In the

UNITED STATES COURT OF APPEALS

for the

Ninth Circuit

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

v.

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

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

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

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I. ISSUE PRESENTED

Whether interlocutory review should be granted when the District Court in its discretion certified under Rule 23(b)(2) a national class of life insurance policyholders for a breach of contract claim and a California class of policyholders for a California UCL claim, where (a) the defendant insurer engaged in conduct "generally applicable to the class" by adopting a cost of insurance rate increase on all such policyholders in alleged contravention of standardized policy language, and (b) the relief sought is exclusively declaratory and injunctive to prevent those increased charges from being deducted from policyholders' accounts.

II. INTRODUCTION

Petitioner Conseco Life Insurance Co. ("Conseco") in its "Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f)" ("Pet.") does not show that this case presents the "rare occurrence" in which interlocutory review is appropriate under Rule 23(f) due to "manifest error." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 958 (9th Cir. 2005). To the contrary, the Honorable A. Howard Matz rigorously and carefully applied Rule 23(b)(2)'s requirements to a discrete set of facts, completely consistent with controlling precedent. Order of December 7, 2009 (ER 229-240) ("Cert. Order"). As Judge Matz correctly found, the "key legal question" – whether the specific language of a standardized life insurance policy permits Conseco to dramatically increase the cost of insurance rates for all

its policyholders – presents an overriding common issue eminently suitable for class-wide declaratory resolution under Rule 23(b)(2). If Conseco is allowed to actually collect the increased COI charges, beginning in 2011 for those policyholders in their 21st year, Class members will experience a 200% increase in their cost of insurance rates – a devastating ***tripling*** of their cost of insurance charges that Conseco estimates will cause a massive "shock lapses" of 25% of all policies. (ER 311). Conseco's own Appointed Actuary testified that the increase at issue "fundamentally violated" all of the policies. (ER 321). Indeed, it is difficult to envision a clearer example of a case properly certified under Rule 23(b)(2) than this one seeking ***solely*** declaratory and injunctive relief to interpret an identical contract term contained in every class member's life insurance policy contract.

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Moreover, policyholders can ill-afford a time consuming interlocutory appeal in this case. As Judge Matz recognized, "Plaintiff most decide *now* whether to continue funding her policy at the current rate, to increase her monthly payments, or to seek alternative life insurance coverage." Order of December 8, 2008, at 6-13 (ER 64-76) ("Dismissal Order") (emphasis in original).

III. STATEMENT OF THE CASE

Conseco issued universal life insurance policies nationwide ("the Policies"), all containing the same, standard provision already adjudicated in *Rosenbaum v.*

Philadelphia Life Insurance Co., Case No. 93-0834 MRP (Ex) (C.D. Cal.) to permit Conseco to increase the Policies' "cost of insurance" ("COI") rate ***only*** "to account for a change . . . in future mortality experience." In late 2002, Conseco implemented a massive COI rate increase as of each Policy's twenty-first anniversary of issuance (the "COI Increase"). Conseco did so even though the relevant mortality experience had actually ***improved*** rather than deteriorated and Conseco improperly used factors other than "mortality experience" to compute the challenged increase. Because the earliest Policies were issued in 1990, Conseco will begin deducting the actual increased COI charges based on the COI Increase in 2011, less than one year from now.

Conseco did not, however, give notice of its decision to impose the COI Increase. Plaintiff-Respondent Celedonia X. Yue ("Yue") only learned in 2007, from her insurance brokers, of a large COI increase in year 21 of her policy.[1] Shortly thereafter, Yue filed this lawsuit to halt the COI Increase, asserting claims for declaratory judgment, breach of contract and violation of California's Unfair

[1] Conseco misstates the record regarding possible knowledge of the COI Increase. Pet. at 3, 17-18. Yue testified that in 2007 she learned from her insurance brokers that they "believed there would be a very large change in year 21" of the policy and thereafter contacted counsel. (ER at 161-62). Significantly, Yue did not know how her brokers learned of the increase. (ER at 160:7-10). Even Conseco does not contend that it gave notice of COI Increase to policyholders. In the absence of notice, the Appointed Actuary of Conseco testified that class members would be unable to discover the COI Increase from their annual statements. (ER 116-118); *see also* Cert. Order at 7-8.

Competition Law ("UCL").

Conseco moved to dismiss Yue's claims, arguing that they were insufficiently ripe. The District Court denied Conseco's motion, finding Yue's claims to be sufficiently concrete and particularized under the Federal Declaratory Judgment Act ("DJA") to satisfy the constitutional "case or controversy" requirement. Dismissal Order at 6-13. Judge Matz concluded that Yue need not wait until 2011 to litigate the legitimacy of the COI Increase because she now faced "important and difficult decisions" and "it would impose a hardship on Plaintiff if the Court were to decide that this matter is not ripe for adjudication." *Id*. at 8.

Expressly disavowing any demand for money damages (since the COI Increase had not yet been collected), Yue sought certification of her claims for declaratory and injunctive relief under Rule 23(b)(2). Yue sought a nation-wide class as to her common law contract claim and a California class as to her UCL claim. Judge Matz certified both classes, finding that all of the requirements of Rule 23(a) were satisfied and that, under Rule 23(b)(2), Conseco had allegedly acted "on grounds that apply generally to the class[es], so that final injunctive or corresponding declaratory relief is appropriate respecting the class[es] as a whole." Cert. Order at 8 (quoting Rule 23(b)(2)).

In previous MDL litigation based on an earlier attempt by Conseco to

increase COI charges in violation of the policy restrictions, Judge Matz similarly certified nationwide and California policyholder classes under Rule 23(b)(2). *In re Conseco Life Ins. Co. Cost of Ins. Litig.*, 2005 WL 5678842 (C.D. Cal. Apr. 26, 2005); *In re Conseco Life Ins. Co. Cost of Ins. Litig.*, 2005 WL 5678790 (C.D. Cal. Apr. 27, 2005); *see also* Cert. Order at 5. On June 21, 2005, the Ninth Circuit denied Conseco's petition for Rule 23(f) review of these decisions. *In re Conseco Life*, #05-80040, Dkt. #6 (June 21, 2005). Nevertheless, Conseco again seeks review of Judge Matz' discretionary decision to certify the two policyholder classes, making some of the very same arguments already deemed unworthy of interlocutory review by this Court.

IV. ARGUMENT

A. Judge Matz's Decision to Certify under Rule 23(b)(2) Is a Sound Exercise of Discretion.

The across-the-board character of the COI Increase indisputably affects all policyholders in both classes certified by Judge Matz, rendering certification under Rule 23(b)(2) entirely appropriate. *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 781 (9th Cir. 1986). The Ninth Circuit has refused to read any special requirement of "predominance" or "cohesiveness" into Rule 23(b)(2): "Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under Rule 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." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *accord Rodriguez v. Hayes*, --- F.3d ---, 2010 WL 6394, at *14 (9th Cir. 2010) ('"[Q]uestions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions."') (quoting *Forbush v. J.C. Penny Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir. 1993)). Even if some special showing of cohesiveness were required for Rule 23(b)(2) certification, it would be readily satisfied here, as the shared need for an immediate declaration of Conseco's contractual authority to impose the now-imminent COI Increase plainly aligns all the Policyholders. *See* Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendment ("Action . . . is directed to a class within the meaning of [Rule 23(b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.").

B. Conseco's Contentions of "Manifest Error" Are Themselves Meritless.

1. Yue Is An Adequate Representative.

Conseco argues that Yue is not an adequate representative, asserting inconsistently that her claims are both premature and time-barred. Pet. at 11-18. Neither argument has merit.

a. Yue's Claim Is Ripe.

The DJA authorizes a federal court to '"declare the rights and other legal relations of any interested party seeking such declaration, whether or not further

relief is or could be sought."' *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007) (internal citation omitted); *Micron Tech., Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 901 (9th Cir. 2008). Subject matter jurisdiction under the DJA extends to an "actual controversy" within the court's jurisdiction, *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 272 (1941), and is coextensive with the "case or controversy" standard embodied in Article III of the Constitution. *See MedImmune*, 549 U.S. at 126-127; *Aetna Life Ins. of Hartford v. Haworth*, 300 U.S. 227, 239-40 (1937).

To satisfy the Constitutional requirement, the dispute need only be a "real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna*, 300 U.S. at 241. '"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is [1] a substantial controversy, [2] between parties having adverse legal interests, [3] of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."' *MedImmune*, 549 U.S. at 127 (quoting *Maryland Cas. Co.*, 312 U.S. at 273); *accord Micron Tech.*, 518 F.3d at 901.

All three elements of the constitutional standard are readily satisfied here. First, there is certainly a "substantial controversy" as to the interpretation of the Policy regarding the COI Increase. Second, that controversy is plainly between

parties with directly "adverse legal interests": Conseco claims that it has authority under the standardized contract language to increase the COI charges and Yue disagrees. And third, the controversy is of "sufficient immediacy and reality" to allow meaningful, non-advisory relief by the Court to redress Yue's alleged injury: an order precluding Conseco from applying the COI Increase to Yue's Policy. Judge Matz correctly recognized that Conseco's contractual authority to increase the COI rate is undeniably of immediate concern to Yue and the other Policyholders, who need to know their rights under the Policies given Conseco's imposition of the "dramatic, sudden, and unexpectedly large" COI Increase. Cert. Order at 3; Dismissal Order at 8.

Highly instructive Ninth Circuit precedent is *Principal Life Insurance Co. v. Robinson*, 394 F.3d 665 (9th Cir. 2005). There, through a ninety-nine year ground lease entered into in 1978, the plaintiff held a partial interest in a long-term lease which was subject to rent recalculation in the thirty-first and sixty-first years of the lease term (*i.e.*, 2008 and 2038). *Id*. at 668. The plaintiff tenant and the defendant owner disagreed on the factors to be considered in recalculating the future rent. *Id*. Because the uncertainty of the future recalculation impacted the present value of the lease, the plaintiff in 2000 brought suit under the DJA, seeking a declaratory judgment adopting its interpretation of the rent recalculation provision. *Id.* at 668-69. Although it acknowledged that the only potential harm to the owner was

"possible financial uncertainty and loss," the Ninth Circuit held that such harm was, in the context of a private party contract action, "sufficiently immediate to warrant the issuance of a declaratory judgment," because the plaintiff was "unable accurately to estimate the value of the interest" and could not determine how rent would ultimately be recalculated. *Id.* at 671-72. Indeed, in distinguishing cases involving administrative actions, the Ninth Circuit stated that "possible financial uncertainty and loss" faced prospectively by a private party is "precisely the type of case for which declaratory relief is appropriate." *Id*. at 671.[2]

Here, as in *Principal* and *Aetna*, the dispute at hand is sufficiently definite and concrete, not hypothetical or abstract. The COI Increase has already directly affected the present value of the Policy, in which Yue holds an alienable property interest. As Judge Matz held "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." Dismissal Order at 12. In addition, Yue does not know

[2] Similarly, in *Aetna* an insurer sought a declaratory judgment that the insured was not relieved of his duty to continue paying insurance premiums and that, since the insured had stopped making payments, the insurance policy had lapsed. 300 U.S. at 238. The insured claimed he was disabled and therefore relieved of making insurance premium payments. *Id*. The Supreme Court held that the case presented a controversy under Article III because the parties had taken adverse positions with regard to their rights and obligations under the insurance policy. *Id*. at 242. "The dispute is definite and concrete, not hypothetical or abstract" as "the parties had taken adverse positions with respect to their existing obligations." *Id.*

whether she should abandon the Policy or at what level to continue to fund the Policy without an adjudication respecting the COI Increase. *Id.* at 8. The conflict over proper interpretation of Conseco's contractual authority is thus sufficiently "concrete" to establish her Article III standing to seek declaratory and injunctive relief. *Id.* at 7-9.

Conseco's newfound reliance on *Bova v. City of Medford*, 564 F.3d 1093 (9th Cir. 2009) is misplaced on several levels.[3] Unlike *Principal*, *Bova* did not involve a determination of the respective responsibilities under a private contract creating alienable property rights. Yue and the other Class members own life insurance policies with a present value that, like other tangible property, is assignable.[4] For example, there is a burgeoning market for "life settlement" transactions through which life insurance policy owners may receive a cash payment in exchange for assigning the right to receive the policy benefits upon death.[5] The present value of a permanent life insurance policy is based on the cost

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[3] Conseco did not cite the May 2009 *Bova* opinion in its July 2009 Memorandum in Opposition to Class Certification (ER 79-84), or otherwise give Judge Matz the opportunity to consider it.

[4] *See Lincoln Nat'l Life Ins. Co. v. Gordon R A. Fishman Irrevocable Life Trust*, 638 F. Supp. 2d 1170, 1177 (C.D. Cal. 2009) ("[O]nce purchased, a policy is freely alienable and may pass by transfer, will or succession to any person . . .").

[5] "A Life Settlement refers to the sale of an existing life insurance policy by the beneficiaries of the policy . . . in exchange for an immediate cash settlement." *Bernardele v. Bonorino*, 608 F. Supp. 2d 1313, 1316 (S.D. Fla. 2009).

of future premiums discounted by the probability of death (mortality); the higher the scheduled premiums, the lower the present value.[6]

This is not, then, a case like *Bova*, wherein the Court concluded that the "alleged injury . . . has not yet occurred"; here, the COI Increase has already diminished the present value of the Policies. The District Court acknowledged this concrete, present injury in rejecting Conseco's ripeness argument on the motion to dismiss. Dismissal Order at 8 ("[T]he Complaint alleges an immediate and certain impact on [Yue] and members of the putative class" as a result of the COI Increase).

In addition, unlike *Bova*, Yue and the Class members (who do not even know of the COI Increase) are currently making premium payments each year and need to know now whether to increase funding to maintain their existing life insurance coverage. Dismissal Order at 8. Premiums being paid by Plaintiff Yue and the other Class members will be forfeited if the Policies lapse as a result of the COI Increase. By contrast, the plaintiff in *Bova* was not required to pay for retirement benefits from his own pocket or otherwise decide whether to continue

[6] J. Alan Jensen & Stephen R. Leimberg, *Stranger-Owned Life Insurance: A Point/Counterpoint Discussion*, 33 AM. C. TR. & EST. COUNS. J. 110, 110 (2007) ("The buyers are investors who believe that the continued premiums required keeping the policy in force, plus the purchase price paid to the insured or owner, will be less than the ultimate death benefit, thereby providing an acceptable return on the investment.").

making such payments in the face of a cost increase.

Moreover, in *Bova*, the record before the Court reflected the significant likelihood that the challenged policy would be rescinded before the plaintiff sustained injuries, by legislative action or the outcome of related litigation on behalf of already-retired employees. 564 F.3d at 1095, 1097. Here, there is no significant prospect that Conseco will decide to reverse the COI Increase before Yue must pay it, nor is there any other litigation challenging the COI Increase. Dismissal Order at 8 ("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.").

Conseco's argument, if accepted, would mean that declaratory relief is never available to determine the respective rights of contracting parties, even where one party has announced its intention to repudiate its obligations, because the breaching party might decide to change its mind. Conseco's argument likewise would mean that injunctive relief is not available to prevent damages from a violation of rights, but only after the economic damages have commenced (at which time, of course, Conseco would presumably argue that injunctive relief is impermissible because a legal damages remedy is available).

Conseco also mistakenly argues that, to satisfy adequacy under Rule 23(a)(4), Yue must furthermore prove the individual Article III standing of each

and every member of the class. That is not the law in the Ninth Circuit, nor generally elsewhere. Alba Conte & Herbert Newberg, *Newberg on Class Actions* §2:5, at 75 (4th ed. 2002) (and authorities cited therein) ("The presence of individual standing is sufficient to confer the right to assert issues that are common to the class, speaking from the perspective of any standing requirements.").[7] This is especially true in the context of a proposed Rule 23(b)(2) class seeking only declaratory and injunctive relief. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (in class action where only liability and injunctive relief was sought, "standing is satisfied where at least one named plaintiff met the requirements"); *Rodriguez*, 2010 WL 6394, at *14 (Rule 23(b)(2) "does not require us to examine the viability or basis 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").[8] In any event, Yue and her fellow Policyholders all stand in the same shoes with respect to the question of Conseco's

[7] "'[S]tanding in a class action is assessed solely with respect to class representatives, not unnamed members of the class.'" *In re Tobacco II Cases*, 207 P.3d 20, 34 (Cal. 2009) (quoting *In re General Motors Corp. Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 310 (S.D. Ill. 2007)).

[8] *See Walters*, 145 F.3d at 1047 ("Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate."); *see generally*, 7AA Charles Alan Wright, Arthur R. Miller, & M. K. Kane, *Federal Practice and Procedure*, § 1775, at 50 (3d ed. 2005) ("All the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2)." (citing, among other authorities, *Walters*, 145 F.3d at 1047)).

contractual authority. If Yue's claim for declaratory and injunctive relief is sufficiently ripe under Article III (and it is), then so too are those of all Class members.

b. Yue's Claims Are Not Time-barred.

Conseco simultaneously contends that Plaintiff Yue is an inadequate class representative because her claims are supposedly time-barred. Pet. at 14-18. Notably, Conseco did not seek summary judgment on this ground; instead, it made the argument for the first time in challenging adequate representation under Rule 23(a)(4). In response, Yue presented at least three independent arguments supporting the timeliness of her claim under California law: the "continuous contract" doctrine,[9] the lack of damages triggering the limitations period,[10] and the application of the discovery rule.

Of the three grounds, Conseco's Petition challenges only the application of the discovery rule. First, Conseco argues that the discovery rule is inapplicable to

[9] Yue's claim is timely under the "continuous contract" analysis of *Romano v. Rockwell International, Inc.*, 14 Cal. 4th 479, 488-89 (1996).

[10] Under California law, the statute of limitations is not triggered by wrongful conduct that produces no immediate harm or only nominal damages. *Davies v. Krasna*, 14 Cal. 3d 502, 513-14 (1975); *Garver v. Brace*, 47 Cal. App. 4th 995, 999-1000 (1996). The limitations period begins only when plaintiff suffers appreciable and actual harm of a type that is recoverable as damages on that type of cause of action. *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 317 (2006); *see also Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1054 (9th Cir. 2008) (quoting *Atlantic Richfield*).

the UCL claim, citing *Karl Storz Endoscopy-America, Inc. v. Surgical Technologies., Inc.*, 285 F.3d 848, 857 (9th Cir. 2002) (assessing then-state of California law). But recent California authority is to the contrary. *See Broberg v. Guardian Life Ins. Co. of Am.*, 171 Cal. App. 4th 912, 920-21 (2009) (application of discovery rule precluded dismissal of UCL claim on limitations grounds); *accord Massachusetts Mut. Life Ins. Co. v. Superior Ct.*, 97 Cal. App. 4th 1282, 1295 (2002) (discovery rule "probably" applies to a UCL claim). It makes no sense to grant interlocutory review in this case simply to bring *Karl Storz* into accord with more recent statements of California law, particularly when the discovery rule and the other two doctrines unquestionably apply to the breach of contract claim that also underlies Yue's request for declaratory relief.

Nor did Judge Matz otherwise misapply California's discovery rule, and certainly not as a matter of law. Cert. Order at 7-8 ("Here, the injury and the act causing the injury were both nigh to impossible for Plaintiff to detect in October 2002."). In *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805 (1983), the court extended the discovery rule to encompass the plaintiff's breach of contract cause of action, noting: "plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed," and "defendants should not be allowed to knowingly profit from their injuree's ignorance." 147 Cal. App. 3d at 831. The court further found it unreasonable to expect a contracting party "to

continually monitor whether the other party is performing some act inconsistent with one of many possible terms in a contract . . . especially . . . when the breaching party can commit the offending act secretly, within the privacy of its own offices." *Id.* at 832; *see also Gryczman v. 4550 Pico Partners, Ltd.*, 107 Cal. App. 4th 1, 6 (2003) (reaffirming the principles set forth in *April Enterprises* and reiterating that the delayed discovery rule "applies when the injury or the act causing the injury is 'difficult' for the plaintiff to detect, not impossible").

Here, there are certainly disputed common issues as to Conseco's alleged efforts to hamper discovery of the COI Increase, if not to conceal it altogether. (Indeed, Conseco itself actually argues that Class members lack standing because they don't know about the Increase! Pet. at 14.) And not even Conseco argues that Policyholder somehow knew that Conseco was imposing the COI Increase for reasons other than those permitted by the Policy contract over the objections of its own Appointed Actuary. Cert. Order at 3.

2. ***Shutts*** **Does Not Preclude Certification of the Nationwide Class.**

Consistent with *Rodriguez* and *Walters*, Judge Matz did not view the predominance or manageability considerations emphasized by Conseco's choice-of-law argument as pertinent to certification under Rule 23(b)(2). Cert. Order at 9-

11.[11] Furthermore, Conseco failed to show any material divergence in state law on the central issue of contract interpretation to be resolved on a class-wide basis: Conseco's contractual authority to increase COI rates under the standardized terms of the uniform Policy contract. *Id.* at 10.[12] Moreover, although Conseco now argues that it is constitutionally entitled to choice-of-law analysis under Rule 23(a)'s ***commonality*** requirement, Pet. at 7 n.4, Conseco ***did not contest commonality*** below. Cert. Order at 6.

In any event, under both the due process clause and California's choice-of-law rules, the law of the forum state may be applied in a multi-state action where that law does not materially differ with the law of the other implicated jurisdictions. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985) ("There can be no injury in applying [the forum state's] law if it is not in conflict with that

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[11] The certified Class claims do not present manageability problems of the sort that would require the submission of a trial management plan. *Contrast Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1183, 1189 (9th Cir. 2001) (a "products liability action involving pacemakers" in which ***differing*** law of numerous states applied, movant must demonstrate a "suitable and realistic plan" for trial of the class claims) (emphasis added). Unlike *Zinser*, this case is not complicated by individually triable tort, causation, past and future damages, punitive damages or other issues requiring elaborate sets of potentially confusing jury instructions.

[12] As Judge Matz noted, "[n]or 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." Cert. Order at 6.

of any other jurisdiction connected to this suit."); *Washington Mut. Bank v. Superior Ct.*, 24 Cal.4th 906, 920 (2001) ("[I]f the relevant laws of each state are identical, there is no problem and the trial court may find California law applicable to class claims."). Conseco had the burden to demonstrate material differences in potentially applicable state law. *Wash. Mut. Bank,* 24 Cal.4th at 919 (under California choice of law rules, foreign law proponent bears burden of establishing true conflict).

Common law contract principles governing the interpretation of a standardized contract are not so varied to preclude class certification.[13] Indeed, if anything, a uniform interpretation of the form contact across ***all*** Policyholders is preferred. Restatement (Second) of Contracts § 211(2), 119 (1981) ("[A form contract] is interpreted wherever reasonable as treating alike all those similarly

[13] *See Leszczynski v. Allianz Ins.*, 176 F.R.D. 659, 671-672 (S.D. Fla. 1997) (certifying nationwide class claiming breach of insurance contract because it is "a pure and simple question of contract interpretation which should not vary from state to state"); *Indianer v. Franklin Life Ins. Co.*, 113 F.R.D. 595, 607 (S.D. Fla. 1986) ("Whether the contract's loan interest provision has been breached is a pure and simple question of contract interpretation which should not vary from state to state."), *overruled in part on other grounds by Ericsson GE Mobile Commc'ns., Inc. v. Motorola Commc'ns. & Elecs., Inc.*, 120 F.3d 216, 219 n.12 (11th Cir. 1997); *Singer v. AT&T Corp.*, 185 F.R.D. 681, 691-92 (S.D. Fla. 1998) ("[B]reach of contract" is a "universally recognized cause[] of action . . . materially the same throughout the United States"); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992) (plurality opinion) (contract law is not at its core "diverse, nonuniform, and confusing"); *Atlantic Mut. Ins. Co. v. Brotech Corp.*, 857 F. Supp. 423, 429 (E.D. Pa. 1994) (referring to the "virtually universal principles of insurance contract interpretation"), *aff'd mem.*, 60 F.3d 813 (3d Cir. 1995).

situated, without regard to their knowledge or understanding of the standard terms of the writing.").

In *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), for example, the Eleventh Circuit found the plaintiffs' burden to demonstrate the uniformity in state law satisfied where the singular question of contract law raised by the plaintiffs was whether a breach had occurred. 382 F.3d at 1262 ("A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey."). State law governing contract interpretation is no less uniform here than in *Klay*, or for that matter than in the earlier MDL 1610 case in which Judge Matz rejected the argument that variations in state contract law precluded the national, class-wide adjudication of its contractual authority to increase COI charges in what was, if anything, a more complicated setting involving policies that had already lapsed as a result of the increase. *In re Conseco Life Ins. Co. Cost of Ins. Litig*., 2005 WL 5678842, at *9. Conseco's Rule 23(f) petition for interlocutory review was denied in MDL 1610, just as it should be denied in the present, far-less-complicated circumstances.

3. **The Discovery Rule Does Not Preclude Class Certification.**

Even in the context of Rule 23(b)(3) classes, "[c]ourts have been nearly unanimous . . . in holding that possible differences in the application of a statute of limitations to individual class members . . . does not preclude certification of a

class action." *In re Energy Sys. Equip. Leasing Sec. Litig.*, 642 F. Supp. 718, 752 (E.D.N.Y. 1986). "As 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 Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000). This rationale applies all the more so under Rule 23(b)(2), particularly where rather than a "constellation of common issues" we have a single star: the overarching issue of Conseco's contractual authority to impose the COI Increase.

Moreover, at best, the discovery rule focuses on Conseco's common conduct in not giving notice of the COI Increase. As noted by Judge Matz, "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." Cert. Order at 11.

V. CONCLUSION

There is no "truly manifest" error. Conseco's Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

Dated: January ___, 2010

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