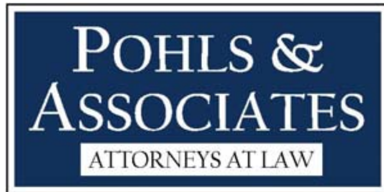

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Health Insurer Faces Potential Class Action Under UCL for Rescissions Based on Misrepresentations in Applications Not Attached to Policies

By Robert R. Pohls

California's unfair competition law (or "UCL") prohibits any "unlawful, unfair or fraudulent business act of practice." Cal. Bus. & Prof. Code §17200. Virtually anything that can properly be called a business practice and, at the same time, is forbidden by law therefore can serve as the predicate for an action under the UCL. See, *Smith v. State Farm Mutual Auto. Ins. Co.* (2001) 93 Cal.App.4th 700.

In *Ticconi v. Blue Shield of California Life & Health Ins. Co.* (Cal.App., Feb. 27, 2008), the insurer rescinded a health insurance policy based upon material misrepresentations allegedly made in the plaintiff's application. Although the plaintiff denied making any material misrepresentations, he also alleged that the insurer could not charge him with any misstatements in the application because it was not attached to the policy when issued. In an effort to state a claim under the UCL, the plaintiff further alleged the insurer had a practice of rescinding policies for misrepresentations in applications that were not attached to the policies when issued.

In part, California Insurance Code Section 10113 prohibits insurers from incorporating an application into a policy by reference unless it was physically attached to the policy when issued. California Insurance Code Section 10381.5 further provides that an insured is not bound by statements made in an application that was not attached to the policy when issued. The Court therefore concluded that, by alleging the insurer was rescinding policies for misrepresentations in applications that were not attached to the policies when issued, the plaintiff had charged the insurer with a business practice that was both unlawful and unfair within the meaning of the UCL.

Relying on the California Supreme Court's decision in *Telford v. New York Life Insurance Co.* (1937) 9 Cal.2d 103, the Court also offered that the insurer's alleged conduct was a form of post-claim underwriting that was separately prohibited by California Insurance Code Section 10384.

At the trial court level, the insurer had successfully argued that the plaintiff's claims should not be certified for class action treatment because factual questions about misstatements others may have made in their applications predominated. The appellate court disagreed, though, both because: 1) insureds are not bound by statements in applications that were not attached to their policies [Cal. Ins. Code §10381.5]; and 2) California courts had long before decided that the equitable defense of unclean hands is not applicable to a UCL claim that is based on the violation of a statute [*Kofsky v. Smart & Final Ins. Co.* (1955) 131 Cal.App.2d 530]. It therefore instructed the trial court to reconsider the plaintiff's motion for class certification.