National Conference of Insurance Legislators

NCOILETTER

...for the states

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INSURANCE CREDIT SCORING: U.S. SUPREME COURT MAY DECIDE FATE

Debate over insurer use of credit information is reaching new heights, as the U.S. Supreme Court prepares to consider two critical cases that challenge the definition of "adverse action" under the Fair Credit Reporting Act (FCRA) and that may have devastating consequences for insurance scoring.

Oral arguments are scheduled for January 16 in *Geico v. Edo* and *Safeco v. Burr*, which the Supreme Court agreed to hear on September 26. In both instances, an insurer was found by the 9th U.S. Circuit Court of Appeals to have engaged in "willful" violations of FCRA because the company did not notify applicants when they were quoted higher initial premiums due to information on their credit reports.

FCRA says that an insurer must disclose when a policyholder's rate increases because of credit history. According to Geico, Safeco, and various industry groups that recently filed friend-of-the-court briefs, there is no "increase" the first time a consumer receives a quote for coverage. Only current policyholders, they say, whose credit information leads to higher rates qualify for FCRA disclosure.

Industry proponents also say that the 9th Circuit Court, based in San Francisco, CA, set too low a standard in finding that a consumer must only prove that a company operated in "reckless disregard" of FCRA, rather than show the insurer knowingly violated the law.

A Supreme Court decision upholding the 9th Circuit Court's ruling could send shock waves *(continued on page 4)*

MENTAL HEALTH PARITY GAINS GROUND IN STATES, CONGRESS

Patients of mental health diseases are closing in on insurance treatment equality, as two large states enact mental health parity measures and a new Congress gets ready to act on the issue. Within a week of each other, and after years of debate, outgoing governors George Pataki of New York and Bob Taft of Ohio signed parity measures in 2006 in their respective states.

Pataki signed a measure know as "Timothy's Law" that would require insurance companies to cover most mental illnesses as well as physical ailments. At the signing Pataki said, "Timothy's Law is an important step to ensure that mental health services are accessible to all individuals and families, so that they can receive beneficial assistance and treatment for mental illness."

The law is named after 12-year-old Timothy O'Clair, who suffered from mental illness and took his own life in 2001. Because his family had health insurance coverage that provided only minimal benefits for mental illness, Timothy received limited and sporadic treatment, and his parents were forced to relinquish custody of Timothy so that he could qualify for *(continued on page 2)*

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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

Inside This Issue:

MENTAL HEALTH PARITY

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state-funded psychological help.

Upon learning of Pataki's decision to sign the bill, Tom O'Clair, the boy's father, said, "Anybody who knew Timothy knew how huge his heart was, and this law is a fitting tribute…as Timothy was a gift to us, Timothy's Law is a gift to New York."

The Ohio law requires health plans to offer the same treatment for mental illnesses as they do for physical ailments. Taft, who had previously resisted similar legislation, said he expects any additional costs brought by the legislation to be minimal and to far outweigh the benefits of providing mental health treatment to individuals in need.

Support for mental health parity extends beyond state governments and is considered a priority of the new Congress. Though a majority of House members co-sponsored a bill in the 109th Congress that would have required equal coverage for mental and physical illnesses, should a policy include coverage for both, Republican leadership had refused to bring the measure to a vote.

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Rep. Jim Ramstad (R-MN), speaking about the possibility that Congress will pass a mental health parity bill, added, "It's not only the right thing to do, but the cost-effective thing to do."

The House is expected to pass a mental health parity measure in 2007, while, despite leadership support, Senate advocates may not have the 60 votes necessary to end debate on a companion bill.

Despite widespread backing from mental health groups, parity measures are opposed by some insurance companies and small business groups who argue that mental health bills amount to an "unfair mandate." Ty Pine of the Ohio chapter of the National Federation of Independent Business (NFIB) said of the Ohio bill, "He [Taft] has dealt a disappointing blow to small business owners who are already struggling to provide any level of coverage and who will now face yet another hurdle in their efforts to provide basic healthcare benefits to their employees."

NCOIL recognized the need for equal coverage when it adopted a *Mental Health Parity Model Act* in 2001. The model provides legislators with a template from which they might draft legislation specific to the concerns of their states.

FACT FINDINGS: WINDS OF CHANGE FOR NATURAL DISASTERS?

Weather experts predicted another active hurricane season for 2006, but Mother Nature struck back with unexpectedly calm seas. The year wasn't all boring, though.

Seven natural catastrophes produced almost 280,000 claims across 20 states.

A mid-March tornado that struck five Midwest states accounted for $920 million in insured damage.

Severe weather in late August led to $560 million in insured losses throughout Illinois, Indiana, Minnesota, and Wisconsin.

Tropical Storm Ernesto, which grazed the eastern coast between August 29 and September 3, resulted in approximately $240 million in claims.

A record five million homes purchased flood insurance in 2006, up from slightly more than 3 million in 2005.

VIEW FROM THE HILL: PROSPECTS FOR MCCARRAN-FERGUSON IN 2007

Over the past few years, there have been additional calls here in Washington, D.C., for Congress to take a look at the McCarran-Ferguson Act's limited antitrust exemption. The 109th Congress saw increased activity, which is expected to continue in the 110th.

One of the first shots over the bow in the recent battle was the creation on the Antitrust Modernization Commission, which was created by legislation passed in 2002. The Commission has held hearings on McCarran-Ferguson and other antitrust exemptions and is expected to issue a report later this year.

In October 2006, the House Democratic Caucus Hurricane Katrina Task Force issued a report recommending that McCarran-Ferguson be repealed and a federal regulator be charged with oversight of the insurance industry. At the time, no one took the report too seriously, as it was drafted by a partisan group in the minority. The group had refused to participate in a Republican-organized, bipartisan commission to investigate the issue, so the Task Force study was expected to fall on deaf ears. However, circumstances have changed with Democrats in power.

Recently, a member of the House Judiciary Committee, Rep. Robert Wexler (D-FL), called on Chair John Conyers (R-MI) to hold hearings on the antitrust exemption to see if it has any bearing on the sharp increases in FL homeowners' rates. More members of Congress, particularly from coastal and Gulf states, are expressing similar interest. Among them are Sen. Trent Lott (R-MS), Sen. Mary Landrieu (D-LA), and Rep. Gene Taylor (D-MS), who co-authored the Katrina Task Force report. This should not be seen as a partisan issue—a relatively equal number of Republicans and Democrats are beginning to ask if the McCarran-Ferguson limited antitrust exemption is still needed.

Regarding recent legislation, several bills were introduced in the last Congress that would have repealed, in some way, the McCarran-Ferguson Act. However, the most direct attack came out of the Senate Judiciary Committee, when it held a hearing in June of last year. As a result of the hearing, Sens. Arlen Specter (R-PA) and Patrick Leahy (D-VT), together with Sens. Lott and Landrieu, introduced a bill in the closing days of the 109th Congress. It is widely expected that this initiative,

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FLOOD PROGRAM REFORMS TREADING WATER, GAO REPORT SAYS

Despite 2004 congressional reforms that kick-started improvements to the National Flood Insurance Program (NFIP), the Federal Emergency Management Agency (FEMA) has achieved only moderate success implementing change, says a December 15 report by the General Accountability Office (GAO). The study also took a critical look at how the agency assessed its handling of Hurricanes Katrina and Rita claims.

According to the GAO, FEMA, which oversees the flood insurance program, has made progress to improve policyholder education and to establish an appeals process for contested claims. However, the study says FEMA has realized limited success establishing minimum NFIP agent training requirements. Fifteen states have adopted revised training rules as of October 2006, two states have issued advisory notices, and one state has drafted standards for an optional NFIP continuing education course.

FEMA has long noted that agent training require-

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SAVE THE DATE

NCOIL Spring Meeting & Seminar

March 1 through 4, 2007

Savannah, Georgia

NCOILetter

Susan F. Nolan, Publisher/Editor

Candace Thorson, Managing Editor
Kevin Horan, Associate Editor
Mike Humphreys, Associate Editor

Simone Smith, Production Assistant
Allyson Wray, Production Assistant
Robert Goodman, Business Manager

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Contact the *NCOILetter* at the:

NCOIL National Office:
385 Jordan Road
Troy, NY 12180
(518) 687-0178 (phone)
(518) 687-0401 (fax)
info@ncoil.org

The NCOIL Office in Washington, D.C.

601 Pennsylvania Ave. NW
Suite 900, South Building
Washington, D.C. 20004
(202) 220-3014 (phone)
(202) 330-5004 (fax)
info@ncoil.org

INSURANCE CREDIT SCORING

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throughout the industry. According to the Property-Casualty Insurance Association's amicus curiae brief, the Circuit Court's decision "potentially exposes the insurance industry to statutory damages alone (not including punitive damages) that could threaten the solvency of many insurers and negatively affect the continued availability and affordability of personal lines insurance."

That's not the point, argue the 13 state regulators who filed an amicus brief in the Supreme Court case. Arkansas Insurance Commissioner Julie Benafield Bowman, who just added her name to the list of commissioners weighing in, said the regulators' brief "further[s] their collective mission of protecting consumers by supporting interpretations of the FCRA that put valuable information in the hands of consumers; provide appropriate incentives for insurance companies that use consumer credit information to adopt procedures that assure compliance with the law, and hold insurance companies accountable…." Delaware, California, Georgia, Iowa, Kansas, Michigan, Montana, New Mexico, North Dakota, Oklahoma, Utah, and Washington also filed.

In addition, 22 state attorneys general, led by Oregon, submitted their own brief, which argues, in part, that insurers were wrong to send adverse action notices only to consumers with below-average scores, as even consumers with above-average rankings should be able to review their credit info.

A 2002 NCOIL *Model Act Regarding Use of Credit Information in Personal Lines Insurance* has been enacted in 26 states and aims to balance consumer protections against promoting a competitive market. The NCOIL P-C Committee will report on the Supreme Court case during the NCOIL Spring Meeting.

FLOOD PROGRAM REFORMS

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ments are a state prerogative, not federal, and has worked with NCOIL and the National Association of Insurance Commissioners (NAIC) to comply with Congress' demand.

The GAO also faults FEMA for failure to fully establish a pilot program that would decrease the number of repetitive loss properties in the NFIP, but does recognize that FEMA has moved forward to develop program guidance and regulations. The system would provide mitigation help to such policyholders, and anyone who refused help would begin paying actuarially sound, rather than subsidized, flood premiums.

The report sharply criticizes FEMA's methodology for reviewing its handling of claims from Katrina and Rita in 2005. Rather than consider a random sample of all closed claims, as recommended by the GAO in October 2005, FEMA reinspected a specific 4,316 adjusted claims and did not analyze the overall results of its reevaluation. The GAO contends that FEMA's approach prohibits projecting the results beyond that small group of claimants and is of limited value.

Also included in the report is an examination of the impact that Katrina and Rita had on the NFIP and the challenges faced by FEMA and others.

VIEW FROM THE HILL

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as well as other proposals, including bills to allow for an optional federal charter that would benefit from repeal of McCarran, will be reintroduced in the coming weeks.

NCOIL will examine efforts regarding McCarran-Ferguson at a March 3 general session entitled *Amending McCarran-Ferguson: The Beginning of the End of State Regulation?*, scheduled during the NCOIL Spring Meeting. Academic, insurer, rating agency, consumer, and legal experts are expected to participate in the 8:00 to 9:30 a.m. event.