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Jolie Matthews
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Comments on the Proposed Indemnity Language for Model Regulation 171

Dear Jolie:

I am writing on my own behalf in response to the invitation to submit comments on the proposed indemnity language for Model 171 dated May 17, 2022. My comments relate solely to suggested changes to the proposed language and drafting note. In addition, I have included draft alternative language for the regulation text and drafting note reflecting these comments.

My comments include a suggestion to establish a general rule, and then separate definitions for hospital indemnity coverage and other fixed indemnity coverage. In addition I suggest striking the referenced citation to federal law because the two federal requirements are already included in the Model Act, and striking the reference to federal regulations due to legal concerns.

The opportunity to comment is greatly appreciated. Thank you for your consideration of these comments and these suggested changes.

Sincerely,



William G. Schiffbauer, Esq.
Attachment

NAIC Model 171 - Comments on
Proposed Definition of Hospital Indemnity or Other Fixed Indemnity

Comments on Proposed B.(1). - General Definition

1. The phrase “provides a benefit”, for hospital confinement. Could be read as permitting only one benefit. Recommend the phrase “provides benefits” per the Model Act. Recommend two separate subsections for defining “hospital indemnity coverage” and “other fixed indemnity coverage” to clarify that “other fixed indemnity coverage” may be offered without a hospital confinement benefit.
2. The phrase “or another health-related event”. Could be read as permitting only one other benefit that must be “health-related” whereas fixed indemnity coverage provides benefits that are triggered by a health event but that are indirect and are not medical expenses in and of themselves, i.e. lost wages, transportation costs, etc. Recommend striking the phrase and inserting “or other specified events” as the Model Act provides.
3. The phrase “consistent with” with the requirements for excepted benefits. Could be read as meeting some but not all, or more, requirements. Recommend using the phrase “that meets”. However, no express reference to federal law is necessary (see next comment).
4. The phrase “under 42 U.S.C. section 300gg-91(c)(3)”. This citation refers to the two federal statutory “conditions” required to be an excepted benefit - that the coverage is “offered as independent, noncoordinated benefits”. Recommend striking this reference. These two requirements are already in Model 170 and are effective as stated in the Model Act without the federal statutory reference.
5. The phrase “and its implementing regulations”. Incorporates by reference the HHS regulations for hospital indemnity or other fixed indemnity insured individual and group, and DOL regulations for group as a state standard. Recommend striking this reference because states cannot enforce federal regulations without express federal statutory authority. See Lemos, “State Enforcement of Federal Law”, *N.Y.U. Law Rev.* (June 2011) at 708. Including this as a product standard requires states to adopt changing federal regulatory policies by reference and without statutory authority. In addition, other provisions of the current federal regulations are open to legal challenge as being in excess of statutory authority. See *Central United Life Insurance Co. v. Burwell* (at footnote 1, citing the required notice that it too is a requirement that goes beyond the statutory authority but that it was not challenged) .

Comments on Proposed B.(2) Definition of Hospital Indemnity Coverage

1. The phrase “single lump sum benefit for hospital confinement of not less than \$[X]”. The minimum lump sum benefit amount is based on unspecified criteria (what is the basis of the amount - it is arbitrary). Recommend not including a lump sum confinement benefit minimum amount. This is a new provision to add to the Model. This is more of a “descriptive” provision rather than a “proscriptive” provision. Recommend using this as a “for example” in the drafting note rather than as a benefit standard. Competition and innovation in the marketplace determines the lump sum benefits offered. State insurance departments review the contracts and approve premium rates charged for the coverage which provides a guardrail for the benefits offered and price charged. Also recommend adding the phrase “fixed dollar benefit” after “single lump sum” to ensure that it is a fixed amount payable regardless of other coverage.

2. The phrase “not less than \$[X] per day”. The minimum daily benefit amount based on unspecified criteria (what is the basis of the amount - it is arbitrary). Recommend not including a per day minimum amount. This provision has been in the Model Regulation since 1975 when it was \$30 per day. This is more of a "descriptive" provision rather than a "proscriptive" provision. Recommend using this as a "for example" in the drafting note rather than as a benefit standard. Competition and innovation in marketplace determines the daily benefits offered. State insurance departments review the contracts and approve premium rates charged for the coverage which provides a guardrail for the benefits offered and price charged. Also recommend adding the phrase "fixed dollar benefit" before "daily benefit" to ensure that it is a fixed amount payable regardless of other coverage.

3. The phrase “not less than thirty one (31) days during each period of confinement”. Maintains a minimum benefit amount based on unspecified criteria (what is the basis of the number of covered days - it is arbitrary). Recommend not including a minimum number of covered days. This provision has been in the Model Regulation since 1975. This is more of a "descriptive" provision rather than a "proscriptive" provision. Recommend using this as a "for example" in the drafting note rather than as a benefit standard. Competition and innovation in marketplace determines the benefits offered. State insurance departments review the contracts and approve premium rates charged for the coverage which provides a guardrail for the benefits offered and price charged.

4. The phrase "and/or a daily benefit". This phrase is necessary in recognizing that hospital indemnity coverage may be combined with other fixed indemnity benefits for specified events.

Comments on Proposed Drafting Notes

1. The phrase “is recognized” as supplemental coverage. In fact, IT IS “supplementary” coverage – and it is not and cannot be tied to any major medical coverage to supplement gaps, and cannot be offered and marketed as major medical coverage.

2. The drafting note should mention that federal law imposes these same conditions on excepted benefits – to pay regardless and not coordinate with other coverage.

3. The last, separate paragraph noting that regulators should examine amounts payable “per day, etc.” – focuses only on the benefits payable of the "fixed dollar amount" coverage and does not focus attention on the marketing. It is the marketing of supplementary coverage as an alternative to or substitute for major medical coverage that presents the abuse and not the supplementary insurance coverage itself when it is offered and marketed as "supplementary" excepted benefits coverage.

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See attached suggested amended version of the Proposed Indemnity Language of 05/17/2022

PROPOSED AMENDED FIXED INDEMNITY LANGUAGE

B. Hospital Indemnity or Other Fixed Indemnity Coverage.

- (1) In General. “Hospital indemnity or other fixed indemnity coverage” provides benefits for specified events based on a fixed dollar amount, regardless of the amount of expenses incurred, and without coordination with any other health coverage.
- (2) Hospital Indemnity Coverage. “Hospital indemnity coverage” may provide a single lump sum fixed dollar benefit for hospital confinement and/or a fixed dollar daily benefit for hospital confinement in addition to benefits for other specified events on an indemnity basis.
- (3) Other Fixed Indemnity Coverage. Provides benefits for specified events based on a fixed dollar amount, regardless of the amount of expenses incurred, and without coordination with any other health coverage.
- (4) Preexisting Conditions. Coverage shall not be excluded due to a preexisting condition for a period greater than twelve (12) months following the effective date of coverage of an insured person unless the preexisting condition is specifically and expressly excluded.

Drafting Notes: Hospital indemnity or other fixed indemnity coverage is supplemental coverage. Any hospital indemnity or other fixed indemnity coverage, therefore, must be payable regardless of other coverage. The same general rule should apply so that group insurance cannot reduce its benefits because of the existence of hospital indemnity or other fixed indemnity coverage. Section 3H(4) of the *Coordination of Benefits Model Regulation* states that the definition of a plan (for the purposes of coordination of benefits)...shall not include individual or family insurance contracts....” States should consider using this language to prevent benefit reductions that could otherwise occur because of the existence of hospital indemnity or other fixed indemnity coverage purchased by the insured.

For indemnity products that are triggered by a variety of health events and provide a variety of daily benefit fixed dollar amounts, regulators should examine the amount payable per day and the total amount payable per year or lifetime to determine whether an indemnity product’s benefits resemble comprehensive major medical coverage. Indemnity products should not be developed, marketed, or sold as an alternative to, or substitute for, or replacement for, major medical coverage. It is the marketing of supplementary coverage as an alternative, substitute, or replacement for major medical coverage that presents the unfair trade practice, and not the supplementary coverage itself when it is offered and marketed as supplementary excepted benefits coverage.