

JUNE 2014

The Bainbridge Law Firm is a business litigation and counseling boutique that focuses on providing results oriented legal representation that protects client resources. We have significant experience in litigating a wide variety of financial services and insurance matters including *Life and Disability Insurance, Property & Casualty Insurance, Bad Faith, Fraud, Annuities, STOLI and Life Settlement matters.*

For more information, kindly contact:

James S. Bainbridge, Esq.  
(484) 690-4542  
[jsb@thebainbridgelawfirm.com](mailto:jsb@thebainbridgelawfirm.com)



#### DISCLAIMER

This communication is intended to inform our clients and friends of developments in the law and to provide information of general interest. It is not intended to constitute advice regarding any client's specific legal problems and should not be relied upon as such.

Furthermore, in order to comply with requirements imposed by the IRS which may apply to this Bulletin as distributed or as re-circulated, please be advised of the following:

THE ABOVE ADVICE WAS NOT INTENDED OR WRITTEN TO BE USED, AND IT CANNOT BE USED, BY YOU FOR THE PURPOSES OF AVOIDING ANY PENALTY THAT MAY BE IMPOSED BY THE INTERNAL REVENUE SERVICE.

In the event that this Bulletin is also considered to be a "marketed opinion" within the meaning of the IRS guidance, then, as required by the IRS, please be further advised of the following:

THE ABOVE ADVICE WAS NOT WRITTEN TO SUPPORT THE PROMOTIONS OR MARKETING OF THE TRANSACTIONS OR MATTERS ADDRESSED BY THE WRITTEN ADVICE, AND, BASED ON THE PARTICULAR CIRCUMSTANCES, YOU SHOULD SEEK ADVICE FROM AN INDEPENDENT TAX ADVISOR.

**Who:** *Byrd v. Conseco Life Ins. Co.*, Nos. 12-CV-2455 (D. Colorado).

**What:** Where an insured misstated her age on an application, a Colorado federal court granted summary judgment in favor of an insurer on a claim by the insured's husband, the policy's beneficiary, that it breached the terms of the policy by adjusting the death benefit to reflect the insured's true age.

On December 27, 1994, the plaintiff, Trenson Byrd, and his wife, Linda Byrd, applied for a \$100,000 life insurance policy on the life of Linda Byrd with Massachusetts General (who later sold the policy to Conseco). The producer mistakenly listed Mrs. Byrd's date of birth at the time she applied as 27 when she was actually 33. The Byrds reviewed and signed the application, it was approved by the carrier and the policy was issued in February 1995. While the plaintiff alleged that he advised the carrier of the mistaken date of birth, the premiums remained the same and all annual policyholder statements continued to list Mrs. Byrd's age on the date of issuance as 27. Mrs. Byrd died in July 2010 and the plaintiff filed a claim for the death benefit. In the course of processing the claim, Conseco learned that Mrs. Byrd's date of birth had been misstated on the application. Accordingly, pursuant to the misstatement of age ("MOA") provision in the contract, it reduced the benefit to the amount it would have issued to a 33 year old female in 1994 based upon the premiums collected. This reduced the death benefit from \$100,000 to \$57,000.

Plaintiff subsequently filed suit against Conseco for breach of contract and bad faith. Defendant filed a motion for summary judgment seeking to dismiss all claims on the grounds that the misstatement of age provision permitted it to adjust the death benefit. Relying on the MOA provision in the policy, the court found that the carrier was entitled to adjust the death benefit to the amount of insurance that the premium collected would have purchased at the correct age. While the plaintiff argued that the MOA provision should not apply because Mrs. Byrd did not "intentionally or knowingly" misstate her age, the court held that neither Colorado law, nor the applicable policy language, requires that a misstatement in age be intentional, or the fault of the insured, in order to make an adjustment based upon the proper age. The court stated "that age adjustment clauses are applicable irrespective of who made the misstatement, and whether the misrepresentation was intentional." Consequently, Conseco was entitled to reduce Mrs. Byrd's death benefit to reflect her true age.

**When:** April 25, 2014