The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

www.mdjwlaw.com A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

**October 27, 2008**

# HEALTH INSURER'S PAST REIMBURSEMENT PRACTICES DO NOT SUPPORT MISREPRESENTATION CLAIMS

Last Monday, a federal District Court in Brownsville rejected claims of fraud, misrepresentation, deceptive trade practices, Texas Insurance Code violations and *quantum meruit* based on a health insurer's changes in payment practices without notice to a health care provider, and the court granted summary judgment in favor of the insurer. In *RGOI ASC, Ltd. v. Humana Insurance Company,* 2008 WL 4661517 (S.D.Tex., October 20, 2008), RGOI – an ambulatory surgery center - was an out-of-network medical service provider who treated patients insured by Humana Insurance Company. RGOI was not told the exact amount it would be reimbursed but had historically received payment on 90-100% of the charges submitted to Humana. But, in late 2006, Humana implemented a new database tracking system and then, comparing the charges submitted to other ambulatory surgery centers, agreed to pay less than 10% of certain charges submitted. RGOI filed suit and Humana moved for summary judgment on the merits of the claims and on the pleadings.

First, the court determined that RGOI's claims were independent from any decisions related to coverage and that RGOI was not a party to the health insurance plan. Therefore, ERISA did not preempt the claims presented. Next, the court observed that all other claims, with the exception of the *quantum meruit* claim, required a misrepresentation finding. The court observed that Texas courts differ on finding circumstances that create a duty to disclose with some courts doing so only in circumstances involving a fiduciary or confidential relationship. Other courts have also found a duty when one makes a representation and fails to disclose new information that would make the earlier untrue or misleading, or a partial disclosure which conveys a false impression.

Examining another decision with facts similar to those at issue in this case, however, the court noted that Texas courts have held that health insurers had no duty to disclose the details of physician compensation to plan members. Furthermore, RGOI was an out-of–network provider with no fiduciary or contractual relationship with Humana. Therefore, RGOI could not impose a duty on Humana greater than that owed to its own plan participants and the "previous reimbursements cannot be characterized as representations that create a misrepresentation of a material fact." Accordingly, the court found as a matter of law that Humana was entitled to summary judgment on all the misrepresentation based claims. As to the *quantum meruit* claims, the court noted that the valuable services were provided to the patients, not Humana. Similarly, Humana's contract was with its plan members, not RGOI. Therefore, the court found that RGOI failed to state claim upon which relief could be granted, dismissed all causes of action, and ordered the case closed.

## DISABILITY PLAN ABUSED DISCRETION IN DENYING BENEFITS

Last Wednesday, the Fifth Circuit Court of Appeals held a long term disability plan provider abused its discretion when it denied long term disability benefits to a plan participant. In *Bernardo v. American Airlines, Inc.*, 2008 WL 4657080 ($5^{th}$ Cir. Tex., October 22, 2008), the plan beneficiary had been on long term disability for two years and was in her second remission from aplastic anemia. But her doctors observed that her disability would continue for several years due to complications arising from the medications and treatment. The plan had two other doctors review the case and determined that she was no longer disabled. The administrative appeal and the district court upheld the decision to deny benefits and this appeal to the Fifth Circuit followed.

The Fifth Circuit reviewed the case applying an abuse of discretion standard and observed there were three reasons supporting disability given by the participant's physician. The reviewing doctors, however, only addressed two issues and didn't address some issues regarding neurotoxicity and related disability due to the medications and treatment. The Fifth Circuit found the plan administrator and reviewing physicians presented no evidence to contradict the treating physicians' disability finding and, as such, the case was remanded to the district court to enter judgment in favor of the plan participant.

## PREMIUM FINANCE COMPANY ENTITLED TO REFUND OF UNEARNED PREMIUM

Last Thursday, in *Southern County Mutual Ins. v. Surety bank, N.A.*, 2008 WL 4662052 (Tex.App.- Fort Worth, October 23, 2008), the Ft. Worth Court of Appeals found that under applicable policy language, provisions of the Texas Insurance Code and related Texas Department of Insurance regulations, a premium financing company was entitled to the refund of the entire unearned premium despite the fact that the insured reportedly paid the down payment itself. In the event that the amounts received exceed the finance company's secured interest, the regulations also provide that the financing company hold the excess funds in trust and return them to the insured within a specified time.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.
If you would like to add additional recipients or would like to unsubscribe , please reply to this e-mail with your request
For past copies of the *Newsbrief* go to www.mdjwlaw.com and click on our Texas Insurance News page.