Post-Claims Underwriting Litigation: A Review of the Governing Law and Emerging Trends

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What is Post-Claim Underwriting?

Lewis v. Equity Nat'l Life Ins. Co., 637 So. 2d 183 (Miss. 1994))

Richison v. Boatmen's Ark., Inc., 981 S.W.2d 112 (Ark. 1998)

- When an insurer waits until after the insured makes a claim to determine whether the claimant is eligible for insurance according to the risk he presents.

Michigan-Mich. Admin. Code r. 550.201 (2008)

- When an insurer determines whether an individual meets underwriting criteria after the receipt of a claim and voiding coverage or denying the claim based upon that determination.

Cal Health & Saf Code § 1389.3 (2008)

- The rescinding, canceling, or limiting of a plan contract due to the plan's failure to complete medical underwriting and resolve all reasonable questions arising from written information submitted on or with an application before issuing the place contract.

What is Post-Claim Underwriting?

"Insurers must decide whether to investigate their applicants at the beginning, in which case they will accept fewer applications but also insure better risks, or increase sales by simplifying their underwriting requirements at the time of purchase and risk adverse selection."

Gary Schuman, Health and Life Insurance Applications: Their Role in the Claims Review Process, 62 DEF. COUNS. J. 225, 243(1995).

The Early Years ...

- Over the last 35 years, numerous courts have condemned the practice of post-claims underwriting as either fraudulent, illegal or constituting bad faith.
  - **Wyoming:** United States District Court held stating that insured made out claim of bad faith by insurer by presenting evidence of post claim underwriting. *White v. Continental Gen. Ins. Co.*, 831 F. Supp. 1545, 1155-56 (D. Wyo. 1993).
  - **Minnesota:** State Court of Appeals finds that question of whether Blue Cross was engaging in retroactive, i.e., post claim underwriting to avoid paying claims for treatment of AIDS was one for jury. *Meyer v. Blue Cross & Blue Shield*, 500 N.W.2d 150, 154 (Minn. Ct. App. 1993).
  - **Mississippi:** Supreme Court stated that an insurer has an obligation to its insureds to do its underwriting at the time a policy application is made, not after a claim is filed. The insurer controls when the underwriting occurs. *Lewis v. Equity Nat'l Life Ins. Co.*, 637 So. 2d 183, 188-89 (Miss. 1994).

State Statutes and Regulations Relating To Post-claims Underwriting

- **Alabama**
  - Ala. Admin. Code r. 482-1-091-.09 (2007)
- **Arizona**
  - Ariz. Admin. Code § R20-6-1011 (2007)
- **Arkansas**
  - 054- 00 Ark. Code § (2008)
- **California**
  - Cal. Health & Safety Code § 1389.3 (2008)
  - Cal. Ins. Code § 10384 (2007)
- **Colorado**
  - 3 Colo. Code Regs. § 702-4 (2008)
- **Connecticut**
  - Conn. Gen. Stat. § 38a-477b (2008)
  - Conn. Agencies Regs. § 38a-501-14 (2008)
  - Conn. Agencies Regs. § 38a-528-7 (2008)
- **Delaware**
  - 18-1400-1404 Del. Code Regs. § 11 (2008)
- **District of Columbia**
  - D.C. Mun. Regs. 26-2607 (2008)
- **Florida**
  - Fla. Admin. Code Ann. Rr. 69B-157.109 (2008)
  - Fla. Admin. Code Ann. Rr. 69O-157.109 (2008)
- **Hawaii**
  - Haw. Rev. Stat. § 431:10H-218 (2007)
- **Idaho**
  - Idaho Admin. Code r. 18.01.60.015 (2007)
- **Illinois**
  - 50 Ill. Code R. 2012.65 (2008)
- **Indiana**
  - 760 Ind. Admin. Code 2-5-1 (2007) (et. seq.)
- **Iowa**
  - IOWA Admin. Code 191-39.8(514G) (2008)
- **Louisiana**
  - La Admin. Code 37:XIII §1921 (2007)
- **Maine**
  - 02-031-425 Me. Code R. § 11 (2008)

State Statutes and Regulations Relating To Post-claims Underwriting

- **Maryland**
  - Md. Code Regs. 31.14.01.09 (2008)
- **Massachusetts**
  - 211 Mass. Code Regs. 65.11 (2008)
  - 211 Mass. Code Regs. 146.11 (2008)
- **Michigan**
  - Mich. Admin. Code r. 550.201 (2008)
  - Mich. Admin. Code r. 550.202 (2008)
  - Mich. Admin. Code r. 550.212 (2008)
- **Minnesota**
  - Minn. Stat. § 62S.21 (2007)
- **Mississippi**
  - 28-000-054 Miss. Code. R. § 9 (2008)
- **Missouri**
  - Mo. Code Regs. Ann. tit. 20 § 400-4.100 (2008)
- **Montana**
  - Mont. Code Ann. § 33-18-215 (2007)
  - Mont. Admin. R. 6.6.3106 (2008)
- **New Hampshire**
  - N.H. Code Admin. R. Ann. Ins. 3601.10 (2008)
- **New Jersey**
  - N.J. Admin. Code 11:4-34.9 (2008)
- **New Mexico**
  - N.M. Code R. 13.10.15.22 (2008)
- **New York**
  - N.Y. Comp. Codes R. & Regs. tit. 11 § 52.25(d) (2008)
- **North Carolina**
  - 11 N.C. Admin. Code 12.1007 (2007)
- **North Dakota (model regs)**
  - N.D. Admin. Code 45-06-05-05.1 (2007)
  - N.D. Admin. Code 45-06-05.1-09 (2007)
- **Ohio**
  - Ohio Admin. Code 3901-4-01 (2008)

State Statutes and Regulations Relating To Post-claims Underwriting

- **Oregon**
  - Or. Admin. R. 836-052-0576 (2008)
- **Pennsylvania (model reg)**
  - 31 Pa. Code § 89a.110 (2008)
- **Rhode Island**
  - 02-030-044 R.I. Code R. §9 (2008)
- **Tennessee**
  - Tenn. Comp. R. & Regs. R. 0780-1-61.11 (2008)
- **Texas**
  - 28 Tex. Admin. Code § 3.3823 (2008)
- **Vermont**
  - 21-020-024 Vt. Code R. § 8 (2008)
- **Virginia**
  - 14 Va. Admin. Code § 5-200-80. (2007)
- **West Virginia**
  - W. Va. Code R. § 114-32-6 (2008)
- **Wyoming**
  - 044-000-037 Wyo. Code R. § 8 (2008)

- **The following states don't have any statutory or regulatory provisions relating to post-claims underwriting**
  - Alaska
  - Georgia
  - Kansas
  - Kentucky
  - Nebraska
  - Nevada
  - Oklahoma
  - South Carolina
  - South Dakota
  - Utah
  - Washington

Hailey v. California Physicians' Service

- On March 26, 2008, the California Supreme Court denied a request to review an appellate court decision addressing post claims underwriting and the process by which health plans rescind service contracts.

- The 4th District Court of Appeals held that section 1389.3 of the California Health & Safety Code prevents a health plan from "rescinding a contract for a material misrepresentation or omission ***unless the plan can demonstrate (1) the misrepresentation or omission was willful, or (2) it had made reasonable efforts to ensure the subscriber's application was accurate and complete as part of the pre-contract underwriting process."***

- The Court further held that the plan's duty under section 1389.3 is "to make reasonable efforts to ensure the subscriber's application is accurate and complete as part of the "Pre-contract Underwriting Process."

- Reversed the lower court judgment and ruled in favor of plaintiffs because the defendants failed to demonstrate that it made these reasonable efforts to ensure the accuracy of plaintiff's insurance application during the pre-contract underwriting period.

Hailey in A Nutshell

- Cindy Hailey applied for Blue Shield family coverage. She provided her medical history in the application but failed to include information regarding her husband's preexisting medical conditions, including obesity and gastro-esophageal reflux disease.

- After the Haileys submitted a claim for one of Mr. Hailey's hospital visits, Blue Shield conducted an investigation regarding potential fraud. A month later, Mr. Hailey was permanently disabled in a car accident and required home nursing care and physical therapy.

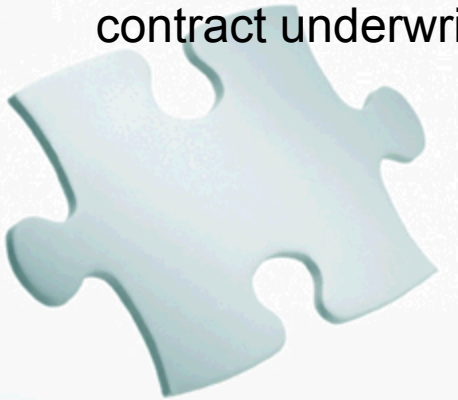
- Three months after the accident, Blue Shield's discovered Mr. Hailey's past medical problems and in June 2001, retroactively cancelled the insurance policy to the date it was issued physical therapy. The couple sued Blue Shield claiming breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional infliction of emotional distress.

- Trial court disposed of each of these claims and awarded damages to Blue Shield on its cross-complaint for rescission of the health services contract.

Hailey in A Nutshell

- The Court of Appeals reversed the trial court ruling and found that there was a triable issue of fact regarding whether the Hailey's engaged in "willful misrepresentation" because the language in the application could reasonably be construed in different ways.

- Acknowledging the difficulty in distinguishing between post-claim eligibility investigations and post-claim underwriting, the Court further held that the plan's duty under section 1389.3 is "to make reasonable efforts to ensure the subscriber's application is accurate and complete as part of the "pre-contract underwriting process."



Recent Rescission Settlements, Fines and Class Actions

PacifiCare of California

- On June 11, 2008, PacifiCare of California voluntarily entered a Settlement Agreement with the DMHC to resolve claims of individuals whose IFP HMO coverage was canceled.
  - Unlike other insurers, PacifiCare did not rescind coverage during the relevant periods, but instead prospectively canceled IFP HMO coverage of specific enrollees.
- Under the Settlement Agreement:
  - PacifiCare agreed to pay an administrative fine of $50,000.
  - The Plan also agreed to draft a corrective action proposal to address completion of medical underwriting. The DMHC may levy an additional fine of $500,000 for a violation to the corrective action plan.

Recent Rescission Settlements, Fines and Class Actions

Kaiser Permanente and Health Net

- The DMHC filed claims against Kaiser and Health Net alleging that the insurance companies enrolled and then rescinded membership agreements in violation of Section 1389.3 of the California Health and Safety Code, which prohibits post claims underwriting.
  - The Kaiser Agreement covers approximately 1,092 former enrollees.
  - The Health Net Agreement covers approximately 85 former enrollees.
- Under the May 2008 Agreements:
  - Kaiser and Health Net will voluntarily offer the former enrollees the option to purchase healthcare coverage without medical underwriting.
  - Former enrollees will have the option to resolve any claims payment issues that arose during the period of non-coverage through an arbitration proceeding.
  - Kaiser and Health Net each agreed to pay $300,000 in administrative fines.

Recent Rescission Settlements, Fines and Class Actions

Health Net Continues to Work with DMHC

- On September 12, 2008, Health Net entered into another agreement to reinstate policyholders who were "unfairly" dropped. Under the September 2008 Agreement:
  - Health Net Inc. agreed to offer new coverage - no questions asked - to 926 people whose policies it canceled.
  - Health Net agreed to pay $3.6 million in penalties.
  - An additional penalty of as much as $3.6 million could be levied on Health Net if a follow-up examination finds that it did not correct all deficiencies.
  - Health Net agreed to repay expenses for reasonable, medically necessary care that would have been covered by the policies had they not been canceled. The company values those expenses at more than $14 million.
  - Health Net did not admit to any wrongdoing.

Class Action Rescission Litigation

- Coast Plaza Doctors Hospitals v. WellPoint Health Networks, Inc., et al., Case No. BC 360235, Los Angeles Superior Court
  - Class Action brought by California hospitals and California Hospital Association (representing 450 hospitals) relating to damages to hospitals resulting from rescission practices.
  - Hospitals asserted standing as assignees of health plan member benefits.
  - The parties settled the action on or about July 10, 2008. The settlement was approved by the court on October 6, 2008.
  - The terms include a $11,650,000 pro rata fund for the hospitals, out of which a $2,980,000 attorney's fee award is to be paid.
  - A separate fund of $150,000 established to reimburse rescinded members who made payments to the hospitals following rescission.
  - Class members provided a general release of all claims relating to rescinded enrollees.

Class Action Rescission Litigation

- Ticconi v. Blue Shield of California, Case No. B190427, Los Angeles Superior Court
  - Class action seeking reversal of all post-claim rescissions by the plan on the grounds of material misrepresentation in the application process.
  - Blue Shield rescinded class representative's coverage 10 months after he obtained coverage and after he accumulated $100,000 in medical claims.
  - Last Thursday, October 16, 2008, Los Angeles Superior Court Judge Anthony Mohr conditionally granted class certification for a class of insureds who had policies rescinded.
  - The Court found that the failure to attach or endorse a copy of the application to the policy constitutes common issue related to liability.

Class Action Rescission Litigation

- Rodriguiez v. Blue Cross, Case No. B194066, Los Angeles Superior Court
  - Plaintiff brought putative class action alleging violation of unfair competition law, declaratory relief and breach of contract, among other claims.
  - Plaintiff contends he incurred over $100,000 in medical bills, after which his coverage was rescinded for material misrepresentations in his application for individual coverage.
  - Blue Cross moved to compel arbitration.
  - On appeal, the Second District recently affirmed the trial court's holding that there was not right to arbitrate the dispute based on the language in the plan documents.
  - The parties are awaiting a ruling on the plaintiff's motion for class certification.

Class Action Rescission Litigation

- Horton v. WellPoint, Case No. BC341823, Los Angeles Superior Court
  - Class action filed on October 24, 2005.
  - Claims filed on behalf of 6,000 putative class members.
  - Plaintiffs are represented by William M. Shernoff, who is active in rescission litigation, both in individual cases and in class actions.
  - Parties reached preliminary settlement in May 2007. The preliminary settlement was terminated in December 2007.
  - The California Medical Association moved to intervene in the action in 2006, alleging that when a plan rescinds an individual policy, it also refuses to pay providers after they have provided treatment.
  - The parties await disposition of the plaintiffs' motion for class certification.

Class Action Rescission Litigation

- City of Los Angeles v. Anthem Blue Cross and Health Net
  - Filed by the City of Los Angeles on April 16, 2008 against Blue Cross and February 22, 2008, against Health Net.
  - Alleges $1 billion in restitution and penalties.
  - Accuses Anthem and Health Net of retroactively canceling health benefits coverage and conducting unlawful post-claims underwriting.

Actions by Other States

- States requiring that plans complete all medical underwriting and resolution of questions at the time of application.
  - CA, CO, CT, FL, IN, MD, NH, NM, OH, PA, RI, VA and WA.
  - 29 States and the District of Columbia have no such requirement.

Actions by Other States

- States Requiring Permission from Insurance Department In Advance of Revocation of Individual Coverage Due to Member's Description of Medical History:
  - CT – Public Act 07-113(b):
    - ***An insurer or health care center shall apply for approval of such rescission, cancellation or limitation by submitting such written information to the Insurance Commissioner on an application in such form as the commissioner prescribes.*** Such insurer or health care center shall provide a copy of the application for such approval to the insured or the insured's representative. The commissioner may approve such rescission, cancellation or limitation if the commissioner finds that (1) the written information submitted on or with the insurance application was false at the time such application was made and the insured or such insured's representative knew or should have known of the falsity therein, and such submission materially affects the risk or the hazard assumed by the insurer or health care center, or (2) the information omitted from the insurance application was knowingly omitted by the insured or such insured's representative, or the insured or such insured's representative should have known of such omission, and such omission materially affects the risk or the hazard assumed by the insurer or health care center. Such decision shall be mailed to the insured, the insured's representative, if any, and the insurer or health care center.