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 BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Protective's motion advances an argument – that actions challenging new, monthly breaches of an in-force life insurance policy are time barred if similar breaches also occurred more than six years ago – that is contrary to Alabama law and has been consistently rejected by state and federal courts around the country, including a case involving Protective itself. *See In Honea v. Raymond James Fin. Services,* Inc., 240 So. 3d 550, 593 (Ala. 2017) (per curiam) (under Alabama law, there is no bar to "recovery for breaches that occur less than six years before the action was filed" just because "similar breaches occurred more than six years before the action was filed") (emphasis in original); *Fradianni v. Protective Life Ins. Co.*, 145 Conn. App. 90, 103 (2013) ("The plaintiff alleges that each year the defendant charged him for a cost of insurance that was in excess of the maximum amount allowed under the terms of the contract . . . These actions, if found to be true, would constitute separate breaches by the defendant, several of which occurred within the statute of limitations period.") (applying Connecticut law and reversing summary judgment).

The motion also wrongly disputes, mischaracterizes, and ignores Plaintiff's allegations, the plain language of the policies, Protective's regulatory filings, and even the fundamental actuarial principles underlying why flexible-premium life insurance policies exist and how they operate. Although Protective spins it

differently, this case is not about any breaches that might have occurred in 1986, 1998, 1999, or 2005. The policies at issue are all "*Flexible* Premium *Adjustable*"[1] and this case is about Protective's determining, calculating, and deducting from Plaintiff's account value, each month during for the past six years, monthly cost of insurance ("COI") charges that were not "based on [Protective's] expectations of future mortality experience," as the policies require. The "flexible" and "adjustable" mortality charges are designed to fluctuate to account for the expected probability that the insured will die "in a particular policy year."[2] The policies state that rates "*will be* determined" based on those expectations and that COI is determined "at the end of each policy month." Protective's regulatory filings confirm that its "mortality charges are initially set and *periodically redetermined* using *currently* experienced intercompany and company mortality." Every month that Protective charges a policy owner a COI that was in excess of the amount allowed under these terms of the contract, that is a *separate* breach which occurred within the statute of limitations period.

When a policy states that COI rates will be based on expectations as to future mortality experience, then COI rates must be "adjusted based on future

[1] All emphases in quotations of documents are added unless otherwise indicated.
[2] Dkt. 1 at ¶ 3; Salinas Decl., Ex. 6 (Protective's 2016 Non-Guaranteed Opinion, which is incorporated by reference at Dkt. 1 at ¶ 3); *id.*, Ex. 7 (Protective's 2017 Non-Guaranteed Opinion, which is quoted at Dkt. 1 at ¶ 8 states that rates are "initial set *and subject to review* using *currently experienced* intercompany and company mortality").

mortality expectations, whether those mortality experiences are improving or declining." *Lincoln Nat. Life Ins. Co. v. Bezich*, 33 N.E. 3d 1160, 1168 (Ind. Ct. App. 2005); *see also* Dkt. 1 at ¶ 5 ("insurer will dutifully decrease COI rates to reflect improved projected mortality experience").[3] Protective, however, breached that obligation. For example, its mortality expectations improved in 2013, but Protective's monthly COI charges in 2013 were not adjusted downward based on those new expectations, and so Protective unlawfully deducted too much money from Plaintiff's account value every month in 2013. Mortality expectations likewise improved in 2014, but Protective's monthly deductions that year also were not made in accordance with the contract. And so on, through the present day.

Protective asks this Court to excuse each of those new breaches because Protective also may have committed *additional* breaches outside of the statute of limitations. Section 6-5-280 of the Alabama Civil Code, the Alabama Supreme Court, and the Eleventh Circuit each recognize that the mere fact that a defendant

[3] Under Indiana Rule of Civil Procedure 58(A), the decision in *Lincoln* was automatically vacated when the Indiana Supreme Court granted Lincoln's petition to hear the case. The parties subsequently settled, and the parties jointly sought dismissal of the Supreme Court appeal. *See also Vogt v. State Farm Life Ins. Co.*, No. 2:16-CV-04170-NKL, 2018 WL 4937330, at *1, 4 (W.D. Mo. Oct. 11, 2018) (denying post-trial motion for judgment as a matter of law after jury awarded $34+ million to the class because the "flexible premium adjustable" policy "required State Farm . . . to refrain from levying charges for non-mortality factors"); *Dean v. United Omaha Life Ins. Co.*, No. 05–6067, 2007 WL 7079558, at *4 (C.D. Cal. Aug. 27, 2007) (concluding that "'based on' is best understood here as simply indicating that a calculation will be performed using the listed factors—not that the COI charge will be determined using additional, unmentioned factors").

breached the contract earlier does not excuse its subsequent breaches, each of which gives rise to a distinct cause of action with a new statute of limitations period. This principle has been applied specifically to the COI context (outside of Alabama) and across a wider variety contexts (in Alabama): recurring COI charges that violate a life insurance contract, recurring failures to apply disability waivers in breach of an insurance contract, recurring installment payments pursuant to a single contract, recurring failures to share distributions in accordance with a contract, and recurring unlawful tax deductions.[4]

The breaches at issue in this case are not even the same as those that Protective believes may have occurred in earlier years. The policies state that future COI rates "*will be* determined" based on the insurer's expectations of future mortality experience. Neither the adjustable monthly COI rates that Protective would ultimately charge from August 13, 2012 to the present, nor the mortality expectations that Protective would have developed and adopted during this period, were fixed or knowable by either party at issuance. And no breach occurred until the monthly COI charge was deducted from Plaintiff's account value each month.

[4] *Fradianni*, 145 Conn. App. at 103 (COI rates); *Klein v. John Hancock Mut. Life Ins. Co.*, 683 F.2d 358 (11th Cir. 1982) (monthly duty to waive insurance premium payments); *Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc.*, 873 So. 2d 1091, 1104 (Ala. 2003) (monthly installment payment); *Ripps v. Powers*, 356 Fed. Appx. 352, 354 (11th Cir. 2009) (unpublished) (ongoing earnings sharing commitment); *AC, Inc. v. Baker*, 622 So.2d 331 (Ala. 1993) (annual tax preparation).

Protective's motion ultimately rests on the illogical and unsupported premise that a policyholder must sue within six years of policy issuance in order to challenge the COI rates and charges that a universal life insurer might apply decades later in 2018 (which had not yet been determined or charged) for not being properly based on the insurer's 2018 mortality expectations (which did not yet exist). Just to state this nonsensical argument is to defeat it.

Protective's motion for judgment on the pleadings should be denied.

STATEMENT OF FACTS

I. Response to Movant's Statement of Facts

A. Protective's "Facts" and Arguments Concerning Plaintiff are Irrelevant and Should be Disregarded

Protective's motion first starts with a section entitled "Advance Trust was created out of the bankruptcy of a life settlement company," but that section contains numerous arguments that depend upon facts from a tort journal and a publication by an organization of trust and estate lawyers that appear nowhere in the Complaint. They are also irrelevant and misleading. Life insurance policies are freely assignable assets and the policies themselves, under the "Rights of Owner" section, state that "these rights include assigning the policy." The purpose of this section of Protective's motion is clear: to try to throw irrelevant mud at the Plaintiff. These "facts" and arguments should be disregarded. *See Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1340 (11th Cir. 2014) (recognizing that "documents

that are not a part of the pleadings" may only be considered on a motion for judgment on the pleadings if "they are central to the claim at issue and their authenticity is undisputed").

In any event, Protective's attempt to smear Advance Trust is baseless. It is true that the creditors and investors in pre-bankruptcy Life Partners Holdings, Inc. were victimized by misconduct of some of its officers and directors. But Life Partners Position Holder Trust, the current beneficial owner of the Subject Policies, is a bankruptcy-created vehicle to ensure maximum recovery for those creditors and investors. Misconduct by certain officers and directors in pre-bankruptcy Life Partners Holdings, Inc. does not tarnish Advance Trust or Life Partners Position Holder Trust in any way whatsoever, and it certainly does not give Protective free reign to disregard its contractual obligations and victimize policyholders forever, as its statute of limitations defense on the pleadings requests.

B. Plaintiff's Response to Plaintiff's Separately-Numbered Statement of Facts

Pursuant to Section D(2) of this Court's initial order (Dkt. 17 at 17), below are Plaintiff's responses to Movant's Statement of Facts. The numbers below correspond to the numbering set forth in Protective's Statement of Facts.

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed, with the qualification that the COI charges that commenced upon the policies' issuance are not the same COI charges that were deducted on a monthly basis from August 13, 2012 to the present, nor were the initial COI charges calculated using the same monthly COI rates that were applied from August 13, 2012 to the present. *See* Salinas Decl., at Exs. 1-5 (annual reports for Policy # B00087535, which are incorporated by reference at Dkt. 1 at ¶ 19, showing monthly mortality charges increasing from $29.52 on 9/15/12 to $46.21 on 9/15/17 as a result of the application of new, increasing monthly COI rates).

6. Undisputed, with the qualification that the duty to determine COI charges using expectations of future mortality experience is prospective. *See* Dkt. 1 at ¶ 19 (quoting policy language that monthly COI rates, which are used to calculate COI charges, "***will*** be determined by us, based on our expectations as to future mortality experience"); *see also* Dkt. 1-1 at 11.

7. Undisputed with respect to COI rates charged from August 13, 2012 to the present. Plaintiff does not make any allegations regarding how the original COI rates, which are no longer being charged, were determined.

8. Undisputed with respect to COI rates charged from August 13, 2012 to the present. Plaintiff does not make any allegations regarding how the original COI rates, which are no longer being charged, were determined.

9. Undisputed with respect to COI rates charged from August 13, 2012 to the present. Plaintiff does not make any allegations regarding how the original COI rates, which are no longer being charged to Plaintiff, were determined.

10. Undisputed with respect to COI rates charged from August 13, 2012 to the present. Plaintiff does not make any allegations regarding how the original COI rates, which are no longer being charged to Plaintiff, were determined, and this allegation refers to statements made by Protective in its 2017 Annual Report regarding how it initially sets charges for new policies and reviews mortality charges on existing universal life policies. *See* Dkt. 1 at ¶ 25.

11. Undisputed with the clarification that the reference to "never adjusted COI rates" refers to downward adjustments; Protective has repeatedly imposed new, increased COI rates on Plaintiff's policies over the course of the past six years. *See*, *e.g.*, Salinas Decl., Exs. 1-5 (annual reports showing increases in mortality charges and COI rates from August 13, 2012 to the present as a result of the application of new, increasing monthly COI rates).

12. Undisputed.

13. Undisputed.

14. Undisputed.

15. Undisputed.

16. Undisputed.

17. Undisputed.

18. Undisputed.

19. Undisputed.

20. Undisputed.

21. Undisputed, with the qualification that this single cause of action is for multiple, successive breaches of the contract.[5]

22. Undisputed.

II. Plaintiff's Statement of Undisputed Facts

Below is Plaintiff's separately numbered Statement of Undisputed Facts:

1. The Subject Policies provide that the cost of insurance charge ("COI charge" or "mortality charge") is calculated as follows:

> **Cost of Insurance**. The cost of insurance is determined at the end of each policy month as follows:
>
> (1) divide the death benefit at the beginning of the policy month by the sum of 1 plus the guaranteed interest rate;
> (2) reduce the result by the amount of policy value {prior to deducting the cost of insurance) at the beginning of the policy month;
> (3) multiply the difference by the cost of insurance rate as described in the Cost of Insurance Rates section.

Dkt. 1-1 at 10.

[5] *See generally* 18 Charles Wright, Arthur Miller & Edward Cooper, Federal Practice and Procedure, § 4408, at 65, § 4409, at 75 (2d ed., West 1990) ("All breaches occurring prior to commencement of the first action constitute part of a single claim or cause of action[.]").

2. The "Cost of Insurance Rates section" of the Subject Policies provides that "[m]onthly cost of insurance rates will be determined by us based on our expectations as to future mortality experience." Dkt. 1 at ¶18; Dkt. 1-1 at 10.

3. Mortality charges are deducted from Plaintiff's policy accounts on a monthly basis. Dkt. 1 at ¶16; Dkt. 1-1 at 10.

4. Neither the current monthly COI rates being applied to Plaintiff's policies, nor the current monthly COI charges that are being deducted from Plaintiff's policy accounts, are the same as they were at policy issuance. *See* Salinas Decl., at Exs. 1-5 (annual reports for Policy # B00087535, which are incorporated by reference at Dkt. 1 at ¶ 19, showing monthly mortality charges increasing from increasing from $29.52 on 9/15/12 to $46.21 on 9/15/17 as a result of the application of new, increasing monthly COI rates).

5. Monthly cost of insurance charges are not fixed at issuance, Dkt. 1-1 at 10, and, "[a]fter issuance, an insurer is required to periodically review the COI rates to confirm that they correctly capture the insurer's projected mortality costs." Dkt. 1 at ¶ 3.

6. Protective has certified to regulators and the National Association of Insurance Commissioners that "mortality charges [for universal life policies] are initially set and periodically redetermined using currently experienced intercompany and company mortality[.]" Salinas Decl., Exs. 6-7 (Protective's

2016 and 2017 Non-Guaranteed Opinion for Exhibit 5, which is incorporated by reference in the Complaint at Paragraph 8).

7. Protective's current mortality expectations are materially more favorable than the mortality expectations that were in place when the Subject Policies were issued. Dkt. 1 at ¶ 22-23.

8. Protective has not properly redetermined monthly COI rates using its then-current mortality expectations. *Id.* at ¶ 25**.**

9. The monthly COI rates now being imposed on Plaintiff's policies, and the monthly deductions from Plaintiff's policy accounts, do not reflect any of the improvement in mortality experience and mortality expectations that occurred when those charges were imposed. *Id.* at ¶ 24.

10. Policy No. B00308093 (093 Policy) was issued North Carolina. Salinas Decl., Ex. 8 at 10. Policy No. B00394328 (328 Policy) was issued in Wisconsin. Salinas Decl., Ex. 9 at 13. Policy No. B00087535 (535 Policy) was issued in Georgia. Salinas Decl., Ex. 10 at 15. Policy No. B00300844 (844 Policy) was issued in, Florida. Salinas Decl., Ex. 11 at 39.

STANDARD OF REVIEW

A "complaint may not be dismissed" on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d

1367, 1370 (11th Cir. 1998). In reviewing a motion for judgment on the pleadings, a court may "must accept all facts in the complaint as true and view them in the light most favorable to the plaintiffs." *Moore v. Liberty Nat. Life Ins. Co.*, 267 F.3d 1209, 1213 (11th Cir. 2001) (internal quotations omitted). Moreover, courts can consider documents attached or referenced to a complaint. *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1215–16 (11th Cir. 2012); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir.2005).

ARGUMENT

I. Plaintiff's Breach of Contract Claim Against Protective for its Unlawful Monthly Deductions Since August 2012 is Timely

After misstating and misconstruing the allegations in the Complaint and ignoring the plain language of the policies, Protective contends that Plaintiff's claim is barred by the statute of limitations because the statute of limitations began to accrue decades ago on the policy's issue date. This argument is meritless. Protective's monthly COI deductions from Plaintiff's account value from August 13, 2012 through the present are unlawful. That's because, under Alabama law, and the law virtually everywhere else, each deduction of COI charges from Plaintiff's policy accounts in a manner inconsistent with the policy terms constitutes a separate breach of contract with its own statute of limitations.

A. Protective Breached the Policies' "Cost of Insurance" Provision Each Month Since August 2012 When it Deducted From Plaintiff's Account Value an Unlawful COI Charge

Protective contends that "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." Dkt. 26 at 33. But the Complaint does not allege that any breaches occurred in 1986, 1998, 1999, or 2005. Nowhere does the Complaint say—as Protective also falsely contends—that the breach occurred "on the policy date" or "as soon as the policy issue date." Dkt. 17 at 3. Those words appear nowhere in the Complaint. Rather, Plaintiff contends that Protective breaches the policy *now*, and each *month* within the statute of limitations, because Protective deducted from Plaintiff's account value a COI charge "calculated from COI rates not based on its expectations as to future mortality experience." ¶ 37; *id.* ¶¶ 3 (COI charges permitted only for mortality risk "in a particular policy year"); 8 ("Each year" Protective makes NAIC filings that state mortality charges are "subject to review using currently experience[d] . . . mortality").

The policies state that COI rates can "change," which is a fundamental feature of "flexible premium *adjustable*" universal life policies. The policies further provide that these rates "***will be*** determined" based on Protective's "expectations of future mortality experience" and that cost of insurance is determined "at the end of each policy month." Because of these ongoing and forward-looking promises, the Complaint pleads that "*[a]fter issuance*, an insurer

is required to periodically review the COI rates to confirm that they correctly capture the insurer's projected mortality costs." ¶ 3. Consistent with this allegation, Protective's 2016 annual actuarial opinion filed with its regulators certifies that its "mortality charges are initially set and *periodically redetermined* using *currently* experienced intercompany and company mortality."[6] And yet, following these new redeterminations and review, Protective has deducted, on a monthly basis for the past six years, mortality charges that are *not* based on Protective's improving expectations as to future mortality experience.

When a policy states that COI rates will be based on expectations as to future mortality experience, then COI rates must adjust rates to reflect mortality improvement. *See* Dkt. 1-1 at 10 (monthly COI charges will be calculated using a monthly COI rate that "***will*** be determined by us, based on our expectations as to future mortality experience"); Dkt. 1 at ¶ 5 ("insurer will dutifully decrease COI rates to reflect improved projected mortality experience"); *id.* at ¶ 7 (explaining that Protective cannot reserve the right to increase COI rates if mortality experience deteriorates, but fail to decrease rates in the event of improvement). The Complaint alleges that Protective's current mortality expectations have dramatically improved in recent years, and certainly *since* the policies issued. *See, e.g.*, Dkt. 1 at ¶ 6 ("That mortality expectations have improved significantly over

[6] Salinas Decl., Ex. 6.

the past several decades is now well-documented."); ¶¶ 21-2; ¶ 23 (discussing industry surveys of insurance companies, including Protective, showing "material rates of mortality improvements"). The Complaint further alleges that Protective subjects its COI rates to "review" using its "*currently* experienced intercompany and company mortality." *See id.* ¶ 25 (quoting 2017 NAIC filing). Indeed, it is commonplace for insurance companies to develop updated mortality expectations regularly. *See, e.g., 37 Besen Parkway LLC v. John Hancock Life Insurance Co. (U.S.A.),* Case No. 15-cv-9924, Dkt. 83 at 3 (S.D.N.Y. Oct. 5 2017) (attached as Exhibit 12 to the Salinas Declaration) (order compelling life insurance company that issued flexible premium adjustable policies with similar language to here, to produce data to plaintiff's expert underlying its updated 2007, 2011, and 2014 mortality tables which provided "expected deaths during a particular year").

Protective, however, has not adjusted its COI rates to reflect its continuously reviewed and updated mortality expectations, and, as a result, the monthly COI charges and deductions taken from Plaintiff's account value on a monthly basis are higher than what the policies permit. *See, e.g.*, ¶ 24 ("Despite this industry-wide improvement in mortality rates—and corresponding decrease in the cost of providing mortality coverage—Protective Life has never decreased its COI rates for the Subject Policies."). Defendants do not (and cannot on a motion for judgment on the pleadings) dispute any of these allegations.

These alleged breaches are due to mortality *improvement*, which, by definition, did not happen at policy issuance, but rather occur each and every new "month" Protective calculates and deducts from Plaintiff's account value COI charges using COI rates that are not based on its improving expectations as to future mortality. Protective fails to mention this mortality-improvement theory, and that is fatal to its motion: the claim that Protective's current COI rates (and going back for the past 6-years) do not reflect Protective's current mortality expectations is obviously not time-barred, and could not have been brought when the policies issued (or prior to the past 6 years).

Protective instead focuses exclusively on *separate* allegations that Protective "*is* also wrongly 'basing' its COI rates on factors not permitted by the contract," like "expense and lapse," and "has also embedded a profit margin into COI rates." Dkt. 1 at ¶ 8. But contrary to Protective's characterizations and inferences, the Complaint alleges that these violations are occurring *now* ("is … basing"), with each monthly deduction that uses an improper COI rate.[7]

[7] Protective harps on the allegation that Protective uses "expense and lapse assumptions" in "setting COI rates," but this refers to how Protective is setting the COI rates *now*, when it subjects them to "review," not to how Protective "*initially* set" the COI rates when the policies issued. The only reference that the Complaint makes to the phrase "setting COI rates" is derived from Plaintiff's quotation of Protective's answer to an interrogatory in its 2017 Annual Report indicating that, for universal life policies writ large, it uses expense and lapse assumptions. *See* Dkt. at ¶ 25. This statement was made in 2017 and uses the present tense. In any event, as explained in more detail below, whether Protective ***also*** breached the terms of the policies in the past is simply irrelevant under Alabama law.

In any event, it is irrelevant when Protective first breached the terms of the Subject Policies because (a) under Alabama law, a prior breach, even an identical one, does not commence the statute of limitations for successive breaches, (b) Protective has an *ongoing duty* to perform in accordance with the policy terms, and (c) neither the monthly COI rates nor the monthly COI charges are fixed.[8] Indeed, Protective itself acknowledges in its motion that the cost of insurance is not determined at inception, but rather "at the end of each policy month":

> 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."
>
> According to the Complaint, "COI charges" are deducted from policy values ***on a monthly basis***…

Dkt. 26 at 11, 7, and 10.

In short, each monthly determination and deduction from the past six years made in violation of the policy terms constitutes an independent and actionable breach. Dkt. 1 at ¶¶ 8, 25, and 26. And the fact that Protective may have breached the terms of the policies in the past when it (i) charged different monthly COI rates and (ii) had different mortality expectations does not transform a claim for successive breaches into one of a single breach.

[8] *See* Plaintiff's Statement of Undisputed Facts No. 5.

B. New Breaches of A Flexible Premium Adjustable Contract are Not Time-Barred, Even if the First Breach Occurred More Than 6 Years Ago

Under black-letter Alabama law, Plaintiff can seek damages for **each monthly** cost of insurance charge that Protective has unlawfully imposed within the 6-year limitations period. The statute of limitations for a breach of contract claim in Alabama is six years. Ala. Code 1975 § 6-2-34. That limitations period "does not begin to run upon the entering into of a contract, but when the contract is breached, and a cause of action accrues." *Stephens v. Creel*, 429 So. 2d 278, 280 (Ala. 1983). Under Section 6-5-280 of the Alabama Civil Code, if "breaches occur at successive period in an entire contract, as where money to be paid by installments, an action will lie for each breach[.]" *See also Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc.*, 873 So. 2d 1091, 1104 (Ala. 2003) (holding that "[e]ach failure to pay an installment when due creates a separate cause of action").

Protective argues that Plaintiff's claims are time-barred because, according to Protective, some of the alleged breaches occurred outside of the limitations period. Protective is wrong, as illustrated by the primary case that Protective relies on: *AC, Inc. v. Baker*, 622 So.2d 331 (Ala. 1993). Protective cites *Baker* for the proposition that "The Alabama Supreme Court 'has never applied a 'continuing contract' doctrine" to toll the statute of limitations until the date that the last injury

occurred. Dkt. 26 at 17 (citing *Baker* at 334-35). But that's a red herring: the Complaint does not allege nor depend upon that tolling doctrine.[9] Instead, it alleges that Protective repeatedly and independently breached the contract recently and monthly, and those breaches that occurred within the limitations period are actionable.

Baker specifically endorses that approach. The plaintiffs in *Baker* alleged that "that for the tax years 1981 through 1985, [plaintiffs] had express agreements with [defendants] that the latter would prepare and review the plaintiffs' income tax returns." *Id.* at 334. The plaintiffs further alleged that "[defendants] breached those agreements by recognizing [improper tax] deductions." *Id.* The Alabama Supreme Court held that the trial court properly concluded that the "plaintiffs' breach of contract claims based on their 1985 tax returns" were "not barred by the statute of limitations[.]" *Id.* at 335. In doing so, the court recognized that even though the defendant began the unlawful conduct in 1981, the statute of limitations only began running on the 1985 claim *when the 1985 deduction was actually*

[9] The other two cases that Protective cites are distinguishable for the same reason. In *Catrett v. Baldwin County Elec. Membership Corp.*, 996 So. 2d 196 (Ala. 2008), the court explained that the tolling doctrine was irrelevant because the complaint "makes no mention of any alleged continuing breach committed by [the defendant]." *Id.* at 202. *Weisberg v. Guardian Life Ins. Co. of Am.*, 2017 WL 5140547, at *4 (N.D. Ala. Oct. 24, 2017) addressed a carrier's "initial determination of ineligibility" to receive disability benefits, not, as here, a prospective duty *on a monthly basis* to deduct from the policy owner's account value adjustable COI charges tied to current mortality predictions.

taken—and that since *that* deduction occurred within the limitations period, it was not barred (even if earlier deductions were). *See id.*

In *Honea v. Raymond James Fin. Services, Inc*., 240 So. 3d 550, 593 (Ala. 2017) (per curiam), which Protective does not address, the Alabama Supreme Court expressly rejected the position Protective asks the Court to take here:

> *Baker* in no way supports the conclusion that application of a continuing-contract theory bars recovery for breaches that occur less than six years before the action was filed so long as similar breaches occurred more than six years before the action was filed.
>
> The *Baker* Court merely concluded that the statute of limitations applicable to each breach began when that breach occurred, rather than when actual damages from that breach were incurred.

(emphasis in original).

Relying on *Baker*, the court in *Honea* reversed a lower court decision that plaintiff's breach of contract claim was barred by the statute of limitations because defendant had also "breached its duties" prior to when the statute of limitations began to run. *Id*. As the Alabama Supreme Court explained:

> The fact that earlier breaches of [defendant's] duties might have given rise to earlier causes of action did not preclude the subsequent breaches from also giving rise to distinct causes of action, namely yet another purchase of an unsuitable investment, yet another excessive trade, yet another improper use of margin, etc.

Id.

This is consistent with other cases applying Alabama law. *See, e.g.*, *Ripps v. Powers*, 356 Fed. Appx. 352, 354 (11th Cir. 2009) (unpublished) (applying

Alabama law, holding that when defendant allegedly repeatedly breached a contract requiring profit-sharing in several properties by not making payments—once prior to and twice during the limitations period—the claim was timely for the recent two breaches because "a distinct limitations period attaches to each breach of an ongoing contract," even defendant had breached the contract in same way each year)[10]; *Bowdoin Square, L.L.C.*, 873 So. 2d at 1104 ("Because an action may not be maintained before a cause of action has accrued[,] a landlord suing for breach of a lease can recover only rent that has accrued and that remains unpaid.") (citation omitted).

Another decision from the Eleventh Circuit, applying Florida law, extends these same principles to life insurance. In *Klein v. John Hancock Mut. Life Ins. Co.*, 683 F.2d 358 (11th Cir. 1982), a policyholder brought an action alleging the

[10] The Eleventh Circuit also rejected Powers' reliance on *Stephens*, a case Protective cites in support of its argument. In *Stephens,* the Alabama Supreme Court held that "in a contract action based upon a warranty to construct a house in a workmanlike manner, the cause of action accrues, and the statute of limitations begins to run on the date" that construction commenced. 429 So.2d at 280. The Eleventh Circuit explained:

> Powers attempted reliance on the narrow holding of *Stephens* falls flat. The alleged breaches by Powers in this case are more like failure to pay periodic rent than the failure to construct a home in a workmanlike manner. The joint ownership agreement here was an ongoing relationship, like a lease agreement. It was not like a construction contract, where the accomplishment of a single object fulfills the contract.

356 Fed. Appx. at 355. Here, a universal life policy, which entails monthly cost of insurance deductions in fluctuating and un-fixed amounts, is nothing like a construction contract for a home.

life insurance company breached the policy by failing to waive premiums due to a disability, settled that action, and then brought a second action alleging a continued failure to waive life insurance premiums due to the same disability. *Id.*at 360. In permitting the second action, the Eleventh Circuit explained that a life insurance policy "can be breached intermittently during the term." *Id.* The Court held that the first action did not preclude the second action for the same breach of the same duty, despite arising from an identical nucleus of facts, because (i) each failure to waive premiums was a separate breach and (b) the insured could not have recovered in the first action the future premium payments at issue in the second action. *Id.* The same is true here: even if Plaintiff alleged that Protective breached the policy in the exact same way at issuance (which it does not), Plaintiff's claims for illegal monthly COI deductions within the last six-years would still not be time-barred.

Not surprisingly, courts have uniformly rejected Protective's arguments in other COI cases across the country. Indeed, Protective itself made these same arguments in a COI case five years ago and had them squarely rejected. In *Fradianni v. Protective Ins. Co.*, 145 Conn. App. 90 (2013), plaintiff alleged that Protective was charging COI rates in excess of those permitted by the contract. In response, Protective made the same argument that it makes here: that claims of excessive COI charges accrue when the insurer first imposes any excessive COI

charge and all of plaintiff's claims were therefore untimely, even with respect to overcharges imposed within the statute of limitations. The Connecticut Court of Appeals disagreed:

> The plaintiff alleges that each year the defendant charged him for a cost of insurance that was in excess of the maximum amount allowed under the terms of the contract and then deducted that excessive amount from the policy's accumulated cash value. These actions, if found to be true, would constitute ***separate breaches*** by the defendant, several of which occurred ***within the statute of limitations period.***

Id. at 102–03. (emphasis added).[11]

In another COI case, *Dean v. United of Omaha Life Ins.*, the Central District of California likewise rejected the same argument that Protective advances here:

> Dean's theory of her claim is that United has continuously violated the terms of the Policy by including expenses in the COI charge on a monthly basis…. United's response is unpersuasive. It claims that the COI rates were set at the inception of the Policy so, if there was any breach, it was when that rate was first applied to Dean in 1996. United fails to explain why the subsequent applications of the inflated rate would not also constitute breaches-what, if anything, is special or unique about the first imposition of the COI charge? Furthermore, Dean has alleged that breaches occurred each time United deducted COI charges that included expense loads, which it did on a monthly

[11] *Fradianni* also rejected Protective's argument in that case that claims challenging new breaches should be barred because they emanated from conduct that occurred at issuance: "The defendant argues that if it breached the contract at all, the breach occurred in 1992 when it assigned the plaintiff a 100 percent rating factor, and the plaintiff's claims are therefore time barred. This claim is unavailing. Although it may be true that the original assignment of the 100 percent rating factor was a breach of the insurance contract now outside the statute of limitations, that does not, by extension, place outside of the statute of limitations the alleged breaches of each subsequent annual application of the rating factor, the calculation of the cost of insurance charges based on that application, and the deductions from the policy's accumulated cash value." *Id.* at n.12.

> basis….Therefore, if Dean proves at trial that United breached the Policy within the limitations period, any such breach or breaches will not be foreclosed by the statute of limitations.

Dean, 2007 WL 7079558, at **9-11.

And in another COI case, *Lee v. Allstate Life Ins. Co.*, 361 Ill. App. 3d 970 (2005), the Illinois appellate court rejected a similar argument—there, the insurance company argued that a cause of action challenging a COI increase was time-barred because it was filed more than 10-years after the COI increase was implemented. The Court disagreed:

> Allstate ignores its continuous duty to abide by the terms of its insurance policies. Because each breach of a continuous duty has its own accrual date, a plaintiff may sue on any breach which occurred within the limitation's period, even if earlier breaches occurred outside the limitation period.

*Id.*at 978**.**

Protective's motion fails by virtue of all these cases. A universal life policy is an ongoing agreement between Protective and the policy holder that involves fluctuating deductions charged to the policyholder's account value that are supposed to be calculated monthly using Protective's then-current "expectations for future mortality experience." Protective must determine *each month* what the COI charge will be from calculating a COI rate that is based on its expectations of future mortality experience. Like the recurring improper tax deductions in *Baker*, the recurring unsound financial advice in *Honea*, the recurring failures to share

distributions in *Ripps*, Protective breaches the contract each time it charges a monthly deduction using COI rates that are not based on Protective's expectations of future mortality.[12]

II. Plaintiff's Claim is Not Barred by Alabama's Rule of Repose

Protective contends "[t]he Alabama Supreme Court's decisions in *Underwood* and *Liberty National* establish that Plaintiff's breach of contract claim as to the 1986 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." Dkt. 26 at 30. Protective's argument fails for numerous reasons.

As a threshold matter, Protective's argument fails because Alabama's rule of repose does not apply to the Plaintiff's policies. Alabama law is clear that, unlike

[12] Protective also makes extensive use of string citations to inapposite cases that stand for wholly unremarkable propositions. In *Alabama Teachers Credit Union v. Design Build Concepts*, Inc., 2018 WL 3819841 (N.D. Ala. Aug. 10, 2018) (Bowdre, J.), for example, the plaintiff alleged breach of a warranty that expired on March 6, 2010, after which time there could not be any possible breach of warranty. Not surprisingly, the Court held the plaintiff's claims were barred when it waited until November 10, 2016 to file suit. *Id.* at * 16. Protective's other cases follow this same pattern. *See Mississippi Valley Title Ins. Co. v. Hooper*, 707 So. 2d 209, 213 (Ala. 1997) (where plaintiff alleged 38 transactions over a three-year period, the last of which occurred more than six years before filing suit, holding that claims were barred because "the latest date alleged by the plaintiff as a date on which Hooper's culpable action occurred was February 23, 1988, and the complaint was not filed until August 13, 1994, more than six years later."); *Seybold v. Magnolia Land Co*., 376 So. 2d 1083, 1085 (Ala. 1979) (finding action time-barred where suit was filed almost ten years after plaintiff had demanded performance and defendant refused to perform); *Wheeler v. George*, 39 So. 3d 1061, 1084 (Ala. 2009) (cited by Protective for the non-controversial proposition that "[i]t is well settled that a cause of action for breach of contract accrues when the contract is breached," while also rejecting defendant's contention that claims begin to accrue "when the agreement was executed").

statutes of limitations, Alabama's judicially-created rule of repose is a matter of substantive law. *Moore v. Liberty Nat. Ins. Co.*, 108 F. Supp. 2d 1266, 1275 (N.D. Ala. 2000) ("While a statute of limitations is a procedural device that sets forth the time period within which an action is deemed to have accrued and that is capable of being waived or tolled, a rule of repose is [a] substantive doctrine of the State, eliminating a cause of action, irrespective of its date of accrual."); *Ex parte Liberty Nat. Life Ins. Co.*, 825 So. 2d 758, 765 (Ala. 2002) (same). Alabama follows the doctrine of *lex loci contractus*, pursuant to which a breach of contract claim is governed by the substantive law "of the state where it is made." *Colonial Life & Acc. Ins. Co. v. Hartford Fire Ins. Co.*, 358 F.3d 1306, 1308 (11th Cir. 2004) (applying Alabama law); *see also Lifestar Response of Alabama, Inc. v. Admiral Ins. Co.*, 17 So. 3d 200, 213 (Ala. 2009).

Here, the policies were issued in North Carolina, Wisconsin, Georgia, and Florida, and Protective cannot prove on the pleadings – and makes no attempt to so prove in its motion – that the policies were "made" in Alabama. As a result, Protective has not come close to establishing, as a matter of law, that Alabama's rule of repose even applies to Plaintiff's claims. *See, e.g., Myers v. Hayes Int'l Corp.*, 701 F. Supp. 618, 623 (M.D. Tenn. 1988) (collecting and surveying cases, noting that "the clear majority has held that statutes of repose are substantive," and

holding that Tennessee statute of repose did not apply to claims arising under Kentucky law).

Even if Alabama's rule of repose were procedural, which it clearly is not, it would not bar Plaintiff's claims for at least three reasons. **First**, Protective's argument is premised on the same mischaracterization of the Complaint and the law governing statute of limitations. By arguing that Alabama's rule of repose began to run at issuance, Protective is assuming that the policies were *only* breached at issuance. As discussed above, that assumption is false. Plaintiff is alleging that those policies were breached each and every month Protective deducted from Plaintiff's account value a COI that was calculated using a COI rate that was not determined using Protective's then-current mortality expectations.

As Protective's own case explains "the 20–year period begins to run against claims the first time those claims could have been asserted." *Ex parte Liberty Nat. Life Ins. Co.*, 825 So. 2d 758, 764 (Ala. 2002). Protective fails to explain how Plaintiffs could have asserted claims for charges deducted in 2018 not tied to 2018 mortality data back in 1986 or 1998. Even with a time machine, it could not have asserted the 2018 breaches because they had neither occurred nor accrued. *See, e.g.*, *Klein*, 683 F.2d at 361 (holding that plaintiff could not recover future damages due to insurer's refusal to waive life insurance premiums because plaintiff's claims as to those future premium payments had not yet accrued).

Am. Gen. Life & Acc. Ins. Co. v. Underwood, 886 So. 2d 807 (Ala. 2004) is similarly inapposite. There, the plaintiff did *not* assert a breach of contract claim, but rather asserted tort claims "arising from the purchase" of a policy; the premium rate for each policy was not adjustable, but was "set when the policy was issued"; and the insurer had no continuing obligation to base rates on its mortality expectations. *See Am. Gen. Life & Acc. Ins. Co. v. Underwood*, 886 So. 2d 807, 809 (Ala. 2004). Each of those three facts distinguishes that case: here, plaintiff sues for successive breaches of an ongoing, prospective duty, not tort claims arising out of the "purchase" of the policy; premiums were not fixed at issuance; and plaintiff could not have brought its claim at policy issuance that the *adjustable* rates that were imposed by Protective from August 13, 2012 to the present are not tied to the corresponding updated mortality experience.

Second, in *Woods v. Liberty Nat'l Life Ins. Co.*, 2018 WL 287762, at *3 (N.D. Ala. Jan. 4, 2018) and *Brawley v. Nw. Mut. Life Ins. Co.*, 288 F. Supp. 3d 1277, 1288 (N.D. Ala. 2017), two cases that Protective refers to in a footnote, the court applied the rule of repose only to tort claims arising from the *purchase* of the policy – claims challenging false representations by an insurance agent that induced plaintiffs to buy the policy. *See Woods*, 2018 WL 287762, at *1 (agent misrepresented whether policy would cover certain expense from cancer); *Brawley*, 288 F. Supp. 3d at 1281 (agent misrepresented whether a certain

definition of disability was in the policies). Neither decision addressed successive breaches of a contractual duty.

Third, Protective mischaracterizes *Liberty National* as holding that "the plaintiffs' causes of action were extinguished by the rule of repose," Dkt. 26 at 28, but in fact, the *Liberty National* court *declined* to issue a writ of mandamus requested by Liberty National, which argued that the lower court erred in not applying the rule of repose. *Ex parte Liberty Nat. Life Ins. Co.*, 825 So. 2d at 760. In denying the writ, the *Liberty National* court gave a general overview of the rule of repose, which was only directed to tort claims, and which recognized that the rule only runs from the "first time th[e] claims *could* have been asserted." *Id.* at 764-65.

Accordingly, while the rule of repose does not even apply to Plaintiff's claims, Protective's arguments would fail even if it did.

III. While Plaintiff's Claims are Timely as Originally Pleaded, Plaintiff Should be Granted Leave to Amend to Make Unambiguous that It is Only Asserting Claims For Breaches After August 13, 2012

While Plaintiff's claims as alleged in its original complaint are unquestionably timely under Alabama law, Plaintiff has requested leave to amend its complaint in order to make explicit that Plaintiff seeks damages only for breaches after August 13, 2012, which is six years before the original complaint

was filed, and to further rebut Protective's mischaracterizations of Plaintiff's claims.

District courts in the Eleventh Circuit have "limited discretion to deny a party leave to amend the pleadings." *Grayson v. K Mart Corp*., 79 F.3d 1086, 1110 (11th Cir. 1996); *Espey v.Wainwright*, 734 F.2d 748, 750 (11th Cir. 1984) ("Rule 15(a) severely restricts the judge's freedom."). A court is "constrained to allow a plaintiff leave to amend unless there is substantial countervailing reason." *Grayson*, 79 F. 3d at 1110. The proposed amended complaint is attached as Exhibit 1 to the concurrently filed motion for leave to amend.

CONCLUSION

Plaintiff respectfully submits that Protective's motion for judgment on the pleadings be denied.

Dated: November 19, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, I filed a copy of the foregoing with the Clerk of the Court using the CM/ECF electronic filing system which will give notification of such filing to all counsel of record.

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