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## **Statutory Prohibitions on the Negotiation of Insurance Agent Commissions: Substantive Due Process Review Under State Constitutions**

ROBERT H. JERRY, II\* AND REGINALD L. ROBINSON\*\*

To market their products, insurance companies for the most part employ salaried workers (usually referred to by the overinclusive label "insurance agent") or use a network of independent intermediaries (the so-called "broker" or "independent agent"). In either case, the compensation of the "agent" (used here to refer to both the salaried employee and the broker) is a commission paid by the insurer upon the placing of the insurance. The consumer seeking insurance deals with one or more agents representing various companies. Almost all of the information that the consumer receives about the coverage and rates will come from the agent. Once a particular company's product is chosen, the agent will typically assist the consumer in applying for the coverage.

The consumer seeking the best price for desired coverage may eventually realize that the agent stands to receive a commission from the company that accepts the consumer's application. It may occur to the consumer that his total expenditure for the product will decline if the agent is willing to rebate a portion of the agent's commission to the consumer. Thus, the consumer might make the following offer to the agent: "I will submit an application through you to Insurer Z, whom you represent, on the condition that you share with me a portion of your commission, in the amount of  $x$ , in the event my application is accepted." In almost every state, the consumer's offer will be rejected; the agent will probably explain that state statutory law prohibits him from rebating to or sharing with the applicant any portion of his commission. Such an explanation, if offered, would be correct: in almost every state, an agent who accepted the consumer's offer would have committed a violation of state statutory law and would be subject to a civil or criminal penalty.

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If the public's "general welfare" is the standard for assessing the merit of these statutes, articulating cogent justifications for restricting the ability of the consumer and the insurance agent to bargain over the agent's commission is difficult. However, because these statutes help maintain the income of insurance agents and preserve current methods of insurance marketing, negative assessments of the statutes are not universally shared. The most obvious arenas for reaching judgments about the merit of these positions are state legislatures, where these statutes were first enacted. No one disagrees that state legislatures have the authority to repeal or amend these statutes, and, as a matter of public policy, it may be wise for legislatures to do precisely that.

However, an equally interesting question is whether and to what extent these statutes are vulnerable to invalidation on the ground that they are unconstitutional under the due process clauses of state constitutions. This question, in turn, raises broader questions about the role of the judiciary in a tripartite governmental system and the extent to which state constitutions create a model of interbranch relations varied from that to which we are accustomed under the federal Constitution. This article uses the state anti-rebate statutes as a vehicle for addressing these interesting, fundamental questions.

In Part I, this Article examines and categorizes the state statutes that prohibit an insurance agent from returning a portion of his commission for the sale of the policy to the consumer. Part II discusses substantive due process<sup>1</sup> in the state courts. After briefly summarizing the rise and fall of federal substantive due process, this part explores the use of state constitutions as independent constitutional authority in the area of economic regulation.<sup>2</sup> This part concludes that two distinct models of substantive due process analysis exist in the state

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1. The term "substantive due process" has different meanings. See *Moore v. East Cleveland*, 431 U.S. 494, 547-52 (1977) (White, J., dissenting). In this article, the term is used to refer to the standard of review of the substantive terms of legislation for reasonableness. Although this type of review need not be confined to review of legislation that regulates economic relationships, the anti-rebate statutes fall into this category, and thus the phrase "economic due process" could be used to refer to this particular kind of substantive due process review. Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241, 246-47 n.19 (1981).

2. The equal protection clause of the fourteenth amendment has also been used to invalidate economic regulation. See *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928) (state tax legislation unconstitutional because the tax classifications denied businesses equal protection of the laws); *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928) (mortgage recording fee and tax classifications violate equal protection); *Gulf, C. & S.F. Ry. v. Ellis*, 165 U.S. 150 (1897) (attorney's fees provisions for certain suits against railroads denies the railroads equal protection). Review under the due process clause of the fifth and fourteenth amendments and the equal protection clause is similar; both are substantive in nature. Under the due process clause, the question is whether the legislation rationally relates to a legitimate governmental end. The same test is used under the equal protection clause, except that the legislation reviewed in this instance always involves a classification. See generally Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CALIF. L. REV. 1049 (1979); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 329 (3d ed. 1986). If all persons are burdened equally by a statute, a due process issue is presented; if a law classifies people into a group that may exercise a right and a group that may not, the issue is equal protection — whether the classification (the "means") rationally relates to a legitimate governmental purpose.

The anti-rebate statutes appear to burden all equally. The only apparent classification is that agents are sometimes allowed, as an exception to the prohibition, to share commissions with other licensed agents. This would seem reasonable to account for those situations where two or more agents cooperate with another agent to place the insurance. If disallowing consumers the right to share the commission is an unreasonable classification, it is for the same reasons that the statute is unreasonable under due process analysis: whether the prohibition itself rationally relates to a legitimate governmental purpose. To this extent, the equal protection and due process analysis

courts. Part III comments on two recent cases where the validity of a state anti-rebate statute was challenged, and evaluates these holdings in light of the models identified in Part II. Finally, in Part IV, this Article discusses the implication of the alternative substantive due process models for the anti-rebate statutes in other states.

## I. THE STATE STATUTES

### A. *Substantive Content: An Overview*

Forty-nine states and the District of Columbia have a statute prohibiting insurance agents from rebating a portion of or splitting their commission with the consumer. Usually, the anti-rebate provision is part of a broader statute prohibiting unfair trade and marketing practices. In forty-seven states, the unfair trade practices statute is modeled on or is similar to the National Association of Insurance Commissioners model "Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance."<sup>3</sup> Section 4 of the NAIC model Act provides:

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

• • •

H. Rebates. (1) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance contract or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.<sup>4</sup>

The NAIC model Act applies to life, health, and accident insurance, but most states have adopted separate statutes extending the rebate prohibitions to other lines of insurance, such as fire and casualty.<sup>5</sup> The model Act's prohibitions are

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overlaps. This article will discuss the issue solely with reference to the due process guarantee. *Cf.* Kirby, *supra* note 1, at 250-51, 261-68, 272-77.

3. III NAT'L ASSOC. OF INS. COMM'RS [hereinafter "NAIC"], MODEL LAWS REGULATIONS AND GUIDELINES 900-1 to 900-17 (1989).

4. *Id.* at 900-2, 900-4.

5. *See* Appendix A.

directed at companies, agents, and brokers.<sup>6</sup> A few state statutes also prohibit the insured from accepting a rebate offered by an agent or broker.<sup>7</sup>

The anti-rebate statutes, by themselves, are sufficiently broad to prohibit an insurance agent or broker from sharing a portion of his commission with the consumer. However, in almost all states the anti-rebate statutes are supplemented by "anti-commission-splitting" statutes, which also have the effect of preventing an agent or broker from sharing a portion of his commission with the consumer. For example, the Virginia anti-commission-splitting statute, which is typical of those in other states, regulates commission negotiation by prohibiting three different activities: payment by the insurer of a portion of a commission to a consumer; payment by the agent of a portion of his commission earned to a consumer; and acceptance by consumers who do not have a license to sell insurance of payments from insurers or agents.<sup>8</sup> Because most consumers do not possess valid insurance agent or broker licenses, the statutes have the effect of prohibiting consumers from receiving any portion of the commission earned by the agent or broker who places the insurance.<sup>9</sup>

Depending on the particular state, these statutes are enforced through various civil and criminal sanctions, including license revocation or nonrenewal, cease and desist orders, revocation of the insurer's certificate of authority, fines, and sometimes imprisonment.<sup>10</sup>

## B. *Early History of the Statutes*

During the post-Civil War nineteenth century, the insurance business, like most United States industries, experienced dramatic prosperity. Although many factors contributed to this growth, insurers' aggressive marketing strategies, which made use of large agency workforces, played a major role in this expansion. The success of the large, aggressive sales forces in generating business caused insurers to compete intensely for the services of agents by offering them

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6. Section 3 of the model Act states that "[n]o person shall engage in this state in any trade practice which is defined in this Act as . . . an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." NAIC, *supra* note 3, at 900-2. Section 4 of the model Act, a portion of which is quoted above at text accompanying note 4 *supra*, defines various unfair methods of competition. Section 2(a) of the model Act defines "person" as anyone, individual or company, "engaged in the business of insurance, including agents, brokers, consultants and adjusters." NAIC, *supra* note 3, at 900-1.

7. *See, e.g.*, ALA. CODE § 27-12-14 (1986) (applying to property, casualty, and surety insurance); ALASKA STAT. § 21.36.120 (1984) (applying to property, casualty, and surety insurance); KAN. STAT. ANN. § 40-941 (1986) (applying to fire insurance); KAN. STAT. ANN. § 40-1122 (1986) (applying to casualty and surety insurance). *See generally* Appendix A. Kimball and Jackson argued in their 1961 study of rebating and other marketing practices that imposing sanctions on the policyholder actually makes the anti-rebate statutes more difficult to enforce, because this would make it less likely that the policyholder would voluntarily reveal information about rebating. Because of constitutional immunities from self-incrimination, compelling such disclosures would be impossible as well. Moreover, as between the agent and policyholder, the policyholder's culpability would seem to be much less. For these reasons, Kimball and Jackson recommended elimination of the crime of receiving a rebate. Kimball & Jackson, *The Regulation of Insurance Marketing*, 61 COLUM. L. REV. 141, 189 (1961).

8. *See* J. Brock, *Baits and Rebates*, (paper presented to the Association of Life Insurance Counsel, December 10, 1963) *printed* by the Association of Life Insurance Counsel 377, 378 (1964).

9. For the list of states having such a statute, see Appendix A.

10. *See* Appendix A.

lucrative fringe benefit and commission packages.<sup>11</sup> To maximize their own compensation, many agents practiced high-pressure sales techniques and engaged in unscrupulous behavior. The intense competition among insurers for agents vested considerable power in the hands of the agents themselves. One description of this period from the agents' perspective states:

Companies could do nothing to hold the line on either rates or commissions, because the whole agency system was out of control. If any order went out from an individual company to its agents, it was: "Get the business, period!" The race belonged to the swift and the battle to those who could march farthest away from ethical practices as we know such practices today, but which were then undefined.

As company control more and more declined, agency control more and more ascended, until its position became truly dominant.<sup>12</sup>

By the turn of the century, abuses in the life insurance industry, where the post-Civil War growth was most dramatic, were widespread. Payments of excessively large commissions to agents, false representations about future dividends, waste of company assets on political activities, the inability of some companies to account for lobbying expenditures, nepotism in the hiring of insurance company employees, and self-dealing by company officials were all common. Some of the abuses, such as the payment of excessive commissions, unfulfilled promises about future dividends, twisting, and rebating, were direct consequences of the intense competition among insurers for agents and among agents for business. Of these concerns, rebating attracted considerable attention from policyholders and the industry alike.

Policyholders knew that rebating was a common occurrence,<sup>13</sup> and they objected to rebating for the same reasons they considered other kinds of preferential treatment to be repugnant. It was unfair, so the objection ran, for some insureds to receive lower premiums for identical coverage than other insureds with the same risk characteristics. Although some policyholders no doubt objected to the inequity, plainly some were angered because they did not receive favored treatment themselves. In addition, the fact that rebates were offered also suggested to policyholders that the products being sold to them were not worth their advertised values. Both criticisms underscored the consumers' absence of trust in insurers, which was typical of the general public's attitudes in that era toward concentrations of wealth in any form.

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11. For a detailed discussion of the early history of anti-discrimination statutes and the anti-rebate laws in particular, see H. GRANT, *INSURANCE REFORM: CONSUMER ACTION IN THE PROGRESSIVE ERA* 5-8 (1979). For a more general discussion of the history of state regulation, see R. JERRY, *UNDERSTANDING INSURANCE LAW* 47-80 (1987). One of the chief reasons insurers were able to pay such large commissions can be traced to the successful marketing of tontine policies. These policies paid dividends only if the insured survived the time period specified in the contract and kept the policy in force. This enabled insurers to accumulate large amounts of surplus funds because tontine policies did not require the annual payment of dividends and because lapsed money was not returned. With the accumulated surplus funds, management could afford to pay high commissions, which agents could share with customers in the form of rebates. S. KIMBALL, *INSURANCE AND PUBLIC POLICY* 123 (1960).

12. W. BENNETT, *THE HISTORY OF THE NATIONAL ASSOCIATION OF INSURANCE AGENTS* 12 (1954).

13. One trade journal in the 1880s stated that rebating had become "so general that it may almost be said to be common to all companies and a majority of agents." H. GRANT, *supra* note 11, at 9 (quoting *Spectator*, May 24, 1888).

From the insurers' perspective, rebating was a costly, disruptive practice.<sup>14</sup> Because agents had considerable leverage over the insurers, an agent could effectively insist that the insurer "make up" in the early years of a policy the amount of the commission "given away" by the agent to induce the sale. As a result, the amount of commission paid in the first year (or first few years) of a policy was much larger relative both to the size of the insured's premium and to the amount of commissions paid in later years.<sup>15</sup> The front-loading of the commission did not reduce the total sum of premiums remitted, but it did require insurers to borrow against reserves for policies sold in earlier years. If the policies sold in the earlier years did not lapse, the insurer would eventually collect enough premium dollars to pay for the high front-end payments given the agents who sold the newer policies. However, if the older policies lapsed, the insurer might find itself collecting insufficient funds to pay for the large front-end commissions. To reduce the risk of these losses, insurers raised premiums, but this only increased the incentive to give rebates to some insureds.<sup>16</sup> In the end, insurance became more expensive for those who did not receive rebates.

During the 1880s and 1890s, some agents and professional organizations dedicated to promoting higher ethical standards for the industry campaigned to suppress abusive marketing practices, including rebating.<sup>17</sup> Bills to control rebating were introduced in various legislatures, and these efforts bore fruit when New York passed the first state anti-rebate statute in 1889. By 1895, twenty-one states had anti-rebate statutes. In that year, thirty life insurance companies entered into an agreement to discharge any agent found guilty of violating an anti-rebate statute and to refrain from hiring any such person for a year. Although the agreement collapsed four years later due to the pressures of competition, the initiative bore witness to the efforts of some within the industry to promote reform.<sup>18</sup>

Widespread public distrust of the insurance industry persisted into the early years of the twentieth century. The most notorious manifestation of this distrust was an investigation in 1905-06 by a New York legislative committee chaired by Senator William W. Armstrong, which resulted in the enactment of reform legislation in that state. Among other things, the New York legislation imposed stricter regulations on agent commissions. The Armstrong investigation also prompted a flurry of regulatory activity in other states. By 1930, most state insurance departments had a fairly broad array of regulatory mandates, including the authority to address a wide variety of unfair trade practices, such as

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14. GRANT, *supra* note 11, at 9.

15. First-year commissions sometimes were as high as three-fourths of the first-year's premium. GRANT, *supra* note 11, at 8.

16. The large front-end commission also created an incentive for "twisting," which is the practice of inducing an insured to surrender an existing policy and buy another policy from another company to take its place. The switch of policy earned a sizeable commission for the agent, but caused a lapse, which made it more difficult for the insurer of the original policy to fund the large commissions being paid its agents. See GRANT, *supra* note 11, at 9-10.

17. GRANT, *supra* note 11, at 11-15; S. KIMBALL, *INSURANCE AND PUBLIC POLICY* 123 (1960).

18. GRANT, *supra* note 11, at 12-13.

misrepresentation, discrimination, rebating, and twisting.<sup>19</sup> In these early years, the statutes were subjected to constitutional challenges, usually on the basis that the statutes bore no relation to public safety or welfare, or were outside the scope of the state's police powers. However, in each of these cases, the validity of the statutes was upheld.<sup>20</sup>

### C. *Early Justifications for the Statutes*

In these early years, much of the public's revulsion at insurance industry abuses centered on preferential treatment. Sometimes the discrimination was overt, in that one insured paid a lower price for identical coverage than another similarly-situated insured. The same effect was obtained covertly when the agent offered the consumer a promise of money or property in addition to what was set forth in the insurance contract. Whether the preferential treatment for one class of insureds was overt or covert, the effect was the same: when an insurer allowed some members of a similarly-situated class of insureds to pay a lower premium than other insureds, the insureds who did not enjoy the benefit subsidized the others. This was widely perceived as being fundamentally unfair.

Legislators understood that statutory prohibitions on overt discrimination in coverage and rate structures could be subverted by collateral, preferential agreements. Their response was to prohibit not only discriminatory rates but also the practice of charging an identically-situated group of insureds the same rate while giving some of those insureds a rebate. Thus, the anti-rebate laws were initially viewed as complementing the anti-discrimination statutes: the anti-rebate laws promoted the broader anti-discrimination objective by addressing covert preferential treatment of some insureds.<sup>21</sup> The anti-rebate provisions were buttressed by provisions in some statutes declaring unenforceable any agreement between insurer and insured not set forth in the policy of insurance; if the preferential agreement was inserted in the policy in order to satisfy the anti-rebate statute, the anti-discrimination ban would be triggered. Of course, prohibiting unfair discrimination remains one of the central goals of modern insurance regulation. Thus, it is not surprising that the statutes enacted in the

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19. These first statutes combined anti-discrimination provisions with anti-rebate provisions, and it was not until later that the states separated the anti-rebate language from the anti-discrimination language. When each of the states passed unfair trade practices legislation in the late-1940s and 1950s, which typically included, as did the model NAIC Act, an anti-rebate provision, most states did not repeal their pre-existing anti-rebate statutes. This explains in part why the anti-rebate statutes are currently spread in diverse sections of the state insurance codes.

20. See, e.g., *People v. Hartford Life Ins. Co.*, 252 Ill. 398, 96 N.E. 1049 (1911); *People v. Formosa*, 131 N.Y. 478, 30 N.E. 492 (Ct. App. 1892); *Commonwealth v. Morningstar*, 144 Pa. 103, 22 A. 867 (1891).

21. See *Greer v. Aetna Life Ins. Co.*, 225 Ala. 121, 142 So. 393 (1932); *Metropolitan Life Ins. Co. v. People*, 209 Ill. 42, 70 N.E. 643 (1904); *Provident Sav. Life Assur. Soc'y v. Puryear's Adm'r*, 109 Ky. 381, 59 S.W. 15 (1900); *Rideout v. Mars*, 99 Miss. 199, 54 So. 801 (1911); *Bernblum v. Travelers Ins. Co.*, 340 Mo. 1217, 105 S.W.2d 941 (1937); *Metropolitan Life Ins. Co. v. Lillard*, 118 Okla. 196, 248 P. 841 (1926). This purpose has been recognized in recent decisions as well. See *Public Service Mut. Ins. Co. v. Rosebon Realty Corp.*, 39 Misc. 2d 663, 241 N.Y.S.2d 555 (N.Y. Civ. Ct. 1963); *Mahone v. Hartford Life & Acc. Ins. Co.*, 561 P.2d 142 (Okla. Ct. App. 1976); *McDowell v. Good Chevrolet-Cadillac, Inc.*, 397 Pa. 237, 154 A.2d 497 (1959). Interestingly, one court stated with candor and enthusiasm that the one purpose of the statute was to protect the livelihoods of insurance agents. See *City of New York Ins. Co. v. Greenwood Int'l Co.*, 170 Miss. 644, 155 So. 346 (1934).

early twentieth century to deal with discrimination by insurers remain in force today.

In addition to the anti-discrimination arguments, opponents of rebating also argued that unrestricted discriminatory pricing could threaten insurer solvency. If the premium advertised by the insurer is presumed to be fair, reasonable, and sufficient to provide a reserve to meet future claims, giving rebates to insureds could, in the long-run, prevent the insurer from meeting its obligations. Thus, if rebating is not restricted, the only way for the insurer to avoid the risk of insolvency under conditions of widespread rebating is to increase the differential between preferred and non-preferred insureds. In other words, if the practice of rebating causes insufficient premiums to be collected to cover anticipated claims, insolvency can be avoided only if those not enjoying preferred treatment are charged an excessive, unfair, and unreasonable price.<sup>22</sup> When so viewed, it becomes clear that the insolvency argument was predicated on the discrimination argument: if preferential benefits are given to one class of insureds, these benefits will be made up by charging another class of insureds a higher price than they would have otherwise paid. Thus, by this line of reasoning, it is inevitable under conditions of widespread rebating that one group of insureds ends up subsidizing another class of similarly-situated insureds.

These early justifications for the anti-rebate statutes remained unquestioned for many years. During this time, the statutes were applied in a variety of situations.<sup>23</sup> Some involved fairly obvious violations,<sup>24</sup> but other situations were more subtle. For example, the statutes were held to invalidate arrangements under which the insured received a highly favorable interest rate on a loan used to pay the premium.<sup>25</sup> Similarly, waiving the interest due on a promissory note given in lieu of the first premium payment was held to constitute the giving of something of value not specified in the policy.<sup>26</sup> Putting the insured on an "advisory board" whose members later shared in distributions not made to

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22. See *People v. Hartford Life Ins. Co.*, 252 Ill. 398, 96 N.E. 1049 (1911) (explaining rationale for the Illinois statute).

23. Surveys of the enforcement through the years of the anti-rebate and related statutes can be found in Brock, *supra* note 8; Gordon, *The Anti-Discrimination Laws—A Survey of the Development and Enforcement—1900-1950*, 1950 PROCEEDINGS 34 (Legal Section, American Life Convention); Gordon, *The Anti-Discrimination Laws 1950-59*, 1959 PROCEEDINGS 448 (Legal Section, American Life Convention).

24. See *Mountain Fir Lumber Co., Inc. v. Employee Benefits Ins. Co.*, 296 Or. 639, 679 P.2d 296 (1984) (oral promise by insurer to rebate premiums unenforceable); 1988 La. Att'y Gen. Op. No. 88-352 (Aug. 26, 1988) (payment of a finder's fee by an insurance agent to an unlicensed person for referral of a customer is an unlawful splitting of commission).

25. See *Western Union Life Ins. Co. v. Musgrave*, 25 Ariz. 219, 215 P. 536 (1923); *Johnson v. American Nat'l Ins. Co.*, 126 Ariz. 219, 613 P.2d 1275 (Ct. App. 1980) (alleged contract that insurer would make loan to insured if insured bought policy is illegal and unenforceable); *Jones v. Crawford*, 21 Ga. App. 29, 93 S.E. 515 (Ct. App. 1917); *Morris v. Ft. Worth Life Ins. Co.*, 200 S.W. 1114 (Tex. Civ. App. 1918). *But see* *Northern Assur. Co. v. Meyer*, 194 Mich. 371, 160 N.W. 617 (1916); *Equitable Life Assur. Soc'y v. Robinson*, 77 Ohio L. Abs. 18, 147 N.E.2d 648 (Ohio C.P. 1957); *Calvin Phillips & Co. v. Fishback*, 84 Wash. 124, 146 P. 181 (1915).

26. See *Ellis v. Anderson*, 49 Pa. Super. 245 (Super. Ct. 1912); *Security Life Ins. Co. v. Allen*, 170 S.W. 131 (Tex. Civ. App. 1914). In reviewing a twist on this arrangement, the court in *Consumer Credit Ins. Ass'n v. State*, 149 Vt. 305, 544 A.2d 1159 (1988) held that the state insurance commissioner exceeded his authority in declaring it an unfair trade practice for issuers of credit insurance policies to make deposits at lower rates of interest than paid to other depositors, reasoning that this is not an agreement between insurer and insured.

all insureds was held an unlawful rebate.<sup>27</sup> Other elaborate efforts to route commissions to the insured were invalidated as well.<sup>28</sup>

The cases in which the statutes have been applied suggest that rebating has, and is probably now, occurring to some extent. The significance of the practice, however, is not quantifiable. What Kimball and Jackson said nearly three decades ago probably remains accurate today:

Persons who commit the offense of rebating are not anxious to discuss it, and, since no one is harmed directly, the violation comes to light only in those cases in which a third person stumbles upon evidence or one of the parties admits his guilt.<sup>29</sup>

Lacking empirical data, Kimball and Jackson nevertheless opined:

That it is difficult to detect and nearly impossible to prove an alleged violation, that most departments and agents believe there is extensive rebating, and that our own earlier association with the business convinces us that rebating was common belie the validity of an inference based solely on the [infrequency] of enforcement proceedings. We believe that the practice is common and that a large number of agents rebate to some extent.<sup>30</sup>

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27. See *Citizens' Life Ins. Co. v. Commissioner of Ins.*, 128 Mich. 85, 87 N.W. 126 (1901); *State Life Ins. Co. v. Strong*, 127 Mich. 346, 86 N.W. 825 (1901); *Smathers v. Bankers' Life Ins. Co.*, 151 N.C. 98, 65 S.E. 746 (1909).

28. Such examples include: (a) a sale of stock in connection with the sale of insurance (*Utah Ass'n of Life Underwriters v. Mountain States Life Ins.*, 58 Utah 579, 200 P. 673 (1921)); (b) named insureds are trustees of a corporation wholly owned by them to which the agent's commissions are transferred (*Arcim Corp. v. Pink*, 253 A.D. 428, 2 N.Y.S.2d 709 (N.Y. App. Div. 1938)); (c) licensing a wholly-owned subsidiary of savings and loan as insurance agency, which would pay dividends to savings and loan, when evaluated against statutes forbidding unlawful inducements to purchase of insurance (*THM, Ltd. v. Commissioner of Ins.*, 176 Mich. App. 772, 440 N.W.2d 85 (Ct. App. 1989)); (d) stock option with sale of insurance (*People v. Commercial Life Ins. Co.*, 247 Ill. 92, 93 N.E. 90 (1910)); (e) application for agency license refused, where proposed agent, director of association, would sell insurance to members of association (whose dues support proposed agent's salary), and would turn over commissions to association, thereby reducing the amount of dues and assessments to be charged the insureds, on ground that this is illegal rebate scheme (*Lyman v. Ramey*, 195 Ky. 223, 242 S.W. 21 (1922)); but see *American Ass'n of Meat Processors v. Casualty Reciprocal Exch.*, 388 Pa. Super. 179, 565 A.2d 173 (Super. Ct. 1989) (anti-rebate statutes did not apply to agreement whereby insurer promised to pay ten percent of premiums derived from workers' compensation insurance sold to Association members, on ground that the Association was neither insurer, broker, or agent; dissenting judge would hold that this arrangement was an illegal rebate); (f) personal services contract provided insured in connection with purchase (*Richmond v. Conservative Life Ins. Co.*, 166 Wis. 334, 165 N.W. 286 (1917)); but see *Julian v. Guarantee Life Ins. Co.*, 159 Ala. 533, 49 So. 234 (1909) ("income" refunded to insured is payment for services stipulated for by insurer and insured); (g) a percentage-of-sales lease agreement between an insurance agent and a landlord who is not licensed to sell insurance (1984 Ariz. Att'y Gen. Op. No. 184-164 (1984)); (h) the making of a small gift to each person answering a newspaper advertisement containing a coupon to be presented to the insurer whereupon the consumer allows the insurer to compare the individual's current automobile policy with the insurer's automobile policy (1984 Ga. Att'y Gen. Op. 167 (1984)); but in the same opinion, the anti-rebate statute was interpreted as not prohibiting the insurer making a charitable contribution to a specified charity based on the total sales of a particular type of policy in one month, because that incidental benefit goes to a third-party rather than to the insured).

Other arrangements, not all of which have resulted in reported decisions, also seem to fall within the scope of the statutes. For example, if an attorney representing a client in a real estate transaction refers that client to a title insurer which issues a policy on property involved in the transaction and then makes a payment to the attorney in exchange for the referral (see *Marcotte, Kickbacks to Lawyers Rapped*, 1986 A.B.A. J. 30), this payment could be viewed as sharing of the title insurance commission with a person who lacks a license to sell insurance. See *Blyth, Guidelines for the Practice of Splitting Title Insurance Premiums Between Title Insurance Companies and Attorneys in the State of New York*, 59 N.Y. St. B.J., Jan. 1987, at 46-51 (sharing of title insurance premiums must be based on services rendered, and not on referral).

29. Kimball & Jackson, *supra* note 7, at 186.

30. *Id.*, at 186-87.

On the other hand, Frankel stated in his 1983 article that his own "informal inquiry . . . of some fifty career life insurance agents and staff managers revealed virtually no knowledge of any rebating activity."<sup>31</sup> But this was countered by Moyses in 1986 who stated that "[i]t is generally agreed that some rebating takes place, even though prohibited by law." Although noting that only a small minority of agents actually rebate, he offered these examples: the agent paying part or all of the first premium out of his own funds; the agent paying a renewal premium to prevent a lapse; and commission sharing with relatives, close friends, and charities with which the agent is personally involved.<sup>32</sup>

Part of the difficulty in quantifying the extent of rebating devolves from the fact that identical formal arrangements may have completely different purposes, with one constituting a rebate while the other is a legitimate association. For example, if a policyholder serves on an insurer's advisory board and actually renders services to the insurer, it is not against public policy to compensate the policyholder. However, if the policyholder receives an appointment to the board as an inducement to her purchase of insurance, the purpose of the anti-rebate law has been offended. In practice, most of the consulting arrangements structured in the early twentieth century never resulted in the provision of any services by the privileged insureds.<sup>33</sup> But an insurer who retains an individual to provide professional services in circumstances where that individual is coincidentally an insured should not be considered to have violated the statute. Thus, it is not possible in many instances to determine whether a particular benefit to an insured is an unlawful inducement to the purchase of insurance without inquiring into the circumstances of the transaction. Presumably, if the agent returns cash to the insured in any amount, an unlawful rebate has occurred. But agents routinely provide other benefits to insureds which may be designed to induce the purchase or renewal of insurance, and one is justifiably hesitant to label these sorts of activities — taking the policyholder to lunch, or providing free calendars and pens — as illegal rebates, even though some of these activities (such as taking the policyholder out for a round of golf) could have more monetary value than a modest cash rebate.<sup>34</sup> Even if proving that the policyholder's benefit induced her purchase of insurance were not difficult, the need for ad hoc examination of business arrangements where rebating may have occurred calls into question the wisdom of a blanket prohibition.

The difficulty inherent in defining and enforcing no-rebate rules is one of the reasons the statutes are now being reevaluated. The first significant questioning of the statutes occurred in 1961 when, as part of a broader study of the ways in which insurance is marketed, Kimball and Jackson observed: "While we are not prepared to assert categorically that the anti-rebating laws should be

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31. Frankel, *Insurance Agent Commission Deregulation: Antirebate Laws and an Alternative to Repeal*, 2 J. INS. REG. 255, 258 (1983).

32. Moyses, *Legalized Rebating — A Marketing View*, 40 J. AM. SOC'Y CLU, 56, 57 (Sept. 1986).

33. Brock, *supra* note 8, at 388.

34. To help clarify this problem, a 1988 revision to the Kentucky statute made it clear that inducements in excess of ten dollars were prohibited, but smaller gifts, etc., were permissible. KY. REV. STAT. ANN. § 304.12-110 (Michie/Bobbs-Merrill 1988).

repealed . . . we do challenge the traditional assumption that such laws are *obviously* desirable."<sup>35</sup> In 1977, a Department of Justice Task Force study called into question the desirability of the anti-rebate statutes.<sup>36</sup> In 1981, Representative LaFalce, Chairman of the House Small Business General Oversight Committee, introduced legislation that would have preempted—and thus invalidated—every state's anti-rebate law.<sup>37</sup> Although at least two states have considered repealing their anti-rebate laws, California is thus far the only state to have done so.

Although it would be premature to describe the criticisms of the statutes as amounting to a "movement," it is fair to say that the sum of these discussions represents a substantial reassessment of the rationales for the anti-rebate laws.

#### D. *Modern Justifications for and Criticisms of the Statutes*

Today, several justifications are offered for the anti-rebate statutes.<sup>38</sup> First, it is still argued today, as it was when the statutes were first proposed, that the anti-rebate statutes prevent unfair discrimination among insureds with identical risks. Preventing rate discrimination is a fundamental objective of state insurance regulation, and the underlying value is one of fairness: if two insureds are similarly situated, those insureds should pay the same amount for their coverage. Allowing one insured to pay less than another similarly-situated, insured means that one insured unfairly subsidizes the other.<sup>39</sup>

The "unfair discrimination" justification depends in large measure on how one defines "unfairness." The corollary of "similar insureds should pay the same rates" is "differently-situated insureds should pay different rates." Yet today differently-situated insureds often pay the same rates, and this is not widely considered to be objectionable. In reality, no two risks are identical. In a perfect world, every risk should be individually evaluated and rated, and a specific premium charged for the individual rate. Transaction costs, however, make precise measurement of each insured risk impossible; thus, affordable rates can be offered to the public only if different risks are grouped together for the purposes of setting a rate. To insist on anything else in the name of "fairness" would make insurance unavailable. Thus, if one defines fairness as differently-situated

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35. Kimball & Jackson, *supra* note 7, at 192 (emphasis in original).

36. U.S. DEP'T OF JUST. REP. TO TASK GROUP ON ANTITRUST IMMUNITIES, THE PRICING AND MKTG. OF INS. 301-03 (Jan. 1977).

37. *Insurance Agent Commission Deregulation, 1981: Hearing Before the Subcomm. on General Oversight of the Comm. on Small Business, 97th Cong., 1st Sess. (1981)* [hereinafter *Hearing*].

38. For other points of view on the arguments for and against anti-rebate statutes, see *Hearing, supra* note 37; Frankel, *supra* note 31; Conniff, *Anti-Rebate Statutes after the Florida Litigation: Alternative Controls for Pricing Abuses*, 5 J. INS. REG. 109 (1986). Conniff's article was adapted from an earlier piece written while a student. See Comment, *Insurance Anti-Rebate Statutes and Dade County Consumer Advocates v. Department of Insurance: Can a 19th Century Idea Protect Modern Consumers?*, 9 U. PUGET SOUND L. REV. 499 (1986).

39. The anti-discrimination justification was the rationale for the Michigan Attorney General's 1983 opinion that an insurance agent may not barter contracts of insurance in return for goods or services. The possibility of incorrect or improper valuation of goods and services provided in lieu of cash created the possibility that policyholders may be treated differently in conflict with the intent of the statute. 1983-84 Mich. Att'y Gen. Op. No. 6140 (April 1, 1983).

insureds paying different rates, it is evident that this kind of fairness is not, and can never be, achieved.

If one defines fairness according to the corollary proposition that "similarly-situated insureds should pay the same rate," it is likewise evident that this view of fairness is not, and cannot be, achieved either. Indeed, a certain amount of discrimination is not only tolerated but also authorized in the industry. Currently, not all persons pay the same price for the same coverage because group insurance, direct sales, and mass media merchandising have less costs to the insurer per policy than individual underwriting, and these reduced costs are passed along to the consumer in the form of lower rates. Those consumers who are in a position to benefit from these kinds of marketing devices pay less for the same coverage than a person who lacks the affiliation essential to participate in such an arrangement. Curiously, cost savings from more efficient marketing systems are extended to some consumers without concern for how this might compromise anti-discrimination goals, but cost savings that might benefit the consumer from commission deregulation, which is merely another kind of change in the marketing system, are carefully scrutinized and sometimes criticized for being unavailable to all.

In defense of the anti-discrimination justification, one must note that the cost-saving aspects of group insurance, direct sales, etc., benefit all members of the group or all recipients equally. This contrasts with rebating, the benefits of which could vary from insured to insured, without any necessary relationship to the cost of serving the insured. Yet, if, as discussed in greater detail below, commission deregulation encourages the development of alternative sales mechanisms such as discount brokerage, one could argue that the cost savings benefit all who choose to take advantage of the service, just as group insurance, direct sales, etc., benefit all consumers who choose to utilize the less-costly alternatives.

In further response to the anti-discrimination justification, it is apparent that in most other sectors of the U.S. economy, it is common for different prices for the same product to be charged to different customers. Automobile discounts vary from customer to customer; whether a customer receives a "factory-rebate" depends on when she makes her purchase. Grocery stores and manufacturers of food items routinely issue coupons; this causes consumers to pay different amounts for the same food product. It is not true that food coupons are available to all on an equal basis; some people—particularly the poor—have less opportunity to purchase newspapers and to develop the purchasing habits through which one typically acquires coupons. In real estate transactions, consumers pay different percentage-commissions to their sales agents, depending on whether the consumer attempts to negotiate a reduction in the agent's commission. In short, our society does not seem particularly troubled when some people get discounts for their purchases of goods and services but others do not.<sup>40</sup> Of

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40. Although our survey of public opinion is not scientific, we are comfortable in asserting that most people outside the insurance business see nothing wrong with purchasing insurance at a discounted price. Most laypeople, including law students, to whom these prohibitions are mentioned express surprise that such prohibitions exist. Most agents, on the other hand, express opposition to rebating. Kimball and Jackson made these same observa-

course, it is likely that large buyers of insurance will obtain larger commission discounts, but this is true in most sectors of the economy: bulk buyers of products and services can typically negotiate a lower price due to the expenses saved the seller in not having to deal with several buyers to sell the same quantity.<sup>41</sup> Indeed, large consumers of insurance currently negotiate their own policies and their own rates, and the commission is handled as a part of this negotiation.<sup>42</sup>

The argument that the anti-rebate statutes prevent discrimination among similarly-situated insureds has more appeal if one assumes that the rebate offered the insured comes out of the premium collected by the insurer. If, however, the rebate comes out of the agent's commission, and if the same sum is remitted to the insurer on the behalf of each similarly-situated insured to pay for the coverage, each similarly-situated insured is treated equally by the insurer. If one views the premium paid by the insured as the sum of two parts,<sup>43</sup> one part being the fee remitted to the insurer to pay for the coverage and the other being the agent's commission, and if no part of the rebate comes out of the fee remitted to the insurer, the anti-discrimination justification for the anti-rebate laws is actually an argument that fairness requires that similarly-situated insureds pay their agents equal fees.<sup>44</sup>

This reconstructed argument—that the anti-discrimination ideal requires similarly-situated consumers to pay equal fees to their insurance agents—is less compelling than the argument that insurers should not be allowed to charge two identical insureds different prices for the same product. The commission is essentially the agent's fee for arranging the sale of insurance. Requiring insureds to pay the same fee to all agents for the sale of an insurance policy is not obviously different from requiring all people to pay all lawyers the same hourly fee or proscribing all electricians from price-cutting. Moreover, if the anti-discrimination objective means that insureds with similar costs should pay the same rate, it follows that fairness is not achieved if Consumer A is required to pay the same as Consumer B for the agent's services if Consumer A has no need for those services (i.e., is a lower-cost consumer). If the commission is simply a brokerage fee, some consumers, in theory, could save that fee by dealing directly with the insurer, such as might occur if the insurer were to provide a catalog of products and prices and the consumer, without obtaining any advice or other sales assistance, simply told the insurer what product was desired.

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tions in 1961, and the reasons they offered for the divergence of opinion between consumers and agents appear equally valid today. Agents have an economic self-interest in opposing rebating and to some extent are the products of "professional conditioning" that rebating is bad, while the general public is accustomed to rebates and discounts for many of their purchases. Kimball & Jackson, *supra* note 7, at 190.

41. Formisano, *Property and Liability Insurance Markets in a "Net Pricing" Framework*, 34 CPCU J. 37 (March 1981).

42. U.S. DEP'T OF JUST., *supra* note 36, at 293-94.

43. Currently, consumers do not distinguish the commission being paid from the price for the basic insurance, because the commission and insurance are bundled together, and the consumer is confronted with a single price.

44. *But see* Smith v. Kleinschmidt, 57 Mont. 237, 187 P. 894 (1920), where the court, in rejecting the argument that the prohibition against discrimination applies only to that share of the premium which the insurer retains for itself, stated: "The agent's commission is as much a part of the premium paid by the assured as is the portion retained by the insurance company." *Id.* at 245, 187 P. at 896.

Commissions are commonly justified as a fee paid by the insured in exchange for the agent's advice and service. Yet not all consumers need this advice and service. The anti-discrimination principle actually suggests that only consumers who need and use the advice should pay for it. Otherwise, consumers who do not need or want the service of the agent pay for it anyway, thereby subsidizing those consumers who make use of the service (or contributing to a windfall profit for the agent who collects a fee for little or no service).<sup>45</sup> In short, the anti-discrimination ideal is less persuasive when used to rationalize forcing consumers to pay equal fees for their agents' services. Taken to its logical conclusion, the anti-discrimination justification tends to support commission deregulation.<sup>46</sup>

A second justification frequently offered for the anti-rebate laws is that the services provided to consumers by agents would deteriorate in the absence of such laws. The essence of this justification is a recognition that the commission is a fee for advisory services provided by the agent. If, it is argued, agents are under pressure to rebate a portion of their commissions to insureds, agents will reduce the quantity and quality of advisory services they provide. In the final analysis, insureds will receive less assistance, information, and advice from agents, and ultimately will make poorer purchasing decisions.<sup>47</sup>

Whether commission deregulation would produce these negative consequences would depend on the value consumers place on the services provided by their agents. Presumably, consumers who desire individualized, personal advice would utilize the services of their current agents, and consumers who do not want such advice or who do not want to pay for it could utilize the services of a discount agent. In addition, part of what the consumer would purchase when paying a higher price to the non-discount agent is the agent's assumption of legal duties toward the consumer. In many cases, courts have recognized that agents who undertake to procure insurance for their clients can, depending on the circumstances, assume contractual, professional, and fiduciary duties to their clients. Presumably, courts would impose these duties less frequently, if at

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45. Whether a broker or agent may accept payments from the insured for additional services rendered in connection with the placing of insurance has received different answers. The Alaska Attorney General concluded that the Alaska anti-commission splitting statute did not prohibit a broker or agent from contracting with the insured and accepting additional compensation from the insured for rendering additional services. Alaska Att'y Gen. Op. No. J-66-008-82 (Oct. 9, 1981). For a different answer under a different statute, see Ark. Att'y Gen. Op. No. 83-142 (July 25, 1983). In the course of the Alaska Attorney General's opinion, it was stated that "the broker may not either refuse to accept the commission paid by the insurer for procuring insurance or refund the commission paid by the insurer to the insured." Curiously, this approach required the insured to pay a commission for services that are not used (i.e., that are below the normal usually provided), but allows the broker to charge an additional fee if the broker's services go beyond the normal services usually provided.

46. A related objection that has been made to the repeal of anti-rebate statutes is that agents who rebate will nevertheless have to report their full commission as income and pay tax on the rebated portion of the commission unless the agent reports the rebate as income to the consumer by using a 1099 form. Moyses, *supra* note 32, at 57-58. Because the rebate reduces the income earned by the agent and clearly does not reflect income earned by the consumer, the rebate is actually a business expense that directly offsets income. The rebate is tantamount to a reduction in price paid for a service, and the amount of that reduction should not be considered as income to either the agent or the consumer.

47. For an example of the proffering of this argument, see Mulcahy, *Rebates Hike Consumer Costs, Slash Agent Earnings*; Wolff, 90 NAT'L UNDERWRITER LIFE & HEALTH INS. 2 (Sept. 10, 1986) (reporting opinions of chair of National Association of Life Underwriters task force to preserve anti-rebate statutes).

all, when consumers utilize discount agents to place their sales.<sup>48</sup> Those consumers who desire the benefit of the legal obligations that arise when the agent undertakes to provide advisory services would pay for that benefit. Those consumers who would prefer not to purchase that benefit could utilize a discount broker, and spend their savings on something of greater utility to them.<sup>49</sup>

Interestingly, the argument that deregulating commissions will cause deteriorated service is analagous to the argument made in opposition to deregulation of commissions in securities markets, which occurred in 1975. Currently, a consumer who desires advice and counseling on her securities purchases can pay for that service through a non-discount broker. A consumer who does not want that service can use a discount broker. The data show that many consumers have reduced their brokerage commissions by foregoing the counseling for which part of those commissions pay; the market share of discount brokers has steadily grown since deregulation occurred over a decade ago. At the same time, the business of full-price brokers remains substantial, indicating that many consumers are willing to pay the higher fees for the counseling. Presumably, similar market patterns would emerge if insurance agent commissions were deregulated: many consumers would opt for the full-price agents and their promise of additional service and counseling, while many other consumers would be attracted to the discount services. Without deregulation, alternative, lower-cost methods of marketing insurance, which could co-exist with the traditional methods of marketing, are unlikely to emerge.

A third justification sometimes offered for the anti-rebate statutes is that the prohibitions on rebates reduce the risk of insurer insolvencies. This argument had its genesis in the period when some insurers were forced to borrow against reserves in order to pay for the high, front-loaded commissions promised to their agents. If the *agent* gives the rebate out of his commission instead of the insurer giving the commission out of its premium remittance, the justification has no merit. The price which the consumer pays is the *gross premium*, which is the sum of the commission plus the *net premium*. The net premium is what the insurer must collect to pay losses and maintain adequate reserves, and this sum should not be reduced when agents rebate a portion of their commissions to consumers. Indeed, agents who purchase insurance for themselves or their immediate families pay only the net premium; the insurer is no worse off for this, because the insurer nets as much from the sale of policies to its own employees as it does from policies sold to third parties.<sup>50</sup> Similarly, in property and liability insurance, the agent often accepts a check from the applicant for

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48. Much of the liability now imposed on agents arises in the situation where the agent represents or allows the consumer to think that the agent will take care of the insured's needs, and the agent exercises unreasonable judgment in arranging coverages for the insured. When consumers utilize discount agents, who would merely obtain the coverages designated by the insured, the consumers substitute their own judgment for the agent's, and this should relieve the agent from liability if inadequate coverages are purchased. Obviously, discount agents could still be liable, as any agent can be held liable today, for failing to follow the instructions of the consumer.

49. These purchases might, of course, include additional insurance coverages.

50. This was implicitly recognized by the Louisiana Attorney General in a classic "a-half-full-glass-is-not-the-same-as-a-half-empty-glass" opinion, where the Attorney General concluded that it would be impermissible for an insurance agency to return a portion of the commission on a workers' compensation policy issued to a school board on a rebate or fee-split basis, but that if the agency initially offered the premium to the school board at a

the gross premium, deducts his commission, and remits the net premium to the insurer. If the agent chooses to reduce his own commission prior to remitting the net premium to the insurer, the insurer is not affected.

To the extent insurers front-load commissions (that is, to the extent some insurers today do not adhere to the practice of net premium pricing), the argument has more relevance. Some life insurers pay in the first year an unusually large commission to the agent who sells the policy, sometimes as much as the entire first premium.<sup>51</sup> Thus, the agent in the first year has a much larger commission out of which to make a rebate, but in later years the agent has little or perhaps no commission with which to make a rebate. To the extent rebates are larger in the first year of some policies than in later years, consumers will be induced to switch their policies from one insurer to another, taking advantage of the larger rebates offered in early years.

The responses to the insurer solvency justification for anti-rebating statutes are several. First, the argument is relevant only to life insurers. Property and liability insurance is typically written on an annual basis, so "front-load" commission structures do not exist in those lines. Second, some insureds will not want to switch policies even if larger rebates are offered. An insured who has developed a health problem may not meet the underwriting requirements for a new policy, or may do so only at much higher rates. Third, it is virtually inconceivable that insurers would leave existing commission structures intact in a deregulated environment, particularly if their solvency were at stake. To deter excessive first-year rebates, insurers need only reallocate some of the agent's commissions from early years to later years. This might induce agents to put greater emphasis on servicing policies and keeping them in force than on writing new policies, but nothing requires that commission structures be heavily weighted toward payments in the early years of a policy.

A fourth justification for the anti-rebate laws reasons that these statutes deter the replacement of policies, the widespread occurrence of which would undermine the savings aspects of whole-life policies.<sup>52</sup> Currently, replacement of one- or two-year old whole-life policies is deterred due to the slightly higher cost that accompanies advanced age and delayed receipt of cash values, dividends, and loan values. However, if agents could offer a replacement policy with a slightly higher premium accompanied by a rebate of half of the agent's commission, many consumers would choose to replace the policies annually. This would cause premiums to rise to keep up with the expenses of commissions, while dividends would decline, and this would vitiate the value of the whole-life product.

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reduced rate (reflecting a reduction on account of a reduced commission), the arrangement would be valid. La. Att'y Gen. Op. No. 87-742 (Dec. 23, 1987).

51. *Hearing, supra* note 37, at 6. (statement of Susan Mitchell, Wisconsin Insurance Commissioner) (first-year commissions for life insurance are as high as 120 percent of first-year premium). *Id.* at 49 (statement of Gordon Bowers, C.L.U.) (normal agency commission is 90 to 120 percent of the first-year premium). *Id.* (statement of John Regan, C.L.U.) (normal agency commission is 60 to 90 percent of first-year premium). Commissions in New York are limited to 55 percent of the first-year premium, but expense allowances are voucherable up to an additional 35 percent of the first-year premium. *Id.* at 49 (statement of Bowers).

52. This argument is articulated by Frankel, *supra* note 31, at 261.

This justification presumes a front-loaded, high first-year commission, which, as discussed earlier, is by no means inevitable. If such a commission structure seemed likely to destroy a popular insurance product, it is highly probable that the industry would decrease early-year commissions and increase the commissions for later years. Assuming a roughly even distribution of commissions over the reasonable life of a policy, no replacement policy will appear substantially superior, because the agent proposing replacement will not be able to offer a substantially greater rebate than the agent currently servicing the policy. Insurers might also opt to price their products at a slightly higher level in the first year in order to cover the costs of issuing the policy; the reduced premium in subsequent years would in itself serve as a deterrent to replacement of the policy.

Those who oppose the statutes also assert disadvantages unrelated to any of the statute's proffered advantages. Foremost among these criticisms is the allegation that the statutes fix the price that consumers must pay for the services of insurance agents. The preclusion of price competition reduces the incentive for agents to compete with each other to provide services to the consumer at a lower cost. As with any cartel where prices are fixed, competition among the cartel's members to increase market share may occur through increased service or improved efficiencies to facilitate increased volume. Some of this competition may benefit consumers, but the fact remains that not all consumers desire improved service or prefer improved service over a decrease in price. Yet all consumers, including those who do not want the service, must pay a full commission for the enhanced service regardless of whether the consumer used the agent's services, the quality of the agent's services, and the amount of effort the agent expended to arrange the sale. If commissions were deregulated, some agents would discount their commissions, and this would force other agents to consider doing so as well. Some would choose not to discount, instead emphasizing good service as the way to keep their clients. Some would offer rebates, and would try to maintain their prior level of revenues by making their operations more efficient and by increasing volume. From the consumer's perspective, deregulation would mean more choices.<sup>53</sup>

In response to this criticism, one could argue that repealing the anti-rebate statutes will not provide consumers uninterested in service with a better product at a lower cost if the repeal is not accompanied by more rigorous regulations requiring disclosure of insurance costs to consumers. In recent years, a number of "no-load" financial products have appeared on the market, but critics have charged that the no-load products do not benefit the consumer because of hidden fees. For example, a commission-free life insurance policy is not cheaper to the consumer if the policy has high surrender charges, which are paid when the policy is cashed. If the agent rebates a portion of his commission, but recoups this loss through higher compensation paid by the insurer funded by its receipt of higher surrender charges, consumers receive no net benefit.<sup>54</sup> Without effec-

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53. Estimates of the cost savings to consumers from deregulation of commission pricing range from three percent to six or seven percent. *Hearing, supra* note 37, at 3 (statement of Rep. LaFalce).

54. See *Wall Street Journal*, Jan. 21, 1985, at 24, c. 4.

tive disclosure of all life insurance costs, and without knowledgeable insureds making informed comparisons of life insurance products, repealing the anti-rebate laws, one could argue, is not likely to yield substantial benefits.

To summarize, the debate over whether anti-rebate statutes should be repealed is vigorous.<sup>55</sup> In the final analysis, it is difficult to articulate persuasive arguments commending the statutes. These statutes may eventually be repealed across the country, but such a development will be years, perhaps a decade or more, in the future.<sup>56</sup>

## II. SUBSTANTIVE DUE PROCESS AND ECONOMIC REGULATION

### A. *The Federal Doctrine: Its Rise and Fall.*

The well-known history of the rise and fall of the federal substantive due process doctrine needs only a brief sketch here. Suggestions that the judiciary has an inherent right to review the substance of legislation enacted by the legislative branch date to the early years of the country. Influential political theories of that era asserted that natural law maxims limited the restrictions on liberty that any government could impose. From this belief in a set of inherent limitations on governmental authority grew the notion that courts could invalidate legislative acts that unduly restricted liberty in violation of natural law.<sup>57</sup> Yet even at this early time there were proponents of what is now described as judicial restraint. In *Calder v. Bull*,<sup>58</sup> the Supreme Court held that the Connecticut legislature did not violate the *ex post facto* clause of the United States Constitution when it set aside a probate decree, because the clause only applied to criminal laws. Justice Chase, however, expressed the view that the Supreme Court could invalidate legislation in a proper case if the Court believed that the legislature had interfered with rights vested in the people by natural law, even if those rights were not specifically protected by the Constitution.<sup>59</sup>

Justice Iredell, on the other hand, argued that no legal theory justified giving a court the power to enforce natural law over the will of the people as reflected in the legislative acts of their representatives. Only if the acts of Congress or the state legislatures violated specific provisions of the Constitution, which also reflected the will of the people, could courts step in and invalidate

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55. See Arndt, *No Consensus on Rebate Threat*, 91 NAT'L UNDERWRITER LIFE & HEALTH INS. 28 (Mar. 23, 1987) ("Agent opinion appears to be split on the question of whether the repeal of anti-rebate statutes presents a serious threat to the life insurance industry."); Van Aartrijk, *The Threat to Agent's Turf*, 84 BEST'S REV. PROP. CASUALTY INS. 14 (April, 1984).

56. If the insurance industry is rocked sometime in the next several years by widespread insolvencies at a level equivalent to that which has overrun the savings and loan industry during the 1980s, we should anticipate substantial federal displacement of traditional state regulation, and federal preemption of state anti-rebate statutes could easily occur in such an environment. In such circumstances, the fate of the anti-rebate statutes would, of course, be among the very least of our worries.

57. See NOWAK, ROTUNDA, & YOUNG, CONSTITUTIONAL LAW 331-33 (3d ed. 1986); TRIBE, AMERICAN CONSTITUTIONAL LAW 560-61 (2d ed. 1988).

58. 3 U.S. (3 Dall.) 386 (1798).

59. Justice Chase's analysis did not rest on natural law alone, but also invoked a structural limitation inherent in the purposes for which legislatures were established. To this extent, Justice Iredell's critique of Chase's opinion, discussed below, was off the mark. See L. TRIBE, *supra* note 57, at 561.

legislative acts. The debate between Justices Chase and Iredell foreshadowed the current debate between those who envision courts as authorized to invalidate statutes whose purpose is economic regulation and those who view courts as substantially constrained in their ability to review legislative acts.<sup>60</sup>

In the mid-1850s, Justice Chase's view was accepted in cases at both the federal and state levels,<sup>61</sup> and the substantive due process doctrine continued to prosper throughout the rest of the century.<sup>62</sup> Thomas M. Cooley's widely read and followed treatise *Constitutional Limitations*,<sup>63</sup> which was first published in 1868, gave strong support to the doctrine.<sup>64</sup> In the 1877 decision *Munn v. Illinois*,<sup>65</sup> the Supreme Court suggested that the due process clause contained some implicit but nevertheless inherent restrictions on the economic regulatory authority of legislatures. The Court rejected due process and commerce clause challenges to Illinois statutes that regulated the rates grain elevators could charge. On the due process argument, the Court observed that a state could use its police power to regulate private property when necessary for the public's welfare. The grain elevator regulation in question was upheld because the operation of grain elevators was "affected with a public interest."<sup>66</sup> However, the portent of decisions to come was evident in the court's qualification that "[u]ndoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially . . . This is because the legislature has no control over such a contract."<sup>67</sup>

In 1887, the Supreme Court explicitly ruled that the substantive due process doctrine could be used to test the constitutionality of legislative regulation. The statute at issue in *Mugler v. Kansas*,<sup>68</sup> which prohibited the sale of alcoholic beverages, was sustained, but the Court stated that definite limits existed beyond which the legislature could not go in its regulatory efforts. Moreover, the Court stated that the judiciary's legitimate role was determining whether

60. See NOWAK, ROTUNDA, & YOUNG, *supra* note 57, at 332; B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 33-34 (1980).

61. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Wynehamer v. People*, 13 N.Y. 378 (1856); NOWAK, ROTUNDA, & YOUNG, *supra* note 57, at 332; E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 114-15 (1948) ("In less than twenty years from the time of its rendition the crucial ruling in [*Wynehamer*] was far on the way to being assimilated into the accepted constitutional law of the country.").

62. See, e.g., *Loan Association v. City of Topeka*, 87 U.S. (20 Wall.) 655 (1874); *Gelpcke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1864); *TRIBE, supra* note 57, at 562-63.

Although the Supreme Court continued to apply a natural law-based substantive due process analysis to strike down legislation during the second half of the nineteenth century, in the period immediately following the Civil War, the Court refused to read a substantive component into the fourteenth amendment's due process clause. See, SIEGAN, *supra* note 60, at 46-55; *TRIBE, supra* note 57, at 564-65.

63. T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (New York: Da Capo Press repr. ed. 1972) (1868).

64. NOWAK, ROTUNDA, & YOUNG, *supra* note 57, at 340; SIEGAN, *supra* note 60, at 45-46.

65. 94 U.S. 113 (1877).

66. *Id.* at 130.

67. *Id.* at 134. See also *Railroad Commission Cases*, 116 U.S. 307 (1886) (regulation requiring railroad to carry passengers or freight "without reward" amounted to confiscation of property beyond authority of state); *Barbier v. Connolly*, 113 U.S. 27 (1885) (due process clause protected freedom to contract and prevented arbitrary deprivations of common-law liberty).

68. 123 U.S. 623 (1887).

and when the legislature exceeded those limits.<sup>69</sup> In unmistakable terms, the Court indicated it would invalidate a law enacted pursuant to the state's police power if it had "no real or substantial relation" to the public health, morals, or safety, and was "a palpable invasion of rights secured by the fundamental law."<sup>70</sup>

By the turn of the century, the Supreme Court was ready to use substantive due process on a broad scale to invalidate legislation that unreasonably infringed on liberty.<sup>71</sup> This era was ushered in by the Court's decision in *Allgeyer v. Louisiana*,<sup>72</sup> where a Louisiana statute prohibiting any attempt in the state to effect a contract for marine insurance on Louisiana property with a company not licensed to do business in Louisiana was invalidated. The Court held that the statute exceeded the state's police power and violated the fourteenth amendment's due process clause, in that it infringed upon the liberty to contract for insurance.

Probably the most famous case of the era of substantive due process activism was the Supreme Court's 1905 decision in *Lochner v. New York*.<sup>73</sup> The New York legislature enacted a statute that limited the number of hours a baker could work to sixty hours per week or ten hours per day.<sup>74</sup> A majority of the Court held the law unconstitutional because it arbitrarily and unnecessarily interfered with the employer's and employee's liberty to contract, a right protected by the fourteenth amendment. The majority found no legitimate governmental purpose in regulating labor conditions or practices where no health or safety interest was clearly implicated. Moreover, the majority rejected the argument that the means chosen by the legislature to protect the health of workers was rationally chosen. In other words, the *Lochner* formula required courts to review both the "ends sought" and "means employed" by economic regulation legislation challenged under the due process clause. In scrutinizing the "means employed," the Court insisted upon a "real and substantial relationship" between the statute and its purposes.<sup>75</sup> In assessing the goals of legislation, the Court insisted that the challenged statute be one that served "the interest of the public," not the interests of private parties.<sup>76</sup> Although the majority stated it would not "substitut[e] the judgment of the court for that of the legislature,"<sup>77</sup> perhaps the most telling explanation for the decision was implicit in the Court's candid observation that "[w]e do not believe in the soundness of the views which uphold this law."<sup>78</sup>

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69. *Id.* at 661. See also *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (due process clause of fourteenth amendment guarantees that a person is free to use his faculties to pursue any kind of employment; Louisiana statute deprived Allgeyer of liberty to contract, and legislature had no right to do so).

70. 123 U.S. at 661.

71. See *TRIBE*, *supra* note 57, at 566.

72. 165 U.S. 578 (1897).

73. 198 U.S. 45 (1905).

74. *Id.* at 46.

75. *Id.* at 56, 64; see also *SIEGAN*, *supra* note 60, at 113; *TRIBE*, *supra* note 57, at 567.

76. *Lochner*, 198 U.S. at 57.

77. *Id.* at 56-57.

78. *Id.* at 61.

Justices Holmes and Harlan wrote important dissents in *Lochner*. Justice Holmes repudiated the activist approach of the majority, stating that the Court should invalidate a law only when "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles [sic] as they have been understood by the traditions of our people and our law."<sup>79</sup> Justice Harlan viewed the New York statute as a valid health measure; he cited evidence supporting the contention that limiting the number of hours bakers could work would protect the workers, whose health standard was below the national average.<sup>80</sup> Justice Harlan believed that so long as the statute was arguably to protect health, the Court should sustain it.

Three years later, in *Muller v. Oregon*,<sup>81</sup> the Court sustained statutes that limited the work hours for women. And in 1917, in *Bunting v. Oregon*,<sup>82</sup> the Court upheld statutes limiting the work hours for men in certain industries. The chief difference between these two cases and *Lochner* was that the advocates of the statutes in *Muller* and *Bunting*, unlike the pro-statute advocates in *Lochner*, marshalled the evidence necessary to convince the Court that the legislation was a proper exercise of the state's police power. Neither *Muller* nor *Bunting* questioned the premise that courts would closely scrutinize the ends sought and means employed when reviewing the validity of legislative enactments under the due process clause. In the years that followed, courts, pursuant to this premise, invalidated numerous federal and state statutes regulating various aspects of the economy.<sup>83</sup>

In the 1920s, the Court, utilizing the "public interest" test of *Munn v. Illinois*, began to invalidate regulatory legislation on the ground that the businesses subject to the legislation were not affected with a public interest. For example, in *Wolff Packing Co. v. Court of Industrial Relations*,<sup>84</sup> the Court reasoned that unless the business either resulted from a public grant or franchise, was the traditional subject of regulation, or was of a type that had evolved into the category properly subject to regulation, the state could not regulate the business. The extreme vagueness of the standard gave the Court almost unbridled power to determine the scope of permissible legislative activity; concomitantly, legislatures had virtually no guidance on what business activities they could regulate.

The substantive due process doctrine prospered for three decades, but a 1934 decision, *Nebbia v. New York*,<sup>85</sup> foreshadowed its demise. In that case, the Court upheld a New York statute that established a regulatory board with the

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79. *Id.* at 76.

80. *Id.* at 71.

81. 208 U.S. 412 (1908).

82. 243 U.S. 426 (1917).

83. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (entry into business of ice manufacturing); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (gasoline prices); *Tyson and Brother v. Banton*, 273 U.S. 418 (1927) (theater ticket prices); *Connally v. Gen. Const. Co.*, 269 U.S. 385 (1926) (regulation of wages of construction workers); *Truax v. Corrigan*, 257 U.S. 312 (1921) (state law restricting use of injunctions in labor disputes); *Coppage v. Kansas*, 236 U.S. 1 (1915) (state law prohibiting contracts which required workers to refrain from union membership as a condition of employment).

84. 262 U.S. 522 (1923).

85. 291 U.S. 502 (1934).

authority to set minimum prices for the retail sale of milk as a legitimate exercise of the state's police power. The Court rejected the argument that the milk industry was not a business affected with the public interest, stating that "there is no closed class or category of businesses affected with a public interest."<sup>86</sup> More importantly, the Court appeared to give broad deference to legislative decisions in matters of economic regulation. It opined that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose," and that courts are not authorized either to establish economic policy or to overrule the legislature's choice of an appropriate policy.<sup>87</sup>

Although the Court in *Nebbia* seemed to embrace the logic of Justice Holmes' dissent in *Lochner*, the Court after *Nebbia* continued to invalidate legislation under substantive due process principles. For example, in *Morehead v. New York*,<sup>88</sup> the Court held unconstitutional a New York statute that established a minimum wage for women on the ground that it violated the fourteenth amendment's protection of liberty to contract. The Court's hostility to legislative economic regulation was also evident in the series of decisions striking down various New Deal statutes.<sup>89</sup>

In the wake of President Roosevelt's unsuccessful effort to pack the Court in order to facilitate his New Deal legislative agenda, the Court abruptly and permanently disavowed the substantive due process doctrine as a constitutional limitation on the legislative regulation of economic relationships.<sup>90</sup> In *West Coast Hotel v. Parrish*,<sup>91</sup> a 1937 decision, the Court upheld the constitutionality of a minimum wage law for women enacted in the state of Washington, even though fourteen years earlier an identical law for the District of Columbia had been invalidated.<sup>92</sup> The Court rejected the argument that the law violated fourteenth amendment substantive due process and overruled its earlier decision striking down the District of Columbia law.<sup>93</sup> A year later, the Court in *United States v. Carolene Products Co.*<sup>94</sup> upheld a Congressional statute prohibiting the interstate shipment of "filled" milk. In response to appellee's due process challenge, the Court stated that "where the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for [the statute]."<sup>95</sup> The Court found sufficient facts to support the finding that the stat-

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86. *Id.* at 536.

87. *Id.* at 537.

88. 298 U.S. 587 (1936).

89. *E.g.*, *United States v. Butler*, 297 U.S. 1 (1936) (invalidated Agricultural Adjustment Act of 1933); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidated wage and hour legislation for coal industry); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (act requiring and regulating pension systems for railroad employees exceeded Congress' commerce power); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidated National Industry Recovery Act of 1933 as unconstitutional delegation of power and beyond scope of commerce power).

90. *See* *TRIBE*, *supra* note 57, at 580-81.

91. 300 U.S. 379 (1937).

92. *See* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

93. 300 U.S. at 400.

94. 304 U.S. 144 (1938).

95. *Id.* at 154.

ute had a rational basis, but the Court's rationale went farther, for it declared that it would uphold legislation if any set of facts, either known or reasonably inferable, supported the legislature's judgment. In addition, the Court established a presumption favoring the legislative judgment: "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis . . . ." <sup>96</sup> Other decisions abandoning substantive due process review quickly followed. <sup>97</sup>

Within a decade, the demise of substantive due process was complete. In *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, <sup>98</sup> where the Court's 1949 decision upheld the constitutionality of a right-to-work law, Justice Black specifically noted the rejection of the *Lochner* doctrine, <sup>99</sup> observing that the states are authorized to legislate against "injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." <sup>100</sup> In a 1955 decision, the Court indicated that it not only would presume that a legislature had a reasonable basis for enacting a particular regulatory measure, but also would hypothesize reasons for the law's enactment if the legislature failed to articulate the reasons underlying the statute. <sup>101</sup> By 1963, it was hardly necessary for Justice Black to reiterate the demise of substantive due process, when he stated in *Ferguson v. Skrupa*: <sup>102</sup> "We refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours." <sup>103</sup>

Although there are a few scattered indications that some of the Supreme Court's justices would like to review the reasonableness of economic legislation, the presumption of the validity of such statutes remains the overriding principle. <sup>104</sup> In a recent decision, the Court emphasized the limited scope of due process review of legislation and reiterated the demise of the means-end form of substantive due process review:

Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substan-

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96. *Id.* at 152.

97. *E.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942); *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941); *United States v. Darby*, 312 U.S. 100 (1941).

98. 335 U.S. 525 (1949).

99. *Id.* at 535-36.

100. *Id.* at 536.

101. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

102. 372 U.S. 726 (1963).

103. *Id.* at 731-32 (citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952)).

104. *See* NOWAK, ROTUNDA, & YOUNG, *supra* note 57, at 358-59. Some commentators and academics have also suggested that the Supreme Court's abandonment of substantive due process is unfortunate; they advocate close Supreme Court scrutiny of legislation that affects economic regulation. *See, e.g.*, SIEGAN, *supra* note 60, at 203; Epstien, *Judicial Review: Reckoning on Two Kinds of Error in Economic Liberties and the Judiciary*, (J. Dorn & H. Manne, eds. 1987) [hereinafter, *ECONOMIC LIBERTIES*]; Siegan, *Rehabilitating Lochner*, 22 *SAN DIEGO L. REV.* 453 (1985); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 *HARV. L. REV.* 1363 (1990).

tive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is . . . only to underline Mr. Justice Black's constant reminder to his colleagues that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable.<sup>105</sup>

Yet, as Professor Tribe has observed, "it is significant that the Court never wholly abandoned the position that legislatures, at least in their regulatory capacity, must always act in furtherance of public goals transcending the shifting summation of private interests through the political process."<sup>106</sup> In fact, an ever-present, restrained form of substantive due process review was acknowledged by Justice White in his dissent in *Moore v. East Cleveland*.<sup>107</sup> He acknowledged the demise of the means-end form of substantive due process review of legislative action, but then added:

Even so, "while the legislative judgment on economic and business matters is 'well-nigh conclusive' . . . , it is not beyond judicial inquiry." *Poe v. Ullman*, [367 U.S. 497 (1961)], at 518 (Douglas, J., dissenting). No case that I know of, including *Ferguson v. Skrupa*, 372 U.S. 726 (1963), has announced that there is some legislation with respect to which there no longer exists a means-ends test as a matter of substantive due process law. This is not surprising, for otherwise a protected liberty could be infringed by a law having no purpose or utility whatsoever. Of course, the current approach is to deal more gingerly with a state statute and to insist that the challenger bear the burden of demonstrating its unconstitutionality; and there is a broad category of cases in which substantive review is indeed mild and very similar to the original thought of *Munn v. Illinois*, 94 U.S. 113, 132 (1877), that "if a state of facts could exist that would justify such legislation," it passes its initial test.<sup>108</sup>

Like a dormant volcano, federal substantive due process review of economic regulation lurks in the background. Clearly, if what is left of substantive due process review at the federal level is to ripen into an aggressive form of judicial oversight like that of the *Lochner* era, a major reversal in the Court's thinking would need to occur, much like the abrupt swing which occurred in the late 1930s.<sup>109</sup> Since the impetus for such a swing is unlikely to come from the right,<sup>110</sup> and the left shows no signs of embracing the doctrine, the prospect for a rejuvenation of substantive due process review at the federal level is remote.

105. *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 543-44 (1977) (White, J., dissenting)).

106. TRIBE, *supra* note 57, at 582.

107. 431 U.S. 494 (1977) (White, J., dissenting).

108. 431 U.S. 494, 547-48. See Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism*, 48 TENN. L. REV. 241, 248-49 (1981) ("As a matter of formal constitutional principles, however, the Court has nursed along enough life to enable a future neo-activist Court to revive the doctrine for future intervention should state legislatures act unreasonably.").

109. Only once since 1937 has the Supreme Court invalidated a state economic regulation, and that case, which was decided on equal protection grounds, was subsequently overruled. See *Morey v. Doud*, 354 U.S. 457 (1957), *ov'rd* by *City of New Orleans v. Duke*, 427 U.S. 297 (1976).

110. See Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 829 (1986) ("My concern is with the contention that a more general spirit of libertarianism pervades the original intention underlying the fourteenth amendment so that courts may review all regulations of human behavior under the due process clause of that amendment. As Judge Learned Hand understood, economic freedoms are philosophically indistinguishable from other freedoms. Judicial review would extend, therefore, to all economic regulations. The burden of justification would be placed on the government so that all such regulations would start with a presumption of unconstitutionality. Viewed from the standpoint of economic philosophy, and of individual free-

## B. *State Constitutions as Sources of Independent Constitutional Authority*

In recent years, judges, lawyers, and scholars have looked with increasing interest at state constitutions as an independent source of protection for individual rights.<sup>111</sup> Under long-established principles, the Supreme Court does not review state court decisions that rest on an "independent and adequate state ground," even if the state court also decides an issue of federal law.<sup>112</sup> A state court is the final arbiter of the meaning of its state's laws, unless the state court interpretation conflicts with a federal law or regulation.<sup>113</sup> In other words, the supremacy of federal law pares away at the autonomy of state law. When these principles are considered in the context of state constitutions, a single proposition emerges: "state constitutions may always be used to supplement or expand federally guaranteed constitutional rights, but may never be used to undermine or infringe them."<sup>114</sup>

When state constitutional claims are presented to a state court, the interactive relationship of the federal and state constitutions requires the court to embrace one of three distinct models of state constitutional jurisprudence. Under the "primacy model," a state court looks first to the state constitution to determine whether a right exists; only if a right does not exist does the court look to the federal constitution for protection against infringement.<sup>115</sup> Under the "simultaneous-use" model, the court looks simultaneously to both constitutions and uses both as a basis for decision. This model should yield the same result as the primacy model because the state constitutional rationale constitutes an independent basis for the decision, and this precludes Supreme Court review. However, it is likely that the simultaneous-use model creates a tendency for state constitutional doctrine to mirror federal precedents.<sup>116</sup> A third model, a so-called "supplemental" or "interstitial model," requires a court to look first to the federal

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dom, the idea has many attractions. But viewed from the standpoint of constitutional structures, the idea works a massive shift away from democracy and toward judicial rule." See also, Scalia, *Economic Affairs as Human Affairs*, in *ECONOMIC LIBERTIES*, *supra* note 104, at 31-37 (expressing skepticism about the need for or wisdom of a "revival" of substantive due process in the economic arena at the federal level).

111. See, e.g., BRENNAN, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371 (1984); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982) [hereinafter *Developments in the Law*]; Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Comment, *Interpreting the State Constitution: A Survey and Assessment of Current Methodology*, 35 U. KAN. L. REV. 593 (1987); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977); National Law Journal, Sept. 29, 1986 (special section on State Constitutional Law).

112. M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 261 (2d ed. 1990).

As the Court states the doctrine: "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

113. G. TARR & M. PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 8 (1988).

114. *Developments in the Law*, *supra* note 111, at 1334.

115. These approaches are discussed in greater detail in Pollock, *supra* note 111, at 717-20. See also, Utter, *Swimming in the Jaws of the Crocodile: State Court Comment of Federal Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1025-30 (1985).

116. See Pollock, *supra* note 111, at 718.

constitution. Only if the challenged restraint is permissible on federal grounds is the state constitution consulted to determine whether the state affords a greater right than the federal constitution.<sup>117</sup> Despite the differences, each of the three models recognizes that state constitutions can serve as an independent source of protections for individual rights and can indeed be less tolerant of infringement of individual rights than the federal constitution.

### C. *Substantive Due Process Under State Constitutions*

Because state constitutions operate independently to provide protection for individual rights, the demise of federal substantive due process as a means of reviewing economic regulation does not ordain sterility in the due process clauses of state constitutions. The continued validity in state courts of this doctrine is not particularly surprising when one considers state courts "relied on various provisions of their constitutions to protect [economic] rights well before the U.S. Supreme Court discovered substantive due process . . . ."<sup>118</sup> State courts have responded to the Supreme Court's abandonment of substantive due process in the economic realm in one of two ways. Some courts have joined the federal retreat and currently apply a "weak-form" review to economic regulation. Other state courts use a "strong-form" review which evaluates the validity of economic laws in a manner akin to that which federal courts employed during the height of the *Lochner* era. As the North Dakota Supreme Court stated, "[i]n state courts substantive due process in economic matters has continued to be used as a ground for decision. It has sometimes been ill but never moribund . . . . State courts have never totally relinquished substantive due process as a permissible ground of decision."<sup>119</sup>

#### 1. *Weak-Form Review*

State courts that have joined the federal court retreat from the substantive due process doctrine apply a deferential standard when examining whether certain legislation impermissibly infringes upon economic rights. Using a test that substantially mirrors the current federal approach, these courts will typically explore whether there is a reasonable relationship between the legislation and a

117. *Id.*

118. Galie, *State Courts and Economic Rights*, 496 ANNALS OF AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 76, 77 (Mar. 1988). In fact many point to a *state* decision, *Wynehamer v. People*, 13 N.Y. 378 (1856), as the "beacon case" in the evolution of the substantive due process doctrine. And while the Supreme Court was initially hesitant to use the fourteenth amendment to develop economic due process (*see supra* note 61) "state courts were quick to add it to their constitutional arsenals." Galie, *supra*, at 77. *See also*, SIEGAN, *supra* note 60, at 58-59 (Supreme Court's constitutionalization of right to contract in *Allgeyer v. Louisiana* not unexpected "[b]ecause the federal judiciary was in fact following trends already established in many states.").

For a discussion of other factors that may help to explain the continuing vitality of substantive review of economic legislation at the state level see Hetherington, *State Economic Regulation and Substantive Due Process of Law*, (pt. 2), 53 NW. U.L. REV. 226, 248-51 (1958) (courts able to adjust doctrine to local needs and conditions); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 117-18 (1950) (judicial desire to protect citizens from legislation that results from combination of short legislative sessions and focused interest group pressure).

119. *Johnson v. Elkin*, 263 N.W.2d 123, 128 (N.D. 1978).

permissible legislative objective.<sup>120</sup> The New Jersey Supreme Court described the test used by these courts as it upheld a statute that prohibited judicial spouses from working in casinos: “[A] state statute does not violate substantive due process if the statute reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory . . . . Briefly stated, if a statute is supported by a conceivable rational basis, it will withstand a substantive due process attack.”<sup>121</sup>

In the same vein is the decision of a Texas court in *Massachusetts Indemnity & Life Ins. Co. v. Texas State Bd. of Ins.* Plaintiff insurer challenged the constitutionality of a Texas statute that limited, but did not prohibit, the insurer’s ability to hire temporary licensees.<sup>122</sup> The court stated that when faced with evaluating a due process challenge, *both* federal and state constitutional law require the court to search for a rational relationship between the legislative means and legitimate end.<sup>123</sup> The court rejected any notion that the Texas Constitution requires closer scrutiny of economic regulation than does the federal constitution. “[O]ur review of Texas cases,” said the court, “inclines us against giving any broader scope to [the Texas Constitution’s due process provision] than the federal constitution affords in cases of this kind.”<sup>124</sup>

In dealing with state constitutional substantive due process challenges to economic regulation, the Texas and New Jersey courts apply the same test that their federal counterparts apply. But not all courts that engage in weak-form review indicate so clearly that they are in fact applying such a deferential standard. Some courts claim to apply a “real and substantial relationship” standard that appears to call for more scrutiny than the federal approach compels. In fact, these courts apply the same deferential review that current federal doctrine yields and courts like those in Texas and New Jersey have adopted.

Illustrative of this kind of case is *Coldwell Banker Residential Real Estate Services, Inc. v. Bishop*, where the plaintiff, a subsidiary of Sears, Roebuck & Company, sought a declaratory judgment that an Ohio statute, which authorized the Ohio real estate commission to suspend or revoke the license of any real estate agent found guilty of “[h]aving offered anything of value other than the consideration recited in the sales contract as an inducement to a person to enter into a contract for the purchase or sale of real estate . . . .”<sup>125</sup> The court held, first, that plaintiff’s home buyer’s discount program, under which the buyer of a home through Coldwell Banker would receive a book of coupons permitting the home buyer discounts on merchandise and services purchased from Sears, did

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120. See, e.g., *Arizona Downs v. Arizona Horsemen’s Found.*, 130 Ariz. 550, 637 P.2d 1053 (1981); *Carolene Products Co. v. Mohler*, 152 Kan. 2, 102 P.2d 1044 (1940); *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530 (1949); *Raisler v. Burlington Northern Railroad Co.*, 219 Mont. 254, 717 P.2d 535 (1985). For an argument that all states should have followed this approach see Paulsen, *supra* note 118.

121. *Greenberg v. Kimmelman*, 99 N.J. 552, 563, 494 A.2d 294, 305-06 (1985).

122. 685 S.W.2d 104, 114 (Tex. Ct. App. 1985).

123. *Id.*

124. *Id.*

125. 26 Ohio App. 3d 149, 150, 498 N.E.2d 1382, 1383-84 (1985) (quoting OHIO REV. CODE ANN. § 4735.18(N) (Baldwin 1984)).

not violate the statute, because the discount program was mentioned in the forms Coldwell Banker used for sales of real estate.<sup>126</sup>

The court went further, however, and commented on plaintiff's allegation that the statute, if interpreted in a manner that proscribed the home buyer's discount program, was unconstitutional. The court disagreed:

[D]efendants assert that [the statute] furthers the dual purposes of maintaining high standards of professionalism among real estate brokers and of focusing consumers on what they are receiving in their purchases of real estate. We find both goals to be valid attempts at preservation of the general welfare of the public and further find that the regulation . . . bears "a real and substantial relation" to the goals sought to be obtained.

The character and ethics of real estate brokers are important subjects of government regulation. There is a valid state interest in promoting the character, honesty and intellectual competence of real estate brokers . . . Likewise, purchasers of real estate should be aware of all they are receiving in exchange for their purchases. Requiring written disclosure of all consideration a purchaser of real estate is to receive results in both the prevention of "under the table" dealings by real estate brokers and a written record of the consideration to be provided a real estate purchaser.<sup>127</sup>

The court said that in order for economic legislation to withstand a state constitutional due process challenge the law "must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public."<sup>128</sup> The court noted further that the reviewing "court must be able to say that [the legislation] tends in some substantial degree to the prevention of offenses, or the preservation of the health, morals, safety or general welfare of the public."<sup>129</sup> The stated test would seem to call for greater scrutiny than would be justified under federal law.<sup>130</sup> However, the court went on to say that "if it is apparent that there is no *plausible*, reasonable and substantial connection between the provisions of the act and the supposed evils to be suppressed, there exists no authority for its enactment."<sup>131</sup> Thus, while the court's statement that it will sustain only those laws that bear a "real and substantial" relation to the end sought raises the possibility of a somewhat searching judicial inquiry, the court's additional suggestion that statutes violate state constitutional due process norms only when there is no *plausible* means-end connection is somewhat akin to the federal approach which sustains economic legislation if there is a *conceivable* rational basis for its existence. The "real and substantial relationship" standard is not always applied in such a toothless fashion. In some states, the test provides courts with a basis for subjecting economic regulation to searching scrutiny. Such courts have refused to join the federal court's abandonment of substantive due process; they continue to examine closely those laws that affect economic rights.

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126. *Id.* at 150-51, 498 N.E.2d at 1384-85.

127. *Id.* at 152, 498 N.E.2d at 1386.

128. *Id.* (citing *Cincinnati v. Correll*, 141 Ohio St. 535, 539, 49 N.E.2d 412 (1943)).

129. *Id.* (citing *Cincinnati v. Correll*, 141 Ohio St. 535, 539, 49 N.E.2d 412 (1943)).

130. See *supra* text accompanying notes 90-110.

131. *Id.* at 152, 498 N.E.2d at 1386 (citing *Cincinnati v. Correll*, 141 Ohio St. 535, 539, 49 N.E.2d 412 (1943)) (emphasis added).

## 2. Strong-Form Review

A number of state courts review economic legislation in a manner akin to that employed by the federal courts during the *Lochner* era. Exemplar of this approach to review of economic regulation is that advanced by Nebraska courts. In *Louis Finocchiaro, Inc. v. Nebraska Liquor Control Commission*,<sup>132</sup> plaintiff, a licensed liquor wholesaler, sought injunctive relief against the enforcement of a Nebraska "price-posting" statute. The statute effectively limited wholesalers to two price reductions per item per year.<sup>133</sup> Plaintiff challenged the statute on state constitutional due process grounds. The court stated that such regulations should be sustained only if there is "some clear and real connection between the assumed purpose of the law and its actual provisions."<sup>134</sup> If under this test it becomes apparent, "that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual."<sup>135</sup> Though the test the Nebraska court stated was substantially the same as that enunciated by the Ohio Supreme Court in *Coldwell Banker*, the Nebraska court was more willing to scrutinize in the spirit of *Lochner*. The court examined the purported purposes for which the legislation at issue was enacted, rejected each in turn, and held that the statutory provisions "[bear] no real or substantial relationship to the general health, morals, or welfare of the public," and are, therefore, unconstitutional. . . ."<sup>136</sup> As *Finocchiaro* demonstrates, the "real and substantial relationship" test can be a tool for intense scrutiny in the hands of a court that is willing to so use it.<sup>137</sup>

Other courts closely scrutinize any economic regulation that reaches industries not "affected with the public interest." For example, in *Batton-Jackson Oil Co., Inc. v. Reeves*,<sup>138</sup> the Georgia Supreme Court considered a statute that made it an unlawful business practice for a distributor to sell a product to one distributor at retail and to another at a price less than retail.<sup>139</sup> Using language reminiscent of that found in *Lochner*-era Supreme Court decisions, the court held this statute unconstitutional. Quoting from a 1951 Georgia Supreme Court decision, the court said "[t]he right to contract, and for the seller and pur-

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132. 217 Neb. 487, 351 N.W.2d 701 (1984).

133. *Id.* at 488-89, 351 N.W.2d at 702-03. The statute required that 150 days elapse between the end of one price reduction period and the beginning of another. Thus, it was not possible for liquor wholesalers to reduce their prices more than twice per year per item. *Id.*

134. *Id.* at 490, 351 N.W.2d at 703 (citing *United States Brewers' Assn. v. Nebraska*, 192 Neb. 328, 220 N.W.2d 544 (1974)).

135. *Id.* at 491, 351 N.W.2d at 704 (citing *Gillette Dairy v. Nebraska Dairy Products Board*, 192 Neb. 89, 219 N.W.2d 214 (1974)).

136. *Id.* at 494, 351 N.W.2d at 706 (quoting *Central Markets West v. Nebraska*, 186 Neb. 276, 280, 182 N.W.2d 898, 900 (1971) (McCown, Spencer, and Boslaugh, J.J. dissenting)).

137. Under this more rigorous application of the real and substantial relationship test courts are unlikely to presume the existence of facts under which a statute would further the legislative goal. *Developments in the Law, supra* note 111, at 1468. Moreover, some courts applying this standard will invalidate a statute if there is a less restrictive alternative available for the achievement of the legislative goal. *Id.* at 1470.

138. 255 Ga. 480, 340 S.E.2d 16 (1986).

139. *Id.* at 480, 340 S.E.2d at 17.

chaser to agree upon a price, is a property right protected by the due-process clause of our [Georgia] Constitution, and unless it is a business "affected with the public interest," the General Assembly is without authority to abridge that right."<sup>140</sup> The court said that the gasoline industry was not an industry affected with the public interest, because it was not within the category of businesses "devoted to a public use" with its use thereby, "in effect, granted to the public."<sup>141</sup>

A few months later, the Georgia Supreme Court elaborated upon its holding in *Batton-Jackson* in the case of *Strickland v. Ports Petroleum Co., Inc.*<sup>142</sup> In *Strickland*, the plaintiff made a constitutional challenge to a Georgia statute that prevented the sale of gasoline below cost. The court reiterated its prior holdings where it had "unreluctantly" . . . struck legislation that attempted to regulate and fix prices in industries that are *not affected with a public interest*.<sup>143</sup> Plaintiffs argued that the statute was simply intended to regulate below sales costs that tended to create a monopoly or hurt competition. The court did not agree. "The ultimate goal of the statute," said the court, "is the regulation of prices in one segment of the oil industry, the sale and resale of gasoline."<sup>144</sup> The court specifically reiterated *Batton-Jackson*, "no matter what other states or the Supreme Court of the United States 'may or may not have decided.'"<sup>145</sup> The price regulation aspect of the statute offended the court in particular.<sup>146</sup>

State courts have been particularly willing to invalidate, on state constitutional due process grounds, economic legislation the courts view as anticompetitive.<sup>147</sup> State court treatment of state "fair trade" laws is illustrative; these cases have special significance because of similarities in the economic effects of the fair trade laws and the anti-rebate statutes. The history of the fair trade laws date to the 1911 case of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, where the United States Supreme Court held that contracts between manufacturers or other suppliers and retail merchants that fixed the price at which the products could be offered to the consumer amounted to an unlawful restraint of trade in violation of the Sherman Antitrust Act of 1890.<sup>148</sup> Such contracts remained illegal until 1937 when, because of an amendment to the Sherman Act, states were permitted to authorize "fair trade" or resale price maintenance.<sup>149</sup> Forty-six states enacted resale price maintenance legislation pursuant to the amendment.<sup>150</sup> Typically, the statutes permitted manufac-

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140. *Id.* at 482, 340 S.E.2d at 18 (quoting *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951)).

141. *Id.*

142. 256 Ga. 669, 353 S.E.2d 17 (1987).

143. *Id.* at 669-70, 353 S.E.2d at 18 (quoting *Williams v. Hirsch*, 211 Ga. 534, 535, 87 S.E.2d 70, 71 (1955)) (emphasis in original).

144. *Id.* at 670, 353 S.E.2d at 18.

145. *Id.* (quoting *Cox v. General Electric Co.*, 211 Ga. 286, 291, 85 S.E.2d 514, 519 (1955)).

146. Because they operate as blatant limitations on the free market, price regulation provisions are particularly susceptible to invalidation in those courts that engage in serious review of economic regulation. *Developments in the Law*, *supra* note 111, at 1469.

147. *Developments in the Law*, *supra* note 111, at 1469-71; Kirby, *supra* note 1, at 252-54.

148. 220 U.S. 373, 400, 407-09 (1911).

149. H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 9.1, at 248 (1985); Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175, 176 (1954).

150. HOVENKAMP, *supra* note 149, at 248.

turers and other suppliers of products sold under a trademark, trade name, or brand name to regulate by contract the price at which their products were sold at retail.<sup>151</sup> The statutes also contained "non-signer clauses" which created a cause of action for unfair competition against one who sold the product below the established contract price, whether or not the seller was a party to the contract.<sup>152</sup>

In *Old Dearborn Co. Distrib. v. Seagram-Distillers Corp.*, the United States Supreme Court sustained the Illinois fair trade law in the face of a federal due process challenge.<sup>153</sup> Refusing to view the law as a price fixing statute, the Court said that the law "permits the designated private persons to contract with respect [to setting a price]."<sup>154</sup> The Court saw the non-signer clause in the Illinois law as a valid mechanism for protecting the "property—namely the good will—of the producer, which he still owns."<sup>155</sup> Thus, after *Old Dearborn*, state fair trade laws were virtually immune from federal constitutional attack.

In 1975, believing that prices were higher in fair trade states than in other states,<sup>156</sup> Congress removed from the Sherman Act the provision that allowed states to enact fair trade laws without running afoul of federal antitrust laws.<sup>157</sup> Thus, currently, the Sherman Act operates generally to prohibit state legislatures from enacting statutes authorizing resale price maintenance. Many state courts, however, did not wait for Congress to withdraw the federal authorization to enact state fair trade laws; these courts used their own state constitutions to strike down the statutes. By 1956 five state courts had invalidated the laws on state constitutional grounds.<sup>158</sup> By the time Congress had acted to make the laws invalid under federal antitrust statutory law, a majority of states had already applied their own constitutions to achieve the same end.<sup>159</sup> A number of the courts invalidated the laws on the ground that the non-signer clauses violated state constitutional due process law.<sup>160</sup> Most of the state courts that invalidated the fair trade laws viewed the provisions as "price-fixing statute[s], designed primarily to destroy competition at the retail level."<sup>161</sup> As some courts considered the argument that resale price maintenance prevents ruinous competition that could lead to economic instability or culminate in retail monopolies, many conceded that the fair trade laws could have been valid when they were first enacted in the 1930s. These courts concluded, however, that such measures

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151. Fulda, *supra* note 149, at 175.

152. *Id.*

153. 299 U.S. 183, 190-96 (1936).

154. *Id.* at 192 (emphasis in original).

155. *Id.* at 193.

156. HOVENKAMP, *supra* note 149, at 248.

157. Consumer Goods Pricing Act, 89 Stat. 801 (1975) (codified as amended at 15 U.S.C. §§ 1, 45 (1988)).

158. Note, *Counterrevolution in State Constitutional Law*, 15 STAN. L. REV. 309, 320 (1963) (citing cases).

159. Kirby, *supra* note 1, at 253.

160. Note, *supra* note 158, at 320 (citing cases).

161. *Remington Arms Co. v. Skaggs*, 55 Wash. 2d 1, 7, 345 P.2d 1085, 1088 (1959) (quoting *Skaggs Drug Center v. Gen. Elec. Co.*, 63 N.M. 215, 226, 315 P.2d 967, 974 (1957)). "The statutes were then condemned as having no public purpose." Kirby, *supra* note 1, at 253 (citing cases).

were no longer valid when the economic emergency that led to their passage subsided.<sup>162</sup>

The subject of state court treatment of fair trade laws probably deserves little more than a footnote in the history of state constitutional activity. However, because one may draw a fair analogy between the invalidated trade laws and anti-rebate laws, these cases deserve more than passing attention. One of the current criticisms levelled against the anti-rebate statutes is that they are anticompetitive.<sup>163</sup> Though the insurance provisions do not set prices in the same way that the fair trade laws allowed manufacturers and other suppliers to do so, they clearly remove some price competition from the marketplace. Just as the fair trade laws operated to prohibit retailers from engaging in price competition in the sale of certain products, so the anti-rebate laws prohibit insurance agents from using their commissions as a mechanism to engage in price competition. In both circumstances, price competition is inhibited and the consumer is the potential loser. Many of the courts that invalidated the fair trade laws did so even though these courts were willing to concede that adverse economic conditions may have justified the enactment of those laws during the 1930s. A court currently evaluating the anti-rebate laws could similarly find that while conditions in the insurance industry may have justified the enactment of the anti-rebate laws at the turn of the twentieth century, they should no longer, given changed circumstances, be allowed to withstand state constitutional scrutiny.<sup>164</sup> Courts adhering to weak-form review would presumably renounce this reasoning as untoward judicial activism, but it is noteworthy that the reasoning state courts employed to invalidate fair trade laws could be applied to strike anti-rebate laws as well.<sup>165</sup>

To summarize, courts differ in the extent to which they are willing to review the economic rationality of legislative pronouncements. At the one extreme, some courts give great deference to legislative judgments. At the other extreme, the *Lochner* decision is alive and well. The two cases decided thus far regarding the validity of the anti-rebate statutes exemplify this divergence. In the spirit of *Lochner*, a Florida court scrutinized the rationality of a Florida Statute and found it lacking. Although a critic of that decision would claim the court substituted its judgment for that of the legislature, in actuality the court simply employed a stricter level of scrutiny, which the statute was unable to survive. In a California case, the court applied the more deferential standard of review, and the statute passed muster under this low level of scrutiny.<sup>166</sup>

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162. Note, *supra* note 158, at 324.

163. See *supra* text accompanying notes 52-54.

164. See *supra* text accompanying note 162.

165. For a discussion critical of state court invalidation of fair trade laws see generally Note, *supra* note 158.

166. *Consumers Union of United States v. Bunner*, No. 843144 (Cal. Super. Ct. July 15, 1987).

## III. JUDICIAL ASSESSMENTS OF THE STATUTES' VALIDITY

In two cases, courts have assessed the validity of state anti-rebate statutes.<sup>167</sup> In 1986, the Florida Supreme Court decided *Department of Insurance v. Dade County Consumer Advocate's Office*,<sup>168</sup> where the Florida anti-rebate statute was invalidated. In 1987, the California Superior Court for the City and County of San Francisco reached the opposite conclusion with regard to the California statute in *Consumers Union v. Bunner*.<sup>169</sup>

A. *The Florida Litigation*

In *Department of Insurance v. Dade County Consumer Advocate's Office*, the plaintiffs, the Consumer Advocate's Office and Walter Dartland,<sup>170</sup> challenged the constitutionality of two Florida statutes<sup>171</sup> that prohibit insurance agents from negotiating with their clients the amount of their commissions or offering to rebate a portion of their commissions to their clients. Plaintiffs alleged that the statutes violated the due process clause of the Florida Constitution.<sup>172</sup> The trial court upheld the statutes as a legitimate exercise of the state police power, and plaintiffs appealed.<sup>173</sup>

The Florida District Court of Appeal reversed. The Court of Appeal articulated the standard of review and set forth its conclusion as follows:

The applicable standard of review is whether the challenged anti-rebate statutes reasonably and substantially promote the public health, safety or welfare as required by the due process clause of the Florida Constitution. To sustain the validity of this exercise of police power there must be shown some rational relation to a legitimate state interest seeking to protect the public. We are unable to find any legitimate state interest justifying the continued existence of the anti-rebate statutes.<sup>174</sup>

The court found unpersuasive various arguments offered by the Department of Insurance and amici curiae,<sup>175</sup> such as that the statutes were rationally related

167. One attorney general opinion has considered whether the anti-rebate statutes violate the constitutional safeguards afforded free speech. After the Florida Court of Appeals declared the Florida anti-rebate statute unconstitutional, the Tennessee Insurance Commissioner sought an opinion from the Tennessee Attorney General on whether the Tennessee anti-rebate statute was a "constitutional restraint on commercial speech." The Attorney General reasoned that the anti-rebate statute simply required that rebates be disclosed in the policy and did not actually prohibit them. As such, the statute was a permissible regulation of commercial speech. If, however, the statute were interpreted so as to prohibit all inducements to the purchase of insurance, the statute would violate the protections afforded commercial speech by both the federal and state constitutions. If the statute were so interpreted, the Attorney General was unable to find any link between the statute and a substantial state interest. Tenn. Att'y Gen. Op. No. 86-016 (Jan. 24, 1986).

168. 492 So.2d 1032 (Fla. 1986). The District Court of Appeal, First District, decision is reported at 457 So.2d 495 (Fla. Dist. Ct. App. 1984).

169. *Consumers Union of United States v. Bunner*, No. 843144 (Cal. Super. Ct. July 15, 1987).

170. Dartland was the head of the Dade County Consumer Advocate's Office. He alleged that he tried and failed to get a life insurance agent to rebate part of the commission to be earned on a life insurance policy. 492 So.2d 1032, n. 1 (Boyd, C.J., dissenting).

171. FLA. STAT. §§ 626.611(11), 626.9541(1)(h)1 (1989).

172. FLA. CONST. art. I, § 9.

173. 492 So.2d 1032, 1032-35.

174. 457 So.2d 495, 497 (citations omitted).

175. Appearing on behalf of the Department were the Florida Association of Life Underwriters, the Florida Association of Insurance Agents, and the American Council of Life Insurance, Inc. 457 So.2d 495, 496.

to the state's interest in guaranteeing insurer solvency and preventing discrimination among similarly-situated insureds, and that characteristics of the insurance industry—such as low educational qualifications of many agents and the present-payment-for-future-benefit characteristic of insurance—necessitated special statutory regulation.<sup>176</sup> The court saw no relationship between an agent's freedom to rebate a portion of commissions and insurer solvency, and perceived no discrimination among insureds so long as the net premium paid by insureds to insurers (the gross premium being the net premium plus the commission) remained a constant.<sup>177</sup> The court reasoned:

The ability of the consumer within a given actuarial class to negotiate for a rebate, and thereby reduce the overall amount paid for insurance relative to another consumer in that class, does not constitute undesirable discrimination in a free market economy. Such price differences have historically been considered fair in every other segment of our economy.<sup>178</sup>

The court found plausible the defendants' argument:

that the agent who is permitted to rebate will do so at the expense of his customers, in that they will not be provided with the quality of information regarding the best type of insurance suited to their needs because the agent, having negotiated his commission, will not spend the requisite time counseling his clients. Accordingly, the argument goes, the public must be protected from low-cost, low-quality service, and the statutes banning rebating therefore advance a legitimate public interest.<sup>179</sup>

The court concluded, however, that these rationales did not justify the exercise of the state's police powers. The court supported this conclusion by referring to *Virginia Pharmacy Board v. Virginia Consumer Council*,<sup>180</sup> where the Supreme Court rejected the argument, offered in support of a Virginia statute prohibiting druggists from advertising the price of their drugs, that the public needed protection from the evils of advertising because low-cost, low-quality druggists would acquire customers at the expense of the "good druggists," thereby reducing the amount of quality services provided by good druggists to consumers. Although *Virginia Pharmacy Board* was a first amendment case, the Court felt that the Florida case presented a similar issue under the due process clause:

The dangers of misuse of information to the consumer by the unscrupulous or indifferent agent may exist, but the possibilities of such abuse cannot serve to suppress bargaining or information which might otherwise lead to an informed choice. Indeed, competitive forces at work in the marketplace should generally serve to protect consumers against unfairly discriminatory prices, provided that there is adequate disclosure available to make consumers aware of alternative sources and prices of insurance.<sup>181</sup>

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176. *Id.* at 497.

177. *Id.*

178. *Id.*

179. *Id.*

180. 425 U.S. 748 (1976).

181. 457 So.2d 495, 498.

Accordingly, the Court held that the anti-rebate statutes "constitute an unjustified exercise of the police power of this state, and are therefore violative of the due process clause, Article 1, Section 9, Florida Constitution."<sup>182</sup>

In a 4-3 decision, the Florida Supreme Court affirmed the decision of the Florida District Court of Appeal: "We find these statutes unnecessarily limit the bargaining power of the consuming public and, in accordance with prior consumer decisions of this Court, we . . . hold that these statutes are unconstitutional to the extent they prohibit rebates of insurance agents' commissions."<sup>183</sup> On appeal to the supreme court, the Department first argued that the district court applied too strict a standard of review in stating that the statutes must " 'reasonably and *substantially* promote the public health, safety or welfare.' "<sup>184</sup> The court agreed that the appellate court had applied an incorrect standard of review in part of its opinion, and that the proper standard was the following:

In considering the validity of a legislative enactment, this Court may overturn an act on due process grounds only when it is clear that it is not in any way designed to promote the people's health, safety or welfare, or that the statute has no reasonable relationship to the statute's avowed purpose.<sup>185</sup>

Nevertheless, the court concluded that the lower court's error in articulating the standard of review did not affect the result: "We find the district court properly found no relationship between the enactments and any legitimate state interest and, therefore, it was not called upon to determine the degree to which the anti-rebate statutes advance a state interest."<sup>186</sup>

The court's analysis meant that it necessarily rejected the Department's and amici curiae's next argument that the statutes "reasonably advance the economic protections of Florida consumers" by preventing price discrimination, enabling consumers to compare costs of similar policies, preventing consumers from focusing on the size of the rebate instead of the more important quality of the coverage, avoiding a spiral of increasing premiums caused by agents' desire for larger commissions with which to offer larger rebates, and avoiding excessive policy lapse, with its concomitant increases in administrative costs, due to consumers' replacing their policies with new policies made attractive through high first-year rebates made possible through prevailing first-year commission structures.<sup>187</sup> The court found all of these arguments unpersuasive:

"From our review of the record, we find no identifiable relationship between the anti-rebate statutes and a legitimate state purpose in safeguarding the public health, safety or general welfare."<sup>188</sup>

The court specifically noted that its decision was consistent with earlier cases in which it had struck down "laws that curtail the economic bargaining power of

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182. *Id.* at 499.

183. 492 So.2d 1032, 1033.

184. *Id.* (quoting 457 So.2d at 497) (emphasis added by Court).

185. *Id.* at 1034.

186. *Id.* at 1035.

187. *Id.* at 1033-34.

188. *Id.* at 1035.

the public."<sup>189</sup> It observed that it had been one of the first states to hold unconstitutional a "fair trade act" that allowed a manufacturer to mandate a minimum retail price for the retailer's sale of a product to the consumer,<sup>190</sup> that it had struck down a statute prohibiting a public adjuster who represents insureds from soliciting business,<sup>191</sup> that it had held invalid a pharmacy board rule prohibiting the advertisement of the name or price of prescription drugs,<sup>192</sup> and that it had invalidated a statute prohibiting retail drug establishments from using the media to promote the use or sale of prescription drugs.<sup>193</sup> The court also cited the United States Supreme Court cases striking down governmental statutes or regulations that restricted the competitive pricing of consumer services.<sup>194</sup>

Three members of the court dissented. The essence of the dissenters' disagreement with the majority was that the majority had a flawed view of the judiciary's role in the tripartite governmental structure:

[I]mplicit in the Court's holding are the following propositions: that the courts of Florida have broad authority to determine whether acts of the legislature serve the public interest; that courts may generally scrutinize legislation to determine whether it achieves a stated legislative purpose with sufficient success or precision; and that courts may nullify laws not shown to serve the public interest to the courts' satisfaction. These propositions are totally erroneous and their application in this case represents an aggrandizement of judicial power that is antithetical to the basic constitutional doctrine of separation of powers.<sup>195</sup>

When confronted with a challenge to legislative regulation of economic activities and relationships, the dissenters believed the court's role to be "severely limited":

In order to declare the law invalid, a court must find that the law is simply and absolutely arbitrary, resting on no conceivable rational relation to the public welfare as determined by the legislature. In evaluating legislation under this "reasonable relation" test, "we do not concern ourselves with the wisdom of the Legislature in choosing the means to be used, or even whether the means chosen will in fact accomplish the intended goals; our only concern is with the constitutionality of the means chosen."<sup>196</sup>

The dissenters noted the mass of information presented to the court concerning the need for and the wisdom and effects of the statutes being challenged, and observed that this information would be better appraised in a debate in legislative chambers:

It is enough to say that it has clearly been made to appear that there is a fairly debatable question about whether the legislation bears a reasonable relation to the

189. *Id.* at 1034.

190. *Id.* (citing *Liquor Store v. Continental Distilling Corp.*, 40 So.2d 371 (Fla. 1949)).

191. *Id.* (citing *Larson v. Lesser*, 106 So.2d 188 (Fla. 1958)).

192. *Id.* (citing *Stadnik v. Shell's City, Inc.*, 140 So.2d 871 (Fla. 1962)).

193. *Id.* (citing *Florida Board of Pharmacy v. Webb's City, Inc.*, 219 So.2d 681 (Fla. 1969)).

194. *Id.* (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)).

195. 492 So.2d 1032, 1035 (Boyd, C.J., dissenting).

196. *Id.* at 1036 (quoting *Lasky v. State Farm Ins. Co.*, 296 So.2d 9, 15-16 (Fla. 1974)).

achievement of an objective within the scope of the police power. The existence of such a debatable policy question is sufficient to put an end to all further judicial inquiry in this kind of case.<sup>197</sup>

The disagreement between the majority and the dissenters in the *Dade County* case reflects a fundamental dispute over the extent to which state courts can employ substantive due process analysis, grounded in state constitutional principles, when reviewing the validity of economic regulatory legislation.

In the aftermath of the Florida decision, the Florida Treasurer and Insurance Commissioner interpreted the Florida anti-discrimination statute as requiring an agent who rebates a portion of the commission of a life insurance policy to make that same rebate available to all of his customers for the policy. Similarly, an agent who rebates a portion of the commission on a property and casualty policy must do so in a manner that is justified by the differing expenses of different consumers.<sup>198</sup> In effect, the Commissioner treated the commission as part of the premium paid for the insurance, instead of considering the commission as an add-on to the basic cost of the insurance, and in doing so, effectively mooted the deregulatory effect of the court's decision. Because Florida agents who offer a rebate to one customer must provide the same rebate to all other customers, commission negotiation between agent and consumer cannot occur, and there is no ability to price the commission based on the amount of service provided. As a result, Florida agents are disinclined to offer rebates, and available reports indicate that little, if any, rebating is occurring in that state after *Dade County*.<sup>199</sup>

### B. *The California Litigation*

In 1986, Consumers Union of the United States, Inc. ("CU") filed a suit in the Superior Court of the City and County of San Francisco challenging the constitutionality of three California statutes that together set forth the anti-rebate principles described above. A trial to the court commenced in June, 1987, and the case was submitted to the court for decision later that month.

While the case was pending, the California legislature passed a statute which purported to state the "legislative intent" regarding the anti-rebate statutes. This statute, Section 750.1 of the California Insurance Code, provided that the purpose of all the anti-rebate laws is to avoid insurer insolvencies, unfair discrimination that creates subsidies from small to large purchasers, decreased quality of service, increased concentration in the distribution of insurance, and misrepresentation and unethical sales practices. This statute influenced the court in *Consumers Union*.<sup>200</sup>

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197. *Id.* at 1037.

198. Memorandum, Fla. Treas. and Ins. Comm'r (Dec. 30, 1986). In a 1989 opinion letter, the Florida Treasurer and Insurance Commissioner declared that a rebating plan for which an insurance agency sought approval which treated all customers alike did not offend Florida insurance laws or regulations. *Sheen v. Dept. of Ins.*, No. 89-DS-01JEH, Slip op. at 12 (Jan. 30, 1989).

199. Haggerty, *Rebating Unlikely to Become Widespread in California*, NAT'L UNDERWRITER, Dec. 5, 1988, p. 19.

200. *Consumers Union of United States v. Bunner*, No. 843144 (Cal. Super. Ct. July 15, 1987).

"The issue was whether an insurance agent can engage in rebating has been presented to the Legislature on prior occasions and, on every occasion, the Legislative [sic] has rejected attempts to allow agent-rebating to occur in California."<sup>201</sup> The court quoted from the legislative history which accompanied the statute and concluded that these were the evils the legislature, in a rational exercise of its judgment, sought to avoid. The only specific point upon which the court commented was the testimony of a Florida agent who, while strongly supporting rebating, also mentioned that the rebates would go to the "better and larger" clients, and not the smaller clients with small policies. The court said: "This was one of the results the Legislature considered, weighed and rejected . . . as against the best interests of the citizens of California, who would be faced with discrimination in favor of larger purchasers."<sup>202</sup>

The court also rejected the discount brokerage analogy:

A point of distinction that must be considered is that discount selling, while a benefit to the consumer who pays a smaller commission for what he or she buys, also concludes the transaction. What the consumer does with the securities thus purchased is up to the judgment of the consumer and no further fiduciary duties exist on the part of the discount broker. In the insurance field, the purchase of insurance is, rather, just the beginning of the policy relationship. The essence of the insurance agreement is not what is monetarily saved at the start but what is available to fulfill the contract at the time the claim is made against the policy.<sup>203</sup>

The court, of course, overlooked the point that the most important long-term relationship is between the insurer and the consumer, not the agent and the consumer. No long-term relationship between agent and consumer need exist, although the consumer should be free to have such a relationship — and pay for it — if one is desired. The long-term insurer-insured relationship will be adequately funded if the insurer receives a sufficient *net premium* to create reserves for the insured and other insureds grouped with the particular insured. After the sale is completed, the contract exists between insurer and insured, and the agent owes no further fiduciary duties *with respect to the policy's initiation*. If the agent undertakes to provide future servicing of the policy, the agent may owe duties, but nothing requires the assumption of such duties.

Although it did not say so expressly, the court clearly gave substantial deference to the legislature's judgment about the merits of anti-rebate statutes. As for the legislature's rationale for enacting the statute, the court at least conceded that "[e]xtensive testimony was presented on all of these points, with experts disagreeing on every point."<sup>204</sup> While the court seemed sympathetic to the statute's objectives, the court ultimately based its decision on a finding that the legislature's choice of policy had a rational basis: "The legislature had ample evidence to support its findings and decision. There is more than sufficient evidence to uphold the Legislature as having a rational basis for its decision."<sup>205</sup>

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201. *Id.*, Slip op. at 2.

202. *Id.* at 4.

203. *Id.* at 3-4.

204. *Id.* at 3.

205. *Id.* at 5.

*Consumers Union* was mooted in 1988 when Proposition 103's enactment repealed California's anti-rebate statute. Accordingly, no California appellate court had the opportunity to review the issues discussed in this case.

#### IV. CONCLUSION

Although the merit of anti-rebate statutes is much debated, a compelling case can be made that the statutes, while perhaps in the interests of insurance agents, are not in the public's interest; the statutes reduce consumer choice, impair the development of new forms of insurance marketing, and create inequities by requiring insureds who need no counseling to pay as much for agent services as those who use the services. The statutes have no necessary relationship to the goal of maintaining insurer solvency. The statutes prevent "discrimination" in the sense that all consumers must pay a uniform rate for an agent's services, but this kind of equality has been rejected elsewhere in our economy. Moreover, the reasons for pursuing the anti-discrimination goal with regard to agent compensation, as distinct from the compensation paid to the insurer, are not obvious.

Obviously, any legislature whose members credit the foregoing arguments could override the judgment of past legislatures by repealing the anti-rebate statutes. Whether a court should override these past judgments is more problematic. In some states, substantive due process review of economic regulation is potent; in other states, substantive due process is as dormant as the federal constitutional doctrine. These two distinct models of review point in opposite directions: under the strong-form of review found in some states, the anti-rebate statutes are very vulnerable; under the weak-form of review, the statutes pass muster. These differing outcomes are starkly presented in *Dade County* and *Consumers Union*, where the results turn upon which model of review is favored.

## APPENDIX A

State	Anti-Rebate	Commission Splitting	Penalty
Alabama	<p>ALA. Code § 27-12-12 (1989) (prohibits rebates by agent or company)</p> <p>ALA. Code § 27-12-14 (1989) (prohibits rebates by company, agent, broker and prohibits insured from accepting rebate)</p> <p>ALA. Code § 27-34-46 (1989) (prohibits member of society from receiving rebate)</p>	<p>ALA. Code § 27-7-35 (1989) (prohibits sharing with anyone not licensed)</p> <p>ALA. Code § 27-8-27 (1989) (prohibits sharing comm. with anyone not licensed for services as agent)</p>	<p>ALA. Code § 27-12-12(b) (1989) (revokes cert. of authority of insurer or license of agent)</p> <p>ALA. Code § 27-7-34(b) (1989) (suspension or revoked-license for sharing comm.)</p> <p>ALA. Code § 27-8-27(b) (1989) (penalty for violating 27-8-27(a) - fine equal to 3 x comm. or revoke license)</p>
Alaska	<p>Alaska Stat. § 21.36.100 (1989) (prohibits anyone from offering rebate as inducement)</p> <p>Alaska Stat. § 21.36.120 (1989) (prohibits rebates by insurer, employee or agent)</p> <p>(b) insured may not accept rebate</p> <p>Alaska Stat. § 21.66.310 (1989) (prohibits rebates by insurer, officer, employee, attorney or agent)</p> <p>(b) the insured may not accept rebate</p> <p>Alaska Stat. § 21.84.480 (1989) (b) prohibits a member from receiving a rebate or part of an agent comm.</p>	<p>Alaska Stat. § 21.27-370(a) (1989) (prohibits sharing comm. by agent to any person other than agent for procuring ins.)</p>	<p>Alaska Stat. § 21.27.370(c) (1989) (penalty for violation of 21.27.370(a) - suspend or revoke license)</p> <p>Alaska Stat. § 21.66.340 (1989) (penalty for violating § 21.66.310 = 5 x amt. of rebate)</p>
Arizona	<p>Ariz. Rev. Stat. Ann. § 20-449 (1990) (agent &amp; company for life &amp; disability)</p> <p>Ariz. Rev. Stat. Ann. § 20-451 (1990) (agent &amp; company - other than life)</p> <p>Ariz. Rev. Stat. Ann. § 20-1586 (1990) (agent or company in title ins.)</p>	<p>Ariz. Rev. Stat. Ann. § 20-311(B) (1990) (prohibits sharing by agent with anyone not licensed)</p> <p>Ariz. Rev. Stat. Ann. § 20-1585 (1990) (prohibits splitting by title insurer - penalty 20-1589)</p>	<p>Ariz. Rev. Stat. Ann. § 20-1589 (1990) (penalty for violating 20-1585)</p> <p>Ariz. Rev. Stat. Ann. § 20-456(b) (1990) (fine for violating § 20-451)</p> <p>Ariz. Rev. Stat. Ann. § 20-1589 (1990) (violation of § 20-1586 = misdemeanor)</p>
Arkansas	<p>Ark. Stat. Ann. § 23-66-206 (1987); § 66-3005(8) (1980) (prohibits rebates on life, health &amp; annuity ins.)</p> <p>Ark. Stat. Ann. § 23-66-308 (1987); § 66-3019 (1980) (prohibits agent or company from offering rebate &amp; person from accepting)</p> <p>Ark. Stat. Ann. § 23-74-140 (1987); § 66-4739 (1980) (prohibits rebates in Frat. Benefit Soc.)</p>	<p>Ark. Stat. Ann. now § 23-64-224 (1987); § 23-66-210; § 66-2830 (1980) (prohibits sharing by agent with anyone not licensed)</p>	<p>Ark. Stat. Ann. § 23-66-210; § 66-3008 (1980) (penalty for violation § 66-3005: 1) cease &amp; desist order modified; 2) fine - \$500 or \$2,500 if person knew of violation; 3) suspension or revocation of license)</p>

State	Anti-Rebate	Commission Splitting	Penalty
California	Cal. Ins. Code § 750 (West 1988) (prohibits rebates by agent or company)  Cal. Dis. Code § 751 (West 1988) (prohibits agent or company from offering any valuable consideration as inducement)	Cal. Ins. Code § 755 (West 1988) (splitting w/ unlicensed - Rebate)  Cal. Ins. Code § 12404 (West 1988) (prohibits comm. splitting on title ins.)	Cal. Ins. Code § 752 (West 1988) (acceptance of rebate - misdemeanor)  Cal. Ins. Code § 12409 (West 1988) (Commissioner can recover up to 5 times the amt. of the unlawful title ins. rebate, or commission)
Colorado	Colo. Rev. Stat. § 10-3-1104 (1987) (prohibits rebates)	Colo. Rev. Stat. § 10-2-206 (1987) (comm. can be split only with licensed in that line of insurance)	Colo. Rev. Stat. § 10-3-1108 (1987) (1) cease & desist and/or 2) fine and/or 3) suspension or revocation)
Connecticut	Conn. Gen. Stat. Ann. § 38-245 (West 1987) (prohibits rebates in Frat. Benefit Soc. Ins.)  Conn. Gen. Stat. Ann. § 38-59 (prohibits release)	Conn. Gen. Stat. Ann. § 38-92 (West 1987) (prohibits paying to unlicensed person by agent or company)	Conn. Gen. Stat. Ann. § 38-92 (West 1987) (fine for splitting comm. - \$500)
Delaware	Del. Code Ann. tit. 18, § 2304(14) (1989) (prohibits person from offering on life, health & annuity)  Del. Code Ann. tit. 18, § 2304(15) (1989) (prohibits rebates on property, casualty & surety)  Del. Code Ann. tit. 18, § 6139 (b) (1989) (prohibits rebates in Frat. Benefit Society)	Del. Code Ann. tit. 18, § 1730 (1989) (prohibits agent giving unlicensed)	Del. Code Ann. tit. 18, § 2308 (1989) (cease & desist or fine or suspension or revocation)
D.C.	D.C. Code Ann. § 35-520 (1981) (prohibits rebates by agent or company)	D.C. Code Ann. § 35-1535 (1981) (prohibits sharing with unlicensed)	D.C. Code Ann. § 35-1546 (1981) (fine and or imprisonment)
Florida	Fla. Stat. Ann. § 626.611 (11) (1984) (prohibits rebates by agent)  Fla. Stat. Ann. § 626.9541(1)(h)1 (1984) (prohibits rebates by agent and company)	Fla. Stat. Ann. § 626.611(11) (1984) (anyone)  Fla. Stat. Ann. § 626.753 (1984) (no agent shall divide prem. w/ others)	Fla. Stat. Ann. § 626.611 (1984) (license revocation, nonrenewal, eligibility)  Fla. Stat. Ann. § 626.9581 (1984) (cease and desist order, license rev., etc.)
Georgia	Ga. Code Ann. § 33-6-4(B) (1989) (prohibits rebates or other inducements)  Ga. Code Ann. § 33-9-36 (1989) (prohibits ins. co. and agent)  Ga. Code Ann. § 33-15-36 (1989) (prohibits rebates in Frat. Benefit Soc.)	Ga. Code Ann. § 33-23-2(c) (1989) (prohibits sharing with unlicensed)	Ga. Code Ann. § 33-6-8 (1989) (penalty for rebate: 1) cease & desist; 2) fine; 3) suspension or revocation)
Hawaii	Haw. Rev. Stat. § 431-643 (1985) (Section 8 - Anti-rebate)  Haw. Rev. Stat. § 434-40 (1985) (anti-rebate in Frat. Benefit Soc.)	Haw. Rev. Stat. § 431-398 (1985) (prohibits sharing by agent or company with unlicensed)	Haw. Rev. Stat. § 431-646 (1985) (Penalty for violating § 431-643: 1) fine; 2) suspension or revocation; 3) cease & desist)

State	Anti-Rebate	Commission Splitting	Penalty
Idaho	Idaho Code § 41-1314 (1990) (prohibits rebates on life or annuity)  Idaho Code § 41-2708 (1990) (makes § 41-1314 applicable to fire ins.)  Idaho Code § 41-3239 (1990) (prohibits rebates in Frat. Benefit Soc.)	Idaho Code § 41-1063 (1990) (anyone not licensed)  Idaho Code § 41-1073 (1990) (prohibits consultants from sharing comm.)	Idaho Code § 41-1319 (1990) (cease & desist)  Idaho Code § 41-117 (1990) (violation of cease and desist = \$1,000/ or jail 6 months)
Indiana	Ind. Code Ann. § 27-1-22-18 (Burns 1986) (prohibits agent from offering)  Ind. Code Ann. § 27-1-20-30 (Burns 1986) (prohibits agent or company from offering and insured from accepting)  Ind. Code Ann. § 27-4-1-4(8) (Burns 1986) (inducements are unfair trade practice)  Ind. Code Ann. § 27-11-8-10 (Burns 1986) (unfair competition statutes applies to Frat. Benefit Soc.)	Ind. Stat. Ann. § 27-1-155-3(d) (Burns 1986) (No comm. splitting unless valid license for that kind of ins.)	Ind. Code Ann. § 27-4-1-6 (Burns 1986) (penalty for violating § 27-4-1-4: 1) cease & desist; 2) \$2,000 - \$5,000; or 3) suspension)
Illinois	Ill. Ann. Stat. tit. 73, § 763 (IC § 1551) (Smith-Hurd 1988) (rebates prohibited)  Ill. Ann. Stat. tit. 73, § 1031 (IC § 424(1)) (Smith-Hurd 1988) (unfair and deceptive practice to offer rebates)  Ill. Ann. Stat. tit. 73, § 926.1 (IC § 314.1) (Smith-Hurd 1988) (rebates prohibited under worker's comp. section)  Ill. Ann. Stat. tit. 73, § 1065.16 (IC § 469) (rebates prohibited under worker's comp. section)  Ill. Ann. Stat. tit. 73, § 1065.18-29 (IC § 485.1) (Smith-Hurd 1988) (rebates prohibited in prop. & casualty ins.)	Ill. Ann. Stat. tit. 73, § 1065.54-1 (IC § 507.1) (Smith-Hurd 1988) (no splitting of commissions with unlicensed)	Ill. Ann. Stat. tit. 73, § 764 (IC § 152) (Smith-Hurd 1988) (class B misdemeanor, no commission)  Ill. Ann. Stat. tit. 73, § 765 (IC § 153) (Smith-Hurd 1988) (no person excused from testifying or producing documents relating to violation of IC § 151 - immunity from pros.)  Ill. Ann. Stat. tit. 73, § 1034 (IC § 427) (Smith-Hurd 1988) (cease and desist order)
Iowa	Iowa Code Ann. § 507B-4 (West 1988) (prohibits rebates on life, annuity, accident or health)  Iowa Code Ann. § 515A.16 (West 1988) (prohibits agent or company on fire & casualty ins.)		Iowa Code Ann. § 507B.7 (West 1988) (penalty for violating § 507B.4 - fine up to \$50,000, suspension)  Iowa Code Ann. § 515A.17 (West 1988) (penalty for violating 515A.16 - fine \$50, suspension)

State	Anti-Rebate	Commission Splitting	Penalty
Kansas	<p>Kan. Stat. Ann. § 40-941 (1986) (prohibits agent or company &amp; insured from accepting in fire ins.)</p> <p>Kan. Stat. Ann. § 40-1122 (1986) (prohibits agent or company &amp; insured from accepting in casualty and surety ins.)</p> <p>Kan. Stat. Ann. § 40-2404 (1986) (prohibits as unfair trade practice)</p>	<p>Kan. Stat. Ann. § 40-241g (1986) (may share with licensed person)</p>	<p>Kan. Stat. Ann. § 40-242 (1986) (suspension of license or fine (Supp. 1989))</p> <p>Kan. Stat. Ann. § 40-2407 (1986) [1] fine - \$100 or \$1,000 (knowingly); 2) suspension]</p>
Kentucky	<p>Ky. Rev. Stat. Ann. § 304.12-090 (Michie/Bobbs-Merrill 1988) (giving or receiving)</p> <p>Ky. Rev. Stat. Ann. § 304.29-540 (Michie/Bobbs-Merrill 1988) (repealed 1989; prohibits in Fraternal Benefit Soc.)</p>	<p>Ky. Rev. Stat. Ann. § 304.9-350 (Michie/Bobbs-Merrill 1988) (prohibits consultant from sharing comm.)</p> <p>Ky. Rev. Stat. § 304.9-421 (Michie/Bobbs-Merrill 1988) (prohibits with unlicensed)</p>	<p>Ky. Rev. Stat. Ann. § 304.9-440 (Michie/Bobbs-Merrill 1988) (suspension or revocation)</p> <p>Ky. Rev. Stat. Ann. § 304.12-120 (Michie/Bobbs-Merrill 1988) (violation of anti-rebate = cease &amp; desist)</p>
Louisiana	<p>La. Rev. Stat. Ann. § 22:1214 (1978) (West 1986) (prohibits as inducement)</p>	<p>La. Rev. Stat. Ann. § 22:1113 (West 1986) (prohibits with unlicensed)</p> <p>La. Rev. Stat. Ann. § 22:1174 (West 1986) (prohibits with unlicensed)</p>	<p>La. Rev. Stat. Ann. § 22:1217 (West 1986) (amended) - penalty for violation \$1,000 per act; \$5,000 intentional)</p> <p>La. Rev. Stat. Ann. § 22:473 (West 1986) (\$500 fine)</p>
Maine	<p>Me. Rev. Stat. Ann. tit. 24-A § 2160 (1990) (prohibits in life &amp; health)</p> <p>Me. Rev. Stat. Ann. tit. 24-A § 2162 (1990) (prohibits in property, casualty &amp; surety ins.)</p> <p>Me. Rev. Stat. Ann. tit. 24-A § 2163 (1990) (prohibits person from receiving rebate)</p> <p>Me. Rev. Stat. Ann. tit. 24-A § 4139 (1990) (prohibits in Frat. Benefit Soc.)</p>	<p>Me. Rev. Stat. tit. 24-A § 1614 (1990) (sharing with unlicensed)</p> <p>Me. Rev. Stat. tit. 24-A § 1808 (1990) (consultant may not receive)</p>	<p>Me. Rev. Stat. Ann. tit. 24-A § 2165 (1990) (Rebate = violation of unfair practice = cease &amp; desist)</p>
Maryland	<p>Md. Ins. Code Ann. § 224 (1989) (prohibits on life &amp; annuity)</p> <p>Md. Ins. Code Ann. § 226 (1989) (agent or company in property, casualty or surety)</p> <p>Md. Ins. Code Ann. § 346 (1989) (prohibits on Frat. Benefit Soc.)</p>	<p>Md. Ins. Code Ann. § 167 (1989) (prohibits with unlicensed)</p>	<p>Md. Ins. Code Ann. § 215 (1989) (penalty for violating § 224 and § 226 = cease &amp; desist)</p>

State	Anti-Rebate	Commission Splitting	Penalty
Massachusetts	<p>Mass. Gen. Laws Ann. ch. 176D § 3 (West 1990) (prohibits on life, accident, annuity accident or health)</p> <p>Mass. Gen. Laws Ann. ch. 175 § 182 (West 1990) (prohibits rebates on any ins. by company or agent)</p> <p>Mass. Gen. Laws Ann. ch. 175 § 183 (West 1990) (prohibits acceptance of rebates)</p>	<p>Mass. Gen. Laws Ann. ch. 175 § 177 (West 1990) (prohibits with unlicensed)</p>	<p>Mass. Gen. Laws Ann. ch. 175 § 177 (West 1990) (comm. sharing violation = fine of \$20 - \$200)</p> <p>Mass. Gen. Laws Ann. ch. 176D § 7 (West 1990) (violation of § 3 = cease &amp; desist) (violation of this a fine of up to \$10,000 or revocation or suspension (\$ 10))</p>
Michigan	<p>Mich. Comp. Laws Ann. § 500.2024 (West 1990) (prohibits on life, accident or health)</p> <p>Mich. Comp. Laws Ann. § 500.2066 (West 1990) (by agent or company)</p> <p>Mich. Comp. Laws Ann. § 500-2070 (West 1990) (prohibits acceptance)</p>	<p>Mich. Comp. Laws Ann. § 500.1207 (West 1990) (prohibits unlicensed)</p>	<p>Mich. Comp. Laws Ann. § 500.4066 (West 1990) (violation of anti-rebate = revoke license for 1 yr or § 500.206)</p> <p>Mich. Comp. Laws Ann. § 500-2069 (West 1990) (misdemeanor fine (\$100/ or prison)</p> <p>Mich. Comp. Laws Ann. § 500-2070 (West 1990) (acceptance of rebate = misdemeanor fine of \$100)</p>
Minnesota	<p>Minn. Stat. Ann. § 72A.20 (West 1990) (agent or company prohibited)</p> <p>Minn. Stat. Ann. § 72A.08 (West 1990) (prohibits agent or company from giving and insured from accepting)</p> <p>Minn. Stat. Ann. § 72A.12 (West 1990) (agent or company on life ins.)</p>	<p>Minn. Stat. Ann. § 60A.17 (West 1990) (prohibits company or agent sharing with unlicensed)</p>	<p>Minn. Stat. Ann. § 72A.08 (West 1990) (penalty for agent or insured on rebate = fine of \$60 - \$200)</p>
Mississippi	<p>Miss. Code Ann. § 83-3-121 (1990) (agent or company on casualty ins.)</p> <p>Miss. Code Ann. § 83-7-3 (1990) (agents or company in life ins.)</p>	<p>Miss. Code Ann. § 83-17-7 (1990) (prohibits agent or company from paying unlicensed)</p>	<p>Miss. Code Ann. § 83-17-11 (1990) (comm. splitting penalty = revocation 3-6 months)</p> <p>Miss. Code Ann. § 83-7-3 (1990) (rebates on life = revocation 1 yr.)</p>
Missouri	<p>Mo. Rev. Stat. § 376.500 (1989) (agent or company on life ins.)</p> <p>Mo. Rev. Stat. § 375.963 (1989) (prohibits rebates)</p>	<p>Mo. Rev. Stat. § 375.158 (1989) (prohibits company paying unlicensed)</p>	<p>Mo. Rev. Stat. § 376.510 (1989) (agent violates § 376.500 = fine - \$50-500 misdemeanor; jail 30 days-6 mos.)</p> <p>Mo. Rev. Stat. § 375.942 (1989) (cease and desist for § 375.963)</p>

State	Anti-Rebate	Commission Splitting	Penalty
Montana	<p>Mont. Code Ann. § 33-18-208 (1989) (prohibits on life, disability &amp; annuity)</p> <p>Mont. Code Ann. § 33-18-210 (1989) (agent or company or insured from accepting on property, casualty &amp; surety)</p> <p>Mont. Code Ann. § 33-7-517 (1989) (prohibits on Frat. Benefit Soc.)</p> <p>Mont. Code Ann. § 33-25-401 (1989) (prohibiting rebate on title ins.)</p>	<p>Mont. Code Ann. § 33-17-1103 (1989) (repealed) (sharing with unlicensed)</p> <p>Mont. Code Ann. § 33-25-401 (1989) (cannot split title ins. fee except for services performed)</p>	<p>Mont. Code Ann. § 33-2-119 (1989) (suspend or revoked license)</p> <p>Mont. Code Ann. § 33-25-402 (1989) (treble damages and attorney fees for violating § 33-25-401)</p> <p>Mont. Code Ann. § 33-1-318 (1989) (cease and desist and/or up to \$5,000 per violation)</p>
Nebraska	<p>Neb. Rev. Stat. § 44-361 (1989) (agent or company and person from accepting)</p> <p>Neb. Rev. Stat. § 44-361.01 (1989) (prohibits circumventing anti-rebate statute)</p> <p>Neb. Rev. Stat. § 44-1525 (1989) (prohibits as unfair competition)</p>	<p>Neb. Rev. Stat. § 44-4037 (1989) (No comm. splitting without valid license in that line of insurance)</p>	<p>Neb. Rev. Stat. § 44-367 (1989) (rebate = revocation)</p> <p>Neb. Rev. Stat. § 44-361.02 (1989) (circumvent anti-rebate stat. = class V misdemeanor)</p> <p>Neb. Rev. Stat. § 44-1528 (1989) (violation of § 44-1525: 1) fine - \$1,000 - 5,000; 2) suspension; 3) cease &amp; desist)</p>
Nevada	<p>Nev. Rev. Stat. § 686A.110 (1989) (prohibits on life, health &amp; annuity)</p> <p>Nev. Rev. Stat. § 683A.420 (1989) (prohibits paying to unlicensed person)</p>	<p>Nev. Rev. Stat. § 683A.440 (1989) (comm. only to licensed person)</p> <p>Nev. Rev. Stat. § 683A.420 (1989) (prohibits paying unlicensed)</p>	<p>Nev. Rev. Stat. § 683A.450 (1989) (violation of § 683A.420: 1) suspension or 2) fine 25-500)</p> <p>Nev. Rev. Stat. § 683A.490 (1989) (misdemeanor - for fit Comm. and red. in amt. of ins. = to amt. of rebate)</p>
New Hampshire	<p>N.H. Rev. Stat. Ann. § 417:4 (1989) (prohibits in title ins.)</p> <p>N.H. Rev. Stat. Ann. § 402:39 (1989) (agent &amp; company)</p> <p>N.H. Rev. Stat. Ann. § 402:40 (1989) (prohibits insured from accepting)</p>		<p>N.H. Rev. Stat. § 402:42 (1989) (violation of § 402:39 or § 402:40 = fine up to \$2,500 or revocation)</p>

State	Anti-Rebate	Commission Splitting	Penalty
New Jersey	<p>N.J. Stat. Ann. § 17:29A-15 (West 1987) (no rebates allowed)</p> <p>N.J. Stat. Ann. § 17:298-4 (West 1987) (rebates are unfair trade practice on life, accident and health ins.)</p> <p>N.J. Stat. Ann. § 17B:30-13 (West 1987) (prohibits contracts with rebates in life, health and annuity ins.)</p> <p>N.J. Stat. Ann. § 17:46B-35 (West 1987) (no rebates on title ins.)</p> <p>N.J. Stat. Ann. § 17:44A-39 (West 1987) (Fraternal benefits - no rebates)</p>	<p>N.J. Stat. Ann. § 17:22-6.18 (repealed (87)) (West 1987) (anyone unlicensed)</p>	<p>N.J. Stat. Ann. § 17B:30-20 (West 1987) (cease &amp; desist order up to \$5,000/violation)</p> <p>N.J. Stat. Ann. § 17:44A-43 (West 1987) (penalties for fraternal benefit)</p> <p>N.J. Stat. Ann. § 17B:30-17 (rebates = fine of \$1,000)</p>
New York	<p>N.Y. Ins. Law § 6409 (1990) (title ins. - prohibits accepting)</p> <p>N.Y. Ins. Law § 2324 (1990) (agent or company)</p> <p>N.Y. Ins. Law § 4224 (1990) (prohibits on accident and health by agent or company)</p> <p>N.Y. Ins. Law § 2602 (1990) (prohibits insured from accepting rebate)</p>	<p>N.Y. Ins. Law § 2114 (1990) (prohibits comm. splitting in Frat. Benefit Soc.)</p> <p>N.Y. Ins. Law. § 2115 (1990) (prohibits comm. splitting in property and casualty ins.)</p> <p>N.Y. Ins. Law § 2116 (1990) (prohibits giving money to unlicensed)</p>	<p>N.Y. Ins. Law § 6409 (1990) (accepting rebate on title ins. = \$1,000 fine or 5 x rebate (whichever is greater))</p> <p>N.Y. Ins. Law § 2324 (1990) (anti-rebate = \$500)</p>
New Mexico	<p>N.M. Stat. Ann. § 59A-16-15 (1990) (prohibits on life, health &amp; annuity)</p> <p>N.M. Stat. Ann. § 59A-16-17 (1990) (prohibits by agent or company on other ins.)</p>	<p>N.M. Stat. Ann. § 59A-12-24 (1990) (prohibits sharing with unlicensed)</p>	<p>N.M. Stat. Ann. § 59A-16-18 (1990) (person who receives rebate = \$1,000 fine)</p> <p>N.M. Stat. Ann. § 59A-16-27 (1990) (cease &amp; desist order)</p> <p>N.M. Stat. Ann. § 59A-16-29 (1990) (assesses fine)</p>
North Carolina	<p>N.C. Gen. Stat. § 58-33-85 (1990) (prohibits agent and company)</p> <p>N.C. Gen. Stat. § 58-33-90 (1990) (prohibits agent and company on life, accident and health)</p> <p>N.C. Gen. Stat. § 58-63-15(8) (1990) (prohibits agent and company)</p>	<p>N.C. Gen. Stat. § 58-33-25 (1990) (prohibits paying unlicensed)</p>	<p>N.C. Gen. Laws § 58-33-45 (1990) (comm. splitting = revocation)</p> <p>N.C. Gen. Laws. § 58-63-30 (1990) (cease and desist order)</p>

State	Anti-Rebate	Commission Splitting	Penalty
North Dakota	N.D. Cent. Code § 26.1-04-03 (1989) (prohibits on life, accident and health) N.D. Cent. Code § 26.1-04-05 (1989) (agent and company on life ins.) N.D. Cent. Code § 26.1-04-06 (1989) (prohibits insured from accepting) N.D. Cent. Code § 26.1-25-16 (1989) (prohibits agent and company)	N.D. Cent. Code § 26.1-26-04 (1989) (paying unlicensed)	N.D. Cent. Code § 26.1 - 26.5 (1989) (fine for comm. splitting = \$100 - \$1,000) N.D. Cent. Code § 26.1-04-16 (1989) (violation of anti-rebate = class A misdemeanor)
Ohio	Ohio Rev. Code Ann. § 3901.21 (g) (1) (Baldwin 1990) (prohibits on life, health and accident) Ohio Rev. Code Ann. § 3911.20 (Baldwin 1990) (prohibits life ins. agent from giving and insured from accepting) Ohio Rev. Code Ann. § 3933.01 (Baldwin 1990) (prohibits paying or receiving)	Ohio Rev. Code Ann. § 3905.05 (Baldwin 1990) (prohibits with unlicensed)	Ohio Rev. Code Ann. § 3901.22 (Baldwin 1990) (violation of anti-rebate cease & desist and fine) Ohio Rev. Code Ann. § 3911.21 (Baldwin 1990) (violation of § 3911.20 - revocation of license for 3 years) Ohio Rev. Code Ann. § 3911.99 (Baldwin 1990) (violation of anti-rebate fine \$500 and 30 days) Ohio Rev. Code Ann. § 3999.99 (Baldwin 1990) (giving rebate misdemeanor in 4th degree)
Oklahoma	Okla. Stat. Ann. tit. 36 § 1204 (West 1989) (prohibits rebates) Okla. Stat. Ann. tit. 36 § 2657 (West 1989) (prohibits in optometry) Okla. Stat. Ann. tit. 36 § 2742 (West 1989) (prohibits in Frat. Benefit Soc.)	Okla. Stat. Ann. tit. 36 § 1424 D (West 1989) (must have valid license for such services)	Okla. Stat. Ann. tit. 36 § 1209 (West 1989) (restraining order) Okla. Stat. Ann. tit. 36 § 1428 (West 1989) (suspension revocation)
Oregon	Or. Rev. Stat. § 744.015 (1989) (prohibits paying to unlicensed person) Or. Rev. Stat. § 746.045 (1989) (prohibits rebates) Or. Rev. Stat. § 746.055 (1989) (prohibits on title ins.)	Or. Rev. Stat. § 744.054-.057 (1989) (prohibits with unlicensed)	Or. Rev. Stat. § 731.988 (1989) (penalties for violation)
Pennsylvania	Pa. Stat. Ann. tit. 40 § 275 (Purdon 1988) (prohibits agent from paying) Pa. Stat. Ann. tit. 40 § 276 (Purdon 1988) (prohibits insured from accepting) Pa. Stat. Ann. tit. 40 § 471 (Purdon 1988) (prohibits agent or company from offering)	Pa. Stat. Ann. tit. 40 § 274 (Purdon 1988) (prohibits with unlicensed)	Pa. Stat. Ann. § 431 (Purdon 1988) (Violation of rebate - fine or jail) Pa. Stat. Ann. tit. 40 § 1171.9 (Purdon 1988) (cease and desist or revocation) Pa. Stat. Ann. tit. 40 § 1171.11 (Purdon 1988) (civil penalties \$5,000 if knew and 1,000 if didn't know)

State	Anti-Rebate	Commission Splitting	Penalty
Rhode Island	R.I. Gen. Laws § 27-29-4 (1989) (prohibits rebates) R.I. Gen. Laws § 27-4-6 (1989) (prohibits by life ins. agent or company) R.I. Gen. Laws § 27-8-7 (1989) (agent or company on casualty) R.I. Gen. Laws § 27-9-44 (1989) (agent or company on casualty)	R.I. Gen. Laws. § 27-2-3 (1989) (pay comm. to licensed only)	R.I. Gen. Laws § 27-2-4 (1989) (violation of comm. splitting - fine \$100 - \$500) R.I. Gen. Laws § 27-29-4.2 (1989) (violation of § 29-29-4 - fine of \$500) R.I. Gen. Laws § 27-6-47 (1989) (violation of § 27-6-46 - fine \$100-500) R.I. Gen. Laws § 27-8-9 (1989) (\$500 fine or jail (1 yr)) R.I. Gen. Laws. § 27-9-45 (1989) (violation of 27-9-44 - fine \$100-\$500)
South Carolina	S.C. Code Ann. § 38-57-130, § 38-55-50 (Law. Co-op. 1988) (prohibits rebates)	S.C. Code Ann. § 38-43-200 (Law. Co-op. 1988) (prohibits with unlicensed)	S.C. Code Ann. § 38-43-130 (Law. Co-op. 1988) (revocation or suspension of license) S.C. Code Ann. § 38-57-200 (Law. Co-op. 1988) (cease and desist)
South Dakota	S.D. Codified Laws Ann. § 58-33-24 (1990) (rebates prohibited) S.D. Codified Laws Ann. § 58-33-14 (1990) (rebates on life and health - class 2 misdemeanor) S.D. Codified Laws Ann. § 58-37-79 (1990) (rebates on Frat. Benefit is class 2 misdemeanor) S.D. Codified Laws Ann. § 58-25-13 (1990) (title insurance)	S.D. Codified Laws Ann. § 58-30-86 (1990) (sharing with unlicensed - class 2 misdemeanor)	S.D. Codified Laws Ann. § 58-33-40 (1990) (cease and desist order)
Tennessee	Tenn. Code Ann. § 56-8-104 (1989) (prohibits rebates) Tenn. Code Ann. § 56-35-119 (1989) (prohibits applicant from rebate on title ins.)	Tenn. Code Ann. § 56-6-149 (1989) (prohibits paying unlicensed)	Tenn. Code Ann. § 56-8-109 (1989) (cease and desist and/or 1) 1,000 violation (\$5,000 if intentional); 2) suspension or revocation)

State	Anti-Rebate	Commission Splitting	Penalty
Texas	<p>Tex. Ins. Code Ann. § 21.21 (Vernon 1989) (prohibits rebates on life, health accident)</p> <p>Tex. Ins. Code Ann. § 5.09 (Vernon 1989) (agent or company on motor vehicle ins.)</p> <p>Tex. Ins. Code Ann. § 5.20 (Vernon 1989) (agent or company on casualty ins.)</p> <p>Tex. Ins. Code Ann. § 5.41 (Vernon 1989) (agent or company on fire)</p> <p>Tex. Ins. Code Ann. § 9.30 (Vernon 1989) (prohibits rebates on title ins.)</p> <p>Tex. Ins. Code Ann. § 24.14 (Vernon 1989) (premium fin. co. cannot rebate)</p>	<p>Tex. Ins. Code Ann. § 21.07 (Vernon 1989) (prohibits paying unlicensed)</p>	<p>Tex. Ins. Code Ann. § 5.20 (Vernon 1989) (rebate on casualty - revocation of license and fine)</p> <p>Tex. Ins. Code Ann. § 541.1 (Vernon 1989) (receiving rebate on fire ins. fine \$100 or 90 days)</p> <p>Tex. Ins. Code Ann. § 21.26 (Vernon 1989) (cease and desist order)</p>
Utah	<p>Utah Code Ann. § 31A-23-302(2) (a) (1990) (prohibits rebates)</p>	<p>Utah Code Ann. § 31A-23-404 (1990) (prohibits sharing with unlicensed)</p>	<p>Utah Code Ann. § 31A-2-308 (1990) (penalty is (1) (a) forfeit twice the amt. of profit (b) \$1,000 @ violation (c) each day is a separate viol. (2) restraining order)</p> <p>Utah Code Ann. § 31A-23-216 (1990) (revoke license)</p>
Vermont	<p>Vt. Stat. Ann. tit. 8 § 4724 (1989) (prohibits rebates)</p> <p>Vt. Stat. Ann. tit. 8 § 4499 (1989) (prohibits on Frat. Benefit Soc.)</p> <p>Vt. Stat. Ann. tit. 8 § 3702 (1989) (agent or company on life ins.)</p> <p>Vt. Stat. Ann. tit. 8 § 3861 (1989) (prohibits on casualty by agent or company)</p> <p>Vt. Stat. Ann. tit. 8 § 4085 (1989) (agent or company on health)</p>	<p>Vt. Stat. Ann. tit. 8 § 4696 (1989) (prohibits sharing with unlicensed)</p>	<p>Vt. Stat. Ann. tit. 8 § 4725 (1989) (violation of § 4724 - fine of 500 and revocation)</p> <p>Vt. Stat. Ann. tit. 8 § 3703 (1989) (violation of § 3702 - fine \$500 and suspension of license 1 yr.)</p> <p>Vt. Stat. Ann. tit. 8 § 4087 (1989) (violation of § 4088 - fine of \$200)</p>
Virginia	<p>Va. Code Ann. § 38.2-509 (1990) (prohibits rebates)</p> <p>Va. Code § 38.2-4614 (1990) (prohibits rebates to real estate agent on title ins.)</p>	<p>Va. Code Ann. § 38.2-1812 (1990) (prohibits sharing with unlicensed)</p>	<p>Va. Code Ann. § 38.2-218 (1990) (fine for comm. splitting is fine; \$1,000 if unintentional)</p> <p>Va. Code Ann. § 38.2-219 (1990) (cease and desist order)</p>

State	Anti-Rebate	Commission Splitting	Penalty
West Virginia	W. Va. Code § 33-11-4 (1989) (prohibits rebates on life, accident and sickness ins.)	W. Va. Code § 33-12-24 (1989) (prohibits paying unlicensed)	W. Va. Code § 33-11-6 (1989) (cease and desist)  W. Va. Code § 33-12-25 (1989) (comm. splitting = revocation of license)
Washington	Wash. Rev. Code § 48.30.140 (1989) (prohibits agent or company)  Wash. Rev. Code § 48.30.170 (1989) (prohibits insured from accepting rebate)	Wash. Rev. Code § 48.17.490 (1989) (prohibits sharing with unlicensed)	Wash. Rev. Code § 48.17.490 (1989) (sharing = revocation)  Wash. Rev. Code § 48.30.170 (1989) (acceptances of rebate = reduction in ins. by amt. of rebate)
Wisconsin	Wis. Stat. Ann. § 628.34 (West 1988) (agent or company prohibited)	Wis. Stat. Ann. § 628:61 (West 1988) (prohibits sharing with unlicensed)	Wis. Stat. Ann. § 601.64 (West 1988) (injunction and up to \$1,000/ violation and/or revocation, suspension)
Wyoming	Wyo. Stat. § 26-13-110 (1989) (prohibits in life, disability and annuity)  Wyo. Stat. § 26-13-113 (1989) (prohibits in property and casualty)  Wyo. Stat. Ann. § 26-29-138 (1989) (prohibits rebates in Frat. Ben. Soc.)	Wyo. Stat. § 26-9-132 (1989) (prohibits sharing with unlicensed)	Wyo. Stat. § 26-13-202 (1989) (violation of rebate is penalty in § 26-1-107 which is fine and jail time)  Wyo. Stat. § 26-1-107 (1989) (civil penalties for viol. of ins. code)