GEORGETOWN UNIVERSITY

Health Policy Institute

To: Commissioner Morrison
From: Mila Kofman, Assistant Research Professor, Health Policy Institute and Mark DeBofsky, Adjunct, Professor of Law, The John Marshall Law School, Chicago, Illinois
Re: NAIC Discretionary Clauses Model – amendment to include disability group contracts

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This is to provide you and the Committee with additional information about discretionary clauses in disability group insurance.

Below is a preliminary analysis of court cases from 1993 to 2003. There were 310 disability cases and 114 health cases. When the court used an arbitrary and capricious standard of review, patients prevailed only in 28% of the disability cases compared to prevailing in 68% of cases reviewed de novo.

Disability Claims (long- and short-term)
De Novo Standard
Patients prevailed on a de novo standard in 21 cases, out of a total of 31 cases decided on this standard.
Insurers prevailed in 10 cases.

Arbitrary and Capricious Standard
Patients prevailed in 79 out of 279 case.
Insurers prevailed in 200 cases.

Health/Medical Claims
De Novo Standard
Patients prevailed on a de novo standard in 8 cases, out of total of 13 cases decided on this standard.
Insurers prevailed in 5 cases.

Arbitrary and Capricious Standard
Patients prevailed in 29 of 101 cases.
Insurers prevailed in 72 cases.

These statistics demonstrate that discretionary clauses in disability contracts, which require an arbitrary and capricious standard of review, are a significant problem for patients seeking a fair review of the merits of their claim before a judge, an independent decision maker. Accordingly, because the NAIC has already adopted the Model prohibiting discretionary clauses in health contracts – and there are fewer health cases than disability cases – the NAIC should amend the model to apply to disability group contracts.

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