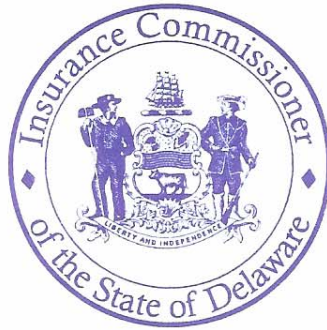


Matthew Denn
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DOMESTIC/FOREIGN INSURERS BULLETIN NO.22

TO: ALL INSURERS PROVIDING PHARMACY BENEFITS OR PHARMACY INSURANCE COVERAGE IN DELAWARE

RE: COMPLIANCE WITH THE PHARMACY ACCESS ACT (18 Del.C. § 7301 et. seq.)

DATE: September 1, 2006

It has come to the Department's attention that some insurance carriers doing business in Delaware have unilaterally altered the terms of existing contracts with respect to prescription drug co-payments, on the pretense that they recently discovered those contracts to be in contravention of the Pharmacy Access Act (18 Del.C. § 7301 et. seq.). In at least one instance, a carrier that previously offered consumers a choice between (a) purchasing 90-day supplies of drugs through a mail order pharmacy with a single co-pay, or (b) purchasing 30-day supplies of drugs through a local pharmacy by making the same co-pay (every 30 days rather than every 90 days), has tripled the amount of the co-pay for the 90 day supply of drugs. The reason given for this action has been compliance with the Pharmacy Access Act.

This bulletin shall constitute formal notice to all insurance carriers that the actions with respect to co-pays described above will be considered violations of 18 Del.C. §§ 2304(1) and 2304(2) if not remedied within 30 days of the date of this bulletin. For purposes of explanation, and to give adequate notice of other potential violations, the Department provides the following two independent bases for its conclusion.

1. The Pharmacy Access Act does not require that co-payments for 90-day mail order supplies of prescription drugs be the same as the cumulative co-payments for the same drugs purchased in 30 day increments from a local pharmacy. The relevant portion of the Act in question reads "No insurer shall impose on a beneficiary any co-payment or condition that is not equally imposed with all contracting pharmacy providers the beneficiary may utilize." This language would prevent an insurer from imposing a higher co-payment for a 30-day supply of drugs on a local pharmacy than it does on a mail order pharmacy. However, it does not prevent an insurer from imposing different co-pays for a 90 day supply

of drugs—which is inherently less expensive for the insurer to provide—than it does for three 30 day supplies of drugs.¹

2. Even if the Pharmacy Access Act did prohibit insurance carriers from charging a higher co-pay for three thirty-day supplies of drugs than it does for a single 90 day supply of drugs, to the extent that an insurance carrier made contractual commitments to its customers that are later found to be void under the Act, the financial consequences must be borne by the insurer, not the consumer. Delaware law is well-settled that insurance contracts are presumptively contracts of adhesion. See, e.g., Shook & Fletcher Asbestos Settlement Trust v. Safety Nat. Cas. Corp., Del. Super., C.A. No. 04C-02-087, Johnston, J. (Sept. 29, 2005). For that reason, they must be interpreted strictly against the insurer. Homsey Architects, Inc. v. Harry David Zutz Ins., Inc., Del. Super., C.A. No 96C-06-082, Herlihy, J. (May 25, 2000). In the specific example of 30-day versus 90-day copays, if the Pharmacy Access Act were to be interpreted as prohibiting higher co-pays for multiple 30-day supplies than for a single 90-day supply, 18 Del.C. § 7303(g) would require that one of the two co-pay provisions be voided. Because the contracts in question are contracts of adhesion drafted by the insurer, Delaware law dictates that the insurer reform the contract in a manner that will ensure the consumer the benefit of the bargain he was offered in the initial contract, rather than a manner that will result in a financial windfall to the insurer. In this instance, that would require complying with the original terms of the contract with respect to mail-order prescription drugs and reducing the co-payments for 30-day purchases.

Because the discrepancy between co-payments for 90 day prescription drug supplies dispensed at once and co-payments for the same drugs dispensed three separate times does not violate the Pharmacy Access Act, insurers shall not unilaterally alter the terms of their contracts on the pretense that such a violation exists. To the extent that existing contracts do violate the Pharmacy Access Act, causing provisions of those contracts to be rendered void, the contracts shall be reformed in a manner that reflects Delaware law regarding contracts of adhesion², and therefore in a manner that protects the terms purchased by the consumer when the contract was executed.

The Department expects insurers that have violated Delaware law as outlined by this bulletin to compensate policyholders and come into compliance with the law within 30 days of the date of this bulletin.

Matthew Denn
Insurance Commissioner

¹ This portion of the Act would, conversely, bar an insurer from requiring a local pharmacy to provide prescription drugs in 30 day increments while allowing a mail order pharmacy to provide the same drugs in 90 day increments. Such a distinction would impose a condition upon beneficiaries patronizing local pharmacies that would not be imposed on those patronizing mail order pharmacies.

² Instances where an insurance contract was drafted by the purchaser rather than the insurer, which the Department believes to be rare, will be considered on a case-by-case basis, and subjected to appropriate Delaware case law.