

COPY

SUMMONS (CITACION JUDICIAL)

SUM-100

FOR COURT USE ONLY (SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT: BLUE CROSS OF CALIFORNIA (Aviso al Demandado): ANTHEM BLUE CROSS, a California corporation; ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY, a California corporation; and DOES 1 to 50, Inclusive

ORIGINAL FILED

AUG 20 2009

LOS ANGELES SUPERIOR COURT

YOU ARE BEING SUED BY PLAINTIFF: RICHARD HIRSCHINGER, (LO ESTÁ DEMANDANDO EL DEMANDANTE): D.D.S., on behalf of himself and all others similarly situated,

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro.

The name and address of the court is: (El nombre y dirección de la corte es): SUPERIOR COURT OF THE STATE OF CALIFORNIA 111 N. HILL STREET 600 S. Commonwealth

CASE NUMBER: (Número del Caso): BC402739

LOS ANGELES, CA 90012 90005

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es): GEORGE R. KINGSLEY, ESQ. SBN-38022 (818) 990-8300 FAX(818) 990-2903 ERIC B. KINGSLEY, ESQ. SBN-185123 KEVIN M. ZIETZ, ESQ. SBN-186244 KINGSLEY & KINGSLEY, APC, 16133 VENTURA BLVD., SUITE 1200, ENCINO, CA 91436

DATE: AUG 20 2009 JOHN A. CLARKE, Clerk, by PARK ENG, Deputy (Fecha) (Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).) (Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

- 1. [] as an individual defendant.
2. [] as the person sued under the fictitious name of (specify):
3. [] on behalf of (specify):
under: [] CCP 416.10 (corporation) [] CCP 416.60 (minor)
[] CCP 416.20 (defunct corporation) [] CCP 416.70 (conservatee)
[] CCP 416.40 (association or partnership) [] CCP 416.90 (authorized person)
[] other (specify):
4. [] by personal delivery on (date):



 **COPY**

ORIGINAL FILED

AUG 20 2009

**LOS ANGELES
SUPERIOR COURT**

1 **KINGSLEY & KINGSLEY, APC**
2 **GEORGE R. KINGSLEY, ESQ. #38022**
3 **KEVIN M. ZIETZ, ESQ. #186244**
4 **BRIAN LEVINE, ESQ. #251416**
5 **16133 VENTURA BOULEVARD, #1200**
6 **ENCINO, CA 91436**
7 **(818) 990-8300; Fax (818)990-2903**

8 **Attorney for Plaintiffs**

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF LOS ANGELES**

11 RICHARD HIRSCHINGER, D.D.S., on behalf
12 of himself and all others similarly situated,

13 Plaintiffs,

14 v.

15 BLUE CROSS OF CALIFORNIA dba ANTHEM
16 BLUE CROSS, a California corporation;
17 ANTHEM BLUE CROSS LIFE AND HEALTH
INSURANCE COMPANY, a California
corporation; and DOES 1 to 50, Inclusive,

18 Defendants.

CASE NO.: BC402739

FIRST AMENDED CLASS ACTION
COMPLAINT FOR:

- 1. Breach of Contract
- 2. Breach of the Implied Covenant of Good Faith and Fair Dealing
- 3. Violation of Business & Professions Code §17200 et seq.

19
20 Plaintiff **RICHARD HIRSCHINGER, D.D.S.**, on behalf of himself and all others similarly
21 situated, complain of defendants, and each of them, as follows:

22 **I**

23 **INTRODUCTION**

24 1. This is a class action pursuant to Code of Civil Procedure §382 on behalf of plaintiff and
25 all individuals who were policy holders of defendant BLUE CROSS OF CALIFORNIA dba ANTHEM
26 BLUE CROSS and ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY,
27 (hereinafter collectively referred to as "defendant" or "BLUE CROSS") who were covered under any
28 individual or group health insurance policy which is exempt from ERISA. This policy covers

1 California Class members only.

2 2. Defendants BLUE CROSS OF CALIFORNIA dba ANTHEM BLUE CROSS, a California
3 corporation, and DOES 1 to 5 are a managed health care organization which sells health insurance
4 policies in the State of California and is doing business in the State of California.

5 3. Defendants ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY,
6 a California corporation, and DOES 6 to 10 is regulated by the California Department of Insurance
7 which sells health insurance policies in the State of California and is doing business in the State of
8 California.

9 4. The true names and capacities, whether individual, corporate, associate, or otherwise, of
10 defendants sued herein as DOES 1 to 50, inclusive, are currently unknown to plaintiff, who therefore
11 sues defendants by such fictitious names under Code of Civil Procedure §474. Plaintiff is informed and
12 believes, and based thereon allege, that each of the defendants designated herein as a DOE is legally
13 responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of court
14 to amend this Complaint to reflect the true names and capacities of the defendants designated
15 hereinafter as DOES when such identities become known.

16 5. Venue is proper in this judicial district pursuant to Code of Civil Procedure §395. The
17 unlawful acts alleged herein have a direct effect on plaintiff and those similarly situated with the State
18 of California.

19 6. Plaintiff RICHARD HIRSCHINGER, D.D.S. is a resident of the County of Los Angeles.

20 II

21 PRELIMINARY FACTUAL ALLEGATIONS

22 7. Plaintiff purchased a health plan from BLUE CROSS and was at all relevant times therefore
23 an individual policyholder of BLUE CROSS and was covered under a policy entitled "Prudent Buyer"
24 which covered him for medically necessary medical expenses.

25 8. Plaintiff has paid all premiums due under said health plan, and has performed all
26 obligations under said plan on plaintiff's part to be performed and has complied with all requirements
27 including appeal and/or grievance procedures that are deemed mandatory under the plan, as well as
28 providing all proper documentation regarding his claim.

1 9. Plaintiff is suffering from a very serious back condition in which he has been advised by
2 his physician that he needs an artificial disc replacement at one level of his lumbar spine. The disc in
3 question is the Pro Disc L.

4 10. This artificial disc was approved in August 2006 by the Federal Drug Administration
5 (FDA) and the studies have shown a success rate of 96% according to the criteria of the FDA.

6 11. Plaintiff has requested that defendant BLUE CROSS approve this surgery, but BLUE
7 CROSS has refused, stating that lumbar artificial diskectomy with insertion is considered
8 investigational and not covered. The decision was based on the defendant's medical policy for Artificial
9 Intervertebral discs. A copy of said letter dated September 25, 2008 is attached hereto as Exhibit "1."
10 The letter is in response to plaintiff's appeal of defendant's denial of this service.

11 12. BLUE CROSS has a uniform policy as stated in their medical policy statement that
12 artificial intervertebral discs are considered investigational and are therefore not covered under their
13 health insurance policies.

14 13. The health insurance policy of BLUE CROSS defines investigational as "procedures or
15 medications are those that have progressed to limited use on humans, but which are not widely accepted
16 as proven and effective within the organized medical community." (Quoting from the policy).

17 14. In fact, the subject procedure is widely recognized and is covered by many other health
18 carriers including, for example, CIGNA and Aetna, is clearly not investigational.

19 15. The FDA website has compiled the summary safety and effectiveness data of the Pro Disc
20 L replacement and has compared results of the traditional fusion with the Pro Disc L and determined
21 the success ratio of the Pro Disc L is superior to the fusion. They have deemed the Pro Disc L
22 replacement reasonably safe and effective.

23 16. There are 39 countries not including the United States where the Pro Disc L Device has
24 been commercially available dating back to 1990.

25 17. Plaintiff by virtue of his payment of premiums had a reasonable expectation that he would
26 receive coverage for all medical expenses that were reasonable and necessary and that were not
27 investigational or experimental as defined in the policy, and, therefore has a vested interest in the
28 defendant's health plan, which defendant has refused to honor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III

CLASS ACTION ALLEGATIONS

18. Plaintiff brings this action on behalf of himself and all others similarly situated as a Class Action pursuant to Code of Civil Procedure §382. Plaintiff seeks to represent a two classes composed of and defined as follows:

- a) All persons who were policyholders of BLUE CROSS OF CALIFORNIA dba ANTHEM BLUE CROSS, who were denied the right to have intervertebral disc surgery at one level using the Pro Disc L intervertebral device, who were between the ages of 18 and 59, on the grounds that the surgery involving the Pro Disc L intervertebral disc was investigational.
- b) All persons who were policyholders of ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY, who were denied the right to have intervertebral disc surgery at one level using the Pro Disc L intervertebral device, who were between the ages of 18 and 59, on the grounds that the surgery involving the Pro Disc L intervertebral disc was investigational.

19. Plaintiff reserves the right under Rule 3.765(b) of the California Rules of Court to amend or modify the class description with greater specificity, by further division into subclasses, or by limitation to particular issues.

20. This action has been brought and may properly be maintained as a class action under the provisions of §382 of the Code of Civil Procedure because there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable.

A. Numerosity

21. The potential members of the proposed class as defined are so numerous that joinder of all the members of the proposed class is impracticable. While the precise number of proposed class members has not been determined at this time, plaintiff is informed and believes that there is a substantial number of policy holders who have been similarly affected.

22. The information regarding the issue of numerosity is obvious, but will be ascertained upon discovery.

B. Commonality

23. There are questions of law and fact common to the proposed class that predominate over any questions affecting only individual class members. These common questions of law and fact

1 include, without limitations.

2 (1) Whether defendants breached their contract with plaintiff and the class members.

3 (2) Whether defendants violated the implied covenant of good faith and fair dealing
4 by arbitrarily and in bad faith in failing to provide coverage for the surgical procedure heretofore
5 described. Plaintiff reserves the right to amend this complaint if it is determined there are other uniform
6 acts of bad faith.

7 (3) Whether defendants violated §17200 et. seq. of the Business & Professions Code
8 by engaging in the acts previously and hereafter alleged.

9 (4) Whether plaintiff and the members of the proposed class are entitled to restitution
10 and injunctive relief pursuant to Business & Professions Code §17200, et. seq.

11 **C. Typicality**

12 24. The claims of the named plaintiff are typical of the claims of the proposed class. Plaintiff
13 and all members of the proposed class sustained damages arising out of and caused by defendants'
14 common course of conduct in violation of laws, regulations that have the force and effect of law, the
15 implied covenants of good faith and fair dealing and code sections as alleged herein.

16 **D. Adequacy of Representation**

17 25. Plaintiff will fairly and adequately represent and protect the interests of the members of the
18 proposed class. Counsel who represents plaintiff is competent and experienced in litigating large and
19 complex class actions.

20 **E. Superiority of Class Action**

21 26. A class action is superior to other available means for the fair and efficient adjudication of
22 this controversy. Individual joinder of all proposed class members is not practicable, and questions of
23 law and fact common to the proposed class predominate over any questions affecting only individual
24 members of the proposed class. Each member of the proposed class has been damaged and is entitled
25 to recovery by reason of defendants' breach of contract and their bad faith conduct in denying policy
26 holders proper compensation.

27 ///

28 ///

1 the United States, have permitted the commercial distribution of this device. Some of the countries
2 have been using this device since 1990.

3 34. Defendants and their employees were all acting in accordance with a uniform course of
4 conduct which was authorized by management. The language on the medical policy statement itself
5 establishes said uniform policy of refusing to authorize the surgery involving the Pro L Disc
6 intervertebral device. In addition, the position that the heretofore described surgery is investigative is
7 inconsistent with the terms of Blue Cross' policy.

8 35. Plaintiff and others similarly situated are claiming attorneys fees per Brandt v. Superior
9 Court.

10 36. Plaintiff is claiming pain and suffering and emotional distress as may be proven as the
11 result of defendant's bad faith.

12 VI

13 **THIRD CAUSE OF ACTION**

14 **UNFAIR COMPETITION PURSUANT TO**

15 **BUSINESS & PROFESSIONS CODE §17200**

16 37. Plaintiff repeats and realleges each and every allegation set forth in all of the foregoing
17 paragraphs as if fully set forth herein.

18 38. This is a Representative Private Attorney General Action and Class Action for Unfair
19 Business Practices. Plaintiff, on behalf of himself, on behalf of the general public, and on behalf of
20 other similarly situated, bring this claim pursuant to Business & Professional Code §17200, et seq. This
21 conduct of all defendants as alleged in this complaint has been and continues to be unfair, unlawful, and
22 harmful to plaintiff, the general public and the proposed classes and sub clauses. Plaintiff seeks to
23 enforce important rights affecting the public interest within the meaning of Code of Civil Procedure
24 §1021.5.

25 39. Plaintiff is a "person" within the meaning of Business & Professions Code §17204, and
26 therefore has standing to bring this cause of action for injunctive relief, restitution, and other
27 appropriate equitable relief.

28 ///

1 40. Business & Profession Code §17200, et. seq. prohibits unlawful and unfair business
2 practices.

3 41. Defendants have breached their insurance contract with their policyholders, have acted in
4 bad faith, and have engaged in unlawful and unfair business practices in violation of Business &
5 Profession Code §17200, et. seq., depriving plaintiff, and all persons similarly situated, and all
6 interested persons of rights, benefits, and privileges guaranteed to all aggrieved policy holders of BLUE
7 CROSS under the law.

8 42. Plaintiff seeks injunctive relief compelling defendants to authorize the surgical procedure
9 using the Pro Disc L surgery in all cases in which it has taken the position that the above mentioned
10 surgery is investigative. This position is unconscionable and in violation of California Code §1770
11 which defines what constitutes unlawful methods of competition, unfair or deceptive practices.

12 43. Defendants' conduct, as alleged heretofore above, constitutes unfair competition in
13 violation of §17200 et. seq. of the Business & Professions Code.

14 44. Defendants, by engaging in the conduct herein alleged, either knew or in the exercise of
15 reasonable care should have known that the conduct was unlawful. As such it is a violation of §17200
16 et. seq. of the Business & Professions Code.

17
18 **RELIEF REQUESTED**

19 **WHEREFORE**, plaintiff prays for the following relief:

20 1. For compensatory damages in the amount plaintiff, and each class member similarly
21 situated, for the reimbursable value of the medical expenses related to the surgery at one disc level on
22 the lumbar spine for insertion of the Pro Disc L artificial device.

23 2. For pain and suffering and emotional distress as a result of defendant's breach of contract.

24 3. For pain and suffering and emotional distress as a result of defendants bad faith.

25 4. For attorneys fees pursuant to Brandt v. Superior Court and under Business & Professions
26 17200 et. seq. as may be proven.


27 5. For an order that defendants be required not to deny the intervertebral artificial disc surgery
28 using the Pro Disc L artificial device on the basis it is investigational.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 6. For costs of suit.
- 7. For such other relief as the court may deem appropriate.

DATED: August 18, 2008

KINGSLEY & KINGSLEY, APC

By: 
GEORGE R. KINGSLEY
Attorney for Plaintiff