

No. 13-30010

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In the United States Court of Appeals  
for the Fifth Circuit

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**JOHNSTON & JOHNSTON,**  
*Plaintiff-Appellee,*

v.

**CONSECO LIFE INSURANCE CO.,**  
*Defendant-Appellant.*

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On Appeal from the United States District Court for the  
Western District of Louisiana  
No. 3:12-cv-01552

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**AMICUS BRIEF OF AMERICAN COUNCIL OF LIFE INSURERS  
IN SUPPORT OF APPELLANT, CONSECO LIFE INSURANCE CO.,  
AND IN SUPPORT OF REVERSAL**

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**JOHNSTON & JOHNSTON,**  
*Plaintiff-Appellee,*

v.

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**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS**

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

**American Council of Life Insurers**  
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TO THE HONORABLE COURT OF APPEALS:

Amicus Curiae, the American Council of Life Insurers (ACLI), respectfully submits this amicus brief in support of Defendant-Appellant, Conseco Life Insurance Co. (“Conseco”). This case presents important questions regarding the interplay between various Louisiana statutes and regulations governing the notice that insurers must provide prior to terminating an insured’s life insurance policy for nonpayment of premiums. As this Court has recognized, these laws serve the laudatory purpose of preventing termination of coverage based on inadvertent nonpayment. *First Am. Bank & Trust of La. v. Tex. Life Ins. Co.*, 10 F.3d 332, 335 (5th Cir. 1994).

But, in their current state, the very old and much newer governing provisions in Louisiana require harmonization to address modern flexible premium policies. Conseco has advanced a reasonable construct that comports with the purpose of the laws and accounts for the distinctions between traditional fixed-premium policies contemplated in the older statute still in force and the flexible premium policies addressed by the more recent additions to the regulations. And, although taking a slightly different tack, at least one other jurisdiction has addressed this identical circumstance and has first construed, and then amended, its laws to require exactly what Conseco did in this case. The district court’s misconstruction of the framework not only places unworkable and impossible notice burdens on life insurers, but also reduces the protections afforded to insureds. ACLI urges this Court to reverse the judgment of the district court.

## STATEMENT OF INTEREST OF AMICUS CURIAE

The American Council of Life Insurers (ACLI) is the largest life insurance trade association in the United States and represents the interests of more than 300 legal reserve life insurer and fraternal benefit society member companies operating in the United States. Its member companies are the leading providers of financial and retirement security products covering individual and business markets. They offer life insurance; annuities; pensions, including 401(k) plans; long-term care insurance; disability income insurance; reinsurance; and other retirement and financial products. ACLI's member companies represent over 90% of the assets and premiums of the U.S. life insurance and annuity industry.

ACLI advocates the interests of life insurers and their millions of policyholders before federal and state legislators, state insurance departments, administration officials, federal regulatory agencies, and the courts. ACLI expands awareness of how the products offered by life insurers—life insurance, pensions, annuities, disability income insurance, and long-term care insurance—help Americans plan for and achieve financial and retirement security.

Given ACLI's extensive involvement in the life insurance industry and its record as an advocate for sound public policy, the legal issue at the crux of this appeal is of great importance to ACLI and its members. Specifically, ACLI and its members



have a strong interest in the maintenance of practical and predictable judicial interpretations of governing statutory and regulatory requirements for the timing of the required notice before effective termination of a policy for non-payment of premiums, without inadvertently triggering lengthy statutory extension periods due to inadequate notice.

Predictability of the manner in which statutory and regulatory notice requirements are interpreted is critically important to ensuring a robust and efficient life insurance market. ACLI is clearly concerned by the district court's failure to appreciate the unique characteristics of flexible premium life insurance policies that are critical to understanding why the Louisiana statutory and regulatory framework for the timing of notices of termination for non-payment of premiums, as the district court interpreted them, was wrong.

More than 260 ACLI member companies are licensed to do business in Louisiana, and 27 are domiciled in the state. In fact, 89% of life insurance and annuity payments in Louisiana are by ACLI members. ACLI member companies provide 92% of the life insurance coverage provided under the 4 million individual life insurance policies owned by Louisiana residents. Thus, the number of individuals and companies that could potentially be affected by the district court's decision is substantial. Because the opinion resulted from a flawed analysis, it should not stand.

If affirmed on appeal, the district court’s judgment will have significant consequences for all life insurance companies with exposure under universal life policies governed by Louisiana law—companies that do not satisfy the district court’s interpretation of the notice requirements will be prohibited from declaring coverage terminated for nonpayment of premiums for an entire year, during which the policyholder can bring the policy current. And the district court’s erroneous ruling that the policyholder was entitled to a 30-day grace period *in addition to* the 61-day grace period provided for in the policy is a ruling of concern for all life insurers.

No counsel for a party authored this brief in whole or in part. FED. R. APP. P. 29(b)(5)(A). No party or party’s counsel “contributed money that was intended to fund preparing or submitting the brief.” FED. R. APP. P. 29(b)(5)(B). No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief. FED. R. APP. P. 29(b)(5)(C). ACLI is paying the fee for this amicus brief.

#### **ARGUMENT**

The key issues before the Court are from what dates statutorily prescribed periods of notice and grace are to be calculated and how long required grace periods extend. The district court incorrectly held that the time for calculating the notice period before terminating a flexible premium life insurance policy for nonpayment

of premiums was not calculated backward from the date that the policy would terminate, as Appellant Conseco Insurance argues, but instead ran backward from a much earlier date—the date that the policy first entered a grace period. The court also incorrectly held that grace periods running forward from that same date were to be “stacked.” Because of the unique nature of flexible premium life insurance policies and the inconsistencies between the historic and new provisions in Louisiana’s insurance law, the district court’s holding creates an unworkable notice, and unwarranted grace, requirement.

**I. This case involves the interplay of the legislative and regulatory framework in Louisiana for calculating the date from which statutory notice must be calculated before a flexible premium policy can be terminated for nonpayment.**

**A. Because of the unique nature of flexible premium policies, they do not have traditional dates when premiums are “due,” making it difficult to calculate notice provisions keyed off when premiums are “due.”**

As a threshold matter, the policy at issue was a flexible premium policy. The Louisiana Administrative Code defines a flexible premium policy as one “which permits the policyholder to vary, independently of each other, the amount or timing of one or more premium payments or the amount of insurance.” LA. ADMIN. CODE tit. 37, § 8503 (applicable to universal life insurance policies, including flexible premium policies); *accord* LA. ADMIN. CODE tit. 37, § 8301 (applicable to variable

life insurance policies, including flexible premium policies) . Unlike traditional term life or whole life insurance policies, which typically require the insured to pay a fixed premium to sustain coverage, flexible premium policies do not impose fixed premium due dates, but rather afford the policy owner the discretion to select a planned periodic premium amount and also to designate the frequency he or she wishes to receive billing notices. *See generally* HAROLD D. SKIPPER & WAYNE TONNING, THE ADVISOR’S GUIDE TO LIFE INSURANCE 109-10, 145, 185-87 (2011); *see also Turner v. OM Fin. Life Ins. Co.*, 822 F. Supp. 2d 633, 634 (W.D. La. 2011).

After the initial premium payment, the cost of the insurance provided by the policy is automatically deducted from the policy’s cash surrender value each month (monthly deduction). “Regardless of whether the insured pays the planned premiums, coverage under the policy continues so long as the account value is sufficient to cover the monthly deduction.” *Turner*, F. Supp. 2d at 634.

Under the terms of the policy, Appellee Johnston & Johnston (“J&J”) selected a “planned periodic premium” at the time of issue, rather than a fixed, scheduled premium. R4, 55, 320, 326.

### **AMOUNT AND FREQUENCY**

The owner may change the amount of planned periodic premium. . . . The frequency of premium payment shown on a Policy Data Page will serve only as an indication of the owner's preference as

to probable future frequency of payment. The owner may change the frequency of planned periodic premium payment at any time.

R326. J&J elected to receive annual billing notices for the periodic payment amount of \$32,451.00. R320. At any time the cash surrender value became insufficient to cover the next monthly deduction, the policy provided a grace period of sixty-one days, during which J&J was required to make a premium payment to prevent the policy from terminating. R. 327.

Although the district court's decision ultimately turned on its view of when premium payments were "due" under the flexible premium policy here, the commentary to the model regulations drafted by the National Association of Insurance Commissioners repeatedly emphasizes that under the "rudimentary design characteristics of flexible premium policies," the concepts of "due dates" are "inadaptable" to flexible premium products:

The hallmark of flexible premium products is the latitude and discretion that the policyholder possesses over the amount and timing of premium payments. Thus the concepts of a discrete, identifiable premium due date and of a premium in default—which are readily defined and easily applied in the context of fixed life insurance and traditional variable life products—are inadaptable to flexible premium products.

NAT'L ASS'N INS. COMM'RS, VARIABLE LIFE INSURANCE MODEL REGULATIONS MDL-270-48 commentary (1996). Accordingly, "the concept of a 'premium due date' was thought to be inapposite to flexible premium policies." *Id.* MDL-270-44 commentary.

**B. Section 22:905 requires that, before terminating coverage, an insurer give notice 15 to 45 days prior to when a premium required by the terms of the policy to be paid is payable.**

The principal provision at issue here is section 22:905 of the Louisiana Revised Statutes. It provides that no life insurer shall, within one year after default in payment of any premium for non-payment when due of any premium required by the terms of the policy, unless a written notice is sent at least 15 and not more than 45 days prior to the date when any premium required by the policy is payable:

No life insurer shall within one year after default in payment of any premium, installment, loan or interest, declare forfeited or lapsed any policy issued or renewed, and not issued upon the payment of monthly or weekly premiums or for a term of one year or less, **for non-payment when due of any premium**, installment, loan or interest, or any portion thereof **required by the terms of the policy to be paid**, unless a written or printed notice stating:

- (1) The **amount of such premium**, installment, loan or interest or portion thereof **due** on such policy; and
- (2) The place where it shall be paid and the person to whom the same is payable, shall have been duly addressed and mailed to the owner of the policy and the assignee of the policy if notice of the assignment has been given to the insurer, ... at least fifteen and not more than forty-five days **prior to the date when the same is payable**.

No policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Any payment demanded by such notice and made within the time limit shall be taken to be full compliance with the requirements of the policy in respect to the time of such payment.

.....

LA. REV. STAT. § 22:905 (emphasis added).

**C. The policy contained a 61-day grace period running from the date when the policy's cash-surrender value is insufficient to cover the next monthly deduction.**

As discussed above, the policy at issue here is a flexible premium policy that did not have fixed scheduled premium due dates. Instead, the policy provided that the insured is *not required* to make any premium payment until after the grace period begins. The policy's grace-period provision is triggered when the cash surrender value of the policy is insufficient to cover the next monthly deduction.

The grace-period provision in Consecos policy, in compliance with Louisiana insurance regulations, provided for a 61-day grace period during which coverage remained in effect and during which J&J could bring the policy current to prevent coverage from terminating:

**GRACE PERIOD**

If the cash surrender value on a monthly anniversary day will not cover the next monthly deduction, a grace period of 61 days from such monthly anniversary day will be allowed to pay a premium that will cover the monthly deduction. The Company will send written notice that the policy will lapse 30 days before the end of the grace period . . . if the premium is not paid. . . . The policy will remain in force during the grace period, unless surrendered.

R327; LA. ADMIN. CODE tit. 37, § 8511.A.6; accord LA. ADMIN. CODE tit. 37, § 8305(A)(3)(a)(ii)(b).

**D. Louisiana Administrative Code section 8511.A.6 provides a grace period of 30 days after “lapse.”**

Section 8511A.6 of title 37 of the Louisiana Administrative Code provides, in pertinent part, as follows:

- a. The policy shall provide for written notice to be sent to the policyowner’s last known address at least thirty days prior to termination of coverage.
- b. A flexible premium policy shall provide for a grace period of at least thirty days (or as required by state statute) after lapse. Unless otherwise defined in the policy, lapse shall occur on that date on which the net cash surrender value first equals zero.

LA. ADMIN. CODE tit. 37, § 8511.A.6 (emphasis added); *accord* NAT’L ASS’N INS. COMM’RS, UNIVERSAL LIFE INSURANCE MODEL REGULATIONS MDL-585-9 (2001) (model provision verbatim the same as section 8511.A.6).

**E. The district court’s interpretation of this statutory and regulatory framework is unworkable.**

Whereas the primary statute at issue (section 22:905) has been in place for several decades and has not been amended to account for newer life insurance products, like the flexible premium policies, the regulatory provisions (sections 8511.A.6(a) and (b)<sup>1</sup>) are newer and speak directly to flexible premium policies. Yet, the applicable statutory and regulatory schemes do not comfortably fit together.

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<sup>1</sup>*See also* LA. ADMIN. CODE tit. 37, § 8305(A)(3)(a)(ii)(b).



Indeed, the district court struggled to harmonize these provisions, but, in doing so, erred. The district court held that the operative date for calculating section 22:905's 15-to-45 day notice period was the day that the policy entered the policy's 61-day grace period—a date that is unworkable for flexible premium policies. RE3:7; R391.

The district court observed that it is undisputed that the net cash surrender value equaled zero no later than December 12, 2010, RE5:5, causing the policy to enter the 61-day grace period, which absent a premium payment by J&J would expire on February 11, 2011. R9, 11, 58-59, 174, 327. Conseco sent a sixty-one day grace notice on the date the cash value became insufficient (December 12) and sent a second notice on January 6, 2011 (thirty-six days before the February 11, 2011 end of grace). No premium payment was made.

The district court concluded that, under section 22:905, the required payment was “due” on December 12, 2010—the date when the policy entered the 61-day grace period because the net cash value was insufficient to cover the next monthly deduction. The court thus concluded that Conseco was required to provide notice no more than 45 or less than 15 days before that date. If the operative date for calculating the 15-to-45 day notice is, as the district court held, December 12, 2010, then Conseco's notices on and 25 days after that date were too late.

The court reasoned that the December 12, 2010 was the date when the premium was “due” within the meaning of section 22:905. The court’s interpretation is troublesome for two reasons. First, the court does not address at all the flexible-premium-specific requirement under sections 8511.A.6(a) and (b) that notice be sent thirty days before the policy coverage terminated (the end of the 61-day grace period)—in other words, notice is timely not *before* the date the cash value became deficient and triggered the 61-day grace period, but up to thirty days *after* that date.

Second, although it is completely predictable 15-to-45 days in advance when a *scheduled* premium will be due (and how much it will be), it is difficult to reliably predict that far ahead of when a monthly deduction is due whether net cash value will be sufficient. Moreover, the requirements of section 22:905 are exacting, the insurer must give the insured notice of the exact sum due and any notice that fails to correctly state the amount of premium required to maintain the policy will be ineffective. And, as Conseco correctly points out, the cash value could be manipulated by the insured after the 15-to-45 pre-deduction date window had passed—in other words, when it would be too late for the insurer to make timely notice. Br. Appellants at 27-29.

Conseco posits that, because no payment was “required” to be made until after the policy entered grace and could be made any time until the last day of that period (February 11, 2011), then that was the date that payment was due and its January 6,

2011 notice was timely. (Having been made 36 days, or between 15 and 45 days, before that date). Br. Appellant at 21-22. Consecos construct—that the “due” or “payable” date is the last day of the 61-day period—is workable and comports with the intent of the scheme. *Id.* at 30. Because notice would be required between 45 and 15 days before the end of the 61-day grace period, and because the statute provides that the policy cannot be terminated within 30 days of notice, the insured would always have at least the required 30 days post-notice to pay and maintain coverage.

But there is support in the authority for the district court’s selection of the date when there was no cash value to call on for the premium—and thus money needed to be paid—as the “due” or “payable” date. *See, e.g.*, COUCH ON INSURANCE § 76:57 (“Effect of Extension of Grace Period to Premium Due Date”) (“The grace clause does not change the date when the premium is due, and therefore, default occurs when a premium is not paid on the due date. Accordingly, payment during the grace period merely constitutes a waiver of the default.”). This “default date” is of importance as it is expressly identified from which the prescribed 61-day is measured. In the event that required notice is not given, the 1-year period also flows from this date. And this date is identified as the operative date for notice under section 8511.A.6, although that provision reasonably contemplates moving *forward* from the date of default (insufficient cash value) rather than back as the court’s construction

holds. However, as explained below, this Court is not without guidance as to how the district court's operative date may be used in harmony with the various notice and grace provisions.

**II. The Court should adopt the rationale of New York's harmonization and amendment of nearly identical laws.**

**A. New York's pre-2008 harmonization of the same historic and modernized provisions is consistent with legislative purpose and Consec's position.**

Prior to 2008, New York's statutory and regulatory scheme governing pre-termination notice requirements was nearly identical to Louisiana's current laws. The analogue to Louisiana's section 22:905, New York Insurance Law section 3211 (and its predecessors), had been on the books substantively unchanged since the early 1900s, providing in pertinent part that:

No policy of life insurance or non-cancellable disability insurance delivered or issued for delivery in this state, and no life insurance certificate delivered or issued for delivery in this state by a fraternal benefit society, **shall terminate or lapse by reason of default in payment of any premium, installment, or interest on any policy loan in less than one year after such default, unless a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due . . . .**

Former N.Y. INS. LAW § 3211(a)(1) (amended 2008).

Just as Louisiana's section 22:931(A)(1) provides for a 30-day grace-period after notice, New York's section 3203 required that all life insurance policies must

provide for at least a 31-day grace period after notice before a policy could be lapsed for non-payment of premiums. Former N.Y. INS. LAW § 3203 (amended 2008). And as does the Louisiana Department of Insurance's section 8305(A)(3)(a)(ii)(b), the New York Department of Insurance's "Regulation 77" (based on a provision specifically applicable to flexible premium policies in the updated Model Insurance Code for variable life insurance policies referenced above) provided that the grace period applicable to flexible premium policies "**must end on a date not less than 61 days after the policy processing day on which the insurer determined that the total charges necessary to keep the policy in force (until the next policy processing day) exceed the net cash surrender value under the policy.**" 11 N.Y. COMP. CODES R. & REGS. tit. 77, § 54.6(b)(3)(I) (2007). Section 54.11(c) of Regulation 77 required insurers to send notice of the minimum premium due and the length of the grace period. *Id.* at Part 54.11(c).

But New York's Department of Insurance (NYDI) recognized that the time period in which a Section 54.11(c) report must be mailed (i.e. no earlier than, and within 30 days after, the policy processing day on which the insurer determined that an insufficiency had occurred) was not the same as the time period in which the Section 3211 premium-due notice must be mailed (i.e., at least 15 days and no more

than 45 days prior to the day when a premium comes due).<sup>2</sup> Former N.Y. INS. LAW § 3211 (amended 2008).

In order for insurers to satisfy both the report requirements of Section 54.11(c) (Regulation 77) and the premium-due requirement of former section 3211, the NYDI construed the two laws to be satisfied by a single report:

For flexible premium policies with the minimum 61-day grace period, insurers may satisfy both the Section 3211 notice requirement and the Section 54.11(c) report requirement by mailing one notice during the 15-day period from the 16th through the 30th day after the policy processing date day on which an insurer determines that an insufficiency has occurred. The single notice must contain all information required by both Section 3211 and Section 54.11(c).<sup>3</sup>

The hypothetical set out by the NYDI provides a clear picture of the window for notice in relation to the date the cash value is determined to be insufficient and the end of the 61-day grace. Side-by-side substitution of the relevant dates in the instant case illustrates the effect of this harmonization here:

For example, consider an insufficiency determined by the insurer on November 1 [**December 12, 2010**]. The grace period ends 61 days later (January 1) [**February 11, 2011**]. The Section 3211 notice must be mailed at least 15 and not more than 45 days prior to January 1 (i.e., no

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<sup>2</sup>See N.Y. Ins. Dept. Circular Letter No. 7, “Statutory Reference: Insurance Law Section 3211, Regulation 77” (Apr. 10, 2008) (withdrawn effective 10/05/2008), *available at* [http://www.dfs.ny.gov/insurance/circltr/2008/c108\\_07.htm](http://www.dfs.ny.gov/insurance/circltr/2008/c108_07.htm) (last visited on Mar. 11, 2013) (attached as Appendix A to this Brief).

<sup>3</sup>*Id.*

earlier than November 17 [**December 26, 2010**] and no later than December 17 [**January 26, 2010**]). The Section 54.11(c) report must be mailed no earlier than, and within 30 days after, the policy processing day on which the insurer determined that an insufficiency had occurred (i.e., no earlier than November 1 [**December 12, 2010**] and no later than December 1 [**January 11, 2011**]). An insurer may satisfy both notice requirements by mailing one notice during the 15-day period from the 16th through the 30th day after the policy processing day on which the insurer determined an insufficiency had occurred (i.e., no earlier than November 17 [**December 28, 2010**] and no later than December 1 [**January 11, 2011**]).<sup>4</sup> [or, in other words, between 45 and 30 days before the end of grace].

Under the identical window established by the Louisiana laws and the policy here, Consecos second notice of January 6, 2011—25 days after the day the cash value became insufficient and 36 days before the end of grace—fell within the permissible effective range. In short, the current Louisiana provisions can be reconciled: “laws on the same subject matter must be interpreted in reference to each other” and “should be harmonized if possible.” *David v. Our Lady of the Lake Hosp., Inc.*, 849 So. 2d 38, 46 (La. 2003); LA. CIV. CODE ANN. art. 13. The Court should apply this harmonizing construction and reverse the judgment.

**B. The reasoning underlying New York’s 2008 amendments to its analogue insurance laws further supports reversal in this case.**

Notably, in 2008, New York amended its Louisiana section 8511.A.6 equivalent (NY § 3203) and its Louisiana section 22:905 equivalent (NY § 3211) to

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<sup>4</sup>*Id.*

make the grace period and premium due notice requirements for flexible premium life insurance products (variable and universal life) consistent with the provisions of Regulation 77:

**EXISTING LAW:** Section 3203 of the current law provides that all life insurance policies must provide for a 31 day grace period before a policy may be lapsed for non-payment of premium. This bill would provide for a longer grace period, 61 days, for flexible premium (universal and variable) life insurance. Section 3211 of the insurance law currently provides that premium due notices should be mailed at least 15 and not more than 45 days prior to the day when such payment becomes due. This bill provides that, for flexible premium life insurance products, notice that there is insufficient cash surrender value under the policy to pay the charges necessary to keep it in force must be mailed no earlier than and within 30 days after the day when the insurer determines that such is the case.

2007 Legis. Bill Hist. N.Y. S.B. 7765 (Sponsor Memo, Apr. 30, 2008) (attached as Appendix B to this Brief); *see also* N.Y. INS. LAW §§ 3203, 3211 (McKinney 2008).

The justification for the change comports with the rationale behind the evolution of the Model Insurance Code, discussed above, namely the need to adjust notice requirements for more modern and sophisticated flexible premium products, and the desire to give insureds even greater protection against inadvertent forfeiture due to nonpayment:

**JUSTIFICATION: The current law, which was enacted many years ago, provides for certain grace period and premium due notice requirements for life insurance policies that do not recognize newer products that have been introduced in recent years by life insurers.**



Products such as variable and universal life insurance do not necessarily have regular premium payments but, rather, flexible premiums, depending on the value that has built up in the policy.

Several years ago, the Insurance Department, in recognizing that the law was lacking for these newer products, promulgated 11 NYCRR Part 54 (Regulation 77) which provided for a 61 day grace period, as well as a time period and process for sending notice to the policyholder to inform them when it is determined that there is insufficient cash surrender value in the policy to keep it in force.

Unfortunately, the law was not correspondingly revised to reflect this regulatory mandate. **By enacting this change, the law will be brought into consistency with the regulation but, more importantly, this bill will be more friendly to the consumer by providing that the policy owner will have a longer period of time to pay sufficient funds to ensure that their policy remains in force than the law currently provides.**

2007 Legis. Bill Hist. N.Y. S.B. 7765 (Sponsor Memo, Apr. 30, 2008) (paragraph separation and emphasis supplied) (attached as Appendix B to this Brief).

As amended, New York's code provisions are consistent and clear in identifying the operative dates and the required notice and grace time periods keying off those dates:

Section 3211 now reads in pertinent part:

No policy of life insurance . . . shall terminate or lapse by reason of default in payment of any premium, installment, or interest on any policy loan in less than one year after such default, unless, **for scheduled premium policies**, a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due, or **for [flexible premium] life insurance**

**policies . . . . no earlier than and within thirty days after the day when the insurer determines that the net cash surrender value under the policy is insufficient to pay the total charges that are necessary to keep the policy in force.**

N.Y. INS. LAW § 3211 (McKinney 2008).

Section 3203 now reads in pertinent part:

[F]or [flexible premium] policies . . . the policyholder is entitled to a sixty-one day grace period, beginning on the day when the insurer determines that the policy's net cash surrender value is insufficient to pay the total charges necessary to keep the policy in force for one month from that day, within which to pay sufficient premium to keep the policy in force for three months from the date the insufficiency was determined. . . . During such grace period, the policy shall continue in full force.

N.Y. INS. LAW § 3203(a)(1) (McKinney 2008).

Thus, the backward-looking (from due date) 15-to-45 day period specifically relates to scheduled premium policies, for which the “due date” is predictable and certain in advance. And the forward-looking (from date of insufficiency) 30-day notice and 61-day grace periods specifically relate to flexible premium policies, for which the date when the cash value is depleted and money will be due is uncertain until it occurs. New York's pre-amendment harmonization of, and subsequent amendment to, its analogue insurance laws generally support the operative date the district court determined (the date the cash surrender value becomes insufficient to cover the next monthly premium deduction). But New York's interpretation and

amendments are consistent with Conseco's actions and position as to the appropriate notice time frame for flexible premium policies relative to the insufficiency and end-of-grace dates. Although Amicus recognizes that it is the Legislature's role to update the statutes to consistency and modernity, until that time, this Court is not without guidance in conducting *de novo* review of the district court's interpretation of the governing provisions. In reviewing the district court's holding, this Court should adopt and apply New York's well-reasoned interpretation of the current laws and hold that Conseco effectively complied with the notice requirements.

**III. The administrative regulation should be read to operate in harmony with the statutory requirement.**

In denying Conseco's post-judgment motion, the district court adopted an alternate rationale for holding that the policy coverage did not terminate. In that ruling, the Court held that section 8511.A.6(b) of the Louisiana Administrative Code provided for a second grace period of 30 days that ran after the expiration of the policy's 61-day grace period, during which time J&J attempted to make a payment.<sup>5</sup> RE5:5. Section 8511.A.6(b), properly understood, however, does not require that a second grace period run at the conclusion of the 61-day grace period already provided

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<sup>5</sup>Like Conseco, in the context of this summary-judgment disposition, ACLI questions whether the district court properly assumed the truth of the affidavit submitted by J&J as the movant on facts that Conseco, as the non-movant, challenged. *See* Br. Appellant at 42.

for in the policy.

Section 8511.A.6(b) provides:

- b. A flexible premium policy shall provide for a grace period of at least thirty days (or as required by state statute) **after lapse**. Unless otherwise defined in the policy, lapse shall occur on that date on which the net cash surrender value first equals zero.

LA. ADMIN. CODE tit. 37, § 8511.A.6(b) (emphasis added). It is undisputed that the flexible premium policy here provide for a 61-day grace period that began, in the language of section 8511.A.6(b), “after” “the date on which the net cash surrender value first equals zero.” *Id.*; R327. And, as the district court observed, it is “uncontested that the net cash surrender value equaled zero on December 12, 2010.” RE5:5; R465.

Thus, as long as “lapse” is not “otherwise defined in the policy” as a different date, then the policy’s existing 61-day grace period complied with section 8511.A.6(b)’s 30-day minimum grace-period threshold. But the district court believed that the policy’s use of the word “lapse” as the end of the grace period, not the day on which the net cash surrender value first equals zero was the equivalent of “lapse” actually being “defined” in the policy with a single, set definition. RE5:5; R465. That is where the district court went astray along the path to concluding that section 8511.A.6(b) thus required an additional 30-day grace period that is stacked on top of and running at the conclusion of the policy’s 61-day grace period.

Using a term in a policy is not the same thing as providing a set definition of a term as a defined term. The difference is important, especially when terms are frequently used in more than one sense. Indeed, the term “lapse” is alternately used to mean the date that a policy terminates due to nonpayment of premiums yet also to mean the date when premiums went unpaid and a grace period begins. *See, e.g.*, HAROLD D. SKIPPER & WAYNE TONNING, *THE ADVISOR’S GUIDE TO LIFE INSURANCE* 482 (2011) (providing alternate definitions of “lapse” in the glossary: “termination of a life insurance policy for nonpayment of premiums, or, in the case of variable life and universal life policies, the depletion of the account value below that required to maintain the policy in force”).<sup>6</sup>

In light of the varying ways in which “lapse” is used in the industry, in policies, and in judicial opinions even within the insurance context, it makes perfect sense that section 8511.A.6(b) would provides that its own definition will control unless lapse is actually “defined” in the policy—as opposed to how that word is used in the policy.

And because the policy here did not include “lapse” as a defined term with a single, set definition, the plain language of section 8511.A.6(b) is that the section’s

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<sup>6</sup>*Compare State Farm v. Beaston*, 907 S.W.2d 430, 432-33 (Tex. 1995) (“The Beastons failed to pay the premium on David’s policy due on December 28, 1983. His policy lapsed as of December 28, 1983, and the thirty-one day grace period expired on January 28, 1984.”) *with id.* at 434 (“Under the policy’s nonpayment-of-premium provision, if a premium has not been paid by the end of the grace period, the ‘policy will lapse as of the due date of any amount of unpaid premium,’ unless the accumulations-to-avoid-lapse provision or the automatic premium loan provision applies. . . . When the policy lapses due to nonpayment, ‘all coverage ceases’ . . . .” (footnote omitted))

own definition of lapse controls. Again, under the section 8511.A.6(b) definition of lapse to mean “the date on which the net cash surrender value first equals zero,” the policy complied with section 8511.A.6(b)’s requirement that “[a] flexible premium policy shall provide for a grace period of at least thirty days (or as required by state statute) after lapse”—the date on which the net cash surrender value first equals zero. Because the district court and all parties agreed that date is December 12, 2010 and that the policy’s 61-day grace period ran from that same date, the policy’s 61-day grace period complies with section 8511.A.6(b)’s threshold minimum grace period.

In this way, section 8511.A.6(b)’s threshold minimum grace period fits logically within the legislative and statutory framework applicable here. The district court’s suggestion that section 8511.A.6(b) creates another grace period of 30 days to be stacked on top of the 61-day grace period unduly extends coverage under the policy.

### **CONCLUSION**

This Court should reverse the judgment of the district court and render judgment for Appellant Conseco Life Insurance Co. In the alternative, this Court reverse and remand to the district court for further proceedings regarding the nature of Johnston & Johnston’s claimed attempt to make a premium payment after February 11, 2011.

Respectfully submitted,

ALEXANDER DUBOSE & TOWNSEND LLP

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### CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2013, I electronically transmitted the attached document to the Clerk of the Court of the 5th Circuit Court of Appeals using the ECF System of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means. I further certify that a copy has been sent via email and United States first-class mail, postage prepaid, to the persons listed below who do not receive electronic notice pursuant to the Court's ECF filing system.

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/s/ Dana Livingston  
Dana Livingston



### ECF CERTIFICATION

I hereby certify (i) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; (ii) the electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; (iii) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; (iv) the original paper document was signed by the attorney of record and will be maintained for a period of three years after mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.2.

/s/ Dana Livingston

Dana Livingston

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(1)(7)(B):
  - This brief contains 6084 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
  
2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(b) because:
  - This brief has been prepared in a proportionally spaced typeface using Word Perfect X4 in 14 point Times New Roman font, except the footnotes, which are in 12 point typeface as permitted by Fifth Circuit Rule 32.1.

Dated: March 11, 2013

/s/ Dana Livingston  
Dana Livingston

# Appendix A



**STATE OF NEW YORK  
INSURANCE DEPARTMENT  
25 BEAVER STREET  
NEW YORK, NEW YORK 10004**

**NOTE: WITHDRAWN EFFECTIVE 10/05/2008**

**David A. Paterson  
Governor**

**Eric R. Dinallo  
Superintendent**

**Circular Letter No. 7  
(2008)  
April 10, 2008**

**TO: All Authorized Life Insurers and Licensed Fraternal  
Benefit Societies**

**RE: Compliance with Section 3211 and Regulation 77  
Notice Requirements for Variable Life Insurance  
Policies**

**STATUTORY REFERENCE: Insurance Law Section 3211,  
Regulation 77**

The purpose of this circular letter is to provide guidance about the application and interpretation of the premium-due notice required by Insurance Law Section 3211 for variable life insurance policies. The premium-due notice requirement in Section 3211(a) applies to all variable life insurance policies, including variable universal life policies delivered or issued for delivery in this state by an authorized life insurer or a licensed fraternal benefit society. The report to be sent to policyholders of flexible premium variable life insurance policies pursuant to

Section 54.11(c) of 11 NYCRR 54 (Regulation 77) is a separate and distinct requirement. An insurer must satisfy both the report requirements of Section 54.11(c) and the premium-due notice requirement of Section 3211(a).

Section 3211(a) provides:

§ 3211. Notice of premium due under life or disability insurance policy; notice to assignees of non-payment of premium.

(a) (1) No policy of life insurance or non-cancellable disability insurance delivered or issued for delivery in this state, and no life insurance certificate delivered or issued for delivery in this state by a fraternal benefit society, shall terminate or lapse by reason of default in payment of any premium, installment, or interest on any policy loan in less than one year after such default, unless a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due. A separate notice shall not be required for insurance that is supplemental to a policy of life insurance.

(2) If a life insurance policy or life insurance certificate provides that the policyholder or certificate holder may vary the amount and frequency of premiums to be paid to the insurer, premiums, installments and interest on loans will be considered due on the day when the failure of the insurer or fraternal benefit society to receive an amount of premium, installment or interest on loan would cause such policy or certificate to terminate or lapse, and the failure to pay such amount shall be considered a default.

Thus, the premium-due notice must be mailed at least 15 and not more than 45 days prior to the day when a premium payment becomes due. For flexible premium policies, the

payment is considered due on the day when the failure of the insurer to receive the payment would cause such policy to terminate or lapse and the failure to pay such amount would be considered a default.

Pursuant to the grace period provision in Section 54.6(b)(3)(i) of Regulation No. 77, the grace period must end on a date not less than 61 days after the policy processing day on which the insurer determined that the total charges necessary to keep the policy in force (until the next policy processing day) exceed the net cash surrender value under the policy.

Reliance solely on the report required by Section 54.11(c) of Regulation No. 77 (stating the minimum premium payment due and the length of the grace period) to satisfy the premium-due notice requirement of Section 3211 is not sufficient. The time period in which the Section 54.11(c) report must be mailed (i.e., no earlier than, and within 30 days after, the policy processing day on which the insurer determined that an insufficiency had occurred) is not the same as the time period in which the Section 3211 premium-due notice must be mailed.

The Section 3211 notice must specify the amount of the payment due, the date when due, the place where and the person to whom it is payable, and state that, unless the payment is made on or before the date when due or within the specified grace period thereafter, the policy shall terminate or lapse except as to the right to a cash surrender value or nonforfeiture benefit, if any.

For flexible premium policies with the minimum 61-day grace period, insurers may satisfy both the Section 3211 notice requirement and the Section 54.11(c) report requirement by mailing one notice during the 15-day period from the 16th through the 30th day after the policy processing day on which the insurer determines that an insufficiency has occurred. The single notice must contain all information required by both

Section 3211 and Section 54.11(c).

For example, consider an insufficiency determined by the insurer on November 1. The grace period ends 61 days later (January 1). The Section 3211 notice must be mailed at least 15 and not more than 45 days prior to January 1 (i.e., no earlier than November 17 and no later than December 17). The Section 54.11(c) report must be mailed no earlier than, and within 30 days after, the policy processing day on which the insurer determined that an insufficiency had occurred (i.e., no earlier than November 1 and no later than December 1). An insurer may satisfy both notice requirements by mailing one notice during the 15-day period from the 16th through the 30th day after the policy processing day on which the insurer determined that an insufficiency had occurred (i.e., no earlier than November 17 and no later than December 1).

Unless the Section 54.11(c) report complies with both the timing requirement and content requirement of Section 3211 or a separate Section 3211 premium due notice is provided, the coverage under the policy would not terminate or lapse by reason of default for up to one year.

Any questions concerning this circular letter may be directed by mail to Kathleen Ryan, Associate Insurance Attorney, Life Bureau, New York Insurance Department, One Commerce Plaza, Albany, NY 12257 or by e-mail to [KRyan@ins.state.ny.us](mailto:KRyan@ins.state.ny.us).

Very truly yours,

---

Martin A. Schwartzman  
Assistant Deputy Superintendent  
and Chief

Life Bureau



# Appendix B

Sponsor Memo, April 30, 2008

Reporter: 2007 Legis. Bill Hist. NY S.B. 7765

Text

SPONSORS MEMO:

NEW YORK STATE SENATE  
INTRODUCER'S MEMORANDUM IN SUPPORT  
submitted in accordance with Senate Rule VI, Sec 1  
BILL NUMBER: S7765

SPONSOR: SEWARD

TITLE OF BILL: An act to amend the insurance law, in relation to the grace period, premium due and notice requirements for life insurance policies

PURPOSE: This bill would amend the insurance law to make the grace period and premium due notice requirements for flexible premium life insurance products (variable and universal life) consistent with such provisions that are currently required pursuant to 11 NYCRR Part 54 (Regulation 77). It would establish a 61 day grace period to the policyholder before a policy may be lapsed for non-payment of premium and would further require that insurers must provide a notice that premium is due not more than 30 days from the date the insurer determines that the net cash surrender value under the policy is insufficient to pay the total charges that are necessary to keep the policy in force.

SUMMARY OF PROVISIONS: This bill would amend paragraph (1) of subsection (a) of Section 3203 of the insurance law to provide for a 61-day grace period, for policies in which the amount and frequency of premiums may vary (flexible premium products), during which the policyholder may pay premium sufficient to keep the policy from lapsing. The bill would further amend paragraph (1) of subsection (a) of Section 3211 of the insurance law to require that a premium due notice must be mailed to the policyholder of one of these types of policies no earlier than and within thirty days after the day when the insurer determines that the net cash surrender value under the policy is insufficient to pay the total charges that are necessary to keep the policy in force. The bill would also amend paragraph (1) of subsection (b) of Section 3211 of the insurance law to require that premium due notices should be mailed to the policy owner, who would be responsible for paying the premium to keep the policy in place. Lastly, this bill would make corresponding changes to paragraph (1) of subsection (a) of

Section 451 0 of the insurance law relating to what is required for the same products when offered by a fraternal benefit society.

EXISTING LAW: Section 3203 of the current law provides that all life insurance policies must provide for a 31 day grace period before a policy may be lapsed for non-payment of premium. This bill would provide for a longer grace period, 61 days, for flexible premium (universal and variable) life insurance. Section 3211 of the insurance law currently provides that premium due notices should be mailed at least 15 and not more than 45 days prior to the day when such payment becomes due. This bill provides that, for flexible premium life insurance products, notice that there is insufficient cash surrender value under the policy to pay the charges necessary to keep it in force must be mailed no earlier than and within 30 days after the day when the insurer determines that such is the case. Section 3211 further requires that premium due notices must be sent to the insured, not the policy owner.

JUSTIFICATION: The current law, which was enacted many years ago, provides for certain grace period and premium due notice requirements for life insurance policies that do not recognize newer products that have been introduced in recent years by life insurers. Products such as variable and universal life insurance do not necessarily have regular premium payments but, rather, flexible premiums, depending on the value that has built up in the policy. Several years ago, the Insurance Department, in recognizing that the law was lacking for these newer products, promulgated 11 NYCRR Part 54 (Regulation 77) which provided for a 61 day grace period, as well as a time period and process for sending notice to the policyholder to inform them when it is determined that there is insufficient cash surrender value in the policy to keep it in force. Unfortunately, the law was not correspondingly revised to reflect this regulatory mandate. By enacting this change, the law will be brought into consistency with the regulation but, more importantly, this bill will be more friendly to the consumer by providing that the policy owner will have a longer period of time to pay sufficient funds to ensure that their policy remains in force than the law currently provides.

EFFECTIVE DATE: This law shall take effect on the ninetieth day after which it shall have become a law.

# Appendix C



**STATE OF NEW YORK  
INSURANCE DEPARTMENT  
ONE COMMERCE PLAZA  
ALBANY, NY 12257**

**David A. Paterson  
Governor**

**Eric R. Dinallo  
Superintendent**

**Circular Letter No. 21  
(2008)  
October 6 , 2008**

**TO: ALL INSURERS AND FRATERNAL BENEFIT SOCIETIES  
AUTHORIZED TO WRITE LIFE INSURANCE IN NEW YORK  
STATE**

**RE: Amendments to Insurance Law Sections 3203, 3211 and  
4510, Pertaining to the Grace Period and Premium Due  
Notice Requirements for Flexible Premium Life Insurance  
Policies**

**STATUTORY REFERENCE: Insurance Law Sections 3203, 3211 and  
4510**

This Circular Letter supersedes Circular Letter No. 7 (2008), which is hereby withdrawn, effective October 5, 2008.

Effective October 5, 2008, Chapter 264 of the Laws of 2008 amended Insurance Law §§ 3203(a)(1), 3211(a)(1) and (b)(1), and 4510(a)(1) with respect to the grace period and premium due notice requirements for individual life insurance policies and certificates issued by life insurers

("insurers") and fraternal benefit societies, in which the amount and frequency of premiums may vary (such policies also are known as "flexible premium policies").

Chapter 264 amended Insurance Law § 3203(a)(1) to require an individual flexible premium policy issued by an insurer to include a provision that entitles a policyholder to a 61-day grace period within which to pay sufficient premium to keep the policy in force for three months. The 61-day grace period begins on the day that the insurer determines that the policy's net cash surrender value is insufficient to keep the policy in force for one month from that date. Chapter 264 also amended Insurance Law § 4510(a)(1) to require certificates issued by fraternal benefit societies to include a provision that entitles the certificate holder to a similar 61-day grace period.

Further, Chapter 264 amended Insurance Law § 3211(a)(1) to prohibit an insurer or a fraternal benefit society from terminating an individual flexible premium policy or certificate for default in payment of any premium, installment or interest on a policy loan in less than one year of the default, unless the insurer or fraternal benefit society mails the premium due notice to the policy owner or certificateholder no earlier than, and within 30 days after, the day that the insurer or fraternal benefit society determines that the net cash surrender value under the policy or certificate is insufficient to pay the total charges that are necessary to keep the policy or certificate in force. In addition, Chapter 264 amended Insurance Law § 3211(b)(1) to require an insurer or a fraternal benefit society to mail the premium due notice to the last known address of the policyholder or certificate holder rather than the person insured.

A flexible premium policy or certificate form must provide for a 61-day grace period to satisfy the new law. Also, if a policy or certificate form contains a premium due notice mailing period provision other than as described above, it will not comply with Insurance Law § 3211(a)(1), as amended. For example, a policy or certificate provision that requires an insurer or fraternal benefit society to mail a premium due notice at least 15 and not more than 45 days prior to the day when failure to pay premium would cause the policy or certificate to terminate or lapse does not comply with Insurance Law § 3211(a)(1), as amended.

Every insurer or fraternal benefit society must revise its policy or certificate forms accordingly, and file new policy or certificate forms with, and seek approval from, the Department. An insurer or fraternal benefit society may use the prior approval procedure under Insurance Law § 3201(b)(1), or prior approval with certification procedure set forth in Circular Letter No. 6 (2004), to file its revised policy or certificate forms.

The Department is instituting an expedited approval process for all filings made solely to comply with the amendments to Insurance Law §§ 3203 (a)(1) and 3211(a)(1). If an insurer or fraternal benefit society makes any other changes to the policy or certificate forms, then the insurer or fraternal benefit society may not utilize the expedited approval process, and the filing will be processed on a non-priority basis. Further, all filings must comply with the following procedural requirements:

1. The "Re" or caption of the submission letter must comply with Circular Letter No. 8 (1999). In addition, the "Re" or caption must identify the filing as a "Grace Period and Notice Revision" filing made pursuant to amendments to the Insurance Law, effective October 5, 2008.
2. The submission letter must identify the previously approved policy or certificate forms by the form number and approval date.
3. The new forms must have a distinguishing form identification number. The use of "Rev" or a date after the form number is acceptable.
4. The insurer or fraternal benefit society must submit a highlighted copy of the new policy or certificate form showing any changes made from the previously approved policy or certificate form, or else the insurer or fraternal benefit society must explain the changes in the submission letter.
5. The filing must include a certification from an authorized officer of the insurer or fraternal benefit society certifying that the insurer or fraternal benefit society has not made any other changes to the previously approved forms, and that the insurer or fraternal benefit society is only making changes to comply with the amendments to the Insurance Law, effective October 5, 2008.

Any questions concerning this circular letter may be directed by mail to Kathleen Ryan, Associate Insurance Attorney, Life Bureau, New York Insurance Department, One Commerce Plaza, Albany, N.Y. 12257 or by e-mail to [KRyan@ins.state.ny.us](mailto:KRyan@ins.state.ny.us).

Very Truly Yours,

---

Martin A. Schwartzman  
Assistant Deputy Superintendent and Chief  
Life Bureau

***United States Court of Appeals***  
FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE  
NEW ORLEANS, LA 70130

April 23, 2013

Ms. Dana Livingston  
Alexander Dubose & Townsend, L.L.P.  
515 Congress Avenue  
Suite 2350  
Austin, TX 78701


**USCA No. 13-30010, Johnston & Johnston v. Conseco Life  
Insurance Co.**  
USDC No. 3:12-CV-1552

The following pertains to your brief electronically filed on  
April 23, 2013.

You must submit the seven paper copies of your brief required by  
5<sup>TH</sup> CIR. R. 31.1 within 5 days of the date of this notice pursuant  
to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

By:   
Sabrina B. Short, Deputy Clerk  
504-310-7817

cc: Mr. George Adam Cossey  
Mr. Scott Nikolaus Hensgens  
Mr. Charles W. Herold III  
Ms. Susan Schlesinger Vance  
Mr. Jason Allen Walters