But You Already Knew That! Post Insurance Claim Underwriting

By Charles R. Gallagher III

Perhaps the single most compelling reason to obtain insurance of any type is peace of mind. Peace of mind that you can seek health care, peace of mind that you can repair your home after a hurricane or peace of mind that you will be protected if you are the cause of a car accident. But what happens when you call upon your trusted insurance carrier in your time of need, only to be told that you were really never covered at all?

Post claim underwriting is a practice where an insurance company waits until a claim has been filed to obtain relevant background information and make underwriting decisions that should have been made long before coverage was bound and a policy was issued. With this new information, the insurance carrier may then deny a claim - as one that would not have been covered had all relevant information been known at the time of application, or rescind the policy altogether on the basis that the insured made a material misrepresentation on the application for insurance. In either case, the carrier avoids paying the claim and the insured receives no benefits.

Florida courts have not addressed this as a precise cause of action, though the issue of post claim underwriting has been addressed in connection with bad faith insurance claims handling under Fla. Stat. § 624.155. Further, Fla. Stat. § 626.9541 imposes extra-contractual liability against insurance carriers for failing to adopt and implement standards for the proper investigation of claims. Finally, F.A.C. 69O-220.201 prohibits insurance adjusters from approaching investigations, adjustments, and settlements in a manner prejudicial to the insured. Accordingly, there would be a legal basis to challenge such conduct of a carrier under Florida law.

Case law on this practice is rapidly emerging across the country. The Supreme Court of Mississippi addressed these issues holding "[a]n insurer has an obligation to its insured to do its underwriting at the time a policy application is made, not after a claim is filed."[1] Several court decisions have also held that the practice of post-claim underwriting is unlawful.[2]

Given competition among carriers along with the significant time and costs of thorough insurance underwriting, an institutional incentive has manifest itself to not ask certain questions of applicants for insurance. Brief written insurance applications relying on the applicant's personal knowledge have added to the problem.

After "fast food" underwriting on the spot, the applicant writes a check and coverage is bound. In the absence of a claim, months and years of premiums are paid to the carrier. However, upon submission of the claim the insurance carrier begins its true underwriting of the claim requesting records, reports and other information that should have been requested prior to binding coverage. Armed with knowledge that Aunt Millie intentionally omitted her bout with pneumonia years back in a grand ruse, the carrier rescinds the policy in the grounds of material misrepresentation, intimating a fraudulent enterprise from the outset.

At first glance the biggest peril of such a practice is the denial of coverage for the given claim or loss. Aside from the claim going uncovered is the larger issue of illusory coverage, which prohibited the insured from getting coverage elsewhere. If only the carrier had asked the right questions or used information within its control to decline the application, then the application could find alternate coverage elsewhere. Additionally, the effect of the recession leaves a gap in the insured's coverage creating problems for future insurability. Later carriers will look unfavorably on this gap and potentially decline a policy on that basis.

Finally, it is important to distinguish between legitimate post-loss obligations of an insured under the terms the insurance policy and the practice of underwriting for the first time after a claim submission. Insureds are under a number of contractual obligations to provide documents, exhibit property, provide statements, itemize losses and otherwise cooperate with a carrier's investigation. This only becomes a problem when it's the first time that the carrier is inquiring into insurability. So next time a client calls about their denied insurance claim, take care to ascertain not just what questions were asked by the adjuster, but when they were asked.

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1 Am. Income Life Ins. Co. v. Hollins, 830 So. 2d 1230 (Miss. 2001) and Lewis v. Equity National Life Insurance Co., 637 So. 2d 183 (Miss. 1994).

*2 Greer v. Burkhardt, 58 F.3d 1070 (5th Cir. 1995); Moore v. Westfield Cos., 1992 WL 113778 at *6 (Ohio Ct. App., 1992): Hatch v. State Farm Fire & Cas. Co., 842 P.2d 1089 (Wyo. 1992).*