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Nevada Begins Audits of TPAs

The Nevada Division of Insurance (the “Division”) recently initiated an audit program of third party administrators (“TPAs”) that administer workers’ compensation claims involving Nevada residents. The audit program was put in place to satisfy a required response to aspects of the Nevada Legislative Counsel Bureau’s audit of the Division. The audits are being conducted on behalf of the Division by A.M. Bennett & Company. Beginning in July, many TPAs received Examination Warrants and follow-up emails explaining the audits.

According to the Division, the audits are not intended to be claims-related audits or market conduct audits. Instead, the audits are intended to provide the Division with the TPA’s current operational data and supporting records, in order for the Division to ascertain the degree of compliance with reporting requirements by each TPA. The audits will cover twenty-five items, and the Division anticipates that only a small number of items will require additional action by the TPA. Once the files are reviewed, examiners will contact the TPA to determine whether the TPA needs to provide additional items to the Division in order to be in compliance with Nevada statutory reporting requirements. TPAs will be provided an opportunity to respond to any inquiries or concerns of the Division.

As a part of the audit, TPAs will be required to report all current, new, and terminated administrative service agreements over the last three (3) years. TPAs must also provide an explanation to the Division regarding the reason any of these administrative service agreements were terminated or otherwise failed to renew. In addition, TPAs must provide the Division with a list of all independent entities the TPA has sub-contracted with to act on its behalf in any capacity, along with a copy of the contract between the TPA and subcontractor. ■

Insurers Challenge Requirement to Use Social Security Death Master File

During the course of a market conduct examination, three life insurers filed an action in Illinois state court seeking declaratory and injunctive relief from the Illinois Department of Insurance (the “Department”) that they have no obligation to utilize the Social Security Death Master File to ascertain whether their insureds are deceased and benefits are payable under policies issued in Illinois. In *United Ins. Co. of Am. v. Boron*, Cir. Ct. of Cook County, Illinois, No. 13CH20383 (Sept. 4, 2013), *United Insurance Company of America*, *Reserve National Insurance Company*, and *Reliable Life Insurance Company*, all assert that Illinois law and regulations do not support

such an obligation, and they also seek a declaration that the Department cannot obtain the insurers policy records for the purpose of comparing them to the Death Master File to identify deceased insureds in order to create new payment obligations.

The insurers claim that under the terms of their policies and the Insurance Code, they are only required to settle and pay claims upon receipt of a claim by the insured's estate or beneficiary and after receipt of due proof of death. The insurers argue that if no death claim is filed, the insurers have no affirmative obligation to search for proof of death or to take steps to pay benefits under the terms of the policies until the insured has reached the "mortality limiting age." If no claim is filed, benefits under the policies will be paid when the insured reaches the mortality limiting age of 99, per the mortality table incorporated into the insurers' policy forms. The insurers argue that the new obligations to review the Death Master File and pay out benefits without any claim being submitted that are being imposed by the Department through the market conduct examination are unfounded in law and contradict the Insurance Code and the express terms of their policies. These insurers also point out that they do not use the Death Master File for any other purpose, such as to cease making annuity payments.

In the examination, the Department appointed Joel Haber of Thomas Coburn, LLP as Examiner in Charge and Verus Financial, LLC as an examiner. According to the complaint, Verus already was engaged as an auditor for the Illinois treasurer and thirty-seven other states, to conduct a multi-state unclaimed property audit. The examiners asked the insurers to provide detailed electronic records regarding all in-force policies at any time since 1996. The data was to include names, dates of birth, and Social Security Records. The insurers objected to the request and asked the Department to confirm the purpose of the request. The Department confirmed that the purpose was for the Department's examiner to compare the data with the Death Master File and identify deceased insureds. The Department claimed that failure to provide the records would constitute "noncooperation" with the examination, which could result in suspension of the insurers' certificate of authority to do business in Illinois.

The market conduction examination has been joined by five other states, California, Florida, New Hampshire, North Dakota, and Pennsylvania and is now a multi-state examination, with the Illinois Department serving as the Managing Lead State. In their complaint, the insurers assert that they had no other remedies available other than filing the court action for declaratory and injunctive relief and that seeking further review from the Department would be futile.

On September 9, 2013, the Illinois Department, as the lead state, and California, Connecticut, Florida, Iowa, New Hampshire,

North Dakota, Pennsylvania, and Vermont announced another life claim settlement agreement with a major insurer. With this settlement, state insurance regulators have reached settlements or concluded investigations of nine of the top twenty life insurance companies, constituting over 45% of the total market. These settlements have all concentrated on the insurers' use of the Social Security Death Master File to stop paying a deceased person's annuity, but not using it to identify deceased insureds under life insurance policies. Regulators nationally are focusing on the remaining examinations of more than thirty top life and annuity insurers in the market. ■

ACLI Files Lawsuit Regarding Prohibition on Offshoring

The American Council of Life Insurers ("ACLI") filed a lawsuit ("Complaint") on May 23, 2013 seeking an injunction and declaratory relief against the Director of the Illinois Department of Insurance (the "Department"). The lawsuit seeks to declare invalid and unenforceable portions of Company Bulletin # 2013-01 - Offshoring ("Bulletin 2013-01") issued by the Department on January 18, 2013. Bulletin 2013-01 supersedes Company Bulletin # 2012-12, dated December 20, 2012, which was previously issued by the Department.

Bulletin 2013-01 was directed to all insurers, registered utilization review organizations ("URO"), and licensed third party administrators ("TPAs") that conduct business affecting Illinois insureds. The Bulletin states that in order to reduce costs, many insurers consider alternative means of administering contracts and healthcare plans that cover Illinois residents, such as outsourcing administrative and utilization review ("UR") functions to non-U.S. facilities. The Bulletin was intended to provide guidance that TPAs and UROs "performing services regarding Illinois insureds are prohibited from conducting their activities offshore." According to the complaint, "Bulletin # 2013-01 concludes by noting that '[t]he Department will . . . not permit the offshoring of either TPA or UR functions.' On information and belief, 'offshore' and 'offshoring' in this context, means that TPAs and UROs are prohibited by Bulletin # 2013-01 from conducting their activities outside of the United States." In reaching this conclusion, the Department relied upon the examination provisions in 215 ILCS 5/132(2) and 5/511.109(b) to assert that TPAs and UROs performing offshore functions deny the Department convenient and free access to their books and records.

The ACLI's Complaint alleges that Bulletin 2013-01 is invalid on the basis that it constitutes improper rulemaking due to the

failure to follow the required rulemaking procedures under Illinois law, such as publishing the Bulletin in Illinois Register, providing notice to stakeholders, and holding a public hearing. Second, the Complaint alleges that Bulletin 2013-01 exceeds the Department's statutory authority by creating an additional licensing requirement that conflicts with the Illinois Insurance Code's licensing requirements, since there is no location or residency requirement for TPAs or UROs. Third, the Complaint alleges that Bulletin 2013-01 exceeds the rulemaking authority of the Director and that the Department lacks statutory authority to direct the location for the storage of records and that nothing in 215 ILCS 5/132(2) and 5/511.109(b) address recordkeeping. Fourth, the Complaint alleges that Bulletin 2013-01 is arbitrary and capricious by not following the administrative procedure act and by not fully considering three problems associated with offshoring: (a) foreign travel, (b) ease of review, and (c) execution of warrants. On these points, the Complaint points out that (a) some foreign countries (like Canada) are closer than other U.S. states and the Department may obtain reimbursement from companies for the expense of foreign travel, (b) for many companies, records only exist electronically on the server, and there are no paper copies regardless of whether they are offshore, and (c) the statement that warrants will not be honored abroad is speculation, and companies would have a strong incentive to voluntarily comply with discovery requests. Finally, the Complaint alleges that Bulletin 2013-01 violates the Separation of Powers Clause of the Illinois Constitution in that the General Assembly did not grant the Director the authority to dictate where companies must conduct business outside of Illinois.

The ACLI asked the court for a declaratory judgment that Bulletin # 2013-01 is invalid and unenforceable as to insurance companies, TPAs, and UROs operating or doing business in the state of Illinois. The Complaint also requested an injunction restraining enforcement of the Bulletin and for attorneys' fees. So far, there have been several continuances and little other activity in the case. ■

Tennessee Modifies Administrative Services Agreement Requirements

Historically, entities applying for a third party administrator ("TPA") license in Tennessee have been required by the Tennessee Department of Commerce and Insurance (the "Department") to supply the Department with a copy of a fully-executed Administrative Services Agreement

("Agreement") with an insurer before the Department would issue a TPA license to the applicant. The Department specified that a TPA could not operate under or utilize an Administrative Services Agreement until it was reviewed and approved by the Department and the TPA license was issued. However, it was often problematic for TPAs to be able to satisfy this requirement, because insurers were often reluctant to enter into signed Agreements with unlicensed TPAs.

The Department has now changed its historical position and no longer requires a TPA applicant to submit a fully-executed Administrative Services Agreement as a condition precedent to obtaining a TPA license in Tennessee. The Department will now permit TPA applicants to submit proposed Agreements with their applications. However, once a licensed TPA executes an Agreement with an insurer covering Tennessee insureds, the TPA must submit a copy of the Administrative Services Agreement to the Department to demonstrate that the Agreement is in compliance with Tennessee's TPA laws. The Department has advised that TPAs are not approved to perform administrative services for any company for which the Department has not approved an Agreement, and Agreements cannot be used until they have been reviewed by the Department. ■

Indiana Insurance Department Amends its Non-Resident TPA Application

The Indiana Insurance Department ("Department") recently amended its Non-Resident Third Party Administrator Application ("Non-Resident TPA Application").

Effective May 1, 2013, the Department added a new Section ("Section 3"), requiring initial and renewal applicants to:

- list the states in which they are licensed or applying as a TPA; and
- list the states in which they are licensed or engaged in business as a TPA.

According to the Department, there were two reasons for the addition of Section 3 to its Non-Resident TPA Application. First, there isn't a national database that keeps track of where TPAs are licensed. Second, the Department indicated it had several instances last year where a few TPAs provided falsified state TPA licenses in an attempt to obtain a TPA license in Indiana. With the addition of Section 3 to the Non-Resident TPA Application, the Department will have additional information to help it verify the states in which a TPA is properly licensed. ■



Third Party Administrator Licensing and Consulting Services

Polsinelli is pleased to offer its Third Party Administrator Licensing and Consulting Services to TPAs and insurers. Services provided to TPAs and insurers include, but are not limited to:

- Assist TPAs with licensing and registration with state insurance departments and other state agencies on a multistate or national basis.
- Assist TPAs with multistate or national research.
- Assist TPAs with monitoring legislative and regulatory developments.
- Assist TPAs responding to regulatory investigations or regulatory actions.
- Assist TPAs with annual license/registration renewals and reports.

- Assist TPAs with negotiating Administrative Service Agreements with insurers.
- Review Administrative Service Agreements for compliance with state TPA laws.
- Assist TPAs with Market Conduct Examinations or audits.
- Assist TPAs with foreign qualifications with Secretaries of State.
- Assist with the acquisition or divestiture of TPAs.

Polsinelli's Insurance Business and Regulatory Law group has experience representing third party administrators and other insurance businesses on a variety of licensing, regulatory, and business issues on both a state and national basis. Attorneys in our group include two members who were formerly general counsel at state insurance departments, three members of the Federation of Regulatory Counsel, Inc., as well as three members who were formerly in-house counsel for third party administrators. ■

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