Legal, Compliance & Regulatory

How to Get Out From Between a Rock and a Hard Place When Faced With Paradoxes in Law

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Expect the Unexpected

Common Paradoxes and Contradictions:

- Moderation in all things, including moderation
- Darned if you do, darned if you don't
- Less is more
- Everyone is responsible for compliance

If "everyone" is responsible for compliance, is "anyone" really responsible?

The Clash

Mr. Reeder might break into song…

Should I stay or should I go now?

If I go there will be trouble, but

If I stay it will be double!

Literal vs. Figurative

Letter of Law & Spirit of Law

We will discuss examples of meeting the letter of the law:

- When it would be best to stop or yield when faced with a paradox
- When it might be acceptable to proceed with caution, and what happens when some carriers operate recklessly
- How to remove the rock and step away from the hard place

As for scenarios when law is silent or contradictory, we'll poll to see if you think:

- You can just do as you please to meet the spirit of the law
- You need to seek regulatory permission first to meet the letter of the law
- You're just stuck between a rock and a hard place until further notice, or if
- It depends on what motivates whoever is calling the shots (risk vs reward)

We'll provide examples of potential consequences for failure to comply:

- Regulatory inquiries, MCEs, ongoing scrutiny, sanctions
- Litigation
- Reputational harm

LTCI Scenario Lapse Notices

Consumer protection laws call for policy lapse notices to be delivered to insureds and to whoever they've named as their designee to receive such notice prior to the lapse, which may potentially enable the premium to be paid, preventing termination due to lapse.

Various jurisdictions also require lapse notices to be delivered by carriers via a method that can produce proof of mailing to the insured and to the designee.

Two states also require the insured to send the notification of the designee and the designee's written acceptance back to the carrier via certified mail. There are no regs that say to what extent the carrier must advise the insureds regarding their obligation to respond via certified mail. And, there's no rule stating that a carrier cannot act on the response if it doesn't come back from the insured via certified mail, or without written acceptance by the designee.

- Do you think carriers are responsible to inform insureds of the requirement that they respond to the carrier by certified mail with their designee's written acceptance?
- What if the insured simply names the designee and responds via regular mail?
- Is it ok to operate in a manner that achieves the DOI's desired result, but uses a different method than specifically prescribed in the letter of the law?

MOA Exhibit

DMV vs. DOI Compliance

Consider these common provisions of law in many states:

- Drivers shall exercise due care to avoid colliding with any pedestrian and exercise proper caution upon observing any child or any obviously confused or incapacitated person;
- Yield the right-of-way to a pedestrian to avoid collision; and
- Yield the right-of-way to an approaching vehicle.

Now consider this, you're driving to the Mall of America, and there's a family walking on the road in front of you trying to get back to their hotel, and cars are coming.

- If you yield to the approaching vehicles, you or others might hit the pedestrians; or
- If you yield to the pedestrians, you'll get hit, and you still might hit the pedestrians.

It's a paradox and potentially very dangerous.

Live Polling Getting to Know You

Imagine this scenario… You're driving on a 2 lane highway, the speed limit is 55 mph, the driver in front of you is only going 54, and you want to pass.

Now consider this provision of law… Some states have a law that allows drivers to speed 10 miles over the limit while passing on the left on a freeway, some states don't address whether this is permissible.

If you're not sure if speeding in this scenario is permissible by law, do you speed up to pass anyway?

A. Heavens no, because you never exceed the speed limit
B. No, because you've gotten too many tickets to risk getting another
C. Oh yes, because you don't think it'll be a problem, and you can argue your way out of a ticket if you happen to get pulled over, or
D. Sure, because you don't pay attention to speed limits anyway

Live Polling Requirements w/out Regs

DOI issued a 2011 Bulletin stating that its LTC insurance statutes were amended with the intent to be consistent with the NAIC LTC models regarding, among other things, Independent Review of adverse decisions related to benefit trigger determinations applicable to policies issued on or after July 1, 2011. It also noted that the director plans to adopt regulations. Still, almost 5 years later, no regs have yet been implemented.

Which of the following is your approach?

A. Contact the DOI and ask what you should do

B. Take no action until regulations are issued

C. Implement policies and procedures to comply the best you can based on the model, including notifying claimants of their right to request Independent Review

Live Polling — Independent or External Review

A state promulgated code in 2010 pertaining to LTC claim denials that says, after completion of all internal appeals, a policyholder may appeal the insurer's benefit trigger determination to an IRO designated by the Commissioner. The regulations state that the insurer shall refer the appeal to an IRO on the Department's list of contracted IROs.

While the Department's site has details on independent external reviews of adverse benefit determinations in comprehensive major medical plans (w/ medical necessity criteria), it's silent regarding IROs for adverse benefit trigger determinations for LTC. It has also been non-responsive to requests for a list of its contracted IROs for LTC plans.

What's your approach if a claimant requests Independent Review and the Commissioner sends them to an IRO that bases its review on criteria other than the LTC benefit trigger, and overturns your denial?

A. Pay the claim, and move on

B. Appeal to the Commissioner, pointing to the Department's conflicting provisions and the disparity, and be ready for potential scrutiny of historical denials – or a class action suit

Live Polling Impact of Medicaid / Partnership Laws

HHS and many state insurance laws call for the reporting of LTCI national partnership (post-DRA) policy data to HHS, so that there can be collaboration on the effectiveness of the partnership and in determining asset disregard, eligibility for state Medicaid benefits, and to help facilitate reciprocity among the states. Due to lack of federal funding and the fact that the data was not used by HHS to determine asset disregard levels or Medicaid eligibility, HHS discontinued data collection on 9/30/13. There's no longer an entity or portal securely collecting the electronic data. AHIP and NAIC both sent letters to HHS in 11/15 requesting that it resume its collection and dissemination to the states. HHS responded in 12/15, not indicating whether the agency will ever resume collection of the data.

Considering that laws still call for reporting by the carriers, what's your approach?

A. Continue to generate and maintain the reports, but not deliver them anywhere for the time being – in case a regulatory body inquires about the data at some point
B. Continue to attempt to electronically submit reports, and keep copies of error messages as evidence of reporting effort
C. Cease generating the reports – since there's no logical way to comply
D. Continue to generate the reports and mail via an encrypted disc to HHS

Live Polling Impact of Health & Safety Code Public Health Law

Prior to 1/1/16, home care providers of services supporting ADLs for private pay LTCI were permitted to do so in CA without any training, licensure or oversight. Now the Dept. of Social Services via the Home Care Services Consumer Protection Act, requires in its public health law, licensure of Home Care Organizations and registration of affiliated Home Care Aides prior to providing home care services to a client. There is a DSS effort to show evidence of the organizations' licensure in Community Care Licensing, and to show evidence of the aides' registrations in HCA Registry by 7/1/16.

There's no parallel reference or requirement in the state's insurance law, yet some LTCI policies require services be performed by licensed providers. If there is a delay in licensing providers, this creates a timing issue paradox for carriers adjudicating claims.

At this point, must carriers (regulated by the DOI, not by DSS) validate if provider licensure is in place in order to pay home care claims?

A. Yes, for services provided on or after 1/1/16 for TQ plans, and pend or deny if there is no evidence of licensure
B. No, not yet, unless or until the DSS enforces their rules before 7/1/16

Live Polling "Targeted" Mini-Market Conduct Exam

A DOI contacts you via its regulatory complaint protocol about an insured's complaint related to his claim being denied. It was properly denied, because it was not an eligible expense under the policy, and the denial was upheld upon appeal. You explain this via written response to the DOI, however the regulator then asks for data "on all similar complaints" over the past 3 years.

How do you respond to the DOI?

A. Gather and expose data on all similar appeals
B. Offer data only on appeals escalated as complaints
C. Respond stating that there were no other similar complaints (*not revealing that your reasoning is because, each claim has unique components)*
D. Argue that the request is unreasonable

Live Polling

Impact of Banking and Commerce Law

States' claims prompt pay insurance laws typically call for interest to be paid on claims not paid timely, sometimes at a state specified rate, and sometimes at a rate based on the state or federal bank lending rate.

There are just a handful of references in the states' insurance laws that call for interest to be paid on late return of premium. Example: 10% annually, within 30 days.

If the state insurance law is silent, should a carrier pay any interest on the return of premium, if it was paid at 40 days?

A. Yes, it would be prudent
B. No, no need

Live Polling

Impact of APS Laws and LHCP Liability

Licensed Health Care Practitioners are Mandated Reporters of abuse under the states' Adult Protective Services (APS) Laws.

It's not uncommon for a LHCP/Care Manager to become aware that a claimant's family won't fully implement a recommended plan of care, perhaps because they object due to the expense or inconvenience.

Is the Care Manager mandated to report this to APS?

A. Yes, because this is neglect, which equates to abuse
B. Only if there has been a known event of harm to the claimant
C. No, because the family probably knows best
D. No, because the LHCP is functioning in a health care operations setting, not in a healthcare treatment setting

Ever Play Red Light Green Light Tag?

When it's prudent to stop:

When there is a clear violation in law.

Recklessness and willful disregard of insurance law draws the biggest sanctions.

When to potentially proceed with caution:

When there is more than one way to comply,

or no perceived way to comply while still having an obligation to honor an insurance contract or law.

Sometimes carriers "over comply" for crisis avoidance, or to prevent complaints or litigation. Sometimes carriers "under comply" for the same reasons.

Carriers can show evidence of due diligence in seeking to achieve compliance when there are paradoxes, by following documented policies and procedures or practice standards with a consistent, reasonable, prudent, non-discriminatory approach.

Do you have a Frog or Flower Mentality?

Questions