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Time to Dust Off the Anti-Rebate Laws

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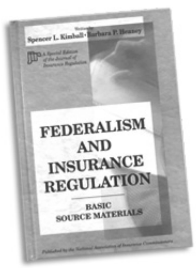

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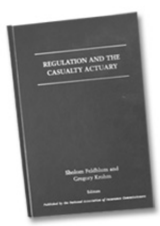

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Time to Dust Off the Anti-Rebate Laws

Jamie Parson*
David Marlett**
Stuart Powell***

Abstract

Anti-rebate laws were introduced more than 100 years ago, after agents' use of rebates threatened the solvency of life insurance companies and raised questions around unfair discriminatory practices. Supporters of the initial law claimed that they provided market stability, prevented unfair discrimination and kept the focus on the quality of the insurance product versus the size of a rebate. On the other hand, opponents suggest the law infringes upon their rights to competition and stifles innovation. Today, most states have enacted anti-rebate statutes and many have enacted the NAIC model *Unfair Trade Practices Act* (#880). Over time, several of these states have carved exceptions to the anti-rebating law. While many states have the same categories of exceptions and similar statutory language, the application of the language varies.

This paper evaluates the recent call for change or repeal of the current anti-rebate laws by reviewing the evolution of the anti-rebating statutes, evaluating the current application and exceptions to the laws and discussing the options in favor of and against repeal. The paper concludes with recommendations for those states considering change to current laws.

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1. Introduction

> *"It's time to dust off the anti-rebate laws…and see if they really serve the purpose they were intended to serve when they were put on the books in a totally different age."*[1]

Rebating occurs when an agent or broker discounts or shares their commission with an insured. Historically, rebates were used in the life insurance industry as an agent's way to induce a customer to purchase a life insurance policy. The first set of laws to regulate this practice were introduced more than 100 years ago, after rebating began to threaten the solvency of life insurance companies and raised questions around unfair discriminatory practices. Rebating is no longer an issue exclusive to life insurance. In fact, agents who sell most insurance products are impacted by anti-rebating laws. Supporters of anti-rebate laws claim it provides market stability by leveling the playing field, preventing unfair discrimination and keeping the focus on the quality of the insurance product versus the size of the rebate. However, opponents argue that current laws are outdated, thereby leaving little room for innovation in marketing and sales. Because of the limitations imposed by the dated laws, they infringe upon a business' right to competition.

Rebating in the marketing of consumer goods is a well-known and widely utilized competitive strategy, both with manufacturers and retailers.[2] Based on game theory, product rebating is one solution, albeit an inferior one, to a competitive dilemma.[3]

The competitive dilemma can be illustrated simply. Assume a market has two competitors and both enjoy equal market share and prices, allowing for comfortable profit margins. Should either lower the price to gain market share? The possible payoffs are:

- Both cooperate and keep prices high, and each continues to earn the same profits.
- Both compete and lower prices, and each earns a reduced profit.
- One competitor lowers prices and the other does not, and the first earns more profit than the latter.

1. Jaffe, "Points & Viewpoints," *National Underwriter, Property & Casualty Ed.*, Oct. 2, 1981, at 52.

2. Edwards (2007) estimates total rebate offer volume ranges from $4 billion to $10 billion per year, involving more than 80% of consumers and more than 5 billion rebates.

3. This competitive dilemma is based on the classic prisoner's dilemma, first introduced by Merrill Flood and Melvin Dresher at RAND in 1950 and later formalized by Albert Tucker at Stanford University in 1952 for psychology research (Dresher, 1961). The illustration has since become widely utilized in teaching and research to describe a host of social and economic problems.

In every scenario, an individual competitor is made better off by lowering price, but if both competitors lower the price, the profit for each is reduced. Cooperation, without either lowering price, is the optimal outcome, maximizing profits for each. Realistically, however, the two competitors who do better when they cooperate have incentives not to cooperate (or are not allowed to cooperate).

Rebating, if inserted into this dilemma, is simply a form of price reduction. In product rebating, however, the price reduction (and thus the dilemma) is more straightforward than it is for insurance rebating.

Why are the behavioral economics of insurance pricing more complicated than for consumer products? Unlike in the consumer products market, rebates in the insurance market are historically offered by intermediaries, not by the manufacturer (insurer) itself. Also unlike the consumer products market, the insurance price is set before the cost of goods sold is known, and partially for this reason, insurance pricing (rating) is regulated. The first complication of using a rebate strategy in insurance, then, is the possibility it leads to tightened price (rate) regulation. Rates for admitted carriers are filed with regulators based on the insurer building agent commissions into the expense portion. If agents can afford to "share" commissions, regulators may decide the expense rate in the filing is higher than needed, or, at a minimum, that insurers need to file rates transparently, with expected agent rebates as an added cost.

Second, rebating as used in insurance is not easily observable among competitors. In the competitive dilemma illustrated above, it was implicitly assumed the competitors could observe one another's price movements (rebates) and respond immediately with their own. Within insurance markets, traditional forms of rebating are not easily observable and could thus be interpreted by other insurers as a signal they have potentially overpriced the underlying risk itself (or that the insurer whose agent offer hidden rebates has underpriced the risk).

Last, if little or no transparency exists in the rebating process (as is the case today), insurance rebating provides a means for agents to collude with insurers (as their principals in the marketing relationship) in an effort to unfairly price-discriminate across insureds. Although price discrimination based on differentials in the cost of the underlying risk is paramount to sound insurance pricing, price discrimination where there is no such risk differential is in conflict with the regulatory goals of price regulation and is, therefore, illegal.

Due to the complexities and potential negative externalities created by insurance rebating, it is understandable that anti-rebating laws are the norm in most states. The overarching question posed by the current research is whether insurance innovations, and the related threat of market disruption, call for repeal or rewrite of these laws to allow for insurers to respond adequately and competitively to market disruptors and insurance substitutes that are not subject to the same regulatory restrictions.

The primary objective of this paper is to evaluate the recent call for change or repeal of the current anti-rebate laws. This paper is organized into three parts: 1) a review of the evolution of the anti-rebate statutes; 2) an evaluation of the current application and exceptions to the laws, including a state-by-state analysis of trends and similarities; and 3) a discussion weighing the options in favor of and against repeal, followed by recommendations for legislatures considering a change to their current laws.

2. History of Anti-Rebate Statutes

Massachusetts was the first state to enact an anti-rebating statute in 1887.[4] Two years later, New York followed suit with an "anti-discrimination" law, which prohibited discrimination between individuals from the same actuarial class (Conniff, 1986). Within three years, 10 states enacted similar laws and, by the early 1900s, most states enacted some form of an anti-rebate law. These laws were created in response to the then common life insurance practices where agents paid rebates to encourage sales (Sherman and Wen, 2009). This practice often led to agents demanding a higher commission to make up for the rebate they gave the customer, which, in turn, raised a concern for the solvency of the insurer. Additionally, it raised the question of whether this practice resulted in unfair discrimination, as the rebates were not offered consistently to all clients.

While a majority of states embraced the idea with little hesitation, the laws proved to be ineffective. In 1895, 30 insurance companies entered into an anti-rebate agreement where they agreed to terminate any agent found guilty of rebating and render the agent unemployable for one year (Conniff, 1986). These efforts seemed to bring more attention to the issue; nonetheless, rebating continued.

After the passage of the federal McCarran-Ferguson Act in 1945, the NAIC developed the model *Unfair Trade Practices Act* (#880), which included provisions that prohibited rebating and certain transactions considered rebating (Conniff, 1986). Most states have enacted language similar to NAIC Model #880, and many of those states have expanded the language to apply to all forms of insurance.

In the 1980s, some courts started questioning the validity and purpose of such a law. In *Dade County Consumer Advocate's Office v. Department of Insurance*, James Blumenthal, a Florida insurance agent sued the Florida Department of Insurance claiming the statute prevented him from competing for insurance sales.[5] The lower court found in favor of the insurance department, and Blumenthal died during the appeal. The case was picked up again in May 1983 and made its way to Florida's First District Court of Appeal, which stated it was "unable to find any legitimate state interest justifying the continued existence of the anti-rebate statutes."[6] Additionally, the court cited violations of the Florida Constitution's due process clause by constituting "an unjustified exercise of the police power"

4. Alaska Attorney General Opinion 661-96-0488 (April 22, 1996).
5. 457 So. 2d 495 (1st DCA, 1984), aff'd, 492 So. 2d 1032 (Fla. 1986).
6. *Id.* at 497.

(Conniff, 1986). In 1990, Florida recodified the law confirming rebating is illegal but provided specific categories of exceptions (Florida Association of Insurance Agents, 2011).

Michigan courts viewed the law differently and upheld the constitutionality of the state's anti-rebate statute. In *Katt v. Commissioner of Insurance*,[7] the court held the plaintiff failed to show that the anti-rebate laws were "utterly without rational foundation" (Harnett, 2011).

In 1988, California voted to repeal the anti-rebating law amongst a host of other regulations under Proposition 103 (Florida Association of Insurance Agents, 2011). While California effectively lifted the lid on rebating, most major insurance companies issued directives stating if agents rebated, their contract would be cancelled.

Most states have enacted some form of NAIC Model #880. As a general rule under the model, agents and brokers are not allowed to offer a discount or other inducement to an insured or prospective insured unless it is specified in the policy, contract or insurer's filings. Courts and state insurance regulators have played a part in further dissecting the application of the rebate law in their jurisdiction. To the surprise of some, one court went so far as to construe a dispute resolution as a rebate.

In Idaho, an agent met with insureds who were planning to prepay for their policies for a certain number of years.[8] The agent called the insurer and received a quote, which he then relayed to the insureds, who executed a check for the balance. Later, the insurer informed the agent that he needed to collect an additional amount of $1,248.33. Unsurprisingly, the insureds became upset and wanted to sue the insurer and agent personally. The agent entered into a compromise with the insureds to cover half of the amount and the insureds paid the other half. Still unhappy, the husband complained to the insurance department, which put the insurance department on notice to the transaction that took place. In turn, the insurance department brought an action against the agent for rebating the premium. The appellate court reversed the decision. It was difficult to say that the payment was an inducement for the insured to buy insurance because the policy was already in place. The court viewed the payment by the agent as a settlement of the disputed claim to prevent personal liability and not an unfair trade practice prohibited by the statute (Harnett, 2011). Common law is not the only venue for exceptions to this statute. In recent years, several states have provided additional exceptions through regulatory directives.

7. Case no 87-60123-CZe (Circuit Court, Ingham County, Michigan, decided July 19, 1990), aff'd, 505 N.W.2d 37 (1993).

8. *Cox v. Department of Ins*. 823 P.2d 177 (1991).

3. Exceptions to the Anti-Rebating Statutes

Although many states have enacted NAIC Model #880, the interpretation of the law varies from state to state. Some states have carved exceptions to the statute through case law, while others have enacted revisions to their statute that list out the exceptions. The remaining states have created exceptions to the anti-rebate statutes through insurance bulletins or advisory opinions. Even though many states have the same categories of exceptions and similar statutory language, they vary in application. There is a particularly significant variation in interpretation of promotional item limits.

Refer to Appendix A for a more detailed look at the state exceptions.

3.1 Promotional Items

Even though many states use similar statutory language, they have different ways of applying anti-rebate laws related to an agent's use of promotional items. NAIC Model #880 states:

> *"Except as otherwise expressly provided by law, knowingly permitting or offering to make or making [any insurance] or agreement as to such contract other than...expressed in the policy...paying or allowing….as inducement to such policy...any valuable consideration or inducement whatever not specified in the policy; or giving, or selling, or purchasing or offering to give, sell, or purchase as an inducement to such policy"*[9]

Most states allow agents and brokers to give promotional items as an incentive so long as the item is not attached to the sale of an insurance product and not unfairly discriminatory. This exception is accomplished in one of two ways: 1) by a set dollar amount incorporated into the statutory language; or 2) by reference in an insurance bulletin or advisory opinion. Some bulletins provide a verbal "reasonable amount" threshold, while many others list out an acceptable dollar amount.

For example, an agent who advertises on Instagram that he will give a free solar flashlight to anyone who comes into his office for a quote on auto insurance would be within the parameters of the rule, as long as the cost of the flashlight does not exceed the state's threshold. However, an agent who offers to give $50 cash to existing customers to cover the cost of the renewal increase if they renew with him would likely be outside of the scope an approved incentive, regardless of the state's threshold.

States have differing opinions of what the appropriate threshold for a "valued amount" looks like. Most states rate an acceptable promotional value as $20 to

9. NAIC Model #880, § 4H(1).

$25, while some allow for as little as $10. Additionally, some states limit promotional items within the statute, while others incorporate by reference in the insurance department bulletins. In 2013, Montana raised its promotional value from $5 to $25 after finding the average for surrounding states to be $50.[10] In September 2016, Montana increased this amount once again to $50.[11] Until 2013, Montana carried the lowest stated promotional value limit. Currently, Idaho allows for the largest monetary value of $200 per calendar year.

In 2015, Washington introduced drastic revisions to its promotional item limitation. Senate Bill 5743 proposed to increase the "valued amount" from a $25 limit to a $100 limit.[12] Supporters of higher limit—including agents and trade associations—argued that under the $25 limit, it was nearly impossible for an agent to engage in simple gestures such as sending flowers to a sick client. Opponents argued that a $75 increase was too much because the previous update in 1990 was a $20 increase. Ultimately, the legislature supported the increase. Agents and trade associations viewed this as a substantial victory in working together with the legislature to gain a reasonable increase under the statute.

Gift cards seem to be most popular among personal insurance agents, especially around the financial crisis of 2008 when gas prices were reaching an all-time high. Many states categorize a gift card as a promotional item subject to the state's threshold, with little additional guidance. Previously, Maine distinguished merchant gift cards from "cash equivalents," which could be used similarly to a credit card. If a card was merchant-specific, then it was an acceptable incentive in Maine, as long as it was within the monetary limit.[13] Maine removed this distinction in the modernization of its statute in 2017.[14]

3.2 Referrals

There are few laws to address sharing commissions between agents. However, anti-rebating statutes often raise a question around the legality of giving an unlicensed person or entity a fee for referring service to the agent. States such as Illinois and Indiana have a specific statutory language to address referral fees for non-agents. Most of those statutes are silent as to an appropriate monetary limit. The remainder of states subscribe to a uniform interpretation. As long as the "referral fee" is not contingent upon a sale, most states view the fee within the parameters of the statute. Often, in justifying the fee, regulators compare the referral to an agent purchasing a lead.

10. At the time, rates for surrounding states were: South Dakota and Washington, $25; North Dakota, $50; and Idaho, $100. *See* Montana Advisory Memorandum (May 14, 2013).

11. Montana Advisory Memorandum (September 26, 2016).

12. S. 5743, 64th Reg. Sess. (WA. 2015).

13. Maine Bulletin No. 384 (November 21, 2012).

14. Maine Bulletin No. 426 (October 25, 2017).

3.3 Raffles

Some states allow an agent or broker to conduct a raffle as long as the entry is not connected to the sale of an insurance product and is within a specific dollar range, which varies by state. However, several states have not offered guidance in this area.

3.4 Charity Donations

A number of states allow producers to donate their commission to charity as long as the client, or prospective client, has no influence over the choice of charity. Additionally, most of these states prohibit the producer from naming the client, or prospective client, so s/he becomes eligible for the tax benefit. The 2008 New Jersey amendment that stated "… the consumer cannot receive the contribution 'and has no direct or indirect interest in the receipt of the contribution'" raised a question about how far removed the client must be from the charity (NJ Insurance Department of Banking and Insurance Office of Consumer Protection, 2009). A client could have an "indirect interest" in a charity if the charity knows that the client's agent donated to the charity, even if the client does not receive the "direct benefit" of the tax write-off. Ultimately, the New Jersey Department of Insurance decided that the "indirect interest" must still be of pecuniary benefit to the client to violate the statute. For example, if the agent donates to the school fundraiser event, as long as it is not linked to the sale of insurance or at least marketed as such, the school is receiving an acceptable "indirect benefit."

3.5 Value-Added Services

"Value-added" services arise when an agent or broker provides a service using certain tools or risk management expertise without requesting an additional fee. This issue is perhaps most common in the commercial context and is of more concern given the evolution of tools available to increase customer service.[15] Generally, services are not prohibited if they are directly related to the insurance product sold, are intended to reduce claims, and are provided in a fair and nondiscriminatory manner.[16] These services include activities or products such as risk assessment, risk control tools, claims assistance, legislative updates or administration consulting. Traditionally, these "value-added" services have been distinguished from providing administration for federal Consolidated Budget Reconciliation Act (COBRA) and mini-COBRA coverage, preparing employee handbooks, and performing drug tests or background checks, just to name a few.

The implementation of the federal Patient Protection and Affordable Care Act (ACA) in 2010 led to increased calls for agents and brokers to assist in compliance

15. Maine Bulletin No. 384 (November 21, 2012).
16. Missouri Insurance Bulletin 10-07 (November 5, 2010).

and tax documentation. This increase in demand for value-added services further prompted discussion on the impact of anti-rebating statutes

Several states have enacted a litmus test, which is highly favored among various industry stakeholders, as it sets direct criteria for services allowed as an exception to the rebate law without naming them one by one. New Hampshire and New York provide for some limited exceptions related to “value-added” services. New Hampshire’s statutory exception follows a two-part test:

> (d) Value added service, activity, or product offered or provided without a fee, or at a reduced fee, that is related to the coverage provided by the insurance contract, if the provision of such value added service, activity, or product does not violate any other applicable statute or rule, and is:
>
> (1) Clearly identified and included within the insurance policy, annuity contract, or brokerage agreement; or
>
> (2) Directly related to the firm’s servicing of the insurance policy, annuity contract, or brokerage agreement, or offered or undertaken to provide risk control for the benefit of the client.[17]

New York enacted a similar litmus test, with guidance and clarification provided in Circular Letter No. 9 (2009):

> … an insurer or insurance producer may provide a service not specified in the insurance policy … if:
>
> 1. the service directly relates to the sale or servicing of the policy or provides general information about insurance or risk reduction; and
> 2. the insurer or insurance producer provides the service in a fair and nondiscriminatory manner for like insureds or potential insureds.

The New York test is still fairly limited in its application of “services directly related to the servicing of the policy,” as the letter cautions certain services—such as payroll services, management of employee benefit programs and other types of human resources (HR) services—“… could, in the Department’s estimation, run afoul of the rebating and inducement provisions set forth in the Insurance Law.” Thus, the New York directive did little to address concerns arising from the ACA or internet platforms such as Zenefits.

17. NH § 402:41(1)(d)(1)-(2).

4. The Cost to Disruptive Technology

Less than two years after the passage of Senate Bill 5743, Washington agents and trade associations found themselves on the other side of the table arguing against removing caps for promotional items and "value-added" services that would allow businesses such as Zenefits to offer its platform free of charge. Zenefits was founded in California in 2013 by Parker Conrad, who thought of the idea after experiencing firsthand what it was like to run the HR functions for a small business. The company is a software-as-a-service (SaaS) and licensed broker, which serves more than 20,000 small to midsize businesses.

While Zenefits has several competitors such as Namely and Gusto, it was the first to offer portions of the software for free while being available to serve as an insurance broker for those clients who choose to use the company for insurance.[18] The technology enables small businesses that do not have the resources for HR support to house a number of components in one location. Under the original model, Zenefits gave customers free access to the basic HR platform that included services such as paid time off (PTO) tracking, on-boarding and off-boarding, and information technology (IT) provisioning. Zenefits then sold the more robust HR tools for a fee.

Today, Zenefits operates like many online services and apps in the market, where the access to the software is provided as a freemium,[19] with certain features available for purchase in a tiered-based pricing model. Under this model, customers are not charged for all services. Some services—such as employee management and benefit administration—are free to all clients who create an account (Zenefits, 2017). However, other services offered through the same platform are available to customers at an additional fee from Zenefits or the contracted vendor. All users in the state of Washington pay for the traditionally free level due to the OIC's current interpretation of the anti-rebate law (Zenefits Blog, 2017).

There are two arguments supporting Zenefits' violation of the anti-rebating laws: 1) hosting all of these services on a single integrated platform "induces" consumers to purchase the insurance through Zenefits versus another broker; and 2) these "free services" have a value that likely exceeds the value allotted by statute and prevents a level playing field.

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18. It is important to note that while Zenefits is the leading technology of debate in this paper, there are other startup technology companies penetrating the market in a similar way. Roc-connect is integrating personal line insurance into the Internet of Things market by providing insurance related benefits such as lower premiums to customers who equip their home with certain risk control smart technology devices such as smart fire detectors that connect to the internet.

19. Freemium is a "combination of the words 'free' and 'premium' used to describe a business model that offers both free and premium services. The freemium business model works by offering simple and basic services for free for the user to try and more advanced or additional features at a premium" (Investopedia, 2017).

In 2014, The Utah Department of Insurance imposed regulation on Zenefits, stating it had to start charging more for its services or face daily fines (Montgomery, 2015). Zenefits saw this as an opportunity to be a trailblazer for technology and its place in the insurance industry. In a 17-page letter to the insurance department, Zenefits' attorney criticized Utah's interpretation of the statute, stating:

> *Banks routinely offer 'free' checking accounts to customers … .Retailers, of course, provide free and discounted services every day. None of these businesses could offer any such discounts or free services to customers under the Department's rule because they also broker insurance—even for the vast majority of their customers who do not buy insurance from them (Welsh, 2014, pg. 6).*

Utah lawmakers saw this as an opportunity to lead in technology regulation and passed a bill, House Bill 141, to accommodate these types of value-added services (Adams, 2014). The Utah law is distinguishable from the challenge of other states because Utah does not adhere to NAIC Model #880.

Regulatory leaders in the state of Washington, however, disagree with the comparison of Zenefits to online travel companies and banks, claiming insurance services are a "sideline" to their primary business.[20] In November 2016, Washington OIC entered into a consent order, which prohibited Zenefits from offering their platform free of charge. Furthermore, Utah has unique framework for its anti-rebating statute, which allowed the legislature to construct a different exception than what was proposed in Washington, which has enacted NAIC Model #880.

In February 2017, Washington state Sen. Joe Fain (R-WA) and Sen. Mark Mullet (D-WA) introduced Senate Bill 5242, which would remove the cap on promotional items and, in turn, lift the limitations for value-added services. Supporters of this bill, such as Chris Massey, Zenefits vice president of government relations and partnerships, argued:

> *"... to date the principal argument in opposition [is] small brokers cannot afford to offer these sorts of free services and we need to protect them from competition. From our perspective, it's just not fair to impose higher cost on other...small business...in order to protect small brokers from innovations that are disrupting the insurance market."*[21]

20. *Committee on Financial Institutions and Insurance: Public Hearing on Senate Bill 5242*, Washington Senate, 65th Legislature (Jan. 26, 2017).

21. *Id.* (Testimony of Chris Massey).

Opponents of Senate Bill 5242 argue that the language of the bill precludes a level playing field for agents. Therefore, larger agencies with higher budgets can entice consumers by incentives including innovative technology. If the larger players control the marketplace, it will eliminate competition and as a result have negative consequences on the consumer if the larger entities are able to control pricing. Supporters of the bill contend the anti-rebating laws are supposed to protect consumer, not level the playing field for agents

Opponents also note that while the cost of the value-added services is not directly imposed on the customer, there is a cost associated with offering such a service even in the development and maintenance of the software. Zenefits willingness to absorb the cost and not directly pass on to the insured, can be considered an inducement under NAIC Model #880.

Additionally, services that are not provided by language in the insurance policy are not subject to the regulation of insurance regulators. Therefore, if a consumer does not believe the company is upholding their end of the service contract, their only recourse is through a court system, which can be costly and unrealistic for a small business.

As of October 2017, Senate Bill 5242 has not yet reached the floor in the Senate nor been introduced in the House. In November 2017, an administrative ruling upheld Washington State's order for Zenefits to cease the free distribution of their platform as a violation of the state's rebating laws (Washington OIC Public Affairs, 2017).

4.1 A Call for Change: Are the Lines Drawn in the Right Place?

Both sides seem to agree a question exists as to whether the lines as drawn currently by anti-rebating statutes appropriately balance consumer protection with consumer innovation. While there would be a loss of opportunity to enhance consumer experience if innovation is stifled, there is reasonable concern that "lifting the lid" on the statutes could lend itself to borderline unethical practices. Providing a good or service that falls within the four corners of the policy is quite different from providing a client with unrelated benefits such as tickets to a professional football game.

California's anti-rebating statutes were repealed as a part of the large regulatory sweep brought on by Proposition 103. However, this repeal had seemingly little consequence as insurance companies refused to do business with agents who were offering rebates. Many companies integrated anti-rebate clauses in the contracts almost immediately after the passage of the law. While the rebating was revived with the elimination of the statute, it was removed again through contracts, which seems to support an industry desire for some regulation in this area.

Griffin and Levin (2009) suggest that states should provide a commercial exemption to allow producers to provide a broad menu of services, which will in turn will lower the cost and provide more efficient health and welfare benefits.

However, there is no indication that this technology will be limited to the commercial setting and needs to be addressed in both the personal and commercial setting.

There is a developing rule among states that support an update to the statute. States like Connecticut, North Carolina, and Louisiana have provided guidance through advisory opinions and legal memorandum that present two questions:

1. Is the service offered on equal terms to the public?
2. Is it offered without the requirement to buy insurance?

If the answer is in the affirmative to both, then the states that apply this two-part test seem to be in agreement that rebating is not taking place. However, this is not a test that can be applied to all value-added service issues.

Recently, Maine passed a bill to repeal and replace its anti-rebating statute exceptions. This bill stands out as a potential model bill for other states to follow, as it appears to address some of the concerns from opponents of change by setting boundaries to "level the playing field" in some sections of exceptions but also creating opportunity for innovation in the field. The statute is organized to address three categories of exceptions.

The first part addresses promotional items, raffles and drawing. The amendment increases the limit of promotional items to $100 per year per person and sets a limit for raffles at $500. The second part addresses permissible value-added services through a two-part test:

> An insurer...or a producer may offer to provide a valued-added service or activity...without fee or at a reduced fee, that is related to the coverage provided by an insurance contract…[if it] is:
>
> A. Clearly identified and included within the insurance contract; or
> B. Directly related to the servicing of the insurance contract or offered or undertaken to provide risk control for the benefit of a client.[22]

The third part of the statute follows the emerging two-part litmus test for models such as Zenefits that are offered for free or for less than fair market value. Such services are allowed, "… as long as the receipt of the services is not contingent upon the purchase of insurance and the services are offered on the same terms to all potential insurance customers."[22]

22. 24-A MRSA § 2163-A (3).

5. Conclusion

Legal conflict frequently is at the core of innovation (Wroldsen, pg. 760, 2016). We have seen this conflict in law and insurance play out in shared economy models such as Uber, Airbnb and, now, Zenefits. Brokers are valuable to most insurance transactions and it is hard to commoditize quality customer service.

Legislatures should be open to carving out an exception that ultimately allows services to go beyond the four corners of the policy, as long as they are related to the functioning of the policy. It is difficult to imagine the industry would not be in support of exceptions which offer services that directly enhance the consumer benefit because these laws were initially put in place to protect consumers. The challenge remains how best to ensure the innovative products being developed to benefit consumers can coexist with the public policy rationale set forth in the anti-rebating laws.

Ideally, an NAIC working group would develop model language to provide guidance to the states and establish a uniform approach. However, interpretation of these exceptions would be left up to the states, which could do little to solve the uniformity concerns, as states with similar anti-rebating statutes interpret the language differently.

Appendix A

The following tables provide a summary of state laws and regulations regarding anti-rebating issues. "NG" refers to areas where no additional guidance was located in the statute, bulletin, or advisory opinion on the topic. "L/H" refers to life/health specific statutory references. "P/C" refers to property/casualty specific statutory references. "SF" references statutory or administrative guidance that offers flexibility for innovation platforms such as Zenefits and/or activities related to the servicing of the insurance product.

Additional Guidance: Alabama–District of Columbia

State	*Statutory Reference for Anti-Rebating*	*Promotional Items*	*Client by Client Referral Fee*	*Raffles*	*Value-Added Services*	*Notes*
Alabama	Ala. Code 27-12-12 (L/H) Ala. Code 27-12-14 (P/C) Ala. Admin. Code 482-1-040-.03	Permitted; $15 limit Ala. Admin. Code 482-1-088-.4 Ala. Admin. Code 482-1-088-.5	NG	NG	NG	
Alaska	AS. 21.36.100 (L/H) AS 21.36.120 (P/C)	NG	NG	NG	NG	
Arizona	Ariz. Rev. Stat. Ann. § 20-449 (L/H) Ariz. Rev. Stat. Ann. § 20-451 (P/C)	Permitted; $25 limit Ariz.Rev. Stat. Ann. § 20-452	NG	NG	SF (Ellingson, 2015)	
Arkansas	Ark. Code Ann. § 23-66-206(10) Ark. Code Ann. § 23-66-308	Permitted; $25 limit Ark. Bulletin 5-98				
California	CA. Irs. Code § 790.02 (Footnote 1988 prop 103 repealed anti-rebating language)	NA	NA	NA	NA	Insurers are permitted to refuse business with agent if s/he rebates
Colorado	Colo. Rev. Stat. Ann. § 10-3-1104(1)(g)	NG	NG	NG	NG	
Connecticut	Conn Gen. Stat. Ann. § 38a-825	NG	NG	NG	SF (Miner, 2015)	
Delaware	Del. Code Ann. tit. 18 § 2304(14) (L/H) Del. Code Ann. tit. 18 § 2304(15) (P/C)	NG	Permitted verbal threshold "nominal fee" Delaware DOI FAQ	NG	NG	
District of Columbia	D.C. Code Ann § 31-2231.12 (L/H) D.C. Code Ann § 31-2231.13 (P/C)	Permitted; $10 limit D.C. Code Ann § 31-2231.12(f) (L/H) D.C. Code Ann § 31-2231.13(h)(1) (P/C)	NG	NG	NG	

Additional Guidance: Florida–Kentucky

State	*Statutory Reference for Anti-Rebating*	*Promotional Items*	*Client by Client Referral Fee*	*Raffles*	*Value-Added Services*	*Notes*
Florida	Fla. Stat. Ann. § 626.95(1)(h) Fla. Stat. Ann. § 626.572	Permitted; $25 limit Fla. Stat. Ann. § 626.9541(1)(m)	NG	NG	NG	
Georgia	Ga. Code Ann § 33-6-4(b)(8)(B)	Permitted; $100/calendar year Ga. Code Ann § 33-6-4(b)(8)(c)(x)	NG	NG	NG	
Hawaii	Haw. Rev. Stat. Ann. § 431:13-103 (a)(8)		NG	NG	NG	
Idaho	Idaho Code § 41-1314	Permitted; $200/year Idaho Code § 41-1314(3)	NG	NG	NG	Exception applies to goods only Id. Bulletin 11-03
Illinois	215 ILCS 5/424 215 ILCS 5/151	Permitted: verbal threshold, "minimal value" IL Bulletin 2012-11	Permitted; no dollar limit 215 ILCS 5/500-80	Permitted: As long as benefit is open to public and not contingent upon sale of policy. IL Bulletin 2012-11	SF IL Bulletin 2012-11	* Insurers are permitted not to do business with agent if s/he rebates
Indiana	Ind. Code Ann. § 27-1-20-30 Ind. Code Ann. § 27-1-22-13 Ind. Code Ann. § 27-4-1-4(i)(8)	Permitted; $25 limit IN Bulletin 177	Permitted; no dollar limit Ind. Code Ann. § 27-1-15.6-13	Permitted; $25 limit IN Bulletin 177	SF IN Bulletin 177	
Iowa	Iowa Code Ann. § 507B.4(3)(i)(1)	Permitted: No cap IA Bulletin 08-15	NG	NG	SF IA Bulletin 08-15	
Kansas	Kan. Stat. Ann. § 40-2404(8)	NG	NG	NG	NG	
Kentucky	Key. Rev. Stat. Ann. § 304.12-090 Key. Rev. Stat. Ann. § 304.12-100 (Exceptions) Key. Rev. Stat. Ann. § 304.12-110	Permitted; $25 limit Key Rev. Stat. Ann. § 304.12-110(4)	NG	NG	Key. Rev. Stat. Ann. § 304.12-100(3)	NG

Additional Guidance: Louisiana–Missouri

State	*Statutory Reference for Anti-Rebating*	*Promotional Items*	*Client by Client Referral Fee*	*Raffles*	*Value-Added Services*	*Notes*
Louisiana	La. Rev. Stat Ann. § 22:1964(8)	If considered "marketing" materials, no limit LA Advisory Ltr. 2015-01 (revised)	NG	NG	SF LA Bulletin 2015-01 (revised)	
Maine	Mae. Rev Stat. Ann. Tit. 24-a § 22160 (L/H) Mae. Rev Stat. Ann. Tit. 24-a § 2162 (P/C)	Permitted; $100 limit Mae. Rev Stat. Ann. Tit. 24-a § 2163-A(1)		Permitted; $500 limit Mae. Rev Stat. Ann. Tit. 24-a § 2163-A (1)	SF M.R.S.A Tit.24-A § 2163-A (2) & (3)	Gift card limited to merchant only Maine Bulletn 384
Maryland	Md. Code. Ann. Insurance § 27-209 (L/H) Md. Code. Ann. Insurance § 27-212 (P/C)	Permitted; $25 limit Md. Code. Ann. Insurance § 27-209(4); § 27-212(d)	NG	Permitted; $25 limit Md. Code. Ann. Insurance § 27-209(4) [Incorporated by reference MD Bulletin 14-08]	SF (August 2015)	
Massachusetts	Mass. Gen. Laws Ann. Ch. 176D § 3(8)	NG	NG	NG	NG	
Michigan	Mich. Comp. Laws Ann. § 500.2024	Permitted; no limit to listen Limit for application: $5 (L/H) Mich. Comp. Laws Ann. § 500.2024(a) $10 (P/C) Mich. Comp. Laws Ann. § 500.2024(b) Michigan DOI, FAQ accessed 12/15/16		$5 limit (life); $10 limit (P/C)		Different approach than other states w/ different standards for applicants vs. "listenersto the pitch"
Minnesota	Minn. Stat. Ann. § 72A.20 subd. 10(a); Minn Stat. Ann.72A-08; Minn. Stat. Ann. § 72A.12, subd. 4(a)&(b) (L/H)	Permitted; $25 limit Minn. Stat. Ann. § 72A.20 subd. 10(b)	NG	NG	NG	Statute provides for penalty if in violation $60–$200
Mississippi	Miss. Code Ann.§ 83-7-3	NG	NG	NG	NG	
Missouri	Mo. Ann. Stat. § 375.936(9) Mo. Ann Stat. § 376.500 (L/H)	Permitted; no limit MO Bulletin 10-07	NG	NG	MO Bulletin 10-07	

Additional Guidance: Montana–North Carolina

State	*Statutory Reference for Anti-Rebating*	*Promotional Items*	*Client by Client Referral Fee*	*Raffles*	*Value-Added Services*	*Notes*
Montana	Mont Code Ann § 33-18-208 (L/H) Mont Code Ann § 33-18-210 (P/C)	Permitted; two-part test: 1) Nominal ($50 threshold) 2) Available to all MT. Advisory Ltr (2016)	NG	Permitted; if exceeds $50, then apply two-part test: 1) Available to all 2) Not connected with sale of insurance	NG	
Nebraska	Neb. Rev. Stat. Ann § 44-1525(8) (L/H) Neb. Rev. Stat. Ann § 44-361	NG	NG	NG	NG	
Nevada	Nev. Rev. Stat. Ann. § 686A.490(2)	Permitted; $100 in aggregate per calendar year NRS§ 686A.110; NRS§ 686A.130	NG	Permitted; $100 in aggregate per calendar year NRS § 686A110; NRS § 686A130	NG	
New Hampshire	N.H. Rev. Stat. Ann § 402:39; § 4174 IX (a)	Permitted; $25 limit N.H.Rev. Stat. Ann § 402:41		Permitted; no cap; two-part test applies N.H. Rev. Stat. Ann § 402:41, I(f)	Limited application RSA § 402:41	Formerly, raffles limited to $1,000/calendar year; limit per N.H. Rev. Stat. Ann § 402:41, I(f); HB 171 removed cap, but left additional requirements alone
New Jersey	N.J. Rev. Stat. Ann § 17:29B-4(8); § 17B30-13; N.J. Admin. Code § 11:17A-2.3 & 2.4	NG	NG	NG	NG	
New Mexico	N.M. Stat. Ann § 59A-16-17(A)	Not allowed NM Bulletin 2010-04	NG	NG	NG	MOST STRICT APPLICATION
New York	N.Y. Ins. § 2119; § 2324	Permitted; $25 limit N.Y. Ins. § 2324 (a)				
North Carolina	N.C. Gen Stat § 58-63-15 (8); N.C. Gen Stat § 58-33-85	Permitted; no dollar amount specified, but reference to "inexpensive" items and food (NC Commissioners Column, 2006)	NG	NG	SF N.C. Gen Stat § 150B-4 N.C.A.C. 01.0301-01.0303 (Piquant, 2015)	

Additional Guidance: North Dakota–Texas

State	*Statutory Reference for Anti-Rebating*	*Promotional Items*	*Client by Client Referral Fee*	*Raffles*	*Value-Added Services*	*Notes*
North Dakota	N.D. Cent. Code § 26.1-04-03 (8)	Permitted; $50 limit N.D.Cent. Code § 26.1-04-03 (8)(c)	NG	NG	NG	
Ohio	Ohio Rev. Code Ann. § 3901.21(G) Ohio Rev. Code Ann. § 3911.20 (addresses consumers) Ohio Rev. Code Ann. § 3999.05 (L/H)	Permitted; $50 limit OH Bulletin 2009-13	NG	NG	NG	
Oklahoma	36 Okla. Stat. Ann. § 1204 (8)	Permitted; $100 limit 36 Okla. Stat. Ann. § 1204 (10)(d)	NG	NG	NG	
Oregon	Or. Rev. Stat § 746.045	Permitted: No Cap OR DOI website	NG	NG	NG	
Pennsylvania	40 Pa. Cons. Stat. Ann. § 1171.5 (a)(8); § 471; § 310.45 & § 31046	NG	NG	NG	NG	
Puerto Rico	PR St. T. 26 s 2710	NG	NG	NG	NG	Maximum $10,000 fine
Rhode Island	R.I. Gen. Laws § 27-29-4 (8); R.I. Gen. Laws § 27-4-6 (L/H)	Permitted; verbal threshold RI Bulletin 2009-9	NG	NG	NG	
South Carolina	S.C. Code Ann. § 38-57-130; S.C. Code Ann. § 38-57-150	Permitted; $25 merchandise limit & $10/person refreshment limit S.C. Code Ann. § 38-57-160	NG	NG	NG	
South Dakota	S.D. Codified Laws § 58-33-14 (L/H) S.D. Codified Laws § 58-33-24 (P/C)	Permitted; $25 limit S.D. Codified Laws § 58-33-74	Permitted no dollar limit S.D. Codifed Laws § 58-30-174	NG	NG	
Tennessee	Tenn. Code Ann. § 56-8-104 (8)	Permitted [no cap] as long as not tied to sale or purchase (Peak, 2015)	NG	NG	SF, as long as not tied to sale or purchase (Peak, 2015)	
Texas	Tex. Ins. Code Ann. § 541.056; § 543003; § 1701.061; 28 Tex. Admin. Code § 21.48.03 & § 4807 & § 4705	NG	NG	NG	Limited Tex. Ins. Code Ann. § 1701.061	

Additional Guidance: Utah–Wyoming

State	*Statutory Reference for Anti-Rebating*	*Promotional Items*	*Client by Client Referral Fee*	*Raffles*	*Value-Added Services*	*Notes*
Utah	Utah Code Ann. § 31A-23a-402(2)(a); Utah Admin Code R590-154 subsec. 10	Permitted; $100 limit UT Bulletin 2015-8	NG	NG	SF UT Code Ann. § 31A-23a-4(2.5 UT Bulletin 2015-8	
Vermont	Vt. Stat. Ann. Tit. 8 § 4724 (8) Vt. Stat. Ann. Tit. 8 § 3702 (L/H)	NG	NG	NG	NG	
Virginia	Code of Va 38.2-509	Permitted: no cap "as long as not contingent upon purchase of insurance"	NG	NG	NG	
Washington	Wash. Rev. Code Ann. § 48.30.150(1)	Permitted; $100 limit Wash. Rev. Code Ann. § 48.30.140(4) Wash. Rev. Code Ann. § 48.30.150	Permitted; $25 per year WAC 284-17-820	Permitted; $25 limit WAC 284-17-830	Very limited	Charitable contribution language WAC 284-17-800
West Virginia	W. Va. Code § 33-11-4 W.Va. Code St. R. 114-70-3/11CSR70	Permitted; $25 limit W. Va. Interpretive Ruling 11CSR70	Permitted; $25 limit W. Va. Interpretive Ruling 11CSR70	NG	NG	
Wisconsin	Wis. Stat. Ann. § 628.34 (2)	NG	NG	NG	NG	
Wyoming	Wyo. Stat. Ann. § 26-13-110	NG	NG	NG	NG	No reference to P/C

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