TEXAS PUBLIC POLICY FOUNDATION
PolicyBrief

March 2011
Center for Economic Freedom

More Intervention in the Insurance Marketplace: SB 871

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Unprecedented product variety, choices in sellers, and consumer information has transformed the modern marketplace. Consumers are empowered to shop wisely and are protected from fraud through education and myriad choices. Consumer advocates, media scrutiny, government complaint resolution, and the civil and criminal justice systems are widely available to help consumers right wrongs.

On the other hand, too often when challenges arise for consumers, the first answer seems to be traditional "consumer protection" laws that dictate market behavior, reduce market efficiencies, curb consumer choice, and—ultimately—hurt consumers more than they help them.

One reason for this in the Texas insurance market is what the Texas Sunset Advisory Commission identified as "TDI's use of both pre- and post-market regulatory tools."[1] The 2008 Sunset Staff Report highlights the problem:

- In 2003, the Legislature established a system of rate regulation for homeowners' insurance that incorporated both pre-market and post-market regulatory tools.
- TDI uses statutory pre-market regulatory tools without defined practices, making aspects of rate regulation unpredictable.
- The processes for placing insurers under prior approval and releasing insurers from prior approval are not defined, creating uncertainty in the system.
- The Legislature cannot judge the success of the shift to file-and-use rate regulation because the system has not been fully implemented.[2]

While TDI has chosen to implement the law with a finger on the regulatory side of the scale, the main source of regulatory uncertainty in the homeowners' insurance market today stems from the poorly crafted statute in the Texas Insurance Code.

This uncertainty is clearly captured in the legal activity of the Texas Department of Insurance. As seen in **Table 1** (on back), some of the legal actions taken by TDI have been dismissed by the courts—often on summary judgment—as "void and unenforceable," "an interference of the freedom to contract," or "arbitrary and capricious."

SB 871 would require in most cases that companies seeking "judicial review of an order disapproving a rate" must either pay upfront the full amount of the amount of money in dispute or post a bond for the same amount. Under SB 871, companies would be forced to bear great expense in their appeals based on due process even if the courts eventually determine that TDI employed a "retrospective ad hoc analysis" whereby an insurer might never know the legal standard it was required to operate under.

This is the kind of regulatory climate that keeps capital from coming into Texas and leaves Texas consumers faced with higher prices and fewer choices. Texas consumers are better off when they can make their own decisions about the prices they pay for insurance—and everything else too. If they don't like the prices or products one company is offering, they can always go elsewhere. If, that is, the government will give them that option. ✭

See Table 1 on back

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Table 1: Selected Texas Department of Insurance Regulatory and Enforcement Actions

Year	TDI Action	Result
2003	State Farm filed its current rates with TDI on June 26, in compliance with SB 14. On August 18, TDI said the rates were "unreasonable" and ordered State Farm to reduce its rates by 12%. State Farm sought judicial review of the commissioner's determination in district court.	The court declared TDI's actions void and unenforceable, finding the statute unconstitutional and that TDI had denied State Farm due process by failing to follow the applicable contested case provisions of the Administrative Procedure Act (APA). This decision was affirmed by the Court of Appeals in May of 2008. *Geeslin v. State Farm Lloyds*, 255 S.W.3d 786.
2004	On December 6, the commissioner issued a rate supervision order, determining that State Farm "require[d] supervision because of [its] rating practices." State Farm sought judicial review of this arguing that the order was invalid because it was based on excessive rates, not rating practices.	On July 5, 2005 the trial court granted State Farm's motion for summary judgment, ending the dispute in favor of State Farm without needing a full trial. Neither party appealed the judgment. *State Farm v. Department of Insurance and Geeslin* - Cause No. GN500537, in the 201st Judicial District, District Court, Travis County, Austin, Texas.
2005	On October 5, TDI filed a lawsuit to force Allstate to extend its homeowners' coverage to payment for alternative living expenses in the wake of Hurricane Rita, even though Allstate claimed that the expenses were not covered under its policies. TDI alleged that the refusal to pay for the loss of use, even where there is no physical damage is an unfair claim settlement practice.	The court found that Allstate did not have to pay for displaced residents' alternative living expenses since those expenses were not covered in the policies. The court also found that TDI's effort was an unenforceable interference of the freedom to contract. TDI did not appeal the decision. *TDI v. Allstate* - Cause No. GN-503652, in the 200th Judicial District Court, Travis County, Austin, Texas.
2006	In May, State Farm filed rates that the commissioner determined to be excessive and unreasonable. The commissioner also revoked State Farm's right to file and use its rates without prior approval from TDI. State Farm sought judicial review and a declaration that the commissioner had no authority to issue the supervision order on the grounds stated.	On July 24, the Court of Appeals affirmed a district court's summary judgment for State Farm, stating that the commissioner had no authority to issue the order on the grounds that State Farm exercised its right to judicial review, that the commissioner violated State Farm's due process rights, that the order was not supported by substantial evidence, and that the commissioner's rate supervision was "arbitrary and capricious." *TDI v. State Farm* 260 S.W.3d 233.
2007	Allstate filed its rates and began to use them as instructed under the statute. TDI retroactively rejected Allstate's rate request and told Allstate to refund its policyholders for the difference plus interest. Allstate appealed to the Third Circuit Court of Appeals.	On April 17th, 2008, the Third Circuit Court of Appeals granted summary judgment in favor of Allstate, which had argued that because TDI's application of a retrospective ad hoc analysis through the "component" method meant that an insurer might never know the legal standards or proper components of a filing. *Geeslin v. Allstate* – Cause No. 03-08-00284-CV, in the 3rd Court of Appeals, Austin, Texas.
2008	TDI issued a rate supervision order revoking State Farm's ability to file and use its insurance rates without prior approval from TDI.	The Appeals Court found the rate supervision order was arbitrary and capricious and reversed TDI's rate supervision order. The court found that State Farm was allowed to charge its initial rates while its appeal of an order issued in rate review proceeding was pending. *TDI v. State Farm*, 260 S.W.3d 438 (Tex.App.-Austin) 2008.
2010	TDI tells State Farm that it will publish confidential rate information on its website after State Farm raises its rates by roughly 4%. State Farm sues to keep its confidential information off the website.	The court issued an injunction temporarily preventing TDI from posting the confidential information, pending outcome of the lawsuit.

[1] Sunset Advisory Commission Staff Report on the Texas Department of Insurance and the Office of Public Insurance Counsel, (May 2008), 9.
[2] Ibid.

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