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Recent Developments in LTC Rate Increase Litigation

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A relatively consistent flow of premium rate increase litigation has been filed against long-term care (LTC) carriers over the past several years. Following the plaintiffs' bar having early success in a limited number of LTC rate increase class actions in the early 2000s, the tide turned definitively in favor of carriers in what we think of as the first generation of such litigation, where the plaintiffs' bar focused primarily on an alleged duty to disclose possible rate increases and challenging the language of the contract itself. Despite the industry's overall success, premium rate increase litigation has attracted an increased level of sophistication from the plaintiffs' bar, which shifted to more creative theories based on extra-contractual representations (e.g., marketing materials) in what we view as the second generation of premium rate increase litigation. While the industry remains mostly successful in warding off rate increase litigation, a new trend may be developing as recent cases focus on more nuanced contractual limitations and rate increase implementation issues.

FIRST GENERATION PREMIUM RATE INCREASE LITIGATION

First generation premium rate increase complaints typically asserted claims of some combination of breach of contract, fraud, bad faith, violations of unfair trade practices statutes, and unjust enrichment, supported by allegations that the carriers knew the policies were underpriced at the time of sale, intended to close blocks knowing that doing so may lead to financial losses, and intended to raise premiums to encourage "shock lapse."

Alvarez is one of the industry's early generation class action victories and it set the tone for the industry's defense against challenges to insurers' contractual right to raise premiums. In *Alvarez*, the plaintiff's complaint was a typical bait-and-switch theory. The plaintiff argued that the representations that (i) the policy was "guaranteed renewable," that (ii) premiums "may" change, and that (iii) the premiums had been expertly priced were "half-truths" that breached an alleged duty of disclosure. The district court granted the carrier's motion to dismiss and the Third Circuit affirmed that decision, holding that an LTC insurer "did not have any duty to disclose the possibility of future premium increases or the underlying actuarial assumptions for that possibility."[1] The policy at issue in *Alvarez* explicitly stated that the premiums were subject to change at any time after payment of the first premium. The court highlighted that the policy "was guaranteed renewable, not guaranteed affordable," and "neither the policy nor the promotional materials represented or implied that expert actuaries calculated the premiums."[2] The court noted, "[w]e have difficulty understanding how he can claim to have relied on a provision that explicitly allows such increases to believe that premiums would never increase."[3]

Unlike *Alvarez* and other first generation cases, the court in *Armour* reached the issue of whether the filed rate doctrine applied and granted the carrier's motion to dismiss on that basis. The filed rate doctrine, which originated from litigation surrounding utility rates, is one of several key defenses to actions challenging premium rates filed with and approved by state insurance regulators. The filed rate doctrine holds that once a premium rate has been filed with and approved by the department of insurance (DOI), it is unassailable in the courts because the legislature has vested the DOI with exclusive authority to set premium rates. Most jurisdictions have adopted the filed rate doctrine in some form and many have applied it to bar challenges to premium rates filed with state insurance regulators. There are two prongs to the filed rate doctrine. The doctrine's nonjusticiability prong requires courts not to "enmesh" themselves in the ratemaking process to avoid disturbing the work of the regulatory agencies, which "are deeply familiar with the workings of the regulated industry and utilize this special expertise in evaluating the reasonableness of rates."[4] As applied, the first prong bars courts from considering the reasonableness of approved rates or awarding damages based on the difference between the rate charged and an allegedly lawful rate.[5] The second prong, the "nondiscrimination" principle, ensures "regulated entities charge only those rates that the agency has approved or been made aware of as the law may require."[6]

Armour was an important victory for the industry because it dispensed with the plaintiff's argument that the filed rate doctrine does not apply when an insurance commissioner may only disapprove rates, as opposed to setting rates. In *Armour*, the plaintiff asserted causes of action for fraud, negligent misrepresentation, violations of the contractual duty of good faith and fair dealing, breach of contract, unjust enrichment and negligence. The theme of the plaintiff's case was that the carrier intentionally designed its LTC policies with flawed actuarial assumptions and sold the policies without disclosing that premiums could increase due to the allegedly known actuarial defects. The carrier moved to dismiss the action, arguing that the plaintiff's claims were barred by the filed-rate doctrine, among other defenses. The court agreed and noted that "[d]espite the sometimes harsh and seemingly merciless effect of [the filed rate] doctrine, courts have not wavered in its application."[7] The plaintiff argued that the commissioner does not have the power to set rates; rather, the commissioner has only the power to disapprove proposed rates. The court disagreed with this distinction, noting that the difference "between the power to establish and fix rates, as opposed to the power to disapprove the rate, is irrelevant for purposes of the filed rate doctrine."[8]

SECOND GENERATION LITIGATION PREMIUM RATE INCREASE LITIGATION

The focus in second generation rate increase actions has been on using extra-contractual representations as the primary basis for plaintiffs to contend that rates cannot be increased. For example, in *Toulon*, the plaintiff alleged that applicants for the LTC policies in question were required to complete a personal worksheet at the point of sale that contained statements that fraudulently or negligently led those applicants to believe that the premium rates for their policies would either remain the same or increase only slightly over time (the statements included, *e.g.*, "Have you considered whether you could afford to keep this policy if the premiums were raised, for example, by 20%?" and that rates had not been previously raised on this form, and only by 15% on a similar form). The plaintiff alleged that one or more of these "representations" was false and led her to purchase coverage. Thus, although the plaintiff also relied on the legacy bait-and-switch theories, *Toulon* was unique in that the plaintiff also focused heavily on extra-contractual matters. Ultimately, the court dismissed the action, holding the carrier had no duty to disclose planned rate increases. With respect to the personal worksheet, the court emphasized that the content of the worksheet was mandated by an insurance regulation and, in any event, that the worksheet was explicit that the insurer had the right to increase premiums.[9]

Toulon was followed by *Newman*, another putative class action filed in the Northern District of Illinois. In *Newman*, the plaintiff's complaint focused primarily on extrinsic representations allegedly made to Newman and a putative nationwide class of insureds in the company's marketing materials. In that way, *Newman* is part of a trend in which the plaintiffs' bar has shifted its focus to arguments that focus on extra-contractual representations. In *Newman*, the plaintiff selected a "Reduced-Pay at 65 Option" at the point of sale. For those who selected this option, the schedule page reflected a reduced premium that would apply "on and after age 65." Although the carrier had reserved the right to increase premiums on a class-wide basis in several places throughout the policy, the plaintiff claimed that the company's marketing brochure for her coverage promised to freeze premiums at half the amount of her pre-age 65 premiums at age 65. The plaintiff's contract underwent a rate increase which, despite the reduced pay option, increased the plaintiff's premium to more than it was before the reduced pay option kicked in at age 65. Plaintiff brought causes of action sounding in breach of contract, and statutory and common law fraud.

Although the lower court dismissed the case, principally because the policy reserved the carrier's right to increase premium in several places, the class action ultimately settled after the Seventh Circuit reversed the lower court's decision and sent the case back down for further proceedings. The Seventh Circuit held that the language used to describe the unique "Reduced Pay at 65 Option" payment option in the schedule page of the contract was ambiguous (*i.e.*, subject to more than one reasonable interpretation). Specifically, the Court reasoned that the policy arguably promised in the schedule page to freeze premiums "on and after age 65" for those policyholders who selected the Reduced Pay at 65 Option. The Seventh Circuit recognized that MetLife had reserved the right to increase premiums on a class-wide basis in several places throughout the Policy, but reasoned that the language could be read to mean that MetLife had the right to raise rates for those who selected the Reduced Pay at 65 Option only up and until age 65.[10] In other words, the Court would not allow MetLife to point to its right to increase to resolve the ambiguity the Court had identified with the Reduced Pay at 65 language in the schedule page.

A POSSIBLE THIRD GENERATION

The Plaintiffs' bar has attempted to expand the Seventh Circuit's ruling in *Newman* to support what may emerge as a third generation of premium rate increase litigation. So far, plaintiffs' efforts in this regard have been unsuccessful, but a new trend may emerge where plaintiffs acknowledge the carrier's general right to increase premiums and yet attack the manner in which a rate increase was implemented. For example, in *Gunn*, a case filed by a putative class of certificate holders, the plaintiff argued that the policy required the carrier to apply premium rate increases on its group policies equally across a nationwide premium class (which, the plaintiff argued, could be defined only by age). The plaintiff in *Gunn* relied heavily on *Newman* in support of his argument in opposition to a motion to dismiss filed by the carrier.[11]). In *Newman*, the Seventh Circuit noted that "class" was undefined and, thus, the four references in the policy to the carrier's right to change the premium on a class-wide basis could not resolve the ambiguity the court identified in the "on and after age 65" language in the Reduced Pay at 65 Option.[12] In *Gunn*, the lower court rejected the plaintiff's arguments and dismissed the complaint based on the filed rate doctrine.[13] The plaintiff appealed the decision to the Seventh Circuit, where the appeal is fully briefed and currently awaiting decision.[14]

Finally, a complaint was filed last month in the District of Connecticut asserting claims similar to those raised in *Gunn*. As is common in the industry, the approved premium rate increase at issue was larger for policyholders who selected rich policy benefits. The plaintiffs allege that a carrier impermissibly increased premium based on sub-classes when the policies allegedly only permit a premium rate increase based on a single, nationwide class (i.e., that the premium rate increase must be the same rate for all policyholders). This new case is in its infancy, but demonstrates a possible continued trend toward challenging the meaning of a class-wide rate increase.

CONCLUSION

As carriers focus on methods to help policyholders mitigate premium rate increases through reduced benefit options and policy buy-outs, potential litigation focused on implementation issues confirms the importance of clear communication with regulators and policyholders. The filed rate doctrine is a formidable defense to premium rate increase litigation, including those cases challenging the applicable premium classes and how an increase will vary based on various policy benefits. Ultimately, these complaints challenge the reasonableness of filed and approved premium rate increases and ask the court to overturn decisions made by insurance regulators. The file rate doctrine bars such challenges. Nonetheless, to strengthen that key defense, carriers should continue to describe the premium rate classes carefully during the rate filing and approval process, including how an increase will vary based on various policy benefits. And, especially when offering arguably novel mitigation options (e.g., policy buy outs), clear disclosures and carefully crafted policyholder communications remain key to reducing confusion and potential policyholder litigation.

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ENDNOTES

1 Alvarez v. Ins. Co. of N. Am., 313 F. App'x 465, 469 (3d Cir. 2008).

2 *d.*

3 *Id.*

4 *Wegoland Ltd. v. NYNEX* Corp., 27 F.3d 17, 19 (2d Cir. 1994).

5 *See, e.g., Horwitz v. Bankers Life & Cas. Co.,* 319 Ill. App. 3d 390, 408 (2001).

6 *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992).

7 *Armour v. Transamerica Life Ins. Co.,* No. CIV. A. 11-2034-KHV, 2012 WL 234032, at *3 (D. Kan. Jan. 25, 2012).

8 *d.* at *4.

9 *Toulon v. Cont'l Cas. Co.*, No. 15 CV 138, 2016 WL 561909, at *3 (N.D. Ill. Feb. 12, 2016), aff'd, 877 F.3d 725 (7th Cir. 2017).

10 *Newman v. Metro. Life Ins. Co.*, 885 F.3d 992, 999 (7th Cir. 2018).

11 *Gunn v. Cont'l Cas. Co.*, No. 18-cv-03341, 2018 WL 8620962 (N.D. Ill. Sept. 13, 2018

12 In *Newman*, the Seventh Circuit did not hold that the language in the policy that reserved the right to increase premium on a class-wide basis was ambiguous—rather, it held that the class-wide premium rate increase language may not apply to Reduced Pay at 65 policyholders because the policy arguably promised in the Schedule Page to freeze premiums for those policyholders "on and after age 65." Newman, 885 F.3d at 999 ("In short, none of the four references in the policy to MetLife's right to change the premium suffice to disabuse a reasonable person of the understanding that purchasing the Reduced Pay option took her out of the class of policyholders who were at risk of having their premium increased after their post-age-65 anniversary. The policy language is thus at least ambiguous, because it can be read reasonably to fix such a person's premium, if she had opted for the Reduced Pay option.").

13 *Gunn,* No. 18-cv-03341 (N.D. Ill. Sept. 3, 2019).

14 *Gunn v. Cont'l Cas. Co.*, No. 19-2898 (7th Cir.).