TEXAS MEDICAL ASSOCIATION

Physicians Caring for Texans

December 1, 2009

The Honorable Michael Geeslin
Commissioner of Insurance
Texas Department of Insurance
333 Guadalupe, MC 113-1C
Austin, Texas 78701

Re: Discretionary Clauses in Insurance Contracts

Dear Commissioner Geeslin:

I am writing to inform you of Texas Medical Association's (TMA) full support of the Office of Public Insurance Counsel Petition for Rulemaking Regarding Discretionary Clauses. TMA is a private, voluntary, nonprofit association of Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters medical care, prevention and cure of disease, and improvement of public health. Its almost 45,000 members practice in all fields of medical specialization. It is located in Austin and has 119 county medical societies around the state.

As I am sure you are aware, discretionary clauses reserve to the insurer the authority to interpret the terms of an insurance policy, in essence combining the drafter of the policy and contract of insurance with the interpreter charged to construe the terms of that contract. This is a classic "fox guarding the henhouse" situation that serves to provide the insurer with the authority to consistently deny benefits that a reasonable insured person would believe falls within the terms of the policy. Indeed, to challenge the interpretation of an insurance contract that contains a discretionary clause requires a person to offer proof that the carrier abused its discretion, an incredibly high burden of proof. This upsets the typical rule of law that provides a contract is construed strictly against the party writing the terms. (*See*, *Balandran v. Safeco Ins. Co. of America*, 972 S.W.2d 738 (Tex.,1998), *citing*, *National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex.1991); *Glover v. National Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex.1977); and *See also*, *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex.1987)). Thus, if there is any ambiguity or interpretation issue, the terms in an insurance contract written by the insurance company should be interpreted in favor of the insured person. In short, these clauses are unfair to patients and the employers who purchase insurance for their employees.

Insurance, at its most simple, is a promise to reimburse an insured person in the case of a loss as agreed to by an insurer through contract. Discretionary clauses introduce a conflict of interest of the highest order – the almost unchallengeable interpretation of the promise to pay is left to the party required to pay under that contract – the insurer. The temptation for an insurer to self-deal in this circumstance is simply too great in light of financial market and investor demands for profit and performance. A discretionary clause makes the insurer the final arbiter of what the insurance contract actually means and eliminates any certainty that may have been contained within the policy. In June 2008, you took action against Blue Cross Blue Shield of Texas, in part, because its contract contained a definition of the "allowable" out of network benefit due to a patient which, you alleged, was "not adequately defined in the policy." Essentially, before you acted, the "allowable" benefit was defined as that amount BCBSTX, in its discretion, determined was payable at the time the claim was processed. You acted where you discovered a term that offered a carrier discretion to the point the contract term was "not adequately defined." TMA respectfully requests that you act now and adopt regulations to prohibit discretionary clauses that extend that same vagueness across the entire contract. Our patients and their employers, consumers of health insurance products, deserve to know that their premium dollar will go to health care, not elsewhere.

One additional note, when reviewing the Insurance Counsel's petition, we ask that you ensure the final product is broad enough to encompass the marketplace conduct of health maintenance organizations in additional to traditional insurance.

With health system reform in the headlines almost everyday, TMA entered into a process of deliberation to formulate guiding principles for the evaluation of various reform proposals. Among those principles is:

> Through public policy enactments, require accountability and transparency among health insurers to disclose how their premium dollars are spent, eliminate preexisting condition exclusions, simplify administrative processes, and observe fair and competitive market practices.

In light of the principle above, we applaud the Insurance Counsel's efforts. TMA has concluded the Insurance Counsel's proposal to prohibit discretionary clauses falls within this principle and therefore has earned our full support.

TMA respectfully requests you grant the Public Insurance Counsel's petition and prohibit discretionary clauses through regulation as an unfair and deceptive trade practice in advertising and the business of insurance.

Sincerely,

William H. Fleming III, MD
President

WHF/ls
cc: Deeia Beck, Public Counsel
Office of Public Insurance Counsel