

191—38.8(509,514) Excess and other nonconforming provisions.

38.8(1) Some plans have order of benefit determination rules not consistent with this rule which declare that the plan's coverage is "excess" to all others, or "always secondary." This occurs because a certain plan may not be subject to insurance regulation; or some group contracts have not yet been conformed with this rule.

38.8(2) A plan with order of benefit determination rules which comply with this rule (herein called a "complying plan") may coordinate its benefits with a plan which is "excess" or "always secondary" or which uses order of benefit determination rules which are inconsistent with those contained in this rule, (therein called a "noncomplying plan") on the following basis:

- a.* If the complying plan is the primary plan, it shall pay or provide its benefits on a primary basis.
- b.* If the complying plan is the secondary plan, it shall, nevertheless, pay or provide its benefits first, but the amount of the benefits payable shall be determined as if the complying plan were the secondary plan. In such a situation, the payment shall be the limit of the complying plan's liability.
- c.* If the noncomplying plan does not provide the information needed by the complying plan to determine its benefits within a reasonable time after it is requested to do so, the complying plan shall assume that the benefits of the noncomplying plan are identical to its own, and shall pay its benefits accordingly. However, the complying plan must adjust any payments it makes based on such assumption whenever information becomes available as to the actual benefits of the noncomplying plan.
- d.* If the noncomplying plan reduces its benefits so that the employee, subscriber, or member receives less in benefits than they would have received had the complying plan paid or provided its benefits as the secondary plan and the noncomplying plan paid or provided its benefits as the primary plan; and governing state law allows the right of subrogation set forth below, then the complying plan shall advance to or on behalf of the employee, subscriber, or member an amount equal to the difference. However, in no event shall the complying plan advance more than the complying plan would have paid had it been the primary plan less any amount it previously paid. In consideration of such advance, the complying plan shall be subrogated to all rights of the employee, subscriber, or member against the noncomplying plan. The advance by the complying plan shall also be without prejudice to any claim it may have against the noncomplying plan in the absence of such subrogation.