In the

United States Court of Appeals

for the

Ninth Circuit

CELEDONIA X. YUE, M.D.,
on behalf of the class of others similarly situated
and on behalf of the General Public,

Plaintiffs-Appellees,

v.

CONSECO LIFE INSURANCE COMPANY,
successor to Philadelphia Life Insurance Company
and formerly known as Massachusetts General Life Insurance Company,

Defendant-Appellant.

Appeal from a Decision of the United States District Court for the Central District of California,
No. 08-CV-01506 · Honorable A. Howard Matz

DEFENDANT-APPELLANT'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(F)

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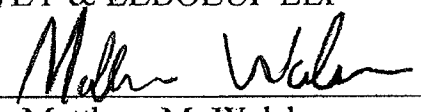
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendant Conseco Life Insurance Company ("Conseco Life") states that Conseco Life, an Indiana corporation, is a direct wholly-owned subsidiary of Washington National Insurance Company ("WNIC"), an Illinois insurance company. WNIC is a direct wholly-owned subsidiary of Conseco Life Insurance Company of Texas ("CLIC-TX"), a Texas insurance company. CLIC-TX is a direct wholly-owned subsidiary of CDOC, Inc., a Delaware general business corporation with its principal place of business in Indiana. CDOC, Inc. is a direct wholly-owned subsidiary of Conseco, Inc., a Delaware general business corporation listed on the New York Stock Exchange under the symbol "CNO."

Dated: December 22, 2009

DEWEY & LEBOEUF LLP

By: 

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PRELIMINARY STATEMENT

This case concerns universal life insurance policies known as ValueLife and ValueTerm (the "Policies") sold by Conseco Life Insurance Company ("Conseco Life"). Plaintiff Celedonia X. Yue claims that Conseco Life breached the Policies in October 2002 by deciding to raise cost of insurance ("COI") rates (the Policy charge allocable to death benefit payments) in the 21st year of each of the Policies, which for Yue would be 2016. Because the Policies were first sold in 1991, the earliest that any class member would pay any increased COI charge flowing from the 2002 decision would be 2011. The class seeks a declaratory judgment and an injunction enjoining Conseco Life from implementing the rate increase.

It was manifest error for the district court to certify a nationwide class in this action. *First*, the district court failed to conduct any choice-of-law analysis, even though Policy owners purchased their Policies in and subject to the laws of 53 jurisdictions (49 states, two U.S. territories and the District of Columbia). This violates *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985), where the Supreme Court ruled that, under the Due Process clause, such an analysis was required in any nationwide class action with claims governed by state law. The district court ruled that such analysis was not required because Yue sought certification under Rule 23(b)(2), but that is wrong. The choice-of-law analysis required by *Shutts* applies in every nationwide class action involving the laws of

multiple states.

Second, the district court erroneously ruled that Yue was an adequate representative of the class. Yue's claims are not ripe under this Court's decision in *Bova v. City of Medford*, 564 F.3d 1093 (9th Cir. 2009). Alternatively, if Yue's claims are ripe, her claims are now untimely because the alleged "breach" according to the district court occurred in 2002. The district court ruled, however, that Yue's contract and California Unfair Competition Law ("UCL") claims were timely under California's "discovery rule." That ruling contradicts this Court's precedent that the discovery rule does *not* apply to UCL claims, and the district court's manifest error undercuts its determination that Yue is an adequate representative for the class.

The district court's application of the discovery rule to Yue's contract claim also ignored settled law and the undisputed factual record. And, the district court's application of the discovery rule itself demonstrates that class certification was inappropriate because the application of that rule requires detailed, individualized factual inquiries not appropriate for class treatment. The same is true with respect to whether each class member has a ripe claim under Article III -- an analysis the court erroneously ruled was not required here because, in the court's view, absent class members need not satisfy Article III's constitutional requirements. This Court should grant this Petition and give Conseco Life permission to appeal the

district court's order.

BACKGROUND FACTS

Yue, a California resident, owns a Policy. *See* Appx. at 4, ¶ 7. Defendant Conseco Life is an Indiana domiciled life insurer that assumed the obligations of Yue's Policy. Yue purchased her Policy in September 1995. *See id.* She brought this action on behalf of herself and a class of "[a]ll owners of [the Policies] issued by either Massachusetts General or Philadelphia Life and that were later acquired by Conseco Life." Appx. at 5, ¶ 12. The national class Yue describes is comprised of policyholders who reside in 53 different jurisdictions. *See* Appx. at 209, ¶ 2.

In October 2002, after consulting recognized outside experts, Conseco Life decided to increase COI rates starting in the 21st year of the Policies. *See* Appx. at 271-272. After 2002, the annual statement projections that the policyholders received yearly from Conseco Life included the COI increase and projected that the Policies would remain in force for less time. Appx. at 9, ¶ 26; *id.* at 12, ¶ 38. More specifically, additional cost of insurance charges were to be subtracted from the projected cash values beginning in year 21, causing the cash values to deplete more rapidly. Yue testified that she first became aware of Conseco Life's intention to raise the COI rate on her Policy in 2007, after meeting with her insurance broker who recognized the COI increase while reviewing the projection Conseco Life sent to Yue. Appx. at 161:22-25.

Yue alleges that Conseco Life's decision to increase the COI rates in the future breaches the Policies and violates California's UCL, California Business and Professions Code Section 17200. Appx. at 2, ¶¶ 2-3. Although the COI increase was authorized by Conseco Life in 2002, no Policy owner has yet paid increased cost of insurance charges based on it, and Policy owners may never do so. Appx. at 70.

Yue filed her complaint on March 4, 2008, eight years before the 2002 decision impacts the COI rates in her Policy, assuming it is ever implemented. On December 8, 2008, the court denied Conseco Life's motion to dismiss. Yue moved for class certification on June 9, 2009 and the motion was fully briefed as of August 17, 2009.[1] Without any hearing, and in a short opinion in which the court performed no analysis required under *Shutts*, the court granted certification.

QUESTIONS PRESENTED

1. Did the district court err in certifying a nationwide class without performing a choice-of-law analysis, despite divergences in applicable state laws?

2. Did the district court err in determining that Yue is an adequate class representative when, under *Bova v. City of Medford*, 564 F.3d 1093 (9th Cir. 2009), her claims are not ripe under Article III of the Constitution?

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[1] The fact discovery cut-off in this case was December 7, 2009, although the parties agreed to finish a single deposition after the cut-off. Trial is currently scheduled for May 18, 2010, and will last approximately five days.

3. Did the district court err in determining that Yue is an adequate class representative based on an incorrect application of California's discovery rule?

ARGUMENT

This Court has "unfettered discretion" under Federal Rule of Civil Procedure 23 ("Rule 23") subsection (f) to grant interlocutory review of a class certification decision based upon any consideration it finds persuasive. *Chamberlan v. Ford Motor Co.,* 402 F.3d 952, 957 (9th Cir. 2005). Review under Rule 23(f) is especially appropriate where "the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review . . . ." *Id.* at 959. That is the case here, as applying *Shutts* to a Rule (b)(2) class involves Due Process considerations and a dearth of appellate authority exists on the issue. Moreover, Rule 23(f) review is warranted where "the district court's class certification decision is manifestly erroneous." *Id.* Here, the district court manifestly erred in holding that Yue was an adequate class representative given that she personally has no claim.

I. THE DISTRICT COURT VIOLATED DUE PROCESS BY CERTIFYING A CLASS WITHOUT PERFORMING A CHOICE-OF-LAW ANALYSIS

In *Shutts*, 472 U.S. at 823, the Supreme Court ruled that, in a nationwide class action governed by state law, constitutional due process guarantees require a

district court to apply, to each class member's claims, the substantive state laws as required by the forum state's choice-of-law rules. As a result of that constitutional imperative, the Supreme Court required district courts to engage in a comprehensive choice-of-law analysis as part of the certification analysis. *Id.*[2] Only by engaging in such an analysis may a court determine which state laws apply and whether, in light of state law divergences, a class action may proceed in a manner that protects the parties' and absent class members' constitutional rights.

The district court ruled that the analysis required by *Shutts* does not apply in the Rule 23(b)(2) context.[3] That is clear error. *Shutts* is not limited to Rule 23(b)(3) damages class actions, and we have found no authority holding that it is. The district court's failure to follow and apply *Shutts* warrants review under Rule 23(f).

The district court failed to recognize that the *Shutts* requirement is grounded in the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of article IV, § 1, of the Constitution and does not emanate from

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[2] *See also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended on unrelated grounds*, 273 F.3d 1266 (9th Cir. 2001) (district courts must perform a pre-certification choice-of-law analysis as part of the "rigorous analysis" required by Rule 23).

[3] *See* Appx. at 238 ("Defendant cites not a single case holding that a choice-of-law analysis ... is required to certify a class under Rule 23(b)(2) ... the question of whether state law may differ on such questions is not relevant to the Court's analysis.").

Rule 23. *Shutts*, 472 U.S. at 822. Absent class members and defendants have the constitutional right to have the appropriate laws applied to each of their claims, and each state has an interest in having its substantive laws applied as well.[4] These constitutional imperatives apply equally to Rule 23(b)(2) and Rule 23(b)(3) class actions, and the district court erred in ignoring its obligations under *Shutts* in holding that choice-of-law issues were "not relevant" in this case.

Significantly, neither Yue nor the district court disputed that substantive state laws diverged widely on numerous issues Conseco Life identified relating to Yue's breach of contract claim. Indeed, the district court, in denying Conseco Life's motion to dismiss, noted the clear divergence in state laws on the outcome determinative issue of whether claims predicated on future premium or COI increases are ripe before the increases take effect.[5] Yet, when constitutional

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[4] The Supreme Court held that the constitutional protections were triggered by Rule 23(a)'s commonality requirement, as opposed to Rule 23(b)(3)'s predominance or superiority requirements, thus undercutting the district court's statement that *Shutts* was not applicable to Rule 23(b)(2) classes. *See Shutts*, 472 U.S. at 821.

[5] The district court took note of the New York rule, under which Yue's claims would be premature, but ruled that New York cases were not "binding authority, and the Court does not find their reasoning persuasive" and decided instead to adopt the law of Massachusetts, which "has come to a different conclusion about the justiciability" of the claims. Appx. at 72 n.4. As we have demonstrated, most courts that have addressed the issue – for example, Alabama, North Carolina, Texas, Tennessee and Pennsylvania – have adopted the New York rule. Appx. at 86, 92-96.

principles required the district court to analyze those divergences at the class certification stage, the district court ignored them, erroneously ruling that those choice-of-law and constitutional principles were "not relevant." Appx. at 73.

The district court also stated, albeit in *dicta*, that the many divergent state law issues Conseco Life raised were "wholly tangential to the fundamental common question of law in this case."[6] But the state law divergences ignored by the district court are hardly "tangential." To the contrary, each divergent issue of state law Conseco Life raised is outcome determinative: for example, if the class' claims are premature under the applicable state laws or have not yet accrued, Conseco Life would be entitled to a dismissal of the claims.[7] Similarly, if, under state law, class members' claims would be limited to one for anticipatory breach,

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[6] This is *dicta* because the district court's holding is that a choice-of-law analysis is "not relevant" and thus not required. Accordingly, the court did not perform it.

[7] *McDonnell v. Conseco Life Ins. Co.*, No. CT-003288-04, 2005 WL 6149704 (Tenn. Cir. Ct. Oct. 13, 2005), illustrates this point. There, a Tennessee court analyzed varying state laws on breach of contract claims when plaintiff's claim, like Yue's and the class' here, was predicated on an alleged impermissible premium increase. The court explained, as did the district court in denying Conseco Life's motion to dismiss, that the "[c]ourts that have heard 'vanishing premium' cases have reached divergent conclusions as to when a plaintiff[']s claim accrues." *McDonnell*, 2005 WL 6149704. Ultimately, after reviewing the law of several states, the Tennessee court adopted the New York rule and dismissed the complaint. *Id.* Conseco Life is entitled to have this outcome determinative Tennessee law applied to the claims of Tennessee policyholders, and the court violated the due process rights of both Tennessee policyholders and Conseco Life in failing to acknowledge as much.

rather than a current breach, class members' claims would be required to be dismissed unless class members affirmatively elected to immediately terminate their Policies, another outcome determinative issue.[8]

For the district court to characterize these divergent state laws as "wholly tangential" when they are outcome determinative was erroneous, and the district court reached this conclusion without even analyzing the state laws at issue. *Shutts* required the district court to analyze them. *Shutts*, 472 U.S. at 816 (remanding and requiring that the Kansas Supreme Court apply a choice-of-law analysis to all questions of state law, "from the direct to the tangential").[9]

The analysis *Shutts* requires, which the district court refused to conduct, is a critical component of class certification rulings. As the Supreme Court has stated, "[d]ue process requires that there be an opportunity to present every available defense," *Lindsay v. Normet*, 405 U.S. 56, 66 (1972) (internal citations omitted),

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[8] *See, e.g., Asad v. Hartford Life Ins. Co.*, 116 F. Supp. 2d 960, 963 (N.D. Ill. 2000) (viewing policyholder's contract claim such as this one as one of anticipatory breach under Illinois law); *Higgins & Higgins Inc. v. Langenkamp*, No. 16668, 2009 WL 565292, at *2 (N.Y. Sup. Ct. Feb. 13, 2009) (finding that under New York law, "plaintiff's insistence on what amounts to a [future] 30 percent price increase . . . constituted an anticipatory breach of the contract").

[9] The district court also improperly shifted the burden, stating that "Defendant has not identified any variation in state law that bears on the fundamental question in this case." Appx. at 73. The burden of proof, however, was on Yue to establish that the requirements of Rule 23 were met. *Zinser,* 253 F.3d at 1186. Yue made no attempt to compare, or even define, the applicable state laws.

but the district court's ruling denies Conseco Life's right to assert every defense available under the applicable laws of each state. Similarly, absent class members have a due process right to have their own state's laws applied to their claims. Only by conducting the choice-of-law analysis that *Shutts* mandates can the Court vindicate the due process rights of both Conseco Life and absent class members.[10]

Perhaps even worse, it appears that, in addition to not performing the choice-of-law analysis required at the certification stage, the court will apply California law to the claims of the nationwide class. That is impermissible unless the choice-of-law analysis required by *Shutts* has been performed. *Shutts*, 472 U.S. at 823. And, because the district court apparently intends to apply California law to the class' claims even though the laws of 53 jurisdictions must be applied, the district court performed no analysis, let alone a "rigorous analysis," of how this case can be tried. Indeed, the court erroneously ruled that no trial plan was necessary, another fundamental error.[11]

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[10] *See, e.g., Lewallen v. Medtronic USA, Inc.*, No. C 01-20395 RMW, 2002 WL 31300899, at *5 (N.D. Cal. Aug. 28, 2002) (denying certification due to substantial divergences in state laws); *Renkiewicz v. Commercial Union Life Ins. Co. of Am.*, No. Civ. A. 98-CV-1564, 1999 WL 820452, at *3 n.1 (E.D. Pa. Sept. 29, 1999) (variation in state laws precluded certification of a nationwide class asserting claims regarding future premium increases).

[11] A plaintiff seeking certification of a nationwide class to which the laws of the several states potentially apply must demonstrate a realistic plan for adjudicating the claims at trial. *Zinser*, 253 F.3d at 1189 ("[b]ecause [plaintiff] seeks certification of a nationwide class for which the law of forty-eight states potentially

II. THE DISTRICT COURT COMMITTED MANIFEST ERROR BY FINDING YUE IS AN ADEQUATE CLASS REPRESENTATIVE BECAUSE HER CLAIMS ARE EITHER NOT RIPE AND SHE HAS NO STANDING TO SUE, OR, IN THE ALTERNATIVE, ARE NOW TIME-BARRED

A named plaintiff is an inadequate class representative under Rule 23(a)(4) if her own claims are barred as a matter of law. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-1023 (9th Cir. 2003).[12] As set forth below, Yue is not an adequate representative either because her claims are not ripe under Article III, or alternatively, her claims are now time-barred under California law.

Ripeness/Standing. Conseco Life initially moved to dismiss the Complaint on the grounds that Yue's claims were premature, arguing that she had no claim until she paid increased COIs flowing from the 2002 decision to raise rates in the future (*i.e.*, the New York rule). Conseco Life argued that her claims were not ripe under Article III because they were based on future contingent events that may not

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applies, she bears the burden of demonstrating 'a suitable and realistic plan for trial of the class claims'") (citation omitted). The district court ruled that a plan was not required for a class certified under Rule 23(b)(2), but that does not make sense. A trial plan enables the court to determine whether a nationwide class action can realistically be tried. That is an essential component of the "rigorous analysis" required under Rule 23.

[12] *See also Hudson v. Capital Mgmt Int'l, Inc.*, No. C-81-1737 MHP, 1982 U.S. Dist. LEXIS 10070, at *9 (N.D. Cal. Jan. 6, 1982) ("If the named plaintiffs are time-barred, they cannot serve as representatives of the class."); *Holloway v. Best Buy Co.*, No. C 05-5056 PJH, 2009 U.S. Dist. LEXIS 50994, at *26-27 (N.D. Cal. May 28, 2009) (same); *Medimatch, Inc. v. Lucent Techs., Inc.*, 120 F. Supp. 2d 842, 854 (N.D. Cal. 2000) (same).

occur. The district court rejected that argument, deciding that she had standing and her claims became ripe when Conseco Life decided in October 2002 to raise COI rates. Appx. at 71-72. The court theorized that Yue's claims were ripe because "policyholders like Yue are immediately confronted with the need to decide, now, whether to increase funding to deal with the cost of insurance increase." [13] Appx. at 71. According to the district court, Yue could sue now because Conseco Life may not improperly raise COI rates "at *any* point during the life of the policy" and "[a]llowing an insurer to decide at any point to increase cost of insurance charges for reasons not permitted by the policy would constitute a breach . . . ." Appx. at 74 (emphasis in original).

The district court's analysis is completely contrary to *Bova v. City of Medford*, 564 F.3d 1093 (9th Cir. 2009), under which Yue's claims are not ripe under Article III. There, city employees brought a declaratory relief/injunction action like this one against their employer, contending that the employer's decision to terminate health care benefits after retirement was unlawful. This Court held that such claims were not ripe under Article III, because "[i]t is possible" that the employer's decision would never impact plaintiffs, who "could change jobs, be

[13] The court held: "Plaintiff must decide *now* whether to continue funding her policy at the current rate, to increase her monthly payments, or to seek alternative life insurance coverage. These are important and difficult decisions." Appx. at 73 (emphasis in original).

terminated or die ... before retiring." *Id.* at 1096-97. "Or, by the time Plaintiffs retire, the City may have abandoned its current policy in favor of one that provides insurance coverage to retired employees, mooting the substantive questions at issue." *Id.* at 1097. Unless and until health benefits were cut off after retirement, the plaintiffs had no claim. The same is true here: unless and until Yue pays increased COIs in 2016, any harm is speculative and thus Yue's claims are not ripe. Yue may die before 2016 or otherwise cancel her policy, and Conseco Life may decide not to implement the COI increase. Yue's claims are not ripe for the same exact reasons the claims in *Bova* were not ripe, and thus Yue cannot be a class representative.

What is more, "no class may be certified that contains members lacking Article III standing . . . ." *Sanders v. Apple, Inc.*, __ F. Supp. 2d __, No. C 08-1713 JF (PVT), 2009 WL 150950, at *10 (N.D. Cal. Jan. 21 2009) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006)). The district court erred in holding that the absent class' members could be part of the class even if they lacked Article III standing to sue.[14] Appx. at 239 n.11.

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[14] The district court relied upon this Court's decision in *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) for the proposition that absent class members need not have Article III standing, but as another district court has recently noted, *Bates* does not establish that principle and in fact Supreme Court precedent requires that each member of the class have Article III standing. *See Burdick v. Union Security Ins. Co.*, No. CV 07-4028 ABC (JCx), 2009 WL 4798873, at *4 (C.D. Cal. Dec. 9, 2009) ("the Court finds Plaintiffs' reliance on

Under the court's analysis many, if not all, absent class members do not have ripe claims. As stated above, the district court ruled that Yue's claim was ripe because Yue was aware of the COI increase and needed to "now" make "important" decisions about what to do with her Policy. Appx. at 71. This ruling expressly assumed knowledge of the COI increase on Yue's part. But, contrary to that holding, the district court later ruled (discussed below) that the COI increase was decided in "secret" and that the class did *not* know about it. Appx. at 236. Under the court's previous standing analysis, class members may not have ripe claims, because, unlike Yue, they do *not* know about the COI increase and are *not* wrestling over what to do about it. In fact, because the district court's ripeness analysis is tethered to the Policy holder's knowledge of the COI increase, an individualized inquiry would be necessary to determine whether each class member knew and was worried about the COI increase such that the class members' claims would be ripe under Article III. The court avoided this constitutional problem by erroneously ruling that class members did not need to have cognizable claims under Article III. That was error.

Statute of Limitations. Although Conseco Life disagrees with the district court's standing rulings (*i.e.*, that Yue has Article III standing and that class

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Bates unpersuasive and concludes that those absent class members lacking justiciable claims under Article III should be excised from the case").

members need not have any Article III standing at all), under the district court's standing analysis the alleged "breach" occurred when Conseco Life decided in October 2002 to raise future COI rates. The logical conclusion is that Yue's claims are time-barred, because she filed this action more than four years after Conseco Life decided to raise COI rates in October 2002.[15] To avoid this result, the district court applied a discovery rule to Yue's claims. Appx. at 235. The court's application of the discovery rule was clear error for several reasons.

First, and most simply, *this* Court has held that California's discovery rule does *not* apply to UCL claims.[16] Although California state appellate courts have disagreed on the applicability of a discovery rule under the UCL, *Karl Storz* governs the issue and the district court committed clear error in ignoring it.[17]

Second, the district court erroneously expanded the discovery rule's

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[15] Yue admitted that her claims arose in October 2002, when Conseco Life adopted a Board resolution to increase COIs. Appx. at 199:2-23; Appx. at 271-272. Under California law, the statute of limitations for Yue's breach of contract and UCL claims is four years. Cal. Civ. Proc. Code § 337; Cal. Bus. & Prof. Code § 17208.

[16] *Karl Storz Endoscopy-Am., Inc. v. Surgical Techs., Inc.*, 285 F.3d 848, 857 (9th Cir. 2002) ("claims under [the UCL] . . . are subject to a four-year statute of limitations which began to run on the date the cause of action accrued, not on the date of discovery").

[17] *See Brewster v. County of Shasta*, 112 F. Supp. 2d 1185, 1188 n.5 (E.D. Cal. 2000) (Ninth Circuit opinions bind district court and take precedence over conflicting state law authority, except from the California Supreme Court), *aff'd*, 275 F.3d 803 (9th Cir. 2001); 16 Cal. Jur. 3d *Courts* § 314 (2009).

application beyond its narrow confines. The discovery rule is a *narrow exception* to the general rule that a claim for breach of contract accrues whether the plaintiff knows of the breach or not.[18] Under this Court's precedent, a discovery rule may apply to contract actions only where the "factual predicate for the plaintiff's injuries was concealed or misrepresented." *Matsumoto v. Republic Ins. Co.*, 792 F.2d 869, 872 (9th Cir. 1986). Yue discovered the COI increase by examining the documents Conseco Life sent her and discussing them with her broker. (Appx. at 159:9 – 160:3). That is the opposite of concealment.

The two cases that the district court cited do not support applying the discovery rule to Yue's contract claim. The district court quoted parts of *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805 (1983) (Appx. at 235) but it cited the portion of the opinion where the state court was describing the laws of *other* states, notably Maryland, on the discovery rule.[19] To invoke the discovery rule for "certain, rather unusual breaches," the *April Enterprises* court stated that a plaintiff "must plead facts sufficient to convince the trial judge that delayed discovery was

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[18] *See, e.g., Rosen v. Stovall*, No. B205600, 2009 WL 4690212, at *5-6 (Cal. App. 2d Dist. Dec. 10, 2009); *Perez-Encinas v. Amerus Life Ins. Co.*, 468 F. Supp. 2d 1127, 1135-36 (N.D. Cal. 2006).

[19] The district court failed to note that the state court actually held that "we do not adopt the broad Maryland view. Nor do we reject the general California rule that contract causes of action accrue on the date of injury. But we do find the unusual facts of this case call for an exception to the general rule." 147 Cal. App. 3d at 832.

justified." *Id.* Yue has pleaded no such facts here. *See* Appx. at Tab 1. To the contrary, she "discovered" the alleged breach based upon documents Conseco Life provided to her. This is not a "discovery rule" case by any stretch.[20]

Third, even if a discovery rule theoretically applied here, undisputed facts show that it does not help Yue. In California, "the plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof . . . ." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397-398 (1999). Thus, a plaintiff "must be diligent in discovering the critical facts" of his or her claim and "a plaintiff who did not actually know of his claim will be barred if he should have known of it in the exercise of due diligence." *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1147 (9th Cir. 2002) (internal quotations, citations and brackets omitted). Yue's Complaint (Appx. at 12, ¶ 38) makes clear that, "each year," she receives an "annual report" that shows the "cost

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[20] The other case relied upon by the court, *Gryczman v. 4550 Pico Partners, Ltd.*, 107 Cal. App. 4th 1, 4-5 (Cal. App. 2d 2003), is also inapposite. There, one party was supposed to give notice to the other, and the discovery rule applied "because ... the failure to give plaintiff notice of the happening of a certain event is both the act causing the injury and the act that caused plaintiff not to discovery the injury." *Id.* at 6. As noted by the court in *Perez-Encinas*, 468 F. Supp. 2d at 1135, *Gryczman* applied the discovery rule because "pursuant to the bargained-for terms of the contract, the defendant had a duty to notify the plaintiff when an offer, if any, was made." No such facts exist here.

of insurance charges."[21] Had she reviewed the projections in her annual statement from 2003 (the year after the COI increase was approved), she would have seen the same COI increase she finally "discovered" in 2007. Appx. at 161:22-25. The same increase was also discernible from the projections sent to her in 2004, 2005 and 2006.[22] These annual statements put Yue on notice of her claims.[23] Because Yue was on notice of her claims as early as 2003, her individual claims are time-barred and she is therefore not an adequate class representative.

III. THE VERY APPLICATION OF A DISCOVERY RULE SHOWS THAT CLASS CERTIFICATION IS INAPPROPRIATE

The need for individual determinations for each class member – such as a determination of whether a discovery rule prevents the class member's claims from being time-barred – demonstrates that a case is not amenable to class resolution.[24]

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[21] Yue admits the annual statements "advise as to the monthly cost of insurance charge deducted from the account value." Appx. at 11, ¶ 36.

[22] Yue testified as to her own lack of diligence: "I think I get the annual statements, but I don't spend a lot of time looking at them." Appx. at 157:12-13. And, even though Yue met with her financial advisor, who is also her insurance broker, "at least annually," she apparently never reviewed or discussed the projections Conseco Life mailed to her each year until 2007, when her broker explained the COI increase to her. Appx. at 157:15.

[23] In fact, after discarding her annual statements for several years, she finally reviewed them in 2007 and realized that her premiums would increase. Appx. at 157:9-18; 161:22-25.

[24] *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997)); *Gregurek v.*

O'Connor v. Boeing North American, Inc., 197 F.R.D. 404, 411 (C.D. Cal. 2000), demonstrates that this point remains valid where certification is sought under Rule 23(b)(2). There, the court noted that consideration of how statutes of limitations, discovery and accrual rules would affect the claims of class members was appropriate even for a Rule 23(b)(2) class. Stating that it needed to make an individual determination for each class member as to "when and how each Plaintiff actually discovered his or her claims," the court ruled that certification was inappropriate and decertified the class. *O'Connor*, 197 F.R.D. at 411. Another recent case from the Central District of California involving the discovery rule in a case involving COI changes to universal life policies is in accord:

> *United's statute of limitations defense will require individualized findings specific to each class member, and is not amenable to collective resolution.*

Gregurek, 2009 WL 4723137, at *8 (emphasis added).[25]

In this case, the district court reviewed the factual record in Yue's individual case and made a determination that California's discovery rule would apply to her claims. Appx. at 235. The district court failed to acknowledge, however, that a

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United of Omaha Life Ins. Co., No. CV 05-6067-GHK (Fmox), 2009 WL 4723137 (C.D. Cal. Nov. 10, 2009).

[25] *See also Doll v. Chicago Title Ins. Co.*, 246 F.R.D. 683 (D. Kan. 2007); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006); *Corley v. Entergy Corp.*, 220 F.R.D. 478 (E.D. Tex. 2004) (all ruling that need to apply discovery rule defeats certification).

similar individual inquiry will be needed for *each* class member and that each inquiry cannot be conducted until a choice-of-law analysis is first done to determine what substantive state law, including laws pertaining to statutes of limitations, accrual of claims and discovery rules – will be applied to *each* class member's claims. The district court instead erroneously stated that state law divergences were "not relevant" to whether this action is amenable to class treatment. Appx. at 237 n.9; Appx. at 238. But in truth, there is simply no way to resolve the application of the discovery rule to each class member's claims in a single class-wide trial.

CONCLUSION

Conseco Life asks that this Court grant this Petition and permit it to appeal the district court's Order.

Respectfully submitted,

Dated: December 22, 2009

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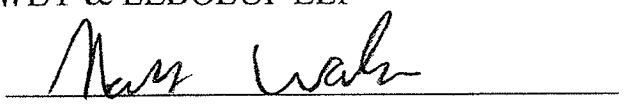
CERTIFICATE OF COMPLIANCE

This brief complies with the page number limitation of Rule 5 of the Federal Rules of Appellate Procedure because it does not exceed twenty pages, excluding portions of the brief exempted by Rule 5(c).

This brief complies with Federal Rule of Appellate Procedure 32(c)(2), as it meets the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font, which is a proportionally spaced, serif-based font.

Dated: December 22, 2009

DEWEY & LEBOEUF LLP

By: 

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