

NAIC/NCOIL Activity

The National Association of Insurance Commissioners (NAIC) and the National Council of Insurance Legislators (NCOIL) convened their respective fall national meetings in December. Outside of a few key issues, NAIC's fall meeting was streamlined and committees and task forces largely focused on preparing for 2021. NCOIL, on the other hand, allotted time to do a deep dive on a handful of subjects.

Highlights of the meetings include:

- NAIC approved the anti-rebating revisions to the Unfair Trade Practices Model Act ([link](#)). The Council has been closely involved in helping to craft the revisions since the inception of this project and is very supportive of the overall endeavor. There are several helpful clarifications and modernizations in the revisions with respect to value-add services.
- The Lender-Placed Insurance Working Group advanced its draft Model on Real Property Lender-Placed Insurance ([link](#)) to the full Property/Casualty (C) Committee. The (C) Committee voted in favor of the Model without any real discussion. The Council has been working with other insurance trade groups to advocate for passage of this Model as proposed by the Working Group.
- The Surplus Lines Task Force requested and was granted authority to update that Non-Admitted Insurance Model Act (Model 870: [link](#)) to reflect and comport with the Nonadmitted and Reinsurance Reform Act (NRA).
- U.S. Congresswoman Carolyn Maloney (D-NY) spoke to NCOIL about her Pandemic Risk Insurance Program (PRIA) proposal and opined that there is "real opportunity" to pass a bill in the first 100 days of the Biden Administration. She dismissed arguments that the private market cannot or should not play a role in pandemic risk insurance, pointing to several industry proposals that demonstrate "broad consensus" that the risk is at least in part insurable by private carriers (e.g., Chubb, Zurich, and policyholders' coalition). She said she will continue to work with stakeholders on a solution that works for everyone, and said the next step for her legislation is a mark-up.
- NAIC will continue its look at race and diversity issues in 2021 through its Special (EX) Committee on Race and Insurance. Similarly, NCOIL convened a special session to discuss the impact of race on insurance underwriting. The NCOIL Committee is currently considering proposed amendments to NCOIL's Property/Casualty Modernization Model to define proxy discrimination. NCOIL is accepting comments on its [staff draft of language](#) and will continue these discussions at its spring meeting.

Rebating Reform

On December 4, the Innovation and Technology (EX) Task Force met for a final discussion of their suggested edits to the Unfair Trade Practices Model Act's anti-rebating provisions. Superintendent Dwyer (RI) led the discussion and confirmed that the objectives of the revisions are to:

- Address the “state patchwork” of approaches to anti-rebating laws and regulations, and to promote greater uniformity;
- Preserve opportunities to innovate;
- Allow for provision of value-add services; and
- Continue to protect solvency.

The Task Force voted unanimously, with very little discussion, to advance their draft to the Executive (EX) Committee. On December 9, the Executive (EX) Committee unanimously approved the rebating revisions without discussion. The Executive (EX) Committee and Plenary subsequently met and approved the revisions as part of the Task Force’s report.

Overall, the revisions will – we think – help to rationalize and unify states’ approach to permitted value-add services provided in connection with insurance purchases.

COVID-19 Issues

Business Interruption & Pandemic Insurance Coverage

This topic continues to receive a lot of attention from both the NAIC and NCOIL. First, the NAIC’s Center for Insurance Policy and Research (CIPR) hosted multiple sessions on solutions for future pandemic risk insurance. CIPR reported that 230 insurance groups, including the top 50 commercial carriers, responded to the NAIC’s data call on business interruption coverage for COVID and other viruses/pandemics. The big take-away from the data call was that insurers are not currently – and generally are unwilling in the future to – write pandemic coverage as part of business interruption coverage. A CIPR survey of academics and insurance experts revealed that the vast majority of respondents do not think pandemic coverage can be efficiently supplied by the private market, but about 70% think a public-private partnership model could work (but with notable questions about what the private market incentive/gain would be to participate). In conjunction with the meeting, the NAIC/CIPR Research Library has compiled a [summary](#) of recent academic articles, news coverage, and state communications about the limitations of business interruption insurance during the COVID-19 pandemic.

Other topline stats coming out of the data call include:

- About 83% of post-SARS business interruption policies exclude “virus” coverage, and about 98% of policies have a “physical loss” requirement that could bar COVID-type claims.
- Roughly \$28B has been paid out globally on business interruption policies that do not have the applicable exclusions/limitations.
- There currently are about 1250 court filings on business interruption coverage claims.

Regulators then heard a presentation on three existing federal models to consider for a public-private partnership approach: TRIA, the NFIP, and the federal crop insurance program. Presenters urged policymakers to draw from these programs’ respective positive or negative performance with respect to:

- Take-up rates (and by whom?);
- Alignment – or lack thereof – of public and private interests;
- Funding mechanisms and program solvency;
- Sufficiency of coverage for insureds; and
- Program design elements (e.g., coverage limits, triggers, etc.).

Additionally, regulators heard from stakeholders, including staff for Rep. Carolyn Maloney (NY-12) and carriers, on the various proposals to address business interruption for a pandemic. Like earlier discussions, the panel focused on:

- Coverage requirements;
- Funding mechanisms and program solvency;
- Sufficiency of coverage for insureds; and
- Program design elements (e.g., coverage limits, triggers, etc.).

NCOIL continued its discussion of pandemic insurance proposals from its Summer meeting, this time hearing from Zurich and U.S. Congresswoman Carolyn Maloney (D-NY). Zurich gave a basic overview of its “concept,” which builds on features from the federal crop insurance program.

Rep. Maloney reported that she thinks there is a “real opportunity” to pass a bill in the first 100 days of the Biden Administration and the next step for her PRIA proposal is a mark-up. She emphasized her ongoing work with different stakeholders to come up with a solution that works for everyone. She also stated that a public-private partnership is “absolutely doable” and dismissed claims by some in the insurance industry that the private market cannot or should not take on any risk in this space (pointing to Chubb, Zurich, and the policyholders’ coalition proposals).

Business Liability Protections from COVID Lawsuits

NCOIL introduced its own COVID Limited Immunity Model Law, which provides businesses with blanket civil liability immunity for injuries or damages resulting from COVID exposure, except in cases of intentional torts or “willful or reckless” misconduct. The Model specifically carves out workers’ compensation laws. Sponsors of the Model introduced it for discussion purposes, but noted that it may be moot with pending federal action and/or expected action by several state legislatures early in 2021.

NAMIC spoke in support of the model, but suggested expanding it to include “take home liability”, e.g., covering third-party exposure if an exposed individual then exposes others, and “direct or indirect” exposure to COVID. The Big I and PIA also spoke in support and suggested this issue is better handled at the state, not federal, level.

Other speakers spoke against the Model as unnecessary (given the relatively low incidence to date of litigation and the difficulty with proving causation in these lawsuits), overly broad, and counterproductive to reopening the economy (suggesting that consumers will not patronize businesses and employees will not go back to work if you tell them they are on their own for COVID liability).

Potential Extension of COVID Insurance Reforms and Modernizations

The Innovation and Technology (EX) Task Force plans to begin 2021 working on a bulletin to highlight COVID-related modifications and modernizations that have been made to various states' insurance laws and regulations, which states may wish to carry forward on a permanent basis. To date, the Task Force has heard consistent support from industry stakeholders for carrying over:

- E-signature allowances for various applications and filings;
- Digital filings and remote participation in department of insurance events and requirements; and
- Remote/digital claims facilitation.

With respect to the last category, the Task Force acknowledged that there may need to be differentiation between the P/C and health spaces, due to some federal law constraints.

Healthcare

Discussions on 2021 Federal Outlook for Healthcare Legislation and Regulation: STLDI, ICHRAs, Federal/State Surprise Billing Actions, Etc.

The NAIC's Health Insurance and Managed Care (B) Committee heard a panel presentation on anticipated federal legislative and regulatory actions under the Biden Administration related to healthcare. Legislatively, there was general consensus among presenters that we should expect to see action on:

- Surprise billing (if not resolved this year);
- Prescription drug reform;
- Telehealth; and
- Specific COVID-related relief.

Second-tier legislative issues (with perhaps less bipartisan support and/or momentum) included: increasing ACA subsidies; utilizing 1332 waivers for more robust reinsurance regimes; network adequacy (particularly with respect to mental health); short-term limited duration insurance (STLDI); and public option discussions.

With respect to regulatory activity, the top-tier prospects identified by the panelists were:

- STLDI;
- Association Health Plans (AHPs);
- Restoring the ACA's 1557 nondiscrimination provisions;
- Abortion issues;
- Use of HRA dollars for healthcare sharing ministries;
- 1332 waiver guidance, including more Exchange flexibility; and
- Medicaid work requirements.

NCOIL heard a similar presentation during its general health session. Those presenters also flagged for potential early regulatory action:

- Telehealth;
- Long-term care regulations;
- Restoration of funding for ACA Navigators and individual market enrollment efforts; and
- Healthcare sharing ministries.

NCOIL also had some discussion of the future of individual coverage HRAs (ICHRAs) in the Biden Administration and in light of COVID. One panelist noted that one post-COVID argument in favor of ICHRAs is that individuals purchase coverage that they can keep, even if they are separated from their employers. More generally, ICHRAs seem to give individuals more control over selecting their networks, benefits, etc. – rather than getting stuck with a one-size-fits-all employer plan.

An NCOIL panelist also urged states to act on surprise billing. Because states regulate the providers, they can prohibit surprised billing by putting the restrictions on them (i.e., you may not send a balance bill), and avoid any ERISA preemption/plan regulation concerns.

PBM Regulation

The NAIC's (B) Committee heard an overview from the PBM Subgroup on its work to create a PBM Model Act, which would require PBMs to be licensed and adhere to certain gag clause restrictions, among other things. The draft PBM Model was recently advanced by the Subgroup to the Regulatory Framework Task Force. Interestingly, that occurred just before the U.S. Supreme Court published its decision in *Rutledge v. PCMA* regarding the scope of ERISA preemption over state regulation of PBMs (a case that caused the Subgroup to draft a very narrow, focused PBM Model, rather than one regulating a wide variety of PBM business practices). It will be interesting to see, in light of that decision, whether the Task Force makes substantive revisions to, or broadens the scope of, the draft PBM Model.

Market Conduct Data Collection for STLDI

There was an effort this year by consumer groups to get the NAIC Market Regulation (D) Committee to collect "transaction-level data" (i.e., more granular data) for travel insurance and STLDI. The Working Group considering the proposal ultimately determined that resource and IT constraints were too great to begin add this type of data reporting and collection to the normal MCAS reporting (but blanks will be added to standard MCAS reporting for travel and STLDI).

During an NAIC-NCOIL dialogue, however, the suggestion was made that STLDI could serve as a "pilot project" for this type of more robust data collection in the future. The NAIC's (D) Committee has left this issue open for future consideration.

NCOIL Telemedicine Model

NCOIL's Health and Long-Term Care Committee continued its discussion of its draft Telemedicine Model Act and heard comments from AHIP, AMA, and a consumer group. The draft has not been updated since August (before the NCOIL Summer meeting) and they are still taking stakeholder comments on the model. They are aiming to have a "final" model to present for a vote in July.

Main themes of the discussion included:

- Whether there should be a "payment parity" requirement for in-office visits and virtual visits;
- How expanding virtual care could narrow the healthcare access gap, *IF* all populations have appropriate technology, Internet/broadband access, and technological know-how to take advantage of virtual care opportunities; and
- Other barriers to broad adoption of virtual care options, e.g., distrust among patients of diagnoses and personalized care delivered in a virtual setting, privacy concerns, language barriers, etc.

AHIP generally continued to oppose any mandates (i.e., telehealth mandates) and advocate for carrier flexibility in benefit design, and also opposes any payment parity requirements. AMA advocated once again for payment parity.

Legislators remain very focused on the payment parity issue; specifically: whether such parity would diminish cost saving opportunities; how consumers can share in any cost savings with virtual care; concerns about "double charging" if a virtual visit is covered at full freight, but then the patient has to come in for an in-person follow-up and that is charged the full costs as well; and whether it makes sense to have parity for some, but not all, specialties. Ultimately, the group seemed to agree that they would like to see more "settling out" and data on virtual care costs, utilization, and best practices coming out of the COVID experience before they make any long-term policy.

Other legislator questions and comments involved competition concerns for providers if out-of-state providers are allowed to offer virtual care and circumvent the state-based licensure system. Also, a comment was made that some COVID-related telehealth expansion really is meant to be "compromise care" and there should not be an assumption that those policies are the best long-term.

NCOIL Air Ambulance Patient Protection Model

Legislators introduced this new air ambulance model during the meeting, which would regulate air ambulance subscription/membership programs as insurance products. Sponsors said the purpose of the model is to address concerns related to:

- Patients not needing these programs because they may already have coverage through Medicare or a private health plan;
- Geographic and other restrictions that make it so some subscribers can never actually use the service;

- Misleading marketing tactics that overstate the need for these programs (particularly targeting elderly people); and
- Lack of rate review for these programs.

Discussion of the new proposal also raised issues around balance billing for air ambulances, U.S. Department of Transportation regulation of program providers with respect to abusive practices, and the potential need for more standardized disclosures and rates for these programs.

Property/Casualty

The Lender-Placed Insurance Working Group presented its draft Real Property LPI Model Act to the full (C) Committee and the Model was adopted, without discussion or questions from regulators, by voice vote (with CA abstaining). The Council supports the Working Group's draft Model and has been working with other industry groups to promote its passage.

The Transparency and Readability of Consumer Information Working Group requested and was granted a new 2021 charge to work on a "best practices" guide for consumer disclosures regarding reasons for significant premium increases in P/C products.

As noted above, the Surplus Lines Task Force requested and was granted authority to update that Non-Admitted Insurance Model Act (Model 870: [link](#)) to reflect and comport with the Nonadmitted and Reinsurance Reform Act (NRRA).

Producer Licensing

The Producer Licensing Task force presented to the full Market Regulation and Consumer Affairs (D) Committee its proposed priorities for the remainder of 2020 and 2021. Next year, the Task Force will be focused on increasing uniformity across states for adjuster licensing and reciprocity issues in general. More immediately, they will be seeking signatures from the 15 remaining states that have not signed the most recent version of the continuing education reciprocity agreement.

NCOIL's Financial Services & Multi-Lines Issues Committee heard presentations from industry on ways that COVID-19 pushed insurance to innovate. With regard to producer licensing, the Big I noted that the framework for credentialing underwent significant stress during the pandemic but states responded quickly and successfully. ACLI urged regulators to monitor the new online producer licensing processes.

Race and Diversity

In advance of the NAIC fall meeting, the health subcommittee (workstream five) of the Special (EX) Committee on Race and Insurance held a meeting to look at race and diversity issues in healthcare. Panelists highlighted the importance of having diverse healthcare professionals in the network – and disclosing that diversity – so that patients feel comfortable seeking treatment. As noted above, NAIC reaffirmed its commitment to examine race and diversity in insurance throughout 2021.

NCOIL convened a special session to discuss race and insurance underwriting. The Committee is currently considering proposed amendments to NCOIL's Property/Casualty Modernization Model to define proxy discrimination. NCOIL is accepting comments on its [staff draft of language](#) and continue these discussions at its spring meeting. During the meeting, the Committee heard a variety of presentations addressing concerns with underwriting issues, including how race and other factors impact actuarial outcomes.

Reinsurance (U.S.-EU Covered Agreement)

During the NCOIL-NAIC dialogue, they heard an update on state adoption of the amended Credit for Reinsurance Model Act/Model Regulation, which implements the requirements of the U.S.-EU covered agreement. So far, 16 states have adopted the revised Model Act and 14 states have it under active consideration (expecting movement in the next session).

The deadline for federal preemption under the covered agreement if a state has not acted to comply is September 1, 2022. Beginning in February 2021, FIO will start studying non-compliant states. Presenters reported that the EU and FIO are both unlikely to extend the preemption deadlines.

Meetings covered during which no relevant substantive issues or discussion arose:

- NAIC Life Insurance and Annuities (A) Committee (no discussion; a whopping 15 minutes WITH roll call!)
- NAIC Long-term Care Insurance (EX) Task Force (referred Reduced Benefit Options (RBO) principles and consumer notices principles to the Long-Term Care Insurance Multistate Rate Review (EX) Subgroup to incorporate into their development of an LTCI multistate rate review framework)
- NAIC International Insurance Relations (G) Committee (heard update reports on IAIS and other international activities; no relevant substantive discussion)
- NAIC Long-Term Care Insurance (EX) Task Force
- NAIC Climate and Resiliency (EX) Task Force (heard information on the Sustainable Insurance Forum; no relevant substantive discussion)
- Workers' Compensation Insurance Committee (heard a presentation on experience rating and Florida's state law; no relevant substantive discussion)
- NCOIL Innovation Series (heard information on medical cannabis, but did not discuss other legalization efforts).