



NCOILETTER

August 2005

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NATIONAL CONFERENCE OF INSURANCE LEGISLATORS

Preserving State Insurance Regulation...

- By interacting with Congress on issues of critical importance to insurance public policy
- By educating state lawmakers on the solutions to their insurance-market crises
- By fostering relationships between state legislators
- By asserting the primacy of state insurance regulation under the McCarran-Ferguson Act of 1945

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HOUSE HEARINGS WEIGH OPTIONS FOR NEW TRIA

With the Terrorism Risk Insurance Act (TRIA) set to expire on December 31, the U.S. House Financial Services Committee last month held two key hearings on potential reauthorization of the program and on options for addressing terrorism risk post-TRIA. At the sessions, which were held in response to a June 30 Treasury Report regarding TRIA's success, sentiment weighed heavily in favor of some form of an extension.

Congressman Robert Bennett (R-UT), a proponent of renewing TRIA, pointed out the obvious at a July 13 hearing, saying that if another serious event occurred the "Senate would speedily step in." He concluded that it would be better to have a program in place then to make taxpayers pay for terrorist events after the fact, and he observed that if, after September 11, insurers had requested \$40 or \$50 billion, Congress would have authorized payment without hesitation.

On July 27, the House Committee on Financial Services Subcommittee on Capital Markets, Insurance, and Govern-

ment Sponsored Enterprises held a hearing in which 11 different groups representing regulators, insurance agents and brokers, commercial property owners, consumer groups, financial services, real estate brokers, and insurance companies participated.

With the exception of Robert Hunter from the Consumer Federation of America, all parties agreed that TRIA should be extended in some manner and that group life should be included in any future program. Chairman Richard Baker (R-LA) concurred but endorsed a new TRIA that would progressively raise the deductible and lower governmental coverage. He expressed concern that Treasury's proposed deductible of \$500 million was too high and joked that, in such a case, most of Louisiana would have to be destroyed before the government would step in to help his constituents. Rep. Baker suggested some kind of sliding damage scale based upon property value in a specific geographic area and asked those testifying to propose a more equitable method for triggering TRIA. *(continued on page 4)*

CONGRESS ACTS ON HEALTH INSURANCE, MED MAL LEGISLATION

In a spate of activity just prior to its August recess, the U. S. House of Representatives took swift action on proposed association health plan (AHP), interstate health insurance sales, high-risk insurance pool, and medical malpractice legislation. The bills, which proponents claim would reduce costs to consumers and increase availability of coverage, would have significant consequences for state insurance regulation and, in almost all cases, would preempt state regulatory authority in favor of some form of federal standard.

AHPs

As in previous years, the House passed a bill to amend the Employment Retirement Income Security Act (ERISA) of 1974 to permit creation of AHPs, which would allow small employers to pool resources in order to either self-insure or buy group health coverage. President Bush and U.S. Labor Secretary Elaine Chao are among those applauding the bill's 263-165 passage on July 26.

H.R. 525, known as the Small Business Health Fairness Act, would establish a framework for two types of AHPs, self-

CONGRESS

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Those opposed [to the interstate health insurance sales bill] assert that it would encourage insurers to flee to states with the weakest consumer protections, as well as raises concerns regarding obstruction of premium tax collection...and “cherry picking” of healthier workers.

insured and fully insured, that would be regulated by the U.S. Department of Labor. Self-insured AHPs would resemble ERISA plans but would be subject to even less state regulatory authority. Fully insured AHPs would have the option of choosing their state of regulation, which would allow them to circumvent less favorable state insurance laws. The other jurisdictions would then be forced to abide by the licensing state’s decision.

Supporters of H.R. 525, sponsored by Rep. Sam Johnson (R-TX), herald what they see as its potential to reduce numbers of working uninsured. They claim that the bill includes strong oversight to prevent fraud and other abuses and that workers covered under AHPs would have secure benefits.

Opponents of the bill—including NCOIL and numerous other organizations—assert that exemption from state mandates would allow AHPs to operate outside the safety net of important state consumer protections. AHPs could “cherry pick” companies and industries with younger and healthier employees, resulting in availability concerns and higher premiums for older, sicker workers forced elsewhere into the market. Regulations that limit premium increases, mandate coverage of critical health services, ensure that insurers can pay their claims, and allow for consumer appeals, among others, would be lost under an AHP system.

The Congressional Budget Office estimates that the vast majority of consumers that would receive coverage under AHPs already would be insured in the state-regulated market, thereby doing little to reduce the number of working uninsured.

Although AHP legislation historically enjoys House support, the Senate consistently rejects similar bills. Success this time likely will depend on support from Democratic senators.

Interstate Health Sales

The Health Care Choice Act of

2005 (H.R. 2355), sponsored by Rep. John Shadegg (R-AZ), narrowly passed the House Commerce Committee on July 20 by a 24-23 margin. Among the bill’s supporters are President Bush and Speaker of the House Dennis Hastert (R-IL), who joins the list of 68 co-sponsors.

H.R. 2355 would allow an insurer to choose a “primary state” for each product it markets, thereby letting the insurer decide which state’s laws would regulate. The requirements of a “secondary state,” or a state of sale, would govern in limited circumstances, including unfair claims settlement practices, agent licensing, and countersignature provisions. However, even in those instances, ambiguities in H.R. 2355 prevent a clean analysis as to whether a “secondary state’s” regulations truly would apply.

Proponents of the bill say that by exempting insurers from many of the approximately 1,800 state mandates nationwide, H.R. 2355 would promote competition and broaden coverage to the uninsured. They say that a consumer who wanted cheaper coverage could buy a policy from an insurer whose primary state had fewer benefit mandates and subsequently cheaper policies.

Those opposed assert that the bill would encourage insurers to flee to the states with the weakest consumer protections, thereby amplifying problems related to adverse selection. Opponents also note that H.R. 2355 raises concerns regarding, among other things, obstruction of premium tax collection; weak regulatory oversight in secondary states by the primary state regulator; whether a primary state has sufficient state resources to effectively regulate; and “cherry picking” of healthier workers.

The bill moves to the full House, which failed to act on similar legislation last session. The Senate Committee on Health, Education, Labor and Pensions has yet to take up a companion bill.

High-Risk Pools

A bill that would, among other things, provide federal funds to states that create or maintain health insurance

pools for high-risk individuals passed the House on July 29.

Sponsored by Rep. John Shadegg of Arizona, the High Risk Pool Funding Extension Act (H.R. 3204) would allot \$15 million in seed grants, capped at \$1 million each, to any state that establishes a high-risk pool. Additionally, the bill would resume the distribution of federal operating grants that offset losses suffered by states that maintain existing pools. In 2002, Congress initiated the grants, but the program expired in September 2004. Recent efforts to extend the funds met with some success in the Senate, but none previously in the House. H.R. 3204 would extend the monies through 2009.

Widespread support exists for the legislation, which many say will help contain insurance premiums and minimize cost-shifting. Certain Democrats expressed concern that high-risk pools amount to a stopgap measure that does not address the larger issue of affordability in the nation's healthcare system.

As of last June, 33 states operated high-risk pools covering more than 180,000 people, who generally suffer from chronic or pre-existing conditions that exclude them from the private market.

Medical Malpractice

Legislation that would establish a national \$250,000 cap on non-economic and punitive damages in medical liability lawsuits passed the House in a 226-200 vote on July 27.

H.R. 5, known as the Help Efficient, Accessible Low-Cost, Timely Healthcare (HEALTH) Act, would preempt state caps on non-compensatory awards, as well as replace state definitions of "punitive damage." The bill, sponsored by Rep. Phil Gingrey (R-GA), would require that a plaintiff present clear and convincing evidence that a defendant is guilty of "malicious intent to injure."

H.R. 5 is based on California's 1975 Medical Injury Compensation Reform Act (MICRA), which, among other things, establishes a \$250,000 cap on non-economic awards. Other states have taken similar action, though they often face constitutional challenge. The Wisconsin Supreme Court recently ruled that that state's damage caps violate Wisconsin's equal-protection guarantees.

According to advocates of H.R. 5, the legal battles indicate that state efforts are insufficient to bring about necessary change and that only a federal standard could reduce the number of med mal "crisis" states. Those opposed to capping non-compensatory awards argue that such limitations disproportionately impact lower income and female plaintiffs, whose compensatory damages are likely to be less than those of other alleged victims.

The House of Representatives has acted several times in support of limiting non-economic awards. Similar legislation is expected to face a tougher battle in the Senate.

"Both Congress and insurers are at something of a crossroads...: either reauthorize TRIA for, say, two years with some modifications..., or enact a more comprehensive modification by adding a more permanent structure for private-industry mutual pool reinsurance to phase out the Federal role over time."

FACT FINDINGS: EXCERPTS FROM CONGRESSIONAL HEARING ON TRIA REAUTHORIZATION

At a July 27 Congressional hearing on Terrorism Risk Insurance Act (TRIA) reauthorization (see story page 1), sentiment was heavily in favor of extending the program. Below are excerpts from testimony.

"Now is the perfect time to wean the affluent insurance industry...from the current free reinsurance provided to them by taxpayers who face mounting federal deficits. The recent...reports make clear that there is no need to

extend TRIA in anything like its current form. [The Consumer Federation of America] agrees....In the wake of these reports the property/casualty industry...warned of disastrous consequences to the economy should TRIA expire or be sharply cut back. We find these predictions of impending doom to be easily disproven...."—Robert Hunter, Consumer Federation of America

"Given the looming (continued on page 4)

SAVE THE DATE

The NCOIL Annual Meeting

November 17 through 20, 2005

San Diego, California

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FACT FINDINGS

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expiration of TRIA, the current lack of a free-market solution to terrorism exposure, and the negative economic consequences that will ensue without the existence of a federal backstop, both my fellow regulators at the National Association of Insurance Commissioners and I believe that immediate action must be taken to ensure that this essential economic protection remains in place without any gap in coverage.”—*NYS Insurance Superintendent Howard Mills*

“Both Congress and insurers are at something of a crossroads...: either reauthorize TRIA for, say, two years with some modifications..., or enact a more comprehensive modification by adding a more permanent structure for private-industry mutual pool reinsurance to phase out the Federal role over time.”—*Bill*

Stiglitz, Ind. Ins. Agents & Brokers of Amer.

“In order to assume a larger role, insurance companies need to be able to experiment and innovate, as well as respond quickly to opportunities and developments. Unfortunately, a patchwork of state laws and regulations, enacted or adopted before September 11, impose counterproductive barriers and obstacles.”—*Ernst Csiszar, Property Casualty Insurance Association of America*

“...the reasons that caused this Committee to work daily to enact the Terrorism Risk Insurance Act have not significantly changed. And, because of this reality, I strongly believe that our economy continues to need a federal terrorism insurance backstop...”—*Penny Pritzker, The Real Estate Roundtable*

TRIA

(continued from page 1)

Beyond reauthorizing the program, Rep. Baker asked witnesses to propose ways in which the industry could eventually insure terrorism risk on its own and to submit possible solutions when Congress returns from its August recess.

James Maurin of the International Council of Shopping Centers suggested developing a mutual reinsurance facility with government funding or retrocessional support. He also proposed using “cat” bonds, reinsurance pools, or securitization products in addition to traditional insurance/reinsurance vehicles.

Jason Schupp of Zurich said the use of “cat” bonds was unrealistic. He pointed out that private bonds secure less than three percent of worldwide catastrophic insurance risk and provide almost no terrorism coverage. He proposed developing a pool or pay-to-play reinsurance system.

Warren Heck, representing the National Association of Mutual Insurance Companies, suggested creating a voluntary public/private partnership like Great Britain’s Pool Reinsurance Company Limited, commonly known as Pool Re. The company is authorized to write only reinsurance relating to terrorism risk on commercial property. It reinsures its

liabilities with the British government, to which it pays a reinsurance premium and from which it recovers any claims that exceed its resources.

Ernie Csiszar of the Property Casualty Insurers Association of America proposed “post-event” funding, using revenue bonds and policyholder assessments. He reasoned that only after an event occurred would industry know the actual cost, and he ventured that “pre-event” expenses could be limited to start-up and administration.

On June 30, Treasury released its long-awaited report regarding TRIA. The Department concluded that while the program had been successful, it also had stifled innovation in the private market. Criticism of the report revolves around its assumption that there might only be a single terrorist event in the future. Treasury also claims that reinsurance levels eventually will return to pre-9/11 activity, but does not offer specific evidence to support the claim.

NCOIL early on endorsed creation of a temporary, limited federal backstop for insurance against terrorism and has urged Congress to extend TRIA to ensure an affordable, available insurance market for consumers and businesses.