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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE 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,	)	**CIVIL ACTION NO.: 2:18-cv-01290-KOB**
Plaintiff,	)	
v.	)	
PROTECTIVE LIFE INSURANCE COMPANY,	)	
Defendant.	)	

DEFENDANT'S BRIEF IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS

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Defendant Protective Life Insurance Company ("Protective") respectfully submits this brief in support of its Motion for Judgment on the Pleadings directed to the Class Action Complaint (D.E. 1) ("Complaint") filed by Plaintiff Advance Trust & Life Escrow Services LTA, as securities intermediary for Life Partners Position Holder Trust ("Advance Trust" or "Plaintiff").

INTRODUCTION

This purported nationwide class action alleges that certain life insurance charges were excessive. The Plaintiff making those allegations is not a typically situated policyholder. In a typical life insurance situation, an individual purchases a life insurance policy insuring that individual's own life or the life of a loved one, pays the premiums on the policy, and designates an individual beneficiary of the policy; the insurance company pays the policy proceeds to the individual beneficiary upon the death of the insured. This case is quite different.

In this case, the Plaintiff describes itself as "Advance Trust & Life Escrow Services, LTA, as securities intermediary for Life Partners Position Holder Trust."[1] Advance Trust was created out of a bankruptcy proceeding from a life settlement company that purchased life insurance policies from individuals, who originally owned the policies, and then sold interests in those life insurance policies to

[1] Complaint at 1.

investors. The trust here is essentially engaged in the business of wagering on the life expectancy and death of strangers.

Plaintiff alleges that Protective breached four universal life insurance policies ("Universal Life" or "UL"), now owned by Advance Trust, by "wrongly 'basing' its COI rates [Cost of Insurance rates] on factors not permitted by the contract—i.e., factors other than [Protective's] 'expectations as to future mortality experience.'"[2] Plaintiff further alleges, "By using 'expense and lapse' in setting COI rates, Protective Life has breached the terms of the Subject Policies."[3] Thus, it is Protective's setting of the Cost of Insurance rates that is at issue.

As context, the Universal Life policy, which is attached to the Complaint, provides for the determination of a number referred to as the "Policy Value."[4] "The policy value *on the Date of Issue*[5] is the first net premium[6] *less the monthly deduction* for the month following the Date of Issue."[7] "The monthly deduction is the sum of

[2] Complaint ¶ 8.

[3] Complaint ¶ 26.

[4] Complaint (D.E.1-1) ("Exhibit A"), section "Policy Value" at pg. 15 of 38. "Policy Value" is used in ascertaining the "Cash Value" of the Universal Life policy from time to time, which in turn is used to determine whether the insurance coverage provided by the policy will terminate. Complaint, Exhibit A, sections "Policy Value" and "Cash Value" at pg. 15 of 38 and "Grace Period" at pg. 12 of 38.

[5] The "Date of Issue" of that Universal Life policy was "September 15, 1986." Complaint, Exhibit A, at pg. 5 of 38.

[6] "A net premium is a premium payment less the percentage of premium expense charges shown in the Policy Schedule." Complaint, Exhibit A, section "Net Premium" at pg. 15 of 38.

[7] Complaint, Exhibit A, section "Policy Value" at pg. 15 of 38 (emphasis added).

the following four items: (1) The *cost of insurance* and the cost of additional benefits provided by riders for the policy month. …"[8] The "cost of insurance" is determined at the end of each policy month by a mathematical calculation that incorporates "the *cost of insurance rate* as described in the Cost of Insurance Rates section."[9]

By alleging that the Cost of Insurance rates were improper by reflecting "factors other than [Protective's] 'expectations as to future mortality experience,'" including "embedd[ing] a profit margin into COI rates," and "using 'expense and lapse' in setting COI rates,"[10] Plaintiff has alleged that the first monthly deduction, which was applied on the Date of Issue, breached the contract.

Consequently, Plaintiff's claim is that Protective breached the four Universal Life policies beginning as soon as each policy was issued—1986, 1998, 1999, and 2005. Plaintiff's breach of contract claim could have been brought against Protective in 1986 for the policy issued in 1986, in 1998 for the policy issued in 1998, in 1999 for the policy issued in 1999, and in 2005 for the policy issued in 2005. After the Cost of Insurance ("COI") had been deducted on a monthly basis for decades for the four Universal Life policies at issue without any inquiry or

[8] Complaint, Exhibit A, section "Monthly Deduction" at pg. 15 of 38 (emphasis added).

[9] Complaint, Exhibit A, section "Cost of Insurance" at pg. 15 of 38 (emphasis added). The Cost of Insurance Rates section is set forth in the Universal Life policy. Complaint, Exhibit A, section "Cost of Insurance Rates" at pg. 16 of 38.

[10] Complaint ¶¶ 8, 26; *see also* Complaint ¶¶ 37, 38.

complaint from the owners, Plaintiff now files a purported nationwide class action challenging Protective's calculation and monthly deduction of the Cost of Insurance.

Plaintiff's breach of contract claim is barred by Alabama's six-year statute of limitations. Plaintiff's breach of contract claim as to the policies issued in 1986 and 1998 has been extinguished by Alabama's rule of repose. This Court should grant Protective's Motion for Judgment on the Pleadings and dismiss Plaintiff's breach of contract claim based on Alabama's statute of limitations and rule of repose.

ADVANCE TRUST WAS CREATED OUT OF THE BANKRUPTCY OF A LIFE SETTLEMENT COMPANY

Before Advance Trust came to own the four Universal Life policies identified in the Complaint (Complaint ¶ 10) ("Four Policies"), those Four Policies were owned by Life Partners Holdings, Inc. ("LPHI"). LPHI is a Texas financial services company that seeks to profit by arranging sales of life insurance policies to investors that hope to realize a profit when the insured dies. *Life Partners, Inc. v. Arnold*, 464 S.W.3d 660, 663 (Tex. 2015). LPHI bought existing life insurance policies from the individuals who originally owned the policies that insured the lives of the owners or the owners' loved ones. *Id.* "These types of transactions are generally referred to as 'life settlements' when the insured is elderly and 'viatical settlements' when the insured is terminally ill." *Id.*

To fund these purchases and its own business, LPHI sold interests in the life insurance policies' future death benefits to investors. *Id.* Those investors pay

premiums on the life insurance policies, and seek to earn a return by collecting death benefits from the insurer once the insured has died. *See, e.g.*, J. Alan Jensen & Stephan R. Leimberg, *Stranger-Owned Life Insurance: A Point/Counterpoint Discussion*, 33 ACTEC J. 110, 110-11 (2007) (describing investor purchasing in secondary market). Investors who purchase life insurance policies on the secondary market have significantly different motivations from, and behave very differently than, individuals who own policies insuring themselves or their loved ones. *See, e.g.* Franklin L. Best Jr., *Securitization of Life Insurance Policies*, 44 TORT TRIAL & INS. PRAC. L.J. 911, 915 (2009) (describing differing behaviors of investors purchasing policies in secondary market versus ordinary insureds).

In December 2014, the U.S. Securities and Exchange Commission (SEC) obtained nearly $50 million in judgments against LPHI and its senior executives for "serious violations" of the securities laws that "deprived the investing public of the information it needed to make a fully informed decision about whether to invest in Life Partners." *SEC v. Life Partners Holdings, Inc. et al.*, No. 1:12-cv-33-JRN, Final Judgment Order, at 3 (W.D. Tex. Dec. 2, 2014). These judgments forced LPHI into bankruptcy in January 2015. *See In re Life Partners Holdings, Inc., et al.*, Case No. 15-40289-rfn-1 (proceeding in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division).

Pursuant to the bankruptcy reorganization plan, effective December 2016, Life Partners Position Holder Trust ("LPPHT") was created to maintain the life insurance policies on behalf of LPHI's investors, *See* Order Confirming Third Amended Joint Plan of Reorganization, ECF No. 3439, *In Re Life Partners Holdings, Inc., et al*., Case No. 15-40289-rfn-11. LPPHT owns hundreds of life insurance policies issued by dozens of different life insurance carriers. *Id.* at Exhibit A (ECF No. 3439-1). Advance Trust is the alleged "securities intermediary" of LPPHT, (Complaint at ¶ 10) and appears to have been created for the purpose of filing COI-related lawsuits on behalf of LPPHT.

STATEMENT OF FACTS

Pursuant to the Notice, contained in this Court's Initial Order, concerning "instructions regarding the preparation and submission of briefs . . . in support of . . . potentially dispositive motions" (D.E. 17, at 14), Protective provides the following Statement of Facts in separately number paragraphs (D.E. 17, at 16):

1. Advance Trust alleges it is the owner of the following four Protective Universal Life insurance policies, all of which were originally purchased more than six years prior to the filing of the Complaint and, according to Advance Trust, "were all issued on the same standardized policy forms":

- Policy No. B00087535 (Issue Date: 9/15/1986; Initial Face Amount: $100,000) ("1986 Policy");

- Policy No. B00308093 (Issue Date: 5/2/1999; Initial Face Amount: $500,000) ("1999 Policy");
- Policy No. B00394328 (Issue Date: 3/1/2005; Initial Face Amount: $500,000) ("2005 Policy");
- Policy No. B00300844 (Issue Date: 6/2/1998; Initial Face Amount: $1,000,000) ("1998 Policy")

(collectively "Four Policies") (Complaint ¶¶ 10, 15).

2. Advance Trust defines the "Subject Policies" at issue as "UL policies issued by Protective Life "in the 1980s, 1990s, and/or 2000s." (*Id.* ¶ 15).

3. Plaintiff's alleged putative "COI Overcharge Class" is defined as:

> All owners of universal life (including variable universal life) insurance policies issued or administered by Protective Life Insurance Company, or its predecessors in interest, that provide that cost of insurance rates are determined based on expectations as to future mortality experience.

(*Id.* ¶ 27).

4. Universal Life policies are described in the Complaint as life insurance policies that "combine death benefits with a savings or investment component" and are subject to "various charges and credits." (*Id.* ¶ 2). These "discrete charges and credits" allegedly include "the COI charges, other contractually-specified costs and crediting rates." (*Id.).*

5. According to the Complaint, "COI charges" are deducted from policy values on a monthly basis, commencing with the policy's issuance. (*Id.* at ¶ 16, and

Complaint, Exhibit A, sections "Policy Value" and "Monthly Deduction" at pg. 15 of 38 (defining "policy value" and "monthly deduction" and making clear that the monthly deduction, including cost of insurance, starts at the date of issuance of the policy and continues monthly thereafter)).

6. According to the Complaint, because "COI charges" are "intended to compensate the insurer for mortality risk," they are "determined by the insurer based on its expectations of future mortality experience." (Complaint ¶ 3).

7. Plaintiff alleges that Protective is "wrongly 'basing' its COI rates on factors not permitted by the contract—i.e., factors other than 'its expectations as to future mortality experience.'" (*Id.* ¶ 8).

8. Plaintiff alleges that, "Protective Life has also embedded a profit margin into COI rates in violation of the plain language of the policies." (*Id.* ¶ 8).

9. Plaintiff alleges that "Protective Life has violated the terms of the [Four] Policies by failing to base cost of insurance rates on its expectations as to future mortality experience, and instead using cost of insurance charges as a way to bolster its profits . . ." (*Id.* ¶ 9).

10. Plaintiff alleges that, "By using 'expense and lapse' in setting COI rates, Protective Life has breached the terms of the [Four] Policies. . ." (*Id.* ¶ 26).

11. Plaintiff alleges that, "Protective Life has not reduced COI rates . . . since at least 1986," "Protective Life has never adjusted COI rates on the [Four]

Policies," and "Protective Life has never decreased its COI rates for the [Four] Policies." (*Id.* ¶¶ 5, 10, 24).

12. Plaintiff alleges that, "Protective Life breached its contracts with Plaintiff . . . by deducting COI charges calculated from COI rates not based on its expectations as to future mortality experience . . ." (*Id.* ¶ 37).

13. Plaintiff alleges that, "Protective Life's use of factors other than expectations as to future mortality alone also breaches the policy." (*Id.* ¶ 38).

14. Plaintiff does not allege that it was the owner of any of the Four Policies when they were issued.

15. Plaintiff does not allege that it was the beneficiary of any of the Four Policies when they were issued.

16. Plaintiff does not allege that it acquired any rights to the Four Policies beyond the rights of the original owners.

17. Plaintiff alleges that the Four Policies, "were all issued on the same standardized policy forms and insureds are not permitted to negotiate different terms. Exhibit A to this Complaint is a representative policy . . . ." *Id.* ¶ 15.

18. Plaintiff's Universal Life policy, which is attached as Exhibit A to the Complaint, states, "The policy value *on the Date of Issue* is the first net premium *less the monthly deduction* for the month following the Date of Issue." (Complaint, Exhibit A, section "Policy Value" at pg. 15 of 38 (emphasis added)).

19. Plaintiff's Universal Life policy states, "The monthly deduction is the sum of the following four items: (1) The *cost of insurance* and the cost of additional benefits provided by riders for the policy month . . . ." (Complaint, Exhibit A, section "Monthly Deduction" at pg. 15 of 38 (emphasis added)).

20. Plaintiff's Universal Life policy states, "The cost of insurance is determined at the end of each policy month" by a mathematical calculation that incorporates "the *cost of insurance rate* as described in the Cost of Insurance Rates section." (Complaint, Exhibit A, section "Cost of Insurance" at pg. 15 of 38 (emphasis added)).

21. Plaintiff alleges a single cause of action for breach of contract. (Complaint at ¶¶ 35-40).

22. Plaintiff seeks compensatory damages, pre-judgment interest, post-judgment interest, costs, and such other relief that this Court may deem appropriate. (*Id.* at 15 (Prayer for Relief)).

PLAINTIFF'S ALLEGATIONS

While Plaintiff's Complaint presents a wide-ranging "explanation" of COI rates and Protective's alleged actions in connection with Plaintiff's breach of contract claim, Protective's motion for judgment on the pleadings focuses on the following allegations: (1) Protective set COI rates that were allegedly higher than permitted by the Four Policies as a result of considering "factors other than its

'expectations as to future mortality experience'"; (2) Protective "has kept the same rate scale since at least 1986"; (3) Protective has neither decreased nor increased its COI rates; and (4) on a monthly basis, beginning on the Date of Issue of each policy, Protective deducted "COI charges" calculated using its COI rates—which Plaintiff alleges were not based on Protective's expectations as to future mortality experience—beginning in 1986 for the 1986 Policy, 1998 for the 1998 Policy, 1999 for the 1999 Policy, and 2005 for the 2005 Policy.[11] Protective denies all material allegations of wrongdoing in the Complaint, including allegations of its improper setting of COI rates, but for purposes of this motion, the relevant consideration is the passage of time from when the Four Policies, now owned by Advance Trust, were issued—1986 for the 1986 Policy, 1998 for the 1998 Policy, 1999 for the 1999 Policy, and 2005 for the 2005 Policy—to when the Complaint was filed in August, 2018.

[11] Complaint at ¶¶ 2, 5, 8, 9, 10, 14, 15-26, 33, 37, 38 & 40, Exhibit A at pg. 15 of 38.

MOTION FOR JUDGMENT ON THE PLEADINGS STANDARD

Rule 12(c) provides that, "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). This Court has explained that, "[a] Rule 12(c) motion 'is subject to the same standard as a motion to dismiss under Rule 12(b)(6).'" *Miller v. Pfizer Inc.*, No. 4:13-CV-01687-KOB, 2014 WL 2155020, at *1 (N.D. Ala. May 22, 2014) ("*Miller*") (citations omitted) (Bowdre, J.) (granting defendant's motion for judgment on the pleadings); *Bender v. Zezulka*, No. 2:14-CV-1583-KOB, 2015 WL 4506683, at *1 (N.D. Ala. July 23, 2015) ("*Bender*") (Bowdre, J.) (granting defendant's motion for judgment on the pleadings and explaining, "In ruling on a motion for judgment on the pleadings, courts apply the same standards as applied to a Rule 12(b)(6) motion to dismiss. *See Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 n.8 (11th Cir. 2002).").

Plaintiff must plead facts sufficient "to 'state a claim to relief that is plausible on its face'" to survive a motion to dismiss under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("*Iqbal*") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("*Twombly*")); *see also Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288-89 (11th Cir. 2010); *Miller*, 2014 WL 2155020, at *2 ("The Eleventh Circuit has explicitly applied the *Twombly* standard to a Rule 12(c) motion . . . .") (citation omitted). A named plaintiff who fails to state a claim on his or her own

behalf cannot maintain a class action on behalf of others. *See Cramer v. Florida*, 117 F.3d 1258, 1264 (11th Cir. 1997).

Documents central to a plaintiff's claim may be considered when ruling on a motion to dismiss or motion for judgment on the pleadings without converting the motion into a motion for summary judgment. *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("*Day*"); *Miller*, 2014 WL 2155020, at *2. The Eleventh Circuit "has also extended the 'incorporation by reference doctrine' of Rule 12(b)(6) to Rule 12(c)." *Miller*, 2014 WL 2155020, at *2 (citation omitted).

Even before the Supreme Court's *Twombly* and *Iqbal* decisions, the Eleventh Circuit had ruled that a court may grant a Rule 12(b)(6) motion to dismiss when the allegations in a complaint "on their face . . . show that an affirmative defense bars recovery on the claim." *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1022 (11th Cir. 2001) (*en banc*). Post-*Twombly*/*Iqbal*, the Eleventh Circuit has recently explained that, "[a] Rule 12(b)(6) dismissal on statute of limitations grounds is appropriate 'if it is apparent from the face of the complaint that the claim is time-barred.'" *Gonsalvez v. Celebrity Cruises, Inc.*, 750 F.3d 1195, 1197 (11th Cir. 2013) (citation omitted) (affirming dismissal of plaintiffs' claims as time-barred). Following the *Gonsalvez* decision in 2013, federal district courts within the Eleventh Circuit have frequently granted motions to dismiss based on the statute of

limitations[12] and the Eleventh Circuit has routinely affirmed district court orders granting motions to dismiss based on the statute of limitations.[13] Even before the Eleventh Circuit's recent guidance in *Gonsalvez* and its progeny, this Court had granted defendants' motions to dismiss based on the statute of limitations and ruled that, "Rule 12(b)(6) can also provide the appropriate vehicle for evaluating a motion to dismiss based on running of the statute of limitations." *United States v. Stricker*, No. CV 09-BE-2423-E, 2010 WL 6599489, at *3 (N.D. Ala. Sept. 30, 2010) (citations omitted) (Bowdre, J.), *aff'd*, 524 F. App'x 500 (11th Cir. 2013). That same standard applies to motions for judgment on the pleadings. *See Miller*, *supra*; *Bender*, *supra*.

[12] *See, e.g.*, *Wyatt v. Georgia-Pacific LLC*, No. CV 17-0285-WS-MU, 2018 WL 1308954 (S.D. Ala. March 13, 2018); *Wiggins v. FDIC*, No. 2:12-cv-02705-SGC, 2016 WL 8260898 (N.D. Ala. Dec. 20, 2016); *Wilson v. Standard Ins. Co.*, No. 4:11-CV-02703-MHH, 2014 WL 358722 (N.D. Ala. Jan. 31, 2014); *Olagues v. Frost*, No. 17-23381-CIV-WILLIAMS, 2018 WL 4378442 (S.D. Fla. Sept. 12, 2018); *Babadjide v. Betts*, No. 6:17-cv-658-Orl-28TBS, 2018 WL 679460 (M.D. Fla. Feb. 1, 2018); *A.L. v. Shorstein*, No. 3:15-cv-1181-J-32PDB, 2017 WL 526618 (M.D. Fla. Feb. 9, 2017); *Foudy v. City of Port St. Lucie*, No. 2:14-CV-14318-ROSENBERG/LYNCH, 2015 WL 5245223 (S.D. Fla. Sept. 9, 2015); *Foudy v. Indian River County Sheriff's Office*, No. 2:14-CV-14316-ROSENBERG/LYNCH, 2015 WL 5245225 (S.D. Fla. Sept. 9, 2015); *Alibris v. ADT LLC*, No. 9:14-CV-81616-ROSENBERG/BRANNON, 2015 WL 5084231 (S.D. Fla. Aug. 28, 2015); *Beach Comm. Bank v. CBG Real Estate LLC*, No. 3:15-cv-00216-MCR-CJK, 2015 WL 11109503 (N.D. Fla. July 17, 2015); *Palaxar Group, LLC v. Williams*, No. 6:14-cv-758-Orl-28GJK, 2014 WL 5059286 (M.D. Fla. 2014); *Valencia v. Universal Studios LLC*, No. 1:14-CV-00528-RWS, 2014 WL 7240526 (N.D. Ga. Dec. 18, 2014).

[13] *See Cannon v. Secretary, U.S. Dept. of Agriculture*, 649 F. App'x 892, 893, 894, 896 (11th Cir. 2016); *Barcelona v. Fogelgren*, 664 F. App'x 884, 885-86 (11th Cir. 2016); *Gomez v. California*, 702 F. App'x 872, 873-74 (11th Cir. 2017); *Jacobs v. Estefan*, 705 F. App'x 829, 830-31 (11th Cir. 2017).

ARGUMENT

I. Plaintiff's breach of contract claim is barred by Alabama's Statute of Limitations.

In this civil action alleging diversity jurisdiction, this Court applies the Alabama statute of limitations to Plaintiff's breach of contract claim[14] even if the substantive law of other states could potentially apply to Plaintiff's underlying breach of contract claim as to each of the Four Policies.[15] The Alabama statute of

[14] *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99, 110-11 (1945); *Reisman v. General Motors Corp.*, 845 F.2d 289, 291 (11th Cir. 1988) ("[F]ederal courts in diversity cases must apply the law of the forum state, including its statute of limitations.") (citations omitted); *Dade County v. Rohr Indus., Inc.*, 826 F.2d 983, 987 (11th Cir. 1987) ("To determine the applicable statute of limitations for a diversity case in federal court, we must look to state law."); *accord Goodbody & Co., Inc. v. McDowell*, 530 F.2d 1149, 1151 (5th Cir. 1976).

[15] *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) ("This Court has long and repeatedly held that the Constitution does not bar application of the forum State's statute of limitations to claims that in their substance are and must be governed by the law of a different State.") (citations omitted); *id.* at 735 ("For 150 years, this Court has consistently held that a forum State may apply its own statute of limitations period to out-of-state claims even though it is longer or shorter than the limitations period that would be applied by the State out of which the claim arose.") (citations omitted) (Brennan, J., concurring); *Precision Gear Co. v. Continental Motors, Inc.*, 135 So. 3d 953, 956-61 (Ala. 2013) (applying Alabama's statute of limitations to claim governed by Oklahoma substantive law and explaining that "*lex fori*—the law of the forum—governs procedural matters.") (citation omitted); *Etheredge v. Genie Indus., Inc.*, 632 So. 2d 1324, 1326-27 (Ala. 1994) (applying Alabama's statute of limitations to claim governed by North Carolina substantive law and explaining, "By legal tradition, most statutes of limitation are deemed procedural rather than substantive. . . . The forum applies its own procedural rules.") (citation and internal quotations omitted); *Nichols v. HealthSouth Corp.*, ___ So. 3d ___, 2018 WL 1443919, at *4 n.4 (Ala. March 23, 2018) (applying Alabama's statute of limitations and Delaware substantive law and explaining, "[*L*]*ex fori*—the law of the forum—governs procedural matters. . . . This Court has also held that, in most instances, statutes of limitations are procedural matters.") (citation and internal quotations omitted); *see also Acme Roofing & Sheet Metal Co. v. Air Team USA, Inc.*, No. CV-12-BE-1056-E, 2014 WL 1278078, at *9 (N.D. Ala. Mar. 27, 2014) (Bowdre, J.); *Thomas v. FMC Corp.*, 610 F. Supp. 912, 914-16 (M.D. Ala. 1985). Advance Trust fails to allege: (1) the states in which the Four Policies were issued; (2) the state of citizenship of the original owner of each Policy when each Policy was issued; (3) the state of citizenship of the insured when each

limitations for a breach of contract claim is six years.[16] That six-year statute of limitations period begins to run when the contract is breached, regardless of whether the plaintiff has suffered an actual injury at the time of the breach.

The Alabama Supreme Court has repeatedly ruled that, "[A] suit on a breach-of-contract claim . . . may be commenced as soon as the defendant breaches the contract, regardless of whether the plaintiff has suffered an actual injury." *American General Life & Accident Insurance Company v. Underwood*, 886 So. 2d 807, 813 n.1 (Ala. 2004); *Stephens v. Creel*, 429 So. 2d 278, 280 (Ala. 1983); *Mississippi Valley Title Ins. Co. v. Hooper*, 707 So. 2d 209, 213 (Ala. 1997) ("In a breach of contract action . . . the limitations period runs from the time the contract is broken, although substantial damage or loss from the breach is not sustained until afterward. . . . Even if the plaintiff is ignorant of the injury at the time . . ., the limitations period begins to run.") (citations omitted); *AC, Inc. v. Baker*, 622 So. 2d 331, 335 (Ala. 1993) ("*Baker*") ("The statute of limitations on a contract action runs from the time a breach occurs rather than from the time actual damage is sustained."); *Seybold v. Magnolia Land Co.*, 376 So. 2d 1083, 1085 (Ala. 1979) ("The statute of limitations begins to run . . . when the contract is breached."); *Wheeler v. George*, 39 So. 3d

Policy was issued; and (4) the states of citizenship of the successive owners of each Policy since each Policy was issued.

[16] Ala. Code (1975), § 6-2-34(9).

1061, 1084 (Ala. 2009) ("It is well settled that a cause of action for breach of contract accrues when the contract is breached."). This Court recently explained that, "Alabama law provides that the limitations period for breach of contract claims is six years, and the limitations period commences when the contract is breached." *Alabama Teachers Credit Union v. Design Build Concepts, Inc.*, No. 4-16-cv-2027-KOB, 2018 WL 3819841, at *9 (N.D. Ala. Aug. 10, 2018) (Bowdre, J.) (granting defendant's motion for summary judgment as to plaintiff's breach of contract claim based on statute of limitations).[17]

The Alabama Supreme Court "has never applied a 'continuing contract' doctrine" for determining when a breach of contract action accrues for statute of limitations purposes. *Baker*, 622 So. 2d at 334-35 (affirming trial court's grant of defendants' motion for summary judgment as to plaintiffs' breach of contract claim based on the statute of limitations); *see also Catrett v. Baldwin County Electric Membership Corporation*, 996 So. 2d 196, 202 (Ala. 2008) (Plaintiff "invites this Court to adopt a 'continuing-contract' doctrine for determining when a breach of

[17] *See generally Ishler v. Commissioner of Internal Revenue*, 442 F. Supp. 2d 1189, 1217 (N.D. Ala. 2006) (breach of contract claim "accrues on the date the contract is breached, not the date on which the plaintiff sustains actual damage as a result of the breach."); *Foster v. State Auto Prop. & Cas. Co.*, No. 2:09-cv-0620-SLB, 2010 WL 11561710, at *2 (N.D. Ala. May 14, 2010) ("That no damage had yet occurred upon the breach is likewise immaterial because, '[t]he claim accrues on the date the contract is breached, not the date on which the plaintiff sustains actual damage as a result of the breach.'") (citation omitted); *Weisberg v. Guardian Life Ins. Group of America*, No. 2:16-cv-00568-AKK, 2017 WL 5140547, at *4 n.9 (N.D. Ala. Oct. 24, 2017) ("*Weisberg*") ("Under Alabama law '[i]t is well settled that a cause of action for breach of contract accrues when the contract is breached.' *Wheeler v. George*, 39 So. 3d 1061, 1084 (Ala. 2009).")

contract occurs, tolling the statute of limitations 'until the last time [defendant] breach[ed] the contractual relationship' . . . . We therefore decline to adopt and apply the continuing-contract doctrine in this case.").[18]

Plaintiff's breach of contract claim against Protective in this case is barred by the statute of limitations based on that case authority. As previously discussed, Plaintiff's claim is that Protective breached the 1986 Policy in 1986, breached the 1998 Policy in 1998, breached the 1999 Policy in 1999, and breached the 2005 Policy in 2005—all more than six years before Plaintiff filed the Complaint.[19] As a result, Plaintiff's breach of contract claim against Protective as to each of the Four Policies is barred by the statute of limitations.

II. Plaintiff's breach of contract claim as to the 1986 Policy and 1998 Policy has been extinguished by Alabama's rule of repose.

In a pair of decisions, the Alabama Supreme Court held that the rule of repose extinguished a plaintiff's common law claims against a life insurer relating to insurance charges imposed on life insurance policies issued more than twenty years before the lawsuit was filed.

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[18] *See also Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Progressive Direct Ins. Co.*, No. 6:14-cv-0038-SLB, 2015 WL 5719178, at *8 (N.D. Ala. Sept. 30, 2015) ("Alabama 'has never applied a "continuing contract" doctrine.'") (quoting *Baker*, 622 So. 2d at 335); *Weisberg*, 2017 WL 5140547, at *4 n.9 (Plaintiff "does not argue that [the insurance company's] failure to pay disability benefits is a continuing breach, and the court has not located any Alabama case law addressing the question.").

[19] Complaint, D.E. 1 at ¶¶ 10, 15-26, 37, 38, 40, Exhibit A at pg. 15 of 38. Plaintiff also alleges that it suffered damages as a result of Protective's alleged breaches. Complaint, D.E. 1 at ¶¶ 16-19, 22-26, 37, 38, 40.

In *American General Life and Accident Insurance Company v. Underwood*, 886 So. 2d 807 (Ala. 2004) ("*Underwood*"), plaintiff alleged that the life insurance company had imposed insurance premium charges that were too high beginning when the life insurance policy was issued, more than twenty years before the lawsuit was filed.[20] Plaintiff asserted a wide range of common law claims, including money had and received and unjust enrichment. The Alabama Supreme Court held that the rule of repose extinguished all of plaintiff's claims:

> In the present case, the rule of repose began running on each claim arising from the purchase of a particular policy as soon as the plaintiff paid the first premium for the policy because that payment supplied the last essential element necessary for all essential elements of the particular claim to coexist so that the plaintiff could file suit. . . . Because the plaintiff paid the first premium for each policy more than 20 years before he commenced this lawsuit against [the life insurance company], the rule of repose barred his claims before he commenced this lawsuit.

Id. at 813 (citations omitted). The Alabama Supreme Court also explained that, "[a] suit on a breach-of-contract claim . . . may be commenced as soon as the defendant breaches the contract, regardless of whether the plaintiff has suffered an actual

[20] *Underwood*, 886 So. 2d at 809-10 ("Between 1947 and 1978, the plaintiff . . . purchased industrial life insurance policies . . . . The premium rate for each policy was set when the policy was issued. The plaintiff began paying the premiums for each policy contemporaneously with its issuance. . . . [T]he plaintiff paid higher premiums for the policies than he would have paid had he and his family been white.").

injury. *Stephens v. Creel*, 429 So. 2d 278 (Ala. 1983)." *Underwood*, 886 So. 2d at 813 n.1.[21]

Similarly, in *Ex parte Liberty National Life Insurance Company*, 825 So. 2d 758, 761 (Ala. 2002) ("*Liberty National*"), plaintiffs alleged that the life insurance company had charged them higher insurance rates than the rates it charged white policyholders for the same life insurance policies. Plaintiffs alleged various common law claims, including breach of contract, relating to the life insurance policies that had been issued more than twenty years before the lawsuit was filed. *Id.* The Alabama Supreme Court explained that the plaintiffs' causes of action were extinguished by the rule of repose:

> Since 1858, causes of action asserted in Alabama courts more than 20 years after they could have been asserted have been considered to have been extinguished by the rule of repose.
> . . .
>
> [T]he 20-year period begins to run against claims the first time those claims *could* have been asserted, regardless of the claimant's notice of a claim. *See Moore* [*v. Liberty Nat'l Ins. Co.*], 108 F. Supp. 2d [1266] at 1275 [(N.D. Ala. 2000)] ("Application of the rule of repose has only one element—the passage of twenty years time from the moment that

[21] The Northern District of Alabama recently relied on the Alabama Supreme Court's holding in the *Underwood* case to grant the insurance company's motion to dismiss based on the rule of repose as to an insurance policy that had been issued more than twenty years before Plaintiffs filed their lawsuit. *Woods v. Liberty Nat'l Life Ins. Co.*, No. 1:17-cv-1586-VEH, 2018 WL 287762 (N.D. Ala. Jan. 4, 2018). In dismissing Plaintiffs' various tort claims, the Northern District of Alabama emphasized that, "If a plaintiff's actual injury resulting from a tort is the payment of premiums for an insurance policy, the payment of the first premium for the policy establishes the element of damage essential to a claim for the tort." *Id.* at *2 (quoting *Underwood*, 886 So. 2d at 813) (emphasis added [by *Woods* court]).

> the actions giving rise to the claim occurred—and, if that time has elapsed, no claim can be pursued.").

Id. at 763, 764-65.[22] The Alabama Supreme Court emphasized that the well-established rule of repose "is based *solely* upon the passage of time . . . and is not based upon concepts of accrual . . . ." *Id.* at 764 (citation omitted).[23]

The Alabama Supreme Court has frequently explained the policy reasons for the rule of repose absolute bar to actions that are not filed within twenty years:

> As a matter of public policy, and for the repose of society, it has long been the settled policy of this state, as of others, that antiquated demands will not be considered by the courts, and that, without regard to any statute of limitations, there must be a time beyond which human transactions will not be inquired into. . . It is necessary for the peace and security of society that there should be an end of litigation, and it is inequitable to allow those who have slept upon their rights for a period of 20 years, after they might have [brought an action] and after, as is generally the case, the memory of transactions has faded and

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[22] *See generally Brawley v. Nw. Mut. Life Ins. Co.*, 288 F. Supp. 3d 1277, 1287-88 (N.D. Ala. 2017) (Plaintiff "paid monthly premiums on his 1987 and 1990 Policies and did not initiate his lawsuit until August 1, 2017. Because well over 20 years elapsed between the payment of his first monthly premium for each policy and the filing date of his state court complaint, 'the rule of repose barred his claims before he commenced this lawsuit.' *Underwood*, 886 [So. 2d] at 813.").

[23] *See also Morgan v. Exxon Corp.*, 869 So. 2d 446, 448-49, 452 (Ala. 2003) (ruling that plaintiffs' common law claims, including breach of contract claim, were barred by the rule of repose and explaining that, "Application of [Alabama's] rule of repose has only one element—the passage of *twenty years* time from the moment that the *actions* giving rise to the claim *occurred*—and, if that time has elapsed, no claim can be pursued. . . . [R]epose does not depend on 'accrual,' because the concept of accrual sometimes incorporates other factors, such as notice, knowledge, or discovery") (internal citations and internal quotations omitted); *Thomas Jefferson Found., Inc. v. Jordan*, 200 So. 3d 645, 652-53 (Ala. 2017); *Pinigis v. Regions Bank*, 977 So. 2d 446, 449-50 (Ala. 2007); *see generally Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1218 (11th Cir. 2001) ("A defining characteristic of the rule of repose is that its time period does not begin to run when the action accrues, but rather when the relevant action occurs."); *Evans v. Walter Indus., Inc.*, 579 F. Supp. 2d 1349, 1360-61 (N.D. Ala. 2008) ("[T]he time period for the rule of repose does not begin to run when the action 'accrues' according to the relevant statute of limitations, but rather when the relevant act itself occurs.").

> parties and witnesses passed away. . . . [The 20 year rule of repose rests] on the higher ground that it is necessary to suppress frauds, to avoid long dormant claims, which, it has been said, have often more of cruelty than of justice in them, that it conduces to peace of society . . . and relieves courts from the necessity of adjudicating rights so obscured by the lapse of time and the accidents of life that the attainment of truth and justice is next to impossible.

Snodgrass v. Snodgrass, 58 So. 201, 201-202 (Ala. 1912) (internal citations and quotation marks omitted); *Liberty National*, 825 So. 2d at 763; *Boshell v. Keith*, 418 So. 2d 89, 91 (Ala. 1982); *Barrett v. Wedgeworth*, 518 So. 2d 1256, 1257 (Ala. 1987); *Tierce v. Ellis*, 624 So. 2d 553, 554-55 (Ala. 1993).[24]

The Alabama Supreme Court's decisions in *Underwood* and *Liberty National* establish that Plaintiff's breach of contract claim as to the 1986 Policy and 1998 Policy has been extinguished by the rule of repose because Plaintiff's allegations relate to Protective's actions as soon as each policy was issued – more than 20 years before this lawsuit was filed.

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[24] The Alabama Supreme Court's position of barring stale claims is entirely consistent with United States Supreme Court precedent. The United States Supreme Court has explained:

> [I]n the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Bd. of Regents v. Tomanio, 446 U.S. 478, 487 (1980); *see also Wilson v. Garcia*, 471 U.S. 261, 271 (1985) (cause of action "'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost.") (citation omitted); *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944) ("The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.").

CONCLUSION

This Court should grant Protective's Motion for Judgment on the Pleadings and dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this the 30th day of October, 2018, a true and correct copy of the foregoing **DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** has been filed electronically using the Court's CM/ECF electronic filing system to the following parties:

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