

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

**FILED**

**In Re: Conseco, Inc.**

) Chapter 11  
)  
)

AUG 18 2005

ROLLIN DICK,

) 05 C 3170  
) Judge Robert W. Gettleman  
)

Judge Robert W. Gettleman  
United States District Court

Appellant.

) 02 B 49672  
) Judge Carol A. Doyle  
)

**APPENDIX TO RESPONSE BRIEF OF APPELLEE CONSECO, INC.**

James H.M. Sprayregen, P.C.  
Scott A. McMillin

KIRKLAND & ELLIS LLP  
200 East Randolph Drive  
Chicago, Illinois 60601  
Telephone: (312) 861-2000  
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*Counsel for Conseco Inc.*

Dated: August 11, 2005

**D.E. 6904**

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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
SEP 21 2004  
CLERK  
PS REP. - FR

In re: ) Chapter 11  
)  
Conseco, Inc., ) Case No. 02 B49672  
) Honorable Carol A. Doyle  
Debtors. ) (Jointly Administered)  
)

**CONSECO, INC.'S STATEMENT OF UNDISPUTED FACTS**

Pursuant to Local Bankruptcy Rule 7056-1, Conseco, Inc. submits the following list of material facts as to which there is no dispute, and which entitle Conseco to partial summary judgment in this matter.

**Jurisdiction**

1. This Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334.
2. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B) because it involves the allowance or disallowance of claims asserted against Conseco's estate, specifically, the claims represented by Proof of Claim Nos. 49672-006377, 49672-006378, and 49672-006379.
3. The plaintiffs/claimants in this matter are the owners of various insurance policies. Pursuant to certain Split-Dollar Agreements, Conseco, Inc. and two former employees of Conseco – Stephen Hilbert and Rollin Dick – agreed to share the obligation to pay premiums on those policies.
4. The defendant/respondent in this case is Conseco, Inc., which filed a chapter 11 petition in this Court on December 17, 2002. On September 9, 2003, this Court confirmed a plan of reorganization, which became effective on September 10, 2003.

### The Split-Dollar Agreements

5. In 1998, Conseco entered into a series of Split-Dollar Agreements which were intended to benefit two members of Conseco's senior management, Stephen Hilbert and Rollin Dick.

6. In total, there were five Split-Dollar Agreements (four for Hilbert and one for Dick). Each Split-Dollar Agreement related to a different life insurance policy. True and accurate copies of the Split-Dollar Agreements and attachments are attached hereto as Exhibits A-E.

7. Each Agreement had three parties: (1) Conseco; (2) the "Employee" (which was either Hilbert or Dick depending on the specific policy involved); and (3) the "Owner" of the insurance policy to be issued (for each of the policies, Hilbert and Dick created trusts to capture the death benefits under the policies).

8. Conseco was a party to all of the Split-Dollar Agreements. The other parties to the five Split-Dollar Agreements, as well as the insurance policies associated with each of the five Agreements are set forth in the table below.

Insurance Policy	Employee	Policy Owner	Trustee for the Owner	Policy Amount
Prudential Policy No. V0001461	Rollin Dick	FBO Dick Family 1998 IRR Trust	Lawrence Dick	\$10 million
MctLife Policy No. 981250011PR	Stephen Hilbert	Amended Hilbert Residence Maintenance Trust	Rollin Dick	\$12.5 million
New York Life Insurance Co. Policy No. 46402088	Stephen Hilbert	Stephen C and TomiSue Hilbert Irrevocable Trust	Rollin Dick	\$25 million

Manufacturers Life Policy No. 55627152	Stephen Hilbert	Stephen C and TomiSue Hilbert Irrevocable Trust	Rollin Dick	\$25 million
MetLife Policy No. 981250010PR	Stephen Hilbert	Stephen C and TomiSue Hilbert Irrevocable Trust	Rollin Dick	\$25 million

9. Under each Agreement, Consecoco agreed to contribute premiums towards a life insurance policy under which Hilbert, Dick and their spouses were the insured lives. (Ex. A at ¶ 3(a))

10. Consecoco agreed to pay annual premiums for the life insurance policies because "the Employee is also an officer and director of the Corporation and has contributed significantly to its success. The Corporation desires to continue to retain the services of the Employee." (Ex. A at 1)

#### The Terms of the Split-Dollar Agreements

11. Under each Split-Dollar Agreement, Consecoco was required to determine the amount of the annual premium due under the terms of the life insurance policy at issue.<sup>1</sup> (Ex. A at ¶ 3(a))

12. Consecoco was then required to determine how that premium payment should be split between Consecoco and the Employee in accordance with IRS PS 38 table rates.<sup>2</sup> *Id.*

<sup>1</sup> The terms of the various Split-Dollar Agreements were virtually identical. In this Statement of Facts, all citations to terms in the Split-Dollar Agreements are to Exhibit A. However, the same terms appear in Exhibits B-E.

<sup>2</sup> The arrangement under which Consecoco and the Employees split the premium payments was designed to confer a tax benefit on the Employees.

13. The Employee (or his spouse or the Owner in his stead) was then required to forward the Employee's portion of the premium to Conseco, which, in turn, would forward the full premium payment to the issuing insurer. *Id.*

14. The insurance policies were "second-to-die" policies (meaning that the death benefit would pay out upon the death of both the Employee and his spouse). (*See, e.g.,* Ex. A, at ¶ 6(a)-(b))

15. Conseco obtained a collateral assignment of each insurance policy pursuant to a separate Collateral Assignment. (*See* Ex. A at Ex. B thereto). Under the terms of the Collateral Assignments, Conseco's interests included the right to be re-paid for its premium payments upon certain events of termination or upon the death of both insured lives (as provided in the Split-Dollar Agreements). (*Id.* at ¶ 3)

16. Each Split-Dollar Agreement also contained an early termination provision, which stated:

This Agreement shall terminate, during the lifetimes of Employee and his said wife, without notice, upon the occurrence of any of the following events: (1) bankruptcy of the Corporation; or (2) failure of the Employee (or his said wife) and the Owner to timely pay the Corporation the Employee's (or his said wife's) portion of the premium, if any, due hereunder, unless the Corporation elects to make such payment on behalf of the Employee, as provided herein.

(Ex. A at ¶ 7)

17. Upon early termination, the Owner of the policy had the option of "purchasing" the policy from Conseco (thus releasing the collateral assignment) by reimbursing Conseco for its premium payments to date. (*Id.* at ¶ 8(a))

18. If the Owner failed to take such action within 60 days, Conseco then had the option of either: (1) taking possession of the policy (*i.e.* becoming the Owner of the policy); or

(2) surrendering the policy, taking reimbursement for its premium payments from the proceeds, and then paying any residual amount to the Owner. (*Id.* at ¶ 8(b))

**The Parties' Dealings under the Split-Dollar Agreements**

19. Conseco, the Employees and the Owners operated under the Agreements until December 2001. True and accurate summaries of the parties' premium payments are set forth in the schedules attached as Exhibit F hereto.

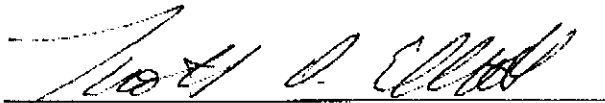
20. In December 2001, Conseco ceased making premium payments on the policies.

21. The Owners of the policies filed claims against Conseco, Inc. that are represented by Proof of Claim Nos. 49672-006377, 49672-006378, and 49672-006379.

22. Conseco filed timely objections to each of those claims. Conseco objected on a number of grounds, including that the Split-Dollar Agreements were non-executory contracts that had terminated when Conseco filed its bankruptcy petition on December 17, 2002.

DATED: September 20, 2004

Respectfully submitted,



James H.M. Sprayregen  
Timothy D. Elliott  
KIRKLAND & ELLIS LLP  
200 East Randolph Drive  
Chicago, IL 60601  
Telephone: (312) 861-2000  
Facsimile: (312) 861-2200

Attorneys for Conseco, Inc.

**CERTIFICATE OF SERVICE**

I, Timothy D. Elliott, an attorney, certify that I served true and correct copies of the foregoing CONSECO, INC.'S STATEMENT OF UNDISPUTED FACTS, by facsimile and Federal Express, on September 20, 2004, upon:

John F. Kinney  
Freeman, Freeman & Salzman, P.C.  
401 North Michigan Avenue  
Suite 3200  
Chicago, IL 60611-4207  
Telephone: (312) 222-5100  
Facsimile: (312) 822-0870

William L. O'Connor  
Dan Pecar Newman & Kleiman, P.C.  
Suite 2300, One American Square  
Indianapolis, IN 46282  
Telephone: (317) 632-3232  
Facsimile: (317) 632-2962

**BY MESSENGER**

**BY FEDERAL EXPRESS**

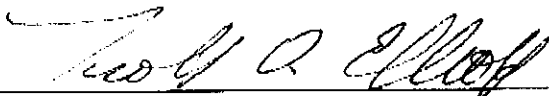
  
\_\_\_\_\_  
Timothy D. Elliott



EXHIBIT A

**SPLIT-DOLLAR AGREEMENT**  
**(Rollin M. and Helen E. Dick)**

THIS AGREEMENT, made and entered into by and among CONSECO, INC., an Indiana corporation (the "Corporation"), ROLLIN M. DICK, of Zionsville, Indiana (the "Employee"), and LAWRENCE E. DICK of Orange County, California, Trustee of the DICK FAMILY IRREVOCABLE TRUST, dated December 8, 1998 (the "Owner").

**Recitals**

- A. The Employee is employed by the Corporation.
- B. The Employee desires to provide life insurance protection for the Employee's family in the event of the Employee's death, under a policy of "second to die" life insurance insuring the life of the Employee and also his wife, HELEN E. DICK, and payable upon the death of the second of them, which Policy is described in Exhibit "A" attached hereto and by this reference made a part hereof (the "Policy"), and which was or is being issued by THE PRUDENTIAL INSURANCE COMPANY OF AMERICA or any of its subsidiaries (the "Insurer").
- C. The Employee is also an officer and director of the Corporation and has contributed significantly to its success. The Corporation desires to continue to retain the services of the Employee, and accordingly, the Corporation is willing to pay a portion of the premiums due on the Policy as an additional employment benefit for the Employee, on the terms and conditions hereinafter set forth.
- D. The Owner is the owner of the Policy and, as such, possesses all incidents of ownership in and to the Policy.
- E. The Corporation desires to have the Policy collaterally assigned to it by the Owner, pursuant to a collateral assignment in the form of Exhibit "B" attached hereto and by this reference made a part hereof or such other form as proposed by the Insurer that is acceptable to the parties hereto (the "Collateral Assignment"), to secure the repayment of the amounts which it will pay toward the premiums on the Policy.
- F. The parties hereto intend that under the Collateral Assignment, the Corporation shall receive only the right to such repayment, with the Owner retaining all other ownership rights in the Policy, as specified herein, and the Corporation shall have no "incidents of ownership" (as defined in Treas. Reg. §20.2042-1(c)(2)) in the Policy.

## Agreement

NOW, THEREFORE, in consideration of the foregoing Recitals, of the mutual covenants and promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Purchase of the Policy. The Owner has purchased the Policy from the Insurer in the total face amount of \$10,000,000. The parties hereto have taken all necessary action to cause the Insurer to issue the Policy, and shall take any further action which may be necessary to cause the Policy to conform to the provisions of this Agreement. The Corporation agrees that it will take such actions as are necessary to cause the Policy to remain in full force and effect during the lifetimes of the Employee and his said wife. The parties hereto agree that the Policy shall be subject to the terms and conditions of this Agreement and of the Collateral Assignment filed with the Insurer relating to the Policy.
  
2. Ownership of the Policy.
  - a. The Owner shall be the sole and absolute owner of the Policy, and may exercise all ownership rights granted to the owner thereof by the terms of the Policy, except as may otherwise be provided herein.
  
  - b. It is the agreement of the parties hereto and the Collateral Assignment that the Owner shall retain all rights which the Policy grants to the owner thereof. The sole right of the Corporation hereunder shall be to be repaid the amounts which it has paid toward the premiums on the Policy and, accordingly, the Corporation shall have no "incidents of ownership" (as defined in Treas. Reg. §20.2042-1(c)(2)) in the Policy, except the right to borrow against its cash surrender value, subject to the terms hereof and provided the Corporation shall pay when due any and all interest and other charges assessed by the Insurer regarding such indebtedness. Specifically, but without limitation, the Corporation shall neither have nor exercise any right as collateral assignee of the Policy which could in any way defeat or impair the Owner's right to receive the cash surrender value or the death proceeds of the Policy in excess of the amount due the Corporation hereunder. All provisions of this Agreement and of the Collateral Assignment shall be construed so as to carry out such intention.

### **3. Payment of Premiums.**

- a. Thirty (30) days prior to the due date of each Policy premium, the Corporation shall notify the Employee or the Owner of the exact amount due (i) while both the Employee and his said wife are living, from the Employee hereunder, measured by the IRS PS 38 table rates, and (ii) after the first of them to die, from the Employee (or his said wife if the Employee has predeceased her) hereunder, which shall be an amount equal to the annual cost of current life insurance protection under the Policy, measured by the lower of the PS 58 rate, set forth in Rev. Rul. 55-747, 1955-2 C.B. 228 (or the corresponding applicable provision of any subsequent Revenue Ruling), or the Insurer's current published premium rate for annually renewable term insurance for standard risks. Either the Employee (or his said wife) or the Owner, on behalf of the Employee, shall pay such required contribution to the Corporation prior to the premium due date. If neither the Employee nor the Owner makes such timely payment, the Corporation, in its sole discretion, may elect to make the Employee's portion of the premium payment, which payment shall be recovered by the Corporation as provided herein.
  - b. On or before the due date of each Policy premium, or within the grace period provided therein, the Corporation shall pay the full amount of the premium to the Insurer, and shall, upon request, promptly furnish the Employee (or his said wife, if the Employee has predeceased her) and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee (or his said wife, if the Employee has predeceased her) a statement of the amount of income reportable by the Employee for federal and state income tax purposes, if any, as a result of the insurance protection provided the Owner as the policy beneficiary.
4. **Collateral Assignment.** To secure the repayment to the Corporation of the amount of the premiums on the Policy paid by it hereunder, the Owner has, contemporaneously herewith, assigned the Policy to the Corporation as collateral in accordance with the terms of the Collateral Assignment. The Collateral Assignment of the Policy to the Corporation hereunder shall not be terminated, altered or amended by the Owner while this Agreement is in

effect. The parties hereto agree to take all action necessary to cause the Collateral Assignment to conform to the provisions of this Agreement.

5. Limitations on Owner's Rights in Policy. The Owner shall not sell, assign, transfer, borrow against, surrender or cancel the Policy, change the beneficiary designation provision thereof, or terminate the dividend election thereof.

6. Collection of Death Proceeds.

a. Upon the second death of the Employee and his said wife, the Corporation and the Owner shall cooperate to take whatever action is necessary to collect the death benefit provided under the Policy. When such benefit has been collected and paid as provided herein, this Agreement shall thereupon terminate.

b. Upon the second death of the Employee and his said wife, the Corporation shall have the unqualified right to receive a portion of such death benefit equal to the total amount of the premiums paid by it hereunder. The balance of the death benefit provided under the Policy, if any, shall be paid directly to the Owner, in the manner and in the amount or amounts provided in the beneficiary designation provision of the Policy. Notwithstanding any term or provision hereof to the contrary, in no event shall the amount payable to the Corporation hereunder exceed the Policy proceeds payable at the second death of the Employee and his said wife. No amount shall be paid from such death benefit to the Owner until the full amount due the Corporation hereunder has been paid. The parties hereto agree that the beneficiary designation provision of the Policy shall conform to the provisions hereof.

c. Notwithstanding any term or provision hereof to the contrary, in the event that, for any reason whatsoever, no death benefit is payable under the Policy upon the second death of the Employee and his said wife and in lieu thereof the Insurer refunds all or any part of the premiums paid for the Policy, the Corporation and the Owner shall have the unqualified right to share such premiums based on their respective cumulative contributions thereto.

7. Termination of the Agreement During the Employee's and His Said Wife's Lifetimes. This Agreement shall terminate, during the lifetimes of Employee and his said wife, without notice, upon the occurrence of any of

the following events: (1) bankruptcy of the Corporation; or (2) failure of the Employee (or his said wife) and the Owner to timely pay the Corporation the Employee's (or his said wife's) portion of the premium, if any, due hereunder, unless the Corporation elects to make such payment on behalf of the Employee, as provided herein.

**8. Disposition of the Policy on Termination of the Agreement During the Employee's and His Said Wife's Lifetimes.**

- a. For sixty (60) days after the date of the termination of this Agreement during the lifetimes of Employee and his said wife, the Owner shall have the option of obtaining the release of the Collateral Assignment. To obtain such release, the Owner shall repay to the Corporation the total amount of the premium payments made by the Corporation hereunder, less any indebtedness secured by the Policy which was incurred by the Corporation and remains outstanding as of the date of such termination, including any interest due on such indebtedness. Upon receipt of such amount, the Corporation shall release the Collateral Assignment, by the execution and delivery of an appropriate instrument of release.
- b. If the Owner fails to exercise such option within such sixty (60) day period, then, at the request of the Corporation, the Owner shall execute any document or documents required by the Insurer to transfer the interest of the Owner in the Policy to the Corporation. Alternatively, the Corporation may enforce its right to be repaid the amount of the premiums on the Policy paid by it from the cash surrender value of the Policy under the Collateral Assignment; provided, however, that in the event the cash surrender value of the Policy exceeds the amount due the Corporation, such excess shall be paid to the Owner. Thereafter, neither the Owner nor the Owner's successors, assigns or beneficiaries shall have any further interest in and to the Policy, under the terms thereof, under this Agreement or the Collateral Assignment.

9. Insurer Not a Party. The Insurer shall be fully discharged from its obligations under the Policy by payment of the Policy death benefit to the beneficiary or beneficiaries named in the Policy, subject to the terms and conditions of the Policy. In no event shall the Insurer be considered a party to this Agreement, or any modification or amendment hereof. No provision of this Agreement, or of any modification or amendment hereof, shall in any way be construed as enlarging, changing, varying or in any other way affecting the obligations of the Insurer as expressly provided in the Policy.

except insofar as the provisions hereof are made a part of the Policy by the Collateral Assignment.

10. **Amendment.** This Agreement may not be amended, altered or modified, except by a written instrument signed by the parties hereto, or their respective successors or assigns, and may not be otherwise terminated except as provided herein.
11. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the Corporation and its successors and assigns, and the Employee, the Owner, and their respective successors, assigns, heirs, executors, administrators and beneficiaries.
12. **Notices.** Any notice, consent or demand required or permitted to be given under the provisions of this Agreement shall be in writing, and shall be signed by the party giving or making the same. If such notice, consent or demand is mailed to a party hereto, it shall be sent by United States certified mail, postage prepaid, addressed to such party's last known address as shown on the records of the Corporation. The date of such mailing shall be deemed the date of notice, consent or demand.
13. **Governing Law.** This Agreement, and the rights of the parties hereunder, shall be governed by and construed in accordance with the laws of the State of Indiana.
14. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document.

IN WITNESS WHEREOF, the parties hereto have executed this Split-Dollar Agreement on this 18<sup>th</sup> day of December, 1998.

CONSECO INC.

By: 

Printed: STEPHEN C HILBERT

Title: CEO

"Corporation"

  
Rollin M. Dick

"Employee"

DICK FAMILY IRREVOCABLE TRUST (dated December 8, 1998)

By: 

Lawrence E. Dick, Trustee

"Owner"

**EXHIBIT "A"**

**The following life insurance policy is subject to the attached Split-Dollar Agreement.**

**Insurer: The Prudential Insurance Company of America**

**Insured: Rollin M. Dick and Helen E. Dick**

**Policy Number: V0001461**

**Face Amount: \$10,000,000**



**EXHIBIT "B"**

**COLLATERAL ASSIGNMENT OF LIFE INSURANCE POLICY  
PURSUANT TO SPLIT-DOLLAR AGREEMENT**

1. **Assignment.** FOR VALUE RECEIVED, LAWRENCE E. DICK, of Orange County, California, Trustee of the DICK FAMILY IRREVOCABLE TRUST, dated December 8, 1998, (the "Owner"), does hereby assign, transfer and set over to CONSECO, INC., an Indiana corporation, and its successors and assigns (the "Assignee"), the following specific rights in and to the "second to die" policy listed on Exhibit "A" attached hereto and by this reference made a part hereof, issued by the insurance company listed on Exhibit "A" (the "Insurer"), together with any supplementary contract or contracts issued in connection therewith (said policy, together with said supplementary contract or contracts are hereinafter collectively referred to as the "Policy"), insuring the life of ROLLIN M. DICK of Zionsville, Indiana (the "Insured") and his wife, HELEN E. DICK on a "second to die" basis subject to all the terms and conditions of the Policy and to all superior liens, if any, which the Insurer may have against the Policy. The Owner, by this Assignment, and the Assignee, by the acceptance of the assignment to it hereunder, agree to the terms and conditions contained herein.

2. **Liabilities Secured by This Assignment.** This Assignment is made, and the Policy is to be held as collateral security for, all liabilities of the Owner to the Assignee, now existing or hereafter arising under and pursuant to that certain Split-Dollar Agreement, among the Assignee, the Insured and the Owner, dated December \_\_, 1998 (the "Split-Dollar Agreement"). It is the intention of the Owner to reserve all rights in and to the Policy, except those specific rights to realize on a portion of the cash value thereof and a portion of the death benefit thereof granted to the Assignee hereby, as security for and only to the extent of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement.

3. **Assignee's Limited Rights.** It is expressly agreed that the Assignee's interest in the Policy shall be limited to the following rights: (a) the right to be paid for its premium payments, less any indebtedness secured by the Policy which was incurred by the Corporation, pursuant to, and as provided by, the Split-Dollar Agreement, with respect to the Policy (the "Payment Amount"); (b) the right to be paid the Payment Amount by realizing on a portion of the cash value of the Policy in the event of the termination of the Split-Dollar Agreement, as provided in the Split-Dollar Agreement; and (c) the right to be paid the Payment Amount by realizing on a portion of the proceeds of the Policy upon the second death of the Insured and said wife. The Assignee shall have no other or further rights in and to the Policy as a result of the assignment hereunder. Except as otherwise provided in the Split-Dollar Agreement, the Assignee shall not have the right to borrow against, make withdrawals, cancel, surrender, pledge or assign the Policy, or exercise any other "incidents of ownership" as defined under Treas. Reg. §20.2042-1(c)(2).

4. Owner Retains All Other Incidents of Ownership. Except as specifically provided herein, the Owner shall retain all incidents of ownership in and to the Policy, including, but not limited to: (a) the sole right to collect and receive all distributions or shares of surplus, dividend deposits or additions to the Policy now or hereafter made or apportioned thereto, except as otherwise provided herein, and to exercise any and all options contained in the Policy with respect thereto; (b) the sole right to exercise all non-forfeiture rights permitted by the terms of the Policy or allowed by the Insurer and to receive all benefits and advantages derived therefrom; (c) the sole right to elect any optional mode of settlement permitted by the Policy or allowed by the Insurer; and (d) the right to collect from the Insurer that portion of the net proceeds of the Policy when it becomes a claim by death or maturity not payable to the Assignee under the Split-Dollar Agreement; provided however, that the foregoing rights retained by the Owner shall be subject to the terms and conditions of the Split-Dollar Agreement.

5. Additional Agreements of the Assignee. The Assignee agrees with the Owner as follows: (a) any balance or sums received hereunder from the Insurer remaining after payment of the then existing liabilities of the Owner to the Assignee under the Split-Dollar Agreement shall be paid to the persons entitled thereto under the terms of the Policy as if this Assignment had not been executed; (b) the Assignee will not exercise any of the rights granted herein to it unless and until there has been default in any of the liabilities by the Owner to the Assignee under the Split-Dollar Agreement, and until twenty (20) days after the Assignee shall have mailed, by first class mail, to the Owner, notice of its intention to exercise such right; and (c) the Assignee will, upon request, forward the Policy to the Insurer, without unreasonable delay, for any election of optional mode of settlement, or the exercise of any other right reserved by the Owner hereunder.

6. Insurer. The Insurer is hereby authorized to recognize the Assignee's claims to rights hereunder without investigating the reason for any action taken by the Assignee, the validity or amount of any of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement, the existence of any default therein, the giving of any notice required herein, or the application to be made by the Assignee of any amounts to be paid to the Assignee. The sole signature of the Assignee or the Owner shall be sufficient for the exercise of their respective rights under the Policy and this Assignment and the sole receipt of the Assignee or the Owner for any sums received by the respective party from the Insurer shall be a full discharge and release therefor to the Insurer.

7. Insurer Relieved of Liability. The Insurer shall be fully protected in (and shall have no liability from) recognizing (and complying with) any request made by the Owner or Assignee, with or without the consent of any other person or entity.

8. Release of This Collateral Assignment. Upon the full payment of the liabilities of the Owner to the Assignee pursuant to the Split-Dollar Agreement, the Assignee shall promptly release and reassign to the Owner all specific rights in the Policy included in this Assignment.

9. Additional Rights and Powers of Assignee. The exercise of any right, option, privilege or power herein granted to the Assignee shall be at the option of the Assignee, and except as provided herein, the Assignee may exercise any such right, option, privilege or power without notice to, or assent by, or affecting the liability of, or releasing any interest hereby assigned by the Owner. The Assignee may take or release other security, may grant extensions, renewals or indulgences with respect to the obligations of the Owner to the Assignee under the Split-Dollar Agreement, or may apply the proceeds of the Policy hereby assigned or any amount received on account of the Policy by the exercise of any right permitted under this Assignment, without resorting to or regard to other security, if any.

10. Conflicts. In the event of any conflict between the provisions of this Assignment and the provisions of the Split-Dollar Agreement, with respect to the Policy or the Assignee's rights of collateral security therein, the provisions of this Assignment shall prevail.

11. No Bankruptcy Proceeding. The Owner declares that no proceedings in bankruptcy are pending against the Owner, and that the Owner's property is not subject to any assignment for the benefit of creditors of the Owner.

12. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document.

IN WITNESS WHEREOF, the parties hereto have executed this Collateral Assignment of Life Insurance Policy Pursuant to Split-Dollar Agreement on this \_\_\_\_ day of December, 1998.

DICK FAMILY IRREVOCABLE TRUST  
dated December 8, 1998

By: \_\_\_\_\_  
Lawrence E. Dick, Trustee

"Owner"

Agreed and accepted on this \_\_\_\_ day of December, 1998.

CONSECO, INC.

By: \_\_\_\_\_  
Printed: \_\_\_\_\_  
Title: \_\_\_\_\_

"Assignee"

**EXHIBIT "A"**

The following life insurance policy is subject to the attached Collateral Assignment:

**Insurer:** The Prudential Insurance Company of America

**Insured:** Rollin M. Dick and Helen E. Dick

**Policy Number:** V0001461

**Face Amount:** \$10,000,000

EXHIBIT B

**SPLIT-DOLLAR AGREEMENT**  
**(Stephen C. Hilbert)**

THIS AGREEMENT, made and entered into by and among CONSECO, INC., an Indiana corporation (the "Corporation"), STEPHEN C. HILBERT, of Carmel, Indiana (the "Employee"), and ROLLIN M. DICK, of Zionsville, Indiana, Trustee of the AMENDED HILBERT RESIDENCE MAINTENANCE TRUST, dated December 19, 1996 (the "Owner").

**Recitals**

- A. The Employee is employed by the Corporation.
- B. The Employee desires to provide life insurance protection for the Employee's family in the event of the Employee's death, under a policy of life insurance insuring the life of the Employee and payable upon his death, which Policy is described in Exhibit "A" attached hereto and by this reference made a part hereof (the "Policy"), and which was or is being issued by METLIFE (the "Insurer").
- C. The Employee is also an officer and director of the Corporation and has contributed significantly to its success. The Corporation desires to continue to retain the services of the Employee, and accordingly, the Corporation is willing to pay a portion of the premiums due on the Policy as an additional employment benefit for the Employee, on the terms and conditions hereinafter set forth.
- D. The Owner is the owner of the Policy and, as such, possesses all incidents of ownership in and to the Policy.
- E. The Corporation desires to have the Policy collaterally assigned to it by the Owner, pursuant to a collateral assignment in the form of Exhibit "B" attached hereto and by this reference made a part hereof or such other form as proposed by the Insurer that is acceptable to the parties hereto (the "Collateral Assignment"), to secure the repayment of the amounts which it will pay toward the premiums on the Policy.
- F. The parties hereto intend that under the Collateral Assignment, the Corporation shall receive only the right to such repayment, with the Owner retaining all other ownership rights in the Policy, as specified herein, and the Corporation shall have no "incidents of ownership" (as defined in Treas. Reg. §20.2042-1(c)(2)) in the Policy.

## Agreement

NOW, THEREFORE, in consideration of the foregoing Recitals, of the mutual covenants and promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Purchase of the Policy. The Owner has purchased the Policy from the Insurer in the total face amount of \$12,500,000. The parties hereto have taken all necessary action to cause the Insurer to issue the Policy, and shall take any further action which may be necessary to cause the Policy to conform to the provisions of this Agreement. The Corporation agrees that it will take such actions as are necessary to cause the Policy to remain in full force and effect during the lifetime of the Employee. The parties hereto agree that the Policy shall be subject to the terms and conditions of this Agreement and of the Collateral Assignment filed with the Insurer relating to the Policy.
  
2. Ownership of the Policy.
  - a. The Owner shall be the sole and absolute owner of the Policy, and may exercise all ownership rights granted to the owner thereof by the terms of the Policy, except as may otherwise be provided herein.
  
  - b. It is the agreement of the parties hereto and the Collateral Assignment that the Owner shall retain all rights which the Policy grants to the owner thereof. The sole right of the Corporation hereunder shall be to be repaid the amounts which it has paid toward the premiums on the Policy and, accordingly, the Corporation shall have no "incidents of ownership" (as defined in Treas. Reg. §20.2042-1(c)(2)) in the Policy, except the right to borrow against its cash surrender value, subject to the terms hereof and provided the Corporation shall pay when due any and all interest and other charges assessed by the Insurer regarding such indebtedness. Specifically, but without limitation, the Corporation shall neither have nor exercise any right as collateral assignee of the Policy which could in any way defeat or impair the Owner's right to receive the cash surrender value or the death proceeds of the Policy in excess of the amount due the Corporation hereunder. All provisions of this Agreement and of the Collateral Assignment shall be construed so as to carry out such intention.

3. **Policy Dividends.** Any dividend declared on the Policy shall be applied to purchase paid-up additional insurance on the life of the Employee. The parties hereto agree that the dividend election provisions of the Policy shall conform to the provisions hereof.
4. **Payment of Premiums.**
- a. Thirty (30) days prior to the due date of each Policy premium, the Corporation shall notify the Employee or the Owner of the exact amount due from the Employee hereunder, which shall be an amount equal to the annual cost of current life insurance protection under the Policy, measured by the lower of the PS 58 rate, set forth in Rev. Rul. 55-747, 1955-2 C.B. 228 (or the corresponding applicable provision of any subsequent Revenue Ruling), or the Insurer's current published premium rate for annually renewable term insurance for standard risks. Either the Employee or the Owner, on behalf of the Employee, shall pay such required contribution to the Corporation prior to the premium due date. If neither the Employee nor the Owner makes such timely payment, the Corporation, in its sole discretion, may elect to make the Employee's portion of the premium payment, which payment shall be recovered by the Corporation as provided herein.
  - b. On or before the due date of each Policy premium, or within the grace period provided therein, the Corporation shall pay the full amount of the premium to the Insurer, and shall, upon request, promptly furnish the Employee and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee a statement of the amount of income reportable by the Employee for federal and state income tax purposes, if any, as a result of the insurance protection provided the Owner as the policy beneficiary.
5. **Collateral Assignment.** To secure the repayment to the Corporation of the amount of the premiums on the Policy paid by it hereunder, the Owner has, contemporaneously herewith, assigned the Policy to the Corporation as collateral in accordance with the terms of the Collateral Assignment. The Collateral Assignment of the Policy to the Corporation hereunder shall not be terminated, altered or amended by the Owner while this Agreement is in



effect. The parties hereto agree to take all action necessary to cause the Collateral Assignment to conform to the provisions of this Agreement.

6. Limitations on Owner's Rights in Policy. The Owner shall not sell, assign, transfer, borrow against, surrender or cancel the Policy, change the beneficiary designation provision thereof, or terminate the dividend election thereof.

7. Collection of Death Proceeds.

a. Upon the death of the Employee, the Corporation and the Owner shall cooperate to take whatever action is necessary to collect the death benefit provided under the Policy. When such benefit has been collected and paid as provided herein, this Agreement shall thereupon terminate.

b. Upon the death of the Employee, the Corporation shall have the unqualified right to receive a portion of such death benefit equal to the total amount of the premiums paid by it hereunder. The balance of the death benefit provided under the Policy, if any, shall be paid directly to the Owner, in the manner and in the amount or amounts provided in the beneficiary designation provision of the Policy. Notwithstanding any term or provision hereof to the contrary, in no event shall the amount payable to the Corporation hereunder exceed the Policy proceeds payable at the death of the Employee. No amount shall be paid from such death benefit to the Owner until the full amount due the Corporation hereunder has been paid. The parties hereto agree that the beneficiary designation provision of the Policy shall conform to the provisions hereof.

c. Notwithstanding any term or provision hereof to the contrary, in the event that, for any reason whatsoever, no death benefit is payable under the Policy upon the death of the Employee and in lieu thereof the Insurer refunds all or any part of the premiums paid for the Policy, the Corporation and the Owner shall have the unqualified right to share such premiums based on their respective cumulative contributions thereto.

8. Termination of the Agreement During the Employee's Lifetime. This Agreement shall terminate, during the lifetime of Employee, without notice, upon the occurrence of any of the following events: (1) bankruptcy of the Corporation; or (2) failure of the Employee and the Owner to timely pay the Corporation the Employee's portion of the premium, if any, due hereunder,

unless the Corporation elects to make such payment on behalf of the Employee, as provided herein.

9. Disposition of the Policy on Termination of the Agreement During the Employee's Lifetime.

- a. For sixty (60) days after the date of the termination of this Agreement during the lifetime of Employee, the Owner shall have the option of obtaining the release of the Collateral Assignment. To obtain such release, the Owner shall repay to the Corporation the total amount of the premium payments made by the Corporation hereunder, less any indebtedness secured by the Policy which was incurred by the Corporation and remains outstanding as of the date of such termination, including any interest due on such indebtedness. Upon receipt of such amount, the Corporation shall release the Collateral Assignment, by the execution and delivery of an appropriate instrument of release.
- b. If the Owner fails to exercise such option within such sixty (60) day period, then, at the request of the Corporation, the Owner shall execute any document or documents required by the Insurer to transfer the interest of the Owner in the Policy to the Corporation. Alternatively, the Corporation may enforce its right to be repaid the amount of the premiums on the Policy paid by it from the cash surrender value of the Policy under the Collateral Assignment; provided, however, that in the event the cash surrender value of the Policy exceeds the amount due the Corporation, such excess shall be paid to the Owner. Thereafter, neither the Owner nor the Owner's successors, assigns or beneficiaries shall have any further interest in and to the Policy, under the terms thereof, under this Agreement or the Collateral Assignment.

10. Insurer Not a Party. The Insurer shall be fully discharged from its obligations under the Policy by payment of the Policy death benefit to the beneficiary or beneficiaries named in the Policy, subject to the terms and conditions of the Policy. In no event shall the Insurer be considered a party to this Agreement, or any modification or amendment hereof. No provision of this Agreement, or of any modification or amendment hereof, shall in any way be construed as enlarging, changing, varying or in any other way affecting the obligations of the Insurer as expressly provided in the Policy, except insofar as the provisions hereof are made a part of the Policy by the Collateral Assignment.

11. **Amendment.** This Agreement may not be amended, altered or modified, except by a written instrument signed by the parties hereto, or their respective successors or assigns, and may not be otherwise terminated except as provided herein.
12. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the Corporation and its successors and assigns, and the Employee, the Owner, and their respective successors, assigns, heirs, executors, administrators and beneficiaries.
13. **Notices.** Any notice, consent or demand required or permitted to be given under the provisions of this Agreement shall be in writing, and shall be signed by the party giving or making the same. If such notice, consent or demand is mailed to a party hereto, it shall be sent by United States certified mail, postage prepaid, addressed to such party's last known address as shown on the records of the Corporation. The date of such mailing shall be deemed the date of notice, consent or demand.
14. **Governing Law.** This Agreement, and the rights of the parties hereunder, shall be governed by and construed in accordance with the laws of the State of Indiana.
15. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document.

IN WITNESS WHEREOF, the parties hereto have executed this Split-Dollar Agreement on this 11<sup>th</sup> day of December, 1998.

CONSECO, INC.

AMENDED HILBERT RESIDENCE  
MAINTENANCE TRUST,  
dated December 19, 1996

By: [Signature]  
Printed: Rollin M. Dick  
Title: Chairman

By: [Signature]  
Rollin M. Dick, Trustee  
"Owner"

"Corporation"  
[Signature]  
Stephen C. Hilbert

"Employee"

**EXHIBIT "A"**

The following life insurance policy is subject to the attached Split-Dollar Agreement:

Insurer: MetLife

Insured: Stephen C. Hilbert

Policy Number: 981250011PR

Face Amount: \$12,500,000

Date of Issue: December 1, 1998

**COLLATERAL ASSIGNMENT OF LIFE INSURANCE POLICY  
PURSUANT TO SPLIT-DOLLAR AGREEMENT**

1. **Assignment.** FOR VALUE RECEIVED, ROLLIN M. DICK, of Zionsville, Indiana, Trustee of the AMENDED HILBERT RESIDENCE MAINTENANCE TRUST, dated December 19, 1996, (the "Owner"), does hereby assign, transfer and set over to CONSECO, INC., an Indiana corporation, and its successors and assigns (the "Assignee"), the following specific rights in and to the policy listed on Exhibit "A" attached hereto and by this reference made a part hereof, issued by the insurance company listed on Exhibit "A" (the "Insurer"), together with any supplementary contract or contracts issued in connection therewith (said policy, together with said supplementary contract or contracts are hereinafter collectively referred to as the "Policy"), insuring the life of STEPHEN C. HILBERT of Carmel, Indiana (the "Insured") subject to all the terms and conditions of the Policy and to all superior liens, if any, which the Insurer may have against the Policy. The Owner, by this Assignment, and the Assignee, by the acceptance of the assignment to it hereunder, agree to the terms and conditions contained herein.

2. **Liabilities Secured by This Assignment.** This Assignment is made, and the Policy is to be held as collateral security for, all liabilities of the Owner to the Assignee, now existing or hereafter arising under and pursuant to that certain Split-Dollar Agreement, among the Assignee, the Insured and the Owner of even date herewith (the "Split-Dollar Agreement"). It is the intention of the Owner to reserve all rights in and to the Policy, except those specific rights to realize on a portion of the cash value thereof and a portion of the death benefit thereof granted to the Assignee hereby, as security for and only to the extent of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement.

3. **Assignee's Limited Rights.** It is expressly agreed that the Assignee's interest in the Policy shall be limited to the following rights: (a) the right to be paid for its premium payments, less any indebtedness secured by the Policy which was incurred by the Corporation, pursuant to, and as provided by, the Split-Dollar Agreement, with respect to the Policy (the "Payment Amount"); (b) the right to be paid the Payment Amount by realizing on a portion of the cash value of the Policy in the event of the termination of the Split-Dollar Agreement, as provided in the Split-Dollar Agreement; and (c) the right to be paid the Payment Amount by realizing on a portion of the proceeds of the Policy upon the death of the Insured. The Assignee shall have no other or further rights in and to the Policy as a result of the assignment hereunder. Except as otherwise provided in the Split-Dollar Agreement, the Assignee shall not have the right to borrow against, make withdrawals, cancel, surrender, pledge or assign the Policy, or exercise any other "incidents of ownership" as defined under Treas. Reg. §20.2042-1(c)(2).

4. **Owner Retains All Other Incidents of Ownership.** Except as specifically provided herein, the Owner shall retain all incidents of ownership in and to the Policy, including, but not limited to: (a) the sole right to collect and receive all distributions or shares of surplus, dividend deposits or additions to the Policy now or hereafter made or apportioned

thereto, except as otherwise provided herein, and to exercise any and all options contained in the Policy with respect thereto; (b) the sole right to exercise all non-forfeiture rights permitted by the terms of the Policy or allowed by the Insurer and to receive all benefits and advantages derived therefrom; (c) the sole right to elect any optional mode of settlement permitted by the Policy or allowed by the Insurer; and (d) the right to collect from the Insurer that portion of the net proceeds of the Policy when it becomes a claim by death or maturity not payable to the Assignee under the Split-Dollar Agreement; provided however, that the foregoing rights retained by the Owner shall be subject to the terms and conditions of the Split-Dollar Agreement.

5. Additional Agreements of the Assignee. The Assignee agrees with the Owner as follows: (a) any balance or sums received hereunder from the Insurer remaining after payment of the then existing liabilities of the Owner to the Assignee under the Split-Dollar Agreement shall be paid to the persons entitled thereto under the terms of the Policy as if this Assignment had not been executed; (b) the Assignee will not exercise any of the rights granted herein to it unless and until there has been default in any of the liabilities by the Owner to the Assignee under the Split-Dollar Agreement, and until twenty (20) days after the Assignee shall have mailed, by first class mail, to the Owner, notice of its intention to exercise such right; and (c) the Assignee will, upon request, forward the Policy to the Insurer, without unreasonable delay, for any election of optional mode of settlement, or the exercise of any other right reserved by the Owner hereunder.

6. Insurer. The Insurer is hereby authorized to recognize the Assignee's claims to rights hereunder without investigating the reason for any action taken by the Assignee, the validity or amount of any of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement, the existence of any default therein, the giving of any notice required herein, or the application to be made by the Assignee of any amounts to be paid to the Assignee. The sole signature of the Assignee or the Owner shall be sufficient for the exercise of their respective rights under the Policy and this Assignment and the sole receipt of the Assignee or the Owner for any sums received by the respective party from the Insurer shall be a full discharge and release therefor to the Insurer.

7. Insurer Relieved of Liability. The Insurer shall be fully protected in (and shall have no liability from) recognizing (and complying with) any request made by the Owner or Assignee, with or without the consent of any other person or entity.

8. Release of This Collateral Assignment. Upon the full payment of the liabilities of the Owner to the Assignee pursuant to the Split-Dollar Agreement, the Assignee shall promptly release and reassign to the Owner all specific rights in the Policy included in this Assignment.

9. Additional Rights and Powers of Assignee. The exercise of any right, option, privilege or power herein granted to the Assignee shall be at the option of the Assignee, and except as provided herein, the Assignee may exercise any such right, option, privilege or

power without notice to, or assent by, or affecting the liability of, or releasing any interest hereby assigned by the Owner. The Assignee may take or release other security, may grant extensions, renewals or indulgences with respect to the obligations of the Owner to the Assignee under the Split-Dollar Agreement, or may apply the proceeds of the Policy hereby assigned or any amount received on account of the Policy by the exercise of any right permitted under this Assignment, without resorting to or regard to other security, if any.

10. **Conflicts.** In the event of any conflict between the provisions of this Assignment and the provisions of the Split-Dollar Agreement, with respect to the Policy or the Assignee's rights of collateral security therein, the provisions of this Assignment shall prevail.

11. **No Bankruptcy Proceeding.** The Owner declares that no proceedings in bankruptcy are pending against the Owner, and that the Owner's property is not subject to any assignment for the benefit of creditors of the Owner.

12. **Counterparts.** This Assignment may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document.

IN WITNESS WHEREOF, the parties hereto have executed this Collateral Assignment of Life Insurance Policy Pursuant to Split-Dollar Agreement on this 18<sup>th</sup> day of December, 1998.

AMENDED HILBERT RESIDENCE  
MAINTENANCE TRUST,  
dated December 19, 1996

By: [Signature]  
Rollin M. Dick, Trustee

"Owner"

Agreed and accepted on this 18<sup>th</sup> day of December, 1998.

CONSECO, INC.)  
By: [Signature]  
Printed: ROLLIN M. DICK  
Title: EXECUTIVE VP

"Assignee"

**EXHIBIT "A"**

The following life insurance policy is subject to the attached Collateral Assignment:

Insurer: MetLife

Insured: Stephen C. Hilbert

Policy Number: 981250011PR

Face Amount: \$12,500,000

Date of Issue: December 1, 1998

ss/81081



EXHIBIT C

**SPLIT-DOLLAR AGREEMENT**  
**(Stephen C. and Tomisue Hilbert)**

THIS AGREEMENT, made and entered into by and among CONSECO, INC., an Indiana corporation (the "Corporation"), STEPHEN C. HILBERT, of Carmel, Indiana (the "Employee"), and ROLLIN M. DICK, of Zionsville, Indiana, Trustee of the STEPHEN C. AND TOMISUE HILBERT IRREVOCABLE TRUST, dated May 16, 1996 (the "Owner").

**Recitals**

- A. The Employee is employed by the Corporation.
- B. The Employee desires to provide life insurance protection for the Employee's family in the event of the Employee's death, under a policy of "second to die" life insurance insuring the life of the Employee and also his wife, TOMISUE HILBERT, and payable upon the death of the second of them, which Policy is described in Exhibit "A" attached hereto and by this reference made a part hereof (the "Policy"), and which was or is being issued by NEW YORK LIFE INSURANCE COMPANY (the "Insurer").
- C. The Employee is also an officer and director of the Corporation and has contributed significantly to its success. The Corporation desires to continue to retain the services of the Employee, and accordingly, the Corporation is willing to pay a portion of the premiums due on the Policy as an additional employment benefit for the Employee, on the terms and conditions hereinafter set forth.
- D. The Owner is the owner of the Policy and, as such, possesses all incidents of ownership in and to the Policy.
- E. The Corporation desires to have the Policy collaterally assigned to it by the Owner, pursuant to a collateral assignment in the form of Exhibit "B" attached hereto and by this reference made a part hereof or such other form as proposed by the Insurer that is acceptable to the parties hereto (the "Collateral Assignment"), to secure the repayment of the amounts which it will pay toward the premiums on the Policy.
- F. The parties hereto intend that under the Collateral Assignment, the Corporation shall receive only the right to such repayment, with the Owner retaining all other ownership rights in the Policy, as specified herein, and the Corporation shall have no "incidents of ownership" (as defined in Treas. Reg. §20.2042-1(c)(2)) in the Policy.

## Agreement

NOW, THEREFORE, in consideration of the foregoing Recitals, of the mutual covenants and promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Purchase of the Policy. The Owner has purchased the Policy from the Insurer in the total face amount of \$25,000,000. The parties hereto have taken all necessary action to cause the Insurer to issue the Policy, and shall take any further action which may be necessary to cause the Policy to conform to the provisions of this Agreement. The Corporation agrees that it will take such actions as are necessary to cause the Policy to remain in full force and effect during the lifetimes of the Employee and his said wife. The parties hereto agree that the Policy shall be subject to the terms and conditions of this Agreement and of the Collateral Assignment filed with the Insurer relating to the Policy.
  
2. Ownership of the Policy.
  - a. The Owner shall be the sole and absolute owner of the Policy, and may exercise all ownership rights granted to the owner thereof by the terms of the Policy, except as may otherwise be provided herein.
  
  - b. It is the agreement of the parties hereto and the Collateral Assignment that the Owner shall retain all rights which the Policy grants to the owner thereof. The sole right of the Corporation hereunder shall be to be repaid the amounts which it has paid toward the premiums on the Policy and, accordingly, the Corporation shall have no "incidents of ownership" (as defined in Treas. Reg. §20.2042-1(c)(2)) in the Policy, except the right to borrow against its cash surrender value, subject to the terms hereof and provided the Corporation shall pay when due any and all interest and other charges assessed by the Insurer regarding such indebtedness. Specifically, but without limitation, the Corporation shall neither have nor exercise any right as collateral assignee of the Policy which could in any way defeat or impair the Owner's right to receive the cash surrender value or the death proceeds of the Policy in excess of the amount due the Corporation hereunder. All provisions of this Agreement and

of the Collateral Assignment shall be construed so as to carry out such intention.

3. **Policy Dividends.** Any dividend declared on the Policy shall be applied to purchase paid-up additional insurance on the life of the Employee. The parties hereto agree that the dividend election provisions of the Policy shall conform to the provisions hereof.

4. **Payment of Premiums.**

- a. Thirty (30) days prior to the due date of each Policy premium, the Corporation shall notify the Employee or the Owner of the exact amount due (i) while both the Employee and his said wife are living, from the Employee hereunder, measured by the IRS PS 38 table rates, and (ii) after the first of them to die, from the Employee (or his said wife if the Employee has predeceased her) hereunder, which shall be an amount equal to the annual cost of current life insurance protection under the Policy, measured by the lower of the PS 58 rate, set forth in Rev. Rul. 55-747, 1955-2 C.B. 228 (or the corresponding applicable provision of any subsequent Revenue Ruling), or the Insurer's current published premium rate for annually renewable term insurance for standard risks. Either the Employee (or his said wife) or the Owner, on behalf of the Employee, shall pay such required contribution to the Corporation prior to the premium due date. If neither the Employee nor the Owner makes such timely payment, the Corporation, in its sole discretion, may elect to make the Employee's portion of the premium payment, which payment shall be recovered by the Corporation as provided herein.
- b. On or before the due date of each Policy premium, or within the grace period provided therein, the Corporation shall pay the full amount of the premium to the Insurer, and shall, upon request, promptly furnish the Employee (or his said wife, if the Employee has predeceased her) and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee (or his said wife, if the Employee has predeceased her) a statement of the amount of income reportable by the Employee for federal and state

income tax purposes, if any, as a result of the insurance protection provided the Owner as the policy beneficiary.

5. **Collateral Assignment.** To secure the repayment to the Corporation of the amount of the premiums on the Policy paid by it hereunder, the Owner has, contemporaneously herewith, assigned the Policy to the Corporation as collateral in accordance with the terms of the Collateral Assignment. The Collateral Assignment of the Policy to the Corporation hereunder shall not be terminated, altered or amended by the Owner while this Agreement is in effect. The parties hereto agree to take all action necessary to cause the Collateral Assignment to conform to the provisions of this Agreement.
6. **Limitations on Owner's Rights in Policy.** The Owner shall not sell, assign, transfer, borrow against, surrender or cancel the Policy, change the beneficiary designation provision thereof, or terminate the dividend election thereof.
7. **Collection of Death Proceeds.**
  - a. Upon the second death of the Employee and his said wife, the Corporation and the Owner shall cooperate to take whatever action is necessary to collect the death benefit provided under the Policy. When such benefit has been collected and paid as provided herein, this Agreement shall thereupon terminate.
  - b. Upon the second death of the Employee and his said wife, the Corporation shall have the unqualified right to receive a portion of such death benefit equal to the total amount of the premiums paid by it hereunder. The balance of the death benefit provided under the Policy, if any, shall be paid directly to the Owner, in the manner and in the amount or amounts provided in the beneficiary designation provision of the Policy. Notwithstanding any term or provision hereof to the contrary, in no event shall the amount payable to the Corporation hereunder exceed the Policy proceeds payable at the second death of the Employee and his said wife. No amount shall be paid from such death benefit to the Owner until the full amount due the Corporation hereunder has been paid. The parties hereto agree that the beneficiary designation provision of the Policy shall conform to the provisions hereof.

- c. Notwithstanding any term or provision hereof to the contrary, in the event that, for any reason whatsoever, no death benefit is payable under the Policy upon the second death of the Employee and his said wife and in lieu thereof the Insurer refunds all or any part of the premiums paid for the Policy, the Corporation and the Owner shall have the unqualified right to share such premiums based on their respective cumulative contributions thereto.

8. Termination of the Agreement During the Employee's and His Said Wife's Lifetimes. This Agreement shall terminate, during the lifetimes of Employee and his said wife, without notice, upon the occurrence of any of the following events: (1) bankruptcy of the Corporation; or (2) failure of the Employee (or his said wife) and the Owner to timely pay the Corporation the Employee's (or his said wife's) portion of the premium, if any, due hereunder, unless the Corporation elects to make such payment on behalf of the Employee, as provided herein.

9. Disposition of the Policy on Termination of the Agreement During the Employee's and His Said Wife's Lifetimes.

- a. For sixty (60) days after the date of the termination of this Agreement during the lifetimes of Employee and his said wife, the Owner shall have the option of obtaining the release of the Collateral Assignment. To obtain such release, the Owner shall repay to the Corporation the total amount of the premium payments made by the Corporation hereunder, less any indebtedness secured by the Policy which was incurred by the Corporation and remains outstanding as of the date of such termination, including any interest due on such indebtedness. Upon receipt of such amount, the Corporation shall release the Collateral Assignment, by the execution and delivery of an appropriate instrument of release.
- b. If the Owner fails to exercise such option within such sixty (60) day period, then, at the request of the Corporation, the Owner shall execute any document or documents required by the Insurer to transfer the interest of the Owner in the Policy to the Corporation. Alternatively, the Corporation may enforce its right to be repaid the amount of the premiums on the Policy paid by it from the cash surrender value of the Policy under the Collateral Assignment; provided, however, that in the event the cash surrender value of the Policy

exceeds the amount due the Corporation, such excess shall be paid to the Owner. Thereafter, neither the Owner nor the Owner's successors, assigns or beneficiaries shall have any further interest in and to the Policy, under the terms thereof, under this Agreement or the Collateral Assignment.

10. **Insurer Not a Party.** The Insurer shall be fully discharged from its obligations under the Policy by payment of the Policy death benefit to the beneficiary or beneficiaries named in the Policy, subject to the terms and conditions of the Policy. In no event shall the Insurer be considered a party to this Agreement, or any modification or amendment hereof. No provision of this Agreement, or of any modification or amendment hereof, shall in any way be construed as enlarging, changing, varying or in any other way affecting the obligations of the Insurer as expressly provided in the Policy, except insofar as the provisions hereof are made a part of the Policy by the Collateral Assignment.
11. **Amendment.** This Agreement may not be amended, altered or modified, except by a written instrument signed by the parties hereto, or their respective successors or assigns, and may not be otherwise terminated except as provided herein.
12. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the Corporation and its successors and assigns, and the Employee, the Owner, and their respective successors, assigns, heirs, executors, administrators and beneficiaries.
13. **Notices.** Any notice, consent or demand required or permitted to be given under the provisions of this Agreement shall be in writing, and shall be signed by the party giving or making the same. If such notice, consent or demand is mailed to a party hereto, it shall be sent by United States certified mail, postage prepaid, addressed to such party's last known address as shown on the records of the Corporation. The date of such mailing shall be deemed the date of notice, consent or demand.
14. **Governing Law.** This Agreement, and the rights of the parties hereunder, shall be governed by and construed in accordance with the laws of the State of Indiana.
15. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document.

IN WITNESS WHEREOF, the parties hereto have executed this Split-Dollar Agreement on this 18 day of December, 1998.

CONSECO, INC.

By: [Signature]  
Printed: Rollin M. Dick  
Title: Executive Vice President

STEPHEN C. AND TOMISUE HILBERT  
IRREVOCABLE TRUST,  
dated May 16, 1996

By: [Signature]  
Rollin M. Dick, Trustee

"Owner"

"Corporation"

[Signature]  
Stephen C. Hilbert

"Employee"

80558



**EXHIBIT "A"**

The following life insurance policy is subject to the attached Split-Dollar Agreement:

Insurer: New York Life Insurance Company

Insured: Stephen C. Hilbert and Tomisue Hilbert

Policy Number: 46402088

Face Amount: \$25,000,000

Date of Issue: November 24, 1998

**EXHIBIT "B"**

**COLLATERAL ASSIGNMENT OF LIFE INSURANCE POLICY  
PURSUANT TO SPLIT-DOLLAR AGREEMENT**

1. **Assignment.** FOR VALUE RECEIVED, ROLLIN M. DICK, of Zionsville, Indiana, Trustee of the STEPHEN C. AND TOMISUE HILBERT IRREVOCABLE TRUST, dated May 16, 1996, (the "Owner"), does hereby assign, transfer and set over to CONSECO, INC., an Indiana corporation, and its successors and assigns (the "Assignee"), the following specific rights in and to the "second to die" policy listed on Exhibit "A" attached hereto and by this reference made a part hereof, issued by the insurance company listed on Exhibit "A" (the "Insurer"), together with any supplementary contract or contracts issued in connection therewith (said policy, together with said supplementary contract or contracts are hereinafter collectively referred to as the "Policy"), insuring the life of STEPHEN C. HILBERT of Carmel, Indiana (the "Insured") and his wife, TOMISUE HILBERT on a "second to die" basis subject to all the terms and conditions of the Policy and to all superior liens, if any, which the Insurer may have against the Policy. The Owner, by this Assignment, and the Assignee, by the acceptance of the assignment to it hereunder, agree to the terms and conditions contained herein.

2. **Liabilities Secured by This Assignment.** This Assignment is made, and the Policy is to be held as collateral security for, all liabilities of the Owner to the Assignee, now existing or hereafter arising under and pursuant to that certain Split-Dollar Agreement, among the Assignee, the Insured and the Owner of even date herewith (the "Split-Dollar Agreement"). It is the intention of the Owner to reserve all rights in and to the Policy, except those specific rights to realize on a portion of the cash value thereof and a portion of the death benefit thereof granted to the Assignee hereby, as security for and only to the extent of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement.

3. **Assignee's Limited Rights.** It is expressly agreed that the Assignee's interest in the Policy shall be limited to the following rights: (a) the right to be paid for its premium payments, less any indebtedness secured by the Policy which was incurred by the Corporation, pursuant to, and as provided by, the Split-Dollar Agreement, with respect to the Policy (the "Payment Amount"); (b) the right to be paid the Payment Amount by realizing on a portion of the cash value of the Policy in the event of the termination of the Split-Dollar Agreement, as provided in the Split-Dollar Agreement; and (c) the right to be paid the Payment Amount by realizing on a portion of the proceeds of the Policy upon the second death of the Insured and said wife. The Assignee shall have no other or further rights in and to the Policy as a result of the assignment hereunder. Except as otherwise provided in the Split-Dollar Agreement, the Assignee shall not have the right to borrow against, make withdrawals, cancel, surrender, pledge or assign the Policy, or exercise any other "incidents of ownership" as defined under Treas. Reg. §20.2042-1(c)(2).

4. **Owner Retains All Other Incidents of Ownership.** Except as specifically provided herein, the Owner shall retain all incidents of ownership in and to the Policy, including, but not limited to: (a) the sole right to collect and receive all distributions or shares of surplus, dividend deposits or additions to the Policy now or hereafter made or apportioned thereto, except as otherwise provided herein, and to exercise any and all options contained in the Policy with respect thereto; (b) the sole right to exercise all non-forfeiture rights permitted by the terms of the Policy or allowed by the Insurer and to receive all benefits and advantages derived therefrom; (c) the sole right to elect any optional mode of settlement permitted by the Policy or allowed by the Insurer; and (d) the right to collect from the Insurer that portion of the net proceeds of the Policy when it becomes a claim by death or maturity not payable to the Assignee under the Split-Dollar Agreement; **provided however**, that the foregoing rights retained by the Owner shall be subject to the terms and conditions of the Split-Dollar Agreement.

5. **Additional Agreements of the Assignee.** The Assignee agrees with the Owner as follows: (a) any balance or sums received hereunder from the Insurer remaining after payment of the then existing liabilities of the Owner to the Assignee under the Split-Dollar Agreement shall be paid to the persons entitled thereto under the terms of the Policy as if this Assignment had not been executed; (b) the Assignee will not exercise any of the rights granted herein to it unless and until there has been default in any of the liabilities by the Owner to the Assignee under the Split-Dollar Agreement, and until twenty (20) days after the Assignee shall have mailed, by first class mail, to the Owner, notice of its intention to exercise such right; and (c) the Assignee will, upon request, forward the Policy to the Insurer, without unreasonable delay, for any election of optional mode of settlement, or the exercise of any other right reserved by the Owner hereunder.

6. **Insurer.** The Insurer is hereby authorized to recognize the Assignee's claims to rights hereunder without investigating the reason for any action taken by the Assignee, the validity or amount of any of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement, the existence of any default therein, the giving of any notice required herein, or the application to be made by the Assignee of any amounts to be paid to the Assignee. The sole signature of the Assignee or the Owner shall be sufficient for the exercise of their respective rights under the Policy and this Assignment and the sole receipt of the Assignee or the Owner for any sums received by the respective party from the Insurer shall be a full discharge and release therefor to the Insurer.

7. **Insurer Relieved of Liability.** The Insurer shall be fully protected in (and shall have no liability from) recognizing (and complying with) any request made by the Owner or Assignee, with or without the consent of any other person or entity.

8. **Release of This Collateral Assignment.** Upon the full payment of the liabilities of the Owner to the Assignee pursuant to the Split-Dollar Agreement, the Assignee shall promptly release and reassign to the Owner all specific rights in the Policy included in this Assignment.

9. **Additional Rights and Powers of Assignee.** The exercise of any right, option, privilege or power herein granted to the Assignee shall be at the option of the Assignee, and except as provided herein, the Assignee may exercise any such right, option, privilege or power without notice to, or assent by, or affecting the liability of, or releasing any interest hereby assigned by the Owner. The Assignee may take or release other security, may grant extensions, renewals or indulgences with respect to the obligations of the Owner to the Assignee under the Split-Dollar Agreement, or may apply the proceeds of the Policy hereby assigned or any amount received on account of the Policy by the exercise of any right permitted under this Assignment, without resorting to or regard to other security, if any.

10. **Conflicts.** In the event of any conflict between the provisions of this Assignment and the provisions of the Split-Dollar Agreement, with respect to the Policy or the Assignee's rights of collateral security therein, the provisions of this Assignment shall prevail.

11. **No Bankruptcy Proceeding.** The Owner declares that no proceedings in bankruptcy are pending against the Owner, and that the Owner's property is not subject to any assignment for the benefit of creditors of the Owner.

12. **Counterparts.** This Assignment may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document.

IN WITNESS WHEREOF, the parties hereto have executed this Collateral Assignment of Life Insurance Policy Pursuant to Split-Dollar Agreement on this \_\_\_\_ day of December, 1998.

STEPHEN C. AND TOMISUE HILBERT  
IRREVOCABLE TRUST,  
dated May 16, 1996

By: \_\_\_\_\_  
Rollin M. Dick, Trustee

"Owner"

Agreed and accepted on this \_\_\_\_ day of December, 1998.

CONSECO, INC.

By: \_\_\_\_\_  
Printed: \_\_\_\_\_  
Title: \_\_\_\_\_

"Assignee"

**EXHIBIT "A"**

The following life insurance policy is subject to the attached Collateral Assignment:

Insurer: New York Life Insurance Company

Insured: Stephen C. Hilbert and Tomisue Hilbert

Policy Number: 46402088

Initial Face Amount: \$25,000,000

Date of Issuance of Policy: November 24, 1998

EXHIBIT D

**SPLIT-DOLLAR AGREEMENT**  
**(Stephen C. and Tomisue Hilbert)**

THIS AGREEMENT, made and entered into by and among CONSECO, INC., an Indiana corporation (the "Corporation"), STEPHEN C. HILBERT, of Carmel, Indiana (the "Employee"), and ROLLIN M. DICK, of Zionsville, Indiana, Trustee of the STEPHEN C. AND TOMISUE HILBERT IRREVOCABLE TRUST, dated May 16, 1996 (the "Owner").

**Recitals**

- A. The Employee is employed by the Corporation.
- B. The Employee desires to provide life insurance protection for the Employee's family in the event of the Employee's death, under a policy of "second to die" life insurance insuring the life of the Employee and also his wife, TOMISUE HILBERT, and payable upon the death of the second of them, which Policy is described in Exhibit "A" attached hereto and by this reference made a part hereof (the "Policy"), and which was or is being issued by MANUFACTURERS LIFE INSURANCE COMPANY (U.S.A.) (the "Insurer").
- C. The Employee is also an officer and director of the Corporation and has contributed significantly to its success. The Corporation desires to continue to retain the services of the Employee, and accordingly, the Corporation is willing to pay a portion of the premiums due on the Policy as an additional employment benefit for the Employee, on the terms and conditions hereinafter set forth.
- D. The Owner is the owner of the Policy and, as such, possesses all incidents of ownership in and to the Policy.
- E. The Corporation desires to have the Policy collaterally assigned to it by the Owner, pursuant to a collateral assignment in the form of Exhibit "B" attached hereto and by this reference made a part hereof or such form as proposed by the Insurer that is acceptable to the parties hereto (the "Collateral Assignment"), to secure the repayment of the amounts which it will pay toward the premiums on the Policy.
- F. The parties hereto intend that under the Collateral Assignment, the Corporation shall receive only the right to such repayment, with the Owner retaining all other ownership rights in the Policy, as specified herein, and the Corporation shall have no "incidents of ownership" (as defined in Treas. Reg. §20.2042-1(c)(2)) in the Policy.

## **Agreement**

NOW, THEREFORE, in consideration of the foregoing Recitals, of the mutual covenants and promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. **Purchase of the Policy.** The Owner has purchased the Policy from the Insurer in the total face amount of \$25,000,000. The parties hereto have taken all necessary action to cause the Insurer to issue the Policy, and shall take any further action which may be necessary to cause the Policy to conform to the provisions of this Agreement. The Corporation agrees that it will take such actions as are necessary to cause the Policy to remain in full force and effect during the lifetimes of the Employee and his said wife. The parties hereto agree that the Policy shall be subject to the terms and conditions of this Agreement and of the Collateral Assignment filed with the Insurer relating to the Policy.
  
2. **Ownership of the Policy.**
  - a. The Owner shall be the sole and absolute owner of the Policy, and may exercise all ownership rights granted to the owner thereof by the terms of the Policy, except as may otherwise be provided herein.
  
  - b. It is the agreement of the parties hereto and the Collateral Assignment that the Owner shall retain all rights which the Policy grants to the owner thereof. The sole right of the Corporation hereunder shall be to be repaid the amounts which it has paid toward the premiums on the Policy and, accordingly, the Corporation shall have no "incidents of ownership" (as defined in Treas. Reg. §20.2042-1(c)(2)) in the Policy, except the right to borrow against its cash surrender value, subject to the terms hereof and provided the Corporation shall pay when due any and all interest and other charges assessed by the Insurer regarding such indebtedness. Specifically, but without limitation, the Corporation shall neither have nor exercise any right as collateral assignee of the Policy which could in any way defeat or impair the Owner's right to receive the cash surrender value or the death proceeds of the Policy in excess of the amount due the Corporation hereunder. All provisions of this Agreement and of the Collateral Assignment shall be construed so as to carry out such intention.



3. **Policy Dividends.** Any dividend declared on the Policy shall be applied to purchase paid-up additional insurance on the life of the Employee. The parties hereto agree that the dividend election provisions of the Policy shall conform to the provisions hereof.

4. **Payment of Premiums.**

a. Thirty (30) days prior to the due date of each Policy premium, the Corporation shall notify the Employee or the Owner of the exact amount due (i) while both the Employee and his said wife are living, from the Employee hereunder, measured by the IRS PS 38 table rates, and (ii) after the first of them to die, from the Employee (or his said wife if the Employee has predeceased her) hereunder, which shall be an amount equal to the annual cost of current life insurance protection under the Policy, measured by the lower of the PS 58 rate, set forth in Rev. Rul. 55-747, 1955-2 C.B. 228 (or the corresponding applicable provision of any subsequent Revenue Ruling), or the Insurer's current published premium rate for annually renewable term insurance for standard risks. Either the Employee (or his said wife) or the Owner, on behalf of the Employee, shall pay such required contribution to the Corporation prior to the premium due date. If neither the Employee nor the Owner makes such timely payment, the Corporation, in its sole discretion, may elect to make the Employee's portion of the premium payment, which payment shall be recovered by the Corporation as provided herein.

b. On or before the due date of each Policy premium, or within the grace period provided therein, the Corporation shall pay the full amount of the premium to the Insurer, and shall, upon request, promptly furnish the Employee (or his said wife, if the Employee has predeceased her) and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee (or his said wife, if the Employee has predeceased her) a statement of the amount of income reportable by the Employee for federal and state income tax purposes, if any, as a result of the insurance protection provided the Owner as the policy beneficiary.

5. **Collateral Assignment.** To secure the repayment to the Corporation of the amount of the premiums on the Policy paid by it hereunder, the Owner has,

contemporaneously herewith, assigned the Policy to the Corporation as collateral in accordance with the terms of the Collateral Assignment. The Collateral Assignment of the Policy to the Corporation hereunder shall not be terminated, altered or amended by the Owner while this Agreement is in effect. The parties hereto agree to take all action necessary to cause the Collateral Assignment to conform to the provisions of this Agreement.

**6. Limitations on Owner's Rights in Policy.** The Owner shall not sell, assign, transfer, borrow against, surrender or cancel the Policy, change the beneficiary designation provision thereof, or terminate the dividend election thereof.

**7. Collection of Death Proceeds.**

- a. Upon the second death of the Employee and his said wife, the Corporation and the Owner shall cooperate to take whatever action is necessary to collect the death benefit provided under the Policy. When such benefit has been collected and paid as provided herein, this Agreement shall thereupon terminate.
- b. Upon the second death of the Employee and his said wife, the Corporation shall have the unqualified right to receive a portion of such death benefit equal to the total amount of the premiums paid by it hereunder. The balance of the death benefit provided under the Policy, if any, shall be paid directly to the Owner, in the manner and in the amount or amounts provided in the beneficiary designation provision of the Policy. Notwithstanding any term or provision hereof to the contrary, in no event shall the amount payable to the Corporation hereunder exceed the Policy proceeds payable at the second death of the Employee and his said wife. No amount shall be paid from such death benefit to the Owner until the full amount due the Corporation hereunder has been paid. The parties hereto agree that the beneficiary designation provision of the Policy shall conform to the provisions hereof.
- c. Notwithstanding any term or provision hereof to the contrary, in the event that, for any reason whatsoever, no death benefit is payable under the Policy upon the second death of the Employee and his said wife and in lieu thereof the Insurer refunds all or any part of the premiums paid for the Policy, the Corporation and the Owner shall have the unqualified right to share such premiums based on their respective cumulative contributions thereto.

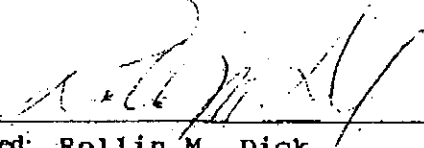
- 8. Termination of the Agreement During the Employee's and His Said Wife's Lifetimes.** This Agreement shall terminate, during the lifetimes of Employee and his said wife, without notice, upon the occurrence of any of the following events: (1) bankruptcy of the Corporation; or (2) failure of the Employee (or his said wife) and the Owner to timely pay the Corporation the Employee's (or his said wife's) portion of the premium, if any, due hereunder, unless the Corporation elects to make such payment on behalf of the Employee, as provided herein.
- 9. Disposition of the Policy on Termination of the Agreement During the Employee's and His Said Wife's Lifetimes.**
- a. For sixty (60) days after the date of the termination of this Agreement during the lifetimes of Employee and his said wife, the Owner shall have the option of obtaining the release of the Collateral Assignment. To obtain such release, the Owner shall repay to the Corporation the total amount of the premium payments made by the Corporation hereunder, less any indebtedness secured by the Policy which was incurred by the Corporation and remains outstanding as of the date of such termination, including any interest due on such indebtedness. Upon receipt of such amount, the Corporation shall release the Collateral Assignment, by the execution and delivery of an appropriate instrument of release.
  - b. If the Owner fails to exercise such option within such sixty (60) day period, then, at the request of the Corporation, the Owner shall execute any document or documents required by the Insurer to transfer the interest of the Owner in the Policy to the Corporation. Alternatively, the Corporation may enforce its right to be repaid the amount of the premiums on the Policy paid by it from the cash surrender value of the Policy under the Collateral Assignment; **provided, however,** that in the event the cash surrender value of the Policy exceeds the amount due the Corporation, such excess shall be paid to the Owner. Thereafter, neither the Owner nor the Owner's successors, assigns or beneficiaries shall have any further interest in and to the Policy, under the terms thereof, under this Agreement or the Collateral Assignment.
- 10. Insurer Not a Party.** The Insurer shall be fully discharged from its obligations under the Policy by payment of the Policy death benefit to the beneficiary or beneficiaries named in the Policy, subject to the terms and conditions of the Policy. In no event shall the Insurer be considered a party to

this Agreement, or any modification or amendment hereof. No provision of this Agreement, or of any modification or amendment hereof, shall in any way be construed as enlarging, changing, varying or in any other way affecting the obligations of the Insurer as expressly provided in the Policy, except insofar as the provisions hereof are made a part of the Policy by the Collateral Assignment.

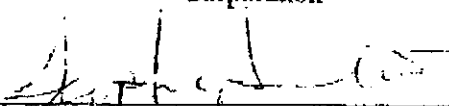
11. **Amendment.** This Agreement may not be amended, altered or modified, except by a written instrument signed by the parties hereto, or their respective successors or assigns, and may not be otherwise terminated except as provided herein.
12. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the Corporation and its successors and assigns, and the Employee, the Owner, and their respective successors, assigns, heirs, executors, administrators and beneficiaries.
13. **Notices.** Any notice, consent or demand required or permitted to be given under the provisions of this Agreement shall be in writing, and shall be signed by the party giving or making the same. If such notice, consent or demand is mailed to a party hereto, it shall be sent by United States certified mail, postage prepaid, addressed to such party's last known address as shown on the records of the Corporation. The date of such mailing shall be deemed the date of notice, consent or demand.
14. **Governing Law.** This Agreement, and the rights of the parties hereunder, shall be governed by and construed in accordance with the laws of the State of Indiana.
15. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document.

IN WITNESS WHEREOF, the parties hereto have executed this Split-Dollar Agreement on this 18 day of December, 1998.

CONSECO, INC.

By:   
Printed: Rollin M. Dick  
Title: Executive Vice President

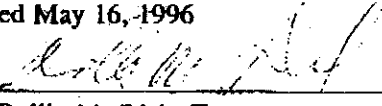
"Corporation"

  
Stephen C. Hilbert

"Employee"

80641

STEPHEN C. AND TOMISUE HILBERT  
IRREVOCABLE TRUST,  
dated May 16, 1996

By:   
Rollin M. Dick, Trustee

"Owner"

**EXHIBIT "A"**

The following life insurance policy is subject to the attached Split-Dollar Agreement:

Insurer: Manufacturers Life Insurance Company (U.S.A.)

Insured: Stephen C. Hilbert and Tomisue Hilbert

Policy Number: 55627152

Face Amount: \$25,000,000

Date of Issue: December 2, 1998

**EXHIBIT "B"**

**COLLATERAL ASSIGNMENT OF LIFE INSURANCE POLICY  
PURSUANT TO SPLIT-DOLLAR AGREEMENT**

1. **Assignment.** FOR VALUE RECEIVED, ROLLIN M. DICK, of Zionsville, Indiana, Trustee of the STEPHEN C. AND TOMISUE HILBERT IRREVOCABLE TRUST, dated May 16, 1996, (the "Owner"), does hereby assign, transfer and set over to CONSECO, INC., an Indiana corporation, and its successors and assigns (the "Assignee"), the following specific rights in and to the "second to die" policy listed on Exhibit "A" attached hereto and by this reference made a part hereof, issued by the insurance company listed on Exhibit "A" (the "Insurer"), together with any supplementary contract or contracts issued in connection therewith (said policy, together with said supplementary contract or contracts are hereinafter collectively referred to as the "Policy"), insuring the life of STEPHEN C. HILBERT of Carmel, Indiana (the "Insured") and his wife, TOMISUE HILBERT on a "second to die" basis subject to all the terms and conditions of the Policy and to all superior liens, if any, which the Insurer may have against the Policy. The Owner, by this Assignment, and the Assignee, by the acceptance of the assignment to it hereunder, agree to the terms and conditions contained herein.

2. **Liabilities Secured by This Assignment.** This Assignment is made, and the Policy is to be held as collateral security for, all liabilities of the Owner to the Assignee, now existing or hereafter arising under and pursuant to that certain Split-Dollar Agreement, among the Assignee, the Insured and the Owner of even date herewith (the "Split-Dollar Agreement"). It is the intention of the Owner to reserve all rights in and to the Policy, except those specific rights to realize on a portion of the cash value thereof and a portion of the death benefit thereof granted to the Assignee hereby, as security for and only to the extent of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement.

3. **Assignee's Limited Rights.** It is expressly agreed that the Assignee's interest in the Policy shall be limited to the following rights: (a) the right to be paid for its premium payments, less any indebtedness secured by the Policy which was incurred by the Corporation, pursuant to, and as provided by, the Split-Dollar Agreement, with respect to the Policy (the "Payment Amount"); (b) the right to be paid the Payment Amount by realizing on a portion of the cash value of the Policy in the event of the termination of the Split-Dollar Agreement, as provided in the Split-Dollar Agreement; and (c) the right to be paid the Payment Amount by realizing on a portion of the proceeds of the Policy upon the second death of the Insured and said wife. The Assignee shall have no other or further rights in and to the Policy as a result of the assignment hereunder. Except as otherwise provided in the Split-Dollar Agreement, the Assignee shall not have the right to borrow against, make withdrawals, cancel, surrender, pledge or assign the Policy, or exercise any other "incidents of ownership" as defined under Treas. Reg. §20.2042-1(c)(2).

4. Owner Retains All Other Incidents of Ownership. Except as specifically provided herein, the Owner shall retain all incidents of ownership in and to the Policy, including, but not limited to: (a) the sole right to collect and receive all distributions or shares of surplus, dividend deposits or additions to the Policy now or hereafter made or apportioned thereto, except as otherwise provided herein, and to exercise any and all options contained in the Policy with respect thereto; (b) the sole right to exercise all non-forfeiture rights permitted by the terms of the Policy or allowed by the Insurer and to receive all benefits and advantages derived therefrom; (c) the sole right to elect any optional mode of settlement permitted by the Policy or allowed by the Insurer; and (d) the right to collect from the Insurer that portion of the net proceeds of the Policy when it becomes a claim by death or maturity not payable to the Assignee under the Split-Dollar Agreement; provided however, that the foregoing rights retained by the Owner shall be subject to the terms and conditions of the Split-Dollar Agreement.

5. Additional Agreements of the Assignee. The Assignee agrees with the Owner as follows: (a) any balance or sums received hereunder from the Insurer remaining after payment of the then existing liabilities of the Owner to the Assignee under the Split-Dollar Agreement shall be paid to the persons entitled thereto under the terms of the Policy as if this Assignment had not been executed; (b) the Assignee will not exercise any of the rights granted herein to it unless and until there has been default in any of the liabilities by the Owner to the Assignee under the Split-Dollar Agreement, and until twenty (20) days after the Assignee shall have mailed, by first class mail, to the Owner, notice of its intention to exercise such right; and (c) the Assignee will, upon request, forward the Policy to the Insurer, without unreasonable delay, for any election of optional mode of settlement, or the exercise of any other right reserved by the Owner hereunder.

6. Insurer. The Insurer is hereby authorized to recognize the Assignee's claims to rights hereunder without investigating the reason for any action taken by the Assignee, the validity or amount of any of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement, the existence of any default therein, the giving of any notice required herein, or the application to be made by the Assignee of any amounts to be paid to the Assignee. The sole signature of the Assignee or the Owner shall be sufficient for the exercise of their respective rights under the Policy and this Assignment and the sole receipt of the Assignee or the Owner for any sums received by the respective party from the Insurer shall be a full discharge and release therefor to the Insurer.

7. Insurer Relieved of Liability. The Insurer shall be fully protected in (and shall have no liability from) recognizing (and complying with) any request made by the Owner or Assignee, with or without the consent of any other person or entity.

8. Release of This Collateral Assignment. Upon the full payment of the liabilities of the Owner to the Assignee pursuant to the Split-Dollar Agreement, the Assignee shall promptly release and reassign to the Owner all specific rights in the Policy included in this Assignment.



9. **Additional Rights and Powers of Assignee.** The exercise of any right, option, privilege or power herein granted to the Assignee shall be at the option of the Assignee, and except as provided herein, the Assignee may exercise any such right, option, privilege or power without notice to, or assent by, or affecting the liability of, or releasing any interest hereby assigned by the Owner. The Assignee may take or release other security, may grant extensions, renewals or indulgences with respect to the obligations of the Owner to the Assignee under the Split-Dollar Agreement, or may apply the proceeds of the Policy hereby assigned or any amount received on account of the Policy by the exercise of any right permitted under this Assignment, without resorting to or regard to other security, if any.

10. **Conflicts.** In the event of any conflict between the provisions of this Assignment and the provisions of the Split-Dollar Agreement, with respect to the Policy or the Assignee's rights of collateral security therein, the provisions of this Assignment shall prevail.

11. **No Bankruptcy Proceeding.** The Owner declares that no proceedings in bankruptcy are pending against the Owner, and that the Owner's property is not subject to any assignment for the benefit of creditors of the Owner.

12. **Counterparts.** This Assignment may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document.

IN WITNESS WHEREOF, the parties hereto have executed this Collateral Assignment of Life Insurance Policy Pursuant to Split-Dollar Agreement on this \_\_\_\_ day of December, 1998.

STEPHEN C. AND TOMISUE HILBERT  
IRREVOCABLE TRUST,  
dated May 16, 1996

By: \_\_\_\_\_  
Rollin M. Dick, Trustee

"Owner"

Agreed and accepted on this \_\_\_\_ day of December, 1998.

CONSECO, INC.

By: \_\_\_\_\_  
Printed: \_\_\_\_\_  
Title: \_\_\_\_\_

"Assignee"

**EXHIBIT "A"**

The following life insurance policy is subject to the attached Collateral Assignment:

**Insurer: Manufacturers Life Insurance Company (U.S.A.)**

**Insured: Stephen C. Hilbert and Tomisue Hilbert**

**Policy Number: 55627152**

**Face Amount: \$25,000,000**

**Date of Issue: December 2, 1998**

EXHIBIT E

**SPLIT-DOLLAR AGREEMENT**  
(Stephen C. and Tomisue Hilbert)

THIS AGREEMENT, made and entered into by and among CONSECO, INC., an Indiana corporation (the "Corporation"), STEPHEN C. HILBERT, of Carmel, Indiana (the "Employee"), and ROLLIN M. DICK, of Zionsville, Indiana, Trustee of the STEPHEN C. AND TOMISUE HILBERT IRREVOCABLE TRUST, dated May 16, 1996 (the "Owner")

**Recitals**

- A The Employee is employed by the Corporation
- B The Employee desires to provide life insurance protection for the Employee's family in the event of the Employee's death, under a policy of "second to die" life insurance insuring the life of the Employee and also his wife, TOMISUE HILBERT, and payable upon the death of the second of them, which Policy is described in Exhibit "A" attached hereto and by this reference made a part hereof (the "Policy"), and which was or is being issued by METLIFE (the "Insurer")
- C The Employee is also an officer and director of the Corporation and has contributed significantly to its success. The Corporation desires to continue to retain the services of the Employee, and accordingly, the Corporation is willing to pay a portion of the premiums due on the Policy as an additional employment benefit for the Employee, on the terms and conditions hereinafter set forth
- D The Owner is the owner of the Policy and, as such, possesses all incidents of ownership in and to the Policy
- E The Corporation desires to have the Policy collaterally assigned to it by the Owner, pursuant to a collateral assignment in the form of Exhibit "B" attached hereto and by this reference made a part hereof or such other form proposed by the Insurer that is acceptable to the parties hereto (the "Collateral Assignment"), to secure the repayment of the amounts which it will pay toward the premiums on the Policy
- F The parties hereto intend that under the Collateral Assignment, the Corporation shall receive only the right to such repayment, with the Owner retaining all other ownership rights in the Policy, as specified herein, and the Corporation shall have no "incidents of ownership" (as defined in Treas Reg §20 2042-1(c)(2)) in the Policy

EXHIBIT     E

### Agreement

NOW, THEREFORE, in consideration of the foregoing Recitals, of the mutual covenants and promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Purchase of the Policy The Owner has purchased the Policy from the Insurer in the total face amount of \$25,000,000. The parties hereto have taken all necessary action to cause the Insurer to issue the Policy, and shall take any further action which may be necessary to cause the Policy to conform to the provisions of this Agreement. The Corporation agrees that it will take such actions as are necessary to cause the Policy to remain in full force and effect during the lifetimes of the Employee and his said wife. The parties hereto agree that the Policy shall be subject to the terms and conditions of this Agreement and of the Collateral Assignment filed with the Insurer relating to the Policy.
2. Ownership of the Policy
  - a. The Owner shall be the sole and absolute owner of the Policy, and may exercise all ownership rights granted to the owner thereof by the terms of the Policy, except as may otherwise be provided herein.
  - b. It is the agreement of the parties hereto and the Collateral Assignment that the Owner shall retain all rights which the Policy grants to the owner thereof. The sole right of the Corporation hereunder shall be to be repaid the amounts which it has paid toward the premiums on the Policy and, accordingly, the Corporation shall have no "incidents of ownership" (as defined in Treas Reg §20.2042-1(c)(2)) in the Policy, except the right to borrow against its cash surrender value, subject to the terms hereof and provided the Corporation shall pay when due any and all interest and other charges assessed by the Insurer regarding such indebtedness. Specifically, but without limitation, the Corporation shall neither have nor exercise any right as collateral assignee of the Policy which could in any way defeat or impair the Owner's right to receive the cash surrender value or the death proceeds of the Policy in excess of the amount due the Corporation hereunder. All provisions of this Agreement and of the Collateral Assignment shall be construed so as to carry out such intention.
3. Policy Dividends Any dividend declared on the Policy shall be applied to purchase paid-up additional insurance on the life of the Employee. The

parties hereto agree that the dividend election provisions of the Policy shall conform to the provisions hereof

**4. Payment of Premiums**

- a. Thirty (30) days prior to the due date of each Policy premium, the Corporation shall notify the Employee or the Owner of the exact amount due (i) while both the Employee and his said wife are living, from the Employee hereunder, measured by the IRS PS 38 table rates, and (ii) after the first of them to die, from the Employee (or his said wife if the Employee has predeceased her) hereunder, which shall be an amount equal to the annual cost of current life insurance protection under the Policy, measured by the lower of the PS 38 rate, set forth in Rev. Rul. 55-747, 1955-2 C.B. 228 (or the corresponding applicable provision of any subsequent Revenue Ruling), or the Insurer's current published premium rate for annually renewable term insurance for standard risks. Either the Employee (or his said wife) or the Owner, on behalf of the Employee, shall pay such required contribution to the Corporation prior to the premium due date. If neither the Employee nor the Owner makes such timely payment, the Corporation, in its sole discretion, may elect to make the Employee's portion of the premium payment, which payment shall be recovered by the Corporation as provided herein.
- b. On or before the due date of each Policy premium, or within the grace period provided therein, the Corporation shall pay the full amount of the premium to the Insurer, and shall, upon request, promptly furnish the Employee (or his said wife, if the Employee has predeceased her) and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee and the Owner evidence of timely payment of such premium. The Corporation shall annually furnish the Employee (or his said wife, if the Employee has predeceased her) a statement of the amount of income reportable by the Employee for federal and state income tax purposes, if any, as a result of the insurance protection provided the Owner as the policy beneficiary.

- 5. Collateral Assignment.** To secure the repayment to the Corporation of the amount of the premiums on the Policy paid by it hereunder, the Owner has, contemporaneously herewith, assigned the Policy to the Corporation as collateral in accordance with the terms of the Collateral Assignment. The Collateral Assignment of the Policy to the Corporation hereunder shall not be terminated, altered or amended by the Owner while this Agreement is in

effect. The parties hereto agree to take all action necessary to cause the Collateral Assignment to conform to the provisions of this Agreement.

**6. Limitations on Owner's Rights in Policy.** The Owner shall not sell, assign, transfer, borrow against, surrender or cancel the Policy, change the beneficiary designation provision thereof, or terminate the dividend election thereof.

**7. Collection of Death Proceeds**

a. Upon the second death of the Employee and his said wife, the Corporation and the Owner shall cooperate to take whatever action is necessary to collect the death benefit provided under the Policy. When such benefit has been collected and paid as provided herein, this Agreement shall thereupon terminate.

b. Upon the second death of the Employee and his said wife, the Corporation shall have the unqualified right to receive a portion of such death benefit equal to the total amount of the premiums paid by it hereunder. The balance of the death benefit provided under the Policy, if any, shall be paid directly to the Owner, in the manner and in the amount or amounts provided in the beneficiary designation provision of the Policy. Notwithstanding any term or provision hereof to the contrary, in no event shall the amount payable to the Corporation hereunder exceed the Policy proceeds payable at the second death of the Employee and his said wife. No amount shall be paid from such death benefit to the Owner until the full amount due the Corporation hereunder has been paid. The parties hereto agree that the beneficiary designation provision of the Policy shall conform to the provisions hereof.

c. Notwithstanding any term or provision hereof to the contrary, in the event that, for any reason whatsoever, no death benefit is payable under the Policy upon the second death of the Employee and his said wife and in lieu thereof the insurer refunds all or any part of the premiums paid for the Policy, the Corporation and the Owner shall have the unqualified right to share such premiums based on their respective cumulative contributions thereto.

**8. Termination of the Agreement During the Employee's and His Said Wife's Lifetimes.** This Agreement shall terminate, during the lifetimes of Employee and his said wife, without notice, upon the occurrence of any of the following events: (1) bankruptcy of the Corporation, or (2) failure of the

Employee (or his said wife) and the Owner to timely pay the Corporation the Employee's (or his said wife's) portion of the premium, if any, due hereunder, unless the Corporation elects to make such payment on behalf of the Employee, as provided herein

9. Disposition of the Policy on Termination of the Agreement During the Employee's and His Said Wife's Lifetimes

a For sixty (60) days after the date of the termination of this Agreement during the lifetimes of Employee and his said wife, the Owner shall have the option of obtaining the release of the Collateral Assignment. To obtain such release, the Owner shall repay to the Corporation the total amount of the premium payments made by the Corporation hereunder, less any indebtedness secured by the Policy which was incurred by the Corporation and remains outstanding as of the date of such termination, including any interest due on such indebtedness. Upon receipt of such amount, the Corporation shall release the Collateral Assignment, by the execution and delivery of an appropriate instrument of release.

b If the Owner fails to exercise such option within such sixty (60) day period, then, at the request of the Corporation, the Owner shall execute any document or documents required by the Insurer to transfer the interest of the Owner in the Policy to the Corporation. Alternatively, the Corporation may enforce its right to be repaid the amount of the premiums on the Policy paid by it from the cash surrender value of the Policy under the Collateral Assignment, provided, however, that in the event the cash surrender value of the Policy exceeds the amount due the Corporation, such excess shall be paid to the Owner. Thereafter, neither the Owner nor the Owner's successors, assigns or beneficiaries shall have any further interest in and to the Policy, under the terms thereof, under this Agreement or the Collateral Assignment.

10. Insurer Not a Party. The Insurer shall be fully discharged from its obligations under the Policy by payment of the Policy death benefit to the beneficiary or beneficiaries named in the Policy, subject to the terms and conditions of the Policy. In no event shall the Insurer be considered a party to this Agreement, or any modification or amendment hereof. No provision of this Agreement, or of any modification or amendment hereof, shall in any way be construed as enlarging, changing, varying or in any other way affecting the obligations of the Insurer as expressly provided in the Policy, except insofar as the provisions hereof are made a part of the Policy by the Collateral Assignment.



- 11. **Amendment** This Agreement may not be amended, altered or modified, except by a written instrument signed by the parties hereto, or their respective successors or assigns, and may not be otherwise unamended except as provided herein
- 12. **Binding Effect** This Agreement shall be binding upon and more to the benefit of the Corporation and its successors and assigns, and the Employee, the Owner, and their respective successors, assigns, heirs, executors, administrators and beneficiaries
- 13. **Notices** Any notice, consent or demand required or permitted to be given under the provisions of this Agreement shall be in writing, and shall be signed by the party giving or making the same. If such notice, consent or demand is mailed to a party hereto, it shall be sent by United States certified mail, postage prepaid, addressed to such party's last known address as shown on the records of the Corporation. The date of such mailing shall be deemed the date of notice, consent or demand
- 14. **Governing Law** This Agreement, and the rights of the parties hereunder, shall be governed by and construed in accordance with the laws of the State of Indiana
- 15. **Counterparts** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document

IN WITNESS WHEREOF, the parties hereto have executed this Split-Dollar Agreement on this 18 day of December, 1998

CONSECO, INC

By [Signature]  
Printed Rollin M. Dick  
Title Executive Vice President

STEPHEN C AND TOMISUE HILBERT  
IRREVOCABLE TRUST  
dated May 15, 1996

By [Signature]  
Rollin M Dick, Trustee

Owner

[Signature]  
"Corporation"  
Stephen C Hilbert

Employer

80646

**EXHIBIT "A"**

The following life insurance policy is subject to the attached Split-Dollar Agreement

Insurer MetLife

Insured Stephen C Hilbert and Thomas Hilbert

Policy Number 981250010PR

Face Amount \$25,000,000

Date of Issue December 1, 1998

**EXHIBIT "B"****COLLATERAL ASSIGNMENT OF LIFE INSURANCE POLICY  
PURSUANT TO SPLIT-DOLLAR AGREEMENT**

1. **Assignment FOR VALUE RECEIVED**, ROLLIN M. DICK, of Zionsville, Indiana, Trustee of the STEPHEN C AND TOMISUE HILBERT IRREVOCABLE TRUST, dated May 16, 1996, (the "Owner"), does hereby assign, transfer and set over to CONSBCO, INC., an Indiana corporation, and its successors and assigns (the "Assignee"), the following specific rights in and to the "second to die" policy listed on Exhibit "A" attached hereto and by this reference made a part hereof, issued by the insurance company listed on Exhibit "A" (the "Insurer"), together with any supplementary contract or contracts issued in connection therewith (said policy, together with said supplementary contract or contracts are hereinafter collectively referred to as the "Policy"), insuring the life of STEPHEN C. HILBERT of Carmel, Indiana (the "Insured") and his wife, TOMISUE HILBERT on a "second to die" basis subject to all the terms and conditions of the Policy and to all superior liens, if any, which the Insurer may have against the Policy. The Owner, by this Assignment, and the Assignee, by the acceptance of this assignment to it hereunder, agree to the terms and conditions contained herein.

2. **Liabilities Secured by This Assignment** This Assignment is made, and the Policy is to be held as collateral security for, all liabilities of the Owner to the Assignee, now existing or hereafter arising under and pursuant to that certain Split-Dollar Agreement, among the Assignee, the Insured and the Owner of even date herewith (the "Split-Dollar Agreement"). It is the intention of the Owner to reserve all rights in and to the Policy, except those specific rights to realize on a portion of the cash value thereof and a portion of the death benefit thereof granted to the Assignee hereby, as security for and only to the extent of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement.

3. **Assignee's Limited Rights** It is expressly agreed that the Assignee's interest in the Policy shall be limited to the following rights: (a) the right to be paid for its premium payments, less any indebtedness secured by the Policy which was incurred by the Corporation, pursuant to, and as provided by, the Split-Dollar Agreement, with respect to the Policy (the "Payment Amount"), (b) the right to be paid the Payment Amount by realizing on a portion of the cash value of the Policy in the event of the termination of the Split-Dollar Agreement, as provided in the Split-Dollar Agreement, and (c) the right to be paid the Payment Amount by realizing on a portion of the proceeds of the Policy upon the second death of the Insured and said wife. The Assignee shall have no other or further rights in and to the Policy as a result of this assignment hereunder. Except as otherwise provided in the Split-Dollar Agreement, the Assignee shall not have the right to borrow against, make withdrawals, cancel, surrender, pledge or assign the Policy, or exercise any other "incidents of ownership" as defined under Treas. Reg. §20.2042-4(o)(2).

CARRIER

F

4. Owner Retains All Other Incidents of Ownership Except as specifically provided herein, the Owner shall retain all incidents of ownership in and to the Policy, including, but not limited to (a) the sole right to collect and receive all distributions or shares of surplus, dividend deposits or additions to the Policy now or hereafter made or apportioned thereto, except as otherwise provided herein, and to exercise any and all options contained in the Policy with respect thereto, (b) the sole right to exercise all non-forfeiture rights permitted by the terms of the Policy or allowed by the Insurer and to receive all benefits and advantages derived therefrom; (c) the sole right to elect any optional mode of settlement permitted by the Policy or allowed by the Insurer, and (d) the right to collect from the Insurer that portion of the net proceeds of the Policy when it becomes a claim by death or maturity not payable to the Assignee under the Split-Dollar Agreement, provided however, that the foregoing rights retained by the Owner shall be subject to the terms and conditions of the Split-Dollar Agreement.

5. Additional Agreements of the Assignee The Assignee agrees with the Owner as follows (a) any balance or sums received hereunder from the Insurer remaining after payment of the then existing liabilities of the Owner to the Assignee under the Split-Dollar Agreement shall be paid to the persons entitled thereto under the terms of the Policy as if this Assignment had not been executed, (b) the Assignee will not exercise any of the rights granted herein to it unless and until there has been default in any of the liabilities by the Owner to the Assignee under the Split-Dollar Agreement, and until twenty (20) days after the Assignee shall have mailed, by first class mail, to the Owner, notice of its intention to exercise such right, and (c) the Assignee will, upon request, forward the Policy to the Insurer, without unreasonable delay, for any election of optional mode of settlement, or the exercise of any other right reserved by the Owner hereunder.

6. Insurer The Insurer is hereby authorized to recognize the Assignee's claims to rights hereunder without investigating the reason for any action taken by the Assignee, the validity or amount of any of the liabilities of the Owner to the Assignee under the Split-Dollar Agreement, the existence of any default thereon, the giving of any notice required herein, or the application to be made by the Assignee of any amounts to be paid to the Assignee. The sole signature of the Assignee or the Owner shall be sufficient for the exercise of their respective rights under the Policy and this Assignment and the sole receipt of the Assignee or the Owner for any sums received by the respective party from the Insurer shall be a full discharge and release therefor to the Insurer.

7. Insurer Relieved of Liability The Insurer shall be fully protected in (and shall have no liability from) recognizing (and complying with) any request made by the Owner or Assignee, with or without the consent of any other person or entity.

8. Release of This Collateral Assignment Upon the full payment of the liabilities of the Owner to the Assignee pursuant to the Split-Dollar Agreement, the Assignee shall promptly release and reassign to the Owner all specific rights in the Policy included in this Assignment.

9. Additional Rights and Powers of Assignee The exercise of any right, option, privilege or power herein granted to the Assignee shall be at the option of the Assignee, and except as provided herein, the Assignee may exercise any such right, option, privilege or power without notice to, or assent by, or affecting the liability of, or releasing any interest hereby assigned by the Owner. The Assignee may take or release other security, may grant extensions, renewals or indulgences with respect to the obligations of the Owner to the Assignee under the Split-Dollar Agreement, or may apply the proceeds of the Policy hereby assigned or any amount received on account of the Policy by the exercise of any right permitted under this Assignment, without resorting to or regard to other security, if any

10. Conflicts In the event of any conflict between the provisions of this Assignment and the provisions of the Split-Dollar Agreement, with respect to the Policy or the Assignee's rights of collateral security therein, the provisions of this Assignment shall prevail.

11. No Bankruptcy Proceeding The Owner declares that no proceedings in bankruptcy are pending against the Owner, and that the Owner's property is not subject to any assignment for the benefit of creditors of the Owner

12. Counterparts This Assignment may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall be deemed one and the same document

IN WITNESS WHEREOF, the parties hereto have executed this Collateral Assignment of Life Insurance Policy Pursuant to Split-Dollar Agreement on this \_\_\_\_ day of December, 1998

STEPHEN C AND TOMISUE HILBERT  
IRREVOCABLE TRUST,  
dated May 16, 1996

By \_\_\_\_\_  
Rollin M. Dyck, Trustee

"Owner"

Agreed and accepted on this \_\_\_\_ day of December, 1998

CONSECO, INC

By \_\_\_\_\_  
Printed \_\_\_\_\_  
Title \_\_\_\_\_

"Assignee"

**EXHIBIT "A"**

The following life insurance policy is subject to the attached Collateral Assignment

Insurer MetLife

Insured Stephen C Hilbert and Thomas Hilbert

Policy Number 981250010PR

Face Amount \$25,000,000

Date of Issue December 1, 1998

EXHIBIT F

Company: Prudential Life Insurance Company  
 Policy Number: V0 001 461  
 Insured: Rollin & Helen Dick

Policy Anniversary	By Conseco	By RMD	Total
12/98	\$839,286	\$15,482	\$854,768
12/99	\$836,652	\$18,115	\$854,767
12/00	\$833,156	\$21,611	\$854,767
12/01	\$0	\$25,907	\$25,907
12/02	\$0	\$2,964	\$2,964

Company: MetLife Insurance Company  
 Policy Number: 981250011PR  
 Insured: Steve Hilbert

	Paid By Conseco	Paid by SCH	Total
12/98	\$313,348	\$16,452	\$329,800
12/99	\$312,582	\$17,218	\$329,800
12/00	\$311,708	\$18,092	\$329,800
12/01	\$0	\$19,027	\$19,027
12/02	\$0	\$20,945	\$20,945



**Company:** MetLife Insurance Company  
**Policy Number:** 98125001PR  
**Insured:** Steve & Tomisue Hilbert

	Paid by Conseco	Paid by SCH	Total
12/98	\$160,471	\$604	\$161,075
12/99	\$160,382	\$693	\$161,075
12/00	\$160,279	\$796	\$161,075
12/01	\$0	\$923	\$923
12/02	\$0	\$1,064	\$1,064

**Company:** Manufacturers Life Insurance Company  
**Policy Number:** 55627152  
**Insured:** Steve & Tomisue Hilbert

	Paid by Conseco	Paid by SCH	Total
12/98	\$198,022	\$693	\$198,715
12/99	\$197,924	\$791	\$198,715
12/00	\$197,807	\$908	\$198,715
12/01	\$0	\$1,035	\$1,035
12/02	\$0	\$1,192	\$1,192

Company: New York Life Insurance Company  
Policy Number: 46402088  
Insured: Steve & Tomisue Hilbert

	Paid by Conseco	Paid by SCH	Total
12/98	\$209,917	\$691	\$209,608
12/99	\$208,820	\$788	\$209,608
12/00	\$208,706	\$902	\$209,608
12/01	\$0	\$1,028	\$1,028
12/02	\$0	\$0	\$0

**D.E. 6917**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

KENNETH S. GARDNER, CLERK  
PS REP. - KG

**FILED**  
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
OCT 15 2004

In re: ) Chapter 11  
)  
Conseco, Inc., ) Case No. 02 B49672  
) Honorable Carol A. Doyle  
Debtors. ) (Jointly Administered)  
)

**CONSECO, INC.'S RESPONSE TO THE TRUSTS' STATEMENT OF  
UNDISPUTED FACTS AND CONSECO, INC.'S STATEMENT OF  
ADDITIONAL UNDISPUTED FACTS**

**Conseco, Inc.'s Response To The Trusts' Statement of Undisputed Facts**

1. Debtor and Claimants have stipulated that the Trust Agreements, Split Dollar Agreements and Policies are all admissible for this proceeding.

**RESPONSE:** Not disputed for purposes of this motion.

2. The Trusts are appended hereto as follows: Dick Family 1998 Irrevocable Trust Agreement-Exhibit A; the Amcnded Hilbert Residence Trust Agreement-Exhibit B; The Stephen C. and Tomisue Hilbert Irrevocable Trust Agreement-Exhibit C.

**RESPONSE:** Conseco does not dispute this fact for purposes of this motion.

3. The Split Dollar Agreements are attached as Exhibits D through H.

**RESPONSE:** Conseco does not dispute this fact for purposes of this motion.

4. Debtor and Claimants have stipulated that Conseco ceased paying its portion of the premiums before the bankruptcy petition was filed and that Steve Hilbert and Rollin Dick continued to pay their portion of the premium. (See also Debtor's Responses to Requests for Admission No. 3, 6 and 9, attached hereto as Exhibit I)

**RESPONSE:** Conseco does not dispute that it failed to make the December 2001 premium payments on the relevant policies, and that Hilbert and Dick continued to make their payments.

5. Rollin Dick is the trustee of the Steve and Tomisue Hilbert Irrevocable Trust. (Exhibit D, pg. 1)

**RESPONSE:** Not disputed.

6. Rollin Dick is the trustee of the Amended Hilbert Residence Trust. (Exhibit B, p. 1)

**RESPONSE:** Not disputed.

7. Lawrence F. Dick is the trustee of the Dick Family 1998 Irrevocable Trust. (Exhibit A, pg. 1)

**RESPONSE:** Not disputed.

8. These trusts shall be collectively referred to as the "Trusts". The Trusts are all irrevocable trusts. (Exhibit A, Clause 4; Exhibit B, Clause 5; Exhibit C, Clause 5)

**RESPONSE:** Not disputed.

9. None of the Trusts has Rollin Dick or Steve Hilbert as beneficiaries. (Id.)

**RESPONSE:** Not disputed.

10. Conesco, Rollin Dick and Lawrence F. Dick, as trustee of the Dick Family Irrevocable Trust, are all parties to a Split Dollar Agreement dated December 18, 1998 regarding a Prudential Insurance Company of America Policy Number V0 001 461 insuring the life of Rollin and Helen Dick with a basic face amount of Ten Million Dollars (\$10,000,000.00). (Exhibit D, pg. 1) (Exhibit I, Conesco Response to Admissions, Answer #1)

**RESPONSE:** Not disputed.

11. Conesco, Steven C. Hilbert and Rollin M. Dick, as trustee of the Amended Hilbert Residence Maintenance Trust, are parties to a Split Dollar Agreement dated December 18, 1998 regarding the Metropolitan Life Insurance Company Policy 981 250 011 with Steven C. Hilbert as an insured with a face amount of Twelve Million Five Hundred Thousand Dollars (\$12,500,000.00). (Exhibit E, pg. 1) (Exhibit I, #4)

**RESPONSE:** Not disputed.

12. Conesco, Steven C. Hilbert and Rollin M. Dick, as trustee of the Steven and Tomisue Hilbert Irrevocable Trust, are all parties to a Split Dollar Agreement dated December 18, 1998 for the Metropolitan Life Insurance Company Policy 981 250 010 insuring jointly the lives of Steven C. Hilbert and Tomisue S. Hilbert with a face amount of Twenty-Five Million Dollars (\$25,000,000.00). (Exhibit F, pg. 1) (Exhibit I, #7)

**RESPONSE:** Not disputed.

13. Conesco, Steven C. Hilbert and Rollin M. Dick, as trustee of the Steven and Tomisue Hilbert Irrevocable Trust, are all parties to a Split Dollar Agreement dated

December 18, 1998 for the New York Life Insurance Company Policy Number 46 402 088 insuring jointly the lives of Steven C. Hilbert and Tomisue S. Hilbert with a face amount of Twenty-Five Million Dollars (\$25,000,000.00). (Exhibit G, pg. 1) (Exhibit I, #7)

**RESPONSE:** Not disputed.

14. Conseco, Steven C. Hilbert and Rollin M. Dick, as trustee of the Steven and Tomisue Hilbert Irrevocable Trust, are all parties to a Split Dollar Agreement dated December 18, 1998 for the Manufacturers Life Insurance Company Policy Number 55 627 152 insuring jointly the lives of Steven C. Hilbert and Tomisue S. Hilbert with a face amount of Twenty-Five Million Dollars (\$25,000,000.00). (Exhibit H, pg. 1) (Exhibit I, #7)

**RESPONSE:** Not disputed.

15. The Split Dollar Agreements were entered into while Steve Hilbert and Rollin Dick were employees of the Debtor corporation. (Exhibits D through H, pg. 1, paragraph a.)

**RESPONSE:** Not disputed.

16. Each of the Split Dollar Agreements required either the Trust or the employees to pay a certain portion of the premiums. (*Id.* at paragraph 4(a))

**RESPONSE:** Not disputed, but Conseco further states that the Split-Dollar Agreements speak for themselves with respect to the parties' contractual obligations.

17. Upon the triggering death, the Trusts are required to take "whatever action is necessary" to collect the death benefit.

**RESPONSE:** Not disputed, but Conseco further states that the Split-Dollar Agreements speak for themselves with respect to the parties' contractual obligations.

18. Beyond the Trusts and/or employees' responsibility to pay their portion of the premium, each of the Split Dollar Agreements required as follows:

"On or before the due date of each Policy premium, or within the grace period provided therein, the Corporation shall pay the full amount of the premium to the Insurer, and shall, upon request, promptly furnish the Employee (or his wife) if the Employee has predeceased her, and the Owner evidence of timely payment of such premium."

(*Id.* at ¶ 4(b))

**RESPONSE:** Not disputed, but Conseco further states that the Split-Dollar Agreements speak for themselves with respect to the parties' contractual obligations.

19. Pursuant to the Split Dollar Agreements, once the Trusts, Rollin M. Dick and/or Steven Hilbert had paid their portion of the premiums that were due, Conseco was required to pay the rest of the full amount of the premium to keep the policies in force. *Id.*

**RESPONSE:** Not disputed, but Conseco further states that the Split-Dollar Agreements speak for themselves with respect to the parties' contractual obligations.

20. At the time of payout and/or termination, the Trusts were required to arrange for collection of funds and/or transfer of matters to Conseco. (Exhibit D, ¶ 6; Exhibit E, F, G and H, ¶ 7)

**RESPONSE:** Not disputed, but Conseco further states that the Split-Dollar Agreements speak for themselves with respect to the parties' contractual obligations.

21. Under the terms of the Split Dollar Agreements, the Trusts were the owners of the policies. (*Id.* at p. 1)

**RESPONSE:** Not disputed, but Conseco further states that the Split-Dollar Agreements speak for themselves with respect to the scope of the Trusts' ownership status.

22. The Split Dollar agreements are all governed by Indiana law. (*Id.* at ¶ 13)

**RESPONSE:** Not disputed.

23. Conseco ceased funding the policies prior to the filing of Conseco's Chapter 11 Petition. (Exhibit I, #3, 6, 9 and Stipulation)

**RESPONSE:** Conseco does not dispute that it failed to pay the December 2001 premium on the policies.

24. The employees paid their portion of the premiums past the time that Conseco breached the Agreements. (Stipulation)

**RESPONSE:** Not disputed.

**Conseco, Inc.'s Statement of Additional Undisputed Facts**

25. Conseco entered into the Split-Dollar Agreements because "[t]he Employee desires to provide life insurance protection for the Employee's family in the event of the Employee's death." (*See, e.g.,* Ex. D to Claimants' Mot. for S.J. at Recital B)

26. Conseco agreed to make premium payments for the life insurance policies because "[t]he Employee is also an officer and director of the Corporation and has contributed significantly to its success. The Corporation desire to continue to retain the services of the Employee, and accordingly, the Corporation is willing to pay a portion of the premiums due on the Policy as an additional employment benefit for the Employee, on the terms and conditions hereinafter set forth." (See, e.g., Ex. D to Claimants' Mot. for S.J. at Recital C)

27. The Trusts have not provided any goods or services to Conscco, nor did they provide any consideration to Conseco in exchange for Conseco's agreement to pay premiums on the Hilbert and Dick life insurance policies.

28. Messrs. Hilbert and Dick both participated in Conscco's various D&O loan programs, including the 1999 loan program. (See Exs. B-C hereto)

29. The Amended And Restated 1999 Director And Executive Officer Stock Purchase Plan Of Conseco, Inc. (dated November 2, 1999), states, in part:

**LOAN GUARANTEE:** Conseco will guarantee repayment to the Bank of 100% of all principal, interest, prepayment fees and other obligations of each Participant under such Participant's Loan described in Section 4. The Conseco loan guaranty is a condition to the loan arrangement Conseco has made with the Bank. The terms and conditions of the guarantee are as agreed by Conseco and the Bank. If a Participant specifies a Participant Designee, the Participant shall enter into an indemnification agreement to indemnify Conseco for any losses under the guaranty of the Loan with respect to the Participant Designee. Each Participant is fully obligated to repay to the Bank all principal, interest, and other amounts on the Loan when due and payable. *Conseco may take any action relating to the Participant and her or his assets, which the Board of Directors deems reasonable and necessary, (including, but not limited to, offsetting amounts owed to Conseco against wages, fees or other amounts owed to the Participant from Conseco) to obtain full reimbursement for amounts Conseco pays to the Bank under its guaranty related to the Participant's or a Participant Designee's Loan ("Loan Default").* Notwithstanding the foregoing, Conseco will not be



subrogated to any right of the Bank as a holder of a security interest in the Purchased Shares.

(Ex. A hereto at ¶ 9 (emphasis added))

30. Hilbert and Dick executed Participation Agreements for the 1999 program which stated that, as Participants in the program, they agreed "to be bound by the terms of the Plan, including, without limitation, the obligations set forth in Section 9 of the Plan to reimburse Conseco, Inc. ("Conseco") in the event Conseco is required to pay any amounts under its guaranty to the Bank (as defined in the Plan)." (Exs. B and C hereto)

31. In the Conseco, Inc. 2000 Non-Employee Stock Purchase Program Work-Down Plan, Conseco stated:

[Conseco] may take any action relating to the Participant and her or his assets, which the Committee deems reasonable and necessary (including, but not limited to, offsetting amounts owed to [Conseco] against wages, fees or other amounts owed to the Participant from [Conseco]) to obtain full reimbursement for amounts [Conseco] pays to the Bank under either of the Program Guarantees.

(Ex. D hereto at ¶ 6(a))

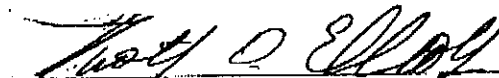
32. Hilbert and Dick both executed Participation Agreements in which they agreed to "comply with all of the terms, conditions and obligations of the Plan." (Exs. E and F hereto)

33. Messrs. Hilbert and Dick both defaulted on their D&O loans, and Conseco, which guaranteed those loans, is now pursuing claims against Messrs. Hilbert and Dick.

34. Messrs. Hilbert and Dick have filed Proofs of Claim purporting to seek damages from the Split-Dollar Agreements. (Ex. G hereto)

Chicago, Illinois  
DATED: October 15, 2004

Respectfully submitted,  
KIRKLAND & ELLIS



James H.M. Sprayregen  
Timothy D. Elliott  
KIRKLAND & ELLIS LLP  
200 East Randolph Drive  
Chicago, IL 60601  
Telephone: (312) 861-2000  
Facsimile: (312) 861-2200

**CERTIFICATE OF SERVICE**

I, Timothy D. Elliott, an attorney, certify that I served true and correct copies of the foregoing CONSECO, INC.'S RESPONSE TO THE TRUSTS' STATEMENT OF UNDISPUTED FACTS AND CONSECO, INC.'S STATEMENT OF ADDITIONAL UNDISPUTED FACTS, by facsimile and Federal Express, on October 1<sup>st</sup>, 2004, upon:

John F. Kinney  
Freeman, Freeman & Salzman, P.C.  
401 North Michigan Avenue  
Suite 3200  
Chicago, IL 60611-4207  
Telephone: (312) 222-5100  
Facsimile: (312) 822-0870

**BY MESSENGER**

William L. O'Connor  
Dann Pccar Newman & Kleiman, P.C.  
Suite 2300, One American Square  
Indianapolis, IN 46282  
Telephone: (317) 632-3232  
Facsimile: (317) 632-2962

**BY FEDERAL EXPRESS**

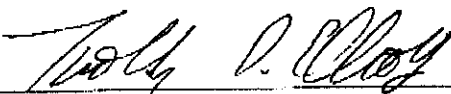
  
\_\_\_\_\_  
Timothy D. Elliott

EXHIBIT A

AMENDED AND RESTATED  
1999 DIRECTOR AND EXECUTIVE OFFICER  
STOCK PURCHASE PLAN  
OF CONSECO, INC.

1. **PURPOSE.** The Amended and Restated 1999 Director and Executive Officer Stock Purchase Plan (the "Plan") of Conseco, Inc. ("Conseco" or the "Company") is adopted to facilitate the purchase by the Directors and Executive Officers of Conseco of Conseco's common stock ("Common Stock"). The purchases facilitated by the Plan are intended to achieve the following specific purposes:
  - a) more closely align key employees' financial rewards with the financial rewards realized by all other shareholders of the Company;
  - b) increase key employees' motivation to manage the Company as owners; and
  - c) increase the ownership of Common Stock among senior management of the Company.
  
2. **ELIGIBILITY.** To be eligible to participate in the Plan, the individual must be a non-employee Director of the Company or an executive officer of the Company ("Eligible Participant").
  
3. **PARTICIPATION.** To become a Plan participant ("Participant"), an Eligible Participant must satisfy the following requirements:
  - a) submit a completed, signed and irrevocable election to purchase a portion of the Common Stock which the Eligible Participant is eligible to purchase under the Plan along with a power of attorney authorizing such purchases on the Participant's behalf;
  - b) complete and sign all necessary agreements and other documents relating to the loan described in Section 4 hereof including, but not limited to, personal financial statements, letters of instruction to brokers, transfer agents and banks as are necessary or appropriate under the loan described in Section 4 hereof, and a power of attorney authorizing borrowings under such loan; and
  - c) satisfy all other conditions of participation specified in the Plan.

The agreements and other documents specified in subsections 3 (a), (b) and (c) must be submitted at such times and to such Company offices as specified by the Company. No Eligible Participant is required to participate in the Plan.

Up to an aggregate of [number of shares that can be purchased for not more than \$150 million] shares of Common Stock may be purchased by all Participants, with the individual allocations to be approved by the Chief Executive Officer of Conseco. All such purchases may be made by the individual Participant or by a trust, corporation, partnership or limited liability company controlled by the Participant ("Participant Designee"; the term Participant shall include Participant Designee unless the context otherwise requires).

4. **PURCHASE OF SHARES.** Conseco, in its sole discretion subject to the terms and provisions of the Plan, will determine the timing, amount, price and mechanics of all of the purchases of shares of Common Stock (the "Purchased Shares") through open market and negotiated transactions. Purchases of Purchased Shares shall be effected through a broker in accordance with Rule 10b-18 under the Securities Exchange Act of 1934. The shares of Common Stock purchased pursuant to the Plan will be allocated proportionately among Participants at the end of each trading day based upon the percentage of all of the shares of Common Stock Participants have elected to purchase and the average price for all purchases of shares of Common Stock on that day.

Conseco has arranged the opportunity for each Participant to obtain a loan through Chase Manhattan Bank and other participating financial institutions (collectively, the "Bank") to fund the purchase of the Purchased Shares (the "Loan"). Each Participant must sign a power of attorney authorizing loans under the Credit Agreement with the Bank and the purchase of the Purchased Shares. Each Participant is responsible for satisfying all of the lending requirements specified by the Bank to qualify for the Loan including all collateral requirements. Each Participant is fully obligated to repay to the Bank all principal, interest, and any prepayment fees on the Loan when due and payable.

In the event a Participant does not wish to obtain the Loan, the Participant shall provide sufficient funds to fund the purchase of the Purchased Shares. Such Participant must execute a power of attorney authorizing the purchase of the Purchased Shares. If the Participant fails to fund the purchase of the Purchased Shares, the Participant may no longer participate in the Plan, and all of the Purchased Shares not paid for will be allocated to the other Participants.

5. **REGISTRATION OF SHARES.** The Purchased Shares will be registered in the name of the Participant or his or her designee and certificated. Each certificate may bear a legend referring to the Plan. The certificates for the Purchased Shares of each Participant who participates in the Loan will be held by the Bank as collateral for the Loan. Each such Participant must deliver to the Bank a stock power endorsed in blank with respect to the Purchased Shares. A Participant may be able to obtain a release of the Purchased Shares from the Bank provided that other collateral of equal value is substituted as collateral for the Loan.
6. **SHAREHOLDER RIGHTS.** Each Participant will have all of the rights of a shareholder with respect to the Purchased Shares, including the right to vote the shares and the right to receive dividends. Any dividends in excess of required interest payments will be deposited to the Participant's account at the Bank.
7. **SALE OF PURCHASED SHARES.** Each Participant is permitted to sell all or any portion of the Purchased Shares; provided, that any such sale does not violate any provision of a Loan.
8. **DEATH OR DISABILITY.** Upon the death of a Participant, her or his estate or the Participant Designee, as the case may be, may elect to cause Conseco to pay the estate or the Participant Designee, as the case may be, an amount equal to the balance of the Participant's Loan minus the value of such shares based upon the closing price of Common Stock on the New York Stock Exchange on the first trading date after the date of death. The estate or the Participant Designee, as the case may be, of a deceased Participant must make such election, in writing, within 30 days after written notice from Conseco. Upon the total and permanent disability of a Participant who is an employee of the Company, such disabled Participant may elect to cause Conseco to pay the Participant an amount equal to the balance of the Participant's Loan minus the value of such shares based upon the closing price of Common Stock on the New York Stock Exchange on the first trading date after the final date of employment. The Participant must make such election, in writing, within 30 days after written notice from Conseco. "Total and permanent disability" means the inability of a Participant to provide meaningful service for the Company due to a medically determinable physical or mental impairment. Such determination of total and permanent disability shall be made by the Company. Notwithstanding the above, if a Participant qualifies for Federal Social Security disability benefits or for payments under the Company's long-term disability income plan, based upon his physical or mental condition, he shall be deemed to suffer from a total and permanent disability hereunder. This Section 8 has no effect on a deceased or disabled Participant's sale of Purchased Shares before the Participant's death or disability. Payment

by Conseco of amounts described in this Section 8 is conditioned on the payment in full of the Participant's Loan (if any), the release of the Company's guarantee with respect thereto, and the payment in full of the Interest Payment Loan. This Section 8 will terminate January 1, 2001.

9. **LOAN GUARANTEE.** Conseco will guarantee repayment to the Bank of 100% of all principal, interest, prepayment fees and other obligations of each Participant under such Participant's Loan described in Section 4. The Conseco loan guaranty is a condition to the loan arrangement Conseco has made with the Bank. The terms and conditions of the guarantee are as agreed by Conseco and the Bank. If a Participant specifies a Participant Designee, the Participant shall enter into an indemnification agreement to indemnify Conseco for any losses under the guaranty of the Loan with respect to the Participant Designee. Each Participant is fully obligated to repay to the Bank all principal, interest, and other amounts on the Loan when due and payable. Conseco may take any action relating to the Participant and her or his assets, which the Board of Directors deems reasonable and necessary, (including, but not limited to, offsetting amounts owed to Conseco against wages, fees or other amounts owed to the Participant from Conseco) to obtain full reimbursement for amounts Conseco pays to the Bank under its guaranty related to the Participant's or a Participant Designee's Loan ("Loan Default"). Notwithstanding the foregoing, Conseco will not be subrogated to any right of the Bank as a holder of a security interest in the Purchased Shares.
10. **LOAN OF INTEREST PAYMENTS AND FEES.** At the discretion of the Directors, Conseco or one of its subsidiaries (the "Lender") may loan funds to the Participants equal to the amount of current interest payments and up-front fees owed by the Participants pursuant to the Credit Agreement (collectively, the "Interest Payment Loans"). All Interest Payment Loans shall be evidenced by promissory notes, the terms and conditions of which shall be determined at the sole discretion of the Lender. If a Participant specifies a Participant Designee, the Participant shall enter into an indemnification agreement to indemnify the Lender for any losses under the Interest Payment Loan.
11. **MARGIN REGULATIONS.**

(a) None of the obligations of the Participants to Conseco or one of its subsidiaries (collectively, Conseco and its subsidiaries shall be referred to as "Conseco" for the purposes of this Section 11) hereunder is or will be secured, directly or indirectly, by Margin Stock (as such term is defined in Regulation U promulgated by the Board of Governors of the Federal Reserve System):



(b) Neither Conseco nor any third party acting on behalf of Conseco has taken or will take possession of a Participant's Margin Stock to secure, directly or indirectly, any of the obligations of such Participant to Conseco;

(c) Conseco does not and will not have any right to prohibit such Participant from selling, pledging, encumbering or otherwise disposing of any Margin Stock owned by such Participant so long as the obligations of such Participant under this Plan remain outstanding;

(d) Such Participant has not granted and will not grant Conseco or any third party acting on behalf of Conseco the right to accelerate repayment of any of the obligations under this Plan of such Participant if any of the Margin Stock owned by such Participant is sold by such Participant or otherwise; and

(e) There is no agreement or other arrangement between such Participant and Conseco or any third party acting on behalf of Conseco (and no such agreement or arrangement shall be entered into so long as this Plan is in effect or any of the obligations of such Participant under this Plan remain outstanding) under which the Margin Stock of Participant would be made more readily available as security to Conseco than to other creditors of such Participant.

12. OTHER TERMINATION. If a Participant ceases to be a Director, officer or employee of Conseco, Conseco shall notify the Participant or Participant Designee that such Participant or Participant Designee shall have the option to either (i) within 30 days of the notice, retire the Loan and release Conseco's guaranty or (ii) continue the Loan and the Interest Payment Loan until their maturity date with Conseco's guaranty, but commence paying all future interest payments on such Loans as due.

If the Participant desires Conseco's guaranty to continue, he or she agrees that, as compensation for continuing such guaranty beyond the termination of such Participant's employment or directorship, as the case may be, the former Participant shall pay to Conseco the following fees:

- (a) A continuing guaranty fee on the outstanding note balance at each calendar quarter end to be paid at the rate of .5% each quarter.
- (b) A settlement fee equal to half of the "Exit Profit". The Exit Profit shall be the excess, if any, of (i) the proceeds received from the sale of the Related Shares (as defined herein) or the

market value of the Related Shares on the date the guaranty is released, whichever occurs first minus (ii) the sum of (x) the higher of (1) the market value of the Related Shares at the Participant's termination date and (2) the original purchase price of the Related Shares and (y) the interest accrued on the Loan since the termination date for the Related Shares. The "Related Shares" means the number of Purchased Shares acquired with the proceeds of the remaining principal amount of the loan at the date of termination of employment.

13. ADMINISTRATION. The Board of Directors of Conseco shall be charged with the administration and interpretation of the Plan but may delegate the ministerial duties hereunder to such persons as it determines. The Board of Directors of Conseco may adopt such rules as may be necessary or appropriate for the proper administration of the Plan. The decision of the Board of Directors of Conseco in all matters involving the interpretation and application of the Plan shall be final and shall be given the maximum possible deference allowed by law.
14. PAYMENT OF EXPENSES. The expenses of administering the Plan shall be paid by the Company except those expenses which are expenses of the Participants.
15. EMPLOYER-EMPLOYEE RELATIONSHIP. The establishment of this Plan shall not be construed as conferring any legal or other rights upon any employee or any person for a continuation of employment, nor shall it interfere with the rights of the Company to discharge any employee or otherwise act with relation to the employee. The Company may take any action (including discharge) with respect to any employee or other person and may treat such person without regard to the effect which such action or treatment might have upon such person as a Participant of this Plan.
16. AMENDMENT AND TERMINATION. The Company reserves the right to change or discontinue this Plan by action of the Board of Directors in its discretion; provided, however, that in the case of any person to whom benefits under this Plan had accrued upon termination of employment prior to such Board of Directors action, or in the case of any Participant who would have been entitled to benefits under this Plan had the Participant's employment ceased prior to such change or discontinuance, the benefits such person had accrued under this Plan prior to such change or discontinuance shall not be adversely affected thereby.

Notwithstanding anything herein to the contrary, nothing contained herein shall restrict the Company's right to

terminate the Plan.

17. **WITHHOLDING.** The Company shall have the right to deduct in cash (whether under this Plan or otherwise) in connection with all payments by the Company to a Participant under this Plan any taxes required by law to be withheld and to require any payments required to enable it to satisfy its withholding obligations.
18. **GOVERNING LAW.** This Plan shall be construed in accordance with the laws of the State of Indiana.
19. **APPROVAL.** If a Participant purchases Purchased Shares, such purchase shall constitute formal approval of this Plan by the Participant and such Participant's agreement to be bound by the terms and conditions of the Plan.

Effective Date: September 7, 1999

Amended and Restated: November 2, 1999

EXHIBIT B

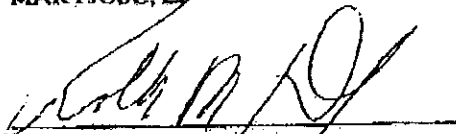
PARTICIPATION AGREEMENT

The undersigned Participant in the 1999 Director and Executive Officer Stock Purchase Plan of Conseco, Inc. (the "Plan") hereby agrees to be bound by the terms of the Plan, including, without limitation, the obligations set forth in Section 9 of the Plan to reimburse Conseco, Inc. ("Conseco") in the event Conseco is required to pay any amounts under its guaranty to the Bank (as defined in the Plan).

IN WITNESS WHEREOF, the undersigned has executed this Agreement this 15<sup>th</sup> day of September, 1999.

MARYIOSC, LP

By:

  
\_\_\_\_\_  
Rollin M. Dick, General Partner

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CONFIDENTIAL

P 043876

**ELECTION TO PARTICIPATE**

As part of the 1999 Director and Executive Officer Stock Purchase Program of Conseco, Inc., I elect the following:

- I elect not to participate.
  
- I elect to participate and purchase 400,000 shares of Conseco stock.

Please indicate below the name, address and social security or federal ID number you will use for the purchaser:

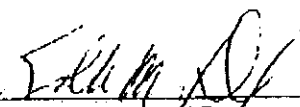
Name and Address

Federal I.D. Number

(If you wish to use more than one owner, indicate the number of shares for each.)

MARYJOSC, I.P  
Rollin M. Dick, General Partner  
9085 State Road 334  
Zionsville, IN 46077

35-2024550

  
\_\_\_\_\_  
Rollin M. Dick, General Partner

9/27/99  
\_\_\_\_\_  
(Date)

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CONFIDENTIAL

P 043874

ELECTION TO PARTICIPATE

As part of the 1999 Director and Executive Officer Stock Purchase Program of Conseco, Inc., I elect the following:

I elect not to participate.

I elect to participate and purchase 400,000 shares of Conseco stock.

Please indicate below the name, address and social security or federal ID number you will use for the purchaser:


Name and Address

Federal I.D. Number

(If you wish to use more than one owner, indicate the number of shares for each.)

MARYJOSC, LP  
Rollin M. Dick, General Partner  
9085 State Road 334  
Zionsville, IN 46077

35- 2024 550

  
\_\_\_\_\_  
Rollin M. Dick, General Partner

9/15/99  
\_\_\_\_\_  
(Date)

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CONFIDENTIAL

P 043875

EXHIBIT C



PARTICIPATION AGREEMENT

The undersigned Participant in the 1999 Director and Executive Officer Stock Purchase Plan of Conseco, Inc. (the "Plan") hereby agrees to be bound by the terms of the Plan, including, without limitation, the obligations set forth in Section 9 of the Plan to reimburse Conseco, Inc. ("Conseco") in the event Conseco is required to pay any amounts under its guaranty to the Bank (as defined in the Plan).

IN WITNESS WHEREOF, the undersigned has executed this Agreement this 27<sup>th</sup> day of September, 1999.

Stephen C. Hilbert Trust

By:



Stephen C. Hilbert, Trustee

ELECTION TO PARTICIPATE

As part of the 1999 Director and Executive Officer Stock Purchase Program of Consecu, Inc., I elect the following:

I elect not to participate.

I elect to participate and purchase 100,000 shares of Consecu stock.

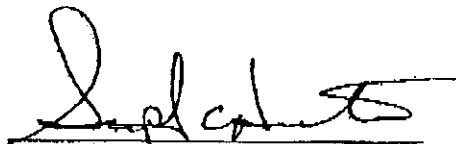
Please indicate below the name, address and social security or federal ID number you will use for the purchaser:

Name and Address

Federal I.D. Number

(If you wish to use more than one owner, indicate the number of shares for each.)

The Heather Dawn Hilbert Irrevocable Trust  
Stephen C. Hilbert as Trustee  
1143 West 116<sup>th</sup> Street  
Carmel, IN 46032

  
\_\_\_\_\_  
Stephen C. Hilbert, Trustee

\_\_\_\_\_  
9/27/99  
(Date)

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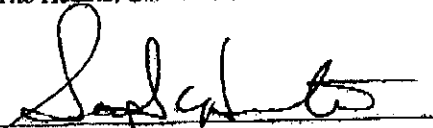
PARTICIPATION AGREEMENT

The undersigned Participant in the 1999 Director and Executive Officer Stock Purchase Plan of Conseco, Inc. (the "Plan") hereby agrees to be bound by the terms of the Plan, including, without limitation, the obligations set forth in Section 9 of the Plan to reimburse Conseco, Inc. ("Conseco") in the event Conseco is required to pay any amounts under its guaranty to the Bank (as defined in the Plan).

IN WITNESS WHEREOF, the undersigned has executed this Agreement this 27<sup>th</sup> day of September, 1999.

The Heather Dawn Hilbert Irrevocable Trust

By:

  
Stephen C. Hilbert, Trustee

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CONFIDENTIAL

P 043928

ELECTION TO PARTICIPATE

As part of the 1999 Director and Executive Officer Stock Purchase Program of Conseco, Inc., I elect the following:

I elect not to participate.

I elect to participate and purchase 925,000 shares of Conseco stock.

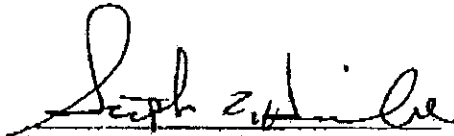
Please indicate below the name, address and social security or federal ID number you will use for the purchaser:

Name and Address

Federal I.D. Number

(If you wish to use more than one owner, indicate the number of shares for each.)

Thomas C. Hilbert Irrevocable Trust, II  
Stephen C. Hilbert as Trustee  
1143 West 116<sup>th</sup> Street  
Carmel, IN 46032

  
Stephen C. Hilbert, Trustee

9/15/99  
(Date)

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CONFIDENTIAL

P 043986

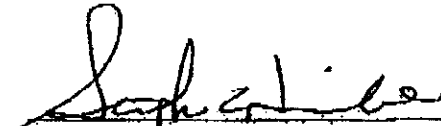
PARTICIPATION AGREEMENT

The undersigned Participant in the 1999 Director and Executive Officer Stock Purchase Plan of Conseco, Inc. (the "Plan") hereby agrees to be bound by the terms of the Plan, including, without limitation, the obligations set forth in Section 9 of the Plan to reimburse Conseco, Inc. ("Conseco") in the event Conseco is required to pay any amounts under its guaranty to the Bank (as defined in the Plan).

IN WITNESS WHEREOF, the undersigned has executed this Agreement this 15<sup>th</sup> day of September, 1999.

Thomas C. Hilbert Irrevocable Trust, II

By:

  
Stephen C. Hilbert, Trustee

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CONFIDENTIAL

P 043987

EXHIBIT D

11/13/00

**CONSECO, INC.**  
**2000 NON-EMPLOYEE STOCK PURCHASE PROGRAM WORK-DOWN PLAN**

1. Plan Purpose. The purpose of this Plan is to promote the long-term interests of the Company and its shareholders by providing a means for certain participants in the Company's Stock Purchase Programs to meet their financial obligations and to align better their interests with those of the Company and the shareholders.

2. Definitions. The following definitions are applicable to the Plan:

"Affiliate" means any direct or indirect subsidiary of the Company.

"Banks" means the financial institutions that will make the Program Loans.

"CIHC" means CIHC, Incorporated, a Delaware corporation.

"Collateral" means any real or personal property reasonably acceptable to the Committee (other than Program Stock) in which a Participant hereafter grants a security interest to the Banks or to the Company (as directed by the Committee) to secure repayment of such Participant's Program Loans or Interest Loans and for which an appropriate pledge or security agreement has been delivered to the Banks or the Company, as the case may be. Notwithstanding the foregoing, no security interest may be granted to the Company in Collateral which represents "margin stock" securing "purpose credit" in each case as defined by Regulation U promulgated by the Board of Governors of the Federal Reserve System, 12 C.F.R. § 221.1 *et seq.*

"Collateral Value" means the value that the Committee determines is the realizable value of the Collateral.

"Committee" means the committee of the Board of Directors of the Company which is appointed to administer this Plan.

"Commitment Termination Date" means October 31, 2000 unless extended by the Company with the consent of Bank of America, N.A., as to certain Program Loans.

"Company" means Conseco, Inc., an Indiana corporation.

"Consultant" means the person or firm appointed by the Committee to provide financial consulting services to Participants and to advise the Committee.

"Director" means a member of the Company's Board of Directors.

"Existing Program Loans" mean the loans made by the financial institutions for whom Bank of America, N.A. or The Chase Manhattan Bank is acting as agent to a Participant or such Participant's designee under the Stock Purchase Programs to purchase Program Stock.

CONFIDENTIAL

P 053478

"Guaranty Fee" means the quarterly fee equal to 0.5% of the principal amount of the Existing Program Loans or the Program Loans, as the case may be, payable to the Company under the Stock Purchase Programs or this Plan.

"Interest Loans" mean the loans made or to be made by Conseco Services, LLC, an Affiliate of the Company, to pay interest to, and origination fees and other charges of, the Banks on the Existing Program Loans and the Program Loans, as the case may be.

"Maturity Date" means December 31, 2003.

"New Interest Rate" means the variable rate of interest payable from time to time on the Program Loans.

"Non-Employee" means any Participant who is a Director, was previously a Director or was previously an employee of the Company or any of its Affiliates and who is not eligible to participate in the Conseco, Inc. 2000 Employee Stock Purchase Program Work-Down Plan.

"Participant" means a participant in the Stock Purchase Programs including any "participant designee" of such person as defined in the Stock Purchase Programs who is eligible to and elects to participate in this Plan.

"Plan" means the Conseco, Inc. 2000 Non-Employee Stock Purchase Program Work-Down Plan.

"Program Guaranties" has the meaning set forth in Section 6(a).

"Program Loans" mean the new loans to be made by the Banks to refinance the Existing Program Loans.

"Program Stock" means the shares of common stock of the Company or other securities acquired by a Participant under the Stock Purchase Programs.

"Stock Purchase Programs" mean the Amended and Restated Director, Officer and Key Employee Stock Purchase Plan of Conseco, Inc. effective July 30, 1998 and amended and restated November 2, 1999 and the Amended and Restated 1999 Director and Executive Officer Stock Purchase Plan of Conseco, Inc. effective September 7, 1999 and amended and restated November 2, 1999.

3. Administration. This Plan shall be administered by the Committee, which shall consist of three or more members of the Board of Directors, none of whom have any outstanding obligations under the Stock Purchase Programs or the Existing Program Loans. A majority of the members of the Committee shall constitute a quorum, and the acts of a majority of the members present at any meeting at which a quorum is present, or acts approved in writing by all members of the Committee without a meeting, shall be acts of the Committee. Except as expressly limited by the Plan, the Committee shall have all powers and discretion necessary or appropriate to administer the Plan and control its operation, including, but not limited to, the power to interpret the Plan and



to adopt rules and procedures for the administration, interpretation and operation of the Plan. All determinations and decisions made by the Committee pursuant to the provisions of the Plan shall be final, conclusive and binding on all persons, and shall be given the maximum deference permitted by law.

4. Election to Participate. To participate in this Plan, a Participant must, on or before November 22, 2000:

(a) elect in writing to participate in this Plan, accept the terms and conditions of this Plan and cooperate fully with the Committee, the Company, the Consultant and the Banks in connection with the administration of the Plan and the Program Loans; and

(b) execute all documents reasonably required by the Company, the Committee and the Banks in connection with the Existing Program Loans, the Program Loans, the Interest Loans and this Plan, including, but not limited to, promissory notes, loan agreements, pledge or security agreements, financing statements, stock powers, releases of liability, personal financial statements, powers of attorney, and letters of instruction to brokers, transfer agents and banks.

5. Eligibility Provisions.

(a) Directors may elect to participate in this Plan only if the following conditions are met: (i) the principal amount of his or her Existing Program Loans is less than or equal to \$300,000 on the date such election is made; (ii) the aggregate amount of his or her Interest Loans is less than \$300,000 on the date such election is made; and (iii) the Existing Program Loans and the Interest Loans have been fully secured by Collateral having a Collateral Value not less than the sum of the outstanding and unpaid Existing Program Loans and Interest Loans.

(b) Other Non-Employees, including former Directors, may elect to participate in this Plan only if the following conditions are met: (i) subject to Section 7, such Participant must begin paying interest on his or her Program Loans and Interest Loans on a quarterly basis at the New Interest Rate; and (ii) subject to Section 7, such Participant must begin making principal reductions of his or her Program Loans or providing Collateral as security for the Program Loans no later than December 15, 2000 in such amounts and forms and on such dates as established in the sole discretion of the Committee such that it is reasonably expected that the unsecured balance of his or her Program Loans as of December 31, 2003 will be less than or equal to \$25.00 per share of Program Stock under each of the Program Loans.

6. Program Loans and Interest Loans.

(a) The Company has arranged for each Participant to obtain a Program Loan with a maturity equal to the Maturity Date. Each Participant is responsible for satisfying all of the lending requirements specified by the Banks to qualify for the Program Loans, including all collateral requirements. Each Participant acknowledges and agrees that he or

she is fully obligated to repay to the Banks all principal, interest, and any prepayment fees on the Program Loans when due and payable. It is a condition to the Program Loans that the Company and CIHC guarantee to the Banks repayment of 100% of the principal, interest, prepayment fees and other fees or obligations of each Participant under the Program Loans (the "Program Guaranties"). The terms and conditions of the Program Guaranties are as agreed by the Company, CIHC and the Banks, and such parties may amend, modify, waive or otherwise change the Program Guaranties as they may from time to time agree. Each Participant agrees to reimburse and to cause its Participant Designee (if applicable) to reimburse the Company and/or CIHC for any and all payments made under either of the Program Guaranties and all loss, cost and expenses of any kind which the Company or CIHC may incur in connection therewith or arising thereunder. The Company may take any action relating to the Participant and her or his assets, which the Committee deems reasonable and necessary (including but not limited to offsetting amounts owed to the Company or CIHC against wages, fees or other amounts owed to the Participant from the Company or its Affiliates) to obtain full reimbursement for amounts the Company or CIHC pays to the Banks under either of the Program Guaranties. Each Participant agrees that the principal amount of its Interest Loans will be increased by (i) one percent (1%) of such Participant's Existing Program Loans reflecting the origination fee paid by the Company to the Banks as of September 22, 2000 and (ii) an amount payable to Conseco, equal to 1.625% per annum from September 22, 2000 through and until the Commitment Termination Date on such Participant's Existing Program Loans that were scheduled to mature August 26, 2001.

(b) Participants shall not be required to pay the Guaranty Fee except as provided in Section 10.

(c) The Program Loans shall be paid in full prior to any payment by the Participants to the Company on the Interest Loans. Any cash dividends paid on the Program Stock shall be paid to the Banks on the Program Loans. If the Company or any Affiliate receives any payment from a Participant relating to the Interest Loans while such Participant's Program Loans are still outstanding, the Company shall turn over and pay (or cause any Affiliate to turnover and pay) the appropriate amount to the Banks to be applied to the Program Loans designated by such Participant at the time of payment and, in the absence of such designation, pro rata to all Program Loans of such Participant.

7. Modification of Obligations. If a Participant does not believe he or she is able to make the interest payments or principal reduction or provide the Collateral provided for in Section 5(b), such Participant shall accept the assistance of, and cooperate fully with, the Consultant. The Consultant shall report to the Committee what it believes the form, amount(s) and due date(s) of such Participant's obligations should be. The Committee shall ultimately determine the form, amount(s) and due date(s) of such obligations. If a Participant fails to comply with the Committee's final decision, the Company may take the actions provided in Section 10.

8. Provisions Regarding Consultant.

(a) The Company will appoint and pay all expenses of the Consultant. The Consultant will be instructed to maintain the confidentiality of all information provided to

it by Participants, except that the Consultant shall report to the Committee what it believes the form, amount(s) and due date(s) of the Participant's obligations should be. Each Participant who is required to consult with the Consultant agrees to use his or her best efforts to provide the Consultant with all information that the Consultant may request as soon as reasonably practicable.

(b) All Participants will have the right to obtain financial counseling services from the Consultant on any matters relating to their obligations under the Stock Purchase Programs and this Plan.

9. Right to Sell Program Stock. All Participants shall retain the right to repay all or any part of their Program Loans and Interest Loans at any time or to sell all or any part of their Program Stock, subject to the terms and conditions of any agreements between the Participants and the Banks respecting the Program Loans and the Program Stock.

10. Failure to Comply. The Committee may declare any Participant who fails to fulfill any of his or her obligations under this Plan ineligible to further participate in the Plan, in which event the Company may cease advancing interest on the Program Loans and Interest Loans for the benefit of such Participant (if the Company is then doing so), declare his or her Interest Loans immediately due and payable (in which event such Interest Loans shall be immediately due and payable), require such Participant to begin paying the Guaranty Fee and take any other action it deems appropriate.

11. Participant Rights Limited. Neither participation in the Plan nor any action taken pursuant to the Plan shall be construed as giving any person any right to be retained in the employ or service of the Company or any Affiliate.

12. Amendment and Modification of Plan. The Company may, at any time, amend or modify this Plan except that no such amendment or modification may accelerate the Maturity Date.

13. Governing Law. This Plan shall be construed in accordance with and governed by the laws of the State of Indiana.

14. Successors and Assigns. This Plan shall be binding upon and inure to the benefit of the successors, assigns and heirs of the Participants, the Company and CIHC. In no event may any Participant assign any of its rights or obligations under the Plan without the prior consent of the Company.

15. Entire Agreement. This Plan and the Stock Purchase Programs constitute the entire agreement between the Company and the Participants and supersede and cancel any and all prior discussions, negotiations, undertakings or other understandings between them relating to the subject matter hereof.

16. Adjustments Upon Changes in Capitalization. In the event of any change in the outstanding shares of common stock of the Company by reason of any reorganization, recapitalization, stock split, stock dividend, combination or exchange of shares, merger,

EXHIBIT E

*RND* and the Conseco, Inc. 2000 New Employee Stock Purchase Program Work-Down Plan

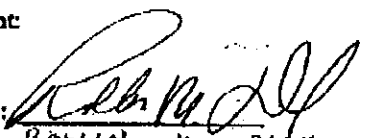
**PARTICIPATION AGREEMENT**

The undersigned (including any spouse or "Participant's designee") hereby elect(s) to participate in the Conseco, Inc. 2000 Employee Stock Purchase Program Work-Down Plan (the "Plan") and represent(s) that he, she or they: (i) has/have received a copy of the Plan; (ii) has/have reviewed the Plan and has/have had an opportunity to ask questions regarding the Plan; and (iii) agree(s) to comply with all of the terms, conditions and obligations of the Plan.

collectively  
*RND*

IN WITNESS WHEREOF, the undersigned has/have executed this Agreement this \_\_\_ day of \_\_\_\_\_, 2000.

Participant:

Signature:   
Printed: ROLLIN M. DICK

Spouse (if applicable):

Signature: \_\_\_\_\_  
Printed: \_\_\_\_\_

Participant's designees (if applicable):

Name of Person or Entity: \_\_\_\_\_  
Signature of Authorized Person: \_\_\_\_\_  
Printed Name and Title of Authorized Person: \_\_\_\_\_

00DMANPCDOCS\INDOCS\12437832

EXHIBIT F

*and the 'Conseco, Inc. 2000 Non Employee Stock Purchase Program Work-Down Plan'* *scf*

**PARTICIPATION AGREEMENT**

The undersigned (including any spouse or "Participant's designee") hereby elect(s) to *scf*  
participate in the Conseco, Inc. 2000 Employee Stock Purchase Program Work-Down Plan *scf* (the  
"Plan") and represent(s) that he, she or they: (i) has/have received a copy of the Plan; (ii) has/have  
reviewed the Plan and has/have had an opportunity to ask questions regarding the Plan; and (iii)  
agree(s) to comply with all of the terms, conditions and obligations of the Plan.

IN WITNESS WHEREOF, the undersigned has/have executed this Agreement this \_\_\_ day  
of \_\_\_\_\_, 2000.

Participant: \_\_\_\_\_  
Signature: *[Handwritten Signature]*  
Printed: \_\_\_\_\_


Spouse (if applicable):  
  
Signature: \_\_\_\_\_  
Printed: \_\_\_\_\_

Participant's designees (if applicable):  
  
Name of Person or Entity: *Stephen C Hilbert August 1998 Trust*  
Signature of Authorized Person: *[Handwritten Signature]*  
Printed Name and Title of  
Authorized Person: *Stephen C. Hilbert, Trustee*

-ODMA\FPCDOCS\INDOCS\1247832

EXHIBIT G



UNITED STATES BANKRUPTCY COURT <u>Northern</u> DISTRICT OF <u>Illinois</u>		<b>PROOF OF CLAIM</b>
Name of Debtor <b>Consoco, Inc</b>		Case Number <b>02-49672</b>
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (The person or other entity to whom the debtor owes money or property) <b>Rollin M Dick</b>		<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.
Name and address where notices should be sent <b>c/o David H Kleiman, Esq DANN PECAR NEWMAN &amp; KLEIMAN, P C One American Square, Suite 2300 Indianapolis, IN 46282 Telephone number (317) 632-3232</b>		
Account or other number by which creditor identifies debtor		Check here if this claim <input type="checkbox"/> replaces a previously filed claim, dated _____ <input type="checkbox"/> amends
<b>1 Basis for Claim</b> <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input checked="" type="checkbox"/> Other <u>See Attachment</u>		
		<input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensation (fill out below) Your SS # _____ Unpaid compensation for services performed from _____ to _____ (date) (date)
<b>2 Date debt was incurred</b>		<b>3 If court judgment, date obtained</b>
<b>4 Total Amount of Claim at Time Case Filed</b> \$ _____ <b>Unliquidated amount for set off and recoupment purposes only</b> If all or part of your claim is secured or entitled to priority, also complete item 5 or 6 below. <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
<b>5 Secured Claim</b> <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff) Brief Description of Collateral <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input checked="" type="checkbox"/> Other <u>Secured only by rights of setoff/recoupment</u> Value of Collateral \$ _____  Amount of arrearage and other charges at time case filed included in secured claim, if any \$ _____		<b>6 Unsecured Priority Claim</b> <input type="checkbox"/> Check this box if you have an unsecured priority claim Amount entitled to priority \$ _____ Specify the priority of the claim <input type="checkbox"/> Wages, salaries or commissions (up to \$4,650)* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier. 11 U.S.C. § 507(a)(3) <input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(4) <input type="checkbox"/> Up to \$2,100* of deposits toward purchase, lease or rental of property or services for personal, family or household use. 11 U.S.C. § 507(a)(6) <input type="checkbox"/> Alimony, maintenance or support owed to a spouse, former spouse or child. 11 U.S.C. § 507(a)(7) <input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8) <input type="checkbox"/> Other. Specify applicable paragraph of 11 U.S.C. § 507(a)(____) <small>*Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>
<b>7 Credits</b> The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. <b>8 Supporting Documents</b> Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. <b>9 Date-Stamped Copy</b> To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.		THIS SPACE IS FOR COURT USE ONLY  <b>FILED</b> <b>FEB 20 2003</b> <b>BMC</b>   <small>Consoco Inc. Claim 49672005821</small>
Date <b>2/18/03</b>	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any) <b>Rollin M Dick</b>	
Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.		

ATTACHMENT TO PROOF OF CLAIM  
FOR  
ROLLIN M DICK

This Proof of Claim is filed out of an abundance of caution to preserve Claimant's rights of setoff and recoupment, and to otherwise ensure that the Claims may be asserted defensively in the event litigation is filed by Debtor or its successors against the Claimant. Claimant intends to object to Article XI G of the Plan of Reorganization dated January 31, 2003, to the extent that such Plan proposes to enjoin Claimant from asserting rights of setoff and/or recoupment. Claimant expressly reserves the right to contend that rights of recoupment are not "claims" within the meaning of 11 U.S.C. §101(5), that setoff rights under 11 U.S.C. §553 survive confirmation of a plan, and that the defensive use of the Claims may not be discharged or enjoined by a plan.

Rollin M. Dick ("Claimant") asserts claims against one or more Holding Company Debtors, including Conseco, Inc., (the "Debtor")<sup>1</sup> for rights of payment, setoff, subrogation, indemnification and/or recoupment from Debtor under legal and equitable theories including but not limited to breach of contract, failure of consideration, violation of securities and banking laws and/or regulations, fraudulent inducement, fraud, duress, equitable estoppel, and negligence.

The claims are related but not necessarily limited to (1) Debtor's failure to perform as required pursuant to its loan agreements made with Claimant as well as other current or former Debtor directors, officers and employees, including Debtor's failure to perform obligations triggered by a change of control over Debtor, (2) Debtor's default under, or rejection of, or negligence with respect to insurance agreements, including split-dollar insurance agreements, entitling Claimant to indemnification and/or monetary compensation, (3) Debtor's failure to perform as required pursuant to employment and termination agreements, including Debtor's failure to perform obligations triggered when Debtor offered its employees certain structured payment agreements, (4) Debtor's failure to perform as required pursuant to payment agreements, including Debtor's acceptance of payments and security from Claimant notwithstanding the failure of Debtor's promised consideration along with Debtor's failure to perform its obligations and conform its conduct to the inherent requirements of good faith and fair dealing, (5) Debtor's enforcement of loan agreements notwithstanding the regulatory character of those loan agreements, (6) Debtor's inequitable and/or fraudulent conduct and representations in relation to the Claimant and the negotiation, execution and performance of the termination and payment agreements, and, (7) Debtor's failure to perform its obligations to Claimant pursuant to Debtor's Articles of Incorporation and By-Laws, including Debtor's failure to indemnify Claimant for acts taken on behalf or for the benefit of Debtor (collectively, the "Claims"). Current estimate of the monetary amount of these Claims is unknown. Investigation and analysis of the Claims are ongoing and Claimant reserves the right to amend this Proof of Claim.

Notwithstanding the filing of this Proof of Claim, Claimant does not submit to nor consent to the jurisdiction of the Bankruptcy or District Court for the Northern District of Illinois.

The documents relating to the Claims are voluminous, however, a non-exclusive list of such documents is attached hereto as Exhibit "A."

<sup>1</sup> The "Holding Company Debtors" are defined as the following entities: Conseco, Inc., CIHC, Incorporated, CTHC, Inc., and Partners Health Group, Inc.,

### Supporting Documents

- *1996 Director, Executive and Senior Officer Stock Purchase Plan Effective date April 4, 1996*
- *1997 Amended and Restated Director, Executive and Senior Officer Stock Purchase Plan Effective Date August 21, 1997*
- *1998 Amended and Restated Director, Officer and Key Employee Stock Purchase Plan Effective date July 30, 1998*
- *1999 Director and Executive Officer Stock Purchase Plan Effective date September 7 1999*
- *1999 Amended and Restated Director, Officer and Key Employee Stock Purchase Plan Effective date July 30, 1998, as Amended and Restated on November 2, 1999*
- *1999 Amended and Restated Director and Executive Officer Stock Purchase Plan Effective date September 7, 1999, as Amended and Restated on November 2, 1999*
- *Guaranty, Dated as of May 13, 1996*
- *Amended and Restated Guaranty, dated as of August 26, 1997*
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- *April 2, 2001, Letter Agreement Between Conseco, Inc., Jay Alix & Associates and Rollin M Dick Regarding Payment and Collateral Schedule*
- *Conseco Articles of Incorporation with Amendments*
- *Conseco By-Laws*
- *Insurance Agreements*

Exhibit "A"

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

**PROOF OF CLAIM**

Name of Debtor Against Which You Assert Your Claim **Case #02-49672**

Conseco Inc     CIHC Incorporated     CIHC Inc     Partners Health Group Inc

NOTE Check one box only. A separate completed and executed proof of claim form against each of the Debtors against which the creditor wishes to assert a claim. Creditors holding claims against more than one Debtor must file a separate claim in the case of each Debtor against whom the creditor asserts a claim. A creditor will be bound by the Debtor named in its proof of claim.

NOTE This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

**Name of Creditor and Address**

02001928103163

Hilbert Stephen C    c/o David H Kleiman  
1143 W 116th Street    DANN PECAR NEWMAN &  
Carmel IN 46032    KLEIMAN, P C  
One American Sq , #2300  
Indianapolis, IN 46282

Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

Check box if you have never received any notices from the bankruptcy court in this case.

Check box if this address differs from the address on the envelope sent to you by the court.

Creditor Telephone Number ( ) **(317) 632-3232**

CREDITOR TAX ID # \_\_\_\_\_ ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR \_\_\_\_\_

Check here  replaces or amends a previously filed claim dated \_\_\_\_\_

**1 BASIS FOR CLAIM**

Goods sold     Personal injury/wrongful death     Retiree benefits as defined in 11 U.S.C. § 1114(a)

Services performed     Taxes     Wages salaries and compensation (Fill out below)

Money loaned     Other (describe briefly) **See Attachment**

Your social security number \_\_\_\_\_  
Unpaid compensation for services performed from \_\_\_\_\_ to \_\_\_\_\_  
(date) (date)

**2 DATE DEBT WAS INCURRED** Various    **3 IF COURT JUDGMENT, DATE OBTAINED** \_\_\_\_\_

**4 TOTAL AMOUNT OF CLAIM** \$ \_\_\_\_\_ (unsecured)    \$ \_\_\_\_\_ (secured)    \$ \_\_\_\_\_ (unsecured priority)    \$ \_\_\_\_\_ (unliquidated amount for setoff and recoupment purposes only)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below

Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

**5 SECURED CLAIM**

Check this box if your claim is secured by collateral (including a right of setoff)

Brief description of collateral

Real Estate

Motor Vehicle

Other Secured only by rights of setoff/recoupment

value of collateral \$ \_\_\_\_\_

Amount of arrearage and other charges at time case filed included in secured claim above if any \$ \_\_\_\_\_

**6 UNSECURED PRIORITY CLAIM**

Check this box if you have an unsecured priority claim

Specify the priority of the claim

Wages salaries or commissions (up to \$4,650\*) earned within 90 days before filing of the bankruptcy petition or cessation of the Debtor's business whichever is earlier 11 U.S.C. § 507(a)(3)

Contributions to an employee benefit plan 11 U.S.C. § 507(a)(4)

Up to \$2,100 of deposits toward purchase lease or rental of property or services for personal family or household use 11 U.S.C. § 507(a)(6)

Alimony maintenance or support owed to a spouse former spouse or child 11 U.S.C. § 507(a)(7)

Taxes or penalties owed to governmental units 11 U.S.C. § 507(a)(8)

Other Specify applicable paragraph of 11 U.S.C. § 507(a) \_\_\_\_\_

Amounts are subject to adjustment on 4/1/01 and every 3 years thereafter with respect to dates commencing on or after the date of adjustment.

**7 CREDITS** The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim

**8 SUPPORTING DOCUMENTS** Attach copies of supporting documents, such as promissory notes purchase orders invoices itemized statements of running accounts contracts court judgments mortgages security agreements and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available explain. If the documents are voluminous attach a summary.

**9 DATE-STAMPED COPY** To receive an acknowledgment of your claim, please enclose a self-addressed stamped envelope and an additional copy of your claim.

The original of this completed proof of claim form must be sent by mail or hand delivered (FAXES NOT ACCEPTED) so that it is received on or before 5:00 pm, **Prevailing Central Time on February 20, 2003**

**BY MAIL TO**  
Bankruptcy Management Corporation  
Attn Conseco, Inc Claims Agent  
P O BOX 1098  
El Segundo, CA 90245-1098

**BY HAND OR OVERNIGHT DELIVERY TO**  
Bankruptcy Management Corporation  
Attn Conseco, Inc Claims Agent  
1330 East Franklin Avenue  
El Segundo, CA 90245

THIS SPACE FOR COURT USE ONLY

**FILED**

**FEB 20 2003**

**BMC**

Conseco Inc Claim  
49672001590

**DATE SIGNED** 2/17/03

**SIGN** and print the name and title of any of the creditor or other person authorized to file this claim (attach copy of power of attorney if any)

Stephen C Hilbert

Penalty for presenting fraudulent claim is a fine of up to \$500,000 or imprisonment for up to 5 years or both 18 U.S.C. §§ 152 AND 3571

ATTACHMENT TO PROOF OF CLAIM  
FOR  
STEPHEN C HILBERT

This Proof of Claim is filed out of an abundance of caution to preserve Claimant's rights of setoff and recoupment, and to otherwise ensure that the Claims may be asserted defensively in the event litigation is filed by Debtor or its successors against the Claimant. Claimant intends to object to Article XI G of the Plan of Reorganization dated January 31, 2003, to the extent that such Plan proposes to enjoin Claimant from asserting rights of setoff and/or recoupment. Claimant expressly reserves the right to contend that rights of recoupment are not "claims" within the meaning of 11 U.S.C. §101(5), that setoff rights under 11 U.S.C. §553 survive confirmation of a plan, and that the defensive use of the Claims may not be discharged or enjoined by a plan.

Stephen C Hilbert ("Claimant") asserts claims against one or more Holding Company Debtors, including Conseco, Inc., (the "Debtor")<sup>1</sup> for rights of payment, setoff, subrogation, indemnification and/or recoupment from Debtor under legal and equitable theories including but not limited to breach of contract, failure of consideration, violation of securities and banking laws and/or regulations, fraudulent inducement, fraud, duress, equitable estoppel, and negligence.

The claims are related but not necessarily limited to (1) Debtor's failure to perform as required pursuant to its loan agreements made with Claimant as well as other current or former Debtor directors, officers and employees, including Debtor's failure to perform obligations triggered by a change of control over Debtor, (2) Debtor's default under, or rejection of, or negligence with respect to insurance agreements, including split-dollar insurance agreements, entitling Claimant to indemnification and/or monetary compensation, (3) Debtor's failure to perform as required pursuant to employment and termination agreements, including Debtor's failure to perform obligations triggered when Debtor offered its employees certain structured payment agreements, (4) Debtor's failure to perform as required pursuant to payment agreements, including Debtor's acceptance of payments and security from Claimant notwithstanding the failure of Debtor's promised consideration along with Debtor's failure to perform its obligations and conform its conduct to the inherent requirements of good faith and fair dealing, (5) Debtor's enforcement of loan agreements notwithstanding the regulatory character of those loan agreements, (6) Debtor's inequitable and/or fraudulent conduct and representations in relation to the Claimant and the negotiation, execution and performance of the termination and payment agreements, and, (7) Debtor's failure to perform its obligations to Claimant pursuant to Debtor's Articles of Incorporation and By-Laws, including Debtor's failure to indemnify Claimant for acts taken on behalf or for the benefit of Debtor (collectively, the "Claims"). Current estimate of the monetary amount of these Claims is unknown. Investigation and analysis of the Claims are ongoing and Claimant reserves the right to amend this Proof of Claim.

Notwithstanding the filing of this Proof of Claim, Claimant does not submit to nor consent to the jurisdiction of the Bankruptcy or District Court for the Northern District of Illinois.

The documents relating to the Claims are voluminous, however, a non-exclusive list of such documents is attached hereto as Exhibit "A."

<sup>1</sup> The "Holding Company Debtors" are defined as the following entities: Conseco, Inc., CHC, Incorporated, CHIC, Inc., and Partners Health Group, Inc.,

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- *1999 Amended and Restated Director, Officer and Key Employee Stock Purchase Plan Effective date July 30, 1998, as Amended and Restated on November 2, 1999*
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- *Conseco Articles of Incorporation with Amendments*
- *Conseco By-Laws*
- *Insurance Agreements*

Exhibit "A"

**D.E. 6994**

**FILED**  
**RECEIVED**  
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

**FILED**

FEB 8 2005  
IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

**KENNETH S. GARDNER, CLERK**  
**PS REP. - RD**

**RECEIVED**  
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
FEB 8 2005

05 FEB - 8 PM 5: 2

In re: )  
)  
Consoco, Inc., )  
)  
Debtors. )

Chapter 11  
Case No. 02 B49672  
Honorable Carol A. Doyle  
(Jointly Administrated)

**KENNETH S. GARDNER, CLERK**  
**PS REP. - RD**

**CONSECO, INC.'S SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Bankruptcy Rule 7056-1, Consoco, Inc. submits the following list of material facts as to which there is no dispute, and which entitle Consoco to summary judgment in this matter. On September 21, 2004, Consoco filed a Statement Of Undisputed Facts in connection with its previous motion for summary judgment. (Doc. No. 6904) On October 15, 2004, Consoco filed a Response To The Trusts' Statement Of Undisputed Facts And Statement Of Additional Undisputed Facts. (Doc. No. 6917) Consoco respectfully incorporates those documents herein by reference, and sets forth below only those additional facts necessary to complete the factual record and support its renewed motion for summary judgment.

**Additional Undisputed Facts**

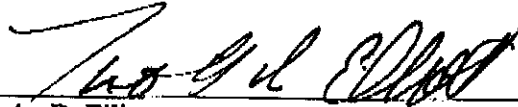
23. The Split-Dollar Agreements were approved by Consoco's Compensation Committee on December 8, 1998. True and accurate copies of the minutes for that meeting and presentation materials for that meeting are attached to the Kindig Affidavit. See Ex. A hereto.

24. Between December 17, 2002 and February 15, 2003, the FBO Dick Family 1998 IRR Trust, the Amended Hilbert Residence Maintenance Trust, and Stephen C. and TomiSue Hilbert Irrevocable Trust ("Trusts") did not exercise their option under Paragraphs 8 and 9 of the various Split-Dollar Agreements by reimbursing Consoco for its premium payments under any of the insurance policies that are the subject of the Split-Dollar Agreements. See Ex. A.



DATED: February 8, 2005

Respectfully submitted,



Timothy D. Elliott  
Scott A. McMillin  
KIRKLAND & ELLIS LLP  
200 East Randolph Drive  
Chicago, IL 60601  
Telephone: (312) 861-2000  
Facsimile: (312) 861-2200

Attorneys for Conseco, Inc.

**CERTIFICATE OF SERVICE**

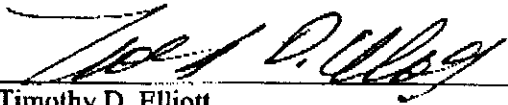
I, Timothy D. Elliott, an attorney, certify that I served true and correct copies of the foregoing CONSECO, INC.'S SUPPLEMENTAL STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT, by facsimile and Federal Express, on February 8, 2005, upon:

John F. Kinncy  
Freeman, Freeman & Salzman, P.C.  
401 North Michigan Avenue  
Suite 3200  
Chicago, IL 60611-4207  
Telephone: (312) 222-5100  
Facsimile: (312) 822-0870

William L. O'Connor  
Dann Pecar Newman & Kleiman, P.C.  
Suite 2300, One American Square  
Indianapolis, IN 46282  
Telephone: (317) 632-3232  
Facsimile: (317) 632-2962

**BY MESSENGER**

**BY FEDERAL EXPRESS**

  
\_\_\_\_\_  
Timothy D. Elliott

# EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re: ) Chapter 11  
)  
Conseco, Inc., ) Case No. 02 B49672  
) Honorable Carol A. Doyle  
Debtors. ) (Jointly Administered)  
)

AFFIDAVIT OF KARL KINDIG

STATE OF INDIANA )  
)ss:  
COUNTY OF HAMILTON )

1. My name is Karl Kindig. I am over the age of 21 years, of sound mind and capable of making this Affidavit. The facts and circumstances stated herein are of my own personal knowledge.

2. I am Secretary of Conseco, Inc. and a member of legal department at that company. In my capacity with Conseco, Inc., I am personally familiar with the manner in which the company generates and maintains the minutes for the meetings of its board of directors and compensation committee. Attached to this affidavit as Exhibit A is a true and correct copy of the minutes for the Dec. 8, 1998 meeting of Conseco, Inc.'s compensation committee, along with a copy of the presentation materials for that meeting. This document was created near the time of the Dec. 8, 1998 meeting by a person with knowledge of the events and materials presented at that meeting. Such minutes are generated, maintained and relied upon in the ordinary course of Conseco's business.

3. In my capacity as a member of Conseco's legal staff, I am familiar with the Split-Dollar Agreements and the course of payments made in connection with those Agreements and the underlying policies. Between December 17, 2002 and February 15, 2003, the FBO Dick Family 1998 IRR Trust, the Amended Hilbert Residence Maintenance Trust, and

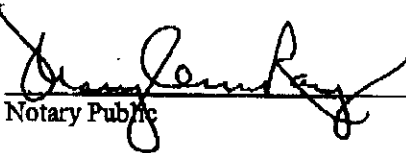
Stephen C and TomiSue Hilbert Irrevocable Trust ("Trusts") did not exercise any option under Paragraphs 8 or 9 of the various Split-Dollar Agreements by reimbursing Conseco for its premium payments under any of the insurance policies that are the subject of the Split-Dollar Agreements.

4. I declare, under penalty of perjury, that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

  
KARL KINDIG

Sworn to and subscribed to before  
me this 8<sup>th</sup> day of February,  
2005.

  
Notary Public

MINUTES OF A MEETING OF THE COMPENSATION COMMITTEE  
OF THE BOARD OF DIRECTORS OF CONSECO, INC.

Carmel, Indiana

December 8, 1998

A meeting of the Compensation Committee of the Board of Directors of Conseco, Inc. ("Conseco" or the "Company") was held on December 8, 1998, beginning at approximately 1:00 p.m. All of the members of the Compensation Committee were present other than M. Phil Hathaway. James D. Massey, Chairman of the Compensation Committee, presided at the meeting. Also present by invitation were Stephen C. Hilbert, Chairman of the Board and Chief Executive Officer, Rollin M. Dick, Executive Vice President and Chief Financial Officer and John J. Sabl, Executive Vice President, General Counsel and Secretary of the Company.

It was noted that the Company's current match for employee contributions (i.e., 50% of the first 4% of pay contributed) under its ConsecoSave plan was lower than that used by a number of other employers with respect to their 401(k) plans. It was agreed in principle that goals should be developed (at least for 1999) so that this 50% percentage could be increased to 75% or 100% if such goals are met. It was noted that a more formal proposal would be forthcoming.

Thomas J. Kilian, the Company's Executive Vice President and Chief Operations Officer, gave a presentation concerning proposed option grants for 1998. It was noted that a formal proposal would be submitted to the Committee in the near future for its consideration.

The Compensation Committee next considered the grant of options. After discussion, the following resolution was moved, seconded and unanimously adopted:

RESOLVED, that the Compensation Committee hereby grants non-qualified stock options to Frank Krekeler for 5,000 shares and to John Mints for 20,000 shares of the Company's common stock under the Company's 1997 Non-Qualified Stock Option Plan; that the exercise price for such options shall be the average of the reported high and low sales prices for the Company's common stock on December 8, 1998; that such options shall vest 50% on December 8, 2001, an additional 25% on December 8, 2002 and the remaining 25% on December 8, 2003; and that such options shall expire on December 8, 2008; provided that the grant of each such option is conditioned upon the optionee promptly entering into a noncompetition agreement with Green Tree Financial Corporation ("Green Tree") in the form specified by Green Tree.

Mr. Hilbert stated that he felt that the Company should offer employment agreements to Jim Adams and to Max Bublitz. After discussion, the following resolution was moved, seconded and unanimously adopted:

**RESOLVED**, that the Company shall offer employment agreements to James S. Adams, the Company's Senior Vice President, Chief Accounting Officer and Treasurer, and Maxwell E. Bublitz, the Company's Senior Vice President, Investments substantially similar to the Company's agreement with Thomas J. Kilian, and that Stephen C. Hilbert, the Company's Chairman of the Board, is authorized to execute and deliver such contracts with Mr. Adams and Mr. Bublitz substantially in such form but with such changes therein as Mr. Hilbert shall approve, such approval to be conclusively evidenced by such execution.

The Compensation Committee next considered the split-dollar life insurance program previously discussed at its October 28, 1998 meeting and as more fully set in the Memorandum from Mr. Hilbert to the Compensation Committee. After discussion, the following resolution was moved, seconded and unanimously adopted:

**RESOLVED**, that the Company purchase split-dollar life insurance with respect to Stephen C. Hilbert and Rollin M. Dick on a basis substantially consistent with that described in the Memorandum dated December 8, 1998 from Mr. Hilbert to the Compensation Committee (a copy of which shall be attached to these minutes of this meeting) and that the officers of the Company are authorized to take all actions in the name and on behalf of the Company as any of them deems necessary or advisable in connection therewith.

There being no further business to come before the Committee, the meeting was adjourned.

  
\_\_\_\_\_  
James D. Massey, Chairman

TO: Compensation Committee  
FROM: Steve Hilbert  
DATE: December 8, 1998

## THE ISSUE

As we discussed at the October 28th Compensation Committee meeting, Conseco has encouraged its executives to acquire and hold a significant position in Conseco stock. While this policy has served Conseco and its executives very well, it causes some concern because the estate of a deceased executive could experience a liquidity crisis. Estate taxes due at death could force the estate to sell massive amounts of Conseco stock -- perhaps in the face of a weak market or during a period where blackouts, pooling of interest transactions or pending announcements interfered with the sale.

This circumstance could cause significant harm to Conseco's stock price and may someday cause the board to consider repurchasing shares from an estate to avoid dumping the shares on a soft market. We feared some of this after Larry Inlow's death, but fortunately a strong stock market, the use of Larry's marital deduction to defer part of the tax, and his somewhat smaller stock position allowed the estate to achieve adequate liquidity without hurting the stock price. Since Conseco was in a stock repurchase program at the time Larry's estate was selling, we purchased some shares directly from the estate.

## PROPOSED SPLIT DOLLAR LIFE INSURANCE PROGRAM

I discussed on October 28 our use of a split dollar life insurance program for me and Rollie to alleviate this liquidity problem in the future. In split dollar plans, the company pays almost all (the executive pays a small amount equal to the portion the IRS tables treat as compensation if paid by the company) of the premiums on a life insurance policy on the life of the executive, and retains an interest in the policy equal to the premiums paid. Therefore, upon death of the executive, a portion of the death benefit (equal to the cumulative premiums paid by the company) is returned to the company and the remainder is paid to the beneficiary named in the policy. If the policy is surrendered before death, the cash value (up to the cumulative premiums paid by the company) is returned to the company and the remainder, if any, is paid to the executive.

This is a relatively low cost program, the company's real cost is only the "time value of money" advanced to pay the premium (and, if the policy is surrendered before cash value exceeds cumulative premium paid, the net short fall). For accounting purposes, the annual excess of premiums paid over the increase in cash value is charged to expense -- but the expense is reversed when cash value equals cumulative payments. This expense is typically small and reverses within a short time.



## IMPLEMENTATION OF PROGRAM FOR LIFE INSURANCE ON ME

We have now implemented the program we discussed at the October 28 meeting for me. We now have in force split dollar insurance on me with face amount coverage of \$87.5 million and an annual premium of about \$900,000 that is to be paid by Consec for 10 years.

In order to qualify for the lowest possible premium per dollar of coverage, we used "second to die" coverage. These policies have a lower premium because they pay a benefit only after the death of both the executive and his spouse. This is a logical program for our split dollar program since the majority of the estate tax can be postponed until the second death. However, to justify the use of these lower premium policies, the company agreed to (i) pay the total planned premium (i.e., the \$900,000 premium for ten years on the plan described above) and (ii) keep the policy in force until the death benefits are paid, even if the executive should die during that period. This assures that the liquidity would be available when needed because of the death of the second to die and that the company's investment in the policy would remain in place until the second death.

The policies will be held by a trust I have organized for this purpose. The expense (i.e., excess of first year premium over first year cash value) recorded in the first year is about \$850,000, in the second year is \$600,000, and in the third year is \$250,000. Thereafter income is recorded (i.e., annual cash value increase is more than annual premium) until the eighth year when the cumulative cash value equals cumulative premiums.

## RECOMMENDATION FOR LIFE INSURANCE ON ROLLIE

Rollie's estate will also face a liquidity issue that could be troublesome for Consec, but the ages of Rollie and his spouse result in proportionately more premiums to achieve the needed liquidity.

A program to provide \$10 million liquidity at the second death requires a premium of about \$650,000 for ten years. However, Rollie's policy builds cash value proportionately faster so the cash value exceeds premiums paid in the third year.

The expense on this program in the first year (i.e., excess of first year premium over first year cash value) is only about \$100,000, which is fully recovered in the third year.

I therefore recommend that we proceed with a similar agreement for a split dollar program on the joint lives of Rollie and his spouse.

Compensation Committee  
December 8, 1998  
Page three

## RECOMMENDATION FOR OTHERS

No other executive has such a concentration of Conseco stock that sales by his or her estate would likely cause Conseco's market price to suffer.

## KEY MAN INSURANCE

We have increased the amount of key man life insurance protection for Conseco (i.e., life insurance on executives payable to Conseco to cover the loss sustained by the company) to \$19 million on me and \$10 million each on Rollie Dick, Ngairé Cuneo, John Sabl, and Tom Kilian. These are term policies with total annual premiums of about \$235,000.

**D.E. 7016**

7016

(21)

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION  
05 APR -6 PM 5:46

In re: ) Chapter 11  
)  
Conscco, Inc., ) Case No. 02 B49672  
) Honorable Carol A. Doyle  
) (Jointly Administered)  
Debtors. )

**CONSECO, INC.'S RESPONSE TO THE TRUSTS' STATEMENT OF  
"MATERIAL FACTS IN DISPUTE" AND "FACTS" AND CONSECO'S STATEMENT  
OF ADDITIONAL MATERIAL FACTS**

**PRELIMINARY STATEMENT**

Parties opposing a motion for summary judgment are required to follow the mandates of  
Local Rule 7056-2. That rule provides:

Each party opposing a motion for summary judgment under Fed. R. Bank.  
P. 7056 shall serve and file the following:

- (1) a supporting memorandum of law;
- (2) a concise response to the movant's statement of facts that shall contain:
  - (a) a response to each numbered paragraph in the moving party's statement, including, in the case of any disagreement, *specific references to the affidavits, parts of the record, and other supporting materials relied upon*; and
  - (b) a statement, *consisting of short numbered paragraphs, of any additional facts that require the denial of summary judgment, including references to the affidavits, parts of the record, and other supporting materials relied upon*; and
- (3) any opposing affidavits and other materials referred to in Fed. R. Civ. P. 56(e).

Bankr. Local Rule 7056-2 (emphasis added). The Trusts' response brief wholly fails to meet the requirements of Local Rule 7056-2. First, the section labeled "Material Facts in Dispute" in the

**FILED**  
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

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Trusts' response brief does not contain any "references to affidavits, parts of the record, and other supporting materials relied upon." Second, the section labeled "Facts" does not consist of "short numbered paragraphs" or for the most part contain any "references to the affidavits, parts of the record, and other supporting materials relied upon." Because the Trusts have failed to abide by the Local Rules, the alleged "Material Facts in Dispute" and "Facts" submitted by the Trusts should be disregarded.

Out of an abundance of caution, Conseco submits this statement in response to the Trusts' statement of "material facts in dispute" and "facts." In addition, under Local Rule 7056-1(C) Conseco, as the moving party, submits a concise reply statement of "additional material facts not in dispute." Finally, the Trusts failed to dispute any of Conseco's Supplemental Statement of Undisputed Facts in Support of its Renewed Motion for Summary Judgment. As a result, Conseco's supplemental facts must be deemed admitted. Bankr. Local Rule 7056-2(B) ("All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party.").

**Conseco, Inc.'s Response To The Trusts' Statement of "Material Facts in Dispute"**

1. The Split-Dollar Agreements were executory contracts and did not terminate upon the filing of Conseco's bankruptcy.

**RESPONSE:** Denied. The Court has already ruled that the Split-Dollar Agreements were non-executory contracts that terminated upon the filing of Conseco's bankruptcy. (Exhibit 1, 1/26/05 Tr.)

2. Conseco did not exercise its rights to be repaid any of its policy premiums and, therefore, waived that right.

**RESPONSE:** Denied. This is a legal argument which is specifically addressed in Conseco's Reply in Support of its Renewed Motion for Summary Judgment. Conseco incorporates that reply as if fully set forth herein.

3. Conseco first materially breached the Agreements and is not allowed to sue to enforce a contractual right to be repaid policy premiums.

**RESPONSE:** Denied. This is a legal argument which is specifically addressed in Conseco's Reply in Support of its Renewed Motion for Summary Judgment (as well as the Court's ruling on January 26, 2005). Conseco incorporates that reply as if fully set forth herein.

4. Conseco has lost or waived its option to take ownership or liquidate the policies for their cash surrender value.

**RESPONSE:** Denied. This is a legal argument which is specifically addressed in Conseco's Reply in Support of its Renewed Motion for Summary Judgment. Conseco incorporates that reply as if fully set forth herein.

5. Even if the Agreements are not executory, the Trusts should continue to hold the policies. Upon payment of a death benefit, Conseco is not entitled to be paid because it has waived its right and the Agreements, according to Conseco, are now terminated.

**RESPONSE:** Denied. This is a legal argument which is specifically addressed in Conseco's Reply in Support of its Renewed Motion for Summary Judgment. Conseco incorporates that reply as if fully set forth herein.

**Conseco, Inc.'s Response to the Trusts' Response Brief Section Titled "Facts"<sup>1</sup>**

6. After the termination of the Split-Dollar Life Insurance Agreements, the Trusts had sixty (60) days in which to exercise its option to retain a release of the Collateral Assignment.

**RESPONSE:** Admitted, but Conseco further states that the Split-Dollar Agreements speak for themselves with respect to the parties' contractual rights, options and obligations.

7. After expiration of this sixty (60) day period, Conseco was then vested with the right to exercise its option to either:

---

<sup>1</sup> As noted above, the Trusts' response brief is not in conformity with the Local Rules because the section titled "Facts" does not consist of "short numbered paragraphs." Bankr. Local Rule 7056-2(A). For the court's convenience, Conseco has attempted to list the alleged "Facts" appearing in the Trusts' response brief in short numbered paragraphs.

1. Request that the Trusts execute documents to transfer the interest of the Trusts in the insurance policies to Conseco, or;

2. To exercise its right to be repaid the premiums that it had paid from the cash value of the life insurance policies owned by the Trusts. (citing the Split-Dollar Life Insurance Agreements)

**RESPONSE:** Admitted, but Conseco further states that the Split-Dollar Agreements speak for themselves with respect to the parties contractual rights, options and obligations.

8. Section 9 of the Agreements is not mandatory and does not require Conseco to exercise either of its options. The Trusts would only be required to transfer ownership "at the *request* of the Corporation . . ." (Id.) (emphasis added) With regard to the cash surrender value, the Agreements state "the Corporation *may* enforce its right . . ." (Id.) (emphasis added)

**RESPONSE:** Admitted, but Conseco further states that the Split-Dollar Agreements speak for themselves with respect to the parties contractual rights, options and obligations.

9. Conseco has never exercised either option. (Conseco's renewed motion ¶9 p.3)

**RESPONSE:** Denied. Conseco further states that it attempted to exercise its option but was threatened with additional litigation if it carried through with its plans. Conseco further states that it will exercise its options within a reasonable amount of time after the Court's Order becomes final.

10. Conseco's first notice to the Trusts that it even had an *intent* regarding doing some action in the unspecified future was on September 8, 2004. (citing Exhibit J)

**RESPONSE:** Admitted, but Conseco further states that it was presently embroiled in litigation with the Trusts, making any attempt to exercise its rights prior to the completion of that litigation futile.

11. Because Conseco waived its option to take or liquidate the policies, and because Conseco first breached the Agreements, the Trusts should remain as the sole and exclusive owners of the policies, and all death benefits should be paid to the Trusts.

**RESPONSE:** Denied. This is a legal argument (not supported by any record evidence) which is specifically addressed in Conseco's Reply in Support of its Renewed Motion for Summary Judgment. Conseco incorporates that reply as if fully set forth herein.

12. Because the Trusts are entitled to all the death benefits, they also have been damaged because Conseco ceased paying premiums in 2001. This failure to pay premiums has reduced the amount of paid-up insurance which otherwise would currently be in place if Conseco had not breached the Agreements pre-petition.

**RESPONSE:** Denied. This is a legal argument (not supported by any record evidence) which is specifically addressed in Conseco's Reply in Support of its Renewed Motion for Summary Judgment. Conseco incorporates that reply as if fully set forth herein.

13. The Court should hold a hearing to hear testimony regarding what the paid-up insurance benefits and cash value the Policies would have been if Conseco had not breached in 2001.

**RESPONSE:** Denied. This is a legal argument (not supported by any record evidence) which is specifically addressed in Conseco's Reply in Support of its Renewed Motion for Summary Judgment. Conseco incorporates that reply as if fully set forth herein.

14. Even if the Court adheres to its preliminary ruling that the Agreements are not executory the Trusts are still damaged because each of the Policies should have had one more year of premium payments from Conseco prior to its bankruptcy filing which would increase the paid up death benefit and the cash value of the Policies.

**RESPONSE:** Denied. This is a legal argument (not supported by any record evidence) which is specifically addressed in Conseco's Reply in Support of its Renewed Motion for Summary Judgment. Conseco incorporates that reply as if fully set forth herein.

15. To accept Conseco's new argument means that Conseco is allowed to enforce a contract against the non-breaching party and to use a contractual option it abandoned more than a year ago.

**RESPONSE:** Denied. This is a legal argument (not supported by any record evidence) which is specifically addressed in Conseco's Reply in Support of its Renewed Motion for Summary Judgment. Conseco incorporates that reply as if fully set forth herein.



**Conseco, Inc.'s Statement of Additional Undisputed Facts**

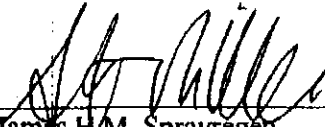
1. In response to Conseco's counsel's letter to the Trusts, dated September 8, 2004 and attached as Exhibit J to the Trusts' Response to Conseco's Supplemental Motion for Summary Judgment on Claims Relating to Split-Dollar Agreements, the Trusts' counsel wrote Conseco's counsel a letter on September 14, 2004. (Exhibit 2)

2. That letter provided in part that the Trusts "would consider your taking of the cash value of the policies not only to be an additional breach of the Split-Dollar Agreements, but also to be a conversion as well." *Id.*

3. The letter also provided that "the Split-Dollar Agreements are executory contracts and thus are subject to 11 U.S.C. § 365(e) and thus, the termination clause is invalid." *Id.*

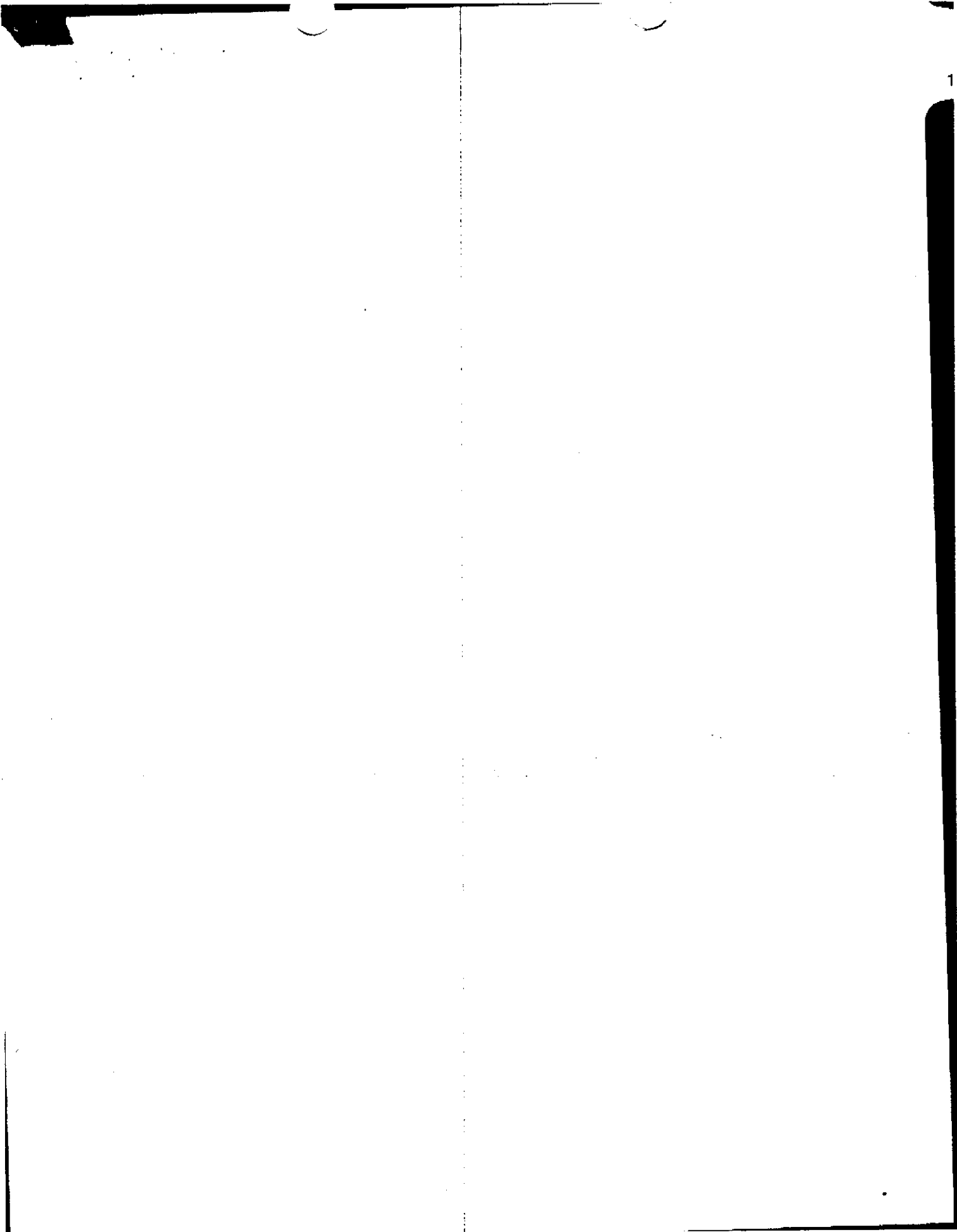
Chicago, Illinois  
DATED: April 6, 2005

Respectfully submitted,  
KIRKLAND & ELLIS



---

James H.M. Sprayregen  
Scott A. McMillin  
KIRKLAND & ELLIS LLP  
200 East Randolph Drive  
Chicago, IL 60601  
Telephone: (312) 861-2000  
Facsimile: (312) 861-2200



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Conseco, Inc.,

) No. 02 B 49672  
) Chicago, Illinois

) 2:00 p.m.

Debtor.

) January 26, 2005

TRANSCRIPT OF PROCEEDINGS BEFORE THE  
HONORABLE CAROL DOYLE

APPEARANCES:

For Debtor:

Mr. Tim Elliott;

Also Participating:

Mr. Bill O'Connor;  
(telephonically)

Court Reporter:

Jackleen DeFini, CSR, RPR  
U.S. Courthouse  
219 South Dearborn  
Room 661  
Chicago, Il. 60604.

1 THE CLERK: Conseco and related  
2 matters.

3 MR. ELLIOTT: Tim Elliott, Kirkland &  
4 Ellis, for Conseco. I think Mr. O'Connor is on the  
5 phone.

6 Mr. O'Connor, are you there?

7 MR. O'CONNOR: Bill O'Connor for the  
8 trust.

9 THE COURT: I do have an oral ruling  
10 to read into the record. I will tell you what the  
11 bottom line is, but there is a hitch in the bottom  
12 line. You both moved for summary judgment. But I  
13 don't believe either of you has really moved for  
14 final judgment on the claim one way or the other.  
15 And there's really no such thing as partial summary  
16 judgment on an issue within a claim. You can resolve  
17 single claims in a multi-claim complaint, but you  
18 can't get judgment on a legal issue that resolves  
19 less than the whole claim. And no matter how I rule  
20 on it, the damages aren't resolved, et cetera. So  
21 there is no basis for me to enter summary judgment  
22 for either party.

23 A lot of people do this. They file  
24 for summary judgment. They want issues narrowed, et  
25 cetera. I think that's what you both are trying to

1 accomplish with your motions. And certainly the way  
2 I'm going to resolve it, I'm going to give you the  
3 rulings that you want on two legal issues. I'll tell  
4 you what those are and then I'll read my ruling into  
5 the record. Just so you don't have to wait until the  
6 ends.

7 I conclude that contracts are not  
8 executory contracts. So on that issue I will rule in  
9 favor of Conesco. But I also find that the debts are  
10 not mutual and setoff is not appropriate. So on that  
11 issue I am concluding in favor of the trusts. But I  
12 am not going to enter summary judgment for either  
13 side. I don't think it's appropriate. I cannot rule  
14 at this point on disallowing the claim or allowing  
15 the claim, which seems to be the issue before me, the  
16 claims of the trusts.

17 So I will read my opinion into the  
18 record. I'm going to treat them as motions in  
19 limine, which is the way courts sometimes avoid  
20 wasting all the effort put into an issue by the  
21 parties, as well the court. And I think in this case  
22 the parties essentially told me that these issues are  
23 going to decide how the parties are going to go from  
24 here. And of course you would all have appeal rights  
25 eventually. But to the extent you wanted to resolve

1 it otherwise, this would give you at least the  
2 court's view on these legal issue.

3 So with those remarks, let me just  
4 read my opinion into the record. It's about ten or  
5 11 pages, but I haven't polished it enough that I  
6 want to put it into a written opinion. So I'm just  
7 going to read it into the record and then you can get  
8 a transcript of it.

9 This matter is before the court on  
10 motions for summary judgment filed by Conseco and by  
11 owners of five life insurance policies collectively  
12 referred to as "the trusts" towards which Conseco  
13 paid premiums under, quote, split-dollar agreements,  
14 close quote. For the reasons I shall state the court  
15 will treat the motions as motions in limine and  
16 concludes that the contracts are not executory  
17 contracts and that Conseco is not entitled to set off  
18 amounts allegedly owed it by two former executives,  
19 Stephen Hilbert and Rollin Dick.

20 Section I, Substantive Issues -  
21 Conseco asks the court to declare that the  
22 split-dollar agreements are not executory contracts  
23 under 11 USC Section 365, and therefore that the  
24 agreements were, by their own terms, terminated upon  
25 Conseco's filing for bankruptcy in December 2002.

1           The trusts assert that split-dollar  
2 agreements are executory contracts that were rejected  
3 upon confirmation of Conseco's plan, and that Conseco  
4 is liable for their breach as a result of the  
5 rejections. The trusts also seek a finding that  
6 Conseco is not entitled to set off amounts allegedly  
7 owed to it by Hilbert and Dick against any damages  
8 for which Conseco may be liable on contracts.

9           Section II - Procedural Issue - The  
10 problem with both motions is that either seeks final  
11 judgment on an entire claim. The trusts have filed  
12 claims against estate. Conseco has filed objections  
13 to those claims, which are contested matters under  
14 Bankruptcy Rule 9014. Bankruptcy Rule 7056 applies  
15 to contested matters and incorporates Rule 56 of the  
16 Federal Rules of Civil Procedure. However, summary  
17 judgment under Rule 56 cannot be granted with respect  
18 to a part of a single claim. See e.g., Commonwealth  
19 Insurance Company versus O. Henry Tent & Awning  
20 Company, 266 F.2d 200, page 201, Seventh Circuit  
21 1959; Ambre versus Joe Madden Ford, 881 F.Supp. 1187,  
22 1193, Northern District of Illinois, 1987; Quintana  
23 versus Byrd, 669 F.Supp. 849, 850, Northern District  
24 of Illinois, 1987; Capital Records, Inc. versus  
25 Progress Record Distributing Inc., 106 F.R.D. 25, 28,

1 Northern District of Illinois, 1985.

2           These decisions reason that Rule 56  
3 contemplates entry of a, quote, "judgment," close  
4 quote, and Rule 54(a) defines a, quote, "judgment,"  
5 close quote, as an order that can be appealed. An  
6 order disposing of fewer than all issues in a claim  
7 cannot be appealed. See generally Capital Records,  
8 106 F.R.D. at 28, 29. Rule 56(d) provides for  
9 findings of material facts that exist without  
10 substantial controversy when an entire claim cannot  
11 be resolved, but it does not provide for a  
12 determination of discrete legal issues that resolve  
13 less than the entire claim. Therefore, the court  
14 cannot grant a motion for summary judgment on  
15 anything less than an entire claim.

16           In this case, all the facts relevant  
17 to the two key legal issues addressed in the motions  
18 for summary judgment are undisputed. However,  
19 neither party has sought a final judgment in a  
20 specific amount, nor provided the basis for the court  
21 to enter any such final judgment. Therefore, the  
22 court cannot grant either motion for summary  
23 judgment.

24           Courts sometime treat motions like  
25 these as motions in limine narrowing the issues for



1 trial as a way to salvage some of the work the  
2 parties and the court have done. See e.g., Chemical  
3 Waste Management versus Sims, 939 F. Supp. 599 at  
4 page 602, Northern District of Illinois, 1996.

5 Because neither party has raised the issue of whether  
6 summary judgment may procedurally be granted here,  
7 and because the parties have indicated that ruling on  
8 the two key issues raised in the motions may result  
9 in resolution of the claims objections, the court  
10 will treat the motions for summary judgment as  
11 motions in limine.

12 Section III - Undisputed Facts

13 The following are undisputed facts  
14 taken from the parties' briefs and 7056-1 statements  
15 of facts. In 1998 Consecoco agreed to contribute  
16 premiums towards life insurance policies under which  
17 Stephen Herbert and Rollin Dick, Consecoco's CEO and  
18 CFO at the time, and their spouses were covered.  
19 Five life insurance policies, (four for Hilbert and  
20 one for Dick) worth between \$10 and \$25 million each,  
21 were executed with five different insurance  
22 companies. The duties to pay for these policies were  
23 set forth in five nearly identical split-dollar  
24 agreements executed by Consecoco, Hilbert and Dick and  
25 the owners of the policies, (the trusts). Hilbert

1 and Dick each created independent trusts that are the  
2 owners and beneficiaries of the life insurance  
3 policies. These trusts filed claims in Consecos  
4 bankruptcy. Consecos has objected to the trusts'  
5 claims.

6 Under the split-dollar agreements,  
7 which are governed by Indiana law, Consecos agreed to  
8 pay annual premiums towards Hilbert's and Dick's life  
9 insurance policies. The policies state that  
10 Consecos's payment was an, quote, "employment benefit"  
11 for Hilbert and Dick and was made due to the  
12 Consecos's, quote, "desire to continue to retain  
13 (their) services," close quote.

14 Paragraph C, Hilbert and Dick or the  
15 trusts were also required to pay a portion of the  
16 policy premiums, but Consecos determined the amount  
17 due from employees under applicable tax law,  
18 collected the payment, and forwarded the full payment  
19 to the insurance companies.

20 The insurance policies provided that  
21 upon the death of either the employee, or both the  
22 employee and his wife, quote, "the corporation,  
23 (Consecos), and the owner shall cooperate to take  
24 whatever action is necessary to collect the death  
25 benefit. The corporation shall have the unqualified

1 right to receive a portion of such death benefit  
2 equal to the total amount of the premiums paid by  
3 it." Paragraph 6(b). Upon the death of the  
4 employee, and in most cases his wife, the death  
5 benefit would pay to the proper trust fund. The  
6 insurance company would then reimburse Conseco for  
7 its premium payments. The, quote, "sole right,"  
8 close quote, of Conseco was "to be repaid the amounts  
9 which it had paid toward the premiums on the policy,"  
10 close quote. Conseco itself had "no incidents of  
11 ownership." Agreement paragraph 2(a). Conseco also  
12 obtained a collateral assignment of each policy from  
13 the trusts to ensure that it would receive  
14 reimbursement for its premium payments.

15 Each split-dollar agreement also  
16 specified that it would terminate if either Conseco  
17 went bankrupt or if the employee or owner failed to  
18 pay Conseco a share of the premiums. Paragraph 7.  
19 Upon termination of the split-dollar agreement, the  
20 owner of the policy had the option of purchasing the  
21 policy from Conseco (and thus releasing the  
22 collateral assignment) by reimbursing Conseco for its  
23 payments towards the policy. If, within 60 days, the  
24 owner did not exercise this option to purchase the  
25 policy, Conseco had the choice of either becoming the

1 owner of the policy or surrendering the policy and  
2 taking reimbursement from the proceeds. Agreement  
3 paragraph 8.

4           Conseco stopped making payments on the  
5 insurance policies in December 2001, one year before  
6 it filed for bankruptcy. The employees or the trusts  
7 continued to make payments on the policies. The  
8 employees (Hilbert and Dick) and the trusts have each  
9 filed claims in Conseco's bankruptcy and allege that  
10 Conseco is liable for breach of the split-dollar  
11 agreements. Conseco objected to these claims on a  
12 number of grounds, including that the split-dollar  
13 agreements were non-executory contracts that had  
14 terminated when Conseco filed for bankruptcy in  
15 December of 2002.

16           Prior to Conseco's filing for  
17 bankruptcy, Hilbert and Dick also participated in  
18 Conseco's Director and Officer (D&O) Loan Program.  
19 This program allowed certain employees to borrow  
20 money in order to purchase Conseco stock. The loans  
21 were due to be paid on December 31, 2003. However,  
22 the loans became due on the day that Conseco filed  
23 for bankruptcy (December 17 2002) because bankruptcy  
24 was an, quote, "event of default," close quote, under  
25 the loan documents. Conseco has satisfied its

1 guarantee of the loans and now contends that it is  
2 subrogated to the lender banks' rights under the  
3 notes to collect what is owed from Hilbert and Dick,  
4 and others.

5 Section IV - The Split-Dollar  
6 Agreements are not Executory Contracts

7 Conseco seeks a ruling that the  
8 split-dollar agreements are not executory contracts.  
9 The court concludes that the agreements are not  
10 executory contracts as a matter of law.

11 The characterization of the agreements  
12 is important because the clause terminating the  
13 split-dollar agreements upon Conseco's bankruptcy  
14 will be given effect only if the agreements are not  
15 classified as executory contracts. Section 365 of  
16 the Code provides, in part, that, quote,  
17 "Notwithstanding a provision in an executory  
18 contract...an executory contract...may not be  
19 terminated...at any time after the commencement of  
20 the case solely because of a provision in such  
21 contract...that is conditioned on...the commencement  
22 of a case under this title." That is the end of the  
23 quote.

24 If the agreements are deemed executory  
25 contracts, the termination clause is ineffective and

1 Consecoco must either accept or reject the contracts  
2 after filing for bankruptcy, and would be liable for  
3 breach if it chose to reject them. 3 Collier on  
4 Bankruptcy 365.09 (15th ed. revised 2000); in re  
5 Crippin, 877 F2d. 594 page 597, 1989. The trusts  
6 argue that the agreements are executory contracts and  
7 that Consecoco therefore is liable for rejecting and  
8 breaching them.

9           The bankruptcy code does not define  
10 executory contract. The Seventh Circuit defines an  
11 executory contract as one where, quote, "significant  
12 unperformed obligations remain on both sides," and  
13 adopts the Countryman definition: An executory  
14 contract is one where, quote, "the obligation of both  
15 the bankrupt and the other party are so far  
16 unperformed that the failure of either to complete  
17 performance would constitute a material breach  
18 excusing performance of the other," close quote.  
19 Mitchell versus Streets (in re Streets & Beard Farm  
20 Partnership), 882 F2d. 233, 235, Seventh Circuit,  
21 1989, citing Vern Countryman for Executory Contracts  
22 in Bankruptcy, part I, 57 Minnesota Law Review, 439,  
23 60, 1974; see also Enterprise Gas Systems versus  
24 United States; in re Columbia Gas Systems, 50 F.3d  
25 233, 240-241, Third Circuit, 1995. Therefore if any

1 of the parties' duties is deemed immaterial, then the  
2 contract is not executory.

3           The determination of the materiality  
4 of an obligation is a, quote, "question of fact  
5 involving inquiry into whether the breach worked to  
6 defeat the bargained-for objective of the parties or  
7 caused disproportionate prejudice to the  
8 non-breaching party, whether custom and usage  
9 considers such a breach to be material, and whether  
10 the allowance of reciprocal non-performance by the  
11 non-breaching party would result in an unreasonable  
12 and unfair advantage to either party," close quote.  
13 Morton versus Arlington Heights Federal Savings &  
14 Loan, 836 F.Supp. 477, 482, Northern District of  
15 Illinois, 1993, citing Heritage Bank & Trust Company  
16 versus Abdnor, 906 F.2d 292, 301, Seventh Circuit,  
17 1990.

18           In this case, the failure of the  
19 employees or the trusts to perform under the  
20 agreements would not constitute a material breach of  
21 the agreements. The employees' duties were to pay  
22 their share of the premiums to Conseco, and the  
23 trusts' duties were to pay the employees' share of  
24 premiums if the employee failed to pay and to  
25 cooperate with Conseco to collect death benefits.

1 First regarding the premiums, the agreements provided  
2 that if the employees and the trusts failed to pay  
3 their share of the premiums, the agreements would  
4 terminate unless Conseco elected to pay their share  
5 of the premiums. If Conseco so elected, it would  
6 recover that premium when the policy proceeds were  
7 eventually paid to the trusts in the same way that it  
8 would recover all other premiums it paid. If Conseco  
9 elected not to pay the employees' and trusts' share  
10 of the premium, Conseco could not sue the employees  
11 or the trusts for material breach. Instead, the  
12 contract would simply terminate automatically. This  
13 is entirely consistent with the purpose of the  
14 contract, which was to provide an employee benefit to  
15 Hilbert and Dick. If the employee and the trusts  
16 chose not to take advantage of the benefit offered,  
17 Conseco would have no reason to force the benefit  
18 upon them.

19 The second obligation of the trusts,  
20 to cooperate upon the death of the insureds, is  
21 insignificant. The agreements do not enumerate any  
22 specific duties the trusts must perform nor any has  
23 any reason been presented that anything other than  
24 proof of death is necessary to collect on the  
25 policies. Conseco had a collateral assignment on the



1 proceeds of the policy ensuring that it would be  
2 reimbursed for premiums paid. The trusts' duty to  
3 cooperate was ministerial at best, provided no real  
4 value to Conseco, and did not make the contracts  
5 executory in nature. See e.g., Sparks versus Sparks,  
6 206 BR 481, 488, Northern District of Illinois, 1997,  
7 (ex-expose's obligation to execute documents  
8 necessary to carry out intent of ante-nuptial  
9 agreement not material); Enterprise Energy Corp.  
10 versus United States, (in re Columbia Gas Systems) 50  
11 F.3d 233 at 238-45, Third Circuit, 1995. Thus,  
12 applying the traditional material breach test, the  
13 agreements are not executory contracts.

14 Courts have also described executory  
15 contracts in more practical terms as providing a  
16 potential benefit to the estate that can only be  
17 obtained at the cost of debtor's future performance  
18 under the contract. As Judge Wedoff has noted, "The  
19 background and purpose of section 365 indicate that  
20 'executory contracts' are those that present the  
21 estate with a 'mixed blessing' - potential  
22 contractual benefits that can only be obtained at the  
23 cost of the debtor's performance under the contract."  
24 In re Resource Technology Corporation, 254 BR 215,  
25 222, Bankruptcy, Northern District of Illinois, 2000.

1 (citations omitted.) If there is no potential benefit  
2 to the estate from the contract, then the non-debtor  
3 simply has a prepetition claim arising from the  
4 debtor's failure to complete the contract. Id. at  
5 223. See also Enterprise Energy, 50 F.3d at 238,  
6 quote, "executory contracts are best recognized as a  
7 combination of assets and liabilities to the  
8 bankruptcy estate." Sparks versus Sparks, 206 BR at  
9 489 (contract not executory where obligation of  
10 non-debtor was "of no material importance to the  
11 debtor or the estate.") Hilbert's and Dick's  
12 employment had been terminated by Consecoco before it  
13 filed for bankruptcy, so the contracts were no longer  
14 serving Consecoco's stated purpose to "continue to  
15 retain their services." Thus, any possible benefit  
16 to Consecoco from the contracts no longer existed at  
17 the time Consecoco filed its bankruptcy petition, which  
18 is the relevant date for determining whether the  
19 contracts were executory. Enterprise Energy, 50 F.3d  
20 at 240. Looked at from this perspective, the  
21 agreements clearly are not executory as they provide  
22 no future benefits whatsoever to Consecoco and provide  
23 benefits solely to the former employees and their  
24 trusts.

25 The trusts' arguments to the contrary

1 are unconvincing. First, the trusts asserted that  
2 insurance contracts are necessarily executory. While  
3 this may be true as a general principal, it is  
4 irrelevant because the agreements at issue are not  
5 insurance contracts. They are contracts to share the  
6 cost of insurance policies. Next, the trusts argue  
7 that Consecos failure to pay the policy premiums  
8 constitutes a material breach. Although this may  
9 also be true, it does not resolve the question of  
10 whether the contracts are executory. The trusts may  
11 simply have a prepetition claim against the estate  
12 for prepetition premiums Consecos failed to pay before  
13 the termination date.

14 Finally, the trusts' argument that  
15 "even if the split-dollar agreements were not  
16 executory contracts and could have been terminated  
17 upon Consecos bankruptcy filing, Consecos breach of  
18 the contracts prior to filing its Chapter 11 petition  
19 negated its ability to enforce the termination  
20 clause" is similarly without merit. (Response, page  
21 17.) While it is true that "a party first guilty of  
22 a material breach of contract may not maintain an  
23 action against the other party or seek to enforce the  
24 contract against the other party," close quote,  
25 Consecos is not seeking to enforce the contract

1 against the trusts. Licocci versus Cardinal  
2 Association, 492 NE2d. 48, 52. Conseco need not,  
3 quote, "enforce" close quote, the termination  
4 provision because the agreements provide that they,  
5 quote, "shall terminate...without notice, upon the  
6 occurrence of... bankruptcy of the corporation."  
7 Agreement paragraph 7. Termination of the  
8 split-dollar agreements was automatic once Conseco  
9 sought Chapter 11 protection, not an option that  
10 Conseco need exercise. Because the court has  
11 determined that the agreements are not executory  
12 contracts under section 365 of the code, the  
13 termination clause was effective upon Conseco's  
14 bankruptcy filing.

15 Section V - Conseco Cannot Set Off  
16 Amounts Owed to it by Hilbert and Dick Against Its  
17 Obligation to Pay Policy Premiums

18 The trusts have moved for summary  
19 judgment on the issue of Conseco's liability for  
20 breaching the split-dollar agreements. The trusts  
21 assert that (1) the termination clause is  
22 unenforceable because the agreements are executory  
23 contracts; (2) Conseco's rejection of the agreements  
24 does not free it of liability; and, (3) Conseco is  
25 not entitled to set off amounts owed to it by Hilbert

1 \*2 (quoting in re Doctors Hospital of Hyde Park, 337  
2 F.3d 951, page 955, Seventh Circuit, 2003.) Indiana  
3 law similarly requires that debts be mutual in order  
4 to be set off against each other. See e.g., First  
5 Bank of Whiting versus Samockki Brothers Trucking  
6 Company, 509, NE 2d. 187, 198-99 (Ind. Ct. App.  
7 1987); Teeters versus City National Bank of Auburn,  
8 14 NE2d. 1004, 1005 (Ind. 1938.)

9 In this case there is no mutuality and  
10 therefore no setoff available between the debt  
11 allegedly owed to Conseco by its employees and any  
12 damages owed to the trusts by Conseco because the  
13 parties to each debt are not the same. While Conseco  
14 is correct that the split-dollar agreements were  
15 entered into to benefit the employees, the contracts  
16 created a duty by Conseco to pay insurance premiums  
17 for the benefit of the trusts and the employees until  
18 the agreements were terminated or the insureds died.  
19 The trusts therefore have an independent if not  
20 exclusive basis for suing Conseco for damages. The  
21 trusts and the employees are not the same entities.  
22 Setoff of the employees' debts against possible  
23 damages owed to the trusts is therefore  
24 inappropriate.

25

Section VI - Conclusion

1                   For all the reasons stated, the court  
2 concludes that the split-dollar agreements entered  
3 into by Conseco, Hilbert, and Dick, and the trusts,  
4 are not executory contracts within the meaning of 11  
5 USC 365, and were automatically terminated when  
6 Conseco filed its bankruptcy petition.

7                   The court also concludes that Conseco  
8 is not entitled to set off amounts owed it by Hilbert  
9 and Dick against damages it may owe on the  
10 split-dollar agreements to the trusts. Therefore,  
11 the court grants both motions, which it treats as  
12 motions in limine with respect to these issues, and  
13 no evidence need be presented at trial on those  
14 issues.

15                   That's the end of my long opinion.  
16 I'm not sure where you think we go from there. At  
17 least Mr. Elliott was expressing surprise that I  
18 might not think I could enter summary judgment on  
19 these motions. I don't know if you have changed that  
20 view after listening to my long, long opinion or not.  
21 But I just don't see how I could resolve -- I could  
22 enter a judgment ruling on these two issues that I  
23 thought were not the subject of any controversy over  
24 the facts.

25                   MR. ELLIOTT: I don't know that I was

1 expressing surprise. I think what I have been trying  
2 to think through after you told us what your rulings  
3 were is what's left and what's the next step. I  
4 think, and maybe this is our fault for being unclear  
5 on the papers, I think there is nothing left once you  
6 rule on the issue of executoriness, once you rule the  
7 contracts are not executory. Bill might disagree  
8 with that, I'm not sure.

9 THE COURT: Right.

10 MR. ELLIOTT: I think it makes sense  
11 for Mr. O'Connor and I to speak in the next few days.  
12 I understand that we may have a date before you on  
13 the 7th of February? If that is the case -- I was  
14 told it was. I spoke with Bill this morning on that.

15 THE COURT: Okay.

16 MR. ELLIOTT: We seem to think there  
17 may be a date. I think we should speak and then come  
18 back and have a status on the 7th of February.

19 THE COURT: Okay.

20 MR. ELLIOTT: My sense is to the  
21 extent there are issues, I'm not sure there are, they  
22 may be small enough we can hash through them and come  
23 to you with something that's stipulated by then.

24 MR. O'CONNOR: If we are dealing with  
25 motions in limine, then they're not final rulings

1 until, you know, evidence is either, you know,  
2 admitted or excluded in an actual trial.

3 You and I can try to work out a way to  
4 get this the quickest way to a final ruling. Then I  
5 can deal with it.

6 THE COURT: I think that's correct.  
7 That was the problem. I didn't feel that by ruling  
8 on these two issues I could enter a final judgment  
9 that was appealable.

10 MR. ELLIOTT: We may then just simply  
11 have not presented you with enough to get you there.  
12 I think all counsel should and will talk. We'll  
13 figure out where we are.

14 THE COURT: Okay.

15 I don't have anything on the 7th.

16 THE CLERK: The 9th is the omnibus  
17 hearing.

18 THE COURT: You could put this on the  
19 agenda for 11:00 on the 9th.

20 MR. ELLIOTT: Why don't we put it on  
21 the agenda as a status hearing. If, as I hope, we  
22 come up with some way to resolve this to a final  
23 judgment prior to that time, we'll file the  
24 appropriate papers.

25 THE COURT: That's fine. And your



1 office generally is in control of what goes on the  
2 agenda, Mr. Elliott. So don't look to us to put it  
3 on the agenda. The debtor's counsel always prepared  
4 the agenda based upon whatever is represented to  
5 them.

6 So, I'm going to enter an order today,  
7 today or tomorrow, basically saying I have treated  
8 the motions as motions in limine. And may, I guess,  
9 grant them in part, each of them in part for the  
10 reasons stated on the record in open court. That is  
11 pretty much all I think I will do at this point.

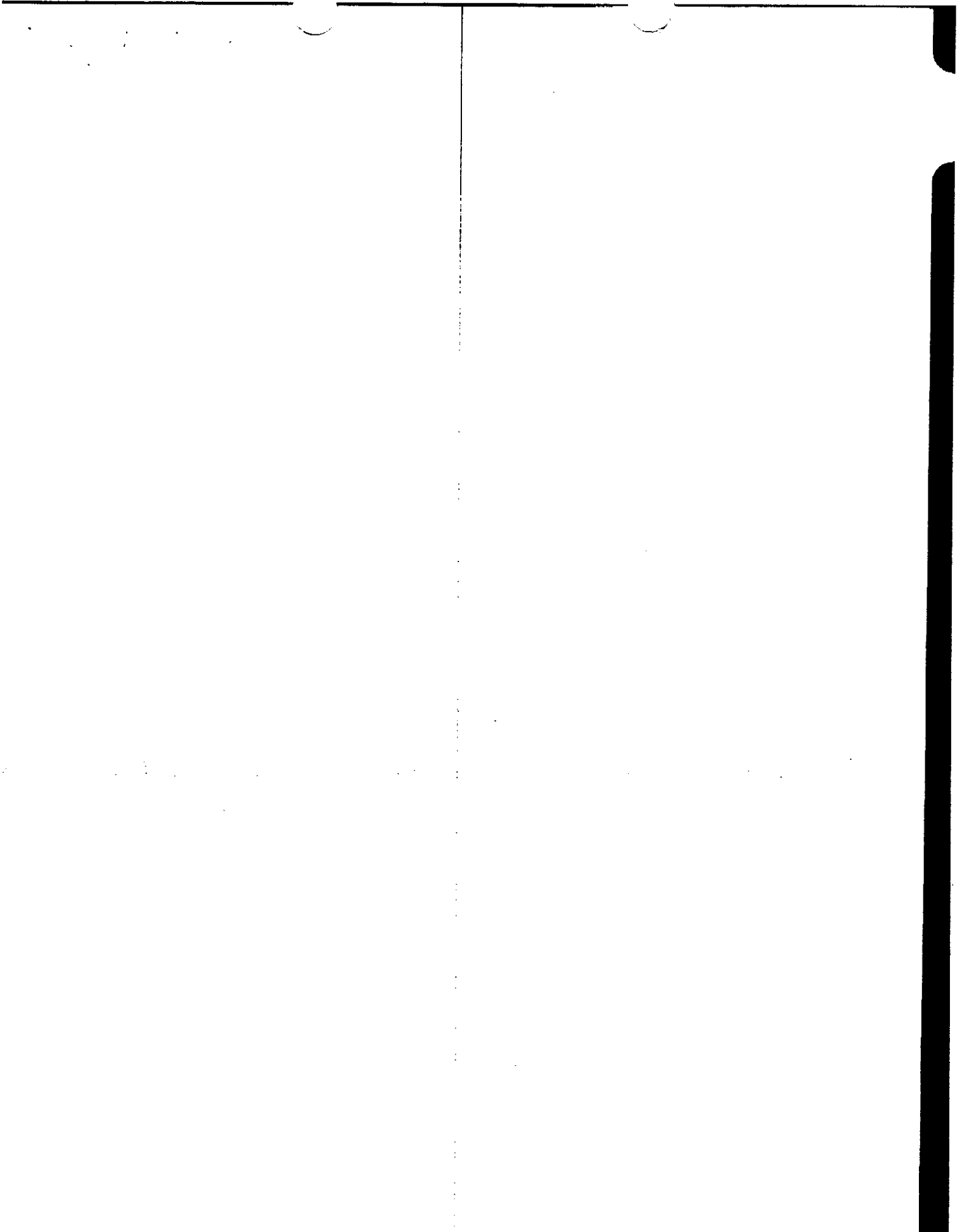
12 MR. ELLIOTT: Thank you, Your Honor.

13 MR. O'CONNOR: Thank you, Your Honor.

14 THE COURT: You're welcome.

15 (Which were all the proceedings had in  
16 the above-entitled cause, January 26th,  
17 2005 at 2:00 p.m.)

18 I, JACKLEEN DE FINI, CSR, RPR, DO HEREBY CERTIFY  
19 THAT THE FOREGOING IS A TRUE AND ACCURATE  
20 TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-  
21 ENTITLED CAUSE.  
22  
23  
24  
25



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September 14, 2004

**VIA FACSIMILE: 312-861-2200**

Timothy Elliott  
KIRKLAND & ELLIS LLP  
200 E. Randolph Drive  
Chicago, IL 60601

Re: In re: Consecó, Inc., et al. - U.S. Bankruptcy Court, Case No. 02 B49672  
Split-Dollar Agreements

Dear Tim:

I have received your letter regarding some action that you plan to take to try and realize the cash value of the life insurance policies. As you know, Consecó, Inc., breached the Split-Dollar Agreements prior to any bankruptcy filing. In addition, the Split-Dollar Agreements are executory contracts and thus are subject to 11 U.S.C. §365(e) and thus, the termination clause is invalid.

The Trust would consider your taking of the cash value of the policies not only to be an additional breach of the Split-Dollar Agreements, but also to be conversion as well.

Furthermore, since both your own actuarial expert and mine have relied upon the cash value of the insurance policies to try and decrease the level of damage to the Trusts by Consecó's breach of the Split-Dollar Agreement. Your proposed action will only increase the amount that is required to place the Trusts back in a position to accommodate for Consecó's breach of the Split-Dollar Agreements. Please copy me on any actions or correspondence that you send to any of the insurance companies so that the Trust can adequately protect their interest. If you are refusing to conduct business in such an open manner, please contact me immediately so that the Trusts can take actions to protect themselves.

Sincerely,

**DANN PECAR NEWMAN & KLEIMAN P.C.**

William L. O'Connor

WLO:sde  
cc: David L. Kleiman

**CERTIFICATE OF SERVICE**

I, Scott A. McMillin, an attorney, certify that I served true and correct copies of the foregoing CONSECO, INC.'S RESPONSE TO THE TRUSTS' STATEMENT OF "MATERIAL FACTS IN DISPUTE" AND "FACTS" AND CONSECO, INC.'S STATEMENT OF ADDITIONAL UNDISPUTED FACTS, by facsimile and Federal Express, on April 6, 2005,

upon:

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401 North Michigan Avenue  
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Telephone: (312) 222-5100  
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**BY MESSENGER**

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Suite 2300, One American Square  
Indianapolis, IN 46282  
Telephone: (317) 632-3232  
Facsimile: (317) 632-2962

**BY FEDERAL EXPRESS**

  
\_\_\_\_\_  
Scott A. McMillin

**D.E. 7029**

25

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re: ) Chapter 11  
 )  
Conseco, Inc., et al.,<sup>1</sup> )  
 ) Case No. 02 B49672  
Debtors. ) Honorable Carol A. Doyle

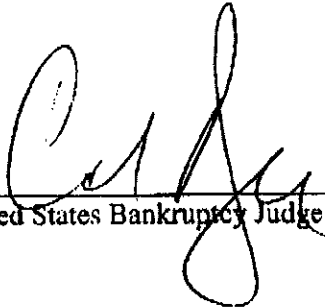
**ORDER**

This matter coming before the Court on Conseco's Renewed Motion for Summary Judgment; the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court finding that this is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2);

**IT IS HEREBY ORDERED THAT:**

1. For the reasons stated on the record in open court on April 13, 2005, the Court GRANTS Conseco's Renewed Motion for Summary Judgment.
2. The Court DISALLOWS claim nos. 49672-006377, 49672-006378 and 49672-006379 for all purposes in the these cases.

Chicago, Illinois  
Dated: April 18, 2005

  
\_\_\_\_\_  
United States Bankruptcy Judge

<sup>1</sup> The Reorganized Debtors comprise the following entities: Conseco, Inc. and CIHC, Incorporated.

**D.E. 7032**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re: ) Chapter 11  
)  
Conseco, Inc., et al., )  
)  
Debtors. ) Case No. 02 B49672  
) Honorable Carol A. Doyle  
) (Jointly Administered)  
)

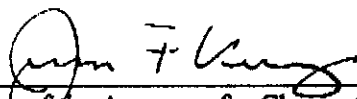
**NOTICE OF MOTION**

To: Anne Marrs Huber  
Anup Sathy  
Scott McMillin  
Kirkland & Ellis LLP  
200 East Randolph Drive  
Chicago, IL 60601

PLEASE TAKE NOTICE that on Wednesday May 18, 2005, at 11:00 a.m., or as soon thereafter as counsel may be heard, counsel for Rollin Dick, as Trustee, shall appear before the Honorable Judge Carol A. Doyle, or any judge sitting in her stead, in Room 742 of the United States Bankruptcy Court, Northern Division of Illinois, Eastern Division, and present Claimants' Motion to Stay Order of the Court Pending Appeal, a copy of which is hereby served upon you.

Dated: April 26, 2005

Respectfully submitted,

  
\_\_\_\_\_  
One of the Attorneys for Claimants

William L. O'Connor  
DANN PECAR NEWMAN & KLEIMAN, P.C.  
2300 One American Square, Box 82008  
Indianapolis, IN 46282

John F. Kinney  
Richard P. Campbell  
FREEMAN, FREEMAN & SALZMAN, P.C.  
401 N. Michigan Avenue, Suite 3200  
Chicago, IL 60611-4207

**FILED**  
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

APR 26 2005

KENNETH B. GARDNER, CLERK  
PS REP. - AI



IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re: ) Chapter 11  
)  
Conseco, Inc., ) Case No. 02 B49672  
) Honorable Carol A. Doyle  
Debtors. ) (Jointly Administered)  
)

**MOTION TO STAY ORDER OF THE COURT PENDING APPEAL**

Comes now Rollin Dick, Trustee of the Stephen and Tomisue Hilbert Irrevocable Trust and Trustee of the Amended Hilbert Residence Maintenance Trust, by counsel, and hereby moves to stay the Court's order of April 18, 2005 (Doc # 7029) disallowing claims numbered 49672-006377, 49672-006378, and 49672-006379. In support of this motion, the Claimant states that:

1. Although the order was to disallow the claims and would typically not have to have the effect stayed pending appeal, this particular order may have collateral effects.

2. Conseco may attempt to use the effect of the Court's order to attempt to liquidate life insurance policies currently being held by the Stephen and Tomisue Hilbert Irrevocable Trust and the Amended Hilbert Residence Maintenance Trust.

3. If the insurance policies are liquidated, and Conseco were to somehow take the cash surrender value of the policies, the reversal of the Court's decision on appeal would become very complex to unravel.

4. Conseco will not be prejudiced by this stay since the insurance policies are continuing to be held by the Trusts.

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

APR 26 2005

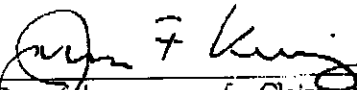
KENNETH S. GARDNER, CLERK  
PS REP. - AI

5. There is no need for additional security to be posted because the life insurance policies themselves have the value that Consecro wishes to obtain.

6. The Claimant has filed a Notice of Appeal with the proper filing fee, and is moving forward expeditiously to appeal the Court's order of April 18, 2005.

WHEREFORE, the Claimant respectfully requests that pursuant to the B.R. 8005, the Court enter an order staying the effect of its order of April 18, 2005.

Respectfully submitted,

  
\_\_\_\_\_  
One of the attorneys for Claimant

John F. Kitney  
FREEMAN, FREEMAN & SALZMAN, P.C.  
401 North Michigan Avenue  
Suite 3200  
Chicago, IL 60611

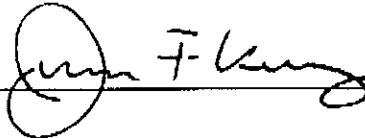
William L. O'Connor, #14925-22  
DANN PECAR NEWMAN & KLEIMAN, P.C.  
2300 One American Square  
Box 82008  
Indianapolis, IN 46282

Dated: Apr. 26, 2005

CERTIFICATE OF SERVICE

The undersigned certifies that he served the foregoing Notice of Motion and Claimants' Motion to Stay Order of the Court Pending Appeal by causing a copy to be sent via e-mail and U.S. mail postage prepaid, to the following counsel for Conseco, Inc. this 26<sup>th</sup> day of April, 2005.

Anne Marrs Huber  
Anup Sathy  
Scott McMillin  
Kirkland & Ellis  
200 East Randolph Drive  
Chicago, IL 60601



\_\_\_\_\_

**D.E. 7059**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

June 15, 2005

Honorable Carol A. Doyle

Hearing Date May 18, 2005

Bankruptcy Case No. 02 B 49672

Adversary No. \_\_\_\_\_

Title of Case In re: Consoco, Inc.; et al

Brief Statement of Motion Motion to Stay Order of the Court Pending Appeal

Names and Addresses of moving counsel	<u>John F. Kinney</u>	<u>William L. O'Connor</u>
	<u>Richard P. Campbell</u>	<u>Dann Pecar Newman &amp; Kleiman</u>
	<u>Freeman, Freeman &amp; Salzman</u>	<u>2300 One American Square</u>
	<u>401 N. Michigan Ave., #3200</u>	<u>Indianapolis, IN 46282</u>
	<u>Chicago, IL 60611</u>	

Representing Rollin Dick, as Trustee

ORDER

Motion denied for the reasons stated on the record in open court

Carol A. Doyle

**1/26/05 Transcript**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Conseco, Inc., ) No. 02 B 49672  
 ) Chicago, Illinois  
 ) 2:00 p.m.  
Debtor. ) January 26, 2005

TRANSCRIPT OF PROCEEDINGS BEFORE THE  
HONORABLE CAROL DOYLE

APPEARANCES:

For Debtor: Mr. Tim Elliott;  
Also Participating: Mr. Bill O'Connor;  
(telephonically)

Court Reporter: Jackleen DeFini, CSR, RPR  
U.S. Courthouse  
219 South Dearborn  
Room 661  
Chicago, Il. 60604.

1 THE CLERK: Conseco and related  
2 matters.

3 MR. ELLIOTT: Tim Elliott, Kirkland &  
4 Ellis, for Conseco. I think Mr. O'Connor is on the  
5 phone.

6 Mr. O'Connor, are you there?

7 MR. O'CONNOR: Bill O'Connor for the  
8 trust.

9 THE COURT: I do have an oral ruling  
10 to read into the record. I will tell you what the  
11 bottom line is, but there is a hitch in the bottom  
12 line. You both moved for summary judgment. But I  
13 don't believe either of you has really moved for  
14 final judgment on the claim one way or the other.  
15 And there's really no such thing as partial summary  
16 judgment on an issue within a claim. You can resolve  
17 single claims in a multi-claim complaint, but you  
18 can't get judgment on a legal issue that resolves  
19 less than the whole claim. And no matter how I rule  
20 on it, the damages aren't resolved, et cetera. So  
21 there is no basis for me to enter summary judgment  
22 for either party.

23 A lot of people do this. They file  
24 for summary judgment. They want issues narrowed, et  
25 cetera. I think that's what you both are trying to



1 accomplish with your motions. And certainly the way  
2 I'm going to resolve it, I'm going to give you the  
3 rulings that you want on two legal issues. I'll tell  
4 you what those are and then I'll read my ruling into  
5 the record. Just so you don't have to wait until the  
6 ends.

7 I conclude that contracts are not  
8 executory contracts. So on that issue I will rule in  
9 favor of Conseco. But I also find that the debts are  
10 not mutual and setoff is not appropriate. So on that  
11 issue I am concluding in favor of the trusts. But I  
12 am not going to enter summary judgment for either  
13 side. I don't think it's appropriate. I cannot rule  
14 at this point on disallowing the claim or allowing  
15 the claim, which seems to be the issue before me, the  
16 claims of the trusts.

17 So I will read my opinion into the  
18 record. I'm going to treat them as motions in  
19 limine, which is the way courts sometimes avoid  
20 wasting all the effort put into an issue by the  
21 parties, as well the court. And I think in this case  
22 the parties essentially told me that these issues are  
23 going to decide how the parties are going to go from  
24 here. And of course you would all have appeal rights  
25 eventually. But to the extent you wanted to resolve

1 it otherwise, this would give you at least the  
2 court's view on these legal issue.

3 So with those remarks, let me just  
4 read my opinion into the record. It's about ten or  
5 11 pages, but I haven't polished it enough that I  
6 want to put it into a written opinion. So I'm just  
7 going to read it into the record and then you can get  
8 a transcript of it.

9 This matter is before the court on  
10 motions for summary judgment filed by Conseco and by  
11 owners of five life insurance policies collectively  
12 referred to as "the trusts" towards which Conseco  
13 paid premiums under, quote, split-dollar agreements,  
14 close quote. For the reasons I shall state the court  
15 will treat the motions as motions in limine and  
16 concludes that the contracts are not executory  
17 contracts and that Conseco is not entitled to set off  
18 amounts allegedly owed it by two former executives,  
19 Stephen Hilbert and Rollin Dick.

20 Section I, Substantive Issues -  
21 Conseco asks the court to declare that the  
22 split-dollar agreements are not executory contracts  
23 under 11 USC Section 365, and therefore that the  
24 agreements were, by their own terms, terminated upon  
25 Conseco's filing for bankruptcy in December 2002.

1                   The trusts assert that split-dollar  
2 agreements are executory contracts that were rejected  
3 upon confirmation of Conseco's plan, and that Conseco  
4 is liable for their breach as a result of the  
5 rejections. The trusts also seek a finding that  
6 Conseco is not entitled to set off amounts allegedly  
7 owed to it by Hilbert and Dick against any damages  
8 for which Conseco may be liable on contracts.

9                   Section II - Procedural Issue - The  
10 problem with both motions is that either seeks final  
11 judgment on an entire claim. The trusts have filed  
12 claims against estate. Conseco has filed objections  
13 to those claims, which are contested matters under  
14 Bankruptcy Rule 9014. Bankruptcy Rule 7056 applies  
15 to contested matters and incorporates Rule 56 of the  
16 Federal Rules of Civil Procedure. However, summary  
17 judgment under Rule 56 cannot be granted with respect  
18 to a part of a single claim. See e.g., Commonwealth  
19 Insurance Company versus O. Henry Tent & Awning  
20 Company, 266 F.2d 200, page 201, Seventh Circuit  
21 1959; Ambre versus Joe Madden Ford, 881 F.Supp. 1187,  
22 1193, Northern District of Illinois, 1987; Quintana  
23 versus Byrd, 669 F.Supp. 849, 850, Northern District  
24 of Illinois, 1987; Capital Records, Tpc. versus  
25 Progress Record Distributing Inc., 106 F.R.D. 25, 28,

1 Northern District of Illinois, 1985.

2           These decisions reason that Rule 56  
3 contemplates entry of a, quote, "judgment," close  
4 quote, and Rule 54(a) defines a, quote, "judgment,"  
5 close quote, as an order that can be appealed. An  
6 order disposing of fewer than all issues in a claim  
7 cannot be appealed. See generally Capital Records,  
8 106 F.R.D. at 28, 29. Rule 56(d) provides for  
9 findings of material facts that exist without  
10 substantial controversy when an entire claim cannot  
11 be resolved, but it does not provide for a  
12 determination of discrete legal issues that resolve  
13 less than the entire claim. Therefore, the court  
14 cannot grant a motion for summary judgment on  
15 anything less than an entire claim.

16           In this case, all the facts relevant  
17 to the two key legal issues addressed in the motions  
18 for summary judgment are undisputed. However,  
19 neither party has sought a final judgment in a  
20 specific amount, nor provided the basis for the court  
21 to enter any such final judgment. Therefore, the  
22 court cannot grant either motion for summary  
23 judgment.

24           Courts sometime treat motions like  
25 these as motions in limine narrowing the issues for

1 trial as a way to salvage some of the work the  
2 parties and the court have done. See e.g., Chemical  
3 Waste Management versus Sims, 939 F. Supp. 599 at  
4 page 602, Northern District of Illinois, 1996.  
5 Because neither party has raised the issue of whether  
6 summary judgment may procedurally be granted here,  
7 and because the parties have indicated that ruling on  
8 the two key issues raised in the motions may result  
9 in resolution of the claims objections, the court  
10 will treat the motions for summary judgment as  
11 motions in limine.

12 Section III - Undisputed Facts

13 The following are undisputed facts  
14 taken from the parties' briefs and 7056-1 statements  
15 of facts. In 1998 Consecoco agreed to contribute  
16 premiums towards life insurance policies under which  
17 Stephen Herbert and Rollin Dick, Consecoco's CEO and  
18 CFO at the time, and their spouses were covered.  
19 Five life insurance policies, (four for Hilbert and  
20 one for Dick) worth between \$10 and \$25 million each,  
21 were executed with five different insurance  
22 companies. The duties to pay for these policies were  
23 set forth in five nearly identical split-dollar  
24 agreements executed by Consecoco, Hilbert and Dick and  
25 the owners of the policies, (the trusts). Hilbert

1 and Dick each created independent trusts that are the  
2 owners and beneficiaries of the life insurance  
3 policies. These trusts filed claims in Conseco's  
4 bankruptcy. Conseco has objected to the trusts'  
5 claims.

6 Under the split-dollar agreements,  
7 which are governed by Indiana law, Conseco agreed to  
8 pay annual premiums towards Hilbert's and Dick's life  
9 insurance policies. The policies state that  
10 Conseco's payment was an, quote, "employment benefit"  
11 for Hilbert and Dick and was made due to the  
12 Conseco's, quote, "desire to continue to retain  
13 (their) services," close quote.

14 Paragraph C, Hilbert and Dick or the  
15 trusts were also required to pay a portion of the  
16 policy premiums, but Conseco determined the amount  
17 due from employees under applicable tax law,  
18 collected the payment, and forwarded the full payment  
19 to the insurance companies.

20 The insurance policies provided that  
21 upon the death of either the employee, or both the  
22 employee and his wife, quote, "the corporation,  
23 (Conseco), and the owner shall cooperate to take  
24 whatever action is necessary to collect the death  
25 benefit. The corporation shall have the unqualified

1 right to receive a portion of such death benefit  
2 equal to the total amount of the premiums paid by  
3 it." Paragraph 6(b). Upon the death of the  
4 employee, and in most cases his wife, the death  
5 benefit would pay to the proper trust fund. The  
6 insurance company would then reimburse Conseco for  
7 its premium payments. The, quote, "sole right,"  
8 close quote, of Conseco was "to be repaid the amounts  
9 which it had paid toward the premiums on the policy,"  
10 close quote. Conseco itself had "no incidents of  
11 ownership." Agreement paragraph 2(a). Conseco also  
12 obtained a collateral assignment of each policy from  
13 the trusts to ensure that it would receive  
14 reimbursement for its premium payments.

15 Each split-dollar agreement also  
16 specified that it would terminate if either Conseco  
17 went bankrupt or if the employee or owner failed to  
18 pay Conseco a share of the premiums. Paragraph 7.  
19 Upon termination of the split-dollar agreement, the  
20 owner of the policy had the option of purchasing the  
21 policy from Conseco (and thus releasing the  
22 collateral assignment) by reimbursing Conseco for its  
23 payments towards the policy. If, within 60 days, the  
24 owner did not exercise this option to purchase the  
25 policy, Conseco had the choice of either becoming the

1 owner of the policy or surrendering the policy and  
2 taking reimbursement from the proceeds. Agreement  
3 paragraph 8.

4           Conseco stopped making payments on the  
5 insurance policies in December 2001, one year before  
6 it filed for bankruptcy. The employees or the trusts  
7 continued to make payments on the policies. The  
8 employees (Hilbert and Dick) and the trusts have each  
9 filed claims in Conseco's bankruptcy and allege that  
10 Conseco is liable for breach of the split-dollar  
11 agreements. Conseco objected to these claims on a  
12 number of grounds, including that the split-dollar  
13 agreements were non-executory contracts that had  
14 terminated when Conseco filed for bankruptcy in  
15 December of 2002.

16           Prior to Conseco's filing for  
17 bankruptcy, Hilbert and Dick also participated in  
18 Conseco's Director and Officer (D&O) Loan Program.  
19 This program allowed certain employees to borrow  
20 money in order to purchase Conseco stock. The loans  
21 were due to be paid on December 31, 2003. However,  
22 the loans became due on the day that Conseco filed  
23 for bankruptcy (December 17 2002) because bankruptcy  
24 was an, quote, "event of default," close quote, under  
25 the loan documents. Conseco has satisfied its



1 guarantee of the loans and now contends that it is  
2 subrogated to the lender banks' rights under the  
3 notes to collect what is owed from Hilbert and Dick,  
4 and others.

5                   Section IV - The Split-Dollar  
6 Agreements are not Executory Contracts

7                   Conseco seeks a ruling that the  
8 split-dollar agreements are not executory contracts.  
9 The court concludes that the agreements are not  
10 executory contracts as a matter of law.

11                   The characterization of the agreements  
12 is important because the clause terminating the  
13 split-dollar agreements upon Conseco's bankruptcy  
14 will be given effect only if the agreements are not  
15 classified as executory contracts. Section 365 of  
16 the Code provides, in part, that, quote,  
17 "Notwithstanding a provision in an executory  
18 contract...an executory contract...may not be  
19 terminated...at any time after the commencement of  
20 the case solely because of a provision in such  
21 contract...that is conditioned on...the commencement  
22 of a case under this title." That is the end of the  
23 quote.

24                   If the agreements are deemed executory  
25 contracts, the termination clause is ineffective and

1 Consecoco must either accept or reject the contracts  
2 after filing for bankruptcy, and would be liable for  
3 breach if it chose to reject them. 3 Collier on  
4 Bankruptcy 365.09 (15th ed. revised 2000); in re  
5 Crippin, 877 F2d. 594 page 597, 1989. The trusts  
6 argue that the agreements are executory contracts and  
7 that Consecoco therefore is liable for rejecting and  
8 breaching them.

9           The bankruptcy code does not define  
10 executory contract. The Seventh Circuit defines an  
11 executory contract as one where, quote, "significant  
12 unperformed obligations remain on both sides," and  
13 adopts the Countryman definition: An executory  
14 contract is one where, quote, "the obligation of both  
15 the bankrupt and the other party are so far  
16 unperformed that the failure of either to complete  
17 performance would constitute a material breach  
18 excusing performance of the other," close quote.  
19 Mitchell versus Streets (in re Streets & Beard Farm  
20 Partnership), 882 F2d. 233, 235, Seventh Circuit,  
21 1989, citing Vern Countryman for Executory Contracts  
22 in Bankruptcy, part I, 57 Minnesota Law Review, 439,  
23 60, 1974; see also Enterprise Gas Systems versus  
24 United States; in re Columbia Gas Systems, 50 F.3d  
25 233, 240-241, Third Circuit, 1995. Therefore if any

1 of the parties' duties is deemed immaterial, then the  
2 contract is not executory.

3 The determination of the materiality  
4 of an obligation is a, quote, "question of fact  
5 involving inquiry into whether the breach worked to  
6 defeat the bargained-for objective of the parties or  
7 caused disproportionate prejudice to the  
8 non-breaching party, whether custom and usage  
9 considers such a breach to be material, and whether  
10 the allowance of reciprocal non-performance by the  
11 non-breaching party would result in an unreasonable  
12 and unfair advantage to either party," close quote.  
13 Morton versus Arlington Heights Federal Savings &  
14 Loan, 836 F.Supp. 477, 482, Northern District of  
15 Illinois, 1993; citing Heritage Bank & Trust Company  
16 versus Abdnor, 906 F.2d 292, 301, Seventh Circuit,  
17 1990.

18 In this case, the failure of the  
19 employees or the trusts to perform under the  
20 agreements would not constitute a material breach of  
21 the agreements. The employees' duties were to pay  
22 their share of the premiums to Conseco, and the  
23 trusts' duties were to pay the employees' share of  
24 premiums if the employee failed to pay and to  
25 cooperate with Conseco to collect death benefits.

1 First regarding the premiums, the agreements provided  
2 that if the employees and the trusts failed to pay  
3 their share of the premiums, the agreements would  
4 terminate unless Conseco elected to pay their share  
5 of the premiums. If Conseco so elected, it would  
6 recover that premium when the policy proceeds were  
7 eventually paid to the trusts in the same way that it  
8 would recover all other premiums it paid. If Conseco  
9 elected not to pay the employees' and trusts' share  
10 of the premium, Conseco could not sue the employees  
11 or the trusts for material breach. Instead, the  
12 contract would simply terminate automatically. This  
13 is entirely consistent with the purpose of the  
14 contract, which was to provide an employee benefit to  
15 Hilbert and Dick. If the employee and the trusts  
16 chose not to take advantage of the benefit offered,  
17 Conseco would have no reason to force the benefit  
18 upon them.

19 The second obligation of the trusts,  
20 to cooperate upon the death of the insureds, is  
21 insignificant. The agreements do not enumerate any  
22 specific duties the trusts must perform nor any has  
23 any reason been presented that anything other than  
24 proof of death is necessary to collect on the  
25 policies. Conseco had a collateral assignment on the

1 proceeds of the policy ensuring that it would be  
2 reimbursed for premiums paid. The trusts' duty to  
3 cooperate was ministerial at best, provided no real  
4 value to Conseco, and did not make the contracts  
5 executory in nature. See e.g., Sparks versus Sparks,  
6 206 BR 481, 488, Northern District of Illinois, 1997,  
7 (ex-expose's obligation to execute documents  
8 necessary to carry out intent of ante-nuptial  
9 agreement not material); Enterprise Energy Corp.  
10 versus United States, (in re Columbia Gas Systems) 50  
11 F.3d 233 at 238-45, Third Circuit, 1995. Thus,  
12 applying the traditional material breach test, the  
13 agreements are not executory contracts.

14 Courts have also described executory  
15 contracts in more practical terms as providing a  
16 potential benefit to the estate that can only be  
17 obtained at the cost of debtor's future performance  
18 under the contract. As Judge Wedoff has noted, "The  
19 background and purpose of section 365 indicate that  
20 'executory contracts' are those that present the  
21 estate with a 'mixed blessing' - potential  
22 contractual benefits that can only be obtained at the  
23 cost of the debtor's performance under the contract."  
24 In re Resource Technology Corporation, 254 BR 215,  
25 222, Bankruptcy, Northern District of Illinois, 2000.

1 (citations omitted.) If there is no potential benefit  
2 to the estate from the contract, then the non-debtor  
3 simply has a prepetition claim arising from the  
4 debtor's failure to complete the contract. Id. at  
5 223. See also Enterprise Energy, 50 F.3d at 238,  
6 quote, "executory contracts are best recognized as a  
7 combination of assets and liabilities to the  
8 bankruptcy estate." Sparks versus Sparks, 206 BR at  
9 489 (contract not executory where obligation of  
10 non-debtor was "of no material importance to the  
11 debtor or the estate.") Hilbert's and Dick's  
12 employment had been terminated by Consecoco before it  
13 filed for bankruptcy, so the contracts were no longer  
14 serving Consecoco's stated purpose to "continue to  
15 retain their services." Thus, any possible benefit  
16 to Consecoco from the contracts no longer existed at  
17 the time Consecoco filed its bankruptcy petition, which  
18 is the relevant date for determining whether the  
19 contracts were executory. Enterprise Energy, 50 F.3d  
20 at 240. Looked at from this perspective, the  
21 agreements clearly are not executory as they provide  
22 no future benefits whatsoever to Consecoco and provide  
23 benefits solely to the former employees and their  
24 trusts.

25 The trusts' arguments to the contrary

1 are unconvincing. First, the trusts asserted that  
2 insurance contracts are necessarily executory. While  
3 this may be true as a general principal, it is  
4 irrelevant because the agreements at issue are not  
5 insurance contracts. They are contracts to share the  
6 cost of insurance policies. Next, the trusts argue  
7 that Conseco's failure to pay the policy premiums  
8 constitutes a material breach. Although this may  
9 also be true, it does not resolve the question of  
10 whether the contracts are executory. The trusts may  
11 simply have a prepetition claim against the estate  
12 for prepetition premiums Conseco failed to pay before  
13 the termination date.

14 Finally, the trusts' argument that  
15 "even if the split-dollar agreements were not  
16 executory contracts and could have been terminated  
17 upon Conseco's bankruptcy filing, Conseco's breach of  
18 the contracts prior to filing its Chapter 11 petition  
19 negated its ability to enforce the termination  
20 clause" is similarly without merit. (Response, page  
21 17.) While it is true that "a party first guilty of  
22 a material breach of contract may not maintain an  
23 action against the other party or seek to enforce the  
24 contract against the other party," close quote,  
25 Conseco is not seeking to enforce the contract

1 against the trusts. Licocci versus Cardinal  
2 Association, 492 NE2d. 48, 52. Consecoco need not,  
3 quote, "enforce" close quote, the termination  
4 provision because the agreements provide that they,  
5 quote, "shall terminate...without notice, upon the  
6 occurrence of... bankruptcy of the corporation."  
7 Agreement paragraph 7. Termination of the  
8 split-dollar agreements was automatic once Consecoco  
9 sought Chapter 11 protection, not an option that  
10 Consecoco need exercise. Because the court has  
11 determined that the agreements are not executory  
12 contracts under section 365 of the code, the  
13 termination clause was effective upon Consecoco's  
14 bankruptcy filing.

15 Section V - Consecoco Cannot Set Off  
16 Amounts Owed to it by Hilbert and Dick Against Its  
17 Obligation to Pay Policy Premiums

18 The trusts have moved for summary  
19 judgment on the issue of Consecoco's liability for  
20 breaching the split-dollar agreements. The trusts  
21 assert that (1) the termination clause is  
22 unenforceable because the agreements are executory  
23 contracts; (2) Consecoco's rejection of the agreements  
24 does not free it of liability; and, (3) Consecoco is  
25 not entitled to set off amounts owed to it by Hilbert



1 and Dick because there was no mutuality between the  
2 debts. The first two of these arguments are moot in  
3 light of the court's decision that the agreements are  
4 not executory in nature. Because the split-dollar  
5 agreements are not executory contracts and were  
6 terminated automatically upon Conseco's bankruptcy  
7 filing, there was no need for Conseco to reject the  
8 agreements and therefore no damages resulting from a  
9 breach upon rejection.

10           Regarding the question of Conseco's  
11 right to set off the debts of Hilbert and Dick  
12 against amounts it may owe to the trusts for unpaid  
13 premiums, the court concludes that no right to set  
14 off exists because the debts are not mutual. Section  
15 553(a) of the Code provides that, quote, "subject to  
16 several exceptions, a creditor may off set a mutual  
17 debt - owed by the creditor to the debtor, and the  
18 debtor to creditor - that arose before the  
19 commencement of the case," close quote. In re Meyer  
20 Medical Physicians Group, Limited, versus Health Care  
21 Service. (In re Meyer Medical Physicians Group, 2004  
22 Westlaw 2109986 at \*1, Seventh Circuit, September 23,  
23 2004.) Mutuality is satisfied "when the offsetting  
24 obligations are held by the same parties in the same  
25 capacity, (that is as obligor and obligee".) Id. at

1 \*2 (quoting in re Doctors Hospital of Hyde Park, 337  
2 F.3d 951, page 955, Seventh Circuit, 2003.) Indiana  
3 law similarly requires that debts be mutual in order  
4 to be set off against each other. See e.g., First  
5 Bank of Whiting versus Samocki Brothers Trucking  
6 Company, 509, NE 2d. 187, 198-99 (Ind. Ct. App.  
7 1987); Teeters versus City National Bank of Auburn,  
8 14 NE2d. 1004, 1005 (Ind. 1938.)

9 In this case there is no mutuality and  
10 therefore no setoff available between the debt  
11 allegedly owed to Conseco by its employees and any  
12 damages owed to the trusts by Conseco because the  
13 parties to each debt are not the same. While Conseco  
14 is correct that the split-dollar agreements were  
15 entered into to benefit the employees, the contracts  
16 created a duty by Conseco to pay insurance premiums  
17 for the benefit of the trusts and the employees until  
18 the agreements were terminated or the insureds died.  
19 The trusts therefore have an independent if not  
20 exclusive basis for suing Conseco for damages. The  
21 trusts and the employees are not the same entities.  
22 Setoff of the employees' debts against possible  
23 damages owed to the trusts is therefore  
24 inappropriate.

25

Section VI - Conclusion

1 For all the reasons stated, the court  
2 concludes that the split-dollar agreements entered  
3 into by Conseco, Hilbert, and Dick, and the trusts,  
4 are not executory contracts within the meaning of 11  
5 USC 365, and were automatically terminated when  
6 Conseco filed its bankruptcy petition.

7 The court also concludes that Conseco  
8 is not entitled to set off amounts owed it by Hilbert  
9 and Dick against damages it may owe on the  
10 split-dollar agreements to the trusts. Therefore,  
11 the court grants both motions, which it treats as  
12 motions in limine with respect to these issues, and  
13 no evidence need be presented at trial on those  
14 issues.

15 That's the end of my long opinion.  
16 I'm not sure where you think we go from there. At  
17 least Mr. Elliott was expressing surprise that I  
18 might not think I could enter summary judgment on  
19 these motions. I don't know if you have changed that  
20 view after listening to my long, long opinion or not.  
21 But I just don't see how I could resolve -- I could  
22 enter a judgment ruling on these two issues that I  
23 thought were not the subject of any controversy over  
24 the facts.

25 MR. ELLIOTT: I don't know that I was

1 expressing surprise. I think what I have been trying  
2 to think through after you told us what your rulings  
3 were is what's left and what's the next step. I  
4 think, and maybe this is our fault for being unclear  
5 on the papers, I think there is nothing left once you  
6 rule on the issue of executoriness, once you rule the  
7 contracts are not executory. Bill might disagree  
8 with that, I'm not sure.

9 THE COURT: Right.

10 MR. ELLIOTT: I think it makes sense  
11 for Mr. O'Connor and I to speak in the next few days.  
12 I understand that we may have a date before you on  
13 the 7th of February? If that is the case -- I was  
14 told it was. I spoke with Bill this morning on that.

15 THE COURT: Okay.

16 MR. ELLIOTT: We seem to think there  
17 may be a date. I think we should speak and then come  
18 back and have a status on the 7th of February.

19 THE COURT: Okay.

20 MR. ELLIOTT: My sense is to the  
21 extent there are issues, I'm not sure there are, they  
22 may be small enough we can hash through them and come  
23 to you with something that's stipulated by then.

24 MR. O'CONNOR: If we are dealing with  
25 motions in limine, then they're not final rulings

1 until, you know, evidence is either, you know,  
2 admitted or excluded in an actual trial.

3 You and I can try to work out a way to  
4 get this the quickest way to a final ruling. Then I  
5 can deal with it.

6 THE COURT: I think that's correct.  
7 That was the problem. I didn't feel that by ruling  
8 on these two issues I could enter a final judgment  
9 that was appealable.

10 MR. ELLIOTT: We may then just simply  
11 have not presented you with enough to get you there.  
12 I think all counsel should and will talk. We'll  
13 figure out where we are.

14 THE COURT: Okay.

15 I don't have anything on the 7th.

16 THE CLERK: The 9th is the omnibus  
17 hearing.

18 THE COURT: You could put this on the  
19 agenda for 11:00 on the 9th.

20 MR. ELLIOTT: Why don't we put it on  
21 the agenda as a status hearing. If, as I hope, we  
22 come up with some way to resolve this to a final  
23 judgment prior to that time, we'll file the  
24 appropriate papers.

25 THE COURT: That's fine. And your

**4/13/05 Transcript**

IN THE UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

4	CONSECO, INC., et al.,	)	No. 02B49672
5		)	Chicago, Illinois
6	Debtors.	)	April 13, 2005
		)	11:00 a.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE CAROL A. DOYLE

APPEARANCES:

12	For Debtors:	Mr. Stephen Hackney;
		Mr. Roger Higgins;
13	For Trustee:	Mr. William O'Connor;
		(Telephonically)
15	Also present:	Mr. Micah Marcus;

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1 THE CLERK: Conseco, Inc. and Conseco Finance  
2 Corporation.

3 MR. HACKNEY: Good morning, Your Honor.  
4 Stephen Hackney on behalf of the reorganized debtors.

5 THE COURT: Good morning. Let's see, let me  
6 find that agenda. I just, of course, got amended  
7 agendas, but luckily they are short today, for  
8 everyone's benefit. Okay. So, the first thing is the  
9 split-dollar issue.

10 MR. HACKNEY: I think you should have someone  
11 on the phone.

12 THE COURT: Right. Mr. O'Connor, are you on  
13 the line?

14 MR. O'CONNOR: Yes, Your Honor. William  
15 O'Connor for Rollin Dick, as trustee.

16 THE COURT: Good morning. I do have a ruling  
17 on that. I'm going to orally rule on the motion, the  
18 renewed motion for summary judgment, and it's not going  
19 to be as painful as the last one. It's only three or  
20 four pages long, but I think everything else isn't going  
21 to take real long. Am I right?

22 MR. HIGGINS: That is correct, Your Honor.

23 THE COURT: Okay.

24 MR. HIGGINS: There is nothing opposed either  
25 in the Conseco or the Conseco Finance --



1 THE COURT: All right.

2 MR. HIGGINS: Roger Higgins.

3 MR. HACKNEY: If it's more convenient, I  
4 wouldn't mind if you wanted to pass it.

5 THE COURT: Okay. Well, let's hold -- the  
6 microphone is really projecting voices today, so I will  
7 try not to break anyone's eardrum.

8 I'll tell you what the ruling is. I'm  
9 going to grant the renewed motion for summary judgment  
10 and disallow the claims, but I've got my reasons for  
11 that just so you're not held in suspense. I'll put  
12 those reasons on the record at the end of the hearing  
13 today, which I hope will only be another maybe 10  
14 minutes or so.

15 So, Mr. O'Connor, if you'll hold on,  
16 we'll come back to the split-dollar issue.

17 MR. O'CONNOR: Thank you, Your Honor.

18 MR. HACKNEY: Very well, Your Honor.

19 THE COURT: Is there anything else,  
20 Mr. Hackney? Are all of the claim objection issues just  
21 continuing?

22 MR. HACKNEY: I'll turn that over to my  
23 colleague.

24 THE COURT: Oh, okay.

25 MR. HIGGINS: Your Honor, Roger Higgins for

1 Conseco.

2 With respect to the remaining claims  
3 against the reorganized debtors, all of those are  
4 continued.

5 THE COURT: Okay.

6 MR. HIGGINS: And we would then turn to the  
7 Conseco Finance, or the CFC estate agenda.

8 THE COURT: Right.

9 MR. HIGGINS: The objections to the Comins'  
10 claim has been continued. The Calvary matter has also  
11 been continued. We have -- and this is where we have a  
12 slightly amended agenda.

13 THE COURT: By the way, can I just say, I  
14 know probably the Comins' counsel is not on the line, I  
15 think I've read that a couple of times, you know, as you  
16 get -- I think it's always sort of said that it's going  
17 forward and then at the last minute it gets changed to  
18 continued. And I'm all for having you work it out, but  
19 lest it get, you know, six months down the road and then  
20 all of a sudden you, you know, do not at the last minute  
21 change it to continued, let me just state that mediation  
22 might be an appropriate result to the extent that the  
23 parties don't work it out.

24 If you want to work it out without  
25 mediation, great. Otherwise, that was certainly my

1 thought in reading this is if you don't work it out,  
2 then I might well decide that is something that I don't  
3 need to decide and just let the mediator continue with  
4 whatever was started. So, I just wanted to plant that  
5 seed.

6 MR. HIGGINS: Thank you, Your Honor.

7 THE COURT: Okay.

8 MR. HIGGINS: With respect to the CFC agenda,  
9 there were a number of claims for which there were going  
10 to be stipulations entered. Those have all been --  
11 those objections have all been withdrawn. The matters  
12 have been resolved.

13 THE COURT: Okay.

14 MR. HIGGINS: So the Martinez claims, the  
15 objections there have been continued until the May 18th  
16 hearing. All of the other omnibus objections, other  
17 than the fifty-second omnibus objection, have been  
18 continued, including Lois on page three. With respect  
19 to the fifty-second omnibus objection, Your Honor, we  
20 would request that the court enter an order disallowing  
21 all the claims for which there were no responses filed.

22 THE COURT: Okay. Well, as I think I've been  
23 saying in this case and I've sure been saying in others,  
24 first of all, I don't want to expunge anything. I think  
25 that's still in the order. There's no such thing as

1 expunging something from the record. It's on the  
2 record. All you can do is disallow it. And, you  
3 really, everybody should get out of the habit of saying  
4 that. The clerk is not empowered to expunge anything  
5 from the record. So I am not going to order the clerk  
6 to do that. And he ignores it anyway, of course,  
7 because he should because it just means that I haven't  
8 gone through and scratched it out of every order. But I  
9 don't think any clerk of court anywhere in the country  
10 can expunge a claim. So that's just a nitpicking issue.

11           The second issue, a little more  
12 substantive, is I'm not willing to disallow claims based  
13 on the fact that there is pending against the claimants  
14 an avoidance or recovery action under 547, et cetera.  
15 So that is one of the grounds for disallowing these  
16 claims, so I don't want to do that.

17           MR. HIGGINS: We would be happy to amend the  
18 order, Your Honor, reflecting that any claims where  
19 there was a section 502(d) objection, we would continue  
20 those. And we will have the others disallowed.

21           THE COURT: Right.

22           MR. HIGGINS: There were a number of others.

23           THE COURT: Okay. Until such time as they're  
24 resolved, whether by default judgment or otherwise.

25           MR. HIGGINS: Yes.

1 THE COURT: But I'm not willing to disallow.  
2 them at this point based on the fact that there's simply  
3 a pending but not resolved avoidance action. Okay. So  
4 other than that, then I think I'd be willing to sustain  
5 the claim objections and disallowed claims as to which  
6 no party, none of the claimants have filed a response to  
7 the fifty-second omnibus objection.

8 MR. HIGGINS: And that is, Your Honor, the  
9 last of the omnibus objections.

10 THE COURT: I heard that this morning. That  
11 was certainly good news.

12 MR. HIGGINS: Now we're down to what we might  
13 call the tough nuts, and we're --

14 THE COURT: All right.

15 MR. HIGGINS: -- working through each of  
16 those as quickly and expeditiously as we can.

17 THE COURT: All right. So if you provide  
18 orders on the fifty-second omnibus objection, I'll sign  
19 those.

20 MR. HIGGINS: Thank you, Your Honor. We will  
21 pass those up to your clerk this afternoon.

22 THE COURT: Okay. Is that it then?

23 MR. HIGGINS: That is all we have --

24 THE COURT: Okay, great.

25 MR. HIGGINS: I yield the podium to

1 Mr. Hackney.

2 THE COURT: Okay. All right. Well, as I  
3 said, I've got a pretty short opinion I'm just going to  
4 read into the record. And the bottom line is I am going  
5 to disallow the claims of the trusts with respect to the  
6 split-dollar agreements.

7 You can sit down, Mr. Hackney.

8 MR. HACKNEY: Thank you, Your Honor.

9 THE COURT: There is no reason to keep  
10 standing.

11 MR. HACKNEY: I appreciate that.

12 THE COURT: All right. This is my oral  
13 ruling.

14 On January 26, 2005, the court  
15 previously ruled on the motions for summary judgment  
16 filed by Conseco, Inc. and the owners of five life  
17 insurance policies, collectively referred to as "the  
18 trusts," with respect to the trusts' claims under  
19 certain contracts to pay insurance premiums that are  
20 referred to as "split-dollar agreements."

21 The court previously concluded that the  
22 agreements are not executory contracts and that they  
23 terminated on the date Conseco filed its bankruptcy  
24 petition, December 17th of 2002. The court also  
25 concluded that Conseco did not have the right to set off

1 amounts owed it by Hilbert and Dick against any  
2 obligation to pay policy premiums. But based on my  
3 ruling today that issue is moot, in any event.

4           The court concluded, however, in ruling  
5 on the motions for summary judgment that it could not  
6 enter summary judgment on Conseco's motion because all  
7 issues relating to the objections to the claims could  
8 not be resolved. On February 8, 2005, Conseco filed a  
9 renewed motion for summary judgment on claims relating  
10 to split-dollar agreements. The court set a briefing  
11 schedule which required a response by March 11th, and a  
12 reply by March 25, 2005.

13           The trusts' response was not filed  
14 until two weeks later after the date on which it was  
15 required, March 23rd, and no motion to extend time to  
16 file the brief was filed until much later, on April  
17 11th. That motion was noticed for presentment  
18 apparently at the next omnibus hearing date in May,  
19 although I note that the amended agenda for today that  
20 was handed to me moments before I walked out into the  
21 courtroom lists that motion, I believe, as being heard.  
22 Let me see exactly what that says. It lists Rollin  
23 Dick's motion for leave to file summary judgment  
24 response brief on the agenda for today.

25           The court has read the motion for leave

1 to file the brief late, even though I didn't believe it  
2 was on the agenda for today, because the court was  
3 considering striking the late-filed brief; but the court  
4 has concluded not to strike the brief. The court  
5 admonishes the parties, however, not to engage in  
6 revisions to briefing schedules without leave of court.  
7 The parties have apparently been generous in granting  
8 extensions to each other in this matter, but while the  
9 parties may tell each other that there is no rush, no  
10 reason to rush to get a brief filed on time, they do not  
11 have authority to change the schedule. If parties want  
12 to change the briefing schedule, they are urged to come  
13 to an amicable agreement, as they apparently did here,  
14 but then they are obliged to bring a motion to extend  
15 time to see if the changes fit within the court's  
16 schedule. That motion should be brought before the  
17 brief is due, not after the brief is due and not after  
18 the brief has already been filed late.

19 In light of the circumstances, the  
20 court will not strike the brief of the trusts, but in  
21 the future it may do so if a motion to extend time is  
22 not filed before a brief is due. While I am open to  
23 changes to scheduling to accommodate other professional  
24 and family commitments, you may not grant them to  
25 yourselves without seeking leave.



1                   On to the merits. The court has  
2 considered the briefs filed and has concluded that there  
3 is no genuine issue of material fact and that judgment  
4 should be granted as a matter of law in favor of Conseco  
5 with respect to its objections to the claims. The  
6 claims will therefore be disallowed.

7                   The trusts concedes the basic facts in  
8 their brief at page three. If the contracts terminated  
9 on the date Conseco filed for bankruptcy, then the  
10 trusts had 60 days in which to exercise its option to  
11 retain a release of the collateral assignment. After  
12 the expiration of this 60-day period, Conseco then had  
13 the option to either, one, request that the trusts  
14 execute documents to transfer the interests of the  
15 trusts in the insurance policies to Conseco or, two, to  
16 exercise its right to be repaid the premiums that it  
17 paid from the cash value of the life insurance policies  
18 owned by the trusts. In other words, either way, the  
19 trusts no longer had the right to be paid any benefits  
20 under the policies.

21                   As I concluded in my opinion issued  
22 January 26, the contracts terminated automatically on  
23 the petition date. Although the trusts seek to reargue  
24 that motion, there is no such thing as a motion to  
25 consider a ruling on a motion in limine. There is only

1 a right to move for relief from judgment under  
2 Bankruptcy Rule 9023. No judgment has yet been entered,  
3 so there is no procedural basis for the motion to the  
4 extent it is a motion to reconsider. In any event, the  
5 court rejects all of the trusts' arguments regarding the  
6 issues decided in the court's January 26th ruling and  
7 stands by that ruling. Therefore, because the trusts  
8 failed to act within 60 days of the filing of the  
9 bankruptcy petition on December 17, 2002, it is  
10 undisputed that the trusts have no rights to the  
11 policies. Therefore, whether Conseco failed to pay any  
12 premiums prior to that date did not cause any damage to  
13 the trusts.

14           Apparently recognizing that they do not  
15 have valid claims under the split-dollar agreements if  
16 its terms are applied, the trusts make two arguments;  
17 that Conseco waived its right by failing to act in time  
18 and that it cannot enforce the contract because it  
19 breached it by failing to pay premiums before it filed  
20 for bankruptcy in December, 2002. Neither argument is  
21 persuasive.

22           First, with respect to waiver, the  
23 trusts presents no case that supports waiver in these  
24 circumstances. In addition, they present no evidence as  
25 is required in responding to a motion for summary

1 judgment demonstrating a need for trial on this issue.  
2 Under the uncontested facts, the court finds that there  
3 was not a waiver by Conseco. The contract contains only  
4 a time limit on the trusts for acting in the event of a  
5 termination of contract, not a time limit on Conseco.  
6 The parties have been disputing whether the contracts  
7 terminated upon Conseco's bankruptcy filing for several  
8 years, and the court is not willing to find a waiver in  
9 these circumstances. The trusts' citation to time  
10 limits in real estate contracts is inapposite.

11           Second, the court rejects the argument  
12 that Conseco cannot enforce a term of a contract it  
13 breached. The court previously rejected this argument,  
14 saying that the contract simply terminated under its own  
15 terms, and Conseco is entitled to the policies, whether  
16 to maintain them for their own benefit or to surrender  
17 them and receive the premiums it paid from the cash  
18 value. The trusts have not argued or established in any  
19 way that the cash value exceeds the amount of the  
20 premiums paid by Conseco, so they have failed to  
21 establish a valid claim against Conseco. Conseco's  
22 renewed motion for summary judgment will be granted and  
23 the court will disallow each of the trusts' claims  
24 against the estate.

25           So that's my ruling. We'll enter an

1 order. It should probably just say for the reasons  
2 stated on the record in open court these claims,  
3 identifying them by number, et cetera, as well as who  
4 the claimants are, are disallowed. And then that will  
5 be the final order in the case, basically functioning as  
6 a final judgment order. All right.

7 MR. O'CONNOR: Thank you, Your Honor.

8 THE COURT: You're welcome. And I guess as a  
9 technical matter, I will grant the motion to file the  
10 brief late, even though it wasn't properly noticed or  
11 filed on time but, obviously, I've considered the merits  
12 that were argued in the response brief.

13 MR. O'CONNOR: I appreciate that very much,  
14 Your Honor. I apologize for having been the cause of  
15 that confusion.

16 THE COURT: That's okay. All right.

17 MR. HACKNEY: Thank you.

18 THE COURT: You're welcome. All right,  
19 thanks everyone.

1 this ruling at this point deals only with the claims of  
2 Rollin Dick as trustee. Is that correct?

3 MR. HACKNEY: It's my understanding that is  
4 correct. However, I'll caveat that somewhat by saying  
5 I'm not an expert in the Dick settlement.

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2 stated on the record in open court these claims,  
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12 that were argued in the response brief.

13 MR. O'CONNOR: I appreciate that very much,  
14 Your Honor. I apologize for having been the cause of  
15 that confusion.

16 THE COURT: That's okay. All right.

17 MR. HACKNEY: Thank you.

18 THE COURT: You're welcome. All right,  
19 thanks everyone.

20 MR. O'CONNOR: Oh, and one point of  
21 clarification. Mr. Hackney? Is counsel for Conseco  
22 there?

23 MR. HACKNEY: Yes.

24 MR. O'CONNOR: I believe that Lawrence Dick's  
25 claims have been resolved between the parties and that

1 this ruling at this point deals only with the claims of  
2 Rollin Dick as trustee. Is that correct?

3 MR. HACKNEY: It's my understanding that is  
4 correct. However, I'll caveat that somewhat by saying  
5 I'm not an expert in the Dick settlement.

6 MR. O'CONNOR: Okay.

7 THE COURT: Okay.

8 MR. MARCUS: With the further caveat --

9 MR. O'CONNOR: Thank you, Your Honor.

10 THE COURT: Mr. Marcus is stepping up, too.

11 MR. MARCUS: Micah Marcus, Your Honor, on  
12 behalf of -- it is my understanding that actually that  
13 claim was disallowed pursuant to that settlement.

14 THE COURT: Okay. I knew it had been  
15 resolved. So -- well, I wasn't sure how. So I will  
16 leave it to you-all. What the debtor should do is,  
17 debtor or whatever we're calling Conseco now, is to  
18 prepare an order and run it by Mr. O'Connor and make  
19 sure that everyone is in agreement with the language  
20 although certainly not with the ultimate conclusion.

21 MR. O'CONNOR: And, Your Honor, for a date of  
22 entry, will that be the date that the written order is  
23 entered or is it this date?

24 THE COURT: I'm not sure exactly what you  
25 mean, but what happens is they submit an order, I sign

1 it. And it's considered entered not on the date I sign  
2 it but on the date it's actually entered in the docket.  
3 So that's the date you need to look out for.

4 MR. O'CONNOR: Okay. Thank you, Your Honor.

5 THE COURT: Exactly what date that is I'm not  
6 sure, what that will turn out to be, but that's the one  
7 you need to be concerned with.

8 MR. MARCUS: Thank you.

9 THE COURT: Okay, thanks.

10 MR. HACKNEY: Thank you, Your Honor.

11 MR. O'CONNOR: Thanks.

12 (Which were all the proceedings  
13 had in the above-entitled cause  
14 as of April 13, 2005.)

15 I, Barbara A. Casey, do hereby  
16 certify that the foregoing is  
17 a true and accurate transcript  
of proceedings had in the  
above-entitled cause.

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**CERTIFICATE OF SERVICE**

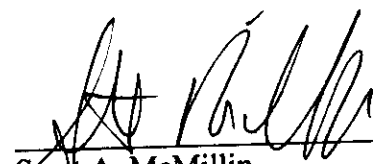
I, Scott A. McMillin, an attorney, certify that I served true and correct copies of the foregoing APPENDIX TO BRIEF OF THE APPELLEE CONSECO, INC., by facsimile and Federal Express, on August 11, 2005, upon:

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\_\_\_\_\_  
Scott A. McMillin