

NAIC/NCOIL Activity

Overview

Understandably, 2020 was a slow year for NAIC and NCOIL – with the obvious exception of COVID-19 matters. Many Working Groups, Task Forces, and Committees delayed projects and meeting altogether. Although there still are discussions on COVID-19 topics (e.g., continued interest by legislators in the UK Supreme Court's recent decision on business interruption insurance that was a complete win for policyholders), the recent Spring meetings of both groups generally focused on getting regular work streams back up and running.

One topic that has been active over the last year, however, is race and diversity, equity, and inclusion (DE&I) in insurance. The organizations have taken different approaches to examining and addressing race in insurance (both discussed in more detail below). For example, NCOIL has focused its efforts exclusively on race in underwriting. NAIC, while focused to some extent on underwriting, has undertaken a more wholistic examination of these issues and has divided work into five workstreams to better focus their efforts. Both groups have devoted significant amounts of time and attention to these conversations and, at least for NAIC, this is just the beginning of the work.

Otherwise, states again find themselves reacting to significant federal developments and scrambling to put implementation measures in place, especially in the health insurance world.

One federal law that received a lot of attention at both meetings was the No Surprises Act (enacted December 2020), which bans surprise medical bills in certain circumstances. The Act purports to preserve substantial state authority to create rules for balance billing prohibitions that are more protective of consumers than the new federal structure, but at this point, state regulators and legislators seem to have more questions than answers about what that means. States have been working closely with Biden Administration officials who are well underway with the rulemaking process. HHS representatives reported that they expect to release proposed rules “very soon” and have set mid-Summer deadlines for regulations to get the system up and running by the statute's 2022 deadline.

Multiple NAIC health insurance Working Groups will focus for the rest of this year on implementation and consumer disclosures around the No Surprises Act and the Exchange/individual market portions of the American Rescue Plan Act (President Biden's recent COVID-19 relief package).

Also in the health insurance space, both groups continue to focus heavily on drug prices and PBMs. As explained below, late last year, the U.S. Supreme Court provided potential new openings for states to regulate non-insurance plan participants in the healthcare supply chain (e.g., PBMs, providers, facilities, etc.), particularly in the area of pricing and costs, and there appears to be strong interest among regulators and legislators to pursue those opportunities.

Race and DE&I in Insurance

As mentioned above, NCOIL's discussions focused on proxy discrimination. NCOIL adopted amendments to its Property/Casualty Insurance Modernization Act at the Spring meeting to define "proxy discrimination" – an intentional discrimination standard – and make clear proxy discrimination is prohibited in all types of insurance. NCOIL has not addressed disparate impact discrimination at this time, but the Committee reserved the right to consider those issues in the future.

NAIC, meanwhile, has created five workstreams within its Special Committee on Race and Insurance to examine these issues: industry, NAIC/state insurance departments, P/C, Life, and Health. Those workstreams have proposed charges to direct their own activities for the rest of the year and the Committee will propose recommendations and charges for NAIC's standing committees for 2022.

Some of the workstreams' early charges that are of importance to CIAB members include:

- The industry workstream will continue analyzing and developing specific recommendations for improving DE&I across the industry and measuring DE&I progress by insurance entities;
- The insurance department workstream will research best DE&I practices among state departments and develop a NAIC training program for state insurance departments;
- Multiple workstreams will examine potential legal and regulatory approaches to addressing different kinds of unfair discrimination (e.g., proxy, disparate impact, and use of third-party data) in different lines of insurance, and are considering new reporting requirements to identify race and other sociodemographic information about insureds; and
- The Health workstream will study measures to advance equity in the cost of, and access to, healthcare, and the potential use of network adequacy requirements to promote culturally competent care.

Notably, some of the NAIC standing committees will focus their work on DE&I issues this year. The Producer Licensing Task Force, for example, will look at offering licensing exams in foreign languages, whether prior criminal charges are impeding individuals from obtaining a license, how cultural bias can be minimized by exam vendors, and how the number and location of producers by company compare to areas' demographics.

NCOIL heard a presentation from New York Department officials on NY Circular Letter 5 (2021) pertaining to diversity in corporate governance. The Letter was prompted, according to officials, at least in part by insurers' request for more guidance on "best practices" and data on diversity in the insurance industry. Notably, NY is not prescribing diversity requirements, but rather, has set forth an expectation that NY insurers will make diversity a business and corporate governance priority and the Department will collect and publish (on an aggregate/anonymized basis and only for carriers above \$10 million in annual premiums) data on diversity of boards and senior management in the industry. The data call is intended to give companies a better sense of how they measure up to

competitors (the data will be broken down by size and other industry cross sections) in terms of diversity at the highest levels of management.

Finally, NCOIL also held an in-depth session on ways insurance can help promote and ensure responsible and just policing – another topic at the forefront of many Americans' and community leaders' minds. Panelists described a need for mandatory police liability insurance (akin to other professions' liability and malpractice insurance) to, among other things, price bad actors out of the profession and also to create systems for early identification of and help for police officers with risk factors for bad actions (e.g., substance abuse issues, domestic dispute history, etc.).

General Producer Topics

Producer Licensing

In November 2020, draft procedures for amending the NAIC Producer Licensing Applications were circulated. Comments were received from California, Washington, and the Professional Insurance Agents (PIA). The Producer Licensing Task Force is updating the Application amendment process following failure in 2018 to get draft Application changes approved by the NAIC Executive Committee. NAIC staff and Task Force leadership are reviewing the comments they received on the amendment procedures and will circulate an updated draft before the Summer meeting. Once amendment procedures are adopted, the Producer Licensing Uniformity (D) Working Group likely will begin reviewing the Applications themselves.

Additionally, 32 states now offer remote, proctored producer licensing examinations and 16 states are in the process of implementing them, a move demanded and accelerated by COVID-19. Three jurisdictions have indicated they will not implement remote examinations. Many NAIC and NCOIL stakeholders are advocating for permanent remote offerings after the pandemic is over.

Privacy – Focus on Consumer Protections

The NAIC's Privacy Protection (D) Working Group continues to be primarily in "study mode." They are monitoring federal legislation and state activity in this space (including the ever-contentious issues of preemption and private rights of action for consumers). For now, the Working Group is surveying what has already been done and assessing emerging trends. The Market Regulation and Consumer Affairs (D) Committee, under which the Working Group falls, has instructed the group to focus in 2021 on developing insurance-specific recommendations for protecting consumer rights, including rights to opt out of data sharing, be "forgotten," and/or restrict insurance entities' use of consumer information. These recommendations will be the main deliverables for the NAIC's Fall meeting and, if time permits, the Working Group will start drafting a policy on minimum consumer protections for data privacy in insurance.

Other industry groups, including APCIA, NAMIC and a coalition of health insurers, have been encouraging the NAIC's Working Group to consider privacy regimes already in

place for insurance, like HIPAA and Gramm-Leach-Bliley – systems that, they contend, work well and should remain the primary pillars of any insurance-based privacy regime.

Healthcare

Insurance legislators and regulators are grappling with how to implement major pieces of federal legislation in the healthcare space, including the American Rescue Plan Act (ARPA), the American Rescue Plan Act and the No Surprises Act referenced above.

American Rescue Plan Act & the Exchanges

State officials are focused on ARPA's provisions related to ACA Exchange operations, including new enrollment periods and more generous subsidy structures. The NAIC's Health Insurance (B) Committee heard a presentation from HHS officials focused on the Biden Administration's priorities for the individual market, including:

- Bringing down uninsured rates;
- Focusing on health equities for minority and underserved populations (notably, multiple Working Groups under the NAIC's (B) Committee also will focus on these issues);
- Promoting and fully funding Navigators and other Assistants, particularly to help with health equity goals; and
- Making subsidies more generous on the exchanges to bring costs down and address the 400% of poverty level "cliff."

One area of concern for the states after passage of ARPA is how 1332 waiver reimbursements/pass-through payments will be made to states now that the Exchange subsidies are so much more generous (and presumably those pass-through payments should be as well). Several state regulators wrote a letter to HHS urging them to make appropriate payment calculation changes, but as of the Spring meeting, they had not received a response.

No Surprises Act

Regarding the No Surprises Act, states have a laundry list of questions regarding their role and what is and is not preempted under the new law. They are urging federal regulators to provide additional clarity in their forthcoming rulemaking, including on:

- Who has primary enforcement authority over *providers* under the law (will it be the states, like they have over fully insured plans?)?
- How does the preemption standard work (e.g., when are state laws more protective of consumers, versus just different from the federal model?)?
- Could a state create its own arbitration process with different parameters and mandatory considerations than the federal law?
- What happens in "mixed cases" when a state's existing laws apply to services, but not facilities?
- What happens when an individual is insured in one state, but receives balance bill-protected services in another state? Whose law applies?

Biden Administration representatives reported that they are in the middle of a “very significant” rulemaking process to implement the law and laid out an aspirational timeline of late Spring for proposed rules and mid-Summer for final rules.

Supreme Court Decision in Rutledge v. PCMA – PBMs and ERISA Preemption

Both groups heard lengthy presentations on the implications of the Supreme Court's decision in *Rutledge* – a case involving the scope of ERISA preemption of state laws “related to” ERISA plans. The Supreme Court upheld Arkansas's law governing PBM payments to pharmacies (which, interestingly, does not even reference insurance or plans) and determined it was not preempted by ERISA. The decision draws a line between laws that merely impact costs and payment rates (generally not preempted) and laws that connect with or reference the plan, coverage requirements, and/or ERISA's nationwide plan administration framework (generally preempted).

Potential take-aways discussed by insurance regulators included, for instance, that direct regulation of fees/costs from hospitals and other providers may be ok, so long as the regulation doesn't touch the insurance plans.

NAIC PBM Model

Relatedly, the NAIC's (B) Committee delayed taking formal action on the draft PBM Model Act in light of *Rutledge* and due to ongoing debates among regulators about how aggressive that model should be (e.g., should it be primarily a licensing and reporting regime, as it currently is drafted, or should it attempt to regulate other PBM business activities like rebate pass-throughs, contracting practices, fiduciary status, etc.?). The Committee plans to hold a separate discussion on this topic to afford regulators ample time to debate and consider the scope of the model.

The PBM and ERISA subgroups have agreed to work on a white paper, which will address ERISA preemption issues in light of *Rutledge* and a host of potential “best practices” for broadly regulating PBMs. To the extent the PBM Model remains a “skinny” licensing approach, the white paper could fuel further action or amendments to the PBM Model down the road.

Telehealth

NCOIL's Health and Long-Term Care Committee continues to consider its Telemedicine Model Act. NCOIL continues to work from the August draft and legislators and NCOIL staff are wordsmithing the language behind the scenes. NCOIL hopes to approve the final model in July and will likely have an interim meeting specifically to discuss the model.

Discussions on the model, by both stakeholders and lawmakers, remain focused on:

- Inclusion of a “payment parity” requirement for in-office visits and virtual visits;
- Expanded virtual care could narrow the healthcare access gap, with the acknowledgement that all populations need appropriate technology,

Internet/broadband access, and technological know-how to take advantage of virtual care opportunities; and

- Barriers to broad adoption of virtual care options remain, including distrust among patients, difficulty of scheduling with primary doctor, privacy concerns, language barriers, etc.

Similar issues were highlighted during NAIC's Health Innovations (B) Working Group panel on telehealth. Commissioners focused on (1) quality of care; (2) improvements in healthcare access; and (3) payment parity.

Potential Healthcare Areas for Near-Term Attention and Action by States

Given the outcome of and states' interest in the *Rutledge* case – and the Court's apparent removal of what had been a perceived omnipresent barrier to robust state regulation of PBMs – we expect to see increased state activity in the PBM space and around other non-plan participants in the healthcare ecosystem.

Other topics highlighted by Georgetown's Center for Health Insurance Research on which we could see more action in the near-term include:

- Network adequacy requirements, compliance, and oversight;
- Non-comprehensive coverage markets and their marketing practices (e.g., short-term limited duration insurance, healthcare sharing ministries, etc.); and
- 1332 waiver opportunities, including reinsurance models that have been effectively deployed by several states already.

Property & Casualty

Cannabis

The NAIC's Cannabis Working Group is considering drafting a memo to NAIC leadership on the federal SAFE Banking Act (which would allow state-legalized cannabis businesses to receive financial services, including insurance) and the U.S. Department of Justice's "Cole Memorandum" to help the NAIC determine whether they should be more engaged in policy conversations and activities around cannabis. They also suggested drafting a memo for the Producer Licensing Task Force on whether cannabis laws are causing problems for producer licensing or otherwise presenting barriers for insurance producers.

The Working Group invited public comments on these potential actions. They intend to report back to the full Property/Casualty (C) Committee with a firmer plan.

Surplus Lines

The NAIC's Surplus Lines Working Group will focus for the remainder of 2021 on governance of alien insurers. They will draft new guidance on standards for admittance on the NAIC Quarterly Listing of Alien Insurers and analyze renewal applications and continued listings to ensure solvency and other compliance issues.

Catastrophe/Natural Disaster Planning & Response

NAIC and NCOIL both continued discussions on natural disasters and catastrophe insurance, particularly related to flood risk and the need for concerted mitigation efforts. The NAIC has been actively engaged with FEMA on this topic and formed a new Working Group to continue coordination with FEMA and to build out NAIC's resources for states (they already have created a new disaster response and preparedness website housed by the NAIC). NCOIL's Property/Casualty Committee, meanwhile, heard a presentation from Marsh on community-based catastrophe insurance solutions.

NAIC's Climate and Resiliency Task Force is also looking at these issues and has divided their work into four workstreams that focus on: (1) solvency, (2) innovation, (3) technology, and (4) disclosure. The Task Force noted that the FCC is currently seeking feedback for developing a framework for climate change disclosures and Senator Dianne Feinstein (D-CA) and Representative Sean Casten (D-IL) reintroduced legislation that would require a report on ways to modernize climate change insurance regulation.

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

- NAIC Workers' Compensation Task Force
- NAIC Market Conduct Annual Statement Blanks Working Group
- NAIC Big Data and Artificial Intelligence Working Group
- NAIC Market Conduct Examination Guidelines
- NAIC Long-Term Care Insurance (EX) Task Force
- NAIC Market Regulation (D) Committee
- NCOIL Workers' Compensation Insurance Committee