



*Formerly The Foundation for Taxpayer & Consumer Rights*

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Wednesday, March 26, 2008

Governor Arnold Schwarzenegger  
State Capitol  
Sacramento, CA 95814

Dear Governor Schwarzenegger,

We understand that yesterday your political staff informed the Department of Managed Health Care that it should “pull back” new regulations crafted over the last two years to end the practice of illegal retroactive cancellations of health insurance policies.

We ask that you explain your intentions on this matter before the Senate Health Committee oversight investigation tomorrow. If it is true that your staff has ordered the Department to soften its position toward health insurers, such a move is counter to your public promises and those of your regulator to protect patients. The essence of that protection is that a health insurer may rescind coverage only if a patient lied about their health when applying for insurance.

You personally promised to end health insurance rescissions in your State of the State address this January. You recounted the story of a San Diego man whose insurer rescinded his coverage after he was diagnosed with lymphoma. You said:

The insurance company then went back through all his records looking for a reason to cut him off. They pointed to a minor knee problem unrelated to the cancer. They noted that he now weighed less than he did when he applied for the insurance.

Well, of course, he did. He was now sick with cancer. But they cut him off.

One month after he got sick, the company cancelled his insurance. Todd died eight months later.

We are taking action so that what happened to Todd will not happen to any other Californian.

Patients facing similar mistreatment by their insurance companies will not be protected by an independent review of their rescission alone. If the insurers now pressuring you for a lower rescission standard than the legally-required “willful misrepresentation” succeed, Todd would have been no better off had his

rescission reached an independent review.

Without a requirement that Todd's insurer must have shown that he lied about his medical history before his policy could be rescinded, the company could (and did) simply point to a discrepancy in the medical record – for example, that Todd once had a knee injury or actually weighed less than he claimed to in the application – as grounds for the rescission.<sup>1</sup>

### **DMHC's Support of A Willful Misrepresentation Standard in "All Cases"**

On January 29, 2007 prior to a hearing on health rescissions, Department of Managed Health Care Director Cindy Ehnes told a crowd of reporters that, as reported by the *Los Angeles Times*, that the Department's position is *that the law banned retroactive rescissions unless a health plan could show that a policyholder intentionally lied about his health history on his application for coverage.*<sup>2</sup>

Recently, the Department of Managed Health Care released draft regulations that clearly require a showing of willful misrepresentation before a policy is rescinded:

(b) 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.

In a survey<sup>3</sup> released on March 22, 2007, the DMHC sharply criticized Blue Cross of California for "routinely rescinding health insurance policies in violation of state law." In the report, the DMHC argued that § 1389.3 requires a showing of *willful misrepresentation* in all cases before a health plan may rescind any enrollee's coverage. The survey found that out of 90 patient complaints reviewed, Blue Cross illegally rescinded coverage in each case by failing to show willful misrepresentation. According to page two of the report,

"[i]n all 90 case files, there was no evidence [that Blue Cross], before rescinding coverage, investigated or established that the applicant's omission/misrepresentation was willful."

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<sup>1</sup> According to Blue Cross' overly broad underwriting criteria, too low weight is grounds for refusing coverage. See:

<http://www.consumerwatchdog.org/healthcare/pr/?postId=7218>

<sup>2</sup> Lisa Girion, "Health plan review may be intensified; the state's top HMO regulatory calls for outside oversight of insurers' attempts to drop policyholders," *Los Angeles Times*, January 30, 2007.

<sup>3</sup> DMHC Final Report, Non-Routine Medical Survey of Blue Cross of California Available at: [www.dmhc.ca.gov/library/reports/med\\_survey/surveys/303full032307.pdf](http://www.dmhc.ca.gov/library/reports/med_survey/surveys/303full032307.pdf)

On page four of its *amicus curiae* brief for the *Hailey v. Blue Shield* appeal, the Department clearly articulated that,

[b]ecause of the catastrophic consequences of losing health care coverage, and in furtherance of the consumer protection purpose of the Knox-Keene Act, the Legislature enacted § 1389.3 . . . [which] expressly prohibits post-claims underwriting and allows a health plan to rescind coverage only in cases where it has met its burden of demonstrating that the consumer willfully misrepresented his or her health history.

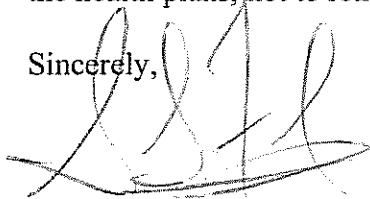
(emphasis added). On page 14, the Department concluded that a showing of willful misrepresentation is necessary even if the health plan conducted pre-issuance medical underwriting:

1389.3 further requires health plans to demonstrate that an applicant willfully misrepresented his or her health history before invoking other remedies such as rescission. That requirement exists in all cases, not just those where the plan failed to resolve all reasonable questions arising from the information submitted on or with the application.

(emphasis added).

The people of California are counting on you to stand up to the bullying tactics of the health plans, not to retreat. They expect an answer tomorrow.

Sincerely,



Jerry Flanagan  
(310) 392-0522 ext. 319

cc: Senator Sheila Kuehl  
Chair, Senate Health Committee