

In the
United States Court of Appeals
For the
Ninth Circuit

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U.S. COURT OF APPEALS

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DATE INITIAL

CELEDONIA X. YUE, M.D.,
on behalf of the class of others similarly situated and on behalf of the General Public,
Plaintiff-Appellee / Cross-Appellant,

v.

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

Defendant-Appellant / Cross-Appellee.

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

NOTIFICATION OF FILING UNDER SEAL

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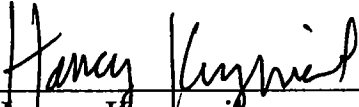
NOTIFICATION OF FILING UNDER SEAL

Pursuant to Circuit Rule 27-13, Defendant-Appellant/Cross-Appellee Conseco Life Insurance Company (“Conseco”) hereby moves to file its Third Brief on Cross-Appeal under seal. Conseco requests that its Third Brief be filed under seal because it references, quotes and describes numerous documents subject to the district court’s protective order, entered on January 12, 2009 (“Protective Order”). That Protective Order remains in effect and a copy is attached hereto as Exhibit A.

In addition, Defendant-Appellant/Cross-Appellee hereby provides notice that it is filing the following additional documents under seal: Motion for Judicial Notice and Aerni Declaration in Support of Motion for Judicial Notice. The Motion and supporting declaration reference, describe and attach Plaintiff’s Reply Memorandum of Points and Authorities in Support of Motion for an Award of Attorneys’ Fees, which was filed under seal in the district court on May 20, 2011, ECF No. 194. Defendant-Appellant/Cross-Appellee files these documents under seal in accordance with the Protective Order. This Motion, itself, need not be filed under seal.

Dated: December 16, 2011

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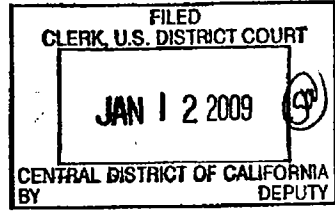
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EXHIBIT A



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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

Plaintiffs,

vs.

CONSECO LIFE INSURANCE
COMPANY,

Defendant.

Case No. CV 08-1506 AHM(JTLx)
Honorable A. Howard Matz
~~PROPOSED~~ PROTECTIVE
ORDER GOVERNING
CONFIDENTIALITY

(Putative) CLASS ACTION

IT IS HEREBY ORDERED THAT:

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

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

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

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

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

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

8 (e) policyholder-specific information that is protected from
9 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:

18 "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
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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;

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1 (h) employees of firms engaged by the parties for purposes of
2 photocopying, electronic imaging or computer litigation support in connection
3 withy this litigation; or

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:

19 "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
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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.

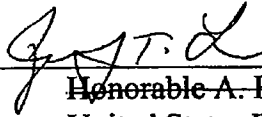
4 13. Within 60 days of final and nonappealable termination of this lawsuit
5 (whether by final judgment, final settlement or otherwise), all Confidential
6 Material and any abstracts and summaries of such material, shall be destroyed or
7 returned to counsel for the producing party. Such destroyed or 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 under seal 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

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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, Stephen Moore, 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 12/16/2011 declarant served the within: Notification of Filing Under Seal
upon:

1 Copies ✓ FedEx USPS

Andrew S. Friedman
Bonnett Fairbourn Friedman & Balint PC
2901 North Central Avenue
Suite 1000
Phoenix, Arizona 85012
Attorney for Appellee / Cross-Appellant,
Celedonia X. Yue, M.D.

1 Copies ✓ FedEx USPS

Timothy P. Dillon
Law Offices of Timothy P. Dillon
1925 Century Park East
Suite 1700
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Celedonia X. Yue, M.D.

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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 3** 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, California 94103-1526

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

Signature: Stephen Moore