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The Honorable Rebecca Rios
Arizona State Senate
Capitol Complex, Senate Building
1700 West Washington
Phoenix, Arizona 85007-2890

The Honorable Linda Gray
Arizona State Senate
Capitol Complex, Senate Building
1700 West Washington
Phoenix, Arizona 85007-2890

Re: Ability of Insurers to Charge Different Co-Payments Under A.R.S. § 20- 461(B) (R08-060)

Dear Senators Rios and Gray:

You have requested advice from the Attorney General's Office regarding the following question: "Is it illegal or improper for an insurance company to charge separate co-pays for different physicians when those physicians are treating the same diagnosis and/or condition?" Although this is not a formal Attorney General opinion issued pursuant to A.R.S. § 41-193(A)(7), it is intended to provide guidance on this issue to assist you in performing your official duties.

As explained below, it is not illegal or improper for an insurance company to charge different co-payments for different physicians when those physicians are treating or diagnosing the same condition, if the difference is based on the physician's status as a primary care physician or specialist. It is also not illegal or improper to designate chiropractors as specialists rather than primary care physicians, so long as that designation is based on some criteria other than the nomenclature used to identify the services.

Background

The Unfair Claims Settlement Practice provision, Arizona Revised Statutes ("A.R.S.") § 20-461, was originally enacted in 1981 to establish standards for claims payment. The statute was amended in 1990 to add the following language to the list of prohibited conduct under A.R.S. § 20-461(A):

> As an insurer subject to section 20-826, 20-922 or 20-1342, failing to pay charges for reasonable and necessary services provided by any physician licensed pursuant to title 32, chapter 8, 13 or 17, if the services are within the lawful scope of practice of the physician and the insurance coverage includes diagnosis and treatment of the condition or complaint, regardless of the nomenclature used to describe the conduction, complaint or service.

1990 Ariz. Sess. Laws, 39th Leg. 2nd Reg. Sess., ch. 394, § 1 (now codified at A.R.S. § 20-461(A)(17)).[1] Chapters 8, 13 and 17 in title 32 refer to chiropractors, allopaths and osteopaths respectively. The same bill added A.R.S. § 20-461(B), which clarified as follows:

> Nothing in subsection A, paragraph [17] of this section shall be construed to prohibit the application of deductibles, coinsurance, preferred provider organization requirements, cost containment measures or quality assurance measures if they are equally applied to all types of physicians referred to in this section, and if any limitation or condition placed upon payment to or upon services, diagnosis or treatment by any physician covered by this section is equally applied to all physicians referred to in subsection A, paragraph [17], without discrimination to the usual and customary procedures of any type of physician.

Id. In 2004, the Legislature added to this subsection the language "[a] determination under this section of discrimination to the usual and customary procedures of any type of physician shall not be based on whether an insurer applies medical necessity review to a particular type of service or treatment." 2004 Ariz. Sess. Laws, ch. 5, § 1 (codified at A.R.S. § 20-461(B)). The Fact Sheet for the bill making this amendment explains that the bill's purpose is to "[a]llow[] an insurer to apply medical necessity review to a particular type of service or treatment without being in violation of the Unfair Claims Settlement Practices Act." Ariz. State Senate, Amended Fact Sheet for S.B.1094, 46th Leg., 2d Reg. Sess., at 1 (Mar. 3, 2004). In reviewing the state of

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[1] As amended, that subsection now states:

> As an insurer subject to § 20-826, 20-1342, 20-1402 or 20-1404, or as an insurer of the same type as those subject to § 20-826, 20-1342, 20-1402 or 20-1404 that issues policies, contracts, plans, coverages or evidences of coverage for delivery in this state, failing to pay charges for reasonable and necessary services provided by any physician licensed pursuant to title 32, chapter 8, 13 or 17, if the services are within the lawful scope of practice of the physician and the insurance coverage includes diagnoses and treatment of the condition or complaint, regardless of the nomenclature used to describe the condition, complaint or service.

A.R.S. § 20-461(A)(17) (internal citation omitted).

the law in 2004, the Fact Sheet stated that without passing Senate Bill 1094, "an insurer that conducts medical necessity review for only one discipline (e.g. chiropractic) would be in violation of the Unfair Claims Settlement Practices Act." *Id.* (parenthetical in original).

Analysis

You have brought to our attention a practice whereby insurance companies categorize chiropractors as specialists, which in turn causes their patients to be charged higher co-payments than those charged for visits to a primary care physician ("PCP"). The question is whether Arizona law forbids such a practice.

Under A.R.S. § 20-461(A), "[a] person shall not commit or perform with such a frequency as to indicate as a general business practice any" of a variety of unfair claim settlement practices. The one at issue here is failing to pay a physician for services where (1) the services were reasonable and necessary, (2) the physician is licensed, (3) the services are within the coverage of the policy and (4) the services are within the scope of the physician's practice. A.R.S. § 20-461(A)(17). Assuming that two physicians are treating or diagnosing the same complaint or condition, both doctors are licensed, the treatment is covered by the policy and the treatment is within the scope of both doctors, requiring a higher co-payment for one would violate the law unless the higher co-payment is based on one of the cost containment measures allowed by A.R.S. § 20-461(B).

Section 20-461(B) states that "[n]othing in subsection A, paragraph 17 of this section shall be construed to prohibit the application of deductibles, coinsurance, preferred provider organization requirements, cost containment measures or quality assurance measures if they are equally applied to all types of physicians referred to in this section." Because the statute explicitly allows for preferred provider organization requirements and other cost containment measures, it does not violate the law to require lower co-payments for visits to PCPs. The statute also requires, however, that such cost containment measures be "equally applied to all physicians referred to in this section." *Id.* As a result, an insurance company can charge different co-payments for different physicians when one is a PCP and the other is a specialist, as long as that practice is equally applied to all chiropractors, osteopaths and allopaths. Thus, the question is whether it violates A.R.S. § 20-461(A)(17) for insurance companies to characterize chiropractors as specialists.

The Arizona Department of Insurance does not regulate the designation of specialists and there are no statutes, rules, or regulations that govern those decisions by insurers. In addition, there are no statutes, rules, or regulations concerning the designation of primary care physicians by insurance companies. Typically, the designations for allopaths and osteopaths correspond to the specialties recognized by the American Board of Medical Specialties and the American Medical Association. Although chiropractors are not included in the American Board of Medical Specialties or the American Medical Association, the Arizona Board of Chiropractic Examiners recognizes and certifies chiropractic specialties in acupuncture and physiotherapy. A.R.S. § 32-922.02. Insurers are generally free to designate physicians as PCPs or specialists.

It would violate A.R.S. § 20-461(A)(17) for an insurance company to refuse to designate chiropractors as PCPs solely because the services they provide are classified as "chiropractic," because such a decision would be based solely on "the nomenclature used to describe the . . . service." On the other hand, it does not violate the statute to pass over chiropractors for PCP designation based on other criteria for designating physicians because such a process is neither regulated by the Department of Insurance nor prohibited by A.R.S. § 20-461(A). We emphasize, however, that insurers must develop the criteria for these designations "without discrimination to the usual and customary procedures of any type of physician." A.R.S. § 20-461(B).

If you have any questions or concerns, please do not hesitate to call me or AAG Carrie J. Brennan at (602) 542-7826 directly.

Respectfully,

Mary O'Grady
Solicitor General

cc: Carrie J. Brennan

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