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March 22, 2010

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The Honorable Chief Justice Ronald M. George and
Associate Justices of the Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102

Re: *Julie Nieto v. Blue Shield of California Life & Health Insurance
Company*
Case No. B214669
Amicus Curiae Letter in Support of Petition for Review

Dear Chief Justice Ronald M. George and Associate Justices of the
California Supreme Court,

This amicus curiae letter is submitted pursuant to California Rule
of Court 8.500(g) on behalf of United Policyholders, ("UP"), a non-
profit organization that advocates on behalf of insurance
policyholders, and on behalf of California Health Advocates,
("CHA"). For the reasons set forth below, UP and CHA, through the
undersigned counsel, support the Petition for Review filed by the
Plaintiff/Petitioner in *Nieto v. Blue Shield of California Life & Health
Insurance Company*, Case No. B214669.

I.

Interest of Amicus Curiae

United Policyholders, ("UP") is a non-profit 501(c) (3) organization founded in 1991 that has eighteen years of experience helping solve insurance problems and advocating for consumer rights. Donations, foundation grants and volunteer labor fuel the organization. UP's Board of Directors includes the former Chief Justice of the Arizona Supreme Court and the former Washington State Insurance Commissioner.

United Policyholders' work is divided into three program areas: *Roadmap to Recovery* provides tools and resources that help individuals and businesses solve insurance problems that can arise after an accident, illness, disaster, or other adverse event. The *Roadmap to Preparedness* program promotes insurance and financial literacy as well as disaster preparedness. The *Advocacy and Action* program advances policyholders' interests in courts of law, legislative and public policy forums, and in the media. United Policyholders participates in the proceedings of the National Association of Insurance Commissioners as an official consumer representative, and chairs a Consumer Advisory Task Force convened by California Insurance Commissioner Poizner. UP offers an extensive library of publications, legal briefs, sample policies, forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.unitedpolicyholders.org.

United Policyholders has appeared as *amicus curiae* in over two hundred and eighty cases throughout the United States. Arguments from our *amicus curiae* brief were cited with approval in *TRB Investments, Inc. v. Fireman's Fund*

Ins. Co., 145 P.3d 472 (Cal. 2006) *Vandenberg v. Superior Court*, 982 P.2d 229 (Cal. 1999), *Watts Industries, Inc. v. Zurich American Insurance Co.*, (2004) 18 Cal. Rptr.3d 61, and *Julian v. Hartford*, (2005) 35 Cal.4th 747. United Policyholders has appeared as *amicus curiae* in the United States Supreme Court. See e.g. *Metlife v. Glenn*, *Campbell v. State Farm*, *FL Aerospace v. Aetna Casualty and Surety Co.*, and *Humana, Inc. v. Forsyth* in which United Policyholders' brief was cited in the published opinion at 525 U.S. 299 (1999).

California Health Advocates (CHA) is a non-profit 501(c) (4) consumer organization that has for the last 12 years been dedicated to education and advocacy efforts on behalf of California's Medicare beneficiaries. CHA maintains a website that provides unbiased information about Medicare benefits and long-term care. www.cahealthadvocates.org CHA routinely presents public comments on issues related to private health and long-term care insurance benefits purchased by older consumers. CHA is also an official consumer representative to the National Association of Insurance Commissioners.

CHA conducts statewide technical trainings and assists social and legal services agencies and professionals on matters related to Medicare, Medigap, and long-term care and the network of California's Health Insurance Counseling and Advocacy Programs (HICAP), California's federally funded State Health Insurance Assistance Program (SHIP) that assists California's Medicare beneficiaries and their families.

Each year CHA reviews cases where health and long term care policies have been rescinded on allegations of prior undisclosed health conditions, a practice known in the insurance regulatory community as post claims

underwriting. Because of this work, CHA has an interest in legal decisions involving post claims underwriting and the improper rescission of insurance policies.

II.

This Court should grant the Petition for Review

United Policyholders and California Health Advocates respectfully urge the Court to grant the Petition for Review for the following reasons:

1. This Court's direction is needed to address apparently conflicting provisions in the Insurance Code governing the important rights and duties of insurance companies and policyholders with respect to the health insurance application process. The Court of Appeal's decision focused on Insurance Code §§331 and 359, which it interpreted as authorizing an insurance company to rescind any policy based on alleged misrepresentations of the policyholder in the application process. Those provisions, however, appear to conflict in practice, and in the health insurance context, with Insurance Code §§10381.5 and 10384. Section 10381.5 provides that an insured "shall not be bound by any statement made in an application for a policy unless a copy of such application is attached to or endorsed on the policy when issued as a part thereof." Section 13884 expressly prohibits the practice of post claims underwriting (§10384). The conflict in the application

of these provisions with the more general provisions in Insurance Code §§331 and 359 is not adequately addressed by the Court of Appeal decision, and creates substantial uncertainty as to the rights of health insurance policyholders who are accused of failing to disclose information about their health history in the application process.

2. The Court of Appeal decision is inconsistent with other appellate court rulings on post claims underwriting. (*Hailey v. California Physicians' Service* (2007) 158 Cal.App. 4th 452, *Barrera v. State Farm Mut. Automobile Ins. Co.* (1969) 71 Cal.2d 659, *Ticconi v. Blue Shield* (2008) 160 Cal. App. 4th 528). In particular, the Court of Appeal decision is in direct conflict with the decision in *Ticconi, supra*, in which the court held, applying Insurance Code §10381.5), that an insured may not be bound by statements in a health insurance application unless the application is attached to or endorsed on the policy.

Accordingly, review is necessary to "secure uniformity of decision [and] to settle an important question of case law," with regard to the correct interpretation of Insurance Code sections 10381.5 and 10384 regarding statements in a health insurance application.

III

The Court of Appeal's Decision Undermines California's Public Policy Prohibiting Medical Post Claims Underwriting

Over four decades ago, this Court declared that California's public policy prohibits an insurer from rescinding a policy unless it conducts a reasonable underwriting investigation to determine insurability **before** claims are filed. (*Barrera v. State Farm Mut. Automobile Ins. Co.* (1969) 71 Cal.2d 659.) This policy is codified in Insurance Code §10384, applicable to health insurance companies, and in Health & Safety Code §1389.3, applicable to health care service organizations. In *Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, the court held that Health & Safety Code §1389.3 required a health care service plan to make reasonable efforts to ensure that a potential subscriber's application is accurate and complete *before* issuing coverage, and prohibited the rescission of coverage based on post claims underwriting. Here, the Court of Appeal in the decision below erred in finding that *Hailey's* interpretation of Health and Safety Code §1389.3 does not apply to Insurance Code §10384. In fact, Health and Safety Code §1389.3 and Insurance Code §10384 contain identical language requiring health carriers "to complete medical underwriting and resolve all reasonable question arising from . . . an application" prior to issuing coverage. As stated in the *Nieto* Petition for Review, under well established principles of construction, identical language in different statutes should be interpreted identically. (*Delaney v. Superior Court*, (1990) 50 Cal. 3d 785). Accordingly, *Hailey's* interpretation of language in the

Health and Safety Code should apply equally to similar language in the Insurance Code.

The State's policy against post claims underwriting was reiterated again in the December 13, 2007 announcement by Insurance Commissioner Poizner that he intended to fine Blue Shield \$12.6 million for violations regarding healthcare rescissions and irresponsible claims practices, [post claims underwriting.]The Commissioner stated that:

Blue Shield committed serious violations that completely undermine the public trust in our healthcare delivery system. . . Rescissions can be devastating to sick patients. Let this be a message to all health insurers that we will not tolerate irresponsible rescissions and shoddy claims handling. We will target this behavior on an industry-wide basis and continue to take appropriate action as needed.

Press Release, California Department of Insurance, December 13, 2007.

If the Court of Appeal decision in this case is allowed to stand, these very practices would become protected by law. The Court of Appeal's decision cannot be reconciled with California public policy on this issue.

IV

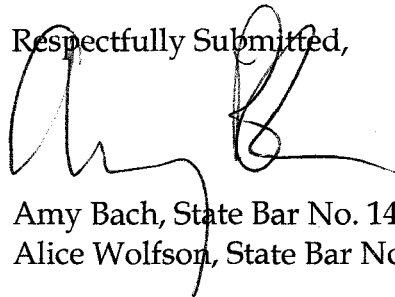
The Opinion Conflicts With *Ticconi*

In *Ticconi v. Blue Shield, supra*, the Court held that unless an application was attached to or endorsed on the policy, the insured cannot be bound by statements on the application and also that the insurer cannot raise the defenses

of fraud or unclean hands based on statements in the application. Since *Nieto's* application was neither attached to nor endorsed by the policy, the appellate court erred in declining to follow *Ticconi*. The Court of Appeal's decision is inconsistent with and based on an incorrect interpretation of *Ticconi*. If left standing, it will create undue confusion and uncertainty in the law.

For the foregoing reasons and in order to resolve the issues raised with respect to post claims underwriting and the unlawful rescission of health insurance policies, United Policyholders respectfully urges the Court to grant the Petition for Review in this matter.

Respectfully Submitted,



Amy Bach, State Bar No. 142029
Alice Wolfson, State Bar No. 146359

*On Behalf of
Amicus Curiae United Policyholders*

Julie Nieto v. Blue Shield of California Life & Health Insurance Company,
Second Appellate District, Division Two, Case No. B214669
Appeal from a judgment of the Los Angeles County Superior Court, Case No.
BC355336, the Honorable Robert Leslie Hess

Proof of Service by Mail

I declare that I am employed in the County of San Francisco, California. I am over the age of 18 years and am not a party to the within cause; my business address is 222 Columbus Ave., San Francisco, CA. 94133.

On March 22, 2010, I served the enclosed

Letter to Hon. Ronald M. George and Associate Justices

on the parties listed below by placing copies thereof in sealed envelopes with adequate postage for first class delivery and depositing each with the U.S. Postal Service:

Michael Cypers, Esq. MAYER BROWN ROWE & MAW 350 South Grand Avenue, 25 th Floor Los Angeles, California 90071	Attys for Defendant Blue Shield of California Life & Health Insurance Company
Gregory N. Pimstone, Esq. MANATT PHELPS & PHILLIPS 11355 West Olympic Boulevard Los Angeles, California 90064	Co-Counsel for Defendant Blue Shield of California Life & Health Insurance Company
Robert E. Bloch, Esq. (pro hac vice) MAYER BROWN LLP 1909 K Street, NW Washington, D.C. 20006	Co-Counsel for Defendant Blue Shield of California Life & Health Insurance Company
Honorable Robert Hess – Dept. 24 Los Angeles Superior Court Clerk of the Court 111 N. Hill Street Los Angeles, California 90012	1 copy
Clerk of the Court of Appeal Second Appellate District 300 S. Spring Street Los Angeles, California 90013	1 copy