LAW & MEDICINE

Rescinding Health Insurance

When he was asked about corporate America during one of his speeches on the presidential campaign trail, former Democratic candidate John Edwards noted, "They don't give the layperson anything; it has to be taken from them." How true this admonition and observation is when it comes to the plight of health plan members whose health insurance coverage is rescinded just when medical bills come due. The "poster child" for this problem seems to be Health Net Inc. of Woodland Hills, Calif.—for good reason.

BY MILES J. ZAREMSKI, J.D.

On Feb. 21, 2008, California resident Patsy Bates was awarded $9 million in an arbitration proceeding involving Health Net. Ms. Bates had a health insurance policy from another company, but was convinced by an insurance agent to try Health Net. She applied for the new policy in July 2003, and Health Net approved her new policy effective Aug. 1. In September of that year, she was diagnosed with breast cancer. Three months later, Health Net asked that she elaborate on certain answers she gave on her enrollment application. In January 2004, Health Net sent Ms. Bates a letter telling her it was rescinding her health insurance policy. This left her, at the time of the arbitration, with unpaid medical bills totaling nearly $130,000.

Bates sued Health Net for breach of contract, and breach of the duty of good faith and fair dealing. She also claimed that by rescinding her policy, Health Net was guilty of oppression, fraud, or malice.

Evidence presented during the arbitration indicated that after Ms. Bates filled out and signed her application, her agent changed what she gave as her weight; however, he did not tell Ms. Bates about the change, nor did he have her approve the change in writing, as required by law.

One of the standards Health Net used for reviewing applications pertained to weight, that is, if an applicant over age 50 weighed more than 198 pounds, the application could be declined, or "rated a "+50." Although Ms. Bates' actual weight was not mentioned in the arbitration record, it appears the agent changed the weight listed on the application from another amount to 185. Ms. Bates' application was initially approved without further investigation or follow-up.

Ms. Bates was a victim of one of the frequent "rescission investigations" performed by Health Net employees. Information omitted from an application, even by mistake, could be grounds for rescission, and employee bonuses were tied to the rescission investigations. "It's difficult to imagine a policy more reprehensible than tying bonuses to encourage the rescission of health insurance that helps keep the public well and alive," wrote the arbitrator in the case.

Ms. Bates claimed that the rescission of her policy was in bad faith because it was based upon the information supplied in the initially approved application. If there was a problem, it should have been investigated before the policy was issued so that if it was declined, she could still keep her previous coverage.

The arbitrator concluded that Health Net was more concerned with its own financial interests than concerns for the interests of Ms. Bates. The award covered Ms. Bates' medical expenses, emotional distress, and nearly $8.5 million in punitive damages. According to one newspaper article, this ruling was the first of its kind, and the most powerful rebuke to California's major insurers concerning the practice of rescinding health insurance policies.

A day before the Bates decision came out, the Los Angeles City Attorney filed a 47-page lawsuit against Health Net and its various entities for claims based on unfair competition and false advertising (Dkt. No. BC385816, Sup. Ct., Cty. of Los Angeles). The thrust of this lawsuit is that coverage provided by Health Net and its member companies is largely illusory because they rescind coverage upon submission of a substantial claim for benefits, as was the case with Ms. Bates. That suit is ongoing.

For its part, Health Net reported that it paid out claims in excess of $200 million in 2006 and that its program of tying bonuses to number of rescinded health insurance contracts has been dropped. The company also said that it has halted cancellations and that it would be changing its coverage applications and retraining its sales force.

Health Net is not the only California insurer in the crosshairs of legal scrutiny. Los Angeles City Attorney Rocky Delgadillo announced in April that he is suing Anthem Blue Cross for illegally canceling the policies of more than 6,000 California residents. There is also the year-old class-action suit against Anthem for canceling policies, and a case joined in last year by the largest organizations representing California doctors and hospitals, accusing the state's largest health plan of illegally and routinely refusing to pay millions of dollars for medical care provided to enrollees whose policies were later canceled.

Then, of course, there was the much-publicized decision earlier this year when Cigna HealthCare denied a liver transplant for a 17-year-old girl in California. The insurer then changed its mind, but it was too late—the girl died a few hours after the reversal was announced. Another insurer decided that after years of paying for nursing care for a badly disabled boy, the boy no longer needed it, even though he suffered from severe brain damage and was unable to walk, sit up, speak, or eat by mouth.

California's Department of Managed Health Care is trying to help people get their policies back. In mid-April, the department announced that it was ordering immediate reinstatement of policies for 26 consumers whose policies the department found were wrongfully rescinded. The department is also ordering a re-review of all other rescissions over the past 4 years as part of its ongoing investigation into the rescission practices of five of the largest health plans that offer individual coverage to state residents.

From all these examples, one could assert that there is a problem in California with insurers' wanting to get out of insurance contracts once an illness or treatment has occurred. But is it an epidemic, or is this problem of rescission limited to California? Evidence has not suggested the problem is "systemic" nationwide, but where there is smoke, there surely is fire. One thing is certain: Insurers seem to be playing the "blame game"—blaming consumers for not filling out applications for coverage properly when these companies have failed to properly investigate the contents of those applications. Ain't that the American way now—place blame on others for your own failings?

Equally noteworthy is that when insurers rescind health coverage due to their own shortcomings, they can still retain premiums paid by patients or employers, deny payments to doctors and health care facilities for care rendered—and perhaps then make their profit margins even heftier. Moreover, buying insurance to protect against a loss or risk is the expectation of *only* those who buy the insurance—and also, perhaps, the physicians who treat patients because they have certain insurance coverage; they are expecting to be paid by that insurer. Another perspective exists, however: to see how inventive an entity protecting against that risk can be to deny or limit the coverage purchased, and to find ways to preclude the doctors who treat those patients from getting paid.

In the end, maybe the Latin, *caveat emptor*, might be worth thinking about. However, it should never come to this, since the insurance laws of any state in which an insurer wishes to write health policies should be inclusive of a provision or two barring cancellations or rescissions of policies based on innocent or negligently made mistakes done by the insured or anyone acting on behalf of the insured in filling out an application for insurance.

Regardless of what remedies are put in place, a perception also certainly exists that rescission of health care coverage only adds to the woes of the health care crisis now engulfing our economy and nation today. But what is important for the reader to know is that maybe health insurers do not insure medical disease or injury, but instead ensure that they will avoid risks themselves once a patient makes a claim. ■

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Congress to AMA: Long-Term SGR Fix Unlikely This Year

BY JOEL B. FINKELSTEIN
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WASHINGTON — Physicians can look for another short-term update to the sustainable growth rate this year as lawmakers struggle under substantial fiscal constraints, members of Congress told physicians at the American Medical Association's national advocacy conference.

"What would be best for me, for everybody in this room, and for the older Americans under the Medicare system is to do a permanent fix. What my gut is telling me is that, at best, we will do an 18-month fix," said Rep. Shelley Berkley (D-Nev.).

Congress passed a 6-month update to the Medicare physician payment rate late last year and have until July 1 to avert a 10.6% cut for the remainder of the year. However, under current federal spending rules, lawmakers will have to offset any increases to physician pay by cutting another program or raising taxes.

"If under the law, the physicians are set to receive a 10% cut, if we restore that 10%, we have to come up with the money somewhere. That's why the solutions generally tend to be short term," said Sen. Jon Kyl (R-Ariz.), who serves on the Finance Committee.

For example, the proposed 18-month fix that would keep physician pay steady through 2008 and raise it 1% in 2009 would cost $37.5 billion over 5 years.

By comparison, a 6-month fix, like the one passed last year, would cost $8.4 billion, saving lawmakers nearly $30 billion in offsets.

That's the easier solution, Sen. Kyl said. "It's not an ideal situation. However, our priority has been and must continue to be averting scheduled cuts and securing a positive update. So we are very short-term oriented."

He added that, while there is currently enough wiggle room in the budget to pay for the 18-month approach, some lawmakers had other priorities for the money.

That fact underscores the need for physicians to get involved in advocating for themselves, Rep. Berkley said.

"The doctors were asleep when things were taking place here in Washington and now you have to be ever vigilant to help us turn back the clock," she said. "Doctors are the lousiest politicians on the planet. You are not good at this, but I encourage you to get good at it." ■