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Insurance Legislation & Regulation To Watch In 2020

By **Jeff Sistrunk**

Law360 (January 1, 2020, 12:04 PM EST) -- With Congress poised to consider legislation that could open the floodgates for cannabis-related insurance and state regulators continuing their work on guidelines to help stabilize the market for long-term care coverage, 2020 promises to be a busy year for policymaking in the insurance space.

Here, Law360 breaks down three pending legislative and regulatory developments to watch.

Congress Considers Pot Insurance Protections

While the ongoing federal prohibition of marijuana has deterred most insurers from offering property and liability policies to cannabis companies, the market for the highly sought-after coverage may heat up if Congress approves two "safe harbor" bills that would protect banks and insurers from legal liability for serving legitimate pot-related businesses.

Marijuana is a boom industry in the U.S., as 33 states have legalized medical cannabis and 11 states and the District of Columbia have approved the drug for recreational use. Sales of medical and recreational pot have soared in recent years and are expected to exceed $16.5 billion in 2020, according to a recent report by credit rating agency A.M. Best.

However, companies operating in the cannabis space — including growers, retailers, distributors and property owners — continue to face challenges obtaining sufficient property and liability insurance for the myriad risks they face, largely owing to the relatively small number of policies available. The A.M. Best report found that only 25 carriers are writing coverage for U.S. marijuana businesses, and most of them are nonadmitted — that is, not licensed by state insurance regulators and therefore not subject to the same level of oversight as their admitted counterparts.

Hunton Andrews Kurth LLP partner Michael Levine, who represents policyholders, said companies involved in the legal cannabis industry face a two-fold challenge on the insurance front, particularly if pot is only one aspect of their business. In addition to the dearth of sufficient specialty coverage for their cannabis-related risks, companies have to worry about their involvement in a federally illegal industry jeopardizing coverage under their other traditional insurance policies, he said.

“I wouldn't put it past some of the major players in the property and casualty insurance market to deny coverage for a large loss because a policyholder was involved in a cannabis-related operation,” Levine said.

But more insurance companies could soon warm to the idea of issuing cannabis-related coverage if Congress passes a pair of bipartisan bills that would protect banks and insurers from federal prosecution for providing services to pot companies operating legally under state law.

The first of the two bills, the SAFE Banking Act, was approved by the U.S. House of Representatives 321-103 on Sept. 25. The measure, which must now be considered by the U.S. Senate, would protect the banking sector from legal liability for serving legitimate cannabis companies, including setting up bank accounts and payroll services.

The other bill, known as the CLAIM Act, was introduced in the House and Senate in July and now sits in committees in both chambers. The legislation would extend the same type of federal safe harbor contemplated by the SAFE Banking Act to insurance companies, agents and brokers that serve pot businesses.

The prospects of both bills remain unclear, given that the CLAIM Act is in its infancy and the SAFE Banking Act will face a tough test in the Senate, where lawmakers have expressed widely differing opinions on marijuana-related policy. Still, the fact that the two measures enjoy substantial bipartisan support is an encouraging sign, according to attorneys. In particular, the CLAIM Act could do some heavy lifting in expanding and stabilizing the market for cannabis-related coverage, Levine said.

"This bill goes a long way toward alleviating those concerns that may arise down the road," he said.

NAIC Aims to Stabilize Long-Term Care Market

In March, the National Association of Insurance Commissioners — the standard-setting body for insurance regulators in the 50 states — established a task force charged with developing 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.

"In a state like California, where the insurance commissioner is an elected position, there is a natural tension between the commissioner and long-term care companies," explained Debevoise & Plimpton LLP partner Nicholas F. Potter, who co-chairs the firm's financial institutions group. "The commissioner would want to protect the interests of state residents, and may not have many domestic LTC companies to oversee, so would not necessarily favor rate increases that benefit the companies. Then some states that might otherwise be inclined to allow rate increases will not want to do that if large policyholder states are holding firm."

The NAIC's LTCI task force will try 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 question is, can a product be developed that will provide meaningful benefits but is still affordable?" NAIC President Eric Cioppa told Law360 in an interview in May.

The task force is expected to deliver its proposals to the NAIC's executive committee before the association's fall meeting in November.

NAIC Grapples With Big Data

The NAIC will also continue its years-long effort to determine if additional regulations are necessary to police insurers' use of so-called big data in underwriting.

Big data is a broad catchall term that refers to everything from databases of information on policyholders' driving habits and lifestyle choices to computerized models that predict properties' susceptibility to natural disasters. According to the NAIC, insurers are increasingly using big data to underwrite and price policies in every line of coverage, including auto, home and life insurance.

In 2016, the NAIC commissioned a dedicated "working group" to study insurers' use of big data and, if necessary, "recommend modifications to model laws and/or regulations regarding marketing, rating, underwriting and claims, regulation of data vendors and brokers, regulatory reporting requirements and consumer disclosure requirements."

The working group currently doesn't have a set deadline for developing and presenting its proposals to the NAIC.

Morgan Lewis & Bockius LLP partner Scott Fischer, who previously served as the executive deputy superintendent for insurance at the New York Department of Financial Services, told Law360 that it will likely take a while for the NAIC to fully get a handle on big data, given its increasing prevalence across the insurance industry.

"The biggest issue for regulators with big data will be, what do we want to [do] about the collection of data? There are many questions tied to that," Fischer said. "Who holds the data? Who can alter the data? What can be done with the data? The list goes on and on."

Big data proponents have asserted that insurers' use of large databases of information will result in more accurate pricing of policies.

"It has the potential to improve pricing for a vast majority of customers," Fischer said. "As insurers use more data, they will be able to focus not just on indemnification, but on prevention as well."

However, a number of state insurance regulators have expressed concerns that insurers may use seemingly neutral data sets to discriminate against policyholders on the basis of otherwise impermissible criteria, such as age or race.

“Proponents of Big Data will tell you that AI-driven algorithms are producing better outcomes,” Fischer explained. “There are, however, questions about what choices are being made by the developers of these algorithms, and what the outcomes of those choices are. For example, are they making it easier for insurance companies to use proxies for otherwise impermissible characteristics?"

--Editing by Rebecca Flanagan and Alyssa Miller.