National Conference of Insurance Legislators

NCOIL LETTER

...for the states

June 2007 www.ncoil.org

SUPREME COURT BACKS INSURERS ON CREDIT SCORING, INDUSTRY TO REEVALUATE

A recent U.S. Supreme Court ruling in favor of GEICO and Safeco sets a landmark precedent regarding insurance company use of credit information, but the decision still forces insurers to reevaluate their definition of "adverse action" or face further trouble down the line.

In a 9-0 decision on June 4, the Court found that neither GEICO nor Safeco acted in "willful disregard" of federal Fair Credit Reporting Act (FCRA) requirements that compel insurers to notify consumers when use of their credit information has a negative impact on their request for, or renewal of, insurance coverage.

In separate class action lawsuits against GEICO and Safeco that led to the Supreme Court decision—and which the Supreme Court ultimately consolidated into one suit—the 9th Circuit Court of Appeals in California had determined that an insurance company must send an adverse action notice to a consumer whenever that person is not given the insurer's best rate in its best tier.

In essence, the Circuit Court concluded that almost every insurance consumer deserves an adverse action notice.

U.S. Justice David Souter, writing for the Supreme Court, said that such a system would be illogical. "Since the best rates presumably go only to a minority of consumers," he wrote, "adopting the [Circuit Court's] view would require insurers to send slews of adverse action notices. We think the consequence of sending out notices on this scale would undercut the obvious policy behind the notice requirement, for notices as common as these would take on the character of formalities, and formalities tend to be ignored."

The fallout from an anti-insurer decision would have been enormous, property-casualty

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ILF SPECIAL REPORT: PHASE ONE OF STATE AUTHORITY STUDY TO HEADLINE NCOIL SPECIAL MEETING

A report on the first phase of an Insurance Legislators Foundation *Study on State Authority: Making a Case for Proper Insurance Oversight* will headline a special July 21 Executive Committee session from 9:45 to 11:15 a.m. at the NCOIL Summer Meeting.

The study ultimately will offer a constructive analysis regarding how the components of state regulation—including legislative, executive, regulatory, and judicial branch members, among others—impact insurance oversight, with an eye toward offering recommendations that will improve state regulation.

Phase I of the study is designed to be educational in nature, providing legislators with sufficient background and understanding of how the various components of state regulation have evolved and currently play out in the states. Phase I will lay a foundation for the recommendations and findings to be presented at the conclusion of the study. Most importantly, the study will assist in the effort to harmonize and modernize state regulation, providing a legitimate state option for insurers should an optional federal charter become a reality. The study is being conducted by Navigant Consulting in partnership with Lord, Bissell & Brook, and Joseph Zimmerman of the Rockefeller College of Public Affairs & Policy, SUNY Albany.

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:

VIEW FROM THE HILL: THE OFC ASSAULT

Supporters of an optional federal charter (OFC) took another step forward in their assault on state regulation when, earlier this month, Senators John Sununu (R-NH) and Tim Johnson (D-SD) introduced the National Insurance Act of 2007, S.40. No surprise to industry watchers, who were expecting another incarnation of last year's Sununu-Johnson OFC proposal, S.40 would let life insurers choose a much more lenient, less consumer-friendly, path of federal oversight.

But S.40 is now broader—and more threatening. The bill would expand the scope of the 2006 legislation to include p-c insurers, reinsurers, and surplus lines. Companies and producers could elect a federal charter system orchestrated by an independent Office of National Insurance within the Treasury Dept.—an office that would surely be as inefficient as other federal bureaucracies.

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"The free rein that S.40 would give to property-casualty rate-making may cause the effort to stumble. Despite what [some] say, Democrats are more than concerned about loosening regulatory oversight for mandatory insurance products purchased by individual, rather than large and sophisticated, buyers."

Despite what Sununu, Johnson, and House OFC sponsor Rep. Ed Royce (R-CA) say, Democrats are more than concerned about loosening regulatory oversight for mandatory insurance products purchased by individual, rather than large and sophisticated, buyers.

Royce, who also introduced OFC legislation last session, is planning to drop his own version shortly. The Royce proposal would mirror the Sununu-Johnson draft but would add so-called "prompt corrective action" provisions, which would allow a federal regulator to police deceptive actions, unfair competition, and fraud by federally chartered insurers and producers.

Going forward, reports indicate that the House and Senate will both hold hearings on the proposals before year end. In the House, the Subcommittee on Capital Markets, Insurance & Government Sponsored Enterprises, led by Rep. Paul Kanjoski (D-PA), will act first. Kanjorski, who in the past has expressed mild support for a life-only OFC, has said that inclusion of personal lines, workers'

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NCOIL TO HOLD FIRST NATIONAL LONG-TERM CARE FORUM

In the wake of a March 26 *New York Times* article regarding alleged abuses in the LTC insurance market, the NCOIL Health, Long-Term Care & Health Retirement Issues Committee is poised to hold the first national forum to investigate current industry practices on July 20 from 1:15 to 2:45 p.m., during the NCOIL Summer Meeting in Seattle.

Committee Chair Rep. Susan Westrom (KY) said, "The *NY Times* article raised concerns regarding arbitrary denials of benefits, unaffordable premium increases, and insufficient inflation protection for consumers of long-term care insurance. LTC is an important product, particularly as the baby boomer generation ages. We must ensure that people don't need to perform a song and dance before their policies pay benefits."

Just after the *NY Times* article, several federal lawmakers, including presidential hopeful Sen. Barack Obama (D-IL), expressed intent to investigate LTC issues. Obama wrote a letter to the Government Accountability Office in which he requested that it "investigate these allegations and the adequacy of state and federal regulation."

In a statement defending itself against allegations in the *Times* article, Conseco, a LTC insurer referenced several times, said, "The article focuses on a small number of dissatisfied policyholders, and not on the vast majority who are receiving satisfactory service and benefits from the Conseco insurance families."

Expected to participate in the NCOIL discussion are consumer, NAIC, and insurer representatives.

STATE HEALTH INSURANCE REFORM: LEGISLATURES TAKE THE LEAD TO COVER THE UNINSURED

Emboldened by landmark programs enacted last year in Massachusetts, Vermont, and Tennessee, several state legislatures took the initiative in 2007—despite a dead-locked federal government—to design health insurance reform packages to cover the approximately 45 million uninsured. In the first ten days of June, California, Connecticut, Delaware, and Oklahoma, among others, took action.

California

On Thursday, June 7, the legislature approved a comprehensive package that would require employers to spend 7.5 percent of payroll on healthcare or pay into a state fund. Under the plan, which was approved along party lines in each chamber, children from families earning up to three times the federal poverty level (FPL) would receive state-subsidized insurance. The state would also require health insurers to spend at least 85 percent of premiums on medical care.

Governor Arnold Schwarzenegger praised legislative efforts to establish a statewide dialogue on the uninsured. Democrats have vowed to work with the governor and other interested parties toward reaching a compromise reform solution.

Connecticut

A little after midnight on Wednesday, June 6, the legislature approved a $390 million reform package that would increase Medicaid reimbursement rates for providers and expand eligibility for low-income parents in HUSKY A, a subsidized health insurance program for children. Medicaid coverage eligibility would also be expanded for low-income pregnant women, and all uninsured newborns would be enrolled in HUSKY, at the state's expense.

Governor Rell has vowed to veto the bill because legislative leaders have not agreed on a state budget. Democrats, who passed the bill with near veto-proof majorities, have vowed to pursue the reforms despite her threat.

Delaware

Enforcement of a recently enacted bill that increases the definition of "dependent," for purposes of health insurance, from 18

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SPECIAL LIFE SETTLEMENTS SESSIONS SCHEDULED AT NCOIL MEETING

In an effort to complete work on a *Life Settlements Model Act*, NCOIL has scheduled two special sessions related to life settlements during the upcoming July 18 through 22 Summer Meeting in Seattle. Legislators hope to readopt the model act, with amendments, at the Executive Committee meeting on Saturday, July 21.

On Wednesday, July 18, an NCOIL Subcommittee on Life Settlements will meet from 2:00 to 6:00 p.m. to conclude its review of proposed amendments to the NCOIL model. Prior, the Subcommittee met to discuss interested-party proposals during an interim meeting on April 20. Representatives of the life insurance, life settlement, and premium finance industries, as well as financial advisors and the investor community, participated in the discussion.

On Thursday, July 19, from 3:30 to 5:00 p.m., the full Life Insurance & Financial Planning Committee will review the model act. After a brief report by Subcommittee Chairman Rep. George Keiser (ND), the Committee will begin consideration of the model, as amended by the Subcommittee.

SAVE THE DATE

NCOIL Summer Meeting & Seminar

July 18 through 22, 2007

Seattle, Washington

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SUPREME COURT

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insurers say. A finding against GEICO and Safeco—affirming that they had "willfully disregarded" the FCRA—would have allowed plaintiffs in the two class actions to recover for damages. It also, as per the FCRA, would have meant that consumers could be awarded $1,000 for each instance in which a company failed to send an adverse action notice when a customer had not received the absolute best rate. The cost of these penalties would have been well into the millions of dollars and, according to some reports, could have jeopardized the solvency of smaller carriers.

Despite the Supreme Court's decision, insurer practices may likely have to change. In evaluating Safeco's adverse action policy, the Court ruled that, although the company's FCRA interpretation was flawed, the insurer's practices were not "objectively unreasonable." Safeco did not send notices to first-time consumers whose credit data negatively impacted their rates. According to the insurer, there is no adverse action when a consumer hasn't yet become a policyholder. According to the Court, there is.

Regarding GEICO, the Justices ruled that the company's practices did not violate FCRA in any way. GEICO first calculates a consumer's rate minus his or her credit information, than recalculates including the credit history. If the insurance score leads to a higher rate, then GEICO sends an adverse action notice.

A 2002 NCOIL insurance scoring model law, adopted in 26 states, would require that insurers send adverse action disclosures in accordance with the FCRA. The model act would mandate that a carrier provide up to four specific credit events that resulted in the higher rate.

VIEW

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comp, and medical malpractice could cause problems.

In the Senate Banking, House and Urban Affairs Committee, Chair Christopher Dodd (D-CT), a current presidential contender, continues to keep his feelings to himself. However, reports indicate that his committee is likely to hold hearings in the fall, when Johnson returns to the Senate following a long illness.

Adding to the mix is a supposedly warm response from the Administration. According to OFC supporters, recent testimony from Treasury officials has been encouraging.

Perhaps. But the list of players in this issue is long, the war is nowhere near over, and those who support state regulation plan to continue the battle.

STATE

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to 24 has begun. The expansion applies to DE residents, including college students, in individual or small group plans. On June 5, the Senate passed a bill that would grant state regulators the same authority to review health insurance rates that they already have for auto and homeowners' policies.

Oklahoma

On June 4, the legislature approved two healthcare reform bills aimed at the state's low-income individuals and families. The *All Kids Act* would expand from 185 to 300 times the FPL the income level of parents eligible to participate in a voucher program to buy private insurance coverage for their children. A second bill would provide additional funding, and expand eligibility, for Insure Oklahoma. Insure Oklahoma seeks to expand healthcare access across the state by helping businesses purchase coverage for their employees.

Governor Brad Henry praised the legislature's work on the reform measures.