**Section 2005.40 Application of the Definition**

a) In applying Section 2005.30 to determine if an insured received consultation, advice or treatment from a physician for a disease, illness, sickness, malady or condition, the consultation, advice or treatment must be clearly indicated in the insured's medical records or from the statements of the insured's legally qualified physician or other relevant evidence.

1) If an application contains conflicting answers, or if an answer is clearly incomplete, the insurer has an obligation to investigate further. For example, if a question about medical history is answered with the name of a physician, but there is no statement concerning the condition treated or the reason for the visit, the insurer has an obligation to investigate further. An insurer failing to make that investigation and then taking appropriate action would be estopped from using a "pre-existing condition" or "pre-existing illness" as grounds for denying the claim or rescinding the policy for the particular disease, illness, sickness, malady or condition.

2) If a particular disease, illness, sickness, malady or condition was not diagnosed by a legally qualified physician before the effective date of the coverage for the insured, but symptomatology was evident regardless of consultation, advice or treatment by a legally qualified physician, the disease or condition will not be considered pre-existing if there were interrogatories appropriate to the symptoms on the application for insurance and if the symptoms were disclosed on the application for insurance and the insurer did not make an investigation and take appropriate action.

3) If there was no application or the interrogatories on any application for insurance were not appropriate to the symptoms, a legally qualified physician must decide if the symptomatology was sufficient prior to the effective date of the policy to make a diagnosis and demonstrate manifestation of the disease, illness, sickness, malady or condition.

4) In the administration of this Section, if the Medical Director, similar employee or other physician retained by the insurer who qualifies as a legally qualified physician decides the medical questions of Section 2005.30(a)(2) or (a)(3), the physician shall notify either the insured or his or her attending physician or other legally qualified physician of the insured of all of the relevant facts supporting the decision. If the attending physician or other legally qualified physician of the insured offers facts that demonstrate there is good reason that the disease, illness, sickness, malady or condition did not exist prior to the effective date of coverage for the insured, the definition of a pre-existing illness must be construed favorably for the insured.

b) A legally qualified physician is a physician as defined and licensed under the Medical Practice Act [225 ILCS 60].

c) The insurer may rescind a policy only if it can demonstrate the insured has withheld material information or answered material questions incorrectly on an application that would have resulted in the insurer, at the time of original application:

1) denying coverage; or

2) restricting (i.e., decreasing) the level or coverage applied for; or

3) rating up (i.e., increasing) the premium normally charged for the coverage applied for.

d) No answers to questions in an application for insurance such as "Are you in good health?" or "Are you free from disease or impairment?" shall be used alone to rescind the policy unless the false answers to those questions, along with the other evidence, clearly demonstrates justification for rescission of the policy.

e) After the coverage for the insured has been in effect for two years, the coverage may not be rescinded except for fraud. To establish fraud, the insurer must meet the requirements of Illinois law in this regard.

(Source: Amended at 38 Ill. Reg. 2132, effective January 2, 2014)