

## UNFAIR DISCRIMINATION AGAINST SUBJECTS OF ABUSE IN DISABILITY INCOME INSURANCE MODEL ACT

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**Introductory Note:** In addition to this model act, the NAIC drafted the following model acts regarding the unfair discrimination against subjects of abuse: The Unfair Discrimination Against Subjects of Abuse in Property and Casualty Insurance Model Act, The Unfair Discrimination Against Subjects of Abuse in Life Insurance Model Act, and The Unfair Discrimination Against Subjects of Abuse in Health Insurance Model Act.

### Section 1. Purpose

The purpose of this Act is to prohibit unfair discrimination by disability income insurers and insurance professionals on the basis of abuse status. Nothing in this Act shall be construed to create or imply a private cause of action for a violation of this Act.

**Drafting Note:** Consideration was given to including a private cause of action for a violation of this Act. It was concluded that a private cause of action is not inconsistent with the model and that a state legislature could find that a private cause of action is appropriate for that state.

### Section 2. Scope

This Act applies to all disability income insurers and insurance professionals involved in issuing or renewing in this state a policy or certificate of disability income insurance.

### Section 3. Definitions

**Drafting Note:** Each state may wish to ensure that the definition of “abuse” for the purposes of this Act does not conflict with the terminology descriptive of abusive behavior in state civil or criminal statutes in such a way as to lead to unintended meanings.

- A. “Abuse” means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner, or caretaker:
- (1) Attempting to cause or intentionally, knowingly or recklessly causing another person bodily injury, physical harm, severe emotional distress, psychological trauma, rape, sexual assault or involuntary sexual intercourse;
  - (2) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm;
  - (3) Subjecting another person to false imprisonment; or
  - (4) Attempting to cause or intentionally, knowingly, or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another person.

**Drafting Note:** States should include appropriate corrective or clarifying language if their ordinary statutory meaning of “person” can be construed as implying legal capacity, since many subjects of abuse are minors and other subjects of abuse may be incapacitated.

- B. “Abuse-related medical condition” means a medical condition sustained by a subject of abuse which arises in whole or part out of an act or pattern of abuse.

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- C. “Abuse status” means the fact or perception that a person is, has been, or may be a subject of abuse, irrespective of whether the person has sustained abuse-related medical conditions.
- D. “Commissioner” means the insurance commissioner of this state.

**Drafting Note:** Where the word “commissioner” appears in this Act, the appropriate designation for the chief insurance supervisory official of the state should be substituted.

- E. “Confidential abuse information” means information about acts of abuse or abuse status of a subject of abuse, the address and telephone number (home and work) of a subject of abuse, or the status of an applicant or insured as a family member, employer or associate of, or a person, in a relationship with, a subject of abuse.
- F. “Insurance professional” means an agent, broker, adjuster or third party administrator as defined in the insurance laws of this state.

**Drafting Note:** Many states license other categories of insurance professionals such as agencies, consultants and producers. Each state should review this definition for consistency with the terminology used in its licensing law.

**Drafting Note:** Unfairly discriminatory underwriting or claims handling practices of a company writing disability income insurance may be committed by insurance professionals when they refuse to process an application or a claim in violation of this act. There is no intent, however, to hold insurance professionals liable for the acts of insurers over which they have no control.

- G. “Insured” means a party named on a disability income policy or certificate as the person with legal rights to the benefits provided by the policy or certificate. For group insurance, “insured” includes a person who is a beneficiary covered by a group policy or certificate.
- H. “Insurer” means a person or other legal entity engaged in the business of disability income insurance in this state.

**Drafting Note:** States may wish to consider whether residual market mechanisms should be included in the definition of insurer.

**Drafting Note:** Each state may wish to consider the advisability of defining “insurance” or “disability income insurance” for purposes of this Act if the state’s present insurance code is not satisfactory in this regard. In some cases a cross reference will be sufficient.

- I. “Policy” or “certificate” means a contract of insurance or indemnity, including endorsements, riders or binders issued, proposed for issuance, or intended for issuance by an insurer or insurance professional.
- J. “Subject of abuse” means a person against whom an act of abuse has been directed; who has current or prior injuries, illnesses or disorders that resulted from abuse; or who seeks, may have sought, or had reason to seek medical or psychological treatment for abuse; or protection, court-ordered protection or shelter from abuse.

#### **Section 4. Unfairly Discriminatory Acts Relating to Disability Income Insurance**

**Drafting Note:** Because of the nature and consequences of the prohibited acts, this model provides that a single instance of prohibited conduct is a violation rather than defining a violation as a general business practice of prohibited conduct. States that choose to incorporate this model into their version of the Unfair Trade Practices Act (or other statute) under which those states define a violation as a general business practice should consider whether that approach provides sufficient protection to subjects of abuse.

- A. It is unfairly discriminatory to:
  - (1) Deny, refuse to issue or renew, cancel or otherwise terminate, restrict or exclude insurance coverage on or add a premium differential to any disability income insurance policy on the basis of the applicant’s or insured’s abuse status; or
  - (2) Exclude or limit coverage for losses or denying a claim under a disability income insurance policy on the basis of an insured’s abuse status.

- B. When the insurer or insurance professional has information in its possession that clearly indicates that the insured or applicant is a subject of abuse, the disclosure or transfer of confidential abuse information, as defined in this Act, for any purpose or to any person is unfairly discriminatory, except:
- (1) To the subject of abuse or an individual specifically designated in writing by the subject of abuse;
  - (2) To a health care provider for the direct provision of health care services;
  - (3) To a licensed physician identified and designated by the subject of abuse;
  - (4) When ordered by the commissioner or a court of competent jurisdiction or otherwise required by law;
  - (5) When necessary for a valid business purpose to transfer information that includes confidential abuse information that cannot reasonably be segregated without undue hardship, confidential abuse information may be disclosed only if the recipient has executed a written agreement to be bound by the prohibitions of this Act in all respects and to be subject to the enforcement of this Act by the courts of this state for the benefit of the applicant or insured, and only to the following persons:
    - (a) A reinsurer that seeks to indemnify or indemnifies all or any part of a policy covering a subject of abuse and that cannot underwrite or satisfy its obligations under the reinsurance agreement without that disclosure;
    - (b) A party to a proposed or consummated sale, transfer, merger or consolidation of all or part of the business of the insurer or insurance professional;
    - (c) Medical or claims personnel contracting with the insurer, only where necessary to process an application or perform the insurer's or insurance professional's duties under the policy or to protect the safety or privacy of a subject of abuse (also includes parent or affiliate companies of the insurer that have service agreements with the insurer or insurance professional); or
    - (d) With respect to address and telephone number, to entities with whom the insurer or insurance professional transacts business when the business cannot be transacted without the address and telephone number;
  - (6) To an attorney who needs the information to represent the insurer or insurance professional effectively, provided the insurer or insurance professional notifies the attorney of its obligations under this Act and requests that the attorney exercise due diligence to protect the confidential abuse information consistent with the attorney's obligation to represent the insurer or insurance professional;
  - (7) To the policyowner or assignee, in the course of delivery of the policy, if the policy contains information about the abuse status; or
  - (8) To any other entities deemed appropriate by the commissioner.
- C. It is unfairly discriminatory to request information about acts of abuse or abuse status, or make use of that information, however obtained.
- D. Subsection B does not preclude a subject of abuse from obtaining his or her insurance records.
- E. Subsection D does not prohibit a disability income insurer or insurance professional from asking about a medical condition or from using medical information to underwrite or to carry out its duties under the policy, even if the medical information is related to a medical condition that the insurer knows or has reason to know is abuse-related, to the extent otherwise permitted under this Act and other applicable law.

- F. A disability income insurer or insurance professional shall not be held civilly or criminally liable for the death of or injury to an insured resulting from an action taken in a good faith effort to comply with the requirements of this Act. However, this subsection does not prevent an action to investigate or enforce a violation of this Act or to assert any other claims authorized by law.

#### **Section 5. Justification of Adverse Insurance Decisions**

An insurer or insurance professional that takes an action that adversely affects an applicant or insured on the basis of a medical condition that the insurer or insurance professional knows or has reason to know is abuse-related shall explain the reason for its action to the applicant or insured in writing and shall be able to demonstrate that its action, and any applicable policy provision:

- A. Does not have the purpose or effect of treating abuse status as a medical condition or underwriting criterion;
- B. Is not based upon any actual or perceived correlation between a medical condition and abuse;
- C. Is otherwise permissible by law and applies in the same manner and to the same extent to all applicants and insureds with a similar medical condition or disability without regard to whether the condition is abuse-related; and
- D. Except for claims actions, is based on a determination, made in conformance with sound actuarial principles and otherwise supported by actual or reasonably anticipated experience, that there is a correlation between the medical condition and a material increase in insurance risk.

#### **Section 6. Insurance Protocols for Subjects of Abuse**

Insurers shall develop and adhere to written policies specifying procedures to be followed by employees and by insurance professionals they contract with, for the purpose of protecting the safety and privacy of a subject of abuse and shall otherwise implement the provisions of this Act when taking an application, investigating a claim, pursuing subrogation or taking any other action relating to a policy or claim involving a subject of abuse. Insurers shall distribute their written policies to employees and insurance professionals.

**Drafting Note:** States may wish to consider requiring insurers to develop procedures in consultation with domestic violence advocacy groups.

**Drafting Note:** States are advised that these policies and procedures should be subject to review as part of a market conduct examination or otherwise at the request of the commissioner.

#### **Section 7. Enforcement**

The commissioner shall conduct a reasonable investigation based on a written and signed [add any means by which the commissioner receives complaints] complaint received by the commissioner and issue a prompt determination as to whether a violation of this Act may have occurred. If the commissioner finds from the investigation that a violation of this Act may have occurred, the commissioner shall promptly begin an adjudicatory proceeding. The commissioner may address a violation through means appropriate to the nature and extent of the violation, which may include suspension or revocation of certificates of authority or licenses, imposition of civil penalties, issuance of cease and desist orders, injunctive relief, a requirement for restitution, referral to prosecutorial authorities or any combination of these. The powers and duties set forth in this section are in addition to all other authority of the commissioner.

**Drafting Note:** States may wish to delete this section if the substance of it already exists in state law.

#### **Section 8. Effective Date**

This Act is effective [insert date], and applies to all actions taken on or after the effective date, except where otherwise explicitly stated. Nothing in this Act shall require an insurer to conduct a comprehensive search of its contract files existing on the effective date solely to determine which applicants or insureds are subjects of abuse.

*Chronological Summary of Actions (all references are to the Proceedings of the NAIC).*

*1996 Proc. 4<sup>th</sup> Quarter 9, 44, 281, 309-312 (adopted).*

*1998 Proc. 3<sup>rd</sup> Quarter 14, 83, 88-89, 101-104 (amended and reprinted).*

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**This chart is intended to provide readers with additional information to more easily access state statutes, regulations, bulletins or administrative rulings related to the NAIC model. Such guidance provides readers with a starting point from which they may review how each state has addressed the model and the topic being covered. The NAIC Legal Division has reviewed each state’s activity in this area and has determined whether the citation most appropriately fits in the Model Adoption column or Related State Activity column based on the definitions listed below. The NAIC’s interpretation may or may not be shared by the individual states or by interested readers.**

**This chart does not constitute a formal legal opinion by the NAIC staff on the provisions of state law and should not be relied upon as such. Nor does this state page reflect a determination as to whether a state meets any applicable accreditation standards. Every effort has been made to provide correct and accurate summaries to assist readers in locating useful information. Readers should consult state law for further details and for the most current information.**

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**KEY:**

**MODEL ADOPTION:** States that have citations identified in this column adopted the most recent version of the NAIC model in a **substantially similar manner**. This requires states to adopt the model in its entirety but does allow for variations in style and format. States that have adopted portions of the current NAIC model will be included in this column with an explanatory note.

**RELATED STATE ACTIVITY:** Examples of Related State Activity include but are not limited to: older versions of the NAIC model, statutes or regulations addressing the same subject matter, or other administrative guidance such as bulletins and notices. States that have citations identified in this column **only** (and nothing listed in the Model Adoption column) have **not** adopted the most recent version of the NAIC model in a **substantially similar manner**.

**NO CURRENT ACTIVITY:** No state activity on the topic as of the date of the most recent update. This includes states that have repealed legislation as well as states that have never adopted legislation.

NAIC MEMBER	MODEL ADOPTION	RELATED STATE ACTIVITY
Alabama		ALA. CODE ANN. § 27-55-3 (2000).
Alaska		ALASKA STAT. § 21.36.430 (1997/2001).
American Samoa	NO CURRENT ACTIVITY	
Arizona		ARIZ. REV. STAT. ANN. § 20-448 (1996/2001).
Arkansas		ARK. CODE ANN. § 23-86-306 (1998).
California		CAL. INS. CODE §§ 10144.2 and 10144.3 (1996/1998).
Colorado		COLO. REV. STAT. § 10-3-1104.8 (1998).
Connecticut		CONN. GEN. STAT. § 38a-816 (18) (1995/2003).
Delaware		DEL. CODE ANN. tit. 18, § 2302(5); § 2304(24), § 2304(25) (1996); BULLETIN 09-005-IB (2009).
District of Columbia	NO CURRENT ACTIVITY	
Florida		FLA. STAT. § 626.9541 (1976/2014).

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<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Georgia		GA. CODE ANN. § 33-6-4 (1972/2002).
Guam	NO CURRENT ACTIVITY	
Hawaii		HAW. REV. STAT. § 431:10-217.5 (1998).
Idaho	NO CURRENT ACTIVITY	
Illinois		215 ILL. COMP. STAT. 5/155.22a (1997/2004).
Indiana		IND. CODE §§ 27-8-24.3-1 to 27-8-24.3-10 (1996).
Iowa		IOWA CODE § 507B.4 (1955/2002).
Kansas	KAN. STAT. ANN. § 40-2404 (1955/2001).	
Kentucky		KY. REV. STAT. ANN. §§ 304.12-211 (2000); § 304.17a-155 (1998).
Louisiana	NO CURRENT ACTIVITY	
Maine		ME. REV. STAT. ANN. tit. 24-A, § 2159-B (1996/2001).
Maryland		MD. CODE ANN. INS. § 27-504 (1957/1997).
Massachusetts		MASS. GEN. LAWS ch. 175, § 95B (1996); § 108G; § 120D; MASS. GEN. LAWS ch. 176A, § 3A; MASS. GEN. LAWS ch. 176B, § 5A; MASS. GEN. LAWS ch. 176G, § 19 (1996).
Michigan		MICH. COMP. LAWS § 500.2246 (1956/1998); § 500.3406j (1956/1998); § 550.1401 (1980/2003).

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<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Minnesota		MINN. STAT. § 72A.20 (1967/2002).
Mississippi	NO CURRENT ACTIVITY	
Missouri		MO. REV. STAT. § 375.1312 (1999/2013) (Group).
Montana		MONT. CODE ANN. § 33-18-216 (1997).
Nebraska	NEB. REV. STAT. §§ 44-7401 to 44-7410 (1998) (portions of model).	
Nevada		NEV. REV. STAT. § 689B.068 (1997).
New Hampshire		N.H. REV. STAT. ANN. § 417:4 (1947/2004).
New Jersey		N.J. REV. STAT. §§ 17:29B-16 to 17:29B-19 (2003); N.J. ADMIN. CODE §§ 11:4-42.1 to 11:4-42.5 (1996/2004) (Group).
New Mexico	N.M. STAT. ANN. §§ 59A-16B-1 to 59A-16B-10 (1997).	13 N.M. CODE R. §§ 7.5.1 to 7.5.17 (1999) (insurers' duty in regard to confidential abuse information).
New York		N.Y. INS. LAW § 2612 (1996).
North Carolina		N.C. GEN. STAT. § 58-68-35 (1997).
North Dakota		N.D. CENT. CODE § 26.1-39-24 (1999).
Northern Marianas	NO CURRENT ACTIVITY	
Ohio		OHIO REV. CODE ANN. § 3901.21 (1970/1999).
Oklahoma	NO CURRENT ACTIVITY	
Oregon		OR. REV. STAT. § 746.015 (1967/2010).

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<b>NAIC MEMBER</b>	<b>MODEL ADOPTION</b>	<b>RELATED STATE ACTIVITY</b>
Pennsylvania		40 PA. CONS. STAT. §§ 29-103 to 429-105 (1974/1996).
Puerto Rico	NO CURRENT ACTIVITY	
Rhode Island	R.I. GEN. LAWS §§ 27-59-1 to 27-59-7 (1997); §§ 27-60-1 to 27-60-7 (1997).	
South Carolina	NO CURRENT ACTIVITY	
South Dakota		S.D. CODIFIED LAWS § 58-18B-27 (1995/1997) (small group).
Tennessee	TENN. CODE ANN. §§ 56-8-301 to 56-8-306 (1996).	
Texas		TEX. INS. CODE ANN. §§ 544.151 to 544.158 (2005).
Utah		UTAH CODE ANN. §§ 31a-21-501 to 31a-21-506 (1997/2013).
Vermont	NO CURRENT ACTIVITY	
Virgin Islands	NO CURRENT ACTIVITY	
Virginia		VA. CODE ANN. §§ 38.2-508 (1986/2013).
Washington		WASH. REV. CODE ANN. § 48.18.550 (1998).
West Virginia		W. VA. CODE § 33-4-20 (1997).
Wisconsin		WIS. STAT. § 631.95 (2000).
Wyoming	NO CURRENT ACTIVITY	

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### Proceeding Citations

Cited to the Proceedings of the NAIC

In July 1994 the NAIC Executive Committee reviewed a resolution that had recently been adopted by the National Association of Attorneys General (NAAG). The chair suggested that members of the NAIC evaluate in their respective states whether victims of domestic violence were subject to exclusions for the costs of treatment under applicable insurance policies so that the NAIC can determine appropriate action. **1994 Proc. 3<sup>rd</sup> Quarter 52-53.**

At the next NAIC meeting a commissioner described the practices of eight large insurers that were underwriting health, life and mortgage disability policies on the basis of medical records that revealed domestic violence experiences in the history of the applicants. After this fact was pointed out in a press conference, most of the insurers cited announced that they would no longer underwrite on the basis of a domestic violence history. The commissioner said a review of the extent of the practice in her own state showed that such practices by insurers were subtle, and were arguably allowed by state law. She suggested it would be appropriate for the NAIC to endorse the “sense” of the NAAG resolution and to develop a model act addressing unfair insurance practices and domestic violence. She suggested that the NAIC should take a leadership role to stop such unfair insurance practices. **1994 Proc. 3<sup>rd</sup> Quarter 10-11.**

Another commissioner expressed reluctance to support the NAAG resolution, citing a number of problems with it. A third commissioner agreed with that assessment, but did encourage the NAIC to take whatever action was appropriate to address unfair insurance practices against victims of domestic violence. **1994 Proc. 3<sup>rd</sup> Quarter 11.**

The chair of the Accident and Health Insurance Committee suggested referring this issue to that committee with a charge to develop a model law. The Plenary voted to follow that recommendation; although a member pointed out that this issue was broader than health insurance. **1994 Proc. 3<sup>rd</sup> Quarter 11-12.**

A working group was appointed by the Accident and Health Insurance Committee to study the issue of policy declination based on an applicant’s history of being a victim of domestic violence. **1994 Proc. 3<sup>rd</sup> Quarter 578.**

The first drafting effort attached to the minutes included three alternative proposals: A draft model act, a draft model regulation, and a draft of amendments to the Unfair Trade Practices Act. **1994 Proc. 4<sup>th</sup> Quarter 699-705.**

When reviewing a first draft, the members of the working group decided to draft several alternative provisions so that the states could elect to suggest legislation for enactment into law or to promulgate regulations pursuant to statutory authority already granted to the insurance commissioner. **1994 Proc. 4<sup>th</sup> Quarter 706.**

One working group member reported that her state was considering amendments to its Unfair Trade Practices Act to address discriminatory practices against victims of domestic violence. She suggested that the working group proceed in that manner or that a drafting note be added to the model act to indicate that language accomplishing the same substantive treatment could be included in a state’s unfair trade practices law. **1995 Proc. 2<sup>nd</sup> Quarter 575-576.**

Early in 1995 a hearing was held to solicit further information on domestic violence. The public hearing provided valuable information and background on the incidence and frequency of such unfair discrimination. **1995 Proc. 1<sup>st</sup> Quarter 509.**

Several federal legislators indicated an interest in developing a federal prohibition of discrimination by insurers against insureds who were victims of domestic violence. Their drafts also included a private cause of action for consumers as well as federal preemptive language. **1995 Proc. 2<sup>nd</sup> Quarter 574.**

One insurance department surveyed insurers and found that 28% of the companies responding to the survey considered domestic violence as an underwriting criterion. The survey also revealed that life insurers used this criterion significantly more than accident and health insurance companies. **1995 Proc. 2<sup>nd</sup> Quarter 575-579.**

A funded consumer representative noted that 13 states had domestic violence legislation pending; states were acting independently without a model law as a guide. She said the legislation proposed differs from state to state in covered lines of insurance and definitional language. She urged the working group to complete a model law as soon as possible. **1995 Proc. 2<sup>nd</sup> Quarter 575.**

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To clarify that unfair discrimination by insurers is at issue, the working group agreed to add the word “unfair” before the word “discrimination” in the model. **1995 Proc 3<sup>rd</sup> Quarter 726.**

In August 1995 the working group, which reported to the Accident and Health Insurance Committee, discussed whether to break out health, disability, life and property/casualty separately. The working group agreed to do initial drafts of a life and a property/casualty model and get input from the Market Conduct and Consumer Affairs Subcommittee on how to proceed. **1995 Proc. 3<sup>rd</sup> Quarter 726.**

The three models dealing with issues other than health were referred to the Market Conduct and Consumer Affairs Subcommittee. The chair noted that the health model was sent back to the Accident and Health Committee for technical modifications. Similar modifications might be needed for the three models before the subcommittee. **1996 Proc. 1<sup>st</sup> Quarter 242.**

**Section 1. Purpose**

When a working group was assigned to consider modifications to create consistency between the four models on domestic violence, one of the first recommendations was to add the purpose section found in the property and casualty model to the other three models. **1998 Proc. 1<sup>st</sup> Quarter 179.**

An industry representative suggested changing Section 1 to refer to “... the basis of abuse *status*” because the purpose of the model acts was to prohibit discrimination on the basis of abuse status, rather than on the mental or physical condition that was a result of the abuse. A regulator commented that the purpose of the models is to prohibit discrimination against subjects of abuse and she saw the change as substantive. The working group decided to make the change. **1998 Proc. 2<sup>nd</sup> Quarter I 117-118.**

Following Section 1 is a note referring to a private cause of action. An early draft contained an alternative provision providing for a private right of action. **1995 Proc. 2<sup>nd</sup> Quarter 575, 583.**

After discussing issues related to the private cause of action option for the states, it was agreed that a statement would be drafted clarifying that, at the discretion of the legislature, states might want to consider this remedy. **1995 Proc. 3<sup>rd</sup> Quarter 726.**

A number of parties questioned the inclusion of the drafting note as being inconsistent with the state regulation of insurance and as subjecting an insurer to monetary penalties for a single violation of the Act. A regulator opined that it may be appropriate for states to allow a violation of this Act to lead to a private cause of action. **1996 Proc. 3<sup>rd</sup> Quarter 219.**

When the working group was considering its charge to create consistency between the four models on discrimination, an early discussion centered on the differing treatment of the issue of a private cause of action. The property and casualty model was drafted to prohibit a private cause of action, but the other three were not. An insurer representative said the drafting note suggesting a state’s consideration of including a private cause of action had been left in the property and casualty model inadvertently and should be deleted. A consumer advocate responded that the inclusion of the drafting note was not an oversight and that the prohibition against a private cause of action should not be incorporated into the other three models. **1998 Proc. 2<sup>nd</sup> Quarter I 117.**

The working group concluded that a private cause of action was not inconsistent with the model and that a state legislature could find a private cause of action appropriate for that state. The working group decided to include the language and the drafting note in all four models. The model act clearly did not provide for a private cause of action, but the drafting note clarified that including a private cause of action would not necessarily conflict with the model. **1998 Proc. 2<sup>nd</sup> Quarter I 117.**

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#### Section 2. Scope

When reviewing an early draft, staff was asked to review the scope section to ensure that the broadest application of the draft would be available to the states. **1994 Proc. 4<sup>th</sup> Quarter 706.**

A suggestion was received that the word “certificate” be deleted from this section. The working group declined to follow the suggestion since it was intended that group coverages be included in the model. Therefore, the word “certificate” was needed. **1996 Proc. 3<sup>rd</sup> Quarter 218.**

#### Section 3. Definitions

A. An early change to the draft was to delete any reference to family relationship in the definition of abuse. **1994 Proc. 4<sup>th</sup> Quarter 699.** It was reinserted in the 1998 amendment. **1998 Proc. 3<sup>rd</sup> Quarter 97.**

When the process of drafting the model was nearly concluded, concerns were raised about whether to include the term “recklessly” in the definition. Consumer advocates preferred that it be included because they did not want those who have been victims not to have the protection of the Act because the abuser said that he did not intend to cause harm. The definition including the word “reckless” has been incorporated in many states. One regulator cautioned that the term may sweep into the Act situations that the subcommittee may not want to include. **1996 Proc. 4<sup>th</sup> Quarter 278.**

B. The working group discussed the need to create definitions of abuse status and abuse-related medical conditions. Working group members discussed the issue of whether all underwriting and limitations based on abuse-related medical conditions should be prohibited or whether the model should attempt to prohibit only underwriting that is based on abuse status, and that all medical conditions should be treated equally under state law. It was suggested that, for the model to clarify that all medical conditions would be treated the same, the burden of proof should be on the insurer to demonstrate compliance. **1995 Proc. 3<sup>rd</sup> Quarter 726.**

C. There was disagreement over the inclusion of the word “perception” in the definition of abuse status. An insurer representative commented that this would create a need to differentiate between what an insurer is thinking and what an insurer knows. If it is the underwriter’s perception that someone has been abused, that would trigger various provisions in the model. Another responded that the real issue would arise in situations where an insurer wrongly takes an action based on the belief that a person is a subject of abuse. Because of the single instance standard of the model, there was great concern that an insurer would have to defend its action based on what it perceived. **1996 Proc. 4<sup>th</sup> Quarter 278.**

E. The definition of confidential abuse information was added in 1998 during the effort to create more consistency between the models. It was copied from the property and casualty model. **1998 Proc. 3<sup>rd</sup> Quarter 102.**

F. The working group creating consistency between the four discrimination models considered the inclusion of producers in the definition of insurer. A regulator suggested deleting agents, brokers, producers and adjusters from the definition of insurer and include a new definition of licensee to incorporate them back into the model. **1998 Proc. 2<sup>nd</sup> Quarter I 118.**

J. There were suggestions for ways to change this definition. The chair declined to do so, saying it was sufficiently broad to ensure that any party who was the subject of abuse would be covered under the model act. **1996 Proc. 3<sup>rd</sup> Quarter 218.**

#### Section 4. Unfairly Discriminatory Acts Related to Disability Income Insurance

Discussion took place on how to clarify that individual acts should be considered to be violations of the Unfair Trade Practices Act in this area, as opposed to the policy generally to consider patterns of practice as violations. Working group members discussed the importance of trying to build up some type of exception for violations in this area so that acts alone constituted violations. **1995 Proc. 3<sup>rd</sup> Quarter 726.**

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**Section 4 (cont.)**

The chair of the working group said that the drafting note to this section indicated that a single instance of prohibited conduct constituted a violation rather than defining that a general business practice of prohibited conduct must exist before a violation occurs. Comments received suggested that the note be modified so that single violations were not defined as prohibited conduct. A regulator responded that it is not unprecedented for a model law to define a single instance of prohibited conduct as being in violation of that law. He stated that the drafting note simply tells states to be aware that using the general business practice approach may not provide sufficient protection for subjects of abuse. **1996 Proc. 3<sup>rd</sup> Quarter 218.**

The subcommittee continued to debate the pros and cons of having a single instance of violation constitute a violation. An industry trade association representative said his concern was that the provisions of the model would affect many policy files and there was always the possibility a mistake could occur. A single instance standard would subject insurers to the full effect of the Act, even in situations when the action taken was admittedly a mistake. A commissioner responded that, because of the significance of the harm that could be inflicted on subjects of abuse as a result of insurers not complying with the Act, she supported keeping a single instance standard in Section 3. None of the subcommittee members were willing to make a motion to remove the single instance standard. **1996 Proc. 4<sup>th</sup> Quarter 279-280.**

A. A regulator expressed concern that the draft model mandates a level of protection for abused individuals that is not provided for others, particularly in the individual market. Another regulator expressed concern about language prohibiting a coverage decision based on an abuse-related medical condition. **1995 Proc. 4<sup>th</sup> Quarter 816.**

Early in the development of the model, the need for a confidentiality provision was recognized. The one contained in the June 1995 draft was a separate section defining discriminatory practices relative to domestic violence. The purpose of the section was to control access by insurers to medical information such that domestic violence information is not released. A regulator noted that the section was too narrow and would be redrafted to incorporate a voluntary waiver provision so that an applicant or an insured could waive confidentiality and make the information available to insurers. **1995 Proc. 2<sup>nd</sup> Quarter 575, 580-581.**

B. The chair said that, in her view, the model did not create a “special class” or an “entitlement” and observed that victims of domestic abuse would doubtfully view their situation in that light. She saw an important public policy issue. **1995 Proc. 4<sup>th</sup> Quarter 805.**

The provisions of Subsection B were the subject of extensive discussion by the working group. Industry representatives indicated that the provisions as drafted [they were later changed] would not allow a company to distribute information in the normal course of business. Comments received from consumer representatives indicated that it was not considered to be in the normal course of business for companies to distribute information related to abuse, but only information related to the underlying medical condition of the applicant or insured. **1996 Proc. 3<sup>rd</sup> Quarter 212.**

The working group discussed the need for companies to have the ability to share information, particularly with regard to reinsurance agreements. A regulator pointed out that insurers have a legitimate need for this information and that there ought to be a way to provide it without violating privacy laws. **1996 Proc. 3<sup>rd</sup> Quarter 218.**

A representative of an insurance trade association stated that one problem with the proposed language was that it required that, when companies were transferring information for various reasons, including reinsurance, mergers and acquisitions, the companies review each file being transferred to ensure there was no information in it relating to abuse or abuse status. **1996 Proc. 3<sup>rd</sup> Quarter 213.**

A trade representative said the language in the section created problems with compliance, particularly if companies were required to black out or otherwise delete information in an applicant or insured’s file related to abuse or abuse status. By doing so, the companies would be singling out those files, which would more easily be identified as files of subjects of abuse. The steps a company would take to delete information in files may, in fact, have the reverse affect of what the working group was trying to accomplish. **1996 Proc. 3<sup>rd</sup> Quarter 213.**



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**Section 4B** (cont.)

Another representative from a trade association also expressed concern with the language in this section. He suggested the working group might limit the application of this section prospectively so that insurers need not go back in files already in existence that might contain information related to abuse or abuse status. The working group chair responded that, because of the small number of files in which this type of information might be contained, it should not create a large administrative burden. The members of the working group agreed to leave the section unchanged. **1996 Proc. 3<sup>rd</sup> Quarter 213.**

The parent committee agreed to retain the model for an additional comment period. The most significant area of comment was in regard to the disclosure or transfer of information. A commissioner said she opposed the censoring of information and had suggested language to allow subsequent carriers to receive the information, as long as they agreed to be bound by the confidentiality requirements. She added that she was opposed to taking a file protection approach because that would have the effect of identifying the person as a victim of domestic violence. **1996 Proc. 4<sup>th</sup> Quarter 331.**

An insurer representative said the requirement to enter into an agreement with subsequent carriers was burdensome. The commissioner responded that it was not her intention that there would be a second agreement but rather, for example, the agreement with a reinsurer would say the reinsurer would be bound by the confidentiality requirements. **1996 Proc. 4<sup>th</sup> Quarter 331.**

Those reviewing the draft of Subsection B expressed concern over the limitation of the protection regarding the transfer or disclosure of information only to individuals. The commissioner responded that this language was incorporated to differentiate between the distribution of information to corporations that have a legitimate business need to have the information and the distribution of that information to individuals who may, in fact, be the party inflicting the abuse. A regulator suggested there were drafting problems with the model and policy questions that needed to be resolved. **1996 Proc. 4<sup>th</sup> Quarter 331-332.**

While discussing confidentiality issues, the chair indicated another committee at the NAIC was developing a confidentiality model that addressed many of the concerns expressed in the comments. A consumer representative noted that committee is just getting started and recommended the working group not remove the provision from this model. **1996 Proc. 3<sup>rd</sup> Quarter 218.**

Shortly before adoption of the model regulators considered a phrase in Subsection B(1) that set a standard with regard to the transfer of information that could be disclosed only if the recipient had executed a written agreement to be bound by the prohibitions of the Act and subject to enforcement by the commissioner and the courts. A consumer advocate said the provision had been drafted in response to industry concerns regarding the transfer of information and files and that companies did not want to have to review and remove information from those files. A commissioner observed that she was only authorized to regulate entities that engage in the business of insurance and would not be able to reach third parties not engaged in the business of insurance. She stated that those entities would be subject to enforcement by the courts. **1996 Proc. 4<sup>th</sup> Quarter 280.**

C. The working group clarified that the hold harmless clause in the model was an issue for the life insurance version and should be deleted from the models for other lines. **1995 Proc. 3<sup>rd</sup> Quarter 726.**

When the model was being considered by the Market Conduct and Consumer Affairs Subcommittee, the co-chair of the working group recommended that a drafting note be added advising states that the section is not intended to prohibit the use of medical information in underwriting. The drafting note was added to the end of Section 4. **1996 Proc. 3<sup>rd</sup> Quarter 208-209, 224.**

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#### Section 5. Justification of Adverse Insurance Decisions

When reviewing the first drafting efforts, one state regulator commented that many states allow insurance policies to preclude coverage for injury, damages or harm resulting from intentional acts, where the injury, damages or harm is expected or intended by the insured. He suggested that the intent of the model drafts appeared to reverse the effect of that policy language. **1994 Proc. 4<sup>th</sup> Quarter 699.**

An insurance trade association expressed concern about Section 5, which shifts the burden to the insurer. **1995 Proc. 4<sup>th</sup> Quarter 804.**

Many of the comments submitted indicated that this section did not specifically permit underwriting based on medical condition, and suggested that it be modified to specifically allow underwriting on the basis of medical condition. The working group decided no modification to Section 5 was necessary to address this issue. **1996 Proc. 3<sup>rd</sup> Quarter 218.**

D. A number of comments related to the requirement in the draft that a determination be made in conformance with sound actuarial principles and supported by “reasonable statistical evidence.” The comments indicated that this requirement was too restrictive and that not all underwriting determinations that conform to sound actuarial principles are supported by statistical evidence. The working group agreed to change to an approach that would incorporate language stating this decision was supported by reasonable evidence of anticipated experience. **1996 Proc. 3<sup>rd</sup> Quarter 219.**

Before adoption of the model the parent subcommittee discussed whether the word “and” should be replaced with “or” to clarify that the support needed must conform with sound actuarial principles *and* otherwise be supported by actual or reasonably anticipated experience, or whether it needed to conform with sound actuarial principles *or* be supported by actual or reasonably anticipated experience. A trade association actuary recommended “or” because that was the standard in the NAIC Model Regulation on Unfair Discrimination in Life and Health Insurance on the Basis of Physical or Mental Impairment. He said that changing the rules to “and” might prohibit insurers from engaging in sound underwriting practices in situations where new or rare diseases need to be considered. A commissioner responded that the model referenced was adopted in the 1970s and is essentially obsolete. In addition, the Unfair Discrimination Against Subjects of Abuse in Health Benefit Plans Model Act had been adopted with the “and” standard, which seemed to indicate the recent NAIC activity had been to support the “and” standard. **1996 Proc. 4<sup>th</sup> Quarter 280.**

#### Section 6. Insurance Protocols for Subjects of Abuse

An early draft of the model contained a section prohibiting subrogation of claims resulting from abuse. **1995 Proc. 2<sup>nd</sup> Quarter 575, 581.**

A consumer advocate commended the drafters for including a provision requiring insurer protocols and asked that there be a section added to require insurers to consult with domestic violence advocacy groups. She expressed opposition to the removal of a provision on subrogation that was in an earlier draft. **1995 Proc. 4<sup>th</sup> Quarter 804-805.**

A regulator clarified that this section required insurers to develop policies that ensure the safety and privacy of a subject of abuse, but it does not ask insurers to guarantee their safety. **1996 Proc. 3<sup>rd</sup> Quarter 219.**

A representative of an insurance trade association said the protocols in Section 6 were problematic. A regulator responded that the protocols work at two levels because they require insurers to develop written policies and also require insurers to ensure their employees adhere to these written policies. The trade representative responded that many companies already have such procedures in place. An evaluation of the model privacy act may show valid and adequate protections in place. A consumer representative said that model was written very broadly and did not address the specific concerns related to abuse. **1996 Proc. 3<sup>rd</sup> Quarter 219.**

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**Section 7. Enforcement**

One of the comments on this section inferred that it did not provide an insurer with adequate due process rights and that it should be deleted. A regulator responded that, unless this model was incorporated into the Unfair Trade Practices Act, it would be best to have a stand-alone enforcement section. After brief discussion, it was agreed that a drafting note would be incorporated at the end of the section to suggest that states delete this section if they have adequate enforcement and due process provisions in place in other state laws. **1996 Proc. 3<sup>rd</sup> Quarter 219.**

**Section 8. Effective Date**

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*Chronological Summary of Action*

*June 1997: Adopted model on discrimination in disability income insurance.*

*December 1998: Model amended to achieve consistency between four models on discrimination against victims of abuse.*

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