

*In the*

**United States Court of Appeals**  
*For the*  
**Ninth Circuit**

**R E C E I V E D**  
MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

OCT 18 2011

FILED \_\_\_\_\_  
DOCKETED \_\_\_\_\_  
DATE \_\_\_\_\_  
INITIAL \_\_\_\_\_

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

**R E C E I V E D**  
MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

OCT 18 2011

FILED \_\_\_\_\_  
DOCKETED \_\_\_\_\_  
DATE \_\_\_\_\_

INITIAL \_\_\_\_\_ CONSECO LIFE INSURANCE COMPANY,  
Successor: Philadelphia Life Insurance Company,  
fka Massachusetts General Life Insurance Company,

*Plaintiff-Appellee,*

v.

*Defendant-Appellant.*

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

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**NOTIFICATION OF FILING UNDER SEAL  
AND MOTION TO FILE UNDER SEAL**

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TIMOTHY P. DILLON, Esq.  
LAW OFFICES OF TIMOTHY P. DILLON  
1925 Century Park East, Suite 1700  
Los Angeles, California 90067  
(310) 553-9400 Telephone  
(310) 553-9405 Facsimile

ANDREW S. FRIEDMAN, Esq.  
FRANCIS J. BALINT, JR., Esq.  
BONNETT, FAIRBOURN,  
FRIEDMAN & BALINT, P.C.  
2901 North Central Avenue, Suite 1000  
Phoenix, Arizona 85012  
(602) 274-1100 Telephone  
(602) 274-1199 Facsimile

*Attorneys for Plaintiff-Appellee Celedonia X. Yue, M.D.*



**NOTIFICATION OF FILING UNDER SEAL  
AND MOTION TO FILE UNDER SEAL**

In accordance with Ninth Circuit Rule 27-13(b), Plaintiff-Appellee hereby provides notice that she is filing under seal Volume II of the Supplemental Excerpts of Record. Plaintiff-Appellee files these documents under seal as they were filed under seal in the district court in accordance with the Protective Order entered in the district court on January 12, 2009. A copy of Protective Order is attached hereto as Exhibit "A."

In addition, Plaintiff-Appellee moves to file her Second Brief on Cross-Appeal under seal as it references documents filed under seal in district court in accordance with the Protective Order.

Respectfully submitted,

Dated: October 17, 2011

LAW OFFICES OF TIMOTHY P. DILLON

By: 

Timothy P. Dillon

Dated: October 17, 2011

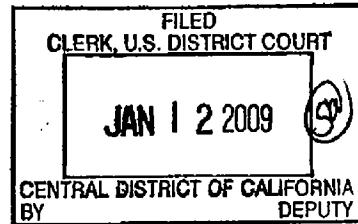
BONNETT, FAIRBOURN,  
FRIEDMAN & BALINT, PC

By: 

Andrew S. Friedman  
Francis J. Balint, Jr.

Attorneys for Plaintiff-Appellee

# **EXHIBIT “A”**



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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

11 CELEDONIA X. YUE, M.D., on behalf  
12 of the class of all others similarly  
situuated, and on behalf of the General  
13 Public,

14 Plaintiffs,

15 vs.

16 CONSECO LIFE INSURANCE  
COMPANY,

17 Defendant.

Case No. CV 08-1506 AHM(JTLx)

Honorable A. Howard Matz

~~PROPOSED~~ PROTECTIVE  
ORDER GOVERNING  
CONFIDENTIALITY

(Putative) CLASS ACTION

18 IT IS HEREBY ORDERED THAT:

19 This Protective Order (hereinafter "Order") shall govern the use of  
20 confidential information produced during discovery in this action. For purposes of  
21 this Order, the party designating information, documents, materials or items as  
22 confidential bears the burden of establishing the confidentiality of all such  
23 information, documents, materials or items under applicable law.

24 1. For the purposes of this Order, "Confidential" information means the  
25 following types of documents and information:

26 (a) policy data that constitutes a trade secret in accordance with  
27 Cal. Civil. Code § 3426.1 and this section is incorporated by reference.

28

(b) financial or actuary projections, analyses or studies reflecting current or future experience or actions;

(c) non-public communications with regulators, Departments of Insurance or other governmental bodies that are intended to be kept confidential and/or are protected from disclosure by statute or regulation;

(d) Board of Director minutes or materials or other documents reflecting non-public business or financial strategies, information or decisions; and

(e) policyholder-specific information that is protected from disclosure by statute or regulation.

10        2. Any party may seek amendment to this Order to designate  
11 confidential documents and information in addition to the categories described in  
12 Paragraph 1 before production of any such documents or information. The parties  
13 agree to meet and confer in good faith and attempt to reach agreement on any  
14 request by a party to designate such additional categories of confidential  
15 documents or information.

16       3. Confidential documents shall be so designated by stamping copies of  
17 the document produced to a party with the following legend:

“CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER”

19 Any such stamp of designation shall not cover up, obscure or otherwise  
20 conceal any text, picture, drawing, graph or other communication or depiction in  
21 the document.

22        4.      The designation of any material as "Confidential" pursuant to this  
23 Order shall constitute the good faith verification of counsel for the producing party  
24 that the material constitutes Confidential information as defined in Paragraph 1 of  
25 this Order. Material designated by a party or non-party or their counsel  
26 "Designating Party" as confidential under this Order ("Confidential Material")  
27 shall be used only for the purpose of the litigation or settlement of this action or

1 for such other purposes or in such other actions as agreed by the parties or ordered  
2 by the Court.

3 5. Confidential Material produced under this Order may be disclosed or  
4 made available only to the following persons ("Qualified Persons"):

5 (a) the parties to this action or an officer, director, or employee of a  
6 party deemed reasonably necessary by counsel to aid in the prosecution, defense,  
7 or settlement of this action;

8 (b) counsel for the parties in this action, including all partners and  
9 associate attorneys of such Counsel's law firms and all clerks, employees,  
10 independent contractors, investigators, paralegals, assistants, secretaries, staff and  
11 stenographic, computer, audio-visual and clerical employees and agents thereof  
12 when operating under the direct supervision of such partners or associate attorneys;

13 (c) court personnel, including attorneys, employees, judges,  
14 magistrates, secretaries, special masters, stenographic reporters, staff, transcribers  
15 and all other personnel of or affiliated with the Court;

16 (d) stenographic reporters or audio-visual personnel engaged in  
17 connection with this action, including deposition reporters, video operators and  
18 transcribers;

19 (e) any person who created, authored, received or reviewed such  
20 Confidential Material and those persons identified on such Confidential Material as  
21 creators, authors or recipients of the Confidential Material;

22 (f) actual and/or potential trial or deposition witnesses, where  
23 counsel believes, in good faith, that disclosure is necessary to prepare for or  
24 develop the testimony of such witnesses;

25 (g) experts or consultants retained such counsel to assist in the  
26 prosecution, defense, or settlement of this action and their respective employees,  
27 associates or colleagues;

28

4 (i) such other persons as may be designated by written agreement  
5 of Counsel or by order of the Court.

6        6.      Before receiving any Confidential Material, each Qualified Person  
7 described in paragraphs 6(f) and (g) shall be provided with a copy of this Order  
8 and shall sign an Agreement to Maintain Confidentiality (“Confidentiality  
9 Agreement”) in the form of Attachment “A”. Each person signing a  
10 Confidentiality Agreement shall be subject to and bound by this Order. Counsel  
11 for the party seeking to disclose Confidential Material to any Qualified Person  
12 under paragraphs 6(f) and 6(g) shall be responsible for retaining the signed  
13 originals of all Confidentiality Agreements until such time as the certification  
14 required by Paragraph 13 is provided.

15        7. Any motion, pleading or other submission that contains or attaches  
16 Confidential Material shall be filed in a sealed envelope that: (a) is endorsed with  
17 the caption for this matter; (b) sets forth a general description of the contents of the  
18 sealed envelope; and (c) contains the following legend:

**“CONFIDENTIAL”**

20 "THIS ENVELOPE IS SEALED BY COURT ORDER, CONTAINS  
21 CONFIDENTIAL INFORMATION AND IS NOT TO BE OPENED NOR THE  
22 CONTENTS REVEALED EXCEPT BY COURT ORDER."

23 All papers that refer to or reply upon Confidential Material shall specify the  
24 particular aspects of the documents or materials that are Confidential with  
25 sufficient particularity to enable the Court in drafting orders or making rulings to  
26 determine whether there is information or evidence which should not be disclosed  
27 in any Court order or ruling. Absent that advance notification, the Court will be  
28 free to incorporate any and all information or evidence in its written or oral rulings.

1        8. (a) If, in connection with this action, a party (the "Disclosing  
2 Party") discloses information subject to a claim of attorney-client privilege or work  
3 product protection ("Disclosed Protected Information"), the disclosure of the  
4 Disclosed Protected Information shall not constitute or be deemed a waiver or  
5 forfeiture of any claim of attorney-client privilege or work product protection that  
6 the Disclosing Party would otherwise be entitled to assert over the Disclosed  
7 Protected Information and its subject matter provided there is compliance with  
8 Rule 502(b) of the Federal Rules of Evidence;

9 (b) A Disclosing Party may assert in writing attorney-client  
10 privilege or work product protection over Disclosed Protected Information in  
11 accordance with Rule 502(b) of the Federal Rules of Evidence. The party  
12 receiving this writing (the "Receiving Party") shall, within ten business days of  
13 receiving that writing, return, sequester, or destroy all copies of the Disclosed  
14 Protected Information and provide a certification of counsel that all such Disclosed  
15 Protected Information has been returned, sequestered, or destroyed in accordance  
16 with Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure.

17 (c) Within ten business days of the notification that such Disclosed  
18 Protected Information has been returned, sequestered, or destroyed, the Disclosing  
19 Party shall produce a privilege log covering the Disclosed Protected Information as  
20 set forth in Rule 26(b)(5)(A)(ii) of the Federal Rules of Civil Procedure;

21 (d) The Receiving Party may move the Court for an order  
22 compelling production of the Disclosed Protected Information (a "Privilege  
23 Motion"). The Privilege Motion shall be filed under seal in accordance with  
24 Paragraph 7 and shall not assert as a ground for entering such an order the fact or  
25 circumstance of the Disclosing Party's earlier production;

26 (e) The Disclosing Party retains the burden of establishing the  
27 privileged protected nature of any Disclosed Protected Information. Nothing in

1 this paragraph shall limit the right of any party to petition the Court for an *in*  
2 *camera* review of the Disclosed Protected Information; and

3 (f) If, at trial, at a hearing, at a deposition, or on a motion, a  
4 Disclosing Party offers into evidence Disclosed Protected Information – or proffers  
5 or elicits testimony or other evidence that incorporates or relies on Disclosed  
6 Protected Information, including evidence within Federal Rule of Evidence 703 –  
7 that act shall be deemed to effect a waiver and forfeiture by the Disclosing Party of  
8 the attorney-client privilege and/or work product protection that would otherwise  
9 apply to undisclosed information within the terms of Federal Rule of Evidence  
10 502(a). The preceding sentence shall not apply to (i) proceedings to determine  
11 whether the Disclosed Protected Information is privileged or protected or subject to  
12 discovery, or (ii) Disclosed Protected Information that is marked for identification,  
13 offered into evidence, or incorporated in evidence proffered or elicited by an  
14 adverse party, or relied on by a witness proffered by an adverse party.

15 9. If the case proceeds to trial or any evidentiary hearing, all documents  
16 or information previously designated as Confidential or as containing Confidential  
17 Material shall become public and shall be available to all members of the public,  
18 including the media, unless a motion is filed in advance of the trial or hearing and  
19 the moving party demonstrates sufficient cause to maintain the confidentiality of  
20 specific documents or information.

21 10. Nothing in this Order shall prohibit disclosure of Confidential  
22 Material produced by or obtained from any party to this action in response to a  
23 subpoena, other compulsory process, or the process of any government regulatory  
24 agency. If any party is served with such process (including any governmental  
25 agency request, demand, subpoena or order), such party shall promptly (not more  
26 than forty-eight (48) hours after receipt of such process) notify the Designating  
27 Party of such process, and shall take all reasonable steps to refrain from producing  
28 Confidential Material in response to such process, to afford a reasonable

1 opportunity for the Designating Party to oppose the process or to seek a protective  
2 order.

3       11. If a deponent testifies about subject matter that a party might properly  
4 designate as Confidential under this Order, or Confidential Material covered by  
5 this Order is marked as an exhibit, counsel of an affected party may designate that  
6 portion of the testimony, or the exhibit or both, as Confidential under this Order,  
7 either at the time of the deposition or by letter postmarked, faxed or emailed within  
8 30 calendar days after receipt of the deposition transcript identifying the pages, and  
9 lines of the transcript and the exhibits that it is designating as Confidential under  
10 this Order, and only those designated portions and exhibits shall thereafter be  
11 treated as Confidential under this Order. If the Designating Counsel fails to timely  
12 provide such identification, any claim of confidentiality shall be deemed waived.

13       12. A party or other person objecting to designation of any document or  
14 material as Confidential Material shall provide written notice of the objection to  
15 Counsel for the Designating Party, specifying the document(s) or material(s) that  
16 are the subject of the objection. Upon receiving the objection, counsel for the  
17 Designating Party shall, within 10 business days, provide a written response to the  
18 objecting party explaining the basis for the designation as Confidential Material;  
19 otherwise the document(s) or material(s) shall be deemed to be no longer  
20 Confidential. The parties and any other objecting persons shall confer in good  
21 faith in an effort to resolve the objection before Court intervention is sought. If the  
22 objecting party or person and Counsel for the Designating Party are unable to  
23 resolve the issue, Counsel for the Designating Party, within 21 days after the good  
24 faith conference(s) has concluded, may file a motion with the Court to continue the  
25 designation of the document(s) or material(s) as "Confidential Material." The  
26 Court shall make an independent determination as to whether the document(s) or  
27 material(s) constitutes Confidential information as defined in Paragraph 1 of this  
28 Order. If the Designating Party does not file a motion seeking to maintain the

1 "Confidential Designation" within 21 days after the good faith conference(s) has  
2 concluded, the document(s) or material(s) at issue shall be deemed to be no longer  
3 confidential.

4       13. Within 60 days of final and nonappealable termination of this lawsuit  
5 (whether by final judgment, final settlement or otherwise), all Confidential  
6 Material and any abstracts and summaries of such material, shall be destroyed or  
7 returned to counsel for the producing party. Such destroyed or returned materials  
8 shall not include the notes or work product of counsel for the parties, expert  
9 witnesses or consultants or investigations or agents thereof. Counsel for each party  
10 shall certify that the provisions of this paragraph have been satisfied by sending  
11 opposing counsel a letter confirming compliance. Reasonable out-of-pocket costs  
12 associated with returning Confidential Materials will be borne by the Party  
13 requesting its return.

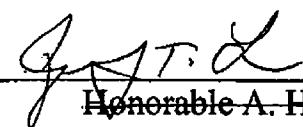
14       14. No party receiving documents or materials designated as  
15 "Confidential Material" shall have any obligation to object to the designation at the  
16 time the designation is made or at any time thereafter. No party shall, by failure to  
17 object, be found to have acquiesced or agreed to such designation or be barred  
18 from objecting to such designation at any time.

19       15. Nothing contained in this Order shall be a waiver of any objection to  
20 the admissibility of evidence at trial (or in any pretrial proceeding or on appeal) of  
21 any Confidential Information.

22       For any order or filing, parties shall comply with  
23 IT IS SO ORDERED. Local Rule 79-5.

24  
25 Dated: January 12, 2009

26  
27  
28



Honorable A. Howard Matz  
United States District Judge

JENNIFER T. LUM  
U.S. MAGISTRATE JUDGE

## ATTACHMENT A

## CONFIDENTIALITY AGREEMENT

Case Name: *Yue v. Conseco Life Insurance Company*

Case Number: CV 08-1506 AHM (JTLx)

I, \_\_\_\_\_, have read and understand the Stipulated Protective Order Governing Confidentiality (the "Order") in *Yue v. Conseco Life Insurance Company*, CV 08-1506 AHM (JTLx), entered on \_\_\_, 2009 and agree to be bound by its terms.

1. As set forth in the Order, I shall use information I learn as a result of having access to materials protected under the Order solely for the purpose of this litigation and agree to be subject to and bound by the Order.

2. I hereby submit myself to the jurisdiction of the United States District Court for the Central District of California for the enforcement of these representations and the Order.

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

[Signature]

[Type or Print Name]

State of California )  
County of Los Angeles )  
 )

Proof of Service by:  
✓ US Postal Service  
Federal Express

I, Kirstin Largent , 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.

On 10/17/2011 declarant served the within: Notification and Motion to File Under Seal upon:

1 Copies FedEx ✓ USPS

John M. Aerni, Esq.  
Adam J. Kaiser, Esq.  
Dewey & LeBoeuf LLP  
1301 Avenue of the Americas  
New York, NY 10019-6092  
  
Attorneys for Defendant-Appellant

Copies FedEx USPS

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the address(es) designated by said attorney(s) for that purpose by depositing **the number of copies indicated above**, of same, enclosed in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of California, or properly addressed wrapper in an Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of California

I further declare that this same day the **original and** copies has/have been hand delivered for filing OR the **original and 0** copies has/have been filed by  third party commercial carrier for next business day delivery to:

Office of the Clerk  
United States Court of Appeals  
for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103-1526

I declare under penalty of perjury that the foregoing is true and correct:

Signature: 