Is U.S. Insurance Regulation Unconstitutional?

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Overview

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I. Overview of NAIC

- Delaware, non-profit corporation
  - 500 employees in Kansas City, NY and DC
  - 50 state insurance commissioners elect 17 commissioners to serve on executive committee
  - $100 Million annual budget, funded by sale of data and publications to industry
- Work-product produced in conjunction with state regulatory staff operating through committees
  - Drafts model laws/regulations
  - Facilitates discussion/coordination among regulators
  - Provides services/education to regulators and consumers
  - Advocacy work

II. State Delegations of Power to NAIC

- State statutes, following NAIC model laws, dynamically incorporate by reference NAIC manuals
- NAIC Valuation Manual
  - Thousand page manual governing procedures, reporting, and assumptions for insurer reserves
- NAIC Own Risk Solvency Assessment Manual
  - Principles governing corporate governance and risk assessment, and potentially details of group capital calculations
- NAIC Statutory Accounting Manual
  - Thousand page manual specifying special accounting rules for insurers in quarterly/annual reporting

III. The Engine of State Delegation: The NAIC's Accreditation Program

- NAIC accredits state insurance departments based in part on whether they have adequate legal authority
- Adequate legal authority requires state departments to have NAIC model laws that dynamically incorporate by reference NAIC materials
- Accredited insurance departments are only allowed to defer to solvency regulation of other accredited insurance departments
- Result: Any state that refused to delegate power to NAIC would lose accreditation, causing local insurers to redomesticate to accredited state
- Redomestication requires relocating insurer's principal place of business to new state of domestication

IV. State Constitutional Restrictions on Delegations of Power to Private Entities

- A. Non-delegation doctrine is constitutional principal that legislature cannot delegate law-making power to third party
- B. Delegations to private, rather than public, entities universally raise unique concerns under states' constitutions
- C. Caselaw analyzing constitutional limits on delegations to private entities focus on three key factors
  - Private vs. public character of the delegate
  - Procedural or substantive restrictions on the delegate's exercise of delegated authority
  - Legislature's capacity to indirectly monitor/police delegate's exercise of authority by altering scope of delegation

V. The Unconstitutionality of State Delegation of Power to the NAIC

- A. NAIC is “private” entity for purposes of state non-delegation doctrine
  - Formally private corporation
  - Not created, controlled, or funded by state legislatures (contrast Amtrak)
  - Any indirect influence of state legislatures is fragmented across states
- B. NAIC’s exercise of delegated authority is not subject to independent judicial or administrative oversight
  - No judicial review
  - State regulators’ role in producing NAIC’s content isn’t sufficient; no check on biased decision making (contrast SEC role in FASB)
  - State regulators’ capacity to promulgate regulations departing from NAIC materials isn’t sufficient
- C. State legislatures cannot claw back power from NAIC due to accreditation program
  - NAIC is not independent expert body; develop manuals for sole purpose of influencing law and regulation

VI. One Potential solution for the Unconstitutional Structure of State Insurance Regulation

- NAIC delegation and accreditation solves real problem despite its problematic structure
  - Standardizes state insurance regulation; prevents “race to the bottom”
- One Potential Solution: Interstate Compact to review NAIC actions that have the force of law
  - Would review NAIC actions using ordinary administrative procedure principals.
  - Precedent: Interstate Insurance Compact
  - Key requirement: independence from NAIC and state insurance regulators.

Questions?