

**OGC Op. No. 08-07-03**

The Office of General Counsel issued the following opinion on July 9, 2008 representing the position of the New York State Insurance Department.

**Re: Live Organ Donations, Insurance Implications**

**Questions Presented:**

1. May an insurer reject a life insurance applicant on the ground that the applicant intends to be a living organ donor?
2. May an insurer reject a life insurance applicant on the ground that the applicant has donated an organ?
3. May an insurer reject a health insurance applicant on the ground that the applicant has donated an organ?
4. May an insurer, during the contestable period, terminate a life insurance policy of an individual on the ground that the individual has donated an organ?
5. May an insurer terminate a health insurance policy of an individual on the ground that the individual has donated an organ?

**Conclusions:**

1. Yes. An insurer may reject a life insurance applicant on the grounds that an applicant intends to be a living organ donor, if the insurer bases the decision on sound actuarial principles or actual experience, and in accordance with underwriting guidelines that the insurer applies uniformly.
2. Yes. A life insurer may reject a life insurance applicant because of the applicant's past organ donation, if the rejection is based on sound actuarial principles or actual experience, and in accordance with underwriting guidelines that the insurer applies uniformly.
3. No. An insurer may not reject an applicant for either individual or group health insurance on account of the fact that the applicant has donated an organ.
4. If the organ donation occurs after the effective date of the life insurance policy, the insurer may not terminate the policy, unless the insured has made a material misrepresentation or fraudulent statement on the application concerning organ donation, and the insurer becomes aware of such statement within two years of issuance of the

policy. If the organ donation occurs prior to the effective date of the policy, and the applicant has made a material misrepresentation or fraudulent statement on the application concerning the donation, the insurer may, if the misrepresentation caused the insurer to issue the policy, contest the policy within the first two years after issuance. Once an individual life insurance policy has been in force for two years, it may not be contested by the insurer.

5. No. An insurer may not terminate an individual or group health insurance policy on the grounds that the insured has donated an organ.

**Facts:**

Pursuant to 42 U.S.C. § 274 (West 2003), the federal Secretary of Health & Human Services (“Secretary”) is required to appoint an entity to operate an Organ Procurement and Transplantation Network (“OPTN”). In accordance with that directive, the Secretary has appointed the United Network for Organ Sharing (“UNOS”) as the required OPTN. The Secretary has promulgated detailed regulations governing the operations of the OPTN.

In accordance with the requirements promulgated by the Secretary, UNOS has established its own standards for transplant centers, including a requirement that the transplant center provide information concerning the effect that the donation may have on an individual’s ability to obtain life and health insurance.

The inquirer deals with live donations of organs for a hospital.

**Analysis:**

When used in this opinion, the term “insurer”, unless the context requires otherwise, includes a health maintenance organization (“HMO”) under the joint jurisdiction of the New York Insurance Department and the New York Department of Health.

Life Insurance

Generally, with respect to individual or group life insurance, an insurer may underwrite the risk and, in accordance with underwriting criteria that the insurer applies uniformly, either decline the application, or issue the policy at an increased premium if the applicant presents an increased mortality risk. The Insurance Department does not generally regulate factors that insurers weigh in assessing mortality risk. Nevertheless, N. Y. Ins. Law § 4224(a) (McKinney 2007), which is relevant to the inquiry, prohibits unfair discrimination. That statute provides:

No life insurance company doing business in this state and no savings and insurance bank shall: (1) make or permit any unfair discrimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged for policies of life insurance or annuity contracts, or in the dividends or other

benefits payable thereon, or in any of the terms and conditions thereof; (2) refuse to insure, refuse to continue to insure or limit the amount, extent or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of the physical or mental disability, impairment or disease, or prior history thereof, of the insured or potential insured, except where the refusal, limitation or rate differential is permitted by law or regulation and is based on sound actuarial principles or is related to actual or reasonably anticipated experience, in which case the insurer, subject to the limitations contained in section twenty-six hundred eleven of this chapter, shall notify the insured or potential insured of the right to receive, or to designate a medical professional to receive, the specific reason or reasons for such refusal, limitation or rate differential . . . (Emphasis added.)

With respect to individual life insurance, the absence of an organ, either by reason of donation or disease, may affect the insurability of a particular individual. Ultimately, that consideration is a question of fact and medical judgment on the part of the insurer, subject to a demonstration by the insurer of the effect that the absence has on increased mortality. In addition, since the loss of an organ by reason of disease may reflect an underlying medical condition, the mortality risk presented by such a loss would differ, and might be greater, than the mortality risk presented by an organ donation.

Further, if the applicant discloses a prior organ donation, or such donation is reported to the insurer by a medical history report, and there is an increased mortality risk, the life insurer may (subject to uniformly applied underwriting guidelines) charge an additional premium (based on the increased risk) or reject the application.

If an application for individual life insurance contains a question concerning either past or future organ donations, the applicant must answer truthfully or else run the risk of having the policy terminated for a material misstatement or fraudulent statement during the contestable period.<sup>1</sup>

Were the insurer to issue the policy, the insurer would have two years to contest the issuance of the policy based upon a material misrepresentation or fraudulent statement in the application. See Insurance Law § 3203(a)(3). After that time, the policy is incontestable. See Reliastar Life Insurance Company of New York v. Leopold, 192 Misc. 2d 385 (Sup. Ct. Nassau Co. 2002). If an insurer sought to terminate a life insurance policy, or deny a claim on an individual life insurance policy, because of the fact of the applicant's prior organ donation, the insurer would have to demonstrate it could not have reasonably discovered the full facts at a life insurance policy issuance.

With respect to group life insurance - which often is purchased in connection with employment - many insurers, particularly with lower amounts of coverage, underwrite the group only to the extent of requiring that all insured individuals be actively at work. Given that circumstance, a life insurer probably would not be concerned with an individual's intention to be an organ donor, and the issue of a previous organ donation probably would never arise.

## B. Health Insurance

With respect to individual and small group health insurance, Insurance Law § 3231(a)(1), which governs policies of commercial health insurers, and Insurance Law § 4317(a), which pertains to contracts of not-for-profit health insurers and all HMOs, generally prohibit underwriting of individual and small group health insurance. Insurance Law § 3231(a)(1) provides:

No individual health insurance policy and no group health insurance policy covering between two and fifty employees or members of the group exclusive of spouses and dependents, hereinafter referred to as a small group, providing hospital and/or medical benefits, including Medicare supplemental insurance shall be issued in this state unless such policy is community rated and, notwithstanding any other provisions of law, the underwriting of such policy involves no more than the imposition of a pre-existing condition limitation as permitted by this article. Any individual, and dependents of such individual, and any small group, including all employees or group members and dependents of employees or members, applying for individual health insurance coverage including Medicare supplemental insurance or small group health insurance coverage . . . must be accepted at all times throughout the year for any hospital and/or medical coverage offered by the insurer to individuals or small groups in this state. Once accepted for coverage, an individual or small group cannot be terminated by the insurer due to claims experience. Termination of an individual or small group shall be based only on one or more of the reasons set forth in subsection (g) of section three thousand two hundred sixteen or subsection (p) of section three thousand two hundred twenty-one of this article. Group hospital and/or medical coverage . . . obtained through an out-of-state trust covering a group of fifty or fewer employees or participating persons who are residents of this state must be community rated regardless of the situs of delivery of the policy. . . . For the purposes of this section, "community rated" means a rating methodology in which the premium for all persons covered by a policy or contract form is the same based on the experience of the entire pool of risks covered by that policy or contract form without regard to age, sex, health status or occupation.

With respect to group health insurance issued to other groups, Insurance Law §§ 3221(q)(1) and 4305(k)(1) are relevant. Both sections read as follows:

No corporation delivering or issuing for delivery in this state a group or blanket contract which provides hospital, surgical or medical expense coverage shall establish rules for eligibility (including continued eligibility) of any individual or dependent of the individual to enroll under the contract based on any of the following health status-related factors: . . . (A) Health status. (B) Medical condition (including both physical and mental illnesses). . . .

Thus, under the plain terms of Insurance § 3221(q)(1) or Insurance Law § 4305(k)(1), a health insurer may not refuse to cover an individual because of the individual's intention to become an organ donor.

With respect to individual and small group health insurance, the inquiry references individuals who are covered by Medicare, and who desire Medicare supplemental insurance. Of course, because those forms of insurance come within the purview of Insurance Law §§ 3231(a) and 4317(a), health insurers may not underwrite such individuals. Note, however, that in contrast to the contestability provision for life insurance policies, see Insurance Law § 3203(a)(3), the contestability provision for health insurance policies contains a fraud exception that is not time limited. See Insurance Law § 3216(d)(1)(B)(i). Moreover, while Insurance Law § 3216(d)(1)(B)(i) has been superseded by Insurance Law §§ 3231(a) and 4317(a), sections 52.22(c)(1) & (2), 52.22(f)(1), and 52.22(k) of 11 NYCRR Part 52 (Regulation 62) still set forth a fraud exception. Accordingly, a health insurer may not seize upon a past loss of an organ, whether by reason of donation or otherwise, to terminate a policy or contract, unless the insured lied about it in the policy application itself.

With respect to coverage other than small group health insurance, Insurance Law §§ 3221(q)(1) and 4305(k)(1) prohibit termination of such coverage because of loss of an organ.

For further information you may contact Principal Attorney Alan Rachlin at the New York City office.

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<sup>1</sup> Insurance Law § 3203(a)(3) provides “that the policy shall be incontestable after being in force during the life of the insured for a period of two years from the date of issue.” There is no exception, even for fraud, that extends the contestable period beyond two years.