

FULL AND FINAL DISCRETION CLAUSES IN GROUP HEALTH CONTRACTS

May 8, 2001

This Bulletin is directed to all insurance companies that offer group health insurance in Indiana.

It has come to the attention of the Indiana Department of Insurance that some insurance companies are writing into their group health contracts a provision that purports to give the company full and final discretion in interpreting benefits and administering the contract. Some such provisions state that all determinations by the company are binding and conclusive on all insured persons. Some state that benefits will be paid only if the company decides in its discretion that an insured person is entitled to them. These provisions are often at the end of the contract or booklet, among other general or administrative provisions.

The Department recognizes that these provisions are a response to the decision of the United States Supreme Court in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and subsequent cases interpreting employee benefit plans under the federal Employee Retirement Income Security Act (29 U.S.C. 1001 et seq.) ("ERISA.") See e.g., *Southern Indiana Health Operations, Inc. v. George*, 696 N.E. 2d 476 (Ind. App. 1998), transfer denied. The Department takes no position on these cases or on the interpretation of employee benefit contracts governed by ERISA.

The Department finds, however, that in group accident and sickness insurance policies governed by state law, these provisions are inequitable and deceptive, and tend to mislead consumers. Under state law, an insurance policy is subject to the same rules of interpretation and construction as other contracts, and where the policy is ambiguous or silent, it is construed by courts against the company that drafts it. *Meridian Mutual Insurance Co. v. Cox*, 541 N.E. 2d 959 (Ind. App. 1989), transfer denied. These provisions could lead consumers and companies to believe that the company has the last word on whether benefits will be paid, regardless of other terms in the contract, and contrary to the right of the insured group to have a court interpret the contract.

To the extent that insurers wish to include such language in policies issued to employee benefit plans, they may include a statement substantially similar to the following: "This provision applies only where the interpretation of this Policy is governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 et seq." Otherwise, forms including a full and final discretion clause will be subject to objection and disapproval by the Department of Insurance under Ind. Code s 27-8-5-1.

Sally McCarty, Commissioner