

When Innovation Meets Regulation

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The Effect of InsurTech on Insurance Rebating Laws

The rise of InsurTech — which brings technological innovations to the business of insurance — has recently had a significant impact on the insurance industry, including through advancements in cybersecurity tools, the introduction of blockchain, and the use of big data for underwriting and claims. Funding in this area has grown exponentially over the past year, and, in just the past few months, several major conferences have brought together insurers and innovators to share ideas about the future of the industry and to promote new products and services. Yet many worry that complex insurance regulations will slow or even prevent further innovation. This article is the first in a series discussing the regulatory issues impacting InsurTech.

One such area is insurance rebating, which occurs when an insurer or producer offers something of value, not specified in the policy, as an incentive to purchase insurance. The practice became prevalent in the late 19th and early 20th centuries when high pressure sales emerged as a tool to sell life insurance. In response, states began passing laws prohibiting rebates, both to prevent insurer insolvency and to protect consumers from discrimination and high rates. Today nearly all states have anti-rebating statutes, most of which are substantially similar to the model law promulgated by the National Association of Insurance Commissioners (NAIC). NAIC Model 880, the Unfair Trade Practices Act, contains a provision on rebates that prohibits insurers and others engaged in the insurance business from offering premium rebates, special favors, or other benefits not included in the policy as an inducement to purchase insurance.

Yet as insurers and producers modernize their marketing and business practices to keep up with new technological advancements, regulators and legislators have been taking a closer look at the types of activities that constitute rebating. As a result, some states have begun clarifying and even amending the laws in this area to prohibit — or, more often, allow for — InsurTech and modern marketing. For example, some state insurance departments such as the Louisiana Department of Insurance have issued guidance regarding "value-added services," allowing insurers, producers, and brokers to provide services that are incidental to insurance for free or below market value as long as such services are offered in a nondiscriminatory manner. In Utah, the legislature went even further in

2015 by amending its anti-rebating law to expressly allow this practice. Utah Ins. Code § 31A-23a-402.5(10). This development was a direct response to the activity of the software company Zenefits, which at the time provided HR software to small businesses for free but earned commissions when its users purchased insurance from its insurance company partners. After the Utah Insurance Department determined the company's business model violated the state's inducement and anti-rebating statutes, the legislature stepped in to amend the law and expressly permit such businesses to operate in the state.

This same tension between regulators and the legislature has also been playing out in Washington. There, the Insurance Commissioner similarly found that Zenefits' provision of free software to residents violated the state's anti-rebating laws. However, an administrative law judge later determined that the company was permitted to offer its software to the public for free but ran afoul of the state's anti-rebating laws when it offered additional benefits solely to those who purchased insurance. Yet the legislature had already stepped in. In January 2017, the Washington State Senate introduced a bill (still pending) that, like Utah's, would amend the state's anti-rebating laws to permit similar businesses to operate in the state as long as the goods and services they offer are not contingent on the purchase of insurance. SB 5242. Maine subsequently followed suit. On May 26, 2017, the legislature adopted an amendment to its rebating laws to specify that insurers and producers may not only provide value-added services incidental to insurance but can also offer services for free or below market value as long as these benefits are offered to all potential consumers and are not contingent on the purchase of insurance. Maine Senate Bill LD 1161, amending 24-A Me. Rev. Stat. § 2163-A.

As more states take similar action, regulator interest in this area continues to increase. To stay informed about technological advances impacting the insurance industry, the NAIC established the Innovation and Technology Task Force, which monitors new developments and develops regulatory guidance. And, although it is not yet clear whether other states will follow the innovation-friendly approach of states like Louisiana, Utah, and Maine or resort to a strict interpretation of anti-rebating statutes as originally seen in Washington, it is clear that the legal and regulatory landscape will continue to shift as the insurance industry adapts to changing technology.

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