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INSURANCE CLASS ACTION TRENDS

Dentons Insurance Symposium

October 13, 2022

Grow | Protect | Operate | Finance

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Roadmap

Long-Term Care Insurance Class Actions

Life Insurance Class Actions

P&C Class Actions



Long-Term Care Insurance Class Actions

Big-picture

Evolution of theories

Latest, Greatest, and Worst

Continued Challenges, and Innovative Solutions

Pricing & Rate Increases

In recent years, many carriers of long-term care insurance (LTCI) products have found themselves with high loss ratios and low profitability. The low interest rate environment, low lapse rates, and higher morbidity have contributed to these factors.

Insurers must collect enough premium now to fund those claims later.

One approach to remedying the challenges insurers are facing is to request approval for a rate increase.

Pollock et al., Anatomy of a long-term care rate increase (Jan. 26, 2021)

Early Challenges to Rate Increases

The Policy language controlled:

time... “[T]he policy explicitly reserved the right to raise premiums at any time...”

“ We have difficulty understanding how [the policyholder] can claim to have relied on a provision that explicitly allows such increases to believe that premiums would never increase...”

The policy was guaranteed renewable, not guaranteed affordable.”

***Alvarez v. Insurance Co. of N.A.*, 313 F. App’x 465, 468 (3d Cir. 2008)**

See also Rakes v. Life Investors Ins. Co. of Am., 582 F.3d 866, 893 (8th Cir. 2009) (dismissing fraud claims because “plaintiffs were not guaranteed a level premium for life”); *Toulon v. Cont’l Cas. Co.*, 2016 WL 561909, at *3 (N.D. Ill. 2016) (dismissing allegations that policy statements were false and misleading in light of insurers’ knowledge that future premium increases would occur because “none of the statements identified can be considered false”).

Early Challenges to Rate Increases

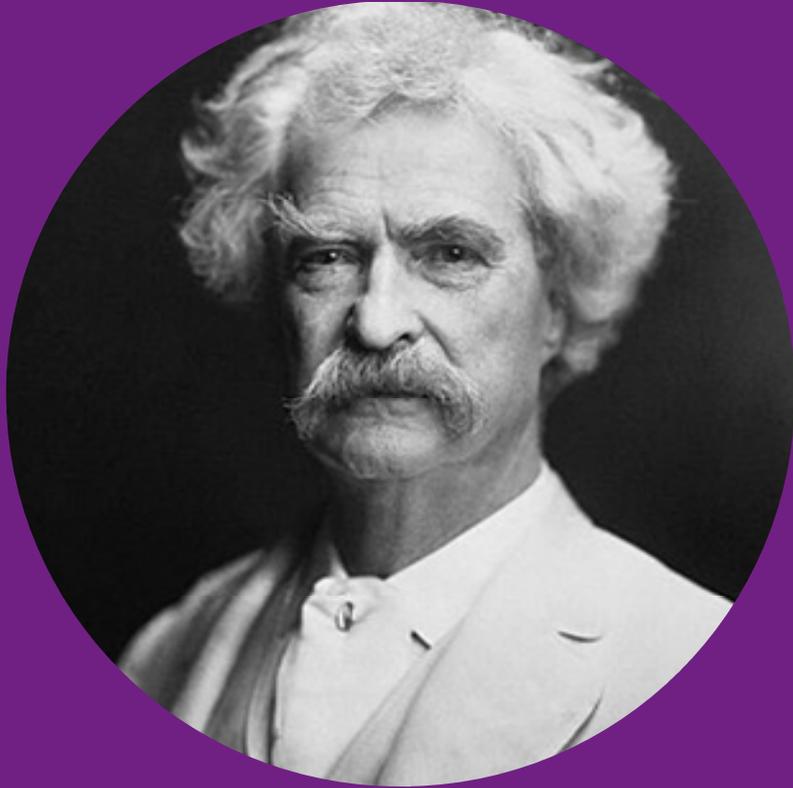
The Filed Rate Doctrine ruled:

- “[T]he doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit.”

Armour v. Transamerica Life Ins. Co., 2012 WL 234032, at *2 (D. Kan. Jan. 25, 2012) (dismissing state law claims that premium rate increases were wrongfully procured through “unreasonable actuarial assumption[s]”)

See also *Flint v. Metlife Ins. Co. Conn.*, 460 F. App’x 483, 485 (6th Cir. 2011) (affirming dismissal of plaintiffs’ claims of allegedly fraudulently procured rate increases as barred by the doctrine).

“ Plaintiffs’ Adaptations



“The reports of my death are greatly exaggerated.”

Plaintiffs’ Class Action Lawyers.

Challenges to Rate Increase Disclosures

Skochin:

This case does not challenge [the insurer's] right to increase these premiums, or the need for premium increases given changes in certain of Genworth's actuarial assumptions. Nor does this case ask the Court to reconstitute any of the premium rates or otherwise substitute its judgment for that of any insurance regulator in approving the increased rates.

Rather, this case seeks to remedy the harm caused to Plaintiffs and the Class from [the insurer's] partial disclosures of material information when communicating the premium increases, and the omission of material information necessary to make those partial disclosures adequate.

Without this material information, Plaintiffs and the Class could not make informed decisions in response to the premium increases and ultimately made policy option renewal elections they never would have made had the Company adequately disclosed the staggering scope and magnitude of its internal rate increase action plans in the first place.

Challenges to *Procurement* of Rate Increases

Gunn Consolidated Class Actions

Plaintiffs' Theory: Who's is the
"Class"?

Initial District Court Opinion

Seventh Circuit Remand



Latest Opinion in *Gunn*

Northern District of Illinois (Aug. 19, 2022):

We conclude that, contrary to Continental’s argument, the filed rate doctrine does not operate to bar Gunn’s claims. Gunn is not challenging the reasonableness of the rates or challenging [the insurer’s] authority to review rates charged to its residents. Rather, Gunn’s claims address “Continental’s conduct in marketing and selling the policy and failing to comply with its terms—by promising a nationwide rate class but nonetheless seeking premium increases without regard to that promise.”

Latest Opinion in *Gunn* (cont'd)

- Policy language stating insurer would raise premiums “only if we change the premiums for all insureds in the same premium class” was ambiguous as to the phrase “premium class.”
 - Extrinsic evidence will be needed to determine whether insureds in different states are members of different premium classes who may receive different levels of rate increases under the policy.
- Fraud claims also allowed to proceed based on marketing materials that stated that premiums would only be raised “for everyone in your age category who has the kind of coverage plan that you do.”
- Breach of contract claims based on marketing statements that with inflation protection, “you will not need to worry about increasing your premium in the future or about tracking offers of additional coverage,” also allowed to proceed.

Gunn v. Cont'l Cas. Co., 2022 WL 3593356 (N.D. Ill. 2022).

Challenges to *Procurement* of Rate Increases

Parmenter Class Action

Plaintiffs' Theory: "Subject to Approval"
means *affirmative, prior approval*

Parmenter Opinion

District of Massachusetts (July 12, 2022):

However, to date the Commissioner has declined to exert its regulatory authority over premiums for group employer coverage. Parmenter thus reads the Group Plan to dictate that Prudential can never raise its group premium rates until the Commissioner decides to adopt a regulatory scheme to review and approve employer-based group long term care insurance rates.

The court agrees with Prudential that this interpretation is "nonsensical," as it could lock in premiums for participants for years, "possibly decades[,] while the cost of medical expenses and inflation continue to rise."

Rather, the court accepts Prudential's common-sense interpretation that changes to premiums under the Group Plan are "subject to" Commissioner approval if and when the Commissioner opts to require such approval.

Class Actions Challenging Public LTCL Programs

Wedding v. California Public Employees Retirement Sys. (CalPERS)

Pacific Bells LLC et al. v. Inslee et al. (Washington Long-Term Cares Act)

Settlements: *Challenges and Innovations*

CalPERS Settlement

16 The Settlement is intended to provide settlement benefits of up to approximately \$2.7
17 billion to participating Settlement Class Members, to be paid out of the Long Term Care Fund.
18 That total settlement benefit includes the refund of all premiums paid by certain participating
19 Settlement Class Members, as well as other payments to policyholders who do not have active
20 policies or who are on claim, in the amount of up to approximately \$2.4 billion, as well as a
21 Contingency/Administration/Fee Fund (“CAF Fund”) of up to \$282.5 million. The CAF Fund may
22 be used to mitigate any adverse consequence to the Long Term Care Fund as a result of opt-outs
23 or Potential Late Opt-Outs and shall be used for Settlement Administration Expenses, any
24 attorneys’ fees award and litigation costs as well as service awards to Plaintiffs. The Settlement

Settlements: *Challenges and Innovations*

CalPERS (blow provision)

CalPERS Long-Term Care Class Action Settlement

Wedding, et al. v. California Public Employees Retirement System, et al., Case No. BC517444

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If you were a California Citizen on February 1, 2013 and you purchased a Long-Term Care insurance policy from CalPERS that included inflation protection benefits, and you were subjected to the 85% premium increase announced by CalPERS in 2013 and implemented in 2015 and 2016, you are entitled to participate in a proposed class action settlement.

Updates: July 18, 2022

For All Settlement Class Members:

Under Section 19.1 of the Settlement Agreement, the Settlement could be terminated if more than 10% of the Settlement Class opted out. Because approximately 30% of the Class opted out, the parties have determined that the existing Settlement will not be going forward. A recent letter by the Parties to the Court confirming the Settlement will not be going forward is available [here](#).

Current Status

Pursuant to the terms the settlement, the Parties have informed the Court the Settlement will not proceed. See FAQs for All Class Members.

Settlements: *Challenges and Innovations*

CalPERS – What Happened?

9. What am I giving up in exchange for the Settlement benefits?

Settlement Class Members who do not submit a valid Request for Exclusion (see [FAQ 15](#)) will release CalPERS and all of its respective current, former, and future parents, subsidiaries, predecessors and successors, and affiliated entities, and each of their respective officers, directors, employees, partners, shareholders, and agents, and any other successors, assigns, or legal representatives from any and all breach of contract claims, rights, demands, liabilities, and/or causes of action of every nature and description, whether known or unknown, arising from or related to the 85% premium increase announced in 2013, including, without limitation, statutory, constitutional, contractual, and/or common law claims.

In addition, Category A Settlement Class Members will be required to surrender their CalPERS LTC Policy and will not be entitled to any benefits from that policy in the future.

Settlements: Challenges and Innovations

Skochin & Halcom
(Special Election Options)

The chart below shows how each of these options compares to your current premiums and benefits.* For additional definitions of terms in the chart, please see the included Important Information about Your Settlement Options.

	Your Current Benefits	Option 1 Enhanced Reduced Paid-Up Benefit	Option 2 Basic Reduced Paid- Up Benefit <i>Plus</i> Cash Payment	Option 3 Remove Inflation Benefit & Revert to Original Benefit Levels <i>Plus</i> Cash Payment	Option 4 Remove Inflation Benefit & 25% Reduction to Certain Maximum Benefits <i>Plus</i> Cash Payment	Option 5 Reduce Benefit Period from [Lifetime] to [x] Years & Reduce Lifetime & Daily Benefit Maximums, <i>Plus</i> Cash Payment
Cash Payment***	N/A	None	[\$XX.XX]	[\$XX.XX]	[\$XX.XX]	[\$XX.XX]
Maximum Benefit (Daily)	[Current Maximum Benefit (Daily)]	[Current Maximum Benefit (Daily)]	[Current Maximum Benefit (Daily)]	[Original Maximum Benefit (Daily)]	[25% Reduction to Current Maximum Benefit (Daily)]	[25% Reduction to Current Maximum Benefit (Daily)]
Inflation Benefit	[Current Inflation Benefit]	[None]	[None]	[None]	[None]	[Current Inflation Benefit]
Elimination Period	[Current Elimination Period]	[Current Elimination Period]	[Current Elimination Period]	[Current Elimination Period]	[Current Elimination Period]	[Current Elimination Period]
Benefit Period	[Current Benefit Period]	[N/A]	[N/A]	[Original Benefit Period]	[Current Benefit Period]	[6-Year Benefit Period (or the next lowest option if a 6-Year Benefit Period is not available)]
Total Lifetime Benefit***	[Current Total Lifetime Benefit]	[\$XX.XX]	[\$XX.XX]	[Current Total Lifetime Benefit] [**]	[Current Total Lifetime Benefit] [**]	[\$XX.XX] [**]
[Annual Premium]***	[\$Current Annual Premium]	Pay no further premiums.	Pay no further premiums.	[\$XX.XX]	[\$XX.XX]	[\$XX.XX]

Life Insurance class actions:

- CA Lapse cases
- Cost of Insurance case developments
- Pricing and claims cases

California Lapse Statute Cases

Cal. Ins. Code sections 10113.71 and 10113.72

- Enacted 2012, effective date Jan. 2, 2013
- Core requirements:
 - Contract grace period not fewer than 60 days
 - Notice provided within 30 days of a missed premium and at least 30 days prior to the effective date of lapse/termination
 - Annual opportunity to designate additional person for notice (“TPN”)

“

“No individual life insurance policy shall lapse or be terminated for nonpayment...” unless notice has been provided [to policy owner/TPN designee];

“[A] notice of pending lapse and termination of a life insurance policy shall not be effective...” absent compliance with the 30 day notice.

The first threshold issue: Retroactivity?

- No language in Statutes regarding retroactive application
- CA Department of Insurance: Statutes apply *going forward*.
 - ACLI
 - SERRF
 - Market Conduct exam instructions.
- Plaintiffs Bar: *38+ class actions and individual cases challenging compliance with Statutes*

McHugh v. Protective Life (CA Supreme Court):

- CA Statutes apply to all policies in force on or after 1/1/2013
- the Statutes were specifically enacted to “protect[] people who hold life insurance policies from **inadvertently** losing them.”

SO, is it a “GOTCHA?!?!”

Plaintiffs, post-*McHugh*:

Statutes demand
strict compliance

Absent strict
compliance →
strict liability for
any violation

Statutes provide
self-effectuating
remedy: policies
stay in force
absent proper
term.

Remedy for L/D:
benefit payable
+ interest, less
prem.

Remedy for L/A:
perpetual
coverage,
absent a re-
lapse

Key Defenses

Compliance / Substantial Compliance (variable)

No private right of action under the California Statutes.

- Plaintiff wants to turn these Statutes into a judicially-created, strict liability private right of action, complete with a specific remedy. Not what the Statutes say, or do.
- An insurer's failure to meet the Statutory requirements, if proven, at most provides *the factual predicate for a breach* (the first element of a contract claim). It does not mandate the remedy of perpetual coverage

Plaintiff has sued for breach of contract, UCL. Plaintiff has a claim only where they can show all elements of that claim: e.g. for contract: performance, breach, and injury, caused by a defendant.

UCL also requires causation and injury

- Why does Plaintiff need a shortcut? The evidence!
 - Vast majority of Plaintiff's proposed class did not want their life insurance coverage.
 - Intentionally allowed their policies to lapse, and would have done so regardless of the notice or grace period provided.
- No STANDING, No CLAIM: Those class members were not injured, and could never prove the elements of a breach of contract claim

Case No. D072863

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

BLAKELY MCHUGH AND TRYSTA M. HENSELMEIER
Plaintiffs and Appellants,
vs.

PROTECTIVE LIFE INSURANCE COMPANY
Defendant and Respondent.

ON REMAND FROM THE SUPREME COURT OF CALIFORNIA, CASE No. S259215

**(ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
THE HONORABLE JUDITH F. HAYES
CASE No. 37-2014-00019212-CU-IC-CTL)**

HOT OFF THE PRESS:

October 10, 2022 Decision, CA Court of Appeals

“We conclude the court did not err by declining to instruct the jury with the special instructions on “strict compliance ...”

“The court instructed the jury on the plaintiffs’ burden of proof in an action for breach of contract. In addition to proving that Protective Life breached the contract, ***plaintiffs had the burden of proving they were harmed*** by the breach. The court noted there were factual disputes to be decided by the jury. Under the circumstances, there was no error in refusing plaintiffs’ special instructions.” (emphasis added).

Class Certification Evidence:

- The evidence overwhelmingly rebuts Plaintiff’s class-wide assumption of inadvertent or “improper lapse.”
- Individual Company evidence re compliance.
- Randomly selected class members’ policy files -- “no inadvertence”
- Declaration, Expert Reports:
 - The decision to lapse is often purposeful, and causes no injury, whether or not technical violation.
 - The reason a policy terminates—and critically, whether there is any harm from that termination—can be determined only by individual inquiry, and the answers vary
 - Owners of policies that cover living insureds—which make up 97% of the proposed class—are not injured, or at bare minimum have no common injury, and thus cannot establish Article III standing or a contract or UCL claim.

- GLT: Premium fixed for a certain period (typically 10 or 20 years), after which contractual premiums escalate dramatically.
- Designed to provide affordable coverage during a “level term” period.
- Industry Research:
 - overwhelming majority of GLT policies lapse at or near the end of level term.
 - Over 80% lapsed exactly at the end of the level term.
- Premiums on those policies were scheduled to increase by an average of more than 1000%

SCHEDULE OF CURRENT PREMIUMS

LEVEL BENEFIT TERM LIFE INSURANCE RENEWABLE TO AGE 95
 WITH PREMIUM ADJUSTMENT PROVISION
 INSURING AGE 28

ANNUAL PREMIUMS FOR FACE AMOUNT ON POLICY SPECIFICATIONS PAGE

RENEWAL AGES	RENEWABLE TERM PREMIUM
29	\$435.00
30	435.00
31	435.00
32	435.00
33	435.00
34	435.00
35	435.00
36	435.00
37	435.00
38	435.00
39	435.00
40	435.00
41	435.00
42	435.00
43	435.00
44	435.00
45	435.00
46	435.00
47	435.00
48	2,330.00
49	2,450.00
50	2,670.00
51	2,860.00
52	3,075.00
53	3,330.00
54	3,590.00
55	3,865.00
56	4,155.00
57	4,435.00
58	4,710.00

Policy 328**** : Shortly after not making her payment, policyholder called Tower expressly indicating her plan to cancel the policy. The call notes read:

Policy 393**** : Policyholder explored surrender options multiple times during life of policy, before having agent call Tower to inform Tower that policyholder wanted to surrender the policy.

Policy 8403**** : Universal Life Survivorship policyholder (now deceased) expressed that because his wife had died, he no longer had anyone to worry about for coverage and wished to lapse and not reinstate.

Case Number: 00002-58296-871 START/STOP TIME: 29-AUG-2016 15:22:33.164 - 29-AUG-2016 15:25:39.587
CSC: Trahan, Michele Session Notes: None Contract Number: 3287297 - GenAm Caller
Relationship: Owner Passed Security: Y Contract Notes: BIRTH DATE 61 customer wants to cancel pol. advised after special courtesy offer ends it will just lapse/go away. no consequences to credit...



CANNOT ASSUME improper lapse.

BOTTOM LINE: These people simply cannot be part of a class. Cannot assume they are injured by 30 day notice. Cannot assume that their policies are still in force when they DO NOT WANT those policies

Other class defenses:

- No class-wide damages model. Comcast Corp. v. Behrend, 569 U.S. 27, 35-36 (2013) (holding that model must be “just and reasonable,” and that making no investigation of proposed model “would reduce Rule 23(b)(3)’s predominance requirement to a nullity.”).
- No Rule 23(b)(2) class because Plaintiff is primarily seeking certification for monetary relief
- Class definition fails. Plaintiffs cannot have a fail-safe class
- Named Plaintiff problems

McHugh Status

- Class decisions to date
- Cases pending decision
- The “issued or delivered” debate: *Elmore v. Prudential*
- The Group Life issue: *Clark v. Transamerica*

Questions?



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