

INSURANCE DEPARTMENT OF THE STATE OF NEW YORK

PROPOSED

REGULATION NO. 184

(11 NYCRR 222)

PROHIBITION OF DISCRETIONARY CLAUSE PROVISIONS IN CERTAIN INSURANCE

POLICIES AND CONTRACTS

[ALL MATERIAL IS NEW]

I, JAMES J. WRYNN, Superintendent of Insurance of the State of New York, pursuant to the authority granted by Sections 201, 301, 3201, and 4308 and Article 24 of the Insurance Law, do hereby promulgate the following Part 222 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 184), to take effect upon publication in the State Register.

A new Part 222 is added to read as follows:

§ 222.0 Purpose.

(a) Federal courts have interpreted discretionary clauses under the Employee Retirement Income Security Act (ERISA), codified as Chapter 18 of Title 29 of the United States Code, as limiting judicial review of the provisions of insurance policy forms. If a policy form contains a discretionary clause, a court cannot interpret the provisions of the policy *de novo*, and is limited in its review as to whether the decision or interpretation of the insurer or other administrator was arbitrary and capricious. This limited standard of review gives the insurer or administrator wide discretion, which can serve to negate essential provisions of policy forms, as well as statutorily required appeal rights. As a result, policy form provisions may be rendered illusory by nullifying the insurer's responsibility to pay. Even where there is a conflict of interest because the plan administrator is both determining benefit eligibility and paying claims, the court will apply an arbitrary and capricious standard when the contract contains a discretionary clause. See Metropolitan Life Insurance Co. v. Glenn, 128 S. Ct. 2343 (2008).

(b) Discretionary clauses are therefore contrary to sections 3201(c) and 4308(a) of the Insurance Law, which authorize the superintendent to disapprove a policy form if it is "prejudicial to the interests of policyholders or members or it contains provisions which are unjust, unfair or inequitable" or if its provisions "encourage misrepresentation or are unjust, unfair, inequitable, misleading, deceptive, or contrary to law or to the public policy of this state." Additionally, a licensee subject to the supervision of the Superintendent of Insurance, who in the conduct of the business of insurance in this State, violates the provisions of this Part shall be deemed to have engaged in an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this State. Any such act shall be deemed to be an unfair trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law, in violation of section 2403 of such law.

§ 222.1 Applicability.

This Part shall apply to every policy form delivered or issued for delivery, including deemed delivered, renewed, modified, altered or amended, by an insurer in this State sixty days after the effective date of this Part.

§ 222.2 Definitions.

(a) *Discretionary clause* means a provision in a policy form that:

(1) grants an insurer, plan administrator or claims administrator the discretionary authority to determine eligibility for benefits, resolve disputes, or interpret the terms and provisions; or

(2) reserves a right to an insurer, plan administrator or claims administrator to develop standards of interpretation or review.

(b) *Insurer* means an insurer licensed to write accident and health insurance (including disability income), life insurance or annuities, a corporation organized under Article 43 of the Insurance Law, or a health maintenance organization certified under Article 44 of the Public Health Law.

(c) *Policy form* has the meaning ascribed to it by New York Insurance Law section 3201(a).

§ 222.3 Prohibited provisions.

No policy form subject to this Part shall contain a discretionary clause.

§ 222.4 Determined violation.

A contravention of this Part shall be deemed to be an unfair method of competition or an unfair or deceptive act and practice in the conduct of the business of insurance in this State, and shall be deemed to be a trade practice constituting a determined violation, as defined in section 2402(c) of the Insurance Law, in violation of section 2403 of such law.