

No. _____

STATE OF TEXAS,
OF

§

IN THE DISTRICT COURT

Plaintiff

§

§

VS.

§

§

TRAVIS COUNTY, TEXAS

CONSECO SENIOR HEALTH
INSURANCE COMPANY

§

§

Defendant

§

§

_____ JUDICIAL DISTRICT

§

§

PLAINTIFF’S ORIGINAL PETITION
AND
APPLICATION FOR INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF THE COURT:

COMES NOW, the State of Texas (hereinafter referred to as “State”), as Plaintiff, acting by and through John Cornyn, Attorney General of the State of Texas, and complains of Conseco Senior Health Insurance Company (“Conseco” or “Defendant”), Defendant, and for cause of action alleges the following:

I.

DISCOVERY CONTROL PLAN

1. The discovery in this case is intended to be conducted under Level 3, pursuant to TEX. R. CIV. P. 190.4.

II.

NATURE OF THIS LAWSUIT

2. The Attorney General, acting within the scope of his official duties under the authority granted to him under the Constitution and the laws of the State of Texas, brings this lawsuit in the

name of the State of Texas and in the public interest through his Consumer Protection Division upon the ground that defendant has violated the provisions of the Texas Deceptive Trade Practices -- Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41, et seq. (hereafter “Deceptive Trade Practices Act”), TEX. INS. CODE ANN. art. 21.21, and 28 TEX. ADMIN. CODE ANN. § 21.1, et seq. The Attorney General has authority to seek injunctive relief and civil penalties for violations of these statutes’ provisions. TEX. BUS. & COM. CODE ANN. § 17.47 and TEX. INS. CODE ANN. art. 21.21, § 15.

III.

JURISDICTION

3. This Court has jurisdiction over this action pursuant to TEX. BUS. & COM. CODE § 17.47(b) and TEX. INS. CODE ANN. art. 21.21, § 15(b) .

IV.

DEFENDANTS

4. Defendant, CONSECO SENIOR HEALTH INSURANCE COMPANY, is an insurance company doing business in Texas and is licensed to write long term care insurance in Texas. It may be served with process by serving C T Corporation System, 350 North St. Paul Street, Dallas, Texas 75201.

V.

VENUE

5. Venue of this lawsuit lies in Travis County, Texas pursuant to TEX. INS. CODE ANN. art. 21.21, § 15(b) and TEX. BUS. & COM. CODE § 17.47(b).

VI.

PUBLIC INTEREST

6. The Attorney General has reason to believe that the Defendant has engaged in, and will continue to engage in, unlawful practices in violation of the DTPA as set forth below, and the State of Texas also has reason to believe that the Defendant has caused and will continue to cause injury, loss or damage to many of its citizens and to other legitimate business enterprises lawfully conducting business in this State. Therefore, the Consumer Protection Division of the Office of the Attorney General of the State of Texas believes that these proceedings are in the public interest, bringing this action pursuant to TEX. INS. CODE ANN. art. 21.21 § 15(a) and TEX. BUS. & COM. ANN. § 17.47(a) and seeking, *inter alia*, injunctive relief against Defendant to restrain the use of such unlawful practices.

VII.

NOTICE

8. The Consumer Protection Division informed the Defendant in general of the alleged unlawful conduct described below which violates the DTPA at least seven days before the filing of this Plaintiff's Original Petition and Application for Injunctive Relief, as required by TEX. BUS. & COM. CODE § 17.47(a).

VIII.

TRADE AND COMMERCE

9. Defendant is a "person," as defined by TEX. BUS. & COM. CODE ANN. § 17.45(3) and TEX. ADMIN. CODE art. 21.21, § 2(a), and has, at all times as described below, engaged in conduct which constitutes "trade" and "commerce," as those terms are defined by TEX. BUS. & COM. CODE

ANN. § 17.45(6), and also in conduct which constitutes the “business of insurance,” as defined by TEX. INS. CODE ANN. art. 1.14-1, § 2(a). Therefore, the conduct of the Defendant has directly affected the citizens of the State of Texas.

IX.

ACTS OF AGENTS

10. Whenever in this petition it is alleged that Conseco did any act or thing, it is meant that Conseco, or its subsidiaries, affiliates, directors, officers, agents, or employees, performed or participated in such act or thing, and in each instance where its subsidiaries, affiliates, directors, officers, agents, or employees performed or participated in such act or thing, they were authorized to and did in fact act on behalf of Conseco.

X.

STATEMENT OF FACTUAL ALLEGATIONS

11. Conseco is the leading provider of long term care (“LTC”) insurance in the United States and it operates in 46 states, including the state of Texas. Conseco is headquartered in Carmel, Indiana. Conseco is a wholly owned subsidiary of Conseco, Inc., which is also headquartered in Carmel, Indiana and is a financial services company with numerous insurance and non-insurance subsidiaries.

12. Long Term Care insurance policies are designed to cover the care that persons receive when they are disabled in some way and require some level of assistance for daily living. This type of insurance evolved from nursing home insurance, but is designed to cover a broader range of care. Consumers who buy LTC insurance most often do so with the expectation that they are buying coverage for some future contingency and that the coverage is a hedge against a significant threat to

their financial situations in their later years of life. From the consumer's perspective, LTC insurance is valueless unless they can afford it and maintain it.

13. On August 25, 1996, Conseco's parent company acquired an insurance company that primarily sold LTC insurance products, ATL Life Insurance Company ("ATL"). The acquisition was effectuated by a plan of merger between ATL's parent company, American Travellers Corporation, and Conseco, Inc. After the acquisition, Conseco, Inc. emerged as the surviving corporation, but continued to use the name "ATL Life Insurance Company" in the sale, administration and renewal of LTC policies in Texas until some point in 1999. Conseco now markets LTC policies in Texas in its name only, Conseco Senior Health Insurance Company.

14. The LTC policies at issue in this lawsuit are those that are connected to ATL and were marketed either by ATL or Conseco, before and/or after the merger. (Because Conseco has liability for its own actions and as successor company for the actions of ATL, henceforth, a reference to "Conseco" also may be a reference to ATL, depending on the context). The LTC policies at issue were marketed to Texas consumers from 1992 to 1999 and included base coverage policies and a variety of riders that could be attached to the base coverage policies to modify or increase coverage.

15. The base coverage policies are identified by the series numbers, ATL-LTC-1, ATL-LTC-3 and ATL-LTC-6. The LTC-3 policy was sold between 1992 and 1997, the LTC-1 between 1994 and 1999, and the LTC-6 between 1995 and 1998. The LTC-3 policy was sold to a total of 716 consumers, the LTC-1 to 2,348 and the LTC-6 to 7,369. The LTC-1, LTC-2 and LTC-3 policy series are no longer marketed and are considered to be "closed." Through 1999, Conseco has collected almost \$60 million from Texas consumers in premiums. Conseco continues to collect millions of dollars in premiums from Texas consumers who have bought these policies and their riders.

16. Consecos marketed LTC policies to Texas consumers, including senior citizens, through general and independent insurance agents and produced marketing materials that agents could distribute. The marketing materials touted that LTC policies were a hedge against the serious financial threat posed by the costs of long term care. Regarding the possibility of rate increases, Consecos made representations in its marketing materials that premiums would remain level and would not be raised because of age or health, but may only be raised with respect to all persons in the state of Texas who are insured under the same policy form or who are in the same class. These statements were grossly misleading to the average consumers who bought these policies because they are unsophisticated in insurance terminology and practices related to class rating. These statements suggest a level of stability in that rates, if raised at all, would have to be raised for a large number of persons. The marketing materials also stated that the policies were guaranteed renewable for life, suggesting that they would be affordable for life. Indeed, some marketing materials even went so far as to state the premiums would be level.

17. Despite the import of the statements made by Consecos, rate increases were swiftly imposed on the policyholders and they were substantial. Rates were substantially increased on the two base policies with largest number of Texas policyholders. LTC-1 policyholders experienced a composite increase of 14% in 1997 and 25% two years later in 1999. LTC-6 policyholders experienced a 16% increase in 1998. The first increase for the LTC-1 policy came about three years after initial date of offering and the second just two years later. The first increase for the LTC-6 policy also came about three years after it was first sold. In addition, rates were substantially increased on many of the riders.

18. Consecos is aware that raising its rates will cause policyholders to lapse their coverages.

In fact, Consecos factors this into their calculations, referring to this phenomena in memorandums regarding the increases as “shock lapse.” Consecos brings in additional premiums from those policyholders who remain. Additionally, because Consecos is released from liability for paying the claims of those persons who lapsed their policies, the pool of money that Consecos is required by law to be set aside for the payment of their claims is also released back to Consecos. Consecos allocates this money in any way it chooses, including releasing all or a portion of the reserves to itself as a profit.

19. While Consecos benefits from its actions, policyholders suffer the consequences. The rate increases also caused significant numbers of policyholders to lapse their coverages, including persons on fixed budgets who could simply no longer afford the premium payments. For these policyholders, lapsing their policies means losing the coverage they had bargained for and the premiums they have paid to Consecos for that coverage.

20. For policyholders who remain with Consecos, they must pay the higher rates, diverting more of their resources to the payment of premiums. Worse, unbeknownst to them, future rate increases are likely because Consecos has discontinued selling the policy series that includes their policies and closed the blocks of business of which they are members. In doing so, Consecos has virtually assured that the blocks of business will enter into an “assessment spiral” or “death spiral.” By closing the blocks of business, Consecos ensures that no new insureds will enter the pool covered by the policy, inevitably leading to a decrease in the size of the pool as healthy insureds switch to cheaper policies and persons who can no longer afford the premiums allow their policies to lapse. This in turn leads to increased premiums, as the risks and costs associated with the pool are shared by fewer and fewer people. As the premiums increase, more of the healthier insureds will flee the policy, along with those who can no longer afford the premiums, leaving only those less healthy persons who

cannot find insurance elsewhere, and leading to even higher premiums. This vicious circle of higher premiums and a shrinking pool to share the increased costs is known in the insurance industry as a “death spiral.” Eventually, the premiums increase to the point where they become unaffordable to the vast majority of policyholders, at which point they fail in increasing numbers to pay the premiums and their policies lapse.

21. When policyholders complain about rate increases, Conseco disingenuously points in its written responses to that part of their marketing materials that states that Conseco “may” increase premiums for all persons in the state of Texas who are insured under the same policy form. Conseco further states in its written responses that the Texas Department of Insurance “approved” the increase and this is patently false since the Texas Department of Insurance does not have authority to approve or disapprove rates under Texas state law.

XI.

TEXAS INSURANCE CODE VIOLATIONS

22. Section VIII is incorporated herein by reference. Defendant has violated TEX. INS. CODE ANN. art. 21.21 by engaging in one or more of the following acts or practices:

- a. engaging in unfair or deceptive acts or practices in the business of insurance, in violation of TEX. INS. CODE ANN. art. 21.21, § 3;
- b. making, issuing, circulating, or causing to be made, issued or circulated, a statement misrepresenting the terms of a policy issued or to be issued or the benefits or advantages promised thereby, in violation of TEX. INS. CODE Art. 21.21, § 4(1); and
- c. making, publishing, disseminating, circulating or placing before the public

making, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a publication, or in the form of a pamphlet, or other way, a statement containing an assertion, representation or statement with respect to the business of insurance which is untrue, deceptive or misleading, in violation of TEX. INS. CODE Art. 21.21, § 4(2).

XII.

TEXAS ADMINISTRATIVE CODE VIOLATIONS

23. Section VIII is incorporated herein by reference. Defendant has engaged in trade practices in the business of insurance that is a misrepresentation of an insurance policy, in violation of 28 TEX. ADMIN. CODE § 21.3(a) by:

- a. omitting to state a material fact necessary to make the statements made (considered in the light of the circumstances under which they were made) not misleading, in violation of 28 TEX. ADMIN. CODE §§ 21.4(2);
- b. making a statement in such a manner or order as to mislead a reasonably prudent person to a false conclusion of a material fact, in violation of 28 TEX. ADMIN. CODE §§ 21.4(3); and
- c. failing to disclose any matter required by law to be disclosed, in violation of 28 TEX. ADMIN. CODE §§ 21.4(5).

24. Section VIII is incorporated herein by reference. Defendants has engaged in trade practices in the business of insurance which are unfair or deceptive, in violation of 28 TEX. ADMIN. CODE § 21.3(b).

XIII.

TEXAS DECEPTIVE TRADE PRACTICES -- CONSUMER PROTECTION ACT VIOLATIONS

25. Section VIII is incorporated herein by reference. Defendant has violated TEX. BUS. & COM. CODE ANN. § 17.41, *et seq.* by engaging in one or more of the following acts or practices:

- a. engaging in false, misleading, or deceptive acts or practices in the conduct of trade and commerce, in violation of TEX. BUS. & COM. CODE § 17.46(a);
- b. representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have, in violation of TEX. BUS. & COM. CODE § 17.46(b)(5);
- c. representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law, in violation of TEX. BUS. & COM. CODE § 17.46(b)(12);
- d. failing to disclose information relating to the goods and services offered to consumers which was known at the time of the transaction where the failure to disclose the information was intended to induce consumers into transactions which the consumers would not have entered had the information been disclosed, in violation of TEX. BUS. & COM. CODE § 17.46(b)(23);

XIV.

INJUNCTION

26. Pursuant to the Deceptive Trade Practices Act, the State may request, and this Court may grant, a temporary restraining order, temporary injunction, or permanent injunction without bond to restrain any act or practices declared to be unlawful by the Deceptive Trade Practices Act. TEX. BUS. & COM. CODE § 17.47(a). Additionally, the Texas Insurance Code provides that the Attorney General may request, and this Court may grant, a temporary or permanent injunction without bond against a person engaged in the business of insurance to restrain the use of acts of practices declared unlawful Deceptive Trade Practices Act, Article 21.21 of the Texas Insurance Code or the Texas Administrative Code. TEX. INS. CODE art. 21.21, § 15(a).

XV.

PENALTIES

27. In addition to injunctive relief, the State may seek civil penalties as provided by the Deceptive Trade Practices Act and the Texas Insurance Code. The Texas Insurance Code provides for civil penalties of not more than \$10,000.00 per violation. TEX. INS. CODE art. 21.21, § 15(a). The Deceptive Trade Practices Act provides for civil penalties of not more than \$2,000.00 per violation, not to exceed a total of \$10,000.00. The Deceptive Trade Practices Act further provides for civil penalties of not more than \$10,000.00 per violation, not to exceed a total of \$100,000.00, if the Consumer Protection Division determines that the act or practice that is the subject of the proceeding was calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older when the act or practice occurred.

XVI.

ADDITIONAL RELIEF

28. The State may seek such additional relief as is necessary to make whole the persons injured by the Defendant's acts and practices. The Deceptive Trade Practices Act and the Texas Insurance Code provides that this Court may issue additional orders or judgments as are necessary to compensate identifiable persons for actual damages or to restore money or property, real or personal, which may have been acquired by means of any unlawful act or practice. TEX. BUS. & COM. CODE § 17.47(d); TEX. INS. CODE art. 21.21, § 15(d).

XVII.

ATTORNEY'S FEES AND COSTS

29. Lastly, the State may seek to recover all costs incurred in this proceeding, including reasonable attorney's fees, investigative costs and court costs, pursuant to TEX. GOV'T CODE § 402.006.

XVIII.

PRAYER

30. WHEREFORE, PREMISES CONSIDERED, the State prays that the Defendant be cited to appear and answer herein and that upon hearing, the Court find:

a. That a judgment be rendered in favor of the State against the Defendant for all penalties, injunctive relief and other relief authorized under TEX. BUS. & COM. CODE § 17.41, *et seq.* and TEX. INS. CODE art. 21.21 to which the State may show itself to be entitled;

b. That upon due notice and hearing, a temporary injunction and, upon final trial, a permanent injunction be granted enjoining the Defendant from violating the Deceptive Trade Practices-

Consumer Protection Act, TEX. BUS. & COM. CODE § 17.41, *et seq.*, TEX. INS. CODE art. 21.21 and 28 TEX. ADMIN. CODE § 21 by doing any of the following:

1. misleading policyholders about the possibility of rate increases in marketing materials and other communications;
 2. henceforth raising rates on any ATL-LTC-1, ATL-LTC-3 or ATL-LTC-6 policy or related riders issued to Texas policyholders;
 3. utilizing reserves released by policyholder lapses of any ATL-LTC-1, ATL-LTC-3 or ATL-LTC-6 policy or related riders for any other purpose than the payment of claims;
- c. That the Attorney General of Texas, acting on behalf of the State of Texas, recover all costs incurred in this proceeding, including reasonable attorney's fees, investigative costs and court costs, pursuant to TEX. GOV'T CODE § 402.006;
- d. That the Attorney General, acting on behalf of the State of Texas, recover from the Defendant the maximum penalties permitted by the Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE § 17.47(c) and TEX. INS. CODE art. 21.21;
- e. That the Court make such additional orders or judgments as are necessary to compensate identifiable persons or to restore money or property, real or personal, which may have been acquired by means of any unlawful act or practice, pursuant to TEX. BUS. & COM. CODE § 17.47(d) and TEX. INS. CODE art. 21.21, § 15(d);
- f. That the Court order that all fines, civil penalties, or forfeitures payable to and for the benefit of the State are not dischargeable under bankruptcy pursuant to 11 U.S.C. § 523(a)(7);
- g. That no bond be required of the State for all costs of these proceedings; and

h. That the Court grant the State such further relief, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

HOWARD G. BALDWIN, JR.
First Assistant Attorney General

JEFFREY S. BOYD
Deputy Attorney General for Litigation

PAUL D. CARMONA
Chief, Consumer Protection Division

RAYMOND GEORGE OLAH
Assistant Attorney General
State Bar No. 00794391
Office of the Attorney General
Consumer Protection Division
P. O. Box 12548
Austin, Texas 78711-2548
512/936-1705
512/322-0578 (Facsimile)