

PROJECT HISTORY – 2004

PROHIBITION ON THE USE OF DISCRETIONARY CLAUSES MODEL ACT (#42)

1. Project Description

In 2002, the NAIC adopted the Prohibition on the Use of Discretionary Clauses Model Act (Model Act), which prohibits the use of such clauses in health insurance contracts. At the 2004 Spring National Meeting, the Consumer Protections Working Group of the Executive (EX) Committee decided that a public hearing should be held in conjunction with the Health Insurance and Managed Care (B) Committee during the 2004 Summer National Meeting. The hearing was intended

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- Several states have concluded that the inclusion of discretionary clauses in insurance contracts is considered inequitable, deceptive and misleading to consumers.
- Insurers argued that the model act is preempted under ERISA. However, states are **not** preempted by ERISA in prohibiting the use of discretionary clauses in insurance contracts because under ERISA states are free to regulate insurance, including the contents of insurance contracts.
- Insurers also argued that the model act will result increased litigation and health care costs. However, several states currently prohibit the use of discretionary clauses and industry failed to present evidence of a resulting increase in litigation or rise in the cost of health insurance in those states. In fact, prohibiting discretionary clauses has no effect on who may file a lawsuit, or when. Furthermore, as (r)1.3 ((o)1.T2.3 (y)4 (x)t)0.7(al