Rescission of Health Insurance

USA Today, "Sicko" and the Law

By Jerry Hartzell

My thesis is that when a consumer fills out a health insurance application in good faith, a health insurance policy is issued, and the consumer reasonably believes she has health insurance, then the insurance policy should not be subject to retroactive cancellation, even if the application contains inaccurate information that the insurer regards as material. I further suggest that insurer rescissions under such circumstances often happen only because they are not effectively opposed.

Public Perception: *USA Today, Sicko*

Rescission (retroactive cancellation) of health insurance policies appears to be a significant issue in healthcare, judging from the attention the subject has received in the media. On Jan. 29, 2007, the lead story in *USA Today* was titled "People Left Holding Bag When Policies Revoked." The article featured the stories of three individuals whose policies were rescinded when the insurer engaged in close analysis of application information after a claim had been presented. The resulting retroactive cancellation was "the most devastating thing that's ever happened to us," according to one of the consumers.

Michael Moore's "Sicko" begins with examples of what is wrong, in his opinion, with the American healthcare system. Roughly 20 minutes into the movie, we are presented with an interview of a former employee of a health insurance company who describes his old job: going through policy applications after claims have been filed to identify bases on which coverage can be cancelled retroactively. The insurer is not identified, but the scene leaves the impression that health insurers are disingenuous nit-pickers, searching for ways to deny consumers the security they thought they had obtained.

On June 17, 2007, "Good Morning America" featured Diane Sawyer and a reporter addressing rescission, which they defined as "a controversial practice where insurance companies retroactively cancel the policy, often after you're trying to make a claim." *Money* Magazine's Feb. 13, 2007, issue also included a story about rescission, titled "The Neutron Bomb of Health Insurance."

A North Carolina Story: Jane Doe of Cary

All of this background information brings me to the story of my client, a real person presented under a fake name. Jane Doe is 51 years old, holds a degree in toxicology from North Carolina State University, is a registered nurse, and works in medical research. In 2005, Jane and her family were dismayed by the rising premiums for the health insurance offered by Jane's employer. Jane decided to obtain health insurance from an out-of-state insurer. One of the questions on the policy application inquired whether Jane had ever had any "condition of the breast." It turned out that Jane had, in fact, been told a year earlier that she had "microcalcifications of the [left] breast (disorganized)." She was told no treatment was required and that this condition was not indicative of future problems. Jane forgot about the statement when she filled out the application for health insurance.

Subsequent to Jane obtaining coverage, she was diagnosed with cancer and underwent a mastectomy procedure. After the insurer was presented with bills for Jane's mastectomy and follow-up treatment, the insurer reviewed Jane's prior medical records. It found the reference to microcalcifications

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case, the signed copy of the form is to be included in the patient's medical record, and the patient/patient representative signature field on the original MOST form should indicate "on file." N.C.G.S. § 90-21.17(b).

♦Designates information that must be included on the MOST form, including information about the patient, the licensed health care professional completing the form, the designated health care choices of the patient, the effective date of the form, and dates on which the was reviewed, among other information. N.C.G.S. § 90-21.17(c).

♦Requires a statement warning patients that a valid MOST form may, while the MOST is in effect, suspend or supersede conflicting directions in a patient's previously executed living will, health care power of attorney or other similar instrument. (This creates the potential for confusion and will require careful discussion with patients or their surrogates.) N.C.G.S. § 90-21.17(c).

♦Requires a statement that patients are not required to have a MOST to receive medical care. N.C.G.S. § 90-21.17(c).

♦States that the MOST form should be a universal, portable form similar to the universal Do Not Resuscitate form. N.C.G.S. § 90-21.17(c).

♦Requires that the Department of Health and Human Services develop a standardized MOST form, which is expected to be closely based on one already developed by the N.C. Medical Society and the NCBA. N.C.G.S. § 90-21.17(c).

♦States that no provider may be found civilly or criminally liable, or face professional disciplinary action, for relying upon a valid MOST form, absent actual knowledge of its revocation or reasonable grounds to doubt its validity. N.C.G.S. § 90-21.17(d). ■

BURGESS IS A HEALTH CARE ATTORNEY IN THE RALEIGH OFFICE OF POYNER & SPRUILL LLP.

and sent Jane a letter stating that her health insurance policy was being rescinded for misinformation on the application.

During appeals to the insurer, we presented affidavits from both Jane and her treating physician that the calcifications should not be regarded as a "condition of the breast." We pointed out that there was no relation between the calcifications (noted in the left breast) and the cancer (found in the right breast). Our arguments were initially rejected. On a second stage internal appeal, the insurer reversed course and reinstated Jane's coverage.

The insurer's rescission of the coverage could have been financially catastrophic for Jane and her family. Jane and her family lacked the financial wherewithal to pay for the surgery and follow-up treatment, particularly at the rates applied to patients who lack insurance. Moreover, cancellation of the policy by the insurer meant that Jane could not obtain insurance coverage from other sources due to the pre-existing condition exclusion. Even though the hospital and cancer treatment center were supportive, and had not pressed for payment, the bills remained outstanding.

The insurer's decision to retract its rescission was welcome news. We attributed the retraction to our plainly stated intent to proceed with litigation, to a poorly worded application, and to support from Jane's doctor, who said that the microcalcifications were no more a "condition" of the breast than a freckle was a condition of the skin.

The Application Process

Health care is complicated. A consumer applying for insurance coverage should know whether she has recently had major surgery, or whether she has been diagnosed with a condition that is significantly life-altering or life-threatening. Beyond that, however, people may or may not remember everything their doctors have told them. Conditions for which a consumer is not currently receiving care, and which are not serious, are not likely to make a lasting impression.

North Carolina law does not require unique facts, such as those of Jane's case, to overcome a health insurer's efforts to rescind coverage. If "the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge thereof, and has been guilty of no bad faith or fraud," then rescission is not warranted. **Jones v. Home Security Life Insurance Co.**, 254 N.C. 407, 413, 119 S.E.2d 215, 219-20 (1961) (quoting and endorsing rule concerning effect of false information inserted into a life insurance application by an agent).

Moreover, there is no reason that policy applications, like policies themselves, should not be construed against the insurer. This is a form of the general rule that "any ambiguity in the meaning of a particular provision will be resolved in favor of the insured and against the insurance company." **Maddox v. Colonial Life and Accident Insurance Co.**, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981).

Promising Results

California Blue Cross reportedly has settled a class action dealing with health insurance rescissions, according to the May 13, 2007, issue of *USA Today* and a series of articles in the *Los Angeles Times.* This development is a hopeful sign. North Carolina has law that may support a similar, or more pro-consumer, result. **Pearce v. American Defender Life Insurance Co.**, 316 N.C. 461, 343 S.E.2d 174 (1986) concerned a life insurer that made representations about coverage that were more expansive than the policy itself provided. Claims based on waiver and estoppel were repeatedly rejected, but the North Carolina Supreme Court ultimately decided that the insurer's mischaracterization of policy terms, even though innocent, should be remedied as an unfair trade practice. If insurer behavior with respect to rescission exceeds the bounds of what is fair, such behavior may be subject to the same remedy.

Over time, the law tends to conform itself to social expectations grounded in vaguely defined, but nonetheless real, notions of fairness and reasonableness. I suggest that societal expectations will not condone health insurers' after-the-fact nit-picking over applications. If the consumer has a good-faith and reasonable basis for the answers that he or she provides on an application, then the insurer should not, under North Carolina law, be permitted to rescind the consumer's policy after a claim has been filed.

A Plea for Advocacy

If our healthcare system is going to work as intended, innocent mistakes on health insurance applications should not be permitted to defeat coverage. Consumers need to fight health insurance rescissions, and lawyers need to help them. It is not just the consumers' money that is at risk; healthcare providers are also at risk of not getting paid when health insurance is rescinded.

Consumers in Jane Doe's situation are rarely going to be in a position to pay an hourly fee for a lawyer, just as such consumers are rarely in a position to pay $100,000 hospital bills. When health problems strike a family, financial problems abound. Consumers who have been paying for health insurance coverage generally will not be below the poverty level, and, therefore, will not typically be eligible for assistance from Legal Aid. Contingency fee arrangements will require the concurrence of healthcare providers, because the money in controversy is money to be paid to providers.

Healthcare providers and consumer lawyers need to work together in combating unfair health insurance rescissions. If rescissions are as substantial a problem as media reports suggest, occasional pro bono representation of insureds will not provide a sufficiently effective means through which rescissions can be challenged. And if lawyers are to take these cases, providers will need to be willing to let lawyers get paid out of the recovery. ■

HARTZELL IS A PRINCIPAL IN THE FIRM OF HARTZELL & WHITEMAN, LLP, LOCATED IN RALEIGH.