Insurance Data and Intellectual Property Issues

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by

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Abstract

This paper provides a timely overview of the legal, political and practical implications of intellectual property concepts as they apply to insurance data collection and use.

Intellectual property issues have become common in regulatory discussions during the 1990's and have also become important to the understanding of advisory organizations. This increased interest and importance – which can be expected to intensify – is largely due to a confluence of two factors: (1) advances in information technology, especially the evolution of personal computers, and (2) a rethinking of the system of statistical agents and advisory organizations (formerly rating bureaus). An understanding of these issues requires a fundamental grasp of intellectual property concepts and an awareness of a host of conflicting considerations.

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Introduction

Perhaps the key precept of the insurance data management profession is that data is a valuable resource and must be managed as such. Paraphrased, insurance data is *intellectual property.* "Intellectual property" is also a legal term that includes such concepts as patents, trade secrets, copyrights and trademarks. The primary focus of this paper will be with the application of intellectual property concepts to statistical data[1] and to similar data contained in rate filings.

[1] Unless otherwise qualified, references to "statistical data" refer to the detailed data reported to statistical agents and databases developed from that data. The term also refers to similar data and databases in the possession of individual insurers. For purposes of this paper, however, the term "statistical data" does not refer to Annual Statement data or reports that accompany rate filings, even though they are ultimately derived from "statistical data." The distinction is important in this paper owing to legal differences that affect the disclosure and distribution of the different types of information.

Intellectual property concepts also apply (and are also the subject of controversy) with regard to such non-statistical items as underwriting guidelines, manuals, policy forms, etc.

There are unsettled situations that relate to the value of data and what is done with it once an insurer reports it to others. Primarily, this reporting is accomplished via statistical agents or advisory organizations. It may also be reported directly to state insurance departments, state accident boards (for workers' compensation) or to others[2]. While contractual agreements or laws largely control the use of insurer data by these entities, there have been changes in the ways that these institutions function and there are ongoing discussions regarding other possible changes. This paper is divided into the following sections:

- Statistical Reporting & State Insurance Regulation;
- Trade Secrets;
- Freedom of Information Act (FOIA) Considerations;
- "Ownership and Control" Issues;
- Controversies Surrounding the Disclosure of Insurer-Specific Statistical Data;
- Data Disclosure in Rate Filings;
- Intellectual Property Issues Relating to Advisory Organizations;
- Florida Workers' Compensation Initiative
- Extending the "Florida Initiative" to Other Lines and States, and
- Speculation about the Future

Statistical Reporting & State Insurance Regulation

State insurance regulation dates to the 1800's, but most of the significant events relevant to data collection and state insurance departments have occurred since 1944. From the 1800's until the mid-1940's, rates for such lines as fire and auto and casualty insurance were generally set by associations of insurers known as rating bureaus. Rating bureaus arose out of disastrous price competition by fire insurers in the early years of insurance, and were welcomed and sanctioned by the states as a means to assure solvency and orderly markets. These organizations certainly operated "in restraint of trade," but the courts of the day had not interpreted insurance as "commerce," and hence insurance was not subject to federal authority under the Constitution's "commerce clause." Specifically, federal anti-trust laws did not apply.

To the modern reader, it is almost impossible to think of insurance as anything but interstate commerce, but it remained that way until June 4, 1944 when the Supreme Court (by a 4-3 margin) recognized it as interstate commerce with the South Eastern Underwriters Association (SEUA) decision.

In response, the Congress passed the McCarran-Ferguson Act that suspended specified federal antitrust laws until 1948. McCarran-Ferguson allowed the states to continue to regulate insurance, even though it was interstate commerce, and provided limited anti-trust protection to

[2] The list of "others" includes the federal Occupational Safety and Health Administration (OSHA) for occupational injuries; fire marshals for fire losses; state motor vehicle departments that receive VIN's and various evidences of insurance; the federal Highway Loss Data Institute (HILDI) for auto losses, various fraud bureaus, etc.

cooperative activities between insurers to the extent that these activities were regulated by the states. It was argued that pooling was necessary to provide credible ratemaking data. Rating bureaus (certainly in their form at that time) could continue to exist only if the states passed laws to regulate them. The following year, the NAIC adopted industry-supported model laws that were subsequently passed in almost all of the states.

It is important to remember that the 1945 NAIC model laws predated electronic data processing equipment. They were drafted when statistical compilation was a tedious manual activity (instead of a tedious electronic activity). A careful study of the data collection provisions in these laws is necessary to understand what state statistical activities are ostensibly designed to do. The laws in most states follow these old NAIC models and read (in part) something like the following:

> The commissioner (may or shall)[3] promulgate reasonable rules and statistical plans[4], which may be modified from time to time and which shall be used thereafter by each insurer, in order that the experience of all insurers may be made available at least annually in such form and detail[5] as may be necessary to aid in determining whether rating systems comply with the standards set forth in section [ ]. The commissioner may[6] designate one or more advisory organizations or other agencies to assist in gathering such experience and making compilations thereof.

While some states allow data to be reported directly to them, other states do not accept direct reporting and virtually all insurers choose to satisfy their statistical data reporting requirements through statistical agents, even where they could report directly to the state. The ease of reporting to a single source is a major consideration for multi-state insurers, as is the technical support provided by statistical agents. Another consideration is that reporting data through a statistical agent generally avoids the state being in possession of detailed statistical data for the individual insurer. Data in the possession of the state is clearly subject to Freedom of Information Act (FOIA) requests, but data possessed by statistical agents has generally managed to stay beyond the grasp of such requests. (This concern will be discussed further in the FOIA section of this paper.)

Some statistical agents have existed only to collect data for statutory purposes, while others collect data for advisory organizations. In fact, advisory organizations generally do not have separate licenses as statistical agents, as licensure as an advisory organization customarily

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3 The NAIC model law was changed from "shall" to "may" in the early 1990's. Some states have "may," but "shall" is still most common.

4 As most readers know, statistical plans are large, complex sets of documentation that require a considerable amount of time for persons with specialized experience to write. With few exceptions, state insurance departments do not have staff with the time or background necessary to write statistical plans. However, it is not beyond the ability of states to specify the data elements to be collected or to instruct national statistical agents of state exceptions necessary to obtain the data necessary to fulfill the needs of a specific state.

5 This is a strong statement. The standards referenced are that each rate on file (whether filed by an advisory organization or an individual insurer) shall not be "excessive, inadequate or unfairly discriminatory." This implies that statistical compilations should be down to the level of individual classification detail. While insurers generally report data with class detail to statistical agents, the reports that are subsequently provided to regulators often do not get down to this level of detail.

6 The "may" is noteworthy, because it leaves the door open to the regulator being the statistical agent. In practice, however, this only occurs rarely.

authorizes them to collect statistics. For most lines and states, the data reported to statistical agents for statutory purposes is only a subset of the more detailed data necessary for ratemaking that is collected by advisory organizations. Therefore, in addition to making loss costs, advisory organizations also use a subset of the data that they collect to satisfy insurers' statutory reporting requirements.

Most state insurance departments are trivial users of insurance statistical data in comparison to advisory organizations, both in terms of the actual amount of data that they handle as well as the nature of the analyses that they perform. In part, this has been because many of the analyses in which the states are interested are, in fact, the same analyses or summaries provided by advisory organizations, statistical agents and large insurers. There is little reason for states to replicate work that has already been performed elsewhere.

The statistical output provided by statistical agents and advisory organizations to most states for most lines has tended to be highly summarized industrywide aggregations. These statistical summaries supplement other sources of information (i.e., Annual Statement Page 15's, rate filings and market conduct exams) used by insurance departments as they attempt to assure compliance with state rating laws. In general, the availability of these highly summarized reports to regulators and hence to the public has failed to generate controversy or concern.

In the author's opinion, the data requested by and provided to state insurance departments can be expected to become more detailed as state insurance departments increasingly take advantage of the processing power of modern personal computers. Consider that the goal of statistical reporting laws is, "to assure that the experience of all insurers is made available at least annually in such form and detail as is necessary to aid in determining whether rating systems comply" with the rating law. Do highly summarized industrywide aggregations provide enough information to fulfill this charge?

Experience has shown that regulatory demands for data most commonly arise out of market problems. Consider the demand generated by market crises – medical professional liability in the 1970's, products and general liability in the mid-1980's and workers' compensation in the late 1980's and early 1990's.

Of course, controversies and the data demands that inevitably result are not entirely restricted to market crises. Controversies relating to urban insurance data arose even though personal lines insurance is almost always competitive. The important point is that regulatory demands for data customarily increase when there are market problems. Yet markets have been virtually crisis-free since PC's with enough power to handle large databases have become common and inexpensive (since about the early 1990's). It seems easy to imagine that state insurance departments, armed with PC's that can handle gigabytes of data, will seek significantly greater amounts of detailed data when the next crisis or controversy brews. Sooner or later, a larger number of insurance departments are likely to seek detailed insurer-specific data, either directly or through statistical agents and advisory organizations.

Trade Secrets

A trade secret is information that you have – and that others don't – that would be of potentially significant value to others, customarily one or more of your competitors. A detailed list of your customers would usually be valuable to your competitors. This is in contrast to an inventory listing of your furniture and office supplies. The inventory listing may be quite valuable to you, but its value would not be affected if a copy of it were leaked to one of your competitors. What benefit would they receive from it? What harm would it do to you?

The intent of trade secret law is to provide protection for certain types of information that would be of value to others. Absent legal recognition of its value, an insurer's employee could sell an information-packed list of insureds to a competitor and the insurer would probably have no legal recourse against either its devious employee or the competitor. The legal recognition provided by trade secret laws allows this recourse. In the case of misappropriation of trade secret information, trade secret law may allow both injunctive relief and damages. Criminal penalties may also apply to the perpetrators. (The complexities associated with possible legal remedies are beyond the scope of this paper. The point to be made is that they exist.)

Most states (about 40) have passed the Uniform Trade Secrets Act and the legal principles that apply under common law are very similar. The following definition is paraphrased from that act:

> A trade secret is information that derives independent economic value, actual or potential, from not being known to other persons who could obtain economic value from its disclosure or use. It must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy and outside parties may not be able to ascertain it at a reasonable cost by proper means.

It follows that a court will almost certainly reject an assertion of trade secret status if <u>any one</u> of the following requirements is not met:

- <u>The information must be of substantial value to competitors (were they to have it).</u> For instance, competitors would probably find a detailed list of insureds to be of substantial value, while an inventory listing of furniture and office supplies would be of minimal value.

- <u>Reasonable efforts must be made to keep the information secret.</u> The amount of effort that is "reasonable under the circumstances" to maintain secrecy is not easily characterized, but insurance data managers should be cautioned that the mere expectation that no one will copy the information is unlikely to be enough.

- <u>The information must not be ascertainable to outside parties by proper means at a reasonable cost.</u> For instance, a complete data-rich listing of insureds showing premiums and coverage amounts is probably not available except from the insurer. But a listing of workers' compensation insureds and their expiration dates for a state may be available from the state workers' compensation commission, and this would eliminate the trade secret status for this type of information in such a state.

These elements often involve "questions of fact," meaning that the determination is not purely objective, but involves judgment by the courts. Adding to the uncertainty, there has not been a significant number of prior court cases that have directly involved most types of insurance data questions, with the exception of customer list questions. The major question to be settled with otherwise straightforward customer list situations is generally whether the list is significantly more valuable than lists that can be developed from at a reasonable cost from openly available information. For instance, lists of homeowners and the value of their real property can generally be found at county courthouses, sometimes even in an electronic format. The amount of insurance would be of additional value, although some may argue that. But if this information were to be coupled with expiration dates, liability limits, amounts of scheduled property and premiums for each coverage, then there would appear to be little doubt that this would be of considerably more value to competitors than simpler lists available from public documents.

Only a few lower court cases have addressed trade secret questions for insurance statistical data of the nature that is routinely reported to statistical agents and advisory organizations (and which can eventually end up in the hands of state insurance regulators). The most notable case is a 1997 lower court case in Missouri, *Ganey, et al., vs. Missouri Department of Insurance, et al.* A newspaper in St. Louis wanted copies of insurer-specific premiums and losses by postal ZIP code from the Missouri Department of Insurance. The court agreed with insurer assertions that the data was trade secret and also affirmed that Missouri's public record law protected trade secrets from disclosure. The court noted, however, that the Missouri Department of Insurance should not presume that trade secret data will always be trade secret, noting that the value of marketing data is likely to diminish over time. The Missouri Department has since promulgated a regulation providing that data more than three years old will be released. This regulation is being challenged at this writing. It is likely that more litigation will be necessary before a reliable pattern can be ascertained for the trade secret status of various types of insurance statistical data.

Trade secret concepts are particularly relevant to data managers in their dealings with such entities as managing general agents and other types of business partners. While these dealings and internal applications (for instance, data mining) have made insurers more aware of the value of the data in their possession, the primary reason that the trade secret topic is the topic of public discussion more now than it was 10 or 15 years ago relates to the importance of this concept for information in the possession of governmental entities.

Freedom of Information Act (FOIA) Considerations

Virtually all government entities have some form of law governing the disclosure and distribution of information in their possession. Although the Freedom of Information Act (FOIA) is a federal law, its concepts are copied by laws in each of the states and much of the case law used to answer disclosure questions under state laws comes from cases in federal courts where FOIA laws are being applied. The general principle of FOIA laws is that every piece of information in the possession of the government should be subject to disclosure unless there is some specific reason (e.g., national security) to keep it confidential. Government should be accountable to the governed, and it can be argued that the ability of consumers, academics and the press to access the information underlying government decisions will result in better government, even in the majority of situations where consumers, academics and the press never avail themselves of this opportunity.

A problem with FOIA laws is that they provide the same broad access to information for competitors and commercial users as they do for consumers, academics and the press. While there are many situations where it is a sensible and proper function of government to obtain information for the purpose of its beneficial dissemination, it would appear desirable – "good government," if you will – for these situations to be identified and acted upon directly, rather than being the haphazard by-product of FOIA laws.

It has been the author's insurance-related experience that consumers, academics and the press comprise only a tiny percentage of the total public records traffic. In a Midwestern insurance department where an ordinary day will have several people viewing public records, a consumer, press or academic person may show up once or twice a year. It will probably be a graduate student seeking background for a paper. As many of the commercially-affiliated visitors are repeat customers, there can be little doubt that their opinion is that they are able to obtain commercially valuable information about their competitors that could not be obtained elsewhere, at least not at such an affordable price.

While this is a problem with FOIA laws, the total amount of information disseminated in this fashion may still be too small to offset the goodwill that results simply because the public knows that these records are available should they ever want to see them. In addition, the widespread protection of information filed with insurance departments would be a hindrance to employees at these departments who, even though they do not routinely provide documents to the public, counsel and respond to members of the public based on the insights that they glean from this information. Were this information to be protected, this muzzling of department employees could routinely put them in awkward situations. It is interesting to note that many associated with state insurance departments view this dissemination of information as a valuable service that enhances competition.

Although the underlying reasons for their existence are similar, it should be noted that the details of FOIA laws vary significantly from state to state. Procedures vary, and "exemptions" (classes of information that do not need to be made public) are mandatory in some states and discretionary in others. Even the definition of what constitutes a public record varies from state to state. As such, the reader should be cautioned that this paper can only make generalizations and to check the specific laws of every state where they have serious FOIA-related questions.

Under FOIA laws, trade secrets are one class of information that either may or shall (depending on the state) be protected from disclosure. For that reason, trade secret concepts are important to insurers when their data is in the possession of a governmental entity. A related exemption under FOIA laws is for "commercial or financial information ... (that is) privileged and confidential." On its face, this language appears to be more sweeping than the courts have interpreted it. In practice, the courts have exempted confidential commercial or financial information if

(1) Disclosure would be likely to impair the government's ability to get information in the future, or
(2) Disclosure would cause substantial competitive harm to the entity that provided it.

In the author's opinion, the first prong of these exemptions appears likely to be applicable to many types of ad hoc special calls for insurance data. If a special call includes data that the regulator had not required to be collected, such that there was no assurance that it would be available, and if the insurers providing the data appear to have a choice whether or not to comply, then it would appear likely that this exemption could apply if a large number of the submitting insurers indicated that they would submit data only if an attempt was made to keep it confidential. A prior indication by the regulator that information would be viewed as confidential would also add strength to an argument of confidentiality, although one should be cautioned that such an indication may not withstand a challenge.

The first prong of these exemptions would be less likely to apply to reports from statistical agents using standard statistical data elements that the regulator had required to be routinely collected. The reason for this is that there is usually no question that the regulator can obtain such reports. The second prong <u>might</u>, but determinations of the likelihood to cause "substantial competitive harm" could be difficult, judgment-filled determinations similar to trade secret determinations of whether the information would be valuable to a competitor.

FOIA laws apply to insurance statistical data in the large majority of states[7], but this has not resulted in a significant amount of FOIA requests by third parties to obtain detailed statistical data. At least one obstacle to FOIA requests for detailed statistical data in most states has been that the states don't have physical possession of the data. Rather, it is in the hands of statistical agents and advisory organizations. With the well-publicized (in statistical circles, anyway) exception of Texas, the fact that the statistical data is in the possession of statistical agents and advisory organizations has apparently taken it out of the reach of FOIA requests. The Texas FOIA provides in part that:

> ... "<u>public information" means information that is collected</u>, assembled, or maintained <u>under a law or ordinance or in connection with the transaction of official business</u>:
> (1) by a governmental body; or
> (2) <u>for a governmental body and the governmental body</u> owns the information or <u>has a right of access to it</u> ...

If the FOIA's in all states included this language, then the barrier to FOIA access by third parties caused by having the data with statistical agents and advisory organizations would be smaller. The Texas language is relatively unique, however, and the language in most other states appears to make it more difficult for FOIA requests to successfully extend to data in the possession of a statistical agent or advisory organization.

If and when such requests are made – and the affected advisory organization or statistical agent will presumably oppose such requests – the courts will probably seek to determine the extent to which the requested information is genuinely a state record. The laws of the individual states and the facts that the courts will be given to consider may vary widely. If the regulator has never

[7] It is technically more accurate to say that FOIA laws apply to insurance statistical data in all states, but that they may be superceded by conflicting language that relates specifically to an individual type of state record. For instance, if the insurance code of a state specifically provides that a given type of record shall be held confidential, then it will be held confidential even though it might not otherwise qualify for a FOIA exemption. There are a few states with provisions in their insurance laws that specifically provide that certain types of insurance statistical data shall be held confidential. However, the author is unaware of any state with an insurance law that liberalizes a state's FOIA by specifically providing that some type of statistical data may or must be released.

adopted regulations requiring the collection of data, then the statistical agent or advisory organization would be in an excellent position to argue that its activities were entirely voluntary. It would be difficult for such data to be accessible through a FOIA request. The scales would begin to tip if a state had requirements that went so far as to specify the data elements that must be collected. Further state actions – like actual promulgation of statistical plans or other heavy involvement in the data collection process – would make it even more likely that the records in question would be treated for purposes of a FOIA request as if they were in the physical possession of the regulator.

There is yet another wrinkle here. While the considerations just described relate to whether statistical data in the possession of a statistical agent is a "public record," the simple fact that something is a public record doesn't mean that the public can get a copy of it. It may be exempt as a trade secret or as confidential commercial information. In addition, FOIA laws generally do not require the creation of reports to respond to public requests. In general, requests under FOIA laws must be for reports that are already in existence. The fact that a statistical agent or a government agency has the ability to create a report from its databases does not mean that it is compelled to do so. While databases in the possession of statistical agents have been set up so that various reports can be generated, they are customarily not in the form of reports. Therefore, while statistical agent databases may be potentially exposed to FOIA laws more than many suspect, other practical considerations appear likely to limit the amount of information that third parties could access through this mechanism

Please note that these views are speculative and that this is an especially difficult area in which to make a prediction of future developments. The author's best guess is that FOIA barriers to the access of data in the possession of third parties will slowly erode. However, lest one become too concerned over side-door FOIA access to information in the possession of a statistical agent, keep in mind that the main reason for that this topic has become so important in the last few years is the expectation that states will begin to ask for detailed electronic reports from the data which statistical agents have collected on their behalf. Once the state has physical possession of detailed reports, there can be no question that they will be subject to the provisions of the state FOIA (although FOIA provisions may still allow or mandate it being held confidential).

Several other details should be noted. Virtually any claim to an exemption from disclosure under a FOIA law will probably be lost if the information is submitted to a regulator without some form of explicit prior understanding or acknowledgment by the regulatory entity regarding confidentiality. Merely sending something to a regulator stamped "confidential" may have little meaning unless this follows a prior agreement or well-documented practice of the regulator.

Note also that the situations are rare where a regulator can agree with certainty to withhold information from disclosure. About all that a regulator can do in most situations is to agree to a good-faith attempt to respect a claim for confidentiality. Should a third party seek to obtain information that a regulator has agreed to keep confidential, the regulator's refusal to disclose the information can be appealed. A court can subsequently order the release of data that does not qualify for one of the FOIA exemptions, even if the regulator had agreed (erroneously, because he/she lacked the authority) to withhold it.

Controversies Surrounding the Disclosure of Insurer-Specific Statistical Data

Disclosure of insurer-specific statistical data by state insurance regulators has been the subject of debate over the past several years, both at the NAIC and at the state level, primarily in Texas and Missouri. (The situation in these states is unsettled as of this writing. In both states, the disputes involve insurer-specific personal lines data by ZIP code. In Missouri the disputed request was for premiums and losses by ZIP code, while the disputed request in Texas did not include losses. At this writing, the courts have barred disclosure in both states, but related disputes continue. A full discussion would be lengthy and quickly out of date.)

Although the debate at the NAIC has often been in terms of all types of P&C statistical data, the primary area of focus has also been insurer-specific personal lines data by ZIP code. In these debates, the position of the insurance industry has been unequivocally in opposition to public disclosure, whether for relatively complete data sets or for reports showing writings (but no losses) by insurer, by ZIP code. (Early in the history of these discussions, some viewed premium and exposure data as being less sensitive than loss data, but this distinction is rarely heard anymore.)

A primary and often-cited reason for trade secret protection is to protect the value of research. If valuable insights are dissipated soon after their discovery, then why should capital be invested to gain them? Insurers argue that the dissemination of their personal lines writings by ZIP code will reveal marketing insights that they have developed through years of research. Note, however, that the debates regarding the disclosure of statistical data have related to situations or requests where the data would be revealed for all licensed insurers. It is one thing for an insurer to assert that it would be harmed if some part of its data was revealed to its competitors, but it is different for an insurer to assert that it would be harmed if all insurers were forced to reveal the same data.

The fact that the industry is unanimous in its opposition to ZIP code data release leads some regulators to question the validity of these arguments. How can <u>all</u> insurers have insights that allow them to perform better than the market? It has proven difficult for some regulators to accept trade secret arguments when there is a lingering suspicion that insurer sensitivity is attributable to reluctance for their writings to be examined by consumer advocates.

Actuaries should attempt to decide the answer to this question for themselves. The NAIC debate is intended to address prospective data collection, usually by statistical agents, rather than after-the-fact special calls. Suppose that premiums, exposures and losses are available by ZIP code on an industry aggregate basis. Other sources of information – primarily competitors' rate filings with accompanying documentation – are also available. Using this information, actuaries seek to develop profitable rate indications on a territorial or ZIP code basis, and may also seek to advise their marketing departments where competitors' rates appear to be on the high or low side versus these indications. Suppose now that the opportunity is offered to know competitors' writings by ZIP code. How much difference will this information make in the work that has already been done? If one answers that it is likely to be of significant value, then this affirms assertions of trade secret status. If one answers that it may be of interest, but that it wouldn't be likely to make much difference, then this would agree with those that dispute the validity of trade secret claims.

It is somewhat easier to give a dispassionate consideration of the data disclosure debate when something other than personal lines data by ZIP code is considered. Another relevant proposal to this debate (in fact, about the only other relevant proposal that has been discussed at the NAIC) is to obtain and reveal by-insurer writings for various general liability sublines. For instance, a report might be given showing lawyers' professional liability writings for the top 5 or 10 such writers in the state. One of the reasons for this is that insureds and producers will be able to ascertain the leading markets, thus making it easier for them to find coverage for lines where there are relatively few markets. Of course, this will also have the effect of revealing lines and situations where there is little competition, which may have the effect of inviting additional competition. To be sure, an insurer that has cornered a market doesn't want its potential competitors to know about it. It also may not want regulators or the public to know about it. Whether this information therefore constitutes a trade secret is arguable (as serious competitors may be able to ascertain this information by other legitimate means), but there can be no doubt that a market leader would rather not have this information published.

These debates match the competing interests of consumers and the marketplace (that is, new competitors and those willing to invest in expansion) versus the interests of those with established market positions. As illustrated by the example in the preceding paragraph, however, there may be times that a state insurance department could seek to further the public interest by making a conscious effort to gather data for the purpose of disseminating it.

Data Disclosure in Rate Filings

A discussion of trade secrets and "confidential commercial information" would not be complete without a discussion of data provided in support of rate filings. Many of the same types of information that are so zealously guarded in statistical databases are provided with rate filings in much easier to understand and straightforward forms. It is often information of a nature that would be a trade secret if it were not subject to disclosure in a rate filing. This disclosure occurs because the exemptions under FOIA laws that would otherwise be applicable in most states are preempted by rate filing laws that specifically provide for rate filings and supporting documentation to be open to public inspection.

Not surprisingly, insurers have occasionally sought to protect parts of their rate filings and at least a few regulators have agreed. The author has heard of states that have agreed to treat parts of the justification for a rate filing as confidential, in spite of what their law says, but it should be cautioned that there is no assurance that such treatment will hold up should a third party appeal the denial of access. Another occasional practice is for the regulator to examine the justification for a rate filing in a face-to-face meeting and hand it back across the table when he or she is done. The advantage to this from a filer's point of view is that the regulator will no longer have the document to disclose at some later date. Of course, the regulator is likely to be criticized should this practice be discovered. At least in some states, laws address disposal of documents in the possession of the regulator, and handing a document back across the table would probably run afoul of laws designed to assure that documents are not disposed of prematurely.

On balance, in spite of these questionable exceptions, the documentation contained in rate filings continues to be open to the public. The author therefore finds it surprising that there has been so little NAIC debate with regard to the information provided in support of rate filings.

There has only been debate regarding two specific situations; namely, catastrophe modeling and credit scoring, but these debates have not resulted in proposals to revisit the provisions of the model rating laws that call for the supporting documentation with rate filings to be disclosed. Perhaps the first NAIC-related indication of a sensitivity to disclosure of rate and form filings was a recent change to SERFF (System for Electronic Rate and Form Filing)[8] rules to ensure that the NAIC could not capture filings made via SERFF for the purpose of marketing them to third parties (or for any other purpose). The industry sensitivity appeared to be strong enough that, without this change, industry support for the SERFF system would have diminished to such a degree that the project would have died.

"Ownership and Control" Issues

A reference that is commonly heard in public discussions is that of "ownership" and "control" of data. "Ownership" of information is a valid concept, but "control" is more relevant and applicable for insurer statistical data. As will be seen, definitive statements regarding the concept of "control" are easier to make where regulatory requirements don't exist that require data to be reported.

Presume for the moment that regulatory considerations do not exist. In this case, data can be used by whatever entity is legally able to create or obtain it. For insurance, this entity will customarily be an insurer, although others – insureds, agents, brokers and organized groups of insureds – could also capture similar, identical or related data. Presume also that the data has value to others. After all, if no one else wants it, then it is not intellectual property and it is not relevant to this paper.

One choice for an insurer with valuable data is to share it with no one. With especially valuable data (i.e., trade secrets), this is often the rational choice. But the fact that an insurer doesn't want data relating to it to be used by others has no restrictive power over another entity if it has been able to legally capture the same information. In most situations, however, the insurer will be the only one with valuable data relating to its insureds.

Suppose that an advisory organization offers to provide valuable services in exchange for the use of an insurer's data. For many lines and insurers, the products provided by advisory organizations are necessary and agreements for sharing of this nature are common. With this sharing, the advisory organization gains whatever ability to use the data that may be provided in the contract between the insurer and the advisory organization. Commonly, the allowed usage of this data will be to produce average loss cost indications. The usage will also include the production of reports to provide to regulators.

Suppose that advisory organization "A" is approached by a consultant or another advisory organization that offers compensation in return for being able to use data in the possession of

[8] SERFF is an NAIC-developed system that allows insurers and advisory organizations to make electronic rate and form filings. It also allows the states to process the filings electronically, correspond with regard to filers via e-mail and to store the filings electronically. As such, many expect (fear) that SERFF will make access to rate filing materials much easier than has traditionally been the situation with submissions made on paper.

advisory organization "A." Advisory organization "A" could share the data – but only to the extent that its reporting insurers have authorized it to do so. Were this to happen, it would offer another example of insurer control. In these examples, all of which presume no regulatory requirements, note that data usage by advisory organizations and statistical agents is only as broad or as narrow as that to which the insurer is willing to agree. In these situations, insurers truly "control" their data.

Back in the real world, regulators exist and most of them want data to be reported to statistical agents or advisory organizations so that they can get reports on insurance in their state. This reduces the control that an insurer has over the use of its data and, depending on the details of the situation, it may also reduce the value of the data. At the very least, insurers are forced to allow their data to be combined with the data of other insurers and provided to the regulator. However, unless otherwise required by the regulator (i.e., as with workers' compensation in most states), the insurer does not need to give the advisory organization or statistical agent permission to do anything with its data other than to provide reports to the regulator. (Whether an advisory organization is interested in providing statistical services for insurers that don't want their data used for ratemaking is generally a matter between the insurer and the advisory organization.)

This loss of control could affect the value of an insurer's data if the data reported or disclosed by the regulator was useful to advisory organizations or others that might otherwise pay to use it. If detailed data is reported to the regulator and then made publicly available, why would an advisory organization want to pay the insurer for data that it can get at no cost from the regulator? This has usually been a hypothetical point because the states have not had much to report or disclose that was not generally available from other sources, anyway. It is still subject to more discussion than action, but Florida's initiative (discussed later in this paper) is an example of the situation just described.

As will be explained in the next section, "ownership and control" questions also apply, although in a somewhat different fashion, to the data possessed by advisory organizations.

Intellectual Property Issues Relating to Advisory Organizations

Advisory organizations are custodians of the intellectual property of insurers, but most of the intellectual property issues relating to advisory organizations relate to intellectual property that they have generated themselves. Copyright considerations are much more important for advisory organizations than for insurers. Trade secret issues are no less important, but they tend to cover different subjects for advisory organizations. After all, advisory organizations are not in the business of selling insurance.

Copyright law covers an incredible range of subject matter. Virtually anything that is original and fixed in some sort of tangible medium is copyrightable. Even the requirement for originality is minimal – works are not required to be novel. Such items as insurance manuals and policies are copyrightable. Look to the bottom of any form or manual page developed by an advisory organization and note the © notice in small print. The major exception[9] to copyright protection that is relevant to advisory organizations and to insurance in general is the following:

> In no case does copyright protection of an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

This means that copyright law cannot protect a trade secret. Rather, copyright law protects the manner in which ideas are expressed, not the ideas themselves. For instance, HO-3 forms cover residential structures from all risks of physical loss except for certain difficult-to-insure perils like earthquake, war, flood, etc. That idea cannot be copyrighted, but it takes a considerable amount of work to put those basic concepts into a sound insurance contract. As such, the insurance contract can be copyrighted, even if the idea behind it cannot, which means that many insurers may offer different forms that provide virtually identical coverage.

Some intellectual property situations for advisory organizations don't fit neatly into either the copyright or trade secret area. Consider the work and expense necessary for an advisory organization to perform an annual loss cost review for a complex major line of insurance. First, there is the work to amass and sanitize the underlying data[10], then the programming necessary to produce the various details in formats suitable for actuarial analyses, then the analyses and finally the production of a filing. To be sure, the loss cost filing is valuable *intellectual property*, but how can it be protected? Trade secret protection doesn't work, because loss cost filings must be publicly disclosed when they are provided to regulators. Yes, an insurer can't photocopy and use loss cost filings without paying the advisory organization, but the underlying data and the judgments that are the filing's primary source of value are not protected by copyright law.

In part, this loss of intellectual property isn't as bad as it hypothetically could be, largely because insurers want to use standard manual pages and also because most insurers are good corporate citizens that realize the need to pay their fair share. Where this falls apart more easily is when the entities that wish to use filing information are not traditional insurers. They might not be insurers at all. Such entities may include group self-insurers, various types of consultants or even other firms wishing to provide statistical agent or advisory organization services.

What if an advisory organization is asked to sell (license, technically) a copy of one or more of its databases? This is a difficult "ownership and control" question that is no longer hypothetical. Presumably, other vendors (competing advisory organizations or consultants) with technical and actuarial expertise could produce competing products if only they had access to the necessary databases.

The apparent ability that advisory organizations have had to deny the use of their data to other advisory organizations represents an issue that the regulatory community has only recently begun to consider. Even if insurers are not opposed to the sharing of data with other advisory

[9] Another exception that may be important to some is the "fair use doctrine" that allows limited use of copyrighted material for research, education and journalism among other endeavors.

[10] To the extent that this data must be reported for regulatory purposes – anyway – then the expense to amass it could not be attributed to the development of a loss cost filing. In general, however, the data necessary to develop loss costs is more extensive than that required to produce regulatory reports.

organizations, why would an advisory organization with a large percentage of the data for a given market be willing to share data except perhaps at a prohibitive price? (That is not to say that advisory organizations faced with this question have demanded unreasonable compensation, but only to point out the existence of uneven bargaining positions between the parties.)

There is only a limited amount of data and the legal question that most regulators will need to answer is whether this impediment to competition between advisory organizations is an impediment to competition between insurers in the marketplace[11]. If it is – and that does not appear to be an easy determination – it will be a challenge to deal with the situation in an equitable fashion. What is fair compensation to be able to use a database representing 20% or 40% or 80% or 100% of a market? How does one fairly value the decades of experience that are embodied by the existing data collection institutions?

With this background, suppose that insurers would like to choose between several competing advisory organizations offering products based on the largest possible portion of the market or, in the case of workers' compensation, the entire market. Or suppose that multiple entities would like to provide these products. Obviously, only one entity can provide these products if only one entity has access to the data necessary to produce them. It is beyond the scope of this paper to decide whether multiple advisory organizations are in the public interest or whether current laws encourage or discourage them. Suffice it to say that there appears to be enough interest in the marketplace and from insurance regulators in some states that there will be pressure for it to happen.

To either allow or cause multiple advisory organizations to share data, it would appear that prices must be attached to the existing advisory organizations' databases. But how can "fair prices" be determined? As will be seen in the next section, the Florida workers' compensation initiative largely avoids this controversy by making the data available to all advisory organizations at no real cost. Extending the Florida example to others involves much greater difficulties, however, and that will be discussed following the discussion of the "Florida initiative."

The Florida Workers' Compensation Initiative

The Florida Department of Insurance recently allowed multiple statistical agents to collect workers' compensation data. This was a first for workers' compensation insurance, even though it reflects the status quo for most other P&C lines. What is notable, however, is that the Florida Department has structured this arrangement so that ratemaking data is pooled and then shared among competing advisory organizations.

[11] State insurance laws generally provide plenty of authority to deal with situations where the action of some entity could restrain trade or reduce competition for insurance. However, if the inability of an aspiring advisory organization is not found to reduce competition for insurance, then the insurance laws of at least some states may not provide any direct recourse. This is uncharted territory. McCarran-Ferguson only exempts insurance from federal antitrust laws to the extent that it is regulated by the states. While the states clearly regulate the rates or loss costs produced by advisory organizations (monopolistic or otherwise), it is not so clear if or how the laws in most states have provided the authority or the charge to regulate pricing for data sharing or advisory organization services. Although a few disputes have recently arisen, it may be too soon to predict what will happen in this area as additional disputes arise.

In Florida, insurers will now be able to fulfill their data reporting requirements for voluntary insurance by contracting with any one of several designated statistical agents. Historically, all insurers had to report to a single organization. Similarly, insurers will be able to purchase services from any licensed advisory organization for workers' compensation. Notable aspects of this arrangement include:

- Experience Rating – if an insurer that purchases advisory organization services from "A" wishes to provide coverage to an employer whose data is with unrelated statistical agent "B," then statistical agent "B" must provide advisory organization "A" with the data that it needs to promulgate the experience modifier.

- Transfer of Data – If an insurer begins reporting to statistical agent "B" after being a client of statistical agent "A," then statistical agent "A" must transfer detailed historical data for the insurer to statistical agent "B."

- Insurance Department Ownership of Statistical Plans and Edit Packages – The Florida Department doesn't own the statistical agents' actual computer code, but it owns the statistical plans and the specifications for edit packages used by the statistical agents.

- Ratemaking Data Filed with the Department – Advisory organizations will get the data necessary to file rates from aggregate reports filed with the Florida Department of Insurance. (While Florida intends that only one set of advisory organization rates will ultimately be approved, all advisory organizations will be allowed to make rate filings. But one must not assume that this will happen in other states if they chose to follow Florida's approach.)

The Florida approach is relatively unique. For their own purposes, insurance departments have generally not attempted to get data suitable for ratemaking[12]. In Florida, however, the Department is working to make sure that the statistical reports that it receives as public documents are suitable to develop workers' compensation rates. This is intended to provide all advisory organizations with the access to the industrywide data necessary to make rates.

This approach will make it difficult for statistical agents to use income from the sale of advisory organization products to offset the costs to collect and cleanse data. Rather, insurers reporting data will need to pay in full for the statistical agents' costs. In turn, advisory organizations will receive data "for free." To emphasize this point, there is no requirement in Florida that an advisory organization must also collect statistics. As such, the pricing of advisory organization products will not need (or be able) to cover data collection costs[13]. Advisory organizations will not need to reimburse insurers for any value of the data, and they will not need to cover the costs to collect and cleanse the data – those costs will be paid by the insurers that report the data.

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[12] Texas has taken actions in this area on a multi-line basis. Texas has contracted with a single statistical agent for each line of insurance to amass detailed data with the intention that insurers and consultants as well as the Texas Department of Insurance can use it. The mechanics and the thrust of the Texas system are different than in Florida, however. Detailed (but not insurer-specific) industrywide data is made available to insurers, but the Texas Department and not advisory organizations set "benchmark rates."

[13] In fact, Florida's contracts with their statistical agents prohibit any penalties or incentives to insurers with respect to the choice of statistical agent or rating organization.

Extending the "Florida Approach" to Other Lines and States

It is too soon to predict the extent to which other states may attempt to apply the concepts behind the "Florida approach." In addition, extending the "Florida approach" to other lines of insurance could be much more difficult than merely extending it to other states. The relative strength of arguments that favor and oppose measures to increase data sharing through regulatory mechanisms are likely to differ greatly for various lines of insurance.

<u>Extending the Florida approach to workers' compensation in other states:</u> Criticisms of the Florida approach include increased difficulties for the state to assure data quality for multiple statistical agents and that multiple statistical agents may be inherently less efficient than a single statistical agent. There is also a fear that competitive pressures may favor laxity on the part of one or more statistical agents in an effort to get the business of insurers that would prefer a statistical agent that is not quite so fussy about data quality. On the other hand, a statistical system that allows an insurer to select and stay with the same statistical agent for all of its states may make data reporting easier for insurers and may promote data quality. It remains to be seen whether competition for advisory and statistical services will ultimately result in better values for the insurance consumer.

The author's major additional concern with the application of this concept for workers' compensation in states other than Florida is that there will be an unfair shifting of costs to insurers if group self-insurers are able to purchase advisory organization services but are not required to report data. This is not a problem in Florida because, unlike many states, it requires group self-insurers to report data in the same fashion as traditional insurers. But this will be a consideration if this arrangement is extended to other states where group self-insurers are not subject to data reporting requirements, because then there will be entities realizing the commercial value of insurer statistical data that will not need to support its costs.

<u>Extending the Florida approach to other lines:</u> There are a host of practical and legal obstacles involved with extending the Florida approach to other lines. It would be most feasible in the personal lines area where several states (North Carolina, Texas and Massachusetts) already have provisions to compile ratemaking data at a single source. The only hurdle in these states would be for the laws to be changed to allow for multiple advisory organizations to use this data to provide services for client insurers.

For commercial lines other than workers' compensation, the practical hurdles (getting all insurers to capture the same relatively extensive set of data elements using the same data definitions) would be daunting. Beyond that, however, lie some "economic" hurdles that could be even more difficult to address.

Florida-style data sharing "for free," if it could be applied successfully to commercial general liability[14], might result in the availability of information to the surplus lines and other alternative markets at lower prices than they would otherwise need to pay. This would subsidize these

[14] Actually, Texas has already embarked on an experiment of this nature, although the system is not mature for commercial lines. As only a single state, although a large one, Texas may not prove to be an accurate test. Turning a complex set of commercial lines data into usable rate or loss cost indications may simply prove to be too much work for it to be economical for individual insurers or an aspiring advisory organization to undertake for a single state.

markets with no apparent public purpose for such subsidization. The same problem would exist with workers' compensation if the state freely allowed group self-insurers to compete, but didn't require them to report data. But this problem wouldn't exist for personal lines and it also wouldn't exist for workers' compensation in states that require group self-insurers to report data.

Another problem with a Florida-style "free data" approach applied to other lines is that it would work most easily with a system that requires the same detailed level of reporting for the entire marketplace[15]. That does not appear to be problematic for workers' compensation, but it would be for most other lines of insurance.

The status quo, where advisory organizations can purchase the license to use insurer data, with its value established in that fashion, appears to have the advantage of promoting efficiency. Those insurers that can produce quality detailed data in an efficient fashion are better positioned to report it and receive the benefits from doing so. This may prove to be especially true for commercial lines (other than workers' compensation), where deregulation may make usable data even more valuable in years to come. The problem with unwarranted subsidization of surplus lines insurers or group self-insureds is also more easily addressed. All of these considerations make the status quo attractive – if it works!

There is another legal point that may prove to be of consequence for other states as they consider this approach. The Florida approach clearly involves planned regulatory dissemination of data to promote competition (at least at the advisory organization level). While virtually all states have laws that require or strongly encourage the regulator to analyze statistical data to assure that rates are not "excessive, inadequate or unfairly discriminatory," probably very few states have laws that provide authority for the state to obtain data with the specific intention of packaging it for distribution in order to promote competition. Even though the author expects that state laws will tend to grant broader authority in this area over the next few decades, it should be noted that many states currently do not have laws that authorize activity of this nature.

Speculation about the Future

The purpose of this paper has been to highlight intellectual property issues that will become more important to the insurance industry over the coming decade. It has become easier for virtually anyone to use large amounts of detailed data – if only they can get their hands on it. This will create more demands for data, which makes it appear certain that the value of relevant data will increase. This may become especially evident in commercial lines (other than workers' compensation) if commercial lines deregulation creates difficulties for those seeking to get sufficient amounts of relevant commercial lines data. The increased value of good commercial lines data will then become a business consideration even more so than it has been in the past.

These forces will lead to increased attention to FOIA laws, both by entities wanting to get data as well as from entities seeking to protect the value of what they have. The debate will be made

[15] A governmentally mandated system wouldn't necessarily need to treat everyone equally. Texas only requires its largest private passenger auto writers to report detailed data, while smaller insurers have lesser requirements. Other schemes could be devised as well, but the point to be made is that it would be much more difficult for a governmentally mandated system to be flexible on an individual insurer basis regarding the business that is reported in detail versus other reporting.

more difficult owing to controversies over consumer interests and a relatively high level of confusion regarding a complex topic area. The next ten years should be interesting to watch.

The Florida initiative is an example of the types of decisions that lawmakers and regulators may need to make over the next decade. In the future, regulators will need to address even tougher questions, as demands for data become more intense and the blurred distinctions between advisory organizations and consultants diminish even more. Should advisory organizations and statistical agents be required to share detailed data with each other? What about sharing ratemaking reports with all insurers? How can prices for this data sharing be determined? If some of these notions are desirable, then how can they be achieved equitably with no more government involvement than is necessary?

With all of these questions, the answers may be different for personal lines than for commercial lines and perhaps workers' compensation. The markets and public interest are quite different in these areas, and it is not unreasonable to expect that data-related regulatory decisions will be different as well.

The potential for ill-considered actions to result in a less-than-optimum flow of the information necessary to conduct the business of insurance is unsettling. Even if some of these speculations turn out to be wildly inaccurate, it appears almost certain that insurers and the regulatory community will face challenging questions for years to come. An understanding of intellectual property law as well as the philosophy underlying the law will be essential to making these decisions. The answers should reflect a reasonable harmony between public and private interests – the issues are clearly more than just a set of legal questions.