Draft date: 10/30/24

2024 Fall National Meeting
Denver, Colorado

NAIC/CONSUMER LIAISON COMMITTEE
Tuesday, November 19, 2024
1:30 – 3:30 p.m.
Gaylord Rockies Hotel—Aurora Ballroom A—Level 2

ROLL CALL

Grace Arnold, Chair	Minnesota	Chlora Lindley-Myers	Missouri
D.J. Bettencourt, Vice Chair	New Hampshire	Eric Dunning	Nebraska
Mark Fowler	Alabama	Scott Kipper	Nevada
Lori K. Wing-Heier	Alaska	Justin Zimmerman	New Jersey
Peni Itula Sapini Teo	American Samoa	Alice T. Kane	New Mexico
Alan McClain	Arkansas	Adrienne A. Harris	New York
Ricardo Lara	California	Mike Causey	North Carolina
Mike Conway	Colorado	Jon Godfread	North Dakota
Andrew N. Mais	Connecticut	Judith L. French	Ohio
Trinidad Navarro	Delaware	Glen Mulready	Oklahoma
Karima M. Woods	District of Columbia	Andrew R. Stolfi	Oregon
Dean L. Cameron	Idaho	Michael Humphreys	Pennsylvania
Ann Gillespie	Illinois	Alexander S. Adams Vega	Puerto Rico
Doug Ommen	Iowa	Cassie Brown	Texas
Vicki Schmidt	Kansas	Jon Pike	Utah
Timothy J. Temple	Louisiana	Scott A. White	Virginia
Marie Grant	Maryland	Mike Kreidler	Washington
Anita G. Fox	Michigan	Allan L. McVey	West Virginia
Mike Chaney	Mississippi	Nathan Houdek	Wisconsin

NAIC Support Staff: Lois Alexander

2024 NAIC Consumer Representatives

Amy Bach—*United Policyholders (UP)*
Kellan Baker—*Whitman-Walker Institute*
Stephani R. Becker—*Shriver Center on Poverty Law*
Ashley Blackburn—*Health Care For All (HCFA)*
Brendan M. Bridgeland—*Center for Insurance Research (CIR)*
Jaclyn de Medicci Bruneau—*Ceres Accelerator For Sustainable Capital Markets*
Bonnie Burns—*California Health Advocates (CHA)*
Jalisa Clark—*Georgetown University Center on Health Insurance Reforms*
Laura Colbert—*Georgians for a Healthy Future (GFHF)*
Symone Crawford—*Massachusetts Affordable Housing Alliance (MAHA)*
Brenda J. Cude—*University of Georgia*

Lucy Culp—*The Leukemia & Lymphoma Society (LLS)*
Deborah Darcy—*American Kidney Fund (AKF)*
Michael DeLong—*Consumer Federation of America (CFA)*
Shamus Durac—*Rhode Island Parent Information Network (RIPIN)*
Eric Ellsworth—*Consumers' Checkbook*
Erica Eversman—*Automotive Education and Policy Institute (AEPI)*
Carly Fabian—*Public Citizen*
Joseph Feldman—*Consumer Advocate*
Adam Fox—*Colorado Consumer Health Initiative (CCHI)*
Stephanie E. Hengst—*The AIDS Institute*
Marguerite Herman—*Consumer Advocate*
Claire Heyison—*Center on Budget and Policy Priorities (CBPP)*
Kara Nett Hinkley—*The Amyotrophic Lateral Sclerosis (ALS) Association*
Anna Howard—*American Cancer Society Center Action Network (ACS CAN)*
Anna Hyde—*Arthritis Foundation*
Janay Johnson—*American Heart Association*
Amy Killelea—*Consumer Advocate*
Kenneth S. Klein—*California Western School of Law*
Peter R. Kochenburger—*Southern University Law Center (SULC)*
Dorianne Mason—*National Women's Law Center (NWLC)*
Erin L. Miller—*Community Catalyst*
Carl E. Schmid II—*HIV+Hepatitis Policy Institute*
Jennifer Snow—*National Alliance on Mental Illness (NAMI)*
Deborah Steinberg—*Legal Action Center (LAC)*
Christa L. Stevens—*Autism Speaks*
Harold "Harry" M. Ting—*Health Care Consumer Advocate*
Wayne Turner—*National Health Law Program (NHeLP)*
Brent J. Walker—*Coalition Against Insurance Fraud (CAIF*)
Richard Weber—*Life Insurance Consumer Advocacy Center (LICAC)*
Caitlin Westerson—*United States of Care (USofCare)*
Jackson Williams—*Dialysis Patient Citizens (DPC)*
Silvia Yee—*Disability Rights Education and Defense Fund (DREDF)*

AGENDA

1. Observe the Presentation of Consumer Representatives' Excellence in Consumer Advocacy Awards to Commissioner Michael Humphreys (PA) by *Amy Bach (UP) and Christa Stevens (Autism Speaks)* and to Commissioner Mike Kreidler (WA) by *Bonnie Burns (Consultant to Consumer Groups) and Brenda Cude (Individual Consumer Representative)*

2. Consider Adoption of its Summer National Meeting Minutes —*Commissioner Grace Arnold (MN)* — Attachment One

3. Hear a Presentation on How Regulators Can Help Consumer Reduce Risk and Reverse a Non-Renewal—*Amy Bach (UP)*

4. Hear a Presentation on the Election to Repair Remedy with All the Costs Benefits and Liabilities That Rebuilding It Yourself Entails—*Erica Eversman (AEPI)*

5. Hear a Presentation on the Use of Criminal History Data in Insurance Underwriting and Claim Evaluation—*Peter R. Kochenburger (SULC)*

6. Hear a Summary of the NAIC Consumer Representative Artificial Intelligence (AI) and Health Insurance Report—*Adam Fox (CCHI), Wayne Turner (NHeLP), and Silvia Yee (DREDF)*

7. Hear a Presentation on Consumer Challenges Accessing Medicare Advantage and Medicare Supplemental Plans—*Bonnie Burns (CHA) and Amy Killelea (Consumer Advocate)*

8. Hear an Update on How Recent and Upcoming Federal Actions Will Impact State Regulation of the Health Insurance Market—*Anna Howard (ACS CAN), Jennifer Snow (NAMI), and Deborah Steinberg (LAC)*

9. Discuss Any Other Matters Brought Before the Liaison Committee —*Commissioner Grace Arnold (MN)*

10. Adjournment

2024 Bonnie Burns Excellence in Consumer Advocacy Awards

Presented by the NAIC Consumer Representatives

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Draft Pending Adoption

Draft: 8/26/24

NAIC/Consumer Liaison Committee
Chicago, Illinois
August 12, 2024

The NAIC/Consumer Liaison Committee met in Chicago, IL, Aug. 12, 2024. The following Liaison Committee members participated: Grace Arnold, Chair (MN); Lori K. Wing-Heier (AK); Mark Fowler (AL); Alan McClain (AR); Ricardo Lara (CA); Andrew N. Mais represented by Kurt Swan (CT); Trinidad Navarro represented by Susan Jenette (DE); Dean L. Cameron represented by Shannon Hohl (ID); Vicki Schmidt (KS); Joy A. Hatchette represented by Nour Benchaaboun (MD); Anita G. Fox represented by Renee Campbell (MI); Chlora Lindley-Myers represented by Jo LeDuc (MO); Mike Chaney represented by Ryan Blakeney (MS); Mike Causey represented by Angela Hatchell (NC); Jon Godfread represented by John Arnold (ND); Eric Dunning represented by Martin Swanson (NE); Justin Zimmerman (NJ); Scott Kipper represented by Todd Rich (NV); Judith L. French represented by Jana Jarrett (OH); Glenn Mulready represented by Ashley Scott (OK); Andrew R. Stolfi represented by Cassie Soucy (OR); Cassie Brown represented by Randall Evans (TX); Jon Pike (UT); Scott A. White represented by Zuhairah Tillinghast (VA); Mike Kreidler (WA); and Nathan Houdek represented by Sarah Smith (WI).

1. Heard Opening Remarks

Brenda Cude (University of Georgia) said Karroll Kitt (University of Texas), who passed away on June 27th, was an NAIC Consumer Representatives since 1999. The Committee paused for a moment of silence to remember Kitt and her contributions as an NAIC Consumer Representative.

2. Adopted its Spring National Meeting Minutes

Commissioner Conway made a motion, seconded by Commissioner Lara, to adopt the Committee's March 15 minutes (*see NAIC Proceedings – Spring 2024 NAIC/Consumer Liaison Committee*). The motion passed unanimously.

3. Heard a Report from the Consumer Participation Board of Trustees

Commissioner Arnold said the Board of Trustees: (a) discussed the automation of the consumer representative application process for 2025; (b) adopted amendments to the Consumer Participation Plan of Operation regarding qualifications for an applicant to be appointed as a consumer representative and the process for a consumer representative changing their post-appointment status from an individual consumer representative to a consumer representative with an organization; and (c) reviewed two requests for actions from NAIC Consumer Representatives. The first request seeks additional NAIC action on readability and the second request seeks additional NAIC action on the regulation of prior authorizations.

4. Heard a Presentation on Insurance Obstacles to Mental Health and Substance Use Disorder Care

Jennifer Snow (National Alliance on Mental Illness—NAMI) said the United States is facing a mental health crisis, as indicated by rising rates of depression, suicide, and drug overdose. Federal surveys consistently show that about one-third of Americans aged 12 and older have a mental health or substance use disorder at any given time. Given its high prevalence, Snow said policymakers have been focusing on access to mental healthcare for decades. The federal Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) requires health plans that cover mental health and substance use disorder benefits to do so no more restrictively than they cover medical and surgical benefits. Snow said quantitative barriers to mental healthcare, such as cost-sharing levels and visit limits are relatively straightforward to assess, while non-quantitative treatment limitations

such as prior authorization, provider reimbursement rates, and formulary design, are more complex. Snow said recent federal legislation requires plans to provide comparative analysis for these non-quantitative limitations, but that enforcement is challenging.

Joe Feldman (Cover My Mental Health) said 9% of cancer patients and 13% of people with cardiovascular disease do not receive treatment; whereas 50% of people needing mental health treatment and 75% of people needing substance use disorder treatment do not receive treatment. Feldman said many people think insurance will not cover the costs of mental health or substance use disorder. Feldman said insurers face little accountability regarding network adequacy and that inadequate networks would not be permitted for medical and surgical treatment. Feldman said out-of-network care leads to delays, additional costs, and challenges in finding providers. Feldman said unacceptable provider reimbursement rates, troublesome insurer oversight, and the burden of joining networks drive mental healthcare providers to accept only private pay clients, which disadvantages consumers who cannot afford treatment.

Deb Steinberg (Legal Action Center—LAC) said state regulators should use the following strategies to enhance access to mental health and substance use disorder care: 1) enforce meaningful compliance with parity laws; 2) establish quantitative network adequacy standards with robust consumer protections; 3) standardize and eliminate unnecessary utilization management practices; 4) support community-based consumer assistance programs; 5) enforce network adequacy standards; 6) enforce balance billing protections; and 7) support standardized coverage criteria and patient placement tools used by plans. Steinberg said proactive enforcement of the MHPAEA is crucial since regulators have access to resources and data that consumers do not.

5. Heard a Presentation on the Impact of the Enhanced Premium Tax Credit on Uninsurance, Premiums, and State Innovation

Claire Heyison (Center for Budget and Policy Priorities—CBPP) said the expiration of enhanced premium tax credits will negatively impact states' efforts to improve health care affordability. Heyison said 19 states have reinsurance programs to lower premiums in the individual market. These programs create federal savings and generate state revenue under the enhanced tax credits.

Laura Colbert (Georgians for a Healthy Future) said 10 states provide extra state-funded premiums or cost-sharing assistance. If the tax credits expire, states may reduce these initiatives, raising costs for enrollees and potentially increasing the uninsured rate. Colbert said that if insurers have doubts about the extension of the tax credits, then premiums might rise, which will deter consumers from returning to the marketplace.

6. Heard a Presentation on Important Changes to Essential Health Benefits in the Notice of Benefit and Payment Parameters 2025

Adam Fox (Colorado Consumer Health Initiative) said the Affordable Care Act's (ACA's) essential health benefits (EHBs) aim to provide comprehensive coverage. Fox said states can define EHBs through a benchmarking process. For changes to be effective in 2027, new benchmark selections must be submitted by May 7, 2025. Wayne Turner (National Health Law Program) said a significant update allows states to incorporate adult dental services into their EHB plans. Turner said research links oral health to conditions such as diabetes, cardiovascular disease, pneumonia, Alzheimer's, and some cancers, emphasizing why separating oral from physical and mental health coverages is not beneficial. Fox said states have flexibility in how they implement this benefit. The U.S. Department of Health and Human Services (HHS) allows states to add adult dental services without monetary caps but within existing categories. Fox said other high-value services can also be added to EHBs to address health disparities and inequities.

Draft Pending Adoption

Turner said there are other significant changes in the benefit payment parameters rule. When prescription drugs are offered above the regulatory minimum, those additional drugs are also considered EHBs. This means cost-sharing protections apply. Fox said there have been instances where health plans tried to impose annual lifetime caps or ignored EHB cost-sharing protections by labeling certain drugs as non-EHB.

7. Heard a Presentation from LICAC on the Misuse of Indexed Life and Annuity Policy Illustrations

Richard Weber (Life Insurance Consumer Advocacy Center—LICAC) said he is handling several consumer complaints and litigation cases about the misuse of indexed life and annuity policy illustrations. The illustrations, not the policies themselves, are at issue. Weber provided an example of where actual policy credits fell short because illustrations only showed growth and failed to show the impact of debt or zero returns. Weber said such illustrations can be deceptive regardless of their intent. Weber said another case involved an arrangement with a registered representative encouraging large upfront premium financing for an employee-employer split dollar plan.

Weber said illustrations never present zero percent returns in current value projections and that values always seem to grow. Customers do not realize the effect of zero returns, an essential aspect of indexed universal life policies. Weber said there are also issues with cap or participation rates. Using stochastic analysis, Weber said he examined the likelihood that $265,000 per year could be withdrawn for 20 years while maintaining a policy and paying off the initial premium loan. Weber said there was a 94% chance of failure within this period, mainly before reaching average life expectancy.

Weber presented a flexible premium fixed index deferred annuity model illustration, which reflected impractical crediting rates and a $250,000 deposit growing to nearly $7 million in 25 years—a 14.25% annual compound return.

Weber said the problem is with the illustrations, not the product. A new illustration paradigm is needed because consumers view the most favorable illustrated results as future projections.

8. Heard a Presentation on Readability Standards in State Insurance Laws

Cude said readability laws mandate consumer documents to meet certain readability standards. Referencing a recent article by Professor Blasie, Cude said 47 states, Washington, D.C., and the federal government had 240 readability laws for insurance in 2023. Professor Blasie categorized these laws into five types: 1) score-based (syllables, words, sentences); 2) feature standards (frequent headings, no double negatives); 3) general plain language use; 4) hybrid standards combining objective scores and features; and 5) subjective readability left to state agency discretion.

Cude said roughly 200 scores exist, typically calculated similarly by counting words, syllables, and sentences. Cude said scores often translate to grade levels. The Flesch-Kincaid score is common and denotes eighth grade as easy understanding, and kindergarten level as simple understanding. Superior readability scores should aim for a 60-70 Flesch-Kincaid score.

Cude recommended the NAIC review and revise its models for readability standards; use Flesch-Kincaid scores for clarity and simplicity, collect data on existing state laws and enforcement practices, and encourage widespread adoption of plainly written consumer-facing documents.

Silvia Yee (Disability Rights Education & Defense Fund—DREDF) recommended the NAIC reference plain/easy English resources from the Centre for Inclusive Design. Yee said supportive decision-making allows adults with

cognitive disabilities to maintain decision-making capacity with plain language documents aiding their autonomy. Yee offered to provide additional background materials upon request for any Committee members.

In response to Eric Ellsworth's (Consumers' Checkbook) question regarding clarity of language used on websites and mobile device applications, Cude said some mobile device applications diagnose readability issues without resolving them while some do both. Cude said some websites offer various readability formulas that provide diagnostic insights into where issues may lie. In response to a question about whether state readability laws apply to policy documents or consumer disclosures, Cude said state laws generally pertain specifically to either policies or disclosures.

9. Heard a Presentation on Whether Plaintiff's Attorneys Are the Cause of Rising Premiums

Kenneth S. Klein (California Western School of Law) said the insurance industry attributes the rise in insurance premiums to a lawsuit crisis driven by plaintiffs' lawyers. Klein said his research shows there is no litigation crisis.

Klein said insurance defense attorneys often have inherent advantages in civil litigation due to time and resources and that a plaintiff attorney bringing numerous frivolous lawsuits will not be successful. Klein said that even if more lawsuits are being brought and won, this does not signify a failing system unless there is proof the cases lack merit. Klein said regulating by lawsuits makes it harder to file or win benefits from insurance companies for those who pay premiums without suffering harm, but disadvantages victims whose cases might be dismissed.

Klein reviewed 28 years of data on federal civil case filings and, according to the Administrative Office of the U.S. federal Courts (AO), tort and personal injury filings show a slight rise, except during 2020. Klein said long periods of flat or declining filings have not correlated with steady or reduced premiums, which suggests there is no direct relationship between filings and insurance premiums. Klein said he examined case outcomes to track average federal civil case verdicts from 1996-2023. Klein said the data reflects long-term stability with recent increases, but median data smooths out anomalies, confirming that recent spikes reflect specific outlier cases.

Klein said his review of state court data focused on Florida, which is often cited as epicenter of the alleged lawsuit crisis. Data from the National Center for State Courts (NCSC) reveals that overall civil case filings in Florida (2012-2022) have decreased, with tort filings showing a minor, steady rise. In Florida, Klein said most outliers involve punitive damages in commercial trucking cases, unaffected by damage caps and irrelevant to insurers' obligations.

Klein said homeowners' affordability indices across jurisdictions indicate no direct correlation between litigation rates and insurance costs. In Florida and Louisiana, Klein said affordability seemed linked to both claim frequency and litigation costs. When isolating states, Klein said affordability strongly correlated with catastrophe experience rather than litigation. In Louisiana, despite similar lawsuits numbers as neighboring states, Klein said higher bodily injury rates might explain high auto insurance premiums. For homeowners' insurance, Klein said hurricane impacts complicate comparisons. Klein said data does not support a litigation crisis that is impacting premiums.

10. Heard a Presentation on Combatting Post-Disaster Fraud

Amy Bach (United Policyholders—UP) said roof coverage curtailment conflicts with Fannie Mae's replacement value requirements, which creates a risk of broader economic implications. Bach said the use of artificial intelligence (AI) could help insurers better detect fraud. Bach said states should consider rejecting policies that only provide roof coverage for actual cash value (ACV) and should require insurers to clearly state deductibles in dollar amounts at the point of sale. If ACV-only roof provisions are permitted, Bach said policyholders should receive a premium discount for ACV-only policies.

Draft Pending Adoption

Brent Walker (Coalition Against Insurance Fraud—CAIF) said predatory contractors often exploit vulnerable homeowners after disasters, leading to financial loss and poor-quality repairs. Walker said there is a need for effective information dissemination and offered to maintain ongoing collaboration with state insurance regulators to create educational toolkits to protect consumers from fraud after a catastrophe.

11. Heard a Presentation on the Progress and Challenges in U.S. Insurance Sector Disclosures in Navigating Climate Risks

Jaclyn de Medicci Bruneau (Ceres Accelerator for Sustainable Capital Markets) discussed integrating climate risk into insurance and highlighted efforts to encourage industry-wide financial disclosures through initiatives such as the task force on climate-related disclosures (TFCD) created by the Financial Stability Board (FSB). Bruneau said her organization, in collaboration with the California Department of Insurance, released its second annual report based on the latest cycle of the climate risk disclosure survey. Bruneau said the results included 516 insurance groups and that her organization made the results available to regulators, insurers, and stakeholders through an interactive dashboard sortable by state, carrier, line of business, company size, and TFCD recommendation.

Bruneau said transparency and disclosure are key to addressing climate risk but must be supplemented by ensuring information is digestible for informed decision-making. Bruneau said the results showed carriers strongest in risk management reporting, followed by strategy and governance. Bruneau said climate risk is immediate, and the industry must accelerate efforts to integrate it into business strategies. Bruneau said all carriers, regardless of size or business line, must address climate risk and said regulators should strengthen reporting and enforcement, develop best practices, support metric and target development, facilitate industry-wide collaboration, and advance stress testing for climate scenarios.

Having no further business, the NAIC/Consumer Liaison Committee adjourned.

SharePoint/NAIC Support Staff Hub/Committees/Consumer Liaison/ 2024 Summer/Consumer_08 Min

United Policyholders™

Empowering the Insured

Setting fair ground rules for property insurers' use of aerial images and risk scores

NAIC Fall Meeting

Consumer Liaison

November 19, 2024

About United Policyholders

- A 33 year-old insurance consumer advocacy 501(c)(3) non-profit with a Platinum Guidestar rating and a national corps of professional and disaster survivor volunteers.
- Advocating for fair insurance practices and improving disaster resilience and recovery since 1991. Engaged w/the NAIC since 2009.
- Trustworthy, plain language info and expertise on buying home insurance and navigating claims after a loss.
- Three programs: Roadmap to Preparedness, Roadmap to Recovery® and Advocacy and Action.
- Closely monitoring the property insurance marketplace, coordinating with stakeholders to restore affordable options and working hard to help people reduce risk and keep homes and businesses adequately insured despite a current national crisis.

FOX 26 HOUSTON

MAY 30, 2024

More insurance companies using drones to inspect homes, evaluate storm damage

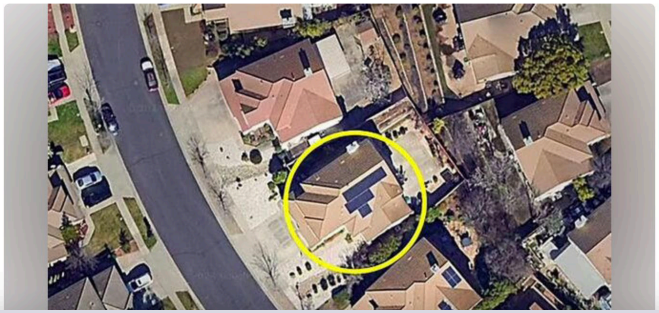
More insurance companies are using drones to survey storm damage and whether to write or renew homeowner's insurance policies. But some consumer advocates say it can unfairly put a homeowner's coverage at risk. More insurance companies are using drones to survey storm damage and whether...

California couple is dropped by long-time home insurer over photo from space

Story by Hannah Broughton • 4d • 2 min read

MARKETS TODAY ...

INX ▲ +0.41% DJI ▲ +0.69% COMP ▲ +0.80%



THE U.S. Sun

JUNE 4, 2024

EYE IN THE SKY 'I was blindsided' says man who had insurance yanked on his home of 40 years – a drone caught issue on his roof

Insurers in Massachusetts have the right to not renew policies for properties A HOMEOWNER has told how he was "blindsided" by insurers when they said he needed to fork out for a number of repairs on his home – despite having no issues for 40...

yahoo! finance

JULY 11, 2024

Insurance Companies Are Using Drones To Monitor Homes — 4 Things They're Looking For That Could End Up Costing You

If you're a homeowner and notice a drone hovering around your house, don't assume it's one of the neighbors playing with a new toy. It could be your homeowners insurance company doing a little spying to see if your house and property meet all the...

2 NEWS OKLAHOMA

JUNE 6, 2024

Insurance companies use drones and satellite images to spot roof damage

Some insurance companies use images to demand customers repair or replace roofs or lose coverage Using satellite or drone images to spot potential roof damage is a growing trend. Some companies use the images to demand customers either make repairs, replace their roof, or risk...

The News&Observer

MAY 28, 2024

How NC insurers use drone, satellite photos to drop home policies (and what you can do)

Rosemary Resler stands outside her home in Chapel Hill Thursday, May 23, 2024. She was recently dropped from her homeowners insurance because aarial photos showed roof damage on her property. Read more.

UP is asking regulators and lawmakers to put regulations and/or legislation in place to:

Require an insurer to provide a consumer with copies of date-stamped images of their home that show conditions that are out of compliance with the insurer's underwriting guidelines and/or impact the property's risk score, what factors go into that score, and what steps the consumer can take to reverse the insurer's decision

Require an insurer to provide an appeal process so the consumer can correct any errors (e.g. "that's not damaged roof tiles – that's my solar panel" or "that's not my home/address" or "There's a fire hydrant/station very close to my home that you didn't factor in"…)

Require an insurer to give the consumer a reasonable time period to cure the defects/conditions underlying the non-renewal or new application rejection.

Require an insurer to offer a new or renewal policy to a consumer who submits proof that they've cured the defects/conditions identified in **A)**, above.

Inform homeowners on addressing hazardous conditions, reducing risk and improving insurability

Require an insurer to provide a consumer with copies of date-stamped images of their home that show conditions that are out of compliance with the insurer's underwriting guidelines and/or impact the property's risk score, what factors go into that score, and what steps the consumer can take to reverse the insurer's decision.

Rectify errors, misinformation

Require an insurer to provide an appeal process so the consumer can correct any errors (e.g. “that’s not damaged roof tiles – that’s my solar panel” or “that’s not my home/address” or “There’s a fire hydrant/station very close to my home that you didn’t factor in”…)

Increase risk reduction

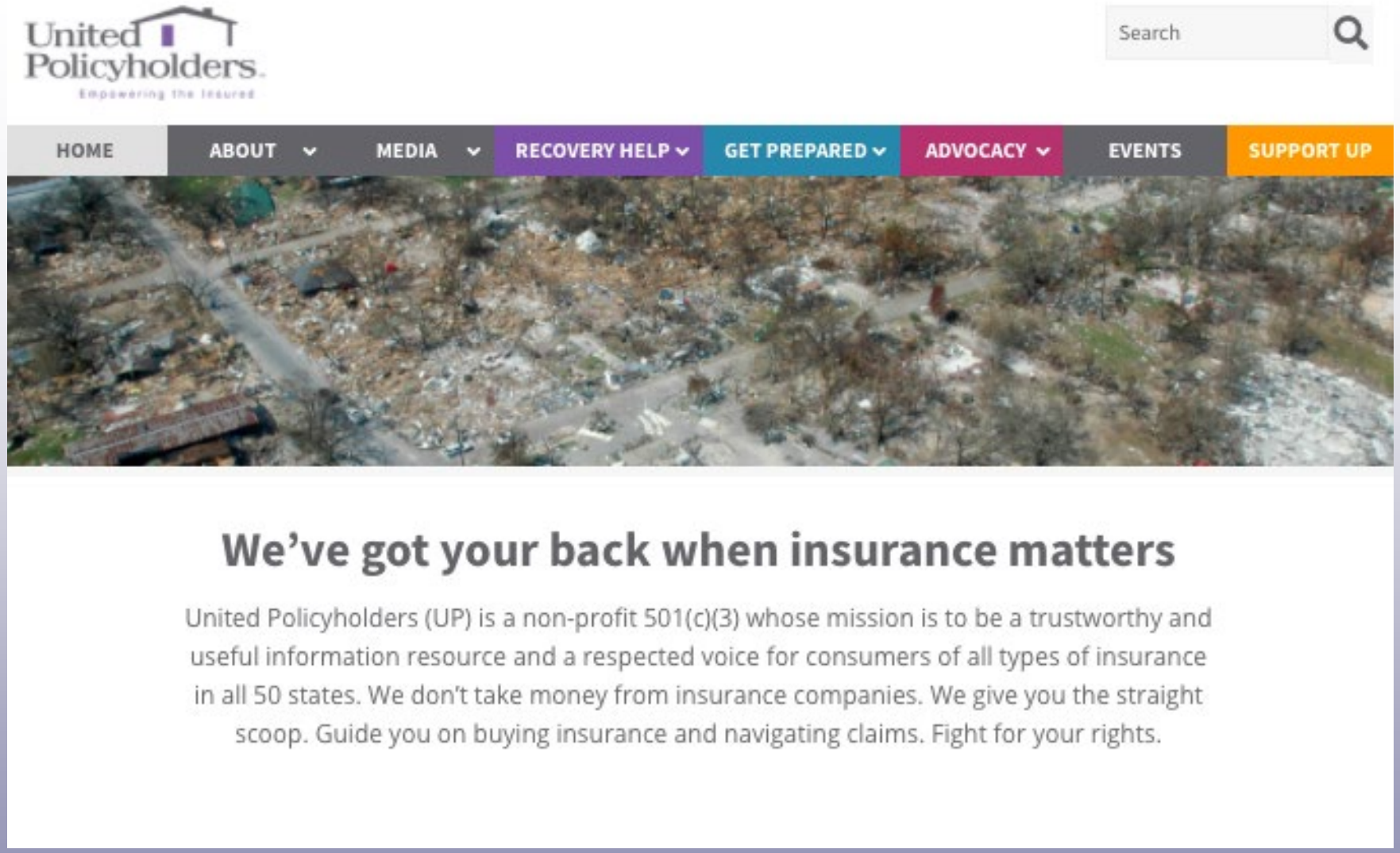
Require an insurer to give the consumer a reasonable time period to cure the defects and conditions underlying the non-renewal or new application rejection.

Appropriately reward risk reduction

Require an insurer to offer a new or renewal policy to a consumer who submits proof that they've cured the defects/conditions identified in A).

Challenges

- Age of images
- Disclosure of UW requirements
- Variations in Risk Scoring Systems
- Mandated renewal offers



info@uphelp.org | www.uphelp.org

THE "ELECTION TO REPAIR" REMEDY MEANS REBUILD IT YOURSELF:

WITH ALL THE COST BENEFITS AND LIABILITIES THAT ENTAILS

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS
DENVER, CO NOVEMBER, 2024

Erica. L. Eversman, J.D.
Automotive Education & Policy Institute

Partial Loss Policy Remedies

- *Pay loss in money*
- *Repair or replace the damaged property*

LEGAL HISTORY OF REPAIR REMEDY (Fire Insurance Over 150 Years Old)

- ***Morrell v. Irving Fire Ins. Co.***, 33 N.Y. 429, 437 (**1865**) (repair "election, converted the contract of insurance into a building contract, the amount of the insurance named in the policy ceased to be a rule of damages.")
- ***Buckeye Mutual Fire Ins. Co.,*** 43 Ohio St. 394, 2 N.E. 420 (**1885**) (insurers who elect repair convert the insurance contract of monetary indemnity into a repair contract)
- ***Zalesky v. Iowa State Ins. Co.***, 102 Iowa 512, 518, 70 N.W. 187, 189 (**1897**)

LEGAL HISTORY OF REPAIR REMEDY
Auto Insurance

- ***Gaffey v. St. Paul Fire & Marine Ins.*** *Co.*, 221 N.Y. 113, 115, 116 N.E. 778, 778 **(1917) NY**
- ***LETENDRE v. Auto. Ins. Co.*****,** 43 R.I. 410, 412-13, 112 A. 783, 784 **(1921) RI**
- ***Buerkle v. Superior Court of Los Angeles County***, 59 Cal. 2d 370, 29 Cal. Rptr. 509, 379 P.2d 941 **(1963) CA**
- ***State Farm Mutual Automobile Insurance Co. v. Dodd***, 276 Ala. 410, 162 So. 2d 621 **(1964) AL**
- ***Gregoire v. Insurance Co. of N. Am.,*** 128 Vt. 255, 261 A.2d 25 **(1969) VT**
- ***Venable v. Import Volkswagen, Inc.,*** 214 Kan. 43, 519 P.2d 667 **(1974) KS**
- ***Mockmore v. Stone,*** 143 Ill. App. 3d 916, 919, 493 N.E.2d 746 (Ill. App. Ct. 3d Dist. **1986**) IL

EFFECT OF REPAIR ELECTION

- Insurer converts insurance contract into repair contract
  - *Takes control of property*
- Insured must co-operate with insurer for repairs
  - *Must sign consumer protection authorization for repair*
- Gives insurer complete cost and provider control
- Insurer becomes general contractor for repair
  - *100% liable to insured/3rd parties for repair*
- Repair contract erases all terms and limitations contained in policy
  - *Policy limits disappear, e.g.*

STEPS FOR ELECTING TO REPAIR

- 1. Must be made within reasonable time after damage or loss
- 2. Must be clear, positive, distinct and unambiguous
- 3. Repairs or replacements must be made within reasonable time
- 4. Cannot be coupled with offer of compromise or be made for purpose of forcing a compromise, but must be an election made with no alternative
- 5. When election made, repair or replacement must be suitable and adequate

Home Mut. Ins. Co. v. Stewart, 105 Colo. 516, 520, 100 P.2d 159, 160-61 (1940)

LIMITED IN CERTAIN STATES

- Anti-steering laws/regs prohibit insurer requiring use of auto repair provider

POLICY PROVISION USE ISSUES

- Auto: Insurer does not tell insured which partial loss policy remedy it has chosen
- Telling insured to select repairer and take vehicle to be repaired is not electing repair remedy
- Merely having preferred provider network is not electing to repair
- Insurers insert themselves into insured's repair to control costs, but disclaim any liability
- Homeowners: Requiring use of provider implies repair election, and exposes insurer to liability

POLICY LOSS REMEDY ALTERATIONS

- Pay for loss in money
- Pay cost to repair/replace damage
  - *Essentially same remedy*
  - *Does not give insurer right to inject itself into repair*

Recommendations

- By official means:
  - *Require insurers to notify insured in writing of remedy provision chosen under policy*
    - Within specific time
  - *Notify insurers they cannot combine pay loss in money and elect to repair remedies*
  - *Establish that insurers must select the repair remedy and its responsibilities if they intend to:*
    - Require use of specific providers; or
    - Inject themselves into repair process

QUESTIONS?

Erica. L. Eversman, J.D.

Insurers' Use of Criminal History Information in Underwriting

NAIC Fall 2024 National Meeting

Peter Kochenburger
Visiting Professor of Law
Southern University Law Center
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Insurers' Use of Criminal History Information
Major Issues

1. Criminal history records have been considered publicly available information for many years, *including arrest records that are not associated with a subsequent conviction*. However, this information is increasingly available online to the public, and incorporated into predictive models for many uses, including insurance. In addition to misdemeanor and felony arrests, minor traffic offenses and municipal ordinance violations (e.g., jaywalking, excessive noise, building code violations) are also captured and can be used in these models.
2. The United States has one of the highest incarceration rates compared to other countries.
3. Our criminal justice system is typically skewed against people of color in policing, arrests, sentencing, and, incarceration rates.
4. We have inadequate information on how criminal records are being used in insurance underwriting, claims and fraud detection.

Insurers' Use of Criminal History Information

Insurers have long used criminal history data in underwriting. Several trends have escalated their use, however:

- Local jurisdictions are putting more of this information online, allowing
- Data vendors and modelers to capture a significantly larger volume of arrest records – independent of conviction - and to incorporate this information into increasingly sophisticated models utilized in underwriting, claim, and fraud evaluations.

Insurers' Use of Criminal History Information

Major risk modelers utilizing criminal records for their insurance-related products include:

- LexisNexis Risk Solutions, [link]
- Verisk (ISO) ClaimDirector, providing a risk score for evaluating claims and fraud evaluation
- TransUnion Criminal History Score
- Choice Screening – "the primary portion of an insurance background check investigates the criminal history of an applicant," including misdemeanors and open criminal cases.

Insurers' Use of Criminal History Information

Major risk modelers utilizing criminal records for their insurance-related products include:

- Solera: Explore Information Services – Sherlock®

  "Sherlock provides the industry's only cost effective real-time solution for underwriting, pricing and fraud investigation based on an applicant's criminal conviction history." https://exploredata.com/insurance/

- MIB and life insurers: "streamline identification of applicants with criminal convictions"

Insurers' Use of Criminal History Information

This trend raises many issues, including:

- As one example, are data vendors and insurers utilizing accurate criminal history data, such as arrest records not associated with its subsequent history .
- On a fundamental level, should criminal history records be utilized at all, given our country's increasing awareness that arrest records, even when accurate, may reflect societal bias against protected classes, low-income populations and other already disadvantaged groups?
- Given the growing number of risk classifications used in underwriting and fraud detection models, will there be a measurable loss in risk prediction justifying continued use of criminal data?

Are Modelers Removing "Inaccurate" Arrest and Conviction History?

Arrest and conviction records can be rendered obsolete or inaccurate in a variety of ways:

- State or local jurisdiction drops the charges
- Defendant is acquitted at trial
- Jurisdiction not updating arrest records
- Decriminalized drug offenses
- The defendant is placed in an accelerated rehabilitation program or similar option, which seals the criminal record and, in some states, (e.g., NY), explicitly forbid its use in credit or insurance underwriting. Many states are expanding rehabilitation and expungement programs.

Are Modelers Removing "Inaccurate" Arrest and Conviction History?

Search engine finds criminal arrest record, which is utilized in insurance-related models

Will insurer/vendor public records search protocols (1) detect absence of a previous criminal record, (2) and modify individual's profile accordingly?

Individual qualifies for "fresh start" – arrest record sealed or erased

Are Modelers Removing "Inaccurate" Arrest and Conviction History?

How, if at all, do modelers seek out revised criminal history (e.g., arrest) records? Are individual risk profiles updated so frequently that revised criminal data will be quickly gathered and the lack of a criminal record incorporated into that individual's profile?

If not:

- defeats a major purpose of accelerated rehabilitation laws, which provide an individual fresh start
- May violate state laws

Transparency?

- Do insurers or regulators know how modelers address this issue?
- How can insurance consumers access this data? Do the modelers or insurers have procedures allowing consumers to correct inaccurate information? If so, how is this option disclosed to consumers and how accessible is it and frequently used?

The Bigger Issue:
Should use of Criminal Record History be Significantly Reduced ?

- At the same time that criminal history data is increasingly accessible and utilized in modeling risk, consumer lending, employment, law enforcement, and other areas,
- There is growing recognition that our criminal justice system is not neutral, reflects and contributes to systemic racism in our society, and that therefore the data it produces, ranging from records of major felonies to violations of municipal ordinances and motor vehicle infractions, disproportionally affect disadvantaged groups, including people of color and the poor.

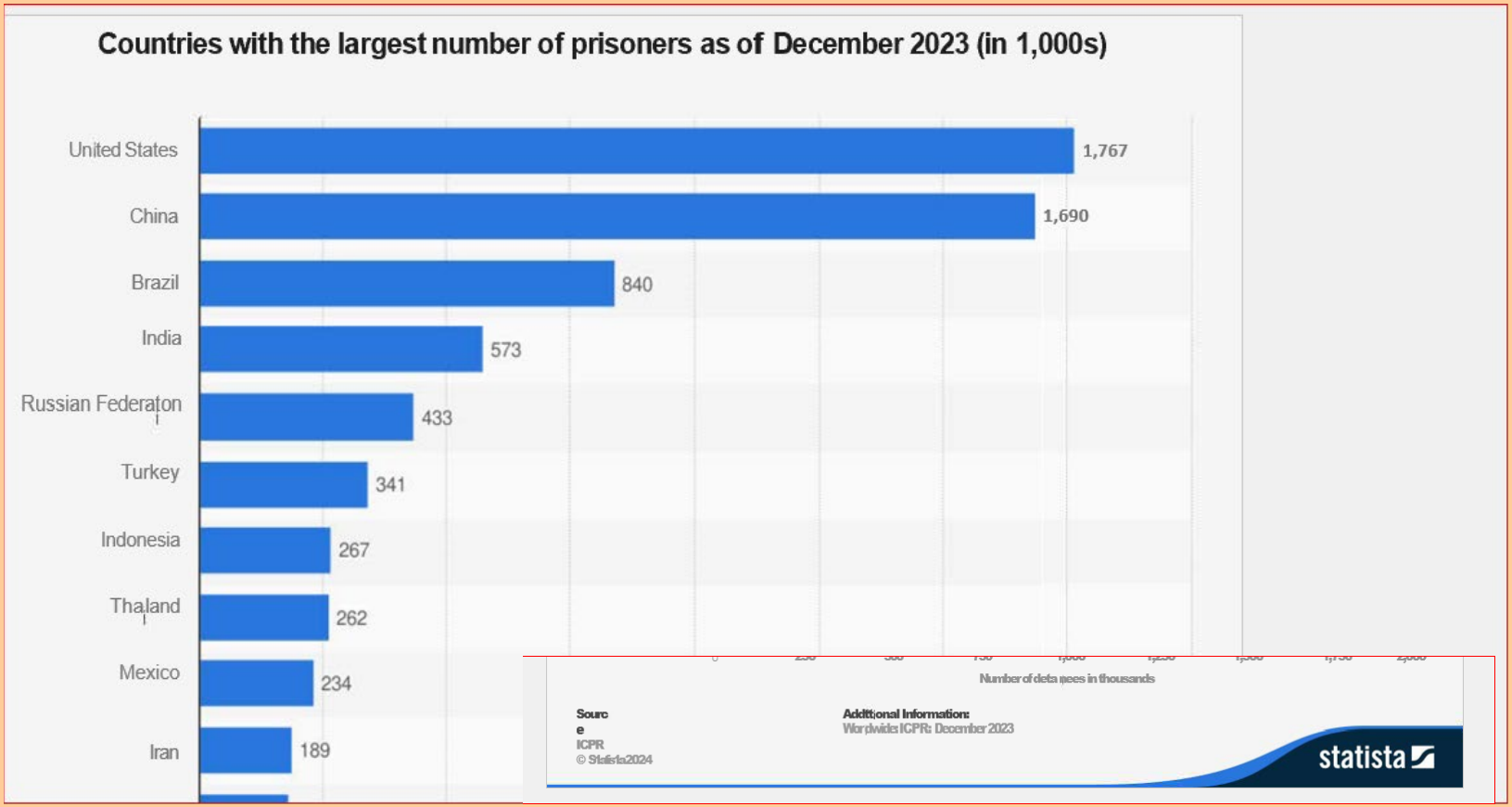
Background Information to Consider

- 6,196,771 arrests in 2022 – FBI Crime Data Explorer [update link]
- Estimated 1/3 of adult Americans have a "criminal record" (arrests, and arrests and convictions). This does *not* include infractions, traffic offenses and other violations that may be included in underwriting models
- Significant disparities by race, including arrest rates: In 2019 Blacks 2X arrest rate of Whites - U.S. Dept. of Justice, Arrests by offense, age, and race (ojjdp.gov) [update link]

Incarceration Rate – Top 10 Countries (Dec. 2023)

(does not include individuals on parole or probation)

https://www.statista.com/statistics/262961/countries-with-the-most-prisoners/

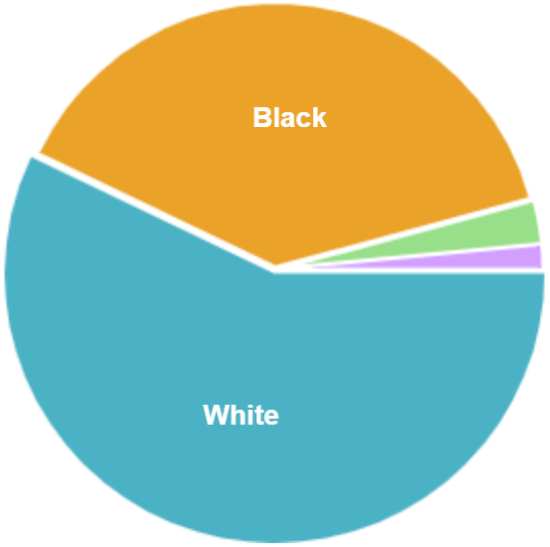


Federal Prisons, Inmates by Race

BOP Statistics: Inmate Race (March 2023)

Inmate Race

Statistics are updated weekly. Last updated on Saturday, 23 March 2024



	Race	# of Inmates	% of Inmates
	Asian	2,265	1.5%
	Black	60,118	38.7%
	Native American	4,231	2.7%
	White	88,643	57.1%

Should use of Criminal Record History be Significantly Reduced?

US DOJ Investigation of the Ferguson Police Department

March 2015 Report, page 4

"Ferguson's approach to law enforcement both reflects and reinforces racial bias, including stereotyping. The harms of Ferguson's police and court practices are borne disproportionately by African Americans, and there is evidence that this is due in part to intentional discrimination on the basis of race . . . Ferguson's law enforcement practices overwhelmingly impact African Americans. Data collected by the Ferguson Police Department from 2012 to 2014 shows that African Americans account for 85% of vehicle stops, 90% of citations, and 93% of arrests made by FPD officers, despite comprising only 67% of Ferguson's population."

Should use of Criminal Record History be Significantly Reduced?

In 2020, Systemic Racism becomes Clear(er)

- Death of George Floyd, May 25, 2020, and its aftermath
- "Unfortunately, discrimination exists in systems meant to protect well-being or health. Examples of such systems include health care, housing, education, criminal justice, and finance. Discrimination, which includes racism, can lead to chronic and toxic stress and shapes social and economic factors that put some people from racial and ethnic minority groups at increased risk for COVID-19." CDC July 24, 2020
- "That discussion [NAIC and diversity] was then followed by a series of senseless, brutal and totally unnecessary killings in our country at the hands of the police. The events shook the moral compass of many within the industry, as the country dealt with a one-two punch in the form of a pandemic and overt racism. Long-festering racial wounds were re-opened, exposing scars and new raw injuries to the social fabric of America." NAIC CEO Mike Consedine (September 25, 2020)

Third-Party Vendors and the Fair Credit Reporting Act

- The FCRA applies to insurance and has specific limitations regarding the use of criminal history information, including not using arrest records that are more than 7 years old, with limited application to life insurance (15 USCA 1681c(a)(2), (b)(2). State laws may further restrict its use.
- The FCRA requires consumer reporting agencies and the insurers and creditors that utilize their information to provide detailed disclosures and information to consumers, along with rights to see and correct inaccurate data and information.

Questions include

- When are third-party vendors subject to the FCRA or related state laws?
- Are they complying and how?
- Do insurance regulators or the CFPB know whether they are complying? Recalling third-party data vendors/modelers' early enthusiasm over what their models could do and their lack of knowledge of insurance law and regulation they demonstrated when explaining their products.
- Are the rights under the FCRA and state laws provided to insurance consumers?

Our Responsibility (?)

The Insurance Industry cannot solve the social, economic, and historical problems that have resulted in a criminal justice system that is often unforgiving and almost always disproportionate in effect. *But,*

We can fairly police on own industry, including

- Restricting its use to those areas where it is necessary to an essential feature of the underwriting or claim risk, and not where it is another risk proxy among many. For example, convictions for insurance fraud, or underwriting employee dishonesty coverage.
- Requiring data modelers and insurers that use criminal history data to demonstrate to regulators that there are not other risk classifications that have similar predictive value without the disproportionate effects, or that overall, the range of risk classifications used in underwriting model provide an essentially equal level of risk precision.

Our Responsibility (?)
Transparency and Accountability

- State legislatures and insurance regulators should have access to detailed information on how criminal history data is collected, modeled and used in underwriting, fraud evaluation and claim handling, and determine what specific uses should be prohibited, restricted, or left to market forces.
- Insurance consumers should have the right to know how their information is utilized and clear procedures to evaluate and contest its accuracy. Require modelers to certify/explain their compliance with the FCRA, or why they believe they are not subject to it.
- Consumer disclosures are necessary and an important regulatory tool, but alone they will not adequately police the use of consumer information, including criminal history data. Substantive prohibitions and restrictions are also appropriate.

Insurers' Use of Criminal History Information NCOIL July 17, 2021 "Resolution Regarding the Use of Certain Rating Factors"

BE IT FURTHER RESOLVED that NCOIL views as contrary to public policy and unfairly discriminatory the use of all data in the underwriting of private, non-commercial insurance that is: related to non-pending arrests, charges and indictments that do not result in conviction; related to convictions that do not relate in any way to fraud; or are not related to the insurability of a prospective or existing policyholder, and urges state legislatures to prohibit its use; ….

Full resolution available at: https://ncoil.org/special-committee-on-race-in-insurance-underwriting-2/

New York Law

- "It shall be an unlawful discriminatory practice [in connection with licensing, housing, employment, including volunteer positions, or providing of credit or insurance] ... to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed ... by a conviction for a violation sealed pursuant to section [CPL 160.58]." Executive Law § 296(16).

- "Criminal history only includes past convictions or pending criminal matters. It does not include prior arrests, pleas or imprisonment for which an individual was not convicted of any crime; or civil dispute history such as appearances in housing court, civil litigation, liens, bankruptcy, etc. See Executive Law § 296(16)." DFS Circular 1, Life (2019) N.Y. Crim. Proc. Law § 160.58 (McKinney)

Artificial Intelligence (AI) in Health Insurance: Report from NAIC Consumer Representatives

NAIC Fall Meeting 2024, Consumer Liaison

Presented by:

- Adam Fox, Deputy Director, Colorado Consumer Health Initiative
- Wayne Turner, Senior Attorney, National Health Law Program
- Silvia Yee, Public Policy Director, Disability Rights Education and Defense Fund

NAIC
National Association of Insurance Commissioners

Roadmap

1. Methodology and regulatory landscape
2. Key issues and concerns for consumers
3. Recommendations for state regulators and next steps

Methodology and summary findings

Report Background

- Use of AI/Algorithms in insurance practice is proliferating rapidly
- Use of AI in Utilization Management (UM) and Prior Authorization (PA) an increasing area of focus and concern in health insurance practice
- Report intended to support regulators and the NAIC and help inform potential actions

The report was developed in partnership with the NAIC Consumer Representatives for Health

CONSUMER HEALTH ADVOCACY AT THE NAIC

The research was divided into three phases:

1. Environmental Scan – Review and summarize white and grey literature to examine the current landscape of AI in health insurance decision making processes, with a focus on prior authorization as a form of utilization management (UM), and preliminary efforts to regulate it.
2. Key Informant Interviews – Supplement the environmental scan to create a more holistic view on the industry's current use and challenges of AI, including information that is not publicly known or published.
3. Synthesis (White Paper Development) – Combine the environmental scan and in-depth interview findings with policy recommendations.

Key Informant Interviews

Perspective	High-Level Descriptor
Health Plan	Analytics Executive at a Regional Health Plan
Thought Leader	Health Policy Professor
Consumer Advocate	Attorney for Underserved Patients and Families
Consumer Advocate	Leader at a Patient Advocacy Organization
Regulator	Representative from a State Department of Insurance
Technical Expert	Algorithmic Design and Measurement Consultant
Provider	Representatives from a Trade Group for Physicians

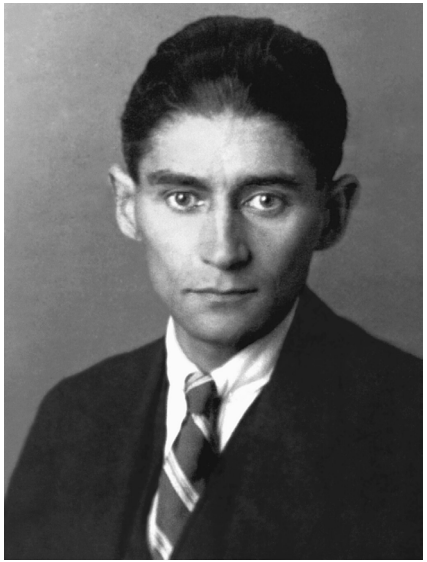
Summary of Report Findings

- Use of AI is already a regular part of UM activities and continues to expand.
    - Proponents cite the potential value of reduced administrative burden and expedited approvals. However, there are significant risks of exacerbating biases, prioritization of misaligned incentives, and use of technologies outside their intended use case or design leading to unintended harm
- All stakeholders interviewed noted the opportunities with the use of AI, but also the need for the proper safeguards.
- While some states have begun to regulate the use of AI in health insurance, for the most part, they have not been able to keep pace with the rapid proliferation of AI use. This has created a challenging but essential problem to solve.

Key issues and concerns for consumers

Limitations of AI/ML for health care determinations

- One-size-fits-all does not work for everyone
- Navigating automated systems can be challenging
- Insurers using AI/ML systems for UM need to provide an off-ramp for individualized care assessments
  - People with chronic conditions need access to treatments that work for them
    - Ex. HIV, Multiple Sclerosis, Irritable Bowel Syndrome have repeated step therapy or prior authorization fights
  - People in health crisis need immediate access to needed care
    - Race against time
    - Insurers should defer to providers



Meaningful transparency

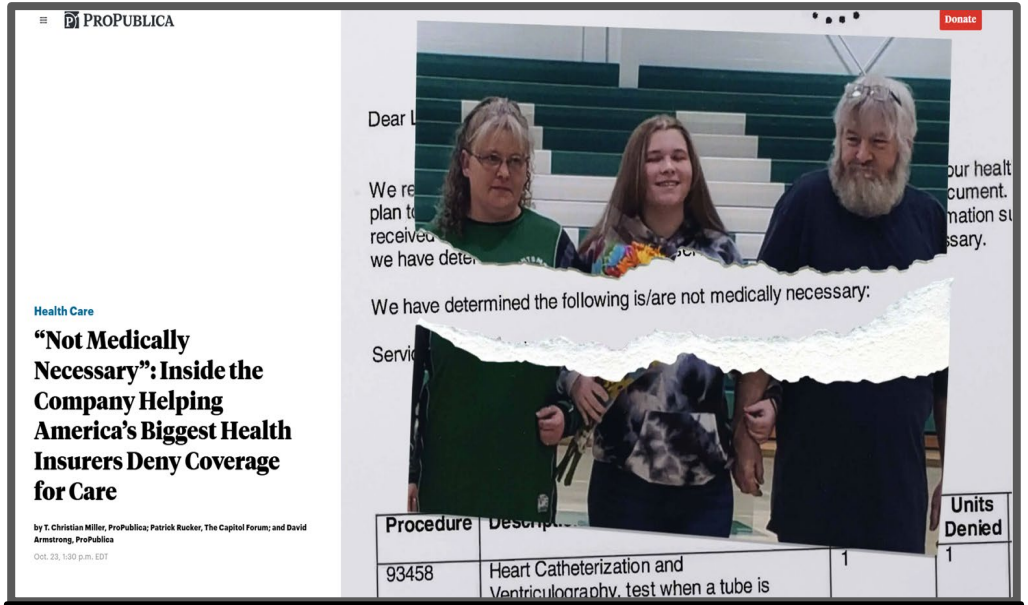
- Consumers need access to the criteria used for utilization management to appeal wrongful denials
- Coverage decisions should be supported by up-to-date clinical standards
  - Criteria must be evidence-based, nonproprietary
  - "Ascertainable standards" required under Medicaid due process. See Salazar v. District of Columbia, 596 F. Supp. 2d 67, 69 (D.D.C. 2009)

"Transparency must be meaningful and enable end users to trace a decision back to a specific actor to accurately determine decision rationale and hold actors accountable for potential adverse outcomes."

– Provider Trade Group

“Denials for dollars”

- Insurers accountable for the vendors/third parties with whom they contract
- Dialing down/up prior authorization approvals
- Insurers/agencies cannot subcontract away their obligations under nondiscrimination and other laws



See Pro Publica *“Not Medically Necessary”: Inside the Company Helping America’s Biggest Health Insurers Deny Coverage for Care*

Testing…testing 1,2,3

- ➔ Pre-deployment testing for accuracy, bias
- ➔ Post-implementation testing and monitoring
  - ◆ data about the use of AI/ML needs to be publicly available to study potential disparate impact from systems that may appear facially neutral
- ➔ Periodic, independent auditing
  - ◆ insurer self-reporting of testing, performance monitoring, review, and corrective action is insufficient

'Good AI governance' not only requires companies to be aware of what they are doing and what models they are using, but they must also have a regular assessment to ensure models continue to behave appropriately."

– Health Plan Executive

Recommendations for state regulators and next steps

Transparency, both to regulators and consumers, is seen as a crucial component of AI oversight

- Meaningful transparency is critical; it must be clear, to both regulators and consumers, when AI is being used by health insurance plans for the purposes of UM and what role the AI plays in making determinations about coverage for care
- Transparency must extend to disclosures about the data used to develop, train, and test the AI tools (with an emphasis on consent for use and representativeness of the population), and the extent to which any AI tool can begin to train itself
- Existing laws that are used to regulate data should be assessed for their applicability to AI in utilization management

The reliance on proprietary technologies obscures accountability for decisions when harm is done

- Transparency is a necessary precursor for any complaint or action taken to enforce regulation
- Regulatory standards must clearly identify which parties are accountable (e.g., health plans, technology developers, etc.) when AI tools are used in UM decisions that lead to consumer harm, including discrimination, breeches of privacy, and incorrect adverse determinations
- Regular audits, conducted on behalf of state regulatory agencies by parties with specialization in testing AI technologies, can be an effective way to both understand the ways AI is used in making UM decisions and hold the plans accountable for its use
- AI tools intended for UM decisions should be built on standards of care that aim to achieve the highest level of quality, and penalties for non-compliance need to be significant enough to have influence
- Governance structures that measure and prevent harm to historically marginalized and minoritized populations must be required

Human oversight is important, but is not a panacea and accessible appeals processes must be prioritized

- Robust and accessible appeals processes for coverage denials need to be established and considered a guaranteed right for all health insurance consumers
- Human oversight must be embedded into UM when AI is used and those reviewers must have the authority and ability to overturn decisions made by the AI without undue consequences
- AI regulation needs to be considered an evolving practice, that relies on collaboration between regulators, technical experts, industry stakeholders, consumers, and consumer advocates

Questions?

Contact:

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- Wayne Turner - turner@healthlaw.org
- Silvia Yee - syee@dredf.org

NAIC
National Association of Insurance Commissioners

Consumer Challenges Accessing Medicare Advantage and Medicare Supplemental Plans

NAIC Fall Meeting 2024

Presented by: Bonnie Burns and Amy Killelea

National Association of Insurance Commissioners

Medicare Advantage (MA) Consumer Challenges and Regulator Considerations

MA Plan Changes for 2025

- Providers leaving MA plans
  - Health systems, rural hospitals, and medical groups leaving MA plans
  - Health care providers can leave MA plan at any time with 30-day notice, not just during the AEP
- Insurers leaving MA market
  - Reduced number of MA plans/options available to Medicare beneficiaries

Effect on MA Members

- Loss of established health care providers
- Narrowed provider network
- Rescheduled services and medical procedures
- Remaining network providers not taking new patients
- Long delays for appointments with remaining network providers
- May use and incur cost for out-of-network providers
- Network adequacy issues
- Time, distance, and location issues/rural areas

MA Plan “Lock-in”

- MA members locked into MA system
  - Can freely change MA plans, but no federal right to a Medigap when health care providers leave an MA plan
- Medigaps screen out applicants with health conditions
- SEP request to the Secretary and CMS
- Consumer group letter to Senior Issues Task Force
- NAIC letter to CMS Administrator

Access to Medigap Is Limited

- When first eligible for Medicare at Open Enrollment rights
- Certain federally protected events
  - Listed in NAIC Model Regulation
  - Federal guaranteed issue events
- Other guaranteed issue events
  - Granted by state law
  - Younger than age 65
  - Other events or situations
- Few states allow voluntary transition from MA plan to Medigap

Options for a Federal SEP

- The Secretary has broad authority to create a Special Enrollment Period (SEP)
- NAIC Model Regulation
  - Guaranteed Issue for Eligible Person:
  - Section 12(e) The individual meets such other exceptional conditions as the Secretary may provide
- A SEP should be broadly applied and include the right to a Medigap
  - Loss of providers from an MA plan

What Can Regulators Do?

- Create state SEP
  - Coordinated with AEP, with Medigap guaranteed issue right
- Monitor industry practices
- Kickbacks to agents/brokers/producers:
  - $60 million judgement (false claims act), https://www.justice.gov/opa/pr/oak-street-health-agrees-pay-60m-resolve-alleged-false-claims-act-liability-paying-kickbacks
- Agent churning based on commissions
  - MA and Medigap commissions as incentive or disincentive for replacements or churning

What Can Regulators Do (Ctd.)?

- Require agent Medicare training
  - Pre-licensing and continuing education tied to license renewal
  - Understanding Medicare and other coverage
  - Medicare, Medigap, MA and Part D plans
  - Other forms of health coverage with Medicare
  - Medicaid and Medicare Savings Programs
  - Federal and state replacement rules
- Require producers to refer applicants to:
  - State Insurance Department
  - The State SHIP
  - State Medicaid program

Medicare and Other Medical Benefits

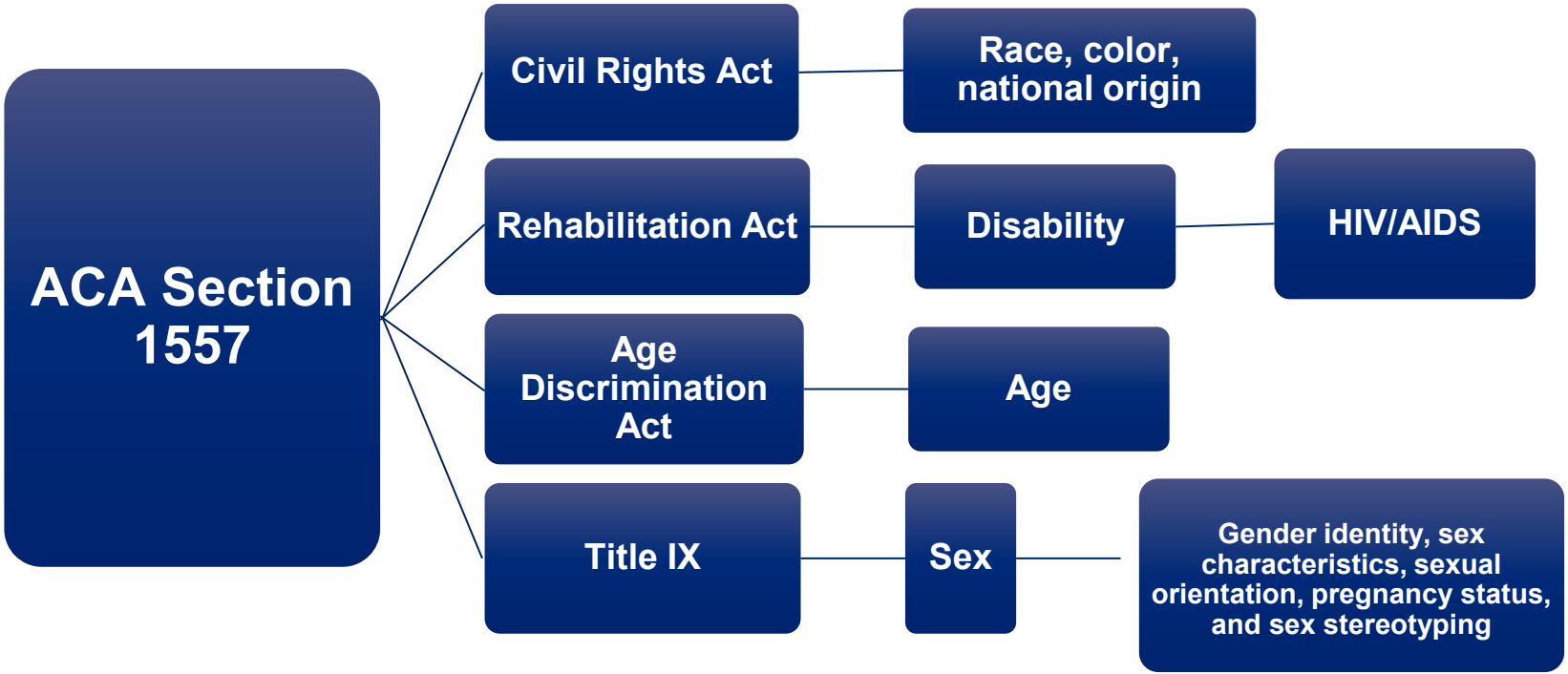
- Medicare coverage
  - Original Medicare
  - Medicare Advantage (51% of beneficiaries)
  - Rx (Part D)
- Employer health coverage (24% of beneficiaries)
  - Primary to Medicare (actively employed)
    - EGHP 20/100)
    - Self (partner, dependents if eligible)
    - Medicare secondary when enrolled for benefits
    - Retiree benefits secondary to Medicare
- Medicare and Medigap (12.5 beneficiaries)
  - Secondary to Medicare covered benefits

Medicare and Other Medical Benefits (Ctd.)

- COBRA and Medicare
  - Secondary to Medicare covered benefits
- VA OR Medicare
  - TriCare secondary to Medicare benefits (if eligible)
- Military medical care
  - Tricare secondary to Medicare (if eligible)
- Medicare and State High Risk Pool
  - Secondary to Medicare covered benefits
- Medicare and State Medicaid program
  - KFF Snapshot, https://www.kff.org/medicare/issue-brief/a-snapshot-of-sources-of-coverage-among-medicare-beneficiaries/econdary for Medicare covered services

Medigap and 1557

Section 1557: Nondiscrimination in “Health Programs and Activities”



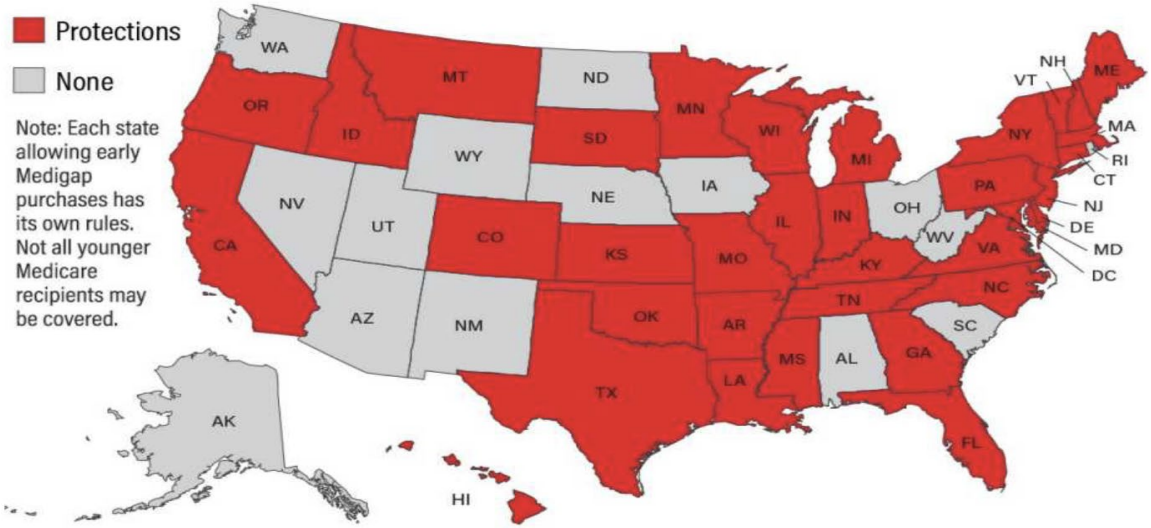
Does 1557 Apply to Medigap Plans and Other Excepted Benefits?

- **Yes,** the ACA statutory language is clear on this
- Section 1557 applies broadly to "**any health program or activity, any part of which is receiving Federal financial assistance**" 42 U.S. Code § 18116
- 1557 protections apply to **all operations** of the entity receiving federal financial assistance, even lines of business that do not directly receive the federal financial assistance
- The application of **civil rights laws** to all operations of an entity receiving federal financial assistance is not new and did not originate with section 1557

Section 1557 Intersects with a Patchwork of Different State Approaches to Medigap

States with Medigap protections if you're younger than 65

While the federal government doesn't require private companies to make Medicare supplement insurance available to disabled beneficiaries under 65, 35 states have regulations directing insurers to make at least one type of policy available to select groups of younger Medicare recipients.



Source: Centers for Medicare & Medicaid Services, AARP research

How Does 1557 Apply to Medigap and other Excepted Benefits Plans?

- Neither the text of the ACA nor the final 1557 regulation include a list of per se discriminatory practices
- The standard cited in the final rule is that the plan practice or plan design **may not be based on unlawful animus or bias, or constitute a pretext for discrimination**
- If a plan design is determined discriminatory, the covered entity may **provide a legitimate, nondiscriminatory reason for the plan's benefit design**
    - For instance, a covered entity could argue that compliance will make the plan unaffordable or force the issuer to stop selling the plan altogether
    - When a non-discriminatory reason is proffered, OCR will carefully consider the evidence presented and determine whether the reason is legitimate and not pretext for discrimination
    - In the case of disability discrimination, covered entities may also prove that modifying a plan to comply with section 1557 would result in a fundamental alteration to their health program or activity

What about Underwriting?

- Million dollar question!
- The ACA and the final rule are silent as to whether underwriting based on a protected class is now prohibited in Medigap and other excepted benefit plans
- But if we follow the discrimination inquiry outlined in the rule, we can start to see a few potential paths for how plans will be reviewed, for instance, the following scenario could play out for Medigap:
    - A Medigap plan that underwrites plans based on disability and charges people with a disability a higher premium, could warrant a discrimination claim that the practice is based on animus or bias against this protected class
    - The Medigap plan could answer that claim by offering evidence that the underwriting practice is not based on bias toward a protected class, it is based on a legitimate business reason to charge this population more in premiums
    - OCR would then have to determine if that business reason is legitimate, and they might look to whether evidence is presented that removing underwriting based on this protected class would send the plan into a death spiral or not and would weigh the business interests against the interest of protecting people with disabilities from higher premiums

What about Other Potentially Discriminatory Practices?

- Refusal to accept third-party payments from charitable or government programs that provide assistance to people with disabilities (e.g., HIV)
- Denying coverage based on a disability
- Charging people higher premiums based on gender

Regulator Considerations

- Assess Medigap and other excepted benefits markets and the extent to which enrollment, premiums, and plan designs exclude or limit coverage based on age, disability, sex, or race
- Consult with consumer groups and other experts on how excepted benefits markets impact consumers based on age, disability, sex, and race
- Develop guidance for regulated entities on how section 1557 impacts products regulated by the state

Questions

- Bonnie Burns, California Health Advocates, bburns@cahealthadvocates.org
- Amy Killelea, amyk@killeleaconsulting.com

How Federal Actions Will Impact State Regulation of Health Insurance

Deborah Steinberg, LAC
Anna Schwamlein Howard, ACS CAN
Jennifer Snow, NAMI

November 19, 2024

Agenda

New Mental Health Parity and Addiction Equity Act (MHPAEA) Final Rule

Enhanced ACA Tax credits

Update on Braidwood v. Becerra

Notice of Benefit and Payment Parameters for plan year 2026 proposed rule

Impact of Federal Election on State Regulators

MHPAEA New Purpose Section & Updated Definitions

- Establishes new purpose
  - Interpret all provisions of the regulations consistent with the fundamental purpose of MHPAEA: no greater burden on access to mental health (MH) and substance use disorder (SUD) benefits than medical/surgical (med/surg) benefits
- Amends definitions of MH, SUD, and med/surg benefits
  - Align with generally recognized independent standards of current medical practice and the ICD/DSM
  - Eating disorders, autism spectrum disorders, and gender dysphoria are MH conditions for purposes of MHPAEA and comparative analyses

Meaningful Coverage & List of NQTLs

- Plans must provide meaningful coverage
  - Acore treatment for a MH/SUD must be offered in a benefit classification if a core treatment for med/surg is offered in that benefit classification
  - Consult generally recognized independent standards of medical practice: i.e., medications for opioid use disorder and outpatient counseling for OUD
- Amends non-exhaustive list of non-quantitative treatment limitations (NQTLs)
  - Medical management standards including prior authorization
  - Standards related to network composition including admission or continued participation, reimbursement rates, procedures for ensuring network adequacy
  - Methods for determining out-of-network rates

NQTL Analysis: Two-Prong Test

- Test 1: Analyze the design and application of the NQTL
  - Plans may not rely on discriminatory (biased or not objective) evidentiary standards or factors in NQTL design, including historical data or information
- Test 2: Evaluate outcomes data
  - Relevant outcomes data exists for all NQTLs, and could include data related to the NQTL required by State law
    - Plans may not disregard data they know or should reasonably know suggest a material difference in access
    - Examples for network composition: in- and out-of-network utilization rates, network adequacy metrics, and reimbursement rates
  - A material difference in access is a strong indicator of non-compliance
  - Plans must take reasonable actions to address material differences in access

NQTL Comparative Analyses & Enforcement

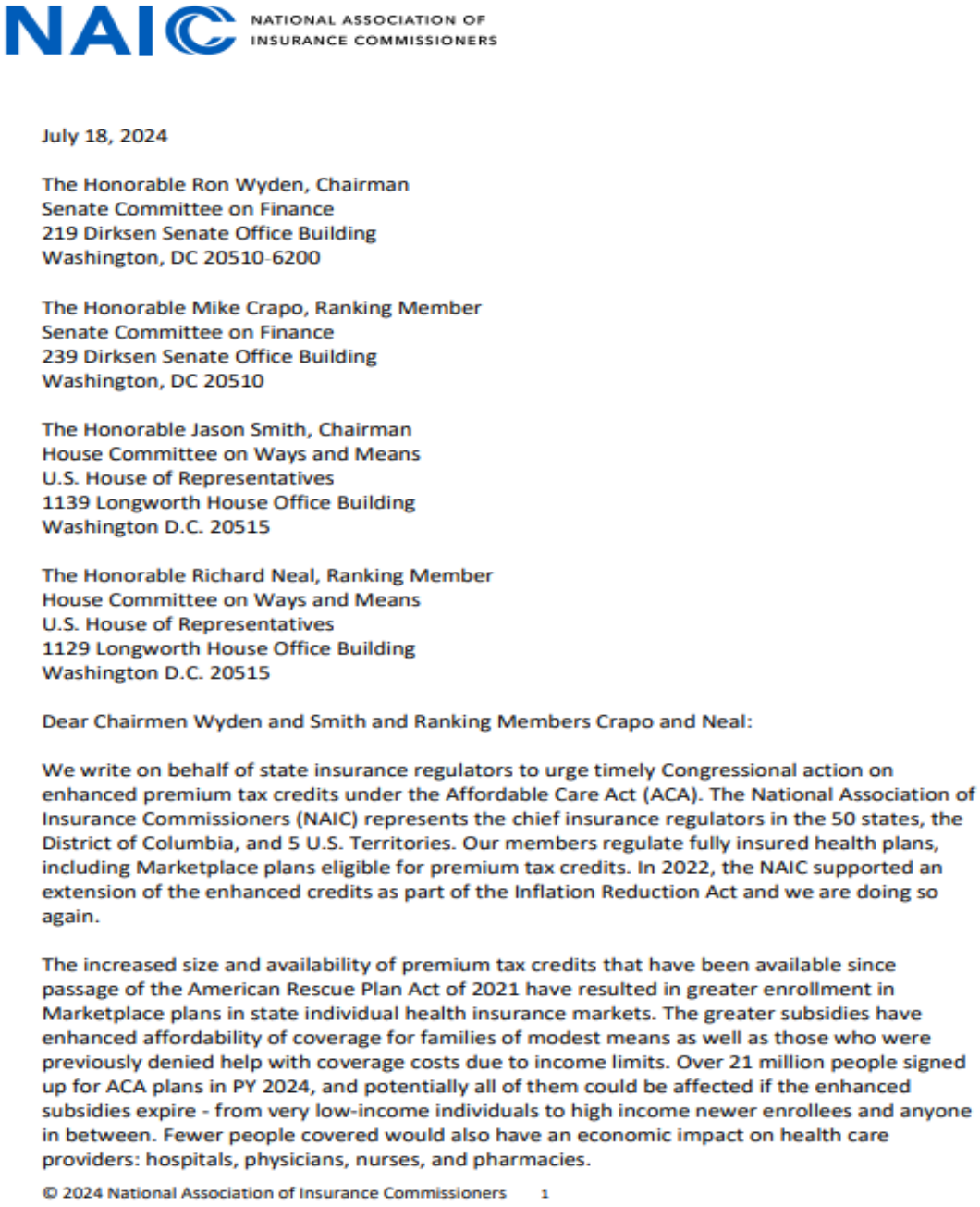
- Requires NQTL comparative analysis
  - Codifies the 6-step process for analyzing NQTLs
  - State regulators can request the comparative analyses at any time
    - Note: many states require plans to submit these on a regular basis (i.e., annually)
- Enforcement options
  - Regulators may require plans to cease applying a NQTL upon a final determination of non-compliance
  - An insufficient or non-compliant comparative analysis can also result in regulators requiring a plan to cease applying a NQTL
  - Other corrective/enforcement actions are permissible

Enhanced ACA Tax Credits

- ACA created tax credits for low- and moderate-income individuals who purchase Marketplace coverage
- ARPA and IRA provided more enhanced tax credits
- Absent Congressional action, the enhanced ACA tax credits will expire on December 31, 2025
- Unless Congress acts swiftly, all Marketplace enrollees will see significant premium increases for plan year 2026 and beyond, and millions will drop coverage

State Regulator Action

- Continued outreach to Congress
  - Education about need for immediate action and ramifications if Congress delays
- Work with Congressional delegation
- Serve as resource to stakeholders



NAIC NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

July 18, 2024

The Honorable Ron Wyden, Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

The Honorable Mike Crapo, Ranking Member
Senate Committee on Finance
239 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jason Smith, Chairman
House Committee on Ways and Means
U.S. House of Representatives
1139 Longworth House Office Building
Washington D.C. 20515

The Honorable Richard Neal, Ranking Member
House Committee on Ways and Means
U.S. House of Representatives
1129 Longworth House Office Building
Washington D.C. 20515

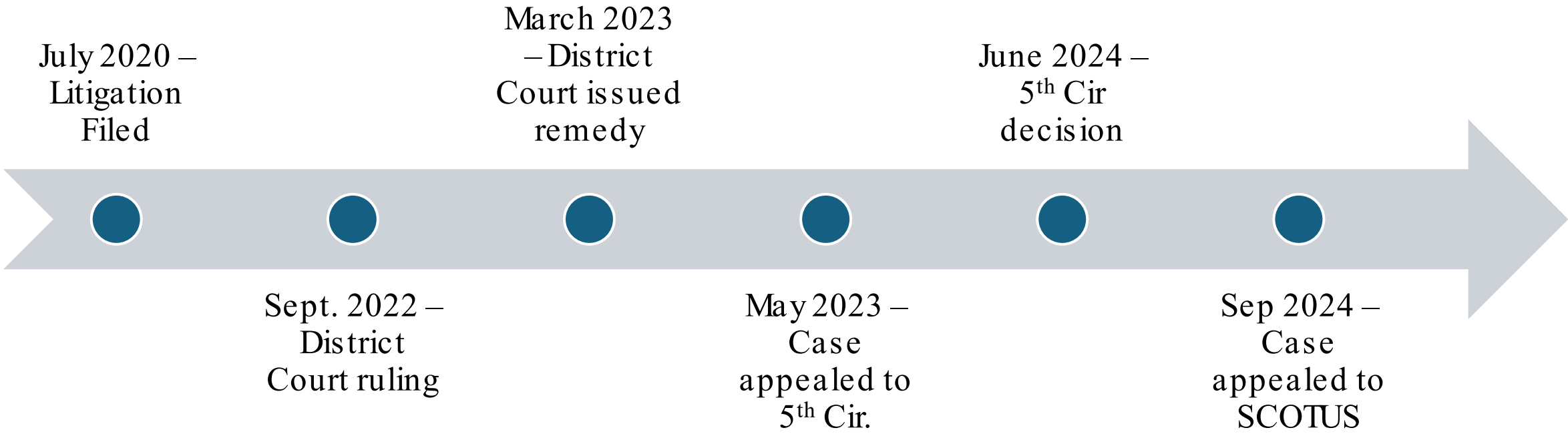
Dear Chairmen Wyden and Smith and Ranking Members Crapo and Neal:

We write on behalf of state insurance regulators to urge timely Congressional action on enhanced premium tax credits under the Affordable Care Act (ACA). The National Association of Insurance Commissioners (NAIC) represents the chief insurance regulators in the 50 states, the District of Columbia, and 5 U.S. Territories. Our members regulate fully insured health plans, including Marketplace plans eligible for premium tax credits. In 2022, the NAIC supported an extension of the enhanced credits as part of the Inflation Reduction Act and we are doing so again.

The increased size and availability of premium tax credits that have been available since passage of the American Rescue Plan Act of 2021 have resulted in greater enrollment in Marketplace plans in state individual health insurance markets. The greater subsidies have enhanced affordability of coverage for families of modest means as well as those who were previously denied help with coverage costs due to income limits. Over 21 million people signed up for ACA plans in PY 2024, and potentially all of them could be affected if the enhanced subsidies expire - from very low-income individuals to high income newer enrollees and anyone in between. Fewer people covered would also have an economic impact on health care providers: hospitals, physicians, nurses, and pharmacies.

Braidwood v. Becerra

- Case threatens the provisions of the Affordable Care Act (ACA) that require most insurance plans cover preventive services recommended by the US Preventive Services Task Force (USPSTF), Advisory Committee on Immunization Practices (ACIP), and Health Resources and Service Administration (HRSA) without cost-sharing.



State Regulator Action

- While litigation is currently pending, ensure continued ACA preventive service coverage and cost-sharing protections by incorporating into state law
- CMS new FAQ requiring issuers to cover all forms of PrEP (including long-acting) w/o Prior Authorization & Addresses Bill/Coding Issues

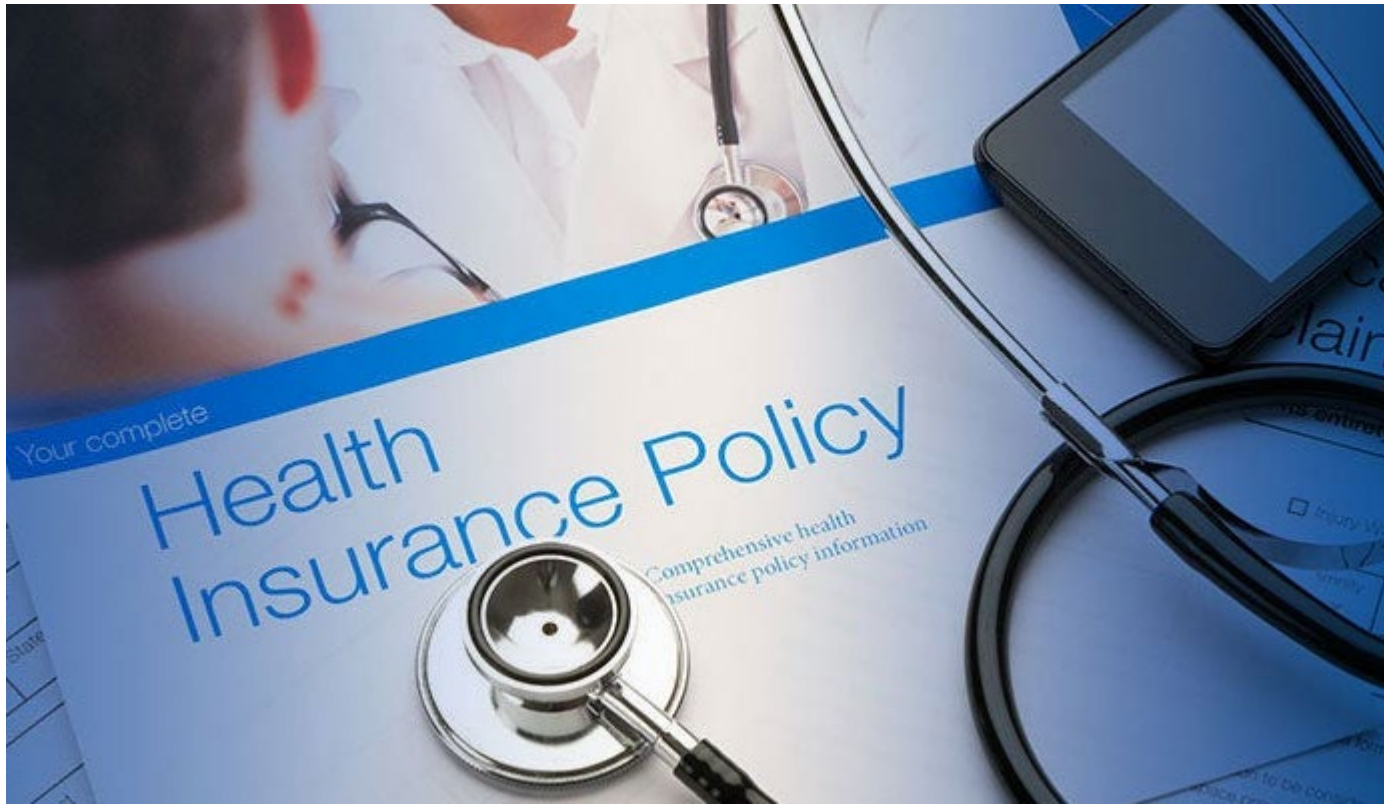
Other Federal Rules of Note

- Short Term Plan Rule (89 Fed. Reg. 23338, Apr. 3, 2024)
  - Effective date June 17, 2024
  - Rule remains in effect, though litigation has been filed

- Preventive Services Proposed Rule (89 Fed. Reg. 85750, Oct. 28, 2024)
  - Comments due Dec. 27, 2024
  - Guidance document released Oct. 21, 2024 (https://www.cms.gov/files/document/faqs-implementation-part-68.pdf)

Proposed Notice of Benefit and Payment Parameters (NBPP) 2026

- Published 10/10/24
- Comments due 11/12/24
- Establishes standards for Health Insurance Marketplaces for 2026 plan year



NBPP- Agent and Broker Changes

- Problem: Unauthorized plan switching
- Fraudulent actors reassigning broker designations and switching consumer enrollments without their permission or knowledge
- Consumers suffer
  - Plans don't include their doctors or medications
  - Higher deductibles than their original coverage choice
  - Can owe back taxes if their income or eligibility for premium tax credits is misrepresented

NBPP- Agent and Broker Changes

- Increase oversight and accountability for brokers and agents in response to problems with switching consumers enrollment.
- Clarify that lead agents are subject to the same rules as individual brokers, agents, and web-brokers and that enforcement action can be taken against the lead agents if they explicitly or implicitly condone misconduct or fraud.
- Broaden CMS's authority to suspend broker and agent system access, inclusive of instances of suspected misconduct that affects eligibility determinations, operations, applicants, or systems
- Expand the model consent form to include documentation of the broker reviewing and confirming the accuracy of submitted application information with the consumer.

NBPP- New Premium Payment Thresholds

- Allow issuers new options to avoid triggering late enrollment grace periods
- Goal to minimize termination of coverage for consumers who owe a small amount
- Fixed Dollar or Percentage-based premium threshold
  - Fixed dollar threshold of $5 or less
  - Percentage-based:
    - 95% of net premium
    - 99% of gross premium

NBPP- Improving Plan Options

- Carriers that operate in the federal marketplace are required to offer a standardized plan option at every product network type and metal level (excluding non-expanded bronze plans) in each service area where they offer non-standardized plan options.
- Proposed update standardized plan options for 2026 to ensure that every plan matches the actuarial value assigned to the plan's metal tier.
- Proposed requirement that issuers requires issuers that offer multiple standardized plan options to meaningfully differentiate between these plans.
- Changes would help consumer better understand included benefits, networks, and drug coverage when making choices.

NBPP- Other Proposals

- Nothing on copay accumulators
- Extending Failure to File and Reconcile Notifications to two consecutive plan years – to help increase awareness so consumers don't lose out of subsidies
- Publicly releasing the State-based Marketplace Annual Reporting Tools and financial and program audits and data – to help increase transparency
- Clarifying that Marketplace can deny certification to any plan that does not meet applicable criteria – to help ensure consumers have access to coverage that meets standards
- User Fee updates dependent on APTC:
  - Between 1.8 percent and 2.5 percent in 2026 for (FFM) states
  - Between 1.4 percent and 2 percent in 2026 for state-based marketplaces on the federal platform (SBM-FPs)

Elections and Implications for 2025

- Regardless of election outcome, 2025 will bring:
  - Advanced Premium Tax Credit Expiration
  - Inflation Reduction Act Implementation
  - Trump tax cut expiration
  - Debt limit reinstated
- Consumer Reps are here to be a resource

Contact Information

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