

[California Court of Appeal Upholds Rescission of Health Insurance Policy](#)

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Concludes that Health Insurer Does Not Have to Physically Attach the Application to the Policy to Rely on Misrepresentations in Application to Support Rescission

In [Nieto v. Blue Shield of California Life & Health Insurance Company](#), ___ Cal.Rptr.3d. ___, 2010 WL 162027 (2010), the Court of Appeal considered whether Blue Shield Life – an California insurance company subject to the California Insurance Code – could rescind plaintiff Julie Nieto’s (“Nieto”) individual health insurance policy based on misrepresentations concerning her medical history contained in the application she submitted to Blue Shield Life.

The Court of Appeal affirmed the trial court’s grant of summary judgment in Blue Shield Life’s favor, concluding that Blue Shield Life had no statutory duty to physically attach Nieto’s application to the insurance policy, nor to conduct further inquiries beyond the application during the underwriting process to ascertain the truthfulness of Nieto’s representations in the application before it issued the policy.

In reaching this conclusion, the Court discussed its holding in light of the recent decisions in [Ticconi v. Blue Shield of California Life & Health Ins. Co.](#), 160 Cal.App.4th 528 (2004) and [Hailey v. California Physicians' Service](#), 158 Cal.App.4th 452 (2007).

On May 5, 2005, Nieto completed and signed a written application to Blue Shield Life for individual health insurance. In the “Medical History” portion of the application, Nieto answered “no” to almost every question. While the application provided some information about back problems, that information did not relate to Nieto. Contrary to the representations made in the application, Nieto had seen an orthopedist and chiropractor numerous times between January 2002 and May 2005 for back pain. Her treatment in 2005 included two steroid injections as well as oral medications, and in 2004 and 2005 Nieto filled at least ten prescriptions for four different medications, including Soma, Tylenol with codeine, Motrin and Xanax. Further in the application, Nieto also answered that her last doctor’s visit had occurred three years earlier, for the flu, and that the visit had resulted in “no finding” and her present health status was “good.” Nieto did not inform Blue Shield Life in the application about her visits to her orthopedist or chiropractor. Finally, Nieto answered “no” to the question asking if she had “[t]aken or been ordered to take prescription medication(s)” within the past 12 months. Blue Shield Life issued a policy of health insurance to Nieto on July 1, 2005 following its review of her application.

In September 2005, Blue Shield Life opened an investigation file on Nieto after Nieto had received a diagnosis of necrosis of the hip and was scheduled for hip replacement surgery in November 2005. As part of the investigation, Blue Shield Life obtained Nieto’s medical and pharmacy records. At that point, Blue Shield Life learned for the first time that immediately preceding her application Nieto had received extensive treatment for back and hip pain and had been prescribed multiple medications. If Blue Shield Life had been aware of the undisclosed information it either would have declined to issue the policy or, at a minimum, would not have issued the policy until receiving additional information from appellant. Blue Shield Life rescinded her policy on November 16, 2005.

In July 2006, Nieto filed a complaint against Blue Shield Life, asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory relief and violation of Business and Professions Code section 17200. Blue Shield Life cross-complained seeking a declaratory judgment that it rightfully rescinded the insurance contract, thereby precluding Nieto from maintaining her action.

In the trial court, Blue Shield Life moved for summary judgment on the ground that Nieto's fraudulent completion of her application entitled it to rescind her policy. The trial court determined the undisputed evidence satisfied the elements of fraud or deceit justifying Blue Shield Life's rescission of the policy. The trial court rejected Nieto's assertion that Blue Shield Life had engaged in postclaims underwriting in violation of Insurance Code section 10384, finding that before issuing the policy, Blue Shield Life properly completed its underwriting process and resolved all reasonable questions arising from the information provided by Nieto. It further found the evidence showed that Blue Shield Life was not required to do more, as there was nothing in the application to alert Blue Shield Life that Nieto's responses were false. The trial court reasoned that even if Blue Shield Life had been required to investigate further, there was no evidence to suggest that it would have learned of Nieto's undisclosed condition and treatment. Finally, the trial court concluded that whether Blue Shield Life attached or endorsed the application to the policy had no bearing on its ability to rescind in view of Nieto's material misrepresentations and omissions. The Court of Appeal agreed with all of the trial court's conclusions, discussing each.

First, the Court of Appeal found that the undisputed evidence showed that Nieto committed fraud by making material misrepresentations or omissions concerning her medical history to Blue Shield Life in the application, thereby entitling Blue Shield Life to rescind. Quoting [*TIG Ins. Co. of Michigan v. Homestore, Inc.*](#), 137 Cal.App.4th 749, 755-756 (2006), the Court of Appeal stated that "[g]overning law permits an insurer to rescind a policy when the insured has misrepresented or concealed material information in connection with obtaining insurance." In reaching its conclusion that Nieto engaged in fraud, the Court of Appeal explicitly discounted her argument that a triable issue of fact existed concerning her "intent" to defraud Blue Shield Life based on her declaration in which she averred that she "did not intend to defraud" Blue Shield Life. In reliance on [*West Coast Life Ins. Co. v. Ward*](#), 132 Cal.App.4th 181, 186-87 (2005), the Court of Appeal stated "[t]he rule in insurance cases is that a material misrepresentation or concealment in an insurance application, whether intentional or unintentional, entitles the insurer to rescind the insurance policy *ab initio*." The Court of Appeal further noted that this rule was codified in *Insurance Code* sections 331 and 360 so that, "any material misrepresentation or the failure, whether intentional or unintentional, to provide requested information permits rescission of the policy by the injured party." Thus, it found that evidence showing that Nieto "lacked any intent to defraud failed to create a triable issue of fact."

Second, the Court of Appeal determined that contrary to Nieto's assertion, *Insurance Code* sections 10113 and 10381.5 did not bar the rescission because Blue Shield Life did not physically attach a copy of the application to the policy or "endorse" the application to the policy. Nieto relied on *Ticconi, supra*, 160 Cal.App.4th 528, 534, where the Court reversed an order denying class certification and construed *Insurance Code* sections 10113 and 10381.5 to

“preclude an insurer from raising the defense of fraud based on statements that an insured made in an application for insurance if the application had not been attached to or endorsed on the policy when issued [citations].” In explaining why the *Ticconi* decision did not preclude summary judgment, the Court of Appeal noted that while not cited by the *Ticconi* court, [*Metzinger v. Manhattan Life Ins. Co.*](#), 71 Cal.2d 423, 427 (1969), explained that section 10113 does not apply to a situation where an insurer seeks to rescind a policy because of fraudulent misrepresentations made by the insured. The Court of Appeal specifically noted that consistent with the holding in *Metzinger*, Blue Shield Life did not seek to incorporate any document into the policy by reference. Rather, it sought to demonstrate that, in accordance with *Insurance Code* sections 331 and 359, it was entitled to rescind the policy. Further, *Insurance Code* section 10113 expressly applies “in the absence of fraud.” Thus, the Court of Appeal concluded that Section 10113 could be harmonized with other *Insurance Code* provisions to permit an insurer to rescind a policy where the insured fraudulently conceals or misrepresents material information in the application. Further, it concluded that *Insurance Code* section 10381.5 does not require that the application be physically attached in all circumstances, noting that Blue Shield Life’s application and policy both expressly stated that the information provided in the application formed the basis for the policy’s coverage. The *Nieto* court thus declined to adopt the blanket conclusion in *Ticconi* that material misrepresentations and omissions in an application which is not physically attached to a policy may not be relied upon by the insurer to rescind the policy.

Finally, the Court of Appeal concluded that *Insurance Code* section 10384 did not bar Blue Shield Life’s rescission. Nieto argued that this section, and the decision in *ailey, supra*, 158 Cal.App.4th 452, barred the rescission, asserting that Blue Shield Life failed to complete medical underwriting and engaged in postclaims underwriting. The Court of Appeal distinguished the *Hailey* decision, as *Hailey* involved a health care service plan governed by *Health and Safety Code*, not an insurance policy governed by the *Insurance Code*. Thus, the Court of Appeal construed *Hailey*’s conclusion that a health care service provider had to do more than rely on the application to complete medical underwriting as having no bearing on health insurers and health insurance policies, finding Blue Shield Life’s underwriting more than sufficient for purposes of section 10384. The Court of Appeal further noted that even if Blue Shield Life had obtained medical records from the physician disclosed by Nieto on the application, those records would not have revealed her undisclosed back and hip problems.