No. 1-15-3603

2017 IL App (1st) 153603-U

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NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
_____

DANTE LOJO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
CONSECO LIFE INSURANCE COMPANY,	)	No. 13 L 12141
an Indiana corporation, f/k/a	)	
MASSACHUSETTS GENERAL LIFE	)	
INSURANCE COMPANY,	)	Honorable
	)	Thomas R. Mulroy, Jr.,
Defendant-Appellee.	)	Judge Presiding.

_____

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1   *Held*: Judgment affirmed. Trial court did not abuse its discretion in finding that insurer's delay in making full payment on life insurance policy was not vexatious or unreasonable under section 155 of the Illinois Insurance Code, where parties had *bona fide* dispute over amount due under policy and whether plaintiff had elected reduced paid-up policy option, even though such election was later nullified under terms of class action settlement.

¶ 2   Plaintiff, Dante Lojo, appeals from the judgment of the circuit court of Cook County

finding in favor of defendant, Conseco Life Insurance Company, an Indiana corporation, f/k/a

- 1 -

Massachusetts General Life Insurance Company (Conseco), on plaintiff's claim for attorney fees and costs pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)) for Conseco's alleged vexatious and unreasonable delay in paying plaintiff's claim on a life insurance policy. The trial court found that plaintiff failed to prove his case, based on the totality of the circumstances but primarily on the credible testimony of Conseco's employee that he made a good-faith mistake in determining whether plaintiff had or had not elected a reduced amount of life insurance previously. Finding nothing to disturb the trial court's credibility determination or factual findings, we hold that the trial court's decision was not an abuse of discretion and affirm the judgment.

¶ 3   I. BACKGROUND

¶ 4   This case involves the interplay between plaintiff's life insurance claim with Conseco and the settlement of a class-action suit against Conseco in a California federal court. In a nutshell, this somewhat convoluted fact pattern can be summarized as follows:

¶ 5   First, the California class action. For our purposes, it is enough to say that Conseco, the defendant in that action, was accused by the plaintiff class of policyholders, among other things, of raising life insurance premiums to the extent that many policyholders could no longer afford them, without giving policyholders a decent option for taking a reduced paid-up (RPU) policy. This RPU allows a policyholder to stop paying premiums in exchange for a markedly lower face value on their policies—the policyholder gets a far smaller insurance policy but, on the bright side, no longer has to pay any premiums whatsoever. Again, as an oversimplification but enough for our purposes, one of the remedies imposed by the California federal district court was to require Conseco to offer a better RPU—to reduce the face value, but not by as much—which the district court and the parties decided, unfortunately, to call an "enhanced RPU" policy.

¶ 6   Plaintiff was one of these policyholders. He had a Conseco life insurance policy with a face value of $50,000 on the life of his mother, Benita Lojo. Plaintiff had been struggling to pay the premiums on the life insurance policy, to the point that Conseco had told him he was in a "grace period," and his policy would be cancelled if the overdue premium payment was not received by April 26, 2013.

¶ 7   In March 2013, pursuant to the federal class-action settlement, Conseco mailed forms to policyholders, including plaintiff, providing them the option of electing the enhanced RPU.

¶ 8   In March and April 2013, plaintiff did two things. First, plaintiff purported to accept the enhanced RPU—that is, he signed, dated, and mailed the election form back to the administrator of the class-action settlement (though plaintiff did not check the box on the form). Plaintiff signed it and dated it March 23, 2013; he mailed it on April 1, 2013. Before signing the form and sending it back, plaintiff did not read the form in full, nor did he call the provided toll-free phone number to learn what his reduced face value would be. In fact, plaintiff testified that he believed that he had *increased* the face value, not decreased it dramatically, by signing the form—he thought what was "enhanced" was the face value of the policy.

¶ 9   Second, by check dated April 1, 2013, plaintiff mailed his overdue premium payment to Conseco.

¶ 10   On April 30, 2013, Conseco mailed a letter to plaintiff, informing him that, pursuant to the enhanced RPU he had elected, he no longer owed premiums, but the face value of his mother's life insurance policy had been reduced from $50,000 to $2,236. At that time, however, plaintiff was in the Phillippines, where his mother had died on April 18.

¶ 11   Plaintiff returned to the United States in May and, on May 8, 2013, notified Conseco of his mother's death and made a claim for benefits. Conseco mailed him a check for $2,236, consistent with the enhanced RPU but considerably less than plaintiff had been expecting.

¶ 12   The initial dispute concerned whether plaintiff had actually elected the enhanced RPU. Plaintiff said he did not understand the enhanced RPU as reducing the face value of the policy, as the word "enhanced" suggested the face value had been increased; that his failure to check the box meant he had not formally elected the enhanced RPU; and that Conseco had accepted a recent premium payment from him, which was inconsistent with the concept of an enhanced RPU (which requires no further premium payments). Plaintiff filed this lawsuit accordingly.

¶ 13   But then everything changed when Conseco's attorney read the complaint and realized something Conseco had previously overlooked: the members of the federal class-action plaintiff class were policyholders whose policies remained in force as of June 5, 2013. Because the insured on plaintiff's policy—his mother—had died on April 18, 2013, plaintiff's policy was *not* "in force as of June 5, 2013." Thus, though plaintiff had validly elected the enhanced RPU policy, due to his mother's death before June 5, 2013, plaintiff had been excluded from the class of plaintiff after the fact and, thus, was not entitled to the option of the enhanced RPU policy in the first place. So plaintiff was entitled to the full face value of the $50,000 insurance policy after all, even if not for the reasons plaintiff had claimed. Upon discovering this error, Conseco paid plaintiff the entire amount of insurance proceeds owed to plaintiff, including interest and cash value.

¶ 14   But the lawsuit did not end. Plaintiff now had his insurance proceeds but persisted with his bad-faith claim against Conseco under section 155 of the Insurance Code. See 215 ILCS 5/155 (West 2012). Plaintiff argued that Conseco acted in a vexatious and unreasonable manner

in failing to promptly pay the claim and in wrongly asserting that plaintiff was a member of the federal class action.

¶ 15   The trial court ruled in favor of Conseco, finding, in sum and substance, that a Conseco employee had made an innocent and understandable mistake in not realizing sooner that plaintiff had become ineligible for the enhanced RPU policy after he had elected it. Plaintiff appeals. Though the summary we provided above suffices as a nutshell of the case, to review plaintiff's claims, we must necessarily provide a much more detailed chronology of the events as revealed at trial.

¶ 16   A. Plaintiff's Policy

¶ 17   Plaintiff has a college degree in business administration, with a major in accounting, from a university in the Philippines. His work history includes a position as a controller, which he testified was a sophisticated job and where he was responsible for a company's finances and filing its tax returns. Plaintiff is now retired.

¶ 18   In the mid-1990s, Conseco issued a flexible premium, adjustable term, life insurance policy to plaintiff, insuring the life of his mother, Benita Lojo, who was 70 years old at the time. The policy had a death benefit of $50,000. Plaintiff's brother-in-law was the agent who sold plaintiff the policy.

¶ 19   B. Cost of Insurance Increase

¶ 20   The policy allowed Conseco to deduct a monthly cost of insurance charge. Conseco sent a letter to plaintiff in October 2011 notifying him of cost increases for his policy, *i.e.*, increasing certain expenses that were deducted monthly, and changing the monthly cost of insurance rates. Conseco's increase in its monthly cost of insurance (COI) rates in 2011 resulted in the federal class action lawsuit in California we previously mentioned, with a class being certified in April

2012. See *Yue v. Conseco Life Insurance Co.*, 282 F.R.D. 469 (C.D. Cal. 2012) (approving certification of California class). At this point, the class did not include plaintiff, because it was limited to California policyholders.

¶ 21   C. Plaintiff's Premium Payments (2012-2013)

¶ 22   On March 13, 2012, and again on September 21, 2012, plaintiff wrote a letter to Conseco stating that, due to the economy and his current financial situation, he could not afford to pay the premium at that time. But plaintiff further noted that the policy had a cash value of $2,786.43 and requested that this cash value be used to pay the premiums. Plaintiff testified that he knew he could do this because his agent (his brother-in-law) had told him he could, and plaintiff had also confirmed it with Conseco.

¶ 23   On December 13, 2012, plaintiff wrote a letter to Conseco noting that the policy had a cash value at that time of $638.04. Plaintiff again requested that this cash value be used to pay the $243 premium due on December 24, 2012.

¶ 24   On February 24, 2013, Conseco sent a letter to the agent on the policy (plaintiff's brother-in-law) stating that it was in the grace period "due to insufficient value to cover monthly cost of insurance and expenses." The letter stated that the policy would lapse on April 26, 2013, unless the amount due was paid. The payment required to retain coverage was $658.47.

¶ 25   On or about March 19, 2013, plaintiff made a $243 premium payment.

¶ 26   On March 21, 2013, Conseco sent a "Final Notice" to plaintiff, as well as to the agent, again stating that the policy was in the grace period "due to insufficient value to cover monthly cost of insurance and expenses." The letter, similar to the February 24, 2013 letter, stated that the policy would lapse on April 26, 2013, unless the amount due was paid. At this point, the payment required to retain coverage was $415.47.

¶ 27   On or about April 5, 2013, plaintiff made a payment of $415.47. On April 8, 2013,

Conseco cashed a check in the amount of $415.47 from plaintiff.

¶ 28   D. Proposed Settlement in Federal Class Action Lawsuit

¶ 29   Meanwhile, on March 6, 2013, the district court in the federal class action lawsuit entered

its "FINDINGS AND ORDER PRELIMINARILY APPROVING THE PROPOSED

SETTLEMENT, DIRECTING THE ISSUANCE OF NOTICE OF SETTLEMENT TO THE

CLASSES, AND SCHEDULING A FAIRNESS HEARING." This class action settlement

played a role in plaintiff's actions, as well as Conseco's handling, or mishandling, of plaintiff's

claim.

¶ 30   As a result of the proposed settlement of the class action, plaintiff became a member of a

nationwide class, specifically the "Injunctive Relief Class" consisting, in part, of "owners of all

Policies that are In Force on the Election Date." When the class notices were mailed in March

2013, plaintiff had an "in force" policy—the insured on his policy, his mother, was still alive.

¶ 31   Pursuant to the proposed settlement, Conseco would reduce the proposed increase in the

cost of insurance. Conseco would additionally offer the option of selecting an "enhanced RPU"

policy, which would allow policyholders who could not afford the higher cost of insurance to

still receive some death benefit. Under the enhanced RPU policy option, no further payment of

premiums would be required. Although some policies, under their terms, already had this option,

the RPU benefit under the class-action settlement was higher than it would have been under the

original terms of the policy—thus, the term "enhanced."

¶ 32   E. Class Action Notice

¶ 33   The district court's order in the class action lawsuit required that the notice of the

proposed settlement to the class members be sent no later than 75 days before the scheduled June

10, 2013 fairness hearing. The notice included the form entitled "Enhanced Reduced Paid-Up Policy Election Form." The form referenced the "Conseco Life Insurance Company Cost of Insurance Class Action Settlement." In its order, the district court expressly found that "the Class Notices are written in plain English and are readily understandable by Class Members."

¶ 34   Rust Consulting, the Settlement Administrator, mailed a total of 47,098 class notice packages on March 20-22, 2013, which would have included the class notice, election form and information request form. Plaintiff was one of those policyholders who received these materials.

¶ 35   The class notice allowed a class member to choose the "Enhanced Reduced Paid-Up Policy Benefit" that was explained as follows: "If you prefer to convert your Policy to a paid-up policy *at a lower face amount of insurance coverage*, you can submit the Enhanced Reduced Paid-Up Policy Election Form contained in the Class Notice Package by June 5, 2013. (*See* Section V.C. below.)" (Emphasis added.) The referenced "Section V.C." was the detailed description of the Enhanced Reduced Paid-Up Policy and stated, in pertinent part, as follows:

> "You may convert your Policy to a paid-up policy *providing a reduced face amount of coverage*, which Conseco will enhance by 15% under the Settlement (the 'Enhanced Reduced Paid-Up Policy Benefit'). *You will not need to pay any future premiums* to keep the reduced paid-up policy In Force." (Emphasis added.)

¶ 36   The notice also included a section on how to get additional information and included the Settlement website, as well as a toll-free telephone number and mailing address for Rust Consulting. The notice contained the following provision that would later become relevant in the instant case: "If your Policy remains In Force (*i.e.*, in effect) through June 5, 2013, you will be a member of the Injunctive Relief Class that covers owners of In Force Policies."

¶ 37   F. Plaintiff Submits "Enhanced Reduced Paid-Up Policy Election Form"

¶ 38   On March 23, 2013, plaintiff signed and dated the enhanced RPU election form, which he

mailed on April 1, 2013. Notably, the form stated:

> "You received this Form because you own an In Force Policy. If you want to keep
>
> your Policy In Force at its current face amount, do not complete this Form.
>
> Complete this Form only if you want the Enhanced Reduced Paid-Up Policy
>
> Benefit *described in the Class Notice*. If you elect to receive the Enhanced
>
> Reduced Paid-Up Policy Benefit, your election is irrevocable." (Emphasis added.)

Plaintiff testified at trial that he did not read the whole form before signing it and mailing it in.

He also testified that he signed the Enhanced Reduced Paid-Up Policy Election Form because he

understood from the form that the value of the face amount of the policy would increase.

¶ 39   Plaintiff's enhanced RPU election form was received at the settlement administrator's

office on April 5, 2013. The notice provided that coverage under the enhanced RPU policy

benefit would be effective as of the postmarked date of the completed form. The notice

additionally stated: "The Enhanced Reduced Paid-Up Policy may not be revoked if the

Settlement is not finally approved." Plaintiff's form was post-marked on April 1, 2013, and was

considered by Conseco's employees to be effective on that date.

¶ 40   G. Plaintiff Excluded from Class

¶ 41   During this time, plaintiff's mother was living in the Philippines. Plaintiff received a

telephone call from his sister telling him that his mother was ill. On April 10, 2013, plaintiff flew

to the Philippines to be with his mother. She passed away on April 18, 2013.

¶ 42   As a result of his mother's death, plaintiff was excluded from the class. As we previously

explained in our summary of the facts, the certified class of plaintiffs entitled to the enhanced

RPU policies included all policies in effect as June 5, 2013. Because plaintiff's mother passed

away on April 18, 2013, plaintiff's policy did *not* remain in force through June 5, 2013. Plaintiff was no longer part of the class and was no longer entitled to the enhanced RPU. Thus, plaintiff's election of the enhanced RPU option (regardless of whether it was valid or invalid initially) was null and void. But this fact was not recognized for several months, until Conseco's legal counsel got involved in this matter.

¶ 43   H. Plaintiff's Insurance Claim

¶ 44   On April 30, 2013, Conseco sent a letter to plaintiff informing him that it had processed his Enhanced Reduced Paid-Up election from the federal class-action settlement. The letter explained that the new policy was effective April 1, 2013, and that his converted insurance policy had a new face amount of $1,944, as well as an additional 15% "enhancement" of $292 as a benefit of the *Yue* federal class-action settlement, for a total of $2,236. The letter also informed him that premium payments were no longer required.

¶ 45   On May 5, 2013, plaintiff returned to the United States. On May 8, 2013, plaintiff called Conseco and notified the customer service representative of his mother's death. The customer service representative noted the date of death and told plaintiff the claim requirements, which included a claim form and a certified death certificate. Conseco also mailed plaintiff a claim packet and instructions.

¶ 46   On May 21, 2013, Conseco sent a letter to plaintiff confirming that it had received his request for benefits. The letter also told him that interest in the amount of 10% would accrue from the date of death until payment, unless payment was made within 31 days from the receipt by Conseco of due proof of loss.

¶ 47   On May 24, 2013, plaintiff called Conseco. A customer service representative verified that Conseco had received plaintiff's claim documents on May 17, 2013, and that the turnaround time for the claim would be 20 days.

¶ 48   The record contains a copy of an e-mail from a Conseco employee, Suzy McCarty, a senior life claims adjuster, to "Legal Interface PHS." McCarty gave a deposition in this matter, which was admitted into evidence. McCarty requested assistance with the policy. She noted that the original face amount was $50,000 and had converted to the RPU option on April 1, 2013. She noted that the insured passed away on April 18, 2013, and that the policy was in a grace period at the time. She asked whether plaintiff was entitled to the full face amount or the RPU amount.

¶ 49   On June 4, 2013, McCarty sent a second e-mail to "Legal Interface PHS" asking for the status on her request.

¶ 50   On June 4, 2013, Frank Scuglik, another Conseco employee, responded to McCarty's e-mail. Scuglik testified at trial that he has been with the company for nineteen years, and for twelve years he was the manager in the product support team. His duties include working on administrative changes to the system, setting up contracts and providing support for the client's action. His duties also include giving depositions and appearing in court.

¶ 51   Scuglik explained to McCarty that the third-party settlement administrator provided Conseco with the date the executed election form was received in its office. Scuglik stated that under the terms of the class-action settlement, the RPU election was effective on the postmarked date of the election form and that the election for plaintiff's policy was April 1, 2013. Scuglik stated that, based on the date of death, plaintiff was entitled to the RPU amount.

¶ 52   On June 6, 2013, plaintiff called Conseco. A customer service representative told plaintiff that the claim was being processed, but he would call plaintiff back in 72 hours.

¶ 53   I. Conseco Pays Plaintiff $2,236

¶ 54   On June 6, 2013 (which was 20 days from the date Conseco received plaintiff's claim),

Conseco mailed plaintiff a check for $2,236 as payment for the claim which Conseco, at the

time, believed was due under the policy.

¶ 55   On June 7, 2013, when the Conseco customer service representative attempted to call

plaintiff to give him an update on the claim status, he got a message stating that the telephone

number he had called was not accepting calls at that time.

¶ 56   J. Plaintiff Disputes Amount Due Under Policy

¶ 57   On June 12, 2013, after he received the $2,236 check, plaintiff called Conseco. The

customer service representative confirmed that the policy was in reduced paid-up status and

confirmed the face amount, but plaintiff said he did not elect the enhanced RPU option. The

customer service representative also confirmed the grace period due date and amount and told

plaintiff he would call him back in three business days. The customer service representative also

asked the claims department to research plaintiff's call, and informed the claims department that

plaintiff stated he did not elect the RPU option, and that the insured (plaintiff's mother) had

passed away before the grace period due date.

¶ 58   On June 17, 2013, the customer service representative called plaintiff back but got a

message stating the voicemail box was full.

¶ 59   On June 21, 2013, Jacqueline Hof, a senior customer service representative, received a

call from plaintiff. Hof also gave a deposition in this matter, which was admitted into evidence

and considered by the trial court. Plaintiff told Hof that he had sent in the $415.47 grace

payment, which had a due date of April 26, 2013, and his check had cleared his account on April

8, 2013. Plaintiff stated that his policy should not have gone into reduced paid-up. Hof requested

that plaintiff send a copy of the cancelled check and gave him the fax number. Plaintiff sent the

copy of the check and again claimed in his fax that the policy should not have gone into reduced

paid-up policy. At trial, plaintiff testified that, on this date, he also requested a copy of his RPU

election form.

¶ 60   Hof sent a message to the claims department letting them know that plaintiff was

disputing the policy having gone into RPU prior to the claim, and that plaintiff was sending a

copy of the cancelled check to show that the grace amount was paid prior to the grace due date.

Hof requested that the claims department review and provide a response for a call back to

plaintiff at his telephone number.

¶ 61   On July 1, 2013, McCarty sent Scuglik an e-mail telling him that plaintiff had sent a letter

stating that the policy should not have gone into RPU. She asked Scuglik to review plaintiff's

letter and the other attachments plaintiff had sent (including the cancelled check) and asked

Scuglik for his opinion.

¶ 62   Scuglik sent the following response:

> "I think the policyholder is getting the grace notice confused with the RPU
>
> election. They may think that their policy has gone on its own NFO (nonforfeiture
>
> option) for failure to pay the grace premium, much like how a traditional whole
>
> life policy works but that is not the case with this UL policy. The grace notice
>
> provided the policyholder with the opportunity to retain their policy in active
>
> status and to prevent it from lapsing and as a result of receiving that payment on
>
> 4-4-13 the policy was removed from the pending grace period.
>
> The RPU election was signed by the policyholder and the Date field was
>
> filled in with 3-23-2013 and the post mark date was April 1, 2013 and the receipt

date at the Settlement Administrator's office was April 5, 2013. The election of

RPU was part of the class action settlement and the RPU is irrevocable as stated

in bold print on the election form and within the class notice. The election was

submitted by Dante Lojo and he is the policy owner, the payor and the beneficiary

so there is no way he can claim that the intent of the owner was other than to elect

RPU. We are held to the terms of the settlement to honor the RPU election.

　　　　The claim should be based on the RPU election.

　　　　Let me know if you have additional questions."

¶ 63　The concept of a "nonforfeiture option" referenced in Scuglik's email is a provision in

some life insurance policies (but not in plaintiff's) whereby, if the policyholder fails to pay

premiums, the policy automatically reverts to something very close to an RPU policy—that is,

instead of cancelling the policy outright for nonpayment of premiums, the face value of the

policy is dramatically reduced, or the cash value of the policy is surrendered to the policyholder,

or something of that nature. Because plaintiff had recently been in arrears on the payment of his

premiums, Scuglik thought that plaintiff was under the mistaken impression that his policy had

gone into nonforfeiture status, when in fact it had not—plaintiff had affirmatively elected the

enhanced RPU status, which was different, though it had many of the same features. Simply put,

Scuglik thought plaintiff was confused about what had happened to his policy and why.

¶ 64　On July 3, 2013, Hof called plaintiff to tell him that she was still waiting for an answer

from the claims department but would continue to follow up with him until his request for

information was completed.

¶ 65　On July 5, 2013, Hof called plaintiff and left a voicemail letting him know that the claims

department would be sending a detailed response by mail.

¶ 66   On July 7, 2013, plaintiff called Conseco regarding the status of his claim. A Conseco

employee advised plaintiff that a nonforfeiture option can be applicable to policies and can

decrease the face amount, but told plaintiff that his policy did not have a nonforfeiture option.

The employee apparently told plaintiff that Hof would contact him by the end of business (4:15

p.m.) with information. During her deposition, Hof testified that she did not believe that she

spoke to plaintiff after July 3, 2013, and that she was not involved in the matter after that date.

Hof also opined that plaintiff's policy was a universal life policy, and that universal life policies

do not have nonforfeiture options.

¶ 67   On July 11, 2013, plaintiff again called Conseco regarding his claim. A customer service

representative told plaintiff that Conseco was sending him a letter showing that he had elected

the enhanced RPU option on March 23, 2013, and that it would arrive within eight business days.

¶ 68   On July 16, 2013, plaintiff called Conseco again. A customer service representative told

plaintiff that Conseco was sending him signed RPU paperwork on the policy and that Conseco

had paid out all it could.

¶ 69   On August 14, 2013, Conseco sent a letter to plaintiff stating, in pertinent part, as

follows:

> "Enclosed, please find a copy of the Enhanced, Reduced Paid-Up Policy
>
> (RPU) Election Form. The form is signed by you, dated March 23, 2013 and post
>
> marked April 1, 2013. It was received at the Settlement Administrator's Office on
>
> April 5, 2013. This option allows coverage to remain in effect at a reduced
>
> amount with no further payments being required and it is irrevocable as stated in
>
> bold print on the form.

The RPU election is separate from the grace notices. You were sent the

grace notices due to the premium payments not having been received in our

office. If the payment had not been received by the date on the notice, the policy

would have terminated for non-payment. Receipt of the payment on April 4, 2013

removed the policy from the pending grace period.

If you have any further questions, please contact our Customer Service

department at the number shown above."

¶ 70   K. Federal Class Action Final Settlement

¶ 71   Meanwhile, during July 2013, the federal class action lawsuit, *Yue v. Conseco*, No. CV

11-09506 settled. Notably, the settlement contained certain exclusions from the class which

applied to plaintiff but, as Conseco's counsel would later explain, that fact was not appreciated

by plaintiff, plaintiff's counsel or Conseco during the time it was handling plaintiff's insurance

claim, including the dispute over whether plaintiff had elected the RPU option. The exclusions

were contained in the description of the two classes affected by the settlement. The July 1, 2013

court order approving the class action settlement stated:

"Certification of Classes. The Court certifies two separate Settlement classes as

part of this Settlement: (a) an 'Injunctive Relief Class' certified as a settlement

class under Fed. R. Civ. P. 23(b)(1) and (2) consisting of owners of all Policies

that are *In Force on the Election Date* and owners of all Surrendered Policies and

Lapsed Policies for which the Reinstatement Benefit is timely elected and

properly exercised in accordance with Section IV(B)(1) of the Stipulation; and (b)

a 'Damages Class' certified as a settlement class under Fed.R.Civ.P. 23(b)(3)

consisting of owners of all Surrendered Policies and Lapsed Policies for which the

Reinstatement Benefit is not timely elected and properly exercised in accordance

with Section IV(B)(1) of the Stipulation, but excludes: (i) those Policyholders

who timely excluded themselves from the Damages Class as set forth on Exhibit

A hereto, and (ii) Lapsed Policies and Surrendered Policies as to which the

insured died before June 5, 2013, the Election Date." (Emphasis added.)

¶ 72   Scuglik testified at trial (and in his affidavit) that he made a mistake in appreciating and

applying the legal terms of the settlement. Scuglik testified: "The June 5th in force policy status

was an item that I missed when I evaluated Mr. Lojo's claim." Scuglik testified that plaintiff's

policy was the only Conseco policy that he knew of where an RPU election had been submitted

and the insured's date of death was prior to June 5, 2013.

¶ 73   Scuglik also testified that he had understood from the notice that, regardless of what

would happen under the settlement, the policyholders' RPU elections were irrevocable. As noted

earlier, the notice stated: "The Enhanced Reduced Paid-Up Policy may not be revoked if the

Settlement is not finally approved."

¶ 74   Thus, even after the settlement, Conseco continued to focus on the dispute over plaintiff's

election of the RPU option based on the enhanced RPU election form that plaintiff had signed

and submitted. And, in spite of Scuglik's oversight, at no time did the dispute between plaintiff

and Conseco concern the validity of that election based on plaintiff's later exclusion from the

class.

¶ 75   L. Plaintiff Retains Legal Counsel

¶ 76   Plaintiff retained an attorney. On August 23, 2013, plaintiff's counsel called Conseco and

requested a copy of the insurance policy and payment history.

¶ 77   On October 3, 2013, plaintiff's counsel called Conseco. A customer service

representative told him that she would request that Conseco resend the letter stating that Conseco

took over Massachusetts General policies.

¶ 78   On October 8, 2013, the customer service representative called plaintiff's counsel and

told him that a letter regarding Massachusetts General changing to Conseco was mailed to

plaintiff's address. At no time did plaintiff's counsel and Conseco have a dispute over whether

plaintiff was a member of the class or whether his policy was an "in force policy."

¶ 79   M. Plaintiff Files Lawsuit

¶ 80   On November 4, 2013, plaintiff filed a three-count complaint. Plaintiff attached, as an

exhibit, a copy of the enhanced RPU policy form to his complaint. As noted earlier, the form

referenced the "Conseco Life Insurance Company Cost of Insurance Class Action Settlement,"

but the notice of the class action settlement was not attached to the complaint.

¶ 81   In count I, plaintiff alleged breach of contract for Conseco's failure to pay the policy

amount of $50,000.

¶ 82   Count II was a claim for damages under section 155 of the Illinois Insurance Code (215

ILCS 5/155(1) (West 2012)) for Conseco's vexatious and unreasonable conduct. Specifically,

plaintiff alleged that he did not check off the election box on the "Enhanced Reduced Paid-Up

Policy Election Form" and that his mere return of the signed form without checking off the

selection box did not convert his contract of insurance to an "Enhanced Reduced Paid-Up

Policy." The complaint contained no allegation that the form was no longer valid as a result of

the exclusion from the class under the terms of the class action settlement, nor any allegation that

plaintiff's policy was not an "In Force" policy.

¶ 83   Count III alleged "Waiver." Plaintiff claimed that Conseco waived any claim that the policy had been converted to a RPU policy by its acceptance of plaintiff's payment of $415.47, which Conseco had deposited on April 8, 2013.

¶ 84   N. Conseco's Counsel Recognizes Conseco's Error

¶ 85   On November 12, 2013, Conseco's counsel, John Aerni, sent an e-mail to plaintiff's counsel, confirming their telephone conversation from earlier that day. Aerni stated, in relevant part, that, "[u]pon reviewing your complaint, I noticed a new fact that you had not previously disclosed to me, namely, that the Policy insured died in April 2013, after your client elected the Enhanced RPU benefit under the *Yue* settlement in March 2013." Aerni explained that, under the terms of the *Yue* settlement, which was not approved until early July 2013, the death of plaintiff's mother in April 2013 had significance that was not appreciated by Conseco *or* plaintiff's counsel.

¶ 86   As Aerni also explained: "The *Yue* settlement contained an exclusion from the Class for Policies and Policyholders where the Policy insured died on or before June 5, 2013. When that occurred, individuals who had been previously included within the Class would cease being Class members, which would also result in the nullifications of elections that the affected Policyholder may have made before the date of death, as had happened in the case of your client."

¶ 87   Finally, Aerni told plaintiff's counsel:

    "Upon realizing, after reviewing your complaint, that all parties, including you,

    your client and Conseco, were under a misimpression, I confirmed with Conseco

    that your client's death claim had been received, processed and approved, and

    then called you to inform you of everyone's confusion. I mentioned on the phone

that, upon recognizing this error and how the confusion had occurred, Conseco

would be paying your client the Policy's full death benefit, with interest."

¶ 88   O. Conseco Pays Plaintiff $54,723.24

¶ 89   Plaintiff received a check dated November 13, 2013, from Conseco in the amount of

$54,723.24, which included the face amount of the policy ($50,000), the policy's cash value

($1,665.76), and 10% interest from April 18, 2013 to November 20, 2013 ($3,057.24).

¶ 90   P. Plaintiff Files Amended Complaint

¶ 91   On February 10, 2015, plaintiff filed an amended complaint alleging "Breach of Contract

by Vexatious and Unreasonable Delay." Plaintiff alleged that, during the six-month delay in

payment, Conseco "denied any liability for payment under the policy, repudiated the policy,

claimed reliance on a proposed and unaccepted policy change, claimed existence of a Federal

injunction against the plaintiff's instant lawsuit in Cook County and sought for plaintiff to

dismiss this lawsuit, and attempted to condition payment of the amount of the policy on

relinquishment of claims for unreasonable and vexatious delay."

¶ 92   Q. Bench Trial

¶ 93   The case proceeded to trial on plaintiff's section 155 claim. The trial court found in favor

of Conseco. This appeal followed.

¶ 94   II. ANALYSIS

¶ 95   Section 155 of the Illinois Insurance Code (215 ILCS 5/155(1) (West 2012)), provides a

remedy for an insured who encounters unnecessary difficulties when an insurer withholds policy

benefits. *Green v. International Insurance Co.*, 238 Ill. App. 3d 929, 935 (1992). The purpose of

section 155 is "to punish insurance companies for vexatiously delaying or rejecting legitimate

claims by holding insurers responsible for the expense resulting from the insured's efforts to

prosecute the claim, and discouraging them from using their superior financial position by delaying payment of legitimate contractual obligations to profit at the insured's expense." (Emphases and internal quotation marks omitted.) *Cook ex rel. Cook. v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 46 (quoting *Neiman v. Economy Preferred Insurance Co.*, 357 Ill. App. 3d 786, 797 (2005)).

¶ 96   Section 155 states, in pertinent part:

"In any action by or against a company wherein there is in issue the liability of a

company on a policy or policies of insurance or the amount of the loss payable

thereunder, or for an unreasonable delay in settling a claim, and it appears to the

court that such action or delay is vexatious and unreasonable, the court may allow

as part of the taxable costs in the action reasonable attorney fees, other costs, plus

[an additional amount subject to certain caps.]" 215 ILCS 5/155(1) (West 2012).

¶ 97   Whether the insurer's acts are "vexatious and unreasonable" within the meaning of section 155 is a question of fact. *Green*, 238 Ill. App. 3d at 935. We review a circuit court's decision to award attorney fees and costs pursuant to section 155 under an abuse-of-discretion standard. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 160 (1999); *accord Cook*, 2014 IL App (1st) 123700 ¶ 47 (reviewing court will not disturb trial court's decision on whether insurer's conduct was vexatious and unreasonable unless court abused its discretion). A trial court abuses its discretion only where its ruling is arbitrary or fanciful, or where no reasonable person would adopt the court's view. *Certain Underwriters at Lloyd's, London v. Abbott Laboratories*, 2014 IL App (1st) 132020, ¶ 68.

¶ 98   In determining whether section 155 sanctions should be imposed, the trial court must consider the totality of the circumstances. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d

456, 469 (2003). Neither the length of time, the amount of money involved, nor any other single factor taken by itself is dispositive of whether the insurer's conduct was vexatious and unreasonable. *Rosalind Franklin University of Medicine & Science v. Lexington Insurance Co.*, 2014 IL App (1st) 113755, ¶ 110; *Green*, 238 Ill. App. 3d at 935. Other factors to consider include "the insurer's attitude, whether the insured was forced to file suit to recover, *** whether the insured was deprived of the use of its property, whether there is a *bona fide* dispute concerning coverage, the extent of the insurance company's evaluation and investigation of the claim, and the adequacy of communications between the insurance company and the insured." (Internal quotation marks omitted.) *Cook*, 2014 IL App (1st) 123700, ¶ 48. Thus, the trial court must consider the totality of the circumstances, "taken in broad focus." *Id*.; *Deverman v. Country Mutual Insurance Co.*, 56 Ill. App. 3d 122, 124 (1977).

¶ 99   In particular, if the evidence demonstrates that a *bona fide* dispute about coverage existed between insurer and insured, delay in settling a claim does not warrant section 155 damages. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 469 (2003). A *bona fide* dispute is one that is real, actual, genuine and not feigned. *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 32.

¶ 100   Here, the trial court ruled that "based on the totality of the circumstances and the credibility of Mr. Scuglik that the plaintiff failed to prove its case." As the court explained:

> "The question is whether or not plaintiff proved by a preponderance of the
> evidence the vexatious and unreasonable refusal to pay this insurance claim and
> the evidence shows that there was, indeed, a six-month delay between the claim
> and the payment, which, in the scheme of things, is not vexatious in and of itself.

The payment was made immediately upon filing of the lawsuit as the

parties point out. It was paid even before there was any service of process. There

were numerous calls made between the plaintiff and the defendant, which

unfortunately in this day and *** age is standard operating procedure. When you

call in your cable company or your insurance company, you have to call more

than once. Sometimes they call you back. Sometimes they don't. Here, it appears

they did call him back from my analysis of Hoff's deposition transcript.

Plaintiff was an educated man and had a close family member as his

broker, whom he consulted generally on various things relating to this insurance

policy on his mother's life. Plaintiff had correspondence with the defendant about

this insurance policy which appeared to me to be evidence of his knowledge of

the policy and his sophistication.

Mr. Scuglik testified and admitted what happened in this case, and the

mistake that he straightforwardly explained. I found him credible. I believed his

testimony. I found him straightforward."

¶ 101   Plaintiff argues otherwise. He claims that there was no good-faith, *bona fide* dispute. He

argues that it was vexatious and unreasonable for Conseco to refuse to pay the face amount of

the policy because Conseco "wrongly claimed" that the policy was governed by a class action

settlement that did not apply and Conseco did not pay until a lawsuit was filed. He further

contends that "[t]he totality of the circumstances include, primarily, the deceptively-titled

"enhanced" election form, insistence that an incomplete form is a completed form, sending a

below-policy amount check with a release of liability above the endorsement line, failing to

determine the applicability of the election form, failure to meaningfully communicate with the

insured, failure to consult an attorney, and failure to train the call center personnel" constituted unreasonable and vexatious conduct. We will address each of these contentions.

¶ 102   A. "Enhanced Reduced Paid-Up Policy Election Form"

¶ 103   Plaintiff first attacks Conseco's reliance on the RPU election form as unreasonable and vexatious, claiming that (1) the use of the word "enhanced" deceptively implied an increase, not decrease, in face value; and (2) plaintiff did not execute the election because he never checked the box.

¶ 104   Before we reach those questions, it is important to note the chronology of events. Conseco promptly paid the death benefit it believed plaintiff was owed—the enhanced RPU benefit of $2,236. It paid this amount on June 6, 2013, twenty days after receiving plaintiff's claim. But when plaintiff objected to Conseco about receiving this reduced death benefit, he did *not* mention the RPU election form he had signed. He did not say it was ambiguous or misleading. He did not challenge whether he had properly made the election. Rather, he said his policy should be in regular, non-RPU status because he had paid the premiums before the expiration of the grace period. But as Scuglik noted at trial and in his internal email, whether he paid his overdue premiums merely kept his policy from cancelling; it did nothing to nullify the irrevocable election by plaintiff to convert to an RPU policy.

¶ 105   It was only after Scuglik identified plaintiff's confusion, and after Conseco, in August 2013, sent plaintiff the copy of the RPU election form that he had, in fact, dated, signed, and returned, that plaintiff challenged the form's validity.

¶ 106   So while there may have been a six-month lag from the time plaintiff made his claim for death benefits (May 2013) and when he ultimately received the full benefits (November 2013), Conseco did not even know that plaintiff was challenging the execution or validity of the RPU

election form until three of those six months had passed. Rather, as described above, Conseco believed that plaintiff was simply operating under a misimpression about the difference between paying his overdue premiums and electing the enhanced RPU option. This is not a dispositive fact, but it does undercut the notion of unreasonable delay—by half, at least.

¶ 107   We will turn to the specific arguments raised.

¶ 108   1. Deceptive, Ambiguous RPU Election Form

¶ 109   We cannot agree with plaintiff's argument that the RPU election form and accompanying notices were so ambiguous and misleading that they are invalid, and thus that Conseco was vexatious and unreasonable in relying on them.

¶ 110   First and foremost, this language was approved by a federal district judge in California, who expressly found that "the Class Notices are written in plain English and are readily understandable by Class Members." So plaintiff's position is directly contrary to a federal court's interpretation, while Conseco's position is perfectly consistent with that court's interpretation. Under these circumstances, we would be hard-pressed to find Conseco's reliance on the validity of these notices and forms unreasonable or vexatious. Indeed, given that Conseco was under a federal court injunction to issue these documents and to deem any elections "irrevocable" once made, Conseco would have risked a contempt citation had it unilaterally declared these documents "ambiguous" or "confusing" and refused to recognize their validity.

¶ 111   Beyond that, while we agree that the use of the word "enhanced" may not have been the wisest choice, the entirety of the RPU election form and the accompanying notices do not strike us as so ambiguous or unclear that Conseco was unreasonable for standing by them. Plaintiff only focuses on one word in the title. He does not mention that the very next word after "enhanced" is "reduced." Nor does he mention the rest of what he was sent.

¶ 112   The Enhanced Reduced Paid-Up Policy Election Form was sent to plaintiff along with the notice of the proposed settlement of the class action, approved by the federal court. Plaintiff views the "title" of the form in isolation and ignores the language both in (1) the entire form and (2) the rest of the class action notice package.

¶ 113   As to plaintiff's focus on the "title" of "Enhanced Reduced Paid-Up Policy Election Form," the form has explanatory language. In bold print, the form states:

"You received this Form because you own an In Force Policy. If you want to keep your Policy In Force at its current face amount, do not complete this Form. *Complete this Form only if you want the Enhanced Reduced Paid-Up Policy Benefit described in the Class Notice*. If you elect to receive the Enhanced Reduced Paid-Up Policy Benefit, your election is irrevocable." (Emphasis added.)

The Class Notice, in turn, described the Enhanced Reduced Paid-Up Policy option as follows: "If you prefer to convert your Policy to a paid-up policy *at a lower face amount of insurance coverage*, you can submit the Enhanced Reduced Paid-Up Policy Election Form contained in the Class Notice Package by June 5, 2013." (Emphasis added.) Also, the form itself clearly stated: "To learn the face amount of the enhanced reduced paid-up benefit that would apply to your Policy, you may call the Settlement Administrator at 1-866-403-0686 or write to it at the address below. You will be provided with the face amount promptly."

¶ 114   Moreover, the language immediately above the spot where plaintiff placed his signature informed him, among other things, that he would no longer owe any premiums. Plaintiff would have this court believe that he reasonably believed that he was accepting an option that (i) increased the face value of his policy while, at the same time, (ii) eliminated all premiums on the policy forever. That is simply an untenable contention. Or if, as plaintiff claimed at trial, he had

not fully read the documents before signing the form, Conseco can hardly be blamed for that fact.

¶ 115   We find no ambiguity in that language, much less sufficient ambiguity and confusion that it was unreasonable and vexatious for Conseco to rely on it.

¶ 116   Plaintiff argues that these are insurance documents that should be strictly construed against the insurer and in favor of the insured. Given what we have said above, we would reach the same conclusion even if plaintiff were correct. But plaintiff is not correct. The general rule is that any ambiguity in an insurance policy will be construed strictly against the insurer who drafted the policy. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 456 (2010). But we do not see any ambiguity. And more importantly, these are not insurance policies drafted by an insurance company. These documents were the result of litigation in California, worked out between opposing counsel and approved by a federal judge.

¶ 117   Conseco raises the additional suggestion that, from the evidence, a finder of fact could infer that plaintiff never found these documents confusing in the first place, that plaintiff knew exactly what he was doing but merely suffered buyer's remorse after his mother's unfortunate and untimely death. The record does support that plaintiff was a sophisticated individual with experience in accounting and as a controller, and his brother-in-law was available to advise him about the policy. And this enhanced RPU was designed for a policyholder just like plaintiff, who was having trouble paying the premiums. No doubt, had he known his mother would die within a few weeks, plaintiff never would have chosen to reduce the death benefit from $50,000 to a very meager sum. But he did not know that. The trial court never specifically found that plaintiff's argument was insincere and that he, in fact, knew exactly what these documents meant and understood exactly what he was doing when he signed that enhanced RPU form, but Conseco is

correct that there is sufficient evidence to support that inference. We review the trial court's

judgment, not its reasoning, and we may affirm on any basis in the record (*Khan v. Gramercy*

Advisors, LLC, 2016 IL App (4th) 150435, ¶ 167), and this is yet another basis for upholding the

trial court's finding.

¶ 118   For all of these reasons, Conseco's reliance on the enhanced RPU election form, over

plaintiff's claim that it was so ambiguous and misleading as to be invalid, was neither

unreasonable nor vexatious, and the trial court's finding in this regard was not an abuse of

discretion.

¶ 119   2. Incomplete RPU Election Form

¶ 120   Plaintiff further argues that there was no *bona fide* dispute over whether plaintiff

executed the RPU election form because he never "completed" the form—he never checked the

box. We find this argument without merit as well.

¶ 121   Plaintiff signed and dated the RPU election form. Above his signature were two

paragraphs, which read:

Your election of the Enhanced Reduced Paid-Up coverage will be effective on the date this Form is postmarked. Within 30 days of receipt of this Form, Conseco will provide you with evidence of the Enhanced Reduced Paid-Up coverage.

☐   **I elect the Enhanced Reduced Paid-Up Policy Benefit. I understand that (a) my election is irrevocable and will result in my Policy's converting from an In Force Policy to an Enhanced Reduced Paid-Up coverage, for which no more premium will be due or accepted; and (b) that there will be no cash value associated with the Enhanced portion of the Reduced Paid-Up coverage. Only the Reduced Paid-Up coverage before the face amount is Enhanced will have a cash value.**

Date: ___/___/2013   _____
**   Policyowner Signature**

¶ 122   Plaintiff did not check the box but did sign the form, date it, and mail it back to the

settlement administrator. As the documents enclosed with the notice clearly explained, there was

no reason to mail it at all if plaintiff did not intend to elect this enhanced RPU option—plaintiff

was informed in two different places that if he did not want the enhanced RPU option, he should

"do nothing" and "do not complete this Form." And the language quoted above informed him

that his election would be effective on the date of the postmark. Nor would it seem to make sense

to sign it and date it if there were no intention to elect the option. And plaintiff's signature was

verified by Conseco as genuine before it was accepted. Moreover, this was the only box on the

form. It was not as if he was asked to check one of several boxes, for several different options,

and he left them all blank, leaving a reasonable person to question which option he chose. There

was only one option, and only one reason to sign it and mail it in—to elect that option. Under

these circumstances, it is difficult to see how Conseco's determination that plaintiff had elected

the option was vexatious and unreasonable.

¶ 123   Just as importantly, plaintiff admitted at trial that he *intended to make the election*—he

just claims to have misunderstood what it was he was electing. He testified that he thought he

was increasing the death benefit, but saying that he made the election under a misimpression is

very different than saying he did not make the election at all. It would be odd, to say the least, to

assess damages against Conseco for believing that plaintiff had intended to elect the RPU option

when plaintiff has admitted that he so intended.

¶ 124   Thus, the trial court's finding that Conseco did not act vexatiously or unreasonably in

determining that plaintiff had, in fact, elected the enhanced RPU form was not an abuse of

discretion.

¶ 125   B. Plaintiff's Ineligibility for Enhanced RPU Due to Mother's Death

¶ 126   Plaintiff next argues that Conseco's delay in paying the face amount of the policy was

vexatious and unreasonable because it failed to immediately realize that plaintiff was excluded

from the plaintiff class in the federal class action, and thus was ineligible for an enhanced RPU policy.

¶ 127   As the record shows, both the March 2013 notice to policyholders and the July 2013 court order in the federal class action in California made it clear that the plaintiff class was limited to policyholders with policies in force as of June 5, 2013. Plaintiff was part of the class when the March 2013 notice was sent and when he elected and mailed in the enhanced RPU policy, but he was excluded upon her death in April 2013.

¶ 128   Nobody at Conseco caught this latter fact, at least not initially. Then again, neither did plaintiff or the lawyer he hired to investigate and vindicate plaintiff's rights. It was only upon the filing of the lawsuit, when Conseco's lawyer, Mr. Aerni—who was involved in, and familiar with, the terms of the settlement—reviewed the complaint and noticed the insured's date of death, that Conseco realized that plaintiff's election of the enhanced RPU, while valid on the date it was made, became invalid upon the death of plaintiff's mother before June 5, 2013.

¶ 129   It would be a fair point to say that Conseco should have been able to determine plaintiff's status more easily than plaintiff himself, or perhaps even plaintiff's lawyer. But Conseco did not, and the trial court did not find any bad faith, ill motive, or unreasonable or vexatious behavior in its initial failure to recognize plaintiff's exclusion from the plaintiff class.

¶ 130   There is no question that Conseco made a mistake. The only question is whether it went beyond an innocent, sincere mistake to vexatious, unreasonable conduct. The trial court ruled that it did not. The trial court expressly found credible the testimony of Scuglik regarding his mistaken understanding of whether plaintiff's policy was in force. Scuglik apparently believed that a policy was in force up until the time a claim was paid. And the evidence showed that plaintiff's particular situation was an outlier—it was the only example among Conseco's insured

where the policyholder opted for the enhanced RPU policy but then fell out of the plaintiff class due to the death of the insured before June 5, 2013. In any event, the trial court expressly found Scuglik's testimony credible and determined that he straightforwardly explained the "mistake."

¶ 131   Where there is a *bona fide* coverage dispute, section 155 damages are not available, even if the insurer's coverage position is ultimately unsuccessful. *Mohr v. Dix Mutual County Fire Insurance Co.*, 143 Ill. App. 3d 989, 999 (1986). As Conseco correctly notes, "simply because an insurer is ultimately determined to be wrong in the factual or legal position it has taken with respect to coverage does not prove that it acted vexatiously." The trial court found that Scuglik credibly testified and that he straightforwardly explained the mistake that happened in this case. An honest error or mistake in legal reasoning is not vexatious conduct.

¶ 132   Plaintiff fares no better in citing Conseco's failure to seek the advice of counsel earlier in the process, or in the fact that it did not pay the full death benefit until after a lawsuit is filed. Conseco was presented with what appeared to be a legitimate election for an enhanced RPU benefit and a policyholder—plaintiff—who was trying to disavow it. He claimed he did not understand what he was signing, but Conseco could do nothing about that; it correctly read the class-action injunction as rendering elections irrevocable. He claimed he did not actually elect the enhanced RPU policy, but Conseco reasonably believed that a signed, dated, and mailed election signified plaintiff's intent to be bound, even if plaintiff did not check the box (and as we have already noted, plaintiff testified that he *did* intend to be bound). And plaintiff complained that Conseco's acceptance of premiums was inconsistent with an enhanced RPU, but Conseco reasonably believed that plaintiff was simply confusing the difference between paying past-due premiums (to bring the policy current) as opposed to electing an option that, going forward, would not require *additional* premiums.

¶ 133   None of those positions would have changed had Conseco consulted its lawyers. And the filing of the lawsuit did not change any of Conseco's reasoning on those points, either.

¶ 134   What ultimately salvaged plaintiff's claim was something Conseco discovered, not merely because plaintiff filed a lawsuit and Conseco realized that plaintiff was serious about pursuing his claim—but rather, because Conseco's lawyer, reviewing the complaint, noticed the date of death of plaintiff's mother and realized that plaintiff was not eligible for an enhanced RPU policy. Once that determination was made, Conseco immediately paid out the full death benefit, with interest for the delay and the cash value as well.

¶ 135   Even if Conseco should have checked with a lawyer earlier in the process, plaintiff's claim here is not one for negligent conduct. It is a claim for unreasonable and vexatious behavior, and the trial court emphatically found that Conseco simply made an honest mistake in good faith. Given that the arguments plaintiff had been raising, all the way up to and including the filing of the lawsuit, had nothing to do with plaintiff's eligibility for the enhanced RPU policy, but rather were arguments that Conseco reasonably believed had no merit whatsoever, it was well within the trial court's discretion to find that Conseco's failure to consult legal counsel earlier on in the controversy was not vexatious or unreasonable.

¶ 136   Plaintiff's note that Conseco, in tendering the initial $2,236 check for the death benefit, included a release of liability above the endorsement line on the back of the check, likewise does not alter our conclusion. At the time Conseco sent that check, plaintiff had irrevocably elected the enhanced RPU option. True, Conseco failed at that point to realize that this RPU option was no longer available to plaintiff, but that was a good-faith mistake (as the trial court found). That mistaken belief aside, of course Conseco would have considered the payment of $2,236 to

constitute full payment and thus a release from further liability. The inclusion of that language

does not turn a good-faith mistake into vexatious conduct.

¶ 137   Plaintiff also argues that the delay in payment of the full proceeds was caused by a failure

to meaningfully communicate with the insured. But as the detailed description of the facts shows,

Conseco communicated often with plaintiff. Insured and insurer went back and forth on many

issues concerning the validity of the election form and whether plaintiff had effectuated an

official election. The record supports the trial court's conclusion that Conseco's communication

with plaintiff on these many issues (which ultimately had nothing to do with why plaintiff

prevailed) did not constitute vexatious or unreasonable conduct.

¶ 138   Plaintiff also raises Conseco's acceptance of the $415.47 premium payment on April 4,

2014, as a factor to be considered. He argues that retaining the premium and denying the full

policy amount is further evidence of the vexatious and unreasonable conduct of Conseco. Citing

Insurance Company of Illinois v. Brown, 315 Ill. App. 3d 1168 (2000), plaintiff argues that "[t]he

rule is that where a paid premium is not refunded, the insurer has acknowledged that its policy is

in effect for the period of payment, and has waived any policy defense concerning cancellation

of the policy."

¶ 139   As Conseco correctly notes, however, plaintiff's reference to waiver of policy

cancellation defenses by acceptance of a premium is not applicable, since Conseco never tried to

cancel plaintiff's policy. And when Conseco processed plaintiff's premium payment on April 4,

2013, it did not know of plaintiff's RPU election. The settlement administrator did not receive

the election form until April 5, 2013. At trial, Scuglik testified that when plaintiff's RPU election

was processed, Conseco saw that the premium payment had been processed "and it provided

[plaintiff] with a higher death benefit under that election." Scuglik testified that, as a result of

paying the $415.47 premium, plaintiff received more. Conseco "included it in the calculation and then granted [plaintiff] that higher amount." We find nothing here constituting vexatious or unreasonable conduct.

¶ 140   Finally, plaintiff also argues that Conseco's failure to train the call center personnel on the terms of the class action settlement caused the delay in payment under the original policy. Plaintiff claims that the call center representatives should have referred plaintiff's call to the settlement administrator, Rust Consulting. Thus, plaintiff's argument is based on his theory that the settlement administrator might have handled plaintiff's inquiries differently. But plaintiff's inquiries had nothing to do with the settlement; he was disputing the payment on his claim. And as the evidence showed, the settlement administrator had no authority to pay claims, and plaintiff's inquiry about payment of additional benefits would have been routed back to Scuglik.

¶ 141   Moreover, as Conseco's attorney Aerni wrote in his e-mail to plaintiff's counsel, "the terms of the [class action] Settlement are lengthy and complicated" and Aerni was able to recognize the error, as well as the confusion that everyone was under "only because [Aerni] spent hours and hours negotiating the terms of this complicated Settlement."

¶ 142   Ultimately, all of plaintiff's contentions come full circle to the same fact: Conseco made an honest mistake, not unreasonable under the circumstances given the many arguments plaintiff was raising that were not meritorious concerning the election form and his payment of premiums, given the complicated nature of the class-action settlement, and considering that plaintiff was the one and only policyholder who both elected the enhanced RPU policy and saw his insured die so soon after the election that the enhanced RPU became, after the fact, no longer applicable to him. As we have said above more than once, the trial court's finding that Conseco's

mistake was in good faith, not unreasonable or vexatious, was not an abuse of discretion and was, in fact, well-supported by the evidence.

¶ 143   III. CONCLUSION

¶ 144   Under the totality of the circumstances, taken in broad focus, the trial court did not abuse its discretion in finding that plaintiff failed to prove that Conseco's conduct was vexatious and unreasonable. We affirm the judgment of the circuit court of Cook County.

¶ 145   Affirmed.