

THE PIASA BRIEFS: THE NEW CONSUMER PROTECTION ACT

Implications for the consumers of medical scheme products and services

This brief forms part of a series developed by the Pharmaceutical Industry Association of South Africa (PIASA) in the interest of patient education. It explores specific implications of this new Act for the medical scheme sector, current and future members (who are all customers in terms of the law), and agents, such as brokers and administrators. The views expressed in this brief do not constitute legal opinion or legal advice, and consumers should seek assistance to take any matter further.

The right to fair and honest dealing

The new Consumer Protection Act (CPA) includes a number of key fundamental consumer rights. The Act will come into force in the near future.

This right includes:

- The duty of suppliers (such as medical schemes that supply medical scheme cover) to not engage in “unconscionable conduct”
- Not to be faced with false, misleading or deceptive representations
- Not to be offered to participate in fraudulent schemes
- Provisions on pyramid and related schemes
- The consumer’s right to assume supplier is entitled to sell goods
- Provisions on auctions
- The consumer’s rights in relation to changes, deferrals, and waivers and substitution of goods

What should happen in cases of over-selling and over-booking

Unconscionable conduct

Section 40 of the CPA prohibits a supplier (medical scheme) or an agent of the supplier (such as a broker, administrator or managed care company) from using:

- physical force;
- coercion (i.e. forcing you to, for example, upgrade your medical scheme option to access benefits);
- undue influence (e.g. trying to influence you in an improper way to accept a specific decision, or to threaten you with some adverse consequence if they continue to pursue something)

- pressure;
- duress (i.e. causing you stress);
- harassment (i.e. unwanted and unwarranted, often repeated, remarks that leads you to feel that you are being victimized or blamed);
- unfair tactics (e.g. promising you something which changes your decision).

Suppliers are also obliged under the CPA to take special care to protect the consumer who are physical or mental disabled, illiterate, ignorant, unable to understand the language of an agreement, or who are subject to any other similar factor. Consumers who are patients who are ill could also fall into this category, as vulnerable persons.

False, misleading, deceptive representations

Section 41 of the CPA applies to all words and behaviour of a supplier, its employees, agents etc. It prohibits:

- False, misleading or deceptive representation concerning a material fact to a consumer, such as the extent of cover actually provided.
- The use of exaggeration, innuendo, ambiguity or deception in relation to a material fact, such as using words such as “the best low-cost cover ever”.
- The supplier from keeping quiet if there is an apparent misapprehension on the part of a consumer, such as where it becomes clear that the consumer misunderstood the specific cover actually provided, or misunderstood that one product on a medicine is “exactly the same” as another, where it is not.

False, misleading or deceptive representation and the failure to correct, is defined to refer to, amongst others:

- any particular status, affiliation, connection, sponsorship or approval relating to the goods or services that it does not possess;
- any ingredients, performance characteristics, accessories, uses, benefits, qualities, sponsorship or approval that they do not have;
- any particular standard, quality, grade, style or model;
- goods that are said to be new or unused, if they are not or if they are reconditioned or reclaimed
- goods that have been used for a period to an extent or in a manner that is materially different from the facts;

- that the necessary service, maintenance or repair facilities or parts are readily available for or within a reasonable period, whereby it is not;
- that a specific price advantage exists where it does not;
- a charge or proposed charge is for a specific purpose;
- etc.

Fraudulent schemes and offers, pyramid schemes

Section 42 prohibits persons from pretending that they, or their communications are authorized by another person, or has been done by such other person. It also prohibits a fraudulent currency schemes, fraudulent financial transactions, the fraudulent transfer of property or legal rights or any other scheme declared by the Minister to be fraudulent.

Supplier entitled to sell goods

Section 44 gives consumers the right to assume that the supplier has the legal right, or the authority of the legal owner, to supply the goods.

Examples

A When communicating with its members, the medical scheme, or its agent (administrator or managed care company), has to be careful to not force the member into a certain situation. For example, the manner in which you are being told that you have to change treatment or service provider, otherwise you'll have to co-pay, or "if you do not comply, we will take this off your savings account", could constitute unconscionable conduct. The way in which recommendations as to changes in options, assessments as to the persons healthcare and processes are explained, are critical. It should not force you to take any particular direction.

Scheme agents, such as call centre staff and staff that handle pre-authorisations, for example, should take care when communicating with older persons, vulnerable persons (which could include persons who are very ill) and those who may have a different understanding, whether based on language, literacy or ignorance.

To prevent facing charges of false, misleading or deceptive representations, medical schemes would have to be careful in how their offerings are worded and explained. "Full" or "comprehensive" cover may be understood differently by different persons, and could easily mislead. Sometimes monetary values are placed on certain types of treatment. "Oncology benefits up to R100 000" may sound like a lot to many consumers, but it may not be sufficient to treat certain cancers and may also be subject to the use of only certain types of medicine or at certain places. The same would go for the description of service providers as "accessible" or "nationwide", or "within easy reach". The use of phrases such as "value for money" or "cost-effective care" should also be considered carefully. Sometimes "cost-effectiveness" means "cheap", or only includes an evaluation of what one portion of healthcare costs, and not all costs.

Medical schemes are therefore under a duty to communicate in an open and complete manner on benefits, such as making clear the legal entitlements of medical scheme members as found in medical scheme legislation.

Substitution of goods (in most cases medicine and medical devices) may take place as a result of the policies of a medical scheme. Schemes may have lists of preferred medicines and equipment in place, and require of healthcare providers (doctors, hospitals, pharmacists) to rather use those than other products. Such substitution should be agreed to be the consumer in terms of the CPA.

The over-booking or over-selling provision could impact the appointment of designated or preferred providers. Where such provider, in spite of being designated or preferred, cannot deliver the goods or service, i.e. is fully booked, has a long waiting list, etc., this fact could be regarded as a breach of contract and certain monies, as described in the Act, could be claimed back by the consumer. Medical Schemes legislation states that where the preferred provider (doctor, hospital or pharmacy) of the scheme is not available to deliver the service (e.g. as a result of being over-booked), the member of the scheme can go to another provider without having to pay anything extra.

Changes, deferrals, waivers, substitution of goods

Section 45 states that where a substitution or change has been agreed to by both parties, the supplier must prepare and deliver to the consumer an amended agreement or sales record, describing the substituted goods, but without making any other changes to the original document.

Over-selling and over-booking

Section 47 prohibits a supplier from accepting payment or other consideration if the goods or services cannot be supplied or cannot be supplied in the promised manner or form or on the specified date or at a specified time. The consumer can then demand any amount paid in respect of that commitment or reservation in addition to compensation for the consumer for costs directly incidental to the supplier's breach of the contract.

The Pharmaceutical Industry Association of SA (PIASA) is a trade association of companies involved in the manufacture and/or marketing of medicines in South Africa. The membership includes a broad representation of foreign multinational pharmaceutical companies and local and generic companies, both large and small.