

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Advance Trust & Life Escrow	)	File No. 18-cv-2863
Services, LTA, as securities	)	(DWF/ECW)
intermediary for Life Partners	)	
Position Holder Trust, and Alice	)	
Curtis on behalf of themselves	)	
and all others similarly	)	
situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
ReliaStar Life Insurance	)	Zoom Video Conference
Company,	)	St. Paul, Minnesota
	)	Friday, June 12, 2020
Defendant.	)	10:10 a.m.
	)	

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BEFORE THE HONORABLE ELIZABETH COWAN WRIGHT  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
**(MOTIONS HEARING)**

APPEARANCES:

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13 Proceedings recorded by mechanical stenography;  
14 transcript produced by computer.

15 \* \* \*

16 **P R O C E E D I N G S**

17 **IN COURT VIA ZOOM VIDEO CONFERENCE**

18 \* \* \*

19 THE COURT: All right. Good morning, everybody.  
20 This is the United States District Court for the District of  
21 Minnesota. The case before the court is Advance Trust  
22 versus ReliaStar, Case No. 18-cv-2863 (DWF/ECW). And we are  
23 here today on plaintiffs' motion for leave to amend their  
24 complaint due to recently revealed information, Docket  
25 No. 105.

Let me begin with appearances of counsel, but  
before I start that, I would like everybody who will be  
arguing today to raise their hand if they can see and hear

1 me. If you can see and hear me, raise your hand. Okay.

2 Mr. Leach, can you hear me?

3 Mr. Weiss, can you hear me?

4 Okay. Mr. Leach and Mr. Erbele, can you hear me  
5 or not?

6 Raise your hand, Mr. Leach, if you can hear me.

7 Who is -- who is -- I'm trying to think who -- is  
8 there someone here who can quickly communicate with  
9 Mr. Leach and let me know if he can or cannot hear me?

10 MS. ZUÑIGA: Your Honor, I can try giving him a  
11 call, if you'd like.

12 THE COURT: I'm chatting with him right now.

13 Mr. Leach, are you able to hear me? Okay.

14 That would be great, Ms. Zuñiga.

15 MS. ZUÑIGA: Your Honor, he was having some  
16 feedback issues, so he tried to connect via phone. He  
17 thinks maybe he's in some sort of hold. Maybe the court  
18 could let him in. But he also said we could just proceed  
19 without him if we want to get started.

20 THE COURT: Okay. Thank you, Ms. Zuñiga. I did  
21 just admit his phone, so let us see now if he can hear me or  
22 not.

23 Can you hear me, Mr. Leach? Raise your hand if  
24 you can. All right.

25 Well, hopefully he'll be able to hear soon. If

1 not, we'll go ahead anyway since he won't be arguing.

2 MR. LEACH: I can hear you now. Can you hear me,  
3 Judge Wright?

4 THE COURT: Yep, Mr. Leach, I can. Thank you very  
5 much.

6 MR. LEACH: Okay. My sincerest apologies. I'm  
7 going to go on mute now.

8 THE COURT: Okay. We're all working with the  
9 technology the best that we can, so this is not the worst  
10 thing that I've had happen so far in a Zoom hearing, I can  
11 tell you all that, so --

12 And I will say to that end, as I tell people in  
13 every hearing and teleconference I'm having now, I know that  
14 some of you may be working from your home. Some of you I  
15 can tell are working from your offices. I know people may  
16 have situations at home with small children, dogs, parrots,  
17 cats, spouses and other noise-making entities. So I know  
18 that we're all doing the best we can. And if there's a  
19 little background noise, I'm not going to get fussed about  
20 it. That is why I ask that everybody mute as much as  
21 possible, though, just to make things easier for our court  
22 reporter.

23 To that end, we do have a court reporter who is on  
24 this Zoom call as well, although I believe he's muted his  
25 video and so on, so you can't see him, but he is --

1 or excuse me, she -- but she is in fact recording. So  
2 although this hearing is taking place via Zoom, I want to be  
3 very clear that the official record of this proceeding will  
4 be the transcript and the court reporter's recording, not  
5 this Zoom video.

6 Let me go ahead with appearances of counsel. And  
7 what I would like to do to minimize the muting and unmuting  
8 is simply have counsel who will be arguing make their  
9 appearances and introduce anybody else who is on -- on the  
10 Zoom hearing right now.

11 So let us begin with counsel for the plaintiff.

12 MS. ZUÑIGA: Good morning, Your Honor. This is  
13 Krisina Zuñiga from Susman Godfrey. I will be arguing this  
14 morning. And we also have our local counsel on the line. I  
15 believe we have both Mr. Leach and Mr. Erbele. And we have  
16 Mr. Ryan Weiss and Mr. Steven Sklaver from my firm joining  
17 as well.

18 THE COURT: Okay. Thank you.

19 And counsel for the defendants.

20 MR. LEIGH: Good morning, Your Honor. Michael  
21 Leigh on behalf of ReliaStar Life Insurance Company. Also  
22 on the call is our cocounsel Doug Elsass and in-house  
23 counsel for ReliaStar John Longwell.

24 THE COURT: Okay. All right. Thank you.

25 And I do want to note that we do have a few or at

1 least one member of the public who is listening in as well  
2 to the proceeding today. Just as any proceeding would be  
3 available to the public if we were in a courtroom, of  
4 course, our hearings via video are also available to the  
5 public. And the public is available on the telephone  
6 bridge. They have been muted. I'm calling it a virtual  
7 gallery right now.

8 And so I will just remind everybody and the public  
9 that, of course, they won't be arguing, but they may observe  
10 and that pursuant to General Order No. 6, which was issued  
11 by Chief Judge Tunheim on March 31st, 2020, members of the  
12 public and media are strictly prohibited from recording or  
13 broadcasting any hearing in whole or in part in any fashion.

14 All right. So let's talk a little bit about  
15 logistics, and then we can move to the motion.

16 We do have a court reporter, but because there can  
17 be issues with lag and so on, I do want to encourage  
18 everybody to talk a little (audio distortion) as you  
19 normally would -- I'm going to do the same -- and to leave a  
20 little gap between sentences to give me the chance to ask  
21 questions without making the transcript too broken up.

22 To that end, what I typically do when I'm wanting  
23 to ask a question is I might kind of wave my hand or my  
24 pencil or something like that to sort of get your attention,  
25 so you can see that I'm trying to break in, because, of

1 course, in the courtroom you would probably see me leaning  
2 forward or something like that, and you can't see that right  
3 now. So there will be a little visual cue as well. So do  
4 try to keep an eye on that as well.

5 And as I said, do try to speak clearly and slowly.

6 If we do end up in a situation where the court  
7 reporter gets ejected out of Zoom -- that's happened to me  
8 earlier this week -- we will just take a pause until she's  
9 able to dial back in.

10 And I also would say that anybody who is not  
11 arguing should mute their device to minimize background  
12 noise.

13 I think the other point I wanted to make is that  
14 this is, of course, a formal court proceeding,  
15 notwithstanding the fact that we're on video today, and I  
16 know that everyone in this case would behave professionally  
17 in any event, but just a reminder that, of course, this is a  
18 formal proceeding.

19 And I will also caution you -- and this is based  
20 on a couple of my other Zoom incidents -- that we can see  
21 each other's faces a lot better than we normally could, and  
22 I would just caution you to remember that keeping your  
23 countenance as professional as possible is probably --  
24 probably a good idea. Just a little head's up as to that.  
25 I think we're all working on our poker faces in this new

1 pandemic era.

2 So with that in mind, let's go ahead and get  
3 started with the motion. This is plaintiffs' motion, of  
4 course, so, Ms. Zuñiga, I will -- Zuñiga, excuse me -- I  
5 will let you proceed.

6 MS. ZUÑIGA: Thank you, Your Honor.

7 I thought I might be able to share some slides.  
8 It doesn't seem like I have that capability, but they were  
9 emailed in advance of the hearing. I might reference them  
10 during the argument.

11 THE COURT: Okay. Let me just check on something  
12 here. Yeah, I think we have not given people the ability to  
13 share slides without knowing about it in advance, because we  
14 are trying to avoid Zoom bombing. So I do have the  
15 PowerPoint.

16 Does opposing counsel have the PowerPoint?

17 MS. ZUÑIGA: I sent it to opposing counsel as  
18 well. I believe I did --

19 MR. LEIGH: I'm not sure. Let me check, Your  
20 Honor.

21 THE COURT: Okay, Mr. Leigh. I will give you a  
22 minute to look for that.

23 MR. LEIGH: Yeah. I'm sorry. I --

24 THE COURT: I think it was sent this morning.

25 MR. LEIGH: Oh, it does -- it does look like, Your

1 Honor, that I have that. It was sent shortly before the  
2 call. I see that now.

3 THE COURT: Okay. All right, Ms. Zuñiga. If you  
4 want to go ahead and proceed.

5 MS. ZUÑIGA: Thank you.

6 Your Honor, plaintiffs seek leave to amend their  
7 complaint because of information ReliaStar only revealed  
8 less than three months ago that shows another way it is  
9 overcharging some of its universal life insurance policy  
10 customers, including members of the current proposed class.

11 As background, I'll point you to slide 2.  
12 Universal life insurance policies are like the more familiar  
13 term life insurance policies, except, instead of paying a  
14 fixed rate for a set term, they're designed to last for the  
15 life of the insured so long as the account has enough funds,  
16 in this illustration water, to cover recurring monthly  
17 deductions. Those deductions are illustrated in this image  
18 as the insurance costs coming out of the faucet at the  
19 bottom. So as long as there's enough money in the account  
20 to cover these monthly deductions, the policy stays in  
21 force.

22 Cost of insurance and rider costs are two such  
23 deductions. If you look at the illustration on slide 3 of  
24 the presentation, it shows that these are both monthly  
25 deductions that are separate. You have the cost of

1 insurance deduction, and that's often abbreviated as COI,  
2 and the rider cost deduction.

3 From the beginning this case has been about  
4 ReliaStar's failure to adjust its COI rates as required  
5 under the proposed class policies based on improved  
6 mortality. Mortality is improving, people are living  
7 longer, but the COI charge, which is contractually required  
8 to be based on the company's mortality expectations, has not  
9 been decreased.

10 Three months into this case, and that was over a  
11 year and a half ago, plaintiff Advance Trust requested  
12 detailed information on the deductions ReliaStar has been  
13 taking from the relevant insurance accounts, including its  
14 COI and rider deductions. Riders are optional guarantees an  
15 insured can add to his or her policy.

16 Here -- and I'll point you to slide 4 -- excuse  
17 me -- slide 5. Advance Trust's policy includes a waiver of  
18 premium, and that's often abbreviated as WP rider. This  
19 rider provides that monthly premium charges will be waived  
20 if the insured suffers a total disability. The monthly cost  
21 of this rider is set out in a table in the policy and  
22 changes based on the insured's attained age. And, again,  
23 you can see this on slide 5. The table was also included in  
24 plaintiffs' memorandum in support of their motion. So  
25 Advance Trust asks for the rates for this deduction in

1 addition to the COI rates ReliaStar has been charging  
2 monthly.

3 A year after Advance Trust requested information  
4 from ReliaStar on its monthly deductions and three  
5 variations of interrogatory answers and numerous emails  
6 later, all of which were submitted in support of our motion,  
7 the numbers ReliaStar was providing and swearing were  
8 accurate repeatedly were not adding up.

9 Then a couple of months ago on March 26th -- and  
10 the relevant email is on slide 6 -- plaintiffs were finally  
11 able to at least partially figure out why the numbers were  
12 not adding up. And that's because ReliaStar produced a  
13 spreadsheet after plaintiffs' repeated inquiries about this  
14 issue revealing that ReliaStar has been adding an extra  
15 15 percent to both the COI and rider rates it uses to  
16 calculate monthly deductions.

17 And if you look at slide 7, and we have this  
18 natively, if it would help Your Honor, you can see that when  
19 you click on the cell for the WP COI -- again, WP stands for  
20 waiver of premium -- there's the additional 15 percent.

21 We, of course, asked about this issue, and weeks  
22 later ReliaStar explained the source of the COI bump, and  
23 that's on slide 8 of the presentation.

24 THE COURT: Ms. Zuñiga.

25 MS. ZUÑIGA: Yes.

1 THE COURT: With respect to the -- going back to  
2 slide 7, is there also a 15 percent bump added to the base  
3 COI?

4 MS. ZUÑIGA: Yes, Your Honor. If you click on the  
5 base COI cell or the WP COI cell, they both show that same  
6 extra 15 percent in the parenthetical.

7 THE COURT: Okay. I noticed in your proposed  
8 second amended complaint that there was -- there were  
9 allegations that the rider rate increase may have been in  
10 fact potentially more than 15 percent. Is there a basis for  
11 that allegation right now?

12 MS. ZUÑIGA: Yes, Your Honor. And that's why I  
13 said earlier that we at least partially figured out why the  
14 numbers weren't adding up. The numbers still are not adding  
15 up completely. And so we're trying to figure out the source  
16 of the discrepancies, but for many of the policies the  
17 15 percent bump explain the discrepancy.

18 THE COURT: Okay. But you have policies right now  
19 where the bump for the WP rider is more than 15 percent or  
20 appears to be --

21 MS. ZUÑIGA: Yeah.

22 THE COURT: -- or the numbers are? Okay.

23 MS. ZUÑIGA: So within a month and a few days  
24 after ReliaStar formally produced revised COI rate tables,  
25 plaintiffs told ReliaStar that they intended to amend their

1 complaint to add a breach of contract claim based on  
2 ReliaStar's inflated rider rates. To plaintiffs' surprise,  
3 given that the situation is entirely one of ReliaStar's  
4 creation, ReliaStar said it would oppose amendment, and  
5 that's why we are here today.

6 THE COURT: And I'd like to understand, first of  
7 all, from the plaintiffs' perspective, which state law do  
8 you think applies to the statute of limitations question  
9 that has been -- or defense, I should say, that is being  
10 raised by the defendant?

11 MS. ZUÑIGA: For plaintiff Advance Trust's policy,  
12 Your Honor, that would be Texas law. It will vary depending  
13 on the proposed class what policyholder is at issue, but for  
14 Advance Trust the policy was issued in Texas and we believe  
15 that that statute of limitations governs.

16 THE COURT: Okay. Do you think there's a  
17 difference in outcome if it's Texas or Minnesota law or any  
18 other state?

19 MS. ZUÑIGA: With respect to this motion, no, not  
20 at all. I think it only affects the damages that would be  
21 calculated and how far back those damages would be added.

22 THE COURT: Okay. And then I'd like to  
23 understand -- I've reviewed your proposed second amended  
24 complaint. And what I would like to understand is, from you  
25 today, is what is specifically the nature of the breach that

1 is now being alleged in the proposed second amended  
2 complaint?

3 MS. ZUÑIGA: Yes, Your Honor. The nature of the  
4 breach is that ReliaStar is not following the contractual  
5 language in its policies by charging policyholders the rider  
6 rates that are specifically set forth in those policies.  
7 Instead, ReliaStar is charging rates at least 15 percent  
8 higher than those that are included in the policies.

9 And I'll point you to -- let me pull up the  
10 relevant slide -- slide 12 of the presentation. And this  
11 shows the language that's at issue. In the policy itself it  
12 says, on the form that explains the rider, that the monthly  
13 cost for this rider is shown in the table of monthly cost  
14 for rider per \$1,000, and below it is the table that we've  
15 been discussing.

16 THE COURT: Okay.

17 MS. ZUÑIGA: So two issues -- two rules -- excuse  
18 me, Your Honor -- are at issue here. One is Rule 16, and  
19 it's the good cause standard to amend the schedule, which  
20 ReliaStar does not dispute plaintiffs satisfy, and second is  
21 Rule 15, and that's the general rule that the court should  
22 freely grant leave to amend when justice so requires, which  
23 ReliaStar argues should not be followed here for two  
24 reasons, one, alleged futility of the amendment and, two,  
25 alleged undue prejudice to ReliaStar. Thus, only two

1 questions are presented to the court today: One, Would  
2 amendment be futile, and, two, Would amendment unduly  
3 prejudice ReliaStar and outweigh the prejudice to  
4 plaintiffs. The burden on both is ReliaStar's, and the  
5 answer to both is no.

6 On futility, ReliaStar says that amendment is  
7 futile based on an allegation that, one, does not appear in  
8 the proposed complaint, two, has no evidentiary support and,  
9 three, is at a minimum disputed. Your Honor, I just want to  
10 be clear that resolving this question is entirely  
11 inappropriate on a motion for leave to amend, where the  
12 incredibly high bar is that a claim must be, quote, clearly  
13 frivolous.

14 Plaintiffs' proposed new claim is not frivolous at  
15 all. It's apparent and clear-cut based on ReliaStar's own  
16 numbers. And it has nothing to do with a 1989 memo, as  
17 ReliaStar claims it unquestionably does. A 1989 memo -- and  
18 this is to address a point raised in ReliaStar's  
19 sur-reply -- is not what prompted plaintiffs' discovery of  
20 ReliaStar's additional overcharging. The formula that we  
21 discussed earlier, buried themselves in the March 26th  
22 spreadsheet, is what prompted this discovery.

23 The memo that ReliaStar's presumably talking  
24 about, which it curiously has not presented to the court, is  
25 a total of one sentence and it contains no mention

1       whatsoever of rider rates. The subject of the memo is COIs.  
2       It's about COI rates. And COI rates, a different provision  
3       of the policies as ReliaStar repeatedly points out, are not  
4       why plaintiffs seek leave to amend. This is not an instance  
5       of artful pleading.

6               THE COURT: And let me just clarify that. I think  
7       you've already said this. But the 1989 memo that everyone  
8       is talking about in their briefs is actually not a part of  
9       the record; is that right?

10              MS. ZUÑIGA: That's right, Your Honor. I'm happy  
11       to send it to the court. It was marked "confidential" by  
12       ReliaStar, so we chose not to include it as an exhibit to  
13       our motion. Again, we find it curious that ReliaStar did  
14       not choose to submit it themselves, but that's why it was  
15       not included in support of our motion.

16              THE COURT: Okay.

17              MS. ZUÑIGA: At this stage the court cannot  
18       consider evidence outside the pleadings; but even if it  
19       could, when ReliaStar first started overcharging the  
20       proposed new classes for riders is irrelevant. The court  
21       need look no further than the very case ReliaStar cites, and  
22       that's *Hamann*, 808 N.W.2d 828, where the Minnesota Supreme  
23       Court explained that where a contract involves an ongoing  
24       duty each violation is a separate and distinct breach.

25              ReliaStar accuses plaintiffs of ignoring the

1 relevant law. ReliaStar is wrong. It is the one that  
2 ignored and failed to distinguish the case law, including  
3 *Levin*, 441 N.W.2d 801, which the Minnesota Supreme Court  
4 held involved repeated violations of an ongoing contractual  
5 duty, each of which had a separate accrual date. And, Your  
6 Honor, that's what we have here. We have an ongoing duty  
7 for ReliaStar to charge policyholders the rider rates that  
8 are set forth in the policy, and it's breaching that duty  
9 every month for years when it charges rates 15 percent  
10 higher than that. Each of those breaches has its own  
11 accrual date. And, therefore, plaintiffs' claim is not  
12 time-barred.

13           Instead, ReliaStar cherry-picks the limited case  
14 law it likes, like the three sentences it relies on from an  
15 unpublished Texas appellate case that addresses the  
16 affirmative defense of ratification, while also saying out  
17 of the other side of its mouth that Minnesota law applies  
18 for limitation purposes. And, in any event, we cite this  
19 case in our reply Texas law holds that recurring overcharges  
20 are separate claims for limitations purposes. And that case  
21 is *Garden Ridge*, Your Honor.

22           As to its second alleged basis for denial of  
23 leave, ReliaStar argues that it would be prejudiced by its  
24 own delays and its own business structure. ReliaStar's own  
25 admitted, repeated discovery errors and delays and its

1 decision to pawn off administration of some of its policies  
2 to a third party do not satisfy its burden of proving undue  
3 prejudice. Delay alone is not a sufficient reason for  
4 denying leave. And that's *Buder*, 644 F.2d 690. And that is  
5 especially true when the delay is entirely the opposing  
6 parties' doing. And discovery doesn't close based on a  
7 stipulated extension until nine months from now. The cases  
8 ReliaStar cites, Your Honor, have to do with eve of trial  
9 motions for amend, motions for leave to amend, but that's  
10 not what we have here.

11 THE COURT: Let me ask you about the schedule. If  
12 I were to grant this motion, would the class certification  
13 deadline need to be pushed out?

14 MS. ZUÑIGA: Well, the parties have already  
15 reached an agreement to push the class certification  
16 deadline by three months, Your Honor. The current deadline  
17 for plaintiffs' motion for class certification is July 24th.  
18 So that would be pushed three months back. It's our  
19 position that it doesn't need to be pushed farther than  
20 that, but we would not oppose it being pushed farther than  
21 that, if that's something ReliaStar would like.

22 THE COURT: Okay. And that three-month agreement  
23 was based on deposition availability; is that right?

24 MS. ZUÑIGA: Yes, Your Honor.

25 THE COURT: Okay. And then I have a curiosity

1 about the discovery that would be required if this motion is  
2 granted. On page 9 of your reply brief -- I think that's  
3 where it was -- plaintiffs say that the discovery they need  
4 would basically be, I think, the insurance policies or  
5 representative samples showing what the -- what the rider  
6 rates should have been in your view. Right? That's one  
7 piece?

8 MS. ZUÑIGA: That's correct.

9 THE COURT: Okay. And then the second piece was  
10 policy-level data, and then you enumerated some examples of  
11 what that would be. I'm trying to understand what the scope  
12 of "policy-level data" means. Are we talking about tens of  
13 thousands of pages of individuals' specific charges or are  
14 we talking about something else?

15 MS. ZUÑIGA: Yeah, the data we're talking about is  
16 like the March 26th spreadsheet that has the rider rates  
17 that were actually applied, the charges that were deducted  
18 as a result of those rates being applied and then the  
19 attained ages. So it would look like that spreadsheet, but,  
20 of course, for policyholders beyond Advance Trust's policy.

21 THE COURT: What do you mean by that? And so  
22 expanding, I mean, that sounds like a number of additional  
23 people; is that right?

24 MS. ZUÑIGA: It would be the information for  
25 anyone who falls into the new proposed class definition.

1 THE COURT: Okay. So you are seeking this  
2 policy-level data on a person-by-person basis?

3 MS. ZUÑIGA: Yes, Your Honor.

4 THE COURT: Okay.

5 MS. ZUÑIGA: Your Honor, with respect to  
6 prejudice, again, we just say that the delay is ReliaStar's  
7 and that alone is not sufficient for a reason to deny leave  
8 to amend.

9 The other thing ReliaStar points to is, as you  
10 were just asking about, is the prejudice of the cost of  
11 discovery. And denial of leave to amend is not appropriate  
12 either where the alleged unfair prejudice is merely the cost  
13 of discovery. The cite for that, Your Honor, is *Brown*, 2020  
14 WL 1164594. Those are the only grounds for prejudice that  
15 ReliaStar has alleged, delay and cost. And they are even  
16 less persuasive in this case where the delay is completely  
17 ReliaStar's fault, and the burden ReliaStar complains about  
18 is caused by its business decision to outsource  
19 administration of a group of its policies.

20 In any event, as we discussed, the additional  
21 discovery that will be needed to be conducted is limited to  
22 just two categories of documents. There's plenty of time  
23 for the parties to conduct this discovery with a stipulated  
24 three-month extension. Six months remain before discovery  
25 is to be substantially completed, and ReliaStar's class cert

1 opposition brief is due also six months from now with that  
2 stipulated extension, and nine months with the extension  
3 remain until discovery closes.

4 Plaintiffs ask the court to follow the guidance of  
5 Rule 15 and give leave when justice so requires, as it does  
6 here.

7 Thank you, Your Honor.

8 THE COURT: Okay. Thank you.

9 I do have one additional question for you at this  
10 time, and then I'll give you the opportunity for a reply.  
11 From your briefing, it's not clear to me whether plaintiffs'  
12 position is that defendant's discovery responses were  
13 actually false or if they were incorrect. Do you see the  
14 distinction?

15 MS. ZUÑIGA: If they intentionally misled us  
16 versus a mistake? Is that what Your Honor is asking?

17 THE COURT: Yes.

18 MS. ZUÑIGA: No. We agree that it appears it was  
19 a mistake. We don't accuse ReliaStar of intentionally  
20 misleading the plaintiffs.

21 THE COURT: Okay. All right. Thank you,  
22 Ms. Zuñiga. And if you could mute as well. Thank you,  
23 ma'am.

24 Okay, Mr. Leigh.

25 MR. LEIGH: Thank you, Your Honor.

1           It's not the case that plaintiffs agree that the  
2           standard for modifying the schedule in order to allow an  
3           amendment out of time has been satisfied. We do address  
4           that argument in our opposition brief and oppose the idea  
5           that ReliaStar should not have been able to rely on the  
6           schedule that has been long set in this case for the  
7           deadline by which parties would amend the pleadings to add  
8           parties or claims to the case. And Advance Trust admits  
9           that they are looking to add an entirely different claim  
10          based on an entirely different theory into this case long  
11          after the deadline has passed.

12           To Your Honor's point in the last question to  
13          Ms. Zuñiga, it is absolutely prejudice where discovery  
14          errors that both sides agree were inadvertent through the  
15          parties' good faith efforts of pursuing discovery on the  
16          only pleaded claim for the past 19 months would reset the  
17          parties on a new course of discovery that plaintiffs concede  
18          would involve thousands of individualized calculations about  
19          policy charges, a search back for records to the 1980s  
20          supporting the rate increase to the rider. Those are  
21          exactly the kinds of prejudice of cases that we cite.

22           And I would point specifically to the Southern  
23          District case cited at the end of our briefs, the antitrust  
24          case, where, while that amendment certainly came closer to  
25          the trial date than what plaintiffs are proposing here, the

1 court's focus was not on why the information was changing,  
2 why the claim was changing, but the fact that it would  
3 unquestionably set the parties back on a new round of  
4 discovery. New search terms would have to be negotiated,  
5 tested. Documents would be collected and reviewed and  
6 produced based on those search terms.

7 As the plaintiffs concede, they would be asking  
8 ReliaStar to go through thousands of policies, a universe  
9 that we don't have any idea, frankly, what the number of  
10 people that would be included in it at this stage, in order  
11 to run these line-by-line calculations presumably over a  
12 period of many years on questionably over thousands of  
13 policies in order to provide them the narrow discovery, the  
14 purportedly narrow discovery that they think would be  
15 required in order to pursue a brand-new claim 19 months into  
16 the case, but --

17 THE COURT: Let me -- I'm trying to make sure my  
18 hands are on the video here. Let me -- let me ask you a  
19 couple of questions, because you said a lot there and I want  
20 to unpack it.

21 So, first of all, defendant is or is not making a  
22 Rule 16 argument? Are you saying there is not good cause to  
23 extend the deadline to amend the pleadings?

24 MR. LEIGH: That's correct, Your Honor. We don't  
25 think that there's good cause to amend the deadline for

1 adjusting the pleadings to add parties or claims.

2 The fact of the matter is that the parties have  
3 extended the schedule numerous -- or several times as a  
4 specific, you know, specifically based on the fact that  
5 discovery was difficult, that there were errors, that the  
6 parties were working in good faith to sort through the  
7 inadvertent errors. And at no time did the plaintiffs seek  
8 to push out the deadline for amending the pleadings, which  
9 means that the parties and the court relied, as they're  
10 entitled to, on the deadline that was set as being the  
11 deadline by which no more changes to the case would be made.  
12 And it's not the case that --

13 THE COURT: But typically, typically the standard  
14 for good cause is whether the information that the party  
15 that is seeking to extend the deadline -- whether that  
16 information was available to them and whether they  
17 reasonably could have proposed the extension earlier.

18 And so I think what I'm struggling with with your  
19 good cause argument is that there doesn't appear to be a  
20 dispute that unintentionally the information that was  
21 provided with respect to these rates wasn't accurate until  
22 March of -- March 26th of 2020.

23 Do I have that wrong or is it -- it looks like the  
24 interrogatory response, again, unintentionally, was  
25 inaccurate. Is that not the case?

1           MR. LEIGH: Well, what changed about the discovery  
2           is the COI rate table applicable to several of the policies,  
3           not the actual policy-level data that ReliaStar produced  
4           many months ago showing the charges that were actually  
5           applied against the policy. So, in other words, you know,  
6           the plaintiffs could have done exactly what they did all  
7           along, which is to compare the statements annually received  
8           showing the policy charges against the rate tables and  
9           discovered that there -- that there was a discrepancy in the  
10          rate table and the charges between the policy-level data  
11          that we provided as to the actual charges and the charges  
12          recorded in the statements.

13                 Now, what they asked for, and received this year,  
14          was specifically for us to manually create a spreadsheet  
15          that typed in the formulas used for calculation of the rider  
16          charges, the base COI, for their purposes. Now, they  
17          originally asked us to do that across thousands of policies.  
18          We objected to that on burden grounds, and we agreed to  
19          produce the plaintiffs' policy or their putative policy,  
20          right, and ten other sample policies of plaintiffs'  
21          selection. All right. So that's the new information that's  
22          been provided, which I think is a little different than they  
23          haven't had any information in discovery until recently that  
24          showed them the discrepancy in the claims. I apologize.

25                 THE COURT: So at what point did defendant produce

1 Excel spreadsheets or charts or whatever it is that actually  
2 broke out the WP rider charge from the overall cost of  
3 insurance, such that they were separate columns in the  
4 table?

5 MR. LEIGH: The table that plaintiffs showed was  
6 produced for the first time in March. Now, that was in  
7 connection with a request made in March.

8 THE COURT: Okay. And was --

9 MR. LEIGH: Not a request made many months ago.  
10 Excuse me.

11 THE COURT: Okay. And I know this is tricky. And  
12 then -- and then with regard to the earlier productions, is  
13 it the case that the charges that were shown and whatever  
14 was produced were -- was some kind of combined cost of  
15 insurance plus rider charge?

16 MR. LEIGH: I believe that the charges are broken  
17 out in the policy-level data, although they are reflected as  
18 a combined number in the annual statements.

19 THE COURT: And when was the policy-level data  
20 produced that showed the WP rider charges?

21 MR. LEIGH: Well, the policy-level data has been  
22 produced on a rolling basis starting in May, April or May of  
23 last year. The difficult portion of the policy-level data  
24 has been that coming from the third-party administrator, and  
25 that did -- that was produced on a rolling basis over some

1 later ensuing months, so August, September, October, of last  
2 year.

3 THE COURT: So the WP rider data was produced last  
4 fall, you think, as a separate component?

5 MR. LEIGH: I couldn't tell you when the very  
6 first spreadsheet of policy-level data was produced that  
7 would have related to the Gibraltar policies, but the full  
8 scope of the Gibraltar data was not received by ReliaStar  
9 until late in the summer and early last fall and produced to  
10 the plaintiff ahead of what had been a settlement conference  
11 scheduled in December. That conference was postponed, in  
12 part, due to continuing discovery productions and requests  
13 by plaintiffs.

14 THE COURT: Okay. And then there's been a lot of  
15 discussion about what happened in 1989. And I don't have  
16 the memo before me, but I'm trying to understand the basis  
17 for defendant's allegation at this time that those WP rider  
18 charges actually increased in the late '80s.

19 MR. LEIGH: There's no dispute as to that. I  
20 understand the plaintiffs are disagreeing that the 1989 time  
21 line is the appropriate one, but the WP rider breakouts were  
22 provided in conjunction with this 1989 rider as well as  
23 early policy-level statements for the Gutierrez policy, the  
24 one that Advance Trust purports to own, is 1989 and 1990  
25 annual statements, it's a package, showing that the increase

1 by 15 percent began in 1990, in February of 1990, as to the  
2 main plaintiffs' policy and that that was based on the  
3 decision made in July of 1989 to increase the rates by  
4 15 percent starting on each policyowner's next policy  
5 anniversary. Now, Mr. Gutierrez's next policy anniversary  
6 would have been February 1990. That's the first month in  
7 which Mr. Gutierrez was charged 15 percent more for the  
8 rider rate. It is one hundred percent apparent, Your Honor,  
9 from these documents that the charge dates to the 1989-1990  
10 period.

11 But, in any event, the plaintiffs concede that the  
12 charge extends far past either a six-year or a four-year  
13 limitations period by the fact that they calculate in their  
14 complaint, on the face of the complaint, that this charge  
15 has been incurred at least eight years back. They calculate  
16 damages in paragraph 30 of the complaint, proposed  
17 complaint, that shows that. So, you know, whether the claim  
18 accrued in 1989, 1990 or eight years ago or at least eight  
19 years ago really matters only in terms of what state's  
20 limitations period applies.

21 Now, I hear the plaintiffs today to be saying that  
22 they believe that Texas's limitations period applies. Now,  
23 I presume that that's because they either -- you know, I  
24 presume that's because, you know, they are treating anything  
25 that happened in 1989 and 1990 as obviously time-barred

1 under the Minnesota limitations period and they want to  
2 trace the providence of their contact -- of their conduct to  
3 sometime after August 1, 2004, which is when Minnesota's  
4 barred-only statute would require that Texas law applies.  
5 Right? So I'll --

6 You know, I think based on that -- the idea of  
7 talking about whether the Minnesota case *Hamann* or the  
8 Minnesota case *Levin* applies, which is really the basis of  
9 their argument, doesn't matter. Those are cases about  
10 Minnesota's limitations law. If plaintiffs and defendants  
11 both agree that Texas limitations law applies, then we don't  
12 have to get into the differences between *Hamann* -- the  
13 *Hamann* holding and the *Levin* holding.

14 Now, ReliaStar certainly believes that the case is  
15 closer to *Hamann* than it is to *Levin*. I can explain why, to  
16 the extent the court wants to know more about that, but what  
17 I would focus on is the Texas limitations period, since both  
18 sides seem to agree that that's the standard that ought to  
19 govern these claims.

20 THE COURT: Okay. So let me -- I'll check in with  
21 Ms. Zuñiga about that. But from the defendant's  
22 perspective, your position is that Texas -- the Texas  
23 statute of limitation applies?

24 MR. LEIGH: Well, let me be more precise about  
25 that. Defendant's position is that the decision, the

1       conduct that occurred obviously occurred as of  
2       February 1990. The challenge here is to a change in the  
3       rate table in the rider. The change to the rate table in  
4       the rider was made as of February 1990, when Mr. Gutierrez  
5       was first charged the increased rider rate. So ReliaStar's  
6       position is that the claim accrued under Minnesota law,  
7       because it would be prior to the borrowing statute, and was  
8       barred six years later.

9               Now, if plaintiffs, you know, if plaintiffs argue,  
10       as they do, that Minnesota law allows a separate cause of  
11       action to accrue for each monthly charge assessed --  
12       ReliaStar, first of all, thinks that's a different claim  
13       than what's been alleged; but even if that applies, then the  
14       latest individual breach that plaintiffs could allege would  
15       be July 31st, 2004, as pertains to Minnesota's limitations  
16       law. In other words, from February 1990 to July 31st, 2004,  
17       the claims would be governed by Minnesota's limitations law.  
18       The latest possible claim accruing under Minnesota's  
19       limitations law would be July 31, 2004, and time-barred six  
20       years later on July 31, 2010.

21               To the extent that -- that they argue Texas law,  
22       it is based only on the idea that the contract can be  
23       breached repeatedly every month as the charge is assessed.  
24       ReliaStar disagrees with that and thinks Minnesota's law  
25       forecloses the claim. But even if we get into the Texas

1 law, that means that the first time the policy was charged  
2 in either August of 2004 or September of 2004 -- and I don't  
3 know based on the exact date it's charged or if it could  
4 have been August 1, 2004, which would be the Minnesota  
5 statute of limitations, or August 2, 2004, but let's just  
6 say it's any charge after August 2, 2004, would accrue the  
7 statute of limitations for purposes of Texas law.

8 And we have two cases factually on point with  
9 premium increases and payments made on life insurance  
10 contracts in the *Beavers* case and the *Howard* case cited in  
11 our briefs under Texas law that say there is no doctrine of  
12 Texas limitations period as to insurance contracts that  
13 allows a breach of contract claim to accrue each month anew  
14 as the policy is charged. Both of those cases deal with the  
15 decision made years prior that plaintiffs in those cases  
16 only complained about years after having been assessed the  
17 increased premium or having their policy deducted by some  
18 improper amount, allegedly improper amount, and in both  
19 cases, the Fifth Circuit, on the one hand, and the Texas  
20 Appellate Court, on the other hand, barred those claims  
21 based on limitations grounds.

22 THE COURT: But I'm not sure that I'm reading  
23 those cases the same way that you are, because when I look  
24 at *Howard*, for example, the unpublished Court of Appeals  
25 case from Texas, the policy at issue -- the plaintiff's

1 argument was that the policy at issue allowed only the  
2 policyholder to change the premiums. So the breach that was  
3 alleged there, when I read the case, is the fact that the  
4 insurance company then increased the premium. In other  
5 words, his breach was that they violated their promise, in  
6 his view, that only he could increase the premium. And to  
7 me that sounds different than what I hear plaintiffs  
8 alleging in this case, which is this contract had a  
9 continuing duty to charge these rates, which changed each  
10 year depending on the person's age, and every time they  
11 charged more than that rate it was a breach.

12 So I'm not sure that -- when I read *Howard*, I  
13 think the alleged breaches are quite different because  
14 you've got a promise that we won't increase your rates, only  
15 you can do that -- premiums, excuse me -- and then that's  
16 not what happened. And here you have a we have an ongoing  
17 promise to only charge a particular rate each year,  
18 depending on your age and so on. But I am having argument  
19 to let you tell me why you think *Howard* is closer to the  
20 facts of this case.

21 MR. LEIGH: Well, respectfully, Your Honor, I do  
22 think that the cases are more analogous, but, you know, the  
23 fact of the matter is the challenge here is to a rate table  
24 that plaintiffs allege was set at one point in time when the  
25 policy rider was developed and that the promise was this

1 rate table would never be changed. The fact of the matter  
2 is as of February 1990 that rate table had been changed.  
3 All of the rates in the rate table were changed at one  
4 moment in time by the same percentage.

5 It's not the case that ReliaStar made numerous  
6 different adjustments to the rate table over time. Right?  
7 They made one change that resulted in a higher premium that  
8 would be paid over the life of the policy from that point  
9 forward, which I think is like the *Howard* case where a  
10 decision to increase premiums made on day one would have  
11 affected the premiums that were paid thereafter. And the  
12 court said it's not the case that every time you pay a  
13 premium you have a new claim that the premium was too high.  
14 Your claim that the premium's too high was when they changed  
15 the basis on which they were going to calculate the premium  
16 going forward. Excuse me, Your Honor.

17 THE COURT: No. I will let you -- I want to let  
18 you finish.

19 So your view is that the promise that was  
20 allegedly broken is a promise that this rate table shown on  
21 this page of your policy will apply going forward? That's  
22 your view as the alleged breach?

23 MR. LEIGH: That's correct, Your Honor.

24 THE COURT: Okay. I understand your position.

25 MR. LEIGH: Okay. That's correct, Your Honor.

1           THE COURT: Okay. And then turning to the -- I  
2 think it's the Beaverston -- *Beavers* case, *Paul Beavers*  
3 *versus Merchant*.

4           MR. LEIGH: Yes, ma'am.

5           THE COURT: I guess -- I guess when I look at that  
6 I have the same concern. Well, I have several concerns  
7 about the reliance on this, because in this case there was  
8 no dispute as to whether the statute of limitations would  
9 apply or not. So I'm not seeing anything in *Beavers* where  
10 the court -- the Fifth Circuit actually made any kind of  
11 holding as to a continuing obligation or so on. When I look  
12 at page 439, it appears that there was agreement that unless  
13 the discovery rule applied that the statute of limitations  
14 barred the claim. So if you can point me to what you think  
15 is most on point in *Beavers* or why you think that supports  
16 the argument here, that would be helpful.

17           MR. LEIGH: Well, thank you, Your Honor.

18           We do think the case supports it here. Now, it  
19 obviously doesn't contain the discussion some of the other  
20 cases do specifically about the idea of a continuing  
21 obligation, but that -- but in that case the alleged breach  
22 was an allegation that, again, a change made by the  
23 insurance company in the 1980s caused, a single change in  
24 the way in which they calculated dividends paid on a policy,  
25 caused the plaintiffs to -- to suffer impacted policy values

1 for years after that. All right? And there was no  
2 allegation, there was no argument that that was a separate  
3 breach that was able to be renewed every time. But the  
4 court did look back to the 1980s and said, look, the  
5 decision was made in the case, the decision was made long  
6 ago, there's no discovery rule under Texas law, and the  
7 claim is time-barred as a result.

8 So I would agree with you that it doesn't discuss  
9 the specific argument that the plaintiffs are making in this  
10 case with respect to an accrual each month, but I think the  
11 underlying rationale of the case follows what we see in  
12 Texas law, which is that Texas takes an extremely strict  
13 view about the application of the statute of limitations to  
14 breach of contract claims. There's no discovery rule. It  
15 doesn't matter whether damages have been suffered or not.  
16 And the limitation period is four years, period. And in any  
17 event, again, you know, the plaintiffs agree that this claim  
18 stretches back well past four years.

19 THE COURT: I have -- I have a couple of questions  
20 about *Beavers*, because when I look at the court's discussion  
21 it appears to be discussing wrongful allocations that  
22 occurred in the '80s. I don't see a discussion about the  
23 decision, which is what you're focusing on. So if there's a  
24 discussion about the -- my reading of the case -- obviously,  
25 I haven't read the underlying papers, but my reading is that

1 it wasn't just a decision made in the '80s. There were  
2 actually wrongful allocations of surplus profits that were  
3 made in the '80s, but then had continuing consequences until  
4 the 2000 era. But if there's a discussion about the  
5 decision itself, I would be happy to be pointed to it.

6 MR. LEIGH: Well, I think that the decision is the  
7 allegation that in the 1980s the insurance company,  
8 Metropolitan Life, made a decision about how they were going  
9 to allocate payments and that that decision at one time  
10 impacted the dividends and values on the policy going  
11 forward. We think that that analogizes to the decision made  
12 in the 1980s to adjust a rate table set forth in the policy  
13 starting at one particular moment, which would have impact  
14 on the premiums and policy values going forward, but --

15 THE COURT: Okay. And then with regard to the  
16 discovery rule, if I'm reading *Beavers* correctly, it  
17 actually says that the Texas Supreme Court has not yet  
18 foreclosed the possibility of the discovery rule applying to  
19 breach of contract claims. I'm star page 339 to 440.  
20 That's the *Via Net* case they are citing. I'm not aware of  
21 any more recent authority. I'm not sure if you are aware of  
22 any more recent authority. Obviously, I can check it back  
23 in chambers, but --

24 MR. LEIGH: We're not aware of any more recent  
25 authority, Your Honor. We do -- we did cite the *Via Net*

1 case in our initial opposition brief, which is a Texas  
2 Supreme Court case that discusses why -- that though they  
3 have not held that as a matter of -- you know, in any  
4 situation for all time the discovery rule doesn't apply, but  
5 does discuss how stringent the discovery rule is under  
6 Texas. In other words, it requires that a policyowner  
7 diligently inquire at all times about the values of their  
8 policy, ask ReliaStar about anything that they have a  
9 question about, and then ReliaStar misrepresent information  
10 affirmatively in response to that ask; only then does the  
11 discovery rule take over. There's no -- we don't see any  
12 support or allegation here that anything like that happened.  
13 So, you know, the discovery rule is not implicated under  
14 Texas law we believe.

15 THE COURT: Okay. And is it your position that on  
16 a motion to dismiss, which is effectively the standard I'm  
17 applying now, that to overcome a statute of limitations  
18 defense that the plaintiff would also need to plead  
19 allegations supporting an application of the discovery rule  
20 at that time?

21 MR. LEIGH: That is our position. That's  
22 typically the standard for having an opportunity to allege  
23 some type of tolling of the limitations period.

24 Here, we think that it's -- that the complaint  
25 obviously contains allegations showing that the alleged

1 breach goes back beyond the limitations period, certainly  
2 the four-year limitations period that plaintiff agrees is  
3 subject to -- or the claims are subject to, but also the  
4 six-year limitations period that we think really ought to  
5 foreclose this claim back in the 1990s. And, you know, the  
6 complaint does not contain any allegations that  
7 Mr. Gutierrez or Advance Trust inquired diligently back in  
8 the 1990s when they first started being assessed the higher  
9 rider charge and were lied to by ReliaStar in response to  
10 those inquiries.

11 THE COURT: Okay. Okay. I asked a lot of  
12 questions, but I want to make sure you get your argument in.

13 MR. LEIGH: Your Honor, that's all I have, subject  
14 to requesting an opportunity to respond to the extent that  
15 Ms. Zuñiga comes up with something that she didn't argue  
16 before or subject to any further questions Your Honor has  
17 after listening to Ms. Zuñiga's reply.

18 THE COURT: Okay. I will give you the  
19 opportunity. All right.

20 MR. LEIGH: Thank you.

21 THE COURT: Thank you, Mr. Leigh.

22 Okay, Ms. Zuñiga.

23 MS. ZUÑIGA: Your Honor, I have four quick points  
24 in response to Mr. Leigh's comments.

25 Number one, we now hear for the first time at

1 least based on what I read in ReliaStar's papers that  
2 ReliaStar is challenging whether plaintiffs have met the  
3 good cause standard. That standard is primarily diligence.  
4 And looking at the time line for how this motion came in  
5 front of Your Honor shows that plaintiffs have been nothing  
6 but diligent.

7 We first requested information to confirm the  
8 accuracy of ReliaStar's COI rate tables on March 1st. I'm  
9 sorry. We didn't first request it then, but we requested it  
10 then because we found that the numbers were not adding up.  
11 I heard Mr. Leigh say that there were no inaccurate numbers  
12 or something about the accuracy.

13 It's undisputed that the COI rate tables that were  
14 produced prior to a couple of months ago were inaccurate.  
15 These are tables that were requested back on January 4th,  
16 2019, and that ReliaStar said were the right rate tables.  
17 And it was comparing these rate tables to policy-level data,  
18 plaintiffs diligently doing so, that led to the discovery of  
19 the 15 percent increases. It's not something that ReliaStar  
20 brought to our attention. It's something that plaintiffs  
21 discovered.

22 On March 1st we asked plaintiffs to explain why  
23 these numbers weren't adding up, and it was weeks later on  
24 March 26th that ReliaStar produced the spreadsheet, the  
25 March 26th spreadsheet that allowed us to discover the

1 15 percent bump. Since then plaintiffs have been emailing  
2 ReliaStar trying to get more information on the source of  
3 this discrepancy and asking if ReliaStar would consent for  
4 amendment purposes, which, of course, ReliaStar did not do.  
5 And we filed our motion for leave to amend. That time line  
6 to me, Your Honor, shows the plaintiffs' diligence and that  
7 good cause is met for amendment of the scheduling order.

8 Mr. Leigh also pointed out that plaintiffs did not  
9 previously ask for an extension of the deadline to amend.  
10 And that's because plaintiffs did not have a reason to. We  
11 were unaware of this buried rider rate claim that we only  
12 recently discovered. So I don't understand how we were  
13 supposed to have asked for an extension, preempting that  
14 ReliaStar would give us wrong information and have  
15 overcharged plaintiffs in yet another way.

16 The second point, it has to do with this 1989  
17 memo. I'd just like to reiterate that this is all documents  
18 and information, the different things Mr. Leigh pointed to,  
19 outside of the pleadings. There's no mention of a 1989  
20 decision or memo in the pleadings. And that's not because  
21 plaintiffs carefully avoided mentioning it. It's because  
22 the only information we've seen about a 1989 decision has to  
23 do with COI rates, not rider rates. And if ReliaStar wanted  
24 to show you the one-sentence, quarter-of-a-page memo that it  
25 keeps talking about, Your Honor would see for itself that it

1 doesn't mention rider rates anywhere. So it's not like we  
2 were trying to avoid or hide the ball. It's not relevant  
3 for plaintiffs' new claim.

4 THE COURT: I have one question about that,  
5 Ms. Zuñiga. If I understand Mr. Leigh correctly, that  
6 Mr. Gutierrez's policy shows an increase -- not his policy,  
7 but his data shows an increase of 15 percent in the rider  
8 rate as of 1990. Is that the case?

9 MS. ZUÑIGA: Your Honor, I believe that the  
10 15 percent is consistent for Mr. Gutierrez, the Advance  
11 Trust policy.

12 THE COURT: Beginning in 1990?

13 MS. ZUÑIGA: I believe so. I'd have to  
14 investigate the data, but, yes, I believe so.

15 THE COURT: Okay.

16 MS. ZUÑIGA: The important part here, as explained  
17 in the memorandum of law in support of our motion for leave  
18 to amend, is the documents we were provided with didn't  
19 break out the rider and the COI charges. So it was really  
20 difficult, and it only resulted from our persistent  
21 inquiries and eventually the spreadsheet to show exactly why  
22 the numbers weren't consistent between these annual  
23 statements that Advance Trust received and some of the data  
24 we were receiving from ReliaStar.

25 And as Your Honor mentioned earlier when

1 discussing the motion with Mr. Leigh, the standard here is a  
2 motion to dismiss standard. So any consideration of  
3 documents that aren't embraced by the pleadings is  
4 inappropriate.

5 And that leads me to my third point, Your Honor.  
6 There was a long discussion about the relevant statute of  
7 limitations. And I submit that this discussion, debate in  
8 itself, shows that it is an inappropriate ground for denial  
9 of leave to amend. The standard on a motion for leave to  
10 amend is that the claim is clearly frivolous. The debate on  
11 which statute of limitation applies, ReliaStar is saying  
12 it's Minnesota, but maybe it's Texas, but maybe the claim  
13 accrued in 1989, but maybe it accrued in 2004, as if  
14 Minnesota's borrowing statute dictates the claims accrual.  
15 It does not. And this debate in itself shows that this is  
16 inappropriate for the current stage, this motion, which is  
17 requesting leave to amend.

18 And, Your Honor, there were a few cases discussed  
19 with ReliaStar. I encourage the court to review as well the  
20 cases we submitted in support of our motion for leave to  
21 amend, far more than a couple from Texas, that show both in  
22 Texas and Minnesota and in other states in the United States  
23 that recurring, ongoing contractual breaches lead to accrual  
24 at each time of those breaches. And so, again, ReliaStar  
25 breached the contract as recently as last month. That was a

1 claim that accrued last month, just like all the other  
2 points at which it overcharged plaintiffs for both COI and  
3 rider rates.

4 THE COURT: Do you have a response to this  
5 argument, to Mr. Leigh's argument, that the breach that  
6 occurred was basically the replacement of the rider table,  
7 the rider charge table, in the original policy with a new  
8 table increasing the charges by 15 percent?

9 MS. ZUÑIGA: Your Honor, our position is the  
10 breach is the overcharge and not the replacement of a table.  
11 We also have no evidence of this table replacement, none  
12 that plaintiffs have seen, none that's alleged in the  
13 complaint. So even if it did happen, we haven't seen it.  
14 And, also, as I mentioned earlier in the argument, that  
15 doesn't explain all the overcharges. So we're not even  
16 convinced that it was just one table swap that resulted in  
17 the repeated overcharges for decades.

18 THE COURT: Okay.

19 MS. ZUÑIGA: And, Your Honor, you asked about the  
20 discovery rule under Texas law. I do have a cite for Your  
21 Honor, and that's 13 F.Supp.3d 661, the *Bankers Bank v.*  
22 *Canyon Community Bank*. It's a Northern District of Texas  
23 case that says, The discovery rule may serve to delay the  
24 commencement of the limitations period to a breach of  
25 contract action. And that's applying Texas law, more recent

1 than the case we were discussing earlier.

2 THE COURT: Okay.

3 MS. ZUÑIGA: And, Your Honor, unless you have any  
4 questions, that's it for my argument.

5 THE COURT: All right. Thank you.

6 Okay, Mr. Leigh.

7 MR. LEIGH: Thank you, Your Honor. I wonder if I  
8 could just have a couple of minutes to make a couple of  
9 points.

10 First of all, with respect to the diligence, I  
11 want to highlight the fact that plaintiffs are trying to  
12 establish diligence or accuse the inadvertent mistakes in  
13 discovery with respect to COI rate tables with the separate  
14 rider table. All right? The only thing that has been  
15 updated in discovery is the -- the base contract COI rate  
16 table with respect to two of the policy forms at issue.  
17 It's not the case that we provided a rider rate table in  
18 discovery that was then updated.

19 In fact, what happened is they asked for us to do  
20 something that we really didn't have to do in discovery as  
21 part of an unofficial request in discovery, as part of meet  
22 and confer, which is, hey, we're having trouble figuring out  
23 how all of the different charges are assessed, would you  
24 give us a breakout that shows the actual formula used for  
25 every single charge on the policies. We said we will do it

1 for a few, but not for the thousands you want. And through  
2 that they basically inadvertently saw that as to a totally  
3 different charge on a different contract, in a different  
4 part of the contract, there was a 15 percent increase.

5 So we're not here arguing about a 15 percent COI  
6 increase to the base contract COI, which is what this claim  
7 has been about and what discovery over the past 19 months  
8 has been about. Right? They are conflating that with  
9 something entirely different that they've discovered  
10 inadvertently in the course of prosecuting the case on  
11 something different.

12 Now, obviously, discovery in a class action  
13 lawsuit reveals all kinds of things about a company. That's  
14 exactly why we have a protective order in place for these  
15 things. But the idea that -- that inadvertently discovering  
16 some cause of action you believe you have that's different  
17 than the one you've been pursuing at 19 months in the case  
18 doesn't -- that's not the type of situation in which, you  
19 know, the court ought to adjust the schedule to allow for  
20 resetting the case on a totally new course of discovery on a  
21 completely new claim.

22 THE COURT: But to that point, though, the  
23 questions, as I understand it, that plaintiffs' counsel were  
24 asking about, the information that you provided, weren't  
25 just for clarification. They were because, as it turned

1 out, the information was inadvertently inaccurate.

2 MR. LEIGH: Well, Your Honor, the COI base, COI  
3 rate table was inaccurate. The policy-level data that we  
4 provided with the actual charges assessed wasn't inaccurate.  
5 The annual statements that we provided in discovery with  
6 respect to the policyowners, those weren't inaccurate. We  
7 have not replaced any of those documents. Right? We  
8 replaced the base contract COI rate table for a couple of  
9 the contracts in the putative class. That's it. Now, that  
10 is a different table than what they're talking about with  
11 respect to their new claim. So I just wanted to be clear  
12 that it's not -- it's not -- the same thing hasn't been  
13 amended by virtue of an inadvertent mistake, right, is what  
14 underlies their new claim. So that's one point I want to  
15 make.

16 The second -- the second item I want to note is  
17 it's not ReliaStar that -- that is pressing the idea that  
18 lots of different statutes of limitations might apply to  
19 this claim. That's in response to plaintiffs' assertion  
20 that, contrary to we think long logic, they should be able  
21 to ground a claim or base a claim on something other than  
22 obviously what happened in February of 1990. The documents  
23 make clear and Ms. Zuñiga effectively concedes -- you know,  
24 I mean, she can look back at the policy data if she wants  
25 to, but plaintiffs effectively agree that the policy charge

1 first impacted Mr. Gutierrez's policy in February of 1990.  
2 It is only their exercise of trying to get out from under  
3 the fact that the claim accrued in February of 1990 as to  
4 the change in the rate table on which their claim is based  
5 that requires us to talk about Texas law at all.

6 Again, ReliaStar's position is that obviously  
7 happened in February of 1990. Minnesota's law bars the  
8 claim six years later. We don't have to talk about Texas  
9 law in any respect, except in response to plaintiffs'  
10 argument that what they're alleging is not an increase of  
11 15 percent to the rate table, although that's what their  
12 claim has pled. That's how their claim is pled. What  
13 they're alleging is that each month the charge was  
14 calculated using that rate table, that's a separate breach  
15 of contract action. That's the only mental exercise that  
16 requires us to get into a dispute as to statute of  
17 limitations.

18 And, frankly, the main point too, Your Honor, is  
19 it's not that complicated in any event. It's certainly not  
20 as complicated as the plaintiffs want it to be made out,  
21 because whether we're talking about a six-year limitations  
22 period or a four-year limitations period, the face of the  
23 pleadings make clear that the claim originates years before  
24 either one of those limitations period. So the dispute  
25 [audio disruption] Texas or Minnesota limitations law

1 applies is immaterial anyway.

2 THE COURT: Mr. Leigh, you've broken up or frozen.  
3 Renee, are you having this issue too?

4 COURT REPORTER: Yes.

5 THE COURT: Yes. Let's just pause for a second  
6 and see if he can come back.

7 MR. LEIGH: Hello?

8 THE COURT: Mr. Leigh, yep, you just froze up for  
9 a moment.

10 MR. LEIGH: Okay.

11 THE COURT: Renee, can you perhaps let Mr. Leigh  
12 know what the last thing was that you got on record?

13 COURT REPORTER: Yes.

14 So the dispute about Texas or Minnesota  
15 limitations law applies is immaterial anyway.

16 THE COURT: And I think Mr. Leigh might have  
17 frozen again. Okay. Let's give him another second. At  
18 least I know it's not my internet.

19 Okay, Mr. Leigh. Hello. I think if we want to --  
20 I'm not sure why -- there's internet live, which I  
21 anticipated. In any event, if you want to finish your  
22 argument, I'll ask Renee to repeat again the last thing that  
23 was said, but if you -- I don't know if this will help or  
24 not, but you might want to mute your video just so your  
25 internet systems perhaps -- if you're comfortable with doing

1 that. I won't be able to see your face, but then I will be  
2 able to hear what you are saying.

3 MR. LEIGH: Let me do that, Your Honor. Thank  
4 you.

5 THE COURT: Okay.

6 MR. LEIGH: Your Honor, I believe that the last  
7 thing that was said -- and I did hear her read it back --  
8 was that the dispute as to Texas or Minnesota limitations  
9 law is immaterial in any event. And that's really my final  
10 point. And that is because whether it's a four-year  
11 limitations period under Texas law or a six-year limitations  
12 period under Minnesota law, the face of the proposed  
13 pleading makes clear that the conduct that they're alleging  
14 breached the contract stretches back at least eight years.  
15 So it doesn't matter whether it's four or six years. And  
16 the academic debate about which limitations period should  
17 apply really doesn't matter in the end, because it's barred  
18 nonetheless.

19 Thank you, Your Honor.

20 THE COURT: Okay. Thank you, Mr. Leigh. I do  
21 have a question for you. I want to be perfectly clear or at  
22 least try to be as to which tables were produced, which were  
23 corrected and which were not corrected. So are you able to  
24 walk me through that? Mr. Leigh? Mr. Leigh, you are muted.

25 Is anyone able to call or text Mr. Leigh?

1 MR. LEIGH: Can you hear me, Your Honor?

2 THE COURT: I can hear you now.

3 MR. LEIGH: Okay. Sorry. I'm sorry about this.  
4 I don't know what's happening, but --

5 THE COURT: I'm sure if you could control your  
6 internet, you would, so.

7 MR. LEIGH: Yes, Your Honor, the table that was  
8 corrected was the base COI table for policy forms 10830 and  
9 10910, which are two of four forms that are administered by  
10 third-party Gibraltar Life Services, Limited. I don't -- no  
11 other table was -- was corrected that had been produced in  
12 discovery.

13 THE COURT: And is the base COI table somewhere?  
14 Is there an example of that in the record? Is that the  
15 table that was cited in the brief, or is that something  
16 else?

17 MR. LEIGH: No. The table that is talked about in  
18 the brief is the rider rate table, I think is what your  
19 question is, is the rider rate table that comes directly out  
20 of the waiver of premium rider that is at issue in the new  
21 claim. That's a different table than the rate table  
22 applicable to the base contract COI.

23 Now, the fact that, you know -- well, that table  
24 is -- I do not believe that table is in the record, the base  
25 COI table is in the record anywhere, Your Honor. There's

1       been no filing that I recollect that I think either party  
2       would have attached the base COI rate tables to.

3               THE COURT:   Okay.   Thank you.

4               MR. LEIGH:   Thank you, Your Honor.

5               THE COURT:   Okay.   Ms. Zuñiga, is there anything  
6       else you want to say about the tables?   I want to be sure I  
7       hear from both of you as to the specifics.

8               MS. ZUÑIGA:   Yes, Your Honor, just on that last  
9       question.   I would point the court to Exhibit 2 in support  
10      of our motion for leave to amend, and that's our first set  
11      of requests for production, specifically Request No. 5.  
12      That's the request for the policy data time series where we  
13      requested the information on rider rates, that that was  
14      not the table that was corrected.   As Mr. Leigh said, it was  
15      the COI base table that was corrected.

16              And if you look at Exhibit 3 to our motion for  
17      leave to amend, page 6, you see here that ReliaStar explains  
18      that it will be producing, quote, revised current COI tables  
19      for the four Gibraltar-administered policies at issue this  
20      week.   This was an email Mr. Leigh sent on April 13th.   And  
21      later ReliaStar corrected its statement yet again that it  
22      actually just involved two of the four  
23      Gibraltar-administered policies.   So there was this email  
24      saying, oh, we have new COI rate tables coming for four  
25      policies, just kidding, it's going to be for two policies.

1           And in terms of the relation with the rider rates,  
2           it was inaccuracy that these rate tables applied to the  
3           policy-level data that led us to discover the 15 percent  
4           increase to the rider rates.

5           THE COURT:   The inaccuracy of which tables?  The  
6           COI tables or the rider rate tables?

7           MS. ZUÑIGA:   COI tables.

8           THE COURT:   Okay.

9           MS. ZUÑIGA:   We weren't looking at the rider rate  
10          tables before.  We didn't know that there was a need to  
11          until we saw this 15 percent increase, and then we started  
12          to investigate the rider rate issue.

13          THE COURT:   All right.  Thank you.

14          Well, I'm going to take this motion under  
15          advisement.  I really want to thank everybody involved both  
16          for their excellent briefing and for their excellent  
17          argument today.  It's an interesting issue.  And I certainly  
18          appreciate the arguments of counsel, which I think have been  
19          very helpful.  So I will be taking the matter under  
20          advisement.  I will get an order out on this as soon as I  
21          can, I guess in due course.  And I think that is it for  
22          today.

23          Is there anything further from the plaintiffs,  
24          Ms. Zuñiga?

25          MS. ZUÑIGA:   Your Honor, the one thing I wanted to

1 add just on that last point, I would want to look into this  
2 one more time, but I actually don't think we've been  
3 provided the rider rate tables. So we didn't discover an  
4 inaccuracy in the rider rate tables, because we only had the  
5 COI rate tables. Again, we weren't focusing on that before.  
6 So I'm not sure those have even been produced. Mr. Leigh  
7 can correct me if I am wrong on that.

8 THE COURT: Okay. Mr. Leigh, is there anything  
9 else you -- do you know right now if the rider rate tables  
10 have been previously produced?

11 MR. LEIGH: I don't, Your Honor, but I think the  
12 fact -- and my guess is that they have not, but I think the  
13 fact that they have not and plaintiffs' admission that they  
14 weren't focused on that is exactly what ReliaStar has been  
15 talking about. Right? The fact that they inadvertently  
16 discovered some other problem, different problem that they  
17 think ReliaStar has with respect to the insurance policies  
18 and did so while pursuing something totally different is  
19 really -- that tells the tale on why we are not talking here  
20 about an amendment that, you know, should have been  
21 discovered or could have been discovered. We're talking  
22 about an amendment that changes the nature of the case to  
23 something completely different so that they can pursue a new  
24 claim that they were not focused on at any point ever before  
25 simply because they inadvertently ran into it in the course

1 of discovery, but --

2 So my belief is that the rider rate tables have  
3 never been produced, because the rider rate tables isn't how  
4 COI is calculated on the base contracts at issue in the  
5 policy, and that's what the pleaded claim is about,  
6 calculation of COI rates on the base contracts.

7 THE COURT: Okay. Thank you, Mr. Leigh.

8 As I said, I'll take the motion under advisement.  
9 And we are now in recess. Thank you, all. And I hope you  
10 have a nice weekend.

11 (Court adjourned at 11:24 a.m., 6-12-2020.)

12 \* \* \*

13 I, Renee A. Rogge, certify that the foregoing is a  
14 correct transcript from the record of proceedings in the  
15 above-entitled matter.

16 Certified by: /s/Renee A. Rogge  
17 Renee A. Rogge, RMR-CRR

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