

In the Matter of

EMPIRE HEALTHCHOICE ASSURANCE, INC.

**ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW
SECTION 63, SUBDIVISION 15**

Pursuant to the provisions of Article 22-A of the General Business Law and Executive Law § 63(12), Eliot Spitzer, Attorney General of the State of New York, caused an inquiry to be made into certain business practices of Empire HealthChoice Assurance, Inc. ("Empire") and, based upon that inquiry, the Office of the Attorney General ("OAG") has made the following findings:

1. Empire is a licensed health insurer under New York Insurance Law, with its principal address at 11 West 42nd Street, New York, New York. For the purposes of this Assurance of Discontinuance, "Empire" shall also include Empire HealthChoice HMO, Inc, a wholly-owned subsidiary of Empire licensed to operate a health maintenance organization pursuant to New York Public Health Law Article 44.
2. In the regular course of business, Empire enrolls health care members and, pursuant to various types of arrangements with health care providers, delivers and arranges for the delivery of health care services to those members.
3. The OAG's Health Care Bureau received a copy of a Provider Explanation of Benefits (a "Provider EOB") that Empire sent to Mohawk Ambulance Service, Inc. ("Mohawk") in response to a health insurance claim submitted by Mohawk for services rendered to an Empire enrollee.
4. Mohawk provides, among other services, prehospital emergency medical services for Albany, Rensselaer, Schenectady, and Saratoga counties.
5. According to the Provider EOB, Empire paid \$150 of Mohawk's total claim of \$305 for date-of-service ("DOS") July 27, 2004. As to the remaining balance of \$155, Empire included a "Message Sent To Your Patient" that states:

This provider is an out-of-network provider. Since you have received care from an out-of-network provider, the provider is entitled to bill you for the amount shown in 'Your Total Responsibility' if it has not already been paid. Using a participating provider means less cost for you. The patient's responsibility is reduced when services are rendered by participating providers.

6. After receiving the Provider EOB, the OAG contacted Empire by letter dated November 4, 2005. The letter expressed concern that the language in the EOB may mislead emergency ambulance providers about consumer liability to such providers under New York law, which protects certain consumers from being billed by ambulance providers for emergency ambulance services. The OAG's letter also expressed concern that the EOB language may similarly mislead consumers about their liability, if the EOB was also sent to consumers. The OAG's letter further requested that Empire produce certain documents to determine the extent of the potential problem.

7. Empire promptly investigated the matter and contacted the OAG on November 22, 2005. According to Empire, the New York law protecting certain consumers from being billed by ambulance providers for emergency services (see paragraph 10 below) was inapplicable to the EOB at issue because the service provided was a non-emergency hospital-to-hospital ambulance transfer.

8. Empire conducted a further investigation into its use of the EOB message identified in the OAG's November 4, 2005 letter. Empire discovered that the message was used in EOBs sent to at least some Empire subscribers who received emergency services from out-of-network providers and who had no liability to such providers.

9. Empire states that it is unable to identify a systematic method for determining whether ambulance providers billed subscribers. Such information would only be available from the subscriber or provider.

10. Insurance Law §§ 3216(24)(A), 3221(15)(A) and 4303(aa)(1) (hereinafter collectively referred to as New York State's "Ambulance Mandate") require coverage of "prehospital emergency medical services" by those policies providing major medical or similar comprehensive health care coverage that are governed by those laws (hereinafter "Ambulance

Policies"). "Prehospital emergency medical services" include "prompt evaluation and treatment of an emergency medical condition, and/or non-airborne transportation to the hospital" (Insurance Law §§ 3216[24][E][I], 3221[15][E][I] and 4303[aa][5][A]). The Ambulance Mandate further provides that the insurer shall pay the ambulance claim under an Ambulance Policy at either the rate negotiated between the insurer and provider, if a participating provider contract exists, or the usual and customary charge, which shall not be excessive or unreasonable, if no participating provider contract exists (Insurance Law §§ 3216[24][C], 3221[15][C] and 4303[aa][3]). Finally, an insurer's payment pursuant to an Ambulance Policy is considered payment in full for the services provided, thus prohibiting an ambulance service provider from seeking any additional reimbursement from the insured, except the collection of any copayment, coinsurance, or deductible for which the insured is responsible under his or her Ambulance Policy (Insurance Law §§ 3216[24][B], 3221[15][B] and 4303[aa][2]).

11. The General Business Law states that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful" (General Business Law § 349[a]). Similarly, Executive Law § 63(12) authorizes the OAG to commence a special proceeding for injunctive relief and restitution against any person engaged in a repeated or persistent fraudulent business activity.

12. Accordingly, an ambulance service provider cannot bill a consumer who has an Ambulance Policy (hereinafter referred to as an "Ambulance Consumer") for the difference between that provider's charges and the insurer's payment (other than for applicable copayment, deductible, or coinsurance amounts). Billing the Ambulance Consumer for such difference constitutes improper balance billing under the New York State Ambulance Mandate. Billing an Ambulance Consumer for an amount not owed under law likewise constitutes a violation of the General Business Law and Executive Law prohibitions against deceptive and fraudulent business practices.

13. Empire sent EOBs containing the "Message Sent To Your Patient" described in paragraph 5 above to Ambulance Consumers who received qualifying emergency ambulance services from out-of-network providers. This message may have misled Ambulance Consumers about their liability to the ambulance provider under New York law. The EOB states that "[s]ince you have received care from an out-of-network provider, the provider is entitled to bill

you for the amount shown in `Your Total Responsibility' if it has not already been paid." As noted above, the Ambulance Mandate prohibits ambulance providers from billing an Ambulance Consumer for the difference between the provider's charges and the insurer's payment. Accordingly, the EOB states that the Ambulance Consumer is liable even in situations where, under the Ambulance Mandate, he or she is not.

14. As a result, Empire's EOBs are contrary to the Ambulance Mandate and constitute a deceptive and fraudulent business practice under General Business Law § 349 and Executive Law § 63(12).

IT NOW **APPEARS** that Empire, without admitting to or conceding the foregoing findings or violations of law, is willing to enter into this Assurance of Discontinuance ("Assurance") and the OAG is willing to accept this Assurance pursuant to Executive Law § 63(15) in lieu of commencing a statutory or other proceeding against Empire pursuant to Executive Law Article 63.

I. **PROSPECTIVE RELIEF — REVISION OF EOB PRACTICES**

15. Empire agrees that all EOBs and any other communications with providers or Ambulance Consumers will accurately describe consumer and ambulance provider rights and responsibilities under the Ambulance Mandate. Specifically, Empire agrees that it will cease sending to Ambulance Consumers, as well as ambulance providers, the EOBs with the "Message Sent To Your Patient" described in paragraph 5 above where such EOBs relate to coverage of emergency ambulance services.

II. **CONSUMER RESTITUTION**

16. Within 180 days of the Effective Date of this Assurance, Empire will send letters to all Ambulance Consumers and ambulance providers who received an EOB with the "Message Sent To Your Patient" described in paragraph 5 above where such EOBs related to coverage of emergency ambulance services. The letters will accurately state the Ambulance Consumer's liability and include a message to the effect that: (1) the letter is being sent because the initial EOB misstated the consumer's liability; (2) briefly describes New York's Ambulance Mandate and how it protects consumers from most liability for qualifying emergency ambulance services; (3) directs the consumer to contact Empire if the consumer received a bill from a provider — whether the consumer paid the bill or not — and; (4) informs the consumer that, if the

consumer paid the bill, he or she may be entitled to a refund from the provider. Within 60 days of the mailing of those letters, Empire will send to the OAG, in a mutually agreeable electronic format, a copy of the form of the letters.

17. For those Ambulance Consumers who contact Empire pursuant to paragraph 16 above, Empire will investigate the claim or claims for emergency ambulance services at issue. Where it appears that the provider billed the Ambulance Consumer and received payment for the claim from the Ambulance Consumer in violation of the Ambulance Mandate, Empire will contact the provider on the Ambulance Consumer's behalf to request that the provider refund any overpayment to the Ambulance Consumer. Empire's communication to the provider shall explain the Ambulance Mandate and the parties' obligations thereunder, and that, because Empire sent an erroneous FOB, pursuant to an agreement with the OAG: (1) Empire seeks to recover from the provider any overpayments made by consumers and; (2) Empire is required to notify the OAG if the provider fails to submit to Empire any overpayments. Where a provider refuses or fails to make the requested refund, or does not address Empire's attempts at contact, within a reasonable time, Empire will reimburse the Ambulance Consumer in the amount of the refund being requested from that provider. Empire's obligation to reimburse the Ambulance Consumer will not arise unless and until such time as that consumer executes in favor of Empire an assignment to Empire of the consumer's rights in regard to that refund, so that Empire may pursue, at its option, its legal and equitable rights against the provider, to recover from the provider the money Empire refunded the consumer. Empire will promptly provide the OAG with the identity of any provider that refuses to work with Empire in good faith to resolve the claim in accordance with the Ambulance Mandate as well as other information relevant to the claim.

18. Within nine months of the Effective Date of this Assurance, Empire shall submit to the OAG a report documenting all of the claims submitted by Ambulance Consumers, including an identifier for each such consumer and the ambulance provider at issue, as well as the amount claimed and the amount refunded to the consumer for each claim.

III. MODIFICATIONS

19. This Assurance does not preclude Empire from modifying its bills, billing forms, computer systems, or any other matter agreed to in Section I of this Assurance of

Discontinuance, provided any modifications comply with this Assurance and all applicable Federal and New York State laws.

IV. COSTS

20. Empire agrees to pay \$5,000 to the OAG for costs incurred during the investigation of this matter by the OAG. This payment will be made within 30 days after the effective date of this Assurance.

V. CORRESPONDENCE AND PAYMENTS

21. All correspondence and payment submitted by Empire to the OAG pursuant to this Assurance of Discontinuance shall be sent to the attention of:

Troy J. Oechsner
Deputy Bureau Chief
Office of the Attorney General
Health Care Bureau
The Capitol
Albany, NY 12224

VI. SUCCESSORS

22. This Assurance, including but not limited to all obligations imposed on or undertaken by Empire herein, will be binding upon and enforceable on Empire regardless of any subsequent change in owner or operator (whether by merger, transfer of control or other means) of all or any substantial portion of Empire's operations in New York State.

VII. MISCELLANEOUS PROVISIONS

23. Nothing herein shall be construed to deprive any consumer or other person or entity of any private right under the law.

24. It is further understood and agreed that the acceptance of this Assurance by the OAG shall not be deemed or construed as an approval by the OAG of any of the activities of Empire, its successors, agents or assigns, and none of them shall make any representation to the contrary.

VIII. EFFECTIVE DATE

25. This Assurance is effective upon the date of the last signature to the Assurance.

IN WITNESS THEREOF, the undersigned subscribe their names:

Dated: New York, New York
April 10, 2006

EMPIRE HEALTHCHOICE ASSURANCE, INC.

By: _____

CONSENTED TO:

Dated: Albany, New York
April 5, 2006

ELIOT SPITZER
Attorney General of the State of New York

JOSEPH R. BAKER III
Bureau Chief
Health Care Bureau

By: _____

TROY J. O'CONNELL
Deputy Bureau Chief
Health Care Bureau