
PREFACE

The purpose of the book is to provide the reader with an *understanding* of the complex state-based regulatory system that governs the insurance industry in the United States. Imparting that understanding certainly requires the presentation of applicable statutes, regulations, and judicial decisions, but a good deal more is required to complete that mission. All regulatory systems are shaped by the subject matter they regulate. Insurance is no exception. Information is provided about the industry's products, its operating procedures, distribution channels, and financial characteristics and performance. To round out the picture the book describes the regulatory process—its core objectives, how and by whom policy is formulated, and how the rules are enforced.

State insurance regulators enforce rules governing such matters as the maintenance of adequate capital and the prompt and equitable treatment of policyholder claims. They are also expected to see that the market for insurance products within their respective states are robust, providing consumers with access to the products they need, but at the same time seeing that key insurance products are affordable. The same regulators are tasked with handling the rehabilitation and liquidation of troubled insurance companies—a job which requires making difficult decisions and is markedly distinct from such process as to other financial institutions in the United States.

Covering a topic as enormous as government regulation of insurance in a thirteen-chapter book presents a daunting challenge. The combined relevant statutory and regulatory output of the states plus the federal government totals many thousands of pages. The number of judicial decisions touching on various aspects of insurance regulation is equally mind-boggling.

The path the authors have chosen to achieve manageable scale is to use a mixture of textual exposition, edited versions of key model laws developed by the National Association of Insurance Commissioners (NAIC), case law, and secondary materials. The NAIC models are the source of a very high percentage of the insurance regulatory laws of the states. No state has enacted all of them verbatim, but each state has made very significant use of them in shaping its insurance regulation rules. The NAIC Model Regulation Service not only contains the model laws but also a chart of the states in which each these laws have been adopted giving the statutory reference. Therefore, the material in the book relating to the NAIC model laws can, by referencing the NAIC Model Regulation Service, be used to research specific legal issues.

The NAIC plays a number of other roles in the overall insurance regulatory scheme. It serves as a data collector and back office for state insurance departments and as the advocate of the state insurance regulatory establishment in opposing federal and international attempts to usurp state authority.

References to the functions it performs and the positions it takes are made throughout the book.

While the locus of most day-to-day insurance regulation lies within the states, there is a significant federal component. The book covers the important federal statutes and relevant case law. The inevitable collision between federal and state law that arises when both cover the same subject matter has given rise to important constitutional law decisions and operational challenges within the industry.

Insurance markets, like every other form of commerce, are becoming more and more international. Sprinkled throughout the book are materials on other nation's approach to insurance regulation and to the growing body of international insurance rules. International regulation has yet to have a direct impact on the day-to-day rules by which U.S. insurers live, but like a neighboring planet it is exerting an unmistakable gravitational influence on the trajectory of U.S. insurance regulation.

The arrangement of the materials within the book's thirteen chapters is given below. Each chapter begins with an introduction or overview that previews what is to follow.

Chapter One describes the three major components of the insurance business: the property/ casualty industry, the life insurance and annuity industry, and the increasingly important health insurance industry. The description includes an explanation of the major product lines and how individuals and businesses utilize them to mitigate risk. There is a look at the forces that drive the financial performance of insurance companies and how their products intersect with those of the banking and securities industries.

Chapter Two provides an overview of the U.S. insurance regulatory system, outlining its objectives, what products it covers, how and by whom regulatory policy is formulated, and a synopsis of the major subject areas of insurance regulation. The chapter also introduces the vexing and recurring issue of which products and activities constitute the business of insurance and fall within the jurisdiction of insurance regulation and which do not.

Chapters Three through Nine examine the rules that govern a specific area of state insurance regulation.

Chapter Three covers the organization and licensing of insurance companies. Insurers are required to undergo a rigorous and somewhat expensive licensing process in every state in which they do business. The chapter also examines the limits of state licensing authority and the impact of licensing requirements on competition.

Chapter Four covers rate setting and regulation. It describes how insurers go about setting rates and the regulatory framework which subjects certain rates to regulatory review. Rates may be rejected because they are excessive, inadequate, actuarially discriminatory, or because they clash with public policy.

Chapter Five covers solvency regulation—a wide-ranging and complex set of rules designed to make certain that insurers maintain the financial capacity to pay their obligations to policy holders. There are capital and reserve

requirements and restrictions on investments and the diversion of insurer assets. It even goes further than the boundaries of the U.S. and explores features of the European Union's Solvency II regime and the solvency principles put forward by the International Association of Insurance Supervisors.

Chapter Six details what happens when the solvency regulations described in Chapter Five don't work. It covers the three mechanisms that insurance regulators have at their disposal in dealing with financially troubled companies—conservation, rehabilitation, and liquidation, and the considerations that go into choosing among the three.

Chapter Seven covers four unique and distinct aspects of the business of insurance: reinsurance, surplus lines, residual markets and alternative markets. It describes the role that each plays in the insurance/risk management world and the regulatory scheme under which each operates.

Chapter Eight covers the regulation of insurance agents and other intermediaries who interpose themselves between the insurer and the insured in the sale and administration of insurance policies. They must hold licenses and there are rules governing how they operate. Since they interact with both buyer and seller there is a body of law that allocates responsibility for their actions.

Chapter Nine covers the devices designed to protect the insurance consumer. These include a variety of state and federal statutes. Litigation on behalf of consumers also plays a role. Industry self-regulation and insurance department market conduct examinations have been utilized as preventative measures.

Chapters Ten through Twelve turn to federal rules and the interaction between federal and state insurance law and regulation.

Chapter Ten deals with the McCarran-Ferguson Act's attempt to blunt the impact of federal commerce clause authority on the states' ability to regulate insurance. The act utilizes the technique of reverse preemption to negate the application of certain classes of intruding federal statutes. The chapter describes judicial efforts to decipher the meaning of the act's reverse preemption language, a process that has required Supreme Court decisions and which has had important impact on the scope and content of state insurance regulation.

Chapter Eleven describes the federal insurance rules contained in Gramm-Leach-Bliley and Dodd-Frank. These include provisions that enable insurance companies to affiliate with banks and securities firms, codify the ability of banks to sell insurance and prescribe the extent to which the states are allowed to regulate such activity, and bring insurers within the realm of institutions that may be designated as systemically important and thereby subjecting them to enhanced regulatory supervision.

Chapter Twelve is devoted to health insurance, a unique insurance product that is governed by a mixture of state and federal rules. The states impose

licensing and solvency requirements as well as imposing coverage mandates. The federal component includes ERISA which is applicable to benefit plans that provide medical coverage and which impacts the right to sue to enforce plan rights. PPACA gives the federal government a concurrent oversight role with respect to rate review, mandates the scope of the plans that insurers offer, imposes cost containment rules and sets its own mandates with respect to coverage.

Chapter Thirteen takes a look at some of the forces and events that have shaped insurance regulation in the past. It then speculates as to what will influence insurance regulation in the future and what direction it will take—the current NAIC/state system, multi-state arrangements, federalization, or an international system.

The authors gratefully acknowledge their indebtedness to Boston University Law School's Morin Center for Banking and Financial Law. Teaching generations of LLM students about government regulation of insurance gave rise to the materials that evolved into this book. They also acknowledge the contributions of Barbara O'Donnell, Rick Paszkiet, and Sarah Forbes Orwig, who believed in the book and encouraged the authors along the path to completion. Most importantly, a thank you to our respective spouses, Doris and Tom, for their support and for accepting the many hours of solitary work we spent on the completion of the project.

Raymond Guenter
Elisabeth Ditomassi
Boston, Massachusetts
March 2017