nolhga journal

Volume XXVI, Number 2 | November 2020

A Publication of the National Organization of Life and Health Insurance Guaranty Associations

Social Distance Learning

NOLHGA's 2020 Legal Seminar moves online and doesn't miss a beat

By Sean M. McKenna

The year 2020 has been a year of changes, and while "not packing for NOLHGA's Legal Seminar" is admittedly pretty small in the grand scheme of things, it provoked a flurry of activity in the NOLHGA office—or would have, if anyone had been in the office. But NOLHGA, like so many other organizations around the country, had shifted to telecommuting well before the July Seminar, which means that our staff members, like our attendees, attended the Legal Seminar in their basements, attics, home offices, kitchens, or (if they were lucky) beside their pools.

The setting may have changed, but the goal of the Seminar—providing the premier educational event for legal developments in the insurance industry and insolvency arena—remained the same. The article below will tell you whether we accomplished our goal, but it's only fitting that we start with a thank you to our attendees, who took a leap of faith with us to embark on our first large-scale online meeting. After 3 days, more than 12 hours of presentations, 1 cat, about a thousand pictures from past Seminars, and more than a few *Hamilton* references, we hope you all felt you made the right call.

Focus on the Pandemic

Not surprisingly, the COVID-19 pandemic played a large role in the 2020 Seminar—and not just in keeping people at home. The first day of the Seminar featured three presentations that explored the public health, public policy/economic, and legal effects of the pandemic. In *Public Health Implications of the COVID-19 Pandemic*, moderator Susan Voss (Nebraska Life & Health Insurance Guaranty Association Board) began the discussion by asking the participants to discuss the early (up to July, when the Seminar was held) response to the pandemic.

Sally Greenberg (National Consumers League) noted the "staggering" impact of the pandemic on public health, pointing out that the number of cases and deaths in the United States were far higher per

["Social Distance Learning" continues on page 18]

IN THIS ISSUE

President's Column by Peter G. Gallanis

Rising to the Challenges

The following comments were adapted from my President's Address, delivered on October 28, 2020, at NOLHGA's 37th Annual Meeting.

This will be the 21st year that I have had the honor of delivering one of these addresses, and I feel very fortunate to have been able to collaborate with the brilliant, creative, and hard-working people in this guaranty system and the many other people who are stakeholders in the success of our mission.

Our dear friend Bob Ewald, who attended so many of these meetings until health issues started keeping him closer to home, always described this annual address as our "State of the Union." In that spirit, I am happy to report that the state of this particular union remains strong. Without doubt, we do have some very serious challenges before us, but before I address those challenges, I'd like to take stock of some accomplishments.

Three-plus years into our work on the Penn Treaty runoff, we're doing better for the policyholders and for our system's stakeholders than ever would have been predicted by anyone aware of all the terrible challenges presented by that case. Likewise, we're now seven-plus years into the runoff of ELNY, another terribly complicated and difficult case in which this system has done stellar work on behalf of policyholders and the stakeholders of our system.

That's just as true of the other cases where we've been called upon to act: cases old and new; large and small; life, annuity, health, long-term care, or otherwise. Every time the bell has rung for this system, we've done our job and we've done it well.

But we do have serious challenges before us—for the insurance industry and its regulators generally, for insurance receivers, and for the guaranty system. I'd like to speak briefly about several categories of challenges: The first involves the pandemic; the second involves some internal strategic issues; and the third involves politics and some external issues that—though not new to us—remain as unresolved strategic challenges.

Pandemic Effects

The pandemic and its aftermath immediately raised a plethora of questions about the general economy and financial sector, and about the ability of the insurance industry to rise to some very specific challenges. We wondered whether the pandemic would cause an economic recession, or even a depression—and whether there were defensible steps that could be taken to head off such disastrous outcomes.

Would life insurance companies be swamped by pandemic-related death claims? Would health insurers be buried in pandemic-related medical claims? Would the investments of insurers continue to support their ability to meet contractual obligations? And going forward, how would insurance companies be able to manage their workforces, conduct policy and claim administration, interface with consumers, develop new products, and market their offerings successfully in an environment where COVID-19 cases continue to proliferate, and where we have yet to see either a safe and effective vaccine or "silver-bullet" therapeutics?

Fortunately, I'm able to pass on those topics for the moment because we have two fantastic panels coming up shortly that will address these very issues: First, regarding the pandemic's effects on the economy and on insurance sector economics; and second, a panel led by NOLHGA Board member Gerrie Marks on how companies are responding to the current state of this crisis and preparing to rise above it and move forward, as we begin to get the pandemic under control (coverage of these panels will appear in the next issue of the *NOLHGA Journal*).

Strategic Preparedness

The second issue—an internal, guaranty system issue—involves organizational and systemic disaster preparedness, continuity planning, and succession.

We in the guaranty system, like many of our friends outside it, began to take disaster preparedness and business continuity planning very seriously 20 years ago, in the wake of the September 11 terrorist attacks. Some local and regional developments have since tested those plans on occasion, but it took the current pandemic to present a live-fire, system-wide stress test of our plans and procedures.

NOLHGA and its member guaranty associations (like most businesses and governmental offices) largely suspended on-site operations in early March and moved almost exclusively to remote work. I'm happy to agree with NOLHGA Chair Tom English's observation that our system lost hardly a beat in this drastic transition: We have continued to perform our mission of serving insurance policyholders and our other stakeholders without delay or interruption. But this was a complex and unprecedented challenge, and we're going to want to look back at our experiences and discuss them with an eye to what lessons we have learned in case of future, serious unexpected developments.

On a related note, turnover is inevitable in all organizations. Sometimes you can plan for it, and sometimes it is completely unexpected. We will be dealing with such issues on the NOLHGA staff this year, and our member associations likewise have worked hard to prepare for and address succession issues they have been facing.

As many of you know, MPC Chair Tom Sullivan and his predecessor Pamela Olsen have made it a major point of this organization to capture the knowledge acquired and the lessons learned in our work over the years and to find ways to preserve and transmit to the newer members of the organization what our experience has taught us. In that connection, when she was MPC Chair, Pam always made it a point to include in all MPC meetings educational sessions focusing on the lessons learned in various historical insolvency challenges.

In a similar vein, for the past two years, Tom has held a series of in-depth orientation and education sessions for the more recently appointed guaranty association Executive Directors. Those efforts have been valuable and well-received. The great report to the MPC yesterday from Janis Potter (Illinois) and Margaret Sperry (Rhode Island) on Multi-Group Collaboration and the upcoming shared learning sessions is an outstanding extension of those longstanding efforts, and one to which I look forward with great interest.

Challenges Isolated & Intertwined

As to the third issue—external strategic challenges—I will mention several that I expect to be ongoing focal points for work that many of us will be doing.

We face a consequential election a week from today. Since none of the experts seem to have the slightest idea how the election will turn out, I am not ashamed to admit that I don't know either. That said, the polls suggest at least the *possibility* of significant changes in government control at both the federal and state levels.

Federal and state policies affecting insurance are *always* under review and always susceptible to revision, but a general political sea change, should it occur, could increase dramatically the likelihood that public policy issues regarding insurance will come under closer scrutiny than ever before. We must be prepared, and we will be.

Even without a political sea change, we know that at least three areas, as Tom noted, are *already* of great significance to the guaranty system and will continue to receive attention in the coming year and beyond: (1) continuing concerns about legacy long-term care insurance (LTCi) policies; (2) proposals to facilitate "business restructuring transactions": Insurance business transfers and corporate division plans; and (3) the growing role of "new equity" investment in the insurance sector—control of companies, acquisition of blocks of business, and reinsurance transactions involving private equity, venture capital, and hedge fund investors, and other funding entities or investors not traditionally involved in the insurance sector.

["President's Column" continues on page 27]

NOLHGA's 2020 Annual Meeting Recap

Coverage of the 2020 Annual Meeting will run in the next issue of the *NOLHGA Journal*.

"There Was a Very Short Learning Curve"

NAIC President-Elect David Altmaier discusses how state regulators reacted to the COVID-19 pandemic and their priorities moving forward

David Altmaier is the Commissioner of the Florida Office of Insurance Regulation, President-Elect of the National Association of Insurance Commissioners (NAIC), and a big Hamilton *fan. He was kind of enough to "sit down" with me (online, of course) in late July during NOLHGA's 2020 Legal Seminar to discuss insurance regulation and the NAIC's plans for 2020 and beyond. The following is an edited transcript of our conversation.—Peter G. Gallanis.*

Gallanis: *Going into 2020, the NAIC had an incredibly ambitious agenda, and I think everyone had high hopes that a lot of progress was going to be made on a lot of different issues. The NAIC has for some years been pursuing its State Ahead Strategic Plan, and you were prepped to move into a new phase of that plan, which I know is deeply important to you and your fellow commissioners. The plan touches on so many issues—group capital, international regulation, the uses and potential misuses of artificial intelligence, suitability, improving the market for long-term care insurance, proposals for restructuring mechanisms, and a lot of other things that I know have been important to you and to a lot of the members of our audience.*

So, you were getting rolling on that agenda, and then, as we got through January and into February, a lot of warning flags started to go up. Can you tell us what you were discussing with your fellow regulators and how the perceptions of the pandemic and its significance began to surface?

Altmaier: I think that's a great place to start. And you're right, we certainly don't tend to shy away from important work at the NAIC. Director Farmer, our President this year, staked out a very ambitious agenda. In fact, we had almost finished staking out that agenda at our committee selection meeting in January, and I was fortunate enough to host my membership here in Orlando for our beginning of the year roundtable to really kick off a lot of that important work.

You mentioned the international work we've been engaged with over the past several years. As part of that international work, in the middle of February we started to hear reports about the spread of the coronavirus. I think that's when we began to realize that, as Director Farmer often says, sometimes you get to pick your priorities, and sometimes your priorities pick you. And that's really when we began to realize that we had a priority that was selecting us, despite our best-laid plans.

As we got back to the States and started to engage with our membership, I think some of us had assembled our internal incident management teams, similar to the way we prepare for oncoming hurricanes and tropical storms. We began to talk about individual states' responses to the pandemic and what to do if it reaches our state, which obviously it ultimately did. And that's when we began to realize that it may become necessary to shift away from some of our priorities, put a pin in others, and focus on our individual state responses to the pandemic.

Gallanis: *The NAIC has asked that business continuity and contingency planning be a priority for U.S. regulated insurance companies. I assume that the NAIC and the different state insurance departments have their own business continuity and contingency plans, and I imagine this was a pretty good live-fire stress test of how those plans were going to work.*

Altmaier: It was. I think a lot of folks in state insurance departments are used to working remotely. I certainly have gotten used to that over the years. But I don't think any of us have been in an environment where we've had to move the majority of our operations on a widespread basis to virtual work setups. We obviously aren't able to close. We have to continue to service Floridians, and my fellow commissioners have to continue to serve the people in their states as well. It became a matter of, "How do we keep our employees safe and also be able to continue our operations, carry out our mission to protect our consumers, and ensure the stability of our markets?"

The insurance industry was obviously in the same situation. Insurance companies can't close either. They have to continue to service their consumers and administer claims and things of that nature. So a lot of us were, in real time, shifting toward those virtual workstreams. I know my staff and many of the insurance department staffs across the country have done that very effectively by getting the right technology into the hands of our employees, and we've been able to continue to carry out those critical needs of each of our agencies.

I think the main difference between today and the middle of February is that we are all much more tuned in with the various videoconferencing platforms out there. We have a number of internal meetings throughout the week in our department, and all of those have continued. We're just talking to our computers now instead of live humans. I know many people in the insurance industry have done the same thing. This conference is a great example of insurance industry and regulatory cooperation, and being able to continue that in a very crucial time, just using different mechanisms.

I think when all of this is said and done, we're going to return to normal in a lot of ways. But for my department and for others in the insurance industry, they'll likely look at some things we initiated during this time and realize that perhaps that's a more effective way to do things. There's always a silver lining somewhere, and I think that could be it here—recognizing that some of the old ways we used to do things could be done a little bit more efficiently in other ways.

Gallanis: *You and your fellow insurance commissioners through the NAIC have recently published a status report on the COVID-19 response of the U.S. insurance regulatory system, and I really commend it. One of the things mentioned in that report is that you hit what has been referred to as a "pivot point" around March 10 to 12. Before then, there were still reasonable hopes of being able to proceed with life as we had all planned it. But over the period of those two or three days, it became clearer to almost everyone that we were going to have to look at going forward in a very different way.*

I gather that's when the NAIC really decided that it needed to reexamine what its short-term priorities were. Can you talk to us a little bit about how those discussions happened and, maybe more importantly, what you identified as the top priorities for the short term?

Altmaier: March is typically when we're hosting our Spring National Meeting, and I think the conversations that led to that pivot point were really a discussion about whether to host that meeting in person or consider an alternative approach. In hindsight, it was a fairly obvious decision, but as the situation was unfolding, we had a number of discussions about how best

As Director Farmer often says, sometimes you get to pick your priorities, and sometimes your priorities pick you.

to handle that. Initially, our thought was to cancel the Spring National Meeting, which we ultimately did, and host it virtually as we're doing now with our Summer National Meeting.

But as those conversations took place, we began to hear from a number of our members: "We'd love to participate in a virtual Spring National Meeting, but there are so many things happening in my state that require my attention in terms of preparing for and responding to the pandemic." And we realized as an organization that perhaps now wasn't the best time to continue with some of the priorities that we had laid out at the beginning of the year. Perhaps it was time to shift our focus to how we could best serve as a resource for our members as we're collectively responding to this pandemic. What can we provide to state insurance departments? What can we provide to D.C. liaisons who were interacting with Congress and other executive branch officials to tell the story about what insurance regulators and the insurance industry were doing to help with the preparation and reaction to the pandemic?

That ultimately resulted in the virtual version of the Spring National Meeting being put on hold. Instead, we hosted a very well attended two-day roundtable on COVID-19. We also had several subsequent member calls that were really just an opportunity for us to trade thoughts and ideas and actions that each of us had taken throughout the course of our individual responses and preparations.

It was an amazing display of collaboration among state-based insurance regulators. I think at some point in the future, we'll look back and point to that as being a hallmark of the effectiveness of our system—the ability for each of us to individually oversee our state's regulatory process but also collaborate with others around the country to have some cohesiveness. That's something we can be proud of.

Gallanis: *The status report noted that initially you had identified three key areas: making sure consumers were protected, making sure the insurance marketplace remained operating and stable, and delivering services to NAIC members that continue to be exceptional even in these difficult times. My guess is that it didn't take long to settle on those as your key focus areas.*

Altmaier: It didn't, and in fact if you look at the three pillars of our State Ahead platform, which you mentioned previously, you will find some striking similarities between those three pillars and the three things we were focusing on in our COVID-19 Priority One, as we began to call it. I think insurance regulators around the country are consistent in our sense of duty when it comes to protecting our consumers, especially in a time like this, while at the same time recognizing that one of the things consumers benefit from the most is a stable and effective insurance market. Those are two of our priorities, in times of crisis and when we're not dealing with global pandemics or catastrophic natural disasters.

So it was a pretty natural progression toward identifying at least those two things in terms of priorities for how to assist our members. After those, member engagement and making sure that we're available to commissioners and their staffs around the country is also a hallmark of our State Ahead platform, and another priority that was fairly easy to identify as critical during a time like this.

Gallanis: *I know that one of the real concerns for most or maybe all regulators was doing whatever was possible to ensure continuity of coverage to policyholders. When it came to trying to assure coverage continuity and delivery of benefits under policies, was there a direction that was fairly easily and quickly settled upon, and how difficult was it to achieve those types of goals?*

Altmaier: I think there was a general consensus amongst insurance regulators that those things were going to be important. How they were ultimately carried out in each individual state was likely

> **It became a matter of, "How do we keep our employees safe and also be able to continue our operations, carry out our mission to protect our consumers, and ensure the stability of our markets?"**

a little bit different. For example, I know some states ordered companies to provide relief to consumers who were having difficulty making payments. Other states, like Florida, issued guidance indicating that it was our expectation that those things happen. I think that was probably one of the bigger benefits of having the collaboration and the member calls that we had throughout the end of February and into March and April—learning how commissioners around the country were carrying out those different initiatives and figuring out the best way to make each initiative most effective in each state.

It's interesting how some of our thought processes in Florida were influenced by other actions around the country. And I do have to hand it to the insurance industry here. By the time we issued a lot of our guidances with respect to premium relief and cancellations and things of that nature in Florida, a large number of carriers had already implemented very similar processes and procedures, which is why we felt comfortable issuing guidances as opposed to a directive.

There wasn't a whole lot of debate amongst regulators about whether these priorities were good ideas, and so we moved on some of those things relatively quickly.

Gallanis: *This is an organization that is mainly focused on life and health insurance, but one of the policy issues that became unavoidable was the whole issue of business interruption insurance. I don't want to get sidetracked completely on this, but could you give us a quick commentary on how that arose as a topic of discussion among the commissioners and what the NAIC decided to do about it?*

Altmaier: When you hear that we're experiencing a pandemic, I think your first reaction is to think, "This is going to

It was time to shift our focus to how we could best serve as a resource for our members as we're collectively responding to this pandemic.

have a huge impact on the health insurance industry." But it didn't take long for a bigger issue to emerge, which is that of business interruption coverage. And it emerged because we all had our ear to the ground in our respective markets to try to determine what insurance issues are going to come out of this pandemic as we prepare for it or respond to it.

I can't pinpoint the precise moment when this conversation began, because so many of us realized it was going to be an emerging issue around the same time. And that's obviously when you hear that businesses have to close, they go to file a business interruption claim, and they find out in perhaps the worst way possible that their policy doesn't cover business interruptions. Many of you have probably read about this, but generally speaking, business interruption policies have a provision that your business needs to incur physical damage for coverage to trigger, or they have a specific exclusion for pandemics. In some cases, they have both.

So, as we all discovered that this was going to be an ongoing issue, we were contacted by a number of different entities. Obviously, consumers reached out to us with concern. Congress reached out to some of the trade associations to determine the best way to resolve this issue. Conversations on that are actually still ongoing. But at the time we took kind of a two-pronged approach. The first prong was, if you don't have an exclusion in your policy for this type of coverage, you should pay it as quickly as possible. And don't jump in line with all the other carriers that do have an exclusion and indicate that you have one as well. We had an expectation that without an explicit exclusion, those claims were going to be paid quickly.

For the policies that did have an exclusion, it was very challenging for us as regulators. Our hearts went out to all those business owners who were struggling during what had to have been the most trying time in the history of their business. We had to do what we thought was in the long-term best interest of consumers and the market, which was to indicate that if the contract has a pandemic exclusion, for solvency reasons and for legal reasons, there's probably not much an insurance regulator can do. And in a lot of cases probably not much a legislative body, either federal or state, can do to go back and retroactively change that policy. And so we took that position, and there's some guidance posted on the NAIC website. We took that position in Florida as well.

We had a couple members of our state legislature reach out to ask questions about that issue. And we began to focus on Congressional conversations about how to provide relief to business owners in other ways, such as the Cares Act and the PPP program. There were conversations that took place and are still taking place about how to establish a mechanism going forward to hopefully learn from this experience and provide a backstop for future pandemics in terms of this coverage.

This is an ongoing issue—you've likely seen reports of large amounts of litigation on this issue. It's a global issue as well. I know that our counterparts at the Bank of England and the EU and other jurisdictions are working through it as well. And in most cases, generally speaking, they're coming to the same conclusion we did: that the implication of retroactively changing a contract could potentially introduce considerations down the road that might do more harm than good. We're focusing on other ways outside of the insurance contract that we can bring relief to those business owners, which oftentimes will come from outside the insurance industry.

Gallanis: *I gather the direction of that last comment is that if insurance companies were asked to shoulder the burden of covering risks they had thought were completely excluded under their contracts, it would raise an issue of solvency for companies and for the industry. But aside from business interruption, I imagine the question of strains upon the liquidity and solvency of insurers was another one of the things the NAIC gave some thought to early on as these problems became obvious.*

We're also placing a high level of expectation on the insurance industry to continue serving their consumers.

Altmaier: After we talked about business interruptions, I think the next most obvious area of concern for us as solvency regulators was investments. We saw some of the economic impact from the pandemic when we looked at the stock market and the fluctuations there, and it became very important for us to be mindful of how that might impact the balance sheets, the liquidity, and the cash flow of our carriers. Especially life insurers, which I would venture to say probably have a higher reliance on long-term investment performance than some of our carriers that write more short-term products, like the P&C industry.

We have several groups at the NAIC that are already engaged on this issue—our Valuation of Securities Task Force, for example. We have a couple risk-based capital workstreams that are already focused on the best way to measure risk in the investment market and how that might spur action or at least consideration from the larger regulatory community. That work just continued.

We began to get more regular updates from the Security Valuation Office in New York, which kept state insurance departments apprised of how stock market movements might impact carriers. Fortunately, it doesn't appear that regulators have had to take any action because of this that we would have otherwise not taken. But it's absolutely been something that we've been mindful of and will continue to be.

Gallanis: *To what extent are regulators talking with each other and comparing notes about what it will take, particularly from an insurance standpoint, to be able to return to work and reopen, and how both companies and regulators should think about doing that?*

Altmaier: At this point, I don't think there's a larger discussion happening about returning to work. Most states will handle that on an individual basis, I would imagine. We've already determined that the NAIC's Summer National Meeting is going to be virtual, and that our insurance summit, which is normally held at this time of year, will also be virtual. I think the next opportunity for us to have some conversations about when to start meeting again in person will be for our Fall National Meeting, which I believe is scheduled for November. Right now, I think we're all just monitoring the trends we see in each of our respective states and making decisions we think are best for our individual insurance departments.

We're mostly focused on the ability of commissioners and state insurance departments to carry out their missions in a virtual capacity. There was a very short learning curve. During that first week or so, we were figuring out which videoconferencing platforms we wanted to use, how to communicate with our employees and keep them safe, and how we could liaise with other insurance departments. Fortunately, outside of our three national meetings, most of our work takes place via conference calls anyway, so I think a lot of that was kind of a natural progression over to carrying out our mission virtually.

As long as we're all able to continue to do that virtually, I don't know that we're necessarily going to rush to have that conversation about returning to the office. We're very fortunate to be able to work during this time when so many people can't. We're going to continue to work very hard to make sure that all our members have the resources they need to continue to function and to keep their people safe. We're also placing a high level of expectation on the insurance industry to continue serving their consumers. As long as we're able to continue to do both those things, I'm not sure that we will rush to have conversations about when to get back together, although I miss seeing everybody. The computer screen is a poor replacement for having an actual conversation with somebody.

Gallanis: *You mentioned the online NAIC Summer National Meeting, which has already begun. You have a very ambitious agenda, and it really loops back to those priorities you had at the beginning of the year, which you discussed at the beginning of this conversation. But one of the things that really jumped out at me as I looked at your agenda is that you've also got several new initiatives, or at least more highly emphasized initiatives.*

One of them is a project distilling the lessons that can be learned from the COVID-19 experience. Another is a project related to climate and resiliency, with some focus on hurricane preparedness and so forth. Then there is another new group that has been formed on the topic of race and insurance, the role of the insurance sector in addressing racial inequality, and promoting diversity within the insurance industry. What can you tell us about those new areas of focus by the NAIC?

Altmaier: I think it's always a good idea, after you've experienced a crisis like the COVID-19 pandemic and you have some time and perspective, to look back on what you did. Hindsight is always 20/20. What did we do well, and what are the things we could have done a little bit better? We need to make sure that if we experience this again, we have a playbook we can work from.

We've done this previously. We did it after the financial crisis with our Solvency Modernization Initiative. Even though I think most of us would say the financial crisis left the insurance industry relatively unfazed, we still took the opportunity to figure out how we did and identify some processes and procedures we might be able to put in place to do a little bit better next time.

I'm excited about the Climate and Resiliency Task Force. That one is in line with one of Director Farmer's key priorities to tackle in 2020, along with long-term care. Natural disasters are becoming much more prevalent, and they're happening in places that historically may not have been natural catastrophe hotspots. Florida has historically been thought of as a state that ought to be prepared for catastrophes, but many of my colleagues are experiencing flooding and wildfires, and I think it's a good opportunity for us to look at how we can make our communities more resilient in the face of those threats and have an insurance industry that's also capable of meeting those higher losses.

The Race and Insurance Committee is one in which we're all very engaged. Obviously this summer, this year, has presented a number of challenges. Most recently we saw a really big movement after the George Floyd murder in Minneapolis. As we saw society respond to that, we started to do some inner reflection about our role as insurance regulators on that topic. It has come up from time to time in our past, but I think as we discussed it on a member call, you could tell that many of our members were very interested in exploring the role of insurance in that conversation. And what practices exist that we might need to take a look at to address some of those things. We're all excited for that work to kick off, and we're looking forward to making a positive impact as those discussions continue throughout the rest of this year.

I know that I and each of the NAIC officers—Director Dean Cameron as our Vice President, and Director Chlora Lindley-Myers as our Secretary-Treasurer—have committed to continuing that conversation during our tenure as NAIC officers. And we've also made it clear to our membership that whoever steps up to run for Secretary-Treasurer at the end of this year, we're hopeful that they will take that on as a priority as well. I think that conversation will be around for a while.

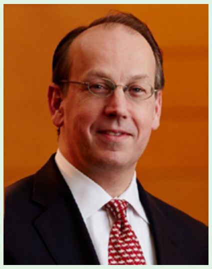
Audience Question: *Throughout the pandemic, how has the working relationship been between the NAIC and the Federal Insurance Office, particularly on international issues?*

Altmaier: I think it's been good and effective. We were somewhat fortunate on the international front, in that November 2019 was a pretty significant milestone for some of the work that's happening on the ComFrame project: the Common Framework

["There Was a Very Short Learning Curve" continues on page 26]

10th Justice or 36th Law Clerk?

Former U.S. Solicitor General Paul Clement discusses the role of the U.S. Solicitor General, the Supreme Court's recent ACA rulings, and the future of the Roberts Court



Paul Clement is a partner with Kirkland & Ellis. He served as the 43rd Solicitor General of the United States from June 2005 until June 2008 and also served as Acting Solicitor General for nearly a year and Principal Deputy Solicitor General for over three years. He has argued over 100 cases before the United States Supreme Court. In fact, he has argued more Supreme Court cases since 2000 than any lawyer in or out of government. He successfully argued for the petitioners in the consolidated cases resulting in the Court's decision in Maine Community Health Options v. United States.

In late July, Mr. Clement participated in NOLHGA's 2020 Legal Seminar, discussing the Maine Community *case as well as his many years spent arguing before the Court. The following is an edited transcript of our conversation.—Peter G. Gallanis*

Gallanis: *Before we get into the specifics of the* Maine Community *case and several other cases past and future that are very important when it comes to the Affordable Care Act (ACA), could you give us a little background on the special role of the Solicitor General? There really is no other lawyer who does what the Solicitor General does. Is that right?*

Clement: I think that's right. The Solicitor General is sometimes referred to as the tenth Justice. One of my predecessors, though, quipped that "36th Law Clerk" might be more accurate. I've certainly never heard any of the nine real Justices refer to the Solicitor General as the tenth Justice. But the reason others refer to the Solicitor General as the tenth Justice is really the closeness of the relationship between the Solicitor General's office and the Court. Because as a private litigant, a company might get up to the Supreme Court only once in a generation. That is true even with very large corporations—this year I had a Supreme Court case for IBM, a huge American business icon, and it was the first case they'd had in the Supreme Court in well over a generation.

The Solicitor General, by contrast, represents the United States and all the agencies of the Executive Branch, and they're up there in 75% to 80% of the Court's cases, either as a party or an *amicus*. They're arguing in front of the court all the time. And so, as the ultimate repeat player, the Solicitor General does have a very distinct relationship with the Court.

One very concrete illustration of that is that about two dozen times a year, the Supreme Court calls for the views of the Solicitor General. So when there's a *cert* petition filed, instead of just granting it or denying it, the Court will call for the views of the Solicitor General and ask what the Solicitor General thinks about the case and whether the Court should take it.

Now, the Court is not really asking for his or her expert opinion so much as trying to get a sense of how important the case is for the United States government. But I do think it really exemplifies the close relationship, because the Court never calls for the views of anyone else. As much as they might respect the ABA, the AMA, fill in the blank, they never call for the views of anybody else. I think it shows that there really is a special relationship.

Gallanis: *And that caused me to think again about how few cases really reach the Supreme Court. There are narrow pathways that allow cases to go from trial and appellate courts, or in rare cases original jurisdiction. But in most cases where litigants try to get a case before the Court, it doesn't get there. And the Solicitor General does play a role to some extent in that process.*

Clement: That's exactly right. One way to think about it is in terms of the Solicitor General's own petitions on behalf of the government. The average petition has literally less than a 1% chance that the Supreme Court will grant it and hear the case on the merits. By contrast, the Solicitor General gets his or her petitions granted at about a 75% to 80% clip. So one way that the Solicitor General really influences the Supreme Court's docket is by the petitions that he or she files.

That high percentage rate doesn't reflect that the Court loves the federal government or loves the Solicitor General's writing style. It reflects the fact that the Solicitor General is essentially in a position to screen out all the petitions that a government agency might want to file at the Court and decide which ones are really important to the federal government and which ones meet the Court's criteria for granting *certiorari*. In that sense, the office plays a big screening role.

That reflects a fundamental difference between the Solicitor General and a lawyer in private practice. Let's say one of my clients comes to me and says, "Paul, we'd really like to file this *cert* petition," and I say, "I don't know. I don't really think this is a strong petition. It doesn't really satisfy the Court's criteria, so I think you should take a pass." They're going to say, "You think that Paul, but we've already decided to file a *cert* petition, and if you won't file it, we'll call another lawyer." But if you're, say, the State Department legal advisor or the head of HHS and one of your rules has been invalidated and you want to go up to the Supreme Court, and the Solicitor General says no, you can't call another lawyer. Maybe the department head can call the Attorney General and complain. But that usually doesn't work.

The Solicitor General thus is in a unique position to control part of the Court's docket. And in addition to the federal government's own cases, there are these 24 or so cases every year that do not involve the federal government as a party, but where the Solicitor General is asked for the government's view. And that process is such that if the Solicitor General is asked to weigh in as to whether or not they should take up a case, if the Solicitor General says yes, literally about 99 times out of 100, the Supreme Court is going to take the case. If the Solicitor General says no, they may still take the case about 30% of the time. It's an important input in their process. Thus, the Solicitor General really does have a very important role in shaping the Court's docket.

Gallanis: *To what extent is the Solicitor General's office involved in deciding which cases, where the United States is a party, get appealed from the district court to the circuit courts, and which cases become the subject of* cert *petitions where the United States is a party at the circuit court level?*

Clement: When I was the Solicitor General and talked about the work of the office, I used to talk about this part of the office's work as the rest of the iceberg. The tip of the iceberg is arguing cases in the Supreme Court, which is very visible.

But with just a couple minor exceptions, every time the federal government loses a case in the lower courts and wants to take it up to the next level of the appellate system—if they lose in the district court and want to go to the court of appeals, or if they lose in the court of appeals and want to go on to the Supreme Court—the Solicitor General has to sign off on that.

That is a very important function, and a lot of times the Solicitor General, in discharging that function, is really looking out for the long-term interests of the federal government and trying to keep bad cases out of the Supreme Court and good cases in front of the Court. When I was Solicitor General, I decided not to appeal a case that a U.S. attorney really wanted to appeal to the Fourth Circuit. When I told him I didn't think we should appeal, he said, "Paul, I know the circuit really well, and I think we can win this case." And I said, "Yeah, that's exactly what I'm worried about. Because if you win this case in the Fourth Circuit, then the other side gets to decide whether they file a *cert* petition and take this case up to the Supreme Court. I'm not denying you the opportunity to appeal because I don't think you can win in the Fourth Circuit. I'm denying you because I think you will win, but if and when this case gets to the Supreme Court, we're going to lose."

Gallanis: *I assume it's true that the Solicitor General, like lawyers generally, does have a client. And the client will have some input on how the Solicitor General reflects about the course of a case?*

Clement: That's true, but it is a different attorney/client relationship than you typically have. There is certainly an attorney/client relationship. You are looking to the agency for their assessment of how important the case is, and to give you the details of how the particular program works. In that sense, the Solicitor General is pretty reliant on the agencies. But at the same time, unlike the typical attorney/client relationship, the attorney is holding a few more cards, because in the federal government context the client cannot turn to another lawyer.

Gallanis: *Let's talk a little bit about the ACA and how it has come to the Supreme Court in several different incarnations. You had a role in the* National Federation of Independent Businesses v. Sebelius *case in 2012, which teed up before the Supreme Court that basic set of questions about the constitutionality of the ACA.*

Clement: That's exactly right. In the *Sebelius* litigation, I represented the 26 states that challenged the constitutionality of the statute.

Gallanis: *One of the challenges to the constitutionality of the ACA had to do with whether the enactment of the law was a proper exercise of Congress's power to legislate under the Commerce Clause. And the Court, in large part because of the way Justice Roberts looked at the case, gave a surprising outcome, didn't it?*

Clement: It surprised a lot of people. It definitely surprised the lawyers and the reporters who were trying to report the decision in real time, because the Chief Justice said in his opinion that there was *not* sufficient authority under the commerce power to enact the Affordable Care Act and the individual mandate in particular, which, as you said, had been the focus of the litigation. But then later in his opinion, he pulled a little bit of a switcheroo and said that even though there was not authority under the commerce power or the necessary and proper clause, there was authority under the taxing power. And so the Court cobbled together five Justices who upheld the individual mandate as a valid exercise in taxing power, and then seven Justices said that at least some applications of the Medicaid expansion were problematic as an exercise of the spending power.

Gallanis: *I'd like to talk about the case that you just resoundingly won in the most recent term,* Maine Community Health Options v. United States. *I think you know that the case really matters a lot to this audience, because we have a number of representatives of medical insurers—companies that believed they had entitlement to risk corridor payments as a result of the way the ACA was originally drafted. Some of them have participated either as direct litigants or as class participants in the litigation that went up to the Court in* Maine Community.

Also, the ACA created a lot of these so-called CO-OPs. A number of them ran into problems and were made insolvent, and some of those CO-OPs triggered guaranty association protection from NOLHGA's member guaranty associations. They also believed that they had an entitlement to *risk corridor payments under the ACA, and the extent that they receive such payments will have an impact on how well policyholders do in the winding up procedures for those companies and how much the guaranty associations have to pay. So we were among your bigger cheerleaders as that case went up.*

Can you talk a little bit about how that case may have been viewed by the Solicitor General's office as they decided how to take it up? And how it was viewed from your perspective as you developed a strategy to get the case before the Supreme Court?

Clement: Lawyers always like to talk about cases they won, so I'm very happy to talk about this case. From the perspective of my clients, I think we really viewed the principal challenge as trying to get the Supreme Court to accept the case for *certiorari*. And as we discussed, when you're a private party and you lose in the lower courts, you have something like a 1% chance on average of getting your petition granted. And there were some particular challenges here, because the best way to get a case granted by the Supreme Court is to be able to tell the Court that the regional circuit courts are divided. The Ninth Circuit has decided it one way, the Second Circuit has decided it another way, and the Supreme Court essentially has to resolve the dispute in the lower courts.

But claims against the government by statute all go through the Court of Federal Claims to the Federal Circuit court of appeals in D.C., so there's no chance that you can have the regional circuits split on these issues. That doesn't mean you can never get a case granted, but it does make it difficult. Because your single best argument in other contexts is not available to you. And then to make matters a little bit trickier, although the plaintiffs had won some of the court of claims cases, they'd lost more than they'd won. Then they went up to the federal circuit, and the panel split two to one against them. It wasn't an ideal situation to try to get the Court's attention.

But we had a couple things going for us. One was the sheer size of these claims. Nobody could really dispute that there was about a $12 billion controversy in these cases. Even in Washington, that's still a significant sum. Second, there really was a fundamental issue at the bottom of this case. In some ways, I found it a little surprising that the answer to the question in this case hadn't been definitively given by the Supreme Court in 1807 or something like that.

Because the idea that one Congress could make a promise that required some future performance and then a subsequent Congress could come in and just not appropriate the funds—it just seems like something that should have happened early in the Republic, and the Court should have resolved it long ago. It is such a foundational issue, and that seemed helpful in getting the Court's attention.

The third thing that seemed helpful, and this is something that we really tried to play up in the petition, is there was just a fundamental fairness aspect to this—just a basic bait and switch about the way Congress had dealt with these obligations. Making that unfairness very clear to the Supreme Court, I think, helped get the Court's attention at the *cert* stage.

One of the things that I thought was powerful in illustrating the unfairness is that there were a handful of insurers that, based on their pricing decisions and their risk pools, actually made more money than they anticipated. And under the statutory formula, they had to make their "payments in" to the government. There was nothing illusory or contingent about that obligation to pay the government its money. And yet the government was essentially saying that its own promise to make the "payments out" in the other direction was effectively an illusory promise.

Those were some things we focused on in the petition. And we were trying to get the whole package up to the Supreme Court in a way that would potentially appeal to the entire Court. Because we thought the left side of the Court might be more committed to the ACA being functional and working as planned, so they're not going

With just a couple minor exceptions, every time the federal government loses a case in the lower courts and wants to take it up to the next level of the appellate system—if they lose in the district court and want to go to the court of appeals, or if they lose in the court of appeals and want to go on to the Supreme Court—the Solicitor General has to sign off on that.

to like the idea that the Federal Circuit's decision made providing coverage on the exchanges a mistake by the companies. We thought that argument might appeal more to the left side of the Court.

But there's also the kind of fundamental, almost like a takings clause aspect of the government saying, "Look, if you do this and you suffer losses, we'll make good on them. Oh, just kidding." I can't talk about this case without thinking about Lucy, Charlie Brown, and the football, and the idea that the government is insisting really, we'll be there for you if you suffer losses. Oh, sorry, we're not covering your losses after all. And so all of that went into our thinking on this *cert* petition.

Just briefly, from the government's perspective, they had won in the Federal Circuit, albeit in a split decision. Their interest was trying to play defense and keep this out of the Court at the *cert* stage. They essentially tried to say, "Nothing to see here. We're just obviously right." And you know, I think that was probably the right strategy. It didn't work—we got the case granted. But that is the standard playbook for the government when they win and there's not a circuit split. But we really felt that the biggest challenge in this case, the big hurdle to clear, was just getting the Supreme Court to consider the case on the merits.

Gallanis: *The opinion was not a close vote. The majority seemed to accept the argument that Lucy couldn't pull the football away.*

Clement: That's exactly right. There are a lot of different ways to think about how definitive a Supreme Court decision is. And one of the things that really struck me was that no member of the Supreme Court really embraced the Federal Circuit's reasoning. The only dissenting Justice, which was Justice Alito, didn't just say that the majority's wrong and the Federal Circuit had it right. He just focused on a single issue in the case, which was essentially, "Is there a private cause of action under the Tucker Act, under the circumstances of our case?" And the majority rejected his view on that. But that wasn't even the rationale of the Federal Circuit decision.

I did feel that this was a case where, once we got over the hump of the Court granting *cert*, our arguments were very strong. I had a sense that the government's position couldn't be right, and that it wouldn't really even be in the government's long-term interests for their position to have prevailed. Because if the government were right here, then Congressional promises for private individuals or companies to take action now in exchange for future payments would be meaningless. Congress would be disempowered to make those kinds of promises in the first instance. It thus seemed like what the government was arguing wasn't really in its long-term interests. And I think that's part of the reason the decision in the end was pretty resounding and lopsided.

Gallanis: *And this was not a constitutional decision?*

Clement: That's right. There were plenty of constitutional overlays and atmospherics. We talked about the takings clause and due process limits on retroactivity. We also tried to put the case in sort of a separation of powers framing. But at the end of the day, it was really a case about what the statute meant. Was Congress clear enough in the first instance in making an enforceable obligation? Was Congress clear enough in the appropriations riders to negate that promise? And was there a cause of action under the Tucker Act to force the government to pay its obligations? Those were really the questions. And those aren't, strictly speaking, constitutional questions.

Gallanis: *In this and the* California v. Texas *case, there is sort of a semantic backdrop against which the cases are playing out. For example, in the* Maine Community *case, there's been some discussion that the payments owed to the insurers, which the Court ultimately said were indeed owed to them, amounted*

Later in his opinion, he pulled a little bit of a switcheroo and said that even though there was not authority under the commerce power or the necessary and proper clause, there was authority under the taxing power.

to some sort of inappropriate "bailout" of insurance companies.

There was also a discussion at the center of the one dissenting vote in the case, having to do with whether the Court was creating some kind of implied private right of action under the Tucker Act. And there's a debate about whether it's appropriate for the Court to recognize a new implied private right of action under federal legislation. Did you find that having this semantic backdrop out there was an issue for you, either on the plus or minus side?

Clement: You have identified two related issues there, in terms of both the efforts of some people outside the Court to label these payments as a "bailout" and the semantics inside the Court concerning implied causes of actions. Any time a Supreme Court case puts $12 billion at stake or involves the Affordable Care Act, let alone both, the case is going to be discussed in a broader arena outside the Court. And I think most of the real work gets done in Court in the briefs and the arguments. But it's important that clients and lawyers not ignore that broader arena, those broader discussions, because they can have some influence on the Court and the way the Court thinks about the case.

The debate in this case was in some respects a debate about whether this was a clear promise and the government has to keep its word, or whether this was a bailout. And I think if five or more Justices were convinced that this was a bailout, the case might have come out the other way. Because a bailout suggests that insurers were not lured in by a clear government promise but voluntarily got themselves into a whole world of trouble, and only then asked for help. It suggests that after they've gotten the proverbial car in the ditch, they say, "Well, I don't have any money to call the tow truck, and I need help." That's obviously not a sympathetic claim.

On the other hand, when the government says, "We know the roads are icy, but we really need some people driving on them to help us deliver services. If you end up in the ditch, don't worry, we'll send a tow truck and we'll pay for it." And then they don't. That is a far more sympathetic claim and does not sound like a "bailout." Although the case in the Court is ultimately going to be decided based on legal doctrine, those broader framings matter.

On the whole implied cause of action point and the Tucker Act, that was something I viewed as a thicket I didn't want to get into. The Supreme Court had for 20 or 30 years pretty clearly treated the Tucker Act as kind of an exception to the general rule that we don't like implied causes of action. So if the whole case were viewed in that implied-cause-of-action framing, that would not be helpful for us, particularly with the right side of the Court.

We didn't want to waste too much ink on this, or make it seem like it was a bigger problem than we thought it really was. But we did point out that the Tucker Act is different. Indeed, one of our best opinions supporting a cause of action under the Tucker Act was written by Justice Scalia, who famously led the Court's charge against implied causes of action. And yet he saw the Tucker Act as being completely different. I clerked for Justice Scalia, so I'm a big fan. And I think he was exactly right about this: If you create jurisdiction to provide a remedy for breach of contract, then you don't really need a separate cause of action.

When somebody comes into court and says, "I'm here to try to redress breach of contract," they generally don't get asked, "What's your cause of action?" It's a contract action. That was the reasoning that Justice Scalia had embraced in a case called *Bowen v. Massachusetts*. Our strategy for that, which I think worked in the end, was to try to deflect that issue a little bit by indicating that even Justice Scalia didn't have a problem with it, and then move on, as opposed to getting into a big debate about it, where it ended up seeming like the whole case was an implied cause of action case.

Gallanis: *All of those semantics played out again in 2017, when we had Congress taking a look at whether the Affordable Care Act should be repealed. This led to the voiding of the individual mandate, which in turn led to challenges by a number of states arguing that the removal of the individual mandate also removed the predicate for believing that the ACA as a whole was constitutional. A district judge in Texas accepted that argument and concluded that not only was the individual mandate no longer valid in a way that supported the constitutionality of the ACA, but that the mandate provision was not severable from the remainder of the ACA, and therefore the entire ACA was unconstitutional.*

That case was taken up on appeal to the Fifth Circuit, but in the meantime, there was a petition filed for certiorari *to the U.S. Supreme Court, and the case is now headed for the Court this fall. When you think about the severability question that has been looked at by the district court and by the Fifth Circuit in that case, and as it's now going to be presented to the Supreme Court, what can you tell us about the general rule on when a statute or an offensive provision of a statute should be considered severable or not severable?*

Clement: The general rule looks to congressional intent and whether the statute could function without the invalid provision. There are different ways to phrase the question, but one way is to ask whether Congress would have preferred

> **I can't talk about this case without thinking about Lucy, Charlie Brown, and the football, and the idea that the government is insisting really, we'll be there for you if you suffer losses.**

to have the rest of the statute without the challenged provision or whether the challenged provision is so central to the act as a whole that the act really can't function without it. In thinking about this question, I think it's important to distinguish between the severability argument that we made back in the *Sebelius* case and the severability argument that is being made in *California v. Texas*.

I think the severability argument that we made back in *Sebelius*, and I say this in part because I made it, was a very fair argument. Which is, the individual mandate was viewed at the beginning as being a very central part of the statute; certainly as being very critical to some of the related provisions, such as guaranteed issue and the like. And so we argued that without that central mechanism in the Act, Congress might not have wanted to pass the Act at all, especially given that you could point to some of the states that had tried to do healthcare reform without an enforceable mandate, and it hadn't succeeded. You could also point to the closeness of the vote for the original Affordable Care Act, which isn't directly doctrinally relevant, but atmospherically it makes it seem like any little change to the Act could have caused the Act not to pass.

I think those were reasonable arguments, and four Justices indicated that they would have accepted those arguments back in *Sebelius*. But now we're in a different situation. The Act as a whole has survived the various challenges. Also, Congress expressly considered the possibility of repealing the whole Act, and there weren't nearly enough votes to do it. And then the same Congress that didn't have the votes to repeal the entire Act did have the votes to essentially zero out the tax revenues from the mandate penalty. So in that context, to say that the same Congress that didn't have the votes to repeal the whole statute would think that because they zeroed out the penalty, the whole thing actually should go—that strikes me as an exceptionally tough argument to make.

I'm glad I made the argument I made back in the day, and that I'm not in a position to have to make the non-severability argument now. They're very different arguments, and the latter strikes me as a much harder argument to make. I also think there are two other salient differences between when I made the argument back in 2012 and where we are now.

First, we already know that in the context of what I think were much stronger arguments, the Chief Justice was not interested in striking down the whole statute. So given how he voted in *Sebelius* and in the *King v. Burwell* case—where he also voted to uphold the Act—is he now at this late juncture going to accept this argument and have the whole Act come crashing down? That seems unlikely.

The second difference is, in this last term, there were two different cases: one of which involved the Consumer Financial Protection Bureau (CFPB) and the other involving the Telephone Consumer Privacy Act. And in both those cases, the Court—in opinions joined by the Chief Justice—adopted what I could say is a pro "salvaging the rest of the statute" approach to severability. In both cases, the Court knocked down targeted provisions that were constitutionally invalid and rejected arguments that this meant that a broader set of provisions should be struck down as unconstitutional.

Lawyers are loath to make predictions about cases they're not directly involved in and haven't read every brief. But it seems very unlikely that there's going to be a non-severability ruling such that the whole statute would now come crashing down at this late stage.

I'll only add that even the federal government, which changed its position and eventually took a "the whole thing's unconstitutional" approach, hasn't acted 100% consistent with that view. Take the *Maine Community* case. Presumably, the government could have argued in that case that it didn't owe anybody any money because the whole statute's unconstitutional. And just last Friday, the government announced an initiative about drug pricing. The authority the government is relying on for its foreign drug-pricing proposal is also part of the Affordable Care Act. So the government is not really acting as if it thinks the Supreme Court is on the brink of striking down the whole statute either.

Gallanis: *Can I ask a quick question about the CFPB case, the* Seila Law *case? I have a hazy recollection that you played kind of an unusual role in that case. Am I right?*

Clement: Your memory is a lot better than you're giving yourself credit for. In a somewhat unusual move, I was appointed by the Court to defend the constitutionality of the statute. Essentially what had happened is, a private party argued that the statute's unconstitutional. The Solicitor General said in response, "They are right. The statute's unconstitutional." And there was no party in the case left to defend the constitutionality of an act of Congress. The Court, as it typically does in that situation, appointed a private lawyer to defend the constitutionality of the statute. And in the CFPB context, that was me.

Gallanis: *One other point that occurs to me as one handicaps what's going to happen with* California v. Texas *is that we're in the middle of a pandemic. A lot of people have lost their health insurance because they've become unemployed. I know there's been a debate raging over the decades on which members of the Supreme Court read* The New York Times *or* Wall Street Journal*, but to what extent do you think the practical circumstances of being in the middle of this gigantic health problem factor into the likelihood or willingness of the Court to look at something like the ACA and sweep it aside?*

Clement: I think it figures into the calculus somewhat—it's part of the atmospherics that inform the way the Court thinks about the case. Even in the midst of the pandemic, if there were a valid constitutional challenge to some provision that really was central to the statute, the Court would still follow the law where it leads. They might, in extreme cases—I'm not suggesting they do this routinely—try to delay the effective date of the decision or otherwise try to give Congress an opportunity to fix the problem.

Gallanis: *I noticed that one of the things you did during your time at Harvard Law School was to serve as the Supreme Court editor of the* Review*. Those of us who subscribe to the* Review *look forward every year to the annual Supreme Court term issue. If you were editing the next version and trying to give some sort of a summation of the term just ended under this so-called Roberts Court, what would the headline be?*

Clement: Probably something along the lines of, "It's really the Roberts Court now." We have this custom of referring to Courts by the Chief Justice, and we do that even in circumstances where the Chief might not be the swing vote or the marginal vote. Take Chief Justice Rehnquist: I don't think anybody would ever call him a swing Justice. Sometimes he voted in a way that might surprise you a little bit, but he was never a swing Justice.

So during the Rehnquist Court, you still had a lot of focus on Justice O'Connor and Justice Kennedy. And so too in the early years of the Roberts Court, you would have a big focus on Justice Kennedy. Occasionally articles would say it's really the Kennedy Court.

I think now, the Chief really is playing a very critical role. I still don't think of him as a swing vote, because I just don't think his vote is up for grabs in as many cases as the typical swing Justice. But I do think he has this independent, institutional concern for the Court and it not moving too fast in one direction or another. As an advocate or somebody who watches the Court based on concerns about what they're going to do to things that affect your livelihood, I think keeping that angle on the Chief Justice front of mind is a good idea; that he's looking at the cases in two ways. Not just, "What do I think the right answer is as a matter of legal doctrine," but, "How does this fit into my institutional stewardship of the Court?" I think that would be a good way to think about the Court going forward. ✮

["Social Distance Learning" continues from page 1]

capita than in Canada and noting that the pandemic had "shown the longstanding systemic health and racial inequities that put some members of racial and ethnic minority groups at increased risk of getting COVID-19 or experiencing severe illness, regardless of age." She also cited what she called a "tsunami of fraud" relating to the virus, with people peddling false cures and fraudulently gaining access to unemployment benefits or funds from the Paycheck Protection Program.

Dr. Joe Antos (American Enterprise Institute) focused on the federal response. "I've spent much of my career in the federal government" he said, "and one of the big surprises is the responsiveness of the federal government to a true emergency. It's something frankly that we haven't seen before." He noted that many emergencies show how slow various government agencies can be to respond, but the pandemic has proved that they can react when necessary. "I was very impressed by the flexibility of my favorite program, Medicare, in loosening up at what I would consider warp speed—and what a normal person would think was awfully slow—the rules for Medicare beneficiaries so that they can take advantage of things like telehealth." He also pointed to Congress funneling billions of dollars into the economy in less than two months, which he called "astonishing."

Ksenia Whittal (Wakely Consulting) explained that her main task is quantifying the financial implications of various risks that are faced by healthcare insurers, and that putting a price tag on the pandemic—even a preliminary one—is proving remarkably difficult. She did note that for health insurers, the costs of COVID-19 testing and treatment are being offset to some extent by people deferring elective procedures and other forms of care.

"We need an office of pandemic preparedness and research that is well staffed, that connects with the states and counties, that understands quickly what they need. One that has an early warning system for pandemics."

Sally Greenberg
(National Consumers League)

"What we're hearing from our clients is that the drop has been 30% to 50%, and it's now slowly climbing back up," she said. She added that the massive rise in unemployment had caused an increase in the number of people without health insurance, which had led to an increase in Medicaid enrollment. "The Medicaid market is particularly challenging because as unemployment rates go up, you have more individuals eligible for Medicaid, but then the state budgets shrink."

When asked about possible weaknesses in the country's response to the pandemic, or areas that we should target going forward, Dr. Antos replied that "the federal government in general isn't very good at collecting relevant data in a timely fashion, and that hit very hard this year." He also lamented that so little was known about the economic impact of the shutdowns that occurred through much of the country. While they were necessary, he said, "we could have eased them somewhat by moving more quickly in other areas. I think one of the many failings of the public health system is kind of a failure to line up alternative strategies."

Greenberg called for a "Cabinet-level response" to the pandemic, similar to what happened after the 9/11 attacks. "We need an office of pandemic preparedness and research that is well staffed, that connects with the states and counties, that understands quickly what they need. One that has an early warning system for pandemics." She also pointed to what she called the "mixed messages" on masks and economic reopening. "That should have been coordinated on a national level, and it wasn't."

Whittal cited the need to act quickly and learn from the experiences in other countries. "As an actuary, I appreciate uncertainty—that's what I do day to day," she said. "But if we could be quicker in learning from others and putting in place those lessons, we probably would be in a better place than we are now."

Where we are right now—economically, at least—was the jumping off point for the next presentation, *Public Policy & Economic Implications of the COVID-19 Pandemic* (moderated by NOLHGA President Peter Gallanis). Scott Campion (Oliver Wyman) said that his main concern—low interest rates—predated the pandemic, but the pandemic hasn't helped. "We've been dealing with low rates for a long time," he said. "But seeing the 10-year drop by 260 basis points earlier this year, over the space of about a month, was pretty shocking." And while the pandemic will, presumably, go away at some point, the same can't be said for low interest rates. "Because a lot of

The View from Washington

NOLHGA's 2020 Online Legal Seminar featured two speakers who gave attendees an inside look at the Trump Administration's response to the COVID-19 pandemic. Eric Hargan, Deputy Secretary of the Department of Health and Human Services (HHS), recounted his department's efforts to deal with what he called "the most dynamic and disruptive year in the history of the modern American healthcare system" by pursuing an approach that runs through local and state leaders and also incorporates the private sector. "You cannot have a governmental response. You need a multi-sector response. Incorporating as many voices as possible can be complicated, it can be messy, but it's absolutely necessary."

Eric Hargan

Douglas Hoelscher

Deputy Secretary Hargan laid out the department's six-point strategy to address the pandemic: surveillance, testing, containment, healthcare capacity, vaccines, and therapeutics. He explained that Operation Warp Speed—the push for a COVID-19 vaccine—employs a "portfolio approach" to vaccine development by investing in many potential vaccines; it also accelerates the process by investing in manufacturing and distribution channels before a vaccine is even approved. The Deputy Secretary also stressed the Administration's commitment to getting the vaccines to the hardest-hit populations. "We're committed to ensuring that any American who wants a COVID-19 vaccine can get one, regardless of means."

Deputy Secretary Hargan also warned of the troubling shutdown of many aspects of the U.S healthcare system during the pandemic. "We've seen a drop in visits to doctors as patients are putting off needed care—diabetes care, heart disease, cancer screenings, emergency department visits. We've seen childhood vaccinations go down very much. As we work to reopen America, we have to get a better handle on the impact of those things."

Douglas Hoelscher, Deputy Assistant to the President and the Director of the White House Office of Intergovernmental Affairs, picked up on the Deputy Secretary's emphasis on the importance of local and state leaders. "We are taking that approach of federally supported, state-managed, and locally executed," he said. "That's the way our system has been designed to work in the emergency management space for decades. It's the federal government's role to identify gaps and fill those gaps through a variety of resources, and we've done just that."

Mr. Hoelscher noted that his office had conducted 31 calls with the nation's governors in the previous four to five months, what he called "a really historic commitment to the state-federal partnership." Those calls, he explained, are in addition to the thousands of calls that various federal agencies are engaging in with local, state, and tribal leaders. That constant communication, he added, has been vital in tailoring the Administration's response to the pandemic as more information becomes available. "An important part of the learning experience is learning from our state, local, and tribal partners," he said. "Public health in some states is delivered at the state level. In other states, it's more locally driven by city or county public health officials, so we're working closely with them as well."

As an example, he noted that early in the pandemic, some states had policies of placing seniors with COVID in nursing homes, which resulted in a number of fatalities. Other states were quickly able to learn from that experience, and the federal government reacted by directing more medical supplies to nursing homes.

people are expecting low rates to be with us for a while, we're looking at a more existential problem, where many of the products our industry sells are not viable in a sustained low-rate scenario."

David Levenson (LIMRA, LOMA & LL Global) noted that social distancing has a huge impact on sales because it's difficult for an agent to sit down with a client. "In May, we saw annualized life premium sales down 11% versus May of last year," he said. "We saw annuity premiums down 30% versus May of last year." He also noted that some companies' business continuity plans rely on outsourcing certain functions. Those plans don't work if the regions where the functions are being outsourced are also in the grip of the pandemic.

On the health side of things, Keith Passwater (PascoAdvisers) said that the drop in office visits and elective procedures has more than offset the cost of COVID testing. "Health insurers are in a strange situation of actually reporting very favorable results." That's not all good, however. Insurers "may end up writing rebate checks under the Affordable Care Act language in early 2021" due to the drop in their medical loss ratios, and 2021 could see a huge spike as people rush to get treatments they skipped because of the pandemic. On the bright side, "televisits in general across medical and behavioral treatments are up 300%," he said. "That's going to generate claims cost, but if we're thinking in terms of public health, it's a good thing people are getting the care they need."

Everyone agreed that the pandemic, though serious, didn't present a solvency risk for the life or health industries. However, Karen Petrou (Federal Financial Analytics) warned that the massive efforts to inject money into the economy could be propping up what she called "zombie companies," and that insurance companies could be threatened by these walking financial dead. "S&P is usually very conservative, and they're projecting that 26% of existing investment grade ratings are subject to write down," she said. "And you all know very well what happens to insurance company capital ratios as ratings go down. So we're looking at potential solvency risk."

Turning from economic to public policy considerations, the panel discussed how the pandemic has brought the issue of inequality to the fore. Petrou, who is writing a book on how monetary and regulatory policy since 2008 have adversely affected U.S. economic inequality, said that inequality really took off after 2010, but "the income inequality with which we entered this crisis, which was significant, is now far, far worse." Low-wage workers suffered three times the unemployment rate of high-wage workers, and many low- and moderate-wage workers have had their wages cut. The effects are far-reaching. "Inequality is a major, major force in slow economic growth. There's no fundamental resilience in an economy as unequal as ours."

Campion said that while he sees a greater focus on this issue in the financial services markets, "my personal belief is that the current systems are so entrenched that change will never come about by incremental solutions within the four walls of the way we sell our products today. We need completely new solutions to serve these communities. But that's going to be hard."

In a sense, the concept of change was at the heart of the final pandemic-related presentation, *Legal Implications of the COVID-19 Pandemic*, moderated by Tom English (New York Life). The panel discussed how the industry and regulators adapted on the fly to meet the needs of their constituencies as the true impact of the pandemic became known. Ray Manista (Northwestern Mutual) explained that, thanks to frequent stress testing and other "war gaming" exercises, his company had a solid foundation when the pandemic hit—one built on maintaining financial strength while focusing on policyholders and clients. The company even has an infectious disease and environmental risk team (IDERT) and has done modeling around the 1918 flu pandemic. When COVID-19 hit, "we engaged the crisis management team and the IDERT team and had them standing up daily" in briefings to the company.

"I've spent much of my career in the federal government, and one of the big surprises is the responsiveness of the federal government to a true emergency. It's something frankly that we haven't seen before."

Dr. Joe Antos
(American Enterprise Institute)

Nick Thompson (UnitedHealthcare) noted that the challenge for his company wasn't limited to the United States, or to solely being an insurance provider. "We had to focus around the world," he explained. "And not only as an insurer, but as a medical provider, because our company is integrating medical care into our business model as an insurer." How do you continue to provide medical care when you're moving 80% of your workforce from offices to their homes, while also ensuring that everything complies with your company's safety protocols? You just do. "We weren't sure how the connectivity would work. Fortunately, it's worked quite well, and it's enabled us to be accessible and responsive to our insureds, to the providers we contract with, and to our regulators and other governmental officials." It also allowed them to provide care to their members, particularly through telemedicine ("there's been some reluctance on the part of providers in the past, but that's changed and we're seeing it being used very effectively").

Connecticut Insurance Commissioner Andrew Mais said that, in the early days of the pandemic, his team reviewed stress test results and the business continuity plans filed by insurers in his state. "We wanted to make sure there were no solvency concerns, no liquidity concerns, and of course no operational concerns," he explained. "And that went really well." His office was also concerned about cybersecurity as so many workers moved to telecommuting, but he hasn't seen any major problems. One reason things have gone so well, he added, is communication. "We worked in cooperation to a great extent with our friends in industry as well as government and our fellow regulators," he said. "We did what we could to protect consumers. If consumers aren't getting covered, I'm not doing my job."

Looking to the future, Manista noted the flood of business interruption litigation, which carries with it another threat to the industry. "Legislators in some states attempted to step in through proposed legislation that would expand or change the definition in the contract of what is covered," he said. "That's notable from a precedential standpoint." Commissioner Mais agreed, noting that contract certainty was one issue he's keeping an eye on. He also expressed concern about asset values ("I look at the stock market right now, and I'm thinking, isn't there a huge disconnect between what's going on on the ground and what the numbers are? What happens if there's a correction?") and what might happen to insurers' investment returns if the bottom falls out of the commercial real estate market.

Thompson said that the health insurance industry is focused on the presidential election and what it will mean for the future of the Affordable Care Act. "Do we have a totally different health insurance system as a result of this, with the discussion about the repeal of the ACA or the replacement of it?", he asked. "Until we get a better idea of whether we're going to have underlying structural changes, our business planning will continue to try to anticipate what changes may occur."

"We did what we could to protect consumers. If consumers aren't getting covered, I'm not doing my job."

Andrew Mais
Connecticut Insurance Commissioner

The Regulatory Space

The close collaboration between industry and regulators that Commissioner Mais mentioned also came up during the *Health Insurance Regulatory Issues* panel moderated by Gregory Martino (Aetna). Pennsylvania Insurance Commissioner Jessica Altman praised the "unbelievable response from across the board in the public sector and the private sector," adding that her department had biweekly calls with the state's insurers to share information and highlight guidance coming from her department or other departments. Matthew Eyles (America's Health Insurance Plans) said that early on, AHIP's members vowed to "work hand in hand with our state and federal partners" to ensure that consumers got the care they needed. "We wanted to make sure that cost was not a barrier to people getting access, whether it's testing, early supplies of medication and refills, or changing prior authorization standards," he explained.

Eyles added that this collaboration extended beyond regulators. In addition to frequent conversations with the NAIC, he said, "I can't tell you how many calls and meetings we've been on with leaders of other major trade associations representing hospitals, physicians, labs, you name it, across the entire spectrum." Thanks to these conversations, insurers and providers were able to get a handle on the situations in various locations and adjust their practices accordingly.

As mentioned earlier, one of these adjustments was the increased use of telemedicine. "I think that tells a really positive tale of how we can leverage technology to improve quality, probably by decreasing costs in the long term," Commissioner Altman said. However, telemedicine only works when people have access to broadband, and that's not the case in many places. "We have to make sure that, as we adopt telemedicine, we don't do it in a way that disadvantages individuals or communities without access to broadband for personal, financial, or other reasons."

Commissioner Altman also noted that the pandemic has revealed that fee for service arrangements just don't work—a topic that was discussed at the NAIC's Summer National Meeting. "Fee for service completely fails our system when something like this results in a drastic shift in utilization," she said. "If you look at providers that have relied on capitation or prospective primary payments, they are going to come out of this in a much stronger position than those that have continued to rely on fee for service. I think that's something to watch."

The next panel, *Insurance Regulatory Modernization Initiatives* (moderated by Cynthia Shoss (Eversheds Sutherland (US) LLP)), had their eyes on regulatory activity in the insurance sector, both here and abroad, before and during the pandemic. Thomas Sullivan (Federal Reserve) noted that the insurance industry is well-positioned to withstand the recent economic crisis, thanks in large part to regulatory changes prompted by the 2008 financial crisis (he cited enterprise risk management and corporate governance in particular). He added that, while regulators had been focused on issues such as ComFrame and the 5-year test of the insurance capital standard (ICS), "I'm somewhat pleased that we've taken our foot off the pedal on some of that and focused on the here and the now and how we respond to the pandemic."

Joseph Engelhard (MetLife) noted that the NAIC had also shifted focus, as Florida Insurance Commissioner Altmaier had pointed out earlier that day (see "There Was a Very Short Learning Curve" on p. 4). He explained that, while regulators had been working on liquidity stress testing of large insurers as part of the NAIC's Macroprudential Initiative (MPI), "they've replaced that with both qualitative and quantitative data collection so they can analyze the impact of COVID-19 on insurers to see if it's going to have any impact on the market." While that can be a mixed blessing (Shoss said she knew of a company that has 200 workstreams going to address these data requests), Engelhard gave high marks to the regulators. "I think the supervisors in the United States as well as globally have done a very good job of changing their macro tools to focus on the current crisis rather than some theoretical one that we've been stress testing for internally for many years."

"Because a lot of people are expecting low rates to be with us for a while, we're looking at a more existential problem, where many of the products our industry sells are not viable in a sustained low-rate scenario."

Scott Campion
(Oliver Wyman)

Sullivan added that the Federal Reserve paused its company examinations but is ramping back up slowly and also continuing its work on the "Building Block Approach" to a capital standard, which will be used to determine capital requirements for the companies it oversees.

James Kennedy (Texas Department of Insurance) reported that regulators are still moving forward on some of their priorities for 2020 and beyond. The NAIC's Receivership and Insolvency Task Force (RITF) was charged with identifying any impediments under existing laws to the resolution of an insurance holding company group, and the task force identified a number of issues. "We found that a lot of the critical functions of an insurer are often handled by an affiliate within the group," he said. "That affiliate may be a company that's not an insurer, so there are regulatory questions about that affiliate. Does the Holding Company Act give us enough authority to handle those kinds of situations? We saw some areas where the Holding Company Act could be beefed up a little bit to address some of these problems."

Kennedy also said that the IAIS is still examining recovery and resolution issues—in fact, he serves on the organization's Resolution Working Group. The group recently released a paper on recovery issues and then turned its attention to troubled company resolution, which has proven to be a thornier issue. "It's difficult to look at resolution, certainly in the U.S., without looking at guaranty funds," he explained. "I think you really miss the boat if you divorce it from that." The difficulty is that guaranty funds (or policyholder protection schemes, as they're known in much of the world) vary from country to country, in how they function and even in their goals—some are designed to save the company or move the business before liquidation, while others are focused on protecting policyholders after liquidation. "That's been an issue we're been struggling with—to what extent do you refer to guaranty funds in this process?"

The Golden Years

Two Legal Seminar panels focused on longevity issues, and the pandemic played a role in those discussions as well. In the *Annuities, Life Insurance & Retirement Security in the Wake of the*

Pandemic panel (moderated by Nancy Davenport (Brighthouse Financial)), Jason Berkowitz (Insured Retirement Institute) said that "the pandemic certainly threw a significant monkey wrench, not only in our plans, but in the plans of the people whose retirements we're trying to help promote." He added that his organization had developed a five-point plan to help consumers recover from the crisis. Two points—increasing the required minimum distribution age to 75 and eliminating barriers to the use of lifetime income products—are centered on allowing people to keep their money longer, while the other three—allowing catch-up retirement contributions for those affected by the pandemic, expanding retirement savings opportunities for nonprofit employees, and offering tax credits to encourage small businesses to join multi-employer plans (MEPs) and pooled-employer plans (PEPs)—focus on allowing consumers to save more now.

Preston Rutledge (former Assistant Secretary of Labor with the Employee Benefits Security Administration) commented that the unemployment situation will have far-reaching effects on retirement security. "When people are unemployed, among all of the other scary things that happen involving rent and mortgages and paying the bills and putting food on the table, you lose access to that workplace-based 401(k) or other kind of benefit plan," he said. "So the savings, the deferrals, the contributions cease. We don't know the scope of that yet, but we're going to be focusing on it for years to come." Even by July 2020, Congress had taken some action to protect consumers—authorizing penalty-free COVID-related distributions and suspending minimum required distributions—but the problems were still pressing. Rutledge also cited a familiar problem. "With these remarkably low interest rates, it's so hard to build up your accumulations," he said. "In the defined contribution world, it dramatically affects a working life of savings."

Then-Ohio Insurance Director Jillian Froment said that the NAIC is trying to be more proactive on this issue, pushing to get information into the hands of consumers, investigating fraud, and ensuring there's continuing education for agents. There's also a special task force devoted to long-term care insurance (more on that below).

"There's no fundamental resilience in an economy as unequal as ours."

Karen Petrou
(Federal Financial Analytics)

Director Froment had served as Chair of the NAIC's Annuity Suitability Working Group, and she walked attendees through the group's development of the Suitability in Annuity Transactions Model Regulation. The group's approach was to consider what other regulators had done in the suitability field, but not to simply copy them. "Our philosophy was that consumers are better protected when, to the extent possible, there's harmonization among the states, the SEC, and the Department of Labor," she explained. The Model Regulation, she said, does not go so far as to establish a fiduciary relationship between the producer and client. "We came up with a best interest standard of conduct that really focused on making sure that a recommendation was done by a producer who was acting in the best interest of the consumer under the circumstances that they had available to them at the time of the recommendation."

Berkowitz and Rutledge praised Director Froment's leadership of the working group, and Berkowitz predicted swift adoption of the regulation by a number of states. "I had been telling people that I was anticipating we would see 25 to 30, if not more, states at least take the first several steps if not get all the way to adoption within the first year," he said. "Obviously, COVID had a different plan in mind, so that prediction has flopped badly. But I'm doubling down on it for 2021." He added that retirement legislation on the federal level is also likely. "There's a lot of interest on both sides of the Hill and both sides of the aisle in moving retirement legislation."

Rutledge, who played a key role in drafting the Secure Act that was signed into law in December 2019, agreed. "We're going to see more legislation down the road," he said, noting that work on what he called "Secure 2.0" has already begun. He added that the Department of Labor sent out a request for information earlier this year to see how the pooled-employer plans (PEPs) established in the Secure Act were being implemented. The department has sent proposed rules concerning PEPs and the Lifetime Income Disclosure Act (both parts of the Secure Act) to the Office of Management and Budget, and he predicted that those two rules will be made public soon.

The only thing that might scare people more than thinking about their retirement is thinking about whether they're ready to pay for long-term medical care—rest assured, the Seminar had that covered. The *Long-Term Care Insurance Developments* panel, moderated by Caryn Glawe (Faegre Drinker Biddle & Reath) touched on the pandemic's effect on the LTC market, the NAIC's efforts on the LTC insurance front, and legacy blocks of LTC insurance.

"COVID-19 is having and will continue to have profound effects on seniors' decisions about housing and the ability of their families and caregivers to care for elderly loved ones," said Mark Sarlitto (Wilson Re), whose company assumed $2.7 billion of LTC business from CNO in 2018. He noted that some carriers are seeing a reduction in claims and an increase in policy terminations as some people postpone treatments and others opt for in-home care rather than entering a nursing home or assisted living facility. He added that from a claims administration standpoint, it's difficult to perform in-home assessments, which has led to some carriers switching to phone or video assessments. While this switch could reduce costs, Patrick Cantilo (Cantilo & Bennett, L.L.P.), who served as Special Deputy Receiver for Penn Treaty/ANIC and is now the SDR for SHIP, warned that LTC policyholders might be more difficult to contact electronically than other patient populations.

The NAIC has focused a great deal of attention on the LTC market in the past few years, according to Virginia Insurance Commissioner Scott White, Chair of the NAIC's Long-Term Care Insurance (EX) Task Force. "The Penn Treaty receivership put long-term care on the radar with many of the states in a way it hadn't been before," he said, as did carriers requesting significant rate increases in multiple states. Crafting a consistent approach to these requests is one of the charges of his task force. "Some states are granting actuarially appropriate rate increases, and others have catching up to do. It's creating frustration and conflict, and so it's a problem that needs to be dealt with." As regulators analyzed the problem, "there was a view that a coordinated rate approach was something that would be a good solution." Cantilo added that this was a key issue for the judge overseeing the Penn Treaty/ANIC liquidations. "We would have two policyholders in different states with exactly the same policy, paying premiums that varied by magnitudes of three or four," he said. "And to the court, that was discriminatory and unfair." He added that "the proper pricing of LTC—both legacy and modern blocks—is probably one of the biggest challenges we face right now in the insurance industry."

Sarlitto pointed out that offering policyholders benefit reduction options—modifying inflation riders, reduced paid-up benefits, cash-out options—rather than simply asking for rate increases seems to be a popular option, but "there's no firm consensus on how to implement those options." He stressed that implementation should focus on speed (since many LTC policyholders are elderly) and making the options understandable. "For many, these policies are both absolutely critical and completely imponderable," he explained. "They're too complex for normal people to understand." He also suggested that there could be a role for an unaffiliated counselor or ombudsman to serve as a policyholder representative as these options are evaluated.

Commissioner Scott noted that one of the workstreams his task force is pursuing involves determining if state laws would prevent a company from separating its LTC policies from the general account if it's unable to secure the rate increases it needs. Other solutions for legacy LTC blocks have also been suggested. "The issue of whether long-term care is appropriate for some of these insurance business transfers and corporate divisions has come up," he said. "I know that's a controversial view given the nature of long-term care, with its volatility and the long tail nature of the product."

Cantilo boiled the issue down to its essence. "There are two universes of potential restructurings—those that will add capital to the enterprise and those that will not," he said. "If we're trying to add capital, we need to explore ways in which we can make the existing enterprise promising to investors." Sarlitto agreed, adding that there are ways to make money by assuming these blocks, but only if you thoroughly crunch the numbers (Wilton Re's deal with CNO took two years to complete). "There's a ton of virtue in taking these policies off the troubled balance sheet," he said. "They're cheaper if there's risk diversification across geographies. There are scale economies in administration that you could access, improvements in servicing by being a best practices carrier, more sophisticated asset liability management and portfolio investment." There are now decades of data on these policies, so much of the uncertainty that once surrounded LTC insurance is gone. "Companies will be interested in acquiring big blocks if you can carve them up in ways that reduce the volatility."

You can't talk about LTC insurance these days without mentioning receiverships, so the panel entitled *Insurer Rehabilitations: Purposes & Tools* (moderated by Joel Glover of Faegre Drinker Biddle & Reath) was a great follow-up to the LTC panel. Kevin Baldwin (Illinois Office of the Special Deputy Receiver) detailed how complicated a rehabilitation can be. "In a liquidation, we're just winding down a company—we're not running it," he said. "A rehabilitation is an ongoing enterprise with coverage in place, maybe issuing new coverage every day, collecting premium. And you become responsible for that with the flip of a switch when a court hands down the rehabilitation order." He added that in cases where there's no guaranty association coverage for policyholders, the rehabilitator can wind up acting like a guaranty association, looking to move the business or pay out as much as possible on claims (what he called "asset/liability matching").

All three participants agreed that guaranty associations can play a critical role in rehabilitations, even though they're not triggered. "I'm an advocate of bringing them in as soon as possible," said Doug Schmidt (Husch Blackwell). "They offer another layer of thinking, and in rehabilitations you have to think outside the box sometimes."

Donna Wilson (Oklahoma Receivership Office) pointed out that a close relationship with the guaranty associations can help in the Receivership Court. In a recent Oklahoma receivership, she said, "it was important for the court to know that there wasn't friction there, and that if it was necessary to liquidate the company, the guaranty funds would support that action."

Of course, guaranty associations aren't the only resources at the rehabilitator's disposal. Wilson noted that reinsurers, which are often seen only as a source of assets, have a lot to offer. "Sometimes we overlook reinsurers," she said. "They have insights into the company that you may not get from management or staff. They also have the ability to make some changes that affect the surplus of your company."

Rehabilitators can also look to new investors to help with a company's recovery, but they need to be careful that they're not just kicking the can down the road. "The biggest thing I'd be wary of is ending up with an investor who puts you back in the same position a year and a half, two years down the road," Schmidt said. "You need to make sure your investor has the ability, the financial wherewithal, the experience, and the knowledge and support to carry out what you want done."

That wariness also extends to the company itself. "My biggest fear is what I don't know," Wilson said. "What have employees not told me? What's not revealed in the statements? Are the assets and liabilities correct? Because if I don't know it, how can I manage it?" Schmidt added that the unknown can also get you into trouble in court. "You lose the court's confidence if you come out of the chute making wild accusations or wild promises you can't fulfill," he explained. "You have to be very circumspect. Don't go too far out on a limb." ✯

Sean M. McKenna is NOLHGA's Director of Communications.

Be Prepared

All cybersecurity presentations feature the same line: "There are two kinds of companies: those that have been hacked, and those that haven't been hacked yet." With this in mind, Cybersecurity: Crisis Planning & Preparedness, moderated by Margaret Sperry (Rhode Island Life & Health Insurance Guaranty Association), started with the premise that your organization has already been hacked. What do you do now? The answer is that you should have been preparing for this a long time ago.

Jason G. Weiss (Faegre Drinker Biddle & Reath) noted that most reactions to a crisis are just that—reactions. "One of the biggest problems with incident response work is that we're very rarely proactive," he said. "We need to use the time when we're not in crisis to prepare for the crisis." Jeff Hunt (Legend Labs) stressed that readiness is more important than ever because of how breaches are covered in the media. "We saw a dramatic shift in crisis communications with the advent of digital and social media," he explained. "We went from a 24-hour news cycle to what I like to call a nanosecond news cycle." When a breach occurs, an organization has a thousand decisions to make. "If you're thinking about these things the first time the day it happens, by definition you're behind schedule already."

According to Hunt, "when any crisis occurs, there's this natural vacuum that gets opened up." That vacuum will be filled, either by the organization (if it's prepared for the crisis) or by speculation and innuendo fueled by outsiders. As Weiss put it, "it's better that you control the narrative."

Controlling the narrative, Hunt and Weiss explained, can only be accomplished if you were ready in the first place. Hunt cited five principles for successful crisis management: authenticity ("people don't want to hear from institutions—they want to hear from people, preferably the experts"), transparency, speed, agility ("the ability to kind of turn on a dime to make the right decisions"), and creativity (the ability to explain the breach and your response in a way that people can understand).

Weiss had three keys for being prepared. First, "train your employees to identify social engineering attacks" such as phishing emails. Second, be sure your organization has a written information security plan (WISP) that spells out the protocols and procedures that each department will follow when a breach occurs. Last but not least, have a disaster recovery plan.

Both Weiss and Hunt stressed the importance of conducting vulnerability tests on your network, and they added that those tests should not be done by the person who designed the network. Also, be sure to involve more than just the IT Department—if a particular department (communications, legal, HR) would be involved in the response, they should be involved in the exercise. And finally, "make sure senior management is involved as well," Weiss said. "If you want to have buy-in from the employees, you've got to have buy-in from management."

["There Was a Very Short Learning Curve" continues from page 9]

for the Supervision of Internationally Active Insurance Groups. After getting through a lot of the work in November, I think we all kind of took a collective deep breath. There's never a good time to have a pandemic, obviously, but in terms of our international work, there was kind of a lull in that anyway. The fact that we haven't been able to travel internationally really hasn't set us back a whole lot in terms of that work.

With respect to the COVID-19 pandemic and how that's impacted our relationship with international regulators, the IAIS Executive Committee has actually taken steps very similar to the NAIC. From March through the end of June or so, we were having biweekly conference calls with our international regulators, who were having very similar conversations to the ones I discussed earlier. What do you see in your jurisdictions? What are you doing about that in your jurisdictions? What lessons can we take away from that for our jurisdictions? And the Federal Insurance Office has obviously been a big part of those conversations, along with the Federal Reserve Board; we collectively refer to ourselves as Team USA. We've had some good conversations domestically about how things are going with COVID-19, as well as the international implications.

Audience Question: *Obviously, the NAIC is monitoring for solvency issues throughout the pandemic. How are things looking across the country, and are there any potential trouble spots?*

Altmaier: On a nationwide basis, I don't know that we've necessarily identified anything as a trouble spot, so to speak. I think certainly through our various e-committee workstreams like the Financial Analysis Working Group, for example, they keep a close eye on specific companies. We always send out a quarterly report about

Prior to the pandemic, I think we saw society generally shifting more toward interacting with insurance companies and other professionals in their life via mobile apps and online.

how things are trending in specific markets, so I know our financial teams are going to keep a close eye on that.

Here in Florida, we are obviously in the midst of the 2020 Atlantic hurricane season on top of everything else that we're dealing with. If you've kept up with the Florida property market, which I know is not exactly the purview of NOLHGA, it's in a bit of a down cycle. The reinsurance buying process this year was a little more challenging than it has been in years past, and obviously we've had some active hurricane seasons over the past several years. So on that front, we've got some things in Florida that we're working on.

Gallanis: *In conclusion, I wonder if you could give us some thoughts on what you perceive will be the "new normal" for the insurance sector. How is it going to differ from how we operated before the pandemic hit? What do you see as the pluses and minuses about the changes the pandemic has caused in how insurance companies operate, how consumers buy insurance, how regulators regulate the marketplace, etc.?*

Altmaier: It's a good question, and an interesting question, and I'm anxious to see what the ultimate answer is. What's interesting is that prior to the pandemic, I think we saw society generally shifting more toward interacting with insurance companies and other professionals in their life via mobile apps and online. We saw some professional settings starting to shift that way, albeit a little bit slowly. I think the pandemic has forced people to expedite or embrace those changes, possibly for the first time. And when this is concluded, I'm wondering how many of those processes and procedures will come back, given the fact that a lot of them were already starting to shift toward a more virtual and less person-to-person type of interaction.

I've said this pre-pandemic, that I think consumers find a lot of benefit and value in having somebody like an agent walk them through the processes of buying an insurance policy to make sure they're buying the one that's best for them. I'm hopeful that some of those key functions of the insurance industry will continue to be a staple of our market in some capacity going forward. But as we start moving to a new normal, it will be interesting to see which functions people identify as needing to become a little bit more efficient. We've already seen a number of carriers indicate that in certain regions, they'll just continue to work virtually for the foreseeable future, and perhaps not even open up an in-person office.

I think we will certainly see some conversations about what coming back to work looks like. From a regulatory policy standpoint, I'm sure we'll look at some things we implemented during the pandemic and decide that there's no reason to go back to the old way of doing things. One good example of that is telehealth. It'll be interesting to see if expanded telehealth offerings are around for the long-term once this has passed. I think we'll have a lot of conversations on that issue. ✯

["President's Column" continues from page 3]

We've spent a fair bit of time over the last year talking about each of those issues, and I won't talk them to death now. But an observation or two about each of those areas, viewed first *in isolation:*

The essential problem for legacy LTCi blocks is now generally recognized: These blocks were permitted to develop for too long with premiums that, in general, were too low to support the contractually promised benefits. For present purposes, why that happened is less relevant than the fact that it *did* happen. Moreover, if you've spent time with actuaries who are experts in this field, you might be convinced that, for some blocks, it's too late, realistically, to take actions that could make the blocks self-sufficient. At least for some companies that are unable to set off LTCi losses with profits from other, healthier lines, there may be no solution other than infusion of new capital. In the more severe cases, that may require liquidation and triggering of the guaranty associations.

That said, at least some blocks may be healthy enough to be stabilized without guaranty association triggering, at least to the point where they might attract interest from private sector investment. I'll return to that momentarily. But both for those borderline blocks and for blocks headed toward receivership, there may be opportunities to mitigate shortfall problems through creative approaches to benefit modifications.

We'll hear more about this topic in the coming year, but it appears to be increasingly possible that for a significant number of LTCi policyholders, the benefits they contracted to receive 25 or 35 years ago exceed what they now may believe they need at age 85 or 90. If thinking on LTCi solutions advances in the next year, I believe that thinking will focus largely on benefit modifications to bring coverage for today's policyholders more in line with what today's policyholders believe they need.

The other major challenge for legacy LTCi is interstate cooperation and "equity." Most of you are familiar with the problem. Some state insurance departments were too slow to approve actuarially supportable premium adjustment requests, and others granted them readily, with the result that the same policy forms, for comparable policyholders, are priced dramatically differently in different states. Now, some states that *have* been granting adjustments feel that their policyholders are "subsidizing" policies issued in the slower-to-approve states.

A general political sea change, should it occur, could increase dramatically the likelihood that public policy issues regarding insurance will come under closer scrutiny than ever before.

The NAIC's Long-Term Care Insurance (EX) Task Force is wrestling with both the benefit reduction and equity issues, but it's hard to see the emergence of a durable solution that will not involve some meaningful commitment to coordinated, national standards going forward. The task force's work slowed considerably this past year because of the pandemic. Now it has to make up for lost time.

On the second issue—business restructuring—the past year has seen a dramatic increase in regulatory appreciation of the fact that improperly structured insurance business transfer and corporate division transactions *might* put at risk potential guaranty association coverage of policyholders in the affected business blocks. Both the NAIC EX Task Force focusing on the issue and the NCOIL team considering similar issues have taken that point to heart. But these transactions, and legislative changes enabling the transactions, continue to advance.

Guaranty associations and their member companies continue to watch these developments and remain deeply interested in both the substantive and procedural requirements, along with interstate review processes, that will apply in such cases. The NAIC is expected to release a draft white paper on the topic of business restructuring in the coming months; again, the timetable was set back considerably by the pandemic. We all look forward to reviewing the draft white paper and responding appropriately as this project begins again to move forward.

On the last issue, the increasing role of "new equity" players, the reality is that the trend of the past 10 years is likely to continue. In that stretch, such investors have gone from a negligible percentage of industry invested capital to a material level, and interest remains high: in corporate acquisitions, in business block acquisitions, in reinsurance transactions, and even in joint ventures with long-established insurance companies.

There are questions that some regulators have asked—and should ask—about such investments, and primarily they revolve around concerns for the safety of policyholders after the deals have been done. Are the investors committed to protecting policyholders? Do they know how to run an insurance operation? How will policies and claims be administered? How will investment policies change? What initial and ongoing disclosures will be made to policyholders and regulators? In short, will policyholders be protected by the types of guardrails that protected them before the "new equity" investment transactions?

So far, I've discussed these issues *in isolation*, but many in this audience know that, in our real world, they are likely to come at us in some sort of conjunction. We've already seen one case where a private equity investor acquired small life companies and got rather creative in the matter of investing insurer funds in affiliated companies. We've also seen a case where a private equity firm acquired a company with significant LTCi writings and attempted some novel corporate restructuring. As the pressure to address the issues of legacy LTCi increases, some interested parties increasingly advocate the use of business restructuring and new equity investment as part of the solution.

And they may well *be* part of the solution. Business restructurings are not *inherently* bad, and neither is new equity. The question for policyholders, for regulators, and for the guaranty associations and their member companies is going to be, "What protective systems are going to apply, and will they do the job?"

So we're in an unusual position now as 2020 winds to a close. We began the year with an ambitious agenda, as did our friends in industry and the regulatory world. The pandemic forced all of us to push other priorities to the side and focus instead on COVID-19. Understandably, other issues largely languished for a time.

Now we must return to them, with all of us a bit further down the road. The issues that need to be resolved are no less difficult than they were at the start of the year; if anything, they are more difficult now. But with the help of all of you—your efforts, your expertise, your good will and best thinking—working together, we all will be able to progress toward the solutions that we need.

It has been a pleasure and an honor to serve this great organization for another year, and I look forward to working with all of you in the years to come. Thank you very, very much. ✮

Peter G. Gallanis is President of NOLHGA.

NOLHGA Calendar of Events

2020

December 3–4, 7–9	NAIC Fall National Meeting Online

2021

January 27–29	**MPC Meeting** **Online**
July 21	**MPC Meeting** **Chicago, Illinois**
July 22–23	**NOLHGA's 29th Legal Seminar** **Chicago, Illinois**

NOLHGA Journal
Vol. XXVI, No. 2 | November 2020

The *NOLHGA Journal* is a publication of the National Organization of Life and Health Insurance Guaranty Associations dedicated to examining issues affecting the life and health insurance guaranty system.

NOLHGA
13873 Park Center Road, Suite 505
Herndon, VA 20171
TEL: 703.481.5206 FAX: 703.481.5209
Editor: Sean M. McKenna
E-mail: smckenna@nolhga.com