PHILADELPHIA COURT OF COMMON PLEAS

IRENE MILKMAN,	)	**CASE NO. 03775**
Individually and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiffs,	)	**CLASS ACTION**
	)	
v.	)	
	)	
AMERICAN TRAVELERS LIFE	)	
INSURANCE COMPANY, a Pennsylvania	)	
Corporation, ATL LIFE INSURANCE	)	
COMPANY; and	)	
CONSECO SENIOR HEALTH	)	
INSURANCE COMPANY,	)	
a Pennsylvania Corporation	)	
	)	
Defendants.	)	

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL

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BRIEF OF THE TEXAS ATTORNEY GENERAL AS AMICUS CURIAE

I. INTEREST OF AMICUS CURIAE

The parties in this case have filed a Joint Motion for Preliminary Approval of Proposed Class Action Settlement. The Joint Motion proposes that this Honorable Court certify a national settlement class that would include Texas citizens. The Attorney General of Texas respectfully files this brief as amicus curiae on behalf of Texas citizens to: (1) convey his request that this Honorable Court act in deference to the lawsuit the Attorney General has filed in Travis County, Texas that concerns the same parties and many of the same issues as this lawsuit, (2) convey his serious concerns about the fairness, reasonableness and adequacy of the proposed class action settlement and (3) assert that the parties to this case have not met the requirements for settlement class certification under the Pennsylvania Rules of Civil Procedure.

The Texas Attorney General asserts that it is timely to file this brief for the reason that Texas consumers will be immediately impacted if the Joint Motion is approved. Further, the Texas Attorney General asserts that fairness requires the filing of this brief before the parties in this action invest significant time and resources in going forward if the Joint Motion is approved.

II. BACKGROUND

The Consumer Protection Division of the Attorney General of Texas initiated an investigation of the practices surrounding rate increases in Texas of ATL Life Insurance Company and Conseco Senior Health Insurance Company ("ATL/Conseco")[1] on October 15, 1999. Under Texas law, the Attorney General has independent authority to investigate and prosecute violations of consumer protection laws by

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[1] These companies merged in1996 and, thus, are referred to together as "ATL/Conseco."

entities engaged in the business of insurance. *See* TEX. INS. CODE ANN. art. 21.21, § 15 (attached hereto as Appendix Tab 1) and the Deceptive Trade Practices -- Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.47[2] (attached hereto as Appendix Tab 2). Pursuant to this authority, the Consumer Protection Division issued a Civil Investigative Demand to ATL/Conseco for production of documents and information on December 30, 1999. Supplemental Civil Investigative Demands were issued on September 8, 2000, and April 27, 2001. ATL/Conseco acknowledged and responded to the Civil Investigative Demands.

Consumer Protection Division staff expended substantial time and effort in reviewing the documents. Further, staff interviewed numerous Texas complainants and consulted with outside actuaries to gain an understanding of the issues. As a result of this work, the Consumer Protection Division determined that there may be violations of Texas consumer laws and advised ATL/Conseco of this by letter dated March 8, 2001(attached hereto as Appendix Tab 3). On April 19, 2001, representatives of the Consumer Protection Division and ATL/Conseco met to discuss the allegations stated in the letter.

At the meeting, the ATL/Conseco representatives advised that a preliminary agreement had been reached to settle a national class action lawsuit and that the issues with which the Texas Attorney General was concerned would be resolved with the class settlement. Based on the description of the settlement provided in the meeting, the Consumer Protection Division representatives conveyed their misgivings to the

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[2] Tex. Ins. Code art. 21.21 is the Texas statute that defines and prohibits the practices that constitute unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. Tex. Ins. Code art. 21.21, §15 authorizes the Texas Attorney General to bring an action in the name of the State of Texas against those who violate the statute. Tex. Ins. Code art. 21.21, §15 incorporates the Deceptive Trade Practices -- Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41, *et seq.*, so that a violation of the provisions of latter statute by an entity engaged in the business of insurance is also a violation of the former.

ATL/Conseco representatives about the settlement's adequacy and requested a document evidencing the terms of the settlement. The Consumer Protection Division followed up its verbal request for such a document by issuing a Supplemental Civil Demand on April 27, 2001, for its production. ATL/Conseco did not respond until June 28, 2001, when it produced a copy of the Memorandum of Understanding that broadly outlined the terms of the proposed class action settlement. Conseco further promised a more detailed outline of the class action settlement. This "outline" was produced to the Consumer Protection Division on July 30, 2001 in the form of the Joint Motion that is now before this Honorable Court. In order to protect the interests of Texas policyholders, the Texas Attorney General filed a lawsuit in the name of the State of Texas against Conseco Senior Health Insurance Company on July 31, 2001, in the 353rd Judicial District Court, Travis County, Texas, Cause No. GV102103 (Appendix Tab 4 hereto, Plaintiff's Original Petition and Application for Injunctive Relief).

III. THIS COURT SHOULD EXERCISE COMITY IN DEFERENCE TO TEXAS ATTORNEY GENERAL LAWSUIT AND COURT SHOULD CONSIDER EITHER REJECTING THE SETTLEMENT AS TO TEXAS POLICYHOLDERS OR CONTINUING THE MATTER WHILE THE TEXAS ATTORNEY GENERAL'S LAWSUIT PROCEEDS

A. The State of Texas' lawsuit addresses many of the same issues

The Texas Attorney General alleges in his lawsuit that Conseco Senior Health Insurance Company led Texas consumers into believing that premiums they would pay for Long Term Care ("LTC") insurance policies would be affordable and remain level or most likely would not be increased when, in fact, these companies intended to, and did raise premium rates substantially. The lawsuit seeks consumer remedies and injunctive relief, civil penalties, attorney's fees and costs.

The Texas Attorney General's allegations are substantially similar to those made in this lawsuit.

However, the Texas Attorney General's allegations were based entirely on the independent work performed by the staff of his Consumer Protection Division. The Texas Attorney General's Consumer Protection Division investigation began several months before the Milkman case filed and Conseco Senior Health Insurance Company was put on notice of the investigation upon receiving the December 30, 1999 Civil Investigative Demand.

B. State of Texas' lawsuit is first in time with respect to interests of Texas policyholders

The interests of Texas citizens are being appropriately represented in the State of Texas' litigation. In accordance with the authority granted under Texas law, the Texas Attorney General can act in the name of the State of Texas and in the public interest to achieve relief for all affected Texas citizens. TEX. INS. CODE ANN. art. 21.21, § 15; TEX. BUS. & COM. CODE ANN. § 17.47. It is not necessary for the Texas Attorney General to seek class certification or a court's order to do so. Therefore, the State of Texas' lawsuit is first in time with respect to the interests of the Texas policyholders, since Texas policyholders are not yet represented in the Pennsylvania lawsuit.

C. Certification of a national class will likely interfere with Texas Attorney General lawsuit

Should this Honorable Court certify a national settlement class that includes Texas policyholders as requested by the parties in the Joint Motion, this action will interfere with the State of Texas' lawsuit.[3] Therefore, the Texas Attorney General requests that this Honorable Court reject the Joint Motion to the extent that it seeks to certify a settlement class that includes Texas policyholders and deferring, with respect

[3] If a national settlement class action that includes Texas citizens is certified, the Defendants (1) probably will attempt to abate the State of Texas' lawsuit; (2) will be sending out notices to Texas class members, including those whose interests are represented in the State of Texas' lawsuit, causing disruption and confusion and (3) will be communicating with persons whose interests are represented in the State of Texas' lawsuit.

to Texas policyholders, as a matter of comity to the State of Texas' lawsuit. Pennsylvania case law supports the extension of comity given these facts. *See Wolgin v. State Mut. Investors*, 402 A.2d 669, 673-74 (Pa. Super.1979)(Court of Common Pleas properly invoked principle of comity in justification of dismissal of complaint in shareholder's derivative action where virtually identical cause of action which had been pursued in Ohio federal courts was pending on appeal, and relief sought in state action would severely interfere with ongoing federal court action).

Alternatively, this Court should consider deferring its decision to certify a national class that includes Texas policyholders until the conclusion of the Texas Attorney General's investigation and litigation. This approach was followed by the court in *In re Prudential-Bache Energy Sec. Lit.*, 815 F. Supp. 177 (E.D. La. 1993). The Court in that case concluded that:

> There are strong comity policy considerations which incline this court to afford those states currently investigating the subject at hand at least more time to conduct and perhaps complete their investigations, so as to allow the court to make a more 'informed decision" as to the fairness of the settlement.

Id. At 184.

D. The Texas Attorney General can better represent the interests of Texas policyholders

In further support of the request that this Court extend comity to the State of Texas' lawsuit, the Texas Attorney General notes and emphasizes that the State of Texas' lawsuit offers more promising causes of action and remedies for Texas policyholders and the Texas Attorney General has greater standing than private plaintiffs in enforcing Texas statutes. Unlike individual consumers, the Texas Attorney General: (1) has authority to enforce not only the Tex. Ins. Code art. 21.21, but also the rules and regulations promulgated by the Texas Department of Insurance. [TEX. INS. CODE art. 21.21, § 15(a)]; (2) is not required to prove that consumers relied on Conseco's representations and statements in order to establish violations of the DTPA and Article 21.21, but only that the representations and statements were false, misleading, unfair and/or deceptive; (3) may obtain substantial penalties which will offer greater deterrence of possible future misconduct. [TEX. INS. CODE art. 21.21, § 15(a)(allowing penalties of up to $10,000.00 per violation with no cap on total amount)] and, significantly, (4) the Texas Attorney General is not subject to a statute of limitations in lawsuits brought pursuant to Tex. Ins. Code art. 21.21, Sec. 15. Additionally, the Texas Attorney General can obtain broad equitable relief such as restitution, disgorgement, recission and "such additional orders or judgments as are necessary to compensate identifiable persons." [TEX. BUS. & COM. CODE ANN. § 17.47(d)]. Moreover, the Texas Attorney General has a state agency relationship with the Texas Department of Insurance, which allows his lawsuit to better address questions regarding rate stability in Texas and the balancing of consumer and insurer solvency concerns.

E. Texas is the better forum to address harm to Texas policyholders

The Travis County, Texas court is a better forum to address the harm caused to Texas policyholders for several reasons, including: (1) Texas law regarding long-term care insurance is different than the laws of other states, for reasons discussed further below; (2) the policyholder witnesses for the State of Texas' lawsuit are Texas residents and are subject to the Texas court's subpoena power; (3) the long-term care policies were sold in Texas through Texas agents; (4) Conseco has local counsel in Travis County, Texas; (5) the Attorney General's Office is located in Travis County, Texas.

F. A class action is not a superior method of addressing a controversy when state Attorney General is able to obtain significant relief for the public

While the Pennsylvania Rules of Civil Procedure do not require that a class action be a superior method of resolving a legal controversy in order for a class to be certified,[4] it is noteworthy in the context of the Texas Attorney General's argument that this Court should defer to the State of Texas' lawsuit that some courts have concluded that a class action is not a superior method when a state Attorney General is involved with the same issue. In *Kamm v. California City Dev. Co.*, the Ninth Circuit observed that a class action is not a superior method when a state Attorney General is able to obtain significant relief for the public and when those people who elect not to receive the restitution benefits of the state action remain free to pursue their own relief. 509 F.2d 205, 207-12 (9th Cir. 1975).

IV. REQUIREMENTS FOR CLASS CERTIFICATION UNDER PENNSYLVANIA RULES OF CIVIL PROCEDURE ARE NOT MET

A. Claims of representative parties are not typical of Texas policyholders

Pennsylvania Rule of Civil Procedure 1702 requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Pa.R.C.P. 1702(3).
The purpose of the typicality requirement for class certification is to determine whether the class representatives' overall position on common issues is sufficiently aligned with that of absent class members to ensure that pursuit of their interests will advance those of proposed class members. *DiLucido v. Terminix Intern. Inc.*, 676 A.2d 1237 (Pa. Super. 1996), *appeal denied*, 684 A.2d 557 (Pa. 1996); *Janicik v. Prudential Ins. Co. of America*, 451 A.2d 451(Pa. Super. 1982). "In determining the ability of a plaintiff to represent adequately a purported class, as required by the rule, it must appear that the relief sought is beneficial to the class members, and that the plaintiffs' interests be consonant with those of the

[4] See explanatory notes following Pa. R. C. P. 1702

other members of the class." *Luitweilder, et al. v. Northchester Corp.,* 319 A.2d 899, 902 (Pa. 1974) (citing *Penn Galvanizing Co. v. Philadelphia*, 130 A.2d 511 (Pa. 1957)).

As stated below, Texas is one of only two states that does not provide authority to its regulators to approve or disapprove of rate increases on long-term care insurance policies. Thus, the regulatory scheme that applies to the class representatives (all Pennsylvania residents) and Texas policyholders, is markedly different. Indeed, the authors of an important study on long-term care rate increases noted that they found very differing levels of scrutiny among the state insurance departments.

> There are differing levels of scrutiny among state insurance departments of long term care insurance rate increase filings, ranging from no scrutiny by Montana and little scrutiny by Idaho, to tough scrutiny by Iowa, Florida and Virginia. In the latter three states, rate increase requests are discouraged, and sometimes rejected. Virginia discourages rate increase requests based upon its underlying belief that industry experience has not sufficiently matured to justify rate increases. Florida can be very tough on insurers seeking to increase long term care insurance premiums on existing policies. Often rate increase matters are determined by adversary legal proceedings. Florida often rejects rate increase requests, or approves rate increases significantly lower than requested. The insurance departments of Texas and Missouri do not have authority to approve long term care rate increases. In these states, rate increases become effective upon the filing of the new rate with the department of insurance. Florida Illinois, Iowa, Kansas, Kentucky, Nebraska, North Dakota, Ohio, South Dakota, and Washington are states that require insurance department approval of long term care rate increases.

Rate Increases by Long Term Care Insurance Companies (Larson Long Term Care Group, L.L.C.) Sept. 1999, at iii.

Because state laws are not similar with respect to long-term care rate increases and because regulator authority and resolve greatly differs from state to state, the relief needed to truly remedy the alleged harm for each state's policyholders would likewise greatly differ. For Texas policyholders, this relief must address the propriety of future rate increases and the proposed settlement in this case does not do so. Therefore, the Pennsylvania class representatives overall position is not sufficiently aligned with that of the absent Texas class members to ensure that the pursuit of their interests will advance those of the proposed Texas class members. Further, and most significantly, it does not appear that the relief sought is beneficial to or consonant with the proposed Texas class members.

B. Philadelphia Court of Common Pleas is not a proper forum for certification of a national class action by opt out settlement.

Because the jurisdiction of Pennsylvania courts is territorially limited, the class of persons bringing a class action suit in a Pennsylvania court may consist only of Pennsylvania residents and nonresidents who submit themselves to its jurisdiction. *Klemow v. Time, Inc.*, 352 A.2d 12 (Pa. 1976), *cert denied,* 429 U.S. 828 (1976); *accord Prince George Center, Inc. v. United States Gypsum Co.*, 704 A.2d 141 (Pa. Super., 1997), *appeal denied*, 732 A.2d 1210 (Pa. 1998). The vast majority of proposed class members under the proposed settlement would not be Pennsylvania residents and the method by which the proposed settlement would have these thousands of nonresidents submit themselves to the jurisdiction of Pennsylvania courts is via an opt out. *See Plaintiff's Memorandum of Law in Support of Joint Motion for Preliminary Approval of Proposed Class Action Settlement* at pp. 25-26. Essentially, the proposed class members who are nonresidents will submit themselves to the jurisdiction of Pennsylvania courts by a negative option.

For the reasons discussed above, this is not necessarily a voluntary choice and it is simply not reasonable or fair to nonresidents of the Commonwealth of Pennsylvania. Moreover, this is not proper under the Pennsylvania Rules of Civil Procedure relevant to certification of a class action in light of Pennsylvania case law. An explanatory note to Pennsylvania Rule of Civil Procedure 1701 interprets

Klemow to mean that nonresidents can only submit themselves to the jurisdiction of the Pennsylvania state courts through intervention or an opt in procedure:

> **[The *Klemow*] holding would require non-residents in this type of "national" consumer class action to intervene or to appear through an opt-in procedure which is provided for by Rule 1711(b)(2).**

Explanatory Note following Pa.R.C.P. 1701(emphasis added).

C. This class action does not assert claims that in all likelihood would not be litigated

Plaintiff's counsel argues that Court's decision to certify a national settlement class should be made liberally because class action suits assert claims that in all likelihood would not otherwise be litigated. *See Plaintiff's Memorandum of Law in Support of Joint Motion for Preliminary Approval of Proposed Class Action Settlement* at p. 13. The Texas Attorney General respectfully disagrees with this assertion in that it is currently in litigation, and also contends that a substantial number of the proposed class members would have claims that are not *de minimus* and have sufficient value for individuals to take action on their own behalf. The Texas Attorney General cites the following examples of the situations of two Texas policyholders:

> (1) A retired couple paid $4,964.00 for one year's premium and were informed 10 months later that their next premium would be $883.57 higher.
>
> (2) A senior citizen paid an initial annual premium of $680.00 in 1997, then saw increases to $788.80 in 1998 and $986 for the year 2000.

In the first example, the policyholders experienced an increase in their annual premiums of almost $900 for one year. Even if there were no further increases, over a period of five years the couple will have paid over $4,000 in additional premiums. In the second example, the policyholder experienced increases that amounted to an additional cost of $300 for the annual premium. Given that the policyholder experienced two rate increases in a three-year period of time, the total additional costs could reach into the thousands of dollars over the life of the policy.

V. THE COURT SHOULD CAREFULLY ASSAY WHETHER THE PROPOSED CLASS ACTION SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE TO SAFEGUARD ABSENT CLASS MEMBERS

If this Honorable Court should not extend the consideration of comity to the Texas Attorney General, then this Honorable Court should reject the class action settlement as unfair, unreasonable and inadequate to Texas policyholders.

A. The Court must protect absent class members

The only valid way that a Pennsylvania class action can be settled is with approval of the court after a hearing. Pa. R. C. P. 1714(a). The purpose of this rule is, "to protect nonjoined members of the class from prejudicial and binding action by their representative." *Shapiro v. Magaziner,* 210 A.2d 890, 895 (Pa. 1965); *see also Silver Spring Township v. Penn. Supply, Inc.*, 613 A.2d 108, 111 (Pa. Commw. Ct. 1992) (applying same test to Pa. R. C. P. 1714(b)). At the hearing, the court must find that the settlement is both fair and reasonable as well as insure that all members of the class are adequately protected. *Buchanan v. Century Fed Sav. and Loan Assoc.*, 393 A.2d 704, 709 (Pa. Super.1978). Included within the factors used to make this determination is the reaction of the class members to the settlement. Id.

When certifying a class, the court must strike a balance between the interests of the litigants, both present and absent, and of the court system in order to determine fairness and efficiency. *Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d 451, 461 (Pa. Super.1982). In examining the duties the court holds toward absent class members, federal precedent is instructive since many of Pennsylvania's class action rules have been taken virtually verbatim from the federal rules. Id. at 454 (FN 3). The court should act as the guardian of the rights of absent class members, and has a fiduciary duty to them with regards to a proceeding which will result in a final judgment that may affect their interests. See *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3rd Cir. 1973). Specifically, this fiduciary duty exists when examining if a class settlement if fair, adequate, and reasonable to all class members. See *Girsh v. Jepson*, 521 F.2d 153, 157 (3rd Cir. 1975).

B. Release required of class members is overly broad and unfair

Under the terms of the proposed settlement, class members will be required to release the Defendants and many other insurers "from any and all claims, actions, suits, obligations, demands promises, liabilities, costs, expenses, and attorney's fees whatsoever (whether class or individual in nature), whether based on any federal or state law or a right of action, in law or in equity or otherwise, *which the Plaintiffs and the Class Members or any of them had, now have, or can have, or shall or may hereafter have*...including, but not limited to...any claims arising out of any facts, failures to act, omissions, oral or written representations, facts, events, transactions, or occurrences set forth or alleged in the Actions or *in any way related directly or indirectly to the subject matter of the Actions...*". *Stipulation of Settlement* at pp. 5-6 (emphasis added). In case there is any doubt about the scope of the release, it further provides that "it is the intention of Plaintiffs and the Class Members in executing this Release to fully, finally, and forever settle and release all such matters, and all claims relating thereto, *which exist, hereafter may exist, or might have existed (whether or not previously or currently asserted in any action)*." *Stipulation of Settlement* at p. 7 (emphasis added).

With this release, all class members will give up all legal rights to complain of rate increases or misrepresentations regarding rate increases, whether the increases be in the past, present or future. This is especially significant in this case where the proposed settlement does not enjoin the Defendants from raising rates in the future or require anything meaningful to control them. Thus, the class members will be releasing the Defendants for acts and practices related to increases that have not yet even occurred and of which they could not possibly be aware. This release would essentially give *carte blanche* to Defendants to increase rates and because, since there are no consequences, there is no disincentive to do so. This is not a reasonable or fair release for class members, especially in light of the paltry "benefits" offered in this settlement to most proposed class members.

C. The final order proposed in the settlement may bar and enjoin state agencies from addressing rate increase issues or marketing practices

The final order proposed in the settlement would bar and enjoin:

> (i) Plaintiffs, all Settlement class Members, *and all persons acting on behalf of or in concert or participation with such Plaintiffs or Settlement Class Members,* from filing, commencing, prosecuting, intervening in, *or participating in any lawsuit in any jurisdiction on behalf of any Plaintiffs and Settlement Class Members*, based upon or asserting any of the Released Transactions....

Stipulation of Settlement at p. 21 (emphasis added). Given the definition of "Released Transactions" by the parties (*Stipulation of Settlement* at pp. 5-7), this language is so broad and sweeping that it may potentially bar and enjoin state agencies from addressing long-term care rate increase issues or marketing practices which relate to any of these class members.[5] Evidently, this is the intent of the parties because there is no caveat that exempts state or federal agencies.

This would be unfair and unreasonable to the class members because the proposed settlement may interfere with their own state agencies' efforts to address issues related to long-term care rate increases with the Defendants now and into the future. The Texas Attorney General would note that rate increase issues have been a recent and important topic with state agencies. The National Association of Insurance Commissioners recently issued a model act which would allow state agencies the ability to better address issues such as the ones that are the subject of this case. The stated purpose of the model act is:

> ...to promote the public interest, to promote the availability of long-term care insurance policies, to protect applicants for long-term care insurance, as defined, from unfair or deceptive sales or enrollment practices, to establish standards for long-term care insurance, to facilitate public understanding and comparison of long-term care insurance policies, and to facilitate flexibility and innovation in the development of long-term care insurance coverage.

LONG-TERM CARE INSURANCE MODEL ACT (National Association of Insurance Commissioners – Model Act 640--April 2000). The Texas Attorney General would further note that the Texas Legislature recently passed legislation that will enable the Texas Department of Insurance to adopt rules that are consistent with the aforementioned model act. TEX. H.B. 2482 77th Leg., R.S. (2001) (amending the Texas Insurance Code).

D. Remedies are inadequate in light of protections surrendered by class members

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[5] Interestingly, the proposed final order would include injunctive language that applies to class members, but does not include any injunctive language that would apply to the Defendants.

The thrust of the Class Action Complaint filed in this case is that Conseco misled purchasers of its long-term care products about the possibility of rate increases. Specifically, the Complaint states that Conseco's statements in its advertisements and marketing materials were misleading about rate stability and Conseco's application for insurance, advertisements and marketing materials failed to adequately disclose the certainty of rate increases. Despite these allegations, the proposed settlement does not require any changes in the Defendants' marketing, sales or insurance application materials whatsoever and the proposed settlement does next to nothing to address the issue of escalating premiums.

The fact that the proposed settlement doesn't address marketing issues or escalating premiums reflects its inadequacy. But the proposed settlement crosses another threshold with the provisions that require certain class members to acknowledge the defendant's right and ability to ask for future rate increases. Class members who elect to keep their current policy will be required under the proposed settlement to "acknowledge the right of Defendants to file for and implement premium increases...". *Stipulation of Settlement* at p. 8. Thus, this settlement not only does not remedy the problem of future rate increases, it requires that the class members who keep their policies to acknowledge that Defendants can conduct business as usual and continue to raise rates.

In exchange for acknowledging that the Defendants can raise rates and giving the Defendants an unusually broad release, the class members can or will receive one or more of three "benefits,"depending in which class category an individual class member fits any election made by the class member: (1) a "replacement benefit," which is the contingent right to replace their current policy with a new currently issued policy at a 5% discount; (2) an "exchange" or "non-forfeiture benefit," which is the option to make a claim up to the amount of premiums paid, less claims paid; and/or (3) an "additional product benefit," which is the right to buy discounted annuity and life insurance products from the Defendants. *See Stipulation of Settlement* at pp. 8-9.

1. The Replacement Benefit

The replacement benefit will only be offered to class members with consideration to current attained age and standard underwriting. Given this, there is no guarantee that such members will receive the policies; in fact, it is likely most will not. For example, a policyholder who originally purchased the policy in 1992 at the age of 55 will now be newly underwritten at the age of 64. This age factor alone will likely result in higher rates and may discourage the policyholder from purchasing the policy. Moreover, if this policyholder had any adverse health condition arise in the intervening period of time, such as treatment for high blood pressure, this will also be a factor in underwriting and may even result in the policyholder being turned down for coverage under the new policy. For a policyholder who hasn't aged a great deal and who is in good health this may be a real benefit. However, this benefit may not become reality to many class members because they will not be able to qualify for it or they will not be able to afford the rates. Even worse for those who will not qualify for this replacement benefit is the exacerbation of the "death spiral," which will be discussed below.

2. The Contingent Non-Forfeiture Benefit

The "exchange" or "non-forfeiture benefit" is actually better described as a "contingent non-forfeiture benefit." It is contingent because it is not a refund of premiums. Rather, it is merely the right to make a claim that will be capped at the amount equivalent to the premiums that have been paid in. This benefit is in effect lowered coverage in an amount much lower than the coverage for which the policyholder originally bargained. Also, presumably, any claim for this benefit will be approved and adjusted or denied in the same way as any other claim. This is not a benefit at all to those class members whose situations are described in paragraph 1(c). *Stipulation of Settlement* at p. 8.

Paragraph 1(c) provides that a member who chooses to retain their current policy may receive a contingent non-forfeiture benefit in the event the Defendants effect very large future rate increases. These class members will not be eligible for this benefit until rate increases reach certain levels, which are set forth on Exhibit A to the *Stipulation of Settlement*. For example, a policyholder who purchased a policy when she was 55 will have to experience a cumulative increase of 90% before she is eligible for this benefit. These increases will be exclusive of past increases, including the increases that are the subject of the Class Action Complaint. Morever, there is a compounding effect to cumulative increases. Three 30% increases would actually amount to well in excess of a 100% increase in the current rate. For these policyholders, this benefit would be of little consolation for enduring rate increases of the magnitude described in Exhibit A and waiving all rights of legal redress against the Defendants. In reality, this scheme further encourages Conseco and the other released insurers to raise rates.

The class members whose situations are described in paragraph 1(c) will likely make up one of the largest groups under this settlement. For these class members, even this contingent non-forfeiture benefit will probably be out of reach. They will likely lapse their policies long before rates have reached the level that will trigger eligibility for this limited benefit.

3. The Additional Product Benefit

The Additional Product Benefit consists of discounts on Conseco annuity and life insurance products, including a 5% discount on the initial premium of an annuity policy issued by Conseco Annuity Assurance Company and a 50% discount on the first year premiums of a life insurance policy issued by

Conseco Life Insurance Company. While these discounts may seem like a benefit to some class members, the sale of these products is more of a benefit to Conseco, which is afforded the court-ordered opportunity under this settlement to solicit additional business from already victimized class members, many of whom are senior citizens.

Moreover, the offer of these discounts appear to violate Texas law. Article 21.21 of the Texas Insurance Code, the chapter that relates to Unfair Competition and Unfair Practices in the business of insurance, makes it illegal to offer "rebates." The relevant section of the Texas Insurance Code is as follows:

> Sec. 4. The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
>
> (8) Rebates. (A) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract[.]

TEX. INS. CODE art. 21.21, §4(8).

Furthermore, it is likely that a substantial part of the $30 million "cost" of this settlement to Conseco is attributed to the value of the discounts alone. However, this is not a true "cost" to Conseco since Conseco presumably benefits from this new business.

E. The proposed settlement will exacerbate the "death spiral" of the closed blocks of business

A central issue in this case is whether the Defendants should have disclosed that the subject long-term care policies were caught in a "death spiral."[6] *See Plaintiff's Memorandum of Law in Support of Joint Motion for Preliminary Approval of Proposed Class Action Settlement* at p. 15. Ironically, the proposed settlement will further promote and exacerbate the "death spiral." Firstly, the settlement does nothing to deter rate increases. Secondly, the "replacement benefit" will siphon off the healthier members from the policy blocks that are the subject of this case. As noted above, the replacement benefit is the offer of a currently written long-term care policy. However, the policy will only be offered with consideration to current attained age and standard underwriting. This means that the likely takers will be those who are the healthiest members of the policy form block, leaving the less healthy members in the block. The block will then be less healthy and as claims mount from these less healthy members, the Defendants will likely raise rates to offset losses, sending the death spiral further on its way.

F. Resolution with some of the companies is premature

The proposed settlement includes many insurance companies that are not named as defendants in

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[6] A death spiral or assessment spiral is the situation that will likely result when a block of business is closed, which is the case of the policies that are subject of both lawsuits. A block of business is usually composed of policyholders who purchased coverage under the same policy form, such as the LTC-1 or LTC-6 policies. By closing the blocks of business, Conseco has ensured 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, who continue to age and become less healthy. As the premiums increase, more of the healthier insureds will tend to 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 proceeds to the point where eventually, the premiums increase to the point where they become unaffordable to the vast majority of policyholders, at which point they fail in exponentially increasing numbers to maintain their policies.

the complaint. No factual or liability allegations are made against these companies. Neither the class members nor the Texas Attorney General can reasonably assess the liability of these companies at this time, yet they will be parties to this settlement and will obtain the same broad release as to past, present and future acts and practices as the named companies.

G. Opt out provision is unfair

The opt out provision in the proposed settlement is unfair. Essentially, it is a negative option: if you don't opt out, you're in whether you like it or not. Class members are given less than 60 days to opt out or object. Many class members will not know if they are interested in opting out or objecting to this settlement because the settlement is too complex for ordinary policyholders to understand what they are receiving and what they are releasing and they will end up participating by default. Certainly, the class action notice will not greatly assist them in making an informed decision. It is 10 pages long, single spaced and members are advised that it is the "summary" version and that the complete terms of the proposed settlement are only available at the Office of the Court Clerk, Philadelphia Court of Common Pleas. In addition, response rates to class action notices are usually small. This fact undermines the argument the opt out procedure is fair and reasonable.

H. Texas policyholders would be unfairly impacted

The impact of the proposed settlement will be greater on Texas policyholders than it will be for the policyholders of nearly all of the other states. Texas is one of only two states in the nation where insurance regulators do not have the authority to approve or disapprove of rate increases on long-term care insurance policies. With respect to long-term care insurance, Texas is a "file for information only" state. All other states except Missouri have the ability to approve or disapprove rate increase filings. Long-term care insurers only have to inform the Texas Department of Insurance that they are raising rates.[7] This leaves only two forms of protection for Texas policyholders: (1) marketing practices statutes, such as the DTPA and Article 21.21 and (2) remedial action by regulators on behalf of affected policyholders specifically targeted to the issue of rate stability.[8] The proposed class action settlement proposes to resolve all policyholder claims with regard to rate increases and requires a release that is so broad that it not only bars future private actions, but it also may bar or impair future actions by government agencies and regulators that act on behalf of the policyholders.

Texas policyholders who would be made class members would suffer unique consequences under the proposed settlement, having very limited or no private recourse in the future and their state agencies possibly being handicapped with their efforts. When the effects of the proposed settlement are coupled with the fact that the Texas Department of Insurance cannot approve or disapprove of rate increases, Texas policyholders in the proposed class will lose much, if not all, of their protection against future rate increases.

CONCLUSION

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[7] Insurers do have to submit an actuarial memorandum to support initial pricing and subsequent rate increases. The only requirement imposed on pricing is that the actuarial data show a minimum loss ratio of 60%. However, as with any report involving numbers and statistics, the memorandum can be manipulated.

[8] Remedial action can include, for instance, a requirement that the insurer offer a policyholder affected by excessive rate increases the opportunity to buy a new, more rate stable policy, **without underwriting**. The Texas Department of Insurance has been given authority in the last legislative session to write rules to address long-term care rate stability issues. This rule making authority will be effective as of September 1, 2001. TEX. H.B. 2482, 77TH Leg., R. S. (2001)

The Texas Attorney General respectfully asserts in this amicus curiae brief that this Honorable Court should act in deference to the lawsuit he has filed in Travis County, Texas, and that the proposed class action settlement before this Honorable Court is seriously flawed and undeserving of this Court's imprimatur. The parties have failed to sustain their burden of establishing the fairness, reasonableness, and adequacy of the proposal and the parties have not met the requirements for class certification under the Pennsylvania Rules of Civil Procedure. The Texas Attorney General thus requests that this Honorable Court reject the proposed national class action settlement and the certification of a national settlement class to the extent that it includes Texas policyholders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Amicus Curiae Brief of the Attorney General of Texas has been mailed to all counsel of record listed below on this __________ day of September, 2001, and to the Honorable Judge John W. Herron.

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APPENDIX