NO GUNBOATS AND NO DIPLOMACY – RESOLVING DISPUTES OVER LIFE AND HEALTH INSURANCE SOLD IN UNREGULATED MARKETS

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For the past several decades, insurance companies domiciled in the United States have sold individual life and health insurance policies to residents of Latin America and the Caribbean, with the health policies secured primarily to obtain medical treatment in the United States. Likely because of its geographic proximity to the region, many insurers who service this often fertile "international health insurance" market are domiciled, or at least transact the business of insurance, within the State of Florida. This article will briefly describe the allure of the international health policies and a few of the challenges currently facing an aggrieved policyholder in any dispute with a Florida domiciled insurance carrier.

Guaranteed Renewability

The health insurance policies sold by North American and other non-resident insurers throughout Latin America and the Caribbean are almost invariably marketed as "non-cancelable" or "guaranteed renewable." Many of these policies specifically provide that the insurance is automatically renewable (usually on an annual basis until a specified age) at the option of the policyholder so long as premiums are timely paid. Such health policies must be sold as guaranteed renewable because, unlike policies sold in the United States, these international policies are not regulated by the countries in the region (likely because both the sale and purchase are illegal in most of Latin America and the Caribbean) and, historically, have not been subject to either form or rate approval by state insurance departments. With governing law or regulation in dispute, the contract itself is often the only protection insureds have from being cancelled once they become sick.

These policies, significantly, are generally claimed not to be subject to state or federal law governing portability of insurance. Thus, the guarantee of renewability is in essence insurance against becoming uninsurable. Without this guarantee, no market would exist for these policies because an insurance carrier would be entitled to collect premiums so long as the individual remains healthy, only to decline renewal at the end of the annual term should the policyholder begin to submit significant claims for medical treatment. Such claims, of course, often are generated by developing medical conditions that will forever bar future insurability. What then, beside corporate conscience and potential negative publicity, prevents Florida insurance carriers from arbitrarily denying expensive claims or simply refusing to renew policies originally sold as automatically renewable?

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Regulation by State Departments of Insurance

The question of who should regulate policies sold by domestic insurers to citizens of foreign countries is one begging for resolution. Florida insurance carriers which sell international health policies generally claim their product is not subject to many provisions of the Florida Insurance Code because the policies are neither "issued for delivery in this state nor delivered in this state." The Florida Department of Insurance is understandably reluctant to apply many aspects of the Florida Insurance Code to policies issued to residents outside Florida, because such an effort could subject insurers to potentially contradictory requirements imposed by an insurer's state of domicile and the insured's state of domicile. In short, regulatory chaos.

Such regulatory forbearance is perfectly sensible when a Florida-domiciled insurance company sells a policy to a resident of, let's say, Colorado. The potential conflict of regulatory schemes exists, however, only because Colorado applies its insurance laws to policies issued to Colorado residents. The logic disappears where the foreign country in which the policyholder resides has no regulatory scheme, and local governments are hardly likely to trouble themselves conjuring regulations for an illegal product. But without any governmental regulation what, if anything, assures foreign consumers that Florida domiciled insurance carriers will uphold their end of the bargain?

Litigation on the Rise

At present, there is a dearth of Florida case law concerning how, and to what extent, Florida domiciled insurance companies which sell international health policies ought to be regulated. The 1998 passage of Florida Statute §624.123, however, provides some long-awaited and potentially instructive guidance. Fla. Stat. §624.123 allows foreign applicants for international health insurance policies to be solicited (and policies sold) at any international airport in Florida. Policies issued pursuant to §624.123 cannot be sold to U.S. citizens and are explicitly exempted from most provisions of the Florida Insurance Code. Perhaps in recognition of this regulatory vacuum, the Florida legislature decided that certain provisions of the Florida Insurance Code must nonetheless be applied to these international policies.

Attorneys' Fees and Bad Faith

An individual insurance policy issued for delivery (or delivered) in Florida implicitly contains a very valuable component – the right to compel an insurer who breaches its contract with its insured to pay not only the benefit owed but also his or her attorney's fees. This well-established right enjoyed by Florida residents levels the playing field between insurers and consumers by making possible the litigation of cases otherwise economically prohibitive so that a consumer need not abandon a policy dispute because the cost of litigation far outweighs the amount at issue. The Florida legislature reaffirmed the importance of fee shifting in insurance cases by specifically subjecting

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Florida domiciled insurers issuing policies pursuant to §624.123 to the fee shifting section of the Florida Insurance Code (Fla. Stat. §627.428) as well as Florida Insurance Bad Faith Statute (Fla. Stat. §624.155).

Contrary to this recent pronouncement by the legislature, however, Florida domiciled insurance carriers selling these policies throughout Latin America sometimes contest the application of §627.428. Such carriers rely on a provision of the Florida Insurance Code that excludes much of the Code from applying to "Policies or contracts not issued for delivery in this state nor delivered in this state, except as otherwise provided in this code." No Florida cases, however, discuss the applicability of Fla. Stat. §627.428 to a Florida domiciled insurance company selling individual life and health policies to residents of a non-regulated foreign market. The Florida legislature's decision to mandate fee shifting in situations where a Florida domiciled insurer breaches an international health policy sold pursuant to §624.123 should prompt Florida courts to provide this fundamental protection equally to policyholders who bought similar policies abroad, though many insurers, perhaps to be fair and perhaps to avoid the possibility of a specific holding, already agree to the application of the fee shifting provision when sued in Florida.

Conclusion

The law governing regulation and dispute resolution for "International" insurance policies sold by North American companies has operated in the shadows for decades, but the increasing volume of this business has gradually led to increased litigation in Florida as the law struggles to define the rights of the parties and the scope of operation for statutes governing the conduct of Florida insurers. Most of the law resulting from this trend has yet to be written, but the pace is about to quicken. The days of American "gunboat diplomacy" in Latin America and the Caribbean may be fading, but when it comes to resolving disputes over insurance the gunboats are steaming northward.

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