

Talking Points and Discussion Outlines

Jenny's law
New draft of S2640

- **Jenny Crowley's story**

- **The insurance company which insured Jenny Crowley now supports this legislation.**

- **The bill does two things:**
 1. Puts the burden of proving that the insured was not in good health on the insurance company once the policy has been delivered

 2. An insurance company can overcome the presumption of good health with evidence of fraud.

- **Reasons for this amendment:**
 1. We learned that case law over many years has interpreted existing statute in a way that made our original bill text ineffective

 2. Working with Senate Counsel and AG's office we have accomplished the same goal.

**Jenny's Law:
S633 An act to ensure consumer protection in life
insurance contracts**

Background

This bill is fundamentally about **FAIRNESS** for families in the Commonwealth

I filed this bill after I heard the story of Jenny Crowley and her family.

When Jenny passed away – **John was told that he had to prove that she was in 'good health' on the day the company issued her policy.**

How was he supposed to do that?

- **In the opinion of the doctors Jenny saw during her pregnancy and after she gave birth she was in GOOD HEALTH**
 - ...but that was not enough for the insurance company
- **She was examined by the insurance company's own MEDICAL PROFESSIONAL and found to be HEALTHY**
 - ...but that was not enough for the insurance company
- **She had BLOOD TESTS for the insurance company – the results were NORMAL**
 - ...but that was not enough for the insurance company
- **After she became ill, some of our NATION'S MOST RESPECTED CANCER SPECIALISTS examined her and looked at her past medical records and concluded that**

NO DOCTOR CAN SAY THAT SHE WAS ILL on the day the policy issued

- ...but that was not enough for the insurance company
- **No information exists to establish that Jenny was ill on the day the policy was issued**

WHAT THE BILL DOES

- **Once a life insurance company issues a policy** the law will assume that the company has satisfied itself that the insured is in good health.
- When a claim is made on the policy, **if the insurance company wants to deny a claim based on the health of the insured then THEY MUST PROVE THAT THE INSURED WAS NOT IN GOOD HEALTH.**
- **THE BILL PUTS THE BURDEN OF PROOF ON THE COMPANY.**
- **The bill maintains ALL THE EXISTING PROTECTIONS against fraud.**
- **Additionally, IF A PERSON KNEW OR SHOULD HAVE KNOWN SHE WAS NOT IN GOOD HEALTH then that is sufficient to meet the burden of proof.**

RECENT COURT CASE

In June 2006, a Superior Court case (Hills v. Savings Bank Life Insurance) dealing with a very similar situation clearly agreed that when the insured person, the company itself and all the doctors involved all honestly conclude that person is in good health when the policy is issued then the company cannot change its mind after the death of the policy holder.

**"...Although "an insurer is entitled to protect itself against risks it does not wish to take...it must manifest its intent to exclude such risks in clear, unequivocal terms."
Where it fails to do so, the Court should interpret the term [good health] based how the average person in the insured's position would understand it. This is not just a question of contract law but of fairness. To interpret the policy contrary to the reasonable expectations of the insured so as to rescind it at a time when it is too late for the insured to seek insurance elsewhere would be "manifestly unjust.""**

S633 DOES NOT GO AS FAR AS HILL

In Hill, the court recognized that the insurance company had precedent on its side – there are several SJC cases from 1896 to 1922 which the companies can rely on.

The Hill court believes the SJC will overturn those cases and take the position that the good health clause "... must be interpreted based on what the parties knew and reasonably believed at the time the policy issued, and not on what in fact turned out to be the case based on discoveries made sometime later"

My bill allows the company to still go back and try to prove that its insured was not in good health at the time the policy issued. The bill lets the company rebut the presumption of good health with evidence that the insured "should have known" he was not in good health.

Other Good Quotes from Hill:

"It hardly seems fair," the judge wrote, "to allow the insurance company to go back on that decision [to issue the policy] when it discovers sometime after delivery of the policy that the risk that the insured sought protection against (namely, his untimely death) can be traced back to some latent condition which no one knew about when the application for insurance was first made."

...courts have given considerable weight to whether the insurer required the insured to undergo a medical examination. These courts reasoned that, in issuing the policy after such an examination, the insurer had effectively waived the ability to cancel a policy based on a condition which neither the insurer nor the insured detected beforehand.

...Where the insurance company determines the nature, scope and extent of the medical examination ... then the insurance company should not be able to take advantage of any shortcomings in such an examination by voiding the policy retroactively under the 'good health' clause once a disease which could have been detected eventually manifests itself,"

"no one would ever know if he were insured or not, even though he has passed a medical examination and received a policy." 323 Pa. at 35. People buy insurance to protect their family's financial future. If one insurer turns them down, they have the option of applying to another. Where the insurer accepts their money and issues the policy, however, then there is no reason to seek coverage elsewhere. It hardly seems fair to allow the insurance company to go back on that decision when it discovers sometime after delivery of the policy that the risk that the insured sought protection against (namely, his untimely death) can be traced back to some latent condition which no one knew about when the application for insurance was first made.

Recognizing that the [insurance company] has precedent on its side, this Court is nevertheless of the view that, if the Supreme Judicial Court were to confront this issue today, it would take the ... position [that] clauses like the instant one must be interpreted based on what the parties knew and reasonably believed at the time the policy issued, and not on what in fact turned out to be the case based on discoveries made sometime later," said Sanders

SBLI Discussion Outline

November 14, 2006

Basis of Denial and Status of Jenny's Health

- Why did you take so long to issue the Policy on September 22, 2004 when the application was submitted June 23, 2004?
- On what basis did you deny Jenny's life insurance claim?
- On what basis did you conclude that Jenny was not in good health at the time the Policy was issued?
- How are you able to make a retroactive diagnosis that contradicts contemporaneous health assessments by Jenny's attending physicians when considering the following facts:
 - Jenny's OBGYN performed a clinical examination of Jenny's breasts after complaints of tenderness and concluded that the discomfort was consistent with postpartum symptoms.
 - Jenny's oncologist reviewed Jenny's health records prior to September 22nd and concluded that the changes in her breasts were consistent with postpartum and were not evidence of breast cancer. In fact, Jenny's oncologist noted that certain symptoms of breast cancer were noticeably absent from Jenny's OBGYN's medical records.
 - SBLI performed a physical examination of Jenny, including blood work, as well as a review of her medical records, and concluded that Jenny was in fact in good health.
 - A panel of independent physicians concluded in connection with a medical malpractice investigation that Jenny's physicians did not miss any symptoms of cancer prior to her diagnosis in October 2004.
 - Jenny's death certificate refers to the period between onset of cancer and death as one year from October 3, 2005, consistent with an onset after the September 22, 2004 delivery of the Policy.
- At which time did you consider Jenny to be in poor health?
 - Since we all suffer from metaphysical imperfections that may eventually result in our own demise, on what basis do you determine the status of an insured's health absent a medical diagnosis?

- Would you consider Jenny to be in poor health at birth since she suffered from a BRAC 1 genetic defect?
- Jenny's oncologist and another independent expert at a world-renowned cancer center concluded that it could not be determined whether Jenny had cancer prior to a diagnosis. Therefore, how are you certain that Jenny did in fact have cancer prior to September 22, 2004?
- In your determination of whether Jenny had cancer prior to the effective date of the Policy, are you making educated guesses as to when the onset of cancer may have occurred based on statistical averages? How did you consider the unique biology and velocity of Jenny's disease in your estimate of when she had cancer?
 - Jenny's cancer was a triple negative triggered by a BRAC 1 gene which is a very, very aggressive form of cancer. As a result, Jenny's oncologist and a leading expert at a world-renowned cancer center concluded that it is possible Jenny did not have cancer prior to September 22, 2004. On what basis do you contradict the opinions of these experts?
- How are you, as an insurance company, able to retroactively determine when illnesses began since this is a skill the medical community currently lacks?

Good Health Provision

- How do you define "good health?"
- The Policy provides "I agree that the insurance applied for shall not be effective until the later of (a) the date the first full premium is paid, or (b) the date the application is approved by SBLI, and only then if each person to be insured is in good health and insurable within the company standards on such date."

The "within company standards" qualification modifies the terms "insurable" and "in good health."

If SBLI had access to all information that was readily available and could have been known prior to the Policy's effective date, performed a physical examination, and issued the Policy, how could Jenny be considered anything but within good health under "company standards?"

- The good health requirement is ambiguous. If read objectively, then Jenny must have been "insurable within the company standards" as SBLI issued the Policy based on its own examination of health prior to issuing the Policy. If read subjectively, then according to basic contract maxims, shouldn't any ambiguities construed against the person who drafted the contract?

- If a person appears to be in clinical good health, do you believe they are in good health?
 - Medical experts believe that health imperfections may be found on virtually anyone if enough diagnostic tests are performed. As a result, physicians qualify someone as in good health based on clinical examinations and routine tests, such as blood work, which SBLI performed.

Since Jenny was not suffering from any disease prior to September 22, 2004, as confirmed by clinical examinations performed by SBLI, how did you conclude that Jenny was indeed not in good health?

- Medical professionals define “good health” based on currently known information, current medical evaluation, and the absence of data or diagnosis to the contrary. How else can one prove a negative? In other words, how can someone applying for insurance demonstrate he or she is in good health other than through the absence of noticeable disease from clinical examinations and reviews of existing medical records?
- When an insured dies from illness as opposed to an accident, what are your procedures to determine when the insured’s illness began to ensure that he or she was in good health at the time the Policy was issued? How long is your “look-back” policy?

Non-Contestability and Good Faith Negotiations

- Your letter dated December 30, 2005 indicates that “Since Ms. Crowley’s death occurred within a two-year period from the date of issue of the policy, and pursuant to the contestability provision within the policy, additional medical information was obtained by us.”

The Limitations on Our Contesting a Claim provision of the Policy states that “We can contest or cancel this policy for any **“material misrepresentation of fact”** within two years from the Issue Date.

Since Jenny’s application did not have any misrepresentations of fact, how were you able to solicit additional information for a purpose other than the determination of whether fraud occurred?

- Do you consider the exercise of the contestability provision in order to obtain documents used to determine good health, not fraud, to be an increase in scope without any corresponding rider?
- What new information was obtained from the exercise of the non-contestability provision that was not available for review by SBLI prior to the issuance of the

policy?

- How does the contestability provision grant SBLI an opportunity to reevaluate its original issuance of a policy based on a retroactive and speculative medical analysis to reach a conclusion that is contrary to what SBLI, Jenny, and her physicians believed at the time?

Assumption of Risk

- Why did you charge Jenny a standard rate rather than a preferred rate? What additional risk were you assuming?
- You were aware of several risk factors associated with Jenny's health.
 - Jenny answered "yes" to the question of "Have you ever had any disorder of menstruation, pregnancy (including toxemia) or of the reproductive organs or breasts."
 - Jenny had melanoma at the age of 25 which suggested possible recurrence of cancer. In fact, doctors consider the risk of melanoma reoccurring (a risk SBLI obviously assumed) to be higher than the possibility of developing breast cancer.

How is SBLI now attempting to avoid its assumption of risk inherent by now denying the Policy claim?

- What new facts as to symptoms experienced by Jenny were not already readily known, or could have been known, by SBLI prior to issuance of the Policy?

Cited Case Law by SBLI is Distinguishable and Dated

- Why do you believe that the law is on your side when the cited cases are distinguishable and dated? (See Case Law Analysis below if certain cases are discussed with SBLI).
 - Many of the cases involve markedly different and material facts of either policyholder misrepresentations or contemporaneous (rather than retroactive) clinical diagnosis of treatment or ill health by a medical professional, or both.
 - Many older cases were decided at a time when the medical community's understanding of disease was quite different from today's understanding.

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- Other states view the good health provision more subjectively, meaning that a person is in good health if he or she appears to be in clinical good health without knowledge of any undisclosed disease.

Public Policy Concerns

- How does your position have a principled boundary to prevent future application to a number instances, not only cancer, but stroke, heart attack, aneurysm, and so forth in which a fatal disease can arguably be shown by expert testimony to likely have begun before the effective date of an insurance policy?
- Do you believe your position is consistent with Massachusetts law forbidding insurers to discriminate based on genetic predispositions?
 - Massachusetts law recognizes that while certain genetic mutations may make an individual more prone to deadly diseases such as cancer or Alzheimer's, insurance companies may not use such genetic predispositions as a basis for denying coverage.

Therefore, isn't current Massachusetts law consistent with the view that a person remains in good health and insurable until he or she is medically diagnosed with a fatal disease or has symptoms caused by such disease?

- Have there been other cases similar to mine; and if so, how have you handled them?

Closing

- Since you were aware of Jenny's illness prior to her death as Jenny participated in SBLI's advertising campaigns (in fact our daughter was on the cover of one of your brochures), why did you continue to accept our premiums for one year, never suggesting that our Policy would be considered void from inception?
- What did I do wrong in attempting to protect my family? What could I have done differently?
- Isn't the point of life insurance to protect your family in case of tragedy like mine?

An Act Ensuring Consumer Protection in Life Insurance Contracts

Discussion Outline with Senator Buoniconti and Senator Spilka

May 22, 2007

Background

- On June 23, 2004, both Jenny and I submitted life insurance applications to SBLI after discovering that Jenny was pregnant.
 - We chose SBLI as Jenny had managed the advertising campaign for the Company (Kaitlyn was on the cover of their brochure) and SBLI had competitive rates.
- On June 29, 2004, Kaitlyn, our daughter, was born.
- On July 19, 2004, SBLI performed a clinical medical exam, including blood tests, as part of its underwriting due diligence.
- On August 4, 2004, Jenny's OBGYN examined Jenny's breast during a routine post-partum checkup and noted "no masses".
- On September 22, 2004, SBLI issued the insurance policy.
- On October, 8, 2004, Jenny visited her OBGYN in connection with a previously scheduled routine follow-up post partum exam at which time the physician referred Jenny to a breast specialist after complaints of firmness and slight pain in her left breast.
- On October 18, 2004, the results of a breast biopsy diagnosing Jenny with stage four breast cancer.
- On October 3, 2005, Jenny passed away.
- On December 30, 2005, SBLI denied Jenny's life insurance claim based on the "good health" provision.

Basis of Denial

- SBLI originally denied the claim based on the policy's contestability provision; however, the Company later changed the basis for its denial to the "good health" provision after acknowledging that the contestability provision only allowed the insurer to contest or cancel a policy for any "material misrepresentation of fact" within two years after the effective date of the policy.

- “Good health” provision: effective on “the date the application is approved by SBLI, and only then if each person to be insured is in good health and insurable within company standards on such date.”
- SBLI acknowledged that no person knew or could have known that Jenny had cancer prior to the biopsy results obtained on October 18, 2004; nevertheless, SBLI believed that Jenny’s cancer existed prior to the effective date of the policy based on evidence of the cancer on October 18, 2004 and therefore concluded that Jenny was not in “good health” as of September 22, 2004. SBLI’s conclusion was made in light of the following facts:
 - Jenny’s OBGYN performed a clinical examination of Jenny’s breast after complaints of tenderness and concluded that any breast discomfort was consistent with postpartum symptoms.
 - Jenny’s oncologist reviewed Jenny’s health records prior to September 22, 2004 and concluded that any changes in her breasts were consistent with postpartum and not cancer; in fact, it was noted by Jenny’s oncologist that symptoms of breast cancer were noticeably absent from Jenny’s medical records.
 - Clinical observations made by attending hospital physicians, nurses and Jenny’s OBGYN following Jenny’s cesarean delivery and noted no signs of illness or disease.
 - A panel of independent physicians concluded in connection with an investigation of potential medical malpractice that Jenny’s physicians did not overlook any symptoms of cancer prior to her diagnosis in October 2004.
 - The Chief of Breast Cancer at Dana Farber and Sloan-Kettering both acknowledge that it is possible that Jenny’s cancer did not exist prior to September 22, 2004 and agree that no conclusions on when the onset of cancer may have occurred prior to receipt of the biopsy results.

Current Law

- The good health provision is ambiguous as there is no direct Massachusetts case law defining good health or its applicability absent fraud or non-compliance with policy terms.
 - Massachusetts law places the burden of proof to prove good health on the insured; however, the courts have not explained what a family must demonstrate to establish the insured was in good health on the effective date of the policy.

- The cases involve markedly different and material facts from Jenny's situation with either policyholder misrepresentation or contemporaneous (rather than retroactive) clinical diagnosis of treatment or ill health by a medical professional, or both.
- Many older cases were decided at a time when the medical community's understanding of disease was quite different from today's understanding of biology and disease.
- Several states view the good health provision more subjectively, meaning that the person is in good health if he or she appears to be in clinical good health without knowledge of any undisclosed disease.

Good Health Provision

- SBLI is performing a speculative, retroactive diagnosis to estimate when Jenny's illness may have begun -- a skill that the medical community currently lacks -- in or to determine if Jenny was in good health at the time the policy was issued.
 - SBLI is making guess when the onset of cancer may have begun based on statistical averages; however, such an estimate does not consider the unique biology and velocity of Jenny's disease and as a result, it remains unknown specifically when Jenny indeed had cancer.
- The policy provides "I agree that the insurance applied for shall not be effective until the later of (a) the date the first full premium is paid, or (b) the date the application is approved by SBLI, and only then, if each person to be insured is in good health and insurable within the company standards on such date.

The "within company standards" qualification modifies the term "insurable" and "in good health."

If SBLI had access to all information that was readily available and could have been known prior to the policy's effective date, performed a physical examination, and issued the policy, how could Jenny have been considered anything but within good health under the "company standards."

- Since we all suffer from metaphysical imperfections that may eventually result in our own demise, is it difficult to determine the status of an insured's health absent a medical diagnosis. Consider the following:
 - At what stage would Jenny have been considered ill -- when she had 1 mutated cell, 1,000 mutated cells, or 1,000,000 mutated cells?

- Would Jenny have been considered to be in poor health at birth since she suffered a genetic defect?
- Physicians believe that health imperfections may be found on virtually anyone if enough diagnostic tests are performed. As a result, physicians qualify someone as in good health based on clinical examinations and routine tests, such as blood work, which SBLI performed.
- Medical experts define “good health” based on currently known information, current medical evaluation, and the absence of data or diagnosis to the contrary. How else can one prove a negative? In other words, how can someone applying for insurance demonstrate he or she is in good health other than through the absence of noticeable disease from clinical examinations and reviews of existing medical records?

Misuse of the Contestability Provision and Expansion of Scope

- The Limitations on Our Contesting a Claim provision of SBLI’s policy states: “We can contest or cancel the policy for any ‘material misrepresentation of fact’ within two years from the Issue Date.”

Since Jenny’s application did not contain any misrepresentations of fact, SBLI used the contestability provision restricted to instances of fraud to expand the scope of its policy without any corresponding rider to obtain additional information only available (or could have been available) after the effective date of the policy to inappropriately deny the claim based on the “good health” provision.

- SBLI used the contestability provision to reevaluate its original issuance of the policy based on a retroactive and speculative medical analysis to reach a conclusion contrary to what SBLI, Jenny, and her physicians believed at the time.

Assumption of Risk

- There is an assumption of risk by the insurer inherent in a life insurance contract.
- When SBLI issued the policy, they were aware of Jenny’s health of several risk factors associated with her health:
 - Jenny had answered “yes” to the question of “Have you ever had any disorder of menstruation, pregnancy (including toxemia) or other reproductive organs or breasts.”
 - Jenny had melanoma at the age of 25 which suggested possible recurrence of cancer. In fact, doctors consider the risk of melanoma reoccurring (a risk SBLI obviously assumed) to be higher than the possibility of

developing breast cancer.

- There were no new facts as to symptoms experienced by Jenny that were not already know, or could have been known, by SBLI prior to the issuance of the policy.

Public Policy Concerns

- There is no principled boundary to prevent future application of SBLI's view and application of the good health provision to a number of instances; not only cancer, but stroke, heart attack, aneurysm, and so forth in which a fatal disease can arguably be shown by expert testimony to likely have begun before the effective date of an insurance policy.
- SBLI's application of the "good health" provision is not consistent with Massachusetts law forbidding insurers to discriminate based on genetic predispositions.
 - Massachusetts law recognizes that while certain genetic mutations may make an individual more prone to deadly diseases such as cancer or Alzheimer's, insurance companies may not use such genetic predispositions as a basis for denying coverage.
- SBLI's view of the good health provision is contrast to the opinion of the general public. As a result, families may be relying on protection that may not be available in the event of the death of a loved one.

Closing

- The very purpose of life insurance is to help secure the family in the event of a tragedy similar to mine.
- There is nothing I could have done differently to have better protected my family in light of SBLI's misuse of the good health provision.
- If a person is in clinical good health – the person feels fine, has no signs of symptoms of disease, and is found to be healthy by the insurance company's own doctor – then that person should be deemed to be in good health and insurance companies should be prevented from making speculative, retroactive diagnoses to attempt to prove otherwise.
- Legislation should be passed that presumes the good health of an insured at the time of a policy's issuance if the insurer issues a policy to the insured.
 - An insurer should only be allowed to rebut this presumption of good health in the event of misrepresentation or by clear and convincing

evidence indicating that the insured should have known he was not in good health based on active symptoms of a serious health condition.

Good Health Clause—Jenny's Law For October 10, 2007

About Senate Bill 633

- Currently, Massachusetts law permits life insurance companies to deny paying claims to a decedent's beneficiaries based upon an unreasonable interpretation of the 'good health' provisions found in most life insurance policies.
- Good health provisions generally state that the policy will not be effective if, on the date that the policy is issued, the insured is not in good health.
- Massachusetts case law indicates that the beneficiaries must prove that the insured was in good health.
- The definition of 'good health' is not clearly stated in Massachusetts statutes or case law.
- Because it is often impossible to know when a fatal disease has begun, it is very difficult for beneficiaries to meet this burden.
- This uncertainty has resulted in insurance companies denying claims if a person dies within two years of the policy start date.
- The companies maintain that the person could not have been in good health, even when a required medical examination did not show any illness, there were no symptoms of illness, and there was no evidence of fraud or misrepresentation.

- This bill would transfer the responsibility of proving good health from beneficiaries to the insurance companies.
- After this change, it would be presumed that the insured was in good health if the insurer issued the policy to the insured.
- The insurance company may rebut the presumption by showing that the insured person misrepresented relevant information or that the insured should have known he was not in good health based on active symptoms of a serious health condition.
- Resolving the uncertainty created by existing case law on this subject will bring much needed peace of mind to the dying and their families.