

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CINDY HAILEY et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA PHYSICIANS' SERVICE,

Defendant and Respondent.

G035579

(Super. Ct. No. 03CC01789)

ORDER MODIFYING OPINION
AND DENYING PETITION
FOR REHEARING; NO
CHANGE IN JUDGMENT

It is ordered that the opinion filed herein on December 24, 2007, be modified as follows:

1. On page 1, the counsel listing for California Department of Managed Health Care is modified to read:

Amy L. Dobberteen, Patricia T. Sturdevant and Lotte Colbert for California Department of Managed Health Care, as amicus curiae on behalf of Plaintiffs and Appellants.

2. On page 4, first sentence of the first full paragraph, beginning "Before issuing a contract" is deleted and the following sentences are inserted in its place:

Blue Shield underwrites all applicants for individual coverage by reviewing and analyzing the information contained in the applications submitted. According to declaration of Margie Macale, a Blue Shield medical underwriter, an applicant's medical history and current medical conditions are assigned a point value.

3. On page 4, third sentence of the second full paragraph, delete the words “a Blue Shield” and insert the word “an” in its place so that the sentence reads:

Learning Blue Shield would cover her family’s physician, she contacted Timothy Patrick, an insurance agent, who sent her an application.

4. On page 5, second sentence of the second paragraph, beginning with “Based on this claim,” is deleted and the following sentence is inserted in its place:

Because of this development, on February 8, 2001, Blue Shield’s medical management department referred the Haileys’ contract to Judith Crary of its “Underwriting Investigation Unit” which, as Crary describes in her declaration, “investigates potential fraud by Blue Shield subscribers.”

5. On page 5, following the end of the last sentence of the second paragraph, which concludes, “gastroesophageal reflux disease,” add the following new sentence:

Based on the information obtained from Steve’s medical providers and Blue Shield’s underwriting guidelines, Crary determined the Haileys intentionally misrepresented and concealed Steve’s medical information.

6. On page 5, first sentence of the third paragraph, the word “permanently” is changed to “completely” so the sentence reads:

On March 19, 2001, an automobile accident left Steve completely disabled.

7. On page 6, the first full paragraph is deleted, beginning with “After Blue Shield cancelled the policy,” and ending with “resulted in further surgery and medication,” and the following paragraph is inserted in its place:

After Blue Shield cancelled the policy, the Haileys could no longer afford nursing care or physical therapy for Steve. In addition, third party medical providers demanded the Haileys pay for medical care previously

provided. Blue Shield's rescission of the health care plan contract caused Steve delays in obtaining necessary medical care. Steve subsequently lost the use of his bladder, which he contends is permanently nonfunctional. Steve also asserts the lack of physical therapy has impaired his ability to walk, increased his pain, and resulted in further surgery and medication.

8. On page 9, first sentence of the first full paragraph, the phrase "health care provider's ability" is changed to "health care service plan's ability."

9. On page 10, second line of the first partial paragraph, after the sentence ending in "omission of Steve's health information," add the following sentences:

Her belief that Steve's medical information was unnecessary in obtaining health insurance also negates an inference that her understatement of Steve's weight on the application was willful. Similarly, Steve's misplaced reliance on Cindy to accurately complete the application also negates an inference of willfulness.

10. On page 11, first sentence of the second full paragraph, the phrase "receiving a claim stemming from" is deleted and replace it with "learning of" so the sentence now reads:

In the present case, the record demonstrates Blue Shield conducted an extensive investigation into Steve Hailey's medical history after learning of Steve's hospitalization for intestinal ailments.

11. On page 12, third sentence of the first full paragraph, the word "provider" is changed to "plan" so that the sentence reads:

But can a plan "complete medical underwriting" within the meaning of section 1389.3 by blindly accepting the responses on a subscriber's application without performing any inquiry into whether the responses were the result of mistake or inadvertence?

12. On page 13, first sentence of the first full paragraph, replace the phrase “health plan providers” with “health care service plans.”

13. On page 13, first sentence of the second paragraph, the word “a” is to be inserted between the words “had” and “Blue” and also delete the “s” on “Shield’s” so the sentence now reads:

Assuming the truth of the Haileys’ evidence, the tragic situation in which they now find themselves could have been averted had a Blue Shield agent or underwriter simply asked Cindy if she had included information for her husband and son.

14. On page 13, second sentence of the third paragraph, the word “provider’s” is changed to “insurer’s” so the sentence reads:

There, the Illinois Court of Appeals upheld rescission of a health services agreement where the insurer’s investigation — undertaken after the subscriber was diagnosed with terminal stomach cancer — revealed the insurance broker failed to disclose the subscriber’s diabetes in the application.

15. On page 14, last sentence of the first partial paragraph, the word “provider” is changed to “insurer” so the sentence reads:

Although recognizing the general principle of postclaims underwriting, the court concluded Illinois law did not require the insurer to perform a preclaims investigation of the subscriber’s health.

16. At the end of the first partial paragraph on page 15, after the sentence ending “under any definition of the term,” add as footnote 6 the following footnote, which will require renumbering of all subsequent footnotes:

⁶Our observations regarding the difficulty a court faces in returning to the status quo a health care subscriber who has suffered a serious illness

or injury are made to illustrate the backdrop of section 1389.3, and are not intended to declare a change in the law of rescission in California.”

These modifications do not change the judgment. The petition for rehearing is DENIED.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.