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EXCERPT

Impetus from Insurtech May Lead to Changes in Anti-Rebating Law

For over a century, most state insurance codes have included broad prohibitions on the payment of "rebates" and "inducements" in connection with the purchase of insurance. Anti-rebating provisions are also included in the *Unfair Trade Practices Act* ("**NAIC Model 880**"), a model law of the National Association of Insurance Commissioners ("**NAIC**"), which is the support and standard-setting organization for the insurance regulators from all 50 states, the District of Columbia and the US territories.

In 2019, however, the NAIC's Innovation and Technology (EX) Task Force indicated its willingness to consider recommending the relaxation of anti-rebating laws. In addition, the National Council of Insurance Legislators ("**NCOIL**"), an organization comprised mainly of members of state legislative committees that oversee insurance legislation, is also working on insurance modernization model legislation, including a model act addressing anti-rebating laws. Such initiatives, if implemented by individual state insurance regulatory authorities and legislatures, could have wide ranging effects.

Background

Rebates of insurance premiums would not be illegal in the absence of specific statutes prohibiting them. In the state of California, for example, where the anti-rebating statute for most lines of insurance was repealed in 1988 by popular vote through Proposition 103, rebates are not illegal for those lines of insurance. However, most states have laws on the books, many of which date back to the 1800s, that prohibit insurance companies, agents and brokers (or others acting on their behalf) from paying or even offering to pay a rebate of premium—or any other valuable consideration that is not specified in the policy—as an inducement to the purchase of insurance.

People from outside of the insurance industry often find the prohibition on rebates hard to understand, because it seems to run counter to consumer interests, but it has been a fixture of insurance regulation for a long time. The precise rationale for the prohibition is shrouded in the mists of history but most often cited are a desire to protect the solvency of insurance companies and the integrity of the rate regulation system, and to prevent unfair discrimination among insureds of the same class. It has been suggested that the durability of the prohibition may be related to a desire by independent agents and brokers (and their allies in state legislatures) to protect against price competition from large brokerage firms and, in recent years, insurtech startup firms. In any case, state insurance regulatory authorities have generally enforced anti-rebating laws quite vigorously.

To complicate matters further, anti-rebating laws and the interpretation of those laws by regulatory authorities are not uniform across the states. Some state statutes permit gifts to customers if they are under a specified value, such as $25 or $100, but many do not. The Illinois anti-rebating statute allows an insurance company to offer a child passenger restraint system for free or at a discount—a remarkable provision in that it suggests that, in the absence of this express exception, doing so might otherwise have been deemed illegal.

In addition to differences among the states with regard to statutory wording, there are differences among state regulatory authorities in the interpretation of the statutes. For example, most state insurance regulators take the view that if a valuable benefit is provided to prospective customers regardless of whether they actually purchase an insurance product, then it does not violate the anti-rebating statutes. Perhaps tongue in cheek, the New York State Insurance Department[1] published an opinion in 2001 explaining that providing free refreshments at a seminar on life and long-term care insurance would not violate the anti-rebating statutes, but only if attendees were allowed to partake of the refreshments regardless of whether they purchased an insurance product. However, not all states follow this rule. A few years ago, the Office of the Insurance Commissioner of the State of Washington made headlines by ruling that offering any valuable consideration as an inducement to insurance violates the Washington anti-rebating law if the valuable consideration is not specified in the policy, even if the benefit is provided to all prospective customers without regard to whether they actually purchase an insurance product.

In a number of states, the state regulatory authorities have been applying a "rule of reason" to determine that certain "value-added" services will not be deemed to constitute a prohibited rebate. For example, the New York State Insurance Department[2] issued a circular letter in 2009 stating that an insurer or insurance producer may provide a service not specified in the insurance policy to an insured or potential insured without violating the anti-rebating statutes if two conditions are satisfied: (a) the service directly relates to the sale or servicing of the policy or provides general information about insurance or risk reduction, and (b) the insurer or insurance producer provides the service in a fair and nondiscriminatory manner to like insureds or potential insureds. In several states, the insurance regulatory authorities have expressly adopted this approach, and it is generally considered to be a reasonable approach in states where the regulators have not published guidance on the subject—but some states expressly reject this approach and insist that any valuable consideration not specified in the policy is prohibited, except where there is a specific statutory carve-out.

Actions by the NAIC in 2019

As durable and unyielding as state anti-rebating laws have historically been, there is a rising groundswell of innovation and technology in the insurance sector that may well bring about some changes—in the statutes, the regulatory interpretations of the statutes or both. The notion that bringing the benefits of a technology platform to insurance customers could be deemed an illegal rebate has led to a rethinking of the whole anti-rebating system.

At the NAIC Spring National Meeting in April 2019, the Innovation and Technology (EX) Task Force announced that a session at the NAIC/NIPR Insurance Summit in June 2019 would specifically focus on the purpose of anti-rebating laws and whether such laws are still needed. The decision to hold this meeting, according to the Task Force staff, arose in the context of discussing potential obstacles to innovation. At the June meeting of the Task Force at the NAIC/NIPR Insurance Summit, various stakeholders presented a wide range of suggestions on anti-rebating laws, ranging from leaving the current regime untouched, drafting changes to NAIC Model 880, and proposing to repeal such laws entirely for commercial lines of insurance.

After evaluating the various proposals offered at the June meeting, the Task Force considered a number of potential approaches at the NAIC Summer National Meeting in August 2019. The Task Force Chair, Commissioner Jon Godfread of the North Dakota Insurance Department, acknowledged the need for an update to the anti-rebating provisions of NAIC Model 880. He observed that these

[1] In October 2011, the functuions of the New York State Insurance Department were transferred to the newly formed New York Department of Financial Services.

[2] *Supra.*

provisions were introduced more than 100 years ago in response to the threat posed by rebates to insurance company solvency and consumer protection against unfair discriminatory practices. Commissioner Godfread pointed out that in today's insurance industry, both startups and incumbent insurers operating in the insurtech space face significant challenges in complying with anti-rebating laws, the regulatory interpretations of those laws and the inconsistencies in those laws and interpretations across the states. Commissioner Godfread also stressed that underlying the various presentations made at the June summit was a shared view that a consistent approach to and interpretation of statutes related to anti-rebating would constitute a major improvement over the current state of affairs.

Accordingly, Commissioner Godfread presented a draft *North Dakota Anti-Rebating Guideline*, which had been prepared based on feedback from the presentations at the NAIC/NIPR Insurance Summit, and which he offered as a starting point for discussion by the Task Force. The draft North Dakota Guideline provides that insurers may offer value-added products, services or programs at no additional cost as long as they are (a) specified in the insurance policy, (b) aligned with the type of insurance offered and (c) either (i) mitigate loss or provide loss control that aligns with the risks of the policy or (ii) assess risk, identify sources of risk or develop strategies for eliminating or reducing those risks that aligns with the risks of the policy. The draft North Dakota Guideline expressly requires that value-added products, services or programs must comply with all other provisions of North Dakota law and, further, stresses that an application of North Dakota's laws to each situation would require a fact-specific evaluation.

Regulators and other interested parties had varying responses to the draft North Dakota Guideline at the NAIC Summer National Meeting. While a representative of the Center for Economic Justice opposed revisions to NAIC Model 880 as not being necessary, most regulators and other participants at least in principle appeared to support the idea of reforming anti-rebating statutes. A representative of the American Property Casualty Insurance Association, while supportive of reform, expressed preference for the approach taken by the Ohio Insurance Department in *Bulletin 2019-14*, which interprets the anti-rebating laws to allow value-added products or services at no or reduced cost using the concepts similar to those in the draft North Dakota Guideline, but which does not include a requirement that it be specified in the policy.

In addition, the Task Force discussed current proposals under consideration by NCOIL to review anti-rebating laws as part of an effort to develop model "insurance modernization" legislation aimed at helping the insurance industry move past what some view as antiquated processes. Representatives from NCOIL stated that many legislators shared the view that there was a need for a balance between modernization and preservation to allow for updating and selective repeal of old anti-rebating statutes on the one hand, while safeguarding against wholesale repeal of anti-rebating laws on the other hand. They also confirmed that legislators would continue their modernization efforts at the NCOIL meeting in December (see further discussion below).

At the conclusion of its meeting in August, the Task Force determined that it should continue work on drafting an NAIC anti-rebating guideline, using the draft North Dakota Guideline as a base, while simultaneously pursuing amendments to NAIC Model 880. Following the meeting, the draft North Dakota Guideline was exposed for comment until September 6, 2019.

However, at the NAIC Fall National Meeting in December 2019, the Task Force decided to take a different approach. Rather than drafting a separate NAIC anti-rebating guideline, the Task Force decided to focus solely on drafting amendments to NAIC Model 880, specifically to clarify what would be considered a "rebate" or an "inducement" in light of the new technologies that are being deployed to add value to existing insurance products and services. That decision was primarily motivated by concerns expressed by insurance regulatory authorities and other interested parties that current anti-rebating language in NAIC Model 880—and inconsistent interpretations of such language—could hamper innovations that are designed to minimize the risk of loss for consumers. The NAIC Executive (EX)

Committee subsequently voted to approve the Task Force's request for approval to draft amendments to NAIC Model 880, so that process is now underway.

Actions by the NCOIL in 2019

In parallel to the NAIC Task Force's activities, the Financial Services & Multi-Lines Issues Committee of NCOIL is engaged in ongoing discussions on the development of an *NCOIL Rebate Reform Model Act*. The draft NCOIL Model Act clarifies when the provisions of value added services, certain gifts and prizes and free or below-market-value services would be considered an impermissible rebate under state insurance laws and regulations. NCOIL continued to discuss the draft Model Act at its 2019 Fall Meeting in December 2019 and discussions are expected to continue well into 2020. If NCOIL adopts the Model Act, that adoption should give additional impetus to the NAIC's efforts and may encourage more states to amend their anti-rebating statutes.

Going Forward

As 2020 progresses, proposed amendments to NAIC Model 880 and the draft NCOIL Model Act will be discussed in greater detail by both the NAIC and NCOIL. Further revisions and input from stakeholders is expected. One thing is certain however—change is in the air.

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