

**09-80191**

*In the*

**United States Court of Appeals**

*for the*

**Ninth Circuit**

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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*

**EXHIBITS TO DEFENDANT-APPELLANT'S PETITION  
FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(F)  
VOLUME I OF II – Pages 1 to 240**

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13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15 WESTERN DIVISION

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

19 Plaintiffs,

20 vs.

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

23 Defendant.  
24  
25  
26  
27  
28

Case No.

CV08-01506 CAS

COMPLAINT

(CTx)

CLASS ACTION

1. Breach of Contract
2. Injunctive and Restitutionary Relief  
Pursuant to Business & Professions  
Code section 17200, *et seq.*
3. Declaratory Relief

JURY TRIAL DEMANDED



1 Plaintiff, for her complaint against Defendant, alleges the following upon  
2 personal knowledge as to herself and her own acts and upon information and belief  
3 as to all other matters.

4 1. Jurisdiction is based on 28 U.S.C. section 1332(a).

5 NATURE OF ACTION

6 2. This is a class action brought by Plaintiff individually and on behalf of  
7 all owners of Valulife and Valuterm universal life insurance policies (the  
8 "Policies") administered by Defendant Conseco Life Insurance Company  
9 ("Conseco Life"). Plaintiff seeks injunctive declaratory and monetary relief  
10 requiring Defendant to forego staggering costs of insurance increases that they  
11 unlawfully imposed upon Valulife and Valuterm policyholders and to repay or  
12 restore to the policies' accumulation accounts any unlawful charges that it has  
13 already collected.

14 3. Previously, in an action entitled *Rosenbaum, et al. v. Philadelphia Life*  
15 *Insurance Co., et al.*, Case No. 93-0834 MRP (EEX) (the "*Rosenbaum Action*"),  
16 this Court (the Honorable Mariana R. Pfaelzer) held that the defendant insurance  
17 companies, now known as Conseco Life, materially breached the cost of insurance  
18 clause in certain of its universal life insurance policies by unlawfully repricing  
19 those policies (*i.e.*, increasing the cost) to pass on to its policyholders a tax that  
20 Congress imposed on life insurance companies. This Court held that the policies  
21 "did not permit [Conseco Life] to increase cost of insurance to account for a  
22 change other than in future mortality experience." (emphasis added). Through  
23 certification of a national class action, Defendant Conseco Life was forced to  
24 return all the unlawful cost of insurance charges (plus interest) to its policyholders.  
25 The Policies, at issue in this action, have the exact same cost of insurance  
26 provisions as the policies adjudicated by this Court in the *Rosenbaum Action*.  
27 Thus, under this Court's prior orders, in the Policies, without question, the only  
28 variable element in the cost of insurance formula is the cost of insurance rate and

1 Defendant can only increase the cost of insurance rate based upon its expectation  
2 as to future mortality experience and for no other reason.

3 4. Now, for the Valulife and Valuterm Policies, even though they have  
4 identical policy provisions as the policies adjudicated by this Court in the  
5 *Rosenbaum* Action, Defendant has unlawfully re-priced those policies and  
6 drastically and precipitously increased the cost of insurance charges. The huge  
7 increases begin in policy year 21 and the increases are so large and sudden that  
8 they cannot possibly be based on expectations as to future mortality experience.  
9 The impact on policyholders will be a devastating increase in the cost of these life  
10 insurance policies and one, according to the language of the policies, that is not  
11 permitted. Since many of these policyholders are now elderly and/or have medical  
12 conditions, they will be left with reduced life insurance coverage or no life  
13 insurance at all. Plaintiff believes that Defendant will unlawfully increase the cost  
14 of insurance charges to attempt to greatly increase profits on this group of policies.

15 5. By this action, Plaintiff, on behalf of herself and on behalf of the other  
16 impacted policyholders, seek an injunction requiring Defendant to reverse the  
17 unlawful increases in cost of insurance charges on the Policies and to fulfill their  
18 contractual and other obligations to Plaintiff and the Class. Plaintiff seeks a  
19 corresponding declaration that Defendant must determine the cost of insurance  
20 charges for the Policies in accordance with the terms of the Policies and reinstate  
21 the cost of insurance charges that existed before the recent unlawful increases.  
22 Plaintiff also seeks corresponding monetary relief requiring Defendant to repay to  
23 Plaintiff and the Class, or restore to the accumulation accounts of the Policies, the  
24 amount of any unlawful overcharges.

25 6. Further, Plaintiff, in accordance with Business and Professions Code  
26 section 17200, *et seq.*, on behalf of all affected policyholders of Defendant, seek an  
27 order enjoining Defendant from, among other things, collecting the unlawful  
28 increased charges from its policyholders and forcing Defendant to reinstate those

1 policyholders who were forced to surrender their policies because of the dramatic  
2 and unlawful increase in cost. Plaintiff also seeks an order of restitution to be paid  
3 by Defendant to the Class for the amounts unlawfully collected.

#### 4 PARTIES

5 7. Plaintiff Celedonia X. Yue, M.D. is, and at all times herein mentioned  
6 was, a resident and citizen of the State of California. In or about September 1995,  
7 Ruth S. Yue became the insured under a universal life insurance policy (known as  
8 Valulife) issued by Defendant and Plaintiff Celedonia X. Yue, M.D. is the owner  
9 of this insurance policy. When originally issued and continuing through the  
10 present, the policy had a face amount of \$400,000 with policy number  
11 1090236101. A true and correct copy of the policy is attached hereto as Exhibit  
12 "A".

13 8. Defendant Conseco Life, and at all relevant times was, and is, a  
14 corporation duly organized and existing under and by virtue of the laws of the  
15 State of Indiana and transacting the business of insurance in the State of California  
16 and within this judicial district. Until 1996, Conseco Life was known as  
17 Massachusetts General Life Insurance Company ("Massachusetts General") and, in  
18 or about 1998, Philadelphia Life Insurance Company ("Philadelphia Life") was  
19 merged into Conseco Life. Both Massachusetts General and Philadelphia Life are  
20 now known as Conseco Life. Massachusetts General and Philadelphia Life  
21 originally issued the life insurance policies at issue in this action and they were the  
22 defendants in the *Rosenbaum* Action.

#### 23 JURISDICTION AND VENUE

24 9. Jurisdiction is proper in this Court under 28 U.S.C. section 1332(a) by  
25 virtue of the diversity of citizenship between the Plaintiff, on one hand, and the  
26 Defendant, on the other hand. The amount in controversy for each Plaintiff and  
27 member of the class exceeds the sum of \$75,000, exclusive of interest and costs.

28 10. Venue is proper in this district under 28 U.S.C. section 1391(a)(1)(2)

1 by virtue of (i) the residence of Defendant in this district and (ii) that a substantial  
2 part of the events giving rise to the claims occurred in this district.

3 CLASS ACTION ALLEGATIONS

4 11. This action is brought by Plaintiff individually and on behalf of a class  
5 (the "Class") pursuant to Rules 23 (a) and (b)(2) and (b)(3) of the Federal Rules of  
6 Civil Procedure. The Class consists of:

7 12. All owners of Valulife and Valuterm "universal life" insurance  
8 policies (the "Policies") issued by either Massachusetts General or Philadelphia  
9 Life and that were later acquired and serviced by Conseco Life. The Class does  
10 not include officers or actuaries (or their immediate families) of Massachusetts  
11 General, Philadelphia Life, Conseco Life, or any of their parent companies,  
12 including Conseco, Inc.

13 13. The Class consists of thousands of consumers of life insurance and is  
14 thus so numerous that joinder of all members is impracticable. The identities and  
15 addresses of Class members can be readily ascertained from business records  
16 maintained by Conseco Life.

17 14. The claims asserted by Plaintiff are typical of the claims of the Class.

18 15. Plaintiff will fairly and adequately protect the interests of the Class in  
19 that they have no interest antagonistic to those of the other Class members, and  
20 Plaintiff has retained attorneys who are knowledgeable and experienced in life  
21 insurance matters, as well as class and complex litigation (the same counsel who  
22 successfully represented the classes of policyholders certified by this Court (i) in  
23 the *Rosenbaum* Action; and (ii) in MDL No. 1610 AHM entitled *In Re Conseco*  
24 *Life Insurance Company Cost of Insurance Litigation* described below).

25 16. Plaintiff requests that the Court provide Class members with written  
26 notice and the right to opt-out of any Class certified in this action.

27 Rule 23 (b)(2)

28 17. This action is appropriate as a class action pursuant to Rule 23 (b)(2).

1 Plaintiff seeks injunctive relief and corresponding declaratory and incidental  
2 monetary relief for the Class. Defendant acted in a manner generally applicable to  
3 the entire Class by increasing in a formulaic manner the cost of insurance charges  
4 on all Valulife and Valuterm Policies owned by members of the Class.

5 18. Defendant's wrongful actions to unlawfully increase the cost of  
6 insurance charges on the Policies, if not enjoined, will subject Class members to  
7 enormous continuing future harm and will cause irreparable injuries to Class  
8 members who are compelled to surrender valuable life insurance policies with no  
9 economically viable option for alternative life insurance. Although Class members  
10 will sustain damages in the form of increased cost of insurance charges and  
11 depleted accumulation account values, the adverse financial impact of Defendant's  
12 unlawful actions is continuing and, unless enjoined, will cause exponentially  
13 higher damages to Class members in future years. Thus, injunctive and other  
14 equitable and declaratory relief are primary goals in this litigation, Plaintiff would  
15 bring suit to obtain injunctive and declaratory relief even in the absence of  
16 available monetary remedies and injunctive and declaratory relief are reasonably  
17 necessary and appropriate when Plaintiff prevails.

18 19. The monetary relief sought on behalf of the Class to remedy  
19 Defendant's wrongful conduct flows directly from Defendant's liability to the  
20 Class as a whole and can be objectively determined. The increased cost of  
21 insurance charges and any diminution of the accumulation account values of the  
22 Policies owned by Class members can be mathematically quantified and do not  
23 depend on any subjective assumptions or idiosyncrasies that are peculiar to  
24 individual Class members.

25 Rule 23 (b)(3)

26 20. This action also is appropriate as a class action pursuant to Rule 23  
27 (b)(3) of the Federal Rules of Civil Procedure.

28 21. The questions of law or fact affecting the Class predominate over

- 1 those questions affecting only individual members. Those common questions  
2 include:
- 3 a. whether Defendant's actions to increase the cost of insurance charges  
4 on the Policies violated the terms of the Policies;
  - 5 b. whether Conseco Life breached its contracts with Plaintiff and  
6 members of the Class;
  - 7 c. whether Defendant breached obligations of good faith and fair dealing  
8 owed to Plaintiff and members of the Class;
  - 9 d. whether Defendant committed acts of unfair competition as defined  
10 by California Business and Professions Code section 17200, *et seq.*;
  - 11 e. whether Plaintiff and members of the Class are entitled to specific  
12 performance, injunctive relief or other equitable relief against  
13 Defendant; and
  - 14 f. whether Plaintiff and Class members are entitled to receive incidental  
15 monetary relief or, alternatively, damages as a result of the unlawful  
16 conduct by Defendant alleged herein.
- 17 22. A class action is superior to other available methods for the fair and  
18 efficient adjudication of this controversy for at least the following reasons:
- 19 a. given the age of members of the Class, many of whom are elderly and  
20 have limited resources, the complexity of issues involved in this  
21 action and the expense of litigating the claims, few, if any, Class  
22 members could afford to seek legal redress individually for the  
23 wrongs that Defendant committed against them, and absent Class  
24 members have no substantial interest in individually controlling the  
25 prosecution of individual actions;
  - 26 b. when Defendant's liability has been adjudicated, claims of all Class  
27 members can be determined by the Court;
  - 28 c. this action will cause an orderly and expeditious administration of the

1 Class claims and foster economies of time, effort and expense, and  
2 ensure uniformity of decisions;

- 3 d. without a class action, many Class members would continue to suffer  
4 injury, and Defendant's violations of law will continue without  
5 redress while Defendant continues to reap and retain the substantial  
6 proceeds of their wrongful conduct; and  
7 e. this action does not present any undue difficulties that would impede  
8 its management by the Court as a class action.

9 BACKGROUND

10 A. In a Universal Life Policy, There are Only Two Material Variable Elements-  
11 (i) the Interest Rate, and (ii) the Cost of Insurance Rate

12 23. The insurance policies at issue in this action are a type known as a  
13 "Universal Life" insurance policy (hereinafter "Universal Life Policy"). A  
14 Universal Life Policy is designed so that the policyholder shares the risk of the  
15 mortality experience and investment functions with the insurance company. The  
16 "cost of insurance charge" paid each month to the policyholder compensates the  
17 insurance company for the mortality risk and this charge is tied to the future  
18 mortality experience of the insurance company. The other variable element is the  
19 interest rate paid by the insurance company on accumulations that build up for the  
20 benefit of the policyholder. The rate of interest will vary depending on general  
21 market and investment conditions in the economy. With the variable (i) rate of  
22 interest and (ii) cost of insurance (mortality) charge, the policyholder participates  
23 with the insurance company as defined by the terms of a Universal Life Policy.

24 24. A Universal Life Policy is typically marketed, sold and purchased on  
25 the premise that a certain number of premium payments will fund the policy at a  
26 certain level of insurance coverage through maturity. This is possible because the  
27 premiums are paid into an account value which builds up over time and the cost of  
28 maintaining the policy is subtracted from the account value. Therefore, a

1 Universal Life Policy gives a policyholder flexibility as to the timing and amount  
2 of premium payments.

3 25. Under a Universal Life Policy, the policyholder pays a premium and  
4 the premium (less an expense charge) is deposited into the account value or  
5 accumulation fund (*i.e.*, a fund that accrues for the policyholder's benefit).

6 26. Each month that a Universal Life Policy is in force, the insurance  
7 company deducts the cost of insurance from the account value and credits interest  
8 on the funds in the account value. Again, the cost of insurance is designed to cover  
9 the future mortality risk to the insurance company (*i.e.*, as described by Defendant  
10 Consecro Life, the "monthly cost of pure insurance protection under the policy").

11 27. Subject to a minimum guaranteed rate of interest, as determined in  
12 good faith by the insurance company, the insurance company credits interest on the  
13 funds in the account value and each month the interest is added to the account  
14 value.

15 28. The account value is defined by the policy as the balance of the net  
16 premiums (premium less an expense charge) paid by the policyholder and credited  
17 interest, decreased by monthly deductions. Subject to further conditions, a  
18 policyholder may also take loans from the account value.

19 29. According to a Universal Life Policy, the monthly deduction is an  
20 amount taken from the account value at each monthly deduction date, and is  
21 calculated by adding the cost of insurance charge to a monthly expense charge. As  
22 long as there are enough funds in the account value to pay the monthly deduction,  
23 the Universal Life Policy will remain in force.

24 30. Under a Universal Life Policy, the cost of insurance charge is the  
25 primary monthly deduction from the account value. For example, in the Policies,  
26 the cost of insurance charge is defined as:

27 COST OF INSURANCE

28 1. The monthly cost of insurance for the policy is



1 calculated as (a) multiplied by the result of (b)  
2 minus (c) where:

- 3 a. Monthly cost of insurance rate as described  
4 in the Cost of Insurance Rates section;  
5 b. Insured's death benefit at the beginning of  
6 the policy month divided by 1.0036748; and  
7 c. Accumulation account at the beginning of  
8 the policy month.

9 Divide the result by \$1,000.

10 Exhibit "A" at p.9.

11 31. The cost of insurance charge is basically the face amount of the  
12 coverage provided by the insurance policy less the account value multiplied by the  
13 cost of insurance rate. The resulting cost of insurance charge fluctuates depending,  
14 among other things, on the amount of funds in the account value at any given time  
15 and the cost of insurance rate. By design, the rates become larger each year as the  
16 insured ages.

17 B. Under the Express Policy Terms, the Cost of Insurance Rate Can Only Be  
18 Changed Based on Defendant's "Expectation as to Future Mortality  
19 Experience"

20 32. Under the express terms of a Universal Life Policy, the cost of  
21 insurance rate is connected to and dependent solely on the future mortality  
22 experience of the insurance company. For example, as set forth in the Policies, the  
23 mortality rate is based on the "Commissioners 1980 Standard Ordinary Mortality  
24 Table." Indeed, under the terms of the Policies, the mortality cost adjustments are  
25 premised solely on the future mortality experience of Defendant Conseco Life.

26 33. The Policies provide, in pertinent part, as follows:

27 The cost of insurance rates shown above are based on the  
28 Commissioners 1980 Standard Ordinary Female

1 Mortality Table . . . Actual monthly cost of insurance  
2 rates will be determined by the company based on its  
3 expectation as to future mortality experience. However,  
4 the actual cost of insurance rates will not be greater than  
5 those shown above.

6 Exhibit "A" at p.4. (emphasis added).

7 34. The Policies in the "COST OF INSURANCE RATES" section,  
8 provide, in pertinent part, as follows:

9 Current monthly cost of insurance rates will be  
10 determined by the Company based on its expectation as  
11 to future mortality experience.

12 Exhibit "A" at p.9. (emphasis added).

13 35. Thus, under the terms of a Universal Life Policy, including the  
14 Policies, once the actual cost of insurance rates are set by the insurance company,  
15 they can only be increased because of anticipated future worsening mortality  
16 experience of insurance company (*i.e.*, more death claims anticipated in the future  
17 than were previously expected).

18 36. The calculation of the cost of insurance charge is highly complex and  
19 it is completely impossible for any policyholder to understand the computation of  
20 the cost of insurance charge because, among other reasons, insurance companies,  
21 including Consecro Life, do not and will not disclose the actual cost of insurance  
22 rates (used in the calculation of cost of insurance charges) to policyholders. In  
23 other words, the policyholder does not know or see the actual cost of insurance  
24 rates charged by the insurance company. As set forth in paragraph 39 below, the  
25 insurance company, including Consecro Life, only advises as to the monthly cost of  
26 insurance charge deducted from the account value and not the actual cost of  
27 insurance rate.

28 37. While there are maximum costs of insurance rates set forth in a

1 Universal Life Policy, without exception, a Universal Life Policy, including the  
2 Policies, are priced and sold by insurance companies with cost of insurance rates  
3 set substantially less than the maximum cost of insurance rates. Otherwise, the  
4 insurance policy would be prohibitively expensive and could not be marketed.  
5 However, after a Universal Life Policy is issued with cost of insurance rates  
6 substantially below the maximum cost of insurance rates, the cost of insurance  
7 rates and resulting cost of insurance charges can only be increased if there is a  
8 material change in the future expectations of mortality experience for the Universal  
9 Life Policies of the insurance company.

10 38. Each year, on the anniversary date of the inception of a Universal Life  
11 Policy, the insurance company sends to the policyholder (with a copy to the listed  
12 insurance agent) an annual report detailing certain values of the insurance policy,  
13 the amounts deducted, and interest credited during the preceding year. Thus, the  
14 annual report will show for each month during the preceding year the premiums  
15 paid by the policyholder, the cost of insurance charges, any expense deductions  
16 taken from the policy, as well as the interest credited to the account value. Again,  
17 an insurance company does not advise policyholders concerning the actual cost of  
18 insurance rates used in the calculation of the cost of insurance charges.

19 C. As Found by this Court, Defendant Materially Breached Universal Life  
20 Policies By Increasing the Cost of Insurance Charges for a Reason Other  
21 Than Its "Expectation as to Future Mortality Experience"

22 39. In or about 1992, even though the cost of insurance is explicitly tied to  
23 future mortality experience, Defendant Conseco Life (previously known as  
24 Massachusetts General and Philadelphia Life) decided to increase the cost of  
25 insurance charges in its universal life insurance policies known as Lifetime and  
26 Lifestyle policies to pass through some of the D.A.C. tax expense to their  
27 policyholders. In or about 1990, as part of the Reconciliation Act, Congress had  
28 imposed the D.A.C. tax on life insurance companies. Defendant made an artificial

1 adjustment in the cost of insurance rate unrelated to its expectations as to future  
2 mortality experience in order to increase premiums and thereby collect the D.A.C.  
3 tax from its policyholders, rather than pay it out of company profits or surplus as  
4 intended by Congress.

5 40. On or about November 18, 1992, Plaintiff James Rosenbaum ("Mr.  
6 Rosenbaum") filed the *Rosenbaum* Action, alleging, among other claims, that  
7 Philadelphia Life and Massachusetts General (now Conseco Life) breached the  
8 Lifetime and Lifestyle policies by increasing the cost of insurance charges to pass  
9 on a portion of the DAC tax liability of Conseco Life. Mr. Rosenbaum maintained  
10 that, according to the language of his insurance policy, the cost of insurance rates  
11 could only be increased due to changes in expectations as to the future mortality  
12 experience of Conseco Life.

13 41. By order and decision dated March 3, 1994 (Exhibit "B" hereto), in  
14 the *Rosenbaum* Action, this Court framed the question presented as follows:

15 In this case, the Court must determine whether the term  
16 "cost of insurance" in the Flexible Policy includes factors  
17 other than the Companies' expectation as to future  
18 mortality experience. Put another way, the Court must  
19 decide whether the Flexible Policy permitted the  
20 Company to increase the cost of insurance to account for  
21 a change other than in expectations as to future mortality  
22 experience.

23 Exhibit "B" at pp. 4-5 (emphasis added).

24 42. In this Court's order and decision, this Court further held:  
25 The natural and reasonable interpretation of the Flexible  
26 Policy, especially in conjunction with the Flexible Policy  
27 language under the chart of "Guaranteed Maximum  
28 Monthly Cost of Insurance Rates," is that expectations as

1 to future mortality experience are the basis for the cost of  
2 insurance rates. *Therefore, any change in the cost of*  
3 *insurance would logically be based on a change in the*  
4 *Companies' expectations as to future mortality*  
5 *experience.*

6 Exhibit "B" at p.5 (emphasis in original; italics added).

7 43. As this Court further held in its order and decision of March 3, 1994,  
8 "[t]he increase in cost of insurance under the Flexible Policies was not due to any  
9 changes in expectations as to future mortality experience." Exhibit "B" at p.4  
10 (emphases added). Indeed, in its order and decision, this Court held:

11 The Court has no difficulty in concluding that the  
12 Flexible Policy did not permit the Companies to increase  
13 the cost of insurance to account for a change other than in  
14 future mortality experience \* \* \* [b]ecause all  
15 ambiguities must be resolved against the insurer, the  
16 Court finds that [Defendant] breached its obligations  
17 under the Flexible Policies . . . when it increased the cost  
18 of insurance to pass on the DAC tax.

19 Exhibit "B" at p.6 (emphasis added).

20 44. Thereafter, in the *Rosenbaum* Action, Plaintiff Rosenbaum, along  
21 with Plaintiff Bernard Gilbert, filed a motion to certify a national class action on  
22 behalf of all similarly situated policyholders of Philadelphia Life and  
23 Massachusetts General (now Conseco Life) with the same language in their life  
24 insurance policies and who also paid increased cost of insurance charges.

25 45. During the *Rosenbaum* Action, because of the summary adjudication  
26 ruling against Conseco Life, Conseco Life returned the cost of insurance rates to  
27 the level prior to the unlawful increase that was not related to future mortality  
28 experience.

1           46. By order entered on February 13, 1995, this Court certified, for all  
2 members of the Class throughout the nation, the claims for breach of contract  
3 premised on the passing on of the DAC tax liability by increasing the cost of  
4 insurance rates contrary to the terms of the Lifetime and Lifestyle policies. The  
5 liability of Conseco Life to the class members for this claim was established by the  
6 order of this Court entered on February 13, 1995. In addition, by order dated  
7 February 13, 1995, this Court certified, as a sub-class for those members of the  
8 Class residing in the State of California, the claims for breach of the implied  
9 covenant of good faith and fair dealing.

10 D. By Order of This Court, in the *Rosenbaum* Action, Defendant Was Forced to  
11 Return the Wrongfully Taken Cost of Insurance Charges Under the Lifestyle  
12 and Lifetime Universal Life Policies to its Policyholders

13           47. After certification of the classes by this Court, but before the  
14 dissemination of the written notice of pendency of a class action, and under the  
15 guidance of this Court, the parties reached a settlement of the *Rosenbaum* Action  
16 on a nationwide basis. In essence, under the settlement, policyholders received  
17 100% of the wrongfully taken cost of insurance charges, plus interest, from  
18 Defendant.

19           48. In addition, under the settlement, for those class members who  
20 wrongfully paid surrender charges on the termination of their insurance policy  
21 because of the increased cost of insurance charges, Defendant created a separate  
22 fund. Under the supervision of a special master, as provided for in the settlement,  
23 the damaged policyholders applied for and received their surrender charges from  
24 this fund.

25           49. In all, Defendant paid in excess of the sum of \$20 million to settle the  
26 *Rosenbaum* Action and to return the unlawful charges, plus interest, to the  
27 impacted policyholders, pay damages to policyholders, and pay attorneys' fees and  
28 costs to class counsel.

1 E. Respecting the Lifetime and Lifestyle Policies, in 2003 and 2004, Conseco  
2 Life Again Wrongfully Increased Cost of Insurance Charges

3 50. In or about 2003 and 2004, for the Lifetime and Lifestyle universal  
4 life insurance policies at issue in the *Rosenbaum* Action, Defendant Conseco Life  
5 announced that it was again increasing the cost of insurance charges. This time the  
6 increase was based on Conseco Life eliminating some unidentified "non-  
7 guaranteed" "benefit" because of the "economic downturn . . . [and] significantly  
8 diminished investment yields." Before this change, unknown to its policyholders,  
9 Conseco Life computed the cost of insurance charges using an actuarial variable  
10 (called the "R-Factor") which had the effect of reducing the cost of insurance  
11 charges assessed against the policyholder's accumulation account. Conseco Life's  
12 "elimination" of the R-Factor increased the cost of insurance charges for many  
13 Lifestyle and Lifetime policyholders.

14 51. As a result of these cost of insurance increases, impacted  
15 policyholders filed numerous actions against Conseco Life and they were  
16 consolidated by the Judicial Panel on Multidistrict Litigation in this Court before  
17 the Honorable A. Howard Matz in a MDL proceeding entitled *In Re Conseco Life*  
18 *Insurance Company Cost of Insurance Litigation*, MDL No. 1610 AHM. In MDL  
19 No. 1610, among other things, Plaintiffs and members of the Class maintained the  
20 cost of insurance charges under the Lifetime and Lifestyle policies could only be  
21 increased in the event that Conseco Life changed its expectation as to future  
22 mortality experience in accordance with the language contained in the cost of  
23 insurance provisions. In other words, the cost of insurance charges could not be  
24 increased because of a change in the formula for computing the cost of insurance  
25 charges. The cost of insurance increases allowed Conseco Life to eliminate many  
26 of the increasingly unprofitable policies, to the detriment of policyholders who  
27 were left with life insurance policies that had suddenly become prohibitively  
28 expensive.

1           52. Plaintiffs in MDL No. 1610 also alleged that Conseco, Inc., the  
2 ultimate parent of Conseco Life, exercised such dominion and control over the  
3 affairs and actions of Conseco Life that these companies had no separate existence.  
4 Plaintiffs alleged that Conseco Life eliminated the R-Factor, and thereby imposed  
5 dramatic premium increases on its policyholders, to enhance the balance sheet of  
6 Conseco, Inc., which was attempting to raise capital in the public financial markets  
7 after emerging from bankruptcy in September 2003. Therefore, Plaintiffs alleged  
8 that Conseco, Inc. was the alter ego of Conseco Life and Conseco, Inc. was liable  
9 and responsible for all of Conseco Life's actions including the unlawful cost of  
10 insurance increases on the Lifetime and Lifestyle policies.

11           53. By orders dated April 25 and April 26, 2005, this Court (the  
12 Honorable A. Howard Matz) certified a national class of policyholders as to the  
13 breach of contract and injunctive relief causes of action and a California class of  
14 policyholders respecting the causes of action for insurance bad faith and violation  
15 of Section 17200, *et seq.*, of the California Business and Professions Code.

16 F. Conseco Life Intends to Massively Increase the Cost of Insurance Rates For  
17 the Valulife and Valuterm Policies Not Based on Its "Expectation as to  
18 Future Mortality Experience"

19           54. As alleged above, under the rulings of this Court and the explicit  
20 language of the Policies, an increase in the cost of insurance rates and attendant  
21 cost of insurance charges can only be predicated on Defendant's expectations as to  
22 future mortality experience and nothing else. Upon information and belief,  
23 Conseco Life intends to dramatically and suddenly increase the cost of insurance  
24 charges for the Policies beginning in policy year 21 for reasons other than its  
25 expectation as to future mortality experience. In recent times, mortality experience  
26 in the United States has improved and mortality experience has not deteriorated.  
27 In other words, it is well known that the population in this country is living  
28 significantly longer than was anticipated in the past and not living shorter than



1 anticipated. For example, according to the Society of Actuaries, Report of the  
2 Individual Life Insurance Valuation Mortality Task Force, issued November 2001,  
3 mortality has improved for males, ages 55-80, in the range of 1 percent each year  
4 and the improvement in mortality for females, ages 55-80, is in the range of .5  
5 percent each year. Therefore, Defendant's expectation as to the future mortality  
6 respecting the Policies could not have suddenly and precipitously decreased  
7 precisely at policy year 21 so as to permit the massive increases in cost of  
8 insurance rates for the Policies beginning in policy year 21.

9 55. Thus, once again, Conseco Life has impermissibly increased cost of  
10 insurance charges on its universal life policies not based on its expectation as to  
11 future mortality experience. Under such circumstances, Conseco Life's increases  
12 of the cost of insurance charges, in flagrant and material violation of the plain  
13 language of the Policies, is unprecedented in the life insurance industry,  
14 particularly in light of (i) Conseco Life's prior breach of the same provisions in the  
15 Lifetime and Lifestyle policies as found, as a matter of law, by this Court in the  
16 *Rosenbaum* Action; and (ii) Conseco Life's impermissible increase in cost of  
17 insurance charges as alleged by the class of policyholders in MDL No. 1610.

18 56. At no time did Conseco Life disclose that it intended to impose  
19 massive cost of insurance increases beginning in policy year 21 of the Policies.  
20 The policyholders, including the Plaintiff in this action, relied on the lower cost of  
21 insurance rates in purchasing the Policies, continuing to pay premiums respecting  
22 the Policies, and not seeking insurance coverage elsewhere.

23 G. Through the Cost of Insurance Increases, Defendant Conseco Life Will  
24 Cause Many of the Policies to Lapse

25 57. The increases in cost of insurance charges for the Policies are so  
26 dramatic, sudden, and unexpectedly large that many members of the Class are now,  
27 or will be, unable to afford to pay these huge and unexpected increases in premium  
28 required to keep their insurance policies in force. Many policyholders will, or have

1 been, forced to surrender their life insurance policies. In addition, upon  
2 information and belief, many of these policyholders are elderly and uninsurable  
3 and, after surrender of their policies, they will thereby be left without insurance  
4 protection and/or adequate insurance protection.

5 58. Upon information and belief, from its perspective, Conseco Life came  
6 to the realization that the Policies could provide a source of additional profits either  
7 through additional cost of insurance collections or forcing policyholders to  
8 surrender their Policies relieving Conseco Life of the obligation of paying future  
9 death benefits on this seasoned book of business. The huge increases in cost of  
10 insurance are so large that Conseco Life must have anticipated that many  
11 policyholders would be unable and/or unwilling to pay these substantially  
12 increased costs to Conseco Life. Under these circumstances, upon information and  
13 belief, there is little question that Conseco Life intended, at a minimum, to  
14 substantially reduce the number of the Policies that are in force.

15 59. In sum, Defendant Conseco Life's actions have greatly damaged  
16 many thousands of policyholders throughout the United States. These  
17 policyholders depended on the good faith and honest actions of Conseco Life to  
18 protect them and to provide life insurance benefits to their families and loved ones  
19 when they die. Rather than honor such trust, particularly when many of these  
20 policyholders are now ill and/or elderly, Conseco Life has violated and broken that  
21 trust with the huge and devastating increases in cost of the Policies.

22 60. Plaintiff and members of the Class were unaware of Conseco Life's  
23 unlawful misconduct and intentions and Plaintiff and members of the Class did not  
24 know anything about Conseco Life's true intentions regarding the cost of insurance  
25 charges for the Policies. Plaintiff and members of the Class were completely  
26 unaware that Conseco Life intended to materially and suddenly increase the cost of  
27 insurance charges beginning in policy year 21 of the Policies.

28

1 FIRST CAUSE OF ACTION

2 (Breach of Contract)

3 PLAINTIFF AND MEMBERS OF THE CLASS, FOR A  
4 FIRST CAUSE OF ACTION AGAINST DEFENDANT  
5 CONSECO LIFE FOR BREACH OF CONTRACT, ALLEGES:

6 61. Plaintiff refers to the prior paragraphs of this complaint and  
7 incorporates those paragraphs as though set forth in full in this cause of action.

8 62. At all relevant times, Plaintiff and members of the Class have paid to  
9 Defendant all premiums and charges due under the Policies as established at the  
10 inception of the Policies and they have performed all their obligations under the  
11 Policies.

12 63. As alleged above, Defendant owed duties and obligations to Plaintiff  
13 and members of the Class under the Policies, among others, to refrain from  
14 increasing the cost of insurance charges, except as allowed under the terms of the  
15 Policies and to otherwise comply with the terms of the Policies.

16 64. Defendant materially breached the terms and provisions of the  
17 Policies by increasing the cost of insurance charges respecting the Policies in order  
18 to increase premium revenue when the increase in cost did not relate to any change  
19 in the expectation as to the future mortality experience of Defendant, but was  
20 solely related to the interest of Defendant in increasing its premium income in  
21 order to generate additional revenue and/or force policyholders to surrender  
22 (cancel) their insurance policies. Defendant did not give adequate notice or  
23 explanation of this increase to Plaintiff and members of the Class and Defendant  
24 attempted to conceal the intended dramatic increase in cost of insurance charges  
25 respecting the Policies.

26 65. This change in the cost of insurance charge is a flagrant and  
27 fundamental violation of the express terms and conditions of the Policies. By so  
28 suddenly and dramatically increasing the cost of insurance charges beginning in

1 policy year 21, Defendant has effectively conceded that the increase is not and  
2 could not possibly be based on its expectations as to future mortality experience.  
3 By increasing the cost, and thereby requiring substantial additional premiums from  
4 Plaintiff and members of the Class, Defendant has materially breached the Policies.

5 66. By demanding more premiums from Plaintiff and members of the  
6 Class and increasing the cost of insurance charges, Defendant has materially  
7 breached the Policies.

8 67. As a direct and proximate result of Defendant Conseco Life's conduct  
9 and material breach of the Policies, Plaintiff and members of the Class have  
10 suffered damages under the Policies in an amount to be determined according to  
11 proof at the time of trial. In addition, respecting future costs of insurance charges  
12 under the Policies, Plaintiff and members of the Class seek an injunction against  
13 Defendant requiring it in the future to charge only the cost of insurance explicitly  
14 permitted under the terms of the Policies and to otherwise comply strictly with the  
15 terms of the Policies.

## 16 SECOND CAUSE OF ACTION

17 (Injunctive and Restitutionary Relief Pursuant to  
18 Business & Professions Code section 17200, *et seq.*)

19 PLAINTIFF, ON BEHALF OF THE GENERAL PUBLIC, FOR A  
20 SECOND CAUSE OF ACTION AGAINST DEFENDANT CONSECO LIFE  
21 FOR INJUNCTIVE AND RESTITUTIONARY RELIEF UNDER BUSINESS  
22 AND PROFESSIONS CODE SECTION 17200, *ET SEQ.*, ALLEGES:

23 68. Plaintiff refers to the prior paragraphs of this complaint and  
24 incorporates those paragraphs as though set forth in full in this cause of action.

25 69. Defendant Conseco Life committed acts of unfair competition as  
26 defined by Business and Professions Code section 17200, *et seq.*, by engaging in  
27 the following practices, among others:

28 a. Marketing and selling the Policies on the premise that they were a

- 1 solid and good insurance product which would provide a certain death  
2 benefit for a certain cost and subsequently taking steps to prevent  
3 policyholders from receiving the promised benefits from those  
4 policies by materially and unlawfully increasing the cost of the  
5 Policies;
- 6 b. Artificially adjusting the cost of insurance rates for the Policies on  
7 grounds unrelated to the Defendant's expectation as to future  
8 mortality experience in order to increase premiums and/or force its  
9 insureds to surrender (cancel) their policies, all of which was, and is,  
10 contrary to, and precluded by, the express terms of the Policies. The  
11 cost of insurance charges were increased so that Defendant could  
12 reduce the size of an unprofitable block of insurance policies and to  
13 cause many of the policyholders to surrender their insurance policies.  
14 Plaintiff is informed and believes and thereon alleges Defendant  
15 breached its duties under the Policies by improperly increasing the  
16 cost of insurance charges in order to gain or retain an unfair  
17 competitive advantage over other life insurers;
- 18 c. After the sale of the Policies, continuing to send annual reports, policy  
19 servicing statements, illustrations and other documents and  
20 correspondence to Plaintiff and members of the Class without  
21 disclosing that there would be sudden and dramatic increases in the  
22 cost of insurance charges beginning in policy year 21; and
- 23 d. Concealing from its policyholders the material increase in cost of  
24 insurance charges and not providing any advance warning that it  
25 intended to massively and suddenly increase the cost of insurance  
26 charges beginning in policy year 21.
- 27 70. Plaintiff is informed and believes and on that basis alleges that the  
28 unlawful practices alleged above are continuing in nature and they are widespread

1 practices engaged in by Defendant.

2 71. On behalf of the general public, Plaintiff respectfully request that the  
3 Court issue an injunction against Defendant preliminarily and permanently  
4 enjoining it from continuing to engage in the unlawful conduct and preventing  
5 Defendant from collecting the increased cost of insurance charges in violation of  
6 the Policies.

7 72. On behalf of the general public, Plaintiff respectfully requests this  
8 Court to order restitution to be paid by Defendant to its insureds for premium and  
9 other amounts wrongfully required, obtained and collected as the result of the  
10 wrongful and unlawful increase in the cost of insurance charges based on the  
11 wrongful increase in the cost of insurance charges that was not based on  
12 expectations as to future mortality experience.

13 73. Plaintiff respectfully requests an award of attorneys' fees as the  
14 prevailing party in her request for injunctive relief against Defendant.

15 THIRD CAUSE OF ACTION

16 (For Declaratory Relief)

17 PLAINTIFF AND MEMBERS OF THE CLASS, FOR A  
18 THIRD CAUSE OF ACTION AGAINST DEFENDANT  
19 CONSECO LIFE FOR DECLARATORY RELIEF, ALLEGES:

20 74. Plaintiff refers to the prior paragraphs of this complaint and  
21 incorporates those paragraphs as though set forth in full in this cause of action.

22 75. An actual controversy has arisen and now exists between Plaintiff and  
23 the members of the Class, on one hand, and Defendant, on the other hand,  
24 concerning the respective rights and duties of the parties under the Policies.

25 76. Defendant contends that it has lawfully and appropriately increased  
26 the cost of insurance charges respecting the Policies, appropriately collected (or  
27 will collect) the increased cost of insurance charges, and that they are permitted to  
28 continue to collect these charges in the future for the duration of the Policies. On

1 the other hand, Plaintiff and members of the Class maintain that Defendant have  
2 inappropriately and unlawfully, in material breach of the Policies, increased the  
3 cost of insurance charges not based on its expectations as to future mortality  
4 experience as required by the explicit language of the Policies and in violation of  
5 the prior adjudications of this Court rendered in the *Rosenbaum* Action.

6 77. Under these circumstances, the parties' desire a declaration as to  
7 their respective rights under the Policies and the Plaintiff requests that Court  
8 declare that the cost of insurance increases at issue are unlawful and in material  
9 breach of the Policies so that future controversies under the Policies may be  
10 avoided.

11 WHEREFORE, Plaintiff and members of the Class pray for judgment  
12 providing:

- 13 1. Injunctive relief to preliminarily and permanently enjoin Defendant,  
14 its representatives, and all others acting with it or on its behalf:
  - 15 a. From changing the cost of insurance and the attendant cost of  
16 insurance charges, other than for expectations as to future mortality  
17 experience, respecting the Policies; and
  - 18 b. From increasing the cost of insurance charges for the Policies and  
19 requiring those charges to be returned to the levels that existed prior to  
20 the unlawful increases imposed by Defendant.
- 21 2. Injunctive relief requiring Defendant, its representatives, and all  
22 others acting with it or on its behalf to reinstate any policyholder whose Policy was  
23 cancelled or surrendered as a result of the intended unlawful cost of insurance  
24 increases.
- 25 3. Incidental or other monetary relief in the form of repayments to  
26 Plaintiff and members of the Class of all overcharges resulting from the cost of  
27 insurance increases complained of herein and/or payment of such amounts into the  
28 accumulation accounts of the Policies.

- 1 4. Alternatively, general damages, consequential damages, and other  
2 incidental damages in a sum to be determined at the time of trial.
- 3 5. Restitutionary relief requiring Defendant to disgorge and divest all  
4 money received from policyholders as a result of, or caused by, the artificial and  
5 sham increase in the cost of insurance (mortality) charges.
- 6 6. A declaration that the increases in cost of insurance charges are in  
7 material breach of the Policies and that Defendant must determine the cost of  
8 insurance charges as explicitly set forth in the Policies.
- 9 7. Attorneys' fees expended and incurred in recovery of benefits and  
10 enforcement of the terms of the Policies against Defendant in a sum to be  
11 determined at the time of trial.
- 12 8. Costs of suit incurred herein.
- 13 9. An award of prejudgment and post-judgment interest.
- 14 10. Such other and further relief as deemed appropriate by this Court.

15  
16 Dated: March 3, 2008

LAW OFFICES OF TIMOTHY P. DILLON

17  
18 By: 

Timothy P. Dillon

19  
20  
21 Dated: March 3, 2008

BONNETT, FAIRBOURN, FRIEDMAN &  
BALINT, P.C.

22  
23 By:  / TD

Andrew S. Friedman

24 Attorneys for Plaintiffs  
25  
26  
27  
28



1 DEMAND FOR JURY TRIAL

2 Plaintiff hereby demands a jury trial.

3  
4 Dated: March 3, 2008

LAW OFFICES OF TIMOTHY P. DILLON

5  
6 By: 

7 Timothy P. Dillon

8  
9 Dated: March 3, 2008

BONNETT, FAIRBOURN, FRIEDMAN &  
BALINT, P.C.

10  
11 By:  / 

12 Andrew S. Friedman

13 Attorneys for Plaintiffs

## EXHIBIT "A"

# MASSACHUSETTS GENERAL LIFE

INSURANCE COMPANY  
BOSTON, MASSACHUSETTS

A STOCK COMPANY/HEREINAFTER CALLED THE COMPANY

Administrative Offices: 7887 E. Belleview Avenue/ Englewood, CO 80111  
(800) 525-7662

This policy is a legal contract between the Company and the owner.

READ YOUR POLICY CAREFULLY.

The Company will pay the proceeds as defined herein to the owner on the maturity date if the insured is living on that date. Upon receipt by the Company at its Administrative Offices of due proof that the insured died before the maturity date and while this policy was in force, the Company will immediately pay the proceeds to the beneficiary.

All payments are subject to all of the provisions of this and the following pages of this policy signed on the date of issue at its Administrative Offices, Englewood, Colorado. This policy is issued in consideration of the application and payment of the initial premium.

## NOTICE OF 20 DAY RIGHT TO EXAMINE THE POLICY

This policy may be cancelled by delivering or mailing the policy to Massachusetts General Life Insurance Company, 7887 East Belleview Avenue, Englewood, Colorado 80111, or to the insurance agent through whom it was effected before midnight of the twentieth day after receipt of such policy by the applicant. Upon such delivery or mailing, the policy shall be void from the beginning. Notice given by mail and return of the policy or contract by mail are effective on being postmarked, properly addressed and postage prepaid. The Company must return all payments made for this policy within ten days after it receives notice of cancellation and the returned policy.

*Robert P. H. Eggen*  
Secretary

*Rgn Elder*  
President

FLEXIBLE PREMIUM ADJUSTABLE TERM TO AGE 100 LIFE INSURANCE POLICY

ADJUSTABLE DEATH BENEFIT.

PROCEEDS PAYABLE UPON DEATH OF INSURED PRIOR TO THE MATURITY DATE.  
FLEXIBLE PREMIUMS PAYABLE DURING THE LIFETIME OF THE INSURED UNTIL THE  
MATURITY DATE. NONPARTICIPATING. NO DIVIDENDS APPLICABLE.

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## OPTIONAL BENEFITS

If you have purchased any optional benefits, they will be listed in the Rider Cost of Insurance

Schedule section of a Policy Data Page and the benefit will be inserted in the contract.

POLICY DATA PAGE

INSURED RUTH S YUE	1090236101	POLICY NUMBER
AGE 70 FEMALE	SEPTEMBER 26, 1995	DATE OF ISSUE
PLAN FLEX. PREM. ADJ. LIFE	\$400,000	INITIAL SPECIFIED AMOUNT
PREMIUM CLASS SELECT NON SMOKER	\$7,890.00	PLANNED PERIODIC PREMIUM
DEATH BENEFIT OPTION A	\$7,890.00	INITIAL PREMIUM
MATURITY DATE SEPTEMBER 26, 2025	ANNUAL	PREMIUM FREQUENCY

MONTHLY COST OF INSURANCE SCHEDULE

FORM NUMBER	BENEFIT DESCRIPTION	INITIAL SPECIFIED AMOUNT	MONTHLY COST OF INSURANCE	FIRST MONTHLY DEDUCTION	LAST MONTHLY DEDUCTION
UNL-91	FLEX. PREM. ADJ. TERM LIFE INSURANCE TO AGE 100	\$400,000	SEE PAGE 4	09/28/95	08/26/25

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY  
ADMINISTRATIVE OFFICE: 7887 EAST BELLEVIEW AVENUE, ENGLEWOOD, CO 80111

POLICY DATA PAGE

TABLE OF GUARANTEED MONTHLY COST OF INSURANCE RATES PER \$1,000

ATTAINED AGE	POLICY YEAR	RATE	ATTAINED AGE	POLICY YEAR	RATE
70	1	0.8768	85	16	10.9306
71	2	0.8768	86	17	12.2389
72	3	0.8768	87	18	13.6543
73	4	0.8768	88	19	15.1838
74	5	0.8768	89	20	16.8317
75	6	3.4575	90	21	18.6490
76	7	3.8848	91	22	20.6564
77	8	4.3438	92	23	22.9970
78	9	4.8411	93	24	25.7925
79	10	5.3971	94	25	29.5778
80	11	6.0366	95	26	35.3585
81	12	6.7749	96	27	45.5264
82	13	7.6370	97	28	66.4471
83	14	8.6208	98	29	93.3333
84	15	9.7216	99	30	93.3333

THE COST OF INSURANCE RATES SHOWN ABOVE ARE BASED ON THE COMMISSIONERS 1980 STANDARD ORDINARY FEMALE MORTALITY TABLE, AGE LAST BIRTHDAY. ACTUAL MONTHLY COST OF INSURANCE RATES WILL BE DETERMINED BY THE COMPANY BASED ON ITS EXPECTATIONS AS TO FUTURE MORTALITY EXPERIENCE. HOWEVER, THE ACTUAL COST OF INSURANCE RATES WILL NOT BE GREATER THAN THOSE SHOWN ABOVE.

BASED UPON THE MINIMUM GUARANTEED INTEREST RATES AND MAXIMUM COST OF INSURANCE, THIS POLICY WILL REMAIN IN FORCE UNTIL APRIL 26, 2001 PROVIDED: (1) THE PLANNED PERIODIC PREMIUM IS PAID EACH TIME WHEN DUE; AND (2) NO CHANGES ARE MADE IN THE POLICY.

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY

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POLICY DATA PAGE  
(CONTINUED)

TABLE OF MINIMUM DEATH BENEFITS

ATTAINED AGE	PERCENT OF ACCUMULATION ACCOUNT	ATTAINED AGE	PERCENT OF ACCUMULATION ACCOUNT
0-40	250%	65	120%
45	215%	70	115%
50	185%	75	105%
55	150%	80	105%
60	130%	85 AND OVER	100%

FOR AGES NOT SHOWN, THE APPLICABLE PERCENTAGE WILL BE DETERMINED BY INTERPOLATING BETWEEN THE AGES THAT ARE SHOWN.

EXPENSE CHARGES

THERE IS A CHARGE OF \$4.50 PER MONTH PER POLICY IN ALL POLICY YEARS. THERE IS AN EXPENSE CHARGE EQUAL TO \$0.54 PER MONTH PER \$1,000 OF INITIAL SPECIFIED AMOUNT IN ALL POLICY YEARS. THERE IS A PERCENTAGE OF PREMIUM CHARGE IN ALL POLICY YEARS EQUAL TO 6.5% OF PREMIUMS PAID TO THE COMPANY.

TABLE OF SURRENDER CHARGES

BEGINNING YEAR	SURRENDER CHARGE	BEGINNING YEAR	SURRENDER CHARGE
1	\$ 1,915.20	9	\$ 1,596.00
2	1,915.20	10	1,516.20
3	1,915.20	11	1,396.52
4	1,915.20	12	1,197.00
5	1,915.20	13	798.00
6	1,835.40	14	399.00
7	1,755.60	15 AND OVER	NONE
8	1,675.80		

EACH PARTIAL WITHDRAWAL IS SUBJECT TO A \$25.00 TRANSACTION CHARGE. IN ADDITION, A PRO RATA SURRENDER CHARGE WILL BE IMPOSED ON PARTIAL WITHDRAWALS IF THE EFFECT OF SUCH PARTIAL WITHDRAWAL IS TO REDUCE THE SPECIFIED AMOUNT. THE AMOUNT OF THE PRO RATA SURRENDER CHARGE WILL BE BASED UPON THE PERCENTAGE OF REDUCTION IN THE SPECIFIED AMOUNT.

NOTE: AT SOME FUTURE TIME, THE NET ACCUMULATION ACCOUNT VALUE (CASH SURRENDER VALUE IF THERE IS DEBT) MAY NOT COVER THE NEXT MONTHLY DEDUCTION. IN SUCH A SITUATION, THE POLICY WILL ENTER THE GRACE PERIOD AND WILL TERMINATE AT THE END OF THAT PERIOD IF SUFFICIENT PREMIUM TO COVER THE MONTHLY DEDUCTION IS NOT PAID.

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY

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## OWNER, BENEFICIARY AND ASSIGNMENT PROVISIONS

### OWNER

The owner means the owner set out in the application unless subsequently changed. During the insured's lifetime, the owner has the right to receive every benefit, exercise every right and enjoy every privilege granted by this policy. If the owner of this policy is a trust, proof of the existence of the trust must be furnished to the Company.

### BENEFICIARY

The beneficiary named in the application will receive the proceeds upon death of the insured unless the beneficiary has been changed by the owner.

If more than one person is named as beneficiary, the proceeds will be paid in equal shares to the surviving beneficiaries, unless otherwise provided.

If the beneficiary is "children," this means children born to or legally adopted by the insured.

### DEATH OF BENEFICIARY

If any beneficiary dies before the insured, that beneficiary's interest will pass to any surviving beneficiaries or contingent beneficiaries according to their respective interest.

If no beneficiary or contingent beneficiary survives he insured, the proceeds will be paid to the owner or the owner's estate.

### OWNER AND BENEFICIARY CHANGE

The owner may change the owner and the beneficiary at any time during the lifetime of the insured unless otherwise provided in a previous designation. Any change must be in written form satisfactory to the Company.

The change will take effect on the date the request was signed, but it will not apply to any payments made by the Company before the request was received and recorded by the Company.

### SIMULTANEOUS DEATH

If any beneficiary dies within 15 days after the insured but before due proof of the insured's death is received by the Company, the proceeds will be paid as if the beneficiary died before such insured.

### ASSIGNMENT

This policy may be assigned. No assignment will be recognized by the Company unless: (i) the original instrument or a certified copy is filed with the Company at its Administrative Offices; and (ii) the Company sends the owner an acknowledged copy. The Company will not be responsible for the validity of any assignment.

The claim of any assignee is subordinate to that of the Company, including any debt to the Company.

The rights of the beneficiary and owner are subject to the rights of the assignee.

## PREMIUM PAYMENTS, GRACE PERIOD AND REINSTATEMENT PROVISIONS

### INITIAL PREMIUM

The initial premium is the premium due on the date of issue of this policy. It is shown on a Policy Data Page.

### PLANNED PERIODIC PREMIUM

The planned periodic premium is shown on a Policy Data Page.

### WHERE PAYABLE

Premiums are payable in advance to the Company at its Administrative Offices. Premiums may be paid to an authorized representative of the Company upon delivery of a receipt signed by the President, Vice President, Secretary or Assistant Secretary.

### AMOUNT AND FREQUENCY

The owner may change the amount of planned periodic premium. The Company reserves the right to limit the amount of any increase.

The frequency of premium payment shown on a Policy Data Page will serve only as an indication of the owner's preference as to probable future frequency of payment.



The owner may change the frequency of planned periodic premium payment at any time. Each premium payment will be credited by the Company as described in the Interest Credits provision.

A check or draft given for all or any part of a premium, unless paid upon its presentation to the bank or person drawn on, shall not be considered as payment.

#### UNSCHEDULED PREMIUMS

Additional premiums, but not less than \$25.00, may be paid at any time before the maturity date. The Company reserves the right to limit the number and amount of additional premium payments.

Section 7702 of the Internal Revenue Code, as amended, limits the amount of premiums payable under this policy for the death benefit to qualify for exclusion from gross income. If a premium in excess of that premium limitation is received, it will be refunded to the owner.

When a change is made under the Policy Change provision, the premium limitation will be adjusted.

#### GRACE PERIOD

A grace period of 61 days will be allowed to pay a premium that will cover the monthly deduction. If there is no debt, the grace period will begin on the monthly anniversary day on which the accumulation account will not cover the next monthly deduction. If there is any debt, the grace period will begin on the monthly anniversary day on which the cash surrender value will not cover the next monthly deduction. If payment is not made, the policy will lapse at the end of such period. The Company will send a written notice 30 days before the end of the grace period to the owner's last address shown in the Company's records and to any assignee of record if the premium is not previously paid. If the insured dies during the grace period, any past due monthly deductions will be deducted from the proceeds. The policy will remain in force during the grace period, unless surrendered.

#### DEATH BENEFIT PROVISION

This policy will provide one of the following death benefits in determining the proceeds of the policy:

1. Option A. The death benefit will be the greater of:

- a. The specified amount on the date of death, or
- b. The accumulation account on the date of death multiplied by the applicable percentage at the insured's attained age as shown in the Table of Minimum Death Benefits on a Policy Data Page.

#### REINSTATEMENT

Subject to meeting the following conditions, the policy may be reinstated during the lifetime of the insured and before the maturity date, unless it was surrendered for cash. The requirements for reinstatement are:

1. Evidence of insurability satisfactory to the Company must be submitted;
2. Premium sufficient to pay any past due monthly deductions at the end of the grace period must be paid;
3. Sufficient premium to keep the policy in force for two months at time of reinstatement must be paid; and
4. Any debt existing at the end of the grace period must be paid or reinstated.

Monthly deductions will not be due for the period of time between the end of the grace period and the date of reinstatement.

The effective date of reinstatement will be the date the application for reinstatement is approved by the Company.

Upon reinstatement, surrender charges, if any, will then be reinstated in the amount shown on a Policy Data Page for the policy year of lapse. Such surrender charges will be the same as if the policy had not lapsed.

The Incontestability section will apply if the policy has been in force for less than two years. If the policy has been in force for two years during the lifetime of the insured, the suicide exclusion will not apply and it will be contestable only as to statements made in the reinstatement application; and, only for a period of two years from the effective date of reinstatement.

2. Option B. The death benefit will be the greater of:

- a. The accumulation account on the date of death, plus the specified amount on the date of death, or
- b. The accumulation account on the date of death multiplied by the applicable percentage at the insured's attained age as shown in the Table of Minimum Death Benefits on a Policy Data Page.

The death benefit option in effect on the date of issue is shown on a Policy Data Page.

## POLICY CHANGE PROVISIONS

### CHANGE IN SPECIFIED AMOUNT

At any time after the first policy year, upon written request, the specified amount may be changed, subject to the following conditions:

#### 1. Specified Amount Decreases

- a. Any decrease will be effective on the monthly anniversary day on or next following receipt of the request by the Company. A decrease will be applied in the following order:

- 1) First, against any increase in the specified amount (beginning with the most recent) and, then;
- 2) Against the initial specified amount.

- b. The specified amount remaining in force after any requested decrease may not be less than \$100,000.

- c. A pro rata surrender charge will be deducted from the accumulation account. Such pro rata charge will be calculated by: determining what percent of the initial specified amount is represented by the decrease; then applying that percentage to the original surrender charge as the pro rata surrender charge. Future surrender charges will be reduced by the same percentage as determined for each such decrease.

- d. The cash surrender value following the decrease must be greater than zero.

#### 2. Specified Amount Increases

- a. Any increase approved by the Company will be effective on the date shown on a supplemental Policy Data Page.
- b. A supplemental application must be submitted.
- c. Evidence of insurability satisfactory to the Company must be submitted.
- d. The first month's cost of insurance must be paid.

### CHANGE IN DEATH BENEFIT OPTION

If the death benefit option is Option B, it may be changed to Option A. The new specified amount will be the death benefit as of the effective date of change. If the death benefit option is Option A, it may be changed to Option B. The new specified amount will be the death benefit less the value of the accumulation account as of the effective date of change.

The effective date of change will be the monthly anniversary day on or next following the date the Company receives the request for change.

The death benefit option may not be changed if:

1. Such change will result in a specified amount below \$100,000; or,
2. After such change the policy would not qualify as a life insurance policy as defined at the date of change by Federal law or regulation.

No change may be made during the first policy year.

## NONFORFEITURE PROVISION

### ACCUMULATION ACCOUNT

The accumulation account on the date of issue will be the initial net premium. The accumulation account on any other monthly anniversary day will be calculated as (a) plus (b) plus (c) minus (d) minus (e) minus (f) where:

- a. Accumulation account on the preceding monthly anniversary day;
- b. One month's interest on item (a);
- c. Net premiums paid since the preceding monthly anniversary day plus interest;

- d. Partial withdrawals made since the preceding monthly anniversary day plus interest;
- e. Monthly deduction for the month preceding the monthly anniversary day;
- f. One month's interest on item (e).

On a day other than a monthly anniversary day, the accumulation account will be calculated as (a) plus (c) minus (d) minus (e) using the above definitions.

Net premium is the premium paid less the percentage of premium expense charge shown on a Policy Data Page.

### MONTHLY DEDUCTION

The monthly deduction for a policy month will be calculated as (a) plus (b) where:

- a. Cost of insurance plus the cost of additional benefits provided by rider for the policy month; and
- b. Monthly expense charges as shown on a Policy Data Page.

### COST OF INSURANCE

The monthly cost of insurance for the policy is calculated as (a) multiplied by the result of (b) minus (c) where:

- a. Monthly cost of insurance rate as described in the Cost of Insurance Rates section;
- b. Insured's death benefit at the beginning of the policy month divided by 1.0036748;
- c. Accumulation account at the beginning of the policy month.

Divide the result by \$1,000.

The monthly cost of insurance for any rider is shown in the Cost of Insurance Schedule section of a Policy Data Page.

### COST OF INSURANCE RATES

The guaranteed monthly cost of insurance rates for the policy are based on the insured's sex, attained age and premium class on the date of issue. Attained age means age on the prior policy anniversary. These rates are shown on a Policy Data Page.

Current monthly cost of insurance rates will be determined by the Company based on its expectation as to future mortality experience. Any change in such rates will apply uniformly to all members of the same age, sex and premium class. The current monthly cost of insurance rates will not be greater than the guaranteed monthly cost of insurance rates.

The monthly cost of insurance rate for any rider is shown or referred to in the Cost of Insurance Schedule section of a Policy Data Page.

### CASH VALUE

The cash value of this policy is:

1. Value of the accumulation account, less
2. Surrender charge.

### CASH SURRENDER VALUE

The cash surrender value of this policy is:

1. Cash value; less
2. Any debt.

### SURRENDER CHARGE

The surrender charge, which is shown on a Policy Data Page, is a charge against the accumulation account for surrender of the policy. It is not applicable to the surrender of a rider attached to the policy.

### SURRENDER

The owner may surrender this policy for its cash surrender value at any time before the policy terminates.

The Company may defer payment for not more than six months following receipt by the Company of the surrender request unless the surrender is to be applied to pay premiums on policies with the Company.

If a surrender is requested within 30 days after a policy anniversary, the cash surrender value will not be less than the cash surrender value on that anniversary, less any policy loans and partial withdrawals made on or after such anniversary.

### PARTIAL WITHDRAWALS

Partial withdrawals may be made from the accumulation account after this policy has been in force for one year. No more than one partial withdrawal may be made in any policy year. The minimum partial withdrawal which may be made is five hundred dollars. The amount which may be withdrawn may not exceed the cash surrender value. The specified amount will be reduced by the amount of the withdrawal if death benefit Option A is in effect.

If death benefit Option A is in effect, a pro rata surrender charge will be imposed against the accumulation account. The amount of this charge will be based upon the percentage of reduction in the specified amount, calculated by: determining what percent of the initial specified amount is represented by the partial withdrawal, then applying that percentage to the original surrender charge as the pro rata surrender charge. A \$25.00 administrative charge will also be imposed.

Subject to evidence of insurability satisfactory to the Company, the specified amount will not be reduced by the amount of a partial withdrawal. In such a case, a charge of only twenty-five dollars (\$25.00) will be imposed against the accumulation account.

If death benefit Option B is in effect, no pro rata surrender charge will be imposed; however, there will be a \$25.00 administrative charge.

#### CONTINUATION OF INSURANCE

If there is no debt, insurance will continue until the monthly anniversary day on which the accumulation account will not cover the next monthly deduction. If there is any debt, insurance will continue until the monthly anniversary day on which the cash surrender value will not cover the next monthly deduction.

This provision will not continue the policy beyond the maturity date or continue any rider beyond its termination date as provided in the rider.

#### INTEREST CREDITS PROVISION

The interest rate to be credited monthly to the unborrowed portion of the accumulation account, during each calendar quarter, or portion thereof, shall be equal to the greater of (i) or (ii) where: (i) seventy-five percent (75%) of the interest rate payable on the third business day immediately preceding each January 1, April 1, July 1 and October 1, by the Chemical Bank, New York, New York, or its successor(s) on three (3) month time certificates of deposit when the effective annual rate is below 16%; eighty percent (80%) of the interest rate payable by the Chemical Bank will be credited when the certificates of deposit effective annual interest rate is 16% or greater; and (ii) the monthly rate equivalent to an effective annual rate of 4.5% during the first twenty policy years and 3% thereafter.

Interest in excess of the above rate may be credited to the accumulation account at the option of the Company based upon its expectations as to future interest rates.

Should the Chemical Bank or its successor(s) cease issuing three (3) month time certificates of deposit, the

#### BASIS OF COMPUTATION

Minimum cash values are based on the Commissioners 1980 Standard Ordinary Mortality Table, Age Last Birthday with interest at 4.5% per year during the first twenty policy years and 3% per year thereafter.

The nonforfeiture values for this policy are equal to or greater than those required by law. The nonforfeiture values are calculated in accordance with the Standard Nonforfeiture Law. A detailed statement of the method of computing values has been filed with the insurance supervisory official of the state in which the application for this policy was signed.

Company reserves the right to substitute the three month certificate of deposit interest rate of another national banking institution of the Company's choice. Such substitution shall be subject to approval by the insurance regulatory authority of the state of residence of the owner, if required.

That portion of the accumulation account equal to an outstanding policy loan balance will earn interest at the rate of 4.5% per year during the first twenty policy years and 3% per year thereafter.

Premiums paid the Company will earn interest beginning on the first business day following the date of deposit of the premiums to the Company's account, but in no event later than the fifth business day immediately following receipt of such premiums at the Administrative Offices of the Company except for the initial premium. The initial premium will earn interest beginning on the first business day immediately following approval for the issuance of this policy unless the premium is paid later. In such case, the premium will be credited in the same manner for renewal premiums.

#### LOAN PROVISION

##### POLICY LOAN

The owner may obtain a loan at any time while this policy is in force and on the sole security thereof.

##### LOAN VALUE

The loan value may not exceed the cash surrender value of the policy.

The Company may defer making a loan for not more than six months after application for the loan is made unless the loan is to pay premiums on policies with the Company.

##### DEBT

Debt means all existing loans on this policy plus earned interest which has either accrued or been added.

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##### LOAN INTEREST

Loan interest will accrue from the date of each loan to the next policy anniversary date. Loan interest is payable in arrears at the end of each policy year. If interest is not paid when due, the amount of the interest will be added to the loan and bear interest on the same terms as the loan. The amount which may be borrowed is that amount which, with interest to the next policy anniversary, will equal the cash surrender value as of the next policy anniversary. Except as provided below, a loan secured by this policy will bear interest at the rate of 7% per year during the first twenty policy years and 5.5% thereafter.

After this policy has been in continuous force for a specified period, the owner will be eligible for a loan at a reduced interest rate of 4.5% per year until the end of the twentieth policy year and 3% per year thereafter. The specified period is:

- a. Ten years if the insured's issue age is 55 or less;
- b. Policy anniversary following the insured's 65th birthday if the insured's issue age is between 55 and 60; and
- c. Five years if the insured's issue age is 60 or over.

This reduced loan interest rate is available subject to the following conditions:

1. The maximum amount which may be loaned during any one policy year at this reduced interest rate may not exceed the greater of:
  - a. 15% of the policy's cash surrender value at the end of the prior policy year; or
  - b. 15% of the cash surrender value on the policy anniversary immediately prior to the first loan exercised under this provision.

#### SETTLEMENT OPTIONS PROVISION

##### ELECTION OF OPTIONS

Any amount payable at the death of the insured or any other termination of this policy will be paid in one sum unless otherwise provided. All or part of this sum may be applied to any settlement option.

Payment under a combination of options, or payment to joint or successive payees, or payment to a beneficiary that is not a natural person may be elected only with the consent of the Company.

Any election must be made in writing to the Company. The Company may require the policy for endorsement.

##### Election by Owner

During the lifetime of the insured, the owner may elect to have the proceeds paid under one of the payment options below.

##### Election by Beneficiary

At the time proceeds are payable to the beneficiary, the beneficiary may elect one of the payment options if proceeds are available to the beneficiary in a lump sum. The beneficiary has 12 months after payment becomes due to elect one of the following options.

This amount may be loaned at this reduced rate in future policy years until there is no more cash surrender value.

2. Amounts loaned in excess of the amounts permitted under 1 above during any one policy year will bear interest at an interest rate of 7% per year during the first twenty policy years and 5.5% per year thereafter.

##### REPAYMENT

A loan may be repaid at any time while this policy is in force. A loan that exists at the end of the grace period may not be repaid unless this policy is reinstated.

##### TERMINATION OF POLICY

At any time the total debt equals or exceeds the cash value, the policy will terminate without value.

At least 31 days before the date the policy terminates, the Company will send a notice of its intention to void the policy. Notice will be mailed to the last known addresses of the owner and to any assignee of record.

##### PAYMENTS

Payments will be made monthly unless otherwise elected.

The Company has the right to change the frequency of payments in order to make a periodic payment of at least \$25.00.

The option date under Options 1, 2 and 3 is the date the proceeds are payable, or the date of election, whichever is later. Interest under Options 4 and 5 will accrue from such date.

Under Option 3, proof of the age of the payee will be required at the time the first payment is due. The Company reserves the right to require proof that the payee is alive at the time of each payment.

##### CHANGE IN PAYMENTS

Partial withdrawal under Options 1 and 2 may not be made. All payments under Options 1 and 2 may be paid in one sum only with the consent of the Company. The value of any one sum payment will be the sum of any remaining guaranteed payments discounted at an interest rate of not less than 3% compounded annually.

Payments under Option 3 will be commuted only in event of death of the payee. Any payments that remain to be paid under Option 3 at the death of the payee will be paid in one sum. The value of the one sum payment will be the sum of the remaining guaranteed payments, discounted at an interest rate of not less than 3% compounded annually.

In the event additional interest is applicable to payments under Option 1, 2, or 3, any such payments, if paid in one sum, shall be discounted at an interest rate equal to that actually credited.

#### WITHDRAWAL

The minimum proceeds that may be applied under Option 4 or 5 is \$1,000. The payee does not have the right to withdraw any portion of the proceeds under Option 4. The minimum proceeds that may be applied or may remain after a withdrawal under Option 5 is \$1,000. The minimum amount that may be withdrawn is \$1,000. Proceeds less than this amount will be paid in a lump sum to the payee.

The Company may postpone payment of any amount to be withdrawn for not more than six months from the date the written request for withdrawal is received in the Company's Administrative Offices.

#### ASSIGNMENT

The proceeds payable under one of these options may not be assigned.

#### CLAIMS OF CREDITORS

To the extent permitted by law, proceeds will not be subject to any claims of a payee's creditors.

#### ADDITIONAL INTEREST

Additional interest, if any, paid over the guaranteed 3%, will be in an amount and by a method determined by the Company.

#### OPTION 1. EQUAL PAYMENTS FOR A GUARANTEED PERIOD

Equal monthly payments for the number of years elected, not to exceed 25 years. Payments will begin on the option date.

Guaranteed Minimum Monthly Payment  
for each \$1,000 of net proceeds

Period Is Payable (Years)	Income Monthly Income	Period Is Payable (Years)	Income Monthly Income
1	\$84.47	14	\$7.26
2	42.86	15	6.87
3	28.99	16	6.53
4	22.06	17	6.23
5	17.91	18	5.96
6	15.14	19	5.73
7	13.16	20	5.51
8	11.68	21	5.32
9	10.53	22	5.15
10	9.61	23	4.99
11	8.86	24	4.84
12	8.24	25	4.71
13	7.71		

#### OPTION 2. EQUAL PAYMENTS OF A SPECIFIED AMOUNT

Equal monthly payments of at least \$4.71 per month for each \$1,000 of proceeds. Payments will begin on the option date and will continue until the proceeds and interest at the rate of 3% compounded annually are exhausted.

#### OPTION 3. EQUAL PAYMENTS FOR LIFE

Equal monthly payments for a guaranteed period of 10, 15 or 20 years as elected and for life thereafter as shown in the table on the following page.

**OPTION 3**  
Amount of each monthly installment per \$1,000 net proceeds:

Monthly Income for Life with Guaranteed Period of:					Monthly Income for Life with Guaranteed Period of:				
Age of Payee*		10 Years	15 Years	20 Years	Age of Payee*		10 Years	15 Years	20 Years
Male	Female				Male	Female			
6	10	\$2.83	\$2.83	\$2.83	44	48	\$4.00	\$3.97	\$3.92
7	11	2.84	2.84	2.84	45	49	4.07	4.03	3.97
8	12	2.86	2.86	2.85	46	50	4.14	4.10	4.03
9	13	2.87	2.87	2.87	47	51	4.21	4.16	4.09
10	14	2.89	2.89	2.89	48	52	4.29	4.23	4.15
11	15	2.90	2.90	2.90	49	53	4.37	4.31	4.21
12	16	2.92	2.92	2.92	50	54	4.45	4.38	4.28
13	17	2.93	2.93	2.93	51	55	4.54	4.46	4.34
14	18	2.95	2.95	2.95	52	56	4.64	4.55	4.41
15	19	2.97	2.97	2.97	53	57	4.74	4.63	4.48
16	20	2.99	2.99	2.99	54	58	4.84	4.72	4.55
17	21	3.00	3.00	3.00	55	59	4.96	4.82	4.61
18	22	3.02	3.02	3.02	56	60	5.07	4.91	4.68
19	23	3.04	3.04	3.04	57	61	5.19	5.01	4.75
20	24	3.07	3.06	3.06	58	62	5.32	5.11	4.82
21	25	3.09	3.09	3.08	59	63	5.45	5.21	4.89
22	26	3.11	3.11	3.11	60	64	5.59	5.32	4.95
23	27	3.13	3.13	3.13	61	65	5.74	5.42	5.02
24	28	3.16	3.16	3.15	62	66	5.89	5.53	5.08
25	29	3.19	3.18	3.18	63	67	6.05	5.64	5.13
26	30	3.22	3.21	3.21	64	68	6.22	5.75	5.19
27	31	3.24	3.24	3.23	65	69	6.39	5.85	5.24
28	32	3.27	3.27	3.26	66	70	6.56	5.95	5.28
29	33	3.30	3.30	3.29	67	71	6.75	6.05	5.32
30	34	3.34	3.33	3.32	68	72	6.93	6.15	5.36
31	35	3.37	3.37	3.36	69	73	7.12	6.25	5.39
32	36	3.41	3.40	3.39	70	74	7.31	6.33	5.42
33	37	3.44	3.44	3.42	71	75	7.51	6.42	5.44
34	38	3.48	3.48	3.46	72	76	7.70	6.49	5.46
35	39	3.52	3.51	3.50	73	77	7.89	6.56	5.48
36	40	3.57	3.56	3.54	74	78	8.08	6.62	5.49
37	41	3.61	3.60	3.58	75	79	8.26	6.67	5.49
38	42	3.66	3.65	3.62	76	80	8.43	6.71	5.50
39	43	3.71	3.70	3.67	77	81	8.60	6.75	5.51
40	44	3.76	3.75	3.71	78	82	8.76	6.78	5.51
41	45	3.82	3.80	3.76	79	83	8.90	6.81	5.51
42	46	3.87	3.85	3.81	80	84	9.02	6.83	5.51
43	47	3.94	3.91	3.87					

\*Age on the birthday coinciding with or next preceding the due date of the first installment. Ages not illustrated are available upon request.

**OPTION 4. PROCEEDS LEFT AT INTEREST -  
WITHDRAWALS NOT ALLOWED**

The proceeds may be left with the Company for a period of 1 to 25 years. Interest on the proceeds will be paid at the rate of 3% compounded annually. The interest may be left with the Company to accumulate or be paid at the following rate for each \$1,000 of net proceeds.

- 1) Annually \$30.00.
- 2) Semiannually \$14.89.
- 3) Quarterly \$7.42.
- 4) Monthly \$2.47.

At the end of the period selected, the proceeds with accrued interest will be paid in one sum unless otherwise provided in the election.

**OPTION 5. PROCEEDS LEFT AT INTEREST -  
WITHDRAWALS ALLOWED**

The proceeds may be left with the Company for a period of 1 to 25 years. Interest on the proceeds will be paid at the rate of 3% compounded annually. The interest may be left with the Company to accumulate or be paid at the following rate for each \$1,000 of net proceeds.

- 1) Annually \$30.00.
- 2) Semiannually \$14.89.
- 3) Quarterly \$7.42.
- 4) Monthly \$2.47.

The payee may withdraw portions of the proceeds by request in writing to the Company. At the end of the specified period, any remaining proceeds with accrued interest will be paid in one sum.

**GENERAL PROVISIONS**

**ENTIRE CONTRACT**

This policy, including any attached riders, and the attached copy of the application and any supplemental applications for additional coverage are the entire contract. This policy cannot be changed or any of its provisions waived, including any extension of time to pay premiums, except by the President, Vice President, Secretary or Assistant Secretary.

All statements made in an application are assumed, in the absence of fraud, to be representations and not warranties. No statement will be used to void this policy or defend against a claim unless it is contained in the application or a supplemental application.

Any changes, modifications, or waivers must be in writing. No agent has authority to waive a complete answer to any question on the application, pass on insurability, make or alter any contract or waive any of the Company's other rights or requirements.

**INCONTESTABILITY**

This policy will be incontestable, in the absence of fraud, after it has been in force during the lifetime of the insured for two years from the date of issue except for nonpayment of premiums.

Any requested additional benefit or specified amount issued after the policy date will be incontestable only after such additional benefit has been in force for two years during the lifetime of the insured following the effective date of such additional coverage.

**PROCEEDS**

Proceeds means the amount payable on the maturity date, or the surrender of this policy prior to the maturity date, or upon the death of the insured.

The proceeds payable on death will be the death benefit less any debt.

If the policy is surrendered the proceeds will be the cash surrender value. On the maturity date the proceeds will be the cash surrender value.

**PAYMENT OF PROCEEDS**

The proceeds are subject first to any debt to the Company and then to the interest of any assignee of record. Payments to satisfy any debt to the Company and any assignee will be paid in one sum.

**PREMIUM CLASS**

The insured's premium class is shown on a Policy Data Page.

**AGE**

Age means age last birthday.

**ERROR IN AGE OR SEX**

If the age or sex of the insured has been misstated, the proceeds payable will be that which the most recent monthly deduction would have purchased at the correct age and sex. No adjustment will be made in the cash surrender value.

**SUICIDE EXCLUSION**

If the insured commits suicide while sane or insane within two years after the date of issue, the amount payable by the Company will be limited to the premiums paid prior to the insured's death less any debt, and less any partial withdrawals.

If the insured commits suicide while sane or insane within two years after the effective date of any requested additional coverage, the amount payable by the Company will be limited to premiums paid prior to the insured's death for such additional coverage less any debt and less any partial withdrawals.



#### **ELECTIONS, DESIGNATIONS, CHANGES AND REQUESTS**

All elections, designations, changes, and requests must be in a written form satisfactory to the Company and become effective when received and approved by the Company at its Administrative Offices.

#### **NONPARTICIPATING**

This is a nonparticipating policy. This policy will not share in any of the Company's profits or surplus earnings. The Company will not pay dividends on this policy. Any premium or factor changes are determined and redetermined prospectively. The Company will not recoup prior losses, if any, by means of premium or factor changes.

#### **MATURITY DATE**

The maturity date is shown on a Policy Data Page. It is the date on which insurance coverage will terminate, no more premiums may be paid, and the cash surrender value is paid to the owner. It is possible that coverage will end prior to the maturity date if the premiums paid and interest credited are not sufficient to continue coverage to such date.

#### **ANNUAL REPORT**

At least once a year, the Company will send the owner a report which shows premiums paid, expense charges, interest credited, mortality charges, outstanding loans, current cash value, cash surrender value, and all charges since the last report.

#### **PROJECTION OF BENEFITS AND VALUES**

The Company will provide a projection of future death benefits and the value of the accumulation account at any time upon written request and payment of a service fee. The fee payable will be the one then in effect for this service. The projection will be based on:

1. Assumptions as to specified amounts, type of coverage option and future premium payments as may be specified by the owner; and
2. such other assumptions as are necessary and specified by the Company and/or the owner.

#### **EFFECTIVE DATE OF COVERAGE**

The effective date of coverage under this policy is as follows:

1. The date of issue is the effective date for all coverage provided in the original application.
2. The effective date for any addition to coverage will be the monthly anniversary date on or next following the date the application for the addition is approved by the Company.

#### **TERMINATION**

This policy will terminate when any one of the following events occur:

1. The owner requests that coverage terminate,
2. The insured dies,
3. The policy matures,
4. The grace period ends without payment of the required premiums,
5. The total debt equals or exceeds the cash value.

#### **DATE OF ISSUE**

Policy years and policy anniversaries are computed from date of issue.

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY  
BOSTON, MASSACHUSETTS

ENDORSEMENT

ANYTHING IN THE POLICY TO WHICH THIS ENDORSEMENT IS ATTACHED TO THE CONTRARY NOTWITHSTANDING:

PROJECTION OF BENEFITS AND VALUES: THE COMPANY WILL PROVIDE A PROJECTION OF FUTURE BENEFITS AND THE VALUE OF THE ACCUMULATION ACCOUNT AT ANY TIME UPON WRITTEN REQUEST AND PAYMENT OF A SERVICE FEE, NOT TO EXCEED FIVE DOLLARS.

ATTACHED TO AND MADE A PART OF THE POLICY TO WHICH IT IS ATTACHED ON THE POLICY DATE OF ISSUE.

*Robert P. P. Epperson*

SECRETARY

MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY  
Boston, Massachusetts

APPLICATION AMENDMENT

PROPOSED INSURED: RUTH S YUE

POLICY NUMBER: 1090236101

Please amend my application to Massachusetts General Life Insurance Company dated  
07/14/95 as follows:

FACE AMOUNT TO READ \$400,000

I hereby agree that these changes shall be amended to, and form a part of, the original application and of any policy issued thereunder, and that insurance shall not be in force until a copy of this amendment and the entire first premium have been received by Massachusetts Life at its Home Office. I further understand that if I do not accept this amendment, I will then be entitled to return of any premium paid.

DATED AT \_\_\_\_\_ on \_\_\_\_\_ 19\_\_\_\_  
City State

\_\_\_\_\_  
Applicant Witness

\_\_\_\_\_  
Owner

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STATEMENT OF GOOD HEALTH AND INSURABILITY

COMPLETED AS A CONDITION TO THE DELIVERY OR CHANGE OF

POLICY NO. 1090236101 ON THE LIFE OF RUTH S YUE

I, the undersigned, hereby declare that I am in good health and that, since the date of my last examination (or Declaration of Insurability in Lieu of Examination) for insurance in Massachusetts General Life Insurance Company:

- (1) I have continued in good health.
- (2) I have not made an application for insurance which has been declined, postponed, or modified.
- (3) I have not consulted or been examined by a physician or practitioner, nor hospitalized within the past 90 days.
- (4) I have been actively at work on a full-time basis as of the date hereof, at least 20 hours per week, and have been actively at work for the past 90 days. ("Actively at work" means performing all normal duties of employment at customary place of employment with Employer.)

*If there are any exceptions to any of the above statements, give full details in the space provided and return this statement and policy to the Underwriting Department.*

*Exceptions:*

I hereby represent that to the best of my knowledge and belief all of the foregoing statements are true and correct and that I have fully stated all exceptions.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Signature of person to be insured

The insured should sign on the above line in all cases.

If this form is required in connection with an insurance policy applied for by a third party, the latter should sign below.

The undersigned certifies the above and foregoing is correct to the best of my knowledge and belief, and agrees to be bound thereby.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of person applying for insurance  
(if other than proposed insured)

SGH-MGL

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PART I APPLICATION  
FOR LIFE INSURANCE TO

MASSACHUSETTS GENERAL LIFE Insurance Company



1. Proposed insured First Name: Ruth Middle: Seid Last: Yue

2. Birth Date: mo/day/year Birth Place: Portland, Oregon

3. Height 5 Ft. 0 In. Weight 105 Lbs.

4. Social Security Number \_\_\_\_\_

5. ☐ Male ☒ Married ☐ Widowed ☐ Separated  
☒ Female ☐ Single ☐ Divorced

6. RESIDENCE:  
Street & No. \_\_\_\_\_  
City \_\_\_\_\_  
State \_\_\_\_\_ Zip Code \_\_\_\_\_ Years \_\_\_\_\_  
Former Address (if less than five years at current address) \_\_\_\_\_

7. OCCUPATION (If Proposed Insured is under 18, complete for Owner)  
Duties: Pharmacist  
Employer: Kaiser Sunset - Permanent  
Address: 4404 Sunset Blvd  
Zip: 90027 Years: 35  
Occupations for past 5 years \_\_\_\_\_

8a. To whom shall premium notices be mailed?  
Proposed Insured ☐ Owner ☒ Other \_\_\_\_\_

b. Where shall premium notices be mailed? Residence ☒  
Business ☐ Other ☐

9. Plan of Insurance VALUE LIFE I Amount (if applicable) \$ 1,000,000

10. Premiums Payable: Planned Premium (Including Riders) \$ \_\_\_\_\_  
☐ Annually ☐ Semi-Annually ☒ Quarterly  
☐ Special Monthly ☐ Govt. Allotment

11. Additional Benefit Riders (Proposed Insured)  
☐ Waiver of Premium (see 13)  
☐ ADB ☐ GIO Option \_\_\_\_\_ units  
☐ Return of Accumulation Account Rider (Lifetrend Series Only)  
☐ Other \_\_\_\_\_

12. Family Supplemental Benefits  
☐ \_\_\_\_\_ units of the Spouse Rider  
☐ \_\_\_\_\_ units of the Family Insurance Rider  
☐ \$ \_\_\_\_\_ Child Rider  
☐ Payor Death Rider  
☐ Payor Death or Disability Rider

13. FLEX. PREMIUM Adjustable Life Only (Universal Life)  
☐ Option A: Level Death Benefit  
☐ Option B: Increasing Death Benefit  
☐ Waiver of "Cost of Insurance"  
☐ Spouse Rider \$ \_\_\_\_\_  
☐ Child Rider \$ \_\_\_\_\_  
☐ Other \_\_\_\_\_

Details of "Yes" answers to question #16.  
9. 16,130 ANNUAL premium

14. If the sum of future premiums paid for proposed policy exceeds the IRS Premium Limitation, the excess premium should be:  
☐ Applied to a Deferred Annuity Policy  
☒ Refunded

15. LIFE INSURANCE NOW IN FORCE (if none, write none)

Company	Amt. of Life Ins.	Amt. of Acc. Death	Year Issd.
<u>None</u>			

- 16a. Do you now have any application for life, accident or health insurance or reinstatement of such insurance pending in any company? ☐ Yes ☒ No
- b. Have you ever had insurance declined, postponed, rated or modified? ☐ Yes ☒ No
- c. Do you intend to make any flights as a pilot, student pilot or crew member? (If yes, complete Aviation Questionnaire) ☐ Yes ☒ No
- d. Have you, or do you intend to engage in any sport or activity such as auto or motorcycle racing, sky-diving or scuba diving? ☐ Yes ☒ No
- e. Do you intend to replace or change any life insurance or annuity policy in connection with this application? ☐ Yes ☒ No

17. Have you smoked cigarettes in the past twelve months? ☐ Yes ☒ No  
If you now smoke, how much per day? \_\_\_\_\_

18. OWNER:  
☐ Proposed Insured  
☒ Other: Name Celestina Yue Relationship daughter  
Address \_\_\_\_\_  
☐ If the Proposed Insured is under age 18, the owner shall be \_\_\_\_\_

19. BENEFICIARY as to proceeds at death of Insured:  
Primary: Name Celestina Yue Relationship daughter  
Secondary, if no primary beneficiary is living:  
☐ Lawful children of the Insured (including any named below)  
☐ Children born of the marriage of the Insured and primary beneficiary (including any named below)  
☒ Deirdre Yue  
Anne Yue  
Beneficiaries as to proceeds at death of any person other than the Insured shall be the Insured, unless otherwise specified.

20. SPECIAL REQUESTS: (Settlement options, policy data, alternatives, APDF, etc.) ☐ Issue as Special Class (Extended Term Insurance not available)

21. Policy Loan Interest is to be paid in advance ☐, or arrears ☐; fixed ☐, or variable ☐. If options are not selected interest will be fixed and payable in advance.

**MASSACHUSETTS GENERAL LIFE Insurance Company**

**PART II APPLICATION  
FOR LIFE INSURANCE**

**NON MEDICAL AND FAMILY APPLICATION**

Proposed Insured Ruth Seid Yue

2. Persons proposed for insurance (include only Proposed Insured's spouse and/or the Proposed Insured's unmarried children, including legally adopted children and stepchildren who have not attained their 21st birthday and are dependent on the Insured or the Payor)

Name	Relationship to Insured	Date of Birth	Place of Birth	HL	Wt.	Insurance In Force or Pending

3a. Name and Address of Personal Physician:

K. Fogarty  
4950 Sunset Blvd  
Los Angeles CA 90029

3. Reason and date consulted:

9/93 diarrhea

Declaration of Insurability

Yes No

Yes No

5. Does any person named above intend to replace or change a life insurance or annuity policy in connection with this application? ☐ Yes ☒ No

6. Has any person named above ever:

a. had kidney disease, nephritis, albumin, blood, pus or sugar in the urine? ☐ Yes ☒ No

b. used on a regular basis: heroin, morphine, other narcotics, marijuana, cocaine, barbiturates, amphetamines, or hallucinogenic drugs, or alcohol? ☐ Yes ☒ No

c. had any bone or joint disorder or disease, tumor, cancer, nervousness, syphilis, tuberculosis? ☐ Yes ☒ No  
had anemia, leukemia or other disease of the blood? ☐ Yes ☒ No

e. had any diabetes, gall bladder trouble, liver or genito-urinary disorder, ulcers or other digestive disturbance? ☐ Yes ☒ No

f. had any heart disease, chest pain, stroke, abnormal blood pressure, hernia, mental trouble, thyroid disturbance or lung trouble? ☐ Yes ☒ No

g. been a patient in or advised to enter a hospital, sanatorium or other institution for observation, rest, diagnosis, treatment or any operation? ☐ Yes ☒ No

h. had any X-rays, electrocardiograms, blood or other medical tests or surgical operations? ☐ Yes ☒ No

i. had any known indication of any disease, condition or other physical disorder or defect not mentioned? ☐ Yes ☒ No

Details of "Yes" answers. (Identify Question Number and Individual and Circle Applicable Items: include diagnosis, dates, duration and names and addresses of all attending physicians and medical facilities.)

I/We hereby represent that to the best of my/our knowledge and belief all statements and answers as written or printed herein are full, complete and true. I/We agree that they shall form part of this application consisting of Parts I and II and become a part of any contract of insurance issued on such application. I/We understand that all statements and answers given herein are material and will be relied upon by the Company as being complete and true in determining whether I/we qualify for the plan of insurance applied for. I/We hereby authorize any licensed physician, medical practitioner, hospital, clinic, or other medical or medically related facility, insurance company, the Medical Information Bureau, or other organization, institute or person that has any records or knowledge of the health of any proposed insured, to give to Massachusetts General Life Insurance Company or its Reinsurers any such information. A photographic copy of this authorization shall be as valid as the original.

I/We understand and agree: (1) that if the full first premium accompanies this application, the coverage (not to exceed \$350,000) applied for becomes effective according to the terms and conditions of the conditional receipt; (2) that if a signed authorization for third party payment which is not accompanied by the full first premium is tendered with the application, coverage shall not be effective until the requested effective date entered on the application and receipt by the Company of the full first premium; (3) that if neither the full first premium nor a signed authorization for third party payment is tendered with the application, no insurance shall take effect unless and until a policy has been delivered to and received and accepted by me and the full first premium paid during the lifetime and insurability of proposed insureds.

The Company has the right to accept or reject this application or to offer coverage at a different rate. I further agree that any policy issued based on this application shall constitute a ratification of additions or corrections made by the Company and noted in the space "Home Office Use". Any change in amount, age at issue, classification, plan of insurance or benefits shall be made only with my written consent in those states where such consent is required.

If the premium for this application is prepaid, I acknowledge possession of the receipt contained herein, and have read the Terms and Conditions of coverage and declare that I understand and agree to those terms and conditions.

\$ 2 deposit made with this application signed at Los Angeles, CA on 7 14 95

Signature of Spouse if proposed for insurance

Signature of Proposed Insured

Agent Replacement Question: Will this coverage replace another insurance or annuity policy? Yes ☒ No

Signature of Witness (Licensed Agent must witness where required by law)

Signature of Owner if other than Proposed Insured

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#1096136101 324

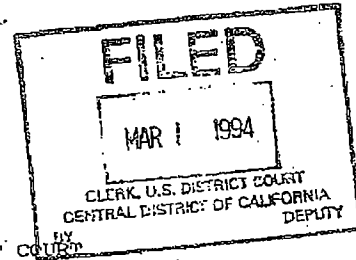
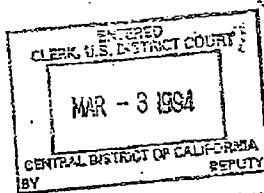
Declarations to Medical Examiner or to Agent, if examination is not required, in continuation of and as a part of my application to the MASSACHUSETTS GENERAL LIFE INSURANCE COMPANY				Part III
Proposed Insured <u>Ruth S. YUE</u>		Birth Date <u>09-27-24</u>		
First Name Middle Initial Last Name		Month Day Year		
1. a. Name and address of your personal physician? <u>Katherine Fogarty, M.D.</u>				
(If none, so state)				
b. Date and reason last consulted? <u>1993/Anesthesia - Kaiser Permanente</u>				
c. What treatment was given or medication prescribed? <u>Levamisole 4950 Sunset Blvd Los Angeles, CA</u>				
2. Have you ever been treated for or ever had any known indication of: Yes No				Details of "Yes" answers. (Identify question number, circle applicable items. Include diagnoses, dates, duration and names and addresses of all attending physicians and medical facilities.)  <u>MR # 2182368</u>
a. Disorder of eyes, ears, nose or throat? <input type="checkbox"/> <input checked="" type="checkbox"/>				
b. Dizziness, fainting, convulsions, headache; speech defect, paralysis or stroke; mental or nervous disorder? <input type="checkbox"/> <input checked="" type="checkbox"/>				
c. Shortness of breath, persistent hoarseness or cough, blood spitting; bronchitis, pleurisy, asthma, emphysema, tuberculosis or chronic respiratory disease? <input type="checkbox"/> <input checked="" type="checkbox"/>				
d. Chest pain, palpitation, high blood pressure, rheumatic fever, heart murmur, heart attack or other disorder of the heart or blood vessels? <input type="checkbox"/> <input checked="" type="checkbox"/>				
e. Jaundice, intestinal bleeding; ulcer, hernia, appendicitis, colitis, diverticulitis, hemorrhoids, recurrent indigestion or other disorder of the stomach, intestines, liver, or gallbladder? <input type="checkbox"/> <input checked="" type="checkbox"/>				
f. Sugar, albumin, blood or pus in urine; venereal disease; stone or other disorder of kidney, bladder, prostate or reproductive organs? <input type="checkbox"/> <input checked="" type="checkbox"/>				
g. Diabetes; thyroid or other endocrine disorders? <input type="checkbox"/> <input checked="" type="checkbox"/>				
h. Neuritis, sciatica, rheumatism, arthritis, gout, or disorder of the muscles or bones, including the spine, back or joints? <input type="checkbox"/> <input checked="" type="checkbox"/>				
i. Deformity, lameness or amputation? <input type="checkbox"/> <input checked="" type="checkbox"/>				
j. Disorder of skin, lymph glands, cyst, tumor or cancer? <input type="checkbox"/> <input checked="" type="checkbox"/>				
k. Allergies; anemia or other disorder of the blood? <input type="checkbox"/> <input checked="" type="checkbox"/>				
l. Excessive use of alcohol, tobacco or any habit-forming drugs? <input type="checkbox"/> <input checked="" type="checkbox"/>				
3. Are you now under observation or taking treatment? <input type="checkbox"/> <input checked="" type="checkbox"/>				
4. Have you had any change in weight in the past year? <input type="checkbox"/> <input checked="" type="checkbox"/>				
5. Other than above, have you within the past 5 years:				
a. Had any mental or physical disorder not listed above? <input type="checkbox"/> <input checked="" type="checkbox"/>				
b. Had a checkup, consultation, illness, injury or surgery? <input type="checkbox"/> <input checked="" type="checkbox"/>				
c. Been a patient in a hospital, clinic, sanatorium or other medical facility? <input type="checkbox"/> <input checked="" type="checkbox"/>				
d. Had electrocardiogram, X-ray or other diagnostic test? <input type="checkbox"/> <input checked="" type="checkbox"/>				
e. Been advised to have any diagnostic test, hospitalization or surgery which was not completed? <input type="checkbox"/> <input checked="" type="checkbox"/>				
6. Have you ever had military service deferment, rejection or discharge because of a physical or mental condition? <input type="checkbox"/> <input checked="" type="checkbox"/>				
7. Have you ever requested or received a pension, benefits, or payment because of an injury, sickness or disability? <input type="checkbox"/> <input checked="" type="checkbox"/>				
8. Family history of tuberculosis, diabetes, cancer, high blood pressure, heart or kidney disease, mental illness or suicide? <input type="checkbox"/> <input checked="" type="checkbox"/>				
		Age If Living?	Cause of Death?	Age At Death?
Father				
Mother			<u>unk</u>	<u>60+</u>
Brothers & Sisters				
No. Living			<u>old Age</u>	<u>80+</u>
No. Dead				
9. a. Have you ever had any disorder of menstruation, pregnancy or of the reproductive organs or breasts? <input type="checkbox"/> <input checked="" type="checkbox"/>				
b. To the best of your knowledge and belief, are you pregnant? <input type="checkbox"/> <input checked="" type="checkbox"/>				
TO THE BEST OF MY KNOWLEDGE AND BELIEF I HEREBY DECLARE that all statements and answers to the above are complete and true, and I agree that they shall form a part of the contract of insurance applied for. I hereby authorize the physician, clinic, or other medical or medically related facility, insurance company, the Medical Information Bureau, or records or knowledge of me or my health, to give the Massachusetts General Life Insurance Company or its Reinsurers authorization shall be as valid as the original.				
Dated this <u>10th</u> day of <u>August</u> 19 <u>95</u>				
Witness <u>Ken [Signature]</u> <u>X Ruth Yue</u>				
Medical Examiner or Agent—Cross out one (The name to be signed in full: Proposed Insured's Signature or Person Having Custody of Proposed Insured)				

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## EXHIBIT "B"



THIS CONSTITUTES NOTICE OF ENTRY  
AS REQUIRED BY FRCP, RULE 77(d).



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JAMES ROSENBAUM,

Plaintiff,

v.

PHILADELPHIA LIFE INSURANCE  
COMPANY; MASSACHUSETTS GENERAL  
LIFE INSURANCE COMPANY; LIFE  
PARTNERS GROUP; JAMES BRENNAN  
and DOES 1 through 100, inclusive,

Defendants.

CASE NO. CV 93-0834 MRP

ORDER

Plaintiff James Rosenbaum's ("Rosenbaum") motion for partial summary judgment, and defendants Philadelphia Life Insurance Company ("Philadelphia") and Massachusetts General Life Insurance Company's (collectively the "Companies" or "defendants") motion for summary judgment and/or specifying facts to be without substantial controversy, and motion for summary adjudication came on for hearing on February 7, 1994. After considering the parties' papers and the arguments of counsel, and having rendered its decision in accordance with the Statement of Uncontroverted Facts and Conclusions of Law,

IT IS HEREBY ORDERED that:

1. Rosenbaum's motion for partial summary judgment on the first claim for breach of contract is granted. Philadelphia breached its flexible premium universal life insurance policies (the "Flexible

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1 Policy") with plaintiff by increasing the cost of insurance for a  
2 reason other than a change in Philadelphia's expectations as to future  
3 mortality experience. The Court will set a hearing to determine which  
4 Flexible Policies held by Rosenbaum were affected by the increase in  
5 cost of insurance, and the damages available on those Flexible  
6 Policies.

7 2. Rosenbaum's motion for partial summary judgment that  
8 Philadelphia breached its Spectra policies with Rosenbaum by failing  
9 to give proper notice of the default in payment on those policies is  
10 denied. The Spectra policies were not affected by the increase in  
11 cost of insurance, and therefore are not at issue in this lawsuit.  
12 Rosenbaum may not recover damages on the Spectra policies.

13 3. Rosenbaum's motion for partial summary judgment that  
14 defendants engaged in an unfair business practice in violation of  
15 California Business and Professions Code § 17200 is denied.

16 4. Philadelphia's motion for summary judgment with respect to  
17 the first claim for breach of contract is denied.

18 5. Philadelphia's motion for summary judgment with respect to  
19 the second claim for breach of the implied covenant of good faith and  
20 fair dealing is denied.

21 6. The Companies' motion for summary judgment with respect to  
22 the third claim for violation of the California Business and  
23 Professions Code § 17200 is denied.

24 7. On the first claim, Rosenbaum is entitled to breach of  
25 contract damages as to the Flexible Policies held by him on which the  
26 cost of insurance was increased by the DAC tax.

27 8. The following facts are not in controversy:

28

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1 a. By stipulation of the parties, Rosenbaum is not seeking  
2 recovery for loss of commissions, loss of earnings or loss of earning  
3 capacity on his first or second claim.

4 b. By stipulation of the parties, Rosenbaum is not seeking  
5 recovery for anxiety, worry, and mental and emotional distress on his  
6 second claim.

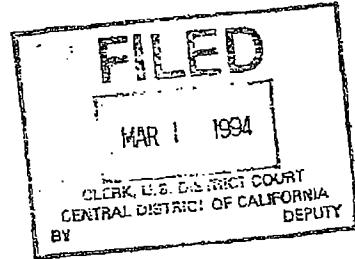
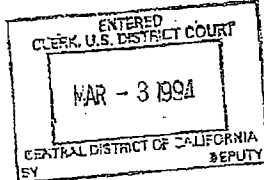
7 c. By stipulation of the parties, Rosenbaum is not seeking  
8 recovery on his second claim for damage to his reputation.

9 DATED: *March 1, 1994*

*Mariana R. Pfaezler*  
Mariana R. Pfaezler  
United States District Judge

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3 CONSTITUTES NOTICE OF ENTRY  
3 REQUIRED BY FRCP, RULE 77(d).



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

10 JAMES ROSENBAUM,

11 Plaintiff,

12 v.

13 PHILADELPHIA LIFE INSURANCE  
14 COMPANY; MASSACHUSETTS GENERAL  
15 LIFE INSURANCE COMPANY; LIFE  
16 PARTNERS GROUP; JAMES BRENNAN  
and DOES 1 through 100, inclusive,

Defendants.

CASE NO. CV 93-0834 MRP

STATEMENT OF UNCONTROVERTED  
FACTS AND CONCLUSIONS OF LAW

17 Plaintiff James Rosenbaum's ("Rosenbaum") motion for partial  
18 summary judgment, and defendants Philadelphia Life Insurance Company  
19 ("Philadelphia") and Massachusetts General Life Insurance Company's  
20 (collectively the "Companies" or "defendants") motion for summary  
21 judgment and/or specifying facts to be without substantial  
22 controversy, and motion for summary adjudication came on for hearing  
23 on February 7, 1994. After considering the parties' papers and the  
24 arguments of counsel, the Court determines that the following  
25 uncontroverted facts and conclusions of law have been established.  
26  
27  
28

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UNCONTROVERTED FACTS

1. Rosenbaum purchased a number of flexible premium universal life insurance policies (the "Flexible Policy") issued by Philadelphia Life Insurance Company ("Philadelphia").

2. A Flexible Policy allows a policyholder some discretion over the amount and timing of premiums. Premiums above the minimum required to keep the Flexible Policy in force go to an accumulation account which earns "credited interest" at "credited interest rates" for the policyholder. The Flexible Policy may be adjusted for changes in the applicable credited interest rate on the accumulation account, but may not fall below 4.5%. The cost of insurance may not exceed a guaranteed maximum set forth on a "Policy Data" page in the Flexible Policy.

3. The issue in this case is whether the Flexible Policy allows adjustments to the cost of insurance rates for anything other than changes in the anticipated mortality experience.

4. There are two relevant sections of the Flexible Policy. All references to the Flexible Policy are to the generic Flexible Policy provided in defendants' motion for summary judgment and/or specifying facts to be without substantial controversy, exhibit one.

a. On page four, the Flexible Policy provides a "Table of Guaranteed Maximum Monthly Cost of Insurance Rates Per \$1000." Underneath the table, the Flexible Policy states, in capital letters:

THE COST OF INSURANCE RATES SHOWN ABOVE ARE BASED ON THE COMMISSIONERS 1980 STANDARD ORDINARY MALE MORTALITY TABLE, AGE LAST BIRTHDAY. ACTUAL MONTHLY COST OF INSURANCE RATES

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1 WILL BE DETERMINED BY THE COMPANY BASED ON ITS EXPECTATIONS  
2 AS TO FUTURE MORTALITY EXPERIENCE. HOWEVER, THE ACTUAL COST  
3 OF INSURANCE RATES WILL NOT BE GREATER THAN THOSE SHOWN  
4 ABOVE.

5 b. On page eleven, the Flexible Policy states:  
6 Cost of Insurance Rates

7 The monthly cost of insurance rate for the policy is based  
8 on the insured's sex, attained age and premium class on the  
9 policy date of the policy. Attained age means age on the  
10 prior policy anniversary.

11 The guaranteed maximum monthly cost of insurance rates  
12 are shown on a Policy Data Page.

13 Monthly cost of insurance rates will be determined by  
14 the Company based on its expectation as to future mortality  
15 experience. Any change in such rates will apply uniformly  
16 to all members of the same age, sex and class. The monthly  
17 cost of insurance rates will not be greater than those shown  
18 on a Policy Data Page.

19 5. In 1990 Congress passed the Revenue Reconciliation Act  
20 (the "Act"). One of the provisions of the Act increased taxes on  
21 life insurance (the "DAC tax"). Under the DAC tax, 7.7% of  
22 actual premiums paid by a policyholder are considered additional  
23 taxable income to the insurer. The tax was not only applicable  
24 to new policies, where it could be factored into the cost  
25 structure, but also to existing policies.

26 6. The Companies sought to obtain compensation for at  
27 least part of the DAC tax by passing it on to policyholders who  
28 owned policies that could be adjusted to account for such a tax.

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1 The Companies could not obtain compensation on term life and  
2 whole life policies since those policies do not contain any  
3 variable elements. The Companies decided not to obtain  
4 compensation on a class of universal life policies called  
5 Spectra.. The Companies did obtain compensation for the DAC tax  
6 through adjustments to the Flexible Policies at issue in this  
7 lawsuit.

8 7. To pass through the DAC tax on its Flexible Policies,  
9 the Companies increased the cost of insurance rates on those  
10 policies by 10%, effective April 1, 1992. On one policy form the  
11 increase was 5%. The increase in cost of insurance under the  
12 Flexible Policies was not due to any changes in expectations as  
13 to future mortality experience.

#### 14 CONCLUSIONS OF LAW

15 1. Whether a term in an insurance contract is ambiguous is  
16 a question of law, not fact. Under California law, words used in  
17 an insurance contract are to be given the plain meaning that a  
18 lay person would normally attach to them. A court should not  
19 strain for interpretations to create ambiguities where none  
20 exist. If there is an ambiguity, however, it should be resolved  
21 against the insurer and in favor of coverage. Poland v. Martin,  
22 761 F.2d 546, 548 (9th Cir. 1985) (citations omitted). This rule  
23 protects not the subjective beliefs of the insurer, but, rather,  
24 the objectively reasonable expectations of the insured. Bank of  
25 the West v. Superior Court, 10 Cal. Rptr. 2d 538, 545 (Cal.  
26 1992).

27 2. In this case, the Court must determine whether the term  
28 "cost of insurance" in the Flexible Policy includes factors other

1 than the Companies' expectation as to future mortality  
2 experience. Put another way, the Court must decide whether the  
3 Flexible Policy permitted the Company to increase the cost of  
4 insurance to account for a change other than in expectations as  
5 to future mortality experience.

6 The Flexible Policy states: "Actual monthly cost of  
7 insurance rates will be determined by the company based on its  
8 expectations as to future mortality experience. Any change in  
9 such rates will apply uniformly to all members of the same sex  
10 and class." This language either clearly supports plaintiff's  
11 reading of the Flexible Policy, or is at least ambiguous. The  
12 natural and reasonable interpretation of the Flexible Policy,  
13 especially in conjunction with the Flexible Policy language under  
14 the chart of "Guaranteed Maximum Monthly Cost of Insurance  
15 Rates," is that expectations as to future mortality experience  
16 are the basis for the cost of insurance rates. Therefore, any  
17 change in the cost of insurance would logically be based on a  
18 change in the Companies' expectations as to future mortality  
19 experience. Defendants contend that the Flexible Policy only  
20 requires that any change in cost of insurance rates apply  
21 uniformly to all members of the same sex and class-- without  
22 limiting the types of changes in cost of insurance that are  
23 permissible under the Flexible Policy. However, that the change  
24 in cost of insurance rates must be based on whatever factors the  
25 Flexible Policy permits is implicit in the phrase "any change in  
26 such rates" immediately following the sentence that describes the  
27 cost of insurance. The previous sentence already stated that the  
28 cost of insurance is based on the Companies' expectations as to

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1 future mortality experience. The Court has no difficulty in  
2 concluding that the Flexible Policy did not permit the Companies  
3 to increase the cost of insurance to account for a change other  
4 than in future mortality experience.

5 Defendants contend that there is nothing in the Flexible  
6 Policy to suggest that the "cost of insurance" is based solely on  
7 expectations as to future mortality experience. However, even  
8 giving the defendants the best of the argument, there is nothing  
9 in the Flexible Policy language which suggests that the cost of  
10 insurance is based on, among other factors, its expectations as  
11 to future mortality experience. To interpret the Flexible Policy  
12 as the defendants do would require reading additional words into  
13 it. At the very least, the Flexible Policy is ambiguous.  
14 Because all ambiguities must be resolved against the insurer, the  
15 Court finds that Philadelphia breached its obligations under the  
16 Flexible Policies with the insured Rosenbaum when it increased  
17 the cost of insurance to pass on the DAC tax.

18 3. There is a question of fact regarding which of  
19 Rosenbaum's Flexible Policies were affected by the increase in  
20 the cost of insurance. A hearing will be necessary to determine  
21 this issue, and to assess the damages from the breach of  
22 contract. The Court notes that Rosenbaum's Spectra policies were  
23 not affected by the increase in the cost of insurance.  
24 Therefore, plaintiff is not entitled to any damages on these  
25 policies. Plaintiff's allegations regarding a lapse in the  
26 Spectra policies due to improper notice are not at issue in this  
27  
28

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1 lawsuit and may not be addressed at the hearing to assess damages  
2 on the Flexible Policies affected by the increase in the cost of  
3 insurance.

4 DATED: *March 1, 1994*

*Mariana R. Pfaelzer*  
Mariana R. Pfaelzer  
United States District Judge

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**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA  
CIVIL COVER SHEET**

<b>I (a) PLAINTIFFS</b> (Check box if you are representing yourself <input type="checkbox"/> )  CELEDONIA X. YUE, M.D., on behalf of the class of all others similarly situated, and on behalf of the General Public  <b>(b) County of Residence of First Listed Plaintiff (Except in U.S. Plaintiff Cases):</b> Los Angeles  <b>(c) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)</b> Timothy P. Dillon (CSB No. 123953) LAW OFFICES OF TIMOTHY P. DILLON 361 Forest Avenue, Suite 205, Laguna Beach, California 92651 (949) 376-2800	<b>DEFENDANTS</b> CONSECO LIFE INSURANCE COMPANY, successor to Philadelphia Life Insurance Company and formerly known as Massachusetts General Life Insurance Company  <b>County of Residence of First Listed Defendant (In U.S. Plaintiff Cases Only):</b>  <b>Attorneys (If Known)</b>
--	---

<b>II. BASIS OF JURISDICTION</b> (Place an X in one box only.)  <input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)  <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES-</b> For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.)  <table style="width:100%;"> <tr> <td style="width:33%;">Citizen of This State</td> <td style="width:10%; text-align: center;">PTF DEF</td> <td style="width:33%; text-align: center;"><input checked="" type="checkbox"/> 1    <input type="checkbox"/> 1</td> <td style="width:24%; text-align: center;">Incorporated or Principal Place of Business in this State</td> <td style="width:10%; text-align: center;">PTF DEF</td> <td style="width:33%; text-align: center;"><input type="checkbox"/> 4    <input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td></td> <td style="text-align: center;"><input type="checkbox"/> 2    <input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td></td> <td style="text-align: center;"><input type="checkbox"/> 5    <input checked="" type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td></td> <td style="text-align: center;"><input type="checkbox"/> 3    <input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td></td> <td style="text-align: center;"><input type="checkbox"/> 6    <input type="checkbox"/> 6</td> </tr> </table>	Citizen of This State	PTF DEF	<input checked="" type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	PTF DEF	<input type="checkbox"/> 4 <input type="checkbox"/> 4	Citizen of Another State		<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State		<input type="checkbox"/> 5 <input checked="" type="checkbox"/> 5	Citizen or Subject of a Foreign Country		<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation		<input type="checkbox"/> 6 <input type="checkbox"/> 6
Citizen of This State	PTF DEF	<input checked="" type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	PTF DEF	<input type="checkbox"/> 4 <input type="checkbox"/> 4														
Citizen of Another State		<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State		<input type="checkbox"/> 5 <input checked="" type="checkbox"/> 5														
Citizen or Subject of a Foreign Country		<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation		<input type="checkbox"/> 6 <input type="checkbox"/> 6														

**IV. ORIGIN** (Place an X in one box only.)  
☒ 1 Original Proceeding    ☐ 2 Removed from State Court    ☐ 3 Remanded from Appellate Court    ☐ 4 Reinstated or Reopened    ☐ 5 Transferred from another district (specify):  
☐ 6 Multi-District Litigation    ☐ 7 Appeal to District Judge from Magistrate Judge

**V. REQUESTED IN COMPLAINT:** JURY DEMAND: ☒ Yes    ☐ No (Check 'Yes' only if demanded in complaint.)

**CLASS ACTION** under F.R.C.P. 23: ☒ Yes    ☐ No    **MONEY DEMANDED IN COMPLAINT:** \$

**VI. CAUSE OF ACTION** (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)  
 28 U.S.C. 1332(a) Breach of Contract based on increase in cost of insurance in Universal Life Insurance Policies

**VII. NATURE OF SUIT** (Place an X in one box only.)

<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 830 Securities/Commodities /Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 250 All Other Real Property	<input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
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**VIII(a). IDENTICAL CASES:** Has this action been previously filed and dismissed, remanded or closed? ☒ No    ☐ Yes

If yes, list case number(s):

**FOR OFFICE USE ONLY:** Case Number: \_\_\_\_\_

CV08-01506

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA  
CIVIL COVER SHEET

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

VIII(b). RELATED CASES: Have any cases been previously filed that are related to the present case? ☐ No ☒ Yes

If yes, list case number(s): 93-0834 MRP and MDL No. 04-1610 AHM, see Notice of Related Cases filed concurrently herewith

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or  
☒ B. Call for determination of the same or substantially related or similar questions of law and fact; or  
☒ C. For other reasons would entail substantial duplication of labor if heard by different judges; or  
☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: List the California County, or State if other than California, in which EACH named plaintiff resides (Use an additional sheet if necessary)  
☐ Check here if the U.S. government, its agencies or employees is a named plaintiff.

Los Angeles County - Celestina X. Yue, M.D.

List the California County, or State if other than California, in which EACH named defendant resides. (Use an additional sheet if necessary).  
☐ Check here if the U.S. government, its agencies or employees is a named defendant.

Los Angeles County - Conesco Life Insurance Company

List the California County, or State if other than California, in which EACH claim arose. (Use an additional sheet if necessary)  
Note: In land condemnation cases, use the location of the tract of land involved.

Los Angeles County

X. SIGNATURE OF ATTORNEY (OR PROPER):



Date March 3, 2007

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DWIC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended, plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DJWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSJD	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

Timothy P. Dillon (CSB No. 123953)  
LAW OFFICES OF TIMOTHY P. DILLON  
361 Forest Avenue, Suite 205  
Laguna Beach, California 92651  
(949) 376-2800  
(949) 376-2808 Facsimile

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CELEDONIA X. YUE, M.D.,  
(SEE ATTACHED)

PLAINTIFF(S)

v.

CONSECO LIFE INSURANCE COMPANY,  
(SEE ATTACHED)

DEFENDANT(S).

CASE NUMBER

CV08-01506 CAS (CTX)

SUMMONS

TO: THE ABOVE-NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED and required to file with this court and serve upon plaintiff's attorney  
Timothy P. Dillon, whose address is:

Timothy P. Dillon, Esq.  
LAW OFFICES OF TIMOTHY P. DILLON  
361 Forest Avenue, Suite 205  
Laguna Beach, California 92651

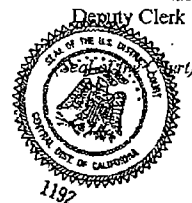
an answer to the ☒ complaint ☐ amended complaint ☐ counterclaim ☐ cross-claim  
which is herewith served upon you within 20 days after service of this Summons upon you, exclusive  
of the day of service. If you fail to do so, judgement by default will be taken against you for the relief  
demanded in the complaint.

Clerk, U.S. District Court

LA'REE HORN

Dated: MAR 4 2008

By: \_\_\_\_\_



**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY**

This case has been assigned to District Judge Christina A. Snyder and the assigned discovery Magistrate Judge is Carolyn Turchin.

The case number on all documents filed with the Court should read as follows:

**CV08- 1506 CAS (CTx)**

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

=====

**NOTICE TO COUNSEL**

*A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).*

Subsequent documents must be filed at the following location:

☒ **Western Division**  
312 N. Spring St., Rm. G-8  
Los Angeles, CA 90012

☐ **Southern Division**  
411 West Fourth St., Rm. 1-053  
Santa Ana, CA 92701-4516

☐ **Eastern Division**  
3470 Twelfth St., Rm. 134  
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 08-1506 AHM (JTLx) Date December 8, 2008  
Title CELEDONIA X. YUE v. CONSECO LIFE INSURANCE COMPANY

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes

Not Reported

Deputy Clerk

Court Reporter / Recorder

Tapc No.

Attorneys **NOT** Present for Plaintiffs:

Attorneys **NOT** Present for Defendants:

**Proceedings:** IN CHAMBERS (No Proceedings Held)

## **I. INTRODUCTION**

On March 4, 2008, Plaintiff Celedonia X. Yue, M.D. filed this putative class action alleging that Defendant Conseco Life Insurance Company ("Conseco") has wrongfully decided to increase the cost of insurance charges for its "Valulife" and "Valuterm" life insurance policies (collectively "Policies"). The Complaint alleges breach of contract and violations of California Business and Professions Code §17200, *et seq.*, and seeks injunctive, declaratory, and monetary relief. On June 25, 2008, Defendant filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) (lack of subject-matter jurisdiction) and 12(b)(6) (failure to state a claim upon which relief can be granted), which the Court took under submission on October 1, 2008. The Court now DENIES the motion to dismiss, and holds that the controversy alleged in the Complaint is ripe for judicial review.

## **II. FACTUAL BACKGROUND ALLEGED IN COMPLAINT**

In 1995, Plaintiff Yue purchased a "Valulife" universal life insurance policy issued by Defendant,<sup>1</sup> with a face amount of \$400,000. Compl. ¶ 7. The insured is Plaintiff's mother, Ruth S. Yue, and Plaintiff Yue is the beneficiary. *Id.* at Ex. A, pp. A-28, A-44.

<sup>1</sup> The policy was actually issued by Massachusetts General Life Insurance Company, which became Conseco Life in 1996. Compl. ¶ 8. Philadelphia Life Insurance Company also issued policies at issue in this action, and in or about 1998 it merged into Conseco. *Id.*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 08-1506 AHM (JTLx) Date December 8, 2008  
Title CELEDONIA X. YUE v. CONSECO LIFE INSURANCE COMPANY

At the time of purchase, Ruth S. Yue was 70 years old. *Id.* at A-28.

The Complaint alleges that Plaintiff's life insurance policy and the policies of the putative class are "universal life" policies. *Id.* Owners of universal life policies pay premiums into an account that earns interest. The account represents (1) the total premiums the policyholder has paid, plus any credited interest, minus (2) expense charges and a monthly "cost of insurance" charge. A universal life insurance policy will remain in force as long as there are enough funds in the account to pay the expense charges and the monthly cost of insurance charge. Compl. ¶ 29.

The cost of insurance charge covers the cost of paying out death benefits, and it is designed to increase as the insured ages. Compl. ¶¶ 23-26, 31. It is calculated based on a formula that takes into consideration the amount of funds in the account and a factor called the "cost of insurance rate." Compl. ¶¶ 30-31. Under the terms of the universal life policies at issue in this action, the cost of insurance rate is dependent solely on the insurer's expectation as to its future mortality experience. Compl. ¶¶ 32-34. In other words, "once the actual cost of insurance rates are set by the insurance company, they can only be increased because of anticipated future worsening mortality experience of insurance company [sic] (*i.e.*, more death claims anticipated in the future than were previously expected)."<sup>2</sup> Compl. ¶ 35. Conseco does not disclose its actual cost of insurance rates. It discloses only the monthly cost of insurance charge deducted from the insured's account. Compl. ¶ 36.

Plaintiff alleges that Conseco has decided to raise the cost of insurance charges beginning in the twenty-first year of the Valulife and Valuterm policies (specifically, in the year 2016 for Plaintiff's policy). Compl. ¶ 54. Plaintiff further alleges that there is no way that the substantial increase could be due to the insurer's anticipated mortality experience because "it is well known that the population in this country is living significantly longer than was anticipated in the past . . . ." *Id.*

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<sup>2</sup> Plaintiff's policy states, "ACTUAL MONTHLY COST OF INSURANCE RATES WILL BE DETERMINED BY THE COMPANY BASED ON ITS EXPECTATIONS AS TO FUTURE MORTALITY EXPERIENCE," and "Current monthly cost of insurance rates will be determined by the Company based on its expectation as to future mortality experience." Compl. Ex. A at A-29, A-34.



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 08-1506 AHM (JTLx) Date December 8, 2008  
Title CELEDONIA X. YUE v. CONSECO LIFE INSURANCE COMPANY

Plaintiff alleges that when policyholders were procuring coverage Conseco did not disclose its intent to impose massive cost of insurance increases beginning in policy year 21, and policyholders thus "relied on the lower cost of insurance rates in purchasing the Policies, continuing to pay premiums respecting the Policies, and not seeking insurance coverage elsewhere." Compl. ¶ 56. Plaintiff also alleges that the increases

are so dramatic, sudden, and unexpectedly large that many members of the Class are now, or will be, unable to afford to pay these huge and unexpected increases in premium [sic] required to keep their insurance policies in force. Many policyholders will, or have been, forced to surrender their life insurance policies. In addition, upon information and belief, many of these policyholders are elderly and uninsurable and, after surrender of their policies, they will thereby be left without insurance protection and/or adequate insurance protection.

Compl. ¶ 57.

Plaintiff's Complaint alleges that the increase is consistent with a history of wrongful increases by Defendant, beginning in 1992 with "an artificial increase in the cost of insurance rate unrelated to [Conseco's] expectations as to future mortality increase," and continuing in 2003 or 2004 with Conseco's allegedly unlawful increase in the cost of insurance charge for certain policies.<sup>3</sup> Compl. ¶¶ 39, 50.

Plaintiff purports to bring this action on behalf of herself and a putative class of "[a]ll owners of ValuLife and ValuTerm 'universal life' insurance policies . . . issued by Massachusetts General or Philadelphia Life and that were later acquired by Conseco Life," with exceptions for officers and actuaries (and their families) of these companies. Compl. ¶ 12. As noted above, she asserts claims for breach of contract and violations of California Business and Professions Code § 17200, *et seq.*, and seeks injunctive,

---

<sup>3</sup> The Complaint states that the former allegations were adjudicated in the plaintiffs' favor in *Rosenbaum, et al. v. Philadelphia Life Insurance Co., et al.*, Case No. 93-0834 MRP (Eex). The latter allegations were brought before this Court in a Multidistrict Litigation proceeding and the parties eventually settled the claims. *See In re Conseco Life Insurance Company Cost of Insurance Litigation*, MDL No. 1610 AHM.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 08-1506 AHM (JTLx) Date December 8, 2008  
Title CELEDONIA X. YUE v. CONSECO LIFE INSURANCE COMPANY

monetary, and declaratory relief.

### III. LEGAL STANDARDS

#### A. Motion to Dismiss under F.R.C.P. 12(b)(1)

A party may challenge a Complaint's assertion of federal subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The burden of proving that a claim is within the jurisdiction of the federal courts rests on the party asserting federal jurisdiction. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936).

A Rule 12(b)(1) attack on jurisdiction may be either facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* When a Rule 12(b)(1) attack is facial, as it is here, the allegations in the complaint are taken as true and all reasonable inferences are drawn in favor of the pleader. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *Saridakis v. United Airlines*, 166 F.3d 1272, 1276 (9th Cir. 1999).

#### B. Motion to Dismiss under F.R.C.P. 12(b)(6)

On a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wylar Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Thus, if the complaint states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory, the complaint should not be dismissed. *Haddock v. Bd. of Dental Exam'rs*, 777 F.2d 462, 464 (9th Cir. 1985).

Federal Rule of Civil Procedure 8(a)(2) requires

only a short and plain statement of the claim showing that the

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 08-1506 AHM (JTLx) Date December 8, 2008  
Title CELEDONIA X. YUE v. CONSECO LIFE INSURANCE COMPANY

pleader is entitled to relief,” in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]” . . . While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . , a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . . Factual allegations must be enough to raise a right to relief above the speculative level.

*Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007) (citations omitted).

“Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. . . . However, material which is properly submitted as part of the complaint may be considered” on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss without converting the motion to dismiss into a motion for summary judgment. *Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001). If the documents are not physically attached to the complaint, they may be considered if their “authenticity . . . is not contested” and “the plaintiff’s complaint necessarily relies” on them. *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998). Furthermore, under Fed. R. Evid. 201, a court may take judicial notice of “matters of public record.” *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). “The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading.” 5C Wright & Miller, *Fed. Prac. & Pro.* § 1363 (3d ed. 2004).

Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted).

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**IV. DISCUSSION**

Defendant's motion to dismiss argues that Plaintiff's breach of contract claim is not ripe, that Plaintiff has no standing to assert a claim pursuant to California's Unfair Competition Law, and that Plaintiff has not presented a case or controversy warranting declaratory relief.

**A. Ripeness of the Breach of Contract Claim**

Plaintiff's breach of contract claim is that

Defendant materially breached the terms and provisions of the Policies by increasing the cost of insurance charges respecting the Policies in order to increase premium revenue when the increase in cost did not relate to any change in the expectation as to the future mortality experience of Defendant . . . . Defendant did not give adequate notice or explanation of this increase to Plaintiff and members of the Class and Defendant attempted to conceal the intended dramatic increase in cost of insurance charges respecting the Policies. . . . By so suddenly and dramatically increasing the cost of insurance charges beginning in policy year 21, Defendant has effectively conceded that the increase is not and could not possibly be based on its expectations as to future mortality experience. By increasing the cost, and thereby requiring substantial additional premiums from Plaintiff and members of the Class, Defendant has materially breached the Policies.

Compl. ¶¶ 64-65. Plaintiff also alleges that "[a]s a direct and proximate result of" the breach "Plaintiff and members of the Class have suffered damages under the Policies in an amount to be determined . . . at the time of trial." *Id.* ¶ 67. In addition, Plaintiff and the putative class "seek an injunction against Defendant requiring it in the future to charge only the cost of insurance explicitly permitted under the terms of the Policies and to otherwise comply strictly with the terms of the Policies." *Id.*

Defendant levels a scattershot attack on this breach of contract claim. First, it contends that the claim is not ripe because the cost of insurance increase is speculative and may never occur. Second, it argues that the claim is invalid because Plaintiff has suffered no damages. Third, it argues that the claim is not ripe because performance of

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the policy's relevant terms is not yet due. Finally, it contends that Plaintiff cannot, as an alternative to the breach of contract claim, assert a claim for anticipatory breach of contract because Plaintiff has not terminated the insurance policy and she has not alleged that Conseco's repudiation of the contract was made in clear and certain terms. The Court is not persuaded by any of these arguments.

1. The alleged increases are not speculative

The question of ripeness goes to the Court's subject matter jurisdiction. *Haw. Newspaper Agency v. Bronster*, 103 F.3d 742, 746 (9th Cir. 1996). Ripeness has both a constitutional and a prudential component. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). With respect to Plaintiff's breach of contract claim, Defendant challenges the prudential component. "In evaluating the prudential aspects of ripeness, our analysis is guided by two overarching considerations: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id.* at 1141 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). An issue is not fit for adjudication if it involves "contingent future events that may not occur as anticipated or indeed not occur at all." *18 Unnamed John Smith Prisoners*, 871 F.2d 881, 883 (9th Cir. 1989) (quoting *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 580-81 (1985)); see also 15 James Wm. Moore, *Moore's Federal Practice* § 101.76[1][a] (3d ed. 2008) ("The critical question concerning fitness for review is whether the claim involves uncertain and contingent events . . ."). "In the absence of an immediate and certain injury to a party, a dispute has not 'matured sufficiently to warrant judicial intervention.'" *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)).

Defendant argues that Plaintiff's claims hang on future events that may never occur: "Plaintiff's [cost of insurance] rates under the Policy *may* increase in 2016. But they may not. Only then, *if* the [cost of insurance] rates increase, will it be possible to fully explore the reasons and effect of such increases." Mot. at 3. Defendant continues, "At present, there may (or may not) be an intent to raise rates in 2016, but Conseco may decide not to; it may decide to raise them even further, if mortality continues to deteriorate . . ." *Id.* at 3-4. Furthermore, Defendant says, "Plaintiff may, or may not, own the Policy in 2016; it is also possible that all benefits under the Policy may be paid before 2016, should Plaintiff's mother no longer be with us." *Id.* at 4.

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Plaintiff replies that her complaint squarely alleges that Conseco has already adopted the cost of insurance increase, albeit one that will begin in policy year 21. *See, e.g.,* Compl. ¶ 4 (“Defendant has unlawfully re-priced those policies and drastically and precipitously increased the cost of insurance charges”); ¶ 5 (Plaintiff seeks “an injunction requiring Defendant to reverse the unlawful increases”); ¶ 21 (questions common to class include “whether Defendant’s actions to increase the . . . charges on the Policies violated the terms of the Policies”); ¶ 64 (“Defendant materially breached the terms and provisions of the Policies by increasing the cost of insurance charges”).

Plaintiff also points out that the Complaint alleges an immediate and certain impact on herself and members of the putative class. An increase in the cost of insurance charges shortens the period of coverage because it depletes the funds in the insured’s account more quickly, and a policy with a shortened period of coverage is worth less. Opp. at 2. Moreover, if Plaintiff wishes to maintain the period of coverage she expected when she purchased her policy, she will have to deposit additional funds in the account. Thus, “[p]olicyholders like Plaintiff Yue are immediately confronted with the need to decide, now, whether to increase funding to deal with the cost of insurance increase.” *Id.* at 3. Plaintiff also notes that “Policyholders purchase life insurance to plan for the future, not to face the insecurity of a possible precipitous surrender or lapse late in life, when securing alternative life insurance will be cost-prohibitive and highly uncertain” because life insurance is much more expensive to obtain in later years. *Id.* at 4.

The Court finds that although some parts of the Complaint do describe the increase in prospective terms, when the Complaint is read as a whole it is clear that Plaintiff alleges that Conseco has already made a decision to increase rates. The Court holds that this allegation is sufficient to make the issue fit for adjudication. Conseco has given not even a sliver of a reason to believe that if the allegations are true — as the Court is required to assume they are — it does not intend to increase cost of insurance rates later on. Although Plaintiff may decide before 2016 to abandon the Policy for reasons unrelated to this lawsuit, and her mother may pass away before then, those possibilities do not negate the fact that 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. They are “ripe” in the practical sense, and it would impose a hardship on Plaintiff if the Court were to decide that this matter is not ripe for adjudication.

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The cases relied upon by Defendant do not alter this analysis. In *Clinton v. Acequia, supra*, Clinton alleged that he and one Ms. Haley had entered an agreement to liquidate the defendant corporation, Acequia, which she and Acequia breached. The Ninth Circuit addressed whether Clinton's breach of contract claim had sufficient federal character to support removal. At oral argument in May 1996, Clinton's counsel conceded that the claim "may not be ripe for reconsideration, or even to come before the court, until 1997." *Clinton*, 94 F.3d at 572. Counsel for Acequia contended that Acequia was not required to liquidate but that "as a practical matter" it would have to be sold by 1997 in order to meet its obligations to its largest creditor. *Id.* The Ninth Circuit held that the contract claim was not ripe because "[t]he parties agree that, if an agreement to liquidate the corporation even exists, Acequia has until 1997 to perform its obligation. We have no way of knowing whether Acequia will actually do so, but a case is not ripe where the existence of the dispute itself hangs on future contingencies that may or may not occur." *Id.* Unlike in *Clinton*, the parties in this case do not agree that Plaintiff need not take legal action before 2016 in order to prevent Defendant from breaching alleged contractual obligations. Nor is there any basis for the Court to find that Defendant will otherwise fulfill those alleged obligations "as a practical matter" or for any other reason. *Clinton* therefore is inapposite.<sup>4</sup>

For the above reasons the Court holds that it is prudent to review Plaintiff's breach of contract claim and that she has stated a basis for it to do so.

2. Plaintiff seeks available relief

Defendant next argues that Plaintiff does not state a breach of contract claim because she cannot (and does not) allege that she has suffered any immediate or certain damage from future increases in cost of insurance rates. Mot. at 4. *See Armstrong Petro.*

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<sup>4</sup> Defendant also relies on a series of decisions in New York state court that it refers to as the "vanishing premium" cases. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201 (N.Y. 2001); *Heslin v. Metro. Life Ins. Co.*, 733 N.Y.S.2d 753 (N.Y. App. Div. 2001). Those cases are, of course, not binding authority, and the Court does not find their reasoning persuasive. Moreover, at least one other state court has come to a different conclusion about the justiciability of vanishing premium claims. *See Szymanski v. Boston Mut. Life Ins. Co.*, 778 N.E.2d 16 (Mass. App. Ct. 2002).

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*Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal. App. 4th 1375, 1391 n.6 (Cal. Ct. App. 2004) ("A cause of action for *damages* for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) the *resulting damages* to plaintiff." (internal quotation marks and citation omitted) (emphasis added)).

Defendant may be correct that the monetary damages Plaintiff Yue seeks are not now supported by any rate increase (since there has not yet been an increase). However, before resolution of the merits of her claim, she may be forced to provide increased funding in order to maintain her expected period of coverage. Moreover, Plaintiff also seeks injunctive relief. Such relief is not contingent on the availability of money damages. "[T]he fact [plaintiff] may have suffered no monetary damage would not defeat [plaintiff's] right to specific performance." *Union Oil. Co. of Cal. v. Greka Energy Corp.*, 165 Cal. App. 4th 129, 136 (Cal. Ct. App. 2008) (internal citation omitted). Defendant correctly notes that specific performance is available only where the Plaintiff's legal remedy is inadequate, see *id.* at 134, but also asserts that "[i]t is usually reserved for cases involving real property or unique services, and has no application here." So what? Defendant cites no case supporting the conclusion that such a remedy could not be applicable in this case, and the Court sees no reason to conclude that it is not.

3. Performance is due

In Defendant's Reply in support of its motion, it reframes in new terms what is essentially its basic argument about ripeness: that Conseco could not have breached the insurance contracts because under California law a breach of contract by nonperformance occurs only when there is "an unjustified failure to perform a material contractual obligation *when performance is due*." *Cent. Valley Gen. Hosp. v. Smith*, 162 Cal. App. 4th 501, 514 n.3 (Cal. Ct. App. 2008) (emphasis added). Performance is not due, Defendant argues, until 2016, the year that Defendant allegedly intends to increase the cost of insurance charges for Yue's policy.

Plaintiff's insurance policy simply states that the insurer will only raise the cost of insurance charge under certain conditions, but does not otherwise provide when performance is "due." Under California law, if a contract does not specify the time of performance, and the act cannot be done "instantly" (such as with an obligation to pay



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money), performance is due within a reasonable time. *See Consol. World Invs. v. Lido Preferred Ltd.*, 9 Cal. App. 4th 373, 381 (Cal. Ct. App. 1992); *Standard Box Co. v. Mut. Biscuit Co.*, 10 Cal. App. 746, 750 (Cal. Ct. App. 1932); 1 Witkin, *Summary of Cal. Law* § 762 (2005). What constitutes a “reasonable time” for performance is a question of fact, and depends on the circumstances of each case. *Consol. World. Invs.*, 9 Cal. App. 4th at 381.

The Court finds that it is reasonable to construe the Complaint to allege that Conseco may not decide to raise its cost of insurance rates in violation of the policy’s terms at *any* point during the life of the policy — whether the increase will take effect immediately or at some future point in the term of coverage. Allowing an insurer to decide at any point to increase cost of insurance charges for reasons not permitted by the policy would constitute a breach and require the insured to face the burdens discussed above, including uncertainty about the cost and duration of the policy and the pressing need to decide whether to continue to fund coverage. The Court thus holds that Plaintiff has stated a valid breach of contract claim. It therefore is unnecessary to address whether Plaintiff has also stated a valid claim for anticipatory breach of contract.

**B. Plaintiff’s Standing to Assert a Claim Pursuant to the UCL**

Plaintiff brings her second cause of action pursuant to California Business and Professions Code § 17200, *et seq.*, also known as the Unfair Competition Law (UCL). She alleges that Defendant committed acts of unfair competition by, among other things, changing the cost of insurance rates for the Policies on grounds unrelated to Defendant’s expectation as to future mortality experience, and sending annual reports to policyholders without disclosing sudden and dramatic increases in the cost of insurance charges. Compl. ¶ 69. Plaintiff asks the Court to enjoin Defendant from continuing to engage in this conduct and preventing Defendant from collecting the increased cost of insurance charges in violation of the Policies. *Id.* ¶ 71. She also asks for restitution to be paid by Defendant to its insureds for premiums and other amounts wrongfully obtained as the result of the allegedly unlawful increase. *Id.* ¶ 72.

Defendant argues that Plaintiff does not have standing to bring this claim because as a result of Proposition 64, passed in 2004, a private individual may bring a UCL claim only if she “has suffered injury in fact and has lost money or property as a result of [the

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alleged] unfair competition.” Cal. Bus. & Prof. Code § 17204; *see Daghlia v. DeVry Univ., Inc.*, 461 F. Supp. 2d 1121, 1154-55 (C.D. Cal. 2006). Defendant contends that Plaintiff has not suffered any injury in fact or lost any money or property as a result of the cost of insurance increase allegedly slated to take effect in 2016, and that it is speculative whether Plaintiff will ever suffer any damages from that increase.

The Court holds that Plaintiff has stated a claim pursuant to the UCL, because the alleged diminution in the value of Plaintiff’s insurance policy is a “loss of property” sufficient to bring a claim. For all the reasons discussed above, Conseco’s alleged decision to increase the cost of insurance charges means that the life insurance policy is worth less to Plaintiff than it was previously.

**C. Declaratory Relief**

Plaintiff’s third cause of action seeks a declaratory judgment that the alleged cost of insurance increases are unlawful and in material breach of the Policies. Compl. ¶ 77. Defendant argues that the absence of a case or controversy bars this request for a declaration.

To determine whether a controversy exists such that declaratory relief may be granted, “the question . . . is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (citation omitted).

Defendant contends that the Complaint does not identify a controversy “of sufficient immediacy” regarding Conseco’s decision to increase the cost of insurance rates. In her Opposition, Plaintiff raises the issue of whether there is a “substantial controversy,” and states that there is a controversy “as to Conseco Life’s interpretation of the Policy as allowing it to assess the cost of insurance increase without any regard for its expected future mortality experience.” In its Reply, Defendant argues that no “substantial controversy” exists because the Complaint does not plead that Conseco has an interpretation of the Policy allowing it to assess the cost of insurance increase without any regard for its expected future mortality increase. This exchange is a red herring; as the Complaint makes clear, the source of the substantial controversy “of sufficient

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immediacy" in this case is the allegation that Defendant already has raised cost of insurance charges for a reason not permitted under the terms of the Policy. Whether Defendant interprets the Policy to permit it to have done what Plaintiff alleges is irrelevant.

For these reasons the Court holds that Plaintiff has properly stated a claim for declaratory relief.

**V. CONCLUSION**

For the above reasons the Court DENIES Defendant's Motion to Dismiss.<sup>5</sup>

This Order is not intended for publication.

Initials of Preparer

                      
RJ  
                    

<sup>5</sup> Docket No. 28.

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15 UNITED STATES DISTRICT COURT

16 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION  
17

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

20 Plaintiff,

21 v.

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

26 Defendant.  
27  
28

Case No. CV08-01506 AHM (CTx)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR CLASS  
CERTIFICATION**

Hearing Date: August 10, 2009  
Time: 10:00 a.m.  
Courtroom: 14  
Judge: Hon. A. Howard Matz

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The Supreme Court has made clear that the Constitution requires district courts to apply, for each class member, the substantive state laws that govern that class member's claims. This case involves a breach of contract claim arising out of policies that were issued for delivery in, and therefore governed by the laws of, almost each of the 50 states (49 states, plus the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands).<sup>1</sup> Defendant Conseco Life Insurance Company ("Conseco") is domiciled and headquartered in Indiana. The Constitution and California choice-of-law rules bar this Court from applying California law to the claims of the non-California class members where California law diverges from the laws of the jurisdictions where the policies were issued.

We demonstrate below that this case raises complex issues of state contract law upon which state laws vary significantly. This Court’s decision denying Consecro’s motion to dismiss the Complaint [Docket Entry (“DE”) 51] is “Exhibit A.” There, in

1

1 footnote 4, the Court rejected as “[un]persuasive” the reasoning of the New York’s  
2 highest court in the “vanishing premium” cases (under which Yue’s claims would be  
3 premature), finding Massachusetts’ divergent approach more appealing. Alabama,  
4 Texas, Pennsylvania, North Carolina, and Tennessee follow New York’s approach,  
5 ruling that claims predicated on future changes in rates or premiums are premature until  
6 the changes take effect. *See* Point I, below. In adjudicating class claims, the  
7 Constitution, Supreme Court precedents and California choice-of-law rules require the  
8 Court to understand and apply nuanced differences in the laws of each of the  
9 jurisdictions in which the policies were issued, even if that will lead to divergent results.  
10 In this motion, Yue bore the burden of identifying state law variations such as these –  
11 and state laws vary on many issues in this case – and proving to the Court that trial will  
12 be manageable despite many variations. Yue did not bother trying to meet that burden,  
13 and her motion should be denied for that reason alone.

14 Class certification should be denied for other reasons. *First*, the proposed class  
15 lacks the requisite cohesiveness. For example, this Court will need to apply a  
16 “discovery rule” to determine whether the claims of class members from certain states  
17 are time-barred, because their claims are subject to state laws that use that rule. That  
18 will require individualized proof and “mini trials” to determine when those class  
19 members learned of the 2002 cost of insurance (“COI”) increase, thus defeating the  
20 purpose of class treatment. *Second*, Yue is not an adequate representative because  
21 California’s applicable four-year statute of limitations bars her individual claims.

## 22 STATEMENT OF FACTS

23  
24 Plaintiff Celedonia Yue seeks to certify a class of “[a]ll owners of ValuLife and  
25 ValuTerm ‘universal life’ insurance policies (the ‘Policies’) issued by either  
26 Massachusetts General or Philadelphia Life and that were later acquired by Conseco  
27 Life.” *See* Complaint [DE 1] ¶ 12. The gravamen of Yue’s Complaint is that Conseco  
28 allegedly increased COI rates in breach of the Policies owned by the putative

1 nationwide class. *Id.* ¶¶ 2-3. Yue seeks declaratory and injunctive relief from the  
2 alleged “staggering [COI] increases” that Conseco “unlawfully imposed,” even though  
3 the COI changes will not affect her policy until 2016, assuming that her policy is still  
4 active and that the insured, her mother, is still alive. *Id.* ¶ 2.

5 Yue posits that this case involves a “single, straightforward, determinative,  
6 purely legal issue.” See Plaintiff’s Motion to Certify [DE 70] at 2. Her actions  
7 contradict this. She has adopted a scorched earth approach to discovery, noticing six  
8 depositions and issuing subpoenas for several of Conseco’s advisors, including its  
9 attorneys. See Declaration of Adam J. Kaiser (“Kaiser Decl.”), ¶ 8.

10 The Conseco document on which Yue relies in this motion shows that Conseco  
11 fully studied the contract language underlying the proposed COI increase. See  
12 Declaration of Timothy P. Dillon, Ex. A. The Conseco actuary concludes that all of the  
13 internal and outside actuaries “believe it [the proposed COI increase] is well within  
14 actuarial standards of practice and satisfies policy contract language . . . I am  
15 comfortable signing the yearend certification of nonguaranteed elements, in which I  
16 will state that coi change meets actuarial standards of practice, and by implication  
17 satisfies policy contract language requirements.” *Id.* This affirmation confirms that  
18 skilled and well-respected outside actuaries concluded that the proposed increasing COI  
19 rates met policy standards.<sup>2</sup>

20  
21  
22  
23 <sup>2</sup> Yue complains of Conseco’s “procedural gamesmanship” in filing a motion to transfer this case to  
24 Judge Snyder and then later, to transfer the case to the district court in Indiana. The Court undercut  
25 those complaints. In the first motion, Conseco advised the Court of a relationship between a court  
26 employee and an associate at this firm, as the law required. The Court noted that Conseco’s  
27 application was made in good faith. [DE 25]. On the second motion, the Court’s tentative ruling  
28 granted the motion, thus destroying any complaint of “gamesmanship.” But this was gamesmanship:  
Yue did not serve Conseco with her notice of transfer of this case when she served the Complaint, in  
violation of Local Rule 83-1.3. See Local Rule 83-1.3.1 (“The Notice of Related Case also shall be  
served concurrently with service of the complaint”). Later, Yue argued that Conseco’s motion to  
transfer the case to Judge Snyder was “untimely,” even though she did not dispute that she violated the  
Local Rules.

1 **ARGUMENT**

2 “Before certifying a class, the trial court must conduct a ‘rigorous analysis’ to  
3 determine whether the party seeking certification has met the prerequisites of Rule 23.”  
4 *Zinser v. Accufix Research Inst., Inc.* 253 F.3d 1180, 1186 (9th Cir. 2001) (citing  
5 *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996)). *See also Gen.*  
6 *Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Sweet v. Pfizer*, 232 F.R.D.  
7 360, 366 (C.D. Cal. 2005). Here, Yue has failed to meet her burden under Rule 23  
8 because she: (i) fails to identify the variations in governing state laws that apply to the  
9 putative nationwide class; (ii) deprives the Court of the information necessary to  
10 conduct the required choice-of-law analysis; and (iii) fails to present a trial plan for  
11 managing the application of the divergent state laws. Accordingly, her motion for class  
12 certification should be denied.

13 **I. YUE HAS FAILED TO IDENTIFY THE VARYING STATE LAWS THAT**  
14 **GOVERN THE PROPOSED CLASS' CLAIMS**

15 **A. Applicable Principles**

16 “[E]ven though Rule 23(b)(2), unlike Rule 23(b)(3), does not specifically contain  
17 predominance and superiority requirements, a class under Rule 23(b)(2) must not be  
18 overrun with individual issues.” *Sweet*, 232 F.R.D. at 374 (citing *Barnes v. Am.*  
19 *Tobacco Co.*, 161 F.3d 127, 142-43 (3d Cir. 1998)) (“While 23(b)(2) class actions have  
20 no predominance or superiority requirements, it is well established that the class claims  
21 must be cohesive”). Thus, “the problems that are fatal to Rule 23(b)(3) certification are  
22 likewise fatal to Rule 23(b)(2) certification.” *Sweet*, 232 F.R.D. at 374 (citing *In re*  
23 *Paxil Litig.*, 212 F.R.D. 539, 552 (C.D. Cal. 2003)).

24 In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the United States  
25 Supreme Court recognized that due process guarantees require a federal court sitting in  
26 diversity to use the choice-of-law test of the forum state to identify the substantive state  
27 laws that should be applied to each individual class member’s claims. The Court held  
28 that the Kansas Supreme Court erred in upholding the application of Kansas contract

1 law class-wide, without first determining whether Kansas law conflicted with other  
2 potentially applicable states' laws. *Id.* at 822-23 and n.8. *Shutts* made clear that the  
3 class action device cannot be used to avoid the due process mandate that the appropriate  
4 state's substantive law should be applied to each class member's individual claims. *Id.*  
5 at 821.

6 Thus, before certifying a nationwide class action in a diversity case, the district  
7 court must perform a choice-of-law analysis, analyzing the laws of each state that will  
8 apply to the class claims, and then apply each state's law as required by the forum  
9 state's choice-of-law rules. As one California court stated:

10 To determine which state's law applies, the court must compare the interest  
11 of each relevant non-forum state with the law of California in order to  
12 determine first if there is a conflict, and then if so, which state has a greater  
13 interest in having its law apply to the dispute. . . . The choice of law  
14 analysis must be applied to each claim upon which certification is sought. .  
15 . . Here, the proposed class is nationwide, and therefore, each of the fifty  
16 states may have an interest in seeing that its law is applied in an action  
17 involving one of its own injured citizens.

18 *Lewallen v. Medtronic USA, Inc.*, No. C 01-20395 RMW, 2002 WL 31300899, at \* 5  
19 (N.D. Cal. Aug. 28, 2002). *See also Spence v. Glock*, 227 F.3d 308, 312-13 (5th Cir.  
20 2000) (district court performed inadequate choice-of-law analysis; proper choice-of-law  
21 analysis required consideration of every state's laws); *In re Am. Med. Sys., Inc.*, 75 F.3d  
22 1069, 1085 (6th Cir. 1996) (nationwide class certification reversed when court "failed  
23 to consider how the law of negligence differs from jurisdiction to jurisdiction"); *In re*  
24 *Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995) (class decertified  
25 where district court skipped choice-of-law analysis); *Walsh v. Ford Motor Co.*, 807  
26 F.2d 1000, 1011-1012, 1016-1017 (D.C. Cir. 1986) (class certification reversed where  
27 district court failed to perform nationwide choice-of-law analysis); *Lyon v. Caterpillar,*  
28 *Inc.*, 194 F.R.D. 206, 213 (E.D. Pa. 2000) (citing *Shutts* and acknowledging need to



1 apply “individualized choice of law analysis to each plaintiff’s claims”) (citation  
2 omitted).

3 The analysis *Shutts* requires is a critical component to the class certification  
4 determination. Absent class members have a due process right to have their own state’s  
5 laws applied to their claims. Thus, it is critical, in protecting the rights of absent class  
6 members, to fully analyze state law variations. Similarly, as the Supreme Court has  
7 stated, “[d]ue process requires that there be an opportunity to present every available  
8 defense.” *Lindsay v. Normet*, 405 U.S. 56, 66 (1972). Consecro has the right to assert  
9 every defense available under the laws of each state. Only by conducting the choice-of-  
10 law analysis that *Shutts* mandates can the Court vindicate Consecro’s due process rights  
11 and those of the absent class members. In this case, Yue has not even bothered to  
12 identify the varying principles of state laws that apply to the putative class claims, a  
13 dereliction that defeats her motion.<sup>3</sup> Yue bore that burden: “when a request for class  
14 certification encounters differing state laws, the burden is on the party seeking  
15 certification to creditably demonstrate, through an extensive analysis of state law  
16 variances, that class certification does not present insuperable obstacles.” *Duncan v.*  
17 *Nw. Airlines, Inc.*, 203 F.R.D. 601, 613 (W.D. Wash. 2001) (citation omitted).

18 Here, state law diverges widely on numerous issues and presents insuperable  
19 obstacles to class certification. When a plaintiff, such as Yue, sues her insurer for  
20 breach of contract based on the insurer’s decision to increase rates or premiums in the  
21 future, at least the following issues apply:

- 22 1. When the policyholder’s claim accrues;
- 23 2. Whether discovery rules apply to the accrual of such a claim;
- 24
- 25

26 <sup>3</sup> Even minor state law differences, or varying state law “nuances,” will defeat certification of a  
27 nationwide class. See e.g., *In re Stucco Litig.*, 175 F.R.D. 210, 216 (E.D.N.C. 1997); *Wash. Mut. Bank*  
28 *v. Superior Court*, 15 P.3d 1071, 1083 (Cal. 2001) (reviewing federal case law and noting that “even  
slight variations and nuances in applicable state laws may affect predominance and manageability”).  
Here, Yue ignored all state law variations, major and minor, all of which are of important to this case.

- 1           3.    What tolling rules, if any, apply to the timeliness of the
- 2                policyholder's bringing suit;
- 3           4.    Whether, based on the state laws identified in response to items 1
- 4                through 3, above, the policyholder's claim is premature;
- 5           5.    Whether, based on the state laws identified in response to items 1
- 6                through 3, above, the policyholder's claim is time-barred;
- 7           6.    Whether state law deems the claim as one for (a) a present
- 8                breach of the contract, (b) an anticipatory breach, or (c) either (a) or
- 9                (b), at the policyholder's election;
- 10          7.    Whether state law requires a policyholder to make an election of
- 11                remedies where the policyholder has a choice of treating its claim as
- 12                one for either a present breach or an anticipatory repudiation; and
- 13          8.    Whether specific performance is an available remedy.

14           Space limitations preclude us from discussing the divergent state laws on all of  
15 these issues, but the burden was on Yue to identify these issues of divergent state laws  
16 and present a trial plan proving that they could be reasonably managed. Yue made no  
17 attempt to meet that burden. We nonetheless identify a few state law variations  
18 involved here, highlighting how they may be outcome determinative.

19                   **B.    California's Choice-Of-Law Rules Require the Court to Apply**  
20                   **the Laws Of 53 Jurisdictions**

21           A federal court sitting in diversity must look to the forum state's choice-of-law  
22 rules to determine the controlling substantive laws. *Shutts*, 472 U.S. at 815-823.  
23 California applies the governmental interest approach to conflict of law questions.<sup>4</sup>  
24 Under this test, the Court should not apply California law to the claims of non-

25  
26           <sup>4</sup> Under the first step of this approach, the applicable rule of law in each potentially concerned state  
27 must be examined for material differences from California law. Where the laws differ, the court must  
28 determine what interest each state has in having its own law applied to the case. Where a material  
conflict exists and the court determines that each state has an interest in having its own law applied, the  
court must select the law of the state whose interests would be "more impaired" if its law were not  
applied. *Zinser*, 253 F.3d at 1187.

1 California, putative class members where California law differs materially from the  
2 laws of the jurisdiction where the putative class member's policy was issued.  
3 California has no interest in applying its laws to claims of putative class members who  
4 bought their policies from an Indiana-domiciled insurer in states other than California.

5 Yue deprived this Court of the information it needed to perform the choice-of-  
6 law analysis. *First*, she did not identify or discuss the substantive issues on which state  
7 laws diverge. *Second*, she did not compare competing state interests that apply to the  
8 varying state laws. These omissions are fatal to her motion.

9 *Sweet, supra*, is on point. There, like here, the substantive state laws that  
10 governed the claims of the nationwide class varied significantly. The court declined to  
11 certify a class under Rule 23(b)(2) for the same reason it declined to certify the class  
12 under Rule 23(b)(3): plaintiff's failure to "address potential difficulties with the  
13 possible application of numerous state laws . . . [which] weighs heavily against  
14 certification." 232 F.R.D. at 374. There, unlike here, plaintiff at least attempted to  
15 organize putative class members into subclasses based on the varying state laws, but the  
16 Court found that class treatment was still unmanageable given the individual issues that  
17 remained. *Id.* Many other courts have denied certification on similar grounds.<sup>5</sup>

### 18 C. An Example of State Law Variations: Prematurity

19 This case involves future COI rate increases that may take effect in the 21st  
20 policy year for putative class members (which would occur in 2016 for Yue), assuming

21 <sup>5</sup> See, e.g., *Block v. Abbott Labs.*, No. 99 C 7457, 2002 WL 485364, at \* 8 (N.D. Ill. Mar. 29, 2002)  
22 ("Significant variations in applicable state laws . . . preclude any finding that 'the interests of the class  
23 members are cohesive and homogeneous'") (citation omitted); *Clay v. Am. Tobacco Co.*, 188 F.R.D.  
24 483, 495-96 (S.D. Ill. 1999) (legal variation precluded certification); *Marino v. Home Depot U.S.A.,*  
25 *Inc.*, 245 F.R.D. 729, 734 (S.D. Fl. 2007) (A district court's "duty to determine whether the plaintiff  
26 has borne its burden on class certification requires that a court consider the variations in state law when  
27 a class action involves multiple jurisdictions"); *Sanders v. Johnson & Johnson, Inc.*, Civ. No. 03-  
28 2663(GEB), 2006 WL 1541033, at \*10 (D.N.J. June 2, 2006) (plaintiff must show that the proposed  
class is cohesive on issues of law, as well as issues of fact); *In re Propulsid Prods. Liab. Litig.*, 208  
F.R.D. 133, 147 (E.D. La. 2002) (plaintiff bears the burden of providing an extensive review and  
analysis of the varying applicable state laws); *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 450  
(D.N.J. 2009) (courts must determine whether the laws in each of the 50 states are uniform before  
certifying a proposed class; otherwise class treatment is likely to be unmanageable and inefficient).

1 the insured is still alive then, the COI increase is not retracted for reasons unrelated to  
2 this case, and the insured's policy did not lapse for other reasons. Conseco argued that  
3 Yue's claims are premature under the substantive laws of California, where Yue lives  
4 and the policy was issued, and under federal law. This Court ruled that, even though  
5 Yue will not need to pay increased premiums, if ever, until 2016, the Complaint stated a  
6 claim for a *present* breach of contract, as opposed to an *anticipatory* breach, because,  
7 under California law, Conseco's performance under her policy is continuously due and  
8 there is a breach when Conseco "decide[s] at any point to increase cost of insurance  
9 charges for reasons not permitted by the policy" [DE 51 at 10]. The Court also  
10 concluded that Yue's claims are now "ripe in the practical sense" under California law  
11 because her policy is allegedly worth less due to the distant COI increase. *Id.* at 8.

12 State laws vary on this issue. Numerous jurisdictions have ruled that similar  
13 "vanishing premium" claims are premature unless and until the day arrives when future  
14 premiums become due. As this Court noted, New York follows this approach. *Id.* at 9  
15 n.4. Alabama, North Carolina, Texas, Tennessee and Pennsylvania, for example,  
16 follow the New York rule.<sup>6</sup>

17 In denying Conseco's motion to dismiss, this Court interpreted California law as  
18 rejecting the New York approach and favoring the Massachusetts approach. In doing so,  
19 the Court recognized that state laws vary widely on this issue and produce opposite  
20 results. *Id.* If a class were to be certified, however, this Court will be required to apply

21  
22 <sup>6</sup> See *DeArman v. Liberty Nat'l Life Ins. Co.*, 786 So. 2d 1090, 1092 (Ala. 2000) (vanishing premium  
23 claim premature until the policyholder is required to make a premium payment after the date upon  
24 which the policy was to become self-sustaining); *Strategic Outsourcing, Inc. v. Cont'l Cas. Co.*, 414 F.  
25 Supp. 2d 545, 550-51 (W.D.N.C. 2006) (breach of contract claim is premature when insurer merely  
26 notifies the insured that it will raise rates in the future); *Frith v. Guardian Life Ins. Co. of Am.*, 9 F.  
27 Supp. 2d 734, 738 (S.D. Tex. 1998) ("To date, Plaintiffs have not made the eighth and purportedly  
28 final premium payment on this policy. Since Plaintiffs' claims . . . involve uncertain and contingent  
future events, such as the insured's status in November of 1998 and future premium and dividend  
payments, the Court finds that such claims are not ripe for adjudication"); *McDonnell v. Conseco Life  
Ins. Co.*, No. CT-003288-04, 2005 WL 6149704 (Tenn. Cir. Ct. Oct. 13, 2005); *Solomon v. Guardian  
Life Ins. Co. of Am.*, No. CIV.A. 96-1597, 1996 WL 741888, at \* 4 (E.D. Pa. Dec. 10, 1996);  
*Renkiewicz v. Commercial Union Life Ins. Co. of Am.*, No. Civ.A. 98-CV-1564, 1999 WL 820452, at \*  
3 (E.D. Pa. Sept. 29, 1999).

1 the varying laws of each relevant jurisdiction, with their subtle nuances, to class  
2 members whose policies were issued in that state. *See Shutts*, 472 U.S. at 815-23. Yue  
3 has not provided this Court with any analysis of the divergent state laws on this  
4 prematurity issue (or any other issue), as she was required to do. She ignored her  
5 burden.

6 The certification of a class in the absence of such an analysis threatens to deprive  
7 both Conseco and absent class members of constitutional due process rights. *Lindsay v.*  
8 *Normet*, 405 U.S. 56, 66 (1972) (“[d]ue process requires that there be an opportunity to  
9 present every available defense”) (citation omitted). *McDonnell v. Conseco Life Ins.*  
10 *Co.*, No. CT-003288-04, 2005 WL 6149704 (Tenn. Cir. Ct. Oct. 13, 2005), illustrates  
11 this point. There, a Tennessee court analyzed varying state laws on breach of contract  
12 claims when plaintiff’s claim was predicated on an alleged impermissible premium  
13 increase. Just as this Court did, the court there explained that the “[c]ourts that have  
14 heard ‘vanishing premium’ cases have reached divergent conclusions as to when a  
15 plaintiff[’s] claim accrues.” *McDonnell*, 2005 WL 6149704. Ultimately, after  
16 reviewing the law of several states, the Tennessee court adopted the New York rule and  
17 dismissed the complaint. *Id.*

18 Conseco must under *Shutts* be able to make its “prematurity” argument under  
19 *each* jurisdiction’s laws. In states where these claims would be deemed premature, that  
20 must be the result here, too. And, in jurisdictions where there is no clear rule, this Court  
21 must under *Shutts* review *each* state’s law and predict, based on available precedent,  
22 how *each* state would resolve the prematurity issue. Anything less would result in a  
23 violation of Conseco’s due process rights. *Lindsay*, 405 U.S. at 66. This is an  
24 enormous undertaking, considering that the laws of 53 jurisdictions apply to the class’  
25 claims. Yue ignores this.

26 What is more, each state should be allowed to address these issues for itself.  
27 *Renkiewicz v. Commercial Union Life Insurance Co. of America*, No. Civ.A. 98-CV-  
28 1564, 1999 WL 820452 (E.D. Pa. Sept. 29, 1999), demonstrates the point. There,

1 plaintiff sought certification of a nationwide class of vanishing premium claimants.  
2 Plaintiff made the same arguments as Yue as to why the claim was not premature: that a  
3 current breach caused the policyowner to suffer a present harm. The court dismissed  
4 the complaint as premature, and in doing so noted that other jurisdictions had their own  
5 ripeness and prematurity rules, which might differ from those in Pennsylvania:

6 Plaintiff cites *Myers v. Guardian Life Insurance Co. of America, Inc.*, 5  
7 F.Supp.2d 423 (M.D.Miss.1998), which ostensibly applies principles that  
8 “are fundamental and are therefore not likely to vary significantly under ...  
9 different state laws,” *id.* at 428 (quoting Judge Reed’s first opinion,  
10 *Solomon v. Guardian Life Ins. Co. of America*, No. CIV.A. 96-1597, 1996  
11 WL 741888, at \*2 (E.D.Pa. Dec. 10, 1996)), but nonetheless reaches a  
12 result directly opposite to that in the second *Solomon* opinion. Taking  
13 Myers’ subtle lesson to heart, this opinion will apply Pennsylvania law as  
14 set forth in *Solomon*, ***and it will respectfully leave decisions concerning***  
15 ***other states’ law for decision in other cases as other courts deem***  
16 ***appropriate.***

17 *Renkiewicz*, 1999 WL 820452, at \*3 n.1.

18 By the same token, certification should also be denied where divergences in state  
19 substantive laws relate to novel issues, because “the differences in state law are likely to  
20 be substantial.” *Lewallen v. Medtronic USA, Inc.*, No. C 01-20395 RMW, 2002 WL  
21 31300899, at \*5 (N.D. Cal. Aug. 28, 2002). That is the case here. Some states have  
22 adopted an approach to cases such as this, involving changes in future rates or  
23 premiums, and the law’s development is diverse, nuanced and ever changing. Yue bore  
24 the burden of proving that this Court could reasonably manage applying these state law  
25 variations, with all of their subtle nuances, but utterly failed to make any attempt to do

1 so.<sup>7</sup> The Court cannot begin to determine whether class treatment is appropriate here in  
2 the absence of Yue's meeting her burden of identifying these variations and showing  
3 how they can be reasonably managed.

4 **D. Another State Law Variation: Anticipatory Breach vs. Present**  
5 **Breach**

6 Yue has also ignored state law variations that abound on whether her breach of  
7 contract claim is one for a *present* breach, or only an *anticipatory* breach. As was the  
8 case in Subpoint C, above, divergent substantive state laws on this issue are nuanced  
9 and often outcome determinative.

10 This Court, applying California law, ruled that Yue stated a claim for a *present*  
11 breach of contract. In vanishing premium or other cases where a contracting party is  
12 sued for instituting a future price increase, however, courts applying the laws of other  
13 jurisdictions have taken the opposite approach and viewed the policyholder's contract  
14 claims as ones for anticipatory breach. *See, e.g., Asad v. Hartford Life Ins. Co.*, 116 F.  
15 Supp. 2d 960, 963 (N.D. Ill. 2000) (viewing plaintiff's claims "under an anticipatory  
16 repudiation theory" under Illinois law); *Higgins & Higgins Inc. v. Langenkamp*, No.  
17 16668/08, 2009 WL 565292, at \*2 (N.Y. Sup. Ct. Feb. 13, 2009) (finding that under  
18 New York law, "plaintiff's insistence on what amounts to a [future] 30 percent price  
19 increase . . . constituted an anticipatory breach of the contract").

20 If an absent class member's contract claim were analyzed as one for anticipatory  
21 breach only, as New York and Illinois law would require, then the class member's  
22 claim should be dismissed because, under anticipatory breach doctrines, the non-  
23 breaching party must either (i) terminate his or her contract and sue for breach *or* (ii)

24 <sup>7</sup> In making decisions about class certification, courts should carefully avoid doing "violence not only  
25 to Rule 23 but also to principles of federalism." *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012,  
26 1020 (7th Cir. 2002). In *In re Bridgestone/Firestone*, the Seventh Circuit reversed a grant of class  
27 certification, stressing the importance of respecting federalism: "Differences across states may be  
28 costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must  
not be overridden in a quest to clear the queue in court. . . . Tempting as it is to alter doctrine in order  
to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *Id.*

1 await the time of performance -- for Yue, that would be 2016 -- and then sue for breach  
2 unless the anticipatory breach is retracted. Under the laws of states that would deem the  
3 contract claim here to be one for anticipatory breach, a plaintiff cannot, as Yue does  
4 here, continue performing the contract and simultaneously sue for breach of contract.  
5 An election of remedies is an essential element of the anticipatory breach doctrine.

6 Yue bore the burden on her motion to identify these state law variations in  
7 whether class members' claims would be deemed ones for present breach, or, on the  
8 other hand, anticipatory breach, as well as the nuanced consequences that might flow  
9 from these divergences in state law. She has not done so. And, because she has not  
10 done so, she has not met her burden of showing the Court how it can reasonably  
11 manage these divergences in state law.

12 Moreover, as noted above, certification is inappropriate where, as here, the issues  
13 are novel because "the differences in state law are likely to be substantial." *Lewallen*,  
14 2002 WL 31300899, at \* 5. That is certainly the case here. We have found that no  
15 state law consensus exists on whether contract claims such as these should be  
16 considered as a claim of an anticipatory breach or a present breach. This court has  
17 viewed the claim as the latter, while the court in *Asad*, 116 F. Supp. 2d at 963, viewed it  
18 as the former. Our research leads us to conclude that a number of the 53 jurisdictions  
19 whose laws are relevant here may not have taken a position on the issue (although this  
20 was Yue's burden to research). Given the novelty of the issues, the differences in state  
21 law are no doubt "substantial" enough to deny certification. *See Lewallen, supra*.

22 **E. Another State Law Variation: Accrual of Contract Claims for**  
23 **Statute of Limitations Purposes**

24 States have divergent rules on when a breach of contract claim accrues for statute  
25 of limitations purposes. "The general rule governing the commencement of the running  
26 of the statute of limitations is that the statutory period is computed from the time when  
27 the right of action that the plaintiff seeks to enforce first accrued; ordinarily, in an  
28 action based on a contract, accrual occurs as soon as there is a breach of contract, with



1 some courts qualifying this by stating that accrual occurs when the promisee discovers  
2 or should have discovered the breach, and others stating that accrual occurs upon  
3 breach, whether or not the promisee is then aware of the breach.” 31 Williston on  
4 Contracts § 79:14 (4th ed.). Thus, in some jurisdictions a “discovery” rule applies to  
5 actions for breach of contract, while in other jurisdictions the statute of limitations will  
6 begin to run when the breach allegedly occurs, regardless of when the non-breaching  
7 party discovers or should have discovered the breach.<sup>8</sup>

8 And, other approaches exist. In some states, like California, no discovery rule  
9 applies in most cases, but a discovery rule may apply where the non-breaching party  
10 presents evidence of fraud or that the breach was intentionally conducted in secret. See  
11 43 Cal. Jur. 3d *Limitations of Actions* § 45. Not only does Yue ignore the centrality of  
12 the accrual issue, but she also overlooks that different states have different statutes of  
13 limitations.<sup>9</sup> It was Yue’s burden to address those differences.

14 <sup>8</sup> Yue’s claims for a declaratory judgment (Count III of her Complaint) will be subject to the same  
15 statute of limitations that would apply to contract actions under state substantive law. See e.g., *Middle*  
16 *Tenn. Occupational and Envtl Med., Inc. v. First Health Group Corp.*, No. 3-05-0218, 2005 WL  
17 3216282, at \*5 (M.D. Tenn. Nov. 28, 2005) (finding that if the substantive claim underlying a claim  
18 for a declaratory judgment is breach of contract, the declaratory judgment claim is subject to the same  
19 statute of limitations that governs contract actions); *Chem. and Equip. Specialties, Inc. v. Vinson*, No.  
20 CIV-05-599-C, 2006 WL 1892594, at \*3-4 (W.D. Okla. July 10, 2006) (dismissing a claim for a  
21 declaratory judgment under Oklahoma’s five-year statute of limitations governing contract actions);  
22 *Howard Jarvis Taxpayers Assn. v. City of La Habra*, 23 P.3d 601, 608 (Cal. 2001) (“[D]eclaratory  
23 judgment [is a remedy] available to enforce a variety of obligations; choice of the statute of limitations  
24 applicable to [this remedy] depends on the right or obligation sought to be enforced, and the statute’s  
25 application generally follows its application to actions for damages or injunction on the same rights  
26 and obligations”); *Ambase Corp. v. City Investing Co.*, No. 18207, 2001 WL 167698, at \*4 (Del. Ch.  
27 Feb. 7, 2001) (“Because Ambase’s injunctive and declaratory relief claims are based on a breach of  
28 contract theory and the complaint was not filed until August 2000, I held that the operation of the three  
year statute of limitations barred its claims unless some basis for equitable tolling of the statute  
existed.”) (Delaware Law). See generally, 26 C.J.S. *Declaratory Judgments* § 112 (“in the absence of  
a statute providing otherwise, the period of limitation applicable to the underlying action at law or suit  
in equity should be applied to an action for declaratory relief; if a statute of limitations would bar the  
claim, if it were asserted in an action for relief other than a declaratory judgment, then the same  
limitation period will bar assertion of that claim in a declaratory judgment action”).

<sup>9</sup> See e.g., *Auscape Int’l v. Nat’l Geographic Soc’y*, No. 02 Civ. 6441 LAK HBP, 2003 WL 23531750,  
at \*16 (S.D.N.Y. July 25, 2003) (“The specter of a multitude of choice of law analyses is not a mere  
academic possibility. Clearly, conflicts of laws do exist among the fifty states. For example, a survey  
of the statutes of limitations for breach of contract reveals that there are considerable differences  
among the states. Nevertheless, plaintiffs have ignored this issue and attempt to dismiss defendants’  
choice of law arguments in one page of their reply brief . . . . Plaintiffs’ ‘back-of-the-hand’ argument is  
simply insufficient to sustain plaintiffs’ burden of proof . . . . [P]laintiffs b[ore] the burden of providing

1        These state law variations are important in this case. Under the “present breach”  
2 theory that this Court applied to Yue’s individual claim, Yue alleges that the breach  
3 occurred around October 2002, when Conseco decided on a future rate increase. *See*  
4 Declaration of Timothy P. Dillon, Ex. B. Yue filed this case in March, 2008, more than  
5 five years later. In states that (i) do not apply a discovery rule, (ii) would deem the  
6 claim as a present (rather than anticipatory) breach, and (iii) have a statute of limitations  
7 of less than five years, the class member’s contract claim would be time-barred, unless  
8 other specific state law tolling provisions would rescue the claim.<sup>10</sup> As this hypothetical  
9 example illustrates, the variations and nuances in governing state laws will present this  
10 Court with mind-numbing and utterly unmanageable permutations as to how it should  
11 apply the appropriate laws to each of the absent class members.

12        Yue dealt with none of these possibilities. She ignored identifying the many  
13 distinct and subtle variations in state law and thus failed to present the Court with a plan  
14 for reasonably managing the state law differences. We presume that she failed to meet  
15 her burden intentionally. She knew that any identification or discussion of her burden  
16 would highlight the unmanageability of class treatment for Yue’s claim, particularly  
17 given the novel issues that her claim raises.

#### 18                    **F.     Another State Law Variation: Specific Performance**

19        In many states, specific performance is an “extraordinary” remedy and rarely  
20 granted.<sup>11</sup> In other states, such as California, the remedy may be more liberally applied.

21        an ‘extensive analysis’ of state law variations to determine whether there are ‘insuperable obstacles’ to  
22 class certification. . . . Attempts at such ‘extensive analysis’ often include model jury instructions and  
23 verdicts forms, as well as an attempt to group state laws by their relevant differences. Plaintiffs made  
24 no such showing here . . . .”) (citations and internal quotes omitted).

25        <sup>10</sup> California has a four-year statute of limitations. *See* Cal. Civ. Proc. Code § 337 (imposing a four  
26 year statute of limitations for breach of written contracts in California)

27        <sup>11</sup> *See, e.g., Tas Distrib. Co. v. Cummins Engine Co.*, 491 F.3d 625, 637 (7th Cir. 2007) (interpreting  
28 Illinois breach of contract law); *Dialog4 Sys. Eng’g GMBH v. Circuit Research Labs, Inc.*, No. CV 07-  
2534-PHX-MHM, 2009 WL 891028, at \*10 (D. Ariz. Mar. 31, 2009); *P.O. Ventures, Inc. v. Loucks*  
26 *Family Irrevocable Trust*, 159 P.3d 870, 874 (Idaho 2007); *W. Willow-Bay Court, LLC v. Robino-Bay*  
27 *Court Plaza*, C.A. No. 2742-VCN, 2007 WL 3317551, at \*12-13 (Del. Ch. Nov. 2, 2007); *Spolar v.*  
28 *Pocze*, No. 88549, 2007 WL 2008692, at \*3 (Ohio Ct. App. July 12, 2007); *Cattail Assocs. v. Sass*,  
907 A.2d 828, 844 (Md. Ct. Spec. App. 2006); *Kirkley v. Jones*, 550 S.E.2d 686, 690 (Ga. Ct. App.  
2001).

1 Yue has not addressed these state law divergences, though it was clearly her burden to  
2 do so.<sup>12</sup>

## 3 **II. YUE HAS FAILED TO SUBMIT THE REQUIRED TRIAL PLAN**

4 A plaintiff seeking certification of a nationwide class to which the laws of the  
5 several states potentially apply must demonstrate a realistic plan for the adjudication of  
6 the claims at issue. *Zinser*, 253 F.3d at 1189 (“[b]ecause [plaintiff] seeks certification  
7 of a nationwide class for which the law of forty-eight states potentially applies, she  
8 bears the burden of demonstrating ‘a suitable and realistic plan for trial of the class  
9 claims’”) (citation omitted). Failing to provide a sufficient trial plan in advance, has led  
10 this and other courts to summarily deny class certification.<sup>13</sup>

11 A sensible trial plan is critical where a plaintiff seeks to certify a national class in  
12 a diversity case. Class actions are easy to file. They are difficult to try. We are not  
13 aware that a federal court has ever tried a class action requiring application of the laws  
14 of fifty or more jurisdictions.<sup>14</sup> Federal courts routinely deny class certification motions  
15 based on the difficulties of trying claims governed by the laws of many jurisdictions.<sup>15</sup>

16 <sup>12</sup> Many other state law variations exist, which we cannot fully explore given space limitations. And,  
17 more importantly, Yue bore the burden of identifying these state law divergences and showing the  
18 Court that it could reasonably manage them. For example, in some states, such as California, any  
19 breach, material or not, allows the non-breaching party to sue for breach of contract. *See Riechert v.*  
20 *Gen. Ins. Co. of Am.*, 68 Cal. 2d 822 (Cal. 1968). The law diverges in other states. For example, in  
21 Florida, Maine and Wisconsin, among other states, only a material breach gives rise to a breach of  
22 contract claim. *Marino v. Home Depot U.S.A., Inc.*, 245 F.R.D. 729, 734 (S.D. Fla. 2007); *Maine*  
*Energy Recovery Co. v. U.S. Structures*, 724 A.2d 1248, 1250 (Me. 1999); *Riegleman v. Krieg*, 679  
N.W.2d 857, 862-63 (Wis. App. 2004). In *Marino*, the court refused to certify a nationwide (b)(2)  
class alleging a breach of contract because, among other reasons, some states (such as Florida) required  
materiality, while other states (the *Marino* court specifically noted California) do not require  
materiality. *Marino*, 245 F.R.D. at 735.

23 <sup>13</sup> *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996) (abuse of discretion to  
24 certify class where plaintiffs failed to show how class trial could be conducted); *Sweet* 232 F.R.D. at  
25 370 (“The Ninth Circuit has clearly stated that plaintiffs seeking certification of a nationwide class in  
26 which numerous state laws may apply bear the burden of demonstrating a trial plan”); *Wash. Mut.*  
*Bank v. Superior Court*, 15 P.3d 1071, 1083-86 (Cal. 2001).

27 <sup>14</sup> *See Wilks v. Ford Motor Co. (In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.)*, 174 F.R.D.  
28 332, 349 (D.N.J. 1997) (“no federal court ha[s] tried a class action which would require the application  
of the laws of fifty-one jurisdictions”); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 461 (D.N.J. 1998)  
(same); *Carpenter v. BMW of N. Am., Inc.*, No. CIV. A. 99-CV-214, 1999 WL 415390, at \*6 (E.D. Pa.  
June 21, 1999) (same); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 498 (S.D. Ill. 1999) (same); *In re*  
*Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 490 (D.N.J. 2000) (same).

1 Here, because Yue fails to identify the many variations and nuances in state law  
2 that will bedevil this case, she does not present the Court with any plan, let alone a  
3 suitable plan, for addressing those variations and nuances at trial. The examples of  
4 divergent state laws discussed above are merely a sample. For this reason alone, Yue's  
5 motion for class certification should be denied.<sup>16</sup>

11 <sup>15</sup> See, e.g., *Adams v. Kansas City Life Ins. Co.*, 192 F.R.D. 274, 277-78 (W.D. Mo. 2000) (quoting *In*  
12 *re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996)) (denying class certification, reasoning that  
13 "if more than a few laws of the fifty states differ, the district judge would face [an] impossible task");  
14 *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 223 (W.D. Mich. 1998) (same); *Chin*  
15 *v. Chrysler Corp.*, 182 F.R.D. 448, 458 (D.N.J. 1998) (same); *In re Ford Motor Co. Vehicle Paint*  
16 *Litig.*, 182 F.R.D. 214, 224 (E.D. La. 1998) (denying class certification where an "accurate jury charge  
17 would have to reflect the proper definition and tests . . . under each state's laws"); *In re Ford Motor*  
18 *Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 350 (D.N.J. 1997) (denying certification where  
19 plaintiffs had "not explained how their multiple causes of action could be presented to a jury for  
20 resolution in a way that fairly represents the law of the fifty states"); *In re Masonite Corp. Hardboard*  
21 *Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 424 & n.16 (E.D. La. 1997) (declining to certify class  
22 where jury instructions would need to be "composite instructions accounting for . . . [state law]  
23 differences [and] would hazard a chaos" because "the jury could be put in the impossible situation of  
24 employing, and then not employing, presumptions, and then accepting, and then not accepting, the  
25 same facts as affirmative defenses"); *In re Stucco Litig.*, 175 F.R.D. 210, 216 (E.D.N.C. 1997)  
26 (denying certification where instructions accounting for variations in state law "would surely baffle a  
27 jury"); *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 632 (D. Kan. 1996) (denying certification where  
28 "jury instructions . . . would be extremely complicated given . . . numerous differences in the law  
applicable to the various claims" and where "instructing the jury in a manner that is both legally sound  
and understandable . . . would be a herculean task"); *Carpenter v. BMW of N. Am., Inc.*, No. CIV. A.  
99-CV-214, 1999 WL 415390, at \* 6 (E.D. Pa. June 21, 1999) (denying certification where jury could  
not "meaningfully be instructed on the laws of [multiple] jurisdiction[s]"); *Cunningham v. PFL Life*  
*Ins. Co.*, No. C 98-67 MJM, 1999 WL 33656879, at \* 6 (N.D. Iowa Aug. 25, 1999) (denying  
certification where task of instructing the jury would be "impossible" because of the differences in  
state law) (citation omitted).

24 <sup>16</sup> Yue cannot cure these defects in her reply papers, as that would deny Conesco due process. See  
25 generally, *Adriana Int'l Corp. v. Lewis & Co.*, 913 F.2d 1406, 1417 at n.12 (9th Cir. 1990) (refusing to  
26 address an argument raised for the first time in a reply brief). In *Sweet*, 232 F.R.D. at 369, like here,  
27 plaintiff failed to address state law legal variations affecting putative class members. Plaintiff sought  
28 to cure the defect and supply a trial plan in reply papers, but the court declined to consider the new  
material because "it is improper for a party to raise a new argument in a reply brief." *Id.* (quoting *U.S.*  
*v. Boyce*, 148 F. Supp. 2d 1069, 1085 (S.D. Cal. 2001). See also *In re Paxil Litig.* 212 F.R.D. 539, 545  
(C.D. Cal. 2003) (criticizing plaintiff's "cavalier" reshuffling of putative class members into groups in  
its reply).

1 **III. CERTIFICATION IS IMPROPER BECAUSE THE CLASS IS NOT**  
2 **SUFFICIENTLY COHESIVE DUE TO THE PRESENCE OF**  
3 **INDIVIDUALIZED ISSUES**

4 “Even though the rule [23(b)(2)] does not contain a predominance and superiority  
5 requirement, the requisite cohesiveness is lacking where individual issues  
6 predominate.” *Lewallen v. Medtronic USA, Inc.*, No. C 01-20395 RMW, 2002 WL  
7 31300899, at \*3 (N.D. Cal. Aug. 28, 2002). For several independent reasons, that is the  
8 case here.

9 *First*, as set forth in Section I (E), many states have adopted a discovery rule for  
10 statute of limitations purposes in breach of contract actions. Individual issues will thus  
11 predominate and destroy cohesiveness for class members whose policies were issued in  
12 states that use (i) a discovery rule and (ii) have limitations periods shorter than six  
13 years. This Court will need to conduct individual mini-trials for class members whose  
14 claims are governed by those state laws, making class treatment unmanageable.  
15 *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404 (C.D. Cal. 2000) is directly on point.  
16 There, the court noted that it was appropriate to consider how statute of limitations  
17 issues would affect the claims of class members, even in a (b)(2) class.<sup>17</sup> The court  
18 decertified a class, largely on the basis of its post-certification decision that the  
19 discovery rule would apply to the tort claims at issue. The court held that class  
20 certification was untenable in light of the discovery rule, because the court would need  
21 to determine, for each class member, “when and how each Plaintiff actually discovered  
22 his or her claims.” *Id.* at 411. *See also id.* at 414 (“the limitations defense raises  
23 substantial . . . questions that vary among class members . . . [b]ased on the  
24 individualized, fact-intensive nature of the necessary inquiry in this case, the statute of  
25

26 <sup>17</sup> The court stated: “[s]ome courts have denied class certification on the ground that the limitations  
27 defense made class treatment inappropriate . . . Many other courts, including some of the courts in  
28 cases cited by Plaintiffs, have taken into consideration a limitations defense in evaluating a  
certification motion. Thus, ‘statute-of-limitations defenses are appropriate for consideration in the  
class certification calculus.’ *Waste Management*, 208 F.3d at 295.” *Id.* at 411. (citations omitted).

1 limitations issues preclude a finding that common issues predominate”). The court  
2 explained (*id.* at 415):

3       Plaintiffs argue that “the appropriate method for addressing individual  
4       issues such as statute of limitations defenses is via questionnaires at the  
5       claims stage.” . . . Plaintiffs’ proposal, however, eviscerates the role of the  
6       limitations defense in this case. . . . [T]he application of the limitations  
7       defense in this matter is not based on easily verifiable “objective” criteria.  
8       The individualized analysis contained in the court’s order illustrated that  
9       the limitations defense cannot be applied across the board to the class. . . .  
10       Thus, ultimately, the limitations defense would require individual trials for  
11       each of the class members.

12       The same is true in this case. Certification is inappropriate because individual  
13       trials will be needed to determine when many putative class members discovered or  
14       should have discovered their claims.<sup>18</sup>

15       The same problems bedevil the putative California class, which asserts a claim  
16       under Cal. Bus. & Prof. Code § 17200 *et. seq.* Yue’s individual claim under the UCL  
17       appears to be time-barred because the UCL has a four year statute of limitations. Cal.  
18       Bus. & Prof. Code § 17208. The Ninth Circuit has held that “claims under [the UCL] . .  
19       . are subject to a four-year statute of limitations which began to run on the date the  
20       cause of action accrued, not on the date of discovery.” *Karl Storz Endoscopy-Am., Inc.*  
21       *v. Surgical Techs., Inc.*, 285 F.3d 848, 857 (9th Cir. 2002). Under *Karl Storz*, Yue’s  
22       UCL claim accrued in 2002 and is untimely.<sup>19</sup> More recently, however, “the California  
23       Supreme Court has stated that [the application of the discovery rule to UCL claims] is

24       <sup>18</sup> Yue exemplifies this point. She says she learned of the rate increase of which she complains in a  
25       2007 meeting with her financial advisor, during which Yue reviewed a 2006 projection from Conseco.  
26       See Deposition Transcript of Celedonia Yue (“Yue Tr.”), 47:21 - 48:25 attached to the Kaiser  
27       Declaration at Exh. A. Individual inquiries would be needed to determine when putative class  
28       members received similar notice of rate increases where discovery rules apply.

<sup>19</sup> If Yue’s claims are time-barred, she cannot represent class members who may have viable claims  
      and is therefore an inadequate class representative under Rule 23(a). See Point IV, *infra*.

1 not settled law.” See *Grisham v. Phillip Morris U.S.A., Inc.*, 151 P.3d 1151, 1157 at  
2 n.7 (Cal. 2007) (comparing *Snapp & Assocs. Ins. Servs., Inc. v. Robertson*, 117 Cal.  
3 Rptr. 2d 331, 335 (Cal. Ct. App. 2002) in which the court held that UCL claims were  
4 not subject to the discovery rule, with *Mass. Mut. Life Ins. Co. v. Superior Court*, 119  
5 Cal. Rptr. 2d 190, 199 (Cal. Ct. App. 2002), in which the court stated that the discovery  
6 rule ‘probably’ applies). If the discovery rule applies to the putative California class  
7 claims, individualized inquiries will be needed to determine when each California class  
8 member knew or should have known about Consecos decision to increase COI rates.  
9 Certification of a California class thus poses the same manageability problems that  
10 afflict the putative national class.

11       *Second*, the proposed class is not cohesive because certification will precipitate  
12 intra-class conflicts. As discussed above, some states deem the contract claim here to  
13 be one for anticipatory breach and require a suing plaintiff to elect between terminating  
14 the contract and suing for breach, or continuing with the contract until year 21 of the  
15 policy and suing then. Certification of this claim will force class members governed by  
16 the laws of those states to make an individual decision, based on their own unique  
17 circumstances, as to which remedy they want to elect now.<sup>20</sup> Not only can Yue not  
18 make that individualized election for them, but her certification motion, if granted,  
19 would force them to make that decision now even if they do not want to. That creates  
20 an intra-class conflict and defeats certification.

21       Yue cannot resolve the conflict by claiming that all class members have a claim  
22 for a present breach only, and not anticipatory breach. By doing so, Yue would  
23 subjecting thousands of putative class members to statute of limitations defenses they  
24 could otherwise avoid. For an anticipatory breach claim, the statute of limitations

25  
26 <sup>20</sup> As this Court has already found, such decisions are “important and difficult.” [DE 51 at 8]. Yue  
27 cannot make such an important and individualized decision for others.  
28

1 ordinarily does not begin to run until the non-breaching party has made his or her  
2 election. Yue's argument that her claim is not one for anticipatory breach, however,  
3 conflicts with the interests of putative class members who would be better served to  
4 treat this as a claim for an anticipatory breach.<sup>21</sup> And, because absent class members  
5 may not opt-out of a class certified under Rule 23(b)(2), certification creates a serious  
6 risk that absent class members will be denied their due process rights and the  
7 protections of their own states' laws. Perhaps this is why Yue has chosen not to address  
8 this issue, although it was her burden to do so.<sup>22</sup>

9 *Third*, many, perhaps most, class members lack the requisite Article III standing  
10 to bring suit, and their claims are not ripe under this Court's analysis. This Court ruled  
11 that "Plaintiff must decide *now* whether to continue funding her policy at the current  
12 rate, to increase her monthly payments, or to seek alternative life insurance coverage."  
13 [DE 51 at 8; emphasis in original]. But discovery has revealed that class members other  
14 than Yue are likely *not* engaging in this analysis. Yue has cited to no complaints made  
15 to Conseco by *any* class member with respect to the proposed COI increase, even  
16 though Conseco has produced all relevant documents. Even Yue has given this very  
17 little thought, hardly believing that she needs to decide what to do at this time.<sup>23</sup> This  
18 Court should not certify a class of people who may lack standing to sue both under the  
19 Constitution and state law.

20 <sup>21</sup> Rational class members would want to treat this as an anticipatory breach. That allows class  
21 members to avoid limitations problems and elect between a litigation and awaiting complete  
performance. Only Yue seeks to litigate now.

22 <sup>22</sup> Yue relies on *In re Consolidated "Non-Filing Insurance" Fee Litigation*, 195 F.R.D. 684 (M.D.  
23 Ala. 2000), see [DE 70 at 13], but fails to advise this Court that the decision in that case was reversed  
on appeal, see *Christ v. Ben. Corp.*, 547 F.3d 1292 (11th Cir. 2008).

24 <sup>23</sup> Yue testified that her financial advisors/insurance brokers (same people) advised her that her  
25 premiums would increase in the 21st year of her policy, but she has no clue how much her premium  
will increase and has never asked her advisors to calculate the increase. See Yue Tr., 47:25- 48:9;  
66:14-16 (Kaiser Decl. Exh. A). Nor has Yue discussed with her advisors whether she should increase  
26 funding of her accumulation account in her policy. *Id.* 53:4-10; 76:12-77:7. She has not thought about  
that on her own either. *Id.* 53:11-17. Similarly, she has not seriously considered alternative life  
27 insurance for her mother; she has not even spoken to her advisors/brokers about that possibility. *Id.*  
55:21-56:6; 71:24-72:5. Yue also acknowledged that she has six years to think about what to do in  
28 light of the fact that her policy will not be affected until 2016. *Id.* 55:9-20; 77:24-78:7. This testimony  
seems to undercut Yue's legal position that she's being "forced" into making difficult decisions "now."



1 **IV. CERTIFICATION SHOULD BE DENIED BECAUSE YUE IS AN**  
2 **INADEQUATE PLAINTIFF: THE STATUTE OF LIMITATIONS BARS**  
3 **HER CLAIMS**

4 A named representative is an inadequate class representative under Rule 23(a)(4)  
5 if her own claims are barred by the statute of limitations.<sup>24</sup> Yue is an inadequate class  
6 representative because California's four-year statute of limitations bars her claims.  
7 "The general rule that the statute of limitations begins to run against a cause of action  
8 for breach of contract at the time of the breach ordinarily applies even though the  
9 injured party is unaware of his or her right to sue." 43 Cal. Jur. 3d *Limitations of*  
10 *Actions* § 45. A narrow exception to this general rule exists, but does not apply here.<sup>25</sup>  
11 Yue admitted that her claims accrued in October 2002, when Conseco adopted a Board  
12 resolution with respect to the 2002 COI increase. *See* Yue Tr., 83:20 – 85:23. This  
13 admission shows that California's four-year statute of limitations bars her claim,  
14 making her an inadequate class representative.

15 In response, Yue may argue that her claims are not time-barred because  
16 Conseco's obligations are continuous, and hence, she can sue at any time. But that is

17  
18 <sup>24</sup> *See, e.g., Hudson v. Capital Mgmt. Int'l, Inc.*, No. C-81-1737 MHP, 1982 U.S. Dist. LEXIS 10070,  
19 at \*9 (N.D. Cal. Jan. 6, 1982) ("If the named plaintiffs are time-barred, they cannot serve as  
20 representatives of the class"); *Holloway v. Best Buy Co.*, No. C 05-5056 PJH, 2009 U.S. Dist. LEXIS  
21 50994, at \*26-27 (N.D. Cal. May 28, 2009) (same); *Medimatch v. Lucent Techs., Inc.*, 120 F. Supp. 2d  
22 842, 854 (N.D. Cal. 2000); *see also Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-23  
23 (9th Cir. 2003) (if named representatives do not have a claim, they cannot represent others who do).

24 <sup>25</sup> A discovery rule may apply to contract actions under California law where the breach was  
25 conducted in secret and there was some duty to disclose it. In that case, the accrual of the claim is  
26 tolled to the time the plaintiff could, through the exercise of "reasonable diligence," discover the  
27 necessary facts. *See Perez-Encinas v. Amerus Life Ins. Co.*, 468 F. Supp. 2d 1127, 1134-36 (N.D. Cal.  
28 2006). Here, every policyholder began receiving illustrations, just like Yue did, showing that their  
premiums would increase in year 21 of the policy. That is the opposite of a secret. Moreover, as the  
*Perez-Encinas* court held, the discovery rule for contract actions does not apply in the absence of a  
fiduciary relationship, and as the court held, there is no fiduciary relationship between and insurer and  
its insured. *Id.* at 1136-37. If this Court ruled, however, that the discovery rule *could* apply, that  
would necessitate a plaintiff-by-plaintiff inquiry, thus further militating against class certification.

1 wrong. Yue claimed at her deposition that Conseco breached the policy in October  
2 2002 and that her claim accrued at that time. *Id.* Moreover, if the case is viewed as one  
3 where one party breaches in the face of an ongoing contractual relationship, California  
4 law would require Yue to make an election: declare a breach and sue now; or await the  
5 time of "complete performance" (which would mean waiting until 2016) and sue at that  
6 time. *See Romano v. Rockwell Int'l*, 14 Cal. 4th 479, 489 (Cal. 1996).<sup>26</sup> Because Yue  
7 has not decided to terminate her policy, she would if such a "continuous relationship"  
8 theory was advanced to dodge the statute of limitations be left with a premature claim,  
9 which could not be brought under *Romano* until the time "complete performance" was  
10 required by Conseco in 2016.<sup>27</sup> In either case, Yue has no claim and thus is an  
11 inadequate class representative.

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21 <sup>26</sup> In *Romano*, an employer told an employee in December, 1988 that he was going to be fired in 1991,  
22 and then, in 1991, the employee was terminated. The employee sued, and the employer argued that the  
23 claim was barred by the statute of limitations because the employee's claim accrued in 1988, when he  
24 was told that he was going to be terminated. The court held that where there were "ongoing  
25 contractual obligations" between the parties, the non-breaching party could terminate the contract and  
26 sue for a breach or "could wait until the time arrived for a *complete performance* by the other party and  
27 then" sue for breach. *Id.* (emphasis added).

28 <sup>27</sup> Moreover, such an argument by Yue would only further highlight state law divergences, as different  
states apply different rules to so-called "continuous" contracts. Under Texas law, for example,  
"[l]imitations begins to run on a continuous contract at the earlier of the following: (1) when the work  
[under the contract] is complete; (2) when the contract is terminated in accordance with its terms; or  
(3) when the contract is anticipatorily repudiated by one party and this repudiation is adopted by the  
other party." *See Packard v. OCA, Inc.*, No. 4:05CV273, 2009 WL 334645, at \*8 (E.D. Tex. Feb. 5,  
2009). Claims governed by Texas law would not be untimely -- but they would be premature under  
this test, just as Yue's claim would be, since none of the three accrual triggers would be satisfied.

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**CONCLUSION**

For the foregoing reasons, Plaintiff's motion for class certification should be denied.

Dated: July 13, 2009

DEWEY & LEBOEUF LLP

By:



Matthew M. Walsh

Attorneys for Defendant CONSECO LIFE  
INSURANCE COMPANY

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20 CONSECO LIFE INSURANCE COMPANY

21 **UNITED STATES DISTRICT COURT**  
22 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

23 CELEDONIA X. YUE, M.D., on behalf  
24 of the class of all others similarly  
25 situated, and on behalf of the General  
26 Public,

27 Plaintiff,

28 v.

29 CONSECO LIFE INSURANCE  
30 COMPANY, successor to Philadelphia  
31 Life Insurance Company and formerly  
32 known as Massachusetts General Life  
33 Insurance Company,

34 Defendant.

Case No. CV08-01506 AHM (CTx)

**DECLARATION OF ADAM J. KAISER  
IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR CLASS  
CERTIFICATION**

Hearing Date: August 10, 2009  
Time: 10:00 a.m.  
Courtroom: 14  
Judge: Hon. A. Howard Matz

1 I, ADAM J. KAISER, hereby declare as follows:

2 1. I am a partner at Dewey & LeBoeuf LLP, counsel for Defendant  
3 Conseco Life Insurance Company ("Conseco"). I make this declaration upon my  
4 own personal knowledge.

5 2. In support of her motion for class certification, Plaintiff submitted a  
6 declaration of Timothy P. Dillon dated June 9, 2009, in which Mr. Dillon purports  
7 to address several discovery disputes. The discovery issues are irrelevant to this  
8 motion, but as Mr. Dillon's declaration is mistaken, I am constrained to submit this  
9 declaration to correct the record.

10 3. Mr. Dillon and I have been conferring for several months concerning  
11 both parties' discovery obligations. As Mr. Dillon knows, Conseco has been  
12 diligently looking for relevant documents responsive to Plaintiffs' broad discovery  
13 requests. Conseco has produced nearly four thousand pages of documents from its  
14 paper files and has completed its production of paper documents. We have  
15 provided Mr. Dillon with a detailed privilege log indicating which documents have  
16 been withheld on the basis of privilege.

17 4. Conseco has also produced electronically stored information that is  
18 reasonably accessible without an undue burden or cost. Conseco has retained an  
19 outside vendor who has searched through approximately 250 gigabytes of data that  
20 consisted of hard drive images from three former employees, but that search of  
21 massive documents produced only approximately 100 non-privileged, responsive  
22 documents. Many of those documents had already been produced. The electronic  
23 search cost over \$15,000 in vendor fees and far more than that amount in attorney  
24 time working on various technical and other issues associated with mining the  
25 massive amount of largely irrelevant data on the hard drive images. Despite the  
26 significant burden and cost associated with searching these hard drive images, and  
27 the fact that such costly searches have produced only a tiny number of relevant  
28 documents, Mr. Dillon has asked us to search more hard drive images. I have

1 informed Mr. Dillon that images do not exist for most of the people he has  
2 identified, and as to the few hard drive images that do exist, they are not from key  
3 individuals and hence are likely to have even less relevant documents. We have  
4 offered to search them if Plaintiff wants to pay for the expense. Mr. Dillon has not  
5 responded that request.

6 5. Mr. Dillon also refers, in ¶ 7 of his Declaration, to “sweeping and  
7 unsubstantiated claims of privilege.” Consecro has made no such claims. Consecro  
8 previously hired counsel in 2002 to assist it in considering potential cost of  
9 insurance rate increases, including the litigation risk exposure in doing so and  
10 providing a legal opinion on what the policy at issue permitted. In connection with  
11 rendering that advice, Consecro’s counsel hired actuarial consultants to review  
12 potential cost of insurance increase scenarios. Ultimately, some of the work  
13 performed by the consultants hired by the lawyers was used by Consecro when it  
14 decided in 2002 to implement cost of insurance rate increases in year 21 of the  
15 policies. I have previously explained this to Mr. Dillon in great detail.

16 6. Because some of the actuarial work performed by the consultants was  
17 ultimately used by Consecro in its decision concerning the cost of insurance rate  
18 increase, Mr. Dillon and I came to an agreement, at my suggestion, memorialized  
19 in a stipulation filed with the Court [DE 63], pursuant to which the consultants  
20 would produce all actuarial documents related to the cost of insurance rate  
21 increases, but that the consultants would not produce documents in which the  
22 consultants were providing advice to Consecro’s lawyers for the purpose of  
23 enabling those lawyers to render legal advice to Consecro.

24 7. Mr. Dillon and I also agreed, as set forth in the stipulation, that by  
25 agreeing to produce these documents, Consecro would not be waiving any privilege  
26 between it and its attorneys, or any of the attorneys’ work-product privilege, which  
27 includes communications between such attorneys and their consultants. This was a  
28 sensible and practical solution that satisfied Plaintiff’s need for relevant actuarial

1 documents and Consecos need to maintain its privileges and that of its lawyers.  
2 Ultimately, the consultants produced 8,709 pages of documents. Consecos provided  
3 a detailed privilege log of the documents withheld from production.

4 8. Contrary to Mr. Dillon's Declaration, Consecos has cooperated with  
5 Plaintiff every step of the way in discovery. For example, although we have no  
6 obligation to do so, we have arranged for the deposition of six non-party witnesses.  
7 Plaintiff has demanded to take the deposition of Consecos's attorneys who in 2002  
8 advised Consecos with respect to the cost of insurance increase, and we have  
9 arranged for that deposition even though we believe it is unnecessary and an  
10 offensive attempt to invade privilege.

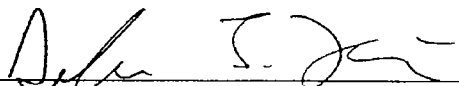
11 9. While Consecos has undertaken, at a substantial expense, a good faith  
12 effort to locate and produce documents, the same cannot be said of Plaintiff. As of  
13 March 25, 2009 Plaintiff produced 78 pages of documents. For more than two  
14 months, in letters, emails, and during our meet and confer sessions, we demanded  
15 that Plaintiff produce documents in the possession of her lawyers related to the cost  
16 of insurance increase, including documents that Plaintiff may use at depositions.  
17 Mr. Dillon did not respond to my letters or emails on the subject.

18 10. During the late afternoon of July 7, 2009 -- less than twenty-four  
19 hours prior to Plaintiff's deposition scheduled for the next day -- Plaintiff produced  
20 an additional 429 pages of documents. The documents could have been produced  
21 at any time, but Plaintiff chose to produce documents on the virtual eve of her  
22 deposition. It is unclear if Plaintiff has completed her production of documents.

1 11. Attached hereto as Exhibit A is a true and accurate copy of the  
2 deposition of Celedonia Yue taken on July 8, 2009.

3  
4 I declare under penalty of perjury under the laws of the United States of  
5 America that the foregoing is true and correct.

6  
7 Executed on July 13, 2009 in New York, New York.

8  
9   
10 ADAM J. KAISER



1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION  
3  
4  
5 CELEDONIA X. YUE, M.D., on behalf )  
6 of the class of all others )  
7 similarly situated, and on behalf )  
8 of the General Public, )  
9 Plaintiffs, )  
10 vs. ) No. CV08-01506  
11 CONSECO LIFE INSURANCE COMPANY, ) VOLUME I  
12 successor to Philadelphia Life )  
13 Insurance Company and formerly )  
14 known as Massachusetts General )  
15 Life Insurance Company, )  
16 Defendant. )  
17 )

18  
19 Videotaped Deposition of CELEDONIA YUE,  
20 at 6673 Foothill Boulevard, Tujunga,  
21 California, commencing at 2:27 P.M.,  
22 Wednesday, July 8, 2009, before  
23 Harry Hansen, CSR No. 4907.

24  
25 PAGES 1 - 94

1 APPEARANCES OF COUNSEL:

2

3 FOR THE PLAINTIFFS:

4

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11

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13

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15 BY: MATTHEW M. WALSH, ESQ.

16 333 South Grand Avenue

17 Suite 2600

18 Los Angeles, California 90071-1530

19 (213) 621-6558

20

21 ALSO PRESENT:

22

23 COURTNEY BATES, VIDEOGRAPHER

24

25

1 THE VIDEOGRAPHER: The time on the record  
2 is 2:29 P.M. Today's date is July the 8th of 2009.

3 My name is Courtney Bates. I'm here with  
4 our court reporter, Harry Hansen. We're here from  
5 Veritext National Litigation Services. 02:27PM

6 This deposition is being held today at  
7 6673 Foothill Boulevard in Sunland, California. The  
8 caption of the case is Yue versus Conseco Life  
9 Insurance. The case number is CV08-01506 AHM  
10 (JTLx). This begins the videotaped deposition of 02:27PM  
11 Celedonia Yue.

12 Please note that the audio and video  
13 recording will continue at all times until we go off  
14 the record. Microphones are sensitive and may pick  
15 up whispers and private conversations. 02:28PM

16 At this time will all counsel present  
17 please identify themselves.

18 MR. WALSH: This is Matthew Walsh for the  
19 defendant Conseco.

20 MR. DILLON: I'm Timothy Dillon for the 02:28PM  
21 plaintiff and the putative class of policyholders  
22 for the case pending in the Federal Court in the  
23 Central District of Los Angeles.

24 THE WITNESS: I'm Dr. Celedonia Yue.

25 THE VIDEO OPERATOR: The court reporter 02:28PM

1 may swear or affirm the witness.

2

3 CELEDONIA YUE

4 having been first placed under oath, testified as  
5 follows:

6

7 EXAMINATION

8 BY MR. WALSH:

9 Q. Would you state and spell your name for  
10 the record, please. 02:28PM

11 A. My name is Celedonia Yue. First name is  
12 C E L E D O N I A, last name is Y U E.

13 Q. Have you ever given testimony in a  
14 deposition or a courtroom before?

15 A. Yes. 02:29PM

16 Q. Approximately how many times?

17 A. Two or three times.

18 Q. You're probably familiar with the ground  
19 rules. I'll just go over them quickly, if I could.

20 First, the oath you took today is the same 02:29PM  
21 oath you would take if you were testifying in a  
22 court.

23 Do you understand that?

24 A. Yes.

25 Q. And the court reporter is taking down all 02:29PM

1 the questions I ask you and all of your responses  
2 and will transcribe them into a little book.

3 Do you understand that?

4 A. I understand.

5 Q. You'll have the opportunity to review that 02:29PM  
6 book or the transcript later and make corrections  
7 you deem appropriate. And if you do so, that may  
8 impact your credibility at trial.

9 Do you understand that?

10 A. Yes, I do. 02:29PM

11 Q. And so it's very important that we  
12 understand each other. So if I ask you a question  
13 you don't understand, please tell me that you don't  
14 understand and I'll try to rephrase it.

15 Do you understand that? 02:29PM

16 A. Yes, I do.

17 Q. And finally, we have to make sure we don't  
18 use uh-huhs or uh-uhs because it's difficult for the  
19 court reporter to transcribe that. So please try to  
20 give yes or no answers or other answers that are 02:30PM  
21 verbal.

22 Do you understand that?

23 A. I will try my best.

24 Q. If you need a break at any time, please  
25 let me know. Just answer the question that's 02:30PM

1 pending and we'll take a break.

2 Do you understand?

3 A. I understand.

4 Q. Have you been involved in any prior  
5 litigations?

02:30PM

6 A. Do you mean myself being sued or being a  
7 plaintiff?

8 Q. You either a defendant or a plaintiff in a  
9 litigation?

10 A. No.

02:30PM

11 Q. You mentioned you've testified a few times  
12 before. In what context were those testimonies?

13 A. One was a medical case where one of my  
14 patients was taken to the emergency room and the  
15 paramedics dropped her off the gurney and she  
16 suffered some fractured ribs. So I was required to  
17 do a deposition and testified in court on her  
18 behalf.

02:30PM

19 The other case was a case where a  
20 physician was being sued by a patient in regards to  
21 medication that was prescribed.

02:30PM

22 Q. Any other times you've been deposed or  
23 testified at trial?

24 A. No.

25 Q. Now it's correct that you completed your

02:31PM

1   undergrad work at Case Western Reserve University in  
2   Cleveland, Ohio?

3           A.   That is correct.

4           Q.   And you graduated in 1985 with a BA in  
5   anthropology and natural sciences; correct?                   02:31PM

6           A.   That's correct.

7           Q.   During college did you take any finance or  
8   accounting courses?

9           A.   I don't think I did.

10          Q.   Did you take any investment courses?                   02:31PM

11          A.   No.

12          Q.   Did you attend any graduate schools other  
13   than the University of Southern California Keck  
14   School of Medicine in Los Angeles?

15          A.   No.   02:31PM

16          Q.   And you did attend that school and  
17   graduated in 1992 with a Doctor of Medicine;  
18   correct?

19          A.   Actually my medical school was finished in  
20   1989, I finished my residency in 1992.                       02:31PM

21          Q.   Okay. So for the record, you graduated  
22   from the USC Keck School of Medicine in 1989?

23          A.   That is correct.

24          Q.   And you completed your residency in 1992?

25          A.   That is correct.                                       02:32PM

1 Q. When you were in graduate school at the  
2 USC Keck School of Medicine did you take any  
3 finance, accounting or investment courses?

4 A. No.

5 Q. Since you matriculated from USC Keck 02:32PM  
6 School have you taken any finance, accounting or  
7 investment courses outside of your college or an  
8 investment club?

9 A. No.

10 Q. What did you do to prepare for today's 02:32PM  
11 deposition?

12 A. I spoke briefly with my lawyer about  
13 meeting with you. And I went over some papers that  
14 had been given to me.

15 Q. Other than speaking to your lawyer, did 02:32PM  
16 you speak to anybody else in preparation for today's  
17 deposition?

18 A. Not in preparation.

19 Q. How much time did you spend to prepare for  
20 today? 02:32PM

21 A. A night.

22 Q. Approximately how many hours would that  
23 be?

24 A. Two or three hours reading over some  
25 papers that I'd gotten. 02:32PM



1 Q. When you say you read over some papers, do  
2 you recall what those papers were?

3 A. They were copies of the initial complaint.  
4 There were some papers in regards to the case trying  
5 to get transferred to another judge and to get 02:33PM  
6 transferred to Indiana. And also there were some  
7 papers in regards to the class certification.

8 Q. Do you recall reviewing any other papers  
9 in preparation for today's deposition?

10 A. I believe my -- the answers to my 02:33PM  
11 interrogatories were in there as well.

12 Q. Did you review any other papers?

13 A. No.

14 Q. Could you briefly go over your employment  
15 history since you completed your residency in 1992. 02:33PM

16 A. For one year I did locum tenens where I  
17 traveled throughout the United States and worked in  
18 different practices for a short period of time.

19 I spent one year in private practice in  
20 Glendale. And then in 1994 I came to this office 02:33PM  
21 and have been here since then.

22 Q. What is locum tenens?

23 A. Locum tenens. That is filling in  
24 temporarily for a physician, for a doctor.

25 For example, if a practice is missing a 02:34PM

1 physician due to illness or some other unforeseen  
2 reason or they were not able to fill a position,  
3 sometimes they will hire a doctor through an agency  
4 to fill in for several weeks to a couple of months  
5 until they can find a permanent replacement.

02:34PM

6 Q. And you said in or about 1994 you came to  
7 work here. And where is here?

8 A. This is my office, my private office. The  
9 address is 6673 Foothill Boulevard, Tujunga,  
10 California 91042.

02:34PM

11 Q. And your interrogatory responses list the  
12 title of medical director at the Toluca Lake Skin  
13 Esthetics?

14 A. Yes.

15 Q. When did you hold that position?

02:34PM

16 A. I believe it was 2005.

17 Q. Do you continue to hold that position  
18 today?

19 A. Yes.

20 Q. Did you ever have any association with  
21 Verdugo Hills Hospital?

02:35PM

22 A. Yes.

23 Q. Tell me about that, please.

24 A. I served as vice-chair of the Department

25 of Family Practice for two years. And then I served

02:35PM

1 for, I believe it was four years, as chair of the  
2 Department of Family Practice.

3 Q. What were the two years that you were the  
4 vice-chair?

5 A. Off the top of my head I can't remember. 02:35PM  
6 I think it was 2000 -- Excuse me. It was 19 -- I  
7 think it was 19 -- I believe it's in the  
8 interrogatories. It's been a few years and I can't  
9 remember exactly what years it's been.

10 Q. You took over the chairman position or 02:35PM  
11 chairperson position directly after the vice-chair  
12 position --

13 A. Yes.

14 Q. -- correct?

15 So two years as the vice-chair followed by 02:35PM  
16 four years --

17 A. That's correct.

18 Q. So two years as the vice-chair followed by  
19 four years as the chair?

20 A. That is correct. 02:36PM

21 Q. Do you invest, Dr. Yue?

22 A. Yes.

23 Q. Do you invest in equities, stocks?

24 A. No.

25 Q. Do you invest in fixed incomes like bonds 02:36PM

1 or CDs?

2 A. Yes.

3 Q. Do you invest in annuities?

4 A. No.

5 Q. When did you start investing? 02:36PM

6 A. When I finished school.

7 Q. Undergrad or medical school?

8 A. I think I started investing probably when  
9 I was done with my medical training. I would say it  
10 was probably after 1992. Because prior to that I 02:36PM  
11 didn't have any money to invest.

12 Q. And what sort of investing were you doing  
13 when you began investing in 1992?

14 A. Initially just putting money in a savings  
15 account and then gradually buying mutual funds. 02:37PM

16 Q. So you do invest in mutual funds; is that  
17 correct?

18 A. Yes.

19 Q. Do you invest in any real estate?

20 A. No. I have -- I own a house. But not any 02:37PM  
21 other property.

22 Q. Do you have any financial advisors?

23 A. Yes.

24 Q. What sort of advisors do you currently  
25 use? 02:37PM

4           A.    He works with Ellen Horn as his partner.

02:37 PM

7 Q. And they're partners, Mr. Russo and  
8 Ms. Horn?

10 Q. Do you have any advisors or -- financial 02:37PM  
11 advisors or insurance agents besides these two?

13 Q. And does Ms. Horn also serve as your  
14 insurance agent?

02:37PM

16 Q. Did Mr. Russo and Ms. Horn serve as your  
17 financial advisors at the time you bought the policy  
18 in issue in question here?

20 Q. And that was approximately 1995; correct? 02:38PM

22 Q. We'll get into that a little bit later.

02:38 PM

1           A.    I had an account at Charles Schwab for a  
2 short time. But I didn't work with anyone  
3 specifically there.

4           Q.    And that was an account for mutual funds  
5 or something else?

02:38PM

6           A.    That was for mutual funds. That account  
7 no longer exists.

8           Q.    Approximately how long did you have that  
9 account?

10          A.    Several years.

02:38PM

11          Q.    Approximately what time frame?

12          A.    I think I got rid of that account in the  
13 early 2000s.

14          Q.    Do you utilize any tax advisors?

15          A.    My brother is an enrolled agent and he  
16 does my taxes.

02:38PM

17          Q.    When you say enrolled agent, what do you  
18 mean?

19          A.    That's his title. He has the ability to  
20 file my taxes and -- I don't know all the details of  
21 the credentialing that goes behind the title, but I  
22 do know he is what is called an enrolled agent.

02:39PM

23          Q.    Is your mind is that like a CPA?

24          A.    It's not a CPA.

25          Q.    And he does your tax returns?

02:39PM

1 A. Yes.

2 Q. Do you utilize any other tax advisors?

3 A. No.

4 Q. Have you since you began investing in  
5 about 1992?

02:39PM

6 A. No.

7 Q. Same question for accountants, do you  
8 utilize any accountants?

9 A. No.

10 Q. How did you first meet Mr. Russo and  
11 Ms. Horn?

02:39PM

12 A. I believe it was 1993 or 1994. And I met  
13 them through a seminar I attended.

14 Q. What sort of seminar?

15 A. A seminar on how to prepare yourself  
16 financially for the future.

02:39PM

17 Q. And were they participants in the seminar  
18 or were they speakers?

19 A. They were speakers.

20 Q. And did you approach them at some point  
21 and become a client of theirs?

02:40PM

22 A. Yes.

23 Q. Approximately when did you become a client  
24 of Mr. Russo and Ms. Horn?

25 A. I believe it was 1994.

02:40PM

1 Q. And was it through Mr. Russo and Ms. Horn  
2 that you bought the insurance policy at issue here?

3 A. Yes.

4 Q. Have you purchased any other insurance  
5 products through Mr. Russo and Ms. Horn?

02:40PM

6 A. Yes.

7 Q. What other insurance products?

8 A. There's another insurance policy on my  
9 mother. I've also purchased a disability policy for  
10 myself. I have a life insurance policy. And my  
11 husband has a life insurance policy.

02:40PM

12 Q. You have -- And you have two -- Strike  
13 that.

14 You mentioned you purchased another policy  
15 with respect to your mother. Is that a life  
16 insurance policy?

02:41PM

17 A. Yes.

18 Q. And which company is that policy  
19 associated with?

20 A. I just thought about that this morning and  
21 I forgot to look at the name of the company.  
22 Honestly I can't tell you. I believe you should  
23 have a copy of that.

02:41PM

24 MR. WALSH: I don't know, Tim, I haven't  
25 seen it, but I don't know whether or not it has been

02:41PM



1 produced.

2 MR. DILLON: Yes, we agreed to produce the  
3 other policy on the doctor's mom.

4 MR. WALSH: Okay. And that's been  
5 produced?

02:41PM

6 MR. DILLON: Correct.

7 BY MR. WALSH:

8 Q. When did you take out that policy,  
9 Dr. Yue?

10 A. It was approximately the same time.

02:41PM

11 Q. And you did that through Mr. Russo and  
12 Ms. Horn?

13 A. Yes.

14 Q. Do you know why Mr. Russo and Ms. Horn --  
15 Strike that.

02:41PM

16 Why did you take out two policies instead  
17 of one larger policy?

18 A. Because she didn't qualify for a larger  
19 policy.

20 Q. And why was that?

02:42PM

21 A. I don't know.

22 Q. Were you just told she didn't qualify for  
23 a larger policy?

24 A. Yes.

25 Q. Was it your initial desire to take out a

02:42PM

1 larger single policy and that was unavailable to  
2 you?

3 A. Yes.

4 Q. Who told you she did not qualify?

5 A. Mr. Russo.

02:42PM

6 Q. And as a result of that you pursued the  
7 two policy route?

8 A. Yes.

9 Q. What's the face value of the other policy,  
10 the non-Conseco policy?

02:42PM

11 A. \$250,000.

12 Q. Is that policy still in effect?

13 A. Yes.

14 Q. Do you know what type of policy that is,  
15 full life, term life?

02:42PM

16 A. I wouldn't be able to answer that.

17 Q. You mentioned you have a disability policy  
18 on yourself; is that correct?

19 A. That is correct.

20 Q. Is that a policy that protects you in case  
21 you become disabled?

02:42PM

22 A. Yes.

23 Q. Which company is that with?

24 A. Again, I'm sorry, I would have to look  
25 that up.

02:42PM

1 Q. When did you take that out?

2 A. I would have to look that up.

3 Q. Do you recall anything else about that  
4 disability policy sitting here today?

5 A. No. 02:43PM

6 Q. You mentioned there is a life insurance  
7 policy on your life; is that correct?

8 A. Yes.

9 Q. And who is the beneficiary of that?

10 A. My husband. 02:43PM

11 Q. And when did you take that policy out?

12 A. I would have to look up what year that is.

13 Q. Could you give me a best estimate?

14 A. I would guess --

15 MR. DILLON: He doesn't -- You should 02:43PM  
16 say --

17 There's a difference between an estimate  
18 and a guess. So if you have to guess, then probably  
19 he'd want you to say -- the correct thing would be  
20 "I don't know." If you have an estimate, you know, 02:43PM  
21 which is something more definite --

22 THE WITNESS: I would estimate about ten  
23 years ago.

24 BY MR. WALSH:

25 Q. And that's your best estimate? 02:43PM

1 A. That's my best estimate.

2 Q. Understood.

3 Which company is that life insurance  
4 policy with?

5 A. That is -- Again, I would have to look 02:43PM  
6 that up. I don't remember the names of all the  
7 companies of all the policies.

8 Q. And the life insurance policy on your  
9 life, is that still in effect?

10 A. Yes. 02:44PM

11 Q. Now there's a life insurance policy on  
12 your husband's life, too; is that correct?

13 A. Yes.

14 Q. Are you the beneficiary of that?

15 A. Yes. 02:44PM

16 Q. When was that taken out?

17 A. That was more recent. I would estimate in  
18 the last three to five years.

19 Q. Do you know what the face value of that  
20 policy is? 02:44PM

21 A. I would have to look that up.

22 Q. What's the face value of the policy on  
23 your life?

24 A. I believe it goes down as I get older.  
25 Originally when I took it out it was 3 million. 02:44PM

1 Q. But you believe it's the kind of policy  
2 that declines over time?

3 A. Yes.

4 Q. Now do you know the company of the life  
5 insurance policy on your husband's life insurance? 02:44PM

6 A. I would have to look that up.

7 Q. And is that policy still in effect today?

8 A. Yes.

9 Q. How did you come to learn about life  
10 insurance products in the first instance? 02:44PM

11 A. Through conversations with Charles Russo.

12 Q. Are you familiar with the different types  
13 of life insurance products, term life and whole  
14 life?

15 A. No. 02:45PM

16 Q. Are you familiar with the term universal  
17 life?

18 A. I've heard of it.

19 Q. Are you familiar with the term variable  
20 life? 02:45PM

21 A. No, I'm not.

22 Q. Could you tell me off the top of your head  
23 what universal life is or what you believe it to be?

24 A. I don't think that I would be able to  
25 explain it to you. 02:45PM

1 I'm not an insurance agent and I don't  
2 understand insurance very well. Most of this  
3 information I've relied on Mr. Russo to interpret  
4 for me.

5 Q. So to the extent that you're familiar with 02:45PM  
6 different aspects of life insurance, did you obtain  
7 that familiarity through conversations with  
8 Mr. Russo and Ms. Horn?

9 A. Yes.

10 Q. Other than the policy that you mentioned a 02:45PM  
11 minute or two ago that's on your life in  
12 approximately \$3 million originally but perhaps  
13 declining, are you aware of any other policies on  
14 your life?

15 A. No. 02:46PM

16 Q. And what was the first life insurance  
17 policy that you were involved in of the four life  
18 insurance policies we've discussed, one on your  
19 life, one on your husband's life and two on your  
20 mother's life? 02:46PM

21 A. I believe it was my mother's.

22 Q. The Conseco policy or the other policy?

23 A. I don't know which one I obtained first.

24 Q. And tell me how you -- Strike that.

25 The two policies on your mother's life, 02:46PM

1 the Conseco policy and the other policy, did they  
2 replace any other insurance policies?

3 A. No.

4 Q. Did you take them out at approximately the  
5 same time given that you wanted a larger policy but 02:47PM  
6 were unable to qualify for it?

7 A. Yes.

8 MR. WALSH: I'm going to mark as  
9 Exhibit 1.

10 (Deposition Exhibit 1 was  
11 marked for identification and is  
12 annexed hereto.)

13 BY MR. WALSH:

14 Q. Dr. Yue, I've marked as Exhibit 1 a copy  
15 of a document entitled "Massachusetts General Life 02:47PM  
16 Insurance Company, Boston, Massachusetts." And  
17 Bates stamped YUE00001 through YUE00021.

18 Do you see that?

19 A. Yes, I do.

20 Q. Do you recognize this document, or 02:47PM  
21 actually looks like two documents, do you recognize  
22 these documents?

23 A. Yes.

24 Q. What are they?

25 A. This looks like a copy of my insurance 02:47PM

1 policy.

2 Q. And beginning on page Bates stamped 18, is  
3 that your application in support of the policy?

4 A. Yes.

5 MR. DILLON: Or you mean 19? 02:48PM

6 MR. WALSH: Thank you. That is correct.

7 Q. Page 19.

8 A. Yes.

9 Q. And that's your signature on page 20?

10 A. Yes. 02:48PM

11 Q. And to the left of your signature, is that  
12 Mr. Russo's signatures?

13 A. Yes.

14 Q. And above your signature, is that your  
15 mother's signature? 02:48PM

16 A. Yes.

17 Q. How did the purchase of this life  
18 insurance policy marked as Exhibit 1 come about?

19 A. With discussions with Mr. Russo. In terms  
20 of planning financially for the future, he suggested 02:48PM  
21 that it might be a good idea to get a life insurance  
22 policy on my mother.

23 Q. And what did he tell you in that regard?

24 A. I don't understand.

25 Q. Why did he tell you it might be a good 02:49PM



1 idea from a financial planning perspective?

2 A. Well, in case something happened and I  
3 needed more money in the future, and he thought that  
4 we should think about ways that I could use my money  
5 so that if there was some catastrophic event in the 02:49PM  
6 future that I would have some insurance in the  
7 future if something happened.

8 Q. Did you have discussions with your mother  
9 about taking out the life insurance policy or  
10 policies on her? 02:49PM

11 A. Yes.

12 Q. And what was her response to that?

13 A. She said it was fine.

14 Q. Did Mr. Russo talk to your mother, to your  
15 knowledge? 02:49PM

16 A. I don't recall. He may have.

17 Q. Do you recall anything else Mr. Russo told  
18 you in connection with his recommendation that you  
19 take out this Conseco policy?

20 A. No. 02:50PM

21 Q. Did your mother at the time support you or  
22 other family members financially?

23 A. Not at the time of this policy, no.

24 Q. Could you recount for us your discussion  
25 with your mother about taking out this particular 02:50PM

1 policy marked as Exhibit 1?

2 A. As far as I can remember, I mentioned to  
3 her that I spoke with Mr. Russo about getting a life  
4 insurance policy on her and if it was agreeable to  
5 her and would she mind getting the exam done, and  
6 she said it was fine.

02:50PM

7 Q. And she did get an exam done in  
8 conjunction with this policy?

9 A. I believe so.

10 Q. And do you recall your discussions with  
11 Mr. Russo about the potential pros and cons of this  
12 particular policy?

02:50PM

13 A. I don't remember any specifics.

14 Q. What do you remember generally, if  
15 anything?

02:51PM

16 A. Generally that it was a good idea to get  
17 one.

18 Q. And did you two discuss different kinds of  
19 insurance products?

20 A. I don't recall that.

02:51PM

21 Q. How long with respect did Mr. Russo  
22 explain about whether or not to take out the life  
23 insurance policy that's marked as Exhibit 1?

24 A. I don't recall that.

25 Q. Were they lengthy discussions, do you

02:51PM

1 recall that?

2 A. I don't recall.

3 Q. Did you discuss this Exhibit 1 life

4 insurance policy, whether to take it out with my

5 other family members besides your mother?

02:51PM

6 A. We talked about getting a life insurance

7 policy for my father, but he did not qualify.

8 Q. And in what regard did he not qualify?

9 A. I believe because he was a smoker and had

10 hypertension.

02:51PM

11 Q. Have you told me everything you recall

12 about the circumstances leading to the purchase of

13 this Exhibit 1 policy?

14 A. Everything that I can recall, yes.

15 Q. Do you recall how many discussions you had 02:52PM

16 with Mr. Russo?

17 A. No.

18 Q. Did you talk to Ms. Horn about it?

19 A. I may have.

20 Q. Well, you told me a few minutes ago that 02:52PM

21 initially you were going to get a single policy with

22 a larger amount but you ended up with two policies.

23 Do you recall that?

24 A. Yes.

25 Q. When you were going to get a single policy 02:52PM

1 for a larger amount, was that with Conseco or with  
2 another insurance company?

3 A. I relied on my agents to help me with  
4 that. They thought that the idea of getting a life  
5 insurance policy on her was probably a good thing. 02:52PM  
6 And they looked for companies that offered that.

7 I don't know the process of how they  
8 settled on this particular company. But I do know  
9 that we talked about it and they seemed to think it  
10 was a good company that was honest and would honor 02:53PM  
11 the contract. And I trusted them.

12 Q. And what were you hoping to accomplish  
13 with the purchase of this particular Conseco life  
14 insurance policy?

15 MR. DILLON: I'm going to object as vague 02:53PM  
16 and ambiguous.

17 But, you know, please answer if you  
18 understand it.

19 THE WITNESS: Well, I wanted to have  
20 financial peace of mind. I wanted to feel that if 02:53PM  
21 something unforeseeable happens in the future or if  
22 my mother becomes ill at the end of life and I had  
23 to pay for healthcare expenses, that there would be  
24 some kind of financial money that would help to  
25 cover that. 02:53PM

1 BY MR. WALSH:

2 Q. Did you explore any other alternatives  
3 with Mr. Russo or Ms. Horn?

4 A. What kind of alternatives?

5 Q. To this Exhibit 1 life insurance policy. 02:53PM

6 A. In terms of other insurance policies?

7 Q. Or in terms of financial alternatives.

8 A. I don't recall.

9 Q. Did you do any independent investigation  
10 with respect to this Conseco policy or did you rely 02:54PM  
11 solely on Mr. Russo and Ms. Horn?

12 A. I relied on Mr. Russo and Ms. Horn.

13 Q. Could you describe your mother's health at  
14 the time of the purchase.

15 A. Excellent health. 02:54PM

16 Q. And she was 70 years old; is that correct?

17 A. 70.

18 Q. And that was in approximately 1995; is  
19 that right?

20 A. Yes. 02:54PM

21 Q. And so today she is about 84?

22 A. That is correct.

23 Q. Could you describe your mother's current  
24 health?

25 A. Excellent health. 02:54PM

1 Q. Does she have any chronic illnesses or  
2 injuries?

3 A. No.

4 Q. Is there a history of longevity in your  
5 mother's family?

02:54PM

6 MR. DILLON: I'll object as vague and  
7 ambiguous.

8 But if you understand it.

9 THE WITNESS: I don't know.

10 The rest of the family was in China when  
11 the war hit. I don't know much about that at all.

02:54PM

12 BY MR. WALSH:

13 Q. Are you aware of any history of illness or  
14 disease on your mother's side of the family?

15 A. No.

02:55PM

16 (Deposition Exhibit 2 was  
17 marked for identification and is  
18 annexed hereto.)

19 BY MR. WALSH:

20 Q. Doctor, I've marked as Exhibit 2 a  
21 document Bates stamped, if you hold it up  
22 vertically, CLIC 00093 through 97.

02:55PM

23 Please take a look to review this document  
24 and please let me know if you recognize it.

25 A. I don't know if I've seen this exact

02:56PM

1 document.

2 Q. Have you seen documents similar to this?

3 A. I have seen similar documents.

4 Q. Do you see on the first page Bates stamped  
5 93, if you turn it to a landscape portrait like you 02:56PM  
6 have it, and the policy years lining vertically 1  
7 through 20 with some figures and columns after that?

8 A. Yes, I see that.

9 Q. Have you seen documents with similar  
10 set-ups before? 02:56PM

11 A. Yes.

12 Q. Did you understand that the policy that  
13 you purchased from Conseco was essentially a 20-year  
14 term policy?

15 A. No. 02:56PM

16 Q. What was your understanding?

17 A. My understanding was that it went until  
18 she was a hundred years old.

19 Q. So you understood it to be a 30-year  
20 policy? 02:56PM

21 A. Yes.

22 Q. And did you understand that there is a  
23 particular time -- Strike that.

24 Did you understand at the time you  
25 purchased the policy that there's a particular time 02:56PM

1 that the premium payments might go up?

2 A. No.

3 Q. Did you understand when you purchased the  
4 policy that there is to be any significance about  
5 the 20-year policy mark? 02:57PM

6 A. No.

7 Q. But you did understand some significance  
8 with respect to the 30-year mark; is that correct?

9 A. Yes.

10 Q. What was your understanding of how the 02:57PM  
11 premium on the Conseco insurance policy, Exhibit 1,  
12 was to be paid?

13 A. I understood that it was \$7,890 that was  
14 to be paid every year. And that I would continue  
15 funding it until either she died or she became a 02:57PM  
16 hundred years old.

17 Q. And who did you expect would be paying  
18 those premium when you bought the policy?

19 A. Myself.

20 Q. Was this policy purchased for estate 02:57PM  
21 purposes?

22 MR. DILLON: I'll object as vague and  
23 ambiguous as to what you mean by "estate purposes."

24 If you understand, you can answer.

25 THE WITNESS: Yes, I don't understand what 02:58PM



1 you mean, what you're asking.

2 BY MR. WALSH:

3 Q. Do you have children?

4 A. No.

5 Q. Was this policy purchased in conjunction 02:58PM  
6 with a trust or other similar set up?

7 A. No.

8 Q. When you purchased this policy, did you  
9 have any intent of assigning or selling the policy  
10 at some point? 02:58PM

11 A. No.

12 Q. Do you currently have any intent of  
13 assigning or selling the policy at any point?

14 A. No.

15 Q. Have you ever had any intent to assign or 02:58PM  
16 to sell the Conseco policy?

17 A. No.

18 Q. Looking back at Exhibit 1, there was a  
19 point in time when you purchased the policy that you  
20 saw this contract; is that correct? 02:59PM

21 A. Yes.

22 Q. Was that before you purchased the policy  
23 or after?

24 A. I don't remember exactly when I got the  
25 policy. I think I paid the policy and then I 02:59PM

1 received this copy.

2 Q. When you received this, did you read it?

3 A. I glanced through it.

4 I'm not an insurance person, so I don't  
5 understand a lot of the insurance terminology. So I 02:59PM  
6 sort of looked through it briefly. But I really  
7 rely on Mr. Russo and Ms. Horn to inform me about  
8 the policy and anything important that I need to  
9 know.

10 Q. Have you ever read it cover to cover? 02:59PM

11 A. No, I don't think so.

12 Q. Now you said you glanced at it. Have  
13 there been any time since you received the policy in  
14 the mail in about 1995 that you glanced at it again?

15 A. I don't recall. I think I glanced at it 02:59PM  
16 when I first received it. And then since this has  
17 all come about, I've glanced through it again.

18 Q. More than once since then?

19 A. Since when?

20 Q. Since this dispute came about? 03:00PM

21 A. I may have glanced at it a couple of  
22 times.

23 Q. When you read the policy, did you  
24 understand it?

25 A. Not fully. 03:00PM

1 Q. Did you ask anybody other than your  
2 lawyers questions about the policy?

3 A. No.

4 Q. Is it correct that you paid the premiums  
5 every year as they become due on the policy? 03:00PM

6 A. Yes.

7 Q. And have you paid those premiums?

8 A. By check.

9 Q. Do you receive something in the mail from  
10 Conseco notifying you? 03:00PM

11 A. That they've received the money?

12 Q. Or that a premium is due, either way?

13 A. I think they send me -- I think they send  
14 me something in the mail that tells me it's coming  
15 due. 03:00PM

16 Q. Do you understand that your premiums under  
17 this policy are not fixed or do you believe them to  
18 be fixed?

19 A. Well, I understand that there is a cost of  
20 insurance which can only go up if there's an 03:01PM  
21 increase in future mortality experience. I believe  
22 that wording. Which was explained to me that only  
23 if there's more people dying or you're dying sooner,  
24 and not for any other reason.

25 Q. And who explained that to you? 03:01PM

1 A. Mr. Russo and then also my lawyer.

2 Q. What else did Mr. Russo tell you about how  
3 the insurance policy worked?

4 A. I think that's about it.

5 Q. So going back to the question, you 03:01PM  
6 mentioned cost of insurance.

7 Do you believe that your premium payments  
8 encompassed more than the cost of insurance?

9 A. I don't know how the money is divvied up,  
10 I just know that this is the amount I need to pay 03:02PM  
11 every year.

12 (Deposition Exhibit 3 was  
13 marked for identification and is  
14 annexed hereto.)

15 BY MR. WALSH:

16 Q. Dr. Yue, the court reporter has marked as  
17 Exhibit 3 a document Bates stamped YUE00022 through  
18 YUE00045.

19 I should say documents, plural, because I  
20 believes this is a collection of a number of 03:02PM  
21 policyholder statements pertaining to your policy.

22 Do you recognize these documents?

23 A. Yes.

24 Q. What are they?

25 A. This looks like a policyholder statement. 03:03PM

1 Or a group of them.

2 Q. Did you receive these on some sort of  
3 regular basis?

4 A. I don't remember if I received these or  
5 maybe Charlie received them. I don't usually go 03:03PM  
6 through all of this in a lot of detail.

7 Q. So it's the case that you may have  
8 received them or perhaps they were just sent  
9 directly to Mr. Russo and he maintained them?

10 A. That's possible. I don't remember. 03:03PM

11 Q. And going to the cost of insurance, is it  
12 your understanding that the cost of insurance is to  
13 be static except for future changes in mortality  
14 expectations?

15 A. That is how I understood it. 03:04PM

16 Q. If we could look at first page of  
17 Exhibit 3, Bates stamped 00022.

18 Did you recognize this format, have you  
19 ever seen a document like this before?

20 A. Similar. 03:04PM

21 Q. If you look at the top, beneath "Conseco  
22 Life," it says "Policyholder Statement for September  
23 26th, 2006 to September 27, 2007."

24 Do you see that?

25 A. Yes. 03:04PM

1 Q. And then below there it says "Owner" and  
2 there's your name.

3 Do you see that?

4 A. Yes.

5 Q. Do you believe this to be the statement 03:04PM  
6 for this particular policy at issue here for the  
7 date range indicated?

8 A. It appears to be so.

9 Q. Do you see the insured is your mother Ruth  
10 S. Yue; do you see that? 03:04PM

11 A. Yes.

12 Q. And the issue date is September 26, 1995?

13 A. Yes.

14 Q. And the specified amount is \$400,000?

15 A. Yes. 03:04PM

16 Q. Now going to the summary of activity, you  
17 see there's a payment column second to the left?

18 A. Yes.

19 Q. And do you see where it says \$7,890?

20 A. Yes. 03:05PM

21 Q. And do you believe that to represent the  
22 annual premium you paid?

23 A. Yes.

24 Q. Now looking at the top of the cost of  
25 insurance column, do you see that number increases? 03:05PM

1 A. Yes.

2 Q. Do see it increasing lightly each month  
3 over time?

4 A. Yes.

5 Q. Did you know that that was the case, that 03:05PM  
6 this cost of insurance was increasing slightly each  
7 month over time?

8 A. It looks like it does change a little bit,  
9 but not in a huge and massive way.

10 Q. Were you aware before today that the cost 03:05PM  
11 of insurance on this policy was changing slightly  
12 each month?

13 A. There's a slight change, yes.

14 Q. Were you aware of that before today?

15 A. I don't recall really looking at these 03:05PM  
16 this closely.

17 Q. Were you aware before today that the cost  
18 of insurance under this particular policy would  
19 increase slightly over time?

20 A. Was I aware -- Sorry. Repeat that. 03:05PM

21 Q. Were you aware before today that the cost  
22 of insurance under this policy would increase  
23 slightly as the insured ages?

24 A. Yes.

25 MR. DILLON: I was going to object as 03:06PM

1 vague and ambiguous.

2 THE WITNESS: Okay.

3 MR. DILLON: But she answered.

4 BY MR. WALSH:

5 Q. And you understood the question? 03:06PM

6 A. I believe so.

7 Q. On the right-hand column it says  
8 "Accumulated Value."

9 Do you see that?

10 A. Yes. 03:06PM

11 Q. And do you see that it looks like in  
12 September of '06 the value was about \$20,991 and  
13 change. And then in September of 2007 it had risen  
14 to \$25,000 and change.

15 Do you see that? 03:06PM

16 A. Yes.

17 Q. What do you believe the accumulated value  
18 refers to?

19 A. I believe that has to do with how much  
20 money is -- I can't really explain this very well. 03:06PM

21 I think it has to do with how much money  
22 has built up, like it has a cash value. So after  
23 they subtract the cost of insurance and the expenses  
24 and I get paid a certain interest, that's what's  
25 left over. 03:07PM



1 Q. What's your understanding of how the  
2 insurance policy, Exhibit 1, works?

3 MR. DILLON: I'll object as vague and  
4 ambiguous and overbroad.

5 But, you know, if you understand, please 03:07PM  
6 answer.

7 THE WITNESS: I mean in a general way I  
8 think that I pay money to have an insurance policy,  
9 that there will be a little variation in the cost of  
10 insurance, but not a huge and massive one. And I'd 03:07PM  
11 eventually -- my mother will either die or she  
12 becomes a hundred then I get the \$400,000 after I've  
13 purchased the policy as long as it doesn't lapse.

14 BY MR. WALSH:

15 Q. Did you understand that if your mother 03:07PM  
16 turned a hundred and she's still with us that you  
17 would receive the full pay out on the policy?

18 A. That is my understanding.

19 Q. So if your mother would live to 102 and  
20 the policy didn't lapse, you would receive the full 03:07PM  
21 pay out if she lived to a hundred?

22 A. That is correct.

23 Q. Do you have any understanding that could  
24 increase or decrease the payments you made  
25 annually? 03:08PM

1 A. I don't understand how all that works.

2 Q. Do you know what happens if the  
3 accumulated value in your account, this right-hand  
4 column in Exhibit 3, goes to zero?

5 A. I think it's not worth anything then. 03:08PM

6 Q. Do you believe your insurance policy would  
7 still be in effect?

8 MR. DILLON: I'll object as vague and  
9 ambiguous. And incomplete hypothetical.

10 But please answer if you can understand. 03:08PM

11 BY MR. WALSH:

12 Q. If you know?

13 A. Not really.

14 Q. In the past have you had questions about  
15 how your insurance policy worked? 03:08PM

16 A. I basically rely on Mr. Russo to keep me  
17 informed.

18 Q. Have you posed any questions you may have  
19 about how it works to him?

20 A. Questions? If I have questions, I will 03:08PM  
21 ask him, which he tries to explain to me.

22 But, again, like I said, I'm not an  
23 insurance expert and therefore I heavily rely on him  
24 to interpret information for me.

25 Q. Has he ever told you that you could pay 03:09PM

1 more or less in your annual payments?

2 A. I think he has mentioned that, although I  
3 don't really -- At this point I just maintained it  
4 the same so we haven't really discussed a lot about  
5 that.

03:09PM

6 Q. Are you aware whether you could take loans  
7 against the cash value of your account?

8 A. I believe I can.

9 Q. Have you ever done that?

10 A. No.

03:09PM

11 Q. Do you understand that you get an interest  
12 payment on the cash value in your account?

13 A. Yes.

14 Q. And do you understand the interest may or  
15 may not vary over time?

03:09PM

16 A. Yes.

17 Q. What do you understand, it may vary or it  
18 may not vary?

19 A. I think there's a minimum where it can't  
20 go under, if I'm not mistaken.

03:09PM

21 Q. What's your understanding in that regard?

22 A. I think it can vary, but I think there's a  
23 certain number that -- a percentage that it's not  
24 supposed to go under.

25 I may be wrong because, again, I'm not a

03:09PM

1 insurance expert.

2 Q. Do you know how you got that  
3 understanding?

4 A. I think through conversations with  
5 Mr. Russo.

03:10PM

6 Q. Do you monitor the cash value of the  
7 policy?

8 A. No.

9 Q. Just for clarity, do you recall ever  
10 receiving any of the these annual statements from 03:10PM  
11 Conseco?

12 A. I think I get the annual statements, but I  
13 don't spend a lot of time looking at them.

14 Generally I will meet with Mr. Russo and  
15 Ms. Horn periodically, at least annually, to go over 03:10PM  
16 basic ideas. I don't spend a lot of time looking at  
17 them. Usually I open the mail and I file  
18 everything.

19 Q. Do you recall receiving anything from  
20 Conseco that tells you how the policy is doing? 03:10PM

21 A. Other than annual statements?

22 Q. To the extent you received them, yes.

23 A. Other than the annual statements, I don't  
24 recall any other communication from them.

25 Q. So when you received the annual 03:10PM

1 statements, do you just glance at them or do you  
2 study them?

3 A. I glanced at them.

4 Q. And then you file them?

5 A. Yes. 03:11PM

6 Q. Do you ever discuss how the policy is  
7 doing with Mr. Russo?

8 A. When we do our reviews, if he feels that  
9 there's something that we need to talk about, he'll  
10 bring it up. 03:11PM

11 Q. Do you have periodic reviews with  
12 Mr. Russo and Ms. Horn?

13 A. Yes.

14 Q. How often?

15 A. It can range from every few months to once 03:11PM  
16 a year.

17 Q. And have you ever used any other insurance  
18 agents other than Mr. Russo and Ms. Horn?

19 A. No.

20 Q. Are you satisfied with how the policy is 03:11PM  
21 performing?

22 A. I'm not happy about this increase that is  
23 supposed to happen in year 21.

24 Q. And that's year 21 of the policy; right?

25 A. Yes. 03:11PM

1 Q. Which would be 21 years after 1995?

2 A. Yes.

3 Q. So the increase we're talking about would  
4 occur in 2016?

5 A. Yes. 03:12PM

6 Q. Are you unhappy with anything else  
7 associated with the policy?

8 A. No.

9 Q. Now what's your understanding about this  
10 increase in year 21 that you just mentioned? 03:12PM

11 A. That there is going to be an increase in  
12 the cost of insurance which will raise the price of  
13 the policy to the point where I would really have to  
14 decide if I'm going to put a lot of additional funds  
15 into it or let it lapse. 03:12PM

16 Q. And what's the price of the policy going  
17 to be increased to?

18 A. I don't know.

19 Q. So you don't know whether it's going to be  
20 small or large? 03:12PM

21 MR. DILLON: Object as vague and  
22 ambiguous. And an incomplete question.

23 THE WITNESS: I don't have an exact  
24 amount. But I was told that it would likely be a  
25 high amount. 03:12PM

1 BY MR. WALSH:

2 Q. Who told you that?

3 A. Mr. Russo.

4 Q. And did he give you any sort of  
5 understanding of what he meant by high amount?

03:13PM

6 A. He did not give me any specific numbers.

7 Q. Do you know how Mr. Russo came to learn or  
8 believe that there would be an increase of a high  
9 amount in the 21st year?

10 A. I don't know.

03:13PM

11 Q. Did you ever ask him?

12 A. No.

13 Q. Did you ever talk to Ms. Horn about this?

14 A. Yes.

15 Q. And what did you talk to her about?

03:13PM

16 A. I think she was there when Mr. Russo told  
17 me about it. So basically the same thing, that  
18 there was this increased cost of insurance which was  
19 proposed that was going to become effective very  
20 soon.

03:13PM

21 Q. Did they give any sort of idea of how much  
22 your payments would change in year 21?

23 A. They did not give me any specific dollar  
24 amount, they just said it would be very large.

25 Q. So sitting here today, you don't really

03:13PM

1 know how much your payments are going to change in  
2 the 21st year; is that right?

3 A. That is correct.

4 Q. Have you ever asked Mr. Russo or Ms. Horn  
5 to calculate how much your payments would increase 03:14PM  
6 in year 21?

7 A. No.

8 Q. Why not?

9 A. I just didn't think to do that.

10 Q. Other than this issue with the year 21 03:14PM  
11 increase, have you had any other concerns about this  
12 Consecoco policy?

13 A. No.

14 Q. Have you discussed any of these year 21  
15 issues with anyone other than your lawyers and 03:14PM  
16 Mr. Russo and Ms. Horn?

17 A. No.

18 Q. Have you ever talked to anyone affiliated  
19 Consecoco about this policy?

20 A. No. 03:14PM

21 Q. Have you -- Strike that.

22 When did you first learn from Mr. Russo  
23 and Ms. Horn that they believed there would be a  
24 very large change in year 21 of this policy?

25 A. I think it was probably in 2007. 03:15PM



1 Q. Was this in conjunction with a regular  
2 review or was this a review specific to this issue?

3 A. I think it was in conjunction with a  
4 regular review.

5 Q. And so this issue as well as others were 03:15PM  
6 covered as part of that review?

7 A. Yes.

8 Q. And what did you do when you learned about  
9 Mr. Russo's and Ms. Horn's belief as to the increase  
10 in year 21? 03:15PM

11 A. Well, he seemed rather alarmed by it. And  
12 so I asked him if there was perhaps a lawyer that he  
13 knew that I could talk to about it.

14 Q. And how did he respond?

15 A. He gave me Tim Dillon's name. 03:15PM

16 Q. And you subsequently consulted Mr. Dillon?

17 A. Yes.

18 Q. And how long after your meeting with  
19 Mr. Russo and Ms. Horn did you consult Mr. Dillon?

20 A. Probably -- I'd have to guess. I mean I 03:15PM  
21 think it was pretty soon after they gave me his name  
22 and phone number.

23 Q. I don't want you to guess.

24 Was it --

25 What's your best estimate? 03:16PM

1 A. A few weeks, a couple of weeks.

2 Q. At what point in 2007 did you have this  
3 meeting in which you learned about this increase in  
4 year 21, first part, second part, do you recall?

5 A. I don't recall specifically what month it 03:16PM  
6 was.

7 Q. Do you have annual reviews at a particular  
8 time each year?

9 A. Usually before the end of the year we'll  
10 have a review. But, again, periodically sometimes 03:16PM  
11 they will come up, you know, during the year if  
12 there's some other issue going on.

13 I don't specifically remember if this was  
14 at our review at the end of the year or if it was  
15 prior to that. 03:16PM

16 Q. And after this discussion with Mr. Russo  
17 and Ms. Horn in which you learned about their belief  
18 about the increase in the 21st year, they gave you  
19 Mr. Dillon's name, have you discussed this  
20 particular issue with Mr. Russo and Ms. Horn since? 03:17PM

21 A. They know that I'm in contact with  
22 Mr. Dillon. I have not spoken with them about any  
23 specifics regarding the case.

24 Q. Have you spoken to them about this year 21  
25 increase since that initial conversation? 03:17PM

1           A.   Not in great detail. I don't recall  
2 specifically talking about that increase. He gave  
3 me Tim Dillon's name, I contacted him and primarily  
4 have been working with him since then.

5           Q.   You said "not specifically." 03:17PM

6                   Do you recall any discussions with  
7 Mr. Russo or Ms. Horn subsequent to this initial  
8 discussion in 2007 about the increase in year 21  
9 about this year 21 increase?

10          A.   I'm sorry, say the question again. 03:17PM

11          Q.   We just heard about the discussion you had  
12 the first time with Mr. Russo and Ms. Horn when you  
13 learned about --

14          A.   Yes.

15          Q.   -- the year 21 increase. 03:17PM

16                   Were there any subsequent discussions with  
17 Mr. Russo or Ms. Horn about this issue?

18          A.   Not specifically about the issue itself.  
19 I may have mentioned this happened, oh, I'm talking  
20 to Mr. Dillon about it, but nothing specifically 03:18PM  
21 about the content of what's going on.

22          Q.   And since then have you come to learn what  
23 the size of the year 21 increase might be with  
24 respect to your policy?

25          A.   No. 03:18PM

1 Q. Have you talked to Mr. Russo or Ms. Horn  
2 about whether you should continue funding at the  
3 \$7,890 rate or change your funding rate?

4 A. That's what we're trying to figure out at  
5 this point. Depends on what happens with this case. 03:18PM

6 Q. So you and Mr. Russo and/or Ms. Horn have  
7 discussed whether to increase your monthly payments?

8 A. No. I'm just saying that at this point  
9 I'm trying to figure out what to do with this policy  
10 and have been working primarily with Mr. Dillon. 03:18PM  
11 Mr. Russo and Helen Horn are aware that this case is  
12 proceeding, but I've not specifically come up with a  
13 strategy with them.

14 Q. Okay, I'm -- Here's what I'm trying to get  
15 at. 03:19PM

16 A. Yes.

17 Q. I don't want to know about discussions you  
18 had with Mr. Dillon. Those are privileged.

19 A. Yes.

20 Q. Or I suspect that they're privileged. 03:19PM

21 But I'd like to know what other  
22 discussions you've had. That's why I'm trying to  
23 separate, pull apart discussions you had with  
24 Mr. Russo and Ms. Horn --

25 A. Right.

1 Q. -- separate from discussions with  
2 Mr. Dillon. That's why I keep going back to  
3 Mr. Russo and Ms. Horn.

4 You said, "We're trying to figure out what  
5 to do with the policy." Do you mean "we're" as in 03:19PM  
6 Mr. Dillon and you or Mr. Russo and Ms. Horn and you  
7 are trying to figure it out?

8 A. Mr. Russo and Ms. Horn and I have not had  
9 any specific discussions about whether or not to  
10 increase the funding for this policy at this time. 03:19PM

11 Q. Have you considered whether to increase  
12 the funding at this time in order to increase the  
13 cash balance of the policy?

14 A. It would depend on the amount of how much  
15 the funding would have to increase. 03:20PM

16 Q. And do you know how much that might be?

17 A. No.

18 Q. Have you actually put more money into the  
19 policy yet other than the \$7,890 you've historically  
20 put in per year? 03:20PM

21 A. No.

22 Q. And you say it would depend how much more  
23 funding were necessary.

24 What do you mean by that, is there a  
25 certain threshold level where you would make other 03:20PM

1 decisions?

2 MR. DILLON: I'll object as vague and  
3 ambiguous and incomplete.

4 You can respond if you understand.

5 THE WITNESS: I don't have a specific 03:20PM  
6 dollar amount in mind. But if it is, again, a large  
7 increase, then I would really have to think about  
8 whether or not it was affordable.

9 BY MR. WALSH:

10 Q. Now you understand the increase here isn't 03:21PM  
11 going to happen until year 21; is that correct?

12 A. That is correct.

13 Q. So until then there's no need for you to  
14 make any adjustments to the amount you're putting  
15 into the policy? 03:21PM

16 MR. DILLON: Objection.

17 Vague and ambiguous.

18 BY MR. WALSH:

19 Q. Do you understand the question?

20 A. I understand the question. 03:21PM

21 I understand that I don't need to put in  
22 more, I'm just in my mind wondering what I'm going  
23 to do when year 21 hits and I need to come up with  
24 all this extra money.

25 Q. And in the unfortunate circumstances that 03:21PM

1 should your mother pass away before year 21, this  
2 wouldn't be an issue; is that correct?

3 A. That's correct.

4 Q. Have you considered obtaining a  
5 replacement policy for this particular Conseco  
6 policy marked as Exhibit 1?

03:21PM

7 A. I have considered it, but have not  
8 actually pursued it.

9 Q. Do you feel any urgency to pursue it given  
10 that there will be no adjustment until 2016?

03:22PM

11 A. Of course I have to consider it.

12 Q. And what's your time line to consider it?

13 A. I need to find out what I'm going to do  
14 before the six years -- six further years are up.

15 Q. Sometime during that period before 2016  
16 you must make your decision; is that your point?

03:22PM

17 A. Yes.

18 Q. Do you know when during that period you  
19 must make your decision?

20 A. No.

03:22PM

21 Q. Have you considered specific alternatives  
22 to this particular policy marked as Exhibit 1 or  
23 just the general idea of getting a new policy?

24 A. General idea.

25 Q. Have you explored that general idea with

03:22PM

1 Mr. Russo or Ms. Horn at all?

2 A. No.

3 Q. Have they approached you with any  
4 alternatives with respect to this policy since they  
5 first informed you about the year 21 increase?

03:23PM

6 A. No.

7 MR. WALSH: Tim, how long have we been  
8 going?

9 MR. DILLON: I don't have a watch. She  
10 does.

03:23PM

11 THE WITNESS: It's about 50 some minutes.

12 MR. WALSH: Five or ten more minutes and  
13 we'll take a break.

14 MR. DILLON: Okay.

15 (Deposition Exhibit 4 was  
16 marked for identification and is  
17 annexed hereto.)

03:23PM

18 BY MR. WALSH:

19 Q. Doctor, I have marked as Exhibit 4 a  
20 document Bates stamped YUE000502 through YUE000507.

03:23PM

21 Do you recognize Exhibit 4?

22 A. I believe I've seen this in the papers  
23 that I was given from Mr. Dillon, although I don't  
24 recall specifically reading this cover letter.

25 Q. Did you recall receiving this letter from 03:24PM



1 Consecro in or about January of 2006?

2 A. No.

3 Q. Do you have any belief that you did  
4 receive it or is it the case that you did not  
5 receive it?

03:24PM

6 A. I'm not sure.

7 Q. Do you know where this letter came from?

8 A. It looks like from Consecro Insurance  
9 Company.

10 Q. Well, I can represent to you that the  
11 Bates stamp on the bottom indicate that it came from  
12 your side.

03:24PM

13 I'm just curious as to whether -- if you  
14 know whether -- Strike that. Let me start all over  
15 again.

03:25PM

16 Do you know if Mr. Russo made any  
17 inquiries to Consecro on your behalf in or about 2005  
18 or 2006?

19 A. I don't know.

20 Q. Looking at this letter, it says, first  
21 paragraph?

03:25PM

22 "Thank you for the opportunity  
23 to serve your insurance needs. We  
24 are pleased to provide you with  
25 information reflecting the

03:25PM

1 performance of your policy in the  
2 event of the following:"

3 And then there's an X and it says:

4 "Minimum continuous premium to  
5 age 92 and age 100."

03:25PM

6 Do you see that?

7 A. Yes.

8 Q. Was there a point in time that you

9 requested Mr. Russo to take a look at what the  
10 premiums would be should your mother reach age 92  
11 and age 100?

03:25PM

12 A. No.

13 Q. Did you ever ask Ms. Horn to look into  
14 that?

15 A. No.

03:26PM

16 Q. Did Mr. Russo or Ms. Horn ever report to  
17 you in or about 2005 or 2006 that they had made  
18 inquiries to Conseco with respect to the Conseco  
19 policy?

20 A. No.

03:26PM

21 Q. And it's your testimony you don't believe  
22 you ever received this letter?

23 A. Yes.

24 MR. DILLON: Objection.

25 Mischaracterizes the record.

03:26PM

1 MR. WALSH: I don't mean to do that.

2 Q. I want to know if you've ever seen this  
3 letter.

4 A. I don't recall.

5 Q. You did receive annual statements from 03:26PM  
6 Conseco; correct?

7 A. Yes.

8 Q. Do you recall receiving anything else from  
9 Conseco in the normal course?

10 A. I don't recall. 03:26PM

11 However, often I get so much mail,  
12 oftentimes we just open it and file it.

13 Q. Did you make any inquiries of Conseco in  
14 2005 or 2006 with respect to the policy?

15 A. No. 03:27PM

16 Q. Did you in 2005 or 2006 ever ask Mr. Russo  
17 or Ms. Horn how the policy would perform should your  
18 mother live past age 90?

19 A. No.

20 Q. Ms. Yue, do you have any understanding or 03:27PM  
21 knowledge as to why this letter was generated that's  
22 Exhibit 4?

23 A. No.

24 Q. Have you received any other letters like  
25 this from Conseco since you took out the policy? 03:27PM

1 A. I don't remember any others.

2 MR. WALSH: This is a good time for a  
3 break. Let's go off the record.

4 THE VIDEOGRAPHER: The time is 3:29 P.M.

5 and we're off the record. 03:27PM

6 (Recess taken.)

7 THE VIDEOGRAPHER: The time is 3:39 P.M.

8 We are back on the record.

9 BY MR. WALSH:

10 Q. Do you understand you're still under oath? 03:37PM

11 A. Yes.

12 Q. You testified earlier you don't recall any  
13 conversations with Conseco since you purchased the  
14 policy. But I want to ask you some more specific  
15 questions to see if I can trigger any memories of 03:37PM  
16 conversations that might have occurred.

17 Have you ever placed a phone call into  
18 Conseco at any time since purchasing your policy?

19 A. No.

20 Q. Have you ever reviewed any policy 03:38PM  
21 statements and had questions and called Conseco?

22 A. No.

23 Q. If you have questions about your policy  
24 you just ask Mr. Russo and Ms. Horn?

25 A. Yes. 03:38PM

1 Q. Other than the statements we've seen, do  
2 you have any recollection of receiving anything in  
3 the mail from Conseco?

4 A. No.

5 Q. Other than Ms. Horn and Mr. Russo, have 03:38PM  
6 you ever communicated with any other insurance  
7 agents regarding your Conseco policy?

8 A. No.

9 Q. Do you know who Jim Hawke is, H A W K E?

10 A. No. 03:38PM

11 Q. You've never heard the name Jim Hawke  
12 before?

13 A. I believe I saw his name on one of the  
14 papers. I don't know what his title is or anything.  
15 I think he's affiliated somehow with Conseco. I'm 03:39PM  
16 not sure if he works for them or is a consultant or  
17 what. I remember seeing the name on a piece of  
18 paper, but really I don't know who he is.

19 Q. Do you know anyone that's ever spoken to  
20 Mr. Hawke? 03:39PM

21 A. No.

22 Q. You mentioned a few minutes ago that  
23 Mr. Russo gave you Mr. Dillon's name and phone  
24 number.

25 A. Yes. 03:39PM

1 Q. And then at some point you consulted  
2 Mr. Dillon; is that correct?

3 A. Yes.

4 Q. Did you consult with anyone else besides  
5 Mr. Dillon and people in his office with respect to 03:40PM  
6 whether to bring this lawsuit?

7 A. No.

8 Q. And about how long after you first  
9 consulted with Mr. Dillon was this lawsuit brought?

10 A. Probably within a couple of months. 03:40PM

11 Q. Could you tell us in your own words what  
12 the lawsuit here is about?

13 A. Basically we feel that the cost of  
14 insurance increase in year 21 is a breach of  
15 contract and that is not right and that it should be 03:40PM  
16 stopped.

17 Q. You say it should be stopped. Is it  
18 correct that you're seeking an injunction to stop  
19 Consecro from making adjustments to the cost of  
20 insurance in year 21? 03:40PM

21 A. Yes.

22 Q. And if that injunction were received, that  
23 would mean that you wouldn't have to pay the higher  
24 cost that you envisioned in year 21 of the policy?

25 A. That is correct. 03:41PM

1 Q. And if the injunction --

2 THE VIDEOGRAPHER: I'm sorry, can we pause  
3 for a moment.

4 Okay, we're back.

5 BY MR. WALSH: 03:41PM

6 Q. And if you're successful in getting that  
7 injunction before year 21 on the policy, you won't  
8 be out of pocket any money; is that correct?

9 A. That is correct.

10 Q. And you would continue to be able to pay 03:41PM  
11 the same premium that you've been paying; is that  
12 your understanding?

13 A. That's my understanding.

14 Q. Now in addition to seeking this  
15 injunction, are you seeking on behalf of yourself 03:41PM  
16 any money damages in this case?

17 A. No.

18 Q. Are you seeking on behalf of the class any  
19 money damages in this case?

20 A. No. 03:42PM

21 (Deposition Exhibit 5 was  
22 marked for identification and is  
23 annexed hereto.)

24 BY MR. WALSH:

25 Q. Dr. Yue, I've marked and handed to you a 03:43PM

1 document marked as Exhibit 5, which is the Complaint  
2 in this action complete with some attachments that  
3 came with the Complaint.

4 Do you recognize this document?

5 A. Yes. 03:43PM

6 Q. Did you read the Complaint before it was  
7 filed?

8 A. No.

9 Q. Have you read the Complaint since it was  
10 filed? 03:43PM

11 A. Yes.

12 Q. When did you first read it?

13 A. A few days ago.

14 Q. So before a few days ago you've never read  
15 the Complaint? 03:43PM

16 A. No.

17 Q. Was the Complaint presented to you, a  
18 draft, that you just didn't read before it was  
19 filed?

20 A. I believe so. 03:43PM

21 Q. And do you recall having any oral input  
22 into this Complaint?

23 A. I spoke with my lawyer about it.

24 Q. But you did not read it before it was  
25 filed; correct? 03:44PM



1 A. Correct.

2 Q. And you first read it just a couple of  
3 days ago?

4 A. Yes.

5 Q. Now, as a matter of clarity, the year 21 03:44PM  
6 increase you're talking about, you understood that  
7 wouldn't go into effect until the year 2016 on the  
8 policy in place here; correct?

9 A. Correct.

10 Q. And before then your premiums would not 03:44PM  
11 rise as a result of this year 21 increase that  
12 you're complaining about?

13 MR. DILLON: Objection.

14 Vague and ambiguous and unclear and  
15 incomplete hypothetical. 03:44PM

16 BY MR. WALSH:

17 Q. Do you understand?

18 A. I understand.

19 I would have to consider what to do with  
20 this policy, whether or not I needed to increase the 03:44PM  
21 funding. Whether that happened the next year or in  
22 year 21, I knew that in the next several years I had  
23 to prepare for that.

24 Q. But if you did nothing, it's true that the  
25 premiums would not actually rise until year 21? 03:45PM

1 A. That is correct.

2 Q. And in year 21 your mother will be 91; is  
3 that correct?

4 A. I believe so.

5 Q. Now, you mentioned earlier that you don't 03:45PM  
6 know the precise amount of increase in year 21, but  
7 you believe it will be very large --

8 A. Yes.

9 Q. -- do you recall that testimony?

10 A. Yes. 03:45PM

11 Q. Do you know how much your cost of  
12 insurance on the policy will increase in 2016?

13 A. Not specifically.

14 Q. Do you have any understanding of the order  
15 of magnitude how much it will increase? 03:45PM

16 A. No.

17 Q. And it's correct that you can't put any  
18 sort of dollar amount on what your increase will be  
19 other than you believe it will be very large?

20 A. That is correct. 03:45PM

21 Q. What's your understanding of how your  
22 attorneys will be paid in this case?

23 A. I don't know.

24 Q. Do you know whether your attorneys have  
25 represented policyholders in previous cases against 03:46PM

1 Consecoco?

2 A. I believe he was involved in a case. I  
3 don't know the specifics of who he represented,  
4 those policyholders.

5 Q. Have you reviewed any materials from this 03:46PM  
6 earlier case?

7 A. Only what was present in the papers that  
8 were given to me.

9 Q. When you say the papers given to you, do  
10 you mean to prepare for your deposition or some 03:47PM  
11 other --

12 A. No. Just the papers to look over before  
13 my deposition.

14 Q. And when did you receive those papers?

15 A. Last week. 03:47PM

16 Q. And you said you reviewed them for a  
17 night. Was that last night or some other night?

18 A. I think it was Monday night.

19 Q. And you believe that there might have  
20 been some materials from that prior case in those 03:47PM  
21 papers?

22 A. Yes.

23 Q. If you look at the Complaint towards the  
24 end, starting on B47, B as in boy, 47, the pages are  
25 numbered sequentially, there's a document there from 03:47PM

1 what appears to be the Rosenbaum case.

2 Do you see that?

3 A. Yes.

4 Q. Is that what you're referring to?

5 A. Yes.

03:47PM

6 Q. Do you recall seeing any other materials

7 from the prior case when you went through the

8 documents in preparation for this deposition?

9 A. I don't recall seeing any other ones.

10 Q. Did you authorize the filing of this

03:48PM

11 Complaint?

12 A. Yes.

13 Q. What is your understanding of what a class

14 action complaint is?

15 A. My understanding is that there's a bunch

03:48PM

16 of policyholders that are all in the same boat and

17 that I'm representing them or I would like to

18 represent them.

19 Q. Do you have any other understanding,

20 further understanding, any more details on that?

03:48PM

21 A. No.

22 Q. Why did you decide to file a class action

23 complaint rather than an individual complaint?

24 A. Because I -- It's my understanding that

25 there are approximately 50,000 of these policies out

03:48PM

1     there, and that many people are in the same  
2     situation that I'm in. And I think it's wrong for  
3     them to do what they are trying to do. And  
4     therefore I thought it was a good idea to represent  
5     everybody.

03:48PM

6           Q.     And where did you get the 50,000 number  
7     from?

8           A.     From my lawyer.

9           Q.     Do you know anyone else that owns a  
10    Conseco life insurance policy?

03:49PM

11          A.     No.

12          Q.     Are you aware of anyone else who alleges  
13    that Conseco acted improperly by increasing the cost  
14    of insurance rates on his or her policy?

15          A.     I don't know anyone personally.

03:49PM

16          Q.     Other than conversations with your  
17    lawyer --

18          A.     Yes.

19          Q.     -- have you learned from anybody else?

20          A.     No.

03:49PM

21          Q.     Do you allege that Conseco made any false  
22    or misleading statements about the premiums in  
23    conjunction with the sale of the policy to you?

24          A.     As I understand it, the way the

25    contract -- the original contract is written, the

03:49PM

1 cost of insurance is only to go up if there is an  
2 increase in mortality experience, in other words, if  
3 there are more people dying. And I don't think that  
4 that is the case. If anything, people are living  
5 longer now. So it didn't really make sense.

03:49PM

6 Q. Did you come to have that understanding  
7 from an individual reading of the policy on your own  
8 behalf or did you get that understanding from  
9 someone else?

10 A. From someone else.

03:50PM

11 Q. And who is that?

12 A. My lawyer.

13 Q. Did you get that understanding from

14 Mr. Russo or Ms. Horn?

15 A. No.

03:50PM

16 Q. So your understanding how the policy works  
17 comes from your lawyers and not from your own  
18 reading of the policy?

19 A. That is correct.

20 Q. Now with respect to the purchase of the

03:50PM

21 policy, did you have any interaction with any

22 Consecro representatives?

23 A. No.

24 Q. Do you know if Mr. Russo or Ms. Horn did?

25 A. I do not know.

03:50PM

1 Q. So is it correct that you're not aware of  
2 any statements made by Consecro in conjunction with  
3 the purchase of this policy?

4 A. I am not aware of.

5 Q. Do you believe that Mr. Russo and Ms. Horn 03:50PM  
6 made my misleading statements to you with respect to  
7 this policy when it was first purchased?

8 A. I do not believe so.

9 Q. You mentioned earlier that you have  
10 considered terminating your policy -- Strike that. 03:51PM

11 You mentioned earlier you have  
12 considered other life insurance products to replace  
13 this policy but haven't made any decisions yet; is  
14 that correct?

15 A. I've only considered it in a general way, 03:51PM  
16 nothing specific.

17 Q. When you say considered it in a general  
18 way, what do you mean?

19 A. I mean should I put more money into  
20 this policy, will this increase not happen, will 03:51PM  
21 I be able to find a life insurance policy to cover  
22 my mother at this age? General questions like  
23 that.

24 Q. Have you gone any further in considering  
25 whether to get a replacement policy other than 03:52PM

1 thinking it through in your head?

2 A. Not at this time.

3 Q. Have you asked Mr. Russo or Ms. Horn to  
4 look into a replacement policy?

5 A. No. 03:52PM

6 Q. And I take it neither you or your mother,  
7 to you knowledge, has applied for new life  
8 insurance?

9 A. No.

10 Q. So you don't know today whether or not 03:52PM  
11 she'd be eligible for an additional life insurance  
12 or new life insurance?

13 A. That is correct.

14 Q. There's something on the -- in relation to  
15 this policy called an accumulation account. 03:52PM

16 Are you familiar with that term?

17 A. I think I've heard it before.

18 Q. If you could look at Exhibit 3, if you  
19 could.

20 Do you see the right-hand column, 03:52PM  
21 "Accumulated Value"?

22 A. Yes.

23 Q. Have you heard of that value called an  
24 accumulation account before?

25 A. Yes. 03:52PM



1 Q. And is it correct that the payments you  
2 make on an annual basis get credited toward this  
3 account?

4 A. Yes.

5 Q. And if you increase your payments, the 03:53PM  
6 account will increase over time more than if you  
7 didn't increase the payments; is that right?

8 A. Yes.

9 Q. Is it your understanding that if you keep  
10 funding this policy at the current rate, there will 03:53PM  
11 be insurance at least through 2015?

12 A. Yes.

13 Q. Do you believe the value of your life  
14 insurance policy has diminished as a result of  
15 the what you believe to be the cost of insurance 03:53PM  
16 increase in 2016?

17 A. Yes.

18 Q. In what way has it diminished?

19 A. Because at year 21, if the increases are  
20 prohibitively expensive the policy will lapse and it 03:53PM  
21 will not be worth as much.

22 Q. Do you believe that the value of the life  
23 insurance policy diminishes today or are you  
24 speaking of future diminished --

25 MR. DILLON: I'm going to object as vague 03:53PM

1 and ambiguous and incomplete.

2 I'll allow her to answer subject to my  
3 objection.

4 BY MR. WALSH:

5 Q. I haven't finished my question. 03:54PM

6 -- future diminished value. So let me  
7 repeat the whole question again subject to  
8 Mr. Dillon's objection.

9 Do you believe the value of your life  
10 insurance policy has diminished today or that it 03:54PM  
11 just suffers from possible future diminished value  
12 should it still be in effect in 2016?

13 A. I think it's diminished today because I  
14 need to consider now what I'm going to do. If this  
15 change in effect happens, my mother is 84-year-old 03:54PM  
16 now, I'm not even sure she can qualify for any other  
17 policies. So if it's not effective until age 100 it  
18 changes a lot of different things .

19 Q. Now if your mother in the unfortunate  
20 circumstance she would pass before 2016, it's 03:54PM  
21 correct that the value of the policy would not  
22 diminish in value at all?

23 MR. DILLON: Objection.

24 Vague and ambiguous. And incomplete  
25 hypothetical. 03:54PM

## DEPOSITION EXHIBITS (CONTINUED)

CELEDONIA YUE

NUMBER	DESCRIPTION	IDENTIFIED
Exhibit 6	Document entitled	79
	"Plaintiff Celedonia X.	
	Yue, M.D. Answers And	
	Objections To Conseco Life	
	Insurance Company's First	
	Set Of Interrogatories."	

**5**

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20 CONSECO LIFE INSURANCE COMPANY

21 **UNITED STATES DISTRICT COURT**  
22 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

23 CELEDONIA X. YUE, M.D., on behalf  
24 of the class of all others similarly  
25 situated, and on behalf of the General  
26 Public,

27 Plaintiff,

28 v.

29 CONSECO LIFE INSURANCE  
30 COMPANY, successor to Philadelphia  
31 Life Insurance Company and formerly  
32 known as Massachusetts General Life  
33 Insurance Company,

34 Defendant.

Case No. CV08-01506 AHM (CTx)

**DECLARATION OF KEITH TURNER  
IN OPPOSITION TO PLAINTIFF'S  
MOTION FOR CLASS  
CERTIFICATION**

Hearing Date: August 10, 2009  
Time: 10:00 a.m.  
Courtroom: 14  
Judge: Hon. A. Howard Matz

1 I, Keith Turner, hereby declare as follows:

2  
3 1. I am a Senior Managing Actuary of Conseco Services, LLC, which  
4 supplies actuarial services and other support for Defendant Conseco Life Insurance  
5 Company ("Conseco Life"). I make this declaration upon my review of Conseco  
6 Life's books and records.

7 2. Based upon my review of Conseco Life's books and records: (a) there  
8 are approximately 50,000 ValuLife and ValuTerm policies currently in force, (b)  
9 ValuTerm and ValuLife policies were issued in all 50 states except New York, and  
10 (c) ValuTerm and ValuLife policies were also issued in Guam, the United States  
11 Virgin Islands, the District of Columbia, and Puerto Rico.

12  
13 I declare under penalty of perjury under the laws of the United States of  
14 America that the foregoing is true and correct.

15  
16 Executed on July 8, 2009 in Carmel, Indiana.

17  
18   
19 KEITH TURNER

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18 UNITED STATES DISTRICT COURT  
19 CENTRAL DISTRICT OF CALIFORNIA  
20 WESTERN DIVISION

21 CELEDONIA X. YUE, M.D., on behalf  
22 of the class of all others similarly  
23 situated, and on behalf of the General  
24 Public,

25 Plaintiffs,

26 vs.

27 CONSECO LIFE INSURANCE  
28 COMPANY,

Defendant.

Case No. CV 08-1506 AHM(SHx)

Honorable A. Howard Matz

**PLAINTIFF'S NOTICE OF  
RECENT DECISION OF NINTH  
CIRCUIT IN SUPPORT OF CLASS  
CERTIFICATION**

(Putative) CLASS ACTION

Date : September 14, 2009

Time : 10:00 a.m.

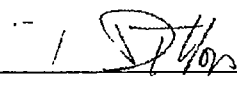
Room: 14

1 Plaintiff respectfully refers this Court to the recent Ninth Circuit decision in  
2 *Rodriguez v. Hayes*, \_\_ F.3d \_\_, 2009 WL 2526622 (9<sup>th</sup> Cir. 2009), at \* 7, 13 which  
3 bears directly on issues presented in Plaintiff's Motion for Class Certification  
4 (ripeness of class members' claims and Rule 23(b)(2) standards for certification).  
5 The Ninth Circuit issued its decision in *Rodriguez* after Plaintiff submitted her  
6 Reply Memorandum in Support of Motion for Class Certification. A copy of the  
7 decision is attached hereto.

8 Respectfully submitted,

9 Dated: August 29, 2009

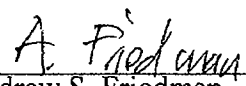
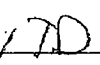
LAW OFFICES OF TIMOTHY P. DILLON

10  
11 By: 

12 Timothy P. Dillon

13  
14 Dated: August 29, 2009

BONNETT, FAIRBOURN, FRIEDMAN &  
BALINT, P.C.

15  
16 By:  / 

17 Andrew S. Friedman  
Francis J. Balint, Jr.

18 Attorneys for Plaintiffs



--- F.3d ---, 2009 WL 2526622 (C.A.9 (Cal.)), 09 Cal. Daily Op. Serv. 10,716  
(Cite as: 2009 WL 2526622 (C.A.9 (Cal.)))

United States Court of Appeals,  
Ninth Circuit.  
Alejandro RODRIGUEZ, Petitioner-Appellant,  
v.

James HAYES, Immigration and Customs Enforcement Los Angeles District Field Officer Director; George Molinar, Chief of Detention and Removal Operations, San Pedro Detention Facility; Janet Napolitano,<sup>58</sup> Secretary, Department of Homeland Security; Eric H. Holder Jr., Attorney General; Paul Walters; Lee Baca, Sheriff of Los Angeles County; Sammy Jones, Chief of the Custody Operations Division of the Los Angeles County Sheriff's Department, Respondents-Appellees.  
No. 08-56156.

Argued and Submitted May 5, 2009.  
Filed Aug. 20, 2009.

**Background:** Petitioner sought writ of habeas corpus, on behalf of himself and class of aliens detained during immigration proceedings for more than six months without bond hearing, seeking injunctive and declaratory relief providing individualized bond hearings with burden on government, certification of class, and appointment of class counsel. The United States District Court for the Central District of California, Terry J. Hatter, J., denied petition. Petitioner appealed.

**Holdings:** The Court of Appeals, B. Fletcher, Senior Circuit Judge, held that:

- (1) proposed class was adequately defined for certification;
- (2) petitioner's claim was not moot despite his release;
- (3) class claims were ripe for adjudication;
- (4) class certification was not barred by Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA);
- (5) class satisfied commonality requirement for certification;
- (6) class satisfied typicality requirement for certification; and
- (7) class satisfied primarily injunctive or declaratory relief requirements for class certification.

Reversed and remanded.

#### West Headnotes

#### [1] Federal Courts 170B 🔑

##### 170B Federal Courts

Court of Appeals reviews a district court's decision to deny class certification for abuse of discretion; however, district court's decision as to class certification is not afforded the traditional deference when the decision is not supported by sufficient findings. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

#### [2] Federal Courts 170B 🔑

##### 170B Federal Courts

Where the district court made no findings whatsoever in support of its denial of class certification, but the record is sufficiently developed, Court of Appeals may itself evaluate whether the proposed class should be certified. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

#### [3] Habeas Corpus 197 🔑

##### 197 Habeas Corpus

Habeas petitioner's proposed class of aliens detained for more than six months pursuant to "general immigration statutes," without bond hearing, was adequately defined for certification, since petition and request for class certification together narrowed general reference to specific provisions of Immigration and Nationality Act (INA) governing detention of aliens at different stages of admission and removal process. 8 U.S.C.A. §§ 1182(d)(5)(A), 1225(b), 1226, 1231(a).

#### [4] Aliens, Immigration, and Citizenship 24 🔑

##### 24 Aliens, Immigration, and Citizenship

Once removal of an alien is no longer reasonably foreseeable, continued detention is no longer authorized by Immigration and Nationality Act (INA) provision authorizing discretionary detention of aliens

--- F.3d ---, 2009 WL 2526622 (C.A.9 (Cal.)), 09 Cal. Daily Op. Serv. 10,716  
(Cite as: 2009 WL 2526622 (C.A.9 (Cal.)))

after removal period. 8 U.S.C.A. § 1231(a)(6).

#### **[5] Aliens, Immigration, and Citizenship 24 ↪0**

##### **24 Aliens, Immigration, and Citizenship**

For six months following the beginning of the admission or removal period, discretionary detention of alien is presumptively authorized, under Immigration and Nationality Act (INA); however, after that period, once the alien provides good reason to believe that there is no significant likelihood of admission or removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing in order to continue to detain the alien. 8 U.S.C.A. §§ 1225(b), 1226(a), 1231(a)(6).

#### **[6] Aliens, Immigration, and Citizenship 24 ↪0**

##### **24 Aliens, Immigration, and Citizenship**

Even when discretionary detention of an alien is authorized, under the Immigration and Nationality Act (INA), due process requires adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint. U.S.C.A. Const.Amend. 5; 8 U.S.C.A. §§ 1231(a), 1226(a), 1231(a)(6).

#### **[7] Aliens, Immigration, and Citizenship 24 ↪0**

##### **24 Aliens, Immigration, and Citizenship**

Immigration and Nationality Act (INA) provision, governing discretionary detention of alien pending decision on removal, authorizes the Attorney General to release the alien from detention on bond, following a bond hearing, unless government establishes that alien is a flight risk or will be a danger to the community. 8 U.S.C.A. § 1226(a).

#### **[8] Aliens, Immigration, and Citizenship 24 ↪0**

##### **24 Aliens, Immigration, and Citizenship**

Although Immigration and Nationality Act (INA) provision governing mandatory detention of criminal aliens for expedited removal does not raise any due process concerns, the provision authorizes mandatory detention only for the limited period of the alien's removal proceedings, generally lasting roughly a

month and a half, and about five months in the cases in which the alien chooses to appeal his removal order to the Board of Immigration Appeals (BIA). U.S.C.A. Const.Amend. 5; 8 U.S.C.A. § 1226(c).

#### **[9] Aliens, Immigration, and Citizenship 24 ↪0**

##### **24 Aliens, Immigration, and Citizenship**

In order to avoid the serious constitutional questions raised by an indefinite mandatory detention of an alien, the detention of an alien beyond an expedited period ceases to be mandatory and instead becomes discretionary, under Immigration and Nationality Act (INA). 8 U.S.C.A. §§ 1226(a), 1226(c).

#### **[10] Aliens, Immigration, and Citizenship 24 ↪0**

##### **24 Aliens, Immigration, and Citizenship**

Regardless of whether removal of the detained alien is foreseeable, under Immigration and Nationality Act (INA) provision governing mandatory detention of alien who has been found inadmissible or removable, because the provision authorizes detention for only the 90-day removal period, the provision does not create any danger of indefinite detention implicating constitutional concerns. 8 U.S.C.A. § 1231(a)(2).

#### **[11] Aliens, Immigration, and Citizenship 24 ↪0**

##### **24 Aliens, Immigration, and Citizenship**

Alien cannot assert a viable constitutional claim when his indefinite detention is due to his failure to cooperate with the government's efforts to remove him, under Immigration and Nationality Act (INA) provision extending removal period and allowing mandatory detention of alien who has been found inadmissible or removable to extend beyond 90 days if alien conspires or acts to prevent his own removal. 8 U.S.C.A. § 1231(a)(1)(C).

#### **[12] Habeas Corpus 197 ↪0**

##### **197 Habeas Corpus**

While ordinarily disfavored, class actions may be brought pursuant to habeas corpus. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

#### **[13] Habeas Corpus 197 ↪0**

--- F.3d ---, 2009 WL 2526622 (C.A.9 (Cal.)), 09 Cal. Daily Op. Serv. 10,716  
(Cite as: 2009 WL 2526622 (C.A.9 (Cal.)))

#### 197 Habeas Corpus

Although habeas petitioner had been released from detention, petitioner's claims for injunctive and declaratory relief were not moot, but rather still presented live controversy on grounds that he retained personal stake in determination of claims on behalf of himself and class of aliens detained during immigration proceedings for more than six months without bond hearing, since petitioner's release was subject to restrictions and subject to discretionary revocation without hearing before neutral decision-maker and without burden of justification on government. U.S.C.A. Const. Art. 3, § 2, cl. 1; 8 C.F.R. § 241.4.

#### 114 Federal Courts 170B

##### 170B Federal Courts

The failure of a party in its opening brief to challenge an alternate ground for a district court's ruling given by the district court waives that challenge.

#### 115 Habeas Corpus 197

##### 197 Habeas Corpus

Habeas petitioner did not waive in his opening brief on appeal any challenge to any ground for denial of certification of proposed class of detained aliens that was not relied upon in the district court's order. Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A.

#### 116 Federal Courts 170B

##### 170B Federal Courts

A claim is not "ripe" for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.

#### 117 Habeas Corpus 197

##### 197 Habeas Corpus

Habeas petitioner's request for certification of claims on behalf of himself and class of aliens detained during immigration proceedings for more than six months without bond hearing was not barred by ripeness requirement, on asserted grounds that government had not yet refused to comply with intervening law requiring bond hearing and that proposed class also

referred to future class members, since government's compliance with intervening law by holding bond hearings would merely reduce size of class, but would not render claims of remaining class members unripe, and future persons' claims would necessarily be ripe when they became members of class. 8 U.S.C.A. § 1226(a).

#### 118 Habeas Corpus 197

##### 197 Habeas Corpus

Habeas petitioner's request for certification of claims for injunctive and declaratory relief on behalf of himself and class of aliens detained during immigration proceedings for more than six months without bond hearing was not barred by Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), prohibiting federal courts from granting classwide injunctive relief against operation of alien detention provisions, under Immigration and Nationality Act (INA), since IIRIRA did not bar declaratory relief and did not bar relief seeking to enjoin violation of, rather than operation of, detention statutes. 8 U.S.C.A. §§ 1221-1231, 1252(f)(1).

#### 119 Aliens, Immigration, and Citizenship 24

##### 24 Aliens, Immigration, and Citizenship

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) prohibits federal courts from granting classwide injunctive relief against the operation of alien detention provisions, under Immigration and Nationality Act (INA), but specifies that this ban does not extend to individual cases. 8 U.S.C.A. §§ 1221-1231, 1252(f)(1).

#### 120 Aliens, Immigration, and Citizenship 24

##### 24 Aliens, Immigration, and Citizenship

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) prohibits only injunction of the "operation of" the detention provisions, under Immigration and Nationality Act (INA), not an injunction of a violation of the provisions. 8 U.S.C.A. §§ 1221-1231, 1252(f)(1).

#### 121 Federal Civil Procedure 170A

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#### 170A Federal Civil Procedure

For class action certification, the commonality requirement is construed permissively. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

#### **[22] Federal Civil Procedure 170A** ⚡

##### 170A Federal Civil Procedure

To satisfy the commonality requirement for class certification, it is not necessary that all questions of fact and law be common to class members, but rather, the existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

#### **[23] Federal Civil Procedure 170A** ⚡

##### 170A Federal Civil Procedure

For class action certification, "common" within meaning of commonality requirement does not mean complete congruence. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

#### **[24] Habeas Corpus 197** ⚡

##### 197 Habeas Corpus

Habeas petitioner's claims for injunctive and declaratory relief on behalf of himself and class of aliens detained during immigration proceedings for more than six months without bond hearing shared sufficiently common questions of law regarding constitutionality of prolonged detainment, as necessary to satisfy commonality requirement for class certification, even though class members were detained for different reasons and under authority of different statutes, since constitutional issue was at heart of each class member's claim for relief. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

#### **[25] Federal Civil Procedure 170A** ⚡

##### 170A Federal Civil Procedure

The typicality requirement for class certification looks to whether the claims of the class representatives are typical of those of the class, and is satisfied when each class member's claim arises from the same course of

events, and each class member makes similar legal arguments to prove the defendant's liability. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

#### **[26] Federal Civil Procedure 170A** ⚡

##### 170A Federal Civil Procedure

Like the commonality requirement, the typicality requirement for class certification is permissive and requires only that the class representative's claims are reasonably co-extensive with those of absent class members; but the claims need not be substantially identical. Fed.Rules Civ.Proc.Rule 23(a)(2), (3), 28 U.S.C.A.

#### **[27] Habeas Corpus 197** ⚡

##### 197 Habeas Corpus

Habeas petitioner's claims for injunctive and declaratory relief were reasonably co-extensive with claims of class of aliens detained during immigration proceedings for more than six months without bond hearing, as necessary to satisfy typicality requirement for class certification, even though petitioner and class members were detained for different reasons, under authority of different statutes, and were at different points in removal process, since all class members raised similar constitutionally-based arguments and were alleged victims of same practice of prolonged detention. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

#### **[28] Federal Civil Procedure 170A** ⚡

##### 170A Federal Civil Procedure

Defenses unique to a class representative counsel against class certification only where they threaten to become the focus of the litigation. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

#### **[29] Federal Civil Procedure 170A** ⚡

##### 170A Federal Civil Procedure

Whether the class representatives satisfy the adequacy requirement for certification of the class depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood

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that the suit is collusive. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

**[30] Federal Civil Procedure 170A** ➡

**170A Federal Civil Procedure**

Class certification under rule requiring that the primary relief sought is declaratory or injunctive does not require examination of the viability or bases of class members' claims for declaratory and injunctive relief, but examination of whether class members seek uniform relief from a practice applicable to all of them. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

**[31] Federal Civil Procedure 170A** ➡

**170A Federal Civil Procedure**

It is sufficient to meet the requirements of class certification rule, requiring that the primary relief sought is declaratory or injunctive, that class members complain of a pattern or practice that is generally applicable to the class as a whole; the fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting these certification requirements. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

**[32] Federal Civil Procedure 170A** ➡

**170A Federal Civil Procedure**

Unlike class actions brought under the other prongs of class certification rule, questions of manageability and judicial economy are irrelevant to class actions in which primary relief sought is declaratory or injunctive. Fed.Rules Civ.Proc.Rule 23(b), 28 U.S.C.A.

**[33] Habeas Corpus 197** ➡

**197 Habeas Corpus**

Proposed members of class of alien detainees all sought injunctive and declaratory relief from government's single practice of prolonging aliens' detention during immigration proceedings for more than six months without bond hearing, as required to satisfy class certification requirement that primary relief sought was declaratory or injunctive in form of individualized bond hearing with burden placed on government, even though some class members may have

suffered no injury or different injuries from prolonged detention and were detained for different reasons and under authority of different statutes that would merely control type of process that class members would receive. Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

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Gregory G. Katsas, Assistant Attorney General, Civil Division; David J. Kline, Director, District Court Section; Gjon Juncaj (argued), Senior Litigation Counsel; and Nancy N. Safavi, Trial Attorney, Office of Immigration Litigation, United States Department of Justice, Washington, DC, for the respondents-appellees.

Appeal from the United States District Court for the Central District of California, Terry J. Hatter, District Judge, Presiding. D.C. No. 2:07-CV-03239-TJH-RNB.

Before BETTY B. FLETCHER, RAYMOND C. FISHER and RONALD M. GOULD, Circuit Judges.

**OPINION**

B. FLETCHER, Senior Circuit Judge:

\*1 Petitioner Alejandro Rodriguez ("Petitioner") seeks a writ of habeas corpus on behalf of himself and a class of aliens detained in the Central District of California for more than six months without a bond hearing while engaged in immigration proceedings. Petitioner requests injunctive and declaratory relief providing individual bond hearings to all members of the class. Petitioner appeals the district court denial without explanation of Petitioner's request to certify the proposed class. Respondents, seeking to fill the gap left by the district court's conclusory order, assert

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that the district court's denial was justified on any of the following grounds: 1) the proposed class is undefined; 2) the claim of Petitioner is moot; 3) the claims of the proposed class are unripe; 4) class relief is barred by 8 U.S.C. § 1252(f); 5) the court lacks jurisdiction over the claims of the proposed class in light of the holding in *Rumsfeld v. Padilla*; and 6) the proposed class does not meet the requirements of Federal Rule of Civil Procedure 23. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292. We conclude that none of the grounds offered by Respondents justify denial of class certification and that the class meets the requirements of Rule 23; accordingly, we reverse.

### I. Background

Petitioner is a citizen of Mexico who came to the United States at the age of one in 1979. He became a lawful permanent resident eight years later. Petitioner was arrested in April 2004, charged with being removable based on past drug and theft convictions, and detained thereafter by the Department of Homeland Security. Petitioner contested his removability before an immigration judge ("IJ"), who determined he was subject to mandatory removal based on either of his past offenses. The Board of Immigration Appeals ("BIA") reversed the IJ's finding that Petitioner was removable on the basis of his drug offense, but upheld the IJ's finding that his theft conviction was an aggravated felony requiring removal. Petitioner appealed the BIA's finding that his theft offense constituted an aggravated felony and we stayed his removal pending our decision. The appeal has been held in abeyance pending determination of a separate appeal to the United States Supreme Court. During his detention Petitioner received three custody reviews from Immigration and Customs Enforcement that determined to continue his detention, the latest occurring in September 2006. In conjunction with these reviews, Petitioner received no hearing or notice explaining ICE's decision beyond mention that his Ninth Circuit appeal was pending.<sup>FNI</sup>

On May 16, 2007, Petitioner filed the current Petition for Writ of Habeas Corpus against the secretaries of the Departments of Homeland Security and Justice, the field office director in the Central District of California for Immigration and Customs Enforcement

("ICE"), and the head officials of various alien detention facilities in the district ("Respondents"). Petitioner seeks relief on behalf of himself and a class of aliens in the Central District of California "who 1) are or will be detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, and 2) have not been afforded a hearing to determine whether their prolonged detention is justified." (Pet. for Writ of Habeas Corpus ¶ 39.) Petitioner asserts that the detention of the members of the proposed class is not authorized by statute, and, in the alternative, that if their detention is authorized it violates the Fifth Amendment's guarantee of due process. Petitioner's requested relief includes the certification of the proposed class, appointment of Petitioner's counsel as class counsel, and injunctive and declaratory relief providing all members of the class "constitutionally-adequate individual hearings before an immigration judge ..., at which Respondents will bear the burden to prove by clear and convincing evidence that Petitioner and each class member is a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future." (Pet. for Writ of Habeas Corpus 21.)

\*2 On June 25, 2007 Petitioner filed a Motion for Class Certification, which was opposed by Respondents on the same grounds now raised in this appeal. ICE released Petitioner from detention under an order of supervision approximately a month later pursuant to 8 C.F.R. § 241.4. Respondents subsequently filed a motion to dismiss Petitioner's action on mootness grounds in light of his release.

The district court denied Petitioner's Motion for Class Certification and the Respondents' Motion to Dismiss on March 19, 2008 in a two-sentence order. Petitioner filed the current appeal of the denial of class certification on July 17, 2008.

### II. Standard of Review

[1][2] We review a district court's decision to deny class certification for abuse of discretion. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir.2001), amended, 273 F.3d 1266 (9th Cir.2001).

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However, a district court's decision as to class certification is not afforded the "traditional deference" "when it is not 'supported by sufficient findings.'" *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir.2003) (quoting *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161(9th Cir.2001)). Here, where the district court made no findings whatsoever in support of its denial of class certification, but the record before us is sufficiently developed, "we may evaluate for ourselves" whether the class should be certified. *Las Vegas Sands*, 244 F.3d at 1161.<sup>FN2</sup> Respondents contend that we should afford the full deference normally accorded the district court's order on the basis that its findings and reasoning can be derived implicitly from Respondents' opposition to class certification filed below. Respondents, however, offered multiple reasons for denying class certification. We would be engaging in mere guesswork were we to assume the district court relied on any particular reason or reasons. We, therefore, follow *Las Vegas Sands* in reviewing the district court's determination.

### III. Definition of Proposed Class

[3] Petitioner seeks to certify a class of detainees who are held pursuant to what Petitioner labels the "general immigration statutes." Respondents assert that Petitioner's use of the phrase "general immigration statutes" creates an undefined class. While not a model of clarity, Petitioner's habeas corpus petition and request for class certification together indicate that "general immigration statutes" refers narrowly to 8 U.S.C. § 1226, 8 U.S.C. § 1225(b), and 8 U.S.C. § 1231(a). Whether 8 U.S.C. § 1182(d)(5)(A) is also included in the definition is ambiguous, as it is only referenced in Petitioner's subsequent filings. This is of no practical importance, however, as Section 1182(d)(5)(A) merely provides for discretionary parole of detainees, which, upon revocation, returns the detainees to the form of legal detention they were in prior to parole. 8 U.S.C. § 1182(d)(5); see *Clark v. Martinez*, 543 U.S. 371, 385-86, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) (discussing effect of Section 1182(d)(5) on detention status). Hence, we conclude Petitioner's proposed class is adequately defined for certification.

### IV. Immigration Detention Statutes

\*3 The three immigration detention statutes implicated by the proposed class govern detention of aliens at different stages of the admission and removal process. 8 U.S.C. § 1225(b) provides for discretionary detention of aliens pending a determination of admissibility.<sup>FN3</sup> 8 U.S.C. § 1226 provides for both discretionary detention generally and mandatory detention for certain narrow categories of aliens pending a determination of their removability.<sup>FN4</sup> 8 U.S.C. § 1231(a) provides for mandatory detention of aliens ordered removed during the 90 day removal period and discretionary detention after the end of the removal period.<sup>FN5</sup> Petitioner's request for relief raises the question of whether prolonged detention without a bond hearing is authorized under any of these statutes and, in the alternative, even if it is authorized, whether such detention is constitutional. These are not new questions for this court. In a series of decisions, the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing. Each decision has undertaken interpretation of the immigration detention statutes against the backdrop of the serious constitutional issues raised by indefinite or prolonged detention. We review these decisions to provide the necessary context to aid in determining the appropriateness of class relief.

#### A. Discretionary Detention

[4][5] In *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), the Supreme Court first took up the question of whether an immigration discretionary detention statute authorized indefinite or prolonged detention. The alien there was detained pursuant to Section 1231(a)(6), authorizing discretionary detention of aliens after the removal period. The Court held that a "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690. The Court found Section 1231(a)(6) ambiguous as to whether it authorized indefinite detention and, therefore, "interpreting the statute to avoid a serious constitutional threat, ... conclude[d] that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. The Court determined that for six months following the beginning of the removal

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period an alien's detention was presumptively authorized. *Id.* at 701. However, after that period, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing" in order to continue to detain the alien. *Id.* Though *Zadvydas* dealt only with aliens detained pursuant to Section 1231(a)(6) who were removable under Section 1227(a)(1)(C), 1227(a)(2) or 1227(a)(4), the Supreme Court subsequently extended its holding to the other two categories of aliens governed by the statute: aliens inadmissible under Section 1182 and aliens determined by the Secretary of Homeland Security to be a risk to the community or a flight risk. See *Clark*, 543 U.S. at 378; see also *Xi v. INS*, 298 F.3d 832, 834 (9th Cir.2002). We have further extended the *Zadvydas* framework to discretionary detention pursuant to Section 1225(b) and 1226(a), finding that indefinite detention under these statutes poses the same constitutional concerns present in *Zadvydas*. See *Prieto-Romero v. Clark*, 534 F.3d 1053, 1062-63 (9th Cir.2008); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1078-80 (9th Cir.2006).

\*4 [6][7] Having applied the *Zadvydas* framework to determine when prolonged discretionary detention is authorized, we have also begun to determine what sort of bond hearing, if any, is needed to justify prolonged discretionary detention for individual petitioners. As we stated in *Prieto-Romero*, even when detention is authorized by statute, "due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" 534 F.3d at 1065 (quoting *Zadvydas*, 533 U.S. at 690-91). In *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949-52 (9th Cir.2008), we determined that Section 1226(a) authorized detention of the petitioner at issue and proceeded to discuss what bond hearing, if any, he was entitled to. We concluded that Section 1226(a) provided authority for the Attorney General to release an alien detained under the section on bond following a bond hearing. *Id.* "Because the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,' " we further concluded "that § 1226(a) must be construed as requiring the

Attorney General to provide the alien with such a hearing." *Id.* (emphasis omitted). Hence, we held that an alien detained under Section 1226(a) "is entitled to release on bond unless the government establishes that he is a flight risk or will be a danger to the community." *Id.* at 951 (internal quotation marks omitted); see also *Flores-Torres v. Mukasey*, 548 F.3d 708, 709 n.2 (9th Cir.2008); *Prieto-Romero*, 534 F.3d at 1065-66 (finding three bond hearings for Section 1226(a) detainee satisfied due process); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir.2005) (finding alien detained for nearly three years could not be mandatorily detained under Section 1226(c) and ordering bond hearing, impliedly finding alien was detained under Section 1226(a)).

In *Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir.2008), by contrast, we refused to reach the issue of whether a bond hearing was required under Section 1231(a)(6). We held the detention of the petitioner at issue beyond the six month period was authorized under Section 1231(a)(6). *Id.* at 1233. We then turned to the issue of what bond hearing, if any, the petitioner was entitled to for determining the necessity of his detention. We concluded that while release on bond was clearly authorized by Section 1231(a)(6) and its implementing regulations, it was unclear whether a bond hearing was required under the statute for petitioner and what burden if any should be placed on the government at such a hearing. *Id.* at 1234-35. Because the district court had not had an opportunity to reach this question, we declined to reach it in the first instance and remanded. *Id.* at 1235. However, in doing so we noted that the issue was "somewhat similar" to that in *Casas-Castrillon*, strongly implying that the district court's determination should at least be informed by its reasoning. *Diouf*, 542 F.3d at 1234-35.

#### B. Mandatory Detention

\*5 [8][9] We have also dealt with indefinite or prolonged detention under immigration mandatory detention provisions, including Sections 1226(c), 1231(a)(2), and 1231(a)(1)(c). Section 1226(c) provides for mandatory detention of criminal aliens for expedited removal. The Supreme Court has held that detention pursuant to Section 1226(c) does not raise any due process concerns. *Demore v. Kim*, 538 U.S. 510, 531, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003).



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However, in upholding Section 1226(c), the Court interpreted it to authorize mandatory detention only for the "limited period of [the alien's] removal proceedings," which the Court estimated "lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal" his removal order to the BIA. *Id.* at 530-31. We have subsequently clarified that, in order to avoid the serious constitutional questions raised by indefinite mandatory detention, detention of an alien beyond an expedited period ceases to be mandatory under Section 1226(c) and instead becomes discretionary under Section 1226(a). *See Casas-Castrillon*, 535 F.3d at 951; *Tijani*, 430 F.3d at 1242.

[10][11] We have additionally held that detention pursuant to Section 1231(a)(2) poses no due process issues, regardless of whether removal of the detained alien is foreseeable, because the statute authorizes detention for only the ninety-day removal period and therefore does not create any danger of unconstitutionally indefinite detention. *Khotesouvan v. Morones*, 386 F.3d 1298, 1299-1301 (9th Cir.2004). We have taken the same view when an alien is detained pursuant to the related provision of 8 U.S.C. § 1231(a)(1)(C), which allows the removal period to be extended and detention to continue beyond ninety days if an alien conspires or acts to prevent his own removal. *Pelich v. INS*, 329 F.3d 1057, 1058-61 (9th Cir.2003). The court, while "expressly declin[ing] to endorse or reject any inferred *Zadvydas*-inspired limitation to § 1231(a)(1)(C)" found that, in any case, "an alien cannot assert a viable constitutional claim when his indefinite detention is due to his failure to cooperate with the INS's efforts to remove him." *Id.* at 1060-61; *see also Lema v. INS*, 341 F.3d 853, 857 (9th Cir.2003) ("We conclude that 8 U.S.C. § 1231(a)(1)(C) ... authorizes the INS's continued detention of a removable alien so long as the alien fails to cooperate fully and honestly with officials to obtain travel documents.") Key to this determination was the court's view that "[t]he risk of indefinite detention that motivated the Supreme Court's statutory interpretation in *Zadvydas* does not exist when an alien is the cause of his own detention." *Pelich*, 329 F.3d at 1060.

#### V. Alleged Bars to Class Relief

[12] Petitioner seeks to end our piece-meal rulings in habeas actions on the necessity of bond hearings to justify prolonged detention in the immigration context and have the courts address the issue on a class-wide basis across the various general immigration detention statutes. While "ordinarily disfavored," the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus. *Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir.1987); *see also Mead v. Parker*, 464 F.2d 1108, 1112-13 (9th Cir.1972) (finding habeas relief to be appropriate in cases "where the relief sought can be of immediate benefit to a large and amorphous group"). Respondents assert, nonetheless, that various constitutional, statutory, and procedural bars to class relief exist in this case.

#### A. Mootness

\*6 [13] Respondents initially challenge class certification on the ground that Petitioner's individual claim has been rendered moot by his release from detention. In fact, mootness of the Petitioner's claim is not a basis for denial of class certification, but rather is a basis for dismissal of Petitioner's action. Because the district court did not dismiss Petitioner's action, but only denied class certification, we see no reason to conclude it based its denial on a finding of mootness. If it had made such a finding, it would have been in error. Petitioner was released pursuant to 8 C.F.R. § 241.4, which provides that "[t]he Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section." 8 C.F.R. § 241.4(i)(2). While the regulation provides the detainee some opportunity to respond to the reasons for revocation, it provides no other procedural and no meaningful substantive limit on this exercise of discretion as it allows revocation "when, in the opinion of the revoking official ... [t]he purposes of release have been served ... [or] [t]he conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate." *Id.* § 241.4(i)(2)(i), (iv) (emphasis added). This places Petitioner in a position analogous to the petitioner challenging his prolonged detention in *Clark v. Martinez*, who was released from detention pursuant to a discretionary parole provision while his suit was ongoing. The Supreme Court found his case was not mooted:

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If Benitez is correct, as his suit contends, that the Government lacks the authority to continue to detain him, he would have to be released, and could not be taken back into custody unless he violated the conditions of release ... or his detention became necessary to effectuate his removal.... His current release, however, is not only limited to one year, but subject to the Secretary's discretionary authority to terminate .... Thus, Benitez continue[s] to have a personal stake in the outcome of his petition.

Clark, 543 U.S. at 376 n. 3 (citations and internal quotation marks omitted) (emphasis added). Petitioner asserts that the government cannot detain him unless it can demonstrate by clear and convincing evidence at a hearing before an immigration judge that he is a sufficient danger or flight risk to justify his detention. If Petitioner is successful in his petition he would be entitled to such a hearing where the government would need to meet its burden or offer him a nondiscretionary release until such time as it can make the requisite showing or has an independent statutory basis to detain him. This would place Petitioner in a far different situation from his current one, released pursuant to the government's independent determination but subject to revocation on the government's discretion without hearing before a neutral decision-maker and without burden of justification on the government. Hence, like the petitioner in Clark, Petitioner here retains a personal stake in the determination of his claim such that it is not moot.

\*7 We further note that Petitioner's current release is subject to a number of restrictions, including the requirements that he remain within 50 feet of his home from 7:00 p.m. to 7:00 a.m. every night and wear an ankle monitoring device at all times. Petitioner proposes that he receive a bond hearing to determine not only whether he should be released, but also under what conditions such release would take place. The strict limitations on Petitioner's freedom, therefore, provide an additional reason why his case presents a live controversy. Cf. Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968) (holding that when habeas petitioner was released from custody, but his felony conviction prevented him from engaging in certain businesses, voting, and serving on juries, underlying habeas case still pre-

sented live controversy).

#### B. Ripeness

[14][15][16][17] Respondents additionally argue that class certification must be denied because the claims of the proposed class are not all yet ripe.<sup>FN6</sup> "[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." Bova v. City of Medford, 564 F.3d 1093, 1096 (9th Cir.2009) (internal quotation marks omitted). Respondents first argue that the claims of proposed class members detained pursuant to Section 1226(a) are unripe because there is no indication yet that the government is refusing to comply with Casas-Castrillon's ruling. This argument rests on a misunderstanding of what constitutes membership in the proposed class. Members of the proposed class are by definition aliens who have been detained without a bond hearing. If an alien who would otherwise be a member of the class receives a bond hearing pursuant to Casas-Castrillon or any other ruling they would cease to be a member of the class. Hence, the government's full compliance with Casas-Castrillon could reduce the size of the class, but it could not render the claims of class members unripe. Respondents additionally argue that the proposed class suffers from ripeness issues because it references future class members. The inclusion of future class members in a class is not itself unusual or objectionable. See, e.g., Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 780 (9th Cir.1986); LaDuke v. Nelson, 762 F.2d 1318, 1321-26 (9th Cir.1985). When the future persons referenced become members of the class, their claims will necessarily be ripe. Hence, we conclude that the requirement of ripeness raises no bar to certification of the class.

#### C. 8 U.S.C. § 1252(f)

Respondents assert that 8 U.S.C. § 1252(f)(1), Section 306(a) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), bars class certification in this case. Section 1252(f)(1) provides:

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the

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operation of the provisions of part IV of this subchapter, as amended by [H.R.], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

\*8 8 U.S.C. § 1252(f)(1). Part IV includes 8 U.S.C. §§ 1221-1231. See Catholic Soc. Servs., Inc. v. INS, 232 F.3d 1139, 1150 (9th Cir.2000) (en banc). Respondents argue that Section 1252(f) bars the proposed class from receiving any injunctive relief, thereby requiring denial of class certification.

[18][19] Respondents are doubly mistaken. Section 1252(f) cannot bar certification of the class unless it bars the proposed class from receiving any class relief. Respondents do not argue, and it is not the case, that Section 1252(f) bars Petitioner from receiving declaratory relief on behalf of the class. The Supreme Court has recognized as much: "By its plain terms, and even by its title, [Section 1252(f)] is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases." Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 481-482, 119 S.Ct. 936, 142 L.Ed.2d 940 (9th Cir.1999). Hence, for this reason alone, Section 1252(f)(1) did not provide the district court with a basis to deny class certification.

[20] In addition, we conclude that Section 1252(f) does not bar injunctive relief for the proposed class. Section 1252(f) prohibits only injunction of "the operation of" the detention statutes, not injunction of a violation of the statutes. This is a distinction we have made before in a decision vacated on unrelated grounds. See Ali v. Ashcroft, 346 F.3d 873, 886 (9th Cir.2003), vacated on unrelated grounds sub nom. Ali v. Gonzales, 421 F.3d 795 (9th Cir.2005). We held there:

"[Section] 1252(f)(1) limits the district court's authority to enjoin the INS from carrying out legitimate removal orders. Where, however, a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated."

*Id.* Analogously, Petitioner here does not seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct it asserts is not authorized by the statutes. Petitioner argues only that the immigration detention statutes, to the extent they cannot be interpreted as requiring provision of a bond hearing, must be enjoined as unconstitutional. However, as this latter argument for relief may never be reached, it cannot be a basis for denial of class certification.

Respondents assert that we should not adopt the reasoning of the vacated opinion in *Ali*, but instead follow our decision in Catholic Soc. Servs., Inc. v. INS, 182 F.3d 1053 (9th Cir.1999), *aff'd in part and rev'd in part en banc*, 232 F.3d 1139 (9th Cir.2000). There we found that injunctive relief for a class asserting that the INS misinterpreted legalization provisions of the Immigration Control and Reform Act was barred by Section 1252(f). We stated:

[R]egardless of the fact that the injunction provides relief for a harm ostensibly created by the INS' misinterpretation of the legalization provisions of part V, insofar as it would interfere with the operation of part IV, the injunction here is contrary to the plain language of § 1252(f) and the district court lacked the jurisdiction to enter it.

\*9 *Id.* at 1062. We subsequently reversed this conclusion on en banc review, however, on the basis that the ordered injunction was issued under part V of the subchapter, rather than part IV and, therefore, not within the terms of Section 1252(f). Catholic Soc. Servs., 232 F.3d at 1150. Were we nonetheless to accept the panel's reasoning as persuasive, it would not control here. The requested injunction at issue does not seek to enjoin the operation of Part IV provisions to relieve harm caused by misinterpretation of other statutory provisions, but to enjoin conduct alleged not to be authorized by the proper operation of Part IV provisions. The sound reasoning of *Ali* persuades that this is not barred by the plain terms of Section 1252(f). <sup>EX?</sup>

*D. Rumsfeld v. Padilla*

Finally, Respondents claim that the Supreme Court's

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holding in *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004), renders class action relief inappropriate in this case. In *Padilla*, the Supreme Court stated that “longstanding practice confirms that in habeas challenges to present physical confinement—‘core challenges’—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.” *Id.* at 435. Respondents argue that this statement mandates that the proper respondents for members of the proposed class are the various wardens overseeing their individual custody. Respondents assert that this renders class relief impossible because, “at a jurisdictional minimum,” all proposed class members must be under the immediate supervision of the same custodian. (Resp’ts Answering Br. 16.) Respondents fail to recognize that *Padilla* specifically reserved the question of whether the proper respondent in habeas challenges brought by “an alien detained pending deportation” would be the immediate custodian of the alien. *Padilla*, 542 U.S. at 436 n. 8. We need not reach it because, even were the Supreme Court’s statement in *Padilla* applicable here, Respondents’ argument is baseless. Respondents cite no authority or rationale for the proposition that we do not have jurisdiction to provide class relief in a habeas corpus action that meets the requirements for certification merely because class members are in the immediate custody of different facilities. Such actions have been maintained previously against single and multiple respondents. See *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984) (class of juveniles sought habeas corpus relief from pretrial detention under state law); *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir.1974) (class of young adults sought habeas corpus relief from serving terms in state reformatories). Regardless of who the proper respondents for the class are, we conclude certification of the class will not pose any jurisdictional concerns.

#### VI. Rule 23

In addition to raising various bars to class relief, Respondents assert that the proposed class fails to comply with the requirements of Federal Rule of Civil Procedure 23, governing class certification. Rule 23(a) provides that a class may be certified only if:

\*10 (1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). The party seeking certification must meet all of these requirements and Rule 23(b) further provides that for certification the class must fall into one of three categories. *Zinser*, 253 F.3d at 1186 (“[T]he party seeking class certification ... bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b).”) Petitioner seeks certification under the category provided for in Rule 23(b)(2), which requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed.R.Civ.P. 23(b)(2). Respondents challenge the proposed class’s compliance with all aspects of Rule 23 except the numerosity requirement, which Respondents concede is met. We discuss the proposed class’s compliance with the remaining requirements individually.

#### A. Commonality

[21][22][23][24] The commonality requirement “serves chiefly two purposes: (1) ensuring that absentee members are fairly and adequately represented; and (2) ensuring practical and efficient case management.” *Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir.1998). We have construed this requirement “permissively.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998). It is not necessary that “[a]ll questions of fact and law ... be common to satisfy the rule.” *Id.* We have found “[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.” *Id.*; see, e.g., *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d

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Cir.1997) ("The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact."); Baby Neal for & by Kanter v. Casey, 43 F.3d 48, 56(3d. Cir.1994) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class."). Nor does "common" as used in Rule 23(a)(1) mean "complete congruence." In re First Alliance Mortg. Co., 471 F.3d 977, 990(9th Cir.2006). We find the claims of the class share sufficiently common questions of law to meet the requirement of Rule 23(a)(1).

Respondents challenge the commonality of class members' claims on the ground that class members suffer detention for different reasons and under the authority of different statutes. Respondents assert that, as a result, the question of whether individual class members' detention may be continued without a bond hearing turns on divergent questions of statutory interpretation and consideration of different factual circumstances. Respondents are undoubtedly correct that members of the proposed class do not share every fact in common or completely identical legal issues. This is not required by Rule 23(a)(1). Instead, the commonality requirements asks us to look only for some shared legal issue or a common core of facts. This the proposed members of the class certainly have. In each case in which we have interpreted the scope of various statutes providing for both discretionary and mandatory detention in the immigration context, our determinations have been guided, if not controlled, by the question of whether indefinite or prolonged detention generating serious constitutional concerns is present. A form of that question is posed here: may an individual be detained for over six months without a bond hearing under a statute that does not explicitly authorize detention for longer than that time without generating serious constitutional concerns? This question will be posed by the detention of every member of the class and their entitlement to a bond hearing will largely be determined by its answer. See Casas-Castrillon, 535 F.3d at 951 ("Because the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,' we hold that § 1226(a) must be construed as requiring the Attorney General to provide the alien with such a hearing." (emphasis omitted)); Tijani, 430 F.3d at 1242 (inter-

preting statutory framework to provide bond hearing because "it is constitutionally doubtful that Congress may authorize imprisonment of this duration for lawfully admitted resident aliens who are subject to removal."). The nature of the particular statute authorizing the detention of individual class members will play some role in determining whether class members are entitled to relief, as well. Nonetheless, the constitutional issue at the heart of each class member's claim for relief is common.

\*11 We also note that a finding of commonality here serves the purposes of the requirement. Answering comprehensively in a class setting the constitutional question that is at the center of the proposed class's claims will facilitate development of a uniform framework for analyzing detainee claims to a bond hearing. This would render management of these claims more efficient for the courts. It would also benefit many of the putative class members by obviating the severe practical concerns that would likely attend them were they forced to proceed alone. In many of the cases where we have adjudicated these immigration detention claims, the petitioner had been detained well beyond six months, the point at which counsel contends that the putative class members should be entitled to a bond hearing. See, e.g., Tijani, 430 F.3d at 1242(9th Cir.2005) (ordering a bond hearing after an alien was detained for nearly three years). Without certification, therefore, many of the putative class members likely would not be able to adjudicate their claimed need of a bond hearing after six months of detention-that claim would become moot before the district court could come to a decision. Thus, for many of the putative class members, class treatment in this case is likely necessary to provide the remedy sought.

To the extent there may be any concern that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical or undermine effective representation of the class, it may counsel the formation of subclasses. See Fed.R.Civ.P. 23(c)(5); Marisol A., 126 F.3d at 378-79 (finding subclasses appropriate where groups of class members each had "separate and discrete legal claims pursuant to particular federal and state constitutional, statutory, and regulatory obligations of the defendants"). Because the possibility

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of subclasses was not raised below, we leave it to the district court to reach it in the first instance. The parties may submit proposals for formation of subclasses on remand and the district court shall exercise its discretion to determine whether adoption of any proposal would be appropriate. See U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 407-08, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (holding that court of appeals may order district court to consider any proposals for subclasses made on remand). The district court, however, should not lose sight of the overarching issue: The circumstances, if any, that would warrant prolonged detention without hearing.

### B. Typicality

[25][26][27] The typicality requirement looks to whether "the claims of the class representatives [are] typical of those of the class, and [is] 'satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" Armstrong v. Davis, 275 F.3d 849, 868 (9th Cir.2001) (quoting Marisol A., 126 F.3d at 376). Like the commonality requirement, the typicality requirement is "permissive" and requires only that the representative's claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." Hanon, 150 F.3d at 1020. We conclude that Petitioner's claim for a bond hearing is reasonably co-extensive with the claims of the class. Though Petitioner and some of the other members of the proposed class are detained under different statutes and are at different points in the removal process and hence do not raise identical claims, they all, as already discussed, raise similar constitutionally-based arguments and are alleged victims of the same practice of prolonged detention while in immigration proceedings. Cf. Armstrong, 275 F.3d at 869 (finding typicality where class representatives suffered with rest of class "a refusal or failure to afford them accommodations as required by statute, and [were] objects of discriminatory treatment on account of their disabilities" in parole and parole revocation proceedings).

\*12 [28] Respondents argue that Petitioner's claims are not typical of the class because of his supervised release and because of his aggravated felon status, currently under appeal. Both are immaterial. The sin-

gle relevance Petitioner's supervised release has to his claim is to whether it renders Petitioner's claim moot. Defenses unique to a class representative counsel against class certification only where they "threaten to become the focus of the litigation." Hanon v. Data-products Corp., 976 F.2d 497, 508 (9th Cir.1992) (internal quotation marks and citation omitted). We have determined that Petitioner's supervised release does not moot his claim and, therefore, no mootness defense particular to him will interfere with the ongoing class litigation.

Petitioner's aggravated felon status is similarly of no significance to the typicality analysis. The claims of Petitioner and the class on the whole are that they are entitled to a bond hearing in which dangerousness and risk of flight are evaluated. While Petitioner's criminal history is currently central to the question of whether Petitioner will ultimately be removed and will almost certainly be relevant to any bond hearing determination, the determination of whether Petitioner is entitled to a bond hearing will rest largely on interpretation of the statute authorizing his detention. The particular characteristics of the Petitioner or any individual detainee will not impact the resolution of this general statutory question and, therefore, cannot render Petitioner's claim atypical.

### C. Adequacy

[29] "Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.'" Walters, 145 F.3d at 1046 (quoting Crawford v. Honig, 37 F.3d 485, 487 (9th Cir.1994)). Petitioner alleged the qualifications of his counsel and the lack of conflict or collusion in the court below. Respondents do not question these allegations. Instead, they challenge Petitioner's adequacy only by re-asserting their commonality and typicality arguments. See Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (noting that commonality and typicality concerns also relate to a representative's adequacy). As we do not find that these arguments have merit, Respondents have provided no reason to conclude that class certification is properly denied for the reason that Peti-

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tioner is an inadequate class representative.

*D. Rule 23(b)(2)*

Respondents challenge certification under Rule 23(b)(2) on grounds parallel to their challenge under Rule 23(a). Respondents assert that as class members are potentially detained pursuant to different statutes, Respondents have not refused to act or acted on grounds generally applicable to the class. In particular, Respondents note that some class members may not ultimately be entitled to a bond hearing because they are properly subject to mandatory detention and that the regulations currently implementing the various discretionary detentions statutes provide for a different burden of proof at bond hearings than that found to be required by us in *Casas-Castrillon* for aliens detained pursuant to Section 1226(a).

\*13 [30][31][32][33] Respondents' contentions miss the point of Rule 23(b)(2). "Class certification under Rule 23(b)(2)" requires that "the primary relief sought is declaratory or injunctive." *Zinser*, 253 F.3d at 1195. The rule does not require us to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them. As we have previously stated, "it is sufficient" to meet the requirements of Rule 23(b)(2) that "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047; see *Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir.1977) (finding Rule 23(b)(2) met despite "individual qualities of [the] suit" because of "pattern or practice characteristic of defendants' conduct that is generally applicable to the class" (internal quotation marks omitted)). The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2). *Walters*, 145 F.3d at 1047; cf. *Gibson v. Local 40, Supercar-goes and Checkers*, 543 F.2d 1259, 1264 (9th Cir.1976) ("A class action may be maintained under [Rule 23(b)(2)], alleging a general course of racial discrimination by an employer or union, though the discrimination may have ... affect[ed] different members of the class in different ways....") Furthermore, unlike actions brought under one of the other

23(b) prongs, "questions of manageability and judicial economy are ... irrelevant to 23(b)(2) class actions." *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir.1993); see *Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir.1977) ("By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a(b)(3), not a(b)(2), class action."), *aff'd in pertinent part and rev'd in part sub nom. Califano v. Yamasaki*, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). The proposed members of the class each challenge Respondents' practice of prolonged detention of detainees without providing a bond hearing and seek as relief a bond hearing with the burden placed on the government. The particular statutes controlling class members' detention may impact the viability of their individual claims for relief, but do not alter the fact that relief from a single practice is requested by all class members. Similarly, although the current regulations control what sort of process individual class members receive at this time, all class members seek the exact same relief as a matter of statutory or, in the alternative, constitutional right. Hence, we conclude that the proposed class meets the requirements of Rule 23(b)(2). Cf. *Walters*, 145 F.3d at 1047 (certifying under Rule 23(b)(2) class of aliens seeking declaratory and injunctive relief on ground that they received constitutionally deficient notice of deportation procedures following charges of document fraud); *Marisol A.*, 126 F.3d at 378 (certifying under Rule 23(b)(2) class of children seeking declaratory and injunctive relief from systemic failures in child welfare system despite differing harms experienced by class members).

## VII. Conclusion

\*14 Having found that none of the bars to class relief raised by Respondents prevent certification of the proposed class and that the class meets the requirements of Rule 23, we reverse the district court's denial of class certification and we remand for further proceedings. We leave to the district court's discretion the question of whether formation of subclasses would be appropriate.

## REVERSED AND REMANDED.

FN\* Janet Napolitano is substituted for her

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predecessor, Michael Chertoff, as Secretary of the Department of Homeland Security, pursuant to Fed. R.App. P.43(c)(2).

FN1. Petitioner also was at one point deemed eligible for release on a bond of \$15,000, which Petitioner could not pay. This bond order was later revoked after the BIA determined his appeal.

FN2. We do not opine on the appropriate course for the reviewing court when a district court makes some, but insufficient, findings, justifying its class certification determination, as that is not the posture we face here.

FN3. 8 U.S.C. § 1225(b)(1)(B)(ii) provides:

If the [asylum] officer determines at the time of the interview [upon arrival in the United States] that an alien has a credible fear of persecution ..., the alien shall be detained for further consideration of the application for asylum.

8 U.S.C. § 1225(b)(2)(A) provides:

[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

FN4. 8 U.S.C. § 1226(a) provides:

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.

8 U.S.C. § 1226(c) provides:

The Attorney General shall take into custody any alien who ... is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

... is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, ... is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[sic] to a term of imprisonment of at least 1 year, or ... is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

FN5. 8 U.S.C. § 1231(a)(2) provides:

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(6) provides:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(1)(C) provides:

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to



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make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

FN6. Respondents assert that Petitioner waived any challenge to their ripeness argument by not raising it in his opening brief. This argument is groundless. We have previously held that the failure of a party in its opening brief to challenge an alternate ground for a district court's ruling *given by the district court* waives that challenge. See United States v. Kama, 394 F.3d 1236, 1238 (9th Cir.2005); MacKay v. Pfeil, 827 F.2d 540, 542 n. 2 (9th Cir.1987). Here, the district court did not cite ripeness or any other rationale for its denial of certification. Petitioner does not waive a challenge to any ground for denial of certification in its opening brief on appeal that was not relied on in the district court's order.

FN7. Petitioner additionally argues that Section 1252(f) properly interpreted does not apply to claims for habeas relief at all. We do not reach this argument at this time, as it is sufficient to find that the district court may in some scenario grant the proposed class some of the relief sought to determine that the class may be certified.

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 08-1506 AHM (JTLx) Date December 7, 2009  
Title CELEDONIA X. YUE v. CONSECO LIFE INSURANCE COMPANY

Present: The A. HOWARD MATZ, U.S. DISTRICT JUDGE  
Honorable

Stephen Montes

Not Reported

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys **NOT** Present for Plaintiffs:

Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS (No Proceedings Held)

## I. INTRODUCTION

On March 4, 2008, Plaintiff Celedonia X. Yue filed her Complaint in this putative class action, alleging that Defendant Conseco Life Insurance Company ("Conseco") has wrongfully decided to increase the cost of insurance charges for its "Valulife" and "Valuterm" life insurance policies (collectively "Policies"). The Complaint alleges breach of contract and violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, and seeks injunctive and declaratory relief.<sup>1</sup> On December 8, 2008, the Court denied Conseco's motion to dismiss on the grounds that the controversy is not ripe for review. On June 10, 2009, Plaintiff filed her motion to certify a National class and a California class. For the following reasons, the Court GRANTS the motion.<sup>2</sup>

## II. FACTUAL BACKGROUND

In 1995, Plaintiff Yue purchased a "Valulife" universal life insurance policy issued by Defendant,<sup>3</sup> with a face amount of \$400,000. Compl. ¶ 7. The insured is Plaintiff's

<sup>1</sup>The Complaint also seeks monetary damages, but Plaintiff now asserts that she seeks only declaratory and injunctive relief.

<sup>2</sup>Docket No. 67.

<sup>3</sup> The policy was actually issued by Massachusetts General Life Insurance Company, which became Conseco Life in 1996. Compl. ¶ 8. Philadelphia Life Insurance

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mother, Ruth S. Yue, and Plaintiff Yue is the beneficiary. *Id.* at Ex. A, pp. A-28, A-44. At the time of purchase, Ruth S. Yue was 70 years old. *Id.* at A-28.

The Complaint alleges that Plaintiff's life insurance policy and the policies of the putative class members are "universal life" policies. *Id.* Owners of universal life policies pay premiums into an account that earns interest. The account represents (1) the total premiums the policyholder has paid, plus any credited interest, minus (2) expense charges and a monthly "cost of insurance" charge. A universal life insurance policy will remain in force as long as there are enough funds in the account to pay the expense charges and the monthly cost of insurance charge. Compl. ¶ 29.

The cost of insurance charge covers the cost of paying out death benefits, and it is designed to increase as the insured ages. Compl. ¶¶ 23-26, 31. It is calculated based on a formula that takes into consideration the amount of funds in the account and a factor called the "cost of insurance rate." Compl. ¶¶ 30-31. Under the terms of all of the universal life policies at issue in this action, the language determining the cost of insurance rate is identical, and the cost of insurance rate is dependent solely on the insurer's expectation as to its future mortality experience. Compl. ¶¶ 32-34. In other words, "once the actual cost of insurance rates are set by the insurance company, they can only be increased because of anticipated future worsening mortality experience of insurance company [sic] (*i.e.*, more death claims anticipated in the future than were previously expected)."<sup>4</sup> Compl. ¶ 35. Conseco does not disclose its actual cost of insurance rates. It discloses only the monthly cost of insurance charge deducted from the insured's account. Compl. ¶ 36.

Plaintiff alleges that Conseco has decided to raise the cost of insurance charges

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Company also issued policies at issue in this action, and in or about 1998 it merged into Conseco. *Id.*

<sup>4</sup> Plaintiff's policy states, "ACTUAL MONTHLY COST OF INSURANCE RATES WILL BE DETERMINED BY THE COMPANY BASED ON ITS EXPECTATIONS AS TO FUTURE MORTALITY EXPERIENCE," and "Current monthly cost of insurance rates will be determined by the Company based on its expectation as to future mortality experience." Compl. Ex. A at A-29, A-34.

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beginning in the twenty-first year of the Valulife and Valuterm policies (specifically, in the year 2016 for Plaintiff's policy). Compl. ¶ 54. Plaintiff further alleges that there is no way that the substantial increase could be due to the insurer's anticipated mortality experience because "it is well known that the population in this country is living significantly longer than was anticipated in the past . . . ." *Id.* Plaintiff offers evidence that the true reason for Conseco's 2003 increase was due to a strategy presented by an outside consulting firm to create a new "mortality ratio" technique that "justifies a [cost of insurance] increase to maintain the ratio, even though the expected mortality rates have not changed. Only the expected mortality payments have increased, and this was due to lower than anticipated lapses." Dillon Decl., Ex. A at 1. This strategy was outlined in a memorandum written by Conseco's appointed actuary, James Hawke, addressing the impending 2003 cost of insurance rate increase. *Id.*

Plaintiff alleges that at no point did Conseco disclose its intent to impose massive cost of insurance increases beginning in policy year 21, and policyholders thus "relied on the lower cost of insurance rates in purchasing the Policies, continuing to pay premiums respecting the Policies, and not seeking insurance coverage elsewhere." Compl. ¶ 56. Plaintiff also alleges that the increases

are so dramatic, sudden, and unexpectedly large that many members of the Class are now, or will be, unable to afford to pay these huge and unexpected increases in premium [sic] required to keep their insurance policies in force. Many policyholders will, or have been, forced to surrender their life insurance policies. In addition, upon information and belief, many of these policyholders are elderly and uninsurable and, after surrender of their policies, they will thereby be left without insurance protection and/or adequate insurance protection.

Compl. ¶ 57.

Plaintiff's Complaint alleges that the increase is consistent with a history of wrongful increases by Defendant, beginning in 1992 with "an artificial increase in the cost of insurance rate unrelated to [Conseco's] expectations as to future mortality increase," and continuing in 2003 or 2004 with Conseco's allegedly unlawful increase in

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the cost of insurance charge for certain policies.<sup>5</sup> Compl. ¶¶ 39, 50.

### III. LEGAL STANDARD FOR CLASS CERTIFICATION<sup>6</sup>

The party seeking class certification bears the burden of establishing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met. *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1176 (9th Cir. 2007) (citing *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended*, 273 F.3d 1266 (9th Cir. 2001)), *reh'g en banc granted*, 556 F.3d 919 (9th Cir. 2009). A district court may certify a class only if, after "rigorous analysis," it determines that the party seeking certification has met its burden. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 158-161 (1982). In reviewing a motion for class certification, the Court generally is bound to take the substantive allegations of the complaint as true. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)). Nevertheless, the Court may look beyond the pleadings to determine whether the requirements of Rule 23 have been met. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (citation omitted). In fact, "courts are not only at liberty to but *must* consider evidence which goes to the requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case." *Dukes*, 509 F.3d at 1178 n.2 (internal quotations and citation omitted). Ultimately, it is within the district court's broad discretion to determine whether a class should be certified. *Id.* at 1176.

### IV. DISCUSSION

In MDL No. 1610, this Court addressed similar class certification motions

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<sup>5</sup> The Complaint states that the former allegations were adjudicated in the plaintiffs' favor in *Rosenbaum, et al. v. Philadelphia Life Insurance Co., et al.*, Case No. 93-0834 MRP (Eex). The latter allegations were brought before this Court in a Multidistrict Litigation proceeding and the parties eventually settled the claims. See *In re Conseco Life Insurance Company Cost of Insurance Litigation*, MDL No. 1610 AHM.

<sup>6</sup>JUDGE: This language is from the orders index.

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regarding Conseco's invalid cost of insurance rate increases under the terms of other life insurance policies. *In re Conseco Life Ins. Co. Cost of Ins. Litig.*, 2005 WL 5678842 (C.D. Cal. April 26, 2005); *In re Conseco Life Ins. Co. Cost of Ins. Litig.*, 2005 WL 5678790 (C.D. Cal. April 27, 2005). In that case, this Court decided to certify a national class and California classes on some of the causes of action (including a UCL claim), conducting its analysis under Fed. R. Civ. P. 23(b)(2). The Court's reasoning in those orders is instructive here.

**A. Definitions of the National Class and the California Class**

Plaintiff seeks certification of the following National class of policyholders:

All owners of Valulife and Valuterm universal life insurance policies issued by either Massachusetts General Life Insurance Company or Philadelphia Life Insurance Company and that were later acquired and serviced by Conseco Life whose policies are in force as of the date class notice in this action is disseminated. This class does not include officers or actuaries (or their immediate families) of Massachusetts General, Philadelphia Life, Conseco Life, or any of their parent companies, including Conseco, Inc.

Plaintiff further seeks certification of the following California class of policyholders:

All owners of Valulife and Valuterm universal life insurance policies issued by either Massachusetts General Life Insurance Company or Philadelphia Life Insurance Company and that were later acquired and serviced by Conseco Life whose policies are in force as of the date class notice in this action is disseminated and either reside [sic] in the State of California when the policy was issued or now reside in the State of California. This class does not include officers or actuaries (or their immediate families) of Massachusetts General, Philadelphia Life, Conseco Life, or any of their parent companies, including Conseco, Inc.

Defendant does not challenge the adequacy of these proposed definitions. With the

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exception of changing the California class definition to incorporate the proper tense (“...and who either resided in the State of California when the policy was issued or now reside in the State of California. . .”), the Court finds these definitions to be satisfactory.

**B. Rule 23(a)**

Plaintiff must show that the class meets the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a)(1)-(4). Defendant does not contest that Plaintiff has met requirements (1)-(3), and, indeed, Plaintiff has shown that she has.

The numerosity requirement is satisfied. Defendant does not dispute Plaintiff’s contention that there are many thousands of policyholders nationwide who may fall within the class. *See* Dillon Decl. ¶ 9 (stating that approximately 48,000 Valulife and Valuterm insurance policies are outstanding and in force).

Commonality is also satisfied, as “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Defendants do not dispute that Conseco Life approached the policies as a group. *See* Dillon Decl., Ex. A at 1; Complaint, Ex. A at A-34. Nor does Defendant dispute that the key legal question of whether the cost of insurance rate increases would be permitted under the uniform language of the policy is common to all members of the class. *See* Complaint ¶ 21 (a).

Plaintiff’s claim also satisfies the typicality requirement. Plaintiff alleges—and Defendant does not dispute—that she purchased one of the policies at issue and that she was subjected to the 2003 cost of insurance rate increase no differently than the other members of the proposed class. Complaint ¶ 7, 54-57.

Defendant does dispute whether “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This depends on two questions: (1) whether the named Plaintiffs and their counsel have any conflicts of interest with other class members and (2) whether the named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1020 (9th Cir. 1998). Defendant does not challenge the adequacy of Plaintiff’s counsel, but it does argue that Plaintiff is an inadequate class representative

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because her claims are time-barred by California's four-year statute of limitations on actions for breach of contract, presumably, Cal. Code Civ. Proc. § 337. Opp'n at 22-23. Conseco argues that Plaintiff's claim accrued in October 2002, when Conseco adopted a Board resolution with respect to the cost of insurance increase at issue. However, even if the cause of action did accrue at that point for statute of limitations purposes—a question the Court will not resolve at this time—Plaintiff's claims would not be time barred because this is an appropriate case in which to apply the discovery rule.

In *April Enterprises*, the California Court of Appeal extended the discovery rule into certain breach of contract cases, even where there is no allegation of fraud, professional negligence, or breach of fiduciary duty. *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805, 830-32 (Ct. App. 1983). Specifically, the court found that “a common thread seems to run through all the types of actions where courts have applied the discovery rule,” namely that the “injury or the act causing the injury, or both, have been difficult for the plaintiff to detect.” *Id.* at 831. In most cases, as well, “the defendant has been in a far superior position to comprehend the act and the injury,” and “the defendant had reason to believe the plaintiff remained ignorant he had been wronged.” *Id.* There is also “an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed,” which is often “accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's [sic] ignorance.” *Id.* See also *Gryczman v. 4550 Pico Partners, Ltd.*, 107 Cal. App. 4th 1, 5-6 (Ct. App. 2003) (reaffirming the principles in *April Enterprises*).<sup>7</sup>

Here, the injury and the act causing the injury were both nigh to impossible for Plaintiff to detect in October 2002. Conseco does not disclose the actual cost of insurance rates to policyholders but only advises as to the monthly cost of insurance charge deducted from the account value. Complaint ¶ 36. In addition, Defendant did not

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<sup>7</sup>Defendant's citation to *Perez-Encinas v. Amerus Life Ins. Co.*, 486 F. Supp. 2d 1127, 1135 (N.D. Cal. 2006), is inapposite because in that case, the alleged breach of contract was not difficult to detect, and the defendant was not in a far superior position to comprehend the alleged breach. Indeed, the defendant there believed that it was faithfully executing the contract, and the plaintiffs were actually in a better position than the defendant to detect the breach. *Id.* at 1135-36.



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at any point notify policyholders of the upcoming change of rates in their policies.<sup>8</sup> Complaint ¶ 56. Further, the actual increases would not be visible in a policyholder's annual report until Year 21 when the rates increase. See Complaint ¶ 38. Defendant was clearly in a far better position to comprehend the act and injury, since it raised the rates, and so the statute of limitations for Plaintiff's breach of contract claim should not have begun to run until Plaintiff knew or had reason to know of her claim. To hold otherwise "would amount to an expectation that a contracting party in such situations has a duty to continually monitor whether the other party is performing some act inconsistent with one of the many possible terms in a contract." *April Enterprises*, 147 Cal. App. 3d at 832. "Imposing such a duty to monitor is especially onerous when the breaching party can commit the offending act secretly, within the privacy of its own offices," *Id.*, as Defendant allegedly did here. Plaintiff's claims are not time-barred, and she is an adequate representative for the class.

**C. Rule 23(b)(2)**

A class may be certified under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001). "A class seeking monetary damages may be certified pursuant to Rule 23(b)(2) where such relief is 'merely incidental to [the] primary claim for injunctive relief.'" *Id.* (quoting *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986)).

Defendant does not dispute that it is proper to analyze whether certification is appropriate under Rule 23(b)(2) because the primary form of relief requested is injunctive. Indeed, although Plaintiff does ask for damages in the form of repayment of any unlawful overcharges, Complaint ¶¶ 5, 6, the primary form of relief requested is

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<sup>8</sup>Defendant asserts that "every policyholder began receiving illustrations, just like Yue did, showing that their premiums would increase in year 21 of the policy." Opp'n at 22 n.25. However, Defendant does not state when these alleged notices were sent out, nor does it cite to any facts to support this assertion.

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injunctive relief preventing Defendant from increasing the cost of the policies, Complaint Prayer for Relief ¶ 1, an event which is not scheduled to occur until Year 21 of the Policies, which corresponds to 2016 for Plaintiff. Complaint ¶¶ 4, 7.

Moreover, class certification is appropriate because Defendant has acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. *See* Fed. R. Civ. P. 23(b)(2). Conseco treated all of the Policies alike in deciding to implement the Year 21 cost of insurance increase. All of the Valulife and Valuterm Policies contain identical cost of insurance language that requires the company to determine monthly cost of insurance rates “based upon its expectation as to future mortality experience.” Complaint, Ex. A at A-34; Dillon Decl., Ex. A at 1. Conseco allegedly decided to uniformly increase the cost of insurance rates for all of the Policies in Year 21 based on a new “mortality ratio” concept developed by outside consultants. Complaint ¶¶ 54-55; Dillon Decl., Ex. A at 1. It is therefore appropriate for the Court to evaluate the claims on behalf of the entire class as a whole, to determine whether these increases are permissible under the Policies and, if the increases are not justified, to order injunctive or declaratory relief applicable to the entire class of Policyholders.

In its Opposition, Defendant argues that a variety of differences in contract law in different states prevent certification of the class. It asserts that because state law may vary on a number of issues—including when the policyholder’s claim accrues, whether to treat the breach of contract claim as a present or an anticipatory breach, and whether specific performance is available—a national class may not be certified.<sup>9</sup> Opp’n at 6-7.

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<sup>9</sup>One particular ground on which Defendant objects to class treatment is that individualized discovery will be necessary for each plaintiff to determine when she acquired knowledge of her claims for statute of limitations purposes. However, even in the context of certification of 23(b)(3) classes, which require a more exacting predominance analysis, “[a]s long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3).” *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000). In fact, “[c]ourts have been nearly unanimous . . . in holding that possible differences in the application of a statute of limitations to individual class members, including the named

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However, Rule 23(b)(2) does not require a showing of predominance or manageability as required under Rule 23(b)(3). *Rodriguez v. Hayes*, 578 F.3d 1032, 1051 (9th Cir. 2009) (“[U]nlike actions brought under one of the other 23(b) prongs, ‘questions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions.’” (quoting *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993)); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (“Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2).”). Nor does the Ninth Circuit require a “cohesiveness” analysis under Rule 23(b)(2), as argued by Defendant. *See Walters*, 145 F.3d at 1047 (“[W]ith respect to 23(b)(2) in particular, the government’s dogged focus on the factual differences among the class members appears to demonstrate a fundamental misunderstanding of the rule. Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2). It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole.”) Defendant cites not a single case holding that a choice-of-law analysis or a broader predominance analysis is required to certify a class under Rule 23(b)(2).<sup>10</sup> *See Opp’n* at 4-5. Thus, the question of whether state law may differ on such questions is not relevant to the Court’s analysis.

Furthermore, Defendant has not identified any variation in state law that bears on the fundamental question in this case—whether Consecro had contractual authority under the Policies to impose the cost of insurance rate increases at issue. *See Opp’n* at 6-7. All of Defendant’s purported variations in state law are wholly tangential to the fundamental, common question of law in this case. These variations, therefore, do not preclude class

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plaintiffs, does not preclude certification of a class action so long as the necessary commonality and, in a 23(b)(3) class action, predominance, are otherwise present.” *In re Energy Systems Equipment Leasing Securities Litigation*, 642 F. Supp. 718, 752-53 (E.D.N.Y. 1986) (compiling authorities addressing the issue); *see also Massachusetts Mutual Life Insurance Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1295 (Ct. App. 2002) (quoting *Energy Systems* on this point).

<sup>10</sup>Nor does Defendant cite to any cases holding that a plaintiff is required to submit a trial plan, as it argues, in the case of a class certification under Rule 23(b)(2). *Opp’n* at 16-17.

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certification under Rule 23(b)(2).<sup>11</sup>

**D. The California Class for the UCL Claim**

Defendant's only challenge to the certification of the California class covering the claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, is that individualized inquiries would be required to determine if particular plaintiffs satisfied the statute of limitations. For the same reasons as discussed in footnote 9, *supra*, this argument does not preclude class certification. Consecos cites no California case declining to certify a class seeking injunctive relief under the UCL on the theory that each member of the class must individually prove timeliness of her claim. In fact, in *Massachusetts Mutual*, the court rejected the contention that individual discovery determinations precluded class certification for a UCL claim. *Massachusetts Mutual Life Ins. Co. v. Superior Court*, 97 Cal. App. 4th 1282, 1295 (Ct. App. 2002). The court reasoned, "Given the fact that plaintiff's claim is based on a nondisclosure, the objective determination of when the nondisclosure should have been discovered seems readily amenable to class treatment." *Id.* Here, too, an objective determination of when the class members should have discovered the increase in cost of insurance rates—based on a disclosure or the lack thereof by Defendant—seems readily amenable to class treatment. Thus, this argument does not preclude certification of the California class based on the UCL claim.

**V. CONCLUSION**

For the foregoing reasons, the Court GRANTS Plaintiff's motion for class certification. The Court certifies the following classes:

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<sup>11</sup>Defendant also asserts that class certification is precluded because many of the putative class members may lack standing. Opp'n at 21. This argument is a non-starter. In a class action, "standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). The Court has already determined that Ms. Yue's claims are ripe, present a case or controversy, and that Ms. Yue has standing to assert a claim under California's Unfair Competition law. December 8, 2008 Order at 6-13.

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1) As to the breach of contract and declaratory relief claims (the national class):

All owners of Valulife and Valuterm universal life insurance policies issued by either Massachusetts General Life Insurance Company or Philadelphia Life Insurance Company and that were later acquired and serviced by Conseco Life whose policies are in force as of the date class notice in this action is disseminated. This class does not include officers or actuaries (or their immediate families) of Massachusetts General, Philadelphia Life, Conseco Life, or any of their parent companies, including Conseco, Inc.

and

2) As to the UCL claim:

All owners of Valulife and Valuterm universal life insurance policies issued by either Massachusetts General Life Insurance Company or Philadelphia Life Insurance Company and that were later acquired and serviced by Conseco Life whose policies are in force as of the date class notice in this action is disseminated and who either resided in the State of California when the policy was issued or now reside in the State of California. This class does not include officers or actuaries (or their immediate families) of Massachusetts General, Philadelphia Life, Conseco Life, or any of their parent companies, including Conseco, Inc.

No hearing is necessary. Fed. R. Civ. P. 78; L. R. 7-15.

Initials of Preparer

SMO

State of California     )  
County of Los Angeles   )  
                                  )

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I, Maurice Harrington, declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

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