Life Insurers’ Use of Genetic Information
Public Policy and Regulatory Issues

NCSL Task Force on Insurance

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The Center for Economic Justice

CEJ is a non-profit consumer advocacy organization dedicated to representing the interests of low-income and minority consumers as a class on economic justice issues. Most of our work is before administrative agencies on insurance, financial services and utility issues.

On the Web: www.cej-online.org
About Birny Birnbaum

Birny Birnbaum is the Director of the Center for Economic Justice, a non-profit organization whose mission is to advocate on behalf of low-income consumers on issues of availability, affordability, accessibility of basic goods and services, such as utilities, credit and insurance.

Birny, an economist and former insurance regulator, has authored reports and testimony for numerous public agencies and consumer organizations, covering a wide variety of topics, including risk classification, unfair discrimination, analysis of insurance markets, insurers' use of big data, market regulation, force-placed insurance, homeowners and flood insurance, consumer credit insurance, title insurance and insurance credit scoring. He has served for many years as a designated Consumer Representative at the National Association of Insurance Commissioners. He is a member of the Federal Advisory Committee on Insurance, chairing the Subcommittee on Affordability and Availability of Insurance.

Birny served as Associate Commissioner for Policy and Research and the Chief Economist at the Texas Department of Insurance. In that role, Birny was responsible for review and approval of rate filings, the development of data collection programs for market surveillance and the analysis of competition in numerous insurance markets.

Prior to his work at the TDI, Birny served as Chief Economist at the Texas Office of Public Insurance Counsel where he provided expert testimony in rate and rule hearings on behalf of insurance consumers before the TDI. While at OPIC, Birny performed the first auto insurance redlining study in Texas.

Birny was educated at Bowdoin College and the Massachusetts Institute of Technology. He holds the AMCM certification.
Why CEJ Works on Insurance Issues

Insurance Products Are Financial Security Tools Essential for Individual and Community Economic Development:

CEJ works to ensure *fair access* and *fair treatment* for insurance consumers, particularly for low- and moderate-income consumers.

Insurance is the Primary Institution to Promote Loss Prevention and Mitigation, Resiliency and Sustainability:

CEJ works to ensure insurance institutions maximize their role in efforts to reduce loss of life and property from catastrophic events and to *promote resiliency and sustainability* of individuals, businesses and communities.
Outline

1. Public Policy Issues: What Personal Consumer Information for What Purposes is Fair for Insurers to Use?

Public Policy

Historical concern with insurers’ use of information obtained from genetic testing:

1995/96 NAIC Task Force: Fallacy that genetic tests produced determinative results and that certain genetic results equaled future outcomes.

That concern is even greater today.
From the *Position Paper on Genetic Information* by the Council for Responsible Genetics from 1996.

Unlike infectious diseases, genetic conditions exist at a fairly stable incidence in our society. There is no epidemic of genetic conditions. Thus, they are already reflected in the actuarial tables used by insurers to establish rates. It is misleading for insurers to suggest that their financial solvency will be jeopardized if they are obligated to insure people at risk for genetic conditions. In fact, insurers have always insured people at risk for genetic conditions.

The insurance industry has offered no compelling reason to specifically exclude this group from the insured pool now. Early identification of risk status may actually lead to insurer cost savings as a result of preventative care and longer life spans during which premiums can be collected.
Recent developments in human genetic science and the technology of testing are not identifying new costly diseases which were not previously accounted for by the insurance industry’s’ actuarial data. Rather, these developments are only facilitating the identification of those individuals who carry disease-associated genes at earlier times; many of these people will never have a related illness, or will experience a lifetime of the asymptomatic, presymptomatic or minimally symptomatic phases of the condition. It is not, therefore, the cost of financing the care of genetic conditions which is driving the call for access and inclusion of genetic information in insurance practices. There is no reason for insurers to begin to use this new predictive information now, merely because it is available.
GENETIC DISCRIMINATION SETS A DANGEROUS PRECEDENT

Genetic testing is not only a medical procedure. It is also a way of creating social categories. As a basic principle, we believe that people should be evaluated based on their individual merits and abilities, and not based on stereotypes and predictions about their future performance or health status. In most cases, genetic testing can only reveal information about probabilities, not absolute certainties. We believe that individuals should not be judged based on stereotypes and assumptions about what people in their class or status are like. Insurance or employment practices which employ these stereotypes in underwriting inadvertently reinforce them in other arenas as well.
There is a strong public policy precedent for avoiding the negative social consequences of such a practice. For example, statistics demonstrate that African Americans do not live as long as Americans of Northern European descent, even when one controls for socio-economic factors. And yet no life insurance company in the country rates applicants differentially on the basis of race. To do so would violate deeply held community values about equality and equal access. Skin color, like other genetic traits, is mediated by genes. These lie entirely outside the individual's control. Whereas individuals can exercise choices about whether to smoke, how much exercise they get, and how much fat is in their diets, they cannot change the contents of their genes. To make employment or insurance decisions on the basis of genetic characteristics determined at the moment of conception is to discard cherished beliefs in justice and equality.
What Should the Public Policy Be for Life Insurers’ Use of Genetic Information?

Outcomes to Avoid:

Don’t want to discourage people from getting genetic tests due to fear of insurance discrimination.

Don’t want to force consumers to take genetic tests.

Insurers’ Have Historically Collected and Used Genetic Information

Historically, Insurers have used without objection crude proxies for genetic information – family history, medical history.

Historically, genetic testing was seen as distinct from medical tests.
What’s Changed?

New Era – reality is that tens of millions of consumers have gotten genetic tests on their own, not through or encouraged by health provider. Reality is also that genetic information and testing has become and will become standard components of routine medical testing and monitoring.
What’s Needed?

There is a need for both leveling the information playing field and overcoming false or incomplete information to consumers and insurers. Key step is to require and make consumers aware that insurers’ use of genetic information will

• be used in the consumer’s interest – for promoting good health and longevity, not exclusion or denial of coverage;
• be defined broadly to include results of genetic tests and genetic screening
• not result in unfair discrimination;
• be protected;
• be used only for these limited purposes and not shared with anyone – including government and law enforcement – without consumer consent;
Regulatory Issues

Disclosure, Consent and Other FCRA protections

The potential for obtaining genetic information from sources other than the consumer now exists – any such access and use should be subject to the protections of the Fair Credit Reporting Act:

- Disclosure
- Consent
- Adverse Action Notice
- Access
- Ability to Correct False Information
- Ability to Obtain Review of Insurer Determination Based on Corrected Data
Preventing Unfair Discrimination

Sea Change in Life Insurance Underwriting and Pricing Requires Modernizing Regulatory Oversight

Then and Now

Historical sources of data and pricing methods by life insurers

- Mortality Tables tied to formulaic reserves
- Generally recognized expense tables

Underwriting and pricing based on very broad risk groupings – male/female; smoker/non-smoker and a small number of rating tiers based on judgments whether individuals would be part of groups with better or worse than the average experience in the mortality tables.
Changes in Life Insurer Underwriting and Pricing Practices

Today, move away from formulaic reserves to reserves set by each company according to an actuary’s assessment (Principles-Based Reserves) and moving away from and/or supplementing mortality tables with big data analytics.

Instead of the historical approach to pricing based on actual mortality data compiled over decades of experience, insurers are now using the same type of data mining and predictive analytic tools used by property casualty insurers.

Types of Data Used in Accelerated Underwriting:

- Driving Record
- Credit Scores
- Facial Analytics
Information Asymmetry Works in Both Directions

Industry argues that asymmetric information will lead to adverse selection – consumers obtain genetic information (the mail order variety) and then base their insurance purchase decision on the results of such tests.

As noted above, this concern is falsely premised on genetic tests determine life outcomes.

But, insurers are now using information and algorithms without disclosure or consent of consumers as part of “Accelerated Underwriting.”
CEJ supports life insurer innovation in underwriting and risk classification that helps make more products available to more consumers and facilitates the purchase and use of life insurance products.

But, the same type of consumer protection – including unfair discrimination issues – that regulators have historically addressed in personal lines property casualty insurance now apply for life insurance.

Just as insurer underwriting and pricing practices have changed, so must the regulatory oversight of these practice change.

Just as regulators review auto and homeowners underwriting guidelines and rates that are filed with the regulator, so should life insurance underwriting guidelines and rates now be filed with and reviewed by regulators – not after the fact in the occasional market conduct exam, but on the same type of routine basis now employed for auto and homeowners insurance.
Disparate Impact as Unfair Discrimination

Disparate Impact means that insurer practices, while not explicitly using a prohibited risk classification, have the same effect as if the insurer was using the prohibited risk classification.

**Regulatory modernization must also define unfair discrimination to include disparate impact against prohibited risk classes.** In an era of data mining, the potential for proxy discrimination is great and that is particularly the case with the use of genetic information for risk classification.