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## **REPRESENTING THE INSURANCE PROFESSIONAL IN THE SALE OF UNAUTHORIZED INSURANCE PRODUCTS**

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Rising insurance premiums, combined with decreased insurance benefits, have created fertile soil for the growth of questionable "health plans." These plans are deemed to be unauthorized entities because they are not regulated by the state. Instead, these plans purport to be outside the scope of state regulation and touted as ERISA plans. Because of their attempt to circumvent state and federal applicable law, these plans are often later denounced as scam or bogus insurance. Unfortunately for the policyholders, the determination of unauthorized insurer status comes too late, after several thousand dollars or more has already been incurred by the policyholder for medical bills which are never paid by this insurance.

### **A. STATE REGULATIONS**

Nearly every state in this country has a state statute that regulates unauthorized entities. Some states provide for criminal redress, while others provide for civil remedies.

Over forty states provide for a civil remedy. Of the states that provide for civil recourse, several more states provide an attorneys fees provision to the plaintiff. For the most part, it is the existence of a statutory attorneys fees provision that has fueled these cases recently.

A comprehensive chart of the various state statutes and their pertinent provisions is attached in the Appendix to this Article.

### **B. FEDERAL REGULATIONS**

Federal law does not govern insurance except for self-funded ERISA plans which are authorized as being outside of state regulation. These plans are regulated by the Secretary of Labor as employment plans. In some instances, a union or ERISA plan may be exempt from state insurance regulation under the Federal Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001 et. seq. (hereinafter referred to as ERISA).

Generally legitimate self-funded ERISA plans established by a single employer for the employer's own employees, as an employment benefit, are exempt from state regulation. This coverage is not marketed or sold by agents since it arises directly as a result of the employment. There are instances where licensed agents may sell insurance products, such as stop-loss insurance or life insurance for trustees of ERISA plans. Legitimate union plans are established by labor unions under a collective bargained agreement with an employer. Under ERISA, a multiple employer welfare arrangement (MEWA) may be exempt from state regulation if it is fully insured and

holds a certificate of authority from the state.

ERISA sets forth various requirements for a health plan to be considered an ERISA product. ERISA is a complex and intricate body of statutory and caselaw and its breadth is too far for any meaningful discussion herein. Suffice it to say, that the typical insurance professional with a 40 hour training course is not intimately familiar with all of the requirements for a plan to be considered an ERISA plan.<sup>1</sup> Therefore due to their unfamiliarity, agents are more likely to be accepting of such a plan, without full research.

### **C. CASE EXAMPLES**

The General Accounting Office (GAO) conducted a study in 2004 of unauthorized entities.<sup>2</sup> The GAO was asked to identify the number of entities that operated from 2000 to 2002 and the number of policy holders and employers affected. The GAO identified 144 entities not authorized to sell health insurance, which involved over 15,000 employers and more than 20,0000 policyholders.

One of these unauthorized entities investigated by the GAO was Employers Mutual LLC, a Nevada based operation, which had sold plans in nearly every state in the union. Employers Mutual LLC collected approximately \$16 million in premiums from over 22,000 people in 2001, leaving more than \$24 million dollars in unpaid medical bills. Since Employers Mutual LLC asserted it was an ERISA plan and outside the scope of state regulation, the Secretary of Labor, then Elaine Chao, brought a cease and desist action against Employers Mutual LLC in federal court in Nevada and had a Receiver appointed to administer the claims.<sup>3</sup> After marshaling Employers Mutual LLC's assets, the Receiver was able to satisfy claims on a nominal amount per dollar to the protection of the policyholders. The Court entered a default judgment

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<sup>1</sup> For instance prior to 2002, there was no requirement for an insurance agent to obtain any training on unauthorized entities in Florida. In the wake of the abuse by these unauthorized entities, the Florida Department of Insurance required agents to take an unauthorized agent course. Effective July 1, 2004, the Florida Department of Insurance eliminated the separate unauthorized entities requirement, however now mandates that courses must include instruction on the subject matter of unauthorized entities engaging in the business of insurance. The scope of the topic of unauthorized entities shall include the Florida Nonprofit Multiple-Employer Welfare Arrangement Act and the Employee Retirement Income Security Act, [29 U.S.C. ss. 1001](#) et seq., as it relates to the provision of health insurance by employers and the regulation thereof.

<sup>2</sup> "Private Health Insurance: Employers and Individuals are Vulnerable to Unauthorized or Bogus Entities Selling Coverage", GAO-04-312 (Feb. 27, 2004).

<sup>3</sup> [Chao v. Graf](#), Civil Action No CV-N-01-0698-DWH(RAM), Federal District Court, Nevada

against the principals of Employers Mutual LLC for \$7.3 million dollars.<sup>4</sup> The Receiver then brought reimbursement actions against the agents and others that sold the coverage. Criminal actions against three plan principals recently resulted in a 25 year prison term.<sup>5</sup>

Another plan with similar attributes was TRG Marketing LLC, an Indiana based operation. TRG purported made all of the policyholders "sales associates" by requiring them to sell long distance phone service for an extra \$100 fee. According to TRG, the sale of long distance phone service constitutes "work" by the policyholders thereby creating an "association" and entitling them to group health benefits. In December 2001, the State of Florida issued a cease and desist order to TRG after it failed to honor claims.<sup>6</sup>

The Colorado Department of Insurance Commissioner issued an emergency cease and desist order regarding other unauthorized entities including American Benefit Plans, National Association of Working Americans, United Employers Voluntary Employees Benefits Association (UEVEBA) and others.<sup>7</sup>

Finally, one of the most creative plans encountered was N.A.P.T. As an employer with legitimate health insurance through Blue Cross/ Blue Shield, N.A.P.T. sought to treat all of the new policyholders as its employees so they would be able to be covered under its plan with Blue Cross/Blue Shield.

#### **D. PRACTICAL TIPS AND STRATEGIES**

The following is a list of product characteristics which should prompt review and investigation before a product is actually sold:

- the product operates like insurance but claims it provides "benefits"
- avoidance of use of certain insurance terminology. Instead of using the term "commissions" for example, the term "consulting fees" is used. Likewise, policyholders are not called "insureds," but rather "plan members" or "associates"

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<sup>4</sup> U.S. Department of Labor News Release, October 14, 2003

<sup>5</sup> "Latest Legal News from the Criminal Court of Los Angeles, California and the U.S.," [www.criminaldefenselawyers.com](http://www.criminaldefenselawyers.com), February 10, 1997

<sup>6</sup> State of Florida Office of Insurance Regulation, Market Investigations [www.floir.com/market\\_conduct/unlicensed\\_entities](http://www.floir.com/market_conduct/unlicensed_entities)

<sup>7</sup> State of Colorado, Division of Insurance, Order No. 0-02-144 (February 13, 2002).

- the product claims to be self funded with no reinsurance
- the product covers pre-existing conditions
- the product advertise unusually low premiums and or unusually generous benefits

### **1. *Duty to Investigate***

Agents should not rely solely on representations of the plans' principals or managing members. Such reliance will not generally insulate the agents from disciplinary action and criminal or civil action. Typical due diligence includes reading all marketing materials and website, verification of licensure with the state department of insurance or exemption from licensure, and verification of an reinsurance. This last requirement is particularly important because in the case of TRG Marketing LLC, it produced what appeared to be a valid reinsurance treaty but no attempts were made to contact the reinsurer directly to verify if reinsurance was truly in place.

### **2. *Tips to minimize losses***

As discussed above, most civil remedy statutes for the sale of unauthorized products provide for the agent who "aided and abetted" the unauthorized sale to be strictly liable for the unpaid claims. In the case of unauthorized health insurance, this means payment of the outstanding medical bills incurred.

In normal claims handling by legitimate insurance carriers, medical expenses are generally reduced prior to payment. Therefore one way to minimize damages in these types of cases is to determine the price the carrier would have paid for that medical charge had the insurance been legitimate. One method is to ensure that medical codes are on all the bills and use an outside medical bill payer service to negotiate the bills to a much lower price.

This approach, rather than letting claimant's attorney negotiate the bills directly, gives the insurance professional control over the bills and the ability to pay a substantially lower price than what a claimant's attorney can negotiate. In some instances, even less than 75% on the dollar.

Lastly it cannot be overlooked that even though no legitimate insurance was purchased, the claimant would only get the benefit what it paid for. Therefore again all co-pays and deductibles and exclusions from coverage should be employed to reduce the overall claim. Keep in mind, however, that some claimant attorneys have taken the position that if the insurance was illegal at the onset, any limitations of coverage in the plan benefits are not enforceable.

## **F. CONCLUSION**

Representation of an insurance professional is often wrought with hurdles and complications. When the product is unauthorized, the claim becomes virtually a strict liability matter. Practical handling of the claim by the e & o defense attorney is invaluable to avoid the claim from mushrooming out of control.

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