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# Insurance Legislation & Regulation To Watch In 2021

By **Jeff Sistrunk**

*Law360 (January 3, 2021, 12:02 PM EST)* -- With Congress set to weigh legislation that would create a multibillion-dollar federal reinsurance program for future pandemics and state regulators continuing work on guidelines to help stabilize the long-term care insurance market, 2021 stands to be an active year for policymaking in the insurance sector.

Here, Law360 breaks down four legislative and regulatory developments that insurance attorneys will be watching this year.

**Congress Probes Pandemic Reinsurance Plan**

As 2021 gets into full swing, lawmakers on Capitol Hill are expected to continue debating a bill that would establish a multibillion-dollar federal reinsurance program to back up insurers that agree to offer coverage for future pandemics.

Newmeyer & Dillion LLP partner Alan H. Packer, who counsels policyholders on insurance coverage matters, told Law360 the proposal has gained traction across a wide variety of business sectors as the fallout of the COVID-19 crisis has laid bare how vulnerable many companies are to pandemic-related losses. Insurers have almost uniformly denied coverage for companies' business interruption losses due to COVID-19 lockdown orders, leading to a flood of litigation, and more carriers have begun inserting explicit pandemic exclusions into new policies, he said.

"We are already seeing policy after policy adding exclusions for pandemics where they did not exist before, just as we saw in other contexts where many claims arose, such as Chinese drywall and asbestos," Packer said. "That would definitely speak in favor of a program to help businesses in future pandemics."

The reinsurance proposal, known as the Pandemic Risk Insurance Act of 2020, or PRIA, was introduced by Rep. Carolyn Maloney, D-N.Y., in May, and is currently being considered by the House Financial Services Committee. It would create a backstop for insurers that offer policies with explicit coverage for policyholders' losses due to business interruptions attributed to an outbreak or pandemic that leads to a federal emergency declaration after Jan. 1, 2021. Maloney has said the proposal is modeled after the Terrorism Risk Insurance Act, which was passed in the wake of the Sept. 11 attacks and created a massive government reinsurance program for terrorism coverage.

Participation in the proposed reinsurance program would be voluntary for insurance companies, but insurers that sign on would be required to offer pandemic coverage in all their business interruption policies. Participating insurers would collectively be responsible for covering the first $250 million of business interruption losses incurred by their policyholders. Once that threshold is reached, a federal fund administered by the U.S. Treasury Department would cover 95% of additional losses up to $750 billion in a single year, with the remaining 5% spread among the insurers.

"Discussions on this proposal will keep rolling for awhile, but if carriers that offer this coverage are allowed to pool premium dollars they receive, and then have that apply to their cap, then we are not putting so much risk on them that they are all in a difficult situation," Packer said. "Instead, most of that burden would fall on the federal government."

Insurance carriers have had a mixed response to Maloney's proposal. A trio of leading insurance industry trade groups, the American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, and Independent Insurance Agents & Brokers of America Inc., have argued that pandemics are uninsurable risks and that the federal government alone would be better-equipped to address businesses' needs in future pandemics.

To that end, the trade groups launched their own counter-proposal for a fully taxpayer-funded pandemic relief program, known as the Business Continuity Protection Program, in May. Companies would pay to participate in the BCPP, which would offer reimbursement of up to 80% of payroll, benefits and operating expenses for three months after a federal declaration of a public health emergency. The proposed program, which has not yet been introduced as legislation, would be administered by the Federal Emergency Management Agency.

However, some insurance companies and brokers do support some type of partnership between the federal government and the private insurance industry. In the fall, Chubb Ltd. rolled out its proposal for a public-private pandemic coverage plan. Chubb's plan, which like the BCPP has not been introduced as legislation, would run for 20 years and consist of two layers.

The first layer would be a $250 billion pandemic coverage program for businesses with 500 employees or less. Private insurers would agree to collectively pay 6% of policyholders' pandemic-related losses in the first year, while the government would pick up the tab for the remainder. The private insurers' share would gradually grow to 12% over the program's 20-year lifespan. The second layer would be funded solely by the government and would provide an estimated $500 billion in pandemic coverage for businesses with more than 500 employees.

Packer said it is possible that a federal pandemic coverage solution could incorporate elements of both PRIA and the insurance industry's alternate proposals. But the ultimate success of any proposal may hinge on whether lawmakers have an appetite for another costly pandemic relief program, he added. Maloney's bill does not currently include a mechanism that would allow the federal government to recoup part of any reinsurance payouts from participating insurers via surcharges on policies, which is a key feature of TRIA, the terrorism coverage backstop.

"I think the debate will center around whether the cost of a program like this would be justified," Packer said. "This is not a federal-backed system that would produce revenues that the government could use to break even in the end."

Even if recoupment provisions are added to PRIA, if the proposed reinsurance backstop "were called

upon in a future pandemic, the program would very likely be a net loss to the federal government," Packer said.

**NAIC Looks to Stabilize Long-Term Care Market**

A task force established in 2019 by the National Association of Insurance Commissioners — the standard-setting body for insurance regulators in the 50 states — will carry on this year with its efforts to develop guidelines to address the pricing problems that have long bedeviled the market for long-term care insurance, or LTCI.

According to an NAIC study, about 7 million people in the U.S. are insured under LTCI policies, which help cover services required by individuals who cannot fully care for themselves, such as nursing home and assisted-living arrangements.

However, policies issued decades ago were largely underpriced, as insurers underestimated how long the policyholders would live and were not yet aware of the potential impact of degenerative cognitive conditions such as Alzheimer's disease, the association noted. Therefore, as policyholders began aging and making more claims, many insurers discovered that the premiums they had collected were insufficient to cover those claims payments.

In response, some of those insurers have sought to repeatedly raise their rates over the years. According to the NAIC, this has proven problematic, because many LTCI insurers sell policies to people across the country but must still seek approval for rate increases in each individual state — and some states are more resistant to signing off on those increases.

The NAIC's LTCI task force is aiming to tackle the problems presented by the states' wildly varying methods for reviewing rates on the policies by developing a "consistent national approach" that "results in actuarially appropriate increases being granted by the states," according to the association. In addition, the NAIC has said the group will explore options to "provide consumers with choices regarding modifications to LTCI contract benefits where policies are no longer affordable due to rate increases."

The task force is expected to present its proposals to the NAIC's executive committee during the organization's summer meeting in August.

Morgan Lewis & Bockius partner Scott Fischer, who previously served as executive deputy superintendent for insurance at the New York Department of Financial Services, expressed hope that the task force will help usher in clarity on the core issues facing the long-term care market.

"The historical books do not seem to be getting any better, so they are very much working to try to come up with alternatives and options, to try to get states on the same page as much as possible on rate review," he said.

**Lawmakers Mull Limits On Data In Underwriting**

Insurance companies will be watching to see if a Senate Democrat garners support for a sweeping federal data privacy proposal that, among other things, would prohibit insurers from using customers' personal data to unlawfully discriminate against them.

Last summer, Sen. Sherrod Brown, D-Ohio, began circulating a discussion draft of proposed legislation

known as the Data Accountability and Transparency Act of 2020. The bill — which has not yet been introduced in the Senate — would impose sharp limitations on companies' ability to use and share consumers' personal data, create a new independent federal privacy regulator and subject corporate executives to potential criminal liability.

Critically for insurers, Brown's proposal would restrict their ability to underwrite policies using algorithms based on aggregated policyholder data. Under the bill, insurance companies must perform "continuous and automated testing" to ensure that such algorithms don't result in bias toward people based on a protected characteristic such as race, gender or sexual orientation. If an algorithm is found to result in impermissible bias toward a protected class, the insurer will then have to show that the algorithm "is not intentionally discriminatory" and is necessary to achieve a legitimate purpose.

"This proposal concerns two connected issues that are currently being confronted by insurance regulators on the state level: racial and ethnic equality and issues of systemic racism, and the use of data, technology, artificial intelligence and machine learning," said Eric Dinallo, chair of Debevoise & Plimpton LLP's insurance regulatory practice and a former New York insurance superintendent. "There is a desire to move insurance forward and have lower pricing, but of course there is an inherent regulatory skepticism about whether these technologies will produce unacceptable outcomes."

Dinallo said the proposed legislation is also noteworthy because it would grant consumers the ability to bring private lawsuits to recover statutory damages of between $100 and $1,000 per violation.

"What is really important is that the act would also create a private right of action, including for punitive damages," he said. "That is a big change, because many states' insurance laws do not provide for private rights of action."

**NAIC Weighs Rules On Consumer Perks**

In recent years, a number of insurance carriers and brokers have taken aim at long-standing "anti-rebating" laws that exist in every state but California. Generally speaking, these laws preclude insurers and brokers from trying to persuade consumers to purchase insurance by offering them gifts or anything else of value that is not specifically included in a policy's terms.

Proponents of anti-rebating laws have argued they are necessary to prevent insurance carriers and brokers from providing preferential treatment to certain policyholders. Critics have countered that the measures hinder innovation in the insurance sector, particularly among startup insurtech firms, which often seek to attract consumers by offering them free perks such as smart sensors that gather data on their homes or cars to help with risk mitigation.

In response to critics' concerns, the NAIC's executive committee in December approved amendments to the organization's model Unfair Trade Practices Act that would allow insurers and brokers to "offer or give non-cash gifts, items, or services," so long as they serve one of several specific purposes, such as providing "loss mitigation or loss control" or reducing claim costs. The amendments would grant state insurance commissioners wide latitude to impose a cap on the value of incentives that an insurer or broker can offer to each customer.

The NAIC's full membership is now expected to consider the amendments at the organization's spring meeting in April. If the amendments receive final approval, it will be up to individual state legislatures to decide whether to adopt them and lift any existing anti-rebating laws.

"The NAIC has devoted a substantial amount of time and effort to revamping those laws, which, as written, are very broad and very inconsistently applied," said Fischer, of Morgan Lewis. "It will be interesting to see if these amendments advance and, if so, how many states adopt them."

--Editing by Marygrace Murphy.

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