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Previewing consumer litigation under the Affordable Care Act

Scott Glovsky is a trial attorney in Pasadena. His practice focuses on health insurance bad faith, associating into cases as trial counsel, and representing children with autism and traumatic injuries. You can reach Scott at sglovsky@scottglovsky.com.



The Patient Protection and Affordable Care Act (ACA) - i.e., Obamacare - has created controversy and spurred national debate over the law's insurance mandate. The ACA stretches over 900 pages, contains hundreds of provisions, and provides many new rules governing health insurers. But how will the ACA affect the rights of health insurance policyholders?

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Consumers faced two common recurring problems before the ACA. First, insurers refused to insure applicants, or rescinded policyholders' coverage, due to preexisting conditions. Second, insurers improperly delayed and denied coverage for medically necessary

treatment.

A preexisting condition is a medical condition that someone has before applying for health insurance. Some conditions, like cancer or HIV, are life-threatening. But health insurers have denied coverage to people with hay fever, asthma, a sports injury, or even being a survivor of domestic violence. Health insurers have also used preexisting conditions to deny insureds treatment by rescinding their coverage for preexisting conditions. This is known as "post claims underwriting." The practice of denying or rescinding coverage based on a preexisting condition has forced millions of the most vulnerable Americans to either go without necessary treatment or face financial ruin.

Health insurers also have a history of wrongfully delaying and denying coverage. Health insurers have repeatedly denied medically necessary treatment for autism, eating disorders, cancer, mental health disorders and organ transplants. A good example is the case of Janell Smith, who weighed 68 pounds at age 26. While Janell was being hospitalized for anorexia nervosa, her weight dropped to 63 pounds. Against the wishes of her treating psychiatrist, Janell's health plan denied her continued treatment and ordered her discharge. As a result, Janell was left vulnerable and committed suicide.

Before delving into the question of how, if at all, the ACA addresses such substantial issues, it is important to understand broadly what the ACA contains. The ACA changes the way the government regulates health insurance and the way people consume health insurance services. The act is divided into 10 titles which generally cover four major changes to the U.S. health insurance system. These changes include: (1) a mandate which requires businesses and individuals to carry a baseline level of health insurance or pay a penalty; (2) a system of federal subsidies to completely or partially pay for the health insurance that is now required for about 34 million Americans who are currently uninsured; (3) new requirements on the health insurance industry; and

NEWS RULINGS VERDICTS

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Government

LA lags on three strikes resentencing

In the 10 months since California voters softened the state's three strikes law, more than 1,000 inmates have been released or granted a lighter sentence.

U.S. Court of Appeals for the 9th Circuit Conservatives maintain influence on 'liberal' court

It's been tough for the 9th U.S. Circuit Court of Appeals to shake its reputation as a liberal bastion, but outnumbered court conservatives continue to hold their own.

Mergers & Acquisitions

Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

Government

Decline in filings affects courts and attorneys

For years, California courts saw more cases being filed. But since 2009, small claims and misdemeanor cases have declined, catching the attention of judges and attorneys.

Mergers & Acquisitions

Skadden, Wilson guide pharma buy

California attorneys advise Tokyo-based drugmaker Otsuka in \$886 million purchase

Intellectual Property

Patent holders, defendants gear up lobbying effort in D.C.

As Congress and the Obama administration continue to debate how to limit patent litigation, several organizations with Silicon Valley connections are ramping up their lobbying efforts.

Google struggles for patent wins after Motorola buy

Google Inc. has taken its share of legal lumps following its acquisition of Motorola Mobility Holdings Inc. last year, with the latest blow coming in the form of a jury verdict loss against Microsoft Corp. late Wednesday.

Labor/Employment

New precedent gives workers fresh fuel for wage lawsuits

Hourly workers are filing more valuable wage

(4) numerous regulations on the practice of medicine.

While the ACA expands regulation of the claim and coverage appeals processes, it does not provide consumers with any new private right to enforce the regulatory provisions of the ACA.

Some of these provisions are designed to keep premium costs down while keeping quality high. Specifically, the ACA implemented a higher medical loss ratio rule, which requires insurers to spend 80 to 85 percent of premium dollars on medical care, rather than on administrative costs. If they don't, the insurers must provide a rebate to their customers. In addition, the act restricts companies from putting lifetime limits on a patient's health benefits.

The ACA prohibits health insurers from discriminating against anyone based on their prior medical conditions. Specifically, the act explicitly prohibits discrimination against individuals based on their health status, medical condition (including both physical and mental illnesses), claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence), disability, or any other health status-related factor.

The ACA reforms health plans' internal appeals processes for denied claims. This regulation requires that group health and insurance plans: "(A) have in effect an internal claims appeal process; (B) provide notice to enrollees, in a culturally and linguistically appropriate manner, of available internal and external appeals processes, and the availability of any applicable office of health insurance consumer assistance or ombudsman to assist such enrollees with the appeals processes; and (C) allow an enrollee to review their file, to present evidence and testimony as part of the appeals process, and to receive continued coverage pending the outcome of the appeals process." It also mandates that plans provide an external review process. Specifically, the act states that group health plans and health insurers shall comply with the applicable state external review process for such plans. This appeal scheme will apply to both state-regulated and ERISA-regulated plans, and thus will end the varied protections that only apply in some states and to some plans.

This scheme enhances the current appeals regulations in California. California has two regulatory systems, one run by the California Department of Insurance, which governs health insurance carriers, and another run by the Department of Managed Health Care (DMHC), which governs health care service plans pursuant to the Knox-Keene Act. Health care service plans are required to maintain internal grievance procedures approved by the DMHC, and to resolve grievances within 30 days, explaining in writing the reasons for any delay or denial of health care services. Unlike the ACA, California statutes do not specifically state that the health plans allow for the presentation of evidence or testimony (although this should be required by the implied covenant of good faith and fair dealing). Under California's regulatory scheme, a consumer can also file complaints directly with the DMHC. The DMHC can determine that the dispute is subject to a separate independent medical review if it involves a determination whether a treatment is medically necessary. If not, then the DMHC can issue its own findings and determination within 30 calendar days of receipt of the grievance.

All this being said, while the ACA expands regulation of the claim and coverage appeals processes, it does not provide consumers with any new private right to enforce the regulatory provisions of the ACA. Instead, enforcement of the regulations of the ACA is given solely to the states. When health insurers or health plans wrong consumers, then those consumers are still forced to sue in a court of law for redress under theories including breach of contract and bad faith. The act does not affect the way those lawsuits will be brought and does not provide the opportunity for those consumers to seek redress under any new statutory authority or cause of action. The ACA explicitly does not reduce the effects of ERISA preemption on such state law cases or expand consumers' opportunity to sue for punitive damages. The ACA also does not touch upon many roadblocks that consumers face when bringing such bad faith actions. Specifically, the ACA does not address prevalence of mandatory pre-dispute arbitration clauses that often force consumers into unfair arbitration models.

So to what degree will the ACA change consumers' rights? While the act sets out additional protections for consumers through the regulatory framework that it imposes, it does not provide consumers with any new tools to ultimately fix problems

lawsuits in California, where recent precedent has provided fresh ammunition to workers who say they weren't paid for their time.

Corporate 'Ag tech' company boom spawns crop of new legal issues

As food companies continue to face pressure to step up productivity while conserving water and other resources, companies are looking to new technology in areas such as crop and soil enhancement, fertilizers and water delivery.

Education Enrollment in California law schools continues downward slide

When classes began at California law schools last month, almost 8 percent fewer first-year students were in the seats than the year before. A handful of schools experienced sharp drops.

Government State-of-the-art Long Beach courthouse to open Monday

Rodent infestations, asbestos and earthquake danger are among the reasons judges, attorneys, public employees and the public at large can be relieved that the city's new courthouse is opening for business.

Judges and Judiciary Former federal judge returns to Bird Marella

After stepping down from the federal bench in April, former U.S. District Judge A. Howard Matz is returning to the firm he helped found in the '80s.

Litigation Toyota unintended acceleration trial centers on braking theories

In direct contradiction of testimony by plaintiffs' two experts, an expert for the automaker testified that a 66-year-old driver failed to depress the brake pedal before a crash that left her dead in 2009.

Solo and Small Firms Weingarten Brown LLP

Driven by a lifelong desire to be his own boss, Alex M. Weingarten has built a 12-attorney business litigation firm that's regularly facing off against some of the biggest firms in the world.

Law Practice August was unusually active for lateral moves

August has been known as a down time for lateral partner movements among law firms. But such activity nearly doubled this year.

Bankruptcy California municipal bankruptcies pave the way for other states

In a legal world often governed by precedent, bankruptcy judges overseeing Chapter 9 cases have

that persist when health insurers improperly delay or deny treatment. At the end of the day, the health insurers are still in control whether they will approve or deny the treatments that our doctors recommend.

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a tough task.

Securities

SEC makes first move to clarify new settlement policy

Chair Mary Jo White's announcement earlier this year that the SEC will abandon its decades-old no admit/no deny settlement policy raised a critical question: In what cases will the SEC require admission? By **Molly White**

Government

Did Richmond expect a thank you note?

Little wonder that investors are concerned about buying Richmond bonds when the city has demonstrated its contempt for private secured financings and asset-backed securitizations. By **Laurence E. Platt**

Criminal

States clash on warrantless searches of cellphones

Two state supreme courts -- Florida and California -- recently came to diametrically opposed conclusions on the matter. By **Scott A. Sugarman**

Labor/Employment

Bill clarifies, improves fee-shifting provision in Labor Code

Last week the Legislature amended the Labor Code to bring a two-way fee-shifting provision in line with the code's statutory scheme of encouraging private enforcement of the statutes. By **Brian Kabateck and Min-Kuk Song**

Employers face uphill battle to recover fees

A recent amendment to the Labor Code strips employers of one possible weapon in their arsenal for deterring nonmeritorious wage and hour claims. By **Kate Gold and Elena Min**

Perspective

The rise and failure of mass incarceration in America

In "The Punishment Imperative," authors **Todd Clear and Natasha Frost** argue that the move to mass incarceration was more than just a response to crime or a collection of policies adopted in isolation; it was a grand social experiment.

Health Care & Hospital Law

Previewing consumer litigation under the Affordable Care Act

The Affordable Care Act provides many new rules governing health insurers. But how will it affect the rights of health insurance policyholders? By **Scott C. Glovsky and Ari Dybnis**

Judges and Judiciary

Fly fishing and the judging life

Stick with me as I explain why I think the art of judging is a little bit like fly fishing. By **Timothy B. Taylor**

Alternative Dispute Resolution

The death of the joint session

In the early days, a typical mediation began with a joint session followed by break-out sessions; today the trend is different. By **Steven H. Kruis**

ADR Provider

Christopher J. Day

Neutral Christopher J. Day pays close attention to the evidence when helping to guide settlements in cases involving medical issues.

Judicial Profile

Catherine D. Purcell

State Bar Court Review Judge San Francisco

Law Practice

Bank gamble pays off, but what comes next for Quinn?

With close to a third of its practice now dedicated to fighting large banking institutions, Quinn Emanuel Urquhart & Sullivan LLP finds itself in an envious but perilous position.

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