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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

ADVANCE TRUST & LIFE ESCROW SERVICES, LTA, as securities intermediary for LIFE PARTNERS POSITION HOLDER TRUST, on behalf of itself and all others similarly situated, Plaintiff, vs. PROTECTIVE LIFE INSURANCE COMPANY, Defendant.	)	Civil Action No. 2:18-cv-01290-KOB

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

I. The Proposed Amended Complaint is Not Futile.

Protective agrees that "leave shall be granted unless there is a substantial reason to deny it." D.I. 42 at 2. The only "substantial reason" Protective asserts is futility. *Id.* at 12. Protective contends that its "Motion for Judgment on the Pleadings and Reply Brief established that Plaintiff's breach of contract claim was barred by Alabama's six-year statute of limitations" and that "[t]hose arguments are equally applicable to the proposed Amended Complaint." *Id.* at 13-14. Protective is wrong for several, independent reasons.

First, Protective's futility defense ignores the plain language of the Alabama Code. The provision cited by Protective, Ala. Code § 6-2-34, states, "Actions upon any simple contract" "must be commenced within six years." D.I. 44 at 14. By its plain terms, this statute does not, as Protective contends, restrict a plaintiff to only a single "action upon a particular contract." *Id*. Rather, the statute requires that an action commence within six years of a breach, and that is exactly what the FAC alleges: impermissible COI deductions within the past six years.

This case involves *variable* COI rates, which are "**periodically redetermined** using **currently** experienced" mortality. FAC ¶4 (quoting Protective's 2016 NAIC Annual Report). The policies promise that "monthly cost of insurance rates *will be* determined by us based on our expectations of future mortality experience," and provide that "cost of insurance is determined at the end

of each policy month." FAC ¶ 25. Protective "continuously reviews" its mortality expectations, and updates them at least once every year. *Id.* ¶¶ 4-5. If Protective's 2018 COI rates are not determined based on Protective's updated mortality expectations in 2018, there is a separate and new breach in 2018. Accordingly, how Protective determined its variable COI rates 20 years ago does not render untimely a recent lawsuit challenging a recent breach.

The Alabama legislature codified this principle in Section 6-5-280, which states "if the breaches occur at successive periods in an entire contract, as where money is to be paid by installments, an action will lie for each breach."[1] Protective's contention that "Section 6-5-280 does not authorize the filing of multiple 'actions' for each breach of an installment contract" violates the statute's plain text.[2] Protective's reading also makes no sense. Taken to its logical conclusion, Protective's argument would permit the insurer to overcharge policyholders by any amount for the first six years that the policies were in effect and, so long as a policyholder did not sue by that time, Protective would then have carte blanche to make new COI determinations and deductions that overcharge

[1] *See also* Ala. Code § 6-5-281 (**"**Successive actions may be maintained upon the same contract or transaction whenever, after the former action, a new claim arises therefrom.").
[2] D.I. 44 at 15; *see also Gregory v. Chem. Waste Mgmt., Inc.*, 38 F. Supp. 2d 598, 620–21 (W.D. Tenn. 1996) (applying Ala. Code. §§ 6–2–34 and 6–5–280 to hold that "Plaintiffs may recover for each breach of paragraph 2.1(b)(i) of the contract that accrued within six years prior to commencement of this action").

policyholders by whatever it wants, based on any factors it wants, in perpetuity. That is not the law in Alabama nor anywhere else.[3]

Second, Protective cites to the Original Complaint to try to prove futility. D.I. 42 at 12-14. This is improper. "An amendment is considered futile when the claim, *as amended*, would still be subject to dismissal." *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 864 (11th Cir. 2017) (emphasis added); *accord SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 764 F.3d 1327, 1344 (11th Cir. 2014).

Third, Protective's contention that Plaintiff has "alleged that Protective had breached the Policies as soon as each policy was issued," D.I. 42 at 13-14, is both wrong and irrelevant. It is wrong because neither that phrase, nor any allegation remotely like it, exists in the FAC (nor the original complaint). The FAC alleges, based on new and incontrovertible evidence, that Protective has in fact been *increasing* COI rates from 2013 to the present without determining those rates based on updated mortality expectations that it re-set annually from 2013 to the present.[4] Whether Protective breached the terms of the policies from 2013 to the

[3] Protective repeatedly suggests that Alabama's statute of limitations rules are unique, and that this is why the Court should ignore all the non-Alabama cases rejecting Protective's argument. But Protective fails to explain how Ala. Code § 6-2-34 substantively differs from the statutes in other states. Indeed, many state statutes of limitation use the same terminology. *See, e.g.*, Fla. Stat. Ann. § 95.011 ("Actions other than for recovery of real property shall be commenced as follows:…(2) within five years.—(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument[.]").

[4] FAC ¶ 8 ("as each of the Annual Reports of the policies at issue show, Protective has determined and applied increased monthly COI charges every year for the past six years"); ¶ 36

present thus depends on the relationship between (a) the mortality charges deducted from policyholder accounts from 2013 to the present and (b) Protective's new mortality expectations from 2013 to the present. Because Protective's mortality expectations changed each year, and rates increased each year, the FAC challenging each of those breaches is timely.

It is, in fact, impossible for Protective to have committed a single breach at inception that time-bars claims for new breaches, and certainly impossible to reach that conclusion on the pleadings alone. At policy inception (1986, 1998, 1999 and 2005, *see* FAC ¶ 17), both Protective's 2018 COI rates and Protective's 2018 mortality expectations were unknown and not fixed.[5] This is therefore not a case of a singular continuing breach; it is a case where Protective breached the policies based on new facts within the past six years. Those claims as alleged in the FAC are therefore not futile.

The fact that the original complaint alleged that industry-wide mortality rates have been declining for decades and that Protective did not adjust COI rates during this time does not demonstrate that Plaintiff once alleged breach upon issuance. D.I. 1 ¶ 6. Without the benefit of discovery, Plaintiff neither knows nor

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(monthly mortality charge on one policy "increased in the past five years over 57%"); ¶ 37 ("monthly COI rates have increased" by 60% and 150% on other policies in last 6 years).

[5] Contrary to Protective's implication, D.I. 44 at 9, the policy's language is clear that "Table of Guaranteed Maximum Insurance Rates" is not the then in effect COI rate, and that suggestion also contradicts the mortality charges reflected in the annual statements identified in the FAC. *See also* D.I. 1-1 at 16.

alleged the precise moment when Protective *first* determined and deducted a COI charge calculated from a COI rate *not* based on Protective's then-current expectations as to future mortality experience. Protective, in fact, denies *ever* having done so, to this day. D.I. 16 at ¶¶ 1-10 & 35-40.

Fourth, *Seybold v. Magnolia Land Co*., 376 So. 2d 1083 (Ala. 1979), did not "reject[] the very argument that Plaintiff advances." D.I. 44 at 19. Protective states, without any citation, that the plaintiff there alleged "a continuing breach for ten years of a contractual obligation to maintain and repair an access road leading to plaintiff's lots." *Id.* That does not accurately characterize the dispute in *Seybold.* In that case, the defendant's failure to begin "maintenance and repairs" was never characterized as anything more than a single "breach." *Seybold*, 376 So. 2d at 1085. The plaintiff in that case had argued that "the statute had not begun to run until Defendant had had a reasonable time in which to perform." *Id.*

Here, the FAC does not allege a "reasonable time in which to perform" theory. Instead, the FAC alleges, and the policies so state, that Protective is required on a prospective and monthly basis to determine new COI charges based on Protective's revised, then-current mortality expectations. FAC ¶¶ 2, 4-8, 13-16, 29-30, 35-38, 50. Yet, Protective has: (a) on a monthly basis for the past six years, determined and deducted from policyholder accounts amounts not based on Protective's then-current mortality expectations, and (b) on an annual basis for the

past six years, unlawfully *increased* COI rates. *Id.* ¶¶ 35-36. *Seybold* recognizes that when "the defendant has agreed under the contract to do a particular thing, there is a breach and the right of action is complete upon his failure to do the particular thing he agreed to do." 376 So. 2d at 1085. The facts at issue *Seybold*—where a party was alleged to have a **single** duty to repair and maintain a road before conveyance to the county and failed to perform ***any*** of its obligation for ten years—does not render the FAC futile.

Fifth, Protective's contention that *AC, Inc. v. Baker*, 622 So. 2d 331, 335 (Ala. 1993) and *Honea v. Raymond James Financial Services, Inc.*, 240 So. 3d 550 (Ala. 2017) "fully support[] Protective's position in this case" is backward. *See* D.I. 44 at 19, 21. In *Baker*, the defendants successively breached their agreements to prepare the plaintiff's tax returns from 1981 to 1985. 622 So. 2d at 333-34. The *Baker* defendants moved to dismiss on limitations grounds and the trial court entered "summary judgment[6] on all claims except the . . . claims . . . based on [defendants'] preparation of the plaintiffs' 1985 tax returns." *Id.* at 332.

The Alabama Supreme Court explained that "the trial court properly held that the only claims not barred by the statute of limitations were the plaintiffs' breach of contract claims based on their 1985 tax returns." *Id.* at 335. Protective seeks to distinguish this language on unpersuasive grounds: that "plaintiffs' breach

[6] The trial court treated defendant's motion to dismiss as a motion for summary judgment. *Baker*, 622 So. 2d at 333.

of contract claims relating to the 1985 tax returns was not presented in plaintiffs' appeal and was not before the Supreme Court." D.I. 44 at 18. But that procedural posture does not erase the Alabama Supreme Court's express endorsement ("the trial court properly held") of the trial court's order.

The same is true with *Honea*. In *Honea*, the court acknowledged that plaintiff was alleging separate and independent breaches of contract. 240 So. 3d at 567 ("[a]lthough it is true that . . . RJFS breached its duties . . . before March 2000, Honea contends that allegedly improper transactions . . . represent independent breaches"). *Honea* also acknowledged that a claim for breach would not be precluded simply because that conduct also occurred outside the statute of limitations. *Id.* at 568 ("Honea also claims that Raymond James failed to properly supervise Michaud . . . . and that a supervisor failed to review Michaud's trading in 1997 . . . . However, nothing before us suggests that any purported failure by Raymond James to supervise Michaud that occurred after March 2000 would be barred by the statute of limitations." (emphasis in original)). That the issue in *Honea* was whether "Honea has demonstrated probable merit—for purposes of a Rule 59(g) hearing," *Honea*, 240 So. 3d at 568, is a distinction without a difference. D.I. 44 at 19, 21. Nor did the *Honea* court, as Protective implies,

condition the holding on a determination that breaches within the limitations period were "unrelated" to breaches outside the limitations period.[7]

In its Response to Protective's Motion for Judgment, Plaintiff neglected to identify language from *Honea* as being part of Justice Murdock's concurring and dissenting opinion. D.I. 31 1, 20. Plaintiff apologizes to the Court for that oversight. It was inadvertent. However, contrary to Protective's contention, Justice Murdock's summary of *Baker* and statement of the law is consistent with the majority's opinion. As Justice Murdock states: "This Court rightly refuses to reject Honea's claims as to damages she incurred from those 'breaches that occurred during the six years before the action was filed' merely because other breaches occurred more than six years before the action was filed." *Honea*, 240 So. 3d at 594 (concurring in case no. 1130655 and dissenting in case no. 1130590).

Sixth, Plaintiff is not "essentially urg[ing]" "the radical step of adopting for the first time in Alabama the 'continuing-contract theory.'" D.I. 44 at 25. That theory would be at issue only if the FAC contended that breaches *outside* the limitations period were actionable. It does not. *E.g.*, FAC ¶ 40 (class definition only includes COI overcharges on or after August 13, 2012).

[7] D.I. 44 at 22-23. The court used the "unrelated" language that Protective references because the defendant's "failure to properly know" and "set[] up an 'unsuitable' account" each constituted a singular breach that occurred outside the limitations period. *Honea*, 240 So. 3d at 566-67.

II. The Amended Complaint is Not in Bad Faith

Protective suggests that Plaintiff's proposed amendments are made in bad faith. D.I. 42 at 8. This argument is also meritless. This case is in its infancy. Plaintiff sought leave to amend after discovering—with the assistance of an expert who reverse-engineered Protective's COI rates from Protective's annual statements—that Protective has in fact *increased* COI rates. The FAC expressly references those annual statements (by specific dates), and includes new allegations—*which Protective does not dispute*—that Protective has, in fact, *increased* COI rates each year from 2013 to the present. FAC ¶¶ 8, 36-37. There is nothing improper about such an amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that the trial court erred in not permitting an amendment stating an alternate theory of recovery); *In re Verilink Corp.*, 410 B.R. 697, 702 (N.D. Ala. 2009) ("[I]t is surely not the rule that amendments are illicit if they seek to alter the theory of a case when facts or circumstances warrant.").[8] Protective's examples of purported omissions in the FAC are also incorrect. As a comparison of

[8] Protective misplaces its reliance on two unpublished decisions that denied leave to amend. The first, *Edwards v. Wyeth, Inc.*, 2008 WL 1908907, at *5 (D. Minn. Apr. 25, 2008), is inapplicable because there the proposed amendment was immaterial and the plaintiff "readily acknowledge[d]" that he discovered his symptoms outside the limitations period. *Id.* Here, of course, it is impossible for anyone to discover that 2018 COI rates that are determined in 2018 are not based on Protective's 2018 expectations of mortality experience until, at the very least, 2018. The second case, *Reliford v. City of Tampa Hous. Auth.*, 190 F. App'x 928 (11th Cir. 2006) is similarly inapposite, because there the plaintiff's proposed, second amended complaint "contradict[ed]" a factual assertion plaintiff had "consistently alleged" in her "previous complaints." By contrast, Protective concedes that Plaintiff's amended complaint "should not be construed as a contradiction" of Plaintiff's prior allegations. D.I. 42 at 7.

the two complaints show, the FAC does not "omit" allegations about the 1980 Mortality Table nor improved mortality rates. *See* Ex. A.

Lastly, Protective cites complaints in cases filed by the plaintiff against *other* companies in *other* jurisdictions, but those complaints do not warrant denial of leave to amend under Rule 15. Allegations of COI overcharges will of course turn on the policies' terms and issue dates, what current COI rates are, the insurer's specific conduct, what the insurer has said about rates in the past, and the theory of breach and damages. A survey of other COI cases illustrates this point.[9] Different complaints against different insurers based on different COI provisions do not reflect gamesmanship, and do not somehow warrant denying leave to amend the Complaint at this early stage of the litigation, under Rule 15.

This case, in fact, is even stronger, given a rider that only Protective used, which allowed Protective to charge COI rates based on factors besides mortality expectations but only for the first ten years. FAC ¶ 22 n.22. Plaintiff's rider expired in 2015. Rather than decreasing COI rates as a result of the expiration of the "loading" period, Protective *increased* COI rates by as much as 60%. *Id.* ¶ 37. These allegations are not only the opposite of futile, Protective will not be able to disprove them once the case proceeds to the merits.

[9] *See Vogt v. State Farm Life Ins. Co.*, No. 2:16-cv-04170-NKL, 2018 WL 1747336 (W.D. Mo. Apr. 20, 2018) (denying summary judgment on discovery rule grounds in case involving claim that insurer was improperly deriving profit from COI rates); *Fleisher v. Phoenix Life Ins. Co.*, 18 F. Supp. 3d 456 (S.D.N.Y. 2014) (denying insurer's motion for summary judgment in case alleging that a COI increase was, among other things, discriminatory).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this the 18th day of January, 2019, a true and correct copy of the foregoing Plaintiff's Reply in Support of Motion for Leave to File an Amended Complaint has been filed electronically using the Court's CM/ECF electronic filing system which will send notification of such filing to the following parties:

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