大成 DENTONS

Gotham Insurance Symposium

Long-Term Care Insurance Developments

October 24, 2019

Thank you to our speakers

Catherine Collins
AVP & Associate General Counsel
John Hancock Life Insurance Company

Allison Kusel
Adjudication Leader
Genworth

Kristen B. Weil
Partner, New York
kristen.weil@dentons.com

Michael Duvall
Partner, Los Angeles
michael.duvall@dentons.com

Kenneth J. Pfaehler
Partner, Washington DC
kenneth.pfaehler@dentons.com

AGENDA

- State of the current LTCI market
- Rate Increase Litigation History
- Recent Developments
  - Regulatory rate increase litigation
  - Individual and class action rate increase litigation
  - *Gunn v. Continental Casualty Co*.
- Insurer Innovations
- Long-Term Claims Fraud

State of the LTCI Market

Long-Term Care Insurance

- LTCI is typically purchased when young and healthy to provide coverage for the costs of care for chronic medical conditions and assistance with activities of daily living needed later in life
- LTCI policies can be issued to individuals or groups

Current Status of LTC Insurance as a Product

- Carriers in the market
- Carriers seeking rate increases on closed blocks of business
- Carriers pivoting to hybrid policies

History of LTCI Rate Increase Civil Litigation

Rate Increase Litigation - Background

- Putative class actions challenging LTCI policy premium increases, starting in late 1990s and 2000s
  - State/nationwide classes of thousands of policyholders
  - Sophisticated plaintiffs' lawyers
  - Potential for punitive damages
  - Cost of defense can be significant
  - Class action settlements (and losses) can be very expensive

Rate Increase Litigation - Common Plaintiffs' Theories

- Insurers knowingly or "fraudulently" underpriced policies
- Insurers seeking rate increases should be responsible for their own alleged fraud/mistakes
- Policies were "experimental"
- The "guaranteed renewable" language was rendered meaningless
- Policies will be "unaffordable" after an increase
- Insurer targeted elderly consumers

Rate Increase Litigation - Common Defenses

- Two central defenses to successfully obtain dismissal of these claims
  - Policy's express reservations of right to raise premiums
  - The Filed Rate Doctrine
- Other defenses include:
  - Lack of reasonable reliance
  - Undisclosed plan to underprice for a long time, with the hope of future rate increases, is not plausible
  - Statute of limitations

The Filed Rate Doctrine

- A judicially created doctrine (federal and state courts)
- Widely accepted
- Prevents judicial attacks by policyholders on premium rate increases filed with or approved by regulators
- Applied to claims predicated on both state statutory (i.e. consumer fraud, bad faith) and common law (i.e., fraud, breach of implied covenant) claims
- Often asserted at pleadings stage

Recent Developments

Recent Developments

- Regulatory rate increase litigation
- Individual and class action rate increase litigation
- *Gunn v. Continental Casualty Co*.

Insurers Challenging Their Regulators - Minnesota Administrative Hearing

- Minnesota disapproved carrier's rate increase filings multiple times
- Carrier met with DOI to discuss rate increases
- Carrier appealed disapprovals and prepared for a full administrative hearing
- On the eve of hearing commencing, carrier and DOI worked out differences, and carrier re-filed and obtained approval of rate increase

Insurers Challenging Their Regulators - Pennsylvania Rate Increase Denial

- 69% rate increase sought on two closed blocks
- DOI disapproved on a “restated loss ratio” methodology, imputing earned premiums as if current rates *and* the requested rates were charged since inception
- Carrier initiated administrative hearing: beyond scope of regulatory authority, a de facto regulation, imposed inadequate or confiscatory rates, and was an abuse of discretion when application did not seek to recoup past losses
- Case settled shortly before April 2017 hearing

Elma Sanchez v. CalPERS

- $1.2 billion class action lawsuit in L.A. County Superior Court claims that California Public Employees' Retirement System breached insurance policies by increasing premium rates by 85% in 2015 and 2016
- Trial started in June 2019 and was broken up into phases
- Trial Court issued proposed statement of decision, concluding that CalPERS had a right to raise rates on a class-wide basis, but could not raise rates "as a result of" inflation protection riders
- Parties currently in mediation
- Upcoming trial phase to commence October 30

Toulon v. CNA Financial Corp.

- Following 76.50% rate increase, Plaintiff argued she was misled to believe that rate increases would be around 20%
  - Worksheet explicitly stated the insurer had a right to raise premiums, but other statements allegedly created inferences about the probability and magnitude of future rate increases
  - “Have you considered whether you could afford to keep this policy if the premiums were raised, for example, by 20%?”
- Allegations included fraudulent misrepresentation and omission, and related state-law claims

Toulon

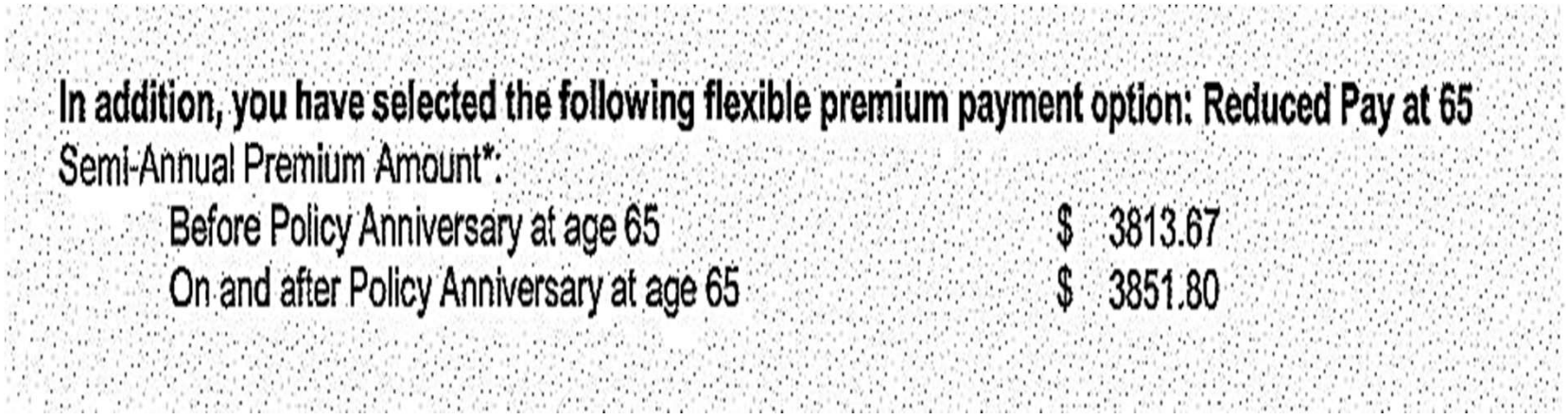
- District court granted motion to dismiss (with prejudice 3rd time), finding that representing increase as possibility and using 20% increase as example was not fraud:
  - Facts in worksheet were true
  - Not reasonable to infer fraud based on mention of a potential percentage increase
  - Regulators required 20% language, providing safe harbor as to statutorily-based deception claim

Toulon

- On December 14, 2017, the Seventh Circuit affirmed the dismissal
  - The Worksheet and the policy did not contain any false statements
  - Even if Toulon misinterpreted the marketing materials and policy to implicitly promise not to raise premiums significantly, reliance is unjustified given clear disclaimers

Newman v. Metropolitan Life Insurance

- Plaintiff purchased Reduced-Pay at Age 65 option, where Policyholder pays higher premium before age 65, but pays half the amount of pre-age 65 premium thereafter:



In addition, you have selected the following flexible premium payment option: Reduced Pay at 65

Semi-Annual Premium Amount*:

Before Policy Anniversary at age 65	$ 3813.67
On and after Policy Anniversary at age 65	$ 3851.80

- Policy warned that rates could increase four separate times

Newman

- Prior to age 65, 18% rate increase
- At age 65 policy anniversary, premium reduced by 50%
- When Plaintiff was 67 years old, premium increased 102%, from the reduced rate

Newman

Plaintiff Files Suit:

1. **Breach of Contract**
   - Alleged policy precluded insurer from increasing premiums above her pre-65 level; claimed Option required locked-in premium after 65
2. **Fraud & Fraudulent Concealment**
   - Alleged false statement in the option because insurer raised premium above pre-65 level
3. **Unfair and Deceptive Practices Under the Illinois Consumer Fraud Act**
   - Alleged Option language constituted a deceptive act or practice

Newman – District Court Opinion

- Motion to Dismiss Granted on March 9, 2017
  - District Court enforced the unambiguous language permitting the rate increase; "[t]he Court will 'not search for ambiguity where none exists'"
  - Found no fraud or deceptive act because the policy warned policyholders that premiums could increase in at least four places
- Request for leave to file Second Amended Complaint was denied
  - The proposed amendment stated no new facts and plaintiff had inappropriately rehashed arguments already considered and rejected by the Court
- Complaint Dismissed April 12, 2017 with Prejudice
- Plaintiff appealed

Newman – 7th Circuit Opinion

- 7th Circuit reversed February 6, 2018, found carrier liable for breach
  - The Court found the policy ambiguous because two interpretations were possible:
    - Insurer: Premium will be half that of **a** Reduced-Pay policyholder who has not yet reached age 65
    - Plaintiff: **Plaintiff's** Post-65 premium will be **fixed** at half the amount of **her** pre-65 premium
  - Court agreed that the Reduced-Pay excerpt cannot be read alone, but found remaining provisions also ambiguous -- "class" was undefined
    - Is class based on age, payment option, something else?

Newman

- Petition for rehearing denied on March 22, 2018 with all judges voting to deny the petition for panel rehearing
- On remand, parties commenced class certification discovery at the start of 2019
- In March 2019, the parties asked that the court stay discovery pending private mediation

Plaintiffs' Unsuccessful Attempt to Expand on *Newman*

Gunn - Complaint (N.D. Ill.)

- Gunn purchased LTC group policy in 2000 in D.C.
- Gunn claims it is impermissible to unevenly implement rates across the country
  - Alleges that CNA knew state regulators would not approve a uniform, nationwide rate increase
  - Alleges that CNA can only raise premium rates by uniform implementation on a class-wide basis
  - Plaintiff defines “class” = all certificate-holders nationwide

Gunn - Complaint (N.D. Ill.)

- Gunn relies on portions of the policy and marketing materials received in his complaint
  - Policy: "… We can, however, change the Insured's premiums based on his or her premium class, but only if We change the premiums for all other Insureds in the same premium class."
    - "premium class" is undefined
  - Brochure: "Premiums may change. But for premiums to change, CNA would have to change premiums for everyone in your age category . . ."
    - "age class" is undefined

Gunn - Motion to Dismiss and Amended Complaint

- CNA moved to dismiss the original complaint on July 7, 2018 —denied as moot after amended complaint filed
- Adds allegation that premiums cannot be raised on policies with inflation protection
  - Marketing piece said that inflation protection rider will prevent “worry about increasing your premium in the future.”
  - D.C. regulations require an offer of inflation protection incorporated into LTC policy provision, by stating policy automatically conforms to requirements of the state of issue (most states require it)
  - No documents stated that purchase of the protection did not guaranty a level premium
  - Failure to disclose was allegedly misleading, constituted fraud, and violated consumer protection statutes

Gunn - Motion to Dismiss (N.D. Ill.)

- On September 3, 2019, the Court granted CNA's renewed motion to dismiss
  - Filed rate doctrine bars Gunn's challenge to premiums increased for a particular premium class on a state-by-state basis and for insureds who opted into an inflation protection option, regardless of whether claims styled as tort, contract, or fraud
  - Granting a premium refund, injunction from increasing premiums, or compensatory, statutory, and punitive damages would result in price discrimination among insureds
- Notice of appeal filed on October 1, 2019

Innovations in LTC Insurance

Innovative LTC Product Offerings and Features

- Innovative rate increase mitigation options
  - LTC Policy Buyout pilot program, where policyholders subject to rate increase are offered an array of options, including the option to elect return of premium in exchange for terminating coverage
  - Shared Cost Option, where policyholders have the option to reduce maximum benefits and claims costs are paid via co-deductible model
  - Benefits: more consumer choice, provides creative ways for policyholders to keep valuable insurance coverage, positive reception from regulators

Innovative LTC Product Offerings and Features

- Policyholder wellness programs
  - Designed to help keep policyholders healthier
  - May involve assessments of policyholders' homes to identify changes to keep policyholders in their homes longer
- Increased policyholder access
  - Online portals for 24-7 information on benefits, premium payments, invoices
  - Increases transparency and reduces insurer administrative costs

Long-Term Care Insurance Fraud

How do, and *can*, insurers combat policyholder fraud?

Long-Term Care Insurance Fraud: Financial Impact

- “It is estimated that 3 to 5 percent of every claim dollar is lost to hard fraud−the kind committed by organized criminals.”

- Source: Deloitte Center for Regulatory Strategies, “Leading in times of change, Insurance regulatory outlook 2019: The fraud epidemic” (Dec. 2018)

Long-Term Care Insurance Fraud: Financial Impact

- "It is estimated that … **5 to 25** percent of every claim dollar is lost to **soft fraud**."

- "'Soft fraud' is opportunistic and typically perpetrated by individuals through relatively benign acts such as exaggeration, embellishment, malingering a claim, or misrepresentation of a previous condition."

- Source: Deloitte Center for Regulatory Strategies, "Leading in times of change, Insurance regulatory outlook 2019: The fraud epidemic" (Dec. 2018)

“Soft” LTC Insurance Fraud

- Misrepresenting/exaggerating condition to satisfy benefit eligibility
- Billing for services not rendered
  - In-home care
  - “Family and friends”
  - Cash payments

- Source: Society of Actuaries, “Long-Term Care Insurance Fraud, Waste and Abuse Risk Management, A Survey of Industry Perspectives” (June 2019)

Typical methods to *further* investigate suspected "soft" LTC insurance fraud

Tool	Have Considered	Would Consider	Would Not Consider	Not Familiar Enough to Know
Require additional proof from insured	77%	24%	0%	0%
Electronic verification methods	46%	46%	0%	8%
Examinations Under Oath (EUOs)	31%	38%	8%	15%
Pursue declaratory judgment	31%	23%	8%	23%
Forensic data-gathering	0%	54%	15%	15%

- Source: Society of Actuaries, "Long-Term Care Insurance Fraud, Waste and Abuse Risk Management, A Survey of Industry Perspectives" (June 2019)

Typical *remedies* pursued for confirmed "soft" LTC insurance fraud

Remedy	
Terminate claim	92%
Ask to recover payments	61%
Terminate policy (and refund premiums)	54%
File declaratory judgment	46%
Refer to prosecutor/regulator	<33%
Sue for fraud	?

- Source: Society of Actuaries, "Long-Term Care Insurance Fraud, Waste and Abuse Risk Management, A Survey of Industry Perspectives" (June 2019)

Combatting LTC Insurance Fraud: (In)Effectiveness

"With regard to evaluating its efficacy at handling fraud, waste and abuse, the industry does not give itself very good grades. None of the respondents feel that the industry is either very or extremely effective."

"Overall, the industry does not feel the regulatory community has a full understanding of the nature, type, and scope of FWA [fraud, waste, and abuse] that is prevalent in the experience of the LTC insurance product today."

- Source: Society of Actuaries, "Long-Term Care Insurance Fraud, Waste and Abuse Risk Management, A Survey of Industry Perspectives" (June 2019)

Combatting LTC Insurance Fraud - Why Ineffective?

- Policy language
- Concern with consumer complaints, legal action
- Lack of political support
- “Fraud is difficult to identify and quantify”
- Social acceptance (“victimless crime”)
- “Just plain apathy”
- “Many companies make the business decision to pay suspicious claims without a fight”

- Sources: Society of Actuaries, “Long-Term Care Insurance Fraud, Waste and Abuse Risk Management, A Survey of Industry Perspectives” (June 2019); Deloitte Center for Regulatory Strategies, “Leading in times of change, Insurance regulatory outlook 2019: The fraud epidemic” (Dec. 2018)

Declaratory Judgment

- Simple
- Jurisdiction
- Discovery

Counter-Claims

- Keep paying

Document Discovery

- Insured
- Spouse
- “Caregivers”
- Bank records
- Credit card statements
- Cell phone records
- Emails
- Texts
- Medical records

Investigation

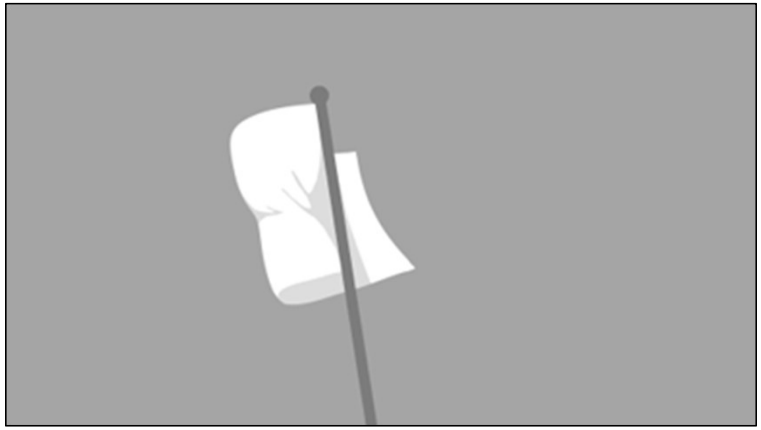
- Litigation Surveillance
  - Consulting (undisclosed) vs. Testifying (disclosed) expert witness
- Social Media & Internet
- DMV
- Real estate
- FAA

Other Claims

- Fraud
- Contract
  - Cons
- Civil RICO
  - Co-conspirators
  - Admissions
  - Prosecution

Depositions and IMEs

What's the Point?



Thank you

Dentons US LLP
1221 Avenue of the Americas
New York, NY 10020-1089
United States

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work. www.dentons.com.