Policy Permutations

Need insurance? Yesterday's legal triumph may be tomorrow's trouble.

June 1, 1999 By Arthur S. Leonard

Since the epidemic's earliest days, many insurance companies have tried to minimize their liability for AIDS-related claims. As soon as the HIV-antibody screening test was licensed in 1985, companies jumped to use the test to screen out infected applicants for health, disability and life insurance, and employers who provided health coverage for their workers began drawing up plans to impose low lifetime caps—per-person limits on the total amount paid out.

In addition to asserting that people with HIV are not eligible to purchase insurance, some insurers tried to cancel policies, arguing that the owners had failed to disclose their HIV status or had fraudulently concealed their status by sending in phony blood samples or lying about past AIDS-related treatment on their applications. Some firms argued that if an applicant is HIV positive when buying a policy, he or she has a "pre-existing condition," so the insurer should be exempted from paying AIDS-related benefits.

But the climate has improved in recent years as some courts have interpreted laws to protect the rights of HIV positive people who are either applying for or already have insurance. In most states, for example, it is now illegal for an insurance company to cancel a policy that has been in effect for more than two years. Consequently, people with HIV (or, in life-insurance cases, their beneficiaries) have been fairly successful in winning lawsuits—most recently in a unanimous decision issued by New York's highest court on March 30—when insurance companies have tried to cut them off for these reasons. Efforts to eliminate the right of companies to screen individuals before selling them health insurance have also been successful. The right to prescreen for life and disability insurance remains, though, and insurers do not always have to give reasons for denying coverage.

However, a 1998 decision in California, *Galanty v. Paul Revere Life Insurance Co.*, points to possible storm clouds ahead for people with HIV. In its ruling, the state appeals court reasoned that because the Supreme Court recognized last year in *Bragdon v. Abbott* (a decision sometimes construed as a complete victory for HIVers) that HIV is a physical impairment from the moment of infection, an insurance company can treat it as a pre-existing condition that must be disclosed on an application for disability insurance. *Galanty* is now on appeal with the California Supreme Court.

Furthermore, viatical-settlement companies have added new wrinkles to AIDS insurance issues.

Viaticals make contracts with “terminally ill” people who want to access the cash value of their life-insurance policies while they are still alive. The viatical company offers to pay a percentage of the face value of the policy in exchange for the insured person’s agreement to make the company his or her beneficiary. Then, after the insured person dies, the viatical collects the full value of the policy from the insurance company. Booming before the development of protease inhibitors, the AIDS viatical industry has proved less lucrative in recent years, and some have folded or stopped selling to PWAs. But as the ads in these pages show, other viatical companies are still attracting business.

With many PWAs who viaticated their life insurance when their health prospects looked poor now doing well, the viatical companies are sitting with insurance policies that may not be collectible until much later than expected. Some policyholders are worried that viatical companies may be able to sue to get their money back by claiming that HIV positive people lied about their health.

If the original transaction was on the up-and-up—on the part of PWA and insurer alike—that shouldn’t be a concern. Viatical companies go into this business with their eyes open, knowing that medical breakthroughs could happen at any time. As long as a doctor acceptable to the viatical company gave a competent opinion about the PWA’s health prospects when the transaction occurred, it’s unlikely that any court would find an individual’s survival a valid basis for setting aside a legal contract.

The law recognizes arguments that contracts should be voided because of unforeseeable changes in circumstances or because the parties were mistaken about essential facts. However, neither of these arguments appears to apply in regards to viatical agreements, as long as all parties were in good faith when the contract was made. People with contracts need not fear that they will be successfully sued just because they’re still here.

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