

# Consumer Protection Initiatives at the NAIC AICP Annual Education Day: May 12, 2017

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## NAIC Consumer Rep. Program

- 22 Funded (travel), 13 Unfunded (expanded by 2 this year)
- Selected by Consumer Participation Board of Trustees – Regulators and Cons. Reps
- 2 year terms, all volunteers, conflict of interest evaluations
- Approximately 2/3 focus on health/ACA, the rest on P/C, Life and other regulatory issues
- Do not represent the NAIC and sometimes take adverse positions
- [http://naic.org/consumer\\_participation.htm](http://naic.org/consumer_participation.htm).



## Example: Spring 2017 NAIC Consumer Liaison Meeting [http://naic.org/cmte\\_conliaison.htm](http://naic.org/cmte_conliaison.htm)

- 3. Hear a Discussion of NAIC Principles for National Flood Insurance Program (NFIP) Reauthorization**—Birny Birnbaum (Center for Economic Justice—CEJ)—17 minutes Attachment One
- 4. Hear a Presentation on Guarantee Funds and Consumer Protection as it Relates to Recent Long-Term Care Insurance (LTCI) Company Insolvencies**—Sonja Larkin-Thorne (Consumer Advocate), Bonnie Burns (California Health Advocates—CHA) and Brendan Bridgeland (Center for Insurance Research)—17 minutes Attachment Two
- 5. Hear an Update on Pre-Dispute Arbitration Clauses**—Peter R. Kochenburger (UConn Law) – 5 minutes
- 6. Hear a Presentation on the Need for Continued Consumer Protections and Stability in State Insurance Markets**—Katie Keith (Out2Enroll), Sarah Lueck (Center on Budget and Policy Priorities) and Timothy Stoltzfus Jost (Virginia Organizing)—15 minutes Attachments Three and Four
- 7. Hear a Presentation on Nondiscrimination in Private Health Insurance**—Amy Killelea (National Alliance of State and Territorial AIDS Directors), Silvia Yee (Disability Rights Education & Defense Fund), Michelle Lilienfeld (National Health Law Program), Harper Jean Tobin (National Center for Transgender Equality), Jackson Williams (Dialysis Patient Citizens) and Deborah Darcy (American Kidney Fund)—25 minutes Attachments Five, Six and Seven

## The ACA, Federal “Replacement” and the States

### The Need for Continued Consumer Protections and Stability in State Insurance Markets in a Climate of Federal Uncertain

Presentation by Consumer Representatives

APRIL 10, 2017, Spring National Meeting

[http://naic.org/cmte\\_conliaison.htm](http://naic.org/cmte_conliaison.htm).

### The Need for Continued Consumer Protections and Stability in State Insurance Markets

“As the leading authorities on insurance regulation, we encourage state insurance regulators and the National Association of Insurance Commissioners (NAIC) to offer your counsel to policymakers as changes are contemplated to help ensure that further reforms, if enacted, do no harm to consumers, minimize market disruption, and maintain common-sense consumer protections. Doing so is critically important to the millions of individuals and families we represent, especially low-income consumers and individuals with high-risk medical conditions.”

## Pre-Dispute Mandatory Arbitration Clauses

### New Working Group (D Committee)

“Consider and, if appropriate, amend the *Unfair Trade Practices Model Act* (#880) or develop a new model act prohibiting the use of: 1) pre-dispute mandatory arbitration clauses in any individual and commercial insurance policies, and 2) choice-of-law and choice-of-venue clauses.”

*Co-Chairs: Susan Stapp (California), TK Keen (Oregon)*

[http://www.naic.org/cmte\\_d\\_predispute\\_arbitration\\_wg.htm](http://www.naic.org/cmte_d_predispute_arbitration_wg.htm)

# Pre-Dispute Mandatory Arbitration Clauses

## Purpose

- Not anti-arbitration, but make it a true, informed choice
- Require that arbitration be:
  - Selected only at the point when an actual dispute exists between an insurer and its policyholder
  - Mutual – both parties must agree; insurer cannot mandate
  - Does not apply to first party property appraisals or arbitration of UM/UIM disputes, as currently permitted by state law
- Limit Forum Selection and Choice of Law clauses to ensure policyholders retain the rights and protections provided in their State

# Big Data, Consumer Protection & Insurance Regulation

Potential for Major Consumer Benefits – and Harm

- Complexity of Underwriting Models and mismatch in information and expertise between insurer and regulator
- Use of 1,000+ rating factors and associated modeling potentially makes de facto “discrimination” difficult to detect
- Lack of consumer transparency on what information is collected and how it is used
- Possibility of “Claim Optimization”

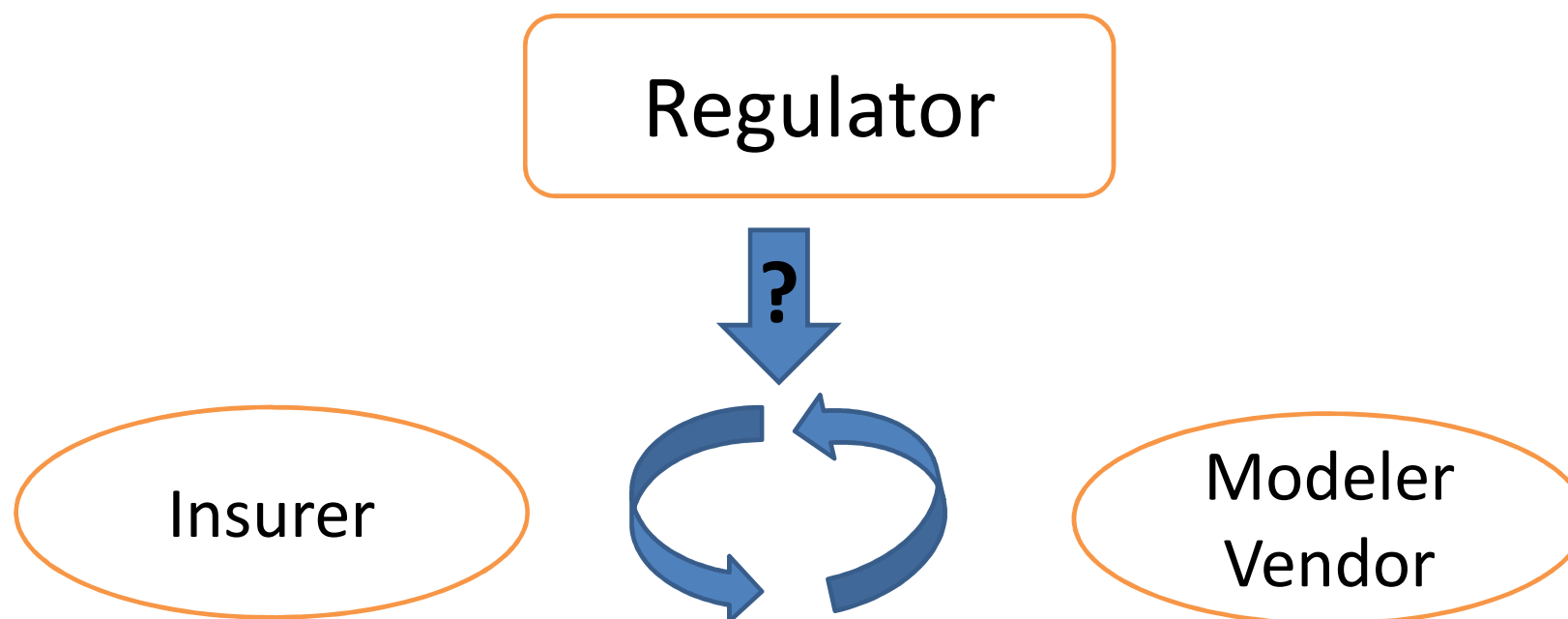
[http://www.naic.org/cmte\\_ex\\_bdwg.htm](http://www.naic.org/cmte_ex_bdwg.htm).



# Big Data, Consumer Protection & Insurance Regulation

*“Distilling the voluminous information connected with price optimization makes determining the extent and effect of a program much more difficult for regulators. In addition, regulators must rely upon insurers to present accurate and complete information on indicated rates and the adjustments to arrive at selected rates. Regulators do not currently have the data necessary for an independent evaluation of most of the insurer modeling and calculations.”* NAIC Actuarial TF on Price Optimization, Nov. 2015

# Big Data, Consumer Protection & Insurance Regulation



# Big Data, Consumer Protection & Insurance Regulation

**Fraud Management:** Big Data promises significant gains in detecting and preventing insurance fraud. However, what type of consumer data is being used to justify the analytics; for example, does the data selected incorporate historical (and existing) biases, such as disparate scrutiny of insurance claims filed by minorities? Will policyholders and claimants know that their claim has been potentially tagged as fraudulent?

**Claims Adjusting Practices:** The same methodologies utilized in pricing and underwriting could be used to “optimize” settlements offers on the statistical likelihood that the policyholder/claimant will accept the offer, rather than on the fair value of the claim itself. Doing so would violate the Unfair Claim Settlement Practices Act

## NAIC Draft Data Security Model Law

[http://www.naic.org/cmte\\_ex\\_cswg.htm](http://www.naic.org/cmte_ex_cswg.htm).

- Ad-hoc drafting group formed in fall 2016
- Versions 1-3 of the Draft Model included two basic components: (1) data security requirements, (2) notification requirements: “Pre-breach and Post-breach” issues
- Compromise proves elusive, especially on consumer notification and consumer rights after a data breach
- At April 2017 national meeting in Denver, the Working Group signaled it would look at new NY Cyber Regs as a possible model, and consider bifurcation of pre and post breach sections

# NAIC Draft Data Security Model Law

## **“Roadblocks remain for NAIC's cybersecurity model law”**

“The NAIC's cybersecurity model law draft continues to vex industry and consumer groups after failing to achieve a hoped-for consensus by the end of 2016” . . . .

“I think it's possible they can actually produce a draft that has sufficient grudging approval after some tweaking,” said Peter Kochenburger, the NAIC's consumer representative and the deputy director of the Insurance Law Center at the University of Connecticut School of Law.” *By Elizabeth Festa, SNL Financial 2/21/17*

**Late April: Version 4: Model bifurcated and compromise achieved!**

## NAIC Draft Data Security Model Law

By removing entire consumer notification section.

- ~~Notification to Consumer Reporting Agencies~~
- ~~Notification to Consumers~~
- ~~Consumer Protections Following a Data Breach~~

## NAIC Draft Data Security Model Law

*“In contrast, the new provision in Version 4 of the NAIC draft incorporating state data breach notification laws (end of Section 6.B) does not model or reflect New York law in this area, as it would leave insurance consumers nationwide with inconsistent, sometimes insufficient, and in a few states, non-existent data breach notification requirements for insurance entities. This is a very different result than developing a notification model that would combine best practices in this area, and provide a nationwide standard promoting both a high level of consumer protection and consistency. At best this version maintains the status quo – a multitude of different state requirements applicable – or not – to insurers and insurance intermediaries.”*

Comments to WG submitted by Birny Birnbaum and PK, May 8, 2017.

## Consumer Representatives: Other Issues

- Health Insurance: Consumer Reps have provided dozens of well-recognized reports on ACA and post ACA legislation since 2010
- Long Term Care Insurance: Need, Cost, and a Disappearing Market?
- National Flood Insurance Program
  - Up for Renewal this fall
  - Grow private flood insurance market (surplus lines?) without sacrificing consumer protections
- International – Several Consumer Reps active participants at IAIS (NAIC has been very supportive of this initiative)



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# Thank You



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