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Department of Insurance Financial Institutions & Professional Registration

Rule Review

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Submitted by Consumers Council of Missouri

Under Governor Greitens, the state has launched an initiative to increase transparency in Missouri government. In accordance with this initiative, the Missouri Department of Insurance is, like many state Departments, conducting this hearing to consider input on its regulations. Consumers Council of Missouri is a consumer advocacy organization that has conducted annual review of health insurance rate increases in the state of Missouri in the absence of a formal rate review process for several years. Consumers Council of Missouri respectfully submits testimony to argue that the Department's regulation 20 CSR § 10-2.400, on the redaction of trade secrets, should be updated to reflect what is required by law. More specifically, the regulation should require insurance companies to provide justification for why the information they are redacting is a trade secret, and if insurers fail to provide such justification then their information should be considered an open record. The way the regulation is currently construed substantially burdens consumers who participate in the rate review process.

Missouri law empowers the Director with substantial discretion to make any record public on a case-by-case basis, unless specifically barred by law.[1] To do so, the Director must first notify the insurer of the possible release of the record and give the insurer ten days to respond.[2] The Director must then determine whether the insurer has adequately justified its claim of trade secret, and if she determines that it has not adequately supported its claim, the Director can release the documents to the public after notifying the company in writing. Under this process, the Director could make public information that insurers have designated as trade secret without substantial justification in as little as twenty days.[3]

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[1] 20 CSR § 10-2.400(8)(2008)
[2] *Id.*
[3] *Id.*

If an insurer wants to challenge the Director's determination, it may seek to have a court enjoin the release of the information in question.[4] The burden then rests on the insurer to demonstrate that such information deserves protection as a trade secret.[5]

Insurance companies routinely designate a substantial amount of information in their rate filings as confidential, while providing little if any justification for trade secret status. In particular, Missouri insurers have historically kept non-public such important components of rate filings as insurers' assumptions concerning trend, morbidity, administrative cost, and risk adjustment. In addition, in 2017 one insurer's filings were so heavily redacted that the actual proposed rates were not visible.

While Department regulation 20 CSR § 10-2.400(2)(k) allows insurers to redact protected trade secrets,[6] such information must be clearly designated as such, and the designation must be supported by evidence that the information meets the statutory definition of a trade secret.[7] Evidence of the purported trade secrets must be sufficiently specific to allow for the Department to make the determination of whether this meets the definition of a trade secret; a boilerplate claim of confidentiality will not suffice.[8] Moreover, as the party seeking to keep information non-public the insurer bears the burden of providing this evidence.[9]

The Missouri Uniform Trade Secrets Act broadly defines trade secret as information that may include "technical or nontechnical data, a formula, pattern, compilation, program, device, method, technique, or process."[10] However, to qualify as a trade secret, such information must derive economic value from its confidentiality.[11] In other words, a trade secret is information that is valuable only so long as it is not generally known by other people who could use it for their own economic advantage.

Courts have addressed this particular issue in several cases by delineating factors to be considered in determining whether information is protected trade secret. In *Am. Family Mut. Ins. Co. v. Mo. Dep't of Ins.*, the court identified the following factors that insurance companies must prove to show that their information is a trade secret: (1) the extent to which the information is known outside of the business; (2)

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[4] *Id*.
[5] *Id.*
[6] 20 CSR § 10-2.400(2)(2008)
[7] 20 CSR § 400-13.100(7)
[8] *Healthcare Services v, Copeland*, 198 S.W.3d 606, 611 (Mo. Banc 2006).
[9] *Am. Family Mut. Ins. Co. v. Mo. Dep't of Ins.*, 169 S.W.3d 905, 910 (Mo. App. W.D. 2005);
[10] Missouri Uniform Trade Secrets Act, RSMo § 417.453(4)
[11] RSMo § 417.453(4)(a)

the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended by the business in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.[12] Consequently, the Department must apply these factors in determining whether the insurer has provided sufficiently specific information to determine the existence of a trade secret.

Currently, the Department allows insurers to claim information as trade secret simply by designating it as such. That procedure does not meet the standards required by law. In *STIM, LLC v. Aecom Tech. Servs.*, the company claiming that certain information was trade secret justified its claim on the grounds that its "processes, procedures, methods, methodologies, associations, contacts, knowledge and/or information regarding business, economics and/or employment economic incentives available from governmental entities" are trade secrets. *STIM, LLC v. Aecom Tech. Servs.*, No. 15-0772-CV-W-ODS, 2016 U.S. Dist. LEXIS 44333 *12-*13 (W.D. Mo. Apr. 1, 2016). The court reasoned that such justification was insufficient to establish trade secret status since it was conclusory. *Id.* Here, insurance companies are providing even *less* information--by merely labeling information as trade secret without providing *any* justification--than the company whose trade secret claim was rejected in the *STIM* case.

In *Conseco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 818-820 (8th Cir. 2004), on the other hand, the court determined that customer files contained within lead sheets were trade secrets because the companies made a proper showing that the information derived economic benefit from the information and that they took reasonable steps to ensure the secrecy of the files. *Id.* In contrast, the Department accepts redactions from insurers without requiring *any* showing that the redacted information is, indeed, a trade secret.

This process fails to satisfy the requirements established by Department regulation or case law. Under such regulation and case law as described above, insurers must establish that they derive economic benefit from the designated trade secret information and specify the steps they are taking to ensure the secrecy of the files for them to claim protection of the information.

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[12] *Am. Family Mut. Ins. Co. v. Mo. Dep't of Ins.*, 169 S.W.3d 905, 909-10 (Mo. App. W.D. 2005); *See* Restatment (First) of Torts § 757.

Notably, Missouri case law makes clear that agencies should err on the side of disclosure, rather than secrecy, in construing the Sunshine Law. For example, in *Guyer v. City of Kirkwood* the court explained:

> (W)here more than one provision of chapter 610 applies to a record, the decision to open or close the record must be informed by the express public policy stated in section 610.011.1, which is that all records of public governmental bodies are presumed to be open records and that the exceptions in sections 610.010 to 610.028, including those in section 610.021, are to be strictly construed to promote that policy. In effect, section 610.011.1 should be used as a tiebreaker in favor of disclosure when records fit equally well under two specific but opposite provisions of the Sunshine Law."[13]

This language suggests that, if records appear to fall under conflicting provisions of the Sunshine Law, an agency such as the Department must presume records to be open and must act in favor of disclosure until such records are shown to be exempt. Exemption for trade secrets is allowed (and not mandated[14]) only when information meets the statutory definition provided in the Missouri Uniform Trade Secrets Act.

The Department has suggested that, to protect issuers' allegedly sensitive data from market competitors, unredacted filings will not be made public. However, in order for the release of rate filing data to have any possibility of harming the filer, it is necessary for other insurers to be able to analyze the data and assumptions and then alter their submitted rate filings based on that data. This is simply not possible as once insurers submit their rate filings they are generally locked in. Further, because Missouri rates are being publicly released at such a late date this year, insurance companies will have even less time to utilize this data, making the data of little value to competitors.

Insurers have produced no evidence suggesting that individual carriers or markets have been adversely affected by disclosures in states that release unredacted rate filings. To the contrary, those states with the most successful exchanges, including California, Colorado, New York, and D.C., are states that release unredacted rate filings.[15]

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[13] *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. 2001).

[14] *Chasnoff v. Bd. of Police Comm'rs*, 334 S.W.3d 147, 151 (Mo. Ct. App. 2011): "Section 610.021 is "permissive," because it describes records that *may* be closed. *Guyer v. City of Kirkwood,* 38 S.W.3d 412, 414 (Mo. banc 2001). Nothing in section 610.021 mandates the closure of records. To the contrary, section 610.022.4 provides:

> 4. Nothing in sections 610.010 to 610.028 shall be construed as to require a public governmental body to hold a closed meeting, record or vote to discuss or act upon any matter."

[15] Cal. Ins. Code §10181.7; Cal Health & Safety Code § 1385.07 ("[A]ll information submitted under this article shall be made publicly available by the department except [contracted rates between a health insurer and provider]....The information shall include...justifications for any unreasonable rate increases, including all

By heavily redacting data and assumptions on which the insurance companies' proposed rates are based, insurers make it difficult if not impossible for third parties to analyze rates and meaningfully comment on them. That is particularly the case this year, due to the unprecedentedly late date by which rate filings must be submitted. The Department should therefore publish unredacted rate filings as soon as reasonably practicable after such filings are submitted.

Lastly, in counties where there is only one insurer present, releasing unredacted rate filings cannot possibly cause competitive harm: information cannot be utilized by a competitor when there is no competitor to make use of the information. As a result, the information in the rate filings is not a trade secret.

We are grateful to the Department for the opportunity to weigh in on regulations, and respectfully suggest the department alter 20 CSR § 10-2.400 to be consistent with the Sunshine Law and Missouri case law. In short, the regulation should require insurance companies to provide justification for why the information they are redacting is a trade secret, and if insurers fail to provide justification that their information will be considered an open record.

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information and supporting documentation as to why the rate increase is justified."); 3 CCR 702-4-2-11 ("All rate filings submitted shall be considered public and shall be open to public inspection, unless the information may be considered confidential pursuant to § 24-72-204, C.R.S. The Division does not consider such items as rates, rating factors, rate histories, or side-by-side comparisons of rates or retention components to be confidential. The entire filing, including the actuarial memorandum, cannot be held as confidential."); D.C. Code Ann. § 31-3311.07 ("The Commissioner shall, as soon as practicable, make all rate filings, including all supporting documentation, amended filings, and reports filed pursuant to this chapter, available for public inspection either at the Department of Insurance, Securities, and Banking or on its website."); 24-A M.R.S. § 2736 ("A filing and all supporting information, except for protected health information required to be kept confidential by state or federal statute and descriptions of the amount and terms or conditions or reimbursement in a contract between an insurer and a 3rd party, are public records . . . and become part of the official record of any hearing.").