



Unfair Discrimination

How will new legislation in Colorado influence the industry approach to potential bias in insurance?

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Breakout Room 4

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Presenters

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Panelists:

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POLLING QUESTION

Are you familiar with SB21-169:
Restrict Insurers' Use Of External
Consumer Data?

- A: Very Familiar
- B: Somewhat Familiar
- C: Not Familiar at All



POLLING QUESTION

How disruptive do you think SB21-169: Restrict Insurers' Use Of External Consumer Data will be for insurers?

- A: Very Disruptive
- B: Somewhat Disruptive
- C: Not Disruptive at All
- D: I don't know enough about SB21-169 to comment



Dorothy L. Andrews

SB21-169

Restrict Insurers' Use Of External Consumer Data

The act prohibits an insurer from:

- **Unfairly discriminating based on** an individual's **race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression in any insurance practice**; or
- **Using any external consumer data and information source, algorithm, or predictive model (external data source) with regard to any insurance practice** that unfairly discriminates against an individual based on an individual's race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression.



SB21-169

Restrict Insurers' Use Of External Consumer Data

Insurance Practice means:

- Marketing
- Underwriting
- Pricing
- Utilization Management
- Reimbursement Methodologies
- Claims Management

In The Transaction Of Insurance.





Stakeholder Engagement

- Intent:

Engage stakeholders to develop rules by which an insurer may demonstrate that it has tested its use of an external data source for unfair discrimination based on an individual's race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression.





Insurer Requirements

- Insurers will need to provide:
 - Information on External Data Sources
 - Explanation of Intended Use of External Data Sources
 - Establish and Maintain Risk Management Framework to prevent Unfair Discrimination via External Data Sources
 - Provide Assessment Reports on Effectiveness of Risk Management Framework
 - Provide Chief Risk Officer Attestations on Implementation of Risk Management Framework





Rules Provisions

- Rules must include provisions establishing:
 - A reasonable period of time for insurers to remedy any unfairly discriminatory impact in an external data source; and
 - The ability of insurers to use external data sources that have been previously assessed by the division of insurance (division) and found not to be unfairly discriminatory.



States Considering Similar Laws

- Oklahoma

- HOUSE BILL 3186: Insurance Consumer Rights Act

AS INTRODUCED

An Act relating to insurance; enacting the Insurance Consumer Rights Act; defining terms; prohibiting discrimination by insurers; prohibiting the use of algorithms and predictive models that unfairly discriminate; directing Insurance Commissioner to adopt rules; directing process for rule creation; directing use of necessary provisions; permitting Insurance Commissioner to investigate; clarifying applicability of act; providing for codification; and providing an effective date.



States Considering Similar Laws

- Oklahoma

- HOUSE BILL 3186: Insurance Consumer Rights Act

Insurers shall not, with regard to any insurance practice:

- A. Unfairly discriminate based on race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression; or**
- B. Pursuant to rules adopted by the Insurance Commissioner, use any external consumer data and information sources, or any algorithms or predictive models that use external consumer data and information sources, in a way that unfairly discriminates based on race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression.**



States Considering Similar Laws

- Rhode Island
 - **Chapter 42-14-20 - House Bill 7230: Insurers' use of external consumer data and information sources, algorithms, and predictive models.**

An insurer shall not, with regard to any insurance practice:

- (1) **Unfairly discriminate based on race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression; or**
- (2) Pursuant to rules adopted by the director of the department of business regulation (the "director") or in consultation with the health insurance commissioner (the "commissioner"), **use any external consumer data and information sources, as well as any algorithms or predictive models that use external consumer data and information sources, in a way that unfairly discriminates based on race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression.**



States Considering Similar Laws

- Connecticut

- **Connecticut Department of Insurance April 14 Notice: The Usage of Big Data and Avoidance of Discriminatory Practices.** The notice states, “**The Department has the authority to require that insurance carriers and third-party data vendors, model developers, and bureaus provide the Department with access to data used to build models or algorithms included in all rate, form, and underwriting filings.**”



States Considering Similar Laws

- Anti-Discrimination & Civil Rights Laws
 - The Brookings Institute published public policy recommendations for updating nondiscrimination and civil rights laws to apply to digital practices. The intent is to understand how algorithms trigger discrimination and update existing civil rights laws to reflect contributory digital parameters and thresholds.



Peter Kochenburger

Colorado SB 21-169 in a broader context

A [very] fluid situation

- Other States, as Dorothy reviewed
- State laws not specific to insurance, but which do or could apply to insurer practices, such as privacy standards, prohibiting use of types of external consumer data in any algorithmic model, and data breach notification requirements
 - with the potential for multiple enforcement agencies and regulatory actions
- And, the federal government



POLLING QUESTION

Which do you believe most accurately describes the McCarran-Ferguson Act?

- A: A federal law placing insurance regulation in the hands of the states and significantly restricting the federal government's ability to regulate insurance.
- B: Largely a rule of statutory construction on when federal laws apply that are applicable to insurance but do not expressly reference it.
- C: Essentially, a sacred text handed down before anyone participating in this session was born, and forever enshrining the primacy of state insurance regulation.



Federal Intervention: Insurance and Disparate Impact Analysis

A very brief history ...

- New to insurance, but Disparate Impact analysis has been part of federal civil rights laws since the early 1970s.
- HUD 2013: Disparate Impact Rule applied to FHA
 - Insurer Trades sue, federal district court enjoins the Rule's application
- *Texas Dept. Housing v. Inclusive Communities*, 576 U.S. 519 (2015): Disparate Impact analysis applicable to FHA
- HUD 2020: In last days of President Trump's Administration, HUD issues new Rule, substantially revising standards of proof
 - Consumer groups sue, federal district court enjoins the Rule's application
- January 26, 2021, President Biden orders HUD to review Rule
- HUD June 25: HUD published a "Notice of Proposed Rulemaking," which would largely restore the Rule to its 2013 version.



Two long-standing and different concepts of “Unfair Discrimination, and neither necessarily require “intent”

- Unfair discrimination in Insurance: “Rates shall not be excessive, inadequate or unfairly discriminatory...”

Here, unfair discrimination considered in the context of “actuarial fairness,”

- Unfair discrimination in Federal and State civil rights laws protects particular population segments that have been historically discriminated against. The discrimination can be *intentional* (almost always prohibited), or in many instances, *unintentional* but still prohibited, depending on the Disparate Impact analysis.

Disparate Impact focuses on the harm caused, not the intent of the actor (insurer, model developer, etc.).



Two long-standing and different concepts of “Unfair Discrimination” and when they clash ...

A state’s definition and application of unfair discrimination as used in the insurance code is at best, or worst, a temporary obstacle with straight-forward legal solutions -

- The state legislature can amend that statute or apply a new or existing civil rights law-type law to it, assuming the state insurance regulator does not already have sufficient authority to expand this traditional definition
- The federal government can preempt state insurance laws through clear statutory language. There can be a federal as well as state solution to this somewhat manufactured conundrum of clashing definitions of unfair discrimination

Neither McCarran-Ferguson nor existing state definitions prevent the application of a disparate impact analysis on insurance practices. (assuming no Constitutional issues)



Public Policy, Risk-Based Pricing and Disparate Impact


The real question is whether and how a Disparate Impact framework should apply. These are public policy questions that will or should be decided by elected officials at the state and/or federal level. If they decline to do so, then it will be left to insurers, actuaries, lawyers, industry and consumer advocates, and others to fight it out, as often happens in the U.S.

The most frequent objection, at least from insurance trade associations, is that it jeopardizes risk-based pricing (RBP). However, RBP is not an end to itself, but a powerful and often appropriate tool, unless there are broader public policy concerns. Examples of when RBP is ignored or diminished:

- The ACA's prohibitions on use of pre-existing conditions
- Explicit risk classifications on race, regardless of whether they are actuarially fair or accurate
- Residual markets that allow high(er) risk individuals or entities to obtain insurance at a regulated rate



The Fallacy of the Slippery Slope – prohibiting or restricting some risk classifications is not the end of Risk Based Pricing




Thinking Is Power

Dear Professor,
If I fail this class my life will spiral out of control. I'll end up homeless and have to beg for change. It'll ruin my chances of going to medical school. So if you fail me I'll have to live in a tent and people will die and it will all be your fault.

Slippery Slope

Argues an action will lead to a chain of events, resulting in undesirable and extreme consequences





And finally, back to Colorado and SB 21-169 Definition of “Unfair Discrimination” (Section 8)

“Unfairly Discriminate” and Unfair Discrimination” include the use of one or more **External Consumer Data and Information Sources**, as well as algorithms or predictive models using **External Consumer Data and Information Sources**, that have a correlation to race, color, national or ethnic origin, religion, sex, sexual orientation, disability, gender identity, or gender expression, and that use results in a disproportionately negative outcome for such classification or classifications, which negative outcome exceeds the reasonable correlation to the underlying insurance practice, including losses and costs for underwriting.



Section 8 ...

- External Consumer Data and Information Sources
- “. . . and that use results in a disproportionately negative outcome for such classification or classifications, which negative outcome exceeds the reasonable correlation to the underlying insurance practice, including losses and costs for underwriting.”



Panel Questions



Panel Question

What are some potential data sources of unfairly discriminatory variables?





Panel Question

Can some data be estimated using statistical inference methods? Are there legal hurdles to companies in acquiring this data?





Panel Question

What if there are no ways for companies to acquire protected class data (either through purchasing or estimation)?





Panel Question

Should actuaries determine the bias or disproportionate impact of their models or should lawyers or both? Who else might weigh in on the determination?





Panel Question

If a particular variable is highly predictive of loss but the analysis shows it might cause a disproportionate impact (whether small or large), how can they mitigate disproportionate impacts? If they cannot be mitigated, can companies still use that variable?





Panel Question

Does selection bias of insurance data add material limitations to the results of any analysis using company-specific data?





Panel Question

One study estimated that 0.6% of the population identifies as transgender. Can an analysis contain sufficient credibility in measuring disproportionate impacts when only a small portion of the population makes up the protected class?





Panel Question

Is it enough to limit the scope of analysis to the evaluation of only a couple variables (e.g. variables that are more controversial), or should we really be looking at all variables in a rating plan?





Panel Question

Given historical segregation-driven policies still impact how our communities look today, should that be considered when evaluating bias?

Or would it be enough to demonstrate that two equivalent risks living in the same territory are charged the same premium regardless of the protected class each belongs to?





Panel Question

In what ways could regulators potentially address limitations identified above? (Validation of company models against independent, regulatory data)



 Questions?

POLLING QUESTION

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REFERENCES

- Towards A Civil Rights Approach to Insurance Anti-Discrimination Law, 69 DePaul Law Review 657 (2020)
- http://leg.colorado.gov/sites/default/files/2021a_169_signed.pdf



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