To be Argued by:
JOHN LASALLE
(Time Requested: 30 Minutes)

CTQ-2022-00002
U.S. Court of Appeals, Second Circuit Docket No. 2021-1830

Court of Appeals

of the

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.

BRIEF FOR DEFENDANT-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, Defendant-Respondent Lincoln Life & Annuity Company of New York states as follows:

Lincoln Life & Annuity Company of New York is a wholly-owned subsidiary of The Lincoln National Life Insurance Company, which in turn is a wholly-owned subsidiary of Lincoln National Corporation.

The following entities are subsidiaries of The Lincoln National Life Insurance Company:

1. Lincoln Life & Annuity Company of New York;
2. California Fringe Benefit and Insurance Marketing Corp.;
3. LFA, LLC;
4. LFD Insurance Agency, LLC;
5. Lincoln Financial Distributors, Inc.;
6. Lincoln Investment Advisors Corp.;
7. Lincoln Financial Advisors Corp.;
8. Lincoln Investment Solutions, Inc.;
9. Westfield Assigned Benefits Company;
10. Lincoln Reinsurance Company of South Carolina;
11. Lincoln Reinsurance Company of Vermont I;

12. Lincoln Assignment Corp.;

13. Lincoln Reinsurance Company of Vermont III;

14. Lincoln Reinsurance Company of Vermont IV;

15. Lincoln Reinsurance Company of Vermont V;

16. Lincoln Reinsurance Company of Vermont VI;

17. Lincoln Reinsurance Company of Vermont VII; and

18. Lincoln Retirement Services Company, LLC.

The following entities are subsidiaries of Lincoln National Corporation:

1. The Lincoln National Life Insurance Company;

2. First Penn-Pacific Life Insurance Company;

3. Jefferson-Pilot Investments, Inc.;

4. Lincoln Investment Management Company;

5. Lincoln Financial Reinsurance Company of Vermont;

6. Lincoln Financial Securities Corp.;

7. Lincoln Financial LLC I;

8. Lincoln National Management Corp.;

9. Lincoln National Reinsurance Company (Barbados) Limited; and

10. Lincoln Insurance Services Limited.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

CERTIFIED QUESTION FOR REVIEW

Whether a planned payment into an interest-bearing policy account, as part of a universal life insurance policy, constitutes a "premium actually paid for any period" under the refund provision of New York Insurance Law Section 3203 (a) (2).

No. A planned payment into an interest-bearing policy account of a universal life insurance policy is not actually paid for any period of coverage beyond the end of the policy month in which the insured died. The monthly deduction from the interest-bearing policy account is what extends the coverage—one month at a time—and when those monthly deductions cease following the policy month in which the insured died, no portion of any planned payment must be refunded under the Insurance Law Section 3203 (a) (2).

PRELIMINARY STATEMENT

Insurance Law Section 3203 (a) (2) applies to an insurance "premium" that was "actually paid for any period beyond the end of the policy month" in which the insured died. The insurance policy at issue (the "Policy") is a universal life insurance policy, a type of policy that "combines 'pure' life insurance with an investment component that creates a potential accumulation of money in the policy" (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 342 [1999]). Payments are credited to a "Policy Value," where they earn interest and increase the "Cash Surrender Value" (which may be accessed as collateral or cashed out prior to the insured's death) (*e.g.*

Record on Appeal ["Rec."] 62, 65-66, 78). Every month, the insurer makes a deduction from the Policy Value that pays for the insurance coverage for the upcoming month (*id.*). It is the monthly deduction—not the contribution to the Policy Value—that funds the insurance coverage, for a period of one month at a time.

Subject to limitations not at issue here, the owner is free to pay money into the Policy Value at any time. But the owner need not make any regular payments: so long as the Policy Value covers the monthly deduction, insurance coverage will continue month to month.

Plaintiff-Appellant ("Nitkewicz") is a trustee for a legal entity that owned the Policy issued by Lincoln Life & Annuity Company of New York ("LLANY"). Nitkewicz had a choice in death benefit options: he could receive the $1.5 million face amount (Option I) or the $1.5 million face amount *plus* the balance of the Policy Value at the insured's death (Option II). Option II provides more and costs more. Nitkewicz chose to save money by selecting Option I. He could have changed his mind at any time before the insured's death. He did not.

When the insured died in October 2018, LLANY stopped taking monthly deductions from the Policy Value, stopped crediting interest on the Policy Value, and paid the $1.5 million Option I death benefit—thus providing Nitkewicz the entire benefit of his bargain.

Nitkewicz then sued for a portion of the funds that were left in the Policy Value, citing New York Insurance Law Section 3203 (a) (2) (the "Statute"). But the Statute only applies to premiums that are "actually paid for any period beyond the end of the policy month" in which the insured died. Nitkewicz's Planned Premium from May 2018 did not "actually pay" for the period after the month in which the insured died. Instead, it funded the Policy Value and resulted in lower monthly deductions (and higher monthly interest payments), both of which ceased in October 2018. There is nothing to refund under the Statute.

This year marks the 100th anniversary of the enactment of the Statute, and universal life insurance policies have been in existence for almost half of that time. Yet Nitkewicz cannot identify a single legal authority that adopts his reading of the Statute (which collapses the distinction between funds held in the Policy Value and funds that actually pay for insurance on a monthly basis). Requiring a refund for a portion of the Policy Value would undermine settled expectations in the life insurance industry and would deny LLANY the benefit of its bargain.

Nitkewicz's argument also undermines the Policy's distinction between Policy Value and monthly deductions. It ignores regulatory advice from the New York Department of Financial Services ("NYDFS"), which provides written guidance to life insurers regarding how to structure their policies in compliance with New York insurance law. And it eviscerates the bargain that Nitkewicz himself struck with LLANY: Nitkewicz had the opportunity to pay for Option II, which would have provided the death benefit he seeks (and more).

LLANY's brief proceeds as follows. In the Statement of the Case, LLANY describes the structure of the Policy and shows that monthly deductions, not Planned Premiums, extend coverage on a monthly basis. Planned Premiums are optional premium payments at intervals selected by the owner at issuance. They increase the investment value of the Policy; they do not pay for a period of insurance coverage. LLANY then describes the different death benefit options and how Nitkewicz chose the cheaper death benefit (which did *not* include return of the Policy Value). LLANY then describes how the federal district court correctly interpreted the Statute and dismissed Nitkewicz's refund claim with prejudice.

The Argument has three parts. First, LLANY shows that the "Planned Premium" is not a statutory premium that must be refunded because it is not "actually paid" for any "period" of coverage. Receiving billing reminders that the owner is free to ignore or paying the same amount of premium every twelve months does not convert a Planned Premium into a premium that pays for a one-year "period." Furthermore, every available interpretative principle and tool of statutory construction confirms LLANY's reading of the statute, including that LLANY's interpretation tracks written guidance provided by the NYDFS.

Second, LLANY shows that, contrary to Nitkewicz's urging, LLANY's interpretation does not require a categorial "exemption" under the Statute for universal life insurance policies. The Policy was designed so that monthly deductions extend the insurance coverage on a monthly basis. So long as the monthly deductions cease following the month of the insured's death, the refund provision of the Statute is not triggered and no refund is required. Nitkewicz's claim that LLANY's argument would create an "exemption" is meritless.

Third, the Policy's Coverage Protection Guarantee Rider ("CPGR") does not support a "fact"-specific answer favoring Nitkewicz. The CPGR is an optional policy add-on that under certain circumstances—not triggered here—allows a policy to remain in force even if the Policy Value lacks sufficient funds to cover the monthly deduction. But the CPGR does not pay for any period of coverage, as the District Court correctly found (Rec. 336 n 4). Furthermore, the Second Circuit rejected Nitkewicz's argument regarding the CPGR (Rec. 392 n 4 ["We are not persuaded"]) and did not include the CPGR in the Certified Question. This Court should not take up Nitkewicz's invitation to revisit an incorrect argument that has already been decided against him.

The answer to the Certified Question is no. A planned payment into an interest-bearing policy account of a universal life insurance policy is not actually paid for any period of coverage beyond the end of the policy month in which the insured died. The monthly deduction from the interest-bearing policy account is what extends the coverage—one month at a time—and when those monthly deductions cease following the policy month in which the insured died, no portion of any planned payment must be refunded under the Insurance Law Section 3203 (a) (2).

STATEMENT OF THE CASE

A. The Monthly Deductions Pay for the Insurance One Month at a Time.

Nitkewicz is trustee for a legal entity that owns a universal life insurance policy (the "Policy") issued by LLANY (Rec. 9). Universal life insurance combines life insurance coverage with an investment feature (here called the Policy Value). The Policy Value has a "Cash Surrender Value," defined as the "Policy Value, less surrender charge, less Debt" (Rec. 62, 328; *see also Gaidon*, 94 NY2d at 342 ["Cash value life insurance combines 'pure' life insurance with an investment component that creates a potential accumulation of money in the policy"]). LLANY credits interest to the Policy Value on a periodic basis, increasing the Cash Surrender Value (Rec. 62, 65-66, 78).

On the first day of the Policy month, LLANY makes a monthly deduction from the Policy Value (Rec. 78). That deduction purchases insurance coverage for that month, and that month only (Rec. 79 ["Monthly cost of insurance rates will be determined by [LLANY] based upon future expectations as to investment earnings, mortality experience, persistency, expenses, taxes, capital, and reserve requirements, and on rules and standards established by the Insurance Department of the state in which this policy is delivered or issued for delivery"]; Rec. 78 [computing the monthly deduction as "the cost of insurance and the cost of any additional benefits provided by Rider for the policy month," plus certain administrative charges]; Rec. 76 ["If on a Monthly Anniversary Day the Cash Surrender Value is less than the monthly deduction due, Your policy will enter the grace period"]).

The deduction has two components, the "cost of insurance" ("COI") charge and "administrative charges" (Rec. 78). The COI charge is calculated as a function of the "net amount at risk" for the insurer—which "in simple terms, is based on the potential payout at the time of the insured's death" (Rec. 328). The COI charges generally correspond to the level of insurance coverage in terms of the amount of proceeds paid upon death; COI charges are higher when the Policy would have a higher total insurance payout upon death and lower when the Policy would have a lower insurance payout (*see* Rec. 78-79).

If the Cash Surrender Value suffices to cover the coming month's charges, LLANY will make the deduction automatically from the Policy Value, thereby extending insurance coverage for the coming month (Rec. 78). Otherwise, the Policy will enter a grace period and ultimately lapse if the owner does not pay into the Policy Value "the minimum amount needed to continue this policy"—namely, an amount sufficient to cover the monthly deduction (Rec. 76; *see also* Rec. 62 ["If the Policy Value, less surrender charge, less Debt (Cash Surrender Value) becomes so small that We cannot take an entire monthly deduction, Your policy may terminate; see, however, the Grace Period Provision"]; Rec. 75-76 ["The policy will terminate only if" certain conditions are met, one of which is that the Policy Value is "less than the monthly deduction due" and the ensuing "grace period ends"]).

B. **The Policy Defines the Terms "Planned Premium" and "Premium Frequency."**

The Policy is "Flexible Premium Adjustable Life Insurance," a name that reflects a central Policy goal: It leaves payments into the Policy Value—whether, when, and how much—almost entirely to the policyholder's discretion (Rec. 62 [defining the term "Flexible Premium Adjustable Life Insurance," as the insurer's "generic name for universal life insurance"]; Rec. 62 [" 'Flexible premium' means that You may pay premiums by any method agreeable with Us, at any time prior to the Insured's Attained Age 121 and in any amount subject to certain limitations"]). Consistent with the goal of premium flexibility for the policyholder, the Policy also includes a "Planned Premium" feature (Rec. 75). A "Planned Premium" is defined as a payment into the Policy Value at intervals ("Premium Frequency") chosen by the owner:

> "The Planned Premium and Premium Frequency, as shown on the policy specifications page, *are selected by You*. The Planned Premium is *the amount of premium You intend to pay*. The Premium Frequency

> is *how often You intend to pay the Planned Premium*. Payment of the Planned Premium is *Your option*" (Rec. 75) (emphasis added).

Because the Planned Premium and Premium Frequency are optional, the Policy also explains that "[p]ayment of a Planned Premium may not prevent this policy from terminating," and that "[f]ailure to pay a Planned Premium will not, in itself, cause this policy to terminate" (Rec. 75).

To use the Planned Premium feature, the owner simply makes a nonbinding statement of when he intends to make deposits into the Policy Value (Rec. 75). The Policy owner then receives payment notice reminders at the intervals selected (Rec. 75 ["We will send You Planned Premium payment reminder notices"]). The notice may be disregarded, or the owner may pay less or more than the amount specified in the reminder (*see* Rec. 75).

The Planned Premium provisions are a financial-planning tool. For example, the Planned Premium provisions may be used for estate planning purposes, including to schedule premium payments at levels designed to qualify as life insurance under the Internal Revenue Code (Rec. 74-75). In this respect, the death benefit and Planned Premium provisions have been carefully constructed with the intent to meet certain Internal Revenue Code provisions, including a "Federal Income Tax exclusion" (Rec. 74 ["This policy is intended to qualify as life insurance under the Internal Revenue Code. The death benefit provided by this policy is intended to qualify for the Federal Income Tax exclusion"]).

Nitkewicz requested and received Planned Premium reminders annually. Nitkewicz further chose to make Planned Premium payments, allegedly in amounts consistent with those reminders—amounts that Nitkewicz selected (Rec. 8, 10-11, 63, 100). Nitkewicz's voluntary payments in response to those reminders increased the Policy Value (*see* Rec. 11; *see also* Rec. 78). The Policy provisions work together such that higher Policy Values lower the monthly deduction for the cost of insurance (Rec. 78), earn more interest (Rec. 62, 65-66, 78), and increase the amount available for use as collateral or returned to the Policy owner should the owner choose to surrender the Policy (Rec. 79-81).

But the Policy owner's voluntary Planned Premium payments did not purchase any period of insurance coverage. Only the monthly deduction did that (Rec. 76, 78-79).

C. Nitkewicz Chose the Cheaper Death Benefit Option (Option I).

The Policy's cost of insurance—part of the monthly deduction—turns in large part on the amount the insurer has at risk. The owner's funding choices—including the owner's Planned Premium choices—affect the net amount at risk and thus may raise or lower the cost of insurance.

The Policy also offers a choice between two death benefit options, called "Option I" and "Option II" (Rec. 77). This choice is a core feature of the Policy (*see e.g.* Rec. 62 [explaining how election between Option I and Option II is a key Policy feature, allowing owners to "change the death benefit to meet [their] changing needs"]). The Option choice affects the net amount at risk, the amount of the monthly deductions, and the size of the death benefit. As a general matter, under Option I the insurer pays the face amount of the Policy upon the death of the insured, regardless of the amount of the Policy Value (Rec. 77). Under Option II, by contrast, the insurer pays the face amount of the Policy *plus* the Policy Value in exchange for higher monthly charges (Rec. 77-78). Simply put, electing Option II lets the owner pay more to get more. The owner may seek to change Options "[a]ny time after the first policy year and prior to the Insured's Attained Age 121" (Rec. 77).

The Option I/Option II distinction operates in significant part by changing how the Policy Value is used in calculating the COI charge and the proceeds of the Policy. Under Option I, the minimum death benefit is a "Specified Amount," similar to a face value or "Face Amount" (*see* Rec. 101), that the owner has selected (less any debt from a Policy loan) (Rec. 77). Option I offers lower COI charges by using the Policy Value to reduce the net amount at risk (Rec. 77-78). That is, under Option I, the cost of insurance is calculated using the Policy's Face Amount less the Policy Value (Rec. 78 ["The cost of insurance is determined on a monthly basis as the cost of insurance rate for the month multiplied by the net amount at risk for the month"]; Rec. 88 [same]). Moreover, under Option I, if the Policy Value is higher than the Specified Amount, the death benefit is not calculated using the Specified Amount but instead will be the Policy Value, increased according to a schedule the Internal Revenue Code uses to define what qualifies as a "life insurance contract" for certain tax purposes (Rec. 76 [providing that "[t]he death benefit of th[e] policy is the larger of" the death benefit option selected by the policyholder or the Policy Value augmented by a coefficient provided by the Internal Revenue Code's life insurance requirements]; *compare* Rec. 67, *with* 26 USC § 7702 [a]).

On the other hand, Option II provides a minimum death benefit of the Specified Amount *plus* the Policy Value (less any loan debt) (Rec. 77). Option II leads to higher COI charges relative to Option I because the Policy Value does not offset any of the Specified Amount for purposes of calculating the net amount at risk (Rec. 77). In other words, under Option II, the policyholder pays COI charges calculated using the Policy's entire face amount. This also means that, under Option II, whatever value remains from the last Planned Premium deposit becomes part of the death benefit and thus is returned explicitly (Rec. 77 ["The death benefit is the Specified Amount on the date of death plus the Policy Value at the beginning of the policy month of death"]).

Nitkewicz selected Option I at the time the Policy issued:

18. Plan of Insurance Flexible Premium Adjustable Life Ins, Qual, 19. Amount of Insurance $ 1,500,000
(Specified Amount, if UL or VUL)

20. (i) Death Benefit Option *(Complete for Universal Life and Variable Universal Life Product only - not required for Term or Whole Life.)*
☑ Level ☐ Increase by Cash Value ☐ Increase by Premium ☐ Increase by Premium Less Policy Factor

(Rec. 100 [selecting a "level" death benefit instead of one that would "Increase by Cash Value"]; *see also* Rec. 63). Nitkewicz could have requested a change from Option I to Option II prior to the Insured's death (*see* Rec. 77) by submitting a written form to LLANY (*see* Rec. 72). Doing so would have resulted in a death benefit that consisted of the Specified Amount plus the Policy Value being returned. Nitkewicz chose not to do so. He elected to pay less, and so he got less.

D. <u>Nitkewicz Demands Part of the Option II Benefits and Sues for the Refund of a "Premium" that Never Paid for Insurance Coverage.</u>

In May 2018, Nitkewicz paid $53,877.72 (the "May 2018 Planned Premium") (Rec. 8 ¶ 4). The May 2018 Planned Premium increased the Policy Value. Over each of the next five months, LLANY took the monthly deduction from the Policy Value and credited interest on the remaining Policy Value. Those monthly deductions were smaller (and the interest payments were higher) because of the higher Policy Value and lower corresponding net amount at risk. After the insured died, LLANY stopped taking deductions from the Policy Value and paid Nitkewicz the Option I benefits he elected: the Policy's $1.5 million Specified Amount. Nitkewicz then demanded that he receive some of Option II's benefits without having paid for them; he claimed he was entitled to take at least some of the Policy Value on top of the Specified Amount for which he bargained (Rec. 11). Nitkewicz justified his demand by citing the Statute, which requires a refund of "any premium actually paid for any period beyond the end of the policy month in which such death occurred" if the insured's death "occurs during a period for which the premium has been paid."

The Statute states:

> "(a) All life insurance policies, except as otherwise stated herein, delivered or issued for delivery in this state, shall contain in substance the following provisions, or provisions which the superintendent deems to be more favorable to policyholders: . . .
>
> (2) that if the death of the insured occurs within the grace period provided in the policy, *the insurer may deduct from the policy proceeds the portion of any unpaid premium applicable to the period ending with the last day of the policy month in which such death occurred*, and if the death of the insured occurs *during a period for which the premium has been paid*, the insurer shall add to the policy proceeds a refund of any premium *actually paid for any period beyond the end of the policy month in which such death occurred*, provided such premium was not waived under any policy provision for waiver of premiums benefit. This paragraph shall not apply to single premium or paid-up policies . . ." (Ins. Law § 3203 [a] [2]) (emphasis added).

LLANY refused Nitkewicz's demand (Rec. 11). Nitkewicz then sued on behalf of a putative class of policyholders for breach of contract in the Southern District of New York. LLANY moved to dismiss, and the District Court granted dismissal as a matter of law because the plain language of the Statute and the Policy both foreclose Nitkewicz's theory (Rec. 325, 335-336, 341-342). The District Court correctly reasoned that the monthly deduction, not the Planned Premium, is what pays for the insurance (Rec. 336). The District Court concluded: "Having reviewed the plain text and the surrounding statutory provisions, the Court determines that the Planned Premium here was not a 'premium actually paid for any period beyond the end of the policy month' in which the insured died, such that it would be covered under the statute" (Rec. 342).

E. <u>The Second Circuit Rejects Two of Nitkewicz's Arguments and Certifies One Question to This Court.</u>

Nitkewicz appealed. The Second Circuit rejected two of Nitkewicz's arguments. *First*, Nitkewicz argued that he should prevail even under LLANY's interpretation of the Statute because the Coverage Protection Guarantee Rider "transform[ed]" the owner's premium payments "into payments that guaranteed and extended coverage for a full year" (Rec. 392 n 4). The Second Circuit rejected that argument:

> "*We are not persuaded*. Even assuming that the Coverage Protection Guarantee Rider did transform the Planned Premium into a payment for a specific period of coverage, *the premium would still not be 'actually paid' under Lincoln Life's interpretation of the statute since only the monthly deduction pays for insurance.* The load charge, meanwhile, 'does not purchase any period of insurance coverage, nor does it relate to any specific period.' Appellee's Br. 49; *see* App'x 62 (distinguishing between the charge Lincoln Life applies 'to each premium You pay' and the 'monthly deduction' of the cost of insurance (quotation marks omitted))" (Rec. 392-393 n 4) (emphasis added).

Second, Nitkewicz pointed to the conduct of another life insurer who refunded part of Nitkewicz's planned premium ($2,186.34) on another life insurance policy that is not part of the record (Rec. 9 ¶ 7). The Second Circuit also rejected this argument:

> "At oral argument, counsel for Nitkewicz suggested that one practical reason for the lack of caselaw on Section 3203(a)(2) is that insurance

> companies are refunding planned premiums as a matter of course. Counsel cited the example of Athene Life Insurance Company of New York, which refunded the balance of Lupe's planned premium after her death. Oral Arg. at 9:27–9:42; see also Appellant's Br. 3–4. We agree with Lincoln Life, however, that '*any inference from the decision of a different insurer to settle rather than litigate would be speculative.*' Appellee's Br. 52" (Rec. 391 n 3) (emphasis added).

The Second Circuit rejected Nitkewicz's arguments regarding both the CPGR and the $2,000 refund on the Athene policy. The Second Circuit did not reference those issues in its Certified Question, which presents only a legal question regarding the interpretation of the Statute. Nevertheless, Nitkewicz relies heavily on both arguments in his brief (App. Br. at 5-6, 10-13, 33-34), asking this Court to revisit two arguments that the Second Circuit already rejected. Those arguments have already been decided against Nitkewicz, and the Court should not sanction Nitkewicz's attempt to relitigate them as part of the Certified Question.

The Second Circuit observed that no New York court had interpreted the Statute or the phrases "actually paid" or "for any period" in this context (Rec. 396). The Second Circuit also noted that "[w]hether such a deposit constitutes 'a premium actually paid for any period' may affect, among other things, what kind of life insurance individuals elect to buy and how insurance companies structure their policies" (Rec. 397). The Second Circuit then certified the question to this Court:

> "Whether a planned payment into an interest-bearing policy account, as part of a universal life insurance policy, constitutes a 'premium actually paid for any period' under the refund provision of New York Insurance Law Section 3203(a)(2)" (Rec. 398).

The answer is no.

ARGUMENT

I. The "Planned Premium" Is Not a Statutory Premium Because It is Not "Actually Paid" for Any "Period" of Insurance Coverage.

a. Under the Plain Meaning of the Statute and the Policy, the Planned Premium Is Not "Actually Paid" for Any "Period Beyond the End of the Month in Which" the Insured Died.

The Statute applies only to premiums that are "actually paid for any period beyond the end of the policy month in which the insured died" and where the insured died "during a period for which the premium has been paid" (Ins. Law 3203 § [a] [2]). A "planned payment into an interest-bearing policy account" (Rec. 398) is not "actually paid" in exchange for insurance coverage. Rather, it contributes to the investment component of the Policy, earns interest, and lowers the amount of the monthly deduction—which is what actually extends the coverage.

"Premium" is a general term. In "term" life insurance, the word refers to a periodic payment that extends insurance coverage for a specific period (*see* 31 NY Prac., Ins. Law § 24:4 [" 'Term life' insurance is defined as life insurance for a specified term only, the premium being calculated on a basis which provides coverage only for a death which occurs during the term"]). The entirety of each term-life payment extends insurance coverage for a specific period (and only that period) (*see* 44 CJS Insurance § 26 [defining term life insurance as "insurance for the term or period for which a premium has been paid, with the right to continue it from term to term on payment of the proper premium"]). If there is no life to insure during that period, the insured has derived no coverage benefit, and the insurer has been paid for coverage of a risk it never assumed (*see* 5 Couch on Ins. § 69:1). In that situation, the insurance company holds an "unearned premium," creating one of the few circumstances that may require the return of an already-paid premium (*see* 5 Couch on Ins. § 79:7 ["As a general rule, in the absence of a statutory provision or an express or implied agreement to the contrary, an insured may not have any part of his or her premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned"]; *see also* 5 Couch on Ins. § 69:1).

Certain types of life insurance, including universal life insurance, offer value and features independent of risk coverage (*see Gaidon*, 94 NY2d at 342 [" 'universal life' insurance [is] a form of 'cash value' life insurance. Cash value life insurance combines 'pure' life insurance with an investment component that creates a potential accumulation of money in the policy"]; *see also* 11 NYCCR § 53-2.7). The payment flows and benefits under such policies do not have a 1:1 relationship to insurance coverage. Some payment flows cover the risk of loss, while others relate to the investment component. In short, universal life insurance policies such as the Policy are complex financial instruments, the terms of which have implications and carefully constructed relationships that go beyond basic risk coverage (*see Gaidon*, 94 NY2d at 342).

The monthly deduction from the Policy Value is what "actually" pays for each monthly "period" of insurance (Rec. 341-342; *id.* 76 [the "minimum amount needed to continue the policy" is the amount sufficient to cover monthly deduction]; *see also* Rec. 75-76 ["The policy will terminate only if" certain conditions are met, one of which is that the Policy Value is "less than the monthly deduction due" and the ensuing "grace period ends"]). The Policy Value is the source of funds for the monthly deduction, but it is the monthly deduction that continues the Policy from month to month (Rec. 76). Nothing but the monthly deduction can "actually" pay for insurance by maintaining the Policy's insurance coverage for the next monthly period (Rec. 76; *see also* Section III, below [explaining why the CPGR does not pay for coverage]).

The Planned Premium does not pay for any period of coverage, and there can be no dispute that the statutory premium must pay for a period of coverage. The Statute refers to this coverage requirement twice. It first refers to the death of the insured occurring "during a period for which the premium has been paid" (Ins. Law § 3203 [a] [2]). Clearly, the period for which the premium has been paid is referring to a period *of coverage* purchased by that premium. Next, the Statute refers to "any premium actually paid for any period beyond the end of the policy month in which such death occurred" (*id.*). Again, the premium must be actually paid for insurance coverage that extends beyond the end of the month in which the insured died. As discussed above, the May 2018 Planned Premium neither paid for any coverage nor any period of coverage beyond the end of the month of the insured's death.

Nitkewicz contends that the Court should do little more than look at the word "premium" in the defined term "Planned Premium," and chides LLANY for "dwelling on some features of universal life insurance" (App. Br. at 5, 16). In the name of keeping the case "simple," Nitkewicz repeatedly urges the Court to rely on lay dictionaries (App. Br. at 4, 16-17, 23) and close its eyes to the structure and function of the Policy's actual provisions (*e.g.* App. Br. at 3, 5, 16).

This Court's reasoning in *New York State Assn. of Life Underwriters, Inc. v New York State Banking Dept.*, 83 NY2d 353 [1994] [hereinafter *NYSALU*] rejects such a facile approach. In *NYSALU*, the plaintiff claimed that "annuities" must be regulated as insurance products because "Insurance Law § 1113(a)(2) includes 'annuities' in its description of 'kinds of insurance authorized' " (*id.* at 363). The Court did not stop after recognizing that Section 1113 (a) (2) included annuities as an "authorized" form of "insurance" (*id.* at 363-364). Nor did it cede the issue to a lay dictionary editor. Instead, the *NYSALU* opinion analyzed the financial substance of annuities and the particular obligations that annuity contracts create (*id.*). The Court concluded that annuities are not "insurance" in the sense that mattered (*id.*).

This case is easier than *NYSALU*. The *NYSALU* statute called annuities "insurance"—period—and the issue presented was whether annuities constituted "insurance." Here, there are express statutory requirements—"actually paid," "for a period," "during a period"—that prevent the Statute from applying to the May 2018 Planned Premium. But *NYSALU* shows that Nitkewicz's interpretive methods cannot carry the day. Substance—the Policy's terms and the obligations they create—determine the outcome, and pointing to a single word is not enough.

Nitkewicz tries to draw analogies between paying the May 2018 Planned Premium and buying groceries or prepaying mortgages. These analogies are not helpful. The Policy is a sophisticated financial instrument with defined terms and specific mechanics, and the Statute refers to the actual payment of premiums in exchange for a period of coverage after the death of the insured. Arguing that a consumer "actually pays" for groceries even though they can be returned or arguing a borrower "actually pays" her mortgage when she prepays twelve installments does not assist the Court in analyzing either the Policy or the Statute.

b. <u>Receiving Annual Planned Premium Reminders Does Not Mean a Planned Premium Pays for a One-Year "Period".</u>

Nitkewicz argues that the Planned Premium must be "for" a period because he ticked the box that said he wanted payment notice reminders on an "annual" basis, rather than a semi-annual, quarterly, monthly, or other basis (App. Br. at 7, 21-22). This argument does not, and cannot, resolve the Certified Question: Whether there were twelve months between the last two Planned Premiums has nothing to do with whether the last Planned Premium was actually paid for a period of insurance coverage following the death of the insured. The Policy is clear that coverage is purchased monthly, not annually, via the monthly deduction, not a Planned Premium (Section I [a], above).

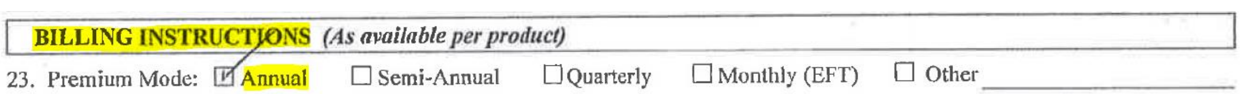
Nitkewicz is wrong in any event. "Annual" refers to how often Nitkewicz chose to receive payment notices that he was free to disregard (Section 1 [a], above; Rec. 75 ["The Premium Frequency is how often You *intend to pay* the Planned Premium. Payment of the Planned Premium is Your option"] (emphasis added); Rec. 75 ["We will send You Premium Payment reminder notices"]). And the fact that Nitkewicz paid Planned Premiums in May of 2016, 2017, and 2018, for example, does not mean that any Planned Premium paid for an identifiable period of coverage, especially when the Policy states that "[f]ailure to pay a Planned Premium will not, in itself, cause this policy to terminate" and warns that "[p]ayment of a Planned Premium may not prevent this Policy from terminating" (Rec. 75). Those payments increased the Policy Value, where they provided ongoing financial benefits for as long as the Policy remained in force.

Nitkewicz argues that the " 'annual' period for this premium is emphasized throughout the Policy" (App. Br. at 7). In support, he cites the policy specification page, which contains the word "ANNUAL" following the amount of the "PLANNED PREMIUM":

PLANNED PREMIUM: $53,877.72 ANNUAL

(App. Br. at 7, citing Rec. 65). The word “annual” here refers to the Premium Frequency (Rec. 75 [“The Planned Premium and Premium Frequency, *as shown on the policy specifications page*, are selected by you”] (emphasis added); Rec. 75 [“The Premium Frequency is how often You intend to pay the Planned Premium”]). “Annual” does not refer to an annual period of coverage: it refers to a non-binding statement regarding how often the owner intended to pay the Planned Premium.

Nitkewicz also cites to the portion of the application where Nitkewicz indicated that the Planned Premiums would be “annual”:


BILLING INSTRUCTIONS *(As available per product)*

23. Premium Mode: ☑ Annual ☐ Semi-Annual ☐ Quarterly ☐ Monthly (EFT) ☐ Other ________

(App. Br. at 7, citing Rec. 100) (emphasis added). The selection falls under the heading “BILLING INSTRUCTIONS,” which is consistent with the fact that Nitkewicz’s selection resulted in LLANY sending payment billing reminders (which Nitkewicz was free to disregard each year). Again, the reference to “annual” says nothing about whether the Planned Premiums paid for a year of insurance coverage (they did not).

Nitkewicz claims without citation that the Policy says that the “purpose” of the “ANNUAL” Planned Premium was for it to be paid exactly once per year (App. Br. at 4), but the Policy does not say that. Instead, the Policy says that “Payment of the Planned Premium is Your option,” and that, after the initial premium, “premiums may be paid at any time prior to the Insured’s Attained Age 121 and in any amount, subject to the following conditions" (Rec. 75). Further, Nitkewicz relies on a dictionary definition of the word "for" (App. Br. at 4 [referring to the "object, aim, or purpose of an action"]), and asserts that "an annual premium payment is plainly for a year." But Nitkewicz does not cite any Policy language showing that the "object, aim, or purpose" of the May 2018 Planned Premium was to provide insurance coverage for one year. Nor can he, given the clear language that the monthly deduction extends insurance coverage one month at a time and that payment of a Planned Premium may not prevent the Policy from terminating. Nitkewicz's alleged "purpose" of the Planned Premium (annual or otherwise) finds no support in the Policy.

Nothing in the Policy, or the rest of the record, supports Nitkewicz's assertion that he would have received no coverage "if he had not paid the annual premiums" (App. Br. at 4 [providing no citation]) or that the "annual premium is therefore designed to be the one and only payment the policyholder pays for that year" (*id.* at 23 [providing no citation]). Aside from the initial premium, the Policy did not require the payment of any premiums on any schedule (Rec. 75). The Policy could have been funded without a single Planned Premium ever being made.

It is also impossible to non-arbitrarily trace a particular Planned Premium payment to a particular monthly deduction or interest credit. This is a practical, not a theoretical, problem. Nitkewicz demands the portion of May 2018 Planned

Premium attributable to the seven months after the insured's death (App. Br. at 11-12; *see also id.* at 26 [mischaracterizing LLANY's contentions on this point]). But he cannot. The $53,877.72 was "for" the Policy Value, where it provided Nitkewicz the benefit of his bargain in the form of additional interest and reduced monthly deductions. Any other characterization requires inventing rules that have no basis in the Policy or statute: Nitkewicz at one point assumed a last-in-first-out rule where the last payment in is deducted first. But there is no reason to favor that rule over a first-in-first-out rule, under which the Policy Value in existence before the alleged $53,877.72 payment would have paid (in whole or in part) for the next seven months. And if the rule is last-in-first-out, Nitkewicz needs to deal with whether accrued interest was deducted first. Moreover, Nitkewicz's theory is inconsistent with the Statute's coverage-related purposes and the Policy's non-coverage bargain he struck because his $53,877.72 Planned Premium payment earned interest and contributed to eligibility for lower COI charges (among other things).

By contrast, following the Policy's plain terms that the monthly deduction is the payment that continues insurance coverage from month to month avoids all those problems.

Nitkewicz also argues that the Statute and the Policy contemplate that premiums can be paid for "multi-month periods" (App. Br. at 23-27). Under Section 3203 (a) (1), the policyholder must be given a "sixty-one day grace period" in order to pay "sufficient premium to keep the policy in force for three months from the date the insufficiency was determined" (Ins. Law § 3203 [a] [1). But the fact that an amount of money would be "sufficient" to keep the Policy in force—*i.e.*, that it would be enough to refill the Policy Value to cover three months' deductions after accounting for the interest credited each month—does not mean that payment of that amount actually purchases three months of coverage. Payment of that amount removes the Policy from "grace"—the policy then functions as it did before it entered the grace period, with the monthly deduction extending coverage one month at a time.

The same is true for the Policy's reinstatement provisions, which, among other things, require the policyholder to pay "an amount that results in a Cash Surrender Value on the date of reinstatement that is sufficient to keep this policy in force for at least two (2) months" (Rec. 76). That requirement is entirely consistent with coverage being extended on a month-to-month basis by the monthly deduction. If a policyholder pays an amount sufficient to keep the policy in force for two months, as Nitkewicz posits (App. Br. at 24), the first monthly deduction would extend coverage for the first month. The remaining funds in the Policy Value would earn interest until the second month's deduction were taken (therefore extending the coverage for the second month). The fact that LLANY undertakes certain obligations (removing a policy from grace or reinstating a policy) upon receipt of funds that are "sufficient" to keep the policy in force for certain amounts of time does not mean that the receipt of those funds actually purchases insurance or otherwise modifies the relationship between the monthly deductions and policy coverage.[1]

Nitkewicz argues that the District Court erred by inserting into the Statute the requirement that a refund is required only when the premium is paid "for any period . . . of coverage guaranteed by the premium payment" (App. Br. at 25-26, citing Rec. 335). Putting aside that this Court's role is not to determine whether or not the District Court erred, Nitkewicz is wrong. The District Court was simply paraphrasing the Policy's Planned Premium provisions—which state that "Failure to pay a Planned Premium will not, in itself, cause this policy to terminate"—to illustrate the (non-)relationship between Planned Premiums and periods of insurance coverage (Rec. 75) because, in the absence of such a relationship, there can be no

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[1] The Policy states: "The duration of coverage will depend on the amount, timing and frequency of premium payments, interest credited, cost of insurance, administrative charges, any loans or partial surrenders, the choice of death benefit option, a requested change in specified amount and the cost of additional benefits" (Rec. 64). In an effort to link premiums with a period of coverage, Nitkewicz infers from this statement that the "policy recognizes that timely payment of premium pays for a 'duration of coverage' " (App. Br. at 24). Not so. This sentence explains that "*the* duration of coverage" (not "*a* duration of coverage") will depend on several things, including the amount, timing, and frequency of premium payments. It does not say that timely payment of premium pays for any particular period or particular duration of coverage.

"actual" payment for a "period" to support a refund. Nitkewicz is attempting to rewrite the Statute to relieve himself of the obligation to identify a premium that was actually paid for a period of coverage.

c. Every Other Available Principle and Tool of Interpretation Supports LLANY's Interpretation.

All other available interpretive principles and tools of statutory construction confirm that Planned Premiums are not subject to the Statute. *First*, LLANY's interpretation gives effect to the "actually" in "actually paid." *Second*, Nitkewicz's interpretation "distorts" the Statute's meaning by placing "undue emphasis" on only part of the Statute. *Third*, as a statute in derogation of the common law, Section 3203 (a) (2) must be narrowly construed. *Fourth*, Nitkewicz's interpretation would produce impractical, unworkable, and unfair results. *Fifth*, Nitkewicz wrongly attempts to import—and then misuse—the inapplicable doctrine of *contra proferentem*. *Sixth*, there is no legislative or regulatory statement that supports Nitkewicz's unprecedented view. On the contrary, the only statement from a non-judicial branch is consistent with LLANY's interpretation.

First, the Statute's emphatic use of "actually" is significant. The term would be superfluous unless it distinguishes the actual transfer of funds in exchange for insurance coverage (*Lemma v Nassau County Police Officer Indemnification Bd.*, 31 NY3d 523, 528 [2018] ["Whenever possible, statutory language should be harmonized, giving effect to each component and avoiding a construction that treats a word or phrase as superfluous"]; *Kamhi v Planning Bd. of Town of Yorktown,* 59 NY2d 385, 391 [1983] ["Our task in interpreting the statute is to give effect to the intent of the Legislature, construing words by giving them their natural and ordinary meaning and construing the various parts of the statute in a manner seeking to harmonize the whole and avoid rendering any part surplusage"]). Planned Premiums are not "actually paid" to the carrier for insurance coverage for an identifiable period. They are simply a deposit into the investment component of the Policy that have the practical effect of increasing the Policy Value. Unless and until the monthly deduction is charged against the Policy Value, the Policy Value is not "paid" but held in consideration of the investment component of the Policy.

Second, the "meaning of a writing may be distorted where undue force is given to single words or phrases" (*Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]). Nitkewicz commits this error, placing all the weight on the "premium" in the defined term "Planned Premium," which allows him to trivialize the "actually paid for any period" of coverage requirement. The distortions caused by the fixation on the word "premium" take Nitkewicz's argument down a winding path, to provisions and terms far afield from the Statute's requirements. Nitkewicz's Brief elaborates a tangential argument about an optional rider (App. Br. at 31-34), talks about an adjustment factor (which Nitkewicz calls a "load charge," a term that never appears in the Policy) (*id.* at 20), and suggests that grace period provisions (which

Nitkewicz never alleges were triggered) might substitute for "actual payment" (*id.* at 24, 32-33).

Nitkewicz raises the Adjustment Factor twice (App. Br. at 8, 21). He presented more elaborate Adjustment Factor arguments in the District and Circuit Courts. In the event Nitkewicz expounds on the theme in reply, the salient points are these: The Policy provides that 85% of funds paid into it will be credited to the Policy Value (Rec. 62, 65, 78). The Policy states that this 85% factor (called the "Guaranteed Net Premium Factor") is applied at the time any premium is received and corresponds only to the amount received (not any duration of coverage) (*id.*). The 15% charge resulting from the Guaranteed Net Premium Factor does not purchase any period of insurance coverage, nor does it relate to any specific period (*id.*). In fact, the Policy expressly contrasts the Guaranteed Net Premium Factor with the "monthly deduction"—the latter of which pays "the cost of providing the coverage" (Rec. 62).[2]

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[2] Nitkewicz argues that the Guaranteed Net Premium Factor is also "applied to cover the company's cost of insurance and other expenses" (App. Br. at 8, citing Rec. 62, 21). The District Court dispatched those arguments succinctly:

> "A more natural reading of this provision is that the 'Monthly Cost of Insurance' covers the 'company's cost of insurance,' whereas the 'Administrative Charges,' like the load charge, cover 'other expenses.' But even assuming the load charge covers the company's cost of insurance in some part, there is nothing to indicate that the load charge covers any specific period of coverage" (Rec. 339).

Third, the Statute must be narrowly construed because it contravenes the common-law rule. The general rule in New York is that a premium, once paid, will not be pro-rated or refunded once *any* risk has attached (5 Couch on Ins. § 79:7 ["As a general rule, in the absence of a statutory provision or an express or implied agreement to the contrary, an insured may not have any part of his or her premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned"]; *Waters v Allen*, 5 Hill 421, 424 [Sup Ct, NY County 1843] ["On the contrary, the policies attached on the subjects insured, and the company incurred the risk, or some part of it; and there is no return of premium where the policy attached, though only for a single moment"]; *Sil-Turn Co., Inc. v London Guar. & Acc. Co., Ltd.*, 153 Misc 805, 806 [NY City Ct 1934] [adopting and applying the Couch rule], *affd* 242 AD 829 [1st Dept 1934]; *see Fleetwood Acres v Federal Hous. Admin.*, 171 F.2d 440, 442 [2d Cir 1948] [observing that New York's "ordinary rule is that an insured may not have any part of his premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned, unless there is an agreement to that effect"]; *see also Jones v St. Paul Fire & Mar. Ins. Co.*, 118 F2d 237, 238 [5th Cir 1941] ["the weight of authority supports the general rule, that the insurance granted is consideration for the entire premium received if the risk has attached by reason of the contract becoming binding on the Insurer"]). The Statute derogates that baseline rule. Such a statute

> “enacted in derogation of the common law . . . is to be strictly construed. Further, it is to be construed in the narrowest sense that its words and underlying purposes permit, since the rules of the common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires” (*Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81, 86 [1995] [cleaned up]).

Thus, the proper construction is most likely the one that reasonably limits the application of Section 3203 (a) (2). LLANY’s contention is reasonably narrow: The payment that maintains insurance coverage from period-to-period is the payment that is actually paid for coverage from period-to-period.

Fourth, Nitkewicz’s interpretation produces unworkable and unfair results. The Statute provides two inverse remedies. Namely, in addition to the refund provision Nitkewicz seeks to invoke, the Statute also provides that, if the insured’s death occurs within the grace period, then “the insurer may deduct from the policy proceeds the portion of any unpaid premium applicable to the period ending with the last day of the policy month in which such death occurred” (Ins. Law § 3203 [a] [2]). Nitkewicz’s interpretation of that same subsection produces untenable results. If Planned Premiums are captured as a “premium actually paid for any period” under the refund provision, then they must also be captured by the parallel language in the deduction provision (“any unpaid premium applicable to the period ending with the last day of the policy month in which such death occurred”) (Rec. 337-338). But “Planned Premiums are, by definition, optional statements of intent” and “Plaintiff’s reading of the statute would thus transform a statement of intent into a binding promise upon the death of the insured" (Rec. 338). The absurdity of this approach is further amplified "if a prorated portion of that unpaid Planned Premium was substantially greater than the relative cost of insurance for that month," meaning the insurer, under Nitkewicz's hypothetical, could deduct from the death benefit much more than the monthly deduction that continued coverage during the grace period (Rec. 338).

Previously, Nitkewicz responded to this argument by saying that it involves a hypothetical that is not presented here, where the insured did not die during the grace period. But this Court considers the full context of the statutory terms at issue (*see Friedman v Connecticut Gen. Life Ins. Co.*, 9 NY3d 110, 115 [2007]; *see also People v Iverson*, 37 NY3d 98, 103-104 [2021] ["Court[s] should give the statute a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions"] [internal quotation marks omitted]; *Peyton v New York City Bd. of Standards & Appeals*, 36 NY3d 271, 280 [2020] ["A statute 'must be construed as a whole,' and 'its various sections must be considered together and with reference to each other' "]; *Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 34 NY3d 1, 7 [2019]). Nitkewicz's interpretation therefore yields untenable results.

Nitkewicz also previously argued that the statutory language permitting the insurer to deduct the Planned Premium from the death benefit would not apply because it would be unfavorable to the policyholder. According to Nitkewicz, only favorable statutory language gets incorporated into the Policy. But the Statute incorporates either the requirements of Section 3203 (a) (2) into the Policy "or provisions which the superintendent deems to be more favorable to policyholders" (Ins. Law § 3203 [a]). Nitkewicz does not identify different language that the superintendent has deemed more favorable to policyholders; he just asserts that including the statutory language is less favorable than excluding it. That is not how the Statute is written. Rather, the inverse remedy regarding the grace period is incorporated into the Policy and leads to unfair results in Nitkewicz's interpretation.

Nitkewicz previously argued that the "unpaid premium" referenced in the Statute is a reference to a "sufficient premium to keep the policy in force for three months" in Section 3203 (a) (1), and not a reference to unpaid Planned Premiums. But Nitkewicz offers no explanation for why the words "*any* unpaid premium" cannot refer to a Planned Premium (in the grace period deduction provision) yet the words "the premium" and "*any* premium" (in the refund provision) *must* refer to paid Planned Premiums.[3] Nitkewicz relies on inconsistent meanings of the word "premium" to obscure the fact that under his interpretation, the Statute

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[3] In any event, the Statute's use of the word "any" in the phrase "any unpaid premium" would cover, under Nitkewicz's interpretation, *both* unpaid grace premium *and* unpaid Planned Premium (Ins. Law § 3203 [a] [2]).

would convert an optional payment into a mandatory one upon the death of the insured during the grace period. Indeed, Nitkewicz's interpretation attaching one meaning to the word "premium" in the first clause of Section 3202 (a) (2) and a different meaning to the word "premium" in the second clause of the same sentence is contrary to basic statutory construction (*see Mental Hygiene Legal Serv. v Sullivan*, 32 NY3d 652, 659-660 [2019] ["Indeed, it is a bedrock rule of statutory construction that, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, absent any indication of a contrary intent"] [cleaned up]; *Law v Siegel*, 571 US 415, 422 [2014] [describing the " 'normal rule of statutory construction' that words repeated in different parts of the same statute generally have the same meaning"]).

Furthermore, as discussed above, Nitkewicz's interpretation forces the Court to make up arbitrary accounting rules that have no basis in the Policy or the Statute (*see* Section I [b], above).

Fifth, Nitkewicz attempts to backdoor the inapplicable doctrine of *contra proferentem* into this case. Nitkewicz argues that a Planned Premium should be deemed an actual payment for a period of insurance coverage because "[i]f the language of the policy is doubtful or uncertain in its meaning, any ambiguity must be resolved in favor of the insured and against the insurer" (*Westview Assoc. v Guaranty Natl. Ins. Co.*, 95 NY2d 334, 340 [2000]). As an initial matter, there is no ambiguity as to what a Planned Premium is or how it functions. But the doctrine *Westview* references—*contra proferentem*—has no place in this case and would not help Nitkewicz in any event.

If there were any relevant ambiguity (and there is not), *contra proferentem* is a rule of contract, not statutory, interpretation (*see Morgan Stanley Group Inc. v New England Ins. Co.*, 225 F3d 270, 275-276 [2d Cir 2000]). *Contra proferentem*'s justifications do not apply to legislative enactments: The legislature is a sophisticated and powerful body that acts on behalf of all New Yorkers, but *contra proferentem* is justified by concerns about one-sided contracts drafted by insurance companies that may not be acting in their customers' best interests (*United States Fire Ins. Co. v General Reins. Co.*, 949 F2d 569, 574 [2d Cir 1991] ["[T]he touchstone for applying *contra proferentem* is the insured's lack of sophistication" relative to the insurer's "bargaining power"]; *see also* 2 Couch on Ins. § 22:18 ["the reason for the rule of construction against the insurer is that policies of insurance are made on printed forms carefully prepared in the light of the insurer's wide experience, by experts employed by the insurer, and in the preparation of which the insured has no voice"]). *Contra proferentem* does not apply to the Statute.

To the extent that Nitkewicz argues that *contra proferentem* should apply to the Policy's use of the word "annual" in connection with the Planned Premiums, there is nothing ambiguous about those references, as discussed above, in light of the clear language that "Premium Frequency, as shown on the policy specifications page," is "how often You intend to pay the Planned Premium" (Rec. 75; Section I [b], above).

Furthermore, *contra proferentem* is a doctrine of "last resort," used only when all other interpretive aids fail (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 448 [1st Dept 2017] [citing New York appellate precedents]; *Birdsong Estates Homeowners Assn., Inc. v D.P.S. Southwestern Corp.*, 101 AD3d 1735, 1737 [4th Dept 2012] [citing New York appellate precedents]); *Fernandez v Price*, 63 AD3d 672, 676 [2d Dept 2009] [citing New York appellate precedents and the Restatement [Second] of Contracts § 206, Comment a]). As discussed above and below, all other interpretative aids favor LLANY; there is no need to resort to *contra proferentem*.

Sixth, the Court may consider the reasoning of persuasive legal authorities. The only such authority supports LLANY's interpretation.

There are no cases on the Statute. This year marks the one hundredth anniversary of its enactment (*see* Laws of the State of New York, 1923, c. 28, sec. 101). Modern universal life insurance has existed for about half that time (D. Fischel and R. Stillman, *The Law and Economics of Vanishing Premium Life Insurance*, 22 Del J Corp L 1, 5-6 [1997] [explaining that universal life insurance arose in the early 1980s], *cited and relied upon in Gaidon*, 94 NY2d at 342 [discussing the history of universal life insurance]). Yet never before has Nitkewicz's argument, or anything analogous to it, arisen in litigation. And, as this Court knows, insurance spawns a great deal of litigation, making it likely the position urged by Nitkewicz would have been litigated long before now were there any merit to it.

The parties and courts that have reviewed this case to date have found only a single relevant pronouncement from a non-judicial branch: the New York Department of Financial Services ("NYDFS") has published guidance that recognizes the Statute has different implications for different policy types. The NYDFS Product Outline for individual universal life insurance policies recognizes that Section 3203 (a) (2) applies to "*the amount needed to continue the policy*"[4] that "*has been applied*" to future months, and requires refunding only "such amount applied for any period beyond the policy month in which the death occurred" (Rec. 208) (emphasis added). By contrast, the Product Outline for individual term life insurance says "premium" without further qualification (Rec. 253). The differences are shown in the chart below:

[4] The phrase "amount needed to continue the policy" is the same phrase used in the Policy to describe an amount sufficient to cover the monthly deduction (Rec. 76). The NYDFS reviewed and approved the Policy, as it does all policies issued in this state (Ins. Law § 3102).

NYDFS Product Outlines	
Universal Life and Variable Life Product Outline (Policies *with* cash-value accounts)	Term Life and Whole Life Product Outlines (Policies *without* cash-value accounts)
"[I]f death occurs during a period *for which the amount needed to continue the policy has been applied,* the insurer must add to the policy proceeds a *refund of such amount applied for any period* beyond the policy month in which the death occurred" (Rec. 208) (emphasis added).	"If death occurs during *a period for which a premium has been paid*, the insurer must add to the policy proceeds a *refund of any premium actually paid for any period* beyond the policy month in which the death occurred" (Rec. 253) (emphasis added).

The Policy follows the NYDFS guidance verbatim: The Policy uses the same phrase as the Product Outline ("the amount needed to continue the policy") to describe an amount sufficient to cover the monthly deduction (Rec. 76). The page prior explains that the Planned Premium is *not* the amount needed to continue the policy (Rec. 75; s*ee also* Rec. 397 [noting as a factor supporting certification that this case may implicate insurers' ability to rely on regulatory guidance and practice when designing products]).

The Product Outlines may be considered by this Court as a construction of the Statute by the responsible agency (*Albano v Kirby*, 36 NY2d 526, 532-535 [1975]). The Outlines may be considered for the purpose of showing that LLANY's construction is reasonable and practical even without a finding of ambiguity in the Statute (*see id.* ["It is of interest and some persuasion that" a State agency has issued a memorandum consistent with the Court of Appeals' view of the provision at issue]). The Product Outlines are therefore properly before the Court.

The Second Circuit observed that the Product Outlines are not "authoritative," and did not consider them helpful for its purposes (Rec. 393-394). LLANY never contended that the Outlines are authoritative or conclusive (*see* Rec. 393-394 & n 6). However, the Product Outlines pre-date this dispute, reflect how the insurance regulator operates in practice, and constitute guidance for insurance companies in their day-to-day operations. They support an inference that the Policy conforms to the best indicator of regulatory or industry practice. They confirm that it is entirely reasonable that the Statute governs only the "amount necessary to continue" insurance coverage in force when applied to universal life insurance structured like the Policy (*contra* App. Br. at 23, 27). Furthermore, the Product Outlines refute Nitkewicz's argument that LLANY's (and NYDFS') interpretation of the Statute would require finding an "exception" to the Statute, as discussed below.

In response, Nitkewicz offers speculation about a non-party. As the Second Circuit noted, Nitkewicz improperly offers speculation about the motives of a different insurer, Athene (Rec. 391 n 3). The Complaint alleges that Nitkewicz made a demand on Athene that was "similar" to the demand Nitkewicz made to LLANY. In response, Athene allegedly paid Nitkewicz approximately $2,000 rather than engage on the arguments. There are numerous reasons why parties may decide to settle (or simply acquiesce in the absence of a formal settlement) rather than litigate, especially when the demand is for $2,000.[5]

This Court should join the Second Circuit in declining Nitkewicz's invitation to speculate regarding the decision of a different insurer to resolve rather than litigate over a $2,000 demand in connection with a policy that is not before the Court.

II. <u>Nothing About This Case Requires a Categorical "Exemption."</u>

Nitkewicz argues that LLANY's statutory interpretation creates an implicit "exemption" for "all" universal life insurance (App. Br. at 27-31). Of course, only the specific Policy and its terms are before the Court. This Policy is designed so that the requirements of the Policy are not triggered because the coverage is extended on a monthly basis by the monthly deduction.

The Policy extends coverage on a monthly basis when the monthly deduction is taken out of the Policy Value (Rec. 75-76). In this way, the Policy maximizes the amount of funds that earn interest during the life of the insured and also maximizes the Cash Surrender Value available to the owner through either a loan or a full or

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[5] Nitkewicz asserts that the "only difference" between Athene's conduct and LLANY's conduct is that Athene paid the refund (App. Br. at 13), notwithstanding Nitkewicz's demand from LLANY was 14 times greater than his demand from Athene ($31,428.67 v. $2,186.34) (Rec. 9). Nitkewicz also quotes statements of his own counsel for the proposition that Athene did not dispute its obligation and promptly paid the refund (App. Br. at 13, citing Rec. 365 [Nitkewicz's attorney arguing before Judge Cronan] and 25 [letter to Judge Cronan from same attorney]).

partial surrender (Rec. 79-80). So long as LLANY ceases to take the monthly deduction following the month in which the insured dies, the policyholder has never actually paid for a period of coverage that must be refunded under the Statute.

Nitkewicz points to two exceptions to the statute for "single premium or paid-up policies" and argues that LLANY is creating a third. Not so. The Policy is designed so that it does not trigger the refund provisions of the Statute and in fact did not trigger them in this case. There is no need for an "exception" or "exemption" because, given the design of the Policy, the Statute's refund obligation is not triggered in the first place. The Court need not create an "exception" to answer the Certified Question in the negative.

Further, Nitkewicz's "exception" arguments are inconsistent with the history of the industry and statute. As explained above, the earliest version of the Statute was enacted in 1923. That is six decades before modern universal life insurance was created (Fischel and Stillman at 1, 5-6, *cited and relied upon in Gaidon*, 94 NY2d at 342). As the absence of cases interpreting Section 3203 (a) (2) demonstrates, the subsection is a straightforward statute and has not created a single controversy until today. It makes perfect sense that the Legislature would not change language that already works. It also makes sense that the Policy is designed so that a refund is never necessary: Month-to-month coverage ensures there never needs to be a Section 3203 (a) (2) refund under this Policy so long as the monthly deductions cease following the month of the insured's death. Such design is administratively efficient and fully conforms to the Statute.

It is Nitkewicz who needs to justify a departure from the ordinary course. The legislature is "presumed to be aware of the decisional and statute law in existence at the time of an enactment" (*Arbegast v Board of Educ. of S. New Berlin Cent. Sch.*, 65 NY2d 161, 169 [1985]). The original common law rule—the one that existed when the Statute was first enacted—was that premiums are generally nonrefundable (Section I [c], above)—and it is therefore Nitkewicz who asks for a new exception from the common law by extending Section 3203 (a) (2) beyond its terms.[6]

Last, Nitkewicz complains that it would be irrational for the Legislature to require a refund on a term policy but not on a universal life insurance policy. Nitkewicz offers no support for the proposition that the Legislature would have wanted owners of two different products offering different types of coverage to be treated the same way. We can think of at least one reason why the Legislature acted

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[6] For the same reasons, *Walsh v New York State Comptroller* (34 NY3d 520 [2019]) is inapposite (App. Br. 29-30). There, this Court interpreted the word "act" included both voluntary and involuntary conduct and observed that if the Legislature tended to limit "act" to voluntary conduct, it could have done so. Nitkewicz attempts to make a similar inference from legislative inaction. But, as discussed above, there is no need for an exception for this universal life insurance policy because it was designed so that the refund requirements of the Statute do not get triggered. That makes sense because the Policy was written against the backdrop of the 100-year-old statute, and there is no need to change what works.

reasonably in treating those owners differently. The term policyholder has a binary choice: (i) pay the premium and get coverage for the year or (ii) do not pay the premium and get no coverage at all. Against this backdrop, the Legislature decided to step in and require a return of unearned premium in derogation of the common law. But the owner of a universal life insurance policy like the Policy faces no such binary choice. The owner could have paid a Planned Premium every 12 months (earning interest, lowering the amount of the monthly deduction, and building up Cash Surrender Value that could be used for a loan, etc.); the owner could have paid the minimum amount every month to keep the policy in force (earning no interest, paying higher monthly deductions, and not building any Cash Surrender Value); or any combination in between. There is no need for the Legislature to step in and save such an owner from the investment and funding decisions that she made of her own accord. It is neither unfair nor irrational for the Legislature to treat owners of term policies and owners of universal life policies differently.

III. <u>The Coverage Guarantee Protection Rider Does Not Support a "Fact"-Specific Answer Favoring Nitkewicz.</u>

Nitkewicz's final argument relies on the CPGR. The CPGR is a rider, an optional Policy add-on, that can prevent policy lapse in some circumstances (Rec. 87). The Second Circuit rejected Nitkewicz's argument regarding the CPGR, and the Certified Question does not reference the CPGR in any way. This Court should not take up Nitkewicz's invitation to relitigate the issue. But even if the Court reaches the CPGR, the argument still fails: Nitkewicz never alleges that the CPGR was triggered or "actually" paid for anything. The argument is an exercise in distraction: The CPGR's terms show that it cannot actually pay for any period of coverage.

Both federal courts that reviewed the CPGR rejected Nitkewicz's argument (Rec. 392 n 4 [Second Circuit: "We are not persuaded"]; Rec. 336 n 4 [District Court: "The CPGR speaks for itself and is simply not a premium 'for any period' of coverage"]). Nitkewicz makes the incorrect—and citation-free—assertion that the "Second Circuit recognized that the CPGR could overcome many of Lincoln Life's arguments—including by establishing that the payment was 'for a specific period of coverage' " (App. Br. at 35). What the Second Circuit actually said was, "*We are not persuaded*," and then went on to say, "[*e*]*ven assuming* that the Coverage Protection Guarantee Rider did transform the Planned Premium into a payment for a specific period of coverage, the premium would still not be 'actually paid' under Lincoln Life's interpretation of the statute since only the monthly deduction pays for insurance" (Rec. 392 n 4) (emphasis added). Contrary to Nitkewicz's unsupported assertion, the Second Circuit did not "recognize[] that the CPGR could overcome" *any* of LLANY's arguments (App. Br. at 35).

Nitkewicz urges that the Court should consider the CPGR and relies on *Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc v Aegis Group PLC*

(93 NY2d 229, 236 [1999]) for the proposition that the Court should answer the Certified Question "on the facts presented" (App. Br. at 5, 33).

Messner does not help Nitkewicz. In *Messner*, the Second Circuit certified two questions that specifically asked about the "adequacy at the pleading stage of a claim invoking the part performance exception to the Statute of Frauds" (*Messner*, 93 NY2d at 231). The questions themselves contain the plaintiff's allegations:

> " 'I. Whether the part performance doctrine is *adequately invoked at the pleading stage by a claim that* the plaintiff "took no action" with respect to a pre-existing written agreement, relying on an oral promise allegedly made by the defendant to the plaintiff that the defendant would act in place of the plaintiff and fulfill all of the plaintiff's obligations under that agreement.
>
> II. Whether the plaintiff's *allegation of part performance* by the defendant alone states a claim under the part performance doctrine' " (*id.* at 232) (emphasis added).

This Court observed that the doctrine of part performance "remains malleable to address a myriad of circumstances," (*id.* at 235) and, unsurprisingly, answered the questions "on the facts presented" (*id.* at 238) because that is precisely what the Second Circuit sought: a ruling under New York law on whether, at the pleading stage, the plaintiff adequately invoked the doctrine under the facts as alleged. By contrast, the Certified Question here does not ask about the CPGR. Indeed, the Second Circuit was "not persuaded" by the argument and the issue therefore is not properly before the Court. *Messner* does not stand for the proposition that this Court should cast its answer in terms of issues that were not "presented" by the Certified

Question, especially when the federal court that certified the question already decided the issue against Nitkewicz and did not include it in the Certified Question.

In any event, the CPGR does not save Nitkewicz's refund claim because the Policy is clear that the CPGR does not actually pay for any period of coverage. Under the Policy, the monthly deduction pays for the CPGR (Rec. 62 ["We deduct the cost of providing the coverage (the cost of insurance) plus the cost of any additional benefits and/or riders and administrative charges from this value each month as a 'monthly deduction' "]). If the Policy's Cash Surrender Value cannot cover a full monthly deduction, the CPGR provides a second chance to avoid triggering the grace period provisions (Rec. 87). The CPGR establishes a calculation (the "CPG Test") that leads to a notional "reference value" (the "Coverage Protection Value") (Rec. 87). When the Coverage Protection Value is positive, "a negative Policy Value will not be in effect under the base policy" (Rec. 87). As a result, the base Policy will not enter a grace period if the Cash Surrender Value cannot cover the full monthly deduction (Rec. 87).

The CPGR does not actually pay for any period of coverage (Rec. 336). Triggering the CPGR does not increase the Policy Value, and therefore the CPGR cannot supply funds for any monthly deduction in any sense (*see* Rec. 87 ["The Coverage Protection Value is not used in determining the actual Policy Value, it is simply a reference value used to determine whether the Coverage Protection

Guarantee is in effect"]; Rec. 336). On the contrary, the Policy expressly states that the monthly deduction pays for the CPGR benefit (Rec. 62).

Moreover, after the CPG Test fails, the owner must pay either an amount sufficient to create a "Cash Surrender Value on the date of reinstatement that is sufficient to keep the policy in force for at least 2 months" or an amount "sufficient to satisfy the CPG Test and to keep the Coverage Protection Guarantee in effect for at least 2 policy months" (Rec. 90). In other words, proceeding under the CPGR requires re-filling the Policy Value (from which monthly deductions are made)—confirming that the Policy Value, not the CPGR or its reference value, funds the monthly deduction.

At several points, Nitkewicz recites the word "guarantee" from the contractually defined term Coverage Protection Guarantee, implying that the CPGR constitutes an *unconditional* guarantee of an outcome (App. Br. at 32 [the CPGR "is what it sounds like: a *guarantee* of *coverage*"); *id.* at 6 ("a way of *guaranteeing* the Policy stays in force for a certain period of time"]). But the CPGR and its "Coverage Protection Guarantee" are defined terms, and therefore the word "Guarantee" has its contractually defined meaning (*see Cream of Wheat Co. v Arthur H. Crist Co.*, 222 NY 487, 491 [1918] [finding that "the courts below ignored the definition which the parties to the contract gave to the term" and that "[s]uch construction is unwarranted"]; *Madawick Contracting Co. v Travelers Ins. Co.*, 307 NY 111, 119

[1954] ["Nevertheless, words and phrases as used in particular contracts are to be interpreted in accordance with the meaning with which they have been invested by the parties"]). In any event, the CPGR and the "Coverage Protection Guarantee" is a guarantee in the sense of "a collateral engagement" to prevent a "default" under the main Policy, provided that the CPGR's express terms are met (*see* Black's Law Dictionary [11th ed 2019] ["guarantee"]). It is not a guarantee of coverage for a specific period after the death of the insured.

Nitkewicz claims that the CPGR "guaranteed coverage for each annual period after an annual premium was paid, provided the annual premium was fully paid on each 'PREMIUM DUE DATE' " (App. Br. at 10 [citing Policy at Rec. 64 and 87]). But the Policy doesn't say that. The Policy explains how the CPGR will prevent a policy from entering into the grace period if the CPG Test is satisfied and lists conditions that may cause the CPG Test to fail (such as not paying "all premiums" by the "premium due date," partially surrendering the Policy, or taking a loan) (Rec. 64, 87) such that additional premium would be required to avoid entering the grace period. The CPGR does not "guarantee" a year of coverage.

Nitkewicz argues that the CPGR turned the Policy into the "functional equivalent of a term life policy," and that the refund provisions of the Statute apply to term policies (App. Br. 34). That is nonsense. The CPGR is a rider that provides additional grace-period protections; it does nothing to undermine any of the defining features of a universal life policy. Nor does the CPGR satisfy the requirements of the Statute because the CPGR itself is not a premium, does not actually pay for insurance coverage, and does not actually pay for a period of insurance coverage after the end of the policy month in which the insured died.

CONCLUSION

For all the foregoing reasons, the answer to the Certified Question is “no.” A planned payment into an interest-bearing policy account of a universal life insurance policy is not actually paid for any period of coverage beyond the end of the policy month in which the insured died. The monthly deduction from the interest-bearing policy account is what extends the coverage—one month at a time—and when those monthly deductions cease following the policy month in which the insured died, no portion of any planned payment must be refunded under the Insurance Law Section 3203 (a) (2)

Dated: May 30, 2023

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CERTIFICATION

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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Sworn to before me on May 26, 2023

Mariana Braylovskiy

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