

2013 WL 6179230 (N.D.Cal.) (Trial Filing)
United States District Court, N.D. California.
San Jose Division

Janice O'BRIEN, an individual, Plaintiff,
v.
CONTINENTAL CASUALTY COMPANY, and Does 1 through 100, inclusive, Defendants.

No. 5:13-cv-01289-EJD.
August 1, 2013.

Joint Case Management Statement & (Proposed) Order

Berkes Crane Robinson & seal LLP, [Steven M. Crane](#) (SBN 108930), [scrane @bcrlaw.com](#), [Laurie S. Julien](#) (SBN 136974), [ljulien@bcrlaw.com](#), 515 South Figueroa Street, Suite 1500, Los Angeles, California 90071, Telephone: (213) 955-1150, Facsimile: (213) 955-1155, Attorneys for Defendant Continental Casualty Company.

Honorable [Edward J. Davila](#).

Case Assigned to: Honorable Edward J. Davila

Date: August 9, 2013

Time: 9:00 a.m.

Courtroom: 4

The parties to the above-entitled action jointly submit this JOINT CASE MANAGEMENT STATEMENT & [PROPOSED] ORDER pursuant to the Standing Order for All Judges of the Northern District of California dated July 1, 2011 and Civil Local Rule 16-9.

1. Jurisdiction & Service

On February 8, 2013, Plaintiff Janice O'Brien ("O'Brien") filed this action against Continental entitled *Janice O'Brien v. Continental Casualty Company*, Monterey Superior Court Case No. M121832. On February 21, 2013, Continental was served with the Complaint through its agent for service of process, CT Corporation System, in Los Angeles, California. There are no other named defendants to this action.

On March 21, 2013, Continental removed this action to federal court on the basis of diversity jurisdiction. Continental is an Illinois corporation with its principal place of business in Chicago, Illinois. O'Brien is a resident of Pebble Beach, Monterey County, California. Continental contends that the matter in controversy exceeds the sum of \$75,000, exclusive of interests and costs, according to the allegations in the complaint. The complaint presents causes of action for breach of contract, bad faith, and **financial elder abuse** ([Welfare & Institutions Code §15610.30 et seq.](#)), and seeks policy benefits allegedly owed from July 15, 2011 to the present and continuing for life, at the rate of \$175 per day, which exceeds the jurisdictional minimum. The complaint also seeks damages for emotional distress, *Brandt* fees, statutory attorneys fees and punitive damages.

O'Brien filed a motion to remand, which is set to be heard on August 23, 2013. There are no counter-claims. No issues of personal jurisdiction or venue exist, and no parties remain to be served.

2. Facts

This action arises out of a first-party insurance coverage dispute involving whether Continental owes O'Brien personal care benefits (reimbursement of payments made to at-home caregivers) under Long Term Care Insurance Policy No. 076582018 ("the Policy"). Personal care benefits are subject to a daily cap of \$175.

O'Brien submitted a claim for personal care benefits in July of 2011, which Continental denied. O'Brien and her family appealed that denial. Continental upheld its denial until May 2013 when it determined that O'Brien was eligible for benefits from 12/7/2012 forward. Continental contends that O'Brien's condition did not satisfy the policy eligibility requirements, therefore Continental initially declined benefits. Following O'Brien's appeal of Continental's decision, Continental obtained an independent medical examination ("IME") of O'Brien, and agreed to reimburse O'Brien for caregiver services from 12/7/2012 forward, the date Continental determined that O'Brien satisfied the eligibility requirements of the Policy, based upon the IME.

The principal factual issues in dispute include: (1) whether O'Brien was eligible for benefits under the policy, and if so, at what point in time; (2) whether Continental breached the Policy; (3) whether Continental owes O'Brien past Policy benefits, and if so, the amount thereof.

3. Legal Issues

The parties agree that the following legal issues are in dispute:

- (1) Whether an insurer's denial of policy benefits can give rise to a **financial elder abuse** claim. *See Welfare & Institutions Code §15610.30*; and
- (2) Whether, as a matter of law, O'Brien may be awarded treble damages under *Civil Code §3345* in connection with her claims for **financial elder abuse** and/or common law bad faith based upon Continental's partial denial of policy benefits, and whether punitive damages may be trebled. *See Civ.Code §3345*.

Continental asserts that the following additional legal issue is in dispute: Whether Continental's denial of benefits was reasonable, as a matter of law. *See Am. Cas. Co. v. Krieger*, 181 F.3d 1113, 1123 (9th Cir. 1999) [where trial court "can conclude as a matter of law that an insurer's denial of a claim is not unreasonable" it can grant summary judgment to the insurer].

4. Motions

Pending motions: (1) Continental's motion to dismiss O'Brien's third cause of action for **financial elder abuse**, set to be heard on August 9, 2013; (2) O'Brien's motion to remand, set to be heard on August 23, 2013.

Anticipated motions: Continental anticipates filing a motion for summary adjudication on O'Brien's first cause of action for bad faith on the grounds that its partial denial of policy benefits was reasonable as a matter of law; thus, there can be no bad faith or punitive damages, and on the third cause of action for **financial elder abuse**, should Continental's motion to dismiss be denied. Unless ordered as part of this case management order, Continental anticipates filing a motion concerning phasing of trial, as described in Paragraph 15 below.

5. Amendment of Pleadings

At this time, the parties do not anticipate adding or dismissing parties, claims or defenses.

6. Evidence Preservation

The parties have reviewed the Guidelines Relating to the Discovery of Electronically Stored Information, and have met and conferred pursuant to [FRCP 26\(f\)](#), including consideration of the Checklist for ESI Meet and Confer. The parties agree to take reasonable steps to preserve evidence relevant to the issues reasonably evident in this action, and do not anticipate any issues with respect to the preservation of evidence.

7. Disclosures

The parties agree to exchange their Initial Disclosures pursuant to [Rule 26\(a\)](#) on or before July 31, 2013, including identification of witnesses with the subject matter of their expected testimony and identification of documents.

8. Discovery

No discovery has been conducted to date. The parties anticipate propounding written discovery to include interrogatories, requests for admission and demands for production of documents. O'Brien anticipates deposing O'Brien's treating physicians, and key Continental employees involved in processing her claim. At this time, Continental anticipates deposing: Plaintiff, her family members, her caregivers, her treating physicians and nurse Nola Bengry. The parties reserve their respective rights to notice additional depositions.

The parties do not propose any limitations or modification of the discovery rules. The parties have considered entering into a stipulated e-discovery order, and agree that it is not necessary or advisable for this case. The parties agree that documents containing privileged and/or work product protected information shall be produced in redacted form, with a privilege log, identifying the document and privilege asserted. The parties are familiar with [Federal Rules of Evidence, Rule 502\(b\)](#), and agree to comply with [Federal Rules of Civil Procedure, Rule 26\(b\)\(5\)\(B\)](#) respecting the inadvertent production of protected documents and information. There are no current discovery disputes.

The parties propose the following discovery plan pursuant to [Rule 26\(f\)\(3\)](#):

(A) No changes need be made as to the timing, form or requirement for disclosures. Initial disclosures are to be made by July 31, 2013;

(B) Discovery is needed on the following subjects: (1) whether O'Brien satisfied the conditions to benefits under the Policy, and if so, as of what date; (2) whether Continental owes O'Brien reimbursement for money paid to in-home caregivers, and if so, in what amount; (3) O'Brien's claimed damages.

(C) There are no current issues regarding discovery or disclosure of electronically stored information.

(D) The parties agree to produce documents containing protected information in redacted form, with a privilege log identifying the document and indicating the privilege asserted. The parties agree that if protected information or documents are inadvertently produced, they can be recalled and treated as privileged by notifying the other party of the inadvertent production.

(E) The parties agree that no changes need be made to the limitations on discovery.

(F) The parties are not aware of any other order that the court should issue at this time.

9. Class Actions

This action is not a class action.

10. Related Cases

There are no related cases.

11. Relief

O'Brien seeks unspecified damages. Continental denies liability, but if liability is found, contends that damages should be calculated as follows: (1) as to breach of contract, reimbursement of money paid to caregivers (based upon proof of payment) up to the daily cap of \$175 for any past days of breach, prior to the date on which Continental agreed to provide benefits, 12/7/2012; (2) as to bad faith, damages for emotional distress should be limited to the time period between Continental's denial of benefits through its agreement to pay benefits; *Brandt* fees must be reasonable and incurred to obtain past policy benefits only through 12/7/2012; (3) as to punitive damages, they must bear a relationship to compensatory damages and harm inflicted under *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417, 425 (2003); (4) as to **financial elder abuse**, reimbursement of money paid to caregivers (based upon proof of payment) up to the daily cap of \$175 for any past days of breach, prior to the date on which Continental agreed to provide benefits.

12. Settlement and ADR

The parties participated in a private mediation on July 19, 2013, before Robert Kaplan. No settlement was reached. In light of the recent unsuccessful mediation, the parties do not believe that assignment to the court-sponsored ADR program at this time would be useful. See Notice of Compliance with ADR Process, filed on July 30, 2013.

13. Consent to Magistrate Judge For All Purposes

The parties do not consent.

14. Other References

The case is not suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

15. Narrowing of Issues

Issues that can be narrowed by agreement or stipulation include: None at this time.

Bifurcating or Phasing of Trial: Continental proposes bifurcating as follows: Phase I to include breach of contract claims and defenses, and liability and defenses for **financial elder abuse**, and bad faith issues if necessary; Phase II to punitive damages, if necessary.

16. Expedited Trial Procedure

The parties have considered the Expedited Trial Procedure and General Order 64, and at this time, agree that this case is not suitable for the expedited trial procedure with limited discovery.

17. Scheduling

The parties propose the following:

Activity	Dates
Designation of Experts	June 6, 2014
Discovery Cut-Off	May 20, 2014
Dispositive Motion Hearing Cut-Off	June 20, 2014
Pre-Trial Conference	July 21, 2014
Trial	August 4, 2014

18. Trial

The case is to be tried by a jury. The expected length of trial is 7 days.

19. Disclosure of Non-Party Interested Entities or Persons

O'Brien: None.

Continental: Continental filed its Certification of Interested Entities or Persons on or about March 25, 2013, which is restated here:

Full Name of Interested Party/Entity	Party	Non-Party	Nature of Interest
Continental Casualty Company	X		
The Continental Corporation		X	Owns all the common stock of Continental Casualty Company
CNA Financial Corporation		X	Owns all the common stock of The Continental Corporation
Loews Corporation		X	Owns the majority of the stock of CNA Financial Corporation

20. Other

The parties are not aware of other matters that may facilitate the just, speedy and inexpensive disposition of this matter at this time.

DATED: August 1, 2013

BERKES CRANE ROBINSON & SEAL LLP

By: /s/ Laurie S. Julien

STEVEN M. CRANE

LAURIE S. JULIEN

Attorneys for Defendant CONTINENTAL

CASUALTY COMPANY

DATED: August 1, 2013

SHERNOFF BIDART ECHEVERRIA

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By: /s/ Samuel L. Bruchey

WILLIAM M. SHERNOFF

SAMUEL L. BRUCHEY

Attorneys for Plaintiff JANICE O'BRIEN

CASE MANAGEMENT ORDER

The above JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and all parties shall comply with its provisions. [In addition, the Court makes the further orders stated below:]

IT IS SO ORDERED.

DATED: _____

U.S. DISTRICT/MAGISTRATE JUDGE