Friday, July 25, 2008

The Honorable Mary Hayashi
State Capitol, Room 2188
Sacramento, CA  95816

Dear Assemblywoman Hayashi,

We understand that you are considering authoring Governor Schwarzenegger’s bill on health insurance rescissions. We are writing to urge you not to do so because the bill violates the Schwarzenegger Administration’s own promise that no innocent patient will ever lose their coverage again.

The bill is fundamentally flawed because it allows insurers to rescind the coverage of innocent patients, and offers patients less protection than they have now in several other ways.

Under the terms of the bill, an insurer can retroactively cancel coverage as long as the company completes “reasonable underwriting” – which the bill largely leaves to the plan to define – prior to rescinding coverage. This is a dramatic departure from the Schwarzenegger Administration’s previous position, which would have required insurers to prove that a patient willfully misrepresented a past health condition before any rescission could be carried out. In 2007, the Schwarzenegger Administration’s Department of Managed Health Care proposed the following standard:

No subscriber contract shall be cancelled or rescinded because of a misstatement or omission in the coverage contract, unless the misstatement or omission is a result of the applicant’s willful misrepresentation and the omitted information would have been a basis for denial of coverage pursuant to the plan’s underwriting criteria, guidelines, policies, and procedures.

Codifying this single sentence into law would make the problem of wrongful rescissions largely self-regulating. Insurers and health plans would no longer bring “gotcha” actions against patients who never knew of, failed to appreciate the significance of, or forget some detail of, a past medical problem.

With such a standard in place it would not be necessary to legislate “reasonable” medical underwriting, “clear” applications, or third party review of rescissions. Each of those terms are unnecessarily complex and skewed to favor the health plans. For example, the reasonableness of
underwriting is by its nature defined on a case-by-case basis. Legislating a standard automatically becomes a ceiling for such reviews. Consider the problems of such an approach:

- The bill repeals Health and Safety Code § 1389.3, which bars the practice of “post claims underwriting.” This will give health insurers the green light to skimp on initial underwriting and scour a patient’s medical records after a patient gets sick – a practice contrary to the very notion of insurance – and rescind coverage even if the patient did not comprehend, or genuinely forgot, the medical fact they are being blamed for omitting on their application for coverage. The bill does not bar insurers from limiting coverage after patients file claims, including by increasing premiums or deductibles, or imposing new pre-existing condition exclusions or waiting periods. Such actions are barred under the existing statute.

- The governor’s bill requires plans to show that a patient willfully misrepresented a health fact only if the plan failed to complete "reasonable" medical underwriting prior to issuing the contract. It is hard to imagine how this would ever occur, given that plans are largely self-defining what constitutes reasonable underwriting. The bill also guts the willful misrepresentation standard by defining willful as "knew or should have known." Who will decide if a patient “should have known” a detail of his or her medical records?

- One section of the bill provides that if doctors did not "inform" patients about a health condition, the patient cannot be rescinded unless an insurer can establish that the doctor actually did inform the patient. This provision is a false protection, and problematic for two reasons: (1) it makes the doctor an agent of the insurer and likely doctors will feel pressured to tell insurers what they want to hear (violating several aspects of H&S Code including §§ 1342 and 1367(g)). (2) "Informing" a patient about an aspect of his or her medical record is very different from achieving patient "understanding" and "appreciation" of its significance and meaning, which is exactly what the existing willful standard is designed to achieve.

- The measure allows plans to tell enrollees that a “material misrepresentation or omission” will justify rescission (§ 1387(a)(2)), rather than telling them that only willful misrepresentation will allow rescission. This will deter people from challenging rescissions. Already, many plans' EOCs specify, and plans may tell enrollees, that misrepresentation will cause them to be referred to law enforcement for prosecution, compounding the chilling effect on any challenges to rescissions.

- Finally, there is no “nexus requirement” to ensure that the rescission relates to the medical problem under review. Patients could be rescinded when they get cancer for the failure to tell the insurer about their arthritis. Or their blood pressure.

Sincerely,

Jerry Flanagan