Time to Dust off the Anti-Rebate Statutes

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It's time to dust off the anti-rebate laws…and see if they really serve the purpose they were intended to serve when they were put in the books in a totally different age…

-Commentator, 1981, National Underwriter, Property & Casualty Ed.

Image Source: https://www.iii.org

Evolution of Anti-Rebate Statutes

- Concerns
  - Solvency of insurer
  - Unfair discrimination practices
- 1887, Massachusetts enacted first anti-rebate law
- 1889, New York passed “anti-discrimination” statute
- 1900’s, most states enacted some form of anti-rebate law
- Development and adoption of the NAIC Model Act
- California and Florida are the only states with history of repeal
  - California Proposition 103 (1988)
  - *Dade County Consumer Advocates Office v. DOI, James Blumenthal, 457 So. 2d 495 (1st DCA, 1984),* aff’d, 492 So. 2d 1032 (Fla. 1986)

Image Source: Hardmoneyman.com

General Rule:

Agents and brokers are **not** allowed to offer a discount or other **inducement** to an insured or prospective insured unless it is specified in the policy, contract, or insurer's filings.

Exceptions

- Promotional Items
- Referrals
- Raffles
- Charity Donations
- Value-Added Services

Promotional Items

General Rule: *Agents/Brokers can give a promotional item as an incentive so long as it is not connected the with the sale of an insurance product or unfairly discriminatory.*

"Valued amount" varies from state to state

- Monetary threshold: $10-$200.00
- Verbal threshold: "reasonable amount"
- Gift Cards
  - Maine previously distinguished Merchant gift cards v. "cash equivalents"

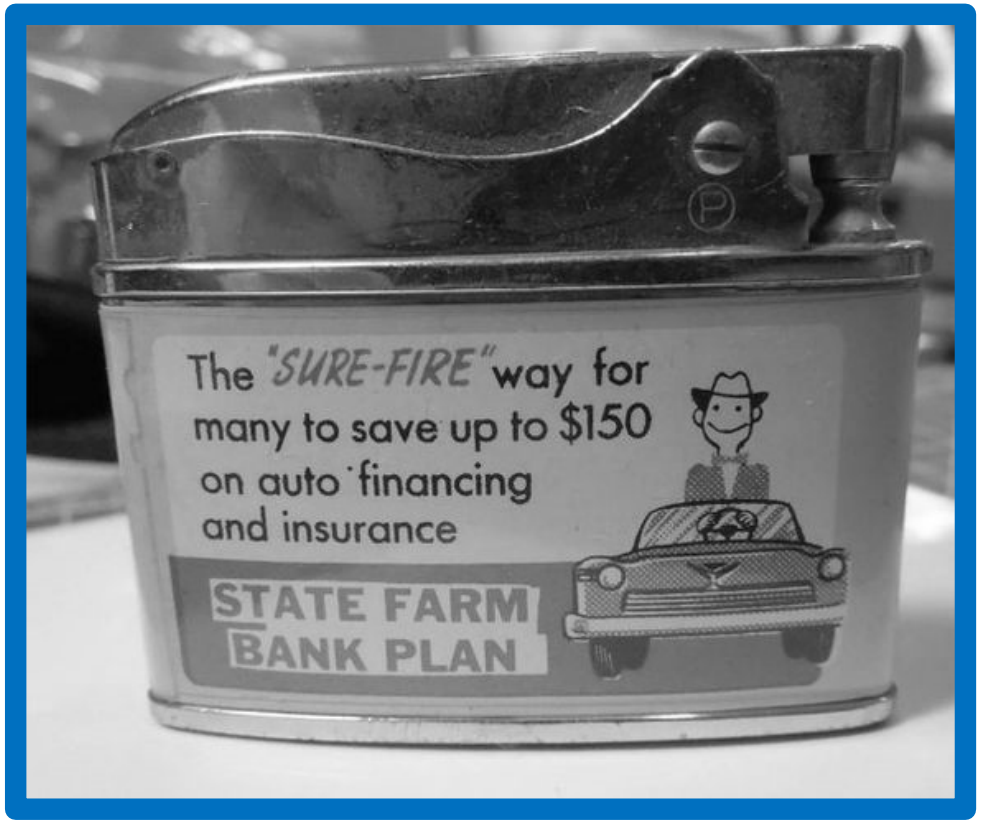

Image Source: Ebay

Referrals

General Rule: *Permissible, as long as the "referral fee" is not contingent upon a sale. Some states have monetary caps for referral fees*

Comparable to purchasing a lead

Image Source: pacificinsurersme.com

Raffles

General Rule: *Permissible, as long as the entry is not connected to the sale of an insurance product and the raffled product is within a certain dollar range.*

Nevada used to prohibit based on statutory definitions of gambling, however this was changed in recent legislation

Image Source: Lake Air Little League

Charity Donations

General Rule: *Permissible, as long as the client or prospective client has no influence over the choice of charity.*

- Can't name the client for tax benefit
- New Jersey distinguishes between Indirect v. Direct Benefit

Image Source: Steemit

Value-Added Services

(Traditional) General Rule: *Service is not prohibited if it is directly related to the insurance product sold, intended to reduce claims, and provided in a fair and nondiscriminatory manner.*

Image Source: Avalon Logistics

Disruptive Technology

What happens when InsurTech platforms are offered for free?

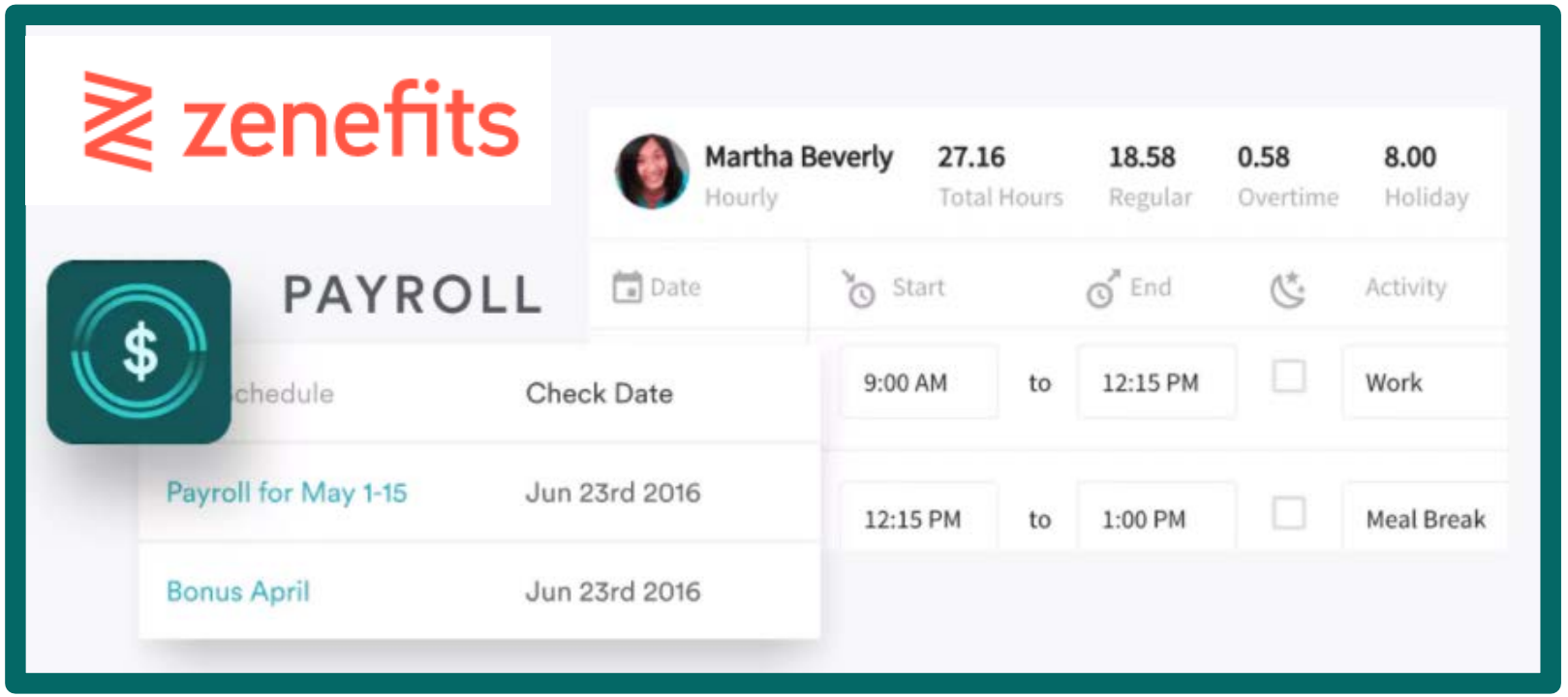

Image Source: Zenefits

Disruptive Technology

Position 1A: Free services on a single integrated platform **induces** consumer to purchase insurance through Zenefits vs. another broker

Position 1B: Purchasing insurance through them is a choice, no additional perks if you use Zenefits as a broker.

- Compares to banking, travel sites, etc.

Position 2A: These "free" services have a cost and value associated to them that likely exceeds the value of allotted by the state, **prevents level playing field**

Position 2B: Some states ask, what is the value? Is it truly "free"? Level playing field for who?

Regulatory Challenge

- Loss of opportunity to stifle innovation
- Concern that “lifting the lid” on the statutes makes it difficult to regulate unethical behavior
- Concern about “leveling the playing field”, however original intent was to protect the consumer and not to level the playing field between agents and brokers.
- Explore ways to carve out exceptions that allow services to go beyond the four corners of the policy as long as it relates to the function of the policy
  - Need to ensure consumer-friendly integration models likes these can co-exist with the consumer protection policy rationales for the inducement laws.

Regulatory Solutions

Utah Law

- Notwithstanding any other provision of this section, a producer…may offer, make available, or provide goods or services, whether or not the goods or services are directly related to an insurance contract, for free or for less than fair market value if:

  (a) the goods or services are available on the **same terms to the general public;**

  (b) receipt of the goods or services **is not contingent upon the immediate or future purchase, continuation, or termination of an insurance product** or receipt of a quote for an insurance product; and

  (c) the producer, consultant, or other licensee, or an officer or an employee of a licensee, **does not retroactively charge for the goods or services based on an event subsequent to receipt of the goods or services**

Utah Code Ann. § 31A-23a-402.5 (West)

Regulatory Solutions

Washington considered a bill

- "Nothing in this section prohibits an insurer or an insurance producer from offering or providing goods or services, whether or not the goods or services are directly related to an insurance contract, for free or for less than fair market value, **so long as receipt of the goods or services is not contingent upon the purchase of insurance**. "

S.B. 5242, 65th Leg., Reg. Sess. (Wash. 2017)

Regulatory Solutions

Some states have carved out an exception for these types of "value-added" services

Rising General Rule: *Where a service is offered on equal terms to the public without requirement to buy the insurance, no unlawful inducement*.

- Direct
  - LA Advisory Letter 2015-01 (Revised)
  - CT, NC, MT, MD Legal Memorandum
  - **Maine Statute**
- Indirect reference
  - NY OGC Op. No. 08-07-26 (applied to wellness program)
  - KS Bulletin 1983-13 (reference to Title Insurance)
  - TN Bulletin ("*valuable consideration offered …irrespective of whether they purchase a policy…will not be considered an inducement*")

Maine Statute (2017)

§2163-A. Permitted activities

1. Permissible gifts and prizes…an insurer, an employee of an insurer or a producer may offer to **give gifts in connection with marketing** for the sale or retention of contracts of insurance, as long as the cost **does not exceed $100 per year per person**, and **conduct raffles or drawings, as long as there is no participation cost** to entrants and as long as the prizes are **not valued in excess of $500**….Gifts and prizes given pursuant to this section may not be in the form of cash…

2. Permissible value-added service or activity. An insurer, an employee of an insurer or a producer **may offer to provide a value-added service or activity, offered or provided without fee or at a reduced fee,** that is related to the coverage provided by an insurance contract if the provision of the value-added service or activity does not violate any other applicable statute or rule and is:

A. Clearly identified and included within the insurance contract; or

B. Directly related to the servicing of the insurance contract or offered or undertaken to provide risk control for the benefit of a client.

3. Services for free or for less than fair market value. This section does not prohibit a person from offering or providing services, whether or not the services are directly related to an insurance contract, for free or for less than fair market value as long **as the receipt of the services is not contingent upon the purchase of insurance** and the **services are offered on the same terms to all potential insurance customers**. A person that offers or provides services under this subsection for free or for less than fair market value shall disclose conspicuously in writing to the recipient before the purchase of insurance, receipt of a quote for insurance or designation of an agent of record that receipt of the services is not contingent on the purchase of insurance.

Conclusion

Encourage innovation while promoting consistency and maintain policy arguments

- Come to a consensus on an appropriate range for “valued-amount”
  - Possibly set two different thresholds for promotional items and value-added services
- Recommend Model Statute working group
  - Define value-added services
  - Set minimum standards
  - Look to Maine bill for guidance

Questions?

Image Source: https://www.bbva.com

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