

Report on Protection of Insurance Consumers and Access to Insurance

FEDERAL INSURANCE OFFICE, U.S. DEPARTMENT OF THE TREASURY

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Glossary

A-PLUS	Automobile-Property Loss Underwriting Service
CFPB	Consumer Financial Protection Bureau
CLUE	.....	Comprehensive Loss Underwriting Exchange
DMF	.....	Death Master File
Dodd-Frank Act	.....	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
FDIC	.....	Federal Deposit Insurance Corporation
FIO	.....	Federal Insurance Office
FTC	.....	Federal Trade Commission
IAIS	.....	International Association of Insurance Supervisors
IDSML	.....	NAIC Insurance Data Security Model Law
IPCC	.....	Intergovernmental Panel on Climate Change
IRA	.....	Individual Retirement Account
IRS	.....	U.S. Internal Revenue Service
LTC	.....	Long-Term Care
LTCI	.....	Long-Term Care Insurance
Model Life Guaranty Act	.....	NAIC Life and Health Insurance Guaranty Association Model Act
NAIC	.....	National Association of Insurance Commissioners
NCOIL	.....	National Conference of Insurance Legislators
NFIP	.....	National Flood Insurance Program
NIST Cybersecurity Framework	.....	National Institute of Standards and Technology Framework for Improving Critical Infrastructure Cybersecurity
NYDFS	.....	New York Department of Financial Services
OSHA	.....	Occupational Safety and Health Administration
PHI	.....	Protected Health Information
PII	.....	Personally Identifiable Information
Report	.....	This Report on Protection of Insurance Consumers and Access to Insurance
Secretary	.....	Secretary of the Treasury
SSA	.....	Social Security Administration
SSDI	.....	Social Security Disability Insurance
Treasury	.....	U.S. Department of the Treasury
USGS	.....	United States Geological Survey

Report on Protection of Insurance Consumers and Access to Insurance

I. Introduction

Protection of insurance consumers and access to insurance are critical to the functioning of a stable and fair insurance marketplace. Recognizing the significance of consumer protection, the Federal Insurance Office (FIO) has highlighted numerous consumer protection issues in its prior reports.¹ Such significant issues, though, demand more focused attention. Accordingly, rather than include all consumer protection issues in its Annual Report on the Insurance Industry, FIO has prepared this separate first annual Report on Protection of Consumers and Access to Insurance (Report).²

This Report recognizes that certain themes commonly recur in discussions of insurance and consumer protection – themes such as technology, the environment, fairness, and the role of insurance as an investment tool – and addresses a range of topics within those broad themes. The Report is designed to illuminate a wide variety of significant consumer protection issues relating to insurance. However, due to the breadth of insurance products, benefits, laws, and regulations, the Report, by necessity, does not address every significant consumer-related insurance issue.

State and federal laws address a far broader range of insurance consumer protection topics than can be encompassed in a single Report. In this regard, the business of insurance in the United States is primarily regulated at the state level.³ Insurance laws are passed by state legislatures, signed into law by governors, and implemented and enforced by state insurance regulators. In addition to prudential regulation (frequently referred to as “solvency” regulation) – which consists of matters related to an insurer’s financial condition – state insurance laws govern the conduct of insurers in a state marketplace, and establish standards for consumer protection. Consumer protection issues addressed in state law include, but are not limited to, the pricing of premiums, product approval, advertising, minimum standards governing the terms of insurance policies, the licensing of insurance producers,⁴ privacy protection, and claims payment, among other things.

This Report highlights some gaps and inconsistencies in state insurance consumer protections and recommends a path forward in each instance. In addition, the Report is intended to serve an

¹ These FIO reports are available at <https://www.treasury.gov/initiatives/fio/reports-and-notice> and include: *How to Modernize and Improve the System of Insurance Regulation in the United States* (December 2013) (Modernization Report); *Annual Report on the Insurance Industry* (September 2014) (2014 Annual Report); *Report Providing an Assessment of the Current State of the Market for Natural Catastrophe Insurance in the United States* (September 2015) (Catastrophe Insurance Report), and *Annual Report on the Insurance Industry* (September 2015) (2015 Annual Report).

² FIO’s annual reports on the insurance industry may continue to feature some consumer protection issues as warranted.

³ See, e.g., the McCarran-Ferguson Act, 15 U.S.C. § 1011; the Gramm-Leach-Bliley Act, 15 U.S.C. § 6711; National Association of Insurance Commissioners (NAIC), *State Insurance Regulation* (2011), available at http://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf.

⁴ “Producers” as used in this Report, and as commonly understood in the industry, refers both to insurance brokers and insurance agents.

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educational function, emphasizing significant issues for consumers' attention and providing a resource for further exploration of the topics presented. The Report advances this two-fold purpose – education and recommending reform – while exploring five broad themes:

- **Insurance and Technology.** Big Data and cyber risk illuminate how technological developments applied in the insurance sector can create new opportunities for consumers, insurers, and state insurance regulators while also creating new risks such as cyber breaches.
- **Environmental Hazards and Insurance.** Insurance plays a significant role in addressing evolving environmental hazards. In particular, the Report considers insurance-related issues posed by human-induced earthquakes and climate change.
- **Fairness in Insurance Practices.** Insurers' practices can raise fundamental questions of fairness. As examples, the Report considers the appropriateness of using marital status, sex, and gender in the underwriting of non-health insurance policies, and the detriment such practices may cause some consumers. The Report also examines the transparency of homeowners' insurance coverage, and the problems that can arise when insurers increasingly use non-standardized coverage forms. Insurers also increasingly include mandatory arbitration clauses in insurance policies. Such clauses affect consumers in many sectors, not just insurance. The Report also examines how insurers renew (and cancel) policies after consumers file claims.
- **Fairness in State Insurance Standards.** Disparity in state insurance standards can give rise to a variety of consumer protection issues. This Report examines two key examples. First, the Report discusses the state insurance guaranty association system, including the inconsistent financial protection that policyholders in neighboring states may experience following the failure of an insurer. Second, the Report outlines developments in the workers' compensation market, including the impact of ongoing legislative efforts in certain states on taxpayers and workers.
- **Retirement and Related Issues.** Insurance can assist consumers in achieving financial security – and raise consumer protection issues in the process. By way of example, the Report examines consumer insurance issues related to the later phases of life: retirement security, the secondary market for life insurance and annuities, long-term care insurance (in coordination with the Department of Health and Human Services), and unclaimed death benefits.

This Report identifies options available to consumers, industry, and state and federal policymakers to address the highlighted gaps in protection for insurance consumers. State regulators, who enforce state-based consumer protection laws, also are an essential resource for both consumers and industry. For this reason, Appendix I of the Report includes contact information for each state insurance regulator. Appendix II lists, for ease of reference, federal sources cited in the Report.

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The protection of insurance consumers and American taxpayers underpins much of FIO's statutory foundation: Title V of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which established FIO within the U.S. Department of the Treasury (Treasury).⁵ In addition to advising the Secretary of the Treasury (Secretary) on major domestic and prudential international insurance policy issues in connection with all lines of insurance except health insurance,⁶ FIO is authorized to:

- monitor all aspects of the insurance industry, including identifying issues or gaps in the regulation of insurers that could contribute to a systemic crisis in the insurance industry or the U.S. financial system;
- monitor the extent to which traditionally underserved communities and consumers, minorities, and low- and moderate-income persons have access to affordable insurance products regarding all lines of insurance, except health insurance;
- recommend to the Financial Stability Oversight Council (on which FIO's Director serves as a non-voting member) that it designate an insurer as an entity subject to regulation as a non-bank financial company supervised by the Board of Governors of the Federal Reserve System (Federal Reserve);⁷
- assist the Secretary in administering the Terrorism Risk Insurance Program, established in Treasury under the Terrorism Risk Insurance Act of 2002, as amended;
- coordinate federal efforts and develop federal policy on prudential aspects of international insurance matters, including representing the United States in the International Association of Insurance Supervisors (IAIS);
- assist the Secretary in negotiating covered agreements and determine whether state insurance measures are pre-empted by covered agreements;
- consult with the states (including state insurance regulators) regarding insurance matters of national importance and prudential insurance matters of international importance; and
- perform such other related duties as may be assigned to FIO by the Secretary.⁸

Also, before the Secretary (in consultation with the President) may determine whether to appoint the Federal Deposit Insurance Corporation (FDIC) as the receiver for an insurer under Title II of the Dodd-Frank Act, the Secretary must receive a written recommendation with the affirmative approval of the FIO Director and the Federal Reserve (in consultation with the FDIC).⁹

⁵ 31 U.S.C. § 313 et seq.

⁶ 31 U.S.C. § 321(a)(9).

⁷ Additionally, FIO and the Federal Reserve coordinate to conduct annual analyses of nonbank financial companies supervised by the Federal Reserve to evaluate whether such companies have the capital, on a consolidated basis, necessary to absorb losses as a result of adverse economic conditions. 12 U.S.C. § 5365(i)(1)(A).

⁸ 31 U.S.C. § 313(c)(1).

⁹ 12 U.S.C. §§ 5383(a)(1)(C), (b).

II. Insurance and Technology

A. Big Data and the Insurance Industry's Use of Consumer Data

The use of big data holds promise for both insurers and consumers, as it facilitates innovation and modernization in insurance product design, distribution, and delivery. The increasing use of big data, though, may also present risks for consumers, creating an increased need for policymakers and insurance regulators to guard against unlawful discrimination.

“Big data refers to the ability to gather large volumes of data, often from multiple sources, and with it produce new kinds of observations, measurements and predictions.”¹⁰ The information that fuels big data comes from a variety of sources. For example, “high velocity” data, which includes GPS information from mobile phones and the clicks of internet users,¹¹ is generated constantly by computer systems and mobile phones.¹² Other data sources include “the public web; social media; mobile applications; federal, state and local records and databases; commercial databases that aggregate individual data from a spectrum of commercial transactions and public records; geospatial data; surveys; and traditional offline documents scanned by optical character recognition into electronic form.”¹³ Additional data comes from the increasing digitalization of devices and products that fill the modern American home, from thermostats and stereo equipment to cars in garages; this technology is referred to as the “Internet of Things.”¹⁴

1. Big Data in Insurance

Data is among the most important assets an insurer possesses. The use of big data can help almost every aspect of the business of insurance, but is particularly useful for underwriting, i.e., determining whether to accept a risk, and if so, at what amount of coverage and for what amount of premium.¹⁵ The use of data supports the risk-based approach familiarly known as “risk classification” that is generally used by insurers to establish the premium prices for insurance products. In risk classification, insurers analyze a number of data points which are used to assign consumers to rating tiers associated with particularized coverage limits and premium prices.¹⁶ Big data allows insurers to increase the number of variables assessed in the risk classification

¹⁰ Executive Office of the President of the United States, *Big Data and Differential Pricing*, at 2 (February 2015), available at https://www.whitehouse.gov/sites/default/files/docs/Big_Data_Report_Nonembargo_v2.pdf (EOP Big Data Differential Pricing).

¹¹ IBM Big Data and Analytics Hub, *The Four V's of Big Data*, available at <http://www.ibmbigdatahub.com/infographic/four-vs-big-data>.

¹² Nir Kshetri, “Big Data’s Impact on Privacy, Security, and Consumer Welfare,” *Telecommunications Policy* 38(11) (2014).

¹³ Executive Office of the President, *Big Data: Seizing Opportunities, Preserving Values*, at 5 (May 2014), available at https://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

¹⁴ See *id.* at 2.

¹⁵ International Risk Management Institute, Inc., *Glossary of Insurance and Risk Management Terms: Underwriting*, available at <https://www.irmi.com/online/insurance-glossary/terms/u/underwriting.aspx> (IRMI Glossary).

¹⁶ Modernization Report, *supra* note 1, at 56.

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process; as a result, risk assessments become more finely-tuned.¹⁷ For example, using big data, auto insurers now populate algorithms with thousands of data points, such as real-time driving information from cars and even reputational data from websites such as Yelp.¹⁸

For an increasing number of insurers,¹⁹ big data also supports the practice of “price optimization,” which “involves the analysis and incorporation of data not related to expected . . . loss and expense experience.”²⁰ For example, an insurer could use big data related to individual shopping habits or perceived tolerance for price changes, referred to as the “price elasticity of demand,” in setting premiums for an individual consumer.²¹ To date, 14 states and the District of Columbia have prohibited or restricted price optimization²² because it allows insurers to use a variety of non-traditional factors to price risk, which can result in consumers with otherwise identical risks paying different prices for the same coverage.²³

2. Data Brokers and Other Third Parties

As big data has grown, the insurance scoring industry has expanded its tools to collect and analyze data. Data brokers, who do not interact directly with consumers, purchase and sell personal information about consumers to help other businesses develop consumer profiles.²⁴ Data brokers also create “derived data,” in which certain inferences are based on available data (for example, an individual with a Sports Illustrated subscription has an interest in sporting events).²⁵ The Federal Trade Commission (FTC) concluded that these data brokers operate without transparency or accountability, and recommended that Congress consider legislation to address the issue.²⁶

Insurers use data brokers and other third-party vendors to assist with the collection and analysis of big data. For instance, insurers use vendors that provide analytical services and software

¹⁷ EOP Big Data Differential Pricing, *supra* note 10.

¹⁸ Alex Woodie, “How Big Data Analytics is Shaking Up the Insurance Business,” *Datanami* (January 5, 2016), available at <http://www.datanami.com/2016/01/05/how-big-data-analytics-is-shaking-up-the-insurance-business/>.

¹⁹ Approximately half of large insurers, and just over a quarter of all insurers in North America, use price optimization in some manner. See Andrea Wells, “The Price of Price Optimization in Insurance,” *Insurance Journal* (November 17, 2015), available at <http://www.insurancejournal.com/news/national/2015/11/17/389153.htm>.

²⁰ *Id.*

²¹ Scott Kersgaard, “Colorado 15th state to ban price optimization,” *Insurance Business America* (December 3, 2015), available at <http://www.ibamag.com/news/west-news/colorado-15th-state-to-ban-price-optimization-27083.aspx>.

²² California, Colorado, Delaware, Florida, Indiana, Maine, Maryland, Montana, Minnesota, Ohio, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia prohibit or restrict price optimization in personal lines ratemaking. See *id.*

²³ Wells, *Price Optimization*, *supra* note 19.

²⁴ EOP Big Data Differential Pricing, *supra* note 10.

²⁵ Federal Trade Commission, *Data Brokers: A Call for Transparency and Accountability* (May 2014), available at <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf> (FTC Data Brokers).

²⁶ *Id.*

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products related to big data,²⁷ such as a product designed to provide insurers with social media risk-scoring solutions tracking “wide ranging data across the social web and broader internet.”²⁸ In all but the rarest of cases, even though these vendors develop the pricing formula on which many insurers rely and, thereby, have a direct effect on the affordability and accessibility of insurance to a consumer, the vendors themselves are outside the scope of supervision by state insurance regulators.²⁹

3. Consumer Implications of Big Data

The increasing use of big data can benefit consumers by allowing the potential for the development of tailored products and premium prices based on the unique needs of individual consumers.³⁰ However, the use of big data by insurers may also be detrimental in some circumstances. For example, price optimization may disadvantage loyal consumers if, for example, they fail to shop for new coverage at the time of renewal. In addition, certain big data methodologies may hide intentional or unintentional discrimination against protected classes “by generating customer segments that are closely correlated with race, gender, ethnicity, or religion.”³¹ Moreover, the existence of a pattern does not necessarily mean the pattern is significant or predictive and, therefore, may not be an appropriate basis for pricing.³²

The lack of transparency by – or oversight of – big data vendors is another area of concern because of the significant effect these vendors have on consumers. For example, health-related data relevant to certain types of insurance underwriting can be gleaned from internet search terms, and online or pharmacy purchases.³³ Consumers have little power to control how data is collected or used by data brokers and vendors, and many state insurance regulators have only limited authority over the ways that insurers use big data. As noted above, in most cases, state insurance regulators do not directly regulate third-party vendors used by insurers.³⁴

4. Consumer Resources and the Path Forward

Consumers are encouraged to educate themselves about the ways that daily acts, from searching the internet to purchasing goods at the grocery store, are being used by a variety of industries –

²⁷ NAIC, Casualty Actuarial and Statistical (C) Task Force, *Price Optimization White Paper* (November 19, 2015), available at http://www.naic.org/documents/committees_c_catf_related_price_optimization_white_paper.pdf.

²⁸ “Social Intelligence Launches Social Media Risk Scoring for P&C Insurers,” *Business Wire* (April 22, 2015), available at <http://www.businesswire.com/news/home/20150422005849/en/Social-Intelligence-Launches-Social-Media-Risk-Scoring>.

²⁹ Modernization Report, *supra* note 1, at 56.

³⁰ FTC Data Brokers, *supra* note 25.

³¹ EOP Big Data Differential Pricing, *supra* note 10. See also, e.g., Federal Trade Commission, *Big Data – A Tool for Inclusion or Exclusion: Understanding the Issues* (January 2016), available at <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf> (outlining federal laws that may apply to big data practices).

³² EOP Big Data Differential Pricing, *supra* note 10.

³³ Kshetri, *supra* note 12.

³⁴ Modernization Report, *supra* note 1, at 57.

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including the insurance sector. Consumers may wish to consult the sources in Appendix II, among others, for more information.

While big data provides promising opportunities for developing more individualized insurance products and pricing, as well as potentially expanding access to insurance products, the insurance sector should confront the unique regulatory and public policy challenges that arise from its use. As the use of big data becomes more prevalent, regulatory and other consumer protection efforts should advance apace. State insurance regulators should ensure that insurers use big data only in a manner consistent with applicable state and federal laws and regulations. As FIO has previously noted, “[s]imply because data may be available regarding consumers does not mean that any data is relevant to determining the insurance premiums they should pay.”³⁵ State insurance regulators also should examine the increasing prevalence of big data and verify that the criteria and methodologies used by insurers and third-party vendors do not violate well-established standards against unlawful discrimination. With rare exceptions, state insurance regulators have not asserted regulatory authority over third-party vendors that provide insurers with pricing and rating tools. This failure results in a significant regulatory gap, which should be closed to prevent potential harm to individuals, families, and businesses.

B. Cyber Risk and Protecting Consumers’ Personally Identifiable Information

Insurance can touch all aspects of a consumer’s life – and gather significant data about consumers in the process. Insurers routinely collect, store, and use a variety of information – including personally identifiable information (PII) and protected health information (PHI) – obtained from policyholders who apply for or purchase insurance products, as well as from claimants and other beneficiaries. These data collections can create cyber risk for insurers and consumers, and cybersecurity challenges for insurers and the government. This section focuses on protecting consumer information held by the insurance industry itself. Beyond the scope of this Report is the separate (and important) topic of what insurers can do to help with cyber risk transfer and mitigation for other sectors by underwriting and offering cyber insurance.

1. Cyber Risk and the Insurance Industry

Cyber risk – which has been described as “the risks of doing business, including managing and controlling data, in a digital or ‘cyber’ environment”³⁶ – is a significant concern. Data breaches at institutions such as insurers and other financial institutions resulted in the exposure of personal data for 348 million people around the world in 2014.³⁷ U.S. consumers lost nearly \$30 billion

³⁵ *Id.*

³⁶ CRO Forum, *Cyber Resilience: The cyber risk challenge and the role of insurance*, at 3 (December 2014), available at <http://www.thecroforum.org/wp-content/uploads/2014/12/Cyber-Risk-Paper-version-24.pdf>.

³⁷ Norton by Symantec, *Norton Cybersecurity Insights Report*, at 3 (January 2016), available at https://us.norton.com/norton-cybersecurity-insights-report-global?inid=hho_norton.com_cybersecurityinsights_hero_seeglobalrpt.

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to cyber-crime in the previous year, with global consumer losses of \$150 billion.³⁸ Insurers collect unique personal information and are at significant risk for cyber attack. For example, one of the largest data breaches in the United States occurred in 2015, when PII and PHI of up to 91 million policyholders at Anthem Blue Cross Blue Shield and Premera Blue Cross were compromised.³⁹ Some insurers also outsource a variety of services to third-party vendors, which may increase the risk of exposure to cyber attack.⁴⁰ With these heightened risks, insurers must do everything reasonable to protect against cyber risk and data breaches.

2. Federal Efforts Involving Cybersecurity for Insurers

Under the 2013 National Infrastructure Plan framework, Treasury is the federal agency charged with coordinating the cybersecurity and resiliency of the nation's critical financial services infrastructure.⁴¹ Treasury also serves as the day-to-day federal interface for matters involving cyber threats and cybersecurity for all institutions within the financial services sector.⁴² FIO, along with other Treasury offices, assists with these efforts. In this work, Treasury actively supports the efforts of the insurance industry to implement enhanced cyber protection measures, including identifying best practices and encouraging participation in industrywide groups, such as the Financial Services – Information Sharing and Analysis Center (FS-ISAC), which share information on cyber threats and cybersecurity. In addition, Treasury works with financial regulators, including state insurance regulators, to develop best practices and a consistently rigorous approach to cybersecurity oversight for insurers. Further, through the IAIS, FIO works with the international supervisory community to develop international standards for regulatory examinations and risk management practices in the insurance sector relative to cybersecurity.

³⁸ Norton by Symantec, *Norton Cybersecurity Insights Report: Global Comparisons* (January 2016), available at http://us.norton.com/norton-cybersecurity-insights-report-us?inid=hho_norton.com_cybersecurityinsights_p3_seectryrpts.

³⁹ Anthem, *AllClearID Frequently Asked Questions*, available at <https://anthem.allclearid.com/faq.html>; Premera, *Free Credit Monitoring*, available at <http://www.premeraupdate.com/free-credit-monitoring/>. In response to the breaches, Anthem and Premera provided affected individuals with 24 months of identity protection services. Given the long-term risks presented by the exposure of health information, some consumers may choose to bear the cost of continuing identity protection services after the two-year period ends.

⁴⁰ See, e.g., IAIS, *Issues Paper on Cyber Risk to the Insurance Sector*, at 9 (August 2016), available at <http://www.iaisweb.org/page/supervisory-material/issues-papers/file/61857/issues-paper-on-cyber-risk-to-the-insurance-sector>.

⁴¹ U.S. Department of Homeland Security, *Financial Services Sector*, available at <http://www.dhs.gov/financial-services-sector> (DHS Financial Services). Critical infrastructure is defined as the “essential services that underpin American society and serve as the backbone of our nation's economy, security, and health.” See U.S. Department of Homeland Security, *What Is Critical Infrastructure*, available at <http://www.dhs.gov/what-critical-infrastructure>. The financial services sector, including insurance, is among the sixteen sectors identified as part of the nation's critical infrastructure. See DHS Financial Services, *supra*.

⁴² U.S. Department of the Treasury, *Remarks of Deputy Secretary Raskin at The Texas Bankers' Association Executive Leadership Cybersecurity Conference* (December 3, 2014), available at <https://www.treasury.gov/press-center/press-releases/Pages/j19711.aspx>.

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3. State Efforts Involving Cybersecurity for Insurers

In the United States, supervision by state insurance regulators plays an important role in the protection of consumer PII and PHI. Attention to cybersecurity by the state insurance regulatory community increased in 2013, when state insurance regulators established the Cyber Security Task Force, a group of state insurance regulators who “consider issues concerning cybersecurity as they pertain to the role of state insurance regulators.”⁴³

In March 2016, state insurance regulators released a draft model law, the *Insurance Data Security Model Law* (IDSML),⁴⁴ relating to data breaches of PII and PHI. Under the IDSML, consumers would be authorized to bring suit against an insurer relating to data breaches, but recoverable damages would be limited to “appropriate equitable relief.”⁴⁵ As of September 30, 2016, the IDSML has not yet been finalized and has not been enacted by any state.

State insurance regulators also revised the *Financial Condition Examiners Handbook* – used to assess the financial condition of insurers during periodic examinations every three to five years by state insurance regulators – to provide specific guidance for examiners who review an insurer’s cybersecurity practices. In addition to adopting an approach to cybersecurity consistent with the National Institute of Standards and Technology Framework for Improving Critical Infrastructure Cybersecurity (NIST Cybersecurity Framework), the handbook encourages examiners to use cybersecurity experts if the insurer has significant exposure to cyber risk.⁴⁶

The New York Department of Financial Services (NYDFS) has been a national leader with respect to the insurance sector and cybersecurity. In 2013 and 2014, the NYDFS surveyed 43 regulated insurers about cybersecurity issues and published a report of its findings in February 2015.⁴⁷ Since then, the NYDFS has increased its focus on cybersecurity, proposed new regulatory requirements regarding cybersecurity at regulated insurers, and highlighted the continuing cybersecurity challenge arising from reliance by insurers on third-party service providers.⁴⁸

⁴³ NAIC, *Cybersecurity (EX) Task Force*, available at http://www.naic.org/cmte_ex_cybersecurity_tf.htm.

⁴⁴ NAIC, *Draft Insurance Data Security Model Law* (March 2, 2016), available at http://www.naic.org/documents/committees_ex_cybersecurity_tf_160524_draft_ins_data_sec_model_law.pdf. Regulators released a revised draft on August 17, 2016. See NAIC, *Preliminary Working and Discussion Draft – Insurance Data Security Model Law* (Draft: 8/17/2016 (version 2)), available at http://www.naic.org/documents/committees_ex_cybersecurity_tf_exposure_mod_draft_clean.pdf. “Model” laws are not valid in a state until they are duly passed and enacted through state legislative and executive branches.

⁴⁵ *Id.*

⁴⁶ NAIC IT Examination Working Group, *Revisions to Exam Handbook Guidance Section 1-3* (September 21, 2015).

⁴⁷ NYDFS, *Report on Cyber Security in the Insurance Sector* (February 2015), available at http://www.dfs.ny.gov/reportpub/dfs_cyber_insurance_report_022015.pdf.

⁴⁸ NYDFS, *Potential New NYDFS Cyber Security Regulation Requirements* (Nov. 9, 2015), available at http://www.sutherland.com/portalresource/pr151109_letter_cyber_security.pdf.

4. Consumer Resources and the Path Forward

Insurers hold substantial amounts of confidential information about consumers, claimants, and beneficiaries. To protect against the unauthorized disclosure or use of confidential information, consumers, insurers, and state insurance regulators should remain vigilant and in constant pursuit of best practices to prevent cyber breaches.

Consumers can take basic steps to protect against or minimize potentially harmful outcomes resulting from a data breach or identity theft scam. For example, the Department of Homeland Security recommends that, among other steps, individuals keep operating systems, browsers, and other critical software optimized by installing updates.⁴⁹ Consumers affected by a data breach should be proactive, such as by taking advantage of resources available through the FTC at www.identitytheft.gov.

Insurers should adopt baseline protections based on leading cyber risk management standards and best practices.⁵⁰ For instance, best practices include, but are not limited to, limiting access to information technology assets and associated facilities to authorized users, processes, or devices, and coordinating response activities with internal and external stakeholders including, as appropriate, law enforcement agencies.⁵¹ In addition, insurers that rely on third-party vendors should review the cyber risk management practices of those vendors and determine whether the vendors use baseline protections based on the NIST Cybersecurity Framework or other leading cyber risk management standards and best practices. Insurers should consider developing a comprehensive cybersecurity strategy that addresses topics such as: cybersecurity governance; risk identification and assessment; protection and detection (including implementation of controls and mitigation measures, and continuous monitoring); testing; response and recovery options; information sharing; and learning from cyber incidents.

Meanwhile, state governments should review existing and proposed laws and regulations and enact laws uniformly that improve the rigor of consumer privacy protection. Consistent with this goal, insurance regulators should follow the lead of the NYDFS in developing an improved inventory of the cyber risks facing the insurance industry. For some states, hiring additional examination staff with cybersecurity expertise may be necessary. Cybersecurity examinations should occur more frequently than the current financial examination schedule of once every three to five years, given the fast-evolving nature of cyber risk.⁵² For both the insurance industry and its regulators, cybersecurity strategies and technologies, and the oversight of those strategies and technologies, should be adaptable and current.

⁴⁹ U.S. Department of Homeland Security, *Stop. Think. Connect.: Cybersecurity 101*, available at https://www.dhs.gov/sites/default/files/publications/cybersecurity-101_4.pdf.

⁵⁰ One significant way that insurers can address cyber risk is by adopting the NIST Cybersecurity Framework.

⁵¹ National Institute for Standards and Technology, *Framework for Improving Critical Infrastructure Cybersecurity*, Version 1.0 (February 12, 2014), available at <http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf>.

⁵² See, e.g., NAIC, *Model Law on Examinations* (October 1999), available at <http://www.naic.org/store/free/MDL-390.pdf>.

III. Environmental Hazards and Insurance

A. Human-Induced Earthquakes and Insurance

Earthquakes occur in the United States thousands of times every year and in every region of the country.⁵³ According to the United States Geological Survey (USGS), the number of earthquakes in the central and eastern United States has increased dramatically over the past few years.⁵⁴ In the central region of the United States, the average annual number of earthquakes magnitude 3 and larger between 2009 and 2014 was 193, including a record high 688 earthquakes in 2014.⁵⁵

Questions have arisen about the connection between the increase in earthquakes in some areas of the United States and human activity, including the increasing prevalence of hydraulic fracturing, also known as fracking, and the use of waste water disposal wells associated with fracking and other petroleum extraction activities.⁵⁶ The distinction between naturally occurring earthquakes and human-induced earthquakes can impact consumers who purchase earthquake insurance and experience a loss, because most earthquake insurance policies cover only damage resulting from natural earthquakes.

1. Overview of Earthquake Insurance

Standard property insurance policies typically exclude coverage for damage caused by earthquakes.⁵⁷ Homeowners and business owners seeking protection against damages caused by earthquakes must separately purchase either an endorsement to a property insurance policy, if available, or a separate earthquake insurance policy. Earthquake insurance “provides protection from the shaking and cracking that can destroy buildings and personal possessions” caused by natural earthquakes,⁵⁸ and is generally available throughout the United States.

Earthquake insurance, however, is not “generally required by mortgage lenders as a loan condition.”⁵⁹ In addition, an earthquake insurance policy typically has a deductible ranging from

⁵³ See, e.g., USGS, *Earthquake Statistics* (as of March 10, 2016), available at <http://earthquake.usgs.gov/earthquakes/browse/stats.php>.

⁵⁴ USGS, *Induced Earthquakes*, available at <http://earthquake.usgs.gov/research/induced/>.

⁵⁵ USGS, *Science Features, 6 Facts About Human-Caused Earthquakes* (June 10, 2015), available at http://www.usgs.gov/blogs/features/usgs_top_story/6-facts-about-human-caused-earthquakes/.

⁵⁶ William Ellsworth, et al., *Increasing seismicity in the U.S. midcontinent: Implications for earthquake hazard*, *The Leading Edge* (June 2015), available at https://profile.usgs.gov/myscience/upload_folder/ci2015Jun0413502655600EllsworthTLE.pdf.

⁵⁷ Catastrophe Insurance Report, *supra* note 1.

⁵⁸ Insurance Information Institute, *Earthquakes: Risk and Insurance Issues* (July 2016) available at <http://www.iii.org/issue-update/earthquakes-risk-and-insurance-issues> (III on Earthquakes).

⁵⁹ California State Senate Committee on Insurance, *Informational Hearing, Catastrophic Risk in California: Are Homeowners and Communities Prepared?*, at 8 (May 14, 2014), available at <http://sins.senate.ca.gov/sites/sins.senate.ca.gov/files/14.05-14.Background.Catastrophic%20Risks%20in%20California.PDF>.

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2 percent to 25 percent of the structure's replacement value,⁶⁰ with insurers requiring higher deductibles (at least 10 percent) for high risk areas.⁶¹ Perhaps for cost reasons, only a minority of homeowners purchase coverage for losses caused by earthquakes. A 2014 survey found that the national rate for the purchase of earthquake insurance was 7 percent, down from 10 percent in 2013 and 13 percent in 2012.⁶² However, increased earthquake activity in the central and eastern United States has led to an increase in the purchase of earthquake insurance in certain states. For example, the take-up rate for earthquake insurance by Oklahomans rose from 2 percent in 2011 to 15 percent in 2014, which is even higher than the 10 percent take-up rate by California residents.⁶³

2. Insurance Coverage for Human-Induced Earthquakes

The cause of an earthquake, whether natural or human-induced, and the effect on earthquake insurance coverage, is an evolving issue for consumers, insurers, and state policymakers and insurance regulators. Typically, earthquake insurance coverage excludes damage caused by human-induced earthquakes (i.e., any earthquake that is not naturally occurring).⁶⁴ If an earthquake is induced by human activity, a claim by a consumer for damages under an earthquake endorsement or earthquake policy may be denied. For this reason, some state insurance regulators are addressing whether human activity like fracking and deep injection waste disposal is responsible for a portion of the recent increase in seismic activity.

In March 2015, the Oklahoma Insurance Department issued a bulletin to insurers operating in Oklahoma stating: "At present, there is no agreement at a scientific or governmental level concerning any connection between injection wells or fracking and 'earthquakes.'"⁶⁵ Additionally, the bulletin expressed concern that insurers might be denying earthquake claims based on insufficient evidence that the earthquakes were caused by fracking. According to the Oklahoma Insurance Department, in 2014, only 8 of the 100 earthquake claims submitted to larger insurers were paid.⁶⁶ In October 2015, the Oklahoma Insurance Commissioner ordered that insurers clarify within 45 days whether policies cover earthquake damages specifically

⁶⁰ III on Earthquakes, *supra* note 58; Washington State Office of the Insurance Commissioner, *Earthquake Insurance*, available at <http://www.insurance.wa.gov/your-insurance/home-insurance/earthquake/>.

⁶¹ III on Earthquakes, *supra* note 58.

⁶² *Id.*

⁶³ See Miguel Bustillo and Daniel Gilbert, "Energy's New Legal Threat: Earthquake Suits," *The Wall Street Journal* (March 30, 2015), available at <http://www.wsj.com/articles/frackings-new-legal-threat-earthquake-suits-1427736148>; Insurance Information Institute, *Another Northern California Quake Underlines Importance of Having Earthquake Insurance* (January 29, 2015), available at <http://www.iii.org/press-release/another-northern-california-quake-underlines-importance-of-having-earthquake-insurance-012915>.

⁶⁴ NAIC, *Hydraulic Fracturing (Fracking)* (last updated September 8, 2016), available at http://www.naic.org/cipr_topics/topic_hydraulic_fracturing.htm.

⁶⁵ Oklahoma Insurance Department, *Earthquake Insurance Bulletin No. PC 2015-02* (March 3, 2015), available at http://www.ok.gov/oid/documents/030415_Earthquake%20Bulletin%203-3-15.pdf.

⁶⁶ *Id.*

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caused by oil and gas wells.⁶⁷ In addition, Oklahoma lawmakers are considering “legislation to create a state-level ‘earthquake reinsurance program’ modeled on the California Earthquake Authority.”⁶⁸

In April 2015, following an increase of earthquakes in areas of Pennsylvania, the Pennsylvania Insurance Department issued a bulletin stating that Pennsylvania earthquake endorsements “should cover all earthquakes, whether believed to be ‘naturally occurring’ or caused by ‘human activity.’”⁶⁹

3. Consumer Resources and the Path Forward

Consumers living in earthquake-prone areas should consider the purchase of earthquake insurance and should carefully review the earthquake policy or earthquake endorsement. If consumers have questions about insurance coverage for earthquakes, they may wish to contact their insurance producer, insurer, or state insurance regulator (contact information for state insurance regulators is listed in Appendix I).

Since FIO raised the issue of human-induced earthquakes in its 2015 Annual Report on the Insurance Industry,⁷⁰ little has changed in state regulation. While the Earthquake Study Group of the National Association of Insurance Commissioners (NAIC) continues to assess this issue,⁷¹ no states individually (other than Oklahoma and Pennsylvania) have taken action to address earthquake insurance coverage. State insurance regulators in states at risk for human-induced earthquakes should follow the lead of the state insurance regulators in Oklahoma and Pennsylvania by addressing the question of whether earthquake insurance coverage includes only naturally occurring earthquakes and seek clarity for consumers regarding coverage.

⁶⁷ Sheldra Brigham, “Insurance companies given deadline to clarify earthquake coverage,” *Kfor.com* (October 21, 2015), available at <http://kfor.com/2015/10/21/insurance-companies-given-deadline-to-clarify-earthquake-coverage/>.

⁶⁸ Ian Adams, “Oklahoma ponders “California model” for earthquake insurance,” *R Street* (February 22, 2016), available at <http://www.rstreet.org/2016/02/22/oklahoma-ponders-california-model-for-earthquake-insurance/>. The California Earthquake Authority (CEA) is a public instrumentality made up of homeowners insurers that write standalone earthquake insurance policies for homeowners, renters, and condominium-unit owners. Participating insurers are responsible for selling and adjusting policies for their policyholders and, in return, receive agent commissions and reimbursement of administrative expenses by CEA. Catastrophe Insurance Report, *supra* note 1.

⁶⁹ Pennsylvania Insurance Department, *Insurance Department Notice No. 2015-04* (April 11, 2015) available at <http://propertyinsurancelawobserver.com/wp-content/uploads/sites/11/2015/05/Department-Notice-2015-04.pdf>.

⁷⁰ 2015 Annual Report, *supra* note 1, at 50-51.

⁷¹ NAIC, Earthquake (C) Study Group, *Agenda* (April 3, 2016), available at http://www.naic.org/meetings1604/committees_c_earthquake_2016_spring_nm_agenda.pdf?1463510818367.

B. Climate Resiliency

With climate change causing increasingly frequent severe weather, assessment of resilience to strong winds, flooding, wildfires, and other natural hazards will continue to be an important aspect of insurance underwriting. Recognizing the shared priorities of the federal government and the insurance industry in responding to natural hazard risk and increasing the resilience of homes and communities, the President's Climate Action Plan, released in June 2013, called for continued engagement between the federal government and the insurance industry "to explore best practices for private and public insurers to manage their own processes and investments to account for climate change risks and incentivize policyholders to take steps to reduce their own exposures to these risks."⁷² Relatedly, representatives of the insurance industry released a joint statement in June 2014 expressing support for "resilience and pre-event property loss mitigation" and the goal of "[s]upporting and utilizing research and targeted incentives (such as tax credits, loans, or grants) to promote effective loss mitigation, in order to reduce current and future risk to people, property, natural features, ecosystems, and critical infrastructure."⁷³ The related issues of climate change, natural hazards, and insurance will continue to intersect, both in terms of the prices consumers pay for homeowners insurance and the public policy goal of increasing resilience.

1. Climate Change and the Price of Insurance

2015 was the warmest year since modern recordkeeping began in 1880, with 15 of the 16 warmest years on record occurring since 2001.⁷⁴ According to the Intergovernmental Panel on Climate Change (IPCC), which includes more than 1,300 scientists from the United States and other countries, "the range of published evidence indicates that the net damage costs of climate change are likely to be significant and to increase over time."⁷⁵

Climate change is already affecting every region of the United States and its effects are expected to increase in severity and frequency. For example, among other risks, sea level rise will threaten both coasts of the continental United States.⁷⁶ The Northeast is expected to face heat

⁷² Executive Office of the President, *The President's Climate Action Plan*, at 13-14 (June 2013), available at <https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

⁷³ *Joint Statement of American Insurance Association, Insurance Institute for Business & Home Safety, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, and Reinsurance Association of America* (September 23, 2014), available at <https://www.disastersafety.org/news/joint-statement-september-23-2014/>.

⁷⁴ National Aeronautics and Space Administration, *NASA, NOAA Analyses Reveal Record-Shattering Global Warm Temperatures in 2015*, Release No. 16-008 (Jan. 20, 2016), available at <http://www.nasa.gov/press-release/nasa-noaa-analyses-reveal-record-shattering-global-warm-temperatures-in-2015>.

⁷⁵ IPCC, *Climate Change 2007: Synthesis Report*, Section 5.7: Costs, benefits and avoided climate impacts at global and regional levels (2007), available at https://www.ipcc.ch/publications_and_data/ar4/syr/en/mains5-7.html.

⁷⁶ Jerry M. Melillo, et al., eds., *Climate Change Impacts in the United States: Highlights*, U.S. Global Change Research Program, at 88 (2014), available at http://s3.amazonaws.com/nca2014/low/NCA3_Highlights_LowRes.pdf.

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waves, coastal, and riverine flooding,⁷⁷ and the Midwest is expected to experience increased heat wave intensity, extreme rainfall, and flooding.⁷⁸ Heat waves are also expected in the Southwest, which will face drought and insect outbreaks too.⁷⁹ These risks will compromise infrastructure, agricultural yields, fisheries, and ecosystems throughout the nation.⁸⁰

Climate change also affects the property insurance sector, which offers a variety of insurance products associated with losses from natural hazards and natural catastrophes.⁸¹ All property insurers factor into insurance product pricing the risks posed by climate change, with high prices sending “signals to individuals as to the hazards they face.”⁸² In short, climate change and natural hazards can increase insurance costs, and mitigation can be used to lower risk and potentially reduce insurance premiums.

2. Hazard Mitigation and Insurance

The increasing frequency and severity of climate change-related natural hazards and natural catastrophes could result in greater loss of life and property, imposing increased costs on individuals, communities, and the government. Hazard mitigation, or actions “to reduce loss of life and property by lessening the impact of disasters,”⁸³ is a proven way to reduce the risks and costs associated with natural hazards, for both the government and individuals. For example, “[n]ationwide, mitigation efforts reduced the cost of natural disasters by an estimated \$3.2 billion in fiscal year 2013.”⁸⁴ A 2007 study of Florida homeowners after Hurricane Charley revealed that homes meeting wind-resistant construction standards instituted after 1994 had nearly 60 percent fewer insurance claims and 40 percent less damage than homes built before those standards were enacted.⁸⁵ State, local, and tribal governments can mitigate the damage and associated costs of natural hazards by, for example, passing and enforcing resilience-based building codes and engaging in thoughtful planning and zoning.

⁷⁷ *Id.* at 70.

⁷⁸ *Id.* at 74.

⁷⁹ *Id.* at 78.

⁸⁰ *Id.* at 6.

⁸¹ For more information about insurance products relating to natural catastrophes, see Catastrophe Insurance Report, *supra* note 1.

⁸² Howard Kunreuther and Erwann Michel-Kerjan, *Managing Catastrophic Risks through Redesigned Insurance: Challenges and Opportunities*, at 17 (July 30, 2012), available at http://opim.wharton.upenn.edu/risk/library/J2013Kunreuther+Michel-Kerjan_Managing-Cat-Risks-through-Redesigned-Insurance.pdf.

⁸³ Federal Emergency Management Administration, *What is Mitigation?*, available at <http://www.fema.gov/what-mitigation>. See also 44 CFR § 201.2 (defining “hazard mitigation” as “sustained action taken to reduce or eliminate the long-term risk to human life and property from hazards”).

⁸⁴ U.S. Department of Homeland Security, *National Preparedness Report*, at 37 (March 30, 2014), available at https://www.fema.gov/media-library-data/1409688068371-d71247cab52a55de78305a4462d0e1a/2014%20NPR_FINAL_082914_508v11.pdf.

⁸⁵ Cassandra R. Cole, David A. Macpherson, Kathleen A. McCullough, *A Comparison of Hurricane Loss Models*, at 6 (April 2010), available at <http://www.stormrisk.org/sites/default/files/A%20Comparison%20of%20Hurricane%20Loss%20Models.pdf>.

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Insurance can play a role in financing hazard mitigation. For example, some states, including Florida, Louisiana, Maryland, and Mississippi, mandate insurance premium discounts when homeowners undertake specified mitigation measures.⁸⁶ Private market solutions tied to insurance can also help encourage hazard mitigation. For example, MyStrongHome, an initiative focused on “making our communities stronger in an age of increasingly frequent and severe weather events,”⁸⁷ helps individuals finance mitigation investments by lending funds for upfront construction costs and using reductions in insurance premiums to assist individuals in paying back the loan over five years.⁸⁸

3. Consumer Resources and the Path Forward

Strengthening homes and communities through hazard mitigation requires a sustained commitment from, and coordination by, local, tribal, state, and federal government officials, as well as participation by individual consumers, insurers, and others in the private sector. As an example of this coordination, in partnership with the Federal Emergency Management Agency, FIO is jointly hosting a series of stakeholder meetings with private sector, public sector, consumer advocate, and academic participants through 2016 about flood insurance and the National Flood Insurance Program (NFIP).

To the extent possible, consumers should understand the natural catastrophe risks in their region and the measures available to mitigate those risks. Consumers may wish to consult the mitigation resources listed in Appendix II.

Local, tribal and state officials, including state insurance regulators, should promote programs to raise awareness of the value of mitigation. Insurers should consider offering financial incentives for homeowners who invest in mitigation measures that reduce risks and costs associated with extreme weather and other effects of climate change. Working both independently and in partnership with the public sector, insurers should continue to support consumer education about the risks associated with climate change, the implications for these increased risks on the price of insurance, and the value of mitigation for homeowners. Further, local, tribal, state, and federal governments should continue to support investment in resilience and mitigation efforts in order to lessen the public and private costs following such events.

⁸⁶ See, e.g., Institute of Building and Home Safety, *Fortified Home FAQs: How Can I Participate in Fortified Homes*, available at <https://www.disastersafety.org/fortified/fortified-home-faqs/>; Florida Office of Insurance Regulation, *Premium Discounts for Hurricane Loss Mitigation*, available at <http://www.floir.com/Sections/PandC/HurricaneLossMitigation.aspx>; Maryland Insurance Administration, *Bulletin 09-08* (April 16, 2009), available at <http://insurance.maryland.gov/Insurer/Documents/bulletins/bulletinpc09-08-windstorm.pdf>. Other states and cities offer income tax credits or building permit rebates for consumers seeking to strengthen their homes. See, e.g., South Carolina Department of Insurance, *State Income Tax Credits for Fortification Measures*, available at <http://www.doi.sc.gov/593/State-Income-Tax-Credit-for-Fortificatio>; City of Orange Beach, Alabama, Ordinance No. 2012-1145: *An Ordinance Adopting Technical Codes and Supplemental Provisions* (2012), available at http://www.cityoforangebeach.com/pages_2011/pdfs/ordinances/2012/2012-1145_Building_Codes_2012_Adopted.pdf.

⁸⁷ MyStrongHome, *About*, available at <http://www.mystronghome.net/about/>.

⁸⁸ MyStrongHome, *Our Approach*, available at <http://www.mystronghome.net/our-approach/>.

IV. Fairness in Insurance Practices

A. Risk Classifications: Marital Status

Insurers examine numerous factors when underwriting an insurance policy, that is, when determining whether to accept a risk, and if so, under what terms and for what price (or premium).⁸⁹ Underwriting generally involves “risk classification,” where insurers analyze a number of data points that are used to assign consumers to rating tiers associated with particularized coverage limits and premium prices.

Marital status is a factor that many insurers use in the rating and pricing of some personal lines insurance. According to a recent study, five major insurers charge higher premiums for automobile insurance to single, separated, and divorced consumers than to married consumers.⁹⁰ A smaller subset of insurers charge higher premiums to individuals in domestic partnerships as compared to those who are married.⁹¹ Higher premiums may even apply to widows: women who have lost a spouse face, on average, 20 percent higher premiums for state-mandated liability coverage, compared to when they were married.⁹² These findings are consistent with a separate study which concluded that, on average, married 20-year-olds pay 21 percent less than single 20-year-olds for the same auto insurance policy.⁹³ Marital status also may affect the cost of home insurance.⁹⁴

1. Questioning the Use of Marital Status in Personal Lines Insurance Pricing

Whether marital status should remain a factor for rating and pricing insurance is an important public policy question. Some maintain that marital status is an appropriate factor in rating auto insurance because married drivers are safer,⁹⁵ married drivers make fewer claims than unmarried drivers⁹⁶ and, more broadly, that the consideration of a wide variety of underwriting factors

⁸⁹ See IRMI Glossary, *supra* note 15.

⁹⁰ Consumer Federation of America, *New Research Shows That Most Major Auto Insurers Vary Prices Considerably Depending on Marital Status* (July 27, 2015), available at http://consumerfed.org/press_release/new-research-shows-that-most-major-auto-insurers-vary-prices-considerably-depend-on-marital-status/ (identifying Farmers, GEICO, Liberty, Nationwide, and Progressive).

⁹¹ *Id.* (identifying GEICO and Progressive).

⁹² *Id.*

⁹³ Nick DiUlio, “The surprising impact of age, gender and marriage on car insurance,” *insurancequotes.com* (March 26, 2015), available at <http://www.insurancequotes.com/auto/surprising-impact-of-age-gender-marriage-on-car-insurance>.

⁹⁴ See, e.g., “Being married can save you money on insurance,” *insure.com* (Dec. 7, 2009) (“[s]ome home insurance companies may also use marital status as a factor in determining your cost for home insurance, although marital status is used more widely in pricing auto insurance” and noting that one insurer, for example “does not use marital status to set prices for home or car insurance, but the company does offer a 5 percent ‘personal status discount’ for married couples”), available at <http://www.insure.com/general-insurance/married.html>.

⁹⁵ *Id.*

⁹⁶ Alexis O’Connell, “4 Facts About Marriage and Car Insurance,” *everquote.com* (November 13, 2014), available at <https://www.everquote.com/blog/car-insurance/marriage-car-insurance-facts/>.

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contributes to a competitive insurance market.⁹⁷ However, penalizing otherwise safe drivers for a personal legal status unconnected to driving can raise issues of fairness. Is it fair for the victim of an abusive spouse who obtains a divorce to face higher auto insurance premiums for ending a dangerous relationship? Is it fair for a widow (or widower) to pay more for auto insurance after experiencing the loss of a spouse?⁹⁸ Further, for any number of reasons, many people in stable, long-term relationships may choose not to pursue or obtain the legal status of marriage.⁹⁹

2. Consumer Resources and the Path Forward

Unlike most states, Hawaii, Massachusetts, Michigan, and Montana prohibit the use of marital status in setting the price of auto insurance.¹⁰⁰ Some states also prohibit consideration of marital status in pricing homeowners insurance.¹⁰¹ State insurance regulators should continue to assess whether marital status is an appropriate rating or pricing consideration for all personal lines insurance. Consumers with questions about the effect of marital status on the cost of auto or other personal lines insurance should contact their insurance producer, insurer, or state insurance regulator (contact information for state insurance regulators is listed in Appendix I) for more information.

B. Risk Classifications: Sex and Gender

Sex and gender, like marital status, are risk classifications commonly used by insurers. Although health insurers are prohibited by the Patient Protection and Affordable Care Act from using sex and gender as risk classifications when underwriting health insurance policies,¹⁰² insurers

⁹⁷ Insurance Information Institute, *Media Advisory: Use of a Variety of Factors Beyond Driving Record Makes for a Competitive Auto Insurance Marketplace* (August 3, 2015), available at <http://www.iii.org/press-release/media-advisory-use-of-a-variety-of-rating-factors-beyond-driving-record-makes-for-a-competitive-auto-insurance-marketplace-080315>.

⁹⁸ The Delaware Insurance Commissioner, for one, answered “no”: “This so-called ‘widow’s penalty’ is completely unfair. . . . I will not approve any auto insurance filings that cannot provide actuarially sound data for including widows and widowers in a higher single rate category.” “Commissioner Stewart Outlaws ‘Widow’s Penalty’ in Setting Auto Insurance Rates,” *Insurance Matters*, Issue 21, at 4 (Fall 2015), available at http://www.delawareinsurance.gov/newsletter/DOInewsletter_21thEdition.pdf.

⁹⁹ The issue of same-sex marriage illuminates the considerations insurers and policymakers must weigh when determining the fairness of using marital status as an underwriting or pricing factor. Prior to the Supreme Court’s 2015 decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that same-sex couples have the fundamental right to marry and that the Constitution requires a state to recognize the marriage of a same-sex couple validly married in another state, many same-sex partners could not legally marry. That a person legally excluded from the institution of marriage had to pay higher insurance premiums because of that exclusion illuminates the potential unfairness of using the legal status of marriage as an underwriting and rating factor.

¹⁰⁰ Haw. Rev. Stat. § 431:10C-207; Mich. Ins. Code § 500.2111(4); Mont. Code Ann. § 49-2-309; Massachusetts Division of Insurance, 211 CMR 79.00.

¹⁰¹ See, e.g., Mass. Gen. Law ch. 175, § 4C (“No insurer . . . shall take into consideration when deciding whether to provide, renew, or cancel homeowners insurance the race, color, religious creed, national origin, sex, age, ancestry, sexual orientation, children, **marital status**, veteran status, the receipt of public assistance or disability of the applicant or insured.”) (emphasis added).

¹⁰² See, e.g., 42 U.S.C. § 18116 (non-discrimination).

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continue to use sex and gender as risk classification factors for non-health insurance products such as life insurance, annuities, and auto insurance. For instance, insurers have provided separate annuity rates (i.e., prices) for men and women since the mid-nineteenth century.¹⁰³ Also, men on average pay higher premiums than women for both life insurance and auto insurance, with one study finding that, over a lifetime, men pay approximately \$15,000 more for auto insurance than women.¹⁰⁴

1. Anti-Discrimination Efforts

Sex- and gender-based approaches to the pricing of insurance products raise questions of fundamental fairness. Insurers assert that sex is an appropriate basis for underwriting and pricing insurance products, noting, for example, that from a claims perspective, women are safer drivers than men. Previous attempts to prohibit sex-based discrimination in insurance pricing through federal legislation did not succeed.¹⁰⁵ In the absence of federal legislation, states and courts have begun to explore the propriety of sex-based pricing of insurance and whether to classify sex- or gender-based underwriting as discriminatory and prohibit the practice.¹⁰⁶

Box 1: Sex vs. Gender

Although many use the words “sex” and “gender” interchangeably, the terms have distinct meanings. According to the World Health Organization: “Sex refers to the biological and physiological characteristics that define men and women. Gender refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for men and women.”¹⁰⁷ The difference between sex and gender has relevance to the question of fairness in auto insurance pricing. People identifying as transgender, i.e., “[w]hen one’s gender identity and biological sex are not congruent,”¹⁰⁸ may have a different gender identity than the sex noted on their birth certificate or driver’s license. A sex-neutral approach to insurance underwriting and pricing would treat all people equally, regardless of sex or gender.

¹⁰³ Mary Heen, *From Coverture to Contract: Engendering Insurance on Lives*, 23 YALE J. OF LAW AND FEMINISM 335, 337, 377 (2011), available at <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1105&context=law-faculty-publications>.

¹⁰⁴ Kathy Kristof, “How men can beat gender bias in car insurance,” *CBS Moneywatch* (May 15, 2012), available at <http://www.cbsnews.com/news/how-men-can-beat-gender-bias-in-car-insurance/>. See also Daniel Kurt, “7 Factors that Affect your Life Insurance Quote,” *Investopedia*, available at <http://www.investopedia.com/articles/investing/102914/7-factors-affect-your-life-insurance-quote.asp>.

¹⁰⁵ Mary Heen, *Nondiscrimination in Insurance: The Next Chapter*, 49 GEORGIA L. REV. 1 (Fall 2014), available at <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2049&context=law-faculty-publications>

¹⁰⁶ *Id.*

¹⁰⁷ World Health Organization, *Gender, women and health: What do we mean by “sex” and “gender”?*, available at <http://apps.who.int/gender/whatisgender/en/>.

¹⁰⁸ American Psychological Association, *Definitions Related to Sexual Orientation and Gender Diversity in APA Guidelines and Policy Documents*, available at <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf>.

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As previously mentioned, some states prohibit the use of sex or gender in the pricing of certain non-health insurance products.¹⁰⁹ In 1985, Montana banned the use of gender as a factor in setting premium rates, including for automobile policies.¹¹⁰ Massachusetts' Private Passenger Motor Vehicle Insurance Rates regulation prohibits the use of a variety of factors, including sex, in underwriting and pricing auto insurance, as do statutes in Hawaii, Michigan, and North Carolina.¹¹¹ Pennsylvania "prohibits insurers from denying benefits or coverage to individuals on the basis of unfair sex or marital status discrimination in the terms or conditions of insurance contracts and in the underwriting criteria of insurers," but allows differentiating prices on the basis of sex with "sound actuarial justification."¹¹²

Additionally, in 1983, the U.S. Supreme Court addressed the issue of sex-based insurance pricing, albeit in the limited context of employer-provided retirement benefits. In *Arizona Governing Committee v. Norris*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 "prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay a woman lower monthly retirement benefits than a man who has made the same contributions," even though women at retirement age tend to outlive men.¹¹³ As a result, "sex-neutral systems [are in place] for payment of employee retirement annuity and pension benefits."¹¹⁴

Further, policymakers outside of the United States also are addressing sex-based discrimination, with a number of countries implementing consumer protection measures related to the practice of sex-based pricing. For example, in 2004, the Council of the European Union released a directive mandating that insurers offering voluntary, commercial insurance in Europe begin to transition to sex-neutral pricing.¹¹⁵

2. The Path Forward

Consumers with questions about the effect of sex or gender on the price of insurance products should contact their insurance producer, insurer, or state insurance regulator (contact information for state insurance regulators is listed in Appendix I) for more information.

¹⁰⁹ See, e.g., Massachusetts Office of Consumer Affairs and Business Regulation, *Massachusetts Consumer Bill of Rights for Automobile Insurance*, available at <http://www.mass.gov/ocabr/insurance/vehicle/auto-insurance/massachusetts-consumer-bill-of-rights-for.html>; Michigan Department of Insurance and Financial Services, *Information on Purchasing Auto Insurance*, available at http://www.michigan.gov/difs/0,5269,7-303-13222_13224-66774--,00.html#q5; Pennsylvania Department of Insurance, *Automobile Insurance Guide*, available at http://www.insurance.pa.gov/Documents/auto_guide.pdf.

¹¹⁰ Mont. Code Ann. § 49-2-309.

¹¹¹ Massachusetts Division of Insurance, 211 CMR 79.00; Haw. Rev Stat § 431:10C-207; Mich. Ins. Code § 500.2111(4); N.C. Gen. Stat. § 58-3-25(a).

¹¹² 31 Pa. Code § 145.1.

¹¹³ *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983).

¹¹⁴ Mary L. Heen, *Sex Discrimination in Pension and Retirement Annuity Plans after Arizona Governing Committee v. Norris: Recognizing and Remediating Employer Non-Compliance*, 8 WOMEN'S RTS. L. REP. 155, 156 (1985) available at <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1260&context=law-faculty-publications>.

¹¹⁵ Heen, *Nondiscrimination*, *supra* note 105, at 71-77.

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Additionally, state and federal policymakers should continue to assess whether sex and gender are appropriate underwriting considerations for insurers. Congress should examine how states are addressing the issue and consider whether sex or gender are valid factors for insurers to use in pricing insurance products. For over thirty years, Congress has considered the need for enhanced federal civil rights legislation that would broadly ban discrimination as it relates to insurance.¹¹⁶ Such federal legislation may be necessary to address the issue of sex- or gender-based discrimination in the insurance industry.

C. Transparency in Homeowners Insurance Coverage

1. Homeowners Insurance and the Policy Form

In a homeowners insurance policy, the insurer, in exchange for the payment of a premium, agrees to pay for damage to the covered property that arises out of the covered perils of the policy. The policy “form” contains the terms governing how much coverage will be provided and under what circumstances. An insurer can develop its own homeowners insurance policy forms or choose to adopt and use standardized forms developed by an insurance advisory organization (such as the homeowners special policy form 3, or HO-3).¹¹⁷

Standardization of homeowners insurance policy forms traditionally has been a significant part of the homeowners insurance business because, among other reasons, it provides clarity of policy language by relying on established interpretations of coverage.¹¹⁸ Additionally, the standardization of insurance policy forms allows consumers the opportunity to compare policies based on price and reputation of the insurer, knowing that the different policies provide consistent coverage.

2. Increasing Use of Non-Standardized Policies

Notwithstanding the continued use of standardized policies in the U.S. homeowners insurance market, some insurers also use non-standardized policy forms that can limit or extend coverage as compared to standardized policy forms. An empirical study of homeowners policies found that 5 of 16 analyzed insurers used policies that were “substantially less generous than the HO-3 policy.”¹¹⁹ In other words, some non-standardized forms reduce the protection provided to consumers in the homeowners insurance policy. For example, some non-standardized homeowners policies exclude all mold-related property damage or place sub-limits on mold-related losses, whereas the standard HO-3 policy covers at least some losses caused by mold (such as loss attributed to mold that is hidden within walls, floors, or ceilings).¹²⁰

¹¹⁶ *Id.* at 23-25.

¹¹⁷ Catastrophe Insurance Report, *supra* note 1.

¹¹⁸ Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1272-73 (2011), available at <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5550&context=uclrev>.

¹¹⁹ *Id.* at 1314.

¹²⁰ *Id.* at 1285.

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The reduced coverage of some non-standardized policies is made more problematic by a lack of transparency which, in turn, hinders the ability of consumers to understand the coverage in their homeowners insurance policies. Generally, policy forms are not made available to a consumer by insurers until after the purchase of the policy, thus reducing the opportunity for a consumer to discover the coverage terms of a homeowners policy.¹²¹ Relatedly, without meaningful transparency, consumers face much more difficulty in comparing policies on the basis of coverage terms. Without understanding the coverage differences among competing homeowners policies, consumers cannot evaluate options from a coverage or price perspective in a fully informed manner.

State insurance regulators and state consumer protection agencies historically have neither provided policy forms to consumers nor educated consumers about the existence of the coverage limitations in some non-standardized policies. This practice is beginning to change. The Nevada Division of Insurance provides policy forms used by the ten largest homeowners insurance groups in Nevada.¹²² In addition, the California Department of Insurance has developed an online comparison tool for consumers shopping for homeowners, renters, and condominium insurance.¹²³ Similarly, the Texas Office of Public Insurance Counsel, which “represent[s] the interests of consumers in insurance matters” primarily before the Texas Department of Insurance,¹²⁴ provides a web-based tool for consumers to compare homeowners insurance policies.¹²⁵

3. The Path Forward

Insurers and state insurance regulators should join in a concerted effort to improve transparency to consumers of the coverage provided by homeowners insurance policies. Insurers should provide consumers with access to homeowners insurance policy forms before purchase, whether by providing a copy as part of an insurance quote, by posting prototype policies on a website, or by other means. Policies should be in a clear format that allows consumers to easily understand the limits, terms, conditions and exclusions. The existence of publicly available and understandable policy forms will better afford an interested homeowner the opportunity to comparison shop for coverage.

State insurance regulators should work to improve the transparency of consumer disclosures regarding policy forms and coverage limits. The NAIC’s Transparency and Readability Working Group notes in its 2016 mandate that it should “[s]ystematize and improve presale disclosures of coverage”; “increase consumer accessibility to different carriers’ policy forms on a

¹²¹ *Id.* at 1319-1323.

¹²² Nevada Division of Insurance, *Policy Forms Used by the 10 Largest Homeowners’ Insurance Groups in Nevada*, available at <http://doi.nv.gov/Consumers/Homeowners-Insurance/Policy-Forms/>.

¹²³ California Department of Insurance, *Homeowners/Renters/Condominium Owners Coverage Comparison*, available at <https://interactive.web.insurance.ca.gov/apex/f?p=143:1>.

¹²⁴ Texas Office of Public Insurance Counsel, *Agency Information*, available at <http://www.opic.texas.gov/opic-info/agency-overview>.

¹²⁵ Texas Office of Public Insurance Counsel, *Homeowners Insurance Comparison*, available at <http://www.opic.texas.gov/residential-property/compare-policy-coverages/homeowners>.

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presale basis” and “facilitate consumers’ capacity to understand the content of insurance policies and assess differences in insurers’ policy forms.”¹²⁶ State insurance regulators should prioritize the charges of the Transparency and Readability Working Group and provide greater assistance with homeowners insurance policies to consumers in every state.

D. Mandatory Arbitration Clauses

1. Mandatory Arbitration for Consumer Insurance Contracts

Mandatory arbitration clauses are provisions that appear in some consumer contracts requiring the parties to resolve some or all disputes through the process of arbitration instead of litigation. Arbitration is a dispute resolution process conducted in front of one or more non-judicial third-party decisionmakers. Typically, an arbitration clause specifies that the results are binding and subject to very limited judicial review, and that a set of rules established by an arbitration body will apply to the proceeding rather than state or federal rules of civil procedure or evidence. Arbitration rules, among other differences, may provide for limited or no discovery as compared to state or federal rules of civil procedure. In a March 2015 report, the Consumer Financial Protection Bureau (CFPB) found that mandatory arbitration clauses are a common feature of consumer financial contracts for tens of millions of consumers.¹²⁷ Some insurers also incorporate mandatory arbitration clauses in insurance contracts, particularly for commercial lines such as commercial liability policies.¹²⁸ While some states have laws prohibiting the use of such arbitration clauses, most do not.¹²⁹

Proponents of arbitration argue that such proceedings are faster and less costly than going to court, and that experienced arbitrators bring substantive expertise to the dispute resolution process.¹³⁰ Indeed, mandatory binding arbitration provisions are common in a range of commercial contexts, including reinsurance contracts, where parties with commensurate bargaining power have agreed on this method of dispute resolution. Nevertheless, mandatory arbitration clauses can be problematic if balanced bargaining power does not exist. For instance, critics charge that such clauses are harmful to consumers and are included in contracts in order to disable “consumer challenges to practices like predatory lending, wage theft and discrimination”

¹²⁶ NAIC, *Transparency and Readability of Consumer Information (C) Working Group: 2016 Charges*, available at http://naic.org/cmte_c_trans_read_wg.htm.

¹²⁷ Consumer Financial Protection Bureau, *Arbitration Study, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015), available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

¹²⁸ Darren S. Teshima and Harry Moren, *Closing the Courthouse Door to Insurance Disputes: Mandatory Arbitration Clauses in Insurance Policies Gain Traction*, Orrick (May 27, 2015), available at <http://blogs.orrick.com/insurance/2015/05/27/closing-the-courthouse-door-to-insurance-disputes-mandatory-arbitration-clauses-in-insurance-policies-gain-traction/>.

¹²⁹ Public Citizen, *State Laws Regulating Arbitration in Insurance Contracts*, available at http://www.citizen.org/congress/article_redirect.cfm?ID=6560.

¹³⁰ JAMS, *JAMS Arbitration Process*, available at <http://www.jamsadr.com/adr-arbitration/>.

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by preventing class action lawsuits and preventing individuals from bringing a lawsuit.¹³¹ Critics further assert that in this “alternate system of justice,” the “rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider” companies to be the “clients” and “cultivate close ties with companies to get business.”¹³²

In response to these concerns, the CFPB published, in May 2016, a proposed rule that would prohibit the use of pre-dispute arbitration clauses to block class actions by providers of certain non-insurance consumer financial products and services related to lending, storing, moving, or exchanging money.¹³³ According to the CFPB, under the proposed rule, consumers would regain access to “the legal system . . . so they could file a class action or join a class action when someone else files it.”¹³⁴

The CFPB’s authority excludes the business of insurance and any person regulated by a state insurance regulator,¹³⁵ leaving insurance consumers to rely on non-uniform state-by-state approaches to the use of mandatory arbitration clauses in insurance contracts. Twenty-four states allow unrestricted use of mandatory arbitration clauses in insurance policies; 16 states prohibit insurers from enforcing arbitration clauses in all types of policies; and the remaining states have laws or regulations prohibiting mandatory arbitration clauses in certain situations.¹³⁶ States that take a targeted approach to regulating or prohibiting arbitration clauses often focus on personal lines insurance products. For instance, Rhode Island prohibits the use of mandatory arbitration clauses only in life insurance policies,¹³⁷ Mississippi prohibits such use for uninsured motorist coverage,¹³⁸ and Delaware insurance regulations allow for non-binding arbitration in coverage actions involving auto and homeowners insurance, but allow determinations from such proceedings to be appealed in court.¹³⁹ As of August 2016, at least one state is considering

¹³¹ Jessica Silver-Greenberg and Robert Gebeloff, “Arbitration Everywhere, Stacking the Deck of Justice,” *New York Times* (October 31, 2015), available at <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

¹³² Jessica Silver-Greenberg and Michael Corkery, “In Arbitration, a ‘Privatization of the Justice System,’” *New York Times* (October 31, 2015), available at <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

¹³³ *Arbitration Agreements*, 81 Fed. Reg. 32829 (May 24, 2016).

¹³⁴ Consumer Financial Protection Bureau, *CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court* (May 5, 2016), available at <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/>.

¹³⁵ See 12 U.S.C. § 5517.

¹³⁶ Public Citizen, *State Laws Regulating Arbitration in Insurance Contracts*, available at http://www.citizen.org/congress/article_redirect.cfm?ID=6560. However, the interplay between state laws prohibiting the use or enforcement of mandatory arbitration provisions and the Federal Arbitration Act complicates the applicability of these laws. While these laws have been upheld or have not been challenged in thirteen states, courts in three states (Alabama, Massachusetts, and Vermont) have held that the laws are preempted by the Federal Arbitration Act. *Id.*

¹³⁷ R.I. Gen. Laws. § 27-4-13.

¹³⁸ Miss. Code Ann. § 83-11-109.

¹³⁹ Delaware Department of Insurance, *Regulation 901, Arbitration of Automobile and Homeowners’ Insurance Claims*, available at <http://www.delawareinsurance.gov/departments/consumer/Reg10.pdf>.

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whether to allow a homeowners insurer to include a mandatory arbitration clause in exchange for a premium discount.¹⁴⁰

2. Consumer Resources and the Path Forward

Consumers with questions about mandatory arbitration clauses may wish to speak with their insurance producer or insurer for more information, or contact their state insurance regulator (contact information for state insurance regulators is listed in Appendix I) to receive an explanation or assistance in addressing this issue.

Policymakers and state insurance regulators should consider developing appropriate constraints on mandatory arbitration clauses in insurance contracts. State policymakers and insurance regulators should assess whether the current lack of uniformity in state laws and regulations raises questions about whether state consumer protections for insurance consumers should better align with those afforded to the consumers of other financial products and services.

E. The Costs of Filing an Insurance Claim

Most consumers purchase property insurance hoping never to file a claim, but with the expectation that should one arise the claim will be paid in accordance with the terms of the policy. Most consumers do not expect that making a claim could have a negative impact even if the policyholder is not at fault. However, in many states, and with many insurers, this is a risk. Filing a claim can increase the price of insurance when applying for renewal, and, for some consumers, may even result in non-renewal. This practice is sometimes referred to as “use it and lose it.”¹⁴¹

Through commonly used insurance databases, insurers collect and share information regarding policyholders’ damages and claims, whether paid or not.¹⁴² For example, the Comprehensive Loss Underwriting Exchange (CLUE), operated by LexisNexis, collects personal auto and personal property claims history about consumers going back seven years.¹⁴³ Another database, the Automobile-Property Loss Underwriting Service (A-PLUS), operated by Verisk Analytics, contains up to seven years of information regarding claims filed by policyholders and previous

¹⁴⁰ See, e.g., Sharadha Kalyanam, “Texas Farm Bureau Mutual proposes premium discount in return for waiver of right to sue,” *SNL* (Aug. 9, 2016), available at <https://www.snل.com/web/client?auth=inherit#news/article?id=37363616&KeyProductLinkType=4>.

¹⁴¹ Amy Bach, “What’s the point? A ‘use it and lose it’ Update,” *United Policyholders*, available at <http://www.uphelp.org/blog/whats-point-use-it-and-lose-it-update>.

¹⁴² Alina Tugend, “Short Cuts: The Peace of Mind of Home Insurance, Unless You Use It,” *New York Times* (October 1, 2005), available at http://www.nytimes.com/2005/10/01/business/the-peace-of-mind-of-home-insurance-unless-you-use-it.html?_r=0.

¹⁴³ Washington State Office of the Insurance Commissioner, *CLUE (Comprehensive Loss Underwriting Exchange)*, available at <http://www.insurance.wa.gov/your-insurance/tips/clue.html> (Washington OIC, *CLUE*).

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property claims.¹⁴⁴ Most insurers report to these databases information arising from incidents for which the insurers set up claim files, pay out money, or formally deny a claim. Many insurers rely on reports generated by CLUE and A-PLUS when determining whether to accept an application for coverage or how much premium to charge for that coverage.¹⁴⁵ CLUE and A-PLUS reports for a particular property can also be accessed by the property owner.¹⁴⁶

According to a 2014 report on the price of homeowners insurance, the average annual insurance premium for a U.S. homeowner increased by nine percent after a single claim.¹⁴⁷ Consumer advocates have observed that even consumers with a claim-free history are dropped from coverage after filing a single claim, and such consumers often have difficulty replacing the policy at comparable cost.¹⁴⁸ A 2015 study focused on auto insurance reported an even more significant effect, noting that filing a claim of any type over \$2,000 resulted in an average premium increase of 75 percent in Massachusetts, 75 percent in California, and 62 percent in New Jersey.¹⁴⁹ Even consumers in the states with the lowest average premium increases (Maryland, Michigan, and Montana) faced average premium increases of at least 22 percent following a \$2,000 claim.¹⁵⁰

1. The Path Forward

Reliance on loss information to price insurance is necessary. A history of claims and insured losses can indicate that a consumer presents a higher risk of loss than a consumer without such a claims history. However, the effect that a single claim can have on premiums can be especially disruptive and potentially unfair for consumers who file a claim even though the consumer is not at fault. Consumers are encouraged to review policy terms with insurance producers, or with the insurer directly, and to shop for coverage that offers the consumer the best protection available. Consumers who believe insurance costs unfairly increase after filing a claim may also wish to contact their state insurance regulator (contact information for state insurance regulators is listed in Appendix I) and ask for an explanation or assistance in addressing this issue.

Policymakers and insurance regulators should identify any reforms needed to address increased premiums after claims caused by accidents for which the policyholder was not at fault.

¹⁴⁴ Verisk Analytics, *Policy, Claims and Coverage Information: A-PLUS Property*, available at <http://www.verisk.com/underwriting/property/policy-claims-and-coverage-information.html>.

¹⁴⁵ Washington OIC, *CLUE*, *supra* note 143.

¹⁴⁶ LexisNexis, *Personal Reports*, available at https://personalreports.lexisnexis.com/fact_act_disclosure.jsp; Verisk Analytics, *A-PLUS – How to order your free A-PLUS loss history report*, available at <http://www.verisk.com/underwriting/order-an-a-plus-loss-history-report.html>.

¹⁴⁷ Nick DiUlio, “One home ownership claim can cause your premium to jump by 32%,” *Insurance Quotes* (October 16, 2014), available at <http://www.insurancequotes.com/home/home-insurance-claim-premium-increase>.

¹⁴⁸ Bach, *supra* note 141.

¹⁴⁹ Nick DiUlio, “Making one auto insurance claim can drive up your rate by up to 76 percent,” *Insurance Quotes* (January 27, 2015), available at <http://www.insurancequotes.com/auto/one-auto-insurance-claim-rate-increase>.

¹⁵⁰ *Id.*

V. Fairness in State Insurance Standards

A. State Insurance Guaranty Associations

An important insurance consumer protection goal, similar in purpose to the goals of the Federal Deposit Insurance Corporation for deposit accounts, is ensuring payments of benefits to consumers even if an insurer becomes insolvent. In order to provide this protection, states establish guaranty associations (sometimes referred to as guaranty funds) for the benefit of policyholders residing in that state.

1. Understanding State Insurance Guaranty Associations

If an insurer can no longer meet its financial obligations to consumers, the insurance regulator of the state in which the insurer is domiciled becomes the statutory receiver and often seeks to rehabilitate the insurer. If rehabilitation is not feasible, a court will preside over a liquidation and the consumer protections provided by the state guaranty associations are triggered.

The benefits of each guaranty association are governed by the laws of its state and each association consists of all insurers licensed to do business in that state. When a guaranty association is required to pay obligations of an insolvent insurer, the association assesses each member insurer a proportionate share of the cost based on the member insurer's market share in the lines of business written by the insolvent insurer.¹⁵¹ State guaranty associations help protect consumers by providing a benefit to cover some or all of the gap, if any, between the amount an insolvent insurer owes to consumers and the amount the insurer is able to pay. State guaranty associations are not, however, required to make a consumer or policyholder completely whole. The maximum benefit payable by an association to an individual policyholder is set by the laws of the policyholder's state of residence.

2. The Need for National Uniformity

Coverage limits under state guaranty associations are not consistent state-to-state. For example, if a life insurer becomes insolvent, a life insurance policyholder residing in the state of Washington may be eligible for up to \$500,000 in guaranty fund protection for the policy's cash value, while a policyholder with the same product from the same insurer residing in Oregon is limited to only \$100,000.¹⁵² Similarly, a Michigan resident who owns a property or casualty policy may be eligible for up to \$5,000,000 in protection for covered claims, while a policyholder in Arizona is limited to only \$300,000.¹⁵³

¹⁵¹ Most states have established separate guaranty associations for life/health and property/casualty lines of business.

¹⁵² Wash. Rev. Code § 48.32A.025(3)(b)(i)(A); Or. Rev. Stat. § 734.810(11)(b)(A). See also National Organization of Life & Health Guaranty Associations, *State Laws and Provisions Report: Benefits Limits* (updated as of July 1, 2016), available at <http://www.nolhga.com/factsandfigures/main.cfm/location/lawdetail/docid/8>.

¹⁵³ Mich. Comp. Laws § 500.7925(6); Ar. Rev. Stat. § 20-667(B).

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State regulators attempted to reform and update state guaranty association laws in order to achieve uniform national protections. In 2009, state insurance regulators adopted revisions to the Life and Health Insurance Guaranty Association Model Act (Model Life Guaranty Act).¹⁵⁴ These revisions expanded the list of covered products to specifically include disability and long-term care insurance, and either reconfirmed existing coverage limits or established new limits for each line of business.¹⁵⁵ As with any NAIC Model Law, the Model Life Guaranty Act does not take effect in a state unless approved by the state legislature and signed into law by the governor.

Additionally, because eligibility for coverage and coverage limitations are generally based on the policyholder's residence at the time of insolvency, instead of residence when the policy was purchased, the protection available when the consumer buys a policy may later change substantially. Under current state laws, if a consumer purchases a life insurance policy in a state that has adopted a cash value limit of \$300,000 (for example, North Carolina), the limit could rise (for example, to \$500,000 in Connecticut) or fall (for example, to \$100,000 in California) depending on the location of the policyholder's next residence.

3. Guaranty Funds: Public Awareness

With the exception of two states (Alabama and Michigan), insurers and insurance producers are prohibited from advertising protections provided by the state's life and health insurance guaranty association. This prohibition on advertising also applies to the property and casualty insurance guaranty associations in 19 states,¹⁵⁶ and prevents insurers and producers from using even the existence of the guaranty association to provide assurance to potential consumers about consumer protections related to an insurance product. The prohibition is based on concerns that state guaranty associations may create a moral hazard and some insurers will underprice or offer financially unsustainable products to generate revenue.¹⁵⁷ Supporters of the prohibition also observe that state guaranty association coverages and limitations are complicated and difficult to explain, potentially leading to misunderstanding by producers and consumers.

Minnesota has adopted an approach that seeks to balance concerns over moral hazard with the benefits of transparency and improved decision-making based on availability of information. Although Minnesota joins other states in prohibiting the use of the life and health guaranty association for sales purposes, its law allows insurers and producers to verbally explain the coverage provided by the association at any time during the application process or thereafter.¹⁵⁸

¹⁵⁴ The Model Life Guaranty Act is available at <http://www.naic.org/store/free/MDL-520.pdf>.

¹⁵⁵ The limits are \$100,000 for health claims, \$300,000 for life claims, \$100,000 for cash surrender/withdrawal values, \$300,000 for both disability and long-term care claims, \$500,000 for basic or major medical claims, and \$250,000 in the present value of annuity benefits. See Model Life Guaranty Act, Section 3. Covered products and limitations under the Property and Casualty Insurance Guaranty Association Model Act have remained substantially the same for decades.

¹⁵⁶ See, e.g., P.S. 40 § 991.1820; RI Gen. L. § 27-34-19; and 8 V.S.A. § 3626.

¹⁵⁷ NAIC, *Proceedings Citations for Life and Health Insurance Guaranty Association Model Act* (Model No. 520), at PC-520-23, available at <http://www.naic.org/store/free/MDL-520.pdf>.

¹⁵⁸ M.S.A. Section 61B.28, Subd. 4. Minnesota is also one of the 31 states (plus the District of Columbia) that require life insurers to provide a document summarizing guaranty association coverage to the policyholder either at

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The longstanding prohibition against describing the coverage backstop may create a lack of transparency in the insurance and retirement products marketplace. This prohibition may also contribute to a lack of trust and confidence among prospective insureds, and further complicate the insurance product buying process.

4. Consumer Resources and the Path Forward

Consumers may wish to proactively seek information about guaranty association coverage of their insurance policies and annuities from the websites for the trade associations for state life and health insurance guaranty associations and for state property/casualty insurance guaranty associations.¹⁵⁹ The websites provide additional information on insurer insolvencies, including the associations' roles and relevant state laws and regulations. Consumers with concerns about guaranty association benefits may also wish to contact their state insurance regulator (contact information for state insurance regulators is listed in Appendix I) to receive an explanation in addressing this issue.

State policymakers and insurance regulators should evaluate whether the guaranty association benefits provided to consumers in their states are appropriate when compared to those available to consumers of the same product from the same insurer in other states. These are issues with interstate implications, especially given an increasingly mobile society and, therefore, are of national interest. For these reasons, if coverage limits are not standardized nationally by the states, then Congress should consider prescribing nationally uniform standards.

B. Workers' Compensation Insurance

Each year, more than three million workers in the United States are either seriously injured or killed as a result of work-related injuries.¹⁶⁰ For many of these workers, workers' compensation (a remediation insurance system) provides for costs related to medical care and treatment, rehabilitation, lost wages, and other financial loss.¹⁶¹

or before the time of delivery of the policy, or (in some states) upon request. In general, the summary document describes the types of policies that are covered by the association and related coverage limitations, states that the policy or contract owner should not rely on guaranty association coverage when selecting an insurer, states the advertising prohibition, and provides other information as directed by the state insurance regulator. American Council of Life Insurers Law Survey, *Guaranty Association Summary Document Requirements* (Update May 11, 2015).

¹⁵⁹ The websites of the National Organization of Life and Health Insurance Guaranty Associations (www.nolhga.com) and the National Conference of Insurance Guaranty Funds (www.ncigf.org) also provide links to the websites of every life and health insurance guaranty association and every property/casualty insurance guaranty association, respectively.

¹⁶⁰ OSHA, U.S. Department of Labor, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job* (June 2015), available at <http://www.dol.gov/oshareport/20150304-inequality.pdf>.

¹⁶¹ See 2015 Annual Report, *supra* note 1, at 72, for an overview of workers' compensation insurance in the United States.

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Each of the 50 states, the District of Columbia, and U.S. territories has unique workers' compensation laws and regulations. Through workers' compensation, employers assume financial responsibility for paying or insuring the statutorily established benefits for employees' work-related injuries.¹⁶² Workers' compensation laws provide defined benefits for specified forms of occupational injuries and illnesses in exchange for the injured worker forgoing a private lawsuit against his or her employer. Workers' compensation systems serve as substitutes for lengthy, expensive civil trials and, in this way, reduce financial uncertainty for both employees and employers.¹⁶³

With the exception of Texas,¹⁶⁴ every state requires private sector employers to possess some form of workers' compensation coverage to benefit injured employees.¹⁶⁵ In most states, mandatory workers' compensation coverage does not apply to the self-employed or independent contractors;¹⁶⁶ and, in some states, mandatory coverage does not extend to some employees in certain sectors, such as farm and domestic workers.¹⁶⁷

According to the National Academy of Social Insurance, in 2014 approximately 132.7 million workers were protected by workers' compensation insurance, representing about 90 percent of the workforce with approximately \$6.8 trillion worth of wages.¹⁶⁸ Employers' estimated costs

¹⁶² NAIC, *An Overview of Workers' Compensation Independent Contractor Regulatory Approaches* (2009) (Workers Compensation Overview), available at <http://www.naic.org/store/free/OWC-OP.pdf>.

¹⁶³ David F. Utterback, Alysha R. Meyers, and Steven J. Wurzelbacher, *Workers' Compensation Insurance: A Primer for Public Health*, Department of Health and Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health (January 2014), available at <http://www.cdc.gov/niosh/docs/2014-110/pdfs/2014-110.pdf>.

¹⁶⁴ It is not mandatory for employers in Texas to provide workers' compensation insurance coverage. Under the Texas system, employers who "opt out" of providing workers' compensation insurance need to notify their employees and the state that workers' compensation benefits are not provided. These employers that opt out, also referred to as "non-subscribers," are subject to the tort system and can be sued in court by an injured employee. To limit their exposures or to enhance employee benefits, some non-subscribers purchase private insurance – an "Employee Injury Benefit Plan" or "Occupational Injury Benefit Plan" – to cover their employees' injuries by providing compensation for medical expenses and lost wages. These plans typically specify any restrictions, conditions, or requirements for receiving benefits, and often require employees to sign a binding arbitration agreement in exchange for receiving plan benefits. An employee does not have to accept the agreement and can retain the right to pursue a claim in the tort system for any sustained injuries. See Texas Department of Insurance, *Information for Workers' Compensation Non-subscribers*, <http://www.tdi.texas.gov/wc/employer/cb007.html>; Texas Workers' Compensation Act, 83rd Texas Legislature (R) (2013), available at <http://www.tdi.texas.gov/wc/act/#html>.

¹⁶⁵ Insurance Information Institute, *Workers Compensation* (January 2016), available at <http://www.iii.org/issue-update/workers-compensation>.

¹⁶⁶ Workers Compensation Overview, *supra* note 162.

¹⁶⁷ See, e.g., New York State Workers' Compensation Board, *Who Is And Is Not Covered By The Workers' Compensation Law*, available at http://www.wcb.ny.gov/content/main/Employers/Coverage_wc/empWhoNotCovered.jsp.

¹⁶⁸ Marjorie L. Baldwin and Christopher F. McLaren, *Workers' Compensation: Benefits, Coverage, and Costs, (2014 Data)*, National Academy of Social Insurance (October 2016), available at https://www.nasi.org/sites/default/files/research/NASI_Workers_Comp_Report_2016.pdf.

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for workers' compensation (including premiums, payments made under deductibles, benefits, and administrative costs) were \$91.8 billion in 2014, including \$62.3 billion in benefits paid.¹⁶⁹

1. Current Trends and Taxpayer Impact

Workers' compensation insurance presents a number of public policy and consumer protection issues. This section discusses some of these issues, including the ongoing cost shift from employers to taxpayers, the non-uniformity of workers' compensation benefits across states, and continuing efforts by some states to move away from the requirement that employers have workers' compensation insurance.

2. Cost Shift to Taxpayers

Federal taxpayers are increasingly absorbing the costs of paying benefits for workers' job-related injuries as states continue to reduce the availability or amount of workers' compensation benefits.¹⁷⁰ Of the approximately 10.9 million Social Security Disability Insurance (SSDI) beneficiaries in 2014, approximately 9 million (or 82 percent) were injured workers¹⁷¹ who were more likely than not receiving SSDI benefits in part because they did not have the option of receiving workers' compensation benefits.¹⁷² A June 2015 report by the Occupational Safety and Health Administration (OSHA) found that “[a]n accumulating body of evidence shows that at least part of the growth in the SSDI benefit payments is attributable to the program’s subsidy for work injuries and illnesses.”¹⁷³ According to a 2012 study, this cost shift resulted in increased SSDI expenditures for workers with workplace injuries amounting to roughly \$12 billion.¹⁷⁴

Some federal lawmakers have taken note of current workers' compensation insurance developments and trends. An October 20, 2015 public letter sent by several senators and representatives to the U.S. Department of Labor notes the “erosion of workers' compensation protections” over the past decade, citing the fact that 33 states have enacted laws reducing

¹⁶⁹ *Id.*

¹⁷⁰ Nick Buffie and Dean Baker, *Rising Disability Payments: Are Cuts to Workers' Compensation Part of the Story?*, Center for Economic and Policy Research (October 2015) (reviewing the potential impact of changes in workers' compensation programs on the federal treasury), available at <http://cepr.net/documents/rising-disability-payments-2015-10.pdf>. See also U.S. Department of Labor, *Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers*, at 5-6 (Oct. 5, 2016) (DOL Workers' Compensation Report) (concluding that workplace-related disability costs are being transferred to other programs such as Social Security retirement benefits, Social Security Disability Insurance, Medicare, and the Affordable Care Act), available at <https://www.dol.gov/asp/WorkersCompensationSystem/WorkersCompensationSystemReport.pdf>.

¹⁷¹ Buffie and Baker, *supra* note 170, at 7-8.

¹⁷² Buffie and Baker, *supra* note 170; DOL Workers' Compensation Report, *supra* note 170.

¹⁷³ OSHA, *supra* note 160.

¹⁷⁴ *Id.* (citing P. O'Leary, et al., *Workplace injuries and the take-up of Social Security Disability benefits*, Social Security Bulletin 2012; 72:1-17).

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workers' compensation benefits or making it more difficult to qualify for those benefits.¹⁷⁵ As states reduce benefits paid by employers, directly or through insurance, for a workplace injury, the cost of these injuries does not decline. Rather, the costs for injured workers are shifted from employers or insurers to the government (and the injured workers themselves).¹⁷⁶

3. State Opt-Out Efforts

State lawmakers are increasingly considering legislation that, if enacted, would allow employers to opt out of traditional workers' compensation systems.¹⁷⁷ Two states, Texas and Oklahoma, enacted legislation allowing employers to opt-out of the workers' compensation system to varying degrees, and similar legislative efforts are currently under consideration in Tennessee and South Carolina.

In Texas, employers are not required to offer workers' compensation benefits, although some employers choose to voluntarily offer coverage through the state workers' compensation program,¹⁷⁸ or to create an internal benefit plan that typically specifies restrictions, conditions, or requirements for receiving benefits.¹⁷⁹ Similarly, in 2013, Oklahoma enacted the Employee Injury Benefit Act which – until it was invalidated earlier this year¹⁸⁰ – allowed employers to opt out of the state workers' compensation insurance program.¹⁸¹ Unlike in Texas, however, the Oklahoma statute required employers to offer some alternative form of workers' compensation coverage that meets the minimum benefit standards of Oklahoma's traditional workers' compensation plans.¹⁸² Analyses showed that injured workers suffered from inadequate care and significantly reduced treatment when an Oklahoma employer opted for an alternative to conventional coverage.¹⁸³ The Oklahoma Supreme Court invalidated the law in September 2016, finding that injured workers under the Employee Injury Benefit Act have “no protection to the coverage, process, or procedure afforded their fellow employees failing under the Administrative

¹⁷⁵ Letter dated October 20, 2015 to the Honorable Thomas E. Perez, Secretary, U.S. Department of Labor, from Congressional Democratic leaders, available at <http://democrats-edworkforce.house.gov/imo/media/doc/Workers%20Comp%20Letter%20to%20DOL%2010-20-15.pdf>.

¹⁷⁶ DOL Workers' Compensation Report, *supra* note 170, at 3 (noting the “transfer of the economic cost of occupationally-caused or aggravated injuries and illnesses to families, communities and other benefit programs, further burdening the federal Medicare and Social Security Disability Insurance programs”).

¹⁷⁷ Stephanie K. Jones, “Group Aims to Create Alternatives to Workers' Comp State-by-State,” *Insurance Journal* (November 10, 2014), available at <http://www.insurancejournal.com/news/national/2014/11/10/346291.htm>. See also Christopher Mandel, “More States to Offer Work Comp ‘Opt-Out’?” *Insurance Thought Leadership.com*, (November 24, 2014), available at <http://insurancethoughtleadership.com/more-states-to-offer-work-comp-opt-out/>.

¹⁷⁸ Texas Labor Code § 5.406.002.

¹⁷⁹ Texas Labor Code § 5.407.041.

¹⁸⁰ *Vasquez v. Dillard's, Inc.*, 2016 OK 89, ___ P.3d ___ (Okla. Sept. 13, 2016).

¹⁸¹ Oklahoma Employee Injury Benefit Act, § 85A-202.

¹⁸² *Id.*

¹⁸³ Howard Berkes and Michael Grabell, “Injured Workers Suffer As ‘Reforms’ Limit Workers' Compensation Benefits,” *NPR* (March 4, 2015), available at <http://www.npr.org/2015/03/04/390441655/injured-workers-suffer-as-reforms-limit-workers-compensation-benefits>.

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Workers' Compensation Act," and that this "impermissible, unequal and disparate treatment of a select group of injured workers" was unconstitutional under the Oklahoma Constitution.¹⁸⁴

In Tennessee, an opt-out law, the Employee Injury Benefit Alternative Act, was introduced in February 2015.¹⁸⁵ The legislation, if passed, would provide that employers offering opt-out plans would need to maintain an approved occupational injury benefit system, although medical benefits would be capped at \$300,000 and lifetime benefits would be eliminated.¹⁸⁶ In addition, employers who opt out would not have the legal protection from being sued by employees.¹⁸⁷ The South Carolina version, the Employee Injury Benefit Plan Alternative, was first introduced in May 2015.¹⁸⁸ It would allow employers to provide injury benefit plans that are less comprehensive than state-mandated workers' compensation insurance, and provides that an employer's opt-out plan would be an employee's only source of benefits for workplace injury or death.¹⁸⁹ An injured employee covered by an opt-out plan would not be able to sue for work-related injuries or illnesses.¹⁹⁰

4. Unequal Worker Protection Across the Country

States independently establish compensation limits and rules for injured workers with little or no meaningful coordination. In fact, states increasingly seem to compete against each other in a battle to reduce employer costs.¹⁹¹ As a result, differing laws and dramatic disparities among benefits, compensability, and eligibility requirements exist from one state to another, potentially leaving workers with unequal protections.¹⁹² Employees working in similar jobs in communities with similar economic profiles across state lines are provided with significantly different financial and legal benefits for identical injuries. For example, an employee in Alabama who suffers the loss of a leg due to a workplace injury is compensated \$44,000, while an employee in Nevada who suffers the same injury is compensated more than ten times that amount, at \$457,418.¹⁹³ For an employee who suffers the loss of an arm in Kentucky the workers'

¹⁸⁴ *Vasquez v. Dillard's, Inc.*, 2016 OK 89 at ¶¶ 22, 36, ___ P.3d ___ (Okla. Sept. 13, 2016). See also DOL Workers' Compensation Report, *supra* note 170.

¹⁸⁵ The Tennessee Employee Injury Benefit Alternative, available at <http://openstates.org/tn/bills/109/SB721/>.

¹⁸⁶ *Id.* at §§ 1.50-10-103 and 1.50-10-104.

¹⁸⁷ *Id.*

¹⁸⁸ South Carolina Employee Injury Benefit Plan Alternative, H4197, available at <http://www.scstatehouse.gov/billsearch.php?billnumbers=4197>.

¹⁸⁹ *Id.* at § 1.64-1-180.

¹⁹⁰ *Id.* at § 1.64-1-230.

¹⁹¹ See, e.g., John F. Burton, Jr., *Workers' Compensation: Can the State System Survive?* (June 1, 2015), available at <http://workerscompresources.com/wp-content/uploads/2012/11/PA-Centennial-Address-Text-V01.pdf> (noting that a current challenge for workers' compensation is a "race to the bottom").

¹⁹² Maureen Gallagher, *States of Confusion: Workers Comp Extraterritorial Issues* (April 2, 2014), available at <http://insurancethoughtleadership.com/states-of-confusion-workers-comp-extraterritorial-issues/>.

¹⁹³ Lena Groeger, Michael Grabell, & Cynthia Cotts, *Workers' Comp Benefits: How much is a Limb Worth*, ProPublica (March 5, 2015), available at <http://projects.propublica.org/graphics/workers-compensation-benefits-by-limb#>.

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compensation benefit is \$402,277, while in Ohio it is \$193,950, and not more than \$52,245 in Massachusetts.¹⁹⁴

Similarly, as workers' compensation typically is based on the place where an employee works or is injured instead of the place of residence, neighbors working at identical jobs in different states may receive different benefits and rights for identical injuries.¹⁹⁵ Non-uniform workers' compensation laws may also impact the ability of some injured employees to receive medical treatment, family help, or pursue an alternative occupation. This increases the burden on local, tribal, and state governments and families, and reduces quality of life for the injured worker. While some injured employees with workers' compensation benefits might have the resources to move to a different state, injured employees living or working in states with less generous workers' compensation benefits may be both unable to work and unable to afford to live elsewhere.

Additionally, state workers' compensation laws differ beyond the financial limits assigned to particular injuries. For example, Wisconsin law allows the injured employee to choose a medical provider,¹⁹⁶ whereas Indiana law requires the injured employee to use a medical provider selected by the employer.¹⁹⁷

5. Employer Misconduct

To avoid mandatory federal and state employment benefit requirements, some employers may misclassify workers as independent contractors instead of as employees. Such misclassification is a national problem affecting millions of workers.¹⁹⁸ Workers misclassified as independent contractors are denied access to critical benefits and protections such as unemployment insurance and workers' compensation.¹⁹⁹ Misclassification of employees potentially could lead to increased cost for insurers and higher premiums for the majority of employers who accurately report and classify workers. Both federal and state governments are taking steps to address this concern.²⁰⁰

¹⁹⁴ *Id.*

¹⁹⁵ DOL Workers' Compensation Report, *supra* note 170, at 9 (“workers who earn the same wages and suffer equivalent injuries receive widely different amounts of compensation from one state to another”) (footnote omitted).

¹⁹⁶ State of Wisconsin, Department of Workforce Development, *Choice of Doctor and Payment of Medical Expenses*, available at https://dwd.wisconsin.gov/wc/medical/med_treatment_selection.htm.

¹⁹⁷ Worker's Compensation Board of Indiana, *Who is Eligible?*, available at <http://www.in.gov/wcb/2382.htm>.

¹⁹⁸ Treasury Inspector General for Tax Administration, *Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings*, Reference No. 2013-30-058 (June 14, 2013), available at <http://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf>.

¹⁹⁹ U.S. Department of Labor, Wage and Hour Division, *Misclassification of Employees as Independent Contractors*, available at <http://www.dol.gov/whd/workers/misclassification/> (Misclassification Website).

²⁰⁰ See, e.g., National Conference of State Legislatures, *Employee Misclassification*, <http://www.ncsl.org/research/labor-and-employment/employee-misclassification-resources.aspx> (noting that a “growing number of states have addressed employee misclassification” and describing actions taken by various states); Misclassification Website, *supra* note 199 (noting that the Department of Labor’s “Wage and Hour Division is working with the IRS and many states to combat employee misclassification”).

6. The Path Forward

Federal, state, local, and tribal policymakers should be wary of the increasing shift of cost to taxpayer-supported programs that bear the burden when states reduce workers' compensation benefits. Also, significant fairness considerations arise when the value assigned to work-related injuries varies based on state of residence or employment. Policymakers should evaluate the fairness of state-by-state differences in body part compensation and consider setting benefit minimums or other alternatives to reduce the state-by-state disparity in benefits. Additionally, state policymakers and insurance regulators should work to promote fair medical treatment and meaningful protections for injured workers and their families.

VI. Retirement and Related Insurance Issues

A. Retirement Security: Life Insurance and Annuities

The insurance industry and its products have an essential and increasingly important role in supporting a secure retirement for millions of Americans. Recent studies show that about half of all U.S. households may not be able to maintain the same standard of living after retirement as before retirement.²⁰¹ Nearly 40 million working-age households do not have a traditional retirement account, such as an employer-sponsored 401(k) or an Individual Retirement Account (IRA).²⁰²

Retirement and financial security are widespread concerns for the baby boom generation. However, these worries are not limited to older generations. A majority of millennials surveyed (ages 20-37) believe that they will not be able to retire when they would otherwise choose, and over a quarter believe that they will never be able to fully retire.²⁰³ Fortunately, consumers have options to achieve a comfortable retirement. As described below, insurance products have an important role for many Americans seeking retirement security.

1. Understanding the Need for Retirement Security

A primary reason for the decline in readiness for retirement is that Americans are living longer than ever before, thereby increasing the number of years that retirement assets are expected to deliver financial security. Increasing life spans have created “longevity risk,” or the risk of outliving assets that individuals accumulate during their working years. A married couple aged 65 has a 50 percent chance that at least one spouse will live to 94, and a 10 percent chance that one will live to 104.²⁰⁴ Additionally, longer life spans typically mean rising health care costs for longer periods of time.

Another key retirement risk is market uncertainty, or the risk that the value of an investment portfolio will decline due to poor market returns. Consumers also may find that traditional sources of guaranteed retirement income are no longer available and that other sources have become less reliable. Historically, employers often offered pension plans (also referred to as defined benefit plans) providing lifetime retirement income streams, under which the employer selected investments without input from the employees. However, most employers that offer retirement benefits have now shifted to defined contribution plans where employees contribute to retirement savings through payroll deductions and can direct their own investment options.

²⁰¹ Alicia H. Munnell, Wengliang Hou, and Anthony Webb, “NRRI Update Shows Half Still Falling Short,” *Center for Retirement Research* (2014), available at http://crr.bc.edu/wp-content/uploads/2014/12/IB_14-20-508.pdf.

²⁰² Nari Rhee and Ilana Boivie, “The Continuing Retirement Savings Crisis,” at 1, *National Institute on Retirement Security* (March 2015), available at <http://laborcenter.berkeley.edu/pdf/2015/RetirementSavingsCrisis.pdf>.

²⁰³ Insured Retirement Institute and The Center for Generational Kinetics, *Will Millennials Ever Be Able to Retire?*, at 8 (September 2015), available at <http://myirionline.org/docs/default-source/research/iri-cgk-study---millennial-retirement-research---digital.pdf>.

²⁰⁴ Prudential Financial, Inc., *Should Americans Be Insuring Their Retirement Income?*, at 3 (July 2013), available at http://www.annuities.prudential.com/media/managed/documents/pruannuities_investor/dams_545801.pdf.

2. Role of Insurance Products in Retirement Security

Insurers are in the business of protecting against risk. Life insurers issue several different types of products to protect against retirement security risks, most commonly annuities and life insurance.

a. Annuities

In an annuity contract, in exchange for a premium, an insurer agrees to make scheduled payments for the lifetime of one or more persons, or for a specified number of years. The ability to provide guaranteed lifetime income is a unique feature of annuities and is particularly relevant in the context of retirement, where individuals may seek to protect against longevity risk. In the simplest form of annuity, known as a single premium immediate annuity, an individual pays a single premium to an insurer and in return receives a regular stream of payments that continue until the purchaser dies. Annuity payments stop at death and, therefore, the owner of the annuity bears the risk of dying too soon and not receiving the return of his or her premium, while the insurer bears the risk that the owner will live longer than expected.

Until the mid-20th century, most annuities were payment streams in the form of an immediate annuity or a distribution from a benefit plan. Another type of annuity is a variable annuity, in which the account value builds over time based on the performance of underlying investment options selected by the consumer. The first variable annuity was introduced in the 1950s. Since then, annuities have evolved into a broad spectrum of products with different features, benefits, and varying degrees of complexity. Today, most variable annuities offer dozens of underlying investment options and the ability to transfer funds among those options. More recently, beginning in the early 2000s, variable annuities have typically been offered with optional guarantees known as “living benefits.” These benefits are typically contained in “riders” to the annuity contract and require a separate fee. Living benefits are complex and varied in their details but in general are designed to ensure that certain benefits – accumulated contract values, minimum payments upon annuitization (i.e., conversion of the annuity’s value into a payout stream), or withdrawals for a specified period or for life – are guaranteed regardless of the investment performance of the accounts underlying the annuity.

b. Life Insurance

In a life insurance policy, an insurer agrees to pay money to a person (the beneficiary) identified in advance by the policyholder upon the death of the person whose life is insured. Life insurance can also play an important role when the consumer needs protection against the financial risks posed by the premature death of a partner. Life insurance is available in two basic types: term and permanent (which includes whole life, universal life, variable life, and variable universal life).²⁰⁵ Term insurance pays the beneficiary named under the policy if the insured dies within a

²⁰⁵ See American Council of Life Insurers, *What You Should Know About Buying Life Insurance*, available at https://www.acli.com/Consumers/Life%20Insurance/Documents/What_You_Should_Know_About_Buying_Life_Insurance.pdf. See also NAIC, *Life insurance: it's more than a death benefit*, available at http://www.insureuonline.org/insureu_type_life.htm (defining different types of permanent life insurance).

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specific period of time. The defined period can be 1 year, 10 years, 20 years, or as long as 30 years. Premiums for term insurance can be fixed for the length of the term or can start lower and increase at a time specified in the policy. Term policies generally do not have a cash value and usually are less expensive than permanent insurance for a given amount of insurance protection during a like time period. Permanent (cash value) life insurance pays the beneficiary whenever the insured dies, as long as premiums have been paid. The policy can build tax-deferred cash value.

3. Consumer Resources

For many Americans, Social Security benefits are the cornerstone of retirement income. Social Security benefits are often supplemented by income from an employer-sponsored benefit plan or other retirement savings account. The private market can serve as another key element of a sound retirement plan. Prior to accessing these private solutions, the consumer should first understand his or her own needs. Considering the variety of available life insurance and annuity products and services, consumers may benefit from the advice of a financial professional, including an insurance producer. Consumers may also wish to consult their state insurance regulators (contact information for state insurance regulators is provided in Appendix I).

B. Secondary Market for Life Insurance and Annuity Products

When a consumer buys a life insurance policy or an annuity contract from a life insurer, the consumer and insurer are acting in what is known as the “primary market.” In most cases, the policyholder and the insurer maintain the primary market relationship until the policy terminates according to its terms (for example, death or lapse of a life insurance policy, or surrender of an annuity contract). However, over the past several decades, markets have emerged that allow the consumer to sell or otherwise transfer ownership and benefits of the life insurance policy or annuity contract to a business entity for immediate cash. This can be done through a life settlement for a life insurance policy, or through the buyout of an annuity contract or payment stream.

If a consumer elects to sell or transfer ownership of a life insurance policy or an annuity contract to a third party, the direct relationship between the original policyholder and the insurer ends, and the policy moves from the primary market to the “secondary market.” The contractual relationship in the secondary market is between the new owner – the third party purchaser – and the insurer that issued the policy; however, the person whose life is insured under the policy or annuity contract remains the same.

Although consumer protection issues arise in the secondary market for both life insurance and annuities, the discussion below focuses on buyouts of products known as structured settlement annuities, an area of particular consumer protection concern.

1. Structured Settlement Buyouts

Introduced in the 1970s, structured settlements are often the preferred method of settling legal disputes or judgments involving severe physical injuries, sicknesses, or permanently disabled

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injured workers. The purpose of the structured settlement is to provide a reliable, steady source of income. This type of legal arrangement provides for the successful plaintiff in a lawsuit to receive a stream of payments over a period of time, rather than an immediate lump sum. Typically, in order to fund the structured settlement, the defendant purchases an annuity from a life insurer.

The secondary market for structured settlement annuities began in the 1990s as a way of permitting payees of structured settlements to convert income streams into lump sums of cash. In a structured settlement buyout, the payee transfers the right to receive future payments to a third party, typically known as a funding company. In exchange for the future payments, the funding company pays a lump sum to the payee. The amount of this lump sum payment is calculated using a discount rate²⁰⁶ generally ranging from 12 to 22 percent, depending on numerous factors such as the length of the payment stream, the costs incurred by the funding company, the financial condition of the insurer that issued the underlying annuity, and state law restrictions on discount rates.²⁰⁷ For example, if an owner of a structured settlement annuity is set to receive \$20,000 per year for the next 25 years (nominally totaling \$500,000), the present value of the payout stream using discount rates of 12 percent and 22 percent would be approximately \$156,000 and \$90,000 respectively.

Structured settlement buyouts can benefit certain consumers by providing access to immediate cash not available from other sources. For example, if a payee is experiencing financial stress, such as unexpected medical expenses or a home foreclosure, proceeds of a buyout can resolve or mitigate the financial burden.

Nevertheless, the structured settlement buyout market has long raised consumer protection concerns about whether payees are treated fairly in these transactions.

Recognizing the importance of consumer protections related to structured settlement buyouts, in 2002 Congress passed the federal Structured Settlement Protection Act.²⁰⁸ The law imposes a 40 percent excise tax on the funding company unless the transfer is approved by a state court in accordance with an applicable state statute.

In response to abuses in the buyout market, state legislatures enacted consumer protection laws to help structured settlement annuity payees. In 2001, the National Conference of Insurance Legislators (NCOIL) adopted a Model State Structured Settlement Protection Act which has been enacted into law, with some variations, in 49 states.²⁰⁹

²⁰⁶ The discount rate is the interest rate one needs to earn on money today to end up with a given amount of money in the future. The discount rate accounts for the time value of money, which means that a dollar today is worth more than a dollar tomorrow because the dollar today has the capacity to earn interest.

²⁰⁷ National Association of Settlement Purchasers, *Secondary Market FAQ*, available at <https://nasp-usa.com/settlement-transfers/secondary-market-faq/>.

²⁰⁸ 26 U.S.C. § 5891.

²⁰⁹ Patricia LaBrode, “The structured-settlement industry is behind greater transparency,” *The Washington Post* (February 5, 2016), available at https://www.washingtonpost.com/opinions/the-structured-settlement-industry-is-behind-greater-transparency/2016/02/05/5f8f4e6a-c91b-11e5-88ff-e2d1b4289c2f_story.html.

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While state laws provide important protections to payees, the laws are not uniform from state to state. For example, most states require that payees appear in person during a court proceeding where a judge considers a proposed transfer, but some states do not. In-person appearances allow judges to speak directly with a payee, ask about the personal and financial circumstances of the payee, and make an informed decision about whether the transaction is in the best interest of the payee. An independent 2015 media investigation into structured settlement approvals by courts in Maryland and Virginia revealed that some court proceedings lacked rigor and failed to adequately protect vulnerable consumers, including lead paint poisoning victims.²¹⁰

2. The Path Forward

Consumers are encouraged to seek financial and legal advice before agreeing to a structured settlement buyout. Key considerations include how much of the guaranteed payment stream to sell, and the adequacy and fairness of the lump sum payment to be received in exchange.

State policymakers and insurance regulators should promote rigorous protection of consumers who engage in structured settlement buyout transactions, and may wish to examine the legislation recently enacted in Virginia²¹¹ and Florida.²¹² States should consider improving the effectiveness of judicial proceedings to determine whether a proposed buyout serves the consumer's best interest. In particular, states should consider requiring that consumers appear in person at a court hearing, to be conducted in the consumer's county of residence, where the proposed purchaser must disclose to the court prior structured settlement buyouts and attempted buyouts within a designated number of years. Structured settlements have interstate implications, especially given an increasingly mobile society, and are an issue of national interest. Indeed, once before (in 2002), Congress passed a law to address differences in state level oversight.²¹³ As a result, if the states fail to protect structured settlement payees in a sufficiently rigorous manner, then Congress should consider whether additional federally-imposed standards or protections are warranted.

²¹⁰ Terrence McCoy, "Company that reaped millions from deals with Baltimore's lead-paint poisoning victims violated law, authorities say," *The Washington Post* (May 11, 2016), available at https://www.washingtonpost.com/local/social-issues/company-that-reaped-millions-from-deals-with-baltimores-lead-poisoning-victims-violated-law-authorities-say/2016/05/11/051a2bb0-1701-11e6-aa55-670cabef46e0_story.html; Terrence McCoy, "The flawed system that allows companies to make millions off the injured," *The Washington Post* (December 27, 2015), available at https://www.washingtonpost.com/local/social-issues/the-flawed-system-that-allows-companies-to-make-millions-off-the-injured/2015/12/27/cce16434-9212-11e5-a2d6-f57908580b1f_story.html; Terrence McCoy, "Prince George's court tightens rules on structured-settlement buyouts," *The Washington Post* (September 13, 2015), available at https://www.washingtonpost.com/local/social-issues/2015/09/13/06d4e2c6-587d-11e5-8bb1-b488d231bba2_story.html.

²¹¹ Va. Code § 59.1-475 et seq.

²¹² Fla. Stat. § 626.99296.

²¹³ 26 U.S.C. § 5891.

C. Long-Term Care Insurance

Long-term care (LTC) refers to the means of meeting the health or personal care needs of individuals who are unable to care for themselves without assistance. An estimated 12 million Americans currently need LTC, a number that is expected to reach 27 million by 2050 due to: (i) growth in the number of individuals age 65 or older; and (ii) increased life expectancy.²¹⁴ Seventy percent of individuals who reach age 65 are likely to require LTC at some point, and about 14 percent will need LTC lasting five years or more.²¹⁵

The federal government is the primary funding source for LTC, with approximately two-thirds of LTC expenditures paid by Medicaid and Medicare.²¹⁶ The remaining one-third is covered by a combination of other public programs, personal out-of-pocket payments by or for the patient, and long-term care insurance (LTCI).²¹⁷

1. State Regulation of Long-Term Care Insurance

LTCI, like most other forms of insurance, is regulated primarily by state insurance regulators. In most states, the state insurance regulator has the authority to approve fully, approve in part, or reject entirely the rates proposed by an insurer. The authority of state regulators to review and approve proposed rate increases before those changes are implemented is a critical factor in the LTCI marketplace.

Beginning in the 1970s, insurers modeled LTCI pricing on Medicare supplement policies, projecting high policyholder lapse rates.²¹⁸ Lapsed policies allow insurers to accumulate capital without the payment of claims, thereby reducing the potential solvency impact of the claims that are made. Contrary to these original expectations, however, LTCI lapse rates have been significantly lower – at five percent or less²¹⁹ – exposing insurers to more claims than expected. In addition, due to increased longevity and increased underlying costs, LTCI claims have been

²¹⁴ Bipartisan Policy Center, *Initial Recommendations to Improve the Financing of Long-Term Care* (February 2016) (BPC Initial Recommendations), available at <http://bipartisanpolicy.org/wp-content/uploads/2016/01/BPC-Health-Long-Term-Care.pdf>.

²¹⁵ *Id.*

²¹⁶ Marc A. Cohen, *The Current State of the Long-Term Care Insurance Market*, presentation to 14th Annual Intercompany Long-Term Care Insurance Conference (March 2014), available at http://iltciconf.org/2014/index.htm_files/44-Cohen.pdf.

²¹⁷ Bipartisan Policy Center, *America's Long-Term Care Crisis: Challenges in Financing and Delivery* (April 2014), available at <http://bipartisanpolicy.org/library/americas-long-term-care-crisis/>.

²¹⁸ Marc A. Cohen, et al., *Exiting the Market: Understanding the Factors behind Carriers' Decision to Leave the Long-Term Care Insurance Market*, Prepared for U.S. Department of Health and Human Services Assistant Secretary for Planning and Evaluation Office of Disability, Aging and Long-Term Care Policy, at 12 (July 2013), available at <https://aspe.hhs.gov/sites/default/files/pdf/177866/MrktExit.pdf>.

²¹⁹ Society of Actuaries and LIMRA, *U.S. Long-Term Care Insurance Persistency: 2008-2011 Data*, at 4 (2016), available at <https://www.soa.org/Research/Experience-Study/Ltc/Persistency/research-ltc-insurance.aspx> (reporting overall voluntary lapse rate of 5.2% from 2002-2004 experience study, 3.8% from 2005-2007 experience study, and 3.6% from 2008-2011 experience study).

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significantly higher than expected and continue to grow. In the 1990s, LTCI insurers began to seek approval from state insurance regulators for rate increases on existing policies.

In 2000, and again in 2014, state insurance regulators adopted model standards to address LTCI rate stabilization that were intended to reduce the frequency and size of rate increases.²²⁰ However, these standards have not been uniformly adopted, implemented, or enforced by the states, and only apply to policies issued after the date of adoption. Insurers continue to seek additional rate increases on LTCI policies sold before 2000 that, in total, often exceed 100 percent or more. Even after revamping pricing models, insurers continued to underestimate the negative pressures on LTCI business. As a result, insurers began seeking increases on more recently issued (post-2000) LTCI policies, generating a range of responses from state regulators, including formal limits on annual rate increases. Several states have rejected requests for rate increases on closed blocks of business, which then triggered similar reactions from other states.

Obtaining approval of LTCI rate increases is a state-by-state process marked by inconsistencies in: (i) the willingness of state regulators to approve increases; (ii) the amount of increases permitted; and (iii) the length of time necessary to obtain approval. Insurers' uncertainty regarding regulatory treatment of requested rate increases limits insurers' ability to remain active in the LTCI market. Insurers that underpriced LTCI policies will not continue to offer these policies without some certainty about future approval of actuarially justified rates. For consumers, substantial rate increases impose financial hardship. In addition, consistently rising rates have created widespread adverse publicity, for example in the *Wall Street Journal*²²¹ and *Kiplinger*,²²² which deters both insurance producers and potential consumers from LTCI.

Historically, some state insurance regulators have been more averse to approval of rate increases and others more receptive. Policyholders in states in which rate increases have been approved may subsidize premiums in other states in which rate increases have been rejected. As a result, some state regulators are now refusing to approve increases of LTCI premiums unless other states have already approved similar increases, thereby increasing the market constriction.

2. Failure in the Long-Term Care Insurance Market

The number of insurers offering individual LTCI declined from more than 100 in the early 2000s to only 12 as of year-end 2015.²²³ From 2013 through 2015, LTCI annual new premiums fell from \$403 million to \$261 million, and new lives covered fell from 171,000 to 104,000.²²⁴ In

²²⁰ See NAIC, *Long-Term Care Insurance Model Regulation* (Model #641), available at <http://www.naic.org/store/free/MDL-641.pdf>.

²²¹ Leslie Scism, "Long-Term-Care Insurance: Is It Worth It?," *Wall Street Journal* (May 1, 2015), available at <http://www.wsj.com/articles/long-term-care-insurance-is-it-worth-it-1430488733>.

²²² Kimberly Lankford, "Long-Term-Care Rate Hikes Loom," *Kiplinger* (January 2011), available at <http://www.kiplinger.com/article/insurance/T036-C000-S002-long-term-care-rate-hikes-loom.html>.

²²³ BPC Initial Recommendations, *supra* note 214, at 10.

²²⁴ Source: LIMRA.

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the employer-sponsored LTCI market, the number of participants added to group plans dropped by 65 percent between 2013 and 2014, and by another 55 percent in 2015.²²⁵

Insurers continuing in the LTCI market have tightened underwriting standards and are offering new products with fewer benefits at higher prices. These changes likely dampen demand for LTCI. In addition, publicity regarding financial difficulties at several major LTCI insurers adds to the constriction of the market.

3. Impact on Consumers and Taxpayers

The failure of the LTCI market may continue to have direct and negative implications for consumers and taxpayers in general. As discussed in Section V.A of this Report, the resolution of an insolvent insurer is governed by state receivership laws. If an insurer is liquidated, then the deficit between the insurer's assets and liabilities (i.e., the amount owed to policyholders, beneficiaries, or claimants) is paid by the state's insurance guaranty association to the extent permitted by state law. Payment for any one policy by a state guaranty association to an individual policyholder, beneficiary, or claimant is limited by state law, and varies state-by-state. For LTCI policies, these limits generally range from \$300,000 to \$500,000, depending on the consumer's state of residence. Although some health insurers previously offered or continue to offer LTCI, the product has been predominantly offered by life insurers. Nevertheless, because state guaranty association laws classify LTCI as health insurance, guaranty association payments on behalf of an insolvent LTCI insurer will be funded in large part by assessments against active health insurers. Health insurers may elect to pass on all or part of the higher guaranty fund payments to consumers by increasing health insurance premiums.

Additionally, as the amount of available LTCI continues to decline and the need for LTC continues to grow, more consumers may be forced to rely on federal and state programs to meet the costs of LTC. This increased strain on programs such as Medicare and Medicaid may increase the shifting of costs to taxpayers.

4. The Path Forward

The social need for LTC is significant and growing, resulting in major strain on public and private payment sources. Given the aging of the U.S. population and increased longevity, the number of Americans needing LTC is projected to more than double over the coming decades, which will substantially increase the pressure on the public and private sectors.

Consumers, care providers, social services networks, LTCI providers, and others in the private sector, as well as regulators and policymakers, should collaborate to develop innovative approaches to lowering LTC costs and promoting the viability of existing and new payment sources. State policymakers and insurance regulators should address the lack of regulatory uniformity that has exacerbated the inherent challenges of the LTCI market. The challenges in providing LTC are of acute national interest, and extend far beyond the insurance sector. For

²²⁵ *Id.*

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that reason, collaboration between federal and state officials is essential— all must work together and embrace the challenge of financing LTC.

D. Unclaimed Death Benefits

Upon the death of an insured under a life insurance policy, the insurer pays the policy benefits to the named beneficiaries. The policy requires the beneficiaries to send the insurer written notice of death in order to receive the death benefits. In cases where the beneficiaries are not aware of the policy or of the death of the insured, death benefits may go unclaimed for many years, or not at all. Under state laws governing unclaimed property, if death benefits are not claimed within a specified period of time, the insurer must pay the benefits to the last known state of residence of the beneficiary.

While insurers usually learn about the death of a policyholder through notification from the beneficiaries, other methods of identification are available. Since 1980, the Social Security Administration (SSA) has maintained a computer database of death records known as the Death Master File (DMF).²²⁶ In the late 2000s, audits conducted by certain state revenue departments revealed that some insurers used the DMF to determine whether annuity owners had died (a basis for terminating payments), but failed to use the DMF to determine whether life insurance policyholders had died (a basis for paying benefits). Additionally, in some cases where the same customers owned both annuity and life insurance policies, insurers used the DMF to terminate annuity payments, but did not inform the beneficiaries of their right to receive death benefits under the insurance policies.²²⁷

1. State Efforts

In 2009, state insurance regulators began to investigate these “asymmetric” practices and concluded that a number of insurers had violated unfair claims settlement laws. To resolve these investigations, at least 22 of the largest life insurers in the United States, representing over 70 percent of the industry by premium volume, entered into settlement agreements with insurance regulators which require the insurers to conduct regular searches of the DMF to identify deceased policyholders. Parallel settlements with state revenue departments require the insurers to remit current unclaimed benefits to the states. Nationally, these settlements have resulted in the return of over \$5 billion to beneficiaries and payment of an additional \$2.4 billion to the states.²²⁸

²²⁶ See generally U.S. Government Accountability Office, *SOCIAL SECURITY ADMINISTRATION: Preliminary Observations on the Death Master File: Testimony Before the Committee on Homeland Security and Governmental Affairs, U.S. Senate*, (May 8, 2013), available at <http://www.gao.gov/assets/660/654411.pdf>.

²²⁷ 2014 Annual Report, *supra* note 1, at 34.

²²⁸ California Department of Insurance, *Multimillion dollar Death Master settlements reached* (December 17, 2015), available at <http://www.insurance.ca.gov/0400-news/0100-press-releases/2015/release115-15.cfm>. More information regarding “life claim” or DMF settlement agreements can be accessed from the website of the Florida Office of Insurance Regulation, available at <http://www.florir.com/siteDocuments/LifeClaimsSettlements.pdf>. The settlements continue. See, e.g., California Department of Insurance, *Four additional insurers agree to change their*

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In addition, at least 20 states have enacted some version of the Unclaimed Life Insurance Benefits Act, a model law drafted by NCOIL.²²⁹ These laws require insurers to perform regular comparisons of policy records against the DMF or a database or service at least as comprehensive as the DMF.²³⁰ However, the laws are not uniform, particularly with respect to whether DMF searches must be conducted retroactively (for all policies in force on the effective date of the law) or only prospectively (for new policies issued after the effective date).²³¹ The laws also differ in other respects, including the frequency of the required death match searches²³² and the criteria for determining a match between the DMF and the insurer's records.²³³

In 2014, state insurance regulators began to consider model legislation to address insurers' business practices relating to claim settlements, identification and reporting of abandoned property, and use of the DMF. Although state insurance regulators have made progress, the timeline for completing the model law is unclear. Of course, any such model legislation will not have any effect unless adopted by the individual state legislatures, and the states may not adopt the legislation uniformly. For these reasons, laws and regulations governing unclaimed death benefits are likely to remain inconsistent across the states, meaning that the rights of beneficiaries will continue to vary substantially based on their state of residence.

2. Access to the Death Master File

Another factor complicating the regulation of unclaimed death benefits is that life insurers face challenges in accessing and relying upon the DMF. The SSA has cautioned that the DMF may contain inaccuracies. In addition, the Bipartisan Budget Act of 2013 limited access to the DMF to persons certified under a program established by the Secretary of Commerce. In June 2016, the Department of Commerce published a final rule which restricts access to the full DMF data while allowing certified subscribers of the DMF, including insurers, to obtain information about

use of Death Master File (August 4, 2016), available at <http://www.insurance.ca.gov/0400-news/0100-press-releases/2016/release092-16.cfm>.

²²⁹ See Ala. Code §§ 27-15-50 to -53, Ark. Code §§ 23-81-901 to 23-81-905, Ga. Code § 33-25-14, Idaho Code §§ 41-3001 to -3003, Ind. Code § 27-2-23-1 et seq., Iowa Code § 507B.4C, Ky. Rev. Stat. § 304.15-420, Md. Code Ins. § 16-118, Miss. Code § 83-7-301, Mont. Code § 33-20-1604, Nev. Rev. Stat. § 688D.090, N.M. Stat. § 59A-16-7.1, N.Y. Ins. Law § 3240, N.C. Gen. Stat. § 58-58-360, N.D. Cent. Code §§ 26.1-55-01 to -05, R.I. Gen. Laws § 27-80-1, Tenn. Code § 56-7-3401, Utah Code § 31A-22-1901, W.Va. Code § 33-13D-1 et seq., VT Stat. tit. 27, § 1244a. In addition, Florida enacted its own version of a law governing unclaimed life insurance benefits in 2016. See Fla. Stat. § 717.107.

²³⁰ See, e.g., *id.*

²³¹ See, e.g., *United Insurance Co. v. Maryland Insurance Admin.*, 144 A.3d 1230 (Md. 2016) (dismissing challenge to Maryland Insurance Administration's retroactive enforcement of Md. Code § 16-118).

²³² Compare, for example, Ala. Code § 27-15-53(a) (requiring search no less than once every three years) with Ark. Code § 23-81-904 (b)(1)(2) (requiring semi-annual searches).

²³³ Compare, for example, Idaho Code § 41-3002(1)(c) (specifying insurers shall implement procedures to account for common nicknames, transposition of month and date of birth, incomplete social security number, etc.) with GA Code § 33-25-14 (no similar requirement).

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an individual within three years of the individual's death.²³⁴ The rule becomes effective in November 2016. The effectiveness of using the DMF as the primary tool for identifying deceased policyholders will be difficult to assess until the final rule is implemented and used in actual practice.

3. Consumer Resources

If consumers believe that a family member owned or was insured under a life insurance policy, but cannot locate the policy, consumers can conduct a search using public and private sources. Several large insurers have established online lost policy finders. In addition, several state insurance departments provide a free missing policy service, including: Alabama, Illinois, Louisiana, Maine, Michigan, Missouri, New York, Ohio, Oregon, Texas, and Vermont.²³⁵ Massachusetts and Rhode Island provide online forms upon request. Contact information for state insurance regulators appears in Appendix I. As an alternative to public sources, several private firms offer policy locator services for a fee.

²³⁴ *Certification Program for Access to the Death Master File*, 81 Fed. Reg. 34882 (June 1, 2016), available at <https://www.federalregister.gov/articles/2016/06/01/2016-12479/certification-program-for-access-to-the-death-master-file>.

²³⁵ Alabama: <https://aldoi.gov/LAPSWeb/NewRequestInfo.aspx>;
Illinois: <https://insurance.illinois.gov/Applications/LifePolicyLocator/>;
Louisiana: <http://www.lidi.louisiana.gov/consumers/insurance-type/life-annuities/life-insurance-policy-search>;
Maine: <http://www.maine.gov/pfr/insurance/LostPolicyLocator/LifeInsuranceSearchForm.html>;
Michigan: <http://www.michigan.gov/difs>;
Missouri: <http://insurance.mo.gov/consumers/life-annuities/lifepolicylocator.php>;
New York: http://www.dfs.ny.gov/consumer/lost_policy_find.htm;
Ohio: <http://www.insurance.ohio.gov/Consumer/Pages/MissingLifeWebpage.aspx>;
Oregon: <https://www4.cbs.state.or.us/exs/ins/lift/>;
Texas: <http://www.tdi.texas.gov/life/life.html>; and
Vermont: <http://www.vermonttreasurer.gov/unclaimed-property/insurancepolicy>.

VII. Conclusion

Insurance is a key source of financial security for Americans. Insurance allows individuals, families and businesses to protect and accumulate property and assets, provides private market options for financial security in retirement, and allows for the inter-generational transfer of wealth. In short, insurance can provide economic opportunity for all Americans. In addition, well-functioning private insurance markets can reduce the burden on taxpayer-funded government programs. The United States has a national interest in promoting fairness, affordability, and accessibility in personal and commercial insurance products. For these reasons, this Report underscores the critical importance of the protection of insurance consumers and access to insurance; highlights areas where the consumer interest is inconsistently represented throughout the country, and presents a number of recommended actions for consideration as a path forward. FIO intends to continue to analyze these and other insurance consumer protection issues in the future.

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Appendix I Contact Information for Insurance Regulators

	Insurance Regulator Website	Phone Number*	Consumer Services Email/ Web Contact Form
Alabama	www.aldoi.gov	334-241-4141	ConsumerServices@insurance.alabama.gov
Alaska	www.commerce.alaska.gov/web/ins	800-467-8725	insurance@alaska.gov
American Samoa	www.americansamoa.gov/office-of-the-governor	684-633-4116	info@as.gov
Arizona	insurance.az.gov	800-325-2548	consumers@azinsurance.gov
Arkansas	insurance.arkansas.gov	800-852-5494	insurance.consumers@arkansas.gov
California	www.insurance.ca.gov	800-927-4357	https://interactive.web.insurance.ca.gov/contactCSD/ContactUs.jsp
Colorado	www.colorado.gov/dora/division-insurance	800-930-3745	dora_ins_website@state.co.us
Connecticut	www.ct.gov/cid	800-203-3447	cid.ca@ct.gov
Delaware	delawareinsurance.gov	800-282-8611	consumer@state.de.us
District of Columbia	disb.dc.gov	202-727-8000	disb@dc.gov
Florida	www.floir.com	877-693-5236	Consumer.Services@myfloridacfo.com
Georgia	www.oci.ga.gov	800-656-2298	Consumer@oci.ga.gov
Guam	www.guamtax.com/about/regulatory.html	671-635-1844	https://www.guamtax.com/about/regulatory.html
Hawaii	cca.hawaii.gov/ins	808-586-2790	insurance@dcca.hawaii.gov
Idaho	doi.idaho.gov	800-721-3272	consumeraffairs@doi.idaho.gov
Illinois	insurance2.illinois.gov	866-445-5364	consumer_complaints@ins.state.il.us
Indiana	www.in.gov/idoi	800-622-4461	consumerservices@idoi.in.gov
Iowa	www.iid.state.ia.us	877-955-1212	http://www.iid.state.ia.us/contact
Kansas	www.ksinsurance.org	800-432-2484	webcomplaints@ksinsurance.org
Kentucky	insurance.ky.gov	502-564-6034	doi.info@ky.gov
Louisiana	ww.ldi.la.gov	225-342-5900	public@ldi.la.gov
Maine	www.maine.gov/pfr/insurance	800-300-5000	Insurance.PFR@maine.gov
Maryland	insurance.maryland.gov	800-492-6116	lhcomplaints.mia@maryland.gov

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	Insurance Regulator Website	Phone Number*	Consumer Services Email/ Web Contact Form
Massachusetts	www.mass.gov/ocabr/insurance	877-563-4467	doicss.mailbox@state.ma.us
Michigan	www.michigan.gov/difs	877-999-6442	difs-ins-info@michigan.gov
Minnesota	mn.gov/commerce/industries/insurance	651-539-1600	consumer.protection@state.mn.us
Mississippi	www.mid.ms.gov	800-562-2957	consumer@mid.ms.gov
Missouri	insurance.mo.gov	800-726-7390	consumeraffairs@insurance.mo.gov
Montana	csimt.gov	800-332-6148	http://csimt.gov/contact/
Nebraska	doi.nebraska.gov	877-564-7323	DOI.ConsumerAffairs@nebraska.gov
Nevada	doi.nv.gov	888-872-3234	cscc@doi.state.nv.us
New Hampshire	www.nh.gov/insurance	800-852-3416	consumerservices@ins.nh.gov
New Jersey	www.state.nj.us/dobi	800-446-7467	http://www.state.nj.us/dobi/aboutdobi.htm
New Mexico	www.osi.state.nm.us	505-827-4601	osi.ask@state.nm.us
New York	dfs.ny.gov	800-342-3736	http://www.dfs.ny.gov/insurance/nyins_csb.htm
North Carolina	ncdoi.com	855-408-1212	http://www.ncdoi.com/Consumer/Requesting_Assistance.aspx
North Dakota	nd.gov/ndins	800-247-0560	insurance@nd.gov
Northern Mariana Islands	commerce.gov.mp/divisions/insurance	670-664-3000	info@commerce.gov.mp
Ohio	www.insurance.ohio.gov	800-686-1578	https://gateway.insurance.ohio.gov/UI/ODI.CS.Public.UI/Comment.mvc/DisplayCommentSubmission
Oklahoma	www.ok.gov/oid	800-522-0071	https://www.ok.gov/triton/contact.php?ac=181&id=157
Oregon	dfr.oregon.gov	888-877-4894	cp.ins@oregon.gov
Pennsylvania	www.insurance.pa.gov	877-881-6388	http://www.insurance.pa.gov/Pages/ContactUs.aspx#.V215U7grJhE
Puerto Rico	www.ocs.gobierno.pr/ocspr	787-304-8686	
Rhode Island	www.dbr.state.ri.us/divisions/insurance	401-462-9520	http://www.dbr.ri.gov/questioncomplaints/
South Carolina	doi.sc.gov	800-768-3467	consumers@doi.sc.gov
South Dakota	dlr.sd.gov/insurance	605-773-3563	insurance@state.sd.us
Tennessee	tn.gov/commerce	800-342-8385	consumer.affairs@tn.gov

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	Insurance Regulator Website	Phone Number*	Consumer Services Email/ Web Contact Form
Texas	www.tdi.texas.gov	800-252-3439	ConsumerProtection@tdi.texas.gov
U.S. Virgin Islands	ltg.gov.vi/division-of-banking-and-insurance.html	340-774-7166 (St. Thomas) 340-773-6459 (St. Croix)	http://ltg.gov.vi/consumer-assistance-program.html
Utah	insurance.utah.gov	801-538-3800	life.uid@utah.gov
Vermont	www.dfr.vermont.gov	800-964-1784	consumercomplaints@vermont.gov
Virginia	www.scc.virginia.gov/boi	877-310-6560	bureauofinsurance@scc.virginia.gov
Washington	www.insurance.wa.gov	800-562-6900	https://www.insurance.wa.gov/your-insurance/email-us/index.html
West Virginia	www.wvinsurance.gov	888-879-9842	OICConsumerServices@wv.gov
Wisconsin	oci.wi.gov	800-236-8517	ocicomplaints@wisconsin.gov
Wyoming	doi.wyo.gov	800-438-5768	http://doi.wyo.gov/contact-us

*800 and 888 numbers may be toll-free only within specified state. If calling from out-of-state, check that state's website for additional numbers.

Appendix II
Summary of Federal Resources Referenced in Report

Federal Insurance Office Reports:

FIO reports are available at www.treasury.gov/initiatives/fio/reports-and-notice. The reports cited in this Report are:

Federal Insurance Office, *Annual Report on the Insurance Industry* (September 2014)

Federal Insurance Office, *Annual Report on the Insurance Industry* (September 2015)

Federal Insurance Office, *How to Modernize and Improve the System of Insurance Regulation in the United States* (December 2013)

Federal Insurance Office, Report Providing an Assessment of the Current State of the Market for Natural Catastrophe Insurance in the United States (September 2015)

Insurance and Technology:

Executive Office of the President of the United States, *Big Data and Differential Pricing* (February 2015), available at

https://www.whitehouse.gov/sites/default/files/docs/Big_Data_Report_Nonembargo_v2.pdf

Executive Office of the President, *Big Data: Seizing Opportunities, Preserving Values* (May 2014), available at

https://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf

Federal Trade Commission, *Big Data – A Tool for Inclusion or Exclusion: Understanding the Issues* (January 2016), available at

<https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>

Federal Trade Commission, *Data Brokers: A Call for Transparency and Accountability* (May 2014), available at

<https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>

Federal Trade Commission, *Report identity theft and get a recovery plan*, www.identitytheft.gov

National Institute for Standards and Technology, *Framework for Improving Critical Infrastructure Cybersecurity*, Version 1.0 (February 12, 2014), available at

<http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf>

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U.S. Department of Homeland Security, *Stop. Think. Connect.: Cybersecurity 101*, https://www.dhs.gov/sites/default/files/publications/cybersecurity-101_4.pdf

U.S. Department of Homeland Security, *Financial Services Sector*, available at <http://www.dhs.gov/financial-services-sector>

U.S. Department of the Treasury, *Remarks of Deputy Secretary Raskin at The Texas Bankers' Association Executive Leadership Cybersecurity Conference* (December 3, 2014), available at <https://www.treasury.gov/press-center/press-releases/Pages/jl9711.aspx>

Environmental Hazards and Insurance:

Executive Office of the President, *The President's Climate Action Plan* (June 2013), available at <https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>

Federal Emergency Management Administration, *What is Mitigation?*, available at <http://www.fema.gov/what-mitigation>

National Aeronautics and Space Administration, *NASA, NOAA Analyses Reveal Record-Shattering Global Warm Temperatures in 2015*, Release No. 16-008 (Jan. 20, 2016), available at <http://www.nasa.gov/press-release/nasa-noaa-analyses-reveal-record-shattering-global-warm-temperatures-in-2015>

U.S. Department of Homeland Security, *National Preparedness Report*, at 37 (March 30, 2014), available at https://www.fema.gov/media-library-data/1409688068371-d71247cabc52a55de78305a4462d0e1a/2014%20NPR_FINAL_082914_508v11.pdf

U.S. Department of Homeland Security, *Ready*, www.ready.gov

U.S. Geological Survey, *Earthquake Statistics* (as of March 10, 2016), available at <http://earthquake.usgs.gov/earthquakes/browse/stats.php>

U.S. Geological Survey, *Induced Earthquakes*, available at <http://earthquake.usgs.gov/research/induced/>

U.S. Geological Survey, *Science Features, 6 Facts About Human-Caused Earthquakes* (June 10, 2015), available at http://www.usgs.gov/blogs/features/usgs_top_story/6-facts-about-human-caused-earthquakes/

Fairness in Insurance Practices:

Consumer Financial Protection Bureau, *Arbitration Study, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March

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2015), available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

Consumer Financial Protection Bureau, *CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court* (May 5, 2016), available at <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/>

Fairness in State Insurance Standards:

OSHA, U.S. Department of Labor, *Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job* (June 2015), available at <http://www.dol.gov/osha/report/20150304-inequality.pdf>

Treasury Inspector General for Tax Administration, *Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings*, Reference No. 2013-30-058 (June 14, 2013), available at <http://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf>

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