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BOARD OF HEALTHCARE FUNDERS

# FRAUD, WASTE 2025 AND ABUSE INDABA

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# Legalities of AODs

Michelle Beneke



## Section 59

### 59. Charges by suppliers of service.

- (1) A supplier of a service who has rendered any service to a beneficiary in terms of which an account has been rendered, shall, notwithstanding the provisions of any other law, furnish to the member concerned an account or statement reflecting such particulars as may be prescribed.

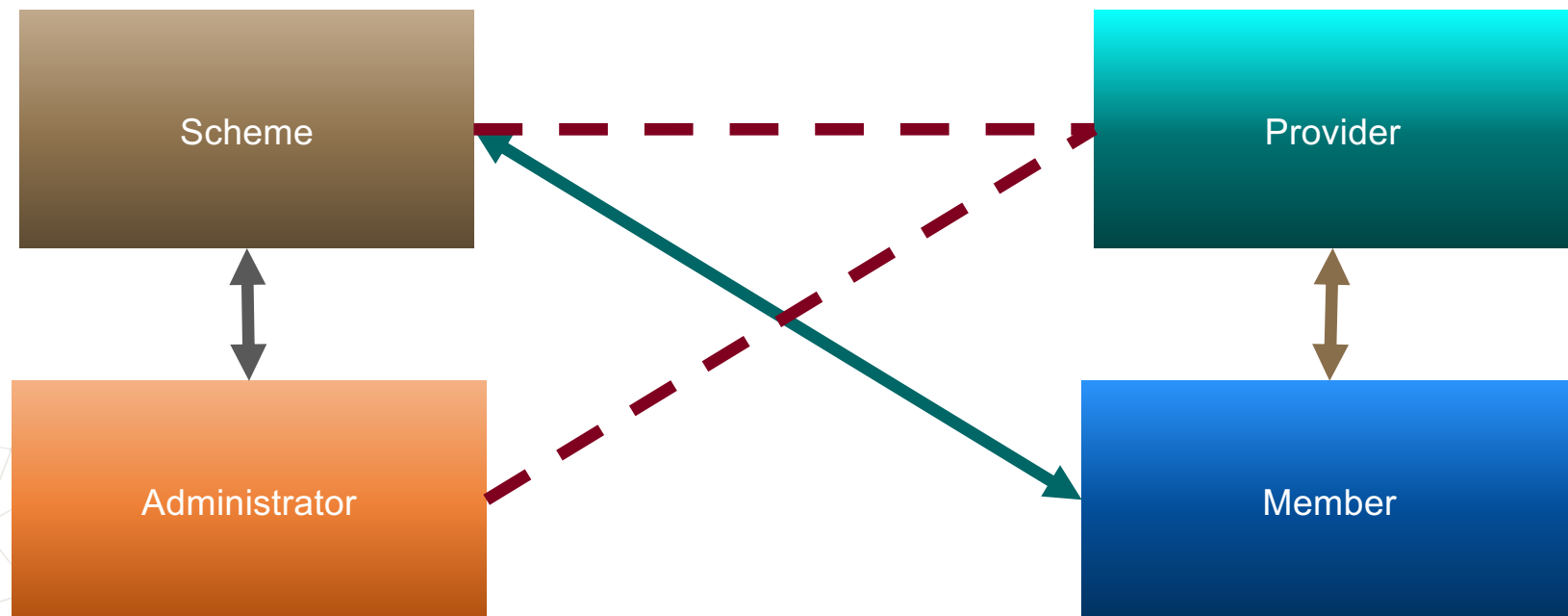
[Sub-s. (1) substituted by s. 24 of Act No. 55 of 2001.]

Wording of Sections

- (2) A medical scheme shall, in the case where an account has been rendered, subject to the provisions of this Act and the rules of the medical scheme concerned, pay to a member or a supplier of service, any benefit owing to that member or supplier of service within 30 days after the day on which the claim in respect of such benefit was received by the medical scheme.
- (3) Notwithstanding anything to the contrary contained in any other law a medical scheme may, in the case of—
  - (a) any amount which has been paid *bone fide* in accordance with the provisions of this Act to which a member or a supplier of health service is not entitled to; or
  - (b) any loss which has been sustained by the medical scheme through theft, fraud, negligence or any misconduct which comes to the notice of the medical scheme, deduct such amount from any benefit payable to such a member or supplier of health service.



# Healthcare funding relationships





# Purpose of AOD

- Binding contractual obligation
- Set-off
- Agreement on quantum
- Liquid document
- Often conditional:
  - Full and final settlement
  - No further action



# Contractual challenges - AODs

- Contract – normal contractual defences
  - Duress
  - Undue influence
  - Mistake
  - Illegality
    - National Credit Act
      - Applies to every credit agreement at **arm's length** excluding:
        - Agreement between juristic persons where threshold exceeded
        - Shareholder loans
        - Parties are natural persons in familial relationship
        - Other arrangement where parties not independent – do not strive to extract utmost possible advantage from transaction or not dealing at arm's length
    - Section 8(4) – **payment of an amount owed is deferred and any charge, fee or interest is payable**
    - **Registration** as credit provider – section 42



# Test for duress

- Arend & Another v Astra Furnishers [1974] 1 All SA 522 (C)
  - **Threat of considerable evil** to person or his family
  - Actual **violence**/ reasonable fear of violence
  - **Imminent threat/ inevitable evil + induced fear**
  - Threat/intimidation is **unlawful** or against public policy
  - **Contract concluded as a result** of duress





# Applied in medical schemes environment

- Medscheme Holdings (Pty) Ltd & another v Bhamjee [2005] 4 All SA 16 (SCA)
  - **Undertaking extracted by unlawful/unconscionable threat of some considerable harm is voidable**
  - **Schemes have considerable power** when dealing with healthcare service providers – depend for economic survival on claims being paid by the scheme
  - **Does economic pressure constitute duress?**
    - **Not unlawful** to cause economic harm/ruin – competitive economy
    - **Commercial bargaining** – expectation of gain vs fear of loss
    - **Hard bargaining is not economic duress even if power imbalance**
    - Duress requires more
  - **No overreaching by Medscheme-** not attempting to extract monies not due
  - **Technicality**





## Section 59 Investigation Panel interim report findings and recommendations

- Trend to favour AODs rather than other action
- Economic duress
  - Power imbalance: Barkhuizen v Napier: extent to which freely and voluntarily concluded
  - Seriousness of consequences of not concluding AOD
- Financial incentivisation
- Similar to policing sector
- Public power – lawful, reasonable, and procedurally fair
- Proceed with caution and implement mechanism to ameliorate risk to providers agreeing to AODs under duress



# Offences - MSA

- Submission of a claim for a benefit knowing it to be false – section 66(1)(b)
- False representation of any material fact to a medical scheme to determine any right to a benefit – section 66(1)(c)
- Rendering statement or invoice knowing it to be false or claiming a benefit greater than the benefit to which member entitled in terms of the rules – s66(1)(e)
- Guilty of offence
- Sanction:
  - Fine
  - Imprisonment ≤ 5 years
  - both





# Prevention of Organised Crime Act 121/1998 (POCA)



Provides inter alia for **recovery of proceeds of unlawful activity**

## “Unlawful activity”

- Conduct which constitutes a crime
- Contravenes any law
- Before or after commencement of Act
- In RSA or elsewhere

A person is **assisting another to benefit from the proceeds of unlawful activities** if:

- **Knows/ought reasonably to have known**
- Person **obtained proceeds of unlawful activities**
- Enters into an **agreement** with that person:
  - **Retention/control of proceeds of unlawful activities facilitated**
  - Proceeds of unlawful activities used to make funds available to acquire property on his behalf/benefit him in any way
- Guilty of an **offence**



SERVING MEDICAL SCHEME MEMBERS





# Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA)



## “Corruption”

- **In/direct**
- **Acceptance/giving**
- **Gratification** for the benefit of the recipient or someone else
- **Act** personally or influence someone else to act in manner
  - Illegal, dishonest, unauthorised, incomplete, or **biased**
  - Misuse or selling of information/material during course of carrying out powers, duties or functions (constitutional, statutory, contractual, or other legal obligation)
- Amounts to
  - Abuse of position of authority
  - Breach of trust
  - **Violation of legal duty**/set of rules
- Designed to achieve **unjustified result** or is **unauthorised/improper inducement** to do or not to do anything

## Guilty of offence



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# “Gratification” - PRECCA



## Includes:

Avoidance of loss, liability, penalty, forfeiture, punishment or other disadvantage (para (c));

Any other service/favour/advantage including:

- Protection from penalty/disability
- Action/proceedings – civil/criminal
- Whether or not instituted
- Including exercise/forbearance from exercising right or any official power/duty (para (g))



## Employer becomes liable for conduct of employee (section 10)

In respect of act or performance of duties in scope of employment relationship



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## In summary

- No contractual relationship between scheme and provider
- AOD creates contractual relationship but other issues
  - Duress
  - Other contractual challenges
- Section 59 investigation panel interim findings and recommendations not favourable
- Unintended consequences – POCA, PRECCA





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# Questions?