IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

JOSEPH A. RUTH,	)	
	)	
Plaintiff,	)	
	)	**No. 08 C 50102**
v.	)	
	)	**Judge Reinhard**
THE PAUL REVERE LIFE	)	
INSURANCE COMPANY,	)	**Magistrate Judge Mahoney**
	)	
Defendant.	)	

THE PAUL REVERE LIFE INSURANCE COMPANY'S
MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Joseph A. Ruth ("Ruth") was the named insured under a Juvenile Endowment Policy purchased in 1949 by his uncle, Joe Stupka. The Policy matured on November 15, 1966, when Ruth attained the age of eighteen, provided the Policy had not lapsed, been cashed-in or loans had not depleted its value. Under the Policy, Joe Stupka possessed the sole authority to exercise the Policy's rights and options during his lifetime. Joe Stupka designated his sister (Ruth's mother), Rose Ruth, as his successor. After Joe Stupka died in 1971, the sole authority to exercise the Policy's rights and options passed to Rose Ruth, who died in 1997. The statute of limitations barred any claim on the Policy ten years after the Policy's maturity date, on November 15, 1976.

More than thirty years after the statute of limitations expired, Ruth seeks to recover the Policy's $1,000 face value, plus a financial windfall of either $93,000 or $782,000, which Ruth portrays as his "investment return." Ruth seeks haven from the statute of limitations by invoking the common law discovery rule. The discovery rule only delays the *commencement* of the statute of limitations, and cannot revive a time-barred claim. Ruth incorrectly assumes that the statute of limitations commenced when he "discovered" the Policy in September 2007. But the statute of limitations began running on November 15, 1966, when Joe Stupka controlled the Policy, and continued running after his death through November 15, 1976, when Rose Ruth controlled the Policy. Assuming that the Policy was in force and retained some value as of November 15, 1966—neither of which can be proven by Ruth—any claim for breach of contract expired ten years later, on November 15, 1976, when Rose Ruth controlled the Policy's rights.

Moreover, when Ruth attained the age of eighteen in 1966, he may not have been entitled to any payment on the Policy. From 1949 to 1966, the Policy may have lapsed for non-payment of premiums, or Joe Stupka may have exercised his contractual right to take out loans or collect the Policy's cash value, which would have terminated the Policy prior to its maturity date. But the problems of proof are insurmountable. Although Ruth alleges that Joe Stupka paid the Policy's premiums in full in 1949, the only surviving documentation is the Policy, which reflects Joe Stupka's election to pay premiums "annually," and a paper receipt for payment of the first annual premium. Ruth's allegation that premiums were fully paid in 1949 is impossible to prove or disprove with any semblance of accuracy, because every witness with knowledge of the events is dead and documentary evidence no longer exists.

Whatever transpired regarding the Policy between 1949 and Joe Stupka's death in 1971 remains an unsolvable mystery. The spoliation of essentially all evidence makes it impossible to adjudicate this case with even minimum accuracy. Any trial on the merits would denigrate the fact-finding process into little more than a popularity contest. The passage of time so greatly increases the problems of proof that it is necessary to bar Ruth from pursuing his untimely claims. Summary judgment should be entered in favor of Paul Revere.

STATEMENT OF FACTS

In August 2007, Ruth's cousin, Vlasta Hanson, came across the Juvenile Endowment Policy while she was clearing out her late mother's home in Oregon, Illinois. (Def. LR56.1, ¶ 18).[1] The Policy was in a filing cabinet with recent bank statements, in a room that her mother, Opal Stupka, used as an office. (Def. LR56.1, ¶ 19). When Vlasta saw Ruth at his home in San Mateo, California the following month, she gave him the Policy. (Def. LR56.1, ¶ 20). Ruth

[1] Citations to "Def. LR56.1, ¶ _" are to the corresponding paragraph in Paul Revere's Local Rule 56.1 Statement of Material Facts. Citations to "Am. Comp., ¶ _" are to the corresponding paragraph of Plaintiff's Amended Complaint.

testified that until September 2007, he never knew the Policy existed. (Def. LR56.1, ¶ 21). Ruth read the 1949 Policy and thought, "how interesting." (Def. LR56.1, ¶ 21). A few weeks later, he demanded payment from Paul Revere.

Ruth's Demand for Payment

On September 12, 2007, Ruth sent a written demand letter to Paul Revere, with a copy to his attorney, demanding immediate payment of "the current policy value," and not merely the Policy's $1,000 face value. (Def. LR56.1, ¶ 22). On October 9, 2007 and again on November 2, 2007, Ruth's attorney wrote to Paul Revere demanding "payment of the full amount of the policy plus all accrued and unpaid earnings before and after maturity of the policy." (Def. LR56.1, ¶ 23).

On November 14, 2007, Paul Revere informed Ruth's attorney that it has "no record of active coverage on policy 324076…." (Def. LR56.1, ¶ 24). Paul Revere noted "this policy was issued on November 15, 1949" with the $1,000 insured amount to be paid on the Maturity Date (November 15, 1966) "if the policy was in force on that date." (Def. LR56.1, ¶ 24). Paul Revere explained that it has no records of the Policy, either active or terminated, at any of its facilities:

> Our records do not indicate any coverage, either active or terminated, for Mr. Ruth. We also checked our list of active policies, which we obtained upon the acquisition of the policy records from the previous administrative office located in Chattanooga, Tennessee, and neither the policy number nor the insured's name appears on the list. The policy terminated prior to the transfer of the administration of the policy to the present site; therefore, we are unable to provide you with a specific reason why the policy is no longer in force.

(Def. LR56.1, ¶ 25).

Paul Revere also explained that Ruth's possession of the Policy does not mean the Policy remains in force, because Paul Revere does not require surrender of the original Policy upon payment. The Policy owner could have "cash surrendered the policy prior to the Maturity Date,"

or "taken loans against the policy." (Def. LR56.1, ¶ 26). Paul Revere explained that its retention period for terminated or inactive policies expired, so Paul Revere has no records whatsoever of the Policy's history. As stated in Paul Revere's letter:

> Please note that because Mr. Ruth is in possession of the policy does not necessarily indicate that the insurance coverage should be in force or that the maturity value is still available. If the policy was in force on the Maturity Date, the sum insured would have been paid in 1966. We typically don't request the return of the original policy upon payment of the maturity value (sum insured).

(Def. LR56.1, ¶ 27).

Ruth's attorney responded in a December 17, 2007 letter, stating, "The policy says you were to pay the insured. Mr. Ruth was not paid. The policy was never surrendered. You have no proof he was paid. Therefore, it is still owed." Ruth's attorney threatened to pursue litigation and seek punitive damages against Paul Revere. (Def. LR56.1, ¶ 28).

Paul Revere conducted a second search for documents and again found no record of the Policy. As reported in Paul Revere's January 3, 2008 letter to Ruth's attorney:

> Upon receipt of your [December 17th] letter, we again conducted a thorough review of our records, and we cannot locate any coverage for Mr. Ruth. If policy number 324076 remained in force to the maturity date (November 15, 1996), the sum insured of $1,000 would have been paid to the Insured on that date. The policy would not have remained in force after November 15, 1966 regardless of whether it matured or terminated prior to that time.

(Def. LR56.1, ¶ 29). Paul Revere explained that it has been prejudiced by Ruth's late demand for payment, due to the passage of time and spoliation of evidence:

> We would not have records after a policy has either terminated or matured more than forty years ago, and we were under no obligation to maintain such records for that period of time. Although we cannot recreate the entire history of this policy, we do not believe we are obliged to make a maturity payment with interest at this late date.

(Def. LR56.1, ¶ 30).

After Ruth filed suit, Paul Revere conducted a third thorough investigation for documents and possible witnesses. Due to the extraordinary passage of time, Paul Revere was unable to identify any living witnesses or locate any records of the Policy. (Def. LR56.1, ¶¶ 31-33). Although Paul Revere cannot authenticate the Policy, for purposes of this litigation, Paul Revere does not dispute that it issued the Policy. (Def. LR56.1, ¶ 34).

The Juvenile Endowment Policy

The Policy was issued on November 15, 1949 with a value upon maturity of $1,000. (Def. LR56.1, ¶ 6). The Policy identifies the maturity date as November 15, 1966, which was Ruth's eighteenth birthday. (Def. LR56.1, ¶ 6). The Policy names the Insured as "Joseph A. Rutkiewicz," the Applicant as "Joe Stupka, Jr., Uncle of the Insured," and the Beneficiary as "Rose Rutkiewicz, Mother of the Insured." (Def. LR56.1, ¶ 7). The Application, which is part of the Policy, lists several options for payment of premiums. The option checked-off on the Application reflects an election to pay premiums "annually" in the amount of $54.93 per year. (Def. LR56.1, ¶¶ 8-9).

The "Control of Policy" provision specifies who has the authority to exercise the Policy's rights and options. The provision states,

> During the lifetime of the Applicant the rights and options granted in this policy may be exercised *only by the Applicant*. In the event of the death of the Applicant, the rights of such Applicant, unless the Applicant has named a successor by written notice to the Home Office of the Company, shall pass immediately to the insured.

(Def. LR56.1, ¶ 10) (emphasis added). On the Policy Application, Joe Stupka designated "Rose Rutkiewicz, Mother" as the person who will "control" the Policy upon his death. (Def. LR56.1, ¶ 11).

The Policy's rights include the right to obtain payment of the Policy's cash value, the right to take out loans up to the Policy's full cash value, and the right to collect the Policy's non-forfeiture value in the event of default for non-payment of premiums.[2] (Def. LR56.1, ¶¶ 12-15). The Policy states, "The Applicant, or the person having control of the policy as provided above, may, without the consent of any beneficiary, borrow on this policy, or surrender it, or exercise any other rights or options provided therein …." (Def. LR56.1, ¶ 12). The Policy's "Payment of Proceeds" provision states,

> All sums payable by the Company under this policy shall be payable at the Home Office of the Company at Worcester, Massachusetts. When settlement is made any indebtedness against the policy will be deducted from the proceeds. Payment of any loan value other than to pay premiums on any policies of the Insured in this Company, and payment of any surrender value, may be deferred for six months after the application therefor.

(Def. LR56.1, ¶ 15).

As the Applicant, only Joe Stupka had authority to exercise the Policy's rights and options during his lifetime. Upon Joe Stupka's death in 1971, only Rose Ruth had the authority to exercise the Policy's rights and options, assuming the Policy remained in force and retained at least some value. Rose Ruth died in 1997.[3]

Ruth's Relationship with Joe Stupka and Testimony about the Policy

In 1963, Ruth's father died unexpectedly at a young age. Ruth (an only child) and his mother moved to Oregon, Illinois, where they both worked at Joe Stupka's grocery store. (Def. LR56.1, ¶¶ 39-41). Rose Ruth continued to work at Joe Stupka's grocery store for thirty years,

[2] The Policy becomes void when the amount of any loans, plus 5% interest, exceeds the Loan Value of the Policy. (Def. LR56.1, ¶ 13; Def. Apdx., Ex. A, Policy, pgs. 4, 5).

[3] Ruth erroneously testified that his mother died in 2005 (Def. Apdx., Ex. B, Ruth Dep., pg. 16), but he corrected the date to January 7, 1997 based on "Plaintiff's Draft Responses to Paul Revere's Interrogatories" prepared by Ruth's attorney but which Ruth never signed. (Def. LR56.1, ¶ 37). Joe Stupka died on July 18, 1971. (Def. LR56.1, ¶ 35).

until shortly before her death in 1997. (Def. LR56.1, ¶ 40). Ruth, a teenager at the time, worked at Joe Stupka's grocery store after school and on weekends from 1963 until shortly before his graduation from high school in 1966. (Def. LR56.1, ¶ 41). Ruth testified that he did not receive any money from Joe Stupka, either as wages or as a gift. (Def. LR56.1, ¶ 42). Rather, Joe Stupka paid any money directly to Ruth's mother. As Ruth explained at his deposition:

> The way in which it was explained to me is that my mother would have been better off with the money. So, therefore, as I was told, the money that I would have normally made went to my mother. And then she could provide me with a stipend of some sort.

(Def. LR56.1, ¶ 42).

From 1963 until his eighteenth birthday in 1966, Ruth saw his uncle Joe Stupka *every day*. (Def. LR56.1, ¶ 43). Ruth left Oregon, Illinois in 1968 when he was drafted into the Army. After his discharge, Ruth obtained a business degree and went on to a successful career in sales and marketing, ultimately settling in San Mateo, California, where he works in sales and marketing for a Silicon Valley company. (Def. LR56.1, ¶¶ 44-45). The only relative Ruth remains in contact with is Vlasta Hanson. Ruth explained his lack of family contact by stating, "There's never been a falling out. There has been an exclusion." (Def. LR56.1, ¶ 46).

ARGUMENT

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories and affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).[4] In determining whether a genuine issue of material fact exists, the court draws all reasonable inferences in favor of the opposing party. *Bennington v. Caterpillar Inc.*, 275 F.3d 654, 658 (7th Cir. 2001), *cert. denied*,

[4] Because this is a diversity case and there is no issue of conflict of law, the substantive law of Illinois applies. See, e.g., *Allen v. Transamerica Ins. Co.*, 128 F.3d 462, 466 (7th Cir. 1997); *Wood v. Mid-Valley Inc.*, 942 F.2d 425, 426 (7th Cir. 1991).

537 U.S. 819 (2002). The court is not required to draw every conceivable inference in favor of the opposing party; "mere speculation or conjecture" will not defeat a summary judgment motion. *McCoy v. Harrison*, 341 F.3d 600, 604 (7th Cir. 2003). Even if the case presents issues typically characterized as questions of fact, summary judgment is appropriate if the evidence is such that no reasonable difference of opinion could exist. *Northern Assurance Co. v. Summers*, 17 F.3d 956, 964 (7th Cir. 1994). If no genuine issue of material fact exists, the sole question is whether the moving party is entitled to judgment as a matter of law. *Logan v. Commercial Union Ins. Co*., 96 F.3d 971, 978 (7th Cir. 1996).

I. Ruth's Claims Are Barred By The Statute Of Limitations.

Statutes of limitations serve three crucial purposes. They protect defendants from false or fraudulent claims that are easily asserted, but due to the passage of time and spoliation of evidence, are extremely difficult to defend. They spare courts from the burden of adjudicating stale claims that may be impossible to resolve with even minimum accuracy. And they protect defendants from prolonged uncertainty about their legal obligations and serve to cap liability. See *Stephan v. Goldinger*, 325 F.3d 875, 876 (7th Cir.), *cert. denied*, 540 U.S. 876 (2003) ("Statutes of limitations … are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.") (quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). See also *Cook v. Chicago*, 192 F.3d 693, 696 (7th Cir. 1999); *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1166 (7th Cir. 1997); *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 877 (7th Cir. 1997).

To achieve these purposes, the Illinois legislature determined that actions on written contracts must be brought within ten years after the cause of action accrued. 735 ILCS 5/13-206.

A cause of action accrues at the time of breach. *Hermitage Corp. v. Contactors Adjustment Co.*, 166 Ill.2d 72, 76-77, 651 N.E.2d 1132, 1135 (1995). Ruth contends that his claim for breach of contract accrued on November 15, 1966, his eighteenth birthday, which was the Policy's maturity date. Assuming the Policy had some cash value on November 15, 1966—that it had not lapsed for non-payment of premiums, been cashed-in, or loans had not depleted its value—the statute of limitations expired ten years later, on November 15, 1976.

Ruth incorrectly assumes that the statute of limitations did not commence until he "discovered" the Policy in September 2007. But the statute of limitations began running on November 15, 1966, when Joe Stupka controlled the Policy, and continued running after his death through November 15, 1976, when Rose Ruth controlled the Policy. The "Control of Policy" provision specifies that "the rights and options granted in this policy may be exercised *only* by the Applicant," and that upon the Applicant's death, the right to control the Policy passes to the Applicant's designated successor, Rose Ruth. (Def. LR56.1, ¶¶ 10-12) (emphasis added). From 1949 until his death in 1971, only Joe Stupka could exercise the Policy's rights and options. When Joe Stupka died in 1971, "control" of the Policy passed to Rose Ruth. On November 15, 1976, ten years after the cause of action accrued, Rose Ruth had the sole authority to exercise the Policy's rights and options.

During the ten year limitations period from November 15, 1966 to November 15, 1976, neither Joe Stupka nor Rose Ruth exercised their contractual rights under the Policy, or if they did and Paul Revere failed to perform, they allowed their rights to expire. Assuming the Policy was in force and retained some value in November 15, 1966, which Ruth cannot prove, any claim for breach of contract expired ten years later, on November 15, 1976, under Rose Ruth's watch.

Ruth tries to revive his time-barred claim by invoking the common law discovery rule. The discovery rule "delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused." *Hermitage Corp.*, 166 Ill.2d at 76-77, 651 N.E.2d at 1135 (citing *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill.2d 240, 249, 633 N.E.2d 627, 630-631 (1994)).

The discovery rule only delays the *commencement* of the statute of limitations, and cannot revive a time-barred claim. When the statute of limitations expired on November 15, 1976 under Rose Ruth's watch, all claims to enforce the Policy were forever extinguished. Ruth's "discovery" of the Policy more than three decades after the statute of limitations expired has absolutely no legal significance. A time-barred claim cannot be revived by any judicial doctrine including the discovery rule. *Clay v. Kuhl*, 189 Ill.2d 603, 609, 727 N.E.2d 217, 221 (2000) ("[U]nder Illinois law, the barring of an action by a statute of limitation creates a vested right in favor of the defendant, and the action cannot later be revived."). The Policy Ruth "discovered" in September 2007 might have personal historical value, but legally it is unenforceable.

The discovery rule cannot shield Ruth from the preclusive effect of the statute of limitations, because the discovery rule cannot revive a time-barred claim. Ruth would need to invoke the discovery rule on behalf of his deceased mother, Rose Ruth, who controlled the Policy's rights and options on November 15, 1976, when the statute of limitations expired. However, no legal authority permits Ruth to invoke the discovery rule on behalf of a deceased third party. Nor is there legal precedent permitting Ruth to extend the discovery rule across two generations of his family.

Factually, Ruth cannot satisfy his burden of proving that the discovery rule even applies to Rose Ruth. See *Hermitage Corp.*, 166 Ill.2d at 84-85, 651 N.E.2d at 1138 (plaintiff has the burden of proving the date on which the claim was discovered). Ruth cannot prove that Rose Ruth (Joe Stupka's only sister) lacked knowledge of the Policy and failed to "discover" her contractual rights during her lifetime.[5] Indeed, it is contrary to common sense that Joe Stupka would purchase a Policy for his *only* sister's *only* child, would designate his sister as the person having sole "control" of the Policy upon his death, would work with his sister every day in the grocery store until his death, yet never bother to tell his sister about the Policy. Conjecture based on common sense is a poor substitute for first-hand evidence, but conjecture is all that exists in this case. Every potential witness is dead, including Rose Ruth, Joe Stupka, and Opal Stupka. Due to the passage of time and spoliation of evidence, the finder of fact could not possibly determine with even minimum accuracy whether Rose Ruth knew of the Policy's existence.

Even in cases where the discovery rule can be asserted, application of the rule is not a foregone conclusion. The discovery rule does not give an unlimited shelf life to every stale claim. Courts must weigh the hardship of applying the statute of limitations against the hardship of applying the discovery rule. "The basic problem is one of balancing the increase in difficulty of proof which accompanies the passage of time against the hardship to the plaintiff who neither knows nor should have known of the existence of his right to sue." *Hermitage Corp.*, 166 Ill.2d at 77, 651 N.E.2d at 1135. Where the passage of time "does little to increase the problems of proof, the ends of justice are served" by applying the discovery rule. *Id.* (quoting *Rozny v. Marnul*, 43 Ill.2d 54, 70, 250 N.E.2d 656, 664 (1969)). However, "[t]here are some actions in which the passage of time, from the instant when the facts giving rise to liability occurred, so greatly increases the problems of proof that it has been deemed necessary to bar plaintiffs who

[5] Ruth testified that Joe Stupka was Rose Ruth's only sibling. (Def. LR56.1, ¶ 37).

had not become aware of their rights of action within the statutory period as measured from the time such facts occurred." *Id.*

The passage of time creates insurmountable problems of proof that deprive Paul Revere of its ability to defend and completely undermine the integrity of the judicial fact-finding process. For example, Ruth alleges in the Amended Complaint that Joe Stupka paid "the premiums in full at the time of issuance of the policy." (Am. Comp., ¶ 4). Ruth's only evidence is an ambiguous handwritten note from 1949 signed by the selling agent, P.G. Watters, stating "Here is the policy Joe. Prem. in full $800.77. See you before too long. Thanks a million Joe – Come see us." (Def. LR56.1, ¶ 17). It is impossible to determine whether Mr. Watters intended to inform Joe Stupka of the full amount of premiums payable over time for the Policy, or whether Mr. Watters intended to confirm that premiums had been paid in full. The insurance Application contradicts Ruth's theory of full payment of premiums, because on the Application Joe Stupka specifically elected to pay premiums "annually" in the amount of $54.93 per year. (Def. LR56.1, ¶ 9). The printed receipt attached to the Policy also reflects receipt of the "first premium" of $54.93 "annually." (Def. LR56.1, ¶ 16).[6] Mathematically, it does not make sense that Joe Stupka would pay $800.77 in full in November 1949 in order to obtain payment of $1,000 in November 1966. Ultimately, however, Ruth's allegation that premiums were fully paid in 1949 is impossible to prove or disprove with any semblance of accuracy, because Joe Stupka and P.G. Watters both died in 1971, and Paul Revere does not have any documents whatsoever regarding the Policy, Joe Stupka or Mr. Watters.

Ruth insists the Policy remained in force from 1949 through 2007, when he "discovered" the Policy. Lacking any proof, Ruth merely theorizes that Joe Stupka maintained the Policy in

[6] The receipt also contains the handwritten figures "745.54" and "$800.77" below the typewritten receipt reflecting "$54.93," adding further ambiguity. (Def. LR56.1, ¶ 16)

full force through its maturity date on November 15, 1966, then sat on his rights and failed to demand payment of the fully matured Policy through his death in 1971, and that Rose Ruth did the same (or she never knew of the Policy's existence).

Ruth, however, may not have been entitled to *any payment* under the Policy even in 1966. Joe Stupka, as the Applicant, retained the exclusive authority to exercise the Policy's rights and options during his lifetime. Between 1949 and 1966, Mr. Stupka may have stopped paying premiums. Or he may have exercised his contractual right to borrow funds or collect the cash surrender value of the Policy, to provide financial support to the widowed Rose Ruth and for Ruth's childhood needs. In either instance, the Policy would have terminated prior to its maturity date. It may be, therefore, that the Policy terminated years before Ruth turned age eighteen, and decades before Ruth "discovered" the antiquated Policy in 2007.

The fact that Ruth endeavors to augment the $1,000 face value of the Policy with a demand for what he describes as an "investment return" of $93,643 under a breach of contract theory (Am. Comp., pg. 2, ¶ 11), or an "investment return" of $782,000 under an unjust enrichment theory (Am. Comp., pg. 6, ¶ 12), underscores one of the reasons why statutes of limitations exist in the first place, which is to protect defendants from prolonged uncertainty about their legal obligations and "to enable the defendant to *cap his liability*." *Cook*, 192 F.3d at 696 (emphasis added). Ruth should not be permitted to use the discovery rule, an equitable doctrine, to obtain a financial windfall. Ruth's maximum claimed damages—if allowable at all—must be limited to the $1,000 face value of the Policy plus statutory prejudgment interest accumulated since September 12, 2007, the date of Ruth's written demand for payment.

Even if the discovery rule saved Ruth's claim from the statute of limitations, Ruth never could prove his case at trial. The same evidentiary problems that make it impossible for Paul

Revere to defend against Ruth's allegations also make it impossible for Ruth to satisfy his burden of proof. *Quantum Mgmt. Group, Ltd. v. Univ. of Chicago Hospitals*, 283 F.3d 901, 905 (7th Cir. 2002) ("If the nonmoving party fails to make a sufficient showing on an essential element of her case, the moving party is entitled to judgment as a matter of law because 'a complete failure of proof concerning an essential element of the [nonmovant's] case necessarily renders all other facts immaterial.'") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

Ruth cannot establish that premiums were paid in full, the Policy was in force in November 15, 1966 (much less in September 2007), the value of the Policy, and that Paul Revere breached the Policy. Indeed, Ruth testified he has no knowledge of whether Joe Stupka or Rose Ruth made a demand for payment under the Policy, received payment of the Policy's proceeds, or took out loans against the Policy. (Def. LR56.1, ¶ 47). Vlasta Hanson also testified she has no knowledge of whether Joe Stupka or Rose Ruth demanded payment, received payment, or took out loans. (Def. LR56.1, ¶ 48). Due to the passage of time, the problems of proof are insurmountable. The relevant time period dates back to 1949, spans nearly sixty years thereafter, and all known witnesses have died. Paul Revere has no records of the Policy's existence, nor was Paul Revere under any obligation to retain records more than forty years after the Policy's maturity date.

Fundamentally, this is not an appropriate case for the discovery rule. The discovery rule applies where the passage of time "does little to increase the problems of proof," so "the ends of justice are served" by delaying the commencement of the statute of limitations. *Hermitage Corp.*, 166 Ill.2d at 77, 651 N.E.2d at 1135. Rather, this is a case "in which the passage of time,

from the instant when the facts giving rise to liability occurred, so greatly increases the problems of proof" that it is necessary to bar Ruth from asserting his claims. *Id.*

II. Ruth Cannot Obtain "Equitable Relief" Based On Quantum Meruit Or Unjust Enrichment.

In his Amended Complaint, as alternatives to his claim for breach of contract, Ruth asserts equitable claims for quantum meruit and unjust enrichment. Ruth's equitable claims are barred by the doctrine of laches, which is "the equitable substitute for the statute of limitations." *Cook*, 192 F.3d at 695. Laches is "an unreasonable delay in pressing one's rights that prejudices the defendant." *Id.* Laches serves "to protect defendants from prejudice caused by stale evidence, prolonged uncertainty about legal rights and status, and unlimited exposure to liability damages." *Smith v. Caterpillar, Inc.*, 338 F.3d 730, 733 (7th Cir. 2003).

District courts enjoy "considerable discretion in deciding whether to apply the equitable doctrine of laches in the first instance," so the Seventh Circuit will not disturb the district court's decision absent an abuse of discretion. *Id.* (citing *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 819 (7th Cir. 1999)). Paul Revere has been materially prejudiced by the delay in asserting claims under the Policy, because every witness with knowledge of the relevant transactions has died and Paul Revere no longer possesses documents necessary to present its defense. Ruth, in turn, endeavors to use the delay to obtain an economic advantage, by enlarging his claimed damages to either $92,643 or $782,000 as his "investment return." See *Smith*, 338 F.3d at 735 (exposure to increased damages constitutes material prejudice for purposes of applying laches). For the same reasons that Ruth's contract claim is barred by the statute of limitations, Ruth's equitable claims are barred by the doctrine of laches.

Ruth's equitable claims also are barred because the parties' rights and obligations are governed by a written contract, albeit a very old one. Because a written contract clearly exists,

Ruth cannot resort to alternative equitable theories premised on the non-existence of a written contract. See *Keck Garrett & Assoc., Inc. v. Nextel Comm., Inc.*, 517 F.3d 476, 487 (7th Cir. 2008) ("Illinois law does not permit a party to recover on a theory of quasi-contract when an actual contract governs the parties' relations on that issue."). See also *Swedish American Hospital Assoc. of Rockford v. Illinois State Medical Inter-Insurance Exchange*, 395 Ill.App.3d 80, 108, 916 N.E.2d 80, 103 (2nd Dist. 2009); *Am. Hardware Mfgr's Assoc. v. Reed Elsevier, Inc*., No. 03 CV 9421, 2010 WL 55708, at *15 (N.D. Ill. Jan. 4, 2010).

Finally, Ruth cannot satisfy his burden of proof at trial on his quantum meruit and unjust enrichment theories. Quantum meruit is a "niche" area of quasi-contract which applies when "services are rendered, but no payment forthcoming." *Midcoast Aviation Inc. v. General Elec. Credit Corp*., 907 F.2d 732, 737 (7th Cir. 1990). The elements of quantum meruit are "the performance of services by the plaintiff, the receipt of the benefit of those services by the defendant, and the unjustness of the defendant's retention of that benefit without compensating the plaintiff." *Id.* Accord *Shair v. Qatar Islamic Bank*, No. 08 CV 1060, 2009 WL 691249, at *4 (N.D. Ill. Mar. 16, 2009). A cash payment is not a "service," so Joe Stupka's payment of a premium in 1949 cannot provide the basis for Ruth's quantum meruit claim. Because no service was performed, Ruth's quantum meruit claim fails as a matter of law. See *Ogdon v. Hoyt*, 409 F.Supp.2d 982, 990-991 (N.D. Ill. 2006) (granting summary judgment on plaintiff's quantum meruit claim because no services were provided).

The theory of unjust enrichment permits recovery of a benefit that has been "unjustly retained." *Midcoast Aviation Inc.*, 907 F.2d at 737. Ruth does not assert that he personally conferred a benefit on Paul Revere. Rather, he seeks to recover the $800.77 premium payment Joe Stupka allegedly paid Paul Revere for the Policy in 1949, augmented by a $782,000

"investment return." (Am. Comp., Count IV, ¶¶ 8-13). A party seeking to recover a benefit conferred by a third party must demonstrate (i) the benefit should have been given to the plaintiff, but the third party mistakenly gave it to the defendant instead, (ii) the defendant procured the benefit from the third party through some type of wrongful conduct, or (iii) the plaintiff for some other reason had a better claim to the benefit than the defendant. *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill.2d 145, 160, 545 N.E.2d 672, 679 (1989).

Ruth cannot satisfy his burden of proof under the first prong of unjust enrichment, because there is no evidence that Joe Stupka "mistakenly" paid premiums to Paul Revere. Ruth cannot satisfy his burden of proof under the second prong, because there is no evidence that Paul Revere "procured" the premium payment from Joe Stupka through wrongful conduct (such as fraud or misrepresentation by P.G. Watters). Ruth cannot satisfy his burden of proof under the third prong, because there is no evidence that Ruth had a "better claim" than Paul Revere to premiums paid in 1949. In fact, Ruth cannot even prove the amount of premiums Joe Stupka paid. He merely assumes Joe Stupka paid premiums in full based on an ambiguous note from P.G. Watters, which is contradicted by Mr. Stupka's election to pay premiums "annually" on the Policy Application and the printed receipt for only one annual premium payment. Fundamentally, Ruth's unjust enrichment claim fails at the outset, because it is undisputed that Paul Revere issued the Policy, so there has been no wrongful conduct or unjust enrichment.

III. Ruth Is Not Entitled To Statutory Penalties Or Fees Under 215 ILCS 5/155.

In Count II of his Amended Complaint, Ruth seeks an award of attorneys' fees and a statutory penalty under 215 ILCS 5/155 of the Illinois Insurance Code. Section 155 provides for the award of attorneys' fees and a statutory penalty when an insurer's delay in paying a claim was vexatious and unreasonable. The final determination of whether an insurer's conduct

violated §155 is made by the court and not by the jury. *Horning Wire Corp. v. Home Indem. Co.*, 8 F.3d 587, 590 (7th Cir. 1993). A §155 claim is appropriate for resolution by summary judgment, even if factual issues preclude summary judgment on the issue of coverage.

An insurer has not engaged in vexatious and unreasonable conduct if: (i) there is a *bona fide* dispute concerning the scope and application of insurance coverage, (ii) the insurer asserts a legitimate policy defense, (iii) the claim presents a genuine legal or factual issue regarding coverage, or (iv) the insurer takes a reasonable legal position on an unsettled issue of law. *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 200 F.3d 1102, 1110 (7th Cir. 2000). See also *Nat'l Stock Exchange v. Federal Ins. Co.*, No. 06 C 1603, 2007 WL 1030293, at *7 (N.D. Ill. Mar. 30, 2007) ("Only when an insurer's interpretation of an insurance policy is baseless, or clearly inconsistent with the terms of the policy, is the insured entitled to relief under Section 155.").

As long as there is a genuine issue of fact regarding coverage, a plaintiff is barred from recovering penalties under §155, even if the insurer's grounds for denial are ultimately found to be erroneous. *Nat'l Stock Exchange*, 2007 WL 1030293, at *8. See also *Bakal v. Paul Revere Life Ins. Co*., 576 F.Supp.2d 889, 902 (N.D. Ill. 2008) ("[B]ecause there is a *bona fide* dispute as to coverage under the terms of the Policy, [plaintiff's] claim for statutory damages pursuant to Section 155 of the Illinois Insurance Code fails as a matter of law.").

Paul Revere has asserted good faith arguments reflecting at least a *bona fide* dispute as to whether any payment should be made to Ruth under the Juvenile Endowment Policy. "Where a defendant presents in good faith a legitimate policy defense supported by case authority and unsuccessful argument, the defendant cannot be considered vexatious or unreasonable."

Harrington v. New England Mut. Life Ins. Co., No. 84 C 6669, 1988 WL 96550, at *3 (N.D. Ill. Sept. 7, 1988). Accordingly, Ruth's §155 claim should be dismissed as a matter of law.

CONCLUSION

This is a case in which the passage of time so greatly increases the problems of proof that it is necessary to bar Ruth from pursuing his untimely claims. The spoliation of essentially all evidence makes it impossible to adjudicate this case with even minimum accuracy. See *Porter v. Decatur Memorial Hosp*., 227 Ill.2d 343, 355, 882 N.E.2d 583, 590 (2008) (the purpose of a statute of limitations is "to afford a defendant a fair opportunity to investigate the circumstances upon which liability is based while the facts are accessible."). Summary judgment should be entered in favor of Paul Revere, and the Amended Complaint dismissed with prejudice.

WHEREFORE, defendant, THE PAUL REVERE LIFE INSURANCE COMPANY, respectfully requests entry of summary judgment in its favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification to the following attorney of record:

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