To Be Argued By:
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Time Requested: 30 Minutes

CTQ-2022-00002
U.S. Court of Appeals, Second Circuit Docket No. 21-1830

Court of Appeals

STATE OF NEW YORK

ANDREW NITKEWICZ, as Trustee of THE JOAN C. LUPE FAMILY TRUST
on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

—against—

LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK,

Defendant-Respondent.

PLAINTIFF-APPELLANT'S RESPONSE TO *AMICUS* BRIEF

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SUMMARY OF RESPONSE TO *AMICUS* BRIEF

The *amicus* brief filed by the American Council of Life Insurers ("ACLI")[1] acknowledges that this case turns on whether the Statute contains a secret "exemption" for universal life policies. ACLI contends that such an "exemption" for universal life policies is "consistent with the statute" because "[a]ny life insurance policy that pays for coverage on a monthly basis, including a UL policy, is not subject to the refund obligations" (*Am*. Br. at 9).

That concession is fatal to ACLI's and the defendant-insurer's position because as a matter of black-letter statutory construction, universal life policies are not exempted. The Statute's premium refund requirement applies to "[a]ll life insurance policies, except as otherwise stated herein," and the two listed exceptions do **not** include universal life policies, even though universal life is explicitly referenced in the prior subsection (Ins. L. § 3203 [a]). The Legislature's choice in writing the Statute this way "implicates a long-settled principle of statutory construction: where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded"

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[1] As of this filing and as far as Plaintiff is aware, the Court has not yet granted ACLI's motion to file its *amicus* brief. Because the September 12 argument date is approaching, Plaintiff respectfully files his response now so the Court may review it should the Court grant ACLI's motion in advance of oral argument.

(*Weingarten v. Bd. of Trustees of New York City Teachers' Ret. Sys.*, 98 NY2d 575, 583 [2002]).

ACLI's request to make universal life a judicially-invented exemption that contravenes the plain language of the Statute is, by ACLI's own admission, driven by "public policy" concerns—not statutory interpretation (*Am*. Br. at 3). That too is grounds to reject ACLI's position (*see Xiang Fu He v. Troom Management*, 34 NY3d 167, 172 [2019] [This Court is "not at liberty to second-guess the legislature's determination, or to disregard—or rewrite—its statutory text."]).

In any event, ACLI's public policy arguments are unpersuasive. For example, ACLI relies heavily on a hypothetical about a policyholder who pays a $100,000 "annual planned premium" in the first year of her policy for insurance and "retirement planning" (*Am*. Br. at 15). But the Legislature did not condition the premium refund requirement on determining what "purpose" the premium was paid for, and for good reason: it would require wasteful, irrelevant, and unreliable investigations into what subjective purpose every policyholder had in making premium payments. The Legislature was right that there is no reason for such an inquiry.

ACLI bizarrely complains that insurance companies "would be required to pay back *some part* of the $100,000" if the insured died within the year under Plaintiff's interpretation, but ACLI fails to explain why that would be unfair. If the

payment was made for a year, as the annual premium payment was here, then the Statute plainly requires that the balance of the year's premium be refunded, for the balance of the period after the month of the insured's death (*see* Ins. L. § 3203 [a] [2] [if the insured dies "during a period for which the premium has been paid," then "the insurer ***shall*** add to the policy proceeds" a refund equal to "any premium actually paid for any period" beyond the month of the insured's death]). That is not unfair. That is the Legislature's public policy decision to prevent the insurance company from obtaining the windfall it would otherwise get if it were allowed to keep premiums paid for a period after the insured is dead.

Finally, ACLI wrongly urges the Court to ignore the "facts presented" (*Am* Br. at 17). Yet ACLI does not address Plaintiff's authorities that expressly allow the Court to consider the facts of this case, nor cite contrary authority (Opening Br. at 31 and Reply Br. at 27 [relying on *Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v. Aegis Grp. PLC*, 93 NY2d 229, 236 [1999]]). ACLI does not even mention the Coverage Protection Guarantee Rider ("CPGR"), let alone refute Plaintiff's argument that, because of it, each of Plaintiff's annual premium payments was designed to (and did) ***guarantee insurance coverage*** for the next annual period, just as the name implies—a **Coverage** Protection **Guarantee** Rider.

ACLI seems to be arguing that this Court's hands are tied, and it must answer the certified question with a categorical "Yes" or "No" answer. That is incorrect. The Second Circuit's question (which it invited this Court to alter as it sees fit) (Rec. 398) is whether a planned premium payment "constitutes" a refundable premium under the Statute, and if the correct answer is "Sometimes, depending on the facts," or "Yes, provided the planned premium was 'sufficient [] to keep the policy in force for' the planned period" (Ins. L. § 3203 [a] [1]), then that is of course the answer this Court should give. At a minimum, the answer to the certified question should be "yes," provided Plaintiff can prove at trial, as he alleges, that payment of each planned annual premium *guaranteed* coverage for the following year, under the CPGR.

ARGUMENT

I. ACLI Ignores the Statute's Plain Meaning.

The plain meaning of the Statute undermines ACLI's argument that universal life policies should be exempted from the refund requirement. The premium refund requirement applies to "[a]ll life insurance policies, except as otherwise stated herein," and the exceptions "stated herein" do not include universal life policies. Rather, the Legislature expressly excluded two, and only two, other insurance policy types: (1) single premium, and (2) paid-up policies.

The Legislature could have made universal life policies a third exception, but it did not. That omission is especially notable in the context of this Statute, because in the immediately prior subsection of the same Statute, the Legislature singled out universal life policies for different treatment with respect to grace periods (*see* Ins. L. § 3203 [a] [1] [providing a longer grace period for policies "in which the amount and frequency of premiums may vary" (i.e., universal life policies)]).

Further still, the second subsection (at issue in this case) plainly and indisputably applies to universal life. The second subsection explicitly refers back to the first subsection—which explicitly mentions universal life policies—because the second subsection sets up rules for death benefit payments, and those rules depend on the first subsection's discussion of the ***different*** rules for how the grace period payments are calculated depending on whether the policy is a universal life policy, or another type of policy (*see* Ins. L. § 3203 [a] [2] [explaining what happens when "the death of the insured occurs within the grace period provided in the policy"]). Given that the second subsection **incorporates the distinct treatment of universal life policies** from the first subsection, and therefore applies to universal life policies, it makes zero sense to assume that the remainder of the second subsection somehow silently excludes universal life policies, and to

disregard the Legislature's decision not to list universal life policies among the short list of exempted policy types.

The Legislature's choice "implicates a long-settled principle of statutory construction: where the Legislature lists exceptions in a statute, items not specifically referenced are deemed to have been intentionally excluded" (*Weingarten v. Bd. of Trustees of New York City Teachers' Ret. Sys.*, 98 NY2d 575, 583 [2002]). Plaintiff made this argument in his briefs (Opening Br. at 28-29; Reply Br. at 14-15), and ACLI ignores it.

Rather than confront Plaintiff's statutory interpretation arguments, ACLI admits that its focus is on "public policy" (*Am*. Br. at 3). That admission alone is grounds to reject ACLI's position. This Court's task is to "construe [the Statute's] unambiguous language to give effect to its plain meaning" (*Beck v. Chevrolet Co. v. General Motors LLC*, 27 NY3d 379, 389-90 [2016])—not to legislate "public policy" (*Am.* Br. at 3).

ACLI does not meaningfully grapple with the Statute. It examines just one provision, and in cursory fashion. ACLI points to the grace period provision, which explains that a universal life policy enters grace when the policy value is insufficient to pay the charges "necessary to keep the policy in force for one month" (*Am*. Br. at 9 [citing Ins. L. § 3203 [a] [1]]). According to ACLI, "this provision recognizes that charges for coverage are deducted from the cash value,

not planned premiums, and that coverage is paid for and continues on a monthly basis" (*id.*). From there, ACLI reasons that premiums do not pay for coverage, only the policy account does, and "any life insurance policy that pays for coverage on a monthly basis, including a UL policy, is not subject to the refund" (*id.*).

ACLI's argument is backward, for several reasons. First, ACLI quotes part of subsection [a] [1], but ignores the very next part of the same subsection, which contravenes its main argument. Subsection [a] [1] explicitly says that universal life "**premiums**" are what "keep the policy in force." (*See* Ins. L. § 3203 [a] [1] (requiring insurers to permit universal life policyowners, whose policies are in grace, to pay "sufficient premium to keep the policy in force"). So the Statute itself recognizes the obvious fact that universal life premiums pay for coverage.

Second, ACLI claims that Section 3203 [a] [2] should be read to mean that "the only amount 'actually paid' for any period of coverage is the monthly deduction," (*Am.* Br. at 4). But that plainly misreads the statute, which refers to "any **premium**" that was "actually paid," not to "deductions" that are actually paid. The policyowner pays the premium; the insurer takes the deduction. The refund Statute refers to the former, not the latter. Although some charges are deducted from the policy value on a monthly basis, the Statute calls for a refund of "premiums," not charges. That is dispositive. The fact that some *charges* are deducted monthly is irrelevant to which *premiums* are refundable. The premium

payments are what fund the policy value (*see* Rec. 62 [defining the "Policy Value" as the place "where Your premiums go"]), and they are what are refunded by the plain terms of the Statute.

Third, there is no "coverage" or "guaranteed coverage" requirement in the Statute (*see* Opening Br. at 25, Reply Br. at 2). All the Statute requires is that a premium be actually paid for any period. There can be no doubt, under plain English, that an "Annual" premium payment that the policyholder pays once per year, is a premium paid for a period – a year.

Here, an insured took out an insurance policy, where the exact amount of the "Annual" premium is stated on the face of the Policy, and he agreed that he intended to pay that amount, once per year, on the "Annual" premium due date. He then wrote and sent a check for that exact "Annual" amount, once per year. He did this for 8 years straight. The only question is whether each of those "Annual" premium payments was for "any period," and the answer is exceedingly obvious: yes. Each "Annual" premium was made for the next year, until the next annual premium check became due. ACLI worries about what might have happened in a different world if he did not pay his annual planned premium, or if his annual payment had somehow not been enough to guarantee coverage for the following year, but the short answer to those theoretical (and unnecessary) worries is that is not this case. An annual premium is for a period: a year.

Four, even if the Court wanted to add-in to the Statute a new "for coverage" or "for guaranteed coverage" requirement, the Statute expressly recognizes that universal life premiums can pay for coverage "for three months," notwithstanding that charges are deducted on a monthly basis (*see* Ins. L. § 3203 [a] [1] [requiring universal life policyholders "to ***pay sufficient premium to keep the policy in force for three months***"]). And if a universal life premium can be paid to extend coverage for three months, it can also be paid to extend coverage for a year, as here. Plaintiff made this argument in his prior briefs, and ACLI ignored it (Opening Br. at 24; Reply Br. at 12). This three-month grace period provision in the Statute provision undermines ACLI's argument that, for universal life policies, coverage can only be "paid for . . . on a monthly basis" (*Am.* Br. at 9). And because monthly deductions are a standard feature of universal life policies—as ACLI acknowledges (*Am.* Br. at 3-4)—to accept ACLI's argument would make universal life a third exception to the Statute, a result that cannot be reconciled with the plain language.

ACLI's reliance on the "Life Insurance Buyer's Guide" is also misplaced (*Am.* Br. at 10). That guide was not cited in the Complaint, the defendant-insurer never relied on that evidence, and it would be improper for this Court to do so now. Regardless, the guide supports Plaintiff because it acknowledges that "eventually your coverage will end" if policyholders do not pay their premiums

(*Am*. Br. at 10). Defendant does not give coverage for free, and Plaintiff would have received no coverage if he did not pay his premiums. As this Court has explained, "[b]y the early 1990s, many consumers who purchased such [universal life] policies were required to continue out-of-pocket payments to keep their policies in force." *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 343 [1999]. Put simply, universal life policyholders need to pay their premiums, or else their policies will lapse. ACLI's efforts to downplay the importance of premium payments for universal life policies should be rejected (*Am.* Br. at 10).

Moreover, neither the Statute nor the Policy distinguish premiums paid for coverage from premiums that relate to investment (or some other purpose) (Reply Br. at 6). There is just one "annual" planned premium, and all the Statute requires is that this premium be paid for any period. Even if ACLI were correct that premiums are "not []used entirely for the cost of insurance," (*Am.* Br. at 10) ACLI does not explain why the insurer should get to keep the entire premium. That outcome is not contemplated by the Statute. Nor is it fair.

ACLI next asks the Court to prioritize "recognized practices" (*Am.* Br. at 10). But there is no evidence in the Record of any "recognized practice" supporting ACLI's position, nor could there be since this case was decided on a motion to dismiss, where all factual disputes are presumed to be in Plaintiff's favor. In fact, the allegations in the Record indisputably supports Plaintiff. Another life insurance

company in New York, Athene Life, complied with the Statute by refunding the premium paid for the period beginning with the month after death on another universal life policy covering the same insured (Rec. 9, Compl. ¶ 7).

Finally, ACLI criticizes Plaintiff for relying on the dictionary (*see* Opening Br. at 4, 17-18, 23; Reply Br. at 5, 10 [relying on dictionary definitions to support Plaintiff's interpretation of the statutory terms "actually paid" and "for any period"]). Without offering any competing definitions, ACLI urges the Court to ignore Plaintiffs' definitions because "the most important consideration in interpretation is the language of the statute" (*Am.* Br. at 10). But the sole authority ACLI cites undermines its position. In that case, this Court interpreted a statute by reference to dictionary definitions (*see De La Cruz v. Caddell Dry Dock & Repair Co.*, 21 NY3d 530, 538 [2013]) [reasoning that "[t]wo central aspects of the meaning of 'public works' may be discerned from the dictionaries" and crafting a rule based on those dictionary definitions]). This Court should follow that approach here. Plaintiff's premium was "actually paid" because he wrote a check to the defendant-insurer to pay the premium, and the defendant cashed the check. The premium was "for any period" because it was an "Annual" premium that he paid once per year, for eight years in a row, by the "premium due date" (Rec. 64-65).

II. ACLI's "Public Policy" Arguments Are Misguided.

To the extent relevant, public policy considerations also support Plaintiff. ACLI's arguments rely on strawman versions of Plaintiff's position. First, ACLI insists that Plaintiff's case involves "such a narrow factual scenario" (*Am*. Br. at 11). As a threshold matter, that framing may impliedly concede that it was unfair for the defendant-insurer to retain over $30,000 of premium for the period after the insured was dead, given the facts of this case including the rider (Reply Br. at 14). ACLI never argues otherwise. This argument is also improper at the pleadings stage where there has been no discovery.

In any event, Plaintiff's case is not unique. He paid his Policy's "planned premium," which is a standard feature of universal life. The Policy describes the "Planned Premium" as "the amount of premium You intend to pay" and the "Premium Frequency" as "how often You intend to pay the Planned Premium" (Rec. 75). Even ACLI admits that "the provisions of [Plaintiff's] policy relating to the payment and application of premiums are also typical of UL policies"—thus contradicting its argument that Plaintiff's case is "narrow" (*Am*. Br. at 8, 11). As explained in *Life Insurance* by Kenneth Black Jr. and Harold Skipper, which ACLI cites and describes as "a leading life insurance textbook" (at 7), insurance companies "often recommend that owners pay a regular planned premium" to "overcome th[e] concern" about "policyholders . . . too easily allow[ing] their

policies to lapse" (K. Black & H. Skipper, *Life Insurance* [15th ed.] at 75. And the same section of the New York regulations that ACLI cites explains that planned premiums are a fundamental part of universal policies. *See* 11 NYCRR 53-2.2 [a] [5] [requiring insurance companies to send universal life policyholders a report stating what the "annual planned premium" is, and how the policy will perform assuming the "annual planned premium" is paid]). In other words, as ACLI appears to concede, planned premiums are standard features of universal life, codified in New York's insurance regulations, which policyholders can use to keep their policies in force, which is why Plaintiff was able to pay his "Annual" planned premium once per year on the "due date" for eight consecutive years, keeping his policy in force each year.

More fundamentally, it does not matter whether (even if it is somehow proven after conducting discovery) Plaintiff's case is "narrow." "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (*Cragg v. Allstate Indemnity Corp.*, 17 NY3d 118, 122 [2011]). Here, an insured would reasonably understand an "Annual" "planned premium" to pay for an annual period. And as the defendant-insurer admits, "only the specific Policy and its terms are before the Court" (Resp. Br. at 41).

ACLI next misinterprets Plaintiff's arguments about the policy account value. Plaintiff has never claimed that the insured has "no access" to the money (*Am*. Br. at 11). Rather, to refute the defendant's (now *abandoned*) argument that the premium was not "actually paid" because it could be withdrawn, Plaintiff simply explained that any withdrawal results in a corresponding reduction to the death benefit, and so is not a withdrawal at all, but a partial surrender or abandonment of the policy, which is why the Policy refers to it as a "partial surrender" (Opening Br. at 9, 20). In any event, whether premiums can be withdrawn is beside the point. As Plaintiff has explained, a shopper has "actually paid" for her groceries when she pays for those groceries even if the grocery store has a return policy (Opening Br. at 19-20). ACLI ignores that analogy and the others Plaintiff used (Reply Br. at 9-10).

ACLI also exaggerates the purported "financial advantages" of universal life (*Am*. Br. at 11). ACLI claims that "a larger Policy Value . . . results in lower monthly deductions for the cost of insurance" (*Am*. Br. at 12). But ACLI does not quantify that impact, likely because the numbers undermine its argument. Here, Plaintiff's $53,877.72 annual premium resulted in no more than a $125 deduction in monthly cost-of insurance charges, and for just five months. (Rec. at 288 n.5). Yet the defendant-insurer retained $31,428.67 for seven months paid with no coverage obligation (Reply Br. at 13-14). That lobsided outcome is a "financial

advantage" to the defendant-insurer, not Plaintiff. And it is exactly the type of windfall that the Legislature decided to prohibit, resolving that public policy dispute in favor of the insured.

Also meritless is ACLI's unsupported prediction that Plaintiff's position somehow undermines policyholders' "ability to choose when premiums are paid and in what amount" (*Am*. Br. at 14). Plaintiff's position does no such thing: some other insured can choose when to pay premiums and in what amount so long as it is permitted under the insurance policy at issue, just as Plaintiff did here when he chose to pay the Policy's "Annual" planned premium. When and how much premiums are paid at most affect the amount of the refund owed after the insured dies; they do not change whether premiums are paid for a period. And if Plaintiff had not paid any premium, he would not be entitled to any refund because he would not have actually paid any premium. None of that affects policyholders' ability to choose what premiums to pay.

ACLI's discussion of policy loans is also misplaced and irrelevant (*Am*. Br. at 12-13). For Plaintiff's Policy, loans carry an automatic 6% interest rate, and if not repaid into the policy account, the insurance is forfeited (Rec. 66, 81). Further, Plaintiff never took out a loan; doing so would have nullified his CPGR and the guaranteed coverage it provided (*see* Rec. 64 ["If . . . partial surrenders or loans are

taken . . . , additional premiums will be required to satisfy any guarantee provided by the" CPGR]; *see also infra* Section III).[2]

Even for policyholders who take out loans, ACLI never explains why Plaintiff's position prevents them from doing so in the future. ACLI briefly speculates that insurers might in the future redesign policies to "decrease[e] the amounts available for policy loans" or "reduc[e] interest credits" (*Am*. Br. at 16). These arguments go far beyond the pleadings and the Record, but they are also incorrect. Under Plaintiff's interpretation of the Statute, the insurer still retains any accrued interest; that is not part of the refund. And because any outstanding loans are subtracted from the death benefit, the insurer has no reason to limit policyholders' access to that supposed "benefit." More importantly, it does not matter whether universal life policies provide different "benefits" relative to other types of policies. ACLI never grapples with how these "benefits" affect whether Plaintiff's premium was "actually paid" or "for any period." There is no connection. All the Statute requires is that a premium be paid for a period, which is what happened here.

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[2] Plaintiff objects to ACLI's reliance on the Life Insurance *Fact*book, which is evidence outside of the Record on Appeal (*Am*. Br. at 14). Plaintiff previously moved to supplement the Record on Appeal so that Plaintiff could cite materials that support his position. The defendant-insurer opposed the motion, and the Court denied it. It is improper for ACLI to covertly expand the factual record, particularly when Plaintiff followed the correct process.

Finally, ACLI suggests that sometimes a universal policyholders' premium "was never intended to pay for coverage" (*Am.* Br. at 16). But nothing in the statutory language remotely suggests that the *subjective purpose* for paying a premium is relevant to whether a refund is owed. Even ACLI elsewhere acknowledges that the Legislature did not intend "to impose an uncertain rule" with "unpredictable results" (*Am.* Br. at 19).

Further, while completely irrelevant to this case and to a motion to dismiss, ACLI's suggestion that some consumers may use universal life policies as a pure investment vehicle does not hold water. For Plaintiff's policy, a whopping 15% cut is taken immediately off the top of all premium payments before the money is placed into the policy account (*see* Opening Br. at 8). And from that policy account, huge monthly deductions are taken for the duration of the policy. No rational investor would put money into an investment vehicle that takes 15% off the top, then charges huge monthly deductions, simply in exchange for 3% interest, independent of the death benefit (Rec. 65). Further, if the policy lapses for zero dollars, or is surrendered for pennies on the dollar, the entire investment is lost. So while it is irrelevant to this case, it is misleading at best to suggest that universal life premium payments are divorced from payments to obtain a death benefit.

III. ACLI Offers No Reason to Ignore the Facts of this Case.

ACLI ignores Plaintiff's authorities that permit the Court to answer the certified question under the facts presented by this case. (*see* Opening Br. at 31-34; Reply Br. at 27-29). Plaintiff's argument that this Court may and should consider the facts of the case before it, in order to give an accurate answer to the Certified Question, should not be controversial. After all, "[c]ourts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries" (*Coleman ex rel. Coleman v. Daines*, 19 NY3d 1087, 1090 [2012]). In certified question cases, this Court may even "reformulate the question [to] provide . . . a meaningful answer that may help in determining the outcome of this particular case" (*Cordero v. Transamerica Annuity Serv. Corp.*, 39 N.Y3d 399, 407 [2023]). This Court's "precedent requires that we rely solely on the facts presented by the certified question, including the claims in the facts presented to us. To do otherwise would violate our constitutional obligation to answer only certified questions . . . which may be determinative of the cause then pending in the certifying court" (*id.* [internal citations and quotation marks omitted]).

Unable to argue otherwise, ACLI instead makes a policy argument, claiming that Plaintiff's proposal "provide[s] no useful guidance to insurance companies" (*Am.* Br. at 18). ACLI misunderstands Plaintiff's argument. The argument revolves entirely around the Coverage Protection Guarantee Rider ("CPGR") that is

indisputably in his Policy. This is a standard policy rider offered by the defendant-insurer (*see* Rec. 64 [referring to the CPGR Rider as "Rider Form J-5899N"]).[3] The CPGR transforms universal life premiums into the functional equivalent of term life premiums, which everyone agrees are covered by the Statute. Because of the CPGR, Plaintiff's premiums ***guaranteed*** his policy would remain in effect for the annual period. Plaintiff's premium therefore satisfies the lower federal court's (incorrect) test that premiums are only "for" a "period" if they guarantee coverage for that period (Rec. 335).

ACLI does not address the arguments about the CPGR in Plaintiff's brief. It complains that Plaintiff's approach would require insurance companies to assess variables like "the policyholder's intention" and "whether other companies" have issued refunds in "specific circumstances" (*Am*. Br. at 18). Not so: that is an implication of Lincoln's position, not Plaintiff's. To the contrary, the only questions relating to the CPGR are (1) whether the policy had a CPGR, and (2) whether the policyholder timely paid the planned premium, thus keeping the CPGR in effect (*see* Rec. 64 [for the CPGR to remain in effect, "all premiums"

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[3] New York insurance law requires that "policy forms" be standardized forms, not subject to individual negotiation (Ins. L. § 3201 [a] ["The term 'policy form' shall not include an agreement, special rider, or endorsement relating only to the manner of distribution of benefits or to the reservation of rights and benefits used at the request of the individual policyholder, contract holder or certificate holder."]).

must be paid "by the premium due date"]). That analysis is not "factually intensive," nor will it lead to "unpredictable" results (*Am*. Br. at 19).

As far as equities are concerned, it would be patently unfair to allow insurance companies to retain a premium paid to *guarantee* coverage for a specific period when the insured is already dead. No plausible interpretation of the Statute supports that outcome. Insofar as public policy is implicated, the Legislature resolved that public policy issue in favor of the insured. For these reasons, at a minimum, the answer to the certified question should be "yes" on these facts.

CONCLUSION

This Court should answer the certified question affirmatively.

Dated: September 7, 2023

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CERTIFICATION

I certify pursuant to Rule 500.13 [c] [1] that the total word count for all printed text in the body of the brief exclusive of the table of contents and the table of cases and authorities is 4,713 words.

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