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
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant, THE PAUL REVERE LIFE INSURANCE COMPANY ("Paul Revere"), by its attorney, Warren von Schleicher of Smith, von Schleicher & Associates, hereby submits its Reply Memorandum in Support of its Motion for Summary Judgment:

INTRODUCTION

Joseph Ruth ("Ruth") seeks to recover hundreds of thousands of dollars on a Policy with a face value of $1,000 and a maturity date that expired over forty years ago, on November 15, 1966. Ruth regards the Policy as a $1,000 savings bond purchased in 1949, when he was one year old, for his sole financial benefit. But the Policy was not Ruth's personal savings bond. It was a multifaceted financial instrument that provided a variety of features, not all of which benefitted Ruth. The Policy, issued when childhood mortality was high, insured Ruth's life in the event he died prior to age eighteen. The named beneficiary of the Policy's life insurance feature was Ruth's mother, Rose Ruth. If Ruth died at age one, the Policy paid a $500 death benefit to Rose Ruth. If Ruth died after age two, the Policy paid a $1,000 death benefit to Rose Ruth.

The Policy also provided the Applicant, Joe Stupka, with a variety of financial options that benefitted Joe Stupka directly, including the right to take out loans using the Policy as collateral, and the right to cancel the Policy in exchange for its cash value. In fact, the Policy was designed to ensure that someone *other than Ruth* had the authority to exercise the Policy's financial rights. This feature, called "Control of Policy," granted to Joe Stupka, during his entire lifetime, the sole authority to exercise the Policy's rights and options. Joe Stupka designated Rose Ruth as his successor. Upon Joe Stupka's death in 1971, the sole authority to exercise the Policy's rights and options passed to Rose Ruth, who retained exclusive control over the Policy until her death in 1997.

Assuming the Policy was in force and retained some monetary value at maturity on November 15, 1966, which Ruth cannot prove, any claim for breach of contract expired ten years later, on November 15, 1976, when Rose Ruth had the sole authority to exercise the Policy's rights and options. During the limitations period, Joe Stupka and Rose Ruth never exercised their contractual rights under the Policy, or if they did and Paul Revere failed to perform, they allowed their rights to expire. If any claim for breach of contract existed as of November 15, 1966, that claim was time barred more than thirty years ago. Ruth's "discovery" of the Policy in 2007 was legally inconsequential, because the discovery rule only delays the commencement of the statute of limitations. The discovery rule cannot revive a time barred claim.

Ruth proclaims that "Paul Revere's only defense is the statute of limitations." (Pl. Resp., pg. 6).[1] The bar of the statute of limitations is a substantial and definitive defense, but not Paul Revere's only defense. Paul Revere also maintains that Ruth cannot satisfy his burden of proof. Ruth cannot prove that the Policy was in effect on November 15, 1966 or that the Policy had any

[1] References to Ruth's "Response" are to "Plaintiff's Response to The Paul Revere Life Insurance Company's Motion for Summary Judgment" (Doc. No. 58), cited as "Pl. Resp., pg. _."

value on that date. Ruth argues that Joe Stupka paid premiums in full for the Policy in 1949. Ruth's evidence consists of two handwritten notes that are ambiguous, undated, and of unknown authorship. The unauthenticated handwritten notes are ensnared in double-hearsay, unreliable, and inadmissible. The Policy provides three premium payment options, single lump sum not being one of them. Joe Stupka elected to pay premiums annually. Ruth cannot prove that premiums were paid in full, and that the Policy was in effect when he attained age eighteen on November 15, 1966. The spoliation of essentially all evidence makes it impossible to adjudicate this case. The allegations of Ruth's Amended Complaint cannot be proved or disproved. The passage of time has so greatly increased the problems of proof that it is necessary to bar Ruth from pursuing his claims.

ARGUMENT

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

Statutes of limitations protect defendants from stale claims that are easily asserted, but due to the passage of time and spoliation of evidence, are extremely difficult if not impossible to defend. Statutes of limitations also spare courts from the burden of adjudicating stale claims that may be impossible to resolve with even minimum accuracy. See, e.g., *Stephan v. Goldinger*, 325 F.3d 875, 876 (7th Cir.), *cert. denied*, 540 U.S. 876 (2003); *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).

Ruth seeks haven from the statute of limitations by invoking the discovery rule. The discovery rule only delays the commencement of the statute of limitations; it cannot revive an already time-barred claim. *Clay v. Kuhl*, 189 Ill.2d 603, 609, 727 N.E.2d 217, 221 (2000). Assuming the Policy had some cash value on November 15, 1966 (that it had not lapsed or been

cashed-in), all claims to enforce the Policy's terms were extinguished ten years later, on November 15, 1976.

The statute of limitations began running no later than 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. During that ten year period, only Joe Stupka or, upon his death, his successor Rose Ruth, possessed the authority to exercise rights under the Policy, pursuant to the "Control of Policy" provision. Ruth argues that Joe Stupka's right to control the Policy terminated on November 15, 1966, when the Policy matured, and thereafter, all rights to the Policy's proceeds vested exclusively in Ruth. (Pl. Resp., pgs. 2, 3, 7).

The contractual terms defeat Ruth's argument. The "Control of Policy" provision specifically vests Joe Stupka with the sole authority to exercise the Policy's rights during his lifetime:

> *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, ¶¶ 10-12) (emphasis added). Joe Stupka's contractual rights did not automatically terminate when Ruth turned eighteen, as Ruth contends. Rather, Joe Stupka's contractual rights terminated on his death in 1971. In fact, the Policy was designed to ensure that an eighteen year old youthful Ruth could *not* exercise the Policy's rights. Joe Stupka took the additional precaution of naming Rose Ruth as his successor, further ensuring that Ruth had no authority to exercise the Policy's rights and options. By naming a successor, Joe Stupka ensured that after his death, only Rose Ruth could exercise the contract rights. If Joe Stupka wanted Ruth to be paid $1,000 on his eighteenth birthday in 1966, only Joe Stupka could exercise that right,

assuming the Policy had not lapsed or previously been cashed-in to help the widowed Rose Ruth care for her son's childhood needs.

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. 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. If the Policy was in force on November 15, 1966, which Ruth cannot prove, any claim for breach of contract became time barred ten years later, on November 15, 1976. For the same reasons, Ruth's alternative claims for *quantum meruit* and unjust enrichment are barred by the doctrine of laches.

This is not an appropriate case for application of the discovery rule to delay commencement of the statute of limitations. Courts must weigh the hardship of applying the discovery rule against the hardship of applying the statute of limitations. The passage of time has so greatly increased the problems of proof that Ruth should be barred from asserting his claims. See *Stephan*, 325 F.3d at 876 ("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" when "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, 348-349 (1944)). The relevant time period dates back to 1949, spans nearly sixty years thereafter, and every witness with knowledge of the material facts has died.

Ruth tries to blame Paul Revere for the evidentiary consequences of the passage of time. He argues that Paul Revere had a statutory obligation to maintain Policy records indefinitely, citing 215 ILCS 5/13. (Pl. Resp., pgs. 1, 13). Section 133, however, applies to the company's financial books and records. An insurer "shall keep its books, records, documents, accounts and vouchers in such manner that its *financial condition, affairs and operations* can be ascertained and so that its *financial statements* filed with the Director can be readily verified…." 215 ILCS 5/133(1) (emphasis added).[2] Paul Revere has no records of the Policy's existence, nor was Paul Revere under any legal obligation to retain records more than forty years after the Policy's maturity date.

Ruth asserts that he and his cousin Vlasta Hanson are alive, so not "every witness" is dead. (Pl. Resp., pgs. 8-9). But Ruth and Vlasta Hanson cannot testify whether premiums were paid in full (in 1949 or any other time) or whether the Policy was in force and had monetary value on November 15, 1966. 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 testified she has no knowledge of whether Joe Stupka or Rose Ruth demanded payment, received payment, or took out loans. (Def. LR56.1, ¶ 48).

The witnesses with knowledge of the material facts necessary to prove or disprove Ruth's claims are Joe Stupka (died 1971), P.G. Watters (died 1971), Rose Ruth (died 1997), and Opal Stupka (died 2007). Paul Revere cannot identify any witnesses with knowledge of the Policy, who nevertheless either would be dead or would have no memory of the relatively mundane history of the Policy.

[2] Section 133(1) applies to Illinois domestic insurance companies. Section 133(2) extends the financial record keeping requirements to foreign insurance companies conducting business in Illinois.

"There 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 had not become aware of their rights of action within the statutory period as measured from the time such facts occurred." *Hermitage Corp. v. Contactors Adjustment Co.*, 166 Ill.2d 72, 77, 651 N.E.2d 1132, 1135 (1995). Due to the passage of time, insurmountable evidentiary problems make it impossible to adjudicate this case with any assurance of accuracy. Ruth's claims were time barred by November 15, 1976, and cannot be revived by the discovery rule.

II. Ruth Cannot Satisfy His Burden Of Proof.

Ruth's claims not only are time barred, but also would be impossible for Ruth to prove at trial. The same evidentiary problems that make it impossible for Paul Revere to defend against Ruth's allegations 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)).

To recover under an insurance policy, Ruth must prove "the policy was in effect" at the time of his demand for payment, "performance was, in fact, due at the time of the claim," and he is the party entitled to the proceeds. See *Patrick Schaumburg Automobiles, Inc. v. Hanover Ins. Co.*, 452 F.Supp.2d 857, 867-868 (N.D. Ill. 2006). Ruth declares that he "has met all burdens to obtain a judgment on Count I of his Complaint: the Policy was issued, premiums paid, the

Insured survived to his eighteenth birthday, he was not paid and he did not discover the Policy until 2007." (Pl. Resp., pg. 12).

Ruth's only evidence of payment of premiums is an undated handwritten note and a printed Receipt dated November 15, 1949. The handwritten note states, "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). Ruth declares that the handwritten note "confirms the $800.77 was '*paid in full*'" to Paul Revere. (Pl. Resp., pg. 4) (emphasis added). Despite Ruth's misleading use of quotation marks, the note does not say $800.77 was "*paid* in full." It is impossible to determine whether the note was intended to inform Joe Stupka of the full amount of premiums payable over time for the Policy, or to confirm payment of any premiums. The Policy 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.

The handwritten note falls squarely within the definition of hearsay. The note is an out of court statement which Ruth offers to prove the truth of the matter asserted, namely, payment of premiums. See Fed. R. Evid. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). The handwritten note fails to satisfy the business record exception to the hearsay rule because Ruth, as the proponent of the evidence, cannot "lay a proper foundation establishing that the documents produced were records kept in the course of regularly-conducted activity and that 'it was the regular practice of that business to make [the document] as shown by the testimony of the custodian or other qualified witness.'" *Minemyer v. B-Roc Representatives, Inc.*, 678 F.Supp.2d 691, 711 (N.D. Ill. 2009) (quoting *United States v. Christ*, 513 F.3d 762, 769-770 (7th Cir.), *cert. denied*, 129 S.Ct. 267 (2008)). Ruth offers no evidence that the note was

"kept in the course of a regularly conducted business activity" and "it was the regular practice of that business activity" to create the handwritten note. See Fed. R. Evid. 803(6). Ruth cannot satisfy the foundational requirements for admission of the note as a record of regularly conducted business activity.

The handwritten note does not fall within the ancient records exception to the hearsay rule, which is a statement in a "document in existence twenty years or more the authenticity of which is established." Fed. R. Evid. 803(16). Nothing is known about the handwritten note other than it was found in 2007 in a filing cabinet in Opal Stupka's home. The note is undated (though Ruth speculates its date to be *circa* 1949) and the author of the note is unknown (though Ruth speculates it was written by P.G. Watters). Ruth cannot authenticate the handwritten note based on speculation about the document's date and authorship. See *Badger v. Greater Clark County Schools*, No. 03-CV-0101, 2005 WL 645152, at *4 (S.D. Ind. Feb. 15, 2005) (refusing to authenticate statements based on speculation) (citing *Palmer v. Marion County*, 327 F.3d 588, 595 (7th Cir. 2003)).[3]

Even if one assumes P.G. Watters authored the note, P.G. Watters was not authorized by Paul Revere to accept premiums or provide a handwritten note as confirmation of payment. The Notice to Policyholder on the reverse side of the printed Receipt states, "Agents have no authority to make collections on account of the Company nor to bind the Company for anything received except upon receipts for such amounts signed by the President or Treasurer." (Def. Apdx. Ex. A, pg. 9, Receipt). The handwritten note is not a receipt authorized and signed by Paul Revere's President or Treasurer. Ruth is barred from using the ambiguous handwritten note

[3] Ruth failed to introduce expert evidence authenticating P.G. Watters as the author of the note, and he failed to submit non-expert testimony establishing the genuineness of the handwriting based on "familiarity not acquired for purposes of litigation." Fed. R. Evid. 901(a) and 901(b)(2).

against Paul Revere as evidence of payment of premiums, because P.G. Watters was not authorized to issue the note as a receipt for payment.[4]

The printed portion of the Receipt further contradicts Ruth's theory of full payment of premiums. The printed Receipt reflects Paul Revere's acceptance of only the "first premium" of $54.93 "annually." (Def. LR56.1, ¶ 16).[5] Ruth argues that the anonymous handwritten figures on the Receipt—"745.54" and "$800.77"—evidence payment of $800.77 in premiums. These handwritten numbers encounter the barrier of double hearsay. Even if the Receipt is admissible as an ancient document under Rule 803(16), the ancient document exception does not apply to the handwriting on the Receipt, made by an unknown declarant, which Ruth failed to authenticate. Admission of the Receipt as an ancient document does not sweep into evidence the anonymous handwritten numbers placed on the Receipt. See *U.S. v. Hajda*, 135 F.3d 439, 444 (7th Cir. 1998) (holding that the ancient document exception "applies only to the document itself. If the document contains more than one level of hearsay, an appropriate exception must be found for each level."); *Hicks v. Charles Pfizer & Co. Inc.*, 466 F.Supp.2d 799, 806 (E.D. Tex. 2005) ("The rationale of Rule 803(16) in permitting the admission of statements in ancient documents where the author is the declarant does not justify the admission of double hearsay merely because of its presence in an ancient document.").

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[4] The handwritten note, therefore, is not an "admission by a party-opponent" under Rule 801(d)(2). That provision only applies when the statement offered against a party was made by a person "authorized by [that] party to make a statement concerning the subject," or is made by that party's agent "concerning a matter within the scope of the agency." Fed. R. Evid. 801(d)(2)(C)-(D).

[5] Ruth misunderstands one of Paul Revere's arguments regarding evidence of premiums. In his Response Ruth states, "To argue the $800.77 was paid in full for only one year's premium—for a $1,000.00 benefit—is preposterous." (Pl. Resp., pg. 4). Paul Revere never argued that Joe Stupka paid $800.77 for one annual premium. Rather, Paul Revere maintains that the Policy Application and printed Receipt reflect payment of a single annual premium of $54.93, and that P.G. Watters' handwritten note is indeterminate on the issue of the amount of premiums paid.

Ruth assumes that Joe Stupka paid 17 years worth of premiums based on hearsay, then contrives a financial justification for the lump sum payment: a 15% discount in premiums. (Pl. Resp., pg. 4). Nothing in the Policy provides for a discount if premiums are paid up front. The Policy provides only three payment options: "Premiums may be paid annually, semi-annually, or quarterly, at the respective premium rates stated on the first page of this policy…." (Def. Apdx. Ex. A, Policy, pg. 3). In the Policy Application, Joe Stupka elected to pay premiums annually. The Policy provides, "No modification of this contract shall be made except over the signature of the President or Secretary." (Def. Apdx. Ex. A, Policy, pg. 4). Ruth's premium discount theory is a purely speculative effort to rewrite the Policy's written terms; full payment of premiums was not a contractual option.

Ruth regards the Policy as a $1,000 savings bond purchased solely for his financial benefit. But the majority of the Policy's features were not for Ruth's benefit, including the provision for life insurance coverage in the event Ruth died prior to age eighteen. The life insurance feature of the Policy provided a financial benefit directly to Ruth's mother, Rose Ruth, as the Policy's named beneficiary. If Ruth died after attaining age two (but before reaching maturity), the Policy paid a $1,000 benefit to Rose Ruth. The premiums for that $1,000 indemnity, assuming death occurred at age two, totals $109.86. No rational person pays premiums 17 years in advance for life insurance coverage.[6] Paying 17 years of premiums in full completely defeats one of the key financial features of the Policy—to insure Ruth's life for the benefit of Rose Ruth.

[6] Rose Ruth was 40 years old when she gave birth to Ruth, her only child. (Def. Apdx. Ex. A, Policy Application). The National Institute of Health reports that child mortality rates increase exponentially for women age 40 or older who give birth to their first child. See http://www.nih.gov/news/pr/mar2007/nichd-08.htm.

Ruth cannot establish that premiums were paid in full, the Policy was in force on November 15, 1966 (much less in September 2007), the value of the Policy, and that Paul Revere breached the Policy. The same problems of proof pervade Ruth's claims for *quantum meruit* and unjust enrichment. Ruth's evidence that premiums were paid in full, and the Policy was in force at the time of his claim, consists of nothing more than "flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from [his] experience." *Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir. 2003) (quoting *Visser v. Packer Engineering Assoc.*, 924 F.2d 655, 659 (7th Cir. 1991)). Judgment should be entered for Paul Revere as a matter of law on Ruth's contract and quasi-contract claims in the Amended Complaint.

Finally, Paul Revere is entitled to judgment as a matter of law on Ruth's claim for "vexatious and unreasonable delay" under 215 ILCS 5/155. Paul Revere has asserted good faith arguments reflecting a bona fide dispute as to coverage. "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).

CONCLUSION

The spoliation of essentially all evidence makes it impossible to adjudicate this case and undermines the integrity of the judicial fact-finding process. 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, 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 July 19, 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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