

1 “(1) is presented with newly discovered evidence, (2) committed clear error or the initial
2 decision was manifestly unjust, or (3) if there is an intervening change in controlling law.”
3 School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

4 **DISCUSSION**

5 **I.**

6 Defendants argue that the Court improperly construed disputed facts in favor of the
7 Plaintiffs. For example, Defendants contend, the Court disregarded the testimony of Falcia
8 Soller in which she stated that the policy was marketed and sold to the Rowes as a “short-
9 term care, limited benefit, convalescent care policy” and denied that the policy was ever
10 represented to the Rowes, prior to purchase, as providing a “lifetime” or “unlimited” benefit.
11 Defendants assert that whether the Rowes’ policy was ever represented, marketed, or sold
12 as a “long-term care insurance” policy and whether Mrs. Rowe is entitled to any additional
13 benefits is a dispute issue of material fact.

14 However, contrary to the Defendants contention, the way in which the policy was
15 marketed and sold to the Rowes is not a material fact. In its July 1, 2008 Order, the Court
16 found that the coverage provided under the policy falls squarely within the Arizona Revised
17 Statute’s definition of long-term care.¹ A policy that meets the definition of long-term care

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19 ¹ Mrs. Soller testified that the policy covers home health care or nursing home care,
20 personal care benefits, custodial care, and even housekeeping. Dep. of Falcia Soller,
21 October 19, 2007.

22 As stated in the July 1, 2008 Order, the Arizona Revised Statute Section 20-1691 ¶
23 8 defines “long-term care insurance” as a policy that provides the following coverage:

24 an individual or group insurance policy . . . advertised, marketed, offered or
25 designed to provide coverage for each covered person on an expense-incurred,
26 indemnity, prepaid or other basis for one or more necessary or medically
27 necessary diagnostic, preventative, therapeutic, rehabilitative, maintenance,
28 personal or custodial care services provided in a setting other than an acute
care setting of a hospital . . . Long-term care insurance also includes a policy
. . . that provides for payment of benefits based on cognitive impairment or

1 insurance, as defined by Section 20-1691 of the Arizona Revised Statutes, as the policy does
2 here, is required to comply with Title 20 of the Arizona Revised Statutes. Title 20 states that
3 “[a] long term care policy shall provide coverage for at least twenty-four consecutive months
4 for each person covered.” A.R.S. § 20-1691.03(c).

5 Interpretation of insurance contracts is a question of law for this court to decide.
6 Benevides v. Arizona Property & Cas. Ins. Guar. Fund, 184 Ariz. 610, 911 P.2d 616, 619
7 (Ariz.App. 1995); Blue Ridge Ins. Co. v. Stanevich, 142 F.3d 1145 (9th Cir. 1998). The
8 Arizona Supreme Court decision St. Paul Fire & Marine Ins. Co. v. Gilmore, sets forth that
9 “[u]nder the operation of our statutes governing insurance, the type of policy is determined
10 by the type of coverage provided, not by the label affixed by the insurer The statutes are
11 part of every insurance policy and mandate that policies providing specific types of coverage
12 meet specific requirements.” 168 Ariz. 159, 812 P.3d 977, 983 (1991).

13 Thus, the Court finds that any dispute about the manner in which the policy was
14 represented, marketed or sold is not a material fact because the policy falls under the
15 definition of long term care. Long-term insurance policies are required to provide coverage
16 for at least twenty-four consecutive months for each person covered. A.R.S. § 20-1691.
17 Therefore, the Court is not persuaded to reconsider it’s July 1, 2008 Order with regard to its
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20 loss of functional capacity. Long-term care insurance does not include any
21 insurance policy that is offered primarily to provide basic medicare
22 supplement coverage, basic hospital expense coverage, basic medical and
23 surgical expense coverage, major medical expense coverage, disability income
24 or related asset protection coverage, hospital confinement indemnity coverage,
25 accident only coverage, specified disease coverage, specified accident
26 coverage or limited benefit health coverage or riders to the insurance policy or
27 a life insurance policy that accelerates the death benefit for terminal illness,
28 medical conditions requiring extraordinary medical intervention or permanent
institutional confinement, that provides the option of a lump sum payment for
those benefits and in which the benefits or the eligibility for the benefits is not
conditioned on the receipt of long-term care.

1 finding that the policy issued to the Rowes was a long-term care policy nor as to the fact that
2 the Rowes are entitled to at least twenty-four months of coverage.

3 **II.**

4 Defendants further request that the Court reconsider its finding with respect to the
5 “Restoration of Benefits” clause. Defendants assert that for the “Restoration of Benefits”
6 clause to be construed as a limitation, it must be assumed that the policyholder is entitled to
7 a “lifetime” or “unlimited” benefit. The Court disagrees. Because the policy is a long-term
8 care policy, which is required to provide at least twenty-four months of coverage, the
9 Restoration of Benefits improperly serves to limit the policy coverage. The Court will leave
10 it to a jury to decide whether the policy entitles Plaintiffs to more than twenty-four months
11 of coverage.

12 **III.**

13 Defendants additionally seek clarification of two aspects of the Court’s July 1, 2008
14 Order. First, Defendants contend that the Court declared that Restoration of Policy Benefits
15 clause does not conform to Arizona Administrative Code (“A.A.C.”) R20-6-1004(B)(2), but
16 the Court did not determine the consequences of the nonconformity. Second, Defendants
17 contend that because the Court found that the policy is contrary to the law and to public
18 policy, the policy should be found to be invalid, but the Court did not comment on whether
19 this finding, in fact, rendered the Policy *void ab initio*. The Court will address these two
20 topics in turn.

21 First the Court will address Defendants’ request with regard to the policy’s
22 nonconformity with A.A.C. R20-6-1004(B)(2). Defendants seek clarification as to the affect
23 of the Court finding that the Restoration of Policy Benefits clause² does not meet the
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25 ² The Restoration of Policy Benefits states as follows:

26 This policy’s Maximum Benefit for Any One Period of Expense will be fully
27 restored when a Family Member has not required treatment or services covered

1 requirements of A.A.C. R20-6-1004(B)(2). Defendants ask whether the Court finds this
2 violation to invalidate the clause or whether it simply creates the potential for an
3 administrative action by the Department of Insurance.

4 Plaintiffs brought this action alleging breach of the duty of good faith and fair dealing,
5 negligence, malpractice, and several claims of fraud. Moreover, as Defendants noted in their
6 response to Plaintiffs' motion for partial summary judgment, prosecution of a violation of
7 an Arizona Department of Insurance regulation such as A.A.C. R20-1004(B)(2) is left
8 exclusively to the discretion of the Arizona Department of Insurance. See e.g., Melancon v.
9 USAA Cas. Ins. Co., 174 Ariz. 344, 347, 849 P.2d 1374, 1377 (Ariz. Ct. App. Div. 2, 1992).
10 The Court stated in its Order that the violation of A.A.C. R20-6-1004(B)(2) is an
11 inappropriate limitation on benefits and granted summary judgment in Plaintiffs' favor. As
12 such, the provision is invalid. Zuckerman v. Transamerica Ins. Co., 133 Ariz. 139, 144, 650
13 P.2d 441, 446 (1982) (finding that if a provision of an insurance agreement is found to take
14 advantage of a claimant with an inferior bargaining position, it may be found invalid). The
15 Court finds that Plaintiffs are entitled to at least twenty-four months of coverage under the
16 policy. A jury can decide whether Plaintiffs are entitled to more than twenty-four months
17 of coverage.

18 A.A.C R20-6-1004(B)(2), states as follows:

19 A long-term care insurance policy or certificate containing any limitations or
20 conditions for eligibility . . . shall describe the limitations or conditions . . . in
21 a separate paragraph of the policy . . . and shall label the paragraph
22 "Limitations or Conditions on Eligibility for Benefits."
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25 under this policy for six consecutive months for the same cause or causes for
26 which a previous Period of Expense began. If this policy includes the Annual
27 Benefit Increase Option, as shown on the Schedule page, the amount restored
28 will include any accumulated benefit increases provided as of the policy's last
anniversary.

1 The Restoration of Policy Benefits at issue here did not meet the requirements set
2 forth under A.A.C. R20-6-1004(B)(2). It is not the intent of the Court to revise, modify,
3 alter, or extend the policy. However, the Court is in a position to conduct policy
4 interpretation. See Benevides, 184 Ariz. 610, 911 P.2d at 619 (finding that interpretation of
5 insurance contracts is a question of law for this court to decide); see also Blue Ridge Ins. Co.
6 v. Stanevich, 142 F.3d 1145 (same). The policy falls within the statutory definition of long
7 term care. In Arizona, any long term care policy is required to provide at least twenty-four
8 months of coverage. Any clause, including the Restoration of Policy Benefits clause, that
9 limits Plaintiffs' benefits to less than twenty-four months is contrary to the statutory
10 requirements for long term care. Accordingly, Defendants are directed to provide Plaintiffs
11 with at least twenty-four months of coverage. A jury can decide whether Plaintiffs are
12 entitled to coverage beyond the statutorily required twenty-four months.

13 Second, Defendants seek clarification contending that if the policy is contrary to the
14 law and to public policy, the Court should have found the policy to be invalid and *void ab*
15 *initio*. It is well established that parties to an insurance agreement may contract for any
16 lawful coverage, and that an insurance company has the right to limit its liability by imposing
17 conditions and restrictions on its contractual obligations; however, these conditions and
18 restrictions may not be inconsistent with public policy. Kepner v. Western Fire Ins. Co., 109
19 Ariz. 329, 330, 509 P.2d 222, 223 (1973). If a provision of an insurance agreement is found
20 to take advantage of a claimant with an inferior bargaining position, it may be found invalid.
21 Zuckerman v. Transamerica Ins. Co., 133 Ariz. 139, 144, 650 P.2d 441, 446 (1982). Thus,
22 "where the conditions do no more than provide a trap for the unwary, the insurer will be
23 estopped to raise them." Id.

24 The Court reiterates its finding in its July 1, 2008 Order that limiting the terms of the
25 Rows' policy to anything less than twenty-four months is in violation of State law. The
26 Court does not find that invalidating the policy clauses that are contrary to public policy
27 renders the policy *void ab initio*. In fact, Defendants include a clause in the policy stating
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1 that the policy shall be read to comply with state statute. The Restoration of Policy Benefits
2 policy provision here appears to take advantage of the Plaintiff's inferior bargaining position.
3 This provision could prove a trap for the unwary, therefore, the insurer will be estopped from
4 relying on it here.

5 In Defendants' conclusion section they ask that the Court de-publish its ruling until
6 Defendants have exercised all of their appeal options. The Court has not acted to request
7 publication of its Order granting Plaintiffs' Motion for Partial Summary Judgment.

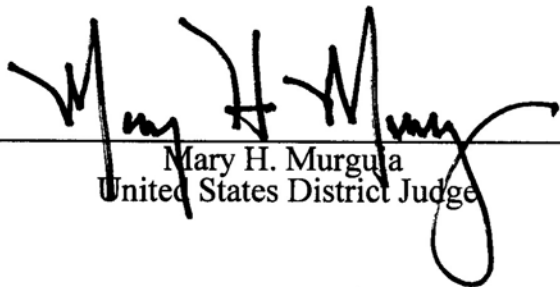
8 **Accordingly,**

9 **IT IS ORDERED** denying Defendants' Motion for Reconsideration but granting
10 Defendants' alternative Motion for Clarification (Doc. 138) to the extent set forth in this
11 Order.

12 **IT IS FURTHER ORDERED** directing Defendants to provide Plaintiffs with at least
13 twenty-four months of coverage under their Policy.

14 DATED this 15th day of September, 2008.

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Mary H. Murgula
United States District Judge