Southwest Regional Office Issue Papers for the 77th Texas Legislature

Consumers Union

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- Funeral Services
- Financial Services
- Open Government
- Privacy
- Health Care
- Utilities
- Housing
- Telecommunications
- Insurance
- E-Business
- Environment

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Each year the Southwest Regional Office of Consumers Union issues reports on consumer issues of particular concern in Texas and the Southwest United States. Topics include financial services, health, utilities, and the environment. You may order copies of reports by calling the Southwest Regional Office at (512) 477-4431 x110 or writing us at 1300 Guadalupe, Suite 100, Austin, Texas 78701. Reports are also posted on our web site at www.consumersunion.org in both HTML and PDF formats.

The following reports were released in 1999 and 2000:
Final Committal: Texas Problems with Pre-Paid Funeral Services and other tales (October 2000)
Animal Factories: Pullution and Health Threats to Rural Texans (May 2000)
Access to the Dream: 2000 Minority borrowers in Texas denied standard home loans at higher rates and take a disproportionate number of subprime loans (April 2000)
Wolf in Sheep's Clothing: Payday Loans Disguise Illegal Lending (Feb 1999)
Texas Digital Divide: Telephone Competition Promise Falls Short (Feb 1999)
Payphones: San Antonio Survey (Feb 1999)
Looking Back at the Promises of Medicaid Managed Care (April 1999)
A User's Guide to the Public Information Act (June 1999)

Consumers Union also participates in the Texas Pesticide Information Network, and produces reports and educational materials for the general public on pesticide use. For more information about reports related to pesticide use in Texas, please visit our web site at www.consumersunion.org.

Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education, and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers.

Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from non-commercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with more than four million paid circulation, and *Consumer Reports Online* (www.ConsumerReports.org) with more than 500,000 paid subscribers, regularly carry articles on health, product safety, marketplace economics and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

Consumers Union's Southwest Regional Office, opened in 1979, is dedicated to advocating the consumer interest, particularly of low-income consumers, and to promoting the growth of the public interest movement in the Southwest.

Improve Pre-Paid Funeral Contracts and Funeral Laws

The Sunset Commission has recommended changes to state laws relating to funeral services. We support these recommendations but the legislature should go further.

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Few of life's purchases cost three to 15 thousand dollars, and those that do—a car or a home improvement—we often research carefully, collecting bids and comparing service quality before laying down money. But a funeral and burial is less a purchase than a life event, fraught with grief and confusion, for which none of us can be fully prepared.

Unfortunately, a funeral is also an expensive product, and the devastation of a recent death is only compounded if families face "sticker shock" or poor care from a funeral home, monument company, insurer or cemetery. While many families try to ease the stress by pre-paying for a funeral service, under Texas law prepaid funerals do not provide a fair deal for consumers. Many other states have rules governing prepaid funerals that are far fairer than Texas law. In Texas, the funeral and burial industries come under the jurisdiction of four separate state agencies, a fragmented bureaucracy that leaves citizens without a clear advocate. We examined nearly 300 consumer complaints related to funeral services (filed from Jan. 1998 to Dec. 1999) and found a pattern of problems in the sale of funeral services, as well as problems with the enforcement of existing laws.

In Short

Pre-need contracts today give consumers a poor return on their long term investment and funeral homes, trusts and insurers may exact steep penalties for cancellation. Funeral homes may even charge interest on time payments although no services have been rendered or goods exchanged.

The largest category of complaints, representing almost a third, relate to prepayment arrangements. Consumers often purchase their funeral in advance because the funeral home guarantees the delivery of a funeral service many years in the future at today's prices.

But trust-backed prepaid contracts give the funeral home all of the interest earnings plus a 10 percent penalty if a consumer wants to change or cancel the service.

Insurance backed pre-need contracts sometimes require the buyer to pay substantially more over time than the cost of today's funeral, and refunds can be quite small. Nearly 20 percent of complaints related to requests for refunds on cancelled or changed pre-need policies.

Almost 15 percent of complaints were sent to the wrong state agency or are beyond the purview of any agency. Each of these agencies has different policies and procedures with respect to complaints, and interagency cooperation is poor.

Other categories of complaints relate to services provided by funeral homes.

These included: mishandled bodies, damaged or incorrect coffins and failure to file a death certificate in a timely manner; monument companies, which are not regulated; the price of the funeral, particularly the high cost of the non-declinable "Basic Services" fee; and cemeteries, including run down cemetery conditions and misplaced bodies.

Recommendations

Reform prepaid laws to ensure consumer value for the money invested and contract portability

- Guarantee consumers who cancel a pre-paid contract receive the full value of their investment, including accumulated interest earnings, less a nominal administrative fee. At death, require funeral homes to refund any excess earnings to the deceased's family or estate.
- Standardize pre-need contracts and provide for reasonable consumer modification of funeral services at need without penalty.
- Restore prohibition against finance charges for the time purchase of funeral-related products and services that will not be delivered at the time of purchase.

The Texas Sunset Commission recommended restoring the prohibition against finance charges, and that funeral homes and consumers split any excess accumulated earnings in consumers' prepaid trust accounts. We urge legislators to go further.

Consolidate funeral regulation into a single agency designed to assure regulation of all funeral services, pre-need services. The agency should provide accessible consumer information regarding complaints, inspections and prices.

The Texas Sunset Commission recommended that the funeral service commission be monitored for the next two years. We recommend that an interim study on the feasibility of consolidating funeral regulation be done during that time.

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A Usury Loophole- The Sale-Leaseback Arrangement

Lenders say its not a loan, but to the people who "sell" their microwaves, TVs, or washing machines and can't "buy" them back after two weeks, it feels like loan sharking.

Consumer credit allows families to manage their budgets and pay for unexpected expenses. Texas' Consumer Credit Code limits the rate of interest that lenders can charge and prohibits loan terms that are abusive to borrowers.

Texas has set reasonable limits on interest rates since it was a republic. Such usury limits balance the interest of lenders with those of borrowers and prevent "loan sharking" and other abusive practices. Though current statutory limits on interest rates still allow lenders to charge high rates to riskier borrowers, lenders have also used loopholes in the law to increase their interest charges far above the statutory caps.

Unfortunately, loan sharking is back. Some lenders exploit loopholes in our credit laws and charge far more than the credit code allows. These loans–termed "sale-leaseback" agreements–use a personal check for collateral and often carry interest rates of several hundred percent. Ostensibly short term loans designed to help borrowers through a crunch to the next paycheck, they can quickly devolve into a long term credit problem if the borrower can't pay back the amount borrowed plus the fee in the initial two weeks. Consumer complaints filed with the Office of Consumer Credit Commissioner outline the desperation of borrowers who struggle to make their payments and never see a decline in principal. Many people end up paying far more in fees than they ever borrowed and still cannot pay off the initial loan.

To make sure borrowers pay these usurious rates, lenders require a personal check, so if the borrower can't make a payment, the lender can cash or threaten to cash the check.

Without sufficient funds to cover the check, the borrowers risk jail if they cannot keep up with the steep interest charges.

Indeed, it is not only the usurious interest, but the threat to use our court systems to enforce these loans that makes the loans particularly abusive. If these loans were not disguised they would clearly be illegal under Texas' longstanding usury protections. Lenders disguise them to get through a loophole in the law – one that should be closed.

Lenders say these transactions are not loans. Under a sale-leaseback arrangement, a lender supposedly "buys" an item, such as an appliance, from the consumer for an amount of money (the amount borrowed) and "leases" it back for a "rental" payment (the interest charge). Although the lender claims to purchase the item, the "sale" really is an attempt to disguise the true nature of the transaction - a loan - and the item remains with the consumer at all times. The interest rate charged for theses types of loans may exceed 700 percent APR.

The Texas Finance Commission has authorized check-secured "payday" loans under Texas laws. The "sale-leaseback" system is an attempt to avoid rules put in place for "payday" loans that protect consumers from a downward debt spiral. Though these rules still allow for very high interest rates, they prohibit multiple rollovers and therefore protect consumers from a plunge into uncontrollable debt.

Very high interest rates financially devastate Texas families. Such abusive lending practices provide a glimpse into what might happen if Texas were to repeal its existing usury limits for consumer loans.

Recommendations

- Keep existing consumer protections for consumer loans. Usury limits on loans of only a few hundred dollars are already quite high, and should not be increased.
- Close the existing loopholes that allow abusive practices like sale-leasebacks. Assure consumers that they will pay reasonable rates, under fair terms, when they borrow money.
- Modify regulation of credit transactions, if necessary, only for those who can afford to bring attorneys and accountants to negotiate the terms offered (like large business transactions).

In Short

Usury laws have protected borrowers from loan sharking since Texas was a republic. Elimination of rate caps would allow lenders to take advantage of the most vulnerable people, and exacerbate the already troubled finances of many families.

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The Office of Access to Financial Services

Make this office work for consumers by placing existing research mandates under its auspices. Staff it, give it a Director, and mandate that the office study and recommend ways to enhance availability, quality and fairness of financial services for all Texans.

Access to financial services is essential to every Texan's economic success. For some Texans, however—especially those of modest means—the financial service marketplace often fails.

If credit is available, it is frequently through lenders who charge very high annual interest rates.

To pay bills and cash checks, many families rely on check-cashing services, a very expensive alternative to the checking accounts from banks or credit unions.

Not surprisingly, banks may also turn these families down when they apply for home mortgage loans. Similar problems plague some small businesses, including family farms.

What is the cause of Texas' two-tiered system? Why are financial services for low-income people so expensive? What can Texas do to improve the situation? Clear answers are hard to come by because state legislators, agency regulators and policymakers have no comprehensive, independent source of information about the financial services marketplace in Texas. The knowledge they have must be gleaned piecemeal from occasional reports and studies.

This is why unbiased, independent research is essential. In 1995, the Legislature took steps to remedy the problem by charging the Texas Finance Commission with studying and reporting on financial services in Texas. In 1997, the Legislature funded the study through a loan fee paid on certain types of consumer loans.

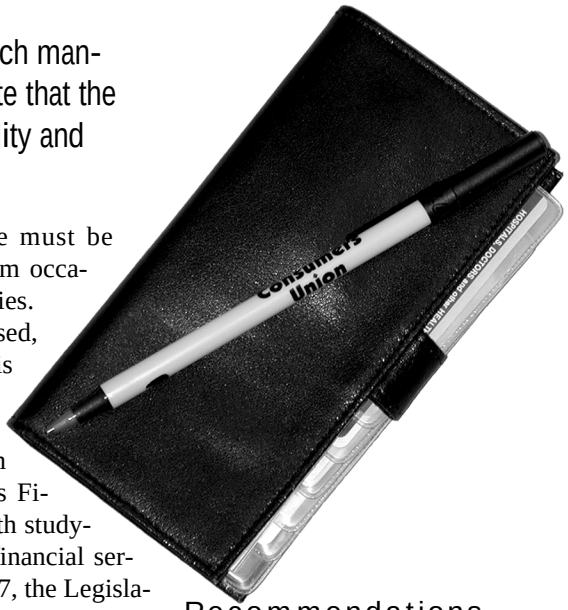
The Finance Commission has now conducted three studies, but in some cases these studies have been marred by the influence of the banks and finance companies who provided much of the information.

Without a Director to guide the office, these and future studies will likely lack the vision to provide the Legislature and public with a full, ongoing analysis of the financial service marketplace.

As part of the home equity constitutional amendment, voters approved the creation of a Director of the Office of Access to Financial Services (OAFS), appointed by the Finance Commission. This Office should be the independent source of research and information on consumer access to all types of financial services. Such a shift would harmonize the intent of the existing research mandates with the structure of the newly created OAFS.

In Short

The Office of Access to Financial Services (OAFS) has a mandate to help ensure consumer access to financial services under fair terms and conditions. Fulfill this mandate by authorizing OAFS to conduct studies of the financial service market already funded by a fee on consumer loans.



Recommendations

The requirement to study financial services already exists in statute and in the Constitution, and funding for the function is in place. The Legislature should:

- combine the separate components into one office under the umbrella of the Finance Commission.
- clarify the responsibilities of the Office of Access to Financial Services
- establish a separate Director for the office
- require the office to research and report comprehensively on the availability, quality and pricing of financial services and on market practices of entities providing financial services for individual, agricultural and small business consumers in Texas; and
- require the office to recommend to lawmakers and regulators ways to enhance availability, quality and price of financial services and to positively impact the interests of financial services consumers.

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Predatory Lending

In some neighborhoods in Texas, subprime lenders make most of the existing home secured refinance loans. These loans cost more and can result in default or loss of equity.

A home is more than a place for a family to live. It is a way for that family to build assets. In fact, for most families, a home is their most important asset. Over time, the value of the home can rise and the equity increases. This accumulation of wealth in a home builds family stability and opens new opportunities.

The accumulated value, or equity, can be passed onto future generations, or taken out in the form of a loan. The equity can be used to pay for an education or a business startup, and the home itself can serve a family for generations.

Homeownership also benefits communities and the state. Property taxes pay for schools and for the operation of local government. More importantly, families that own homes have a stake in the success of communities—and a stable group of homeowners assures stability in neighborhoods.

That is why predatory home lending is such a threat to Texas. Predatory lenders target vulnerable borrowers and sell them high cost loans under unfair conditions that can lead to foreclosure. Not all higher interest loans are predatory. But a high cost loan combined with other practices can be predatory. Predatory loan practices include:

- Interest rates that have little relation to the credit worthiness of the borrower
- Excessive fees that must be paid for a loan, or are rolled into the amount borrowed
- Little consideration of the ability of the borrower to repay
- Loans made on the basis of the equity in the home, instead of on the borrower's income
- Single-premium credit insurance that is rolled into the loan
- Prepayment penalties designed to lock borrowers into abusive loans
- Failing to move qualified borrowers to a lower-priced "prime" loan
- Home improvement scams where lenders pay (and borrowers must repay) despite low-quality or unfinished work

Lenders that make credit available to people with blemished or no credit histories are called "subprime" lenders. These loans are made at far higher rates than standard loans. Predatory loans are generally a subset of subprime loans; they are made at high subprime rates, but also include one or more of the characteristics described above.

An analysis of Home Mortgage Disclosure Act (HMDA) data from 1998 shows that in major Texas cities, African-American neighborhoods appear to be targeted by subprime lenders for home refinance loans, indicating the possibility that these communities are being victimized by predatory lenders.

In low-income Black neighborhoods in Dallas, eight out of the 10 top lenders were subprime lenders. For the same incomes in white Dallas areas, only two out of 10 were subprime. In Houston, six out of 10 were subprime in Black neighborhoods, with only one out of 10 in white neighborhoods. This pattern holds true in all major Texas cities. Regardless of income, 27 percent of Black borrowers statewide refinance their home through a subprime lender, compared to 15.3 percent of Hispanic borrowers, and only 6.3 percent of white borrowers.

It is difficult to imagine, when income is controlled, that there could be such dramatic differences between borrowing patterns—that minority borrowers would simply end up borrowing from high cost subprime lenders. Instead, these patterns indicate the possibility that these communities may be targeted by predatory lenders.

Texas sought to address abusive home equity lending and enacted prohibitions against many of the practices that have plagued borrowers in other states. However, loans with excessive interest rates have no special borrower protections in Texas law.

Recommendations

- Expand predatory lending protections to all home-secured loans;
- Limit costs of loans;
- Prohibit unfair loan terms and practices;
- Assure that all Texas borrowers get the lowest cost loan for which they qualify.

In Short

Predatory loans are made without consideration of the borrower's ability to repay. Instead, lenders base the loan on the amount of equity available in the home and offer terms that borrowers cannot hope to meet. Prepayment penalties lock borrowers into bad loans, and people who can't keep up face foreclosure.

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Open Government

The Texas Legislature improved portions of the Public Information Act last session to ensure that citizens have access to basic information critical to educated public participation in decisions of state and local officials. The reforms are starting to work.

The Texas Public Information Act (PIA) gives citizens oversight of government officials. But some officials, state agencies, and local governments that are required to comply with the PIA attempt to manipulate the process to deny or delay legitimate requests.

Last session, the 76th Texas Legislature substantially improved portions of the PIA to make the processes better serve the general public. The most important improvements include:

A faster Attorney General process for reviewing information that governmental bodies want to keep closed;

Better notice to citizens of their rights and responsibilities under the Act, both at the time they make requests and at the time a governmental body denies access to information;

Clarification that certain information is clearly public—like government policies and procedures that affect members of the public, or budget and expenditure records—and must be provided;

Elimination of reconsiderations after the AG said records must be released (a loophole in the process that once added months to the time it took to get records out in the open); and

An itemized estimate of charges if a governmental body wishes to charge a member of the public more than $40 to fill a request for public information.

These changes all help citizens get the information they need to understand and participate in government decisions. Yet governmental bodies continue to stand between citizens and the information they need. In particular, the Attorney General has now issued numerous letter opinions directing governmental bodies to release records that fall under one of the categories of clearly public information. Clearly public records that governmental bodies attempted to protect include:

- Information in the public domain like court pleadings and newspaper articles;
- Settlement agreements
- A completed study of residential water rates
- Agendas and minutes of public meetings
- An air quality report conducted for a specific high school
- Reports on the condition of a city landfill
- Results of a "school climate survey" conducted by a school district
- Audit reports including a KPMG audit of a school district

Under the new system of administering open records requests, the Attorney General directed governmental bodies to provide these items to the requestor, and did so in a reasonable time. Since members of the public are unlikely to have the resources to take a government official to court over a records request, it is critical to maintain the current AG process. The list of clearly open records gives the AG its best tool to ensure a minimum level of public access.

Government officials sometimes worry about public scrutiny if information is released. The PIA ensures that every major decision that involves the expenditure of public funds or the quality of public service does receive a high level of scrutiny and public input.

Yet, new exceptions to the Act specifically limit educated public involvement in major government spending decisions. The electric deregulation bill passed last session created broad new secrecy provisions for municipal utilities even if they elect not to open local markets to competition. Other legislation allowed public officials to negotiate tax and other public incentives with corporations in secret. It is vital that information that directly affects public decisions on how public money should be spent, or decisions about the nature and quality of our state regulatory systems, remain available to the public.

In Short

New exceptions to the Act specifically limited educated public involvement in major public decisions, including decisions to give incentives to corporations and decisions about the activities of city owned utilities. Information that directly affects the public and the tax base should be open.

Recommendations

- Narrow the broad exceptions for municipal utilities and tax incentive negotiations.
- Maintain the clear, minimum access to records listed under the Categories of Public Information; and
- Avoid creating broad new exceptions for particular types of officials or in specific regulatory arenas.

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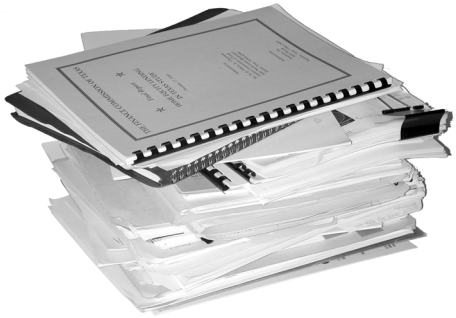

Balancing Accountability Against Privacy

Agencies collect some information about individuals that should remain open because release of that information serves a vital public purpose—like information about the qualifications and problems of licensed professionals. Personal financial and medical records require a higher standard of protection.

Balancing the interest of public oversight of government with the protection of individuals' personal information must be done carefully. Some government information about individuals is clearly private and should be protected, but agencies also collect information about that should remain open because release of that information serves a vital public purpose.

Keeping information about how state officials or employees do their job or spend tax dollars open to the public is fundamental to citizen oversight of government. Public information about government regulatory activity ensures that regulations designed to address problems are actually working as promised.

In general, the Public Information Act is designed to hold people in government accountable to citizens for their actions, and this critical public purpose must be weighed against the privacy interests of individuals and those regulate.

Government Agencies Maintain Information about Individuals

State and local government holds some amount of information about many people. The Department of Public Safety once sold drivers' license information (driver's license number, name and birth date, general description) to anyone who asked for it. That information is now stored in an online database and available for a small fee. However, as drivers' licenses come up for renewal, DPS now must give drivers the right to opt out of release of that information in the future.

Most sensitive information about individuals collected by a government agency will not be released. For example, personal financial information or medical records are protected under the Public Information Act, and the records cannot be released.

Most Government Information has a Public Purpose that May Outweigh Privacy Interests

But, the public has an interest in information about licensed professionals, government contractors, and the quality and qualifications of government employees.

Government agencies hold information about professional licensees. Some information about licensed professionals is nearly always public. For the most part, a consumer can find out if a professional actually has a license, and the date of that license.

Sometimes consumers can find out if there have been complaints filed against that professional. To protect themselves, consumer should be able to know if there are complaints against a licensee, whether the state licensing board has taken disciplinary action, and the nature of the reported problems.

Companies that hope to win government contracts often provide information about the qualifications of the people in the company who will be doing the work. They also provide basic financial information about the company. Public scrutiny of this kind of information in government contracts assures the process is transparent and that the bid process is accessible to all qualified persons.

When a consumer complains to a government agency about a wide variety of problems, that letter of complaint may be public-although personal financial information and medical records are removed. The ability of the public to review these complaints ensures that citizens will know whether agencies are responding timely and appropriately, whether existing laws effectively prevent abuses reported by consumers, and whether there is a pattern of unfair or deceptive practices. Such independent analysis has resulted in agency enforcement actions and new public policy in a wide array of areas.

The public has an interest in how its money is spent, the products and services it gets for its tax dollars, and the people who provide those products and services. The public also has an interest in the effectiveness of its laws, and the agencies that enforce those laws. Proposals designed to protect a particular privacy interest should be weighed against the value of the information to the public as a whole.

In Short

The public has a strong interest in how its money is spent, the products and services it gets for its tax dollars, and the people who provide those products and services. The public also has an interest inthe effectiveness of its laws, and those who enforce the laws.

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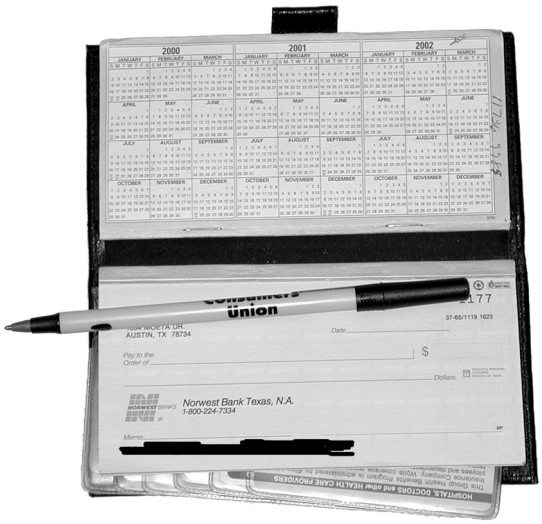

Financial Privacy

Americans overwhelmingly support strong protections for personal financial information like credit card numbers, social security numbers, and information about financial assets.

In poll after poll, Americans say that protecting their personal privacy is of great concern to them. In response to a 2000 National Consumer League survey question regarding the protection of specific types of information online, respondents ranked credit card numbers, social security numbers, and information about financial assets as their top three concerns.

While the protection of personal privacy ranks high, of particular concern is the protection of highly sensitive information. Such sensitive information, including information about a person's health or finances, comes with the expectation that it will be protected. For example, you do not expect a stranger to ask detailed questions about a health condition, just as you probably would not answer a stranger's questions about your financial affairs.

But recent changes in the way financial services are regulated may give strangers access to all kinds of information that was unavailable to them before.

Changes to federal laws now allow banks, securities firms, and insurance companies—once separate entities—to form holding companies. This offers the consumers the ability for "one-stop shopping," but also means that information from different types of financial services companies can share personal financial information.

For example, information about an expiring certificate of deposit at your bank may be shared with a securities affiliate to get you to buy stocks. Your history of health insurance claims may be shared with the company's mortgage lending affiliate—possibly affecting your ability to get a mortgage. Or your detailed history of credit card transactions might be shared with a third party.

The lack of control consumers have over sensitive financial information has led to calls to strengthen privacy protections for consumers above the minimum standards set out in federal law. Under the Gramm-Leach-Bliley Act, financial services companies must disclose their privacy policies and practices. The legislation also requires that their customers be allowed to "opt-out" of sharing personal information with non-affiliated third parties. But this opt-out option has a loophole: if a company creates a marketing alliance with another financial company—say, a link between your bank and an unrelated insurance company—it is not required to give you the opportunity to have your information withheld.

There is good news—while the federal law provides inadequate protections, states are permitted to go further. For example, states can require companies to get your permission before they share any information, even with affiliates. Or, states can require financial service providers to get your permission—to get you to "opt-in"—before they share your information with third parties.

In Short

New federal laws allow banks, insurance companies and securities firms to merge under a single financial services company. While this may give consumers "one stop shopping" for financial services, it also means that affiliates may share personal financial information with each other and others.

Recommendations

Because of the sensitive nature of financial information, higher standards for its protection should be put in place in Texas law.

States like Texas are permitted to adopt higher standards for protecting financial privacy.

Texas should adopt an opt-in requirement so that financial services companies have to get consumers' permission before sharing information with affiliates or third parties.

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Medical Privacy

"One out of every six people engages in some form of privacy-protective behavior to shield themselves from the misuse of their health information, including withholding information, providing inaccurate information, doctor-hopping to avoid a consolidated medical record, paying out of pocket for care that is covered by insurance, and—in the worst cases—avoiding care altogether"—Georgetown University Health Privacy Project

The increasing intrusiveness of data gathering conjures up a future when consumers risk losing control over how their sensitive personal information is used. In reality, that future is now.

Electronic storage of information has changed our lives in many positive ways and has many beneficial uses in the health care arena. For example, ready access to complete electronic medical records can reduce medical errors caused by missing a critical fact such as a drug allergy. Electronic prescriptions are far clearer than physicians' often illegible prescriptions.

But electronic medical information also presents dilemmas – the most prominent being the protection of sensitive and highly personal health information. Americans consistantly support strong protections for the privacy of individually identified health information.

Consumers Union supports federal privacy policies that establish a basic level of protection nationwide. We also support strong state policies, with state regulators keeping a close watch to ensure that Texans' personal health information will be kept confidential. Health privacy policies should cover the following:

- Notice Clearly inform consumers of health care services, in understandable language, about how their health information is collected, how it will be used and to whom it might be disclosed.
- Consent Allow consumers to limit the use of personal health information *beyond the purposes for which it was originally intended*. An "opt in" approach, under which consumers must explicitly grant advance permission to share information for other purposes, should be the standard.
- Access Give consumers the right to a timely and inexpensive way to view, copy and correct inaccuracies in their own health records.
- Security Require health care providers, insurers, and other health entities that gather or use information about consumers to comply with privacy laws and to reasonably ensure the information is secure against loss or unauthorized access or use.
- Enforcement Impose strong penalties for privacy violators, both civil and criminal. Self regulation is not enough. Regulators must be funded to investigate violations. Consumers should have the right to a private cause of action when they have been harmed by the release of health information.

RESEARCH AND HEALTH DATABASES. "With proper safeguards against re-identification, analysis of government, hospital, and health care databases yields a gold mine of information on public health trends and the effectiveness of various types of care," Consumer Reports states. Safeguards include assigning unique patient identifiers with strong penalties for anyone attempting to re-identify a patient; a science review panel which screens and allows only legitimate researchers who agree to use the data for specific purposes; suppression of small elements of data and coding of data that might allow identification. The Texas Health Care Information Council uses all of these safeguards, and more, to ensure patient confidentiality is not breached.

WHAT IS HIPAA? HIPAA, the 1996 Health Insurance Portability and Accountability Act, required the federal health agency to adopt regulations if Congress failed to pass comprehensive health privacy legislation. These regulations were finalized in December 2000. Consumers support the HIPAA regulations because they give patients access to their records; limit others' access to protected health information without specific consent; and restrict employer access to their employees' protected health information.

While these federal regulations provide a baseline, they don't go far enough. They don't cover drug companies or life insurers and fail to give consumers a cause of action if they are harmed by released information. States need to pass more comprehensive protections with state enforcement. A privacy ombudsman should inform the public about privacy rights.

In Short

Although new federal "HIPAA" rules help protect individual medical information, the state can and should do more. Drug companies, for example, collect substantial health information and are exempt from HIPAA requirements. Further state enforcement will ensure compliance.

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Nonprofit Health Care Conversions

When a nonprofit hospital or health plan is sold to or merged with a for profit company, the charitable assets at stake have a special status in law—the assets must remain in the public trust and be used to meet the health care needs of the community.

Nonprofit to for-profit hospital and health plan conversions represent the transfer of hundreds of millions, if not billions, of charitable dollars out of the public domain and into the hands of big corporations and their investors. These "conversions" have transformed the Texas health care landscape from a community-focused system to a more corporate-controlled system.

Some Texas insurance companies/HMOs and most Texas hospitals were originally founded as charitable nonprofit organizations in order to take advantage of generous federal grants, loans, federal and state tax-exempt status and the ability to receive tax-exempt donations from people in their community who supported their charitable mission.

When such a nonprofit is formed, it agrees to irrevocably dedicate its assets to charitable purposes that serve the public. In essence, the public becomes the shareholder of the nonprofit corporation, the owner of its assets. When the nonprofit corporation becomes for-profit, it is obligated under common law to turn over its assets to a charitable organization dedicated to similar purposes. Without careful monitoring, the for-profit corporation may seek instead to hold on to these public assets and devote them to multi-million dollar compensation packages for corporate executives and profit-making enterprises that are accountable only to their individual stockholders.

When public attention is focused on these transactions, the charitable assets held by converting nonprofit health care corporations can be preserved to meet critical health care needs of Texans. Without intense public scrutiny, the funds may be lost forever, going instead to the new for-profit company.

The Texas Attorney General (AG) is responsible for protecting charitable trusts, gifts, and entities in Texas. However, nonprofits are not obliged to notify the AG when they are considering a sale, merger, or other transaction with a for-profit or mutual company. Furthermore, Texas law provides insufficient standards and direction to guide these conversions.

While the flurry of nonprofit to for-profit conversion activity in Texas in the 1980s and 1990s has slowed, the threat to charitable health assets continues today. Nonprofit hospitals are constantly stressed by factors such as high rates of uninsured Texans and cuts in reimbursements from commercial, Medicaid, and Medicare managed care organizations. The possibility of future conversions is likely. The state should be proactive in preventing any further loss of Texas charitable dollars. See back for a brief summary of some important Texas nonprofit hospital and health plan conversions from the past decade.

In Short

The Texas Attorney General is responsible for protecting charitable trusts, gifts and entities. However, there is no duty for nonprofits to notify the AG when they are considering a sale, merger or joint venture with a for profit company. And Texas has not standards for these transactions.

Recommendations

The legislature should establish minimum standards for transactions between nonprofit and for-profit or mutual corporations that address the following issues:

- **Notification to the AG.** The nonprofit should notify the AG regarding its intent to convert (including sales, mergers, and joint partnerships) as soon as an offer is under consideration or a bidding process planned. Basic information given to the AG about the transaction should be made public.
- **Public involvement in the process.** Nonprofit conversions should be public transactions with public disclosure and oversight. Ironically, while for-profit directors are required to notify the public of the sale of their corporation, nonprofit directors have no such responsibility. These transactions are considered "private." Notice in local newspapers, public comment, and public hearings should be required.
- **Set aside assets for the community's health care needs.** The full and fair market value of the assets of nonprofit health care organizations should continue to serve the mission for which they were dedicated, either in an existing foundation or a new grant-making foundation under IRS code 501(c)(3).
- **Independent foundation boards.** To avoid conflicts of interest, foundation boards receiving nonprofit health care assets should be independent from the organization involved in the transaction and reflect the diversity of the community.

Case Studies of Texas Conversions

Health Plan Conversions

Blue Cross Blue Shield of Texas (BCBSTX). The biggest Texas conversion transaction was in 1998, when BCBSTX, a charitable nonprofit, got the go-ahead from the Texas Department of Insurance to merge with Blue Cross Blue Shield of Illinois (BCBSIL), a mutual insurance company. While the merger was consummated, the Texas AG pursued preserving BCBSTX's charitable assets through a suit which is currently awaiting an appellate court decision. If the AG's appeal fails, these assets—which belong to the people of Texas—will transfer to an Illinois mutual insurance company whose duties and interests extend to its members and not to the citizens of Texas. If the AG succeeds, at least $350 million will be placed in a foundation to serve the health care needs of the people of Texas. As part of an agreement with the AG to let the merger move forward, BCBSIL has donated $6 million to help insure low-income Texas children.

Harris Methodist Health Plan in Fort Worth. In 1996, HMHP converted to a for-profit plan, but remained under control of its nonprofit parent, Harris Methodist Health Care System. After losing more than $300 million, the once largest health plan in North Texas sold in 2000 to PacifiCare, a California for-profit company, in what the local paper called a "distress sale." While the proceeds of that sale went to the health plan's nonprofit parent, Texas Health Resources (formed in 1997 by a merger of the Harris Methodist system and Dallas Presbyterian hospitals), they were significantly diminished, leaving fewer charitable dollars for the citizens of Fort Worth.

Hospital Conversions

In a marketplace rife with all variations of mergers, sales, and closures, many ask why Consumers Union focuses on "conversions" involving nonprofit to for-profit transactions. No matter what the transaction involves, changes in ownership can eventually lead to significant changes in available services in the area, including elimination of services altogether by closing. Consumers Union believes hospitals have a responsibility to the communities they serve and should ask for input when such changes are considered. Unfortunately, most see these transactions as merely a business deal, and the community rarely has an opportunity to voice concerns. However, when the transaction involves a charitable nonprofit entity and a non-charitable entity, the assets at stake have a special designation through long-standing *law* to remain in the public trust. Hence our focus on these transactions and the compelling reason for the state to protect these funds for the charity's community.

Gilmer Hospital in rural East Texas. A nonprofit hospital, built by a local doctor but transferred to Baylor University in 1982, sold to the for-profit HealthTrust hospital chain 11 years later. No charitable assets were left to the community. In 1995, Columbia/HCA bought HealthTrust, scaled back Gilmer services and, six month later, shut the hospital down. Gilmer residents had to travel at least 25 miles for hospital and emergency services. With each transaction the local community found itself further removed from the decision-making process. They tried to keep the hospital open through negotiations, town meetings and protests. Eventually, Columbia agreed to sell the building to the community, which turned it into a free-standing 24-hour emergency care center.

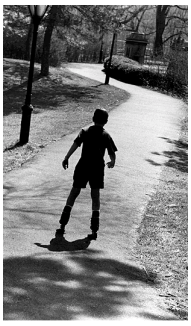
Providence Hospital in El Paso. Tenet Healthcare Corporation purchased the last nonprofit hospital in El Paso in 1995 for $130 million. These charitable assets were set aside in the Paso del Norte Health Foundation, which funds health education and prevention programs. The foundation board decision to move away from direct services was controversial in this community with a high poverty rate and strained public health care system. While most of the foundation's grants focus on prevention issues of critical importance to El Paso, some are only indirectly health related (e.g. $378,000 for bike paths). Tenet abandoned plans for a much-needed new clinic and scaled back plans to expand specialty pediatric services.

St. David's Hospital in Austin & Southwest Texas Methodist Hospital in San Antonio. Each of these nonprofit hospital systems formed a joint partnership with for-profit Columbia/HCA. In both ventures, the nonprofit and for-profit partners contributed equal amounts of assets (including property) to the venture. Columbia/HCA is the managing partner, all the hospitals in the "venture" systems are now run as for-profit hospitals, and the nonprofit partner holds half of the seats on the governing board. St. David's was valued at $160 million and Southwest at $268 million. As part of the Southwest transaction, Methodist Healthcare Ministries in San Antonio received $42 million, which it uses to fund health-related projects, and secured an agreement that the for-profit hospital system will do a specified amount of charity care. The St. David's Foundation received no assets. Both nonprofit partners share 50% of system profits with Columbia/HCA.

Angelo Community Hospital. Columbia/HCA bought this 165-bed nonprofit hospital in 1995 for $75 million. Angelo Community Health Foundation was created, governed by the old hospital board. The Foundation decided to use $50 million ($25 million paid off bond debt) to support general charitable projects not limited to health-related projects. While all grants are given to charities, a significant portion of them went to non-health related causes (such as a local art museum), thus diverting charitable *health* dollars to other purposes.

Northwest Texas Hospital in Amarillo. This tax-supported hospital was sold to Universal Health, a for-profit hospital chain, following competitive bidding that improved the ultimate sale price. A $121 million trust fund was established to serve community health care needs. When open government laws required this *public* hospital to involve the community - which included a nonbinding referendum, debate in the local media, and public forums - citizen pressure led to an improved indigent care agreement. Under a 25-year agreement, the cost of indigent care is shared between the for-profit and the trust fund.

Children's Health Insurance



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The simple CHIP application process accentuates the unfairness of out-dated Medicaid procedures. Parents must take time off of work to go to the TDHS office to apply. They must provide extensive documentation verifying income and assets, and their children cycle on and off insurance coverage due to fluctuations in their income.

In 1999, the Children's Health Insurance Program ("CHIP") was created for Texas children not qualifying for Medicaid but whose families had low incomes (see chart on back). Children eligible for Medicaid are not eligible for CHIP.

CHIP is publicly funded, with a 3-to-1 federal-state match. CHIP is family friendly, with mail or call in applications, simple verification of income with no questions about family assets, and an entire year of coverage for continuity of care. CHIP even includes an outreach program to inform parents of the availability of coverage for their children and help them apply. Everything about CHIP is arranged to encourage children to get insured.

In contrast, our Medicaid health insurance program, which serves the poorest and neediest children, remains mired in old policies. Even though Texas Medicaid has gradually changed to serve low-income children, it still operates as if it were only available to families receiving "welfare."

In Short

Very low-income working parents face onerous state-imposed barriers to insure their children through Medicaid. The Medicaid application process should be changed so it is as simple and family friendly as that of the CHIP program.

Only one-third of the children covered by Medicaid today receives TANF; the rest have one or more working parents. When AFDC was replaced with TANF, federal and state leaders separated Medicaid health insurance from TANF. They recognized that families returning to work needed help with their children's health care needs.

The onset of CHIP has accentuated the unfairness of out-dated Medicaid application policies. Parents must take time off of work to go to the TDHS office to apply. They have no say about the time of their appointment – it is set for them and if they cannot come at that time, their children will not be covered. They must do this twice a year. They must provide extensive documentation verifying income and assets.

And, their children cycle on and off of insurance coverage due to fluctuations in their income – if they find good work one month, their children lose health insurance coverage. Without continuous coverage, quality of care suffers.

It is no surprise that 600,000 of the 1.4 million uninsured Texas children who are income eligible for Medicaid are not enrolled. Over 98,000 CHIP applicants have been sent to TDHS to apply for Medicaid. More than 46,000 of them either could not keep the appointments assigned to them or provide the needed verification, or simply chose not to go through the bureaucratic process.

Recommendations

All of this bureaucratic red tape is imposed by the state of Texas and not required by the federal government. The legislature should remove these inequities that make the poorest children jump through the most hoops to get and keep health insurance.

The state should change the Medicaid program to:

- **Allow mail-in application and re-certification and adopt documentation policies identical to CHIP.** CHIP allows families to apply by phone or mail. No appointment or time off of work is necessary. Families wanting the help of a Medicaid caseworker should still be able to apply at TDHS offices. Thirty-eight states now allow mail-in applications for Medicaid children. Seven states do not even require proof of income, and many more have simplified documentation requirements.
- **Eliminate the "assets test."** Children in families with assets (e.g., savings accounts) worth more than $2000 are ineligible for Medicaid. After "failing" the Medicaid assets test these children can be considered for CHIP enrollment. Unfortunately, many parents give up in frustration and never find out if their children are CHIP eligible. Texas CHIP and 40 state Medicaid programs have no "assets test" for children.
- **Adopt 12 months continuous eligibility for children in Medicaid.** Once eligible, children would remain covered for the next year, regardless of their parents' income. The Texas CHIP program and 15 other state Medicaid programs have adopted continuous eligibility.
- **Fund and foster outreach efforts** to inform families about Medicaid and help them apply, just as in CHIP.

Funding and Administration

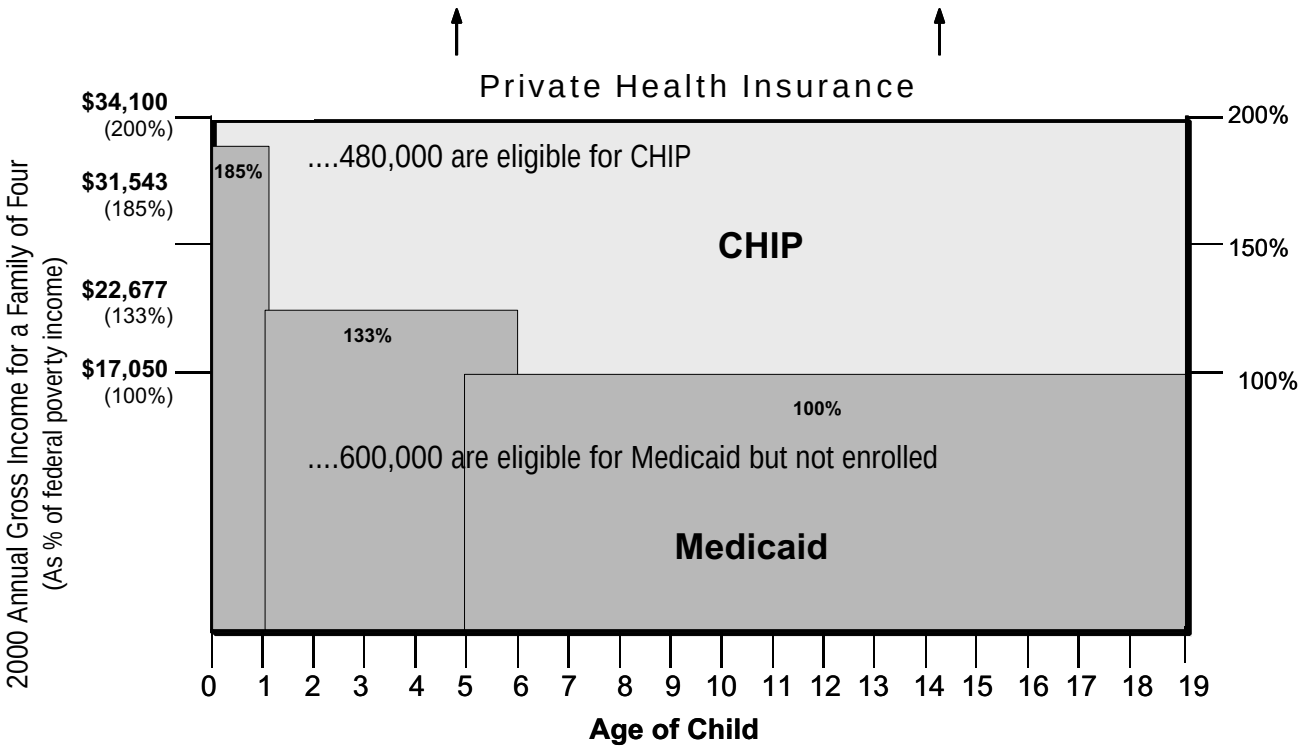
Cost and funding. The estimate of the cost of these proposals is still being debated and independent Texas research has been done to further identify the costs. But we do know that most other states have eliminated these barriers without a budget crisis.

We also know that when children are uninsured, the cost of their care is borne by local taxpayers, often placing the greatest burden on the poorest communities. We know the negative consequences when children fail to get the health care they need: delayed treatment can lead to much more expensive care needs; absences from school due to illness that lasts longer without access to a doctor cause loss of school funds; and parents lose time at work (businesses lose productivity) when their children do not get prompt attention for health problems. Some of the state's tobacco settlement funds are earmarked for CHIP and sufficient funds remain to address the glaring inequities between these two Texas children's health insurance programs.

State workers. No state workers should be eliminated due to simplifying the Medicaid application process. More families will be applying, requiring more casework. There is a current backlog in processing the applications of children referred to TDHS from CHIP. Both TDHS and the LBB estimate 50 less FTEs would be needed if the face to face appointment requirement were eliminated. However, the fiscal note for the bill creating CHIP projected a need for 35 new FTEs in the first year and up to 219 new FTEs in year three. No additional FTEs were added when CHIP passed. Instead, the budget *eliminated* over 600 TDHS employees.

Texas Children's Health Insurance Coverage

Medicaid's "stair step" eligibility system is based on income and age--some families have one child in Medicaid and another in CHIP. The complex eligibility matrix makes applying for Medicaid confusing enough; add the enrollment barriers and you get a bureaucratic nightmare.



- Some children from families in the Medicaid income categories may not be eligible for Medicaid due to a state imposed assets test ("countable" assets must be less than $2,000 per familiy). These children are eligible for CHIP.
- Coverage ends when birthday indicated on scale is reached.
- Texas Healthy Kids Corporation stopped enrolling children on 9/15/2000. Families are referred to the private health insurance market.

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Contact Lens Prescriptions

While most eye doctors will now release contact lens prescriptions, many attach conditions that make it more difficult for consumers to shop for a better deal on lenses elsewhere.

In June 1997, the 75th Texas Legislature passed "The Contact Lens Prescription Act" which gave consumers the right to their contact lens prescriptions. However, it also contained a number of loopholes that enable eye doctors to manipulate the law to protect their contact lens sales.

The Act requires an optometrist or ophthalmologist ("eye doctors") to provide a contact lens prescription to a patient requesting it. The eye doctor must provide the prescription when he or she "determines the parameters" of it. The legislation gave eye doctors the flexibility to determine a contact lens wearer's needs *based on the ocular health of individual patients*. For example, a new user might need to try new lenses for a week and return for a follow-up visit to be sure the new lenses were the proper fit or strength. An existing wearer making no changes in the lens type or prescription strength might need only an exam and verification that the current lenses are comfortable.

Some eye doctors, with the blessing of the Texas Optometry Board, have instead used the flexibility granted by statute to create procedures that apply to every patient - in particular the follow-up visit requirement. They require a second visit of all wearers, regardless of their medical history, and refuse to provide the contact lens prescription to those who do not return for the follow-up.

Under the statute, the patient can request the prescription at any time while it is valid (prescriptions cannot be written for *less than a year*) but if the prescription has already been filled by the eye doctor, some eye doctors refuse to provide it. Although the law specifically requires eye doctors to extend the prescription time upon request of a patient, it does not specify that this extension applies to patients who have already purchased a full one year supply of lenses. Because the prescription specifies the number of lenses, people losing or tearing a lens cannot replace it without another exam.

A "valid" prescription must be an "original" and picked up in person or mailed. A faxed or copied prescription is not "valid." This legal restriction bars most people from effectively shopping for contact lenses online or by phone because these providers cannot fill a faxed prescription.

Further the eye doctor is only required to provide the prescription once, according to Optometry Board interpretation. The statute actually says that an eye doctor must provide the prescription "at any time during which the prescription is valid," and does not limit the number of times eye doctors must give out an original prescription.

Finally the law allows eye doctors to refuse to release prescriptions if financial obligations have not been met, including pending insurance claims. Complaints filed with the Optometry Board demonstrate that some eye doctors hold the prescription hostage until all insurance payments are made, even if that process takes months.

In Short

Some eye doctors use loopholes in the Contact Lens Prescription Act to manipulate the law and protect their own sales. Mandatory followup visits, restrictions on faxed prescriptions, requirements that insurance claims be paid in full, and other technicalities limit real competition.

The Texas Contact Lens Prescription Act intended to give consumers the right to take possession of their contact lens prescription to buy lenses from the dispenser of their choice in a competitive marketplace. It has partially succeeded, but some eye doctors are attaching conditions to the release of prescriptions, which makes it harder for the patient to buy lenses from other vendors.

Recommendations

The Optometry Board should:

- adequately enforce existing law that prohibits optometrists from attaching blanket conditions to the release of contact lens prescriptions, such as requiring all patients to buy a first supply of lenses from them.
- change its follow-up visit rule to correspond to current law so it is conditioned on the individual patient's ocular health.

The Texas Legislature should amend the Contact Lens Prescription Act to:

- specify that prescriptions do not have to be "original," however, require confirmation from the prescribing eye doctor if the prescription is faxed or copied; require eye doctors to promptly respond to confirmation requests;
- prohibit an eye doctor from filling a prescription that he has refused to release, unless the refusal is based on the individual patient's ocular health as allowed by law;
- prohibit eye doctors from refusing to release a prescription based on a bill or portion of a bill that remains unpaid due to a pending or disputed insurance claim;
- remove the limitations on the number of contact lenses a person may buy on a prescription.

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Access to Complaint Information On Hospitals

The Texas Department of Health receives an average of 35 complaints against hospitals every day, yet information about the type of problems people report with respect to any one hospital is completely confidential under a law passed last session.

When Consumers Union asked the Texas Department of Health (TDH) for information about hospital complaints, we found that TDH receives on average 35 complaints against hospitals per day from across the state. Only 45 to 60 percent of the complaints logged against individual hospitals are investigated by TDH.

We asked for the complaint records on seven large hospitals in different areas of the state and found that the annual number of complaints against these hospitals ranged from 11 to 85. The nature of each complaint was explained using general categories.

But when we later asked to look at more detailed information about the complaints, TDH told us that a new law, which went into effect after our initial request, barred the release of any information other than aggregate statewide statistics. We were stunned to find that the number of complaints by hospital name were now considered confidential. According to TDH, even the person who makes the complaint cannot get information about the department's investigation of it.

In 1998, the Sunset Advisory Commission reviewed TDH. The Commission's staff report of findings and recommendations included a subsection on 'Public Access and Oversight' which identified the following issue: *"Consumer access to regulatory information allows the public to make informed decisions. In the area of health, access to complaint and enforcement information on professionals and facilities is critical for people to obtain quality health services."*

The report further emphasized this point: *"Making such information available to the public is an important part of the disciplinary process so that the public, and those subject to regulation, can stay informed of potential hazards within a profession or facility, as well as the performance of individual professionals and facilities."*

In 1999, Representative Patricia Gray passed HB 2824, basically an omnibus bill on the confidentiality of certain records and the subpoena power of agencies that license health and mental health professionals. The House committee added a section relating to hospital complaints and a House floor amendment changed that section to further restrict the public's access to hospital complaint information.

The new law makes confidential *"[a]ll information and materials obtained or compiled by the department [of health] in connection with a complaint and investigation concerning a hospital."* Hospital complaint information (with patient identities redacted) are no longer subject to the Texas Public Information Act.

The legislation represented an about-face from Sunset Commission recommendations concerning public access to complaints. While Sunset lauded the value of public oversight, the legislation absolutely prohibited TDH from even admitting that a complaint exists. Only one person signed up in favor of HB 2824: a representative of the Texas Hospital Association. Representative Gray said she never intended to close hospital complaint information from public view.

Recommendation

Amend Section 241.051(d) of the Health and Safety Code to allow for public access to hospital complaint information in accordance with the Texas Public Information Act.

In Short

Under current law, "all information and materials obtained or compiled by the department [of health] in connection with a complaint and investigation concerning a hospital" is confidential. Even the person who filed a complaint can get no information about the complaint and no statistics by hospital are released.

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Gas Utility Consumer Protection at the Railroad Commission

When consumers opened their gas bills this winter, many saw huge increases. High gas prices also affect the cost of electricity. Today, a number of electric utilities also own gas services, but regulation of the industry is split between two different state agencies. The PUC should regulate both electric and gas rates to better protect consumer interests.

Record high natural gas prices and home heating bills have put the regulation of gas utility service on the front burner for Texas consumers. The Railroad Commission, which will undergo Sunset review this legislative session, has responsibilities ranging from a limited role in setting gas utility rates to environmental protection relating to oil and gas wells.

There is a critical link between natural gas rates and electricity rates in this state. The 1999 passage the law to deregulate the electric industry in Texas was largely premised on the expectation that natural gas-fired generating plants would drive down the price of electricity. However, the recent rise in natural gas prices has evaporated the potential for savings. High gas prices have also affected consumers of both gas utility and electric utility service who have seen significant increases in their monthly energy bills.

Making the links between electric and gas even tighter, some large electric and gas utility companies have merged into single corporate entities, yet Texas remains the only state that does not have regulation of electric and gas service under a single agency. The two largest electric utilities in Texas, TXU and Reliant, own the gas distribution company in their own electric utility service territories as well as gas pipelines. Consumers in much of the state can expect to have their gas and electric bills combined, yet oversight for these services will be split between two agencies: the Railroad Commission and the Public Utility Commission The consolidation in the energy industry necessitates changes in this regulatory structure—including stronger oversight of affiliate relationships, because of the potential for cross-subsidies and unfair treatment of electric industry competitors by gas pipelines.

In Short

Electric and gas utility services are increasingly interdependent. It no longer makes sense to have separate regulatory schemes controlled by different state agencies. Instead, the Public Utility Commission should set rates for both electric and gas utility customers, with participation by OPUC.

Recommendations

At a minimum, the Railroad Commission and the Public Utility Commission should coordinate activities relating to electric and gas utilities in common ownership, including review of affiliate transactions and issues relating to access to natural gas pipelines by electric utility competitors.

However, the wholesale transfer of gas utilities regulation to the PUC is more efficient and, we believe, will result in more effective regulation and oversight of retail energy services.

Regulation of gas utilities is a "better fit" at the PUC. Regulation of gas utilities and direct contact with residential retail customers represent a small fraction of the Railroad Commission's programs, while the PUC has the day-to-day responsibility of assisting utility customers and overseeing the retail utility market.

In Addition:

- Require system-wide rate setting at the Commission, so rates do not differ for customers of the same gas utility depending on the city, or whether the customer lives in a city or unincorporated area.
- Allow the Office of Public Utility Counsel to participate in Railroad Commission cases and rulemakings representing residential consumers.
- Move agency hearings to the State Office of Administrative Hearings.
- Update the customer protection statute for gas utilities to provide a better, statewide level of basic protections.
- Adopt a program to assist lower income households with gas utility bills.
- Monitor market power in the natural gas ind/ustry, which can negatively affect the price and supply of electricity in the deregulated electricity market.

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Price spikes and rolling blackouts: Can it happen here?

Texans should not expect to be immune to the inherent risks of deregulating a service which is so essential to our health, safety and economy.

In California consumers protested after their electric bills tripled last summer. The state has suffered rolling blackouts and utilities have lost billions of dollars. The governor of California has called electricity deregulation a colossal disaster.

- Will Texas consumers see bills triple, blackouts and utilities seeking another multi-billion dollar bailout from lawmakers after the state's electric deregulation statute takes effect on January 1, 2002?

Probably not.

- Will deregulation fail to bring the promised savings and will utilities seek to increase prices to consumers in Texas?

Most likely.

Texans should not expect to be immune to the inherent risks of deregulating a service which is so essential to our health, safety and economy.

The phrase "deregulation of electricity" means two things—deregulation of the price of the generation component of electric rates and allowing competition in the retail marketing of electric service.

The situation in California is due to extraordinarily high prices in the wholesale market for electricity. In most parts of California consumers are protected by a "price cap" meant to provide a safe haven for them in the transition to a deregulated market.

The extraordinarily high wholesale prices mean that utilities lose money every time they sell electricity under a retail price cap. In San Diego, the price cap on consumers' rates was lifted and consumers felt the full effects of the high wholesale prices. Their electricity bills tripled in a matter of months.

What caused the high wholesale prices which appear to have triggered this disaster? And are the conditions the same in Texas?

Some say there is only one cause for the high wholesale prices in California—a shortage of electricity because no new power plants have been built for years. The answer is more complex and includes bad luck (a pipeline out of service which limited the supply of natural gas to run power plants, and an unusually hot summer and cold winter, increasing demand over expectations) and manipulation or "gaming" of the market aimed at increasing the wholesale price (there are several investigations now under way).

Others blame the price cap itself, saying the cap is contrary to deregulation and that the utilities would not have lost billions of dollars except they were forced to sell under a retail price cap. True. If the utilities had been able to directly pass on the high prices they would not have suffered. The consumers would have suffered instead, as they did in San Diego.

The Texas deregulation law contains several provisions which make it superior to the California law--but the utility companies here are clearly aware of the potential risk. They have already asked the PUC, during implementation proceedings, to raise the price cap to limit their risk of high wholesale prices.

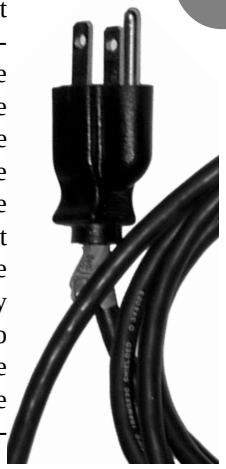
Texas is also vulnerable to the kinds of shortages, bad luck and unforeseen situations which have so exacerbated the situation in California. Many here confidently assume that our state's wholesale prices will remain low, as we are expected to have enough new power plants built in the next few years. However, there are critical questions about whether the state's transmission system and the supply of natural gas will be sufficient to serve those plants. Our wholesale market, although set up differently than California's, is not immune to manipulation. Several observers have said it appears that companies in the wholesale market in California, acting completely legally, "gamed" the market rules to jack up the price of electricity.

Finally, although California is the exemplar of problems with deregulation, it is not alone. Deregulated states in the northeast have been experiencing the same rise in electric bills, higher than expected wholesale prices, and requests by utilities to increase the price cap on consumer service. The steep rise in natural gas prices has only compounded the effect.

There are many lessons to be learned from the electric deregulation tsunami currently overtaking California. The most important is that consumers and businesses will not sit idly by and tolerate steep price increases in the electricity market. When high electricity prices hurt consumer pocketbooks and drain the bottom line for businesses, they turn to lawmakers to fix the problem—deregulation or not.

Texas should be proud of the consumer protections included in our deregulation law; but not so proud that we ignore reality. If the market in Texas is not ready, if the problems in other states continue, the PUC should delay implementation of our deregulation law. The state must also step in and take quick action if unforeseen problems occur once the market opens.

In Short



Our traffic lights, our emergency systems, our banks and ATMs, our homes and schools all require electricity. Rolling blackouts in California wrecked havoc and demonstrated that electricity is too important a public good to leave entirely to an unfettered free market.

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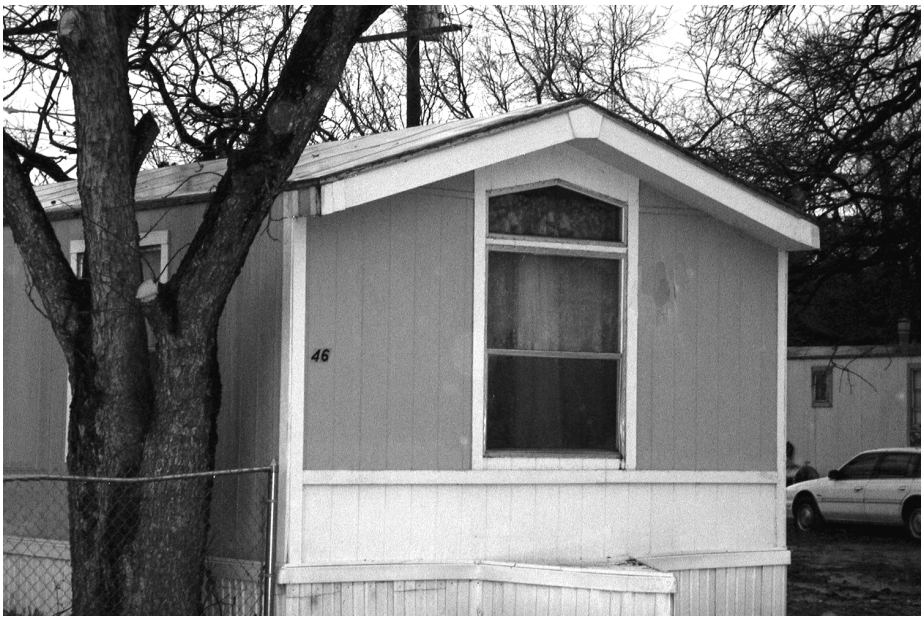
Manufactured Housing Rental Community Tenants Rights

Unlike apartment renters, people who own a manufactured home placed on a rented lot in a mobile home park have no tenant rights in Texas. Manufactured homes are expensive to move, giving landlords great leverage to increase rents and change rules.



Each year more than 65,000 Texans, including a good number of retirees, buy manufactured homes (also called mobile homes). And over a quarter million families in this state live in mobile homes on rented land. Although these families have tens of thousands of dollars invested in their homes, manufactured housing park residents live at the whim of park owners and operators.

In Short

Give families who buy a manufactured home and place it on a rented lot basic tenant's rights including a written lease that discloses the rent amount and rate of rent increases as well as requiring just cause for eviction and a specific notice period of the land is to be redeveloped and the family must move.

Texas has no law in place to govern manufactured home and mobile home park leases, and laws governing apartment dwellers do not apply when only the lot—as opposed to the entire residence—is leased.

Presently, park owners/operators are not required to offer a lease to a manufactured home park resident or show cause for eviction; they are free to impose virtually any rules or regulations they choose and are not required to notify residents of land use change or the sale or lease of land to another group. As our cities grow, land that was once of limited value and readily developed as a manufactured home park increases in value, and landlords have an incentive to sell out. When that happens, long time residents with limited means are displaced—sometimes with with limited notice and nowhere at all to go.

Residents of manufactured housing rental parks are not transient tenants. A majority of residents own their homes and consider them permanent residences, but they rent the lot where their home is located.

Manufactured homes are not mobile: they are delivered on wheels that are returned to the manufacturer or dealer. Moving a manufactured home is estimated to cost $3,000 to $5,000, which is a commanding expense to encounter unexpectedly.

A shortage of rental spaces, rules limiting installation of older homes in newer communities, and the general immobility of today's manufactured homes, gives park owner-operators extraordinary leverage to exact large increases in rents and other fees from their tenants. And they can legally require tenants to move with little notice and no assistance for the costs associated with hauling the home to a new location.

Recommendations

Legislation to enact a law governing manufactured home and mobile home park leases was introduced in the last legislative session with the support of Consumers Union, AARP, groups of manufactured home owners and others. The legislation has been introduced again this session. The law will benefit millions of Texans and should include:

- a renewable, written lease that discloses rent levels and the rate of rent increases;
- just cause for eviction;
- prohibition of unfair practices and unreasonable park rules;the law should require that all rules and regulations be reasonably related to the health, safety, and quiet enjoyment of the residents of the park;
- a requirement that the landlord maintain the park in a reasonable fashion; and
- adequate notice or relocation assistance in the event of park closure.

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Texas Department of Housing and Community Affairs

Plagued with controversy, the state's housing agency has not effectively spent its state and federal funds to ensure adequate housing for the state's low-income working families.

The lack of affordable housing is a growing problem in Texas. As real estate prices escalate and rents climb higher, many low-income Texans struggle to maintain a home while thousands wait for scarce public housing. Meanwhile, the state agency charged with assisting in the state's housing needs is plagued by scandal and poorly-managed programs.

There is a tremendous unmet need for housing that lower-income and working class families can afford; and by all accounts, the affordable housing needs of the state are growing rapidly. In no Texas city can a minimum wage earner, working a full-time job, afford a modest apartment (based on HUD definitions).

A very large portion of the existing stock of lower-income housing is at risk of being lost through expiring low-income housing use restrictions, federal restructuring of project operations, and private market forces.

Audits of the Texas Department of Housing and Community Affairs conducted by the State Auditors Office and the federal Department of Housing and Urban Development has found mismanagement, questions about whether funds are distributed fairly, and failure to develop a process to ensure that housing services are delivered to the areas of greatest need or priority. A TDHCA board member was recently convicted on federal bribery charges stemming from actions taken as a member.

- Over 650,000 households pay more than half their income for housing, or live in severely inadequate housing.
- Many of these people are elderly or disabled.
- A minimum wage worker must work 87 hours per week to pay for a modest two bedroom apartment.
- People who pay over half their income in rent are concentrated in all our major cities, and in the eastern, central, and southern parts of the state.

Recommendations

Consumers Union has joined with other consumer and housing advocates in recommending reforms to TDHCA. Only by changing the management and mindset of the agency will the state be able to provide housing assistance that adequately meets the needs of our citizens.

- Restructure the TDHCA governing body as a seven-member Board composed of public members with demonstrated interests in housing and community support services issues.
- Establish a functional governing body that values public input and allows Board members to develop the expertise necessary to make informed decisions about and ensure accountability of the Department and its programs.
- Implement a statewide needs assessment and associated fund allocation process that:
  - ensures the State's most pressing needs are identified and met,
  - incorporates input from local entities,
  - maximizes the objective of preserving the State's existing affordable housing stock,
  - ensures the State receives the best value for its resources, and
  - maximizes the State's objectives for its housing and community support services.
- Develop policies and procedures that clearly define the appropriate roles of the Board members and agency staff, including conflict of interest provisions and implementation of rules outlining a formal process to appeal Board decisions.
- Establish compliance procedures to actively ensure that the Department's programs actually provide fair access to low-income housing.

In Short

State auditors and HUD found mismanagement, questions about whether funds are distributed fairly, and failure to develop a process to ensure that housing services are delivered to the areas of greatest need or priority. TDHCA must develop a process to get resources to those who need it most.

Local Telephone Deregulation

Five years after passage of the Federal Telecommunications Act, the promise of competition in local phone markets is all talk and no savings. The bottom line on consumer bills is higher, not lower.

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As the fifth anniversary of the signing of the Federal Telecom Act (FTA) approaches, Texas consumers find the promise of competition in the local telephone market all talk, but no savings. Indeed the bottom line on local phone bills is higher, rather than lower, for consumers who use basic services.

These findings are striking, considering Texas is one of only two states to have its local phone market pass the federal "checklist" as being sufficiently open to competition.

A study conducted by Consumers Union Southwest Regional Office and a separate Public Utility Commission report submitted to the Legislature both come to the same conclusion: five years after the federal law, and nearly six years after passage of a state law to promote competition for local telephone service, there are few companies emerging as true competitors to incumbent Southwestern Bell Telephone (SWBT) and Verizon (formerly GTE) for residential service.

Local telephone books continue to list dozens of companies as "Local Service Alternatives." However, most of the companies surveyed by Consumers Union do not provide competitive basic service to the typical household.

Instead, they target high revenue users like business customers or select high-usage residential customers. Or they target low income people and those with credit problems, selling them very costly prepaid service.

Meanwhile those consumers who use only basic service and a few add-ons have seen new fees and surcharges added to their phone bills. In 1999 the Texas Legislature also granted the monopoly phone companies the flexibility to increase rates for many services without approval of regulators, as a "trade" for lowering the "access" fees charged to long distance companies.

Since then Southwestern Bell has raised prices several times for residential optional services, amounting to several dimes to several dollars each month, depending on the services used.

Meanwhile, those companies which only a year or so ago announced they would compete for the average residential customer are exiting the market. In December 2000, the Sprint Communications Company announced that it is discontinuing local telephone operations in Texas. AT&T and MCIWorldcom are cutting back on residential operations. Further, ChoiceCom and Westel, two new competitive local providers that entered the Texas local telephone market in the summer of 1998, have discontinued operations and restricted operations to Austin, respectively.

The only active and growing market is for prepaid local service. Anumber of companies have expanded the local residential market by providing service to customers whose phone service has been disconnected due to payment problems, customers with bad credit and those without social security numbers.

Consumers Union found that nearly three quarters of the companies providing residential service in six large Texas metropolitan areas provide services to customers in this segment only. By accepting customers rejected from the monopoly phone company, these companies are not actually competing on price.

Charge consumers more in order to increase competition?

While the PUC's report had similar findings, several of its recommendations favor competitors over consumers. Of most concern is the PUC's suggestion to lift the current price cap and raise local phone rates. Prices were "capped" to protect consumers during a transition to competition. It can't be denied that the higher the price, the more likely it is that another company will want to serve residential customers. The question is whether it is good public policy to increase prices to residential consumers in order to help new market entrants earn more money. We think that's a bad public policy.

Recommendations

- Maintain the price cap. Reconsider the deregulation of basic local phone service prior to the expiration of the price cap in 2005.
- Support initiatives to bridge the digital divide, including programs to provide advanced service in rural Texas and to lower-income households.
- Do not once again lower long distance "access" charges and permit phone companies to turn around and make up for it by raising prices on residential services or by adding or increasing surcharges on bills.

In Short

Some are recommending that Texas increase the basic cost of phone service to encourage new companies to enter the market. While we agree that higher prices will likely draw new companies, we do not believe it is good policy to increase residential consumer bills to help new entrants earn more money.

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Insurance Rate Deregulation

Homeowners insurance rates in this state have been virtually deregulated for many years due to a loophole in current law—and Texans pay among the highest rates in the nation. Now insurers want deregulated auto insurance rates, too.

For years the insurance industry has tried to get the Legislature to deregulate both auto and homeowners insurance. Because of a loophole in Texas law, rates for homeowners insurance have been mostly deregulated, and Texas has the highest rates in the nation. Now insurance companies are proposing to deregulate auto insurance rates.

Instead of implementing the insurers' proposal the Legislature should make sure there is adequate oversight of both auto and homeowners insurance policy forms and rates.

For the insurance market to work properly, consumers must make informed buying decisions and rates must be fair, since the purchase of insurance involves the purchase of a legal contract that promises to pay in the future under certain circumstances.

Rate Deregulation

A loophole in current rate regulations now allows two-thirds of the homeowners market to escape all rate control and oversight. In 1991, when the benchmark rating system was established, insurers argued that the "lloyds" companies should be exempt from rate regulation, since the companies wrote only a small portion of the coverage in Texas and they priced their policies below standard rates. They got their exemption.

Since then, insurance companies moved most policyholders into their lloyds affiliate. These lloyds companies now control more than two-thirds of the market, but the law does not even require lloyds companies to file their rates with the Texas Department of Insurance. According to the *Dallas Morning News*, Texas now has the highest homeowners' insurance rates in the nation, with insurance costs 47 percent higher than the U.S. average.

Similarly, about one-fourth of the auto market—"county mutual" insurance companies that sell high priced auto coverage—are not subject to rate oversight by TDI. County mutuals were originally authorized as specialized insurers for only the highest risk drivers, but recent studies demonstrate that minorities are more likely to end up in county mutuals, although they do not represent a higher accident risk. The structure of standard regulated rates already allows insurers to charge higher risk drivers a higher premium. There is no need for a separate non-rate-regulated market.

Insurance is a highly technical product based on a legal contract whose value can only be truly assessed by an actuary looking at years of historical loss experience. Without standardized coverage and meaningful rate regulation, consumers are largely at the mercy of insurance companies. When consumers start with standard policy language, they can effectively choose the level of coverage they need and can effectively choose among companies based on price and service.

While standard policy forms help consumers put pressure on prices, natural market forces alone cannot prevent insurers from reacting to every loss by quickly raising all rates. After hailstorms hit Tarrant county a few years ago, consumers insured by Lloyds companies saw drastic increases in their rates. Such increases could happen anywhere in Texas, since severe storms, tornadoes or hurricanes threaten most of our state.

Recommendations

- The Legislature should help Texas homeowners understand insurance policy forms by requiring that differences between the purchased form and the Texas standard form be laid out, in an easily understandable format on the face of the policy. The Office of Public Insurance Counsel should have a role in examining such policies and developing a standard disclosure.
- The Legislature should assure Texas consumers that homeowner and auto insurance rates are reasonable by bringing Lloyds and county mutual insurance into the benchmark rating system.

In Short

Today, more than two thirds of the homeowners insurance market is controlled by lloyds companies. These companies are not rate regulated and do not even file their rates with the Department of Insurance. About a quarter of the auto insurance market is in county mutuals, which are also not rate regulated.

Public Counsel Offices

The Office of Public Insurance Counsel and the Office of Public Utility Counsel ensure that individual consumers are adequately represented at the complex rate and rule hearings before public agencies that ultimately determine how much consumers pay for basic services like electricity and mandatory insurance coverages.

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The Office of Public Insurance Counsel

Insurance companies spend millions of dollars on lawyers and lobbyists to influence decisions made by the Texas Department of Insurance (TDI). While industry representatives are involved in virtually every administrative decision that affects them, insurance consumers cannot afford equal representation.

Fortunately, the Legislature created the Office of Public Insurance Counsel (OPIC) to put consumers on a more equal footing when insurance decisions are made. Funded by a small assessment on insurance policies, OPIC represents consumers in many rate and rule hearings.

- OPIC produces an annual Health Maintenance Organization report card to consumers based on a survey asking HMO members about the care they receive and the doctors and specialists in their plan.
- As an advocate for fair insurance rates, OPIC has saved consumers hundreds of millions of dollars in auto, homeowners and renters insurance costs. Its ability to hire experienced lawyers, actuaries, and other experts puts consumers on a more equal footing with insurance companies.
- Since its inception, OPIC has advocated for improved coverage under the standard homeowners and auto policies, and has intervened when TDI proposed rules affecting consumers.
- OPIC drafted a bill of rights for automobile and homeowners insurance consumers, and performed a comprehensive review of the underwriting criteria used by these companies in order to detect any discriminatory practices.

Recommendations

The office should be fully funded and have full authority to represent consumers on all regulatory issues that affect them. Having an agency with the authority and resources to fully research complex insurance issues and advocate on behalf of consumers ensures a more level playing field in decisions where consumers are outnumbered and outgunned.

The Office of Public Utility Counsel

The Office of Public Utility Counsel (OPUC) represents residential and small business consumers of telephone and electric services in hearings, rulemakings, and other policy matters before the Public Utility Commission. In 1999, the 76th Legislature passed a law deregulating electric service. OPUC represents residential consumers in the numerous and complex hearings now underway to implement that law, including the setting of stranded costs.

In Short

The Public Counsel offices advocates on behalf of consumers. Insurance companies and utilities send their own experts and hire lawyers to present their case for higher electric or insurance rates. Without the Public Counsel offices, ordinary consumers would not have any way to contest their claims.

The office must have adequate funding to assure consumers this representation will continue as many complex and potentially costly telephone and electric utility issues are debated before the PUC. Residential ratepayers—the largest class of customers for any utility—must be represented when decisions are made which affect their rates or service. This is particularly important since utility costs represent a major portion of a family's budget.

PUC commissioners must hear from representatives of all affected parties in order to make informed decisions. Therefore, OPUC's presence is vital to public policy-making.

As the telephone and electric industries undergo major change and competition begins to enter those markets, the role of the Office of Public Utility Counsel will continue to grow. Competition initially adds confusion to the marketplace and presents new opportunities for consumer abuse. Texans should be represented at the PUC when the rules for competition are written.

Texas was the 37th state to create a public utility advocate for consumers; several more states have added similar offices since that time. Conservative estimates by OPUC show that its participation in telephone and electric utility rate cases has saved Texas ratepayers well over $1 billion since 1985.

Recommendations

- Consumers Union supports continued funding for OPUC to assure residential and small business consumers are fully and aggressively represented before the Public Utility Commission. Consumers cannot be properly served by a public counsel on a shoestring budget.
- In addition, OPUC's role should be expanded to include representation of gas utility customers before the Railroad Commission.

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Reducing the Number of Uninsured Motorists

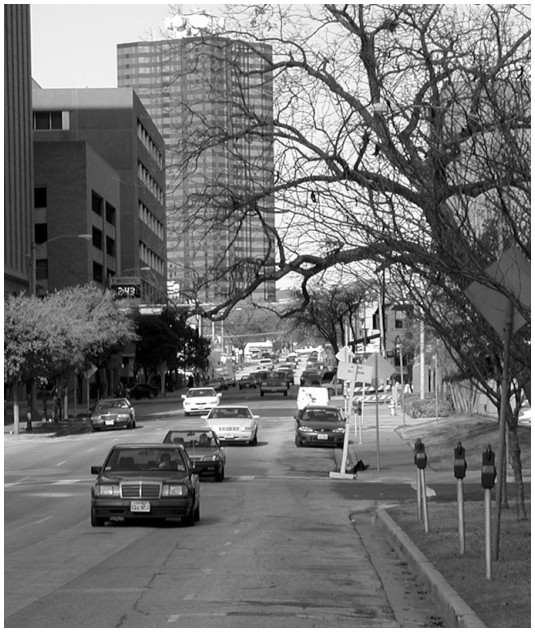
Many people are uninsured because they can't afford the high rates offered to them by county mutual insurance companies. County mutuals, once set up to cover "high risk" drivers, are often a dumping ground for low income and minority drivers. More people will buy insurance if a "good driver" program ensures they pay what their accident risk requires.

The Texas Department of Insurance estimates that 17 to 26 percent of Texas drivers do not carry mandatory liability insurance. But increasing penalties against uninsured motorists has had little effect on reducing the number of uninsured drivers—especially for those who are victims of unfair insurance discrimination, a problem often referred to as "redlining."

If the Legislature is serious about reducing the number of uninsured drivers, Texas must address unfair discrimination. Good drivers, especially those in low-income and high minority areas of the state, are often forced to buy coverage from high-cost, non-rate-regulated auto insurance companies. If these drivers paid the rates they deserve, far more would be able to purchase state-mandated liability insurance.

In an effort to address the uninsured motorist problem, various solutions have been proposed. One proposal would establish a statewide computer database to track the insurance status of every Texan. Another would prevent uninsured drivers from recovering certain damages in an accident even if the other driver was responsible for the accident.

Such a "no-pay, no-play system" would indeed punish an uninsured driver—and perhaps other innocent victims of an accident—and could have many other negative effects. For example, if an uninsured motorist were severely injured due to the irresponsibility of another driver, that motorist might have to rely on state assistance for damages if he or she was unable to recover in a lawsuit against the responsible party. And a statewide database to track every Texas driver's insurance coverage would be costly, cumbersome, extremely complicated,



and would run the risk of disclosing sensitive personal information.

Such proposals do not address one fundamental flaw in our current auto insurance system—that many drivers, especially those in low-income and high minority communities, are relegated to high-priced "county mutual" companies whose rates are not regulated. Year after year, studies show that consumers who live in lower-income or high-minority zip codes pay much more for basic auto insurance coverage through TAIPA (the state high-risk plan) or through county mutual companies which may charge several hundred percent more than standard rates.

No evidence exists that low-income or minority drivers are involved in more accidents than others. Yet, insurance companies use factors like a person's occupation, credit history (despite the fact that insurance is prepaid) or length of residency at the person's current address in their underwriting decisions. So motorists who are not professionals, who have a blemish (or an error) on their credit history, or those who have recently moved will likely have difficulty finding low-cost coverage even if they have been accident- and ticket-free for several years.

Recommendations

To reduce the number of uninsured motorists the Legislature should:

- establish a "good-driver program" in Texas that gives people with clean accident and ticket records the right to purchase insurance at the lowest price from the companies they choose;
- assure that TAIPA rates for good drivers are reasonable; and
- avoid measures that punish uninsured motorists without providing a reasonable method for victims of unfair discrimination to comply with Texas' minimum liability requirements.

In Short

Establish a "good driver program" in Texas that gives people with clean accident and ticket records the right to purchase insurance at the lowest prices from the companies they choose. Don't further punish uninsured motorist until fairly priced insurance is available to everyone who comes to buy it.

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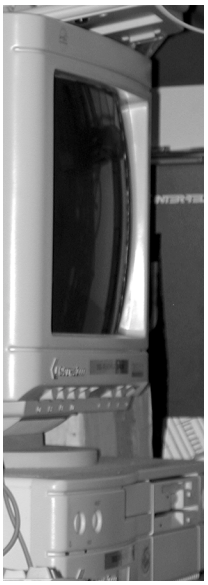
Electronic Transactions

Federal e-signature laws should be implemented at the state level with appropriate protections for consumers. But the Uniform Computer Information Transactions Act (UCITA) would replace existing standards for consumer warranties with a special law for software purchases. Consumers may be bound by a contract they don't see until after they buy the software, unwrap it, and install it on their computer.

Two major pieces of uniform legislation affecting the way we interact with business in the Internet age are making their way into legislatures across the nation.



The Uniform Electronic Transactions Act, or UETA, will permit electronic interaction between businesses and consumers, and implement the ability to have electronic signatures, pursuant to the federal "e-sign" legislation.

The Uniform Computer Information Transactions Act, or UCITA, dramatically changes the traditional rights consumers have when purchasing software and other information products. It replaces traditional contract, warranty and copyright law with the electronic contract a consumer receives when buying online, or the paper "shrink-wrap" warranty a consumer gets when buying a hard copy of an information product, such as software.

In Short

UCITA allows software publishers to sell software with no warranty, and if consumers sue over bad software, UCITA gives the software firm the power to select the state where the suit will be heard. Consumers agree to all of this after purchase, during installation, when they click past the licensing agreement.

Consumer groups generally support UETA across the nation. However, it is critical that the consumer protections adopted by Congress in its passage of the "e-sign" legislation be incorporated into state adoption of UETA. These basic protections ensure the transactions are fair to consumers; require that consumers have the ability to get paper copies of transactions; and ensure that consumers have truly given their consent and have the ability to conduct transactions electronically. UETA attempts to ensure electronic commerce is fair by applying existing rules about agreements between consumers and businesses in the electronic realm.

In sharp contrast, consumer groups, other public interest groups and many businesses across the nation oppose UCITA. UCITA replaces the existing standards for consumer warranties, protections in consumer contract law, and other laws with a standard written by the manufacturer in the agreement the consumer receives after purchase. This places individual consumers, businesses, libraries, and many others in the untenable position of having to accept the terms of software as it is delivered to them.

- UCITA allows software publishers to sell software "as is," meaning there is no warranty that it works right or that you can get your money back if it does not.
- When consumers are supposed to get notices from a software publisher or online service, UCITA considers the notice to be "received" by a consumer if the notice is only posted on a Web site.
- If the consumer wants to sue over bad software or over a bad online service, UCITA allows the software publisher or Internet service to name almost any state in the United States as the state where the consumer's law suit has to be brought.
- UCITA allows the consumer to be trapped into agreeing to all of this after buying the software or online service. Under UCITA these provisions may be placed in the boilerplate "fine print" that the consumer sees for the first time only after the consumer buys the software at the mall and takes it home (or downloads it), unwraps the box, puts the disk in the computer and starts loading the software for the first time.
- UCITA allows the software license to say that a magazine or newspaper cannot publish a review of the software without the publisher's permission unless and until the courts find such a provision to be unenforceable. This will prevent bad reviews of software from appearing in newspapers or magazines, making it harder for consumers to find out if software works right before buying it.

Recommendations

UETA
Assure that the federal e-sign protections are incorporated into UETA.

UCITA
Do not allow this flawed law to govern transactions in Texas.

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Sunset: Texas Natural Resources and Conservation Commission

Sunset Commission staff found that TNRCC is not adequately representing the general public interest in its policymaking, and recommended a stronger role for the Public Interest Counsel. Only with access to trained legal counsel and technical experts can citizens effectively participate in permit decisions.

In its recent review of the TNRCC, the Texas Sunset Advisory Com mission staff found that "The public's interest is not adequately supported in agency policymaking." To address this finding Sunset staff recommended strengthening the Public Interest Counsel (PIC), both by making it independent of the agency and by increasing the PIC's power and resources. Sunset Staff's findings and recommendations were nearly identical to those of the Texas Comptroller's 1993 performance review.

Unfortunately, while the Sunset Commissioners recognized the problem with agency support of the public interest, the Commission failed to adopt the most important staff recommendations to fix the problem.

The Public Counsel is currently employed by and answerable to the TNRCC Commissioners; therefore, a conflict of interest arises whenever he or she must argue a position contrary to the agency's. Exacerbating this personnel conflict of interest is the conflict inherent in the agency's mission. The TNRCC is charged with "protecting the State's human and natural resources consistent with sustainable economic development." The problem for public health and environmental protection is that the vast resources brought to bear on the agency to promote economic development far outweigh the resources devoted to protecting human health and the environment. The Sunset Staff and 1993 performance review recommendations seek to improve the balancing of interest by augmenting the PIC's ability to adequately represent the public interest.

Adequate public representation in agency proceedings is essential for consumers. It is even more compelling for historically disadvantaged communities, whether low-income or communities of color. Because critical environmental cases are handled in relatively complex, quasi-judicial settings, the need for public representation is increasing. Only with access to trained legal counsel and technical experts will citizens be able to effectively participate in agency decisions on permit applications that will have a direct effect on the health, environment, and property values of their community.

An independent PIC will also increase the TNRCC's impartiality as a decision-maker, enabling the agency to fairly review all information presented to it without itself exercising influence over the position advocated by any of the parties to the process.

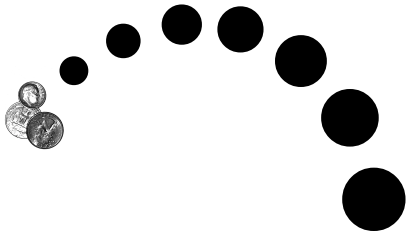
Recommendations

Consumers Union supports the Sunset Staff recommendation to make the TNRCC PIC resemble the independent public counsel's offices for utilities and insurance. At a minimum the TNRCC office of Public Interest Counsel should be stengthened by the following:

- having the PIC appointed by the governor with advise and consent of the Senate;
- specifying the Public Counsel also represent the public in agency rules and policies;
- authorizing the PIC to appeal agency decisions in court; and
- allocating additional technical resources for the PIC.

In Short

TNRCC issues permits to pollute after complex, quasi-judicial hearings that involve both legal and technical expertise. Citizens who attempt to protect the use and enjoyment of their property are at a strong disadvantage. An independent PIC will ensure that all aspects of a permit application are reviewed fairly.



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