

Direct Primary Care and Insurance Legislative Council Study Committee

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GOALS:

- What is insurance and how is it regulated?
- Provide insight into how the State (Legislature, Courts, OCI) have made these determinations in the past.
- Inform the Legislature, study committee on application to Direct Primacy Care

DIRECT PRIMARY CARE

- OCI is interested in assisting entities in structuring arrangements so they are in compliance with insurance laws, and to protect interests of consumers, users of the health care system, health care service providers, and the general public.
- Properly Designed and Implemented... not insurance.
- But, if it looks like a duck, swims like a duck, and quacks like a duck, it's probably a duck.

WHY REGULATE INSURANCE?

- **(1)** To ensure the solidity of all insurers doing business in this state
- **(2)** To ensure that policyholders, claimants and insurers are treated fairly and equitably
- **(3)** To ensure that the state has an adequate and healthy insurance market, characterized by competitive conditions and the exercise of initiative;
- **(7)** To maintain freedom of contract and freedom of enterprise so far as consistent with the other purposes of the law;
- *From Wis. Stat. § 601.01 – OCI Purposes Section

Why does it matter if DPC is
Insurance?

WHY DOES IT MATTER IF DPC IS INSURANCE?

- **Insurance is highly regulated**
 - Primarily to benefit consumers
- **Marketing Regulations**
 - Ensure consumers know what they are buying
- **Financial Solvency Regulations**
 - Ensure consumers will get the benefit of that product through the continued solvency of the insurer

FINANCIAL SOLVENCY REQUIREMENTS

- ENSURING CONSUMERS GET THE BENEFIT OF PREMIUMS PAID
- **Extensive Solvency and Reserve Requirements**
 - **Initial Capital and Permanent Surplus Requirements**
 - **Initial Expendable Surplus**
 - **Risk Based Capital Requirements**
- **Commissioner approval for large transactions (extraordinary dividends, changes in control)**
- **Rehabilitation or Liquidation Proceedings**
- **Guaranty Fund Requirements and Assessment Abilities**

MARKET REGULATION REQUIREMENTS

- **Ensure consumers know what they are buying, and those products comply with the law**
 - **File rates, forms, and policies for compliance with the law.**
 - **How is insurance being sold?**
 - **Agent licensing**
 - **Review Consumer Complaints – Market Conduct Reviews**

CERTIFICATE OF AUTHORITY

- 601.04(2) - No insurer or plan subject to this section may transact insurance business in this state without having in effect a certificate of authority.
- 601.04(3) - The commissioner shall issue to any insurer or plan subject to this section a certificate of authority authorizing it to transact the business of insurance in this state ***if the commissioner is satisfied that it has met all requirements of law and that its methods and practices and the character and value of its assets will adequately safeguard the interests of its insureds and the public in this state.***

"DOING AN INSURANCE BUSINESS" – WIS. STAT. § 618.02(2)

- (a) Soliciting, making, or proposing to make an insurance contract;
- (b) Taking or receiving an application for insurance;
- (c) Collecting or receiving, in full or in part, an insurance premium;
- (d) Issuing or delivering an insurance policy except as a messenger not employed by the insurer or by an insurance agent or broker;
- (e) Inspecting risks, setting rates, disseminating information or advising on risk management in connection with the solicitation, negotiating, procuring or effectuating of insurance coverage;
- (f) Investigating, settling, adjusting or litigating claims;
- (g) In any way representing or assisting any person to do an insurance business or to procure insurance; and
- (h) Any other act generally regarded as doing an insurance business.

What is Insurance?

Statutes

OCI and Courts

What have the Courts Said?

- “Insurance’ is not defined in the statute, but it has a commonly understood meaning of a contract that shifts the risk of loss in exchange for premiums.”
- "A promise by one party to pay another for a specified loss in return for premiums"
 - *National Motorists Asssocation v. OCI (2002)*

Premium

- “Premium” means any consideration for an insurance policy, and includes assessments, membership fees or other required contributions or consideration, however designated.
 - Wis. Stat. 601
- “Rate that an insured is charged, reflecting his or her expectation of loss risk.”
 - Dictionary of Insurance Terms, 6th Edition

What do the Statutes Say?

- 600.03(25) **(a)** “Insurance” **includes** any of the following:
 1. Risk distributing arrangements providing for compensation of damages or loss through the provision of services or benefits in kind rather than indemnity in money.
 2. Contracts of guaranty or suretyship entered into by the guarantor or surety as a business and not as merely incidental to a business transaction.
 3. Plans established and operated under ss. [185.981](#) to [185.985](#).
(Cooperative health care associations)
 4. Coverage, including stop-loss coverage, of an employer or plan sponsor relating to claims incurred under the employer's or plan sponsor's self-funded employee welfare benefit plan, as defined in [29 USC 1002](#) (1). (ERISA)
- **(b)** “Insurance” does not include a continuing care contract, as defined in s. [647.01](#) (2).

Insurance includes:

- **Risk distributing** arrangements providing for compensation of **damages or loss** through the **provision of services or benefits in kind** rather than indemnity in money.
 - 600.03(25) (a)(1)

Regulatory Approaches to “Insurance” Products

- **Legislative/ Statutory Exemptions**
- **Administrative Rules**
- **Agency/Court Interpretation**

Statutory Exemptions

- **These things may or may not be insurance, but are generally exempted from state insurance statutes:**
 - **Reinsurance**
 - **Certain service contracts**
 - **Vehicle protection product warranties**
 - ***DPC under AB 798**

Administrative Rule

- These products are insurance, **but** lesser level of regulation is appropriate
- State statute permits OCI to promulgate rules where:
 - Regulation not required to protect insureds or public, OR
 - Regulation would be impracticable when doing a cost/benefit comparison

Warranty Plans - Ins 15.01

- It is Insurance... but subject to limited regulation
 - “requirements more specifically appropriate to the business of the issuance of warranties”
- Exemptions for some types of warranties
- Limited, specified regulation for others

Legal Expense Insurance Plans - INS

22.01

- Defined as "contractual obligation to provide specific legal services or to reimburse for specific legal expenses in consideration of specified payment for an interval of time..."
- Certain plans exempted from regulation entirely
- Limited regulation of other plans that meet certain criteria

Agency or Court Interpretations

- **OCI applies law to given set of facts**
 - Enforcement proceedings
 - Judicial Review
 - Consultation with OCI

NATIONAL MOTORISTS ASSOCIATION V. OCI (2002)

- “Speeding ticket insurance”
 - NMA offered a Pre-Paid Traffic Ticket Program
- ALJ and Commissioner concluded it was Insurance
 - Product was “a promise to pay another for a specified loss – a traffic fine – in return for premiums paid.”
- Court of Appeals agreed this was insurance.
 - "agreement to reimburse subscribers for loss from traffic fines in exchange for payments, thereby shifting the risk of that loss from subscribers to NMA."
- While there may be other definitions of insurance, OCI's was reasonable.

Homeward Bound Services v. OCI (2006)

- **Assisted Living Services Contracts** - "an alternative to nursing home recovery"
 - In return for price paid by subscriber, HBS provided assistance with everyday personal and household activities.
 - Services were available on demand, and did not require a specified loss that is fortuitous or contingent – essentially an “opt in”
 - Included disclaimer "This is not Insurance"
- **Commissioner took position this was insurance.**
 - Evidence suggested subscribers believed they were paying premiums so that they would have services if they became incapacitated or required additional assistance.

Homeward Bound Services, cont.

- At issue was whether there was a “loss” as required under statutory definition, because services were available “on demand”.
- Court of Appeals: Insurance
 - Agreement to provide services if and when an illness or event occurred to the subscribers that created a need for services to remain in their home.
 - “This constituted a shift to HBS of the risk of loss for a premium.”

Dental Pre-Paid Plans

- Not insurance, if properly constructed
 - Membership or discount/pre-payment arrangements.
- Not Insurance, because no transfer of risk.
 - Limited number of specified services
 - The more dental care needed, the more the customer pays
- Avoid giving consumers impression of being Insurance

Direct Primary Care and Insurance

Applied to DPC

- **Primary Question – Risk:**
 - **Is there a transference of risk between the parties?**
 - Unlimited Risk vs. Specific and quantifiable services provided?
 - Premiums or pre-payment/discounted services?
 - **What is the nature of the benefit?**
 - Is it of a limited or an unlimited nature?
 - When or how can the services can be received under the plan?
 - **What risk adjustment or underwriting is occurring?**
 - Adjusting monthly payments based on past usage?
 - Underwriting based on predicted costs?
 - Health status and age?

Applied to DPC

- Is it presented in a way that looks like insurance?
 - **Consumer Protection Concerns**
 - Do consumers understand what they are buying?
 - Insurance Terms? – premium, health plan, insurance
 - **How is it marketed?**
 - Limits on number of patients accepted into the practice?
 - Is the physician taking on substantial financial risk for future services?
 - Is the agreement terminable? Are pro-rated refunds contemplated?

Questions?

Direct Primary Care

- **No (or very limited) transfer of risk**
 - **Finite benefit/services**
 - **Unlimited Access vs. Services**
- **Avoid insurance terms**
- **Premiums - definition**
- **Avoid underwriting**