

ONE STATE'S ANSWER TO COMPETITIVE RATING

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Introduction

Early in 1998, the Administrator of the Insurance Division of the Department of Consumer and Business Services of the State of Oregon wrote to the state's Attorney General and inquired about several aspects of Oregon's workers' compensation program. She included among her inquiries the continuing role of the one current rating organization and statistical agent, the National Council on Compensation Insurance ("NCCI"), and the feasibility of having multiple rating organizations or statistical agents under Oregon law. On April 2, 1998, the Attorney General's office replied that the Director of the Department of Consumer and Business Services ("Director") *must* license as a rating organization any party that met the minimal requirements of ORS 737.355(1). In addition, the Attorney General observed that the statute did not allow the Director to designate one rating organization as the state's sole statistical agent. It was this Attorney General's opinion that provided the impetus for enactment of SB 280,² amending ORS 737.355.

History

Since 1966, the State of Oregon has required a rating organization/statistical agent to collect statistical data (payroll, premium, claims costs, types of injuries, etc.) from insurers across the state.³ Once it collects this data, the organization processes it in order to (1) determine "annual rate revisions for workers' compensation insurance, (2) create experience ratings for Oregon employers," (3) "evaluate trends in workers' compensation costs and benefits," and (4) "support the legislative process by providing cost estimates of pending workers' compensation legislation, among other things."⁴ For thirty-three years, the NCCI has performed these functions as the sole rating organization/statistical agent in Oregon. A recent push for competition among rating organizations and statistical agents may change all of this.

While most states, including Oregon, have theoretically allowed for multiple rating organizations and/or statistical agents for several years, it was not until 1998 that any state actually implemented a competitive scheme. In that year, Florida and Arizona both introduced a competitive scheme for rating organizations and statistical agents. While Florida employs a competitive plan that allows for both multiple rating organizations and statistical agents, Arizona's arrangement involves multiple rating organizations and only a single statistical agent.⁵ While it appears to be too soon to draw any definitive conclusions regarding the efficacy of the competitive arrangements in Florida and Arizona, there are reports of increased costs and service delays for insurers in those states.⁶

Industry Perspectives on Competition

Much of the discussion regarding multiple rating organizations and statistical agents involves NCCI and Insurance Data Resources, Inc. ("IDR"). IDR has led the charge to introduce competition to a field in which NCCI has been the sole occupant since its creation over seventy-five years ago. It should come as no surprise that IDR and NCCI offer different perspectives on the impact of competition. IDR has been optimistic about introducing competition into the field of statistical/rating organizations. The benefits that IDR anticipates will emerge from a competitive scheme "include improved customer service, innovative new technology, increased efficiency and ultimately, lower costs."⁷ IDR adds that these benefits will extend to all sectors of the industry, including regulators, carriers, employers, and injured workers.⁸

NCCI, on the other hand, has not been as optimistic about the effects of competition. "No improvements are demonstrable as yet from competition between advisory/rating or statistical agents."⁹ In addition, as noted above, in states where competition has occurred among advisory/rating organizations, NCCI reported that it has actually increased costs and decreased the timeliness of service to insurers.¹⁰ NCCI has stressed that "fragmentation of the database" is a "paramount," issue that could accompany competition.¹¹ Fragmentation can lead to "degradation and loss of credibility" in "annual rate revisions, experience ratings, trend indications, and cost estimates of pending legislation."¹² Discussing the potential problems of data fragmentation and experience mod "shopping" which could result from

competition, NCCI has stated that “as yet there is no solution that avoids increased costs of high-volume data exchanges, inefficiencies and delays in experience rating production, fraud opportunities, and other negative effects.”¹³

Both NCCI and IDR stress the importance of effective regulation of competition. According to NCCI, “Multiple advisory/rating organizations can exist in [a competitive] environment if carefully managed, using a uniform infrastructure and a single shared database. A competitive environment would also contemplate the equitable sharing of costs for the maintenance of those uniform plans, rules and rates.”¹⁴

The Development of SB 280

When the Attorney General’s office replied to the Oregon Director’s 1998 inquiry, it was apparent that ORS 737.355, as written, was not well-suited for a competitive scheme. Under existing law, (1) lack of licensing discretion by the Director, (2) the potential for multiple statistical agents, which could lead to a fragmentation of the database, and (3) uncertainty about the exchange of information under a competitive scheme, all posed potential threats to the integrity and efficiency of the workers’ compensation rating system in Oregon. Thus, the Director introduced and the legislature enacted SB 280 “in order to state the qualifications for licensing these rating organizations, to provide for exchange of data among rating organizations and to require that one of the licensed rating organizations be designated as the statistical agent who will gather data.”¹⁵

SB 280 amends ORS 737.355 to authorize the Director to “license one or more but not necessarily all workers’ compensation rating organizations who meet applicable standards.”¹⁶ Unlike the earlier law, the Director now has ultimate oversight on the number and identity of entities licensed as rating organizations, so long as any denial of a license to a qualified applicant follows “a process established by rule.”¹⁷ By requiring the Director to adhere to administrative guidelines when denying a license to a qualified applicant, SB 280 represents an effort to level the playing field for all rating organizations throughout the application process.

SB 280 also allows the Director to designate a single statistical agent among the licensed workers’ compensation rating organizations. No similar provision existed in the former law. This provision is significant because it reduces the danger of fragmentation of the database used for workers’ compensation purposes. By allowing the Director to name a single statistical agent, SB 280 safeguards the credibility of the data used for rate revisions, experience ratings, and trend indications, thereby protecting the integrity of the workers’ compensation rating system as a whole.

Finally, SB 280 requires the Director to adopt rules governing the exchange of data among licensed rating organizations. Just prior to the enactment of SB 280, NCCI and IDR settled a protracted lawsuit involving the intellectual property rights of NCCI to control access to data used by rating organizations and statistical agents.¹⁸ By establishing parameters for data exchange at the outset, SB 280 notifies rating organizations of their rights and responsibilities regarding intellectual property before they apply for an Oregon license. Thus, the law seeks to minimize legal squabbles among rating organizations and the statistical agent regarding the information that they use in the data compilation and dissemination process.

SB 280 allows for competition among rating organizations and statistical agents while simultaneously seeking to avoid potential pitfalls that could accompany competition. The law contemplates two different types of competition in the context of rating organizations and statistical agents. While competition among rating organizations will be ongoing as the licensed entities carry out their duties as rating organizations, competition among potential statistical agents will cease once the Director designates a single entity as such. Thus, the law recognizes the difference between the duties of rating organizations and statistical agents, and it seeks to tailor its competitive scheme to accommodate these differences.

The original version of SB 280 listed several functions that each licensed rating organization would be required to perform. Many of these duties resembled quasi-regulatory tasks. For example, among other duties, the original SB 280 required rating organizations to (1) provide the Director with standard and advisory forms to be used by workers’ compensation insurers, (2) maintain a “classification system and rules for classifying employer operations and determining premiums,” (3) “comput[e] and distribut[e] all experience rating modification factors,” (4) “provid[e]

classification and rating information to interested parties,” and (5) collect “annual statistical data according to a plan adopted by the Director.”¹⁹ NCCI had performed most, if not all, of these enumerated services, as the sole licensed rating organization in Oregon during the past thirty-three years. While NCCI, IDR, and others seemed willing to undertake these functions voluntarily, most resisted codification of these regulatory functions.

By the time Governor Kitzhaber signed the final version of the bill on June 9, 1999, this laundry list had disappeared. In fact, a working committee decided to remove these provisions before any legislative action on the bill had even begun. Thus, there was no serious consideration of including these provisions by the time SB 280 arrived for consideration by legislative committees. All agreed to leave the regulatory responsibilities to the regulators and not the licensees.

Recent Developments

Upon enactment of SB 280 on June 9, 1999, the Director of the Insurance Division assembled an advisory committee to promulgate rules necessary for the implementation of the law. The Director chose representatives of rating organizations, insurers, trade organizations, and state agencies to carry out this task. This group is currently considering proposed rules that the drafters believe will (1) create a competitive and fair selection process for choosing rating organizations and a single statistical agent and (2) ensure the continued integrity of the data compiled by the statistical agent and used by rating organizations.²⁰ On July 16, 1999 the committee began a series of meetings aimed at finalizing the proposed rules. Final rules are expected in September 1999.

On June 21, 1999 NCCI’s Chief Executive Officer announced that NCCI agreed to purchase two of ISO’s subsidiaries: Insurance Data Resources, Inc. (“IDR”) and IDR Statistical Services (“IDRSS”).²¹ The motivation for acquiring these entities was to “better serv[e] [the] industry and its stakeholders by providing what they have asked for — a unified database, and a single, consistent workers’ compensation infra-structure which is as efficient and economical as it can possibly be.”²² This recent acquisition, however, does not diminish the importance of SB 280.

Throughout the development of SB 280, industry representatives have emphasized that legislators should assume that competitors other than NCCI and IDR/ISO would be involved in the bidding process.²³ In fact, in 1997 U.S. Rating Bureau (“USRB”) submitted an application to the State of Oregon to become licensed as a rating organization. Although the state ultimately did not approve the organization’s application,²⁴ USRB remains active in other states and thus exists as a potential competitor in the Oregon market. Thus, the planned acquisition of IDR by NCCI may cause some of the benefits and shortcomings of a competitive system to remain, for the time being, matters of conjecture rather than empirical fact in Oregon — at least until other competitors enter the market. SB 280 may help to increase these benefits and minimize competition’s shortcomings when that day arrives.

Endnotes

1. The author gratefully acknowledges the assistance of Timothy M. Sullivan in preparing this article.
2. 1999 Or. Laws 235. Since this article concerns the development of this new law, it will be referred to as SB 280, the title that was used throughout the legislative process.
3. SB 280: Hearings before the Oregon Senate Public Affairs Committee, 70th Leg. (1999) (testimony of John Booton) [hereinafter Booton Testimony].
4. *Id.*
5. *See* Alliance of American Insurers, Multiple Statistical/Rating Organizations Report, at Attachment C (1999).
6. Alliance of American Insurers, Multiple Statistical/Rating Organizations Report, at Attachment B (1999). [hereinafter Alliance Attachment B].
7. *Id.*

8. *Id.*
9. *Id.*
10. *Id.*
11. Boonton Testimony.
12. *Id.*
13. Alliance Attachment B.
14. *Id.*
15. Need for Action, Nancy Ellison, State of Oregon Department of Consumer and Business Services, Deputy Insurance Commissioner and Administrator, Insurance Division (1999) [hereinafter Need for Action].
16. *Id.*
17. ORS 737.355(2) (as amended June 9, 1999).
18. National Council on Compensation Insurance, Inc., Media Release (May 7, 1999). For more information concerning this litigation, see *National Council on Compensation Insurance, Inc. v. Insurance Data Resources, Inc.*, No. 96-8036 CIV-RYSKAMP, 1996 WO 672973 (S.D. Fla. Oct. 3, 1996), *rev'd in part, vacated in part*, 130 F.3d 443 (11th Cir. 1997) (unpublished table decision).
19. S. 280, 70th Leg. (Or. 1999) (draft).
20. Need for Action.
21. Bill Schrepf, Memorandum, NCCI To Acquire Insurance Data Resources (IDO), June 21, 1999.
22. *Id.*
23. See, e.g., Alliance of American Insurers, Multiple Statistical/Rating Organizations Report, at Attachment B (1999).
24. See Letter from Richard M. McGavock, Manager, Rates & Form Section, Insurance Division, State of Oregon Dep't. of Consumer & Business Serv. & R. Michael Lamb, Casualty Actuary, Insurance Division, State of Oregon Dep't. of Consumer & Business Serv., to James D. Huber, Counsel for United States Rating Bureau 1 (Feb. 12, 1997) (on file with author).