

Insurer Data Disclosure

Statement of Birny Birnbaum

on behalf of the Center For Economic Justice

June 8, 2000

Property Casualty (C) Committee

CEJ's Response to April 5, 2000 Industry Comments

Introduction

The Statistical Task Force has proposed revisions in Section 17 (Statistical and Rate Administration) of the Property Casualty Model Rating Law. This section covers the authority of the Commissioner to require insurers to report certain information to the insurance department and whether that information is available to the public or not. The proposal is currently before the Property Casualty (C) Committee.

The Center for Economic Justice submitted comments and an alternative proposal on January 17, 2000. Following the Spring National Meeting, a group of insurers, trade associations and advisory organizations ("the industry") submitted comments on our proposal. This document is our response to those comments.

Overview

The main features of our proposal were to declare that insurer-specific zip code exposure data is public information and to require insurers to do more than stamp "trade secret" on its papers to justify a trade secret claim. The industry countered with hysterical claims that our proposal will result in "destruction of property and the lack of opportunity to recoup investments made in data, data analysis and product development." These are exactly the type of conclusory, unsupported claims that evaporate under even modest scrutiny and have failed to convince Texas and California courts, as described below.

In addition, the industry invokes Gramm-Leach-Bliley again as justification for the NAIC acquiescing to industry wishes on this issue, just as the industry has done for a number of other issues, including privacy issues. While we support the modernization of insurance regulation to the benefit of consumers and insurers, we cannot support a "modernization" program that is a wish list for industry while leaving consumers without meaningful insurance regulation. Moreover, in a regulatory scheme that places more emphasis on "competition" and market conduct evaluations, the availability of information to the public to enable the

public to monitor the market performance of insurers is both reasonable and necessary.

The public availability of insurer-specific zip code exposure data is so reasonable and necessary, that, from our perspective, the NAIC's action on our proposal is a critical test of whether the NAIC is as committed to concrete actions on behalf of consumers as to insurers in the push to modernize insurance regulation.

Qualifications

Some regulators may not be familiar with me or my work on insurance data issues over the years. I have worked on insurance data issues intensively for the past nine years. While Chief Economist and Associate Commissioner for Policy and Research at the Texas Department of Insurance, I was the staff person responsible for developing statistical reporting plans and implementing those plans. I was also responsible for responding to public requests for information as well as dealing with insurer's claims of trade secret. I have testified in numerous cases about the trade secret status of zip code data. I am one of the most knowledgeable people in the country on insurer statistical data and trade secret issues related to these data.

The Center for Economic Justice is a Texas organization that advocates on behalf of low-income consumers on utility, insurance and credit issues. A number of other organizations join CEJ is asking the NAIC to adopt our proposal, including Consumers Union, Minnesota Legal Services Advocacy Project, Consumer Federation of America, Common Cause of Texas, Texas NAACP and others.

Not a Radical Proposal

In contrast to the unsupported allegations in the industry letter, there are a number of facts that support both the policy and law underlying our proposal. For starters, our proposal is not radical. At least five states declare insurer-specific zip code exposure data to be public information. Two states – Minnesota and Massachusetts – declare certain zip code data to be public by statute. Two other states – Texas and California – declare zip code exposure data to be public by regulation. Texas has two regulations – one for private passenger auto zip code data and another for residential property zip code data.

Illinois law empowers the Insurance Director to collect insurer-specific zip code data and make these data available to the public. Illinois Insurance Code 215 ILCS 5/Sec. 143.25 states:

The Director of insurance may order any of the following if it is determined to be in the public interest:

(a) Some or all companies issuing policies of insurance as defined in subsections (a) and (b) [private passenger auto and residential property

insurance] of Section 143.13 annually disclose by postal zip code area the number of policies applied for, the number of policies issued including renewals, the number of policies cancelled or nonrenewed for some or all areas of the State, and loss data.

Illinois has routinely collected insurer-specific zip code data and released these data to the public for over ten years. Despite the industry's allegations about public release of zip code data, the Illinois insurance markets have not collapsed.

The Industry April 5, 2000 Comments: Errors and Misrepresentations

The errors and misrepresentations in the April 5, 2000 industry comments are breathtaking. Below, we cite the major comments of the industry and point out the glaring errors.

Industry Claim: "Mr. Birnbaum's proposal weakens the protection our proposal gives to information that could be identified as relating to an individual insured. Deleting specific identifiers such as social security number is not sufficient to protect clients who may have a unique combination of insurance classification codes."

The Facts: The language in our proposal regarding protection of individual insured's information Section C (intro) and C (1) is identical to the language proposed by the industry! Moreover, our proposal makes no mention of social security numbers or any discussion of how a state would implement this provision. The industry statement is pure fabrication.

Industry Claim: "Mr. Birnbaum's proposal presumes that insurance regulators are not properly regulating companies, so that almost all insurer data should be made public for use by self-appointed surrogate regulators who will take up the slack. Our proposal recognizes that insurance regulators are trusted with valuable intellectual property of the insurers they regulate and that the standard protections for such property should be available."

The Facts: The industry claim is a blatant attempt to turn regulators against our proposal by inventing the claim that we "presume" regulators are not doing their job. Instead, this comment reveals the insurers' contempt for public information laws. Under the insurers' approach, there is no need for any information to be public because all public officials can be trusted. In contrast, we support public information as essential to democracy and essential for promoting competition in the marketplace. Unlike the unsupported industry allegations, we have facts to support our contention. For example, lenders have been reporting Home Mortgage Disclosure Act data to federal regulators for ten years. These data are more detailed than the zip code data in our proposal – loan applications, loan acceptances and loan rejections by type of loan, size of loan, ethnicity of applicant by census tract. (A census tract is a smaller geographic area than a ZIP Code.) These data are public and have helped the public monitor the performance of lenders in serving traditionally underserved communities. The same rationale applies for insurer-specific zip code exposure data.

Industry Claim: "Mr. Birnbaum's proposal demonstrates his lack of understanding of the proper functioning of trade secret law by requiring 'specific, factual evidence of harm to

the entity upon public release of the information.' Our proposal recognizes that the issues involved in determining the existence of trade secrets for insurers are the same legal issues facing other businesses, and the procedures for dealing with them should be the same as well."

The Facts: I have been involved in determining the trade secret status of numerous types of insurer information reported to regulators over the years and have testified as an expert in three states specifically on zip code data issues. I have first hand experience both as a regulator and as a member of the public in seeing and responding to insurers' trade secret claims. The fact is that insurers routinely make frivolous trade secret claims on information that is clearly not a trade secret. We cited the example of State Farm claiming the number of agents by zip code as a trade secret in both Texas and California. Even after admitting that this information was not a trade secret to the California Court, State Farm refused to make the same admission to the Texas Court. Our proposals does not demonstrate a lack of understanding of trade secret law – it reflect a profound understanding insurers' routinely stamping trade secret on documents and forcing state insurance departments and consumers to sort it out.

Industry Claim: "Mr. Birnbaum's proposal imposes huge administrative burden on regulators and courts, as well as on insurers submitting data in compliance with state requirements."

The Facts: This unsupported allegation is silly on its face. First, for a certain class of information – zip code exposure data – the proposal clearly reduces the administrative burden on regulators because they will not have to sort through the trade secret allegations. Second, the proposal does not require any state to collect information it is not already collecting or does not want to collect. If a state does not collect ZIP Code data, there is nothing for the regulator to produce and, thus, no additional administrative burden. Third, our proposal reduces the administrative burden by requiring insurers to think through their trade secret claims, thereby placing less burden on regulators to sort through the frivolous claims from legitimate ones. The insurers' claim of increased administrative burden is utterly wrong.

Industry Claim: "Mr. Birnbaum's proposal fails to realize that an insurer's premium and exposure information by ZIP code is very valuable proprietary information, revealing the results of an insurer's marketing, underwriting and pricing strategies."

The Facts: These are exactly the types of unsupported claims that the Texas and California Courts have rejected. In Texas litigation, a Texas Court of Appeals disagreed that the insurers proved that zip code information constitutes a trade secret. The Court reviewed the evidence of the insurer's trade secret claim and concluded:

[W]e find the evidence of probable harm is largely conclusory. No evidence demonstrated how, as a practical matter, the release of written premiums and the change in vehicles insured over time per ZIP code could give competitors any real advantage over one another. ... However, we may not reverse a temporary injunction for abuse of discretion *merely because we disagree with a trial court decision.*

Birnbaum v. Alliance of American Insurers, 994 S.W.2d 766 (Tex. App. – Austin, 1999, writ denied) at 782 (emphasis added). Because of the abuse of discretion standard, the Court did not reverse the temporary injunction. Apparently the insurers were also

unimpressed with their trade secret evidence, because they fired their expert witness after that hearing.

In recent California litigation, State Farm sued me personally asking the court to force me to return zip code data I obtained through a public information act from the California Department of Insurance. The California court dismissed State Farm's complaint, including State Farm's claim of trade secret.

As recently as May 12, 2000, a Travis County Texas District Court denied a request by Nationwide Insurance for a temporary injunction to prevent release of Nationwide's Texas homeowners zip code data. Nationwide's arguments that the data were a trade secret were rejected. Nationwide declined to appeal the ruling.

The fact is that the zip code data do not reveal marketing, underwriting and pricing strategies. In the ongoing Texas litigation, the insurers are gone through two experts and are now on their third expert in an attempt to find someone who can identify any harm from the public release of zip code data. The testimony of the latest industry expert in Texas, George Berry, unequivocally contradicts the industry claim in their April 5, 2000 letter. The following comes from the May 23, 2000 deposition of Dr. Berry. "QMR" refers to insurer-specific zip code data for Texas automobile insurers.

Q. Would the public release of the QMR data reveal what the reporting insurance company's individual marketing strategies are?

A. No.

....

Q. And do you agree that the public release of the QMR data will not reveal the reporting insurance company's individual underwriting guidelines?

A. I don't believe so.

(page 47)

Q. Will the release of the QMR data reveal the effectiveness of the insurer's overall marketing strategy in a ZIP code?

A. No.

(page 81)

The conclusory claims of harm are also refuted by the actions of individual insurers. If public release of these data would truly cause irreparable harm to insurers, no insurer would ever consent to the release of these data. Yet, some insurers have consented to the release of their zip code data. In Texas, State Farm specifically waived its trade secret claims to certain zip code data on at least two different occasions. In the past month in Texas, a Travis County District Court denied Nationwide Insurance of a temporary injunction preventing release of homeowners zip code data. Nationwide has since consented to the release of both private passenger automobile and homeowners zip code data in Texas. We applaud Nationwide for putting its efforts into expanding underserved markets instead of litigation to keep the public in the dark.

Industry Claim: "Mr. Birnbaum's proposal quotes both inaccurately and out of context the details of several legal proceedings, so that his submission will lead into error anyone relying on it."

The Facts: Despite their claim, the insurers cite no "inaccurate quote." The quotes in our proposal were accurate. The industry next tries to cover the facts with the old "taken out of context" claim. We stated that State Farm had erroneously claimed the number of agents by zip code as a trade secret. This is true. Our January 17, 2000 comments stated, "In fact, State Farm subsequently admitted, after having to explain to a court why it considered these data a trade secret, that it erred in making these trade secret claims." This statement is correct – as the insurers' own explanation readily shows. In the absence of having to justify its frivolous claim to the court, State Farm would have never had to correct its error.

Industry Claim: "The first sentence of Section C of the STF proposal lays the foundation that the STF saw as the applicability of this section -- which is the Statistical and Rate Administration Section. The Birnbaum-proposed first sentence, in conjunction with his proposed Section E, broadens the applicability beyond what has traditionally been considered 'statistical information.' In fact, the Birnbaum language broadens the applicability into market conduct-type individual insurer information, which is appropriately treated with great care by regulators as respects its confidentiality. Such broadening is not germane or necessary."

The Facts: There is no "broadening." The industry and STF proposals seek to *narrow* the scope of this section from the current scope. This narrowing is clearly inappropriate. Section 17 is a section in the (now) property and casualty model rating and policy form law. Sections A & B provide the commissioner with authority to promulgate rules regarding the collection of information from insurers "for effecting the purposes of this Act." Our proposal identifies information specifically related to the purposes of the Act. Thus, our proposal is both necessary and germane. The fact is that our proposal does not broaden the scope of the section – it simply does not narrow its scope as desired by the industry.

Conclusion

We urge the Property Casualty (C) to adopt our proposal. The facts show that public availability of insurer-specific zip code data has benefited consumers. Members of the public have used these data to confront insurers and regulators about insurance redlining and, in some cases, insurers have changed their market practices to expand their markets. In contrast, there is no example or evidence of an insurer or insurers being harmed in those states where insurer-specific zip code data are available to the public. There is not one example of these data being used as the basis of any litigation – class action or other – against insurers. Our proposal is reasonable, necessary and the right thing to do.