

**From:** Douglas A. Hartz  
**To:** [Mumford, Jim](#); [Vacca, David](#)  
**Subject:** RE: Receivership and Insolvency Task Force Conference Call  
**Date:** Tuesday, October 11, 2011 8:17:29 AM

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First, the following observations are my own only and are not meant to represent the views of anyone else or any other group of which I may be a member.

I do not know if the questions regarding *Insurer Receivership Model Act*, Section 711 should be limited only to the effects the operation of 711 may have in a receivership. These effects were not, by my recollection, the major factor considered when we first considered adoption of 711's predecessor section in the receivership models prior to IRMA. Rather, the main consideration, by my recollection, was if not adopting QFC treatment would lead to disadvantages for operating insurance companies. It is simply the case that the provisions of insolvency law (creditor and debtor rights and remedies in the context of insolvency) do effect how ongoing companies plan for ongoing operations. This may be the tail wagging the dog, but there would be no financial system if the parties entering into a financial arrangement did not have some idea what to expect (what law would apply) in the event that one party becomes insolvent. The expertise for addressing questions regarding if a provision in the insolvency law may affect ongoing companies may be more likely found in insolvency practitioners and may be less likely to be found in other areas of insurance financial regulation. This may be the case simply because insolvency practitioners will have had more occasions to consider such questions. In any event, since about 1994 the NAIC task force dealing with insolvency has reported to the NAIC E-Cmte (instead of to the EX Cmte). Thus, it now makes recommendations to the group that will consider impacts to the financial regulation on ongoing insurance companies. But, it still has to make recommendations so that there is something to consider. While it may not be what is going on here, we have seen attempts to delay action on matters by playing off of created confusion about which group at the NAIC should be dealing with a matter.

While the past consideration may have focused on potential disadvantages for operating insurance companies, the question may be if the potential harm to insurance benefit claimants in the event of insolvency is so great that some disadvantages to operating insurance companies may have to be tolerated. This is a question where the expertise to address it most likely exists in the Insolvency Task Force. Estimating these potential disadvantages or harms may take further study, but both should likely be first addressed by the Insolvency Task Force.

The past consideration's focus on potential disadvantages for operating insurance companies was centered on what was contained in the Bankruptcy Code (both in the late 1990's and in the updates made to IRMA). The question was if a variance in state insolvency law from what was in the Bankruptcy Code would create a disadvantage for

ongoing insurers. It appears that there is now some consideration and debate about the provisions in the Bankruptcy Code which should be followed closely. But this should not be the only consideration regarding what should be in IRMA. What is in the insurers insolvency model should reflect what works best out of the state's insolvency laws and the Bankruptcy Code. But when looking at what is best out of the Bankruptcy Code, it must also be tempered with the recognition that insurance is different. It rests more on consumer confidence than may be the case with general commerce. A failure in the protecting insurance benefit claimants could have more detrimental effects on the insurance industry.

In the last call there was reference to 17 states adopting QFC treatment. This appears being pointed to as an argument that the NAIC model should reflect the same because so many states have adopted this. This is not a good argument because the models are supposed to reflect the best provisions that the states have put into place – what is best for the insurance industry and its customers – not what is merely most common. That may simply reflect what was most well lobbied. If “most common” were the test, then we would not have, for example, requirements for CPA opinions annually. Very few states had this requirement before the NAIC Accreditation Program lead to its adoption.

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