

**BEFORE THE COMMISSIONER OF INSURANCE**

**STATE OF GEORGIA**

**IN THE MATTER OF:**

**CHAPTER 120-2-20  
UNFAIR TRADE AND CLAIMS  
SETTLEMENT PRACTICES**

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**DOCKET NUMBER I-11-R-5**

**ORDER**

**I. STATEMENT OF PROCEEDINGS**

On May 25, 2011, Notice of Intent to Adopt Rule Changes and Notice of Hearing was given regarding the proposed repeal of Regulation Chapter 120-2-20-.03 entitled “Severability” and the adoption of Regulation Chapter 120-2-20-.03 entitled “Unlawful Agreements between Insurers and Hospitals” and the adoption of Regulation Chapter 120-2-20-.04 entitled “Severability.” These modifications to the regulations were proposed in order to promote the efforts of the Office of the Insurance and Safety Fire Commissioner (“Office”) to enforce the prohibition in O.C.G.A. §33-6-13 against agreements which establish or perpetuate any condition detrimental to free competition in the business of insurance or are injurious to the insuring public.

By letter dated May 27, 2011, the Office of the Attorney General opined that the above-referenced modifications (“Original Proposal”) were within this Office’s scope of authority (Exhibit 5, June 30, 2011, Hearing). On June 30, 2011, a hearing was held on the Original Proposal. Interested persons were given the opportunity to participate in the proposed rulemaking by submitting their written comments before the hearing and offering oral

comments at the hearing. This Office received written comments from Archbold Medical Center, Georgia Hospital Association, Georgia Society of Managed Care, Tanner Health System, University Health Care System, Aetna, Medical Association of Georgia, and Blue Cross Blue Shield of Georgia (“BCBSGA”). Oral comments were offered at the hearing by Trey Sivley, the Assistant Director of the Regulatory Services Division of this Office and Mark Cohen, counsel for BCBSGA.

After the hearing was held on the Original Proposal, no order was issued because this Office determined that additional substantive modifications were required. In particular, this Office determined that the prohibition against so-called “most-favored-nation” or “MFN” clauses between insurers and hospitals in the Original Proposal should be extended to insurers and providers *including but not limited to hospitals*. Consequently, this Office proposed additional modifications to the Regulation Chapters (“Proposed Regulation”).

By letter dated December 12, 2011, the Office of the Attorney General opined that the Proposed Regulation was within this Office’s scope of authority (Exhibit 5, January 11, 2012, Hearing). Pursuant to O.C.G.A. §50-13-4(e), the Proposed Regulation was transmitted to Wayne R. Allen, Legislative Counsel for the General Assembly, for assignment to the appropriate standing committees of the Senate and House of Representatives (Exhibits 6 and 7, January 11, 2012, Hearing).

On January 11, 2012, a hearing was held on the Proposed Regulation. Interested persons were given the opportunity to participate in the proposed rulemaking by submitting their written comments before the hearing and offering oral comments at the hearing. This Office received written comments from Medical Mutual of Ohio, Medical Association of Georgia, and Blue Cross Blue Shield of Georgia. Oral comments were again offered by Messrs. Sivley and Cohen.

## **II. CONSIDERATION OF INTERESTED PARTY COMMENTS**

With the exception of BCBSGA's comments, all of the comments submitted to this Office have been broadly in favor of the Original Proposal and the Proposed Regulation. Two common requests for modifications to the Original Proposal by industry supporters are addressed herein. One request was that the "MFN prohibition" be expanded to include providers beyond hospital providers. This Office modified the Original Proposal to address that request.

Another request was that the Original Proposal be clarified to make clear that MFN clauses in existing contracts between insurers and health care providers are "null and void." BCBSGA asserts that such a declaration by this Office would violate this state's constitution (See Ga. Constitution Article I, § I, Paragraph 10 ("[No]... retroactive law... shall be passed"). In addition to this assertion, BCBSGA claims that the Proposed Regulation, and by implication the Attorney General's approval of such, is contrary to existing case law, statutory authority and empirical evidence.

## **III. DECISION**

This Office has given careful consideration to all of the written and oral comments offered in this matter. This Office's statutory authority to promulgate the Proposed Regulation is clear. According to O.C.G.A. §33-2-9, the Commissioner of Insurance is authorized to promulgate regulations implementing the provisions of Title 33. Pursuant to O.C.G.A. §33-6-13(a)(3),

"No person shall... engage in any practice for the purpose of or that has a tendency to or the effect of:... [e]stablishing or perpetuating any condition in this state detrimental to free competition in the business of insurance or injurious to the insuring public."

The fact that the General Assembly did not define “detrimental to free competition in the business of insurance or injurious to the public” suggests that the General Assembly intended for this Office to have a degree of discretionary authority to make such determinations.

BCBSGA asserts that the Proposed Regulation is contrary to existing case law but it fails to cite any specific court decision that prohibits this Office from promulgating the Proposed Regulation. Additionally, BCBSGA asserts that the Proposed Regulation is contrary to empirical evidence and cites an economics study to support its policy arguments in favor of allowing MFN clauses to be used in certain instances. Such a citation does not remove this Office’s discretionary responsibilities or authority.

Finally and with regard to BCBSGA’s arguments addressing the constitutionality of the Proposed Regulation, this Office agrees that it does not have the legal authority to declare MFN clauses in existing contracts “null and void.” As was explained by Mr. Sivley at the hearing on the Proposed Regulation, however, this Office does have the legal authority to take enforcement action against insurers that attempt to enforce MFN clauses after the effective date of the Proposed Regulation.

**WHEREAS**, this Office agrees with many of the comments offered in support of the Proposed Regulation by Archbold Medical Center, Georgia Hospital Association, Georgia Society of Managed Care, Tanner Health System, University Health Care System, Aetna, Medical Mutual of Ohio, and Medical Association of Georgia; and

**WHEREAS**, this Office finds persuasive the opinion of the Office of the Attorney General that the Proposed Regulation is within this Office’s scope of authority, **IT IS HEREBY ORDERED** that Regulation Chapter 120-2-20-.03 entitled “Severability” is repealed and that

Regulation Chapter 120-2-.03 entitled "Unlawful Agreements between Insurers and Providers," and Regulation Chapter 120-2-.04 entitled "Severability" a copy of both of which are attached hereto and made a part by reference, are **HEREBY ADOPTED**.

Given under my Hand and Seal this 10<sup>th</sup> day of February, 2012.

  
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RALPH T. HUDGENS  
INSURANCE AND SAFETY FIRE COMMISSIONER  
STATE OF GEORGIA