VIRGINIA ENACTS SPECIFIC STATUTE PROHIBITING RE-UNDERWRITING UNDER EXISTING GROUP OR INDIVIDUAL HEALTH POLICIES

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The Virginia Bureau of Insurance ("VABOI") proposed creating a new Section 38.2-508.5 to prohibit underwriting in health insurance after an insurance contract is issued where the re-underwriting will place the insured in a less favorable position than he held when the policy was originally underwritten.[1]

The reason for this proposed new law was to specifically prohibit a practice that has recently been used in health insurance to re-evaluate an individual's health status at the renewal date of the insurance contract. The VABOI was first made aware of this practice when a complaint was received in which premiums were substantially increased partially because the Complainant had suffered a significant setback in his health. Subsequently, the VABOI was made aware of several *Wall Street Journal* articles (April 9, 2002 and April 26, 2002) that highlighted a specific insurer's (American Medical Security Group, Inc.) practice of re-underwriting individuals at their annual renewal.[2] This statutory proposal was designed to prohibit this approach to underwriting for health insurance when it places the consumer at a disadvantage relative to his position when he purchased the insurance.

This new statute was placed under Chapter 5 – "Unfair Trade Practices" despite the fact that Virginia has an insurance-specific statute (38.2-508) that would prevent trade practices that could conceivably reach adverse re-underwriting practices.

Historically most individuals are initially charged varying prices for their health insurance at the time the insurance is purchased. Subsequently, the individual could expect to receive the same annual percentage increase which would reflect medical inflation in the claims filed by an entire "Policyholder Group." These Policyholder Groups are tiers. This is a methodology that is used by most health insurers and they place individuals in a class defined by their claims and medical experience. All individuals within each class will receive the same percentage of discounts or surcharges at their renewal date. One of the largest challenges of the health insurance industry is that of limiting the cost of coverage for individuals who develop serious medical conditions, while at the same time keeping prices attractive enough for healthy individuals to keep them in the market.

In recent years, health insurers have started developing a rating methodology which utilizes "*BOTH*" a good claims discount as well as a claims surcharge. The discount or surcharge is generally based solely upon the prior year's claim experience and not upon an individual's actual health situation or prognosis. The goal of this new rating methodology is to provide an incentive for healthy individuals to stay in the insurance pool. Conceivably, overall premiums can be reduced enough that even those with relatively poor experience would end up paying less for their premiums. Unfortunately, little, if any, reliable information appeared to be available to the health insurers. Consequently, the lack of reliable technical information appears to be an impediment to developing a united front or a formal policy position with regard to this issue.

Within the past year, the American Academy of Actuaries has been called upon to provide a reliable, unbiased, technical review of the likely impact of using some degree of experience rating at renewal in the individual insurance market. The Health Insurance Association of America has called upon the Academy to investigate the extent to which experience rating can keep healthy individuals in a block of policies as it ages, the impact on initial premiums, the impact on renewal premiums for both healthy and impaired individuals, the impact on lapse rates over time, and more broadly whether such a rating approach could help improve the financial viability of blocks, and thus make it easier for carriers to keep them open over time.

Even the federal government has considered the issue of experience or tiered rating at renewal; however, Virginia appears to be the first state to actually enact specific legislation relating to this issue. The original piece of legislation effectively banned two consumer friendly practices commonly used in the health insurance industry, mainly lifestyle based, good health discounts and the removal of waivers or riders which limit coverage for specific

medical conditions.

Many health insurers provide "more good health discounts" to an individual based upon that individual's adherence to a healthy lifestyle. These "good health discounts" would relate to such things as the absence of tobacco or alcohol, establishing an exercise regimen and maintenance of appropriate weight, blood pressure and cholesterol count. The original legislation prohibited such "good health discounts" and appeared to run counter to the overall purpose of the statute in providing incentives to individuals to maintain their health lifestyles.

The original legislation also prohibited waivers or riders which limited the coverage provisions for certain pre-existing medical conditions. The original language of the Bill appeared to prohibit such contractual "modifications" based on a change in a health status related factor of the individual insured. Many insurers underwrite an individual insured subject to waivers or riders which limit the coverage provisions for certain pre-existing medical conditions. The limitations for these conditions can be removed by the insurer if the underlying medical condition is corrected or cured. Thus, if the waiver or rider is removed, the insured is then entitled to all of the benefits available under his health insurance contract rather than just those not related to the pre-existing condition. These "consumer friendly" aspects of health insurance were ultimately modified in the final version of the Bill.

During the course of the 2003 Virginia General Assembly several compromises were suggested to the VABOI which were rejected. The first suggestion was to call to their attention the fact that the Unfair Trade Act Statute (Section 38.2-508) appears to already prohibit this practice. The second suggestion was to call to VABOI's attention an inconsistent code provision dealing with the Small Employer Market (Section 38.2-3433). That code section recites that the "market premium" rates charged by a health insurance issuer may deviate from the community rate filed by the health insurance insurer but not more than 20% above or 20% below such rate for claims experienced, health status and duration …." This established deviation in the Small Employer Market of 20% in an increase or a discount appears to be inconsistent with the new Section 8.38.2-508.5. Finally, it was suggested to VABOI to include a provision that would allow the individual to consent or reject a policy that does allow the coverage with a rating methodology allowing limited discounts and increases. This was rejected as well.

VABOI stated that the National Association of Insurance Commissioners ("NAIC") was favorably disposed toward enactment of similar laws; however, my search of their website yielded no reports, articles or other documents discussing or addressing the issues covered by HB1826. Also, despite the comment in the *Wall Street Journal* article of April 26, I can find no reports, articles or other documents published by the National Conference of State Legislatures ("NCSL") concerning the issues of re-underwriting.

Conclusion

The new Section 38.2-508.5 appears to be a singular law with no comparable counterpart yet enacted in other states. There is likewise no federal law either enacted nor proposed that covers the issue. It appears that the exhortations of state legislators in states such as Florida and U. S. Senators such as Bob Graham regarding similar legislation is at this point just that – talk.

My research did, however, uncover at least one analogue that seems to me would be a possible avenue for redressing re-underwriting results in altered premiums based upon changes in health condition. Namely, several states (including Virginia) have insurance specific unfair trade act laws that could conceivably reach adverse re-underwriting practices. The first example is Georgia's version (OCGA Section 33-6-4) which deems discrimination between individuals of the same class and hazard regarding their premiums, fees or rate to be an unfair trade practice. Also, Minnesota (Minn. Stat. §72A.20) has a similar approach to the Georgia statute with regard to premium discrimination that goes further by prohibiting the use of "any selection or underwriting practice that is arbitrary, capricious, or unfairly discriminatory." It also disallows any change in policy coverage or premiums based on the results of an HIV test, and precludes the design of provider networks or policy offerings that would discourage enrollment by persons or groups whose health risk could be perceived as likely to be more expensive than average.

Finally, North Dakota (N.D. Cent. § 26.1-04-03) likewise has the same approach to discrimination between persons of

the same class and hazard. It specifically states that readjusting the premium rates for group insurance policies from year to year based on loss or experience or expense experience is not prohibited, but is silent as to similar adjustments to individual policies. From this admission, it is possible to infer that such an act would be prohibited (or at least does not fall as squarely within the letter of the law as adjustments in the group context). All of these code sections are analogous to Virginia Code Section 38.2-508. Similarly, a number of states, including the three mentioned above, prohibit the use of discounts that are now specifically governed under Virginia's new statute. I believe that these provisions may have the presumably unintended consequence of prohibiting good health discounts and related practices that benefit consumers.

In conclusion, it is rare to find Virginia in the forefront of enacting legislation such as this most recent HB1826, but I am sure that other states will be following in short order.

Endnotes

1. **CHAPTER 699**

An Act to amend the Code of Virginia by adding a section numbered 38.2-508.5, relating to re-underwriting individuals under health insurance policies.

[HB 1826]

Approved March 19, 2003

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 38.2-508.5 as follows:

   § 38.2-508.5. Re-underwriting individual under existing group or individual accident and sickness insurance policy prohibited; exceptions.

   A. No premium increase, including a reduced premium increase in the form of a discount, may be implemented for an insured individual under existing individual health insurance coverage as defined in subsection B of § 38.2-3431 subsequent to the initial effective date of coverage under such policy or certificate to the extent that such premium increase is determined based upon: (i) a change in a health-status-related factor of the individual insured as defined in subsection B of § 38.2-3431 or (ii) the past or prospective claim experience of the individual insured.

   B No reduction in benefits may be implemented for an insured individual under existing individual health insurance coverage as defined in subsection B of § 38.2-3431 subsequent to the initial effective date of coverage under such policy or certificate to the extent that such reduction in benefits is determined based upon: (i) a change in a health-status-related factor of the individual insured as defined in subsection B of § 38.2-3431 or (ii) the past or prospective claim experience of the individual insured.

   C. No modifications to contractual terms and conditions may be implemented for an insured individual under existing individual health insurance coverage as defined in subsection B of § 38.2-3431 subsequent to the initial effective date of coverage under such policy or certificate to the extent that such modifications to contractual terms and conditions are determined based upon: (i) a change in a health-status-related factor of the individual insured as defined in subsection B of § 38.2-3431 or (ii) the past or prospective claim experience of the individual insured.

   D. This section shall not prohibit adjustments to premium, rescission of, or amendments to the insurance contract in the following circumstances:

   1. When an insurer learns of information subsequent to issuing the policy or certificate that was not

disclosed in the underwriting process and that, had it been known, would have resulted in a higher premium level or denial of coverage. Any adjustment to premium or rescission of coverage made for this reason may be made only to extent that it would have been made had the information been disclosed in the application process, and shall not be imposed beyond any period of incontestability, or beyond any time period proscribing an insurer from asserting defenses based upon misstatements in applications, as otherwise may be provided by applicable law. Any such rescission shall be consistent with § 38.2-3430.3 regarding guaranteed availability.

2. When an insurer provides a lifestyle-based good health discount based upon an individual's adherence to a healthy lifestyle and this discount is not based upon a specific health condition or diagnosis.

3. When an insurer removes waivers or riders attached to the policy at issue that limit coverage for specific named pre-existing medical conditions.

E. For purposes of this section, re-underwriting means the reevaluation of any health-status-related factor of an individual for purposes of adjusting premiums, benefits or contractual terms as provided in subsections A, B and C of this section.

F. The provisions of this section shall not apply to individual health insurance coverage issued to members of a bona fide association, as defined in subsection B of § 38.2-3431 , where coverage is available to all members of the association and eligible dependents of such members without regard to any health-status-related factor.

2. Chad Terhune, "Insurer's Tactic: If You Get Sick, the Premium Rises," The Wall Street Journal, April 9, 2002. "American Medical Security Gets Setback and Victory in Florida," Chad Terhune.