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BULLETIN NUMER 2006-10

TO: All Licensed Health Insurers and Licensed Health Maintenance Organizations in South Carolina

FROM: Eleanor Kitzman
Director

RE: Interpretive Bulletin regarding the Application of S.C. Code of Laws § 40-47-20(36)(f) to South Carolina Insurers and Health Plans

DATE: December 21, 2006

I. Purpose of Bulletin

During the 2006 legislative session of the South Carolina General Assembly, several significant changes were made to Chapter 47 of Title 40 of the South Carolina Code of Laws. *See* 2006 S.C. Act No. 385. Specifically, S.C. Code Ann. § 40-47-20 broadly defines "practice of medicine"[1] in several respects, by including those actions which constitute "rendering a determination of medical necessity or a decision affecting the diagnosis and/or treatment of a patient." *See* S.C. Code Ann. § 40-47-20(36)(f). Because the expansive language used in § 40-47-20 could be interpreted to impact licensed health insurers and licensed health maintenance organizations ("HMOs"), over which the South Carolina Department of Insurance ("Department") has been given regulatory authority, the Department is compelled to provide guidance regarding the applicability of § 40-47-20(36)(f). S*ee, e.g.*, S.C. Code Ann. §§ 38-3-10 *et. seq.* (2002).

II. Applicability of S.C. Code Ann. Section 40-47-20(36)(f)

Health plans (as defined below) have questioned whether the activities described in § 40-47-20(36)(f) are intended to include decisions made by a health plan during the evaluation of whether a particular medical service is covered by that plan. This process of reviewing whether medical services are "necessary, appropriate, and efficient allocation of health care resources and services given or proposed to be given to a patient

[1] *See* RE: Act No. 385 of 2006, S.C. Sup. Ct. Order dated August 24, 2006 at footnote 2 (acknowledging breadth of Act 385).

or group of patients" is referred to in South Carolina as "utilization review." *See* S.C. Code Ann. § 38-70-10(1) (2002).[2]

Based upon a review of § 40-47-20(36)(f), existing statutes and regulatory requirements and applicable case law, it is the opinion of the Department that § 40-47-20(36)(f) was not intended to apply, and does not apply, to utilization review decisions made by licensed health insurers, licensed HMOs and group health plans (hereinafter collectively referred to as "health plans"). This determination is based on the reasons set forth below.

A. Application of Section 40-47-20(36)(f) to health plans conflicts with the statutory scheme established by the Utilization Review and Private Review Agent Act.

The Utilization Review and Private Review Agent Act ("UR Act") and accompanying regulations establish a comprehensive regulatory scheme governing utilization review decisions. Utilization review decisions are coverage determinations. They are neither clinical determinations of medical necessity nor decisions affecting the diagnosis and/or treatment of a patient. Nothing contained in the UR Act indicates that utilization review decisions are the practice of medicine.

B. Applying Section 40-47-20(36)(f) to health plans in South Carolina contradicts existing South Carolina case law, statutes and public policy

Nothing contained in S.C. Code § 40-47-10 *et. seq.* appears to have been intentionally or explicitly directed to health plans. Indeed, the Department notes that the terms health insurer, HMO, and health plan do not appear anywhere within Act No. 385. Furthermore, the Act includes no reference to the insurance provisions contained in Title 38. Moreover, the Title portion of the Act gives no indication of any intent to alter the express statutory framework in Title 38 that governs health plans in our state.

Interpreting § 40-47-20(36)(f) as applying to utilization review decisions made by health plans would conflict with the regulatory scheme set forth under the UR Act. *See, e.g.,* S.C. Code Ann. §§38-33-10 *et seq*; §§ 38-70-10 *et seq.*; §§ 38-71-10 *et seq.* For example, § 38-33-240(c) provides that "[n]o health maintenance organization authorized under this chapter is considered to be practicing medicine." Thus, classifying activities by licensed HMOs as the practice of medicine pursuant to § 40-47-20(36)(f) directly conflicts with § 38-33-240(c) and § 38-71-1920. If the General Assembly had intended to define utilization review activities as the practice of medicine, it would have repealed or amended these inconsistent insurance provisions. *See* S.C. Code Ann. § 38-33-240

[2] The Department notes that health plans in South Carolina sometimes refer to these types of decisions as "medical necessity" decisions. The Department believes the use of this phrase in § 40-47-20(36)(f) has contributed to the confusion. However, the phrase "medical necessity" clearly has a plain meaning outside of its use as industry jargon, and for the reasons described throughout this Bulletin, the Department is convinced the General Assembly did not intend for its use of the term to be synonymous to the term "utilization review."

(2002); also S.C. Code Ann. §§ 38-71-1910 *et seq.* (2002). South Carolina courts have held that statutes in apparent conflict should, if possible, be construed so as to allow both to stand and to give effect to each. *See, e.g., Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). The goal when construing conflicting statutes is to harmonize them whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. *See, e.g., Powell v. Red Carpet Lounge*, 280 S.C. 142, 145, 311 S.E.2d 719, 721 (1984). Applying these principles to § 38-33-240(c), the UR Act, the External Review Act and § 40-47-20(36)(f) leads the Department to conclude that § 40-47-20(36)(f) is not intended to apply to health plans.

Applying § 40-47-20(36)(f) to health plans in South Carolina conflicts with South Carolina case law prohibiting the corporate practice of medicine. The South Carolina Supreme Court has held that a "corporation may not engage in the practice of medicine even through licensed employees." *Wadsworth,* 203 S.C. at 543, 28 S.E.2d at 419. Further, the application of § 40-47-20(36)(f) to health plans in South Carolina would result in dual regulation. Pursuant to Title 38, health plans are already regulated through this Department, often in a number of capacities. It would result in a substantial, new and unique burden to subject these organizations to regulation by another state agency. The Department is charged with maintaining a stable insurance market in South Carolina and believes such dual regulation would undoubtedly have a substantial chilling effect, discouraging health plans from competing in this market, to the detriment of consumers and employers. Thus, this Department does not believe this dual regulation was intended by the General Assembly.

III. Summary

For the reasons outlined in this bulletin, the Department does not believe that the General Assembly, in enacting § 40-47-20(36)(f), intended the definition of the practice of medicine to include the activities of health plans in South Carolina. This Department requests that during its 2007 Session, the General Assembly provide further clarity and guidance on this aspect of Act 385, through consideration by the House Labor, Commerce and Industry and Senate Banking and Insurance Committees, in conjunction with the Judiciary Committees, to amend § 38-33-240(c) and § 38-71-1510, et seq. *See* RE: Act No. 385 of 2006, S.C. Sup. Ct. Order dated August 24, 2006. Until such time as there is clarification of this issue by the General Assembly, it is the opinion of this Department that § 40-47-20(36)(f) does not apply to the activities of health plans in South Carolina.

Questions regarding the content of this Bulletin should be directed to: Gwendolyn Fuller McGriff at (803) 737-6200 or E-mail: gmcgriff@doi.sc.gov.