



May 9, 2016

Mr. Jim Tompkins
Office of the Insurance Commissioner
State of Washington
P.O. Box 40258
Olympia, WA 98504-0258

RE: Requiring notice to 3rd party claimants of settlement payments by carriers (R 2015-06)

Dear Mr. Tompkins,

Thank you for the opportunity to comment on proposed rule R 2015-06, relating to requiring notice to 3rd party claimants of settlement payments by carriers.

OIC's intent behind proposed rule R 2015-06 is to reduce fraud in relation to the attorney-client relationship. To achieve your goal, the proposed rule would require carriers to provide written notice to 3rd party claimants that payment of a settlement claim has been made to the 3rd party claimant's attorney or representative. Written notice would only be required when the following three requirements are satisfied: (1) the settlement payment is for \$5,000 or a greater amount; (2) the settlement payment is specifically for a 3rd-party liability claim; and (3) the 3rd-party claimant is natural person.

We share your concern for reducing the potential for fraud. However, we see R 2015-06 as a having minimal benefit because the proposed rule only requires notice to individual claimants, not to carriers. In addition, the proposed rule puts the onus on the carrier to act as a watchdog and ensure that 3rd party claimants are not the victims of unknowing fraud, breach of fiduciary duty, or malpractice at the hands of the claimant's legal counsel.

The underlying issue – members' attorneys settling claims without notice to the subrogated health plan -- is not a significant concern because it is well controlled by our operations processes. We do not rely on notice from a 3rd party or from the member's attorney. We proactively review claims for potential subrogation situations and put the 3rd party on notice, then regularly follow up so that we know when a claim settles, without depending on other parties to tell us.

In short, this proposed regulation would have no effect on a carrier's recovery efforts because it does not provide the carrier with any information. To improve the rulemaking, we propose that the liability carrier must notify the injured party and the injured party's carrier. That would alert us and help prevent another fraudulent act committed by some plaintiff attorneys – namely, settling personal injury cases and

distributing funds to their client despite knowledge that their client has a contractual obligation to repay a portion of those funds to the health plan that paid for their related medical treatment.

In addition to our high level suggestion, we suggest the following technical changes to improve the rulemaking.

Language and Construction

The language in Section (1) is vague and the proposed construction is confusing. There is not a clear indication as to when a carrier is required to provide written notice. Is notice required concurrent with payment? Required within a reasonable time of payment? There is no clarification as to what constitutes written notice for this rule.

The proposed rule's focus on settlement payments at or above \$5,000 appears arbitrary. Why was a line drawn at this level? Does this apply to aggregate payments or total amounts to be paid? What if two payments of \$4,000 are made – does that trigger the notice requirement?

We recommend amending the proposed rule to clarify the two issues above.

Attorney-Client Privilege & ABA Rules

The proposed rule may undermine scope of representation and attorney-client privilege for 3rd party claimants by circumventing communication between the insurer and 3rd party claimant's counsel.

ABA Rule 1.4(a)(1) & (3) requires an attorney to keep clients reasonably informed about the status of representation and to promptly inform a client of any decision that requires the client's informed consent, such as a settlement or payment. We should not be liable for an actual, or potential, violation of this duty by the attorney of a 3rd party claimant.

The proposed rule may force an insurer to violate ABA Rule 4.2's "Anti-Contact Rule."

This rule restricts communication concerning settlement, in addition to other matters subject to client representation, without the authorization of the 3rd party claimant's counsel. The communication restriction also applies to written communications. For example, this rule would prevent a carrier's attorney from sending proposed settlement terms directly to the 3rd party claimant or from sending the 3rd party claimant a copy of a letter also sent to the claimant's counsel discussing a possible settlement. However, there is often some leeway granted when it is not the attorney communicating directly with the 3rd party claimant. The anti-contact rule does not by its terms prohibit an attorney's client (the carrier) from communicating directly with the 3rd party claimant. However, there may be other controlling regulations that specifically address such actions. My understanding is that jurisdictions have a varied spectrum of views on whether an attorney may encourage an insurer to reach out to 3rd party claimants in the OIC's proposed manner.

I am happy to talk with your office about this rulemaking at any time. I can be reached at (206) 332-5060 or zach.snyder@cambiahealth.com.

Sincerely,

A handwritten signature in black ink, appearing to read 'Zach Snyder', with a stylized, cursive script.

Zach Snyder
Cambia Health Solutions
Regulatory Affairs