REGULATION OF MULTI-STATE GROUP HEALTH INSURANCE
HAS THE TIME FOR A MODEL LAW ARRIVED?

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The company proposing to insure a group[1] with members in 10, 15 or even more states is truly in the middle of a regulatory quagmire. Although exceptions or exemptions exist, determining which jurisdictions have exemptions and how they apply could easily take weeks or months and require the expenditure of substantial amounts of money. Retaining lawyers or identifying the appropriate staff member at the regulatory bodies alone could amount to a major undertaking. Generally the need for information is on a far shorter time schedule. A potential group looking for insurance coverage may not be able to wait the weeks or months needed to insure regulatory compliance. Furthermore, the economic considerations of the insurer may militate against spending the time or money necessary to submit a proposal that may be rejected by the group or may be underbid by an insurer willing to take the risks of regulatory non-compliance.

It seems as though the insurance regulatory scheme has, at least in the area of group coverages, failed to stay abreast of and adapt to the changing nature of society and the demand for interstate group insurance. Insurance regulations that were designed to protect the consumer may have reached the point of frustrating this very goal. Consumers could very well be denied the benefits provided by group purchasing power, and the maze of regulatory requirements would certainly have the effect of significantly raising the cost to a compliant provider. Equally as plausible, the willingness of an insurer to look the other way with regard to the varying regulatory schemes could also have the effect of consumers being insured by companies that are not regulated by the state.

With the ever increasing calls for federal intervention into healthcare and the insurance arena, a cooperative effort by the states could short circuit any perceived need for federal intervention and thus keep insurance regulation at the state level where it more properly belongs and where it can be more effectively administered. Perhaps a systematic, nationwide approach to regulation of these matters could significantly reduce regulatory hurdles and the expense of providing a product in this arena. Such a systematic approach would ultimately lead to a better regulated and perhaps less expensive product reaching the consumer. The market could very well open up to more competition by smaller companies.

At the present time, however, providing group health and accident coverage to groups, associations or other entities who have members located in various states remains a regulatory quagmire. An insurer proposing to write group coverage involving numerous states is initially faced with questions concerning licensing, obtaining certificates of authority and exceptions to these requirements in the various states in which the group has members. Determining the regulatory requirements can be a daunting task and can involve review of literally hundreds of statutes. This review, generally, will lead to a conclusion that providing group coverage falls within the definition of transacting the business of insurance. In the absence of an exception, the insurer will need a license or certificate from the state regulatory authorities.

The general licensing requirement will, however, often be subject to one or more of a myriad of exceptions or exemptions. Unfortunately, these exceptions are not uniform from state to state. The insurer proposing to write multi-jurisdictional group health and accident coverage may find exemptions involving the manner and location in which the policy was negotiated and procured,[2] whether and by whom premium taxes are paid,[3] the percentage number of insureds who are residents of the state[4] and what actions the insurer's domiciliary state has taken with regard to the policy.[5]

These requirements are usually stated in conjunction with other requirements and sometimes vary widely from state to state. Additionally, there are issues of form approval, mandated benefits and the issue of whether the group was formed for the purpose of procuring insurance or for some other purpose.[6] Each of these exceptions may require the analysis of other code sections to determine the applicability to any given policy or certificate of coverage. As can readily be seen, extensive legal research or analysis may be needed to determine how the laws of a state may apply. The costs associated with this level of review can be significant. Assuming a scenario that involves group members in numerous

states but with relatively few members in each state, costs associated with regulatory compliance can quickly become prohibitive.

The question of whether an insurer's actions with regard to a group policy or group member in any given state implicates licensing or certification requirements logically should be the first issue addressed. States can and do impose criminal sanctions for transacting the business of insurance without a certificate of authority.[7] Given the ripple effect that an adverse action by one state's regulators can have with every insurance regulatory department, the need to avoid even a misdemeanor violation is readily apparent.

As mentioned, many states have statutory schemes that provide exceptions to licensing requirements. The exceptions vary substantially, and even when such an exception is found, it can give rise to more questions than answers. For example, New Jersey specifically exempts from its licensing requirements "group . . . health insurance . . . contracts covering residents of this state under a group policy or contract lawfully issued in another state.[8] This exception, as noted, is a licensing exception. The insurer seeking to provide coverage to group members in this state would then be faced with statutes that require that all policies or certificates "delivered or issued for delivery in this state" be filed with the Commissioner for approval.[9] The insurer must determine whether the exception from the requirement of obtaining a certificate of authority provides an exception from this filing requirement. A similar question is then raised concerning mandated or minimum benefits requirements.[10]

Even when the exceptions in different statutes are similar, states often add different regulatory wrinkles. West Virginia has a statute that is somewhat similar to New Jersey's. The West Virginia statute exempts certain actions from the definition of unlawful transaction of business where the master policy was "lawfully issued and delivered in" another state in which the insurer was authorized to do business.[11] This exception requires that the master policy be "delivered in" another state but presumably would allow the delivery of the certificates in West Virginia. However, the West Virginia statutes require more than lawful issue in another state and add additional requirements. Specifically, these statutes require that the policy must have been issued to a "group organized for purposes other than the procurement of insurance."[12] Additionally, the policy must comply with West Virginia law governing group health insurance. This requirement apparently mandates knowledge of and compliance with laws and regulations concerning mandated benefits, form filings and various other regulatory requirements. Although no certificate of authority is required, it is readily apparent that regulatory compliance could, and most probably would, require a great deal of time and money.

Other exceptions are based on the situs of the transactions and negotiations relating to the contract of insurance. Connecticut, for example, exempts "transactions involving contracts of insurance independently procured"[13] outside of the state. New Hampshire likewise exempts contracts procured out of state if the policies are reported.[14] The question then is what constitutes procurement out of the state. New Hampshire, as do other states, characterizes acts affected by mail as occurring in the state. Arguably, if a group member was mailed information in regard to applying for insurance, the negotiations could be deemed to have occurred within the state under this type rule.

Many states require the payment of premium taxes[15] either by the insured or the insurer. If the New Hampshire exception discussed above is applicable, the insured must provide information to the Commissioner regarding the insurer. Pennsylvania provides an exception to its licensing requirement depending on such things as the type of group, whether the insurance officials in the state of insurer's domicile have made findings regarding the master policy and whether the rates are reasonable in relation to the benefits.[16] Additionally, Pennsylvania requires that the insurer "claiming exemption" must demonstrate compliance. This language seems to indicate that this proof must proceed the act of insuring. Otherwise and in the absence of proof of compliance, there would be no exemption.

Other states, such as Mississippi, simply do not have any statutes that appear to exempt insurers from their general licensing requirements. Additionally, some states give discretion to the Commissioner to make exceptions.[17] It is entirely possible that a state's regulatory authorities may have the authority to promulgate regulations that affect or provide exemptions or exceptions. Reviewing the states' statutory schemes is a daunting task but would seem to pale in comparison to a similar review of the regulations and administrative positions of numerous states.

The one thing that is clear in the group insurance regulatory context is that there are no general rules that can be applied across the board from state to state. Although it appears that many states have attempted to relax regulatory control

through exceptions to licensing requirements, these efforts apparently provide little effective relief. At best, an insurer will be required to research, review and comply with a number of differing statutes and regulations. Additionally, interaction with numerous regulators at varying levels will range from minimal to extensive. All of this effort will be required in order to cover one group that may have few members in any given state. Furthermore, depending on the geographic make-up of the group members, the insurer could be required to become licensed in some states.

The need for a consistent approach to multi-state group health insurance seems apparent. The numerous exceptions to general licensing requirements that exist indicate that many states have recognized, at least to some degree, that this type insurance requires different, if not relaxed regulatory treatment. The fact that so many different exceptions exist, however, has thwarted any effort to simplify writing multi-state group coverage. A NAIC model law adopted by the states could provide the mechanism whereby this type coverage could be provided more economically while still insuring appropriate regulatory oversight. A model could set forth the requirements for forms, the payment of taxes, minimum benefits and financial requirements for the insurance company. Additionally, such a model law could provide for simplified reporting so that information concerning the company is available to those states in which the company has insureds. Under such a law, a company domiciled and licensed in a state that had adopted the model law could provide coverage to insureds in any state where the model law had been adopted. A regulatory scheme adopting these general principles would go a long way toward simplifying a complicated and often encountered problem area.

Endnotes

1. The term “group” here is used in its generic sense, and this article deals with group type insurance. States have varying views as to what constitutes group insurance.

2. Conn. Gen. Stat. Ann. § 38a-271.

3. N.H. Rev. Stat. Ann. § 406-B:2 (requiring insured to pay premium taxes).

4. Vt. Stat. Ann. tit. 8, § 3368 (allowing not more than 25% of members to be Vermont residents).

5. 40 Pa. Cons. Stat. Ann. § 46 (exception applied if Commissioner in state of insurer’s domicile makes findings regarding economies of administration, etc).

6. By way of example, West Virginia distinguishes between what has often been called “true group” and groups formed for the purpose of procuring insurance. W. Va. Code § 33–3-20.

7. New Jersey makes violations a misdemeanor. *See* N.J. Stat. Ann. § 17B:17-13. Maine on the other hand punishes violations by a fine not to exceed $5,000.00 or imprisonment for not over two years. Me. Rev. St. Ann. tit. 24-A § 404.

8. N.J. Stat. Ann. § 17B: 17-13.

9. N.J. Stat. Ann. § 17B:27-49.

10. N.J. Stat. Ann. § 17B:27-33.

11. W. Va. Code § 33-3-20.

12. *Id*.

13. *See* Conn. Gen. Stat. Ann. § 38a-271(b)(4). Connecticut also has a specific exception to true groups where the master policy was issued in another state. Conn. Gen. Stat. Ann. § 38a-271(b)(8).

14. N.H. Rev. Stat. Ann. § 406-B:2.

15. As a non-exhaustive example, Maryland, Connecticut, New Hampshire and Wisconsin all specifically require payment of premium taxes in the statutes which set forth the exceptions.

16. 40 Pa. Cons. Stat. Ann. § 46.

17. *Id*.