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NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES

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February 5, 2015

Victor Garcia
Oregon Department of Consumer and Business Services
Insurance Division
350 Winter Street NE
Salem, OR 97301

sent via email:
victor.a.garcia@state.or.us

Re: Discretionary Clause Rule **- NAMIC's Written Comments and Recommendations**

Dear Mr. Garcia:

Thank you for affording the National Association of Mutual Insurance Companies (NAMIC) an opportunity to submit written comments and recommended revisions to the Proposed Discretionary Clause Rule. NAMIC's comments are limited to the contemplated application of the proposed rule to property and casualty insurance, workers' compensation, and commercial insurance.

NAMIC is the largest property/casualty insurance trade association in the country, serving regional and local mutual insurance companies on main streets across America as well as many of the country's largest national insurers.

The 1,400 NAMIC member companies serve more than 135 million auto, home and business policyholders and write more than $196 billion in annual premiums, accounting for 50 percent of the automobile/homeowners market and 31 percent of the business insurance market. NAMIC has 153 members who write property/casualty insurance in the State of Oregon, which represents 46 percent of the insurance marketplace.

Through our advocacy programs we promote public policy solutions that benefit NAMIC companies and the consumers we serve. Our educational programs enable us to become better leaders in our companies and the insurance industry for the benefit of our policyholders.

NAMIC appreciates and shares the Oregon Insurance Division's (OID) commitment to promoting the best interest of insurance consumers, and its desire to make sure that the terms and conditions of insuring agreements are consistent with the requirements of the insurance code and state law.

In the spirit of the OID's overture to the insurance industry to collaborate on the drafting of the Proposed Discretionary Clause Rule, NAMIC respectfully requests that the OID revise the proposed rule so that it clearly applies to *only* health and disability insurance.

NAMIC believes that property and casualty, workers' compensation, and commercial insurance should be excluded from the Proposed Discretionary Clause Rule for the following reasons:

1) The National Association of Insurance Commissioners' (NAIC) Model Rule restricts the application of the Discretionary Clause Rule to health and disability insurance.

The NAIC model rule adoption process requires extensive debate over the scope and language of any NAIC proposed model rules, and the commissioners who participated in and voted on the model rule decided after due consideration not to include all lines of insurance within the scope of their model rule. Since the OID's Proposed Discretionary Clause Rule is expressly modeled after the NAIC Model Rule, it makes sense for the OID to follow the NAIC's lead on the scope of the Discretionary Clause Rule and promote national uniformity on this insuring agreement issue.

2) The national trend in states adopting laws on the use of discretionary clauses supports limiting the scope of the Proposed Discretionary Clause Rule to just health and disability insurance.

As of 2012, nineteen (19) states have adopted the NAIC Discretionary Clause Rule and *none* of these states have expanded the scope of their rule to apply to property and casualty, workers' compensation, and commercial insurance. A number of the adopting states (CA, HI, NY, and WA) are well-known for their vigorous approach to consumer protection and none of these states expanded the scope of their discretionary clause rule to apply to property and casualty, workers' compensation, and commercial insurance.

3) There is no regulatory necessity to justify expanding the scope of the Proposed Discretionary Clause Rule to apply to property and casualty, workers' compensation, and commercial insurance.

As the OID has acknowledged, there are no pending discretionary clause regulatory problems before the OID that relate to property and casualty, workers' compensation, and commercial insurance. Moreover, the OID has clear regulatory authority to invalidate any contractual provision that is inconsistent with the insurance code or state law, so the OID already has the authority and ability through market conduct actions and other regulatory powers to address any discretionary clause issue that it believes is inconsistent with state insurance law. Further, if a consumer has a dispute with an insurer over the interpretation of an insuring agreement or the scope of insurance coverage, the consumer has the opportunity to bring their claim to the OID, who has power to order payment of the disputed claim, or the consumer can seek redress of their contract dispute through the judicial system (or an ALJ in workers' compensation). The judicial system has the power to interpret the contract, and award contractual and statutory damages to the consumer.

In addition to NAMIC's contention that the proposed rule should not be applied to property and casualty, workers' compensation, and commercial insurance, NAMIC also has a number of technical concerns with the proposed rule:

From a public policy and consumer protection standpoint, consumers should, as they currently do, have the right to legally contest an insurer's interpretation of a disputed contract provision or coverage determination, in a manner consistent with state law and the terms of the insuring agreement. The current language of the proposed rule could create confusion for consumers as to their legal rights and the insurer's legal duties. Additionally, several of the proposed provisions could create serious claims adjusting problems for insurance companies, because the language and sentence structure of the proposed rule could arguably be interpreted to alter or abrogate certain agreed upon standard contract provisions that are reasonable and necessary for the fair and timely adjusting of insurance claims.

For example:

> (1) As used in this rule, "discretionary clause" means a policy provision that purports to bind the claimant to, or to grant deference to the insurer in *proceedings subsequent to* the insurer's decision, denial or interpretation on terms, coverage or eligibility for benefits. "Discretionary clause" includes a policy provision that provides any of the following: (a) An insured or other claimant *may not appeal* a denial of a claim. (Emphasis added)

NAMIC is concerned that this definition is overly broad in scope in that it could interfere with legally valid and appropriate contractual provisions related to standard claims adjusting and claims dispute resolution practices, like binding arbitration or the use of a binding appraisal process for valuation disputes in property claims. This is particularly concerning, because Oregon law (742.504 & 742.061) specifically acknowledged ADR as an option for resolution insurance disputes. The use of contractually agreed upon binding arbitration and a binding appraisal process are "*proceedings subsequent to* the insurer's decision, denial or interpretation on terms, coverage or eligibility for benefits." Insurance consumers and insurers benefit from having the ability to use alternative dispute resolution practices to settle insurance claims in a timely, efficient, and cost-effective manner for the parties.

Consequently, NAMIC believes that Section (1)(a) should be revised to read:

> (1)(a) An insured or other claimant may not appeal a denial of a claim; **this does not preclude an insurer from requiring a dispute to be submitted to binding arbitration, mediation, appraisal, or some other binding alternative dispute resolution process, nor does it invalidate the legally binding effect of contractually agreed upon alternative dispute resolution settlements intended to be binding and non-appealable by the parties.** (Bold font denotes suggested additions).

NAMIC is also concerned that the following provision needs to be revised to avoid consumer confusion and legal ambiguity. Specifically, the use of the phrase "binding upon" throughout Section 1 is problematic, because an insurer's interpretation of the insuring agreement and coverage determinations are in fact and should be binding upon a policyholder or claimant, *subject to the terms and conditions of the contract and state law*. The discretionary clause

prohibitions should be strictly directed at preventing the inclusion in an insuring agreement of language that prevents a policyholder or claimant from being legally entitled to seek third-party review of a disputed interpretation of the contract or coverage determination. It should not be worded in such a way as to raise legal questions as to whether an insurer's interpretation of the policy or coverage determination is "binding". This technical phraseology distinction is legally important. An insurer's decision is, for all practical and legal purposes, "binding" unless the parties enter into a legal settlement of an insurance coverage dispute, or until a judge, regulator or arbiter rules otherwise. Additionally, the word "deference" should be qualified to make it clear that the prohibition applies to "legal deference", i.e. deference given in a judicial or regulatory proceeding.

Consequently, NAMIC recommends the following revisions to the discretionary clause list of prohibited language:

"Discretionary clause" includes a policy provision that provides any of the following:

> (b) The insurer's decision to deny coverage is (binding upon*)* **not subject to contractually agreed to alternative dispute resolution, or judicial or regulatory review by** a policyholder or other claimant, or **the insurer's decision** is otherwise entitled to **legal** deference upon appeal or review. (Bold font denotes suggested additions and parenthesis denotes deletions).

NAMIC also recommends that the following provisions be revised and combined into one subsection because they relate to the same activity (insurer's interpretation of the terms of a policy):

> (d) The insurer's interpretation of the terms of a policy is binding upon a policyholder or other claimant or is otherwise entitled to deference;
>
> (e) On appeal the insurer's interpretation of the terms of a policy is binding or is otherwise entitled to deference;

NAMIC suggests the following language:

> (d) The insurer's interpretation of the terms of a policy is (binding upon*)* **not subject to contractually agreed to alternative dispute resolution, or judicial or regulatory review by** a policyholder or other claimant, or **the insurer's interpretation of the policy** is otherwise entitled to **legal** deference **upon appeal or review.** (Bold font denotes suggested additions and parenthesis denotes deletions).

NAMIC suggests that Section (1)(c) be removed from the proposed rule, because an insurer's "*decision-making power* as to coverage" is not something that is going to be contested by a policyholder or claimant. The policyholder's or claimant's dispute will pertain to the actual policy interpretation or coverage decision by the insurer in the particular claim. The issue of what *decision-making power* an insurer has in the claims process is a legal, regulatory, and public policy issue that exceeds the scope of the discretionary clause rule discussion. Since the provision is confusing, unnecessary, and of no practical value to insurance consumers, NAMIC respectfully requests that this subsection be removed from the proposed rule.

NAMIC suggests that (1)(f) be revised to add the qualifier "legal" to the word "deference", as previously discussed, and also to the phrase "standard of review", so that it is clear that the provision applies to the legal definition of "standard of review".

> (f) A **legal** standard of review on appeal that gives **legal** deference to the original claim decision, or gives rise to such **legal** standard of review;

Finally, NAMIC believes that (1)(h), which states "[t]he insurer has discretion to determine whether a claim is compensable or to interpret the provisions of the policy or certificate", should be entirely removed from the proposed regulation, because it is overly broad in scope, specifically addressed in other subsections of the proposed rule, and susceptible to being misinterpreted in a way that could unreasonably and unnecessarily hinder insurers in their ability to engage in standard claims adjusting practices.

Moreover, an insurer does, in fact, and unavoidably has to have "discretion to determine whether a claim is compensable or to interpret the provisions of the policy" in order for the insurer to process an insurance claim. The focus of the Discretionary Clause Rule should be to make sure that insuring agreements do not have provisions that are contrary to the insurance code or state law, or which prevent consumers from being able to seek review or appeal an insurer's interpretation of the policy or coverage determination.

Thank you for your time and consideration. Please feel free to contact me at 303.907.0587 or at crataj@namic.org, if you would like to discuss NAMIC's written comments.

Respectfully,

Christian John Rataj, Esq.
NAMIC Western State Affairs Manager