

# Third Party Administrator Update

## TPA LICENSING AND COMPLIANCE DEVELOPMENTS

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### Multistate Regulatory Action a Significant Reminder that Insurers Must Only Conduct Business with Licensed TPAs

A Regulatory Settlement Agreement was recently entered into by forty-one (41) states and an insurer as a result of a multistate targeted market conduct examination (“Multistate Examination”) of the insurer. The Multistate Examination focused on the insurer’s short-term medical, limited medical and fixed indemnity business, and it was spearheaded by the Delaware Department of Insurance and the District of Columbia Department of Insurance, Securities and Banking (DISB) (the “Managing Lead States”) and the Wisconsin Insurance Department, the Kansas Insurance Department and the South Dakota Division of Insurance (the “Lead States”). In addition to the Managing Lead States and the Lead States, thirty-six (36) other states also participated in the Multistate Examination.

The Multistate Examination resulted in a Regulatory Settlement Agreement (“Settlement Agreement”) in which the insurer was required to make a \$1,216,500 payment, divided among the forty-one (41) jurisdictions participating in the Multistate Examination.

In addition to the \$1,216,500 payment, the Settlement Agreement also required the insurer to comply with the following business practices and reforms:

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#### POLSINELLI'S THIRD PARTY ADMINISTRATOR LICENSING AND COMPLIANCE SERVICES TEAM



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- That all TPAs doing business with it are duly licensed in all required jurisdictions.
- That it would undertake commercial best efforts only to do business with TPAs that maintain all required TPA licenses in good standing, and at all times relevant to the Company's business practices in accordance with the applicable TPA licensing jurisdiction's insurance laws.
- That it would submit to the Delaware Director all new TPA agreements or contracts for review and approval prior to execution of the agreements.
- That it will obtain necessary regulatory approvals for all plans of its Limited Medical Business in accordance with each state's insurance laws.

Additionally, should the insurer fail to materially comply with any part of the Settlement Agreement, an additional charge of \$1,000,000 could be assessed against the insurer. While there were multiple issues involved in this multistate regulatory action, this significant penalty and action by forty-one (41) state insurance departments is a cautionary and costly reminder that insurers should only conduct business with TPAs that are properly licensed in all required jurisdictions.

## North Carolina Regulatory Action a Reminder That Insurers Are Responsible for the Acts of Their TPAs

The North Carolina Insurance Department ("Department") recently announced a regulatory action against an insurer for alleged claims practices violations and contracting with a TPA before it became licensed in North Carolina. The regulatory action resulted in a Settlement Agreement between the Department and the insurer in which the insurer was assessed a \$1,100,000 monetary penalty and the insurer also had to pay out \$2,533,000 in additional claims and interest payments to claimants.

According to the Department, the Settlement Agreement was the result of a target examination of the insurer's claims practices and claims procedures. The Department's examiners reviewed approximately 300 claims in the target examination and the examination revealed numerous alleged claims processing violations of the insurer's accidental death and dismemberment policies.

The Department asserted that, in some cases, unnecessary information was requested from claimants, significantly delaying their claim payment. Additionally, the Department alleged some claims were not promptly settled under one portion of a policy where the insurer's liability was reasonable clear in order to influence settlement under other portions of the policies. The Department also alleged the average time to process the accidental death and dismemberment claims was 208 calendar days. The Department examiners also allegedly discovered that when payments were made, interest was not paid to the claimant as required by North Carolina insurance law.

Finally, the examination also revealed the insurer had contracted with a TPA to administer its accidental death and dismemberment policies, but the TPA had not been licensed as a TPA in North Carolina for almost three years while it was servicing the policies.

This regulatory action by the North Carolina Insurance Department is a reminder that insurers may be held strictly liable for alleged violations of insurance laws committed by their TPA business partners.

## TPA Agreement Filing and Compliance Requirements

The NAIC Model Third Party Administrator Act, and nearly every state that has enacted laws regulating TPAs' administrative service agreements, requires such agreements to comply with the following:

- The TPA shall not act without a written agreement between a TPA and the insurer.
- The written agreement must contain all the provisions required by state TPA laws.
- The written agreement must be retained as part of the official records of both the insurer and the TPA for the duration of the agreement and for a prescribed number of years thereafter.

While almost every state that has enacted TPA laws imposes the above requirements pertaining to administrative service agreements, there are a number of states that also have affirmative requirements to file the agreements with state insurance regulators or to report the existence of such agreements to the regulators within prescribed time periods after execution.

In order to assist our TPA and insurer clients compliance with all of the TPA laws under the state insurance codes, we have created a national regulatory addendum, which contains mandated statutory provisions under all state TPA laws. The compliance addendum is also designed to assist with meeting various state insurance departments' checklist requirements for administrative service agreements during the TPA licensing process.

The national regulatory addendum is available on a flat-fee basis. For more information regarding our national regulatory addendum, please contact the authors listed on the first page.

## TPA Claims Processing Procedures: "Sometimes Just Ok Is Not Ok"

A recent case demonstrates the perils of missing a claim submission deadline under a self-insured medical plan. In a recent case, a North Carolina district court on May 1, 2020, denied a motion to dismiss on allegations that a third-party administrator (TPA) had failed to timely submit a claim to the stop-loss carrier despite instructions from the employer and the plan. *Technibilt Group Insurance Plan v. Blue Cross and Blue Shield of North Carolina*, 438 F. Supp. 3d 599 (W.D.N.C. 2020). In that case, Blue Cross and Blue Shield of North Carolina (BCBS) served as the claims administrator of the Technibilt Group Insurance Plan (the Plan).

In November 2018, a Plan participant that had been gravely ill passed away after accumulating claims in excess of \$1.6 million during the 2018 plan year. Because the Plan sponsor, Technibilt, Ltd. ("Technibilt"), had stop loss insurance that only covered claims paid during the plan year, Technibilt notified BCBS of the impending end-of-year deadlines and the substantial monetary implications of failing to pay the claims by the end of the year.

While the date of when BCBS received notice was debated, ultimately BCBS paid half of the claims in early January 2019. That portion of the claim was not covered by Technibilt's stop loss policy, leaving the Plan and Technibilt to make up the difference. BCBS alleged that it did not actually receive notice until December 31, 2018, but plaintiffs allege they notified BCBS much earlier.

The Plan and Technibilt then sued BCBS, alleging, in part, that BCBS breached its fiduciary duty by failing to pay the claims within the time requested by Technibilt. BCBS made a motion to dismiss the claims, arguing, in part, that plaintiffs could not

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prove that BCBS was a fiduciary regarding the timing of payment of claims. Noting the early stage of the action, the court denied BCBS's motion to dismiss and tentatively found that BCBS's "control respecting disposition of the Plan's assets, could plausibly make [BCBS] a *functional* fiduciary with respect to the handling of the extraordinary and urgent circumstances" under the issue at hand. *Technibilt*, at 605. As a result, even assuming the payment was made within BCBS' standard timeframe, the court held that the facts and circumstances developed in discovery could show that "sometimes just ok is not ok." *Id.*

This case raises many issues relating to who might be ultimately responsible when claims are not timely processed. In that regard, it is critical for employers and TPAs to establish good procedures for impending deadlines. Clear communication between sponsors and TPAs are also important, especially in extraordinary circumstances like the one at issue in the case. Finally, this case raises the importance of carefully delineating the obligations of each party in the applicable Administrative Services Agreement as that document may eventually have a critical role in the ultimate outcome of the case.

If you have any questions, please contact the authors of this article: Henry Talavera at [htalavera@polsinelli.com](mailto:htalavera@polsinelli.com), or Rafael Ramos at [rmosaguirre@polsinelli.com](mailto:rmosaguirre@polsinelli.com).

## Oregon Regulatory Actions a Reminder that Insurers are Responsible for Providing Competent Administration of Their Insurance Programs

The Oregon Department of Consumer and Business Services ("Oregon Department") recently announced regulatory actions against four insurers for alleged violations of the Oregon Insurance Code. The regulatory actions resulted in Consent Orders with the Oregon Department pursuant to which one insurer was assessed a \$30,000 penalty, another insurer was assessed a \$50,000 penalty and the two remaining insurers were jointly and severally assessed a \$75,000 penalty. A portion of each of these penalties was suspended pending the satisfaction of certain conditions by each insurer.

According to the Oregon Department, all of the regulatory actions were the result of investigations which found, in part, that the insurers failed to provide, or failed to timely provide, to certain Oregon consumers annual reports for their annuity contracts and/or life insurance policies in 2015, 2016 and 2017. The Consent Orders indicate that the same unaffiliated TPA had been administering the life insurance products and annuity contracts for all four insurers during the relevant time period. The Consent Orders further indicate that, although the insurers had contracted with the TPA to provide the required annual reports, the insurers were still responsible because the obligation to provide the annual reports was on the insurers and insurers are responsible for providing competent administration of their insurance programs pursuant to ORS 744.740 (2).

These regulatory actions taken by the Oregon Department are another reminder that insurers cannot outsource their regulatory responsibilities to a third party and may be held strictly liable for alleged violations of insurance laws committed by their TPA business partners.

## Third Party Administrator Licensing and Compliance Services

Polsinelli's Third Party Administrator Team has significant experience representing TPAs on a national basis regarding a variety of business and compliance issues. The group includes attorneys who were formerly in-house counsel for TPAs, as well as attorneys who were formerly insurance regulators and members of the Federation of Regulatory Counsel.

Polsinelli's experience in the third party administrator industry is demonstrated by these representative examples:

- National and multi-state TPA licensing projects.
- Advise clients regarding business, regulatory and compliance matters associated with mergers, acquisitions and divestitures involving entities licensed as a TPA.
- Assistance with investigations, market conduct examinations and formal regulatory actions brought by state insurance departments.
- Negotiate and draft Administrative Services Agreements and subcontracts, including assistance with statutorily-mandated provisions and best practice business provisions.
- Assistance in developing a TPA Regulatory Addendum designed to comply with the statutorily-mandated provisions applicable under the TPA laws on a national basis.
- Monitor regulatory and legislative activity affecting our TPA clients and provide periodic reports regarding such activity.
- Maintain licensure as a TPA, PBM, Adjuster, Insurance Producer, or Service Company through periodic renewal and annual report filings.
- Assistance with ancillary state filing and registration requirements such as All-Payer Claims Databases and Vaccination Assessments.

To learn more about Polsinelli's **Third Party Administrator Licensing and Compliance Services** practice, or to contact a member of the Third Party Administrator Licensing and Compliance Services team, visit [polsinelli.com/industries/third-party-administrator-tpa-licensing-and-compliance-services](https://polsinelli.com/industries/third-party-administrator-tpa-licensing-and-compliance-services).

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- Polsinelli's TPA team provides TPA licensing services, TPA regulatory and compliance services, drafting and negotiation of administrative services agreements and a number of other TPA services.
- By leveraging its extensive experience representing TPAs, our TPA team helps clients avoid the learning curve and related cost implications that can be experienced by working with companies or attorneys who are less familiar with the regulatory and compliance needs of TPAs.

For questions regarding this information, please contact one of the authors, a member of Polsinelli's Third Party Administrator Licensing and Compliance Services practice, or your Polsinelli attorney.

## For More Information or To Subscribe

For questions regarding this alert or to learn more about how it may impact your business, please contact one of the authors, a member of our Third Party Administrator Licensing and Compliance Services practice, or your Polsinelli attorney.

Polsinelli's [Insurance Business and Regulatory](#) group stays apprised of TPA industry trends and emerging TPA regulatory and compliance issues, publishes a newsletter and distributes eAlerts that are solely dedicated to the TPA industry. To subscribe to future TPA updates and eAlerts, please email [TPA@polsinelli.com](mailto:TPA@polsinelli.com).

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