

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,

*Plaintiff-Appellee,*

v.

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

*Defendant-Appellant.*

*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  
AND MOTION TO FILE UNDER SEAL**

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



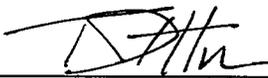
**NOTIFICATION OF FILING UNDER SEAL  
AND MOTION TO FILE UNDER SEAL**

In accordance with Ninth Circuit Rule 27-13(b), Plaintiff-Appellee hereby provides notice that she is filing under seal Plaintiff-Appellee's Response to Defendant/Appellant's Motion for Judicial Notice and the related declaration of Timothy P. Dillon. Plaintiff-Appellee files these documents under seal as they contain information designated by Defendant-Appellant as confidential in accordance with the Protective Order entered in the district court on December 6, 2011 in the action entitled *Yue v. Conseco Life Insurance Company*, Case No. CV 11-09506 AHM(SHx). A copy of Protective Order is attached hereto as Exhibit "A."

Respectfully submitted,

Dated: December 30, 2011

LAW OFFICES OF TIMOTHY P. DILLON

By:   
\_\_\_\_\_  
Timothy P. Dillon

Dated: December 30, 2011

BONNETT, FAIRBOURN, FRIEDMAN  
& BALINT, PC

By:   
\_\_\_\_\_  
Andrew S. Friedman

Attorneys for Plaintiff-Appellee

# **EXHIBIT A**



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

3 (b) financial or actuarial projections, analyses or studies reflecting  
4 past, present, or future experience or actions;

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

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

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

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

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

20 "CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER"

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

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

1 shall be used only for the purpose of the litigation or settlement of this action or  
2 for such other purposes or in such other actions as agreed by the parties or ordered  
3 by the Court.

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

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

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

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

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

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

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

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

1 (h) employees of firms engaged by the parties for purposes of  
2 photocopying, electronic imaging or computer litigation support in connection with  
3 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 5(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 5(f) and 5(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, work  
3 product protection or any other privilege or protection from discovery ("Disclosed  
4 Protected Information"), the disclosure of the Disclosed Protected Information  
5 shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or  
6 protection that the Disclosing Party would otherwise be entitled to assert over the  
7 Disclosed Protected Information and its subject matter provided there is  
8 compliance with Rule 502(b) of the Federal Rules of Evidence;

9           (b)   A Disclosing Party may assert in writing privilege or work  
10 product protection over Disclosed Protected Information in accordance with Rule  
11 502(b) of the Federal Rules of Evidence. The party receiving this writing (the  
12 "Receiving Party") shall, within ten business days of receiving that writing, return,  
13 sequester, or destroy all copies of the Disclosed Protected Information and provide  
14 a certification of counsel that all such Disclosed Protected Information has been  
15 returned, sequestered, or destroyed in accordance with Rule 26(b)(5)(B) of the  
16 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  
28

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 9. If the case proceeds to trial or any evidentiary hearing, all documents  
4 or information previously designated as Confidential or as containing Confidential  
5 Material shall presumptively become public, unless a motion is filed in advance of  
6 the trial or hearing and the moving party demonstrates sufficient cause to maintain  
7 the confidentiality of specific documents or information.

8 10. Nothing in this Order shall prohibit disclosure of Confidential  
9 Material produced by or obtained from any party to this action in response to a  
10 subpoena, other compulsory process, or the process of any government regulatory  
11 agency. If any party is served with such process (including any governmental  
12 agency request, demand, subpoena or order), such party shall promptly (not more  
13 than forty-eight (48) hours after receipt of such process) notify the Designating  
14 Party of such process, and shall take all reasonable steps to refrain from producing  
15 Confidential Material in response to such process, to afford a reasonable  
16 opportunity for the Designating Party to oppose the process or to seek a protective  
17 order.

18 11. If a deponent testifies about subject matter that a party might properly  
19 designate as Confidential under this Order, or Confidential Material covered by  
20 this Order is marked as an exhibit, counsel of an affected party may designate that  
21 portion of the testimony, or the exhibit or both, as Confidential under this Order,  
22 either at the time of the deposition or by letter postmarked, faxed or emailed within  
23 30 calendar days after receipt of the deposition transcript identifying the pages, and  
24 lines of the transcript and the exhibits that it is designating as Confidential under  
25 this Order, and only those designated portions and exhibits shall thereafter be  
26 treated as Confidential under this Order. If the Designating Counsel fails to timely  
27 provide such identification, any claim of confidentiality shall be deemed waived.

28

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

20           13. Within 60 days of final and nonappealable termination of this lawsuit  
21 (whether by final judgment, final settlement or otherwise), all Confidential  
22 Material and any abstracts and summaries of such material, shall be destroyed or  
23 returned to counsel for the producing party. Such destroyed or returned materials  
24 shall not include the notes or work product of counsel for the parties, expert  
25 witnesses or consultants or investigations or agents thereof. Counsel for each party  
26 shall certify that the provisions of this paragraph have been satisfied by sending  
27 opposing counsel a letter confirming compliance. Reasonable out-of-pocket costs  
28

1 associated with returning Confidential Materials will be borne by the Party  
2 requesting its return.

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

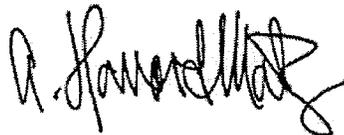
8 15. Nothing contained in this Order shall be a waiver of any objection to  
9 the admissibility of evidence at trial (or in any pretrial proceeding or on appeal) of  
10 any Confidential Information.

11 16. For any under seal filing, the parties shall comply with Local Rule 79-  
12 5.

13 17. Subject to the terms and conditions of this Order and the Order  
14 entered in the action entitled *Yue v. Conseco Life Insurance Company*, Case No.  
15 CV 08-1506 AHM (SHx) ("*Yue I*"), the parties may use in this action the  
16 documents, information and deposition testimony from *Yue I*.

17 IT IS SO ORDERED.

18 Dated: December 06, 2011



19  
20  
21 A. Howard Matz  
22 United States District Court Judge  
23  
24  
25  
26  
27  
28

**ATTACHMENT A**

**CONFIDENTIALITY AGREEMENT**

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

Case Number: CV 11-9506 AHM (SJHx)

I, \_\_\_\_\_, have read and understand the Stipulated Protective Order Governing Confidentiality (the "Order) in *Yue v. Conseco Life Insurance Company*, CV 11-9506 AHM (SHx), entered on \_\_\_\_\_, 2011 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 \_\_\_\_\_, 201\_\_.

\_\_\_\_\_  
[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 12/30/2011 declarant served the within: Notification of Filing Under Seal  
and Motion to File Under Seal  
upon:

1 Copies FedEx ✓ USPS  
John M. Aerni, Esq.  
Adam J. Kaiser, Esq.  
DEWEY & LE BOEUF LLP  
1301 Avenue of the Americas  
New York, New York 10019-6092  
Attorneys for Defendant-Appellant,  
Conseco Life Insurance Company

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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, California 94103-1526

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

Signature: Stephen Moore