What Should Define the Future of Insurance Regulation?

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Two Core Topics

- I. The Future of Insurance Antidiscrimination Law
    - A. A Brief Primer on Insurance Antidiscrimination Law
    - B. Insurance and Generalized Disparate Impact
    - C. Insurance and Proxy Discrimination
    - D. Antiquated Regulation of “Unfair Discrimination”
    - E. Towards a Civil Rights Approach to Insurance Anti-Discrimination Law
- II. The Future of the NAIC’s role in State Insurance Regulation
    - A. Overview of the NAIC
    - B. State Delegations of Power to NAIC
    - C. The Engine of State Delegation: The NAIC’s Accreditation Program
    - D. State Constitutional Restrictions on Delegations of Power to Private Entities
    - E. The Unconstitutionality of State Delegation of Power to the NAIC
    - F. A Potential Solution to the Unconstitutional Structure of State Insurance Regulation

I. The Future of Insurance Antidiscrimination Law: A Primer on insurance antidiscrimination law

- Insurers discriminate among policyholders in both underwriting and rating
- States prohibit “unfairly discriminatory” or “excessive” rates
  - Discrimination that is not actuarially justified.
- Federal and state prohibitions on discrimination based on specific factors
  - Goal is to prevent even actuarially justified (“rational”) discrimination for factors like genetics, preexisting conditions, history of reporting domestic violence, etc.

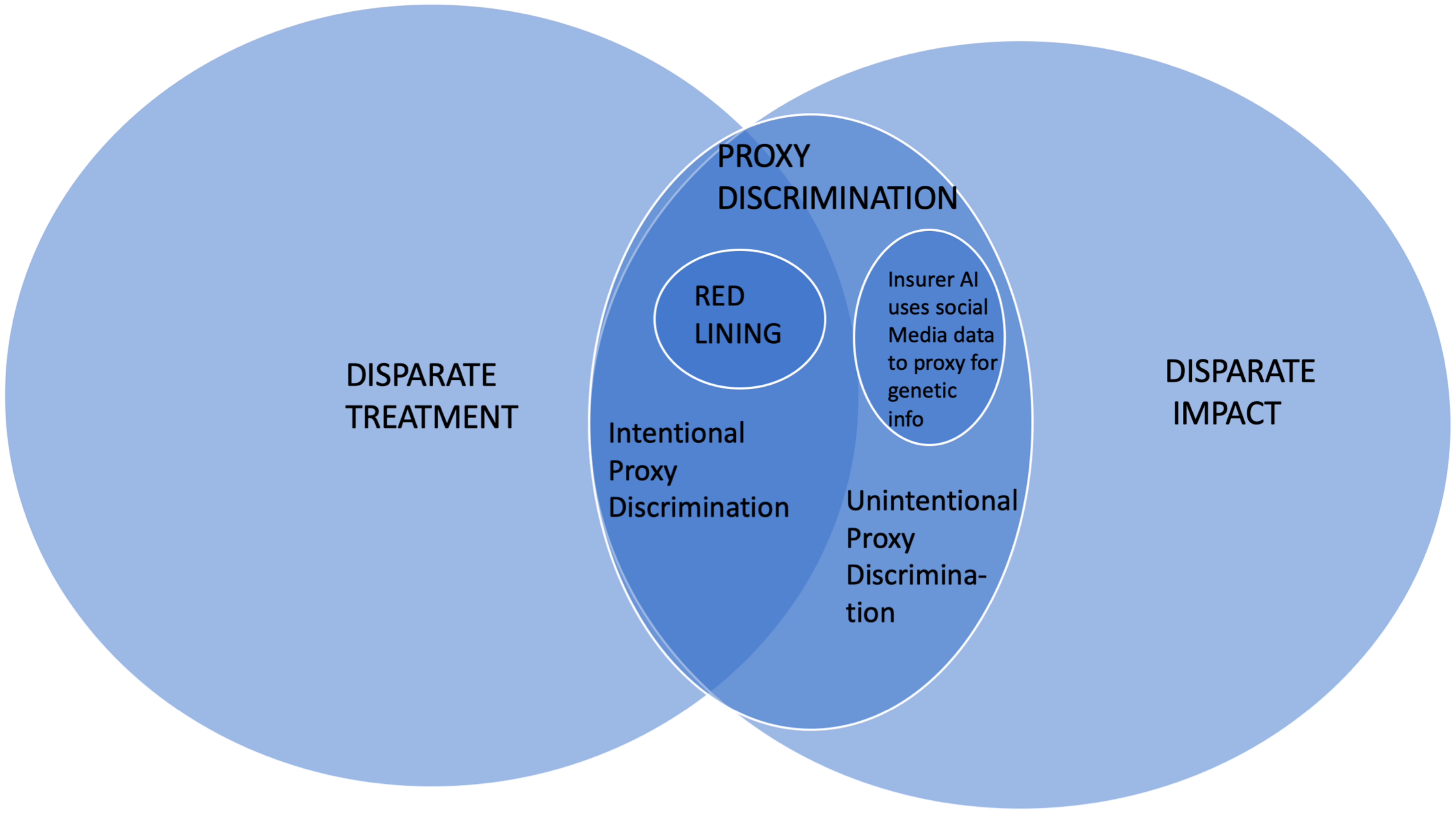
I. The Future of Insurance Antidiscrimination Law: Insurance and Generalized Disparate Impact

- Disparate impact is not actionable under insurance anti-discrimination law
- Overwhelming evidence that facially neutral insurance practices have substantial disparate impact on low-income and minority groups.
- Some evidence that disparate impact produced by some insurer practices are not risk-based.
- Less discriminatory alternatives may be available.

I. The Future of Insurance Antidiscrimination Law: Insurance and Proxy Discrimination

- Proxy discrimination:
  - (1) facially neutral practice harms protected group (disparate impact)
  - (2) the usefulness to the discriminator of the facially neutral practice derives from its capacity to proxy for membership in protected group.

Core goal of much insurance law is to prohibit some types of **rational discrimination** (genetics, preexisting conditions)



Discrimination by AI inevitably produces unintentional proxy discrimination whenever law seeks to prohibit **rational discrimination**

I. The Future of Insurance Antidiscrimination Law: Antiquated Regulation of "Unfair Discrimination"

- State prohibitions on "unfairly discriminatory" or "excessive" rates arose out of perceived necessity of price collusion in insurance industry in mid-20th Century.
  - Goal was to prevent monopoly pricing that didn't reflect true cost to insurer of providing insurer.
- Insurers no longer need to price fix or share info that could facilitate implicit price coordination.
- Regime is becoming increasingly difficult to maintain and ineffective.
  - Complexity of insurer statistical methods outpacing regulatory expertise.
  - Underwriting and rating are merging, but regime only examines rating

I. The Future of Insurance Antidiscrimination Law: Towards a Civil Rights Approach to Insurance Anti-Discrimination Law

- Deregulation:
  - Eliminate state prohibitions on “unfair discrimination”
  - Eliminate regulatory review and approval of insurer rating plans
- Reregulation:
  - Mandate collection and public disclosure of company-specific, transaction-level data, paralleling HMDA
  - Private cause of action for disparate impact that
    - (i) reflects unique importance of risk-based discrimination in insurance, but
    - (ii) focuses on particularly concerning types of disparate impact, like (a) proxy discrimination, and (b) non-risk based pricing.

II. The Future of the NAIC's role in State Insurance Regulation: Overview of NAIC

- Delaware, non-profit corporation
  - 500 employees in Kansas City, NY and DC
  - 50 state insurance commissioners elect 17 commissioners to serve on executive committee
  - $100 Million annual budget, funded by sale of data and publications to industry
- Work-product produced in conjunction with state regulatory staff operating through committees
  - Drafts model laws/regulations
  - Facilitates discussion/coordination among regulators
  - Provides services/education to regulators and consumers
  - Advocacy work

II. The Future of the NAIC's role in State Insurance Regulation: State Delegations of Power to NAIC

- State statutes, following NAIC model laws, dynamically incorporate by reference NAIC manuals
- NAIC Valuation Manual
  - Thousand page manual governing procedures, reporting, and assumptions for insurer reserves
- NAIC Own Risk Solvency Assessment Manual
  - Principles governing corporate governance and risk assessment, and potentially details of group capital calculations
- NAIC Statutory Accounting Manual
  - Thousand page manual specifying special accounting rules for insurers in quarterly/annual reporting

II. The Future of the NAIC’s role in State Insurance Regulation: The NAIC’s Accreditation Program

- NAIC accredits state insurance departments based in part on whether they have adequate legal authority
- Adequate legal authority requires state departments to have NAIC model laws that dynamically incorporate by reference NAIC materials
- Accredited insurance departments are only allowed to defer to solvency regulation of other accredited insurance departments
- Result: Any state that refused to delegate power to NAIC would lose accreditation, causing local insurers to redomesticate to accredited state
- Redomestication requires relocating insurer’s principal place of business to new state of domestication

II. The Future of the NAIC's role in State Insurance Regulation: State Constitutional Restrictions on Delegations of Power to Private Entities

- A. Non-delegation doctrine is constitutional principle that legislature cannot delegate law-making power to third party
- B. Delegations to private, rather than public, entities universally raise unique concerns under states' constitutions
- C. Caselaw analyzing constitutional limits on delegations to private entities focus on three key factors
  - Private vs. public character of the delegate
  - Procedural or substantive restrictions on the delegate's exercise of delegated authority
  - Legislature's capacity to indirectly monitor/police delegate's exercise of authority by altering scope of delegation

II. The Future of the NAIC's role in State Insurance Regulation: The Unconstitutionality of State Delegation of Power to the NAIC

- A. NAIC is "private" entity for purposes of state non-delegation doctrine
  - Formally private corporation
  - Not created, controlled, or funded by state legislatures (contrast Amtrak)
  - Any indirect influence of state legislatures is fragmented across states
- B. NAIC's exercise of delegated authority is not subject to independent judicial or administrative oversight
  - No judicial review
  - State regulators' role in producing NAIC's content isn't sufficient; no check on biased decision making (contrast SEC role in FASB)
  - State regulators' capacity to promulgate regulations departing from NAIC materials isn't sufficient
- C. State legislatures cannot claw back power from NAIC due to accreditation program
  - NAIC is not independent expert body; develop manuals for sole purpose of influencing law and regulation

II. The Future of the NAIC's role in State Insurance Regulation: One Potential solution for the Unconstitutional Structure of State Insurance Regulation

- NAIC delegation and accreditation solves real problem despite its problematic structure
  - Standardizes state insurance regulation; prevents "race to the bottom"
- One Potential Solution: Interstate Compact to review NAIC actions that have the force of law
  - Would review NAIC actions using ordinary administrative procedure principles.
  - Precedent: Interstate Insurance Compact
  - Key requirement: independence from NAIC and state insurance regulators.