

Legal, Compliance & Regulatory:

LTCi Litigation Update/Prevention

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**Joshua S. Akbar
Dentons US LLP**

**Michael S. Gugig
General Counsel, Genworth Long Term Care**

**Stephen A. Serfass
Drinker Biddle & Reath LLP**



15th Annual Intercompany Long Term Care Insurance Conference

Goals for Session



- Discuss recent class action cases
- Identify trends in litigation
- Consider key takeaways

- Increased attention from plaintiffs' bar
- Increasing volume of claims
- Negative publicity
- Attention of regulators and consumer advocacy groups



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Agenda



- Claims Based Class Actions
- Rate Increase Class Actions
- Conflicts and Choice of Law Issues
- Provider Eligibility and Credentialing

Claims Based LTCi Class Actions



- The start of a new trend?
- Facts alleged:
 - Policy provided benefits for assistance with ADLs and other homemaker services.
 - Insurer required licensure of Home Care providers.

The claims: Carrier's administration of LTCi policies violated California Unfair Competition Law.

- Wrongly required daily care notes.
- Wrongly required repetitive, unnecessary information.



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- Why is this significant?
 - First LTCi claims class action in nearly ten years.
 - Well-connected, sophisticated plaintiffs' attorney.
 - Involvement of consumer group.
 - June 7, 2013 *New York Times* article.

- Key Terms of Settlement
 - Reformation of claims handling practices for California claimants:
 - Provide new FAQ on claims practices.
 - HHC providers need not be licensed in California in order for claims to be paid.
 - Simplify the “Daily Visit Notes” forms that HHC providers need to fill out and eliminate the weekly form.
 - Accept a letter from a policyholder’s physician as evidence of the start date that a policyholder becomes eligible for benefits.

Factual Background:

- 2008–2011: Insured on claim for care received from a managed residential community holding an Assisted Living Services Agency license.
- Insured recovers, goes off claim in 2011.
- 2012: Insured injured, submits new claim for stay at the exact same facility.
- Basis for denial: MRC/ALSA facility is not a LTC facility under the policy, due to revised interpretation flowing from a class action settlement.

Gardner v. CNA (D. Conn. 2013)



- Plaintiff alleged that the insurer originally covered stays at a Connecticut Managed Residential Community (MRC) holding an Assisted Living Services Agency (ALSA) license, but subsequently interpreted “Long Term Care Facility” to exclude claims for stays in all Connecticut Assisted Living Facilities.
- Case Status: Pending

Gardner v. CNA Financial Corporation, 3:13-cv-01918 (D. Conn. 2013).



Inflation Protection Provision:

“Your monthly benefit will increase each year on the policy anniversary. Increases will be automatic and occur regardless of your health or whether or not you have suffered a covered loss. Your lifetime maximum benefit amount will also increase.”

- Complaint asserted insurer wrongfully calculated inflation protection.
- Insurer's alleged interpretation: after an insured suffers a covered loss and receives benefits, the annual increase applies only to the amount of benefits remaining—not to the total lifetime maximum benefit amount.
- **Case Status:** Pending





- “Good News! . . . [We are] improving your [LTC] policy. . . . [T]here may be alternative services, treatments, or facilities which can replace the need for nursing home care. This [APOC Benefit] assures you that [we] will consider reimbursement for such alternative care.”¹
 - **APOC provision**: “[M]ay detail ‘(1) special treatments; (2) different sites of care; or (3) different levels of care.’”
- **Claim**: Insured submits claim for stay at ALF.
- **Basis for denial**: APOC Benefit denied when Nursing Home Facilities are available in the insured’s area.

¹Letter to Policyholder, Complaint at pp. 5-6.



- Plaintiff alleged that the insurer routinely and repeatedly denied claims for benefits for stays at alternative facilities.
- Insurer's alleged basis for denial:
 - APOC benefit should be denied whenever Nursing Home Facilities are available in the insured's area.
- **Case Status: Pending**

Levine v. Continental Casualty Co., 1:14-cv-11099 (D. Mass. 2014).

Rate Increase LTCi Class Actions

- Class actions challenging rate increases have been filed in numerous states against many carriers.
- Each case has asserted fraud and/or other claims that allow for the potential imposition of punitive damages.
- Class action settlements (and losses) can be very expensive—a vigorous defense is mandatory.

- Insurers knowingly sold “defectively underpriced” policies at “low-ball prices.”
- Policies were “experimental.”
- The “guaranteed renewable” language was rendered meaningless.
- The purported “rate spiral” or “death spiral” leads to more frequent rate increases.

- Unambiguous contract language permitting class-wide rate increases.
- The “filed rate doctrine.”
- Statute of limitations.
- Lack of reasonable reliance on purported promises that rates would not increase in light of express policy language.



- Early cases favored plaintiffs:
 - *Hanson v. Acceleration Life* (D. N.D. 1999).
 - *Milkman v. Am. Travelers Life* (Pa. Com. Pleas 2001).
 - *Rose v. United Equitable* (N.D. 2002).
 - *Shaffer v. Continental Cas. Co.* (C.D. Cal. 2007).

The Tide Turns in 2008



- Claims dismissed based on policy language and disclosures made to policyholders.
- *Alvarez v. Ins. Co. of N. Am.* (3d Cir. 2008).
- *Rakes v. Life Investors* (N.D. Iowa 2008), *aff'd* (8th Cir. 2009).

- “The policy was guaranteed renewable, not guaranteed affordable.”
- “This guaranteed the right to renew the policy, not the financial ability to renew the policy.”
- “[D]id not imply that premiums would never increase, or that they would only increase by a limited, affordable amount.”

- “The plaintiffs were not guaranteed a level premium for life; they were guaranteed the right to renew their LTC insurance policies.”
- “Life Investors disclosed its right to change premium rates on the first page of its policies, in boldface, capital letters.”

- “[T]he documents and testimony support Life Investors’ position that it priced the policies using appropriate lapse rates”

- The “filed rate doctrine” is applied to LTC insurance for the first time.
 - State-law doctrine barring judicial challenges to rates which have been filed with a state regulator.
- *Flint v. MetLife* (6th Cir., Dec. 12, 2011).
- *Armour v. Transamerica* (D. Kan., Jan. 25, 2012).

- New rate increase class actions continue to be filed:
- *Sanchez v. CalPERS* (Cal. Sup. Ct.) - filed August 2013.
- *Toulon v. CNA Financial Corp.* (N.D. Illinois) - filed January 2015.



- "Your filing has been disapproved...."
- Administrative proceedings involving state insurance departments.
 - Insurer challenge to disapproval of rate increase filing.
 - Policyholder challenge to approved rate increase filing.

Conflicts and Choice of Law Issues

- LTCi policy issued in 1987 with a provision preconditioning benefit eligibility on the prior hospitalization of the policyholder.
- Policyholder's resident state subsequently enacts a law prohibiting such provisions.
- Policyholder submits a claim for nursing services provided without a prior hospitalization.
- Does the subsequent law apply?

Bushnell v. Medico Ins. Co.



- Policy provided benefits for skilled nursing care, but required such care begin after hospital confinement of at least 3 days.
- Subsequent Washington law, shortly after the policy was issued, prohibited this precondition.
- Court held that each renewal constituted a new contract.

Bushnell v. Medico Ins. Co., 246 P.3d 856 (Wash. App. Ct.) *review denied*, 257 P.3d 665 (Wash. 2011); Wash. Admin. Code 284-54-150(7) (“No insurer may offer a contract form which requires prior hospitalization as a condition of covering institutional or community based care.”).

Bell Care Nurses v. Continental



- Home Health Care policy issued 1990 in Florida
- Coverage for “secondary services” was conditioned on receiving “primary services” during the same week
- In 1992, Florida law updated to prohibit such conditions
- Later, insured received only secondary services from Bell Care Nurses, no primary services

Bell Care Nurses Registry, Inc. v. Continental Cas. Co., 25 So.3d 13 (Fl. Ct. App. 2010).

- Held: New contract upon renewal, therefore new law applied
- Court's reasoning:
 - Florida law treated a policy renewal as a new contract; thus, the Florida legislature intended for the statute in question to apply.
 - Decision to raise renewal rates was “left in the hands of the insurer.”
 - ***Court failed to address that the insurer was required to obtain regulatory approval to raise premiums.***

- “[G]uaranteed renewable” LTCi policies issued in 1998 in Connecticut.
- Insured relocated to Florida.
- Policy says if the law changes, the policy will conform to applicable law.
- Plaintiffs alleged that “when a policy is obtained out of state but then renewed in Florida” the policy automatically becomes a Florida policy.

Mann v. Unum Life Ins. Co. of America, 2013 WL 4768660 (Fla. Cir. Ct.) aff’d, 139 So. 3d 895 (Fla. Dist. Ct. App. 2014).

Held: The “[p]olicies’ language clearly and unambiguously provide[d] that the controlling law is that of the state where the insured resides on the [date the policy was originally issued].”

Contrary to *Bell Care Nurses*, the Court highlighted that each renewal was considered a continuation of the policy, not a re-issuance.

Mann v. Unum Life Ins. Co. of America, 2013 WL 4768660 (Fla. Cir. Ct.) aff’d, 139 So. 3d 895 (Fla. Dist. Ct. App. 2014.)

- “Supplemental Nursing Home and Home Health Care Policy,” effective 1989. Policy was guaranteed renewable.
- After policy issued, Pennsylvania prohibited prior institutionalization exclusions.
- Court reasoned “the legislature did not intend the Act to apply to policy renewals” and a new contract was not formed upon each renewal period (no offer, acceptance, or consideration).

Yoder v. Am. Travellers Life Ins. Co., 814 A.2d 229 (Pa. Super. 2002).

Provider Eligibility and Credentialing

- Facility/provider eligibility is a hot issue in LTC litigation.
- Question of contract, but...
- ...often also depends on state facility or provider licensing schemes.
- Careful contract interpretation and diligent claims practices are key.

Examples of Facility Denial Cases



- *Gregg v. IDS Life Ins. Co. of New York* (N.Y. App. Div. 1999).
- *Gillogly v. GE Capital Assurance Co.* (10th Cir. 2005).
- *Michel v. American Family Life Assur. Co.* (N.D. Ohio 2007).
- *Geary v. Life Investors Ins. Co. of Am.* (N.D. Texas 2007).
- *Milburn v. Life Investors Ins. Co. of Am.* (10th Cir. 2008).

The *Milburn* Concurrence



- Two 10th Circuit judges in *Milburn* issued a strongly-worded concurring opinion expressing "serious concerns" about elderly policyholders having to wade through state regulatory schemes which change over time.
- A warning shot across the bow to LTC insurers.

The *Milburn* Concurrence



- "[S]ome corrective action is necessary to protect policyholders' reasonable expectations."
- LTC insurers urged "to provide clearer definitions of the crucial terms."
- Oklahoma policymakers urged "to add simple clarity to this important area of law."

Pistorese v. Transamerica (2013)



- *Pistorese v. Transamerica*,
2013 WL 4008828 (W.D. Wash.).



Pistorese v. Transamerica (2013)



- Plaintiff purchased a "Nursing Home Benefit" in 1993.
- Declined optional Home Health Care coverage at time of application.
- Rejected offer to add Assisted Living Benefit in 2001.

Pistorese v. Transamerica (2013)



- Plaintiff moves into a licensed "boarding home" (now called "assisted living facility").
- A covered "Nursing Home" must provide "nursing care and related services on a continuing inpatient basis."
- Under WA law, a boarding home may, but is not required to, provide "intermittent nursing services" to "residents."

Pistorese v. Transamerica (2013)



- In 2007, a judge from the same court addressed identical policy language, and held that a boarding home was legally prohibited from satisfying that Policy requirement. (*McDermott*)
- Result in *Pistorese*?

- **Court**: summary judgment for policyholder on breach of contract claim.
- Policy's requirement that a covered "Nursing Home" provide "nursing care . . . on a continuing inpatient basis" is met if:
 - A facility provides "some" "nursing care to . . . continuing inpatients."
- Is that the same thing?

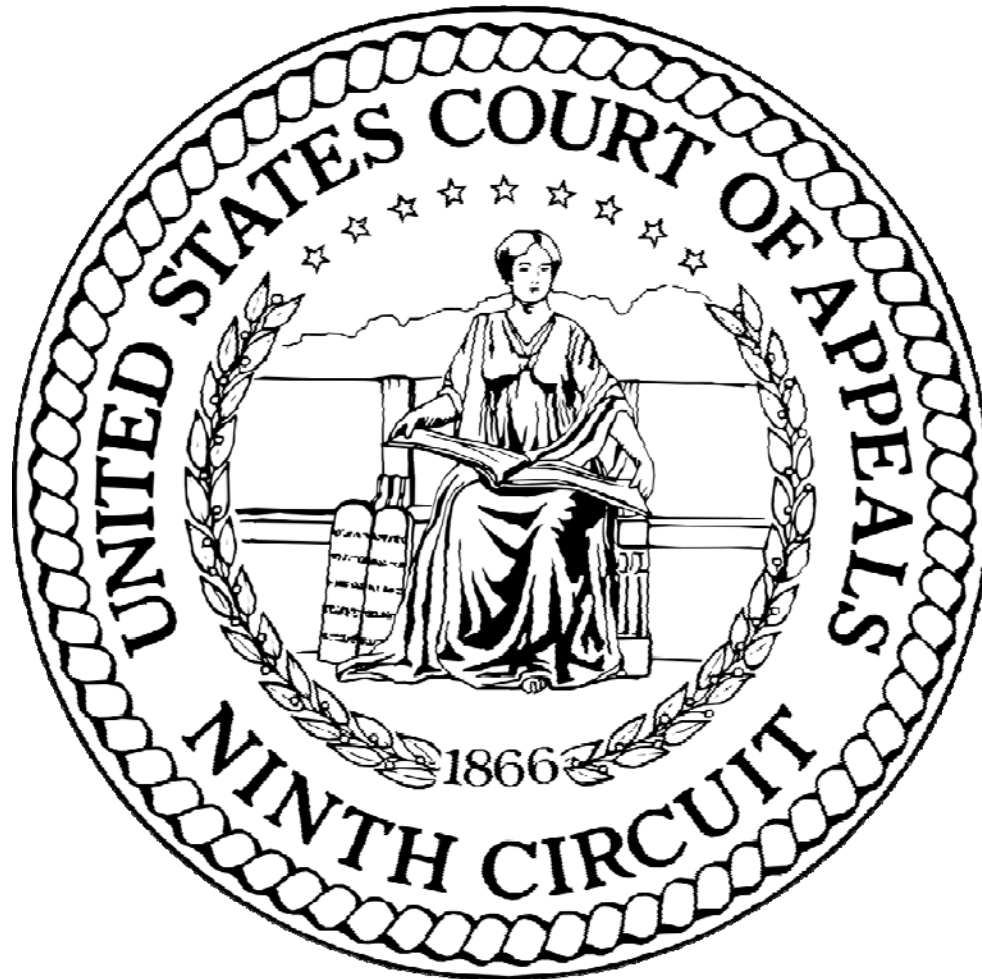
- And what exactly is a "continuing inpatient"?
- "[A] facility satisfies the second element if its residents receive some nursing care during an 'ongoing' or non-temporary stay at the facility."
- Lack of clarity makes claim decisions difficult.

- What about *McDermott*?
- "[T]his Court reaches a different interpretation."
- Result is a split of authority by two judges within the same district court (but different divisions).

Pistorese v. Transamerica (2013)



- Stay tuned...



- *Fallow v. Bankers Life and Casualty*, 2013 WL 175803 (D. Oregon).





- Oregon resident purchased a Home Health Care Policy in 2002.
- "Home Health Aide" required to be "an individual . . . licensed or certified to provide home health care services."

- Credentials of Plaintiff's caregiver:
 - (1) Certificate from WA Aging and Adult Services Administration for completing a 3-day "Caregiving Fundamentals" course in 2000.
 - (2) Three certificates from Ferry County Community Services for continuing education courses on "senior information and assistance."



- What does "licensed or certified" mean?
- "Licensed or certified" by whom?
- Bankers: no coverage because caregiver not a certified nursing assistant or licensed by the State of Oregon to provide home health care services.



- **Court**: Policy requires a caregiver to have received permission to provide home health care services by any competent authority.
- WA Aging and Adult Services, a competent authority, issued "a certificate following a three-day course on 'Caregiving Fundamentals' to provide home health care services."

Christophel v. Continental Cas. Co. (2013)



- *Christophel v. Continental Cas. Co.*, 2013 WL 3233247 (N.D. Ind.).



- "Alternate Care Facility": engaged primarily in providing care to inpatients in one location, and also (in relevant part):
 - Provides 24-hour-a-day care sufficient to support needs resulting from inability to perform ADLs.
 - Licensed or accredited "to provide such care."
 - Has methods/procedures for handling and administering drugs/biologicals.

Christophel v. Continental Cas. Co. (2013)



- Evergreen Place is unlicensed, but "registered with Indiana to provide housing with services."
- Part of Greencroft Goshen, a "continuing care retirement community" with separately-licensed facilities on campus.
- Employees of Greencroft provide services, including assistance with ADLs.
- Not licensed as a facility which can legally administer medication.

Christophel v. Continental Cas. Co. (2013)



- **Court**: Summary judgment for the policyholder.
- Evergreen licensed or accredited to provide assistance with ADLs.
- Services provided 24/7 by Greencroft employees.
- Evergreen attendants prohibited from administering medication, and policies and procedures exist which confirm that.



- Court did not address the policy "inpatient" requirement.
- Under IN law, "resident" means "an individual who has a contract to reside in a housing with services establishment."
- Is that an "inpatient"?

Conclusion



- Rising volume and magnitude of claims
- Significant rise in recent LTCi litigation
- Well-connected, sophisticated plaintiffs' attorney
- Clear and accurate communications
- Diligent claims practices and strong claims and policy owner services teams



Questions?

Thanks for participating!



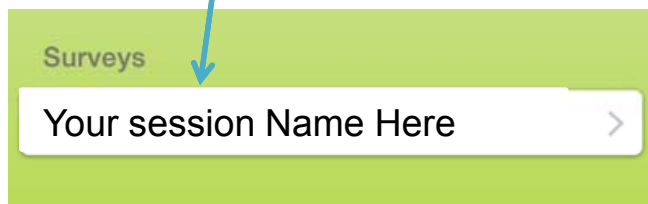
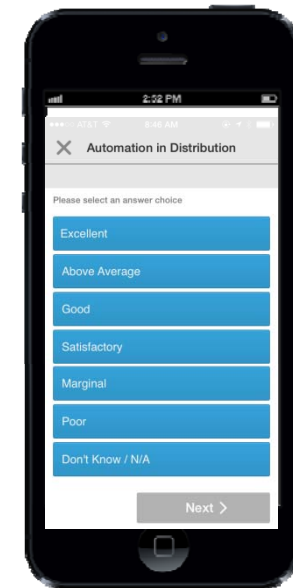
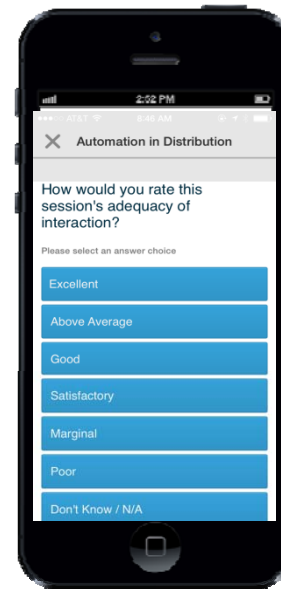
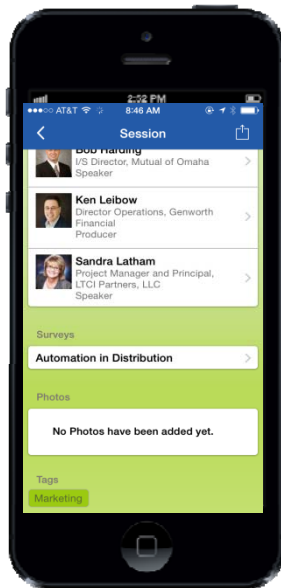
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