STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

November 28, 1990

ATTORNEY GENERAL OPINION NO. 90-130

The Honorable Janis K. Lee
State Senator, 36th District
R.R. 1, Box 145
Kensington, Kansas 66951

Re: Insurance -- General Provisions -- Insurance Coverage for Services Rendered in Treatment of Alcoholism, Drug Abuse, or Nervous or Mental Conditions

Synopsis: Insurance companies are not prevented by K.S.A. 40-2,105 from enforcing valid contractual exclusions for payment of claims for services rendered in the treatment of alcoholism, drug abuse, or nervous or mental conditions. The statute only requires that certain health insurance policies provide inpatient benefits for those conditions at the same level as other illnesses. Utilization review does not fall within the scope of the healing arts act. Its practice is not subject to Kansas licensure laws. Cited herein: K.S.A. 40-2,105; 40-2403; K.S.A. 1989 Supp. 40-2404; K.S.A. 65-1113; 65-2802; 1990 Senate Bill No. 760.

* * *

Dear Senator Lee:

As State Senator for the Thirty-Sixth District, you request our opinion regarding insurance benefits mandated by K.S.A. 40-2,105. That statute provides for equity in health insurance coverage between physical and mental illnesses.

Specifically, you ask whether an insurer is prohibited from using a system of utilization review such as a managed health care company to determine, for purpose of benefits payment, whether hospitalization is necessary in a given case. Additionally, you ask whether this review may be conducted by a person who is not licensed under the healing arts act.

Subsection (a) of K.S.A. 40-2,105 states in part:

> "On or after the effective date of this act, every insurer which issues any individual or group policy of accident and sickness insurance providing medical, surgical or hospital expense coverage for other than specific diseases or accidents only and which provides for reimbursement or indemnity for services rendered to a person covered by such policy in a medical care facility, must provide for reimbursement or indemnity under such . . . policy . . . which shall be limited to not less than 30 days per year when such person is confined for treatment of alcoholism, drug abuse or nervous or mental conditions in a medical care facility. . ., a treatment facility for alcoholics . . ., a treatment facility for drug abusers . . ., a community mental health center or clinic . . . or a psychiatric hospital . . . . Such . . . policy shall also provide for reimbursement or indemnity . . . of the costs of treatment of such person for alcoholism, drug abuse or nervous or mental conditions, limited to not less than 100% of the first $100, 80% of the next $100 and 50% of the next $1,640 in any year and limited to not less than $7,500 in such person's lifetime, in the facilities enumerated when confinement is not necessary for the treatment or by a physician licensed or psychologist licensed to practice under the laws of the state of Kansas. . . ."

This section also applies to health maintenance organizations. K.S.A. 40-2,105(c). For purposes of this discussion, those entities will be considered insurers.

The first issue raised is whether an exclusion in the health insurance policy may validly limit benefit coverage. An insurance policy is a contract. Western Casualty & Surety Co. v. Trinity Universal Ins. Co., 13 Kan.App.2d 133, 136, aff'd 245 Kan. 44 (1989). As a matter of contract formation, an insurer may limit its contractual duty by clearly and unambiguously stating in the policy how coverage is restricted. Goforth v. Franklin Life Ins. Co., 202 Kan. 413, 417 (1969); Thompson v. Harold Thompson Trucking, 12 Kan.App.2d 449, 452-53 (1987). Such contractual clauses will be upheld unless in conflict with statute. Farmers Ins. Co. v. Prudential Property & Cas. Ins. Co., 10 Kan.App.2d 93, 95, rev. denied, 237 Kan. 886 (1985). Courts will not rewrite the contractual terms employed by the parties to the agreement unless there is such a conflict. Gibson v. Metropolitan Life Ins. Co., 213 Kan. 764, 770 (1974). Where the policy provisions do conflict with state law, the state law controls. Cory v. Binkley Co., 235 Kan. 906, 914 (1984).

We do not believe that K.S.A. 40-2,105 preemptively strikes an exclusion from health coverage which requires some degree of necessity to receive the insurance benefits. The last sentence of the subsection refers to outpatient benefits. This has led the Kansas insurance department to construe the statute as requiring inpatient benefits to be provided at the same level as other medical conditions. Kansas Insurance Department Bulletin 1986-10 (Addendum); see also Kansas Attorney General Opinion No. 87-58. The last sentence of subsection (a) also refers to the necessity of those benefits. The legislature has not mandated coverage for inpatient care when such inpatient care is not necessary. An exclusion which limits benefits to those which are necessary does not conflict with K.S.A. 40-2,105.

In determining whether receipt of benefits will be allowed, we believe that an insurer may use utilization review systems. This refers to the practice of using other health care professionals to review the claim for benefits, either prospectively or retrospectively, to determine whether the claim meets the contractual criteria for payment. Corcoran, Managed Health Care 1989 (Practicing Law Institute, 1989), 30-31. On the one hand, it appears that the practice involves second-guessing the opinion of the insured's health care provider, especially when the review is prospective. However, the reviewer's decision is not a gateway to treatment, it merely determines whether the insurer agrees it is liable to pay for the treatment. Protection from erroneous deprivation

of benefits is found in the prohibitions of K.S.A. 40-2403 (unfair methods of competition or unfair and deceptive acts or practices), and as defined in K.S.A. 1989 Supp. 40-2404(9) (unfair claim settlement practices). Additionally, some jurisdictions have allowed a civil cause of action to hold the insurer legally accountable for damages. See, e.g., Wickline v. State, 228 Cal. Rptr. 661 (Cal.App.2d Dist. 1986).

The second issue you raise is whether physicians or nurses conducting utilization review are unlawfully practicing a profession for which licensure is required when those health care professionals maintain their offices and conduct review outside the state of Kansas. We do not have to resolve the territorial reach of Kansas licensure statutes. We believe that those statutes require licensure to practice the profession, and not to consult with insurers regarding contractual obligations. Physicians, like osteopaths and chiropractors, are licensed under the Kansas healing arts act. The healing arts are defined in K.S.A. 65-2802, which provides in relevant part:

> "(a) The healing arts include any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, or injury, and includes specifically but not by way of limitation the practice of medicine and surgery; the practice of osteopathic medicine and surgery; and the practice of chiropractic. . . ."

Similarly, the practice of nursing is focused on practice rather than insurance review. The practice of nursing is defined generally as application of specialized knowledge in the biological, physical and behavioral sciences to care, diagnose, treat and counsel. K.S.A. 65-1113(d).

As previously stated, utilization review is a process by which insurance claims are evaluated. Often, this review takes place after treatment has already been rendered. Even utilization review that involves the prior authorization of treatment before services are provided cannot be said to constitute the practice of the healing arts, or allied health sciences or behavioral sciences. Care is not being administered or withheld by the reviewing person. Rather, a

determination is made as to whether or not the proposed care is believed covered by the insurance contract. An insured who is denied benefits by utilization review, on the grounds that the treatment sought is not "medically necessary" for example, is not prevented from obtaining medical care; such person would merely be in the same position as one without any insurance coverage at all.

The legislature has also indicated that utilization review does not fall within the scope of "healing arts" as defined in K.S.A. 65-2802. 1990 Senate Bill No. 760, which would have deemed persons engaged in utilization review to be engaged in the practice of medicine and surgery, was not passed. 1990 Senate and House Actions Report, Senate Actions at 106 (June 1, 1990).

In conclusion, it is our opinion that insurance companies are not prevented by K.S.A. 40-2,105 from enforcing valid contractual exclusions for payment of claims for services rendered in the treatment of alcoholism, drug abuse, or nervous or mental conditions. The statute only requires that certain health insurance policies provide inpatient benefits for those conditions at the same level as other illnesses. Utilization review does not fall within the scope of the healing arts act. Its practice is not subject to Kansas licensure laws.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Mark W. Stafford

Mark W. Stafford
Assistant Attorney General

RTS:JLM:MWS:bas