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Insurer Rebate Laws May Shift Toward Allowing Smart Devices

By **Michael Sabino, Richard Liskov and Laura Foggan** (July 24, 2019, 3:49 PM EDT)


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Robust regulatory schemes can frustrate insurers seeking to utilize technologies that offer the opportunity to reduce claims expense and mitigate loss, especially when such technology has already embedded itself in consumers' day-to-day lives. Although state insurance regulators have varied their approach to new technologies within the practices of the insurance industry, some have taken a more active approach.

This month, an amendment to Florida Statute §626.9541, which addresses unfair methods of competition within the insurance industry, becomes effective. The amended language of the Florida statute now permits insurers or agents to provide insureds items of value, provided they are related to loss-mitigation efforts. It explicitly states that it is permissible for insurers to give to insureds, for free or at a discounted price, loss-mitigation services or loss-control items of value that relate to the risks covered under the policy.

As consumers' use of smart devices becomes more prolific and the functionality of devices connected to the internet of things becomes more diverse, the opportunity for insurers to interface with insureds in new, more efficient ways becomes available. In addition to simplifying users' lives, connected sensors and other devices may also be deployed to guard against risks and fortuitous loss, as well as provide data feedback to help anticipate future risk exposure. Recognizing the opportunity this technology presents, many insurers have sought to incorporate the use of connected devices and the data they provide into the insured's coverage program.

Nevertheless, in a long-established insurance regulatory landscape that has just begun to address the use of connected technology, insurers must be ever mindful of regulatory considerations with respect to the implementation of programs that provide connected devices to insureds.

For example, several insurers seeking to capitalize on the push to further integrate connected technology into more spaces have initiated specialized programs, sometimes characterized as "value-added" services, which provide the connected tech to qualifying policyholders. In turn, once the insureds have deployed the connected technology, insurers are able to rely upon the devices as means of reducing claims expense and mitigating loss. Through IoT-connected devices, insurers can develop a deeper understanding of their exposures through real-time, individualized data on the risk of loss. This information also enables insurers to educate policyholders about risk, thereby potentially preventing loss. Through this type of technology, insurers also may learn of loss in real time, enabling them to respond more quickly and mitigate harm.

Illustrations of such programs include the bundling of home telematics technology (such as water detection and fire sensors) with property insurance policies to assist in reducing claims expense and mitigating loss, as well as wearable technology, such as Fitbits, provided to insureds by health insurers.

Such programs, however, may subject insurers to regulatory scrutiny. The majority of jurisdictions have enacted anti-inducement and related unfair competition laws, which generally prohibit insurers from giving or offering to give any valuable consideration or inducement of any kind, directly or indirectly. The purpose of these laws, generally enacted decades ago, was to protect consumers from being induced to make an unsuitable policy choice, to protect against discrimination in the provision of insurance, and to protect insurer solvency and prevent predatory pricing.

Although originally well-intended, today these anti-rebating laws are acting as a potential hurdle to innovation through the use of IoT-connected devices and other technology. Other than in California, where voters repealed that state's anti-inducement provision in 1988 as part of Proposition 103, insurers and producers must constantly be mindful of the broad reach of anti-inducement laws in other states — such as Section 2324 in New York, which requires that any inducements over a specified value, e.g. $25, be explicit in the policy terms which presumably regulators have approved.

However, Florida's recent amendment may be indicative of a trend toward insurance regulators' acknowledgment that the benefits these connected technologies offer in mitigating and avoiding loss and claims expense outweigh the potential risk of unfair business practices. Effective July 1, 2019, Florida Stat. § 626.9541 was amended to carve out from the broad prohibition of inducements, the ability of insurers or agents to provide free or discounted items of value provided that the items relate to loss-control or loss-mitigation with respect to the risks covered under the policy.[1]

The amendment follows similar permissive statutes, such as sections 3239 and 4224(f)(2) of the New York Insurance Law, as well as Florida Statute § 627.6402. Such permissive statutes allow insurers to provide wellness programs and such incentives as fitness trackers, gift cards and premium reductions to insureds in connection with health coverage, although — unlike the new Florida law — New York's is limited to group health insurance. Under such statutes, insurers have developed programs rewarding insureds for leading a "healthy lifestyle," which is confirmed via data gathered through insurer-provided connected technology such as fitness trackers and other wearable devices. Of course, but for such enabling statutes, such programs would clearly violate anti-inducement and anti-rebating laws.

Florida's amendment to its statutory language is encouraging to insurers who seek to fold into their offerings connected technologies and other loss mitigation tools. However, these piecemeal implementations are still limiting to insurers seeking to roll out nationwide programs that include the use of insurer-provided devices. For this reason, insurers and their trade groups are calling for legislative and regulatory changes that will expressly allow insurers to offer free or price-discounted devices that are designed to prevent or mitigate loss or to provide loss control by monitoring or assessing risk, or developing strategies to eliminate or reduce risk.

At the summer meeting of the National Council of Insurance Legislators last week, for instance, the American Property Casualty Insurance Association urged state legislators to consider legislation explicitly stating that an insurer may offer "for free or at a discounted price" products or services "that are intended to educate about, assess, monitor, control or prevent risk of loss to persons or property." APCIA suggested that legislators could offer specific legislative proposals stating that the offer or provision of free or discounted-price products intended to control or mitigate loss "are exempt from the prohibitions set forth" in anti-rebating laws.

So far, a few jurisdictions have enacted new statutes or are considering exemptions from existing anti-rebate laws to address connected tech. But, many state regulators and legislatures have not yet acted. Although additional insurance regulators may follow this trend toward liberalization of anti-rebating laws, in the meantime insurers must assure that any program that provides an insured with any item of value is compliant with each of the regulatory schemes in place in each of the 50 states.

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[1] See Laws 2019. C. 2019-108, § 11, eff. July 1, 2019.1