1 UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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Advance Trust & Life Escrow Services, LTA, as securities intermediary for Life Partners Position Holder Trust, on behalf of itself and all others similarly situated, Alice Curtis, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ReliaStar Life Insurance Company,

Defendant.

File No. 18-cv-2863 (DWF/BRT)

St. Paul, Minnesota
January 28, 2022
9:03 a.m.
VIA VIDEO CONFERENCE

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BEFORE THE HONORABLE DONOVAN W. FRANK
15 UNITED STATES DISTRICT COURT JUDGE
(CIVIL MOTION HEARING)

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20 Proceedings recorded by mechanical stenography; transcript produced by computer.

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P R O C E E D I N G S

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IN OPEN COURT

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4 THE COURT: Good morning, counsel.

5 MR. JOHNSON: Good morning.

6 MR. LEIGH: Good morning.

7 MR. SKLAVER: Good morning.

8 THE COURT: So first I want to check with my court

9 reporter, Lynne, can you hear me all right right now?

10 (Court Reporter responded.)

11 THE COURT: All right. And then obviously as

12 maybe you've been told and it's not inconsistent with other

13 zooming, if either I can't hear or you can't hear and

14 especially if my court reporter can't hear, we won't be

15 bashful and you shouldn't either about saying so so there's

16 an accurate record.

17 And so before we begin why don't we start with

18 plaintiffs' counsel with introductions for the record, then

19 we can move on the defense counsel and then to the extent if

20 you have any other cocounsel or other members of your

21 respective firms observing, feel free to note that for the

22 record and introduce them, as well.

23 So whenever you're ready.

24 MR. SKLAVER: Good morning, Your Honor. Steven

25 Sklaver for the plaintiffs at Susman Godfrey.

1 And I'll introduce someone who's listening just
2 because her video is off, Krisina Zuniga is listening from
3 Susman Godfrey. She would have argued today as well but she
4 has a trial tomorrow. I mean, it's supposed to start today
5 and it just got canceled yesterday, so we appreciate her
6 listening in.
7 MR. ARD: Good morning, Your Honor. Seth Ard from
8 Susman Godfrey for the plaintiffs.
9 MR. WEISS: Good morning, Your Honor. Ryan Weiss
10 from Susman Godfrey on behalf of the plaintiffs.
11 MR. ERBELE: Good morning, Your Honor.
12 MR. LEIGH: Sorry, Michael.
13 MR. ERBELE: Good morning, Your Honor. Michael
14 Erbele with Merchant & Gould on behalf of plaintiffs.
15 MR. LEIGH: Your Honor, on behalf of defendants,
16 Michael Leigh of Kaplan Johnson Abate & Bird. Also today
17 with me is my partner Clark Johnson and Doug Elsass.
18 THE COURT: All right.
19 MR. JOHNSON: Good morning, Your Honor.
20 THE COURT: Have we got everybody? All right.
21 And a couple of the other folks you'll see, not by
22 camera are either staff of mine or my one of my law clerks.
23 I'll represent to you that we've had a chance to read all
24 submissions and I think with few exceptions the numerous
25 cases that you've each cited.

1 I'm assuming until counsel tells me otherwise,
2 we'll begin with the motion for class certification unless
3 counsel have discussed it and we're going to start with the
4 defendant's motion for summary judgment. Is that how we're
5 going to begin this morning?
6 MR. SKLAVER: Your Honor, we did have a call, Mr.
7 Leigh and I spoke yesterday and discussed the logistics and
8 agree with -- fortunately agreed with your suggestion, but
9 we will proceed with the motion for class certification
10 first and then summary judgment.
11 THE COURT: All right. So we can proceed.
12 And then we can decide depending on where we're at
13 whether we need to take a break for the benefit of anybody,
14 including my court reporter but the -- and it's not my style
15 to try to direct -- I'll make a couple of observations, it's
16 not my style to kind of direct oral argument, but I'll just
17 make a couple of comments.
18 And then you don't have to begin and address
19 anything if you feel I've raised some issue, because I'm
20 sure even if I was completely silent these things will be
21 addressed because they were addressed in your respective
22 briefing. But obviously it's really not an issue, it's a
23 given that there's different courts, different
24 jurisdictions, different -- ruling differently on
25 essentially first to discuss the contract issue pretty much

1 on almost the exact same contract language, even though the
2 law by state and federal government doesn't really change
3 that much with respect to Hornbook law and the restatement
4 of contracts and other issues and so that's just a given.
5 The real issue is, well, what affect should that have on
6 either motion this morning.
7 And then something that's kind of indirectly
8 related in part and that is of course there's different
9 statute of limitations by state court, by jurisdiction, by
10 the state, by the feds. But that really isn't, you know,
11 too complicated. And so it will be curious to hear with all
12 the different cases and all the different decisions on cases
13 what the downside and upsides are to bringing -- and I'd
14 probably say this even if I hadn't had a lot of class
15 actions and numerous MDL cases over the years, but look at
16 the up and down side of whether it's subgroups by
17 jurisdiction, by case type, addressing all these issues to
18 bring once and for all everybody into the same location and
19 end all of this either by court decision or agreement or
20 whatever. Be curious to hear what everybody is saying as I
21 -- because I look at all these different -- all this
22 litigation, all these different case and I'm thinking, wow,
23 you know, it seems like a very kind of inefficient way to
24 kind of deal with issues unless the law truly compels that
25 with respect to some of the very and common issues across

1 the board and across the nation.
2 But then I'll just -- I'll dispense with that
3 probably unnecessary narrative and we can go to plaintiffs'
4 motion for class cert.
5 MR. SKLAVER: Thank you, Your Honor. This is
6 Steven Sklaver for the plaintiffs.
7 I just want to go straight to your first question,
8 if that's okay.
9 THE COURT: That's up to you.
10 MR. SKLAVER: Yeah. Which is the question about
11 different courts handling and coming out in different ways.
12 All of those decision decisions, Your Honor, are all on the
13 merits, of course.
14 THE COURT: True.
15 MR. SKLAVER: -- summary judgment motions or
16 motions for judgment on the pleadings.
17 As the Court heard in the *Security Life of Denver*
18 COI case the question here is what are the legal rules
19 governing interpretation of a contract and whether managing
20 those rules is possible, not what the outcome of those rules
21 are.
22 And *Security Life of Denver* squarely says that
23 doesn't impact predominance. That doesn't make the class
24 not certifiable. And in disclosure, we're class counsel on
25 *the Security Life of Denver* case and Mr. Leigh and Mr.

1 Johnson are opposing counsel in the *Security Life of Denver*
2 case. *Security Life of Denver* is an affiliate of ReliaStar.
3 And we already really previewed that argument in
4 our brief, which you saw --
5 THE COURT: Yeah.
6 MR. SKLAVER: -- which you have experience with,
7 which is two judges analyzing the same contract, applying
8 the same rules in the same courthouse may come out with a
9 different conclusion on the merits but that doesn't make the
10 process unmanageable.
11 And we've made it manageable through our extensive
12 surveys that have explained what are the rules that have to
13 be applied to interpret a form contract. And it's important
14 that we always keep in mind, as the Court said in its
15 opening questions, that these are form insurance contracts
16 with integration clauses that cannot be negotiated
17 individually. Those are the ones that have clean rules
18 nationwide that can be grouped by state on how to manage.
19 There are the Stage 1. There is, is it ambiguous or not.
20 And the majority of the states look at the four corners of
21 the document.
22 THE COURT: Mm-hmm.
23 MR. SKLAVER: There are some states that allow
24 objective extrinsic evidence of custom and usage and then
25 two more that allow post-execution conduct also by objective

1 evidence. There is not a single state, zero, that allows
2 the admission of subjective intent of a policyholder, what's
3 in someone's head or have they understood an oral
4 presentation or anything like that that is admissible in
5 either Stage 1 or Stage 2 determining whether their contract
6 is ambiguous or how to construe the ambiguity.
7 And, in fact, neither party -- and you'll see that
8 kind of the elegance of having summary judgment here at the
9 same time as class certification -- and one of the reasons
10 we didn't oppose having them heard together is that you can
11 see no party tenders anything other than common proof. All
12 the evidence submitted today is common evidence about
13 whether or not what the contract means and that's the
14 contract itself or, you know, custom and usage for a few
15 states and then interpreting the contract that's also common
16 evidence. Their business summary review memorandas. We
17 call that the BSRM and I'll show you an example to kind of
18 take away the mystery of the acronyms. And so all of those
19 rules are manageable and therefore the class should be
20 certified.
21 I just want to make sure at least it's clear from
22 our position and I think you'll see it more in the summary
23 judgment hearing is that no court has interpreted a contract
24 like this that in the maximum COI rate provision, right?
25 There's --

1 THE COURT: Mm-hmm, right.
2 MR. SKLAVER: It actually uses the phrase based
3 on. And it says, Maximum COI rates are based on -- it's
4 called the 1958 CSO table. It's an industry table at the
5 time. And if you apply the simple -- it's pure math. You
6 can use the '58 table and apply a three-step equation and
7 that equals the maximum COI rates in the contract. And
8 that's undisputed, you know, the math doesn't lie.
9 ReliaStar agrees that the maximum COI rates are equal to the
10 1958 table.
11 And so you really have a sui generis contract here
12 that no other court has litigated where based on is used in
13 a COI rate provision without dispute to mean equal and that
14 also distinguishes it from a lot of the other cases. A lot
15 of the other cases also have other distinguishing factors.
16 It is true that if you just pulled the lens back
17 and think about the theoretical definition of based on that
18 there are courts that have, you know, viewed it various
19 ways.
20 There's the very clever example the Eighth Circuit
21 gave in oral argument in *Vogt*, you know, taking your car to
22 an auto repair shop, you know. If you listen to the audio,
23 the silence that follows the question is pretty amazing.
24 The question is, you know, if an auto repair person says
25 that your repairs aren't going to be based on parts and can

1 they charge you for their lunch. Right? The answer's
2 clearly no and that's really the analogy here. But it's
3 more than an academic debate about based on. ReliaStar has
4 contracts, and we submit that in the record, for other
5 policies that use based on expectations of future mortality
6 experience and then list other factors, investment
7 experience, expenses. Here it's only one factor.
8 So for purposes of class certification this Court
9 should really follow the SLD, the *Security Life of Denver*
10 court, and find that just because other courts have ruled on
11 the merits doesn't render the process unmanageable. And you
12 can't conflate, of course, the merits and you can look, you
13 know, where necessary to the merits if it's relevant for a
14 Rule 23 analysis, but you can't make a merit determination
15 and that's why even though, you know, the Court started off
16 with questions about the other decisions that doesn't render
17 this process manageable.
18 And that's coupled by the fact that there really
19 -- I mean, there really is no subjective evidence in this
20 case that's been submitted and it's not admissible
21 nationwide.
22 The other point to flag about the split of
23 authority argument is no Court has ever held that a carrier
24 can ignore its expectations of future mortality experience.
25 There is a debate, apparently, between the parties of

1 whether or not it can include other factors but no court has
2 ever held they can ignore it. And that's also what we
3 allege in this case and have proven in this case or at least
4 prove on the merits.
5 And I don't know if it's helpful for me to pull up
6 one of the business summary memorandums. Did the Court get
7 our submissions this morning?
8 THE COURT: Yeah, we did.
9 MR. SKLAVER: Yeah. Should I do -- I don't know
10 if -- should I do a share screen to show it, would that be
11 helpful or can I just --
12 THE COURT: That's entirely up to other counsel.
13 I've got it here in front of me and I -- because we -- I'm
14 an old fellow so I copied it all before the hearing, so.
15 MR. SKLAVER: Would it -- would opposing --
16 would -- Mr. Johnson, would you like me to do the share
17 screen or should I just go ahead and --
18 THE COURT: You're on mute there, Mr. Johnson.
19 MR. SKLAVER: Any opposition to me using the share
20 screen?
21 MR. JOHNSON: Thanks for pointing out I was muted.
22 I don't have an opposition you using it. I have the
23 documents in front of me as well so it's totally up to you.
24 MR. SKLAVER: Okay. Let me see if I can do it and
25 if not I'll just go ahead and proceed. Here we go. Okay.

1 Let me see if this works.
2 So the first -- the first part of -- can everyone
3 see the screen?
4 THE COURT: Yep. It's on.
5 MR. SKLAVER: The first exhibit we sent is really
6 just a quote from ReliaStar's 30(b)(6), it's Exhibit 41,
7 where we ask their witness, "Do the policies with the same
8 language have the same meaning for all policyholders?" And
9 their answer's, "Yes. That would be my understanding."
10 Now, that means ReliaStar has affirmatively
11 disclaimed that subjective intent of any policyholder is
12 relevant. You know, had he said the opposite it wouldn't
13 had really mattered because the law prohibits -- his
14 testimony, ReliaStar's testimony is consistent with the law
15 of all states subjective intent is irrelevant.
16 But as for this point that no court has ever
17 allowed a carrier to ignore their expectations, we wanted to
18 put an example of the business summary review memoranda.
19 And this is a 2015 example. It's created by a committee
20 and the markings on these memos are mine. They are not the
21 defendant's. They are just for illustrative purposes and
22 they are exhibits in the record.
23 This is from 2015. It's called the 2015 Mortality
24 Assumption Change. This is Exhibit 27. And you can see
25 here, "Mortality assumptions have been reviewed on an annual

1 basis to reflect emerging experience and best estimate of
2 expected future cash flows." And that's for 2015.
3 Another one in 2018. There's an approval memo for
4 mortality assumption changes. "The following approval memo
5 has been prepared to help expedite sign-off on changes to
6 the individual life mortality assumptions. This change will
7 be implemented on September 30th for DAC," that stands for
8 Differed Acquisition Costs, "unlocking and cash flow
9 testing." And you can see they do this every year and I've
10 kind of circled, it's an update. It's another year of
11 experience. They do it for their life insurance, that
12 includes ReliaStar. And then they apply this updated
13 expectations all across the business. They do it for
14 submissions to regulators where they have to do what's
15 called asset adequacy testing. Where they have to talk
16 about their expectations of future mortality experience and
17 weigh it as a projected liability compared to their
18 reserves. They use it for their GAAP financials. They use
19 it -- before it became a U.S. company it followed
20 international standards and it followed those international
21 accounting.
22 It uses it for reserve unlocking. And an example
23 of that is Exhibit 17. And we had a typo in our brief, I
24 just wanted to flag that for the Court, we labeled this as
25 Bates 100-735 and it turns out it's Bates 100-731.

1 THE COURT: Okay.
2 MR. SKLAVER: It's in the same document. But it
3 shows individual life unlocking mortality assumption -- they
4 used all of these EFMEs, these expectations, and they
5 released, because it's improving, $21.7 million that flowed
6 right to the bottom line, but they ignored it for
7 policyholders.
8 And no court anywhere -- I'm going to stop the
9 screen share, has ever held a carrier can ignore their
10 expectations no matter what the -- however the debate is
11 resolved on the merits on what based on means.
12 So that's another independent reason why the fact
13 that we have some cases interpreting based on one way or the
14 other really doesn't apply here. You know, most of those
15 cases even admit that based on has to be a principal
16 ingredient of the rate if the Court goes that way.
17 So that's really the answer to I think the first
18 question. The Court should follow the SLD court, all the
19 other COI courts. *Voya*, you know, both parties, *Voya*, *AXA*,
20 *Lincoln*, that's the *Bezich* case, the *Hancock* case and, of
21 course the *Vogt* case from the Eighth Circuit that was
22 affirmed, that's a Missouri-only class.
23 THE COURT: Uh-huh.
24 MR. SKLAVER: But it shows how the rules can be
25 applied mechanically using the surveys we've adopted.

1 Missouri is a four corners state and it automatically
2 applies contra proferentem in Stage 2. It's the same thing
3 here.
4 You look at the four corners of the contract. If
5 the Court finds it to be ambiguous, it's automatically
6 construed against the insured for nine states in Group 1 in
7 Stage 2. And then the rest the factfinder hears all the
8 extrinsic evidence and then construes the meaning of the
9 contract applying contra proferentem either simultaneously
10 for one group or as a rule of last resort for the others.
11 And that objective evidence -- that extrinsic evidence is
12 objective.
13 You know, before I got into this business of
14 litigating these COI cases I always thought extrinsic
15 evidence -- I never thought about the distinction of
16 extrinsic evidence, but that's really what's important.
17 There's subjective extrinsic evidence, what's in someone's
18 head, and objective, which can be proved by common proof.
19 And no state allows the submission of subjective extrinsic
20 evidence to interpret a form insurance contract. And that's
21 what the *Red Barn*, Seventh Circuit decision that we block
22 quote our brief, you know, talks about.
23 In any event, it's really an academic debate
24 because ReliaStar doesn't tender any subjective intrinsic
25 evidence. They don't have agents submitting declarations.

1 They don't have testimony from a policy owner about what was
2 in his or her head about the contract. Everything here is
3 industry practice and custom if it's extrinsic evidence.
4 It's ReliaStar's own documents. They have internal
5 documents where they analyze these policies and they only
6 look to mortality as a cost factor. That's in Paragraphs 6
7 through 10 in the Mr. Rouse rebuttal report, Exhibit 38.
8 And so all this can be handled with common proof.
9 So that's really our, you know, our position on these
10 issues. The split authority argument is really a merits
11 debate that can be handled with rules.
12 There are some decisions that ReliaStar has cited
13 where class cert has been denied. That's like the *Taylor*
14 case from the Southern District of Illinois. That we've
15 explained those clearly, no one tendered surveys in that
16 case that provided all the groupings that's necessary. And
17 that's because the plaintiff in that case argued that Iowa
18 law applied nationwide and didn't analyze the manageability
19 of the issues and also they relied there on fraudulent
20 tolling whereas -- fraudulent concealment on the basis of
21 tolling and here we don't rely on tolling.
22 So unless the Court has any other questions on
23 predominance that's really, you know, our view. It's a
24 pretty straightforward issue that the *Security Life of*
25 *Denver* court vigorously and rigorously analyzed and came out

1 the right way and I think the Court here should do the same
2 thing.
3 THE COURT: Not to oversimplify your position on a
4 predominance and the other class cert issues, but I think
5 you're also saying to the extent there are some
6 jurisdictional issues, whether it's because of -- and, of
7 course, that -- apart from the issue of the contract, the
8 statute of limitations issue, other issues, that can be
9 solved by subgroups or groups by jurisdiction, which is the
10 nature of many class actions and it doesn't stand in the way
11 of the predominance issue.
12 MR. SKLAVER: Absolutely, Your Honor.
13 And the concrete suggestions we've provided in our
14 brief include special questions, you know, on the verdict
15 form to the jury on those issues. You can have, you know,
16 special jury instructions on these issues. You know, to
17 give an example on the contra proferentem issue, you know,
18 you can have a jury instruction that says if you consider it
19 together, exactly that, that you can consider all the
20 extrinsic evidence to determine the meaning and construe the
21 contract against the carrier because they drafted the
22 contract.
23 And then you can have a separate instruction when
24 you apply it as a rule of last resort. And this is done in
25 all these jurisdictions. And, you know, we can work through

1 that, you know, at the final pretrial conference and the
2 like. And that instruction would say, you are supposed
3 interpret the contract using all the objective extrinsic
4 evidence but after considering that if you still can't
5 construe its meaning then you construe it as a rule of last
6 resort against the carrier because it drafted the contract.
7 So there are plenty of procedural tools, you know,
8 procedural arrows in the Court's quiver that it has vast
9 familiarity with in a variety of cases to manage the case at
10 trial and subgrouping is absolutely appropriate and there
11 are a lot of devices to do that at trial and that's what
12 makes it I think manageable. So we agree with that
13 completely.
14 THE COURT: But I think actually the -- on a
15 number of these issues, they likely would come up and a lot
16 of these things would be resolved -- well, and every judge
17 has and districts have their own kind of different
18 philosophies on pretrials and how early to do things and
19 what to cover.
20 But some of those issues you just described I
21 suspect would be probably resolved before we got to the
22 jury -- any jury case or factfinder at some significant
23 motions in a pretrial setting once we -- in other words,
24 once the subgroups or subclasses were divided, that probably
25 would be a separate issue all by itself. I suspect some of

1 those things would get resolved -- not unique to this case
2 either, that sometimes comes up, whether it's a class action
3 setting or MDL setting, so.
4 Not to oversimplify the position of either side,
5 but I think some of these issues probably would, in
6 everyone's best interests be resolved probably prior to any
7 trial, whether it was in front of the Judge or the jury, so.
8 MR. SKLAVER: Yeah. We agree.
9 We cite a case on that in our reply brief. It's
10 *In Re Storage Tech Corporate Securities Litigation.* It lays
11 out the rules of civil procedure there and there's, you
12 know, a final pretrial conference, that's Rule 16. There's
13 Rule 23(d)(1), which provides the Court with vast procedural
14 discretion on how to manage the class action. You can have
15 separate trials, you know, a posttrial on the statute of
16 limitations issue, which really are pure legal questions
17 anyway in a separate proceeding. That's under Rule 42(b)
18 and summary judgment. You know, we haven't filed our
19 summary judgment motion, we have a right to do that
20 subsequently.
21 So, yes, these issues can be narrowed through a
22 variety of mechanisms and that is our -- that is a good
23 proposal and one we've suggested on how this case can be
24 managed.
25 THE COURT: Because, frankly speaking, maybe you

1 can all decide if it relates to this case, but quite
2 separate from the merits and procedural issues, I've been
3 maybe unpleasantly surprised at being on some panels on some
4 national practice institutes, whether it was class action or
5 MDLs. Of course, now we've kind of been doing everything by
6 zoom and so forth and the -- and how frustrated some of the
7 lawyers are about -- because of their clients are frustrated
8 saying, why couldn't we get access to the Judge on some of
9 these key issues early on in the case before we spent all
10 this money and we could have gotten -- we could have
11 directed the litigation.
12 So I think that is responsive and maybe just
13 simply called responsible case management by the judge. But
14 the -- but, yeah, I think that's an issue not unique to
15 class action issues or MDL issues. That probably is
16 criticized in a lot of major standalone cases, too. But
17 we'll save that for another day.
18 But I think, yeah, getting -- trying to identify
19 the issues without trying to short circuit the lawyers and
20 not micromanage the case as early on as possible probably
21 benefits everyone but --
22 MR. SKLAVER: And we in this case have had that
23 opportunity that the parties by stipulation don't have a
24 trial date yet.
25 THE COURT: Right.

1 MR. SKLAVER: We deferred the schedule so that we
2 could get the ruling on class certification and discuss what
3 the next steps might be.
4 THE COURT: Well, and unfortunately, and I say
5 that in a respectful way, unrelated to all the lawyers --
6 and it's just one of those things that happen. You now have
7 the third magistrate in your case, Judge Thorson, and just
8 because of when we had our newest magistrate, John Docherty,
9 we hired then cases were randomly reassigned. So then
10 Magistrate Judge Wright no longer had the case, even though
11 she had made that pretty significant 27-page ruling sometime
12 ago on the motion to amend issues. So then, of course, he
13 probably appropriately recused and so now we have Magistrate
14 Judge Thorson, so.
15 And I would be the first to say I can promise you
16 that's not going to delay or get in the way of anything,
17 especially since she's very experienced in these types of
18 cases regardless of any decisions I make, so.
19 MR. SKLAVER: And, you know, the other issues on
20 class certification -- so I think we've addressed really the
21 two issues you led off with.
22 And the other issues, you know, to be pretty
23 direct, Your Honor, I don't have much to add other than
24 what's in the briefing and I don't want to -- and I know the
25 Court has read the briefing.

1 THE COURT: Well, maybe we can see where defense
2 counsel focuses because one of the -- a lot of times -- and
3 every Judge has their own style, but selfishly we like the
4 rebuttal or surrebuttal just because then the Judge
5 understands and can't claim ignorance to what's most
6 important and crucial to both parties, you know.
7 So why don't we do that. We can go on to defense
8 counsel and then we'll come back to you.
9 So whenever you're ready, Mr. Johnson.
10 MR. JOHNSON: Thank you, Your Honor. Clark
11 Johnson for defendant ReliaStar Life Insurance Company.
12 Your Honor, plaintiffs' motion fails the rigorous
13 analysis that is required by Rule 23 and Supreme Court
14 precedent.
15 I understood the Court has handled many class
16 actions and the fundamental question for the Court is by
17 trying these two named plaintiffs' claims can we fairly
18 determine the claims of the absent class members, thousands
19 of other persons in more than 40 states in the proposed
20 class here?
21 THE COURT: Well, and not to interrupt you because
22 you probably -- and I know you're going to head there, but
23 of course that's one of the reasons I asked the question
24 about the subgroups and subclasses or whether -- whatever
25 other category you -- but, I mean, I think that's one of the

1 reasons I asked that question.
2 MR. JOHNSON: And that's exactly where I'm going,
3 Your Honor. I think we're all focused on that fundamental
4 issue in this case.
5 And that is let's consider a class member in
6 Florida, Your Honor. A class member whose contract is
7 subject to Florida law.
8 I'm sure you've already read the *Slam Drunk*
9 decision from the Eleventh Circuit.
10 THE COURT: Yes.
11 MR. JOHNSON: I think it's fair to say, Your
12 Honor, that there's no serious possibility that a claim by a
13 class member in this case filed in Florida could survive the
14 *Slam Drunk* case.
15 Mr. Sklaver suggests that there's something unique
16 about the COI provision here and that it has based on
17 provision relating to the guaranteed maximum rates charge.
18 THE COURT: Uh-huh.
19 MR. JOHNSON: Well, so does the *Slam Dunk*
20 contracts. It's cited in the Eleventh Circuit decision and
21 that includes three based on provisions just like ours,
22 including a provision that says the guaranteed maximum
23 rights are based on Commissioner's 1980 extended term table.
24 So *Slam Dunk* is essentially identical to this
25 case. And what that means is under Florida law this claim

1 cannot proceed. And all of the charts and tables and
2 subgroupings that Mr. Sklaver has put out there don't answer
3 the question of, why could you -- how could you possibly
4 include Florida in this class given *Slam Dunk*? You can't do
5 it.
6 And what's more difficult for the Court is you
7 also would have to decide, what would Michigan law say about
8 based on, what would Massachusetts law?
9 Mr. Sklaver likes to talk about the *Advance Trust*
10 *and Security Life of Denver* case. The Judge there a year
11 ago this month says, There is a well-developed split of
12 authority on how to construe this based on language in COI
13 cases.
14 THE COURT: Yeah. So did Judge Breyer say that in
15 the *Bally* case, too.
16 MR. JOHNSON: Correct.
17 And so what we should focus on in that case is the
18 Judge's comment about the well-developed split of authority
19 and the Court's decision in that case did not certify any
20 class on the based on provision.
21 The class certified in that case is unrelated to
22 this based on dispute. In fact, the Court granted summary
23 judgment in favor of *Security Life of Denver* with respect to
24 the based on claim.
25 And the Eleventh Circuit in *Slam Dunk* said

1 explicitly, We recognize that there is some disagreement
2 about how to construe these provisions.
3 Well, if there's some disagreement, if there's a
4 well-developed split of authority, the Court should not be
5 certifying a forty-state class or even a thirty-three-state
6 class under one proposal and a seven states on contra
7 proferentem as a last resort or however you want to divide
8 them up.
9 And so, you know, the fundamental problem here,
10 Your Honor, is that given this divergence of opinion the
11 Court shouldn't be with one swoop deciding the law of 40
12 states and liability when it's clear from *Slam Dunk* that
13 there are significant states that absolutely would not allow
14 this case to proceed.
15 Now, in fact, Mr. Sklaver talked about the *Taylor*
16 case from the Southern District of he said Illinois, I think
17 it's Iowa, that explicitly denied class certification based
18 on diverging approaches to this based on language and that
19 was three years when the Court did that. It's only got
20 muddier since then.
21 So we submit that plaintiffs have not established
22 that there are predominant questions of law that would allow
23 for any class beyond the Texas and Tennessee classes that
24 would tie to their named plaintiffs.
25 THE COURT: And I think it's your provision -- and

1 it was, of course, briefed that doing a jurisdictional
2 survey, whether it was on the contract issue or its
3 estimations whether that's done or not that still doesn't
4 address the predominance issue which you just addressed
5 saying that which -- and is the reason -- kind of a focus on
6 the opposition to the class cert issue?
7 MR. JOHNSON: Right.
8 So let's take another person that would be in the
9 class that plaintiff wants to have certified. And we talk
10 about this class member in our brief. Her name is Lola
11 Arnold, who lived in Illinois, and Illinois by the way is
12 where *Norem* comes from.
13 THE COURT: Uh-huh.
14 MR. JOHNSON: It's a Seventh Circuit decision,
15 where it says based on is not made based exclusively on.
16 And Ms. Arnold would be in this -- or her heirs, rather,
17 would be in this class as proposed.
18 But Ms. Arnold got exactly what she wanted when
19 she bought this life insurance. She bought her contract in
20 1986. She planned to pay $182 a quarter for $50,000 in
21 death benefit protection. She paid that amount. One of the
22 features of these contracts is the ability to allow a person
23 to change how much they're paying but she wanted to pay $182
24 a quarter. She did that every quarter until 2015 when she
25 died and her heirs were paid the $50,000 death benefit.

1 So what is her damage? Well, plaintiffs' expert
2 says during the course of those 20-some odd years ReliaStar
3 collected about $200 too much from her accumulation value
4 when it was calculated costs and insurance charges. Okay.
5 So plaintiffs' theory is we owe her heirs $200, I
6 guess. But her contract specifically provides that upon her
7 death and the payment of the death benefit, the accumulation
8 value, whatever it is, reverts to ReliaStar. So she has no
9 injury.
10 If she were to file a claim now to say, give me
11 the extra $200, clearly that claim would fail because she
12 upon death was entitled to death benefit, her heirs got it,
13 the accumulation value, whatever it is, reverts to us.
14 And I bring this up, Your Honor, because the
15 Supreme Court in *TransUnion versus Ramirez* make it quite
16 clear, the class members who have only a hypothetical injury
17 are not allowed to recover in a class action.
18 Now, what does -- what do plaintiffs say in
19 response to that *TransUnion Ramirez* argument? Well, they
20 correctly point out that Footnote 4 to the TransUnion case
21 notes that the issue of standing and whether a class member
22 can recover is a distinct question from whether a class
23 should be certified but what does the Supreme Court do in
24 that same footnote? They cite an Eleventh Circuit case that
25 says if the question of standing presents individualized

1 issues then the class should not be certified because it
2 fails predominance.
3 And here we have individualized factual inquiries
4 to determine the standing question and predominance fails on
5 that basis. Whether Ms. Arnold's injury was hypothetical or
6 not, you know, it clearly is hypothetical unless somehow she
7 could come in and say, had I had that extra $200 in my
8 accumulation value I would have done something differently
9 and had a concrete harm as a result of that. That can't
10 happen here. And as a result the -- whether it's a pure
11 Article III standing issue or a Rule 23 predominance issue,
12 the classes defined is not going to be manageable.
13 Now, the third point I want to touch on briefly,
14 Your Honor, is the notion that because these are standard
15 form contracts there's some kind of presumption in favor of
16 certification.
17 Well, that's not the case at all. And, in fact,
18 you know one of the seminal Eighth Circuit cases on class
19 certification, the *Avritt versus ReliaStar* case from 2010
20 involved the standard form contract and the court denied
21 certification of that case. In fact, the court affirmed
22 Judge Ericksen's denial of certification in that case. And
23 it did so because of the possibility of subjective evidence
24 of intent. The very evidence that Mr. Sklaver says is
25 clearly off the table. There's no court anywhere would deny

1 certification because of the availability of subjective
2 intent evidence. The Eighth Circuit explicitly says these
3 are standard form contracts. But for plaintiffs' theory to
4 proceed defendants are entitled to inquire as to whether
5 each contract holder expected some additional amount of
6 interest credit on their annuity contract. And, in fact,
7 you know, the parallels because *Avritt* and this case are
8 eery, in fact.
9 *Avritt* was an annuity case. A standard form
10 contract that said, We guarantee we'll credit at least
11 3 percent interest to your annuity, maybe more in our
12 discretion. The contract here says, We promise never to
13 charge in excess of the maximum guaranteed amount, but we
14 may charge less at our discretion.
15 And because of the distinct possibility and the
16 probability that some class members shared ReliaStar's same
17 understanding as to this contract there should be no
18 exposure or liability to those individuals. And Mr. Sklaver
19 rightly points out there are no agent affidavits here,
20 there's no customers who say, Here's what I think. But we
21 say a wealth of information in the public domain that
22 acknowledges that companies include in their cost of
23 insurance charges some measure of profit, covering other
24 expenses besides the pure mortality risk.
25 And so to the extent that information is widely

1 available and some of our customers read that, understood
2 it, why would we pay them damages? They share our view of
3 that contract.
4 And we cited other contract, standard form
5 contract cases, Your Honor, where despite the fact that it's
6 a standard form contract class certification was denied.
7 I want to touch lastly, Your Honor, very briefly
8 on Ms. Curtis's services as a class representative here.
9 THE COURT: Uh-huh.
10 MR. JOHNSON: Ms. Curtis is obviously a very
11 pleasant and decent person but she clearly has no
12 understanding what this case is about and has not undertaken
13 any supervision of class counsel. And class counsel's
14 obviously extremely capable and excellent, but Rule 23
15 requires that the class representative have a role in making
16 decisions in the case and as supervising class counsel --
17 and she almost three years into the case has not done that
18 in the least.
19 And so we submit this is a rare instance where
20 this particular class representative is not adequate under
21 the circumstances and that would be yet another reason to
22 deny certification or her approval as a class
23 representative.
24 And unless -- as I heard Mr. Sklaver -- at least
25 you've obviously read all the briefs --

1 THE COURT: Yes.
2 MR. JOHNSON: -- and a lot of the issues have been
3 fully briefed, unless there's any other issues you'd like me
4 to address, I'll let Mr. Sklaver speak more.
5 THE COURT: Mr. Sklaver, before you rebut do you
6 want to get a copy of that tape where he was very
7 complimentary to you and Ms. Curtis?
8 You may want to get a copy of the transcript and
9 say, hey, here's what opposing counsel was saying about me
10 and Ms. Curtis, so, but.
11 MR. SKLAVER: We will order the transcript on an
12 expedited basis.
13 THE COURT: Okay. So rebuttal if you wish.
14 And, again, I'll indicate I agree with both of
15 your comments about you have covered very specifically the
16 issues in your briefs and that's -- it's amazing to me now
17 the statistics nationwide and we are persuading our newest
18 judges not to do it here, but a large number of federal
19 judges don't have oral argument anymore and so -- because
20 it's almost always the case with experienced lawyers they
21 just don't repeat what's in their brief, they focus in on
22 what they believe is the most important or key issues to
23 themselves and their clients. But we'll save that for
24 another day because the trend is what it is.
25 But whenever you're ready, Mr. Sklaver.

1 MR. SKLAVER: Sure. So I'll just take Mr.
2 Johnson's points in order.
3 THE COURT: Okay.
4 MR. SKLAVER: And I'll repeat the compliments that
5 opposing counsel's also excellent. They should order that
6 for their clients as well.
7 The fundamental mistake made in his opening
8 argument about Florida law is he's jumping to merits to make
9 a determination that is incorrect and we dispute it to then
10 use that to try and defeat certification. It would be error
11 for the Court to conclude on the merits that Florida law
12 bans or bars plaintiffs' claim.
13 All you can analyze for the Rule 23 purposes, and
14 that's what Rule 23 requires, is is the process to reach the
15 conclusion manageable? And it is.
16 Florida is a four corners state and you analyze
17 the four corners of the contract. And if it goes their way,
18 they should welcome certification if their reading of
19 Florida law is right and then there should be a decision
20 adverse to the plaintiffs and it would bind the Florida
21 class members. And that's the way it works in these types
22 of groupings process. You look at the arguments and
23 evidence presented and it's in a manageable framework and
24 you reach a conclusion.
25 It is true that in the *Slam Dunk* case the policy

1 has a max rate provision. Every UL policy has a max rate
2 provision. But the plaintiff did not argue as we do here --
3 I mean, you have to look at what the arguments are advanced
4 in a court proceeding before you reach a conclusion about
5 the holding, that based on equals the maximum COI rate and
6 therefore it's used to mean exclusively in the same
7 contract. That argument wasn't really advanced there.
8 But you'll hear more on the merits. On the merits
9 when the summary judgment's being heard about why *Slam Dunk*
10 is actually not *Slam Dunk* in this case involving these
11 facts.
12 The same thing is true about Illinois. The *Norem*
13 case, in fact, even specifically mentions mortality is not
14 mentioned in this contract and suggests had it been it might
15 have been a different result.
16 In any event, that's the same flaw. It would be
17 error to say, well, the merits come out X, Y and Z and
18 therefore the process is unmanageable. We've laid out the
19 manageable process. The Court understands, I think, the
20 framework to get it done and it can be done through
21 appropriate trial and pretrial mechanisms.
22 The answer to the question about -- I guess I'll
23 also address the issue of -- well, let me continue on the
24 predominance issue.
25 THE COURT: Okay.

1 MR. SKLAVER: *Avritt*. Mr. Johnson cites the
2 *Avritt* case. We debate that thoroughly in our briefing.
3 THE COURT: Right.
4 MR. SKLAVER: First of all, *Avritt* was decided
5 under Washington law. We exclude Washington from the class
6 definition. So that's just fact one.
7 I encourage the Court to read the *Whitman versus*
8 *State Farm* case. That actually is a Washington decision.
9 That's certifies a Washington class. That squarely holds
10 under Washington law the subjective understanding of a
11 policyowner is not relevant in interpreting a form contract.
12 In any event, in Avritt that involved oral sales
13 presentations. And the dispute there was not about the
14 policy language but what happened in the oral sales
15 presentations. There was no evidence of that here.
16 And unlike in *Avritt*, and the *Whitman* court
17 explains this and the *USAA COI* case explains it, unlike in
18 *Avritt* there is indication, at least here, that the contract
19 bars modification of the contract by agents. It can only be
20 modified in writing. And none of that -- none of those
21 issues were raised in the *Avritt* case. And the courts
22 distinguish *Avritt* on a lot of these grounds at its oral
23 presentations.
24 There is the issue about Mrs. Arnold which for the
25 first time in oral argument is being converted into a

1 predominance attack rather than a damages attack. That's
2 not even raised in their opposition brief. They only make
3 it a damages issue but I can address both easily.
4 This is squarely rejected in *Vogt*. An account
5 value is a property interest of the owner. When a carrier
6 illegally takes money or unlawfully takes money from your
7 property you have a claim for damage.
8 The *Vogt* court held in fact that it is the most
9 reasonable measure of damages to measure diminution of
10 account value. The *Bally* court also held the same thing.
11 And I think there's one other court that addressed that
12 issue. Let me just quickly find it. Oh, in the *Whitman*
13 court. The *Whitman* court, *Whitman versus State Farm*, also
14 said, Diminished account value is damage. And, you know,
15 these are all merits questions.
16 Now, notably ReliaStar did not move for summary
17 judgment on this damage issue. They didn't actually argue
18 for the Court to find that when your property's taken away
19 you aren't damaged but that issue can be addressed on
20 separate merits briefing.
21 In any event --
22 THE COURT: They kind of reference the standing
23 issue --
24 MR. SKLAVER: Yeah.
25 THE COURT: -- on that issue.

1 MR. SKLAVER: Yeah. That's a standing -- yeah,
2 but it actually -- that wrongly conflates standing with
3 damages and is a damages issue.
4 And in any event, if they're ripe on the merits,
5 and they're not, no court has ever held you can take
6 someone's property and have that not be injury. Then those
7 policies can be identified policy by policy because we do
8 damages policy by policy and they would get nothing from the
9 judgment or they can be excised posttrial just like the *Vogt*
10 court in the Eighth Circuit held was permissible.
11 But, you know, first principles are these are the
12 damages suffered by the owners. And the fact that a -- it
13 should be clear, our class is owners of the policies, not
14 beneficiaries.
15 And so the fact that beneficiaries are paid a
16 death benefit doesn't mean that the owners haven't been
17 damaged and they should be owed for the diminution of
18 account value that was suffered.
19 The last issue that has been addressed by Mr.
20 Johnson is Ms. Curtis. And I really just think this is
21 about spin on her deposition. I encourage the Court to read
22 her deposition. We submitted her entire deposition pursuant
23 to the Court's practice pointers.
24 THE COURT: You did.
25 MR. JOHNSON: We string cite all over her

1 deposition her testimony, I'm here to help people. I want
2 to help people. It is true she is not as legally
3 sophisticated as any of the lawyers here and could not
4 articulate that -- to the penny her damages, but she says I
5 want my -- I wanted my rates to go down. She says that, I
6 am here to help people. She has been engaged by attending
7 the deposition. And the threshold to be adequate in those
8 circumstances is pretty low and easily satisfied.
9 I didn't hear Mr. Johnson make the argument about
10 her not attending trial, but we addressed that in our brief
11 as well.
12 THE COURT: Right. That's in the briefs.
13 MR. SKLAVER: And so, you know, she's clearly
14 adequate and will do well to represent a class along with
15 ATLES.
16 And so for all these reasons the Court should
17 certify the class and we can come back after summary
18 judgment is decided, you know, in another proceeding to talk
19 about next steps on how to manage the case best, you know,
20 depending on the shape of the ruling.
21 And we also note, you know, all alternative
22 classes easily should be certified as well. I think the
23 national class or really the forty-four-state class that
24 matches *Security Life of Denver* is appropriate and we ask
25 that the Court grant it.

1 THE COURT: Mr. Johnson, would you like the last
2 word before I move on?
3 Most lawyers don't turn it down, but you can if
4 you want. It's up to you.
5 MR. JOHNSON: Very briefly. Yeah, especially
6 since obviously the Court is about to get to the summary
7 judgment motion --
8 THE COURT: Mm-hmm.
9 MR. JOHNSON: -- on the merits. But I think the
10 Court needs to be mindful of the Supreme Court's direction
11 that, in fact, in deciding Rule 23 issues it is essential to
12 delve into the merits.
13 So the notion that there is a process by which the
14 merits might later be tried is a nice concept. But we know
15 the process for deciding Florida law in connection with a
16 virtually identical contract has already played out.
17 It is not a merits decision for this Court to say,
18 I think Florida law would preclude this claim because there
19 is no Florida plaintiff in this case right now. You have
20 two plaintiffs, neither of whom the subject of Florida law.
21 You can look at and should look at *Slam Dunk* to
22 conclude that Florida would not allow this claim and exclude
23 Florida from the class. But when you do that you then have
24 to ask the question about, what about all these other
25 states. And given the divergence of opinion, the clear

1 split of authority, how comfortable can the Court be that
2 it's going to, with this process however outlined, come to
3 the same answer as all of the states that haven't answered
4 this question?
5 So we'd submit that the motion should be denied
6 and as Mr. Leigh will argue now, that in fact summary
7 judgment should be entered on these claims.
8 THE COURT: Well, and I think what you've raised,
9 you've both put that issue kind of front and center in your
10 respective briefs, too. And then, of course, so I'll have
11 to deal with it straightforward, which isn't unique to this
12 case, where you're saying because of those reasons the
13 motion should be denied and Mr. Sklaver and cocounsel said,
14 well, for those reasons here's why it should be granted.
15 So anything else, Mr. Sklaver, before we move on
16 to defendant's motion for summary judgment?
17 MR. SKLAVER: Other than the premise that Florida
18 law requires anything due to *Slam Dunk* is false.
19 *Slam Dunk,* as you'll hear, is an unpublished
20 Eleventh Circuit case. It is not the Court's job to predict
21 anything about other states. It is any court's job to apply
22 the relevant legal rules and come to its own conclusion.
23 There isn't some binding State Supreme Court
24 decision on this particular contract laws. We're talking
25 about various decisions involving different languages, some

1 not even binding in the Eleventh Circuit itself. And the
2 process here is manageable and predominance is satisfied.
3 THE COURT: Anything else, Mr. Johnson?
4 MR. JOHNSON: No, Your Honor.
5 THE COURT: All right. Thank you both. And, of
6 course, thank you for your arguments.
7 And then, obviously, you'll also both rest on your
8 -- the extensive briefing that was done.
9 And, Lynne, I think I'm going to go right into the
10 next motion if that's acceptable to you?
11 (Court reporter respondent.)
12 THE COURT: So we can go to defense motion for
13 summary judgment.
14 MR. LEIGH: Thank you, Your Honor.
15 Despite the plaintiffs' efforts, as the Court has
16 heard extensively this morning, this case actually presents
17 straightforward applications of contract law and statute of
18 limitations law.
19 And the result of that ReliaStar submits is that
20 it is entitled to summary judgment under Texas and Tennessee
21 law, which is the state law that governs the claims of the
22 named plaintiffs.
23 As has been discussed at length, the principle
24 issue between the parties is whether based on in the
25 contracts connotes exclusivity or does not.

1 THE COURT: Right.
2 MR. LEIGH: And it appears that all the parties
3 and the Court are honed in on this issue. And that's where
4 I would like to be in as well with looking at the actual
5 contract language and comparing that contract language to,
6 in particular, the *Vogt* decision, which the plaintiffs want
7 the Court to apply in sort of a rogue fashio and the *Slam*
8 *Dunk* case, that would be Eleventh Circuit, which ReliaStar
9 submits presents a closer analogy to the contract provision
10 that the Court is actually set to construe in this case.
11 THE COURT: Well, and if I may -- sorry to
12 interrupt, but obviously you had Judge Breyer in the *Bally*,
13 or *Bally,* B-A-L-L-Y for my court reporter, obviously, and he
14 did it in a respectful way, but he was kind of maybe a bit
15 critical of the *Vogt* decision because it came out a few
16 months later. And so, obviously, you both kind of put those
17 in front of me.
18 And then, of course, then we're going to get down
19 to the issue now is that, well, that conflict in law --
20 they're going to -- I mean, obviously I'm about to hear no
21 genuine issue of fact -- genuine issue of fact, but I'll
22 stop interrupting you.
23 But, yeah, I think that's where a number of these
24 courts have raised that issue and come straight to the
25 point, so.

1 MR. LEIGH: We agree, Your Honor. And, you know,
2 we obviously have submitted the *Bally* decision, as you --
3 THE COURT: Right.
4 MR. LEIGH: -- and, you know, I think that Judge
5 Breyer's criticisms of that decision are well-founded. And
6 I think as we're going to discuss today, there's reasons for
7 that.
8 I would, one -- you know, I'd highlight something,
9 and this is in the brief but before I get to it I do have
10 some documents that I want to show here in a moment.
11 THE COURT: Okay.
12 MR. LEIGH: But before we get to that, you know, I
13 would identify for Your Honor -- and again this is in our
14 briefing, but one of the unique aspects of the *Vogt* case and
15 one of the problems with using the *Vogt* case to apply to
16 this case is that Missouri law, which is the only law that
17 was issued, that issued in that case --
18 THE COURT: Mm-hmm.
19 MR. LEIGH: -- treats these diverging opinions
20 around the country as evidence of contract ambiguity itself.
21 They allow that to be considered in the contractual analysis
22 of whether the terms of the contract themselves are
23 ambiguous.
24 That is quite unique to Missouri, Your Honor. And
25 we have identified that under Texas and Tennessee law that's

1 not the case.

2 Obviously diverging opinions is evidence that --

3 of nothing more than there are different judges around the

4 country that have come to different conclusions with respect

5 to contract language that may be materially similar and may

6 not be materially similar. But it is not taken as evidence

7 that the Judge can use or observes is something that's

8 material to a decision as the ambiguity of a contract

9 provision.

10 So to the extent that we're trying to reconcile

11 Judge Breyer's criticism with the Eighth Circuit's decision

12 and the trial judge's decision in the Missouri District

13 Court, that's certainly one factor that ReliaStar thinks

14 plays into how we might reconcile those things. If we are

15 talking about Missouri law only, there is a unique aspect to

16 Missouri contract interpretation. What's important today is

17 that that unique aspect of Missouri law is not repeated in

18 Texas law or in Tennessee law.

19 THE COURT: So I think, again -- sorry to

20 interrupt you -- and I think that's something -- and I'm

21 sure plaintiffs' counsel will focus in, and you're saying

22 for that reason because it's legally and factually

23 distinguishable, obviously plaintiff doesn't agree, that the

24 Court isn't bound to follow the *Vogt* decision.

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

1 I think legally it's not bound to follow that for
2 those reasons, as well as the fact that that's a decision
3 only under Missouri law and as only under Missouri law.
4 Factually, there are a number of other issues and
5 I think that's where I'd like to go next.
6 THE COURT: All right.
7 MR. LEIGH: Unless Your Honor has more specific
8 questions.
9 THE COURT: No.
10 MR. LEIGH: I will -- just bear with me one second
11 because I do want to put up a document.
12 THE COURT: Okay.
13 MR. LEIGH: I'll ask just initially, can the Court
14 and everyone see the document that I put up?
15 THE COURT: Yes, I can.
16 MR. LEIGH: So this, Your Honor, is the actual
17 contract provision that we are arguing over today.
18 THE COURT: True.
19 MR. LEIGH: Now, plaintiffs' contention is that
20 the sentence based on ReliaStar's expectations of future
21 mortality experience, the our, is ReliaStar in that
22 sentence, that's the second highlighted sentence in this
23 paragraph, requires that COI be based exclusively on
24 ReliaStar's expectations of future mortality experience.
25 And they otherwise contend that there's at least an

1 ambiguity question as to that point.

2 But application, Your Honor, of settled contract
3 principles under Texas and Tennessee law in particular show
4 plaintiffs' contention to be false.

5 So, first, plaintiffs' contention that based on
6 can be exclusive in this one sentence -- and again, they
7 focus on this second sentence here, the rates will be based
8 on our, meaning ReliaStar's, future expected mortality
9 experience, is exclusive because they contend that based on
10 is used exclusively in other parts of the contract.

11 But if Your Honor looks at the provision itself,
12 the COI provision itself undermines that point and
13 demonstrates its fallacy. There are two uses of based on in
14 this one paragraph of the COI rate provision.

15 The first one says that monthly cost of insurance
16 rate is based on the insured's sex, attained age and rating
17 class. Then later on it says that monthly cost of insurance
18 rates are based on ReliaStar's expected future mortality
19 experience.

20 One cannot, as we identify in our briefs, base
21 something exclusively on A, B and C, the insured's sex,
22 attained age and rating class, and at the same time
23 exclusively base something on D, ReliaStar's expectations of
24 future mortality experience. But that, Your Honor, is what
25 the plaintiffs are contending here.

1 Like this, Your Honor. This is plaintiffs'
2 preferred COI position. They invite this Court to ignore
3 that they cannot square that based on followed by sex,
4 attained age and rating class of the insured cannot be
5 exclusive to ReliaStar's expected future mortality
6 experience by simply asking this Court to collapse the
7 insured's sex, attained age and rating class into the words
8 expected future mortality experience and then add the word
9 exclusively to only the second sentence of the provision.
10 Your Honor, I'd submit that merely saying that out
11 loud exposes the legal flaw to what plaintiffs here propose.
12 Courts do not add words as a matter of Hornbook law to a
13 contract. And they especially do not do so that would
14 elevate one sentence of the contract provision above another
15 sentence of the contract provision. And they especially do
16 not do so where they change one usage of the same phrase in
17 a contract provision to mean something that the other usage
18 of the exact same phrase simply cannot carry.
19 So the only way to achieve plaintiffs' desired
20 result in this case is to effectively delete, strikethrough,
21 the fact that mortality COI rates are going to be based on a
22 person's age, attained rate -- attained age and rating class
23 and focus only on the second use of the exact same words.
24 And aside from --
25 THE COURT: What if one of their position is

1 saying that, well, we're alleging that there's an issue of
2 fact on the fact that they completely ignored their own
3 future mortality experience.
4 MR. LEIGH: Well, Your Honor, I'm glad you asked
5 about that because we'll move to that. I do want to address
6 that.
7 THE COURT: Well, you don't have to interrupt your
8 argument. I'll just --
9 MR. LEIGH: That's okay.
10 THE COURT: That's all right.
11 MR. LEIGH: Let's focus on that. And I'm happy to
12 return to this to the extent that there's more to say about
13 this, but let's focus on that for a moment.
14 Because to begin with, you know, that is a
15 contention that was the pivot that plaintiffs came up with
16 during the course of the litigation. But it also is exactly
17 that, Your Honor, it is purely a contention.
18 There is no evidence, other than the testimony of
19 their hired testifying expert who has run an analysis, which
20 we've identified as flawed for a number of reasons, to
21 support the contention that there is absolutely no grounding
22 of COI rates in ReliaStar's mortality experience -- or
23 ReliaStar's -- yeah, expected mortality experience.
24 The fact is that it's almost, Your Honor, a
25 logical fallacy akin to affirming a consequent.

1 What they say is because ReliaStar hasn't
2 increased or decreased COI rates over the past years then
3 therefore ReliaStar's rates can't be grounded in or based on
4 ReliaStar's expected future mortality.
5 But let's look at what the actual evidence in the
6 case is.
7 Plaintiffs admit that ReliaStar analyzes its
8 mortality experience and assumptions every year. So it's
9 not the fact that the evidence shows that ReliaStar does not
10 pay any attention to its expected mortality assumptions, it
11 does so every year. It does so on an ongoing basis, as one
12 would expect of an insurance company who has to manage
13 blocks of policies over 30, 50, 100 years.
14 ReliaStar's own corporate testimony is that it
15 experienced volatile up and down mortality experience as to
16 the policies at issue in this case.
17 Plaintiffs' expert Mr. Rouse, his analysis
18 actually bolsters this point. And here we might switch the
19 screen view to talk again about Ms. Arnold. So if you'd
20 bear with me.
21 THE COURT: Okay.
22 MR. LEIGH: Let me see if I'm able to do this.
23 Let me see. I guess that didn't -- that didn't exactly
24 work, but let me -- one more shot. Does that work, Your
25 Honor?

1 THE COURT: Yes.
2 MR. LEIGH: Okay. So we're here looking at, this
3 is plaintiffs' expert analysis related to the Arnold
4 contract, which Mr. Johnson discussed from a class
5 certification perspective.
6 If we look in the far column over here, Your
7 Honor, you see what plaintiffs are contenting is the
8 overcharge. Now, obviously ReliaStar disputes this math --
9 THE COURT: Yeah.
10 MR. LEIGH: -- and, you know, the fact that it
11 actually shows any overcharge.
12 But let's just take this document at face value
13 and assume for purposes of this discussion that it
14 represents any kind of accurate number in this overcharge
15 column.
16 If we scroll through the document we see that in
17 the vast majority of the months, over half certainly, there
18 is a line here. That means that under Mr. Rouse's analysis
19 there is no COI overcharge for those months.
20 So the only logical explanation for that is that
21 ReliaStar must have either gotten the COI charge for those
22 months exactly right or ReliaStar didn't charge quite enough
23 to Mrs. Arnold in COI. In either way, what it does show
24 that there is no dispute that as to individual
25 policyholders, just like as to the actual block of policies

1 that are grouped together for mortality analysis that are at
2 issue in this case, ReliaStar experiences up and down
3 mortality experience with respect to those policies.
4 It is not as plaintiffs would have the Court
5 believe, just a persistent or consistently improving
6 mortality analysis. And their basis for that is generic
7 assertions that, well, people live longer today than they
8 did in the 1980s when these policies were developed or if we
9 go -- and again I'd point to, if we look at -- if we look at
10 the document that Mr. Sklaver showed, this business
11 memorandum that he advanced on class certification, if you
12 look at this, again, he is using a business memorandum that,
13 right here, all companies, all Voya companies are being
14 discussed in this memorandum. So that includes ReliaStar
15 New York, ReliaStar at issue in this case, Midwestern United
16 Life Insurance Company, Security Life of Connecticut, as
17 well as other companies. Captives is a group of companies
18 that we don't even -- there are probably too many to even
19 break out here.
20 But the point being, this does not show and lends
21 no support to the assertion that the cohort of the policies
22 at issue in this case experience consistently improving
23 mortality, even if we accept the proposition, which is not
24 grounded to the contract, that ReliaStar has a legal
25 contractual obligation to adjust COI rates at any point in

1 time in particular, so as long as they don't exceed the
2 maximum rates guaranteed in the contract.
3 Another item of evidence that undermines the idea
4 that ReliaStar's rates are in no way grounded on -- in its
5 expectations of future mortality experience is that
6 ReliaStar did undertake a comprehensive review of its
7 mortality in 2011 and the results of that mortality analysis
8 was that as to, again, not the whole company, which is where
9 Mr. Sklaver and his colleagues want to reside or where at
10 least the plaintiffs want to reside, but as to the policies
11 issued by Security-Connecticut Life Insurance Company, which
12 are the policies actually at issue in this case, mortality
13 was significantly worse than the company as a whole.
14 That, Your Honor, would justify a COI increase.
15 And, in fact, those documents show that ReliaStar
16 substantially increased its mortality expectations, meaning
17 made them much worse for the policies at issue in this case
18 after that comprehensive review in 2011, but did not
19 increase the COI rates reflective of that worsening
20 mortality. Not improving mortality, but worsening
21 mortality.
22 So you know, again, I think generic assertions by
23 the plaintiffs that mortality across all Voya companies,
24 which is the ultimate holding company of ReliaStar or that
25 mortality across the entire U.S. population or world has

1 improved from the 80s to today is candidly irrelevant, but
2 it's obviously easily rebutted by generic evidence to the
3 contrary. You know, I feel like, Your Honor, that it's
4 monthly that articles in the newspaper and other major media
5 reflect that mortality in the United States is worse this
6 year and the past few years because of the COVID-19 pandemic
7 than it has been since the Spanish flu. And that's
8 something that frankly Advance Trust, the plaintiff in this
9 case, touted in a different COI case in crowing about the
10 success of their settlement efforts in another COI case.
11 They noted for the Court that it is a significant
12 achievement of Advance Trust that we have negotiated no COI
13 increases for a period of years following the settlement
14 because mortality is absolutely in the dumps as a result of
15 this pandemic. And they cite newspaper articles about the
16 worsening immortality experience in the United States and
17 generally.
18 So, you know, I think those, Your Honor, if we
19 look at the actual evidence in the case, it provides a clear
20 answer to the plaintiffs' contention that ReliaStar does not
21 base its COI rates on anything related to its mortality
22 analysis and disproves that allegation. That is nothing
23 more than an allegation. And obviously, you know, they have
24 hired someone to run some numbers to try and report that or
25 support that contention. But if we look at the

1 contemporaneous evidence, if we look at the actual company
2 records, et cetera, we are dealing here with exactly that, a
3 contention supported by a hired expert and nothing more.
4 So going to -- back just briefly, Your Honor, to
5 the slide. So this is, again, what plaintiffs' preferred
6 COI provision to read. Now they want to match it up with
7 *Vogt*.
8 We would submit, Your Honor, that *Vogt's* COI
9 provision is different than the COI provision here. And
10 again, this is covered in our briefs as well.
11 THE COURT: Right.
12 MR. LEIGH: But just to highlight this for the
13 Court visually, to begin with -- and this is, you know,
14 aside from the legal points we discussed earlier, as a
15 factual point here in *Vogt* we have only one use of based on
16 in talking about how COI -- current COI rates are set.
17 Right?
18 The COI rates for the policy each year are based
19 on the insured's age, policy, anniversary, sex and
20 applicable rate class.
21 Here, in our case, we have two based ons. And,
22 again, so this is a factual difference that explains how the
23 Court in *Vogt* could say, well, where we only have one based
24 on with respect to current COI rates, we could see how under
25 Missouri law, particularly given under the unique aspect

1 that different decisions around the country are informative
2 as to whether there's ambiguity in the actual contract that
3 we don't know exactly what this one based on means, whether
4 it can be exclusive or nonexclusive.
5 But ReliaStar submits that where we have based on
6 used multiple times in the same provision, each one followed
7 by different words, different metrics, the insured's sex,
8 attained age and rating class of one and the company's
9 expected future mortality in another, then as a matter of
10 law neither of them can be exclusive and both of them have
11 to be nonexclusive.
12 And if we go back to Mr. Rouse's report, he
13 effectively acknowledges this. This is plaintiffs' expert,
14 because he acknowledges that net amount at risk is a
15 relevant consideration when -- when charging COI rates.
16 But, you know, again, I would commend the provision in front
17 of Your Honor that it doesn't contain the words net amount
18 at risk.
19 And so, again, there's something that even
20 plaintiffs agree net amount at risk is baked into the
21 concept of expected future mortality experience of a
22 company.
23 So, again, I think that there is -- ReliaStar
24 believes there's ample evidence and that simple legal
25 propositions require that the based on in this contract be

1 nonexclusive, connote nonexclusivity, and that defeats
2 plaintiffs' claim.
3 Now, if we look at the *Slam Dunk* provision, Your
4 Honor.
5 THE COURT: All right.
6 MR. LEIGH: And this is the last slide on this.
7 *Slam Dunk's* provision, as Mr. Johnson pointed out
8 earlier, is more similar. Right? This is a provision
9 that's materially similar. To the extent that we're
10 interpreting what based on means, right, which is the
11 central dispute in this case, here we have a provision with
12 two based on. Based on the insured's attained age, type of
13 benefit, class of insured and method of premium payment.
14 And also based on the insurance company's expectations of
15 future mortality experience. That's almost exactly like the
16 provision we have here.
17 And in that case the Eleventh Circuit said,
18 where -- when faced with this -- with this provision, with
19 two usages of based on in the same COI provision the Court
20 said, so we cannot say -- and it would be incorrect as a
21 matter of law to say that only the second one is exclusive
22 and disregard the first one because that violates the
23 contract principle of elevating one usage of the same word
24 above the other usage of the same word and frankly, Your
25 Honor, renders the first usage of based on surplusage.

1 So I do want to touch briefly, Your Honor, on this
2 -- the idea that there is something about the maximum COI
3 table provision as that's come up today and has been
4 discussed in the context of class certification but is
5 raised in plaintiffs' brief as an example of how based on
6 another context means exactly what follows, exclusively what
7 follows.
8 But as we heard plaintiffs' counsel today, that's
9 actually not true. Plaintiffs' counsel started today by
10 noting that the guaranteed cost of insurance rates are based
11 on the 1958 CSO Mortality Table, age last birthday, plus a
12 mathematical formula that has to be applied to reach the
13 maximum COI rates. I don't see, again, in the contract that
14 it says plus a mathematical formula or times X or Y. It
15 just says based on 1958 CSO Mortality Table.
16 So, again, ReliaStar would submit that, to begin
17 with, the fact that ReliaStar ultimately decided to -- you
18 know, even if it was true that the 1958 table was just
19 plugged into the contracts, that does not mean that as a
20 contractual matter, as a legal matter, that ReliaStar was
21 obligated to do that. They could have taken the 1958 table
22 and added something to it or something like that and
23 ReliaStar submits that that would be consistent with the
24 usage of based on throughout the rest of the contract.
25 Right? Based on the based insured's X, Y, Z and based on

1 the insurer's A as is used earlier in the paragraph.
2 But even plaintiffs' counsel acknowledges and Mr.
3 Rouse's analysis shows that Mr. Rouse has to do math to get
4 from the 1958 table to the maximum COI rates in the
5 Gutierrez policy, which is a policy on which ATLES sued.
6 So, again, we don't believe that there's any
7 support for the idea that based on in the contract can be
8 legally interpreted to connote exclusivity and each instance
9 of based on, even in the COI provision itself, has some
10 connection to something not listed specifically after each
11 iterance of based on, suggesting that it can only be
12 interpreted as unambiguously nonexclusive.
13 Your Honor, you know, I would, you know, point to,
14 again, the briefs for the majority of the rest of the
15 arguments. Obviously we have advanced an argument that I'll
16 touch on just very briefly with respect to the prior *Alten*
17 *Blanke* settlement --
18 THE COURT: Mm-hmm.
19 MR. LEIGH: -- which Ms. Curtis was a part of.
20 I'm happy to answer any questions that the Court
21 has about that settlement but ReliaStar submits that that
22 settlement forecloses Ms. Curtis's claims.
23 The fact of the matter is is that settlement
24 expressly releases future claims with respect to what it
25 defines as the release transactions and the release

1 transactions expressly includes cost of insurance charges.
2 It is also indisputed in this case -- undisputed in this
3 case that Ms. Curtis was a member of that class, plaintiffs
4 do not dispute that point. Plaintiffs do not dispute that
5 Alten provided class-wide relief. Plaintiffs do not dispute
6 that as part of the class relief that was agreed to and
7 implemented that there was a COI rate adjustment made to Ms.
8 Curtis's contract and that ReliaStar has adhered to that COI
9 rate adjustment as part of the class action settlement at
10 all times since.
11 So the concept that Ms. Curtis can come back
12 around and complain that the COI rate that effectively she
13 agreed to in settling the prior class action that she was a
14 part of is now wrongful defies Your Honor's basic settlement
15 enforcement principles. Again --
16 THE COURT: So is it -- because I think what
17 plaintiff is suggesting is so then the -- kind of the
18 post-settlement conduct from, say, 2012 on out that that
19 rate in 2012 was -- in other words, one, that State Farm was
20 free to set any rate they wanted but then separate from that
21 issue that, well, the rate in 2012 was based upon the
22 settlement back in the case you mentioned?
23 MR. LEIGH: Well, you know, again, I think it's --
24 it's conceded that obviously something that occurred in 2017
25 can't be sued on in -- or in 1999 --

1 THE COURT: Right. Right.
2 MR. LEIGH: -- or 1995. But that's not really the
3 analysis -- the analysis with respect to these cases. And
4 the cases cited in the briefs, whether it's the *Raven* case
5 on which they rely or *Yearby* or *Freeman* stand for this
6 proposition, which is it is not whether the actual, you know
7 -- that the inquiry is whether the subject matter at issue
8 in the release is the same before the release and after the
9 release.
10 Here plaintiffs' contention is -- Ms. Curtis's
11 contention, Your Honor, is that for 30 years, which
12 certainly encompasses the entire period that the *Alten* case
13 was pending, the *Alten* case was settled, as well as all time
14 after that ReliaStar did not lower its COI rates in
15 conformity with improving mortality expectations within the
16 company.
17 That is clearly something that she should have
18 sued -- that she could have sued on 30 years ago. And, in
19 fact, one of the premises of the *Alten* case was a COI
20 increase by Security Connecticut. And that increase was
21 made based on incases in the DAC tax, not because of
22 increasing mortality or decreasing mortality.
23 So, again, there is no evidence, and plaintiffs
24 advanced none and there could be no evidence, that ReliaStar
25 is a process for changing COI rates or for judging its

1 expected future mortality is different before the *Alten*
2 settlement and today.
3 And so, you know, it is not the case that there's
4 any difference in what Ms. Curtis could have sued on or the
5 *Alten* class could have sued on and what they're alleging in
6 this case.
7 At bottom, the issue of cost of insurance rates
8 was included in the *Alten* settlement and should not be
9 something that Ms. Curtis or any other member of the *Alten*
10 class can turn around and object to decades down the road as
11 being something that they haven't released with respect to
12 breach of contract claims. That's what Ms. Curtis tries
13 here. We'd submit that the Court ought to reject that.
14 You know, I'll leave it there and, you know, I'm
15 happy to answer any questions the Court has. Obviously
16 ReliaStar moves as well on Advance Trust standing, which has
17 come up earlier today both from a class cert perspective,
18 although as the Court notes and as Mr. Johnson and Mr.
19 Sklaver noted, goes to the merits as well as an Article III
20 proposition and as to what the parties call the rider claim.
21 THE COURT: Right.
22 MR. LEIGH: We moved on statute of limitations.
23 We think that those are straightforward arguments that we
24 make in our briefs and the parties have briefed at length.
25 And so if the Court doesn't have any questions, I

1 will stop there and let plaintiffs respond.
2 THE COURT: One other question and then we'll see
3 where plaintiff focuses.
4 But on the statute of limitations -- and obviously
5 then Magistrate Wright kind of focused partly on this saying
6 that, well, yes, since we're -- this is not a discovery
7 state but this ongoing obligation to charge rates -- in
8 other words where she made the comment, I think it was --
9 well, my memory maybe fails me, page, I think, 22 of her 27
10 page -- that well then that would renew that any actionable
11 conduct, if there was any, on a yearly basis -- and, in
12 other words, obviously we had California, that's kind of a
13 discover state, but the -- what's most important for me to
14 know about that?
15 And maybe that's not where plaintiff will focus
16 with respect to how it affects the statute of limitations.
17 MR. LEIGH: Sure.
18 Well, Your Honor, I think the most important
19 aspect of the rider claim in the statute of limitations and
20 laches issue, Your Honor.
21 THE COURT: Right.
22 MR. LEIGH: Be mindful of laches here.
23 THE COURT: You raised that, too.
24 MR. LEIGH: This is candidly, Your Honor, my first
25 time ever moving on laches. It's often asserted in cases

1 but not something that I've seen subject of a lot of debate,
2 but we think it's very appropriate in this case given the
3 age of the conduct that we're talking about.
4 Judge Wright absolutely went through a statute of
5 limitations analysis. But if -- but reading her opinion she
6 makes clear a number of times that the only record in front
7 of her, because the only record that can be in front of her
8 is the proposed amended complaint asserting this new claim.
9 THE COURT: True.
10 MR. LEIGH: And that it would be -- and she says
11 in her motion, discovery is needed to identify --
12 THE COURT: Also true.
13 MR. LEIGH: -- when this conduct happened, when
14 the rate was changed.
15 And she noted, and she says this expressly in her
16 opinion, it would be not incorrect but premature to dismiss
17 the claim or to judge the claim on the limitations argument
18 prior to that discovery.
19 Well, Your Honor, discovery is done now. There
20 are no more facts to be discovered about the rider claim.
21 And what discovery shows, and it cannot be disputed, is that
22 the rate was changed -- was changed in 1989 and that the
23 first time it had an effect on the plaintiffs' policy in
24 this case was February 1990. Plaintiff does not dispute
25 that. Plaintiff cannot dispute that.

1 Meaning that in February of 1990, Mr. Gutierrez'
2 premiums increased as a result of the rate change that was
3 made in July of 1999. It's -- it's not necessarily going to
4 why there's a lag but it's because rates took effect on the
5 next policy anniversary of each policy member. So the fact
6 that the change is made in 1980 as a practical matter
7 affected Mr. Gutierrez in 1990.
8 But even if we take the February 1990 date, that's
9 still more than 30 years ago, Your Honor. And he's been
10 paying -- and, you know, the company that actually owns the
11 policy now, which is a trust called Life Partners Position
12 Holder Trust --
13 THE COURT: Right.
14 MR. LEIGH: -- has been paying this higher rate
15 for many years as a result of that change.
16 So, you know, the important point to the rider
17 claim is that it is indisputable that it is business conduct
18 by ReliaStar undertaken 1989.
19 It is indisputable that that conduct first
20 impacted and so it caused damages satisfying the last
21 element of a breach of contract claim for Mr. Gutierrez in
22 February of 1990.
23 So waiting 30 years to complain about your
24 increased premiums as a result of conduct undertaken
25 30 years ago, you know, we contend simply is unsupported by

1 the law.
2 Texas and Minnesota, whichever law you choose,
3 Your Honor, does not have a discovery rule --
4 THE COURT: No.
5 MR. LEIGH: -- that it applies to breach of
6 contract claims. And we've advanced cases, principally the
7 *Beavers* case and I'd point to the *Hamann* case. *Beavers* is a
8 Texas case and *Hamann* is a Minnesota case, in which courts
9 rejected the contention that business conduct undertaken in
10 the 80s and 90s that resulted in periodic underpayments to a
11 plaintiff over many years after that can be picked up and
12 sued on decades after the business conduct that caused the
13 change simply on this idea that every month starts a new
14 statute of limitations.
15 You know, we would propose that that's the law of
16 Minnesota and Texas. That both the law of Minnesota and
17 Texas would apply the limitations period to bar this claim.
18 And we'd further suggest that outside of the pure
19 statute of limitations argument, again, that this is a case
20 in which laches is a clear -- is a clear affirmative defense
21 that ought to be applied.
22 There is no person alive who can offer testimony
23 or insight as to what happened in July of 1989. The sole
24 evidence in this case with respect to the rider claim will
25 be a single-page memorandum from 1989. That is the only

1 evidence of the decision by ReliaStar to change these rates
2 by 15 percent. The policy statements of Mr. Gutierrez',
3 what we also call the Advance Trust policy, showing that the
4 rate began to impact that policy in February of 1990. And
5 then the corporate testimony of ReliaStar that, yes, the
6 1989 memo and February of 1990 premium increase is the rider
7 increase at issue in this claim. That's it. There will --
8 there will be no more evidence in this case with respect to
9 that.
10 Now obviously the plaintiff -- I mean, except for
11 the plaintiffs' effort to calculate some damages on the back
12 of that factual evidence. But in terms of contemporaneous
13 factual evidence, in terms of the actual basis of the claim,
14 that's 100 percent of the evidence in the case.
15 And so we would submit that that's what's
16 important, is where does this decision come from, when was
17 it made and when did it first impact the plaintiffs'
18 policies? All of that happened decades ago, Your Honor.
19 THE COURT: All right. Thank you. We'll move on
20 to plaintiffs' response.
21 MR. ARD: Thank you, Your Honor. Seth Ard, Susman
22 Godfrey on behalf of plaintiffs.
23 As we indicated by e-mail yesterday, I will handle
24 the first part of the argument on the based on clause and in
25 light of Your Honor's rules we're having one of our

1 superstar associates, Ryan Weiss will be arguing the release
2 statute of limitations arguments.
3 THE COURT: And your associate probably will want
4 that quote for any salary evaluation for superstar, so.
5 MR. ARD: Yes.
6 THE COURT: You might want --
7 MR. ARD: We might be needing a transcript, Your
8 Honor.
9 MR. WEISS: I'll note it, Your Honor.
10 THE COURT: All right. Okay.
11 MR. ARD: Plaintiffs admitted detailed expert
12 reports showing that ReliaStar deducted more than
13 $40 million in COI charges as permitted to by the contracts
14 and that number continues to grow.
15 Defendant's motion is focused on the meaning of
16 the form contract and not on those facts.
17 The first key dispute here and really the key
18 dispute in defendant's motion is whether based on is
19 exclusive. If it's exclusive or ambiguously so that ends
20 the motion and even if it's not exclusive the motion should
21 still be denied.
22 ReliaStar's position is that based on is
23 unambiguously nonexclusive, which is directly contrary to
24 what *Vogt* held. The *Vogt* court relied on policy language
25 that is materially the same as language that also appears in

1 plaintiffs' policies. And this is in our Slide 1.
2 THE COURT: Right.
3 MR. ARD: And let me just pull it up here on the
4 screen. And you just saw that from counsel, too. Share
5 screen.
6 So, Your Honor, the first sentence in -- the *Vogt*
7 policy's on the top and our policy's on the bottom.
8 THE COURT: Right.
9 MR. ARD: The first sentence in both policies are
10 materially the same. It says that, The COI rates are going
11 to be -- are based on the insured's age, sex and rating
12 class. That's in both policies.
13 The *Vogt* court focused on that sentence and it
14 interpreted that sentence to mean that COI rates must be
15 based exclusively on mortality factors. It says it has to
16 be -- it's in the least ambiguous as to whether it means
17 that. And so it construe that in favor of *Vogt* and how the
18 COI rates must be based exclusively on mortality factors and
19 not on nonmortality factors.
20 Under *Vogt's* holding this same language in
21 plaintiffs' policy at the very least is ambiguous, in
22 meaning that COI rates would be based exclusively on
23 mortality. That's the holding of *Vogt*. If you just look to
24 those first two sentences.
25 ReliaStar's reply brief says that *Vogt* should be

1 distinguished for three reasons but none are available, and
2 Mr. Leigh just focused on some of them.
3 First, ReliaStar says *Vogt* should be distinguished
4 because of differences in policy language. But, you know,
5 as indicated the *Vogt* court relied on materially the same
6 sentence as one that also appears in our contract.
7 But what ReliaStar argues is that another sentence
8 in plaintiffs' policy, the second one highlighted here --
9 THE COURT: Mm-hmm.
10 MR. ARD: -- which says that COI rates will be
11 based on EFME expectations of future mortality experience
12 somehow undermines the *Vogt* conclusion that the policy is
13 mortality only, but that's exactly backward.
14 The EFME clause in our policy simply strengthens
15 the conclusion that the policy is mortality only. It
16 doesn't undercut it, it just says explicitly what the *Vogt*
17 court held was implied in the contract. And if anything,
18 our policy more clearly states that COIs will be based on
19 mortality than the *Vogt* policy.
20 If you look again the language, the *Vogt* policy
21 says that COIs can be adjusted for projected changes in
22 mortality. Our policy says it will be based on expectation
23 of future mortality.
24 Second, ReliaStar says that *Vogt* is a non-Missouri
25 law. But the Eighth Circuit said its conclusion was

1 grounded in the language of the provision alone and that
2 analysis applies to this language for all states.
3 Our survey shows that Missouri's a four corners
4 state. So the *Vogt* holding applies, you know,
5 straightforwardly to all four corners states.
6 And as ReliaStar acknowledges, other states focus
7 on the plain language of the policy, plus considers some
8 extrinsic evidence in determining whether a contract's
9 ambiguous. But that doesn't help ReliaStar because the
10 extrinsic evidence cited on Pages 22 to 25 of our brief, you
11 know, supports our interpretation. So that can't be a
12 ground for summary judgment.
13 And, of course, you know, courts across the
14 country apply *Vogt* to hold that based on connotes
15 exclusivity including Judge Magnuson recently in Minnesota.
16 Third, ReliaStar argues that Texas and Tennessee
17 law are different than Missouri law because in Texas and
18 Tennessee the existence of varying judicial decisions
19 doesn't, as a matter of law, mean the contract's ambiguous,
20 but that's a straw man argument. We're not saying the
21 contract ambiguous as a matter of law because of varying
22 judicial decisions, we're just saying that's one thing the
23 Court can consider and Texas and Tennessee law are not to
24 the contrary.
25 If *Vogt* applies and the based on clause is

1 exclusive that ends this motion and ReliaStar doesn't argue
2 otherwise, nor could it.
3 In fact, let me just jump ahead here to Slide 5.
4 Their own witness, 30(b)(6) witness agrees that the cost of
5 insurance rates are not exclusively based on mortality.
6 It's in our brief, it's in their brief and it's quoted here
7 on Slide 5.
8 So if the Court holds that the clause that based
9 on is exclusive or that it's ambiguously exclusive, that
10 ends the motion right away and ReliaStar doesn't argue
11 otherwise.
12 ReliaStar argues that it's inconsistent to say
13 that COI rates are based exclusively on both mortality
14 factors and on mortality. But that is also meritless. And
15 this is the key point, I think.
16 In *Vogt*, looking back at the contract again,
17 looking at the first sentence in *Vogt*, the Court inferred
18 that the COI provision was mortality only because the policy
19 listed only three factors, sex, age and rate class that are
20 all mortality factors.
21 But here, unlike in *Vogt*, the policy explicitly
22 says that COIs are based on mortality. So there's no
23 inconsistency. The policy just explicitly says where the
24 *Vogt* court inferred COI rates must be based on mortality
25 expectations.

1 This is in -- you know, so if you take these two
2 COI -- these two based on clauses together, it just means
3 that COI rates will be based on mortality expectations
4 alone, that's what was inferred in *Vogt* and that the
5 specific mortality factors that will be considered are age,
6 sex and rating class. No inconsistencies.
7 That's in stark contrast to *Slam Dunk*, which is
8 ReliaStar's leading case. And let me just pull up our brief
9 on this because we have a chart in our brief in contrasting
10 language of *Slam Dunk* in our case, so.
11 In the *Slam Dunk* case, the first based on clause
12 listed enumerated factors that were not all mortality
13 factors and we highlight it here in our brief.
14 For example, it said that COI rates are based on
15 the type of benefit and whether premiums for that insured
16 are paid directly or through payroll deductions. Those are
17 not mortality factors.
18 The unpublished *Slam Dunk* decision, which issued
19 almost a year after *Vogt* and didn't even cite *Vogt,* at most
20 stand for the proposition that a policy can't be interpreted
21 to mean that COI's must be based exclusively on mortality
22 factors and mortality factors at the same time. That's
23 inconsistent. But that's not our case. Our case is like
24 *Vogt* where the first based on clause just lists mortality
25 factors. So *Slam Dunk* is completely different policy

1 language.

2 And, in fact, ReliaStar's argument directly
3 contradicts *Vogt*. The *Vogt* policy said -- let me go back to
4 that slide again -- well, let me -- I'll stay with this
5 slide. But the *Vogt* policy said that COIs can be adjusted
6 for projected changes in mortality.

7 ReliaStar's argument that a COI rate can't be
8 based exclusively on mortality factors, like age, sex and
9 rate class, it also be based on changes on mortality runs
10 directly counter to *Vogt because the Vogt* policy explicitly
11 allows COIs to be adjusted for changes in mortality and
12 requires COIs to be based exclusively on the same mortality
13 factors as here.

14 And even if -- and this is the final point and
15 perhaps the most important one, even if there was some
16 perceived tension between the based on clauses in our
17 policy, the first two that are highlighted here on the
18 right, the difference in verb tense solves the problem that
19 again was not present in *Vogt* -- *in Slam Dunk*.

20 The ReliaStar contract says COI -- first says COI
21 is -- the cost in insurance rate is based on the insured's
22 sex, age class and rating class. It then says that COIs
23 will be based on expectation of future mortality experience.
24 If there's some tension between those based on factors, and
25 I don't know how there is, but if there is the contract

1 should be interpreted to mean that the original cost of
2 insurance rates are based on sex, attained age or rating
3 class and that future cost insurance rates will be based on
4 expectations of future mortality experience.
5 Again, there's no inconsistency there. And the
6 *Slam Dunk* provision didn't have that because they have are
7 in both clauses. It was present tense in both clauses.
8 Ours is a present tense and a future tense.
9 So if there's any inconsistency the difference in
10 verb tense it solves it.
11 And ReliaStar even recognizes that the *Phoenix*
12 court drew this exact distinction between original and
13 future COIs. That's in Footnote 1 of its reply brief. But
14 it doesn't explain why this same point, the same solution
15 doesn't apply here. So that's *Slam Dunk* and *Vogt*.
16 In reply, ReliaStar says that -- and just referred
17 to it here briefly, ReliaStar says that the EFME clause --
18 that EFME can't be exclusive because plaintiffs' expert
19 notes that in deriving its expectations of future mortality
20 experience ReliaStar sometimes looks at the face amount of
21 policies. But that's a red herring.
22 The question of how EFME are derived is
23 irrelevant. The only issue is whether ReliaStar can base
24 its COI rates on something other than its EFME. And the
25 answer is no, regardless of, the EFME is derived.

1 Even apart from *Vogt*, the phrase based on in this
2 policy is used in other parts of the policy. And every time
3 it is used in the exclusive sense. ReliaStar doesn't
4 dispute that. That strongly supports the interpretation
5 that based on is exclusive hereto.
6 First and most important, as we sort of talked
7 about already -- oh, I got to switch my screen share
8 here.
9 The cost insurance provision that we just looked
10 at in the bottom of it, right here at the bottom of the page
11 highlighted here in the next Slide 3 says, "Guaranteed cost
12 insurance rates are based on the 1958 mortality table."
13 Now we have put in evidence, and I've never seen
14 this in other cases, certainly not in *Slam Dunk*, that if you
15 do the math the guaranteed rates in the policy were set
16 equal to the mortality table.
17 So we are interpreting based on in the exact same
18 way the policy uses that same term in the context of maximum
19 COIs. Setting the COIs equal to the rates in January's
20 updated mortality tables. You can't have better evidence of
21 a term means than in the same paragraph it's used in a way
22 that's consistent with how we interpret it.
23 Second, ReliaStar agrees that the phrase based on
24 the insured's person's sex, attained age or rating class
25 connotes exclusivity.

1 And we cite in our brief Tony Brantzeg, their
2 30(b)(6), agreeing that those are the only three factors
3 that take it into account. And that's on Document 181-1.
4 And the Eighth Circuit already held that anyway. So we
5 already know that based on used in the same clause is
6 exclusive.
7 And, third, the policy's say that the minimum cash
8 values are based on industry table in interest of
9 4.5 percent per year. And our expert also showed this
10 exclusive to is based only on those factors and that's in
11 Rouse's declaration Paragraphs 20 to 21.
12 The *Bally* decision which is -- Your Honor asked
13 about, also held that based on is exclusive.
14 THE COURT: Not really.
15 MR. ARD: Well --
16 THE COURT: Not the second time by Judge Breyer.
17 MR. ARD: Right. Just let me pull off the shared
18 screen.
19 Well, he says he did. To the extent, of course,
20 that he's just flatly disagreeing with the Eighth Circuit's
21 reading of the exact same policy, the exact same sentence,
22 the Eighth Circuit's reading is controlling here. It has
23 nothing to do with the difference in state law because the
24 Eighth Circuit was just reading that sentence and so was
25 Judge Breyer. They both were just analyzing that same

1 sentence in how a reasonable insured would interpret it. So
2 that's point one. To the extent that it's inconsistent with
3 *Vogt*, of course *Vogt* controls.
4 But more important,in *Bally* Judge Breyer held that
5 the insured didn't have any prospective duty to base future
6 COI rates on mortality expectations because the policy only
7 said that the future COI rates, "Can be adjusted for
8 rejected changes in mortality." Can be. Here it says will
9 be. And that was sort of the main basis for his holding.
10 What he said is, and this is quoting from *Bally*,
11 he says, "No reasonable insured can conclude from the policy
12 language that State Farm was bound for each policy year to
13 develop its cost of insurance rates in a specific manner."
14 And he says, "The provision makes no promises about how the
15 applicable rate test will be developed. And certainly never
16 promises those rates can be only used -- developed using
17 mortality factors."
18 Well, that -- that's not our contract. That
19 contract says that COI rates can be adjusted for projected
20 changes in mortality. Our contract says, Will be based on
21 expectations of future mortality experience. So it's a very
22 different language and it's plainly distinguishable for that
23 simple reason.
24 There's one other reason you can distinguish --
25 that *Bally* is distinguishable. And that is that, you know,

1 as he explained there, they put into evidence that in
2 developing the rating classes and policy issuance that State
3 Farm put into evidence that it used nonmortality factors,
4 ReliaStar hasn't put in any evidence of how rating classes
5 were developed here.
6 But the far more important distinction is just
7 that, you know, there Judge Breyer said, look, it doesn't
8 say anything about how COI rates will be developed and never
9 promises the rates will be developed using mortality factors
10 but here it does promise that explicitly. Says will be
11 based on expectations of future mortality experience.
12 So, we also, you know, we cite evidence in our
13 brief about extrinsic evidence that confirms it. We talk
14 about a common meaning of the term based on, you know, just
15 like the Eighth Circuit's example of based on parts and
16 labor, all the cases go in our favor. I'll rest on the
17 briefs there.
18 But the one point I do want to hit on is that even
19 if ReliaStar's interpretation were right that based on
20 unambiguously means nonexclusive the motion still fails.
21 And Your Honor asked a question about this.
22 ReliaStar's reply brief doesn't really address the
23 argument beginning on Page 25 of our opposition brief, that
24 ReliaStar's completely ignored its updated EFME. And that's
25 a breach even under ReliaStar's own authority, which says

1 that the based on factors must still be the "principle
2 ingredient" in the analysis. That's, you know, from *Norem*
3 and other cases.
4 Now the simple facts here, Your Honor, and this is
5 straightforward for the jury. This is straightforwardly a
6 jury question. The simple facts here is that ReliaStar
7 hasn't changed its COI rates scale in over 20 years for
8 these policies. That's cited in our brief. Brantzeg,
9 Page 3 -- in his deposition, 331, 3 to 10.
10 ReliaStar's mortality and expectations change
11 annually. Again you heard opposing counsel say that. Cited
12 in our brief. Rouse report, Pages 30 to 33 in his opening
13 report on class certification.
14 ReliaStar itself has done an analysis of
15 historical mortality improvement which means look -- what
16 they say is okay, well, if you assumed rates back in -- if
17 we had a mortality expectation back in 1995 or let's say
18 2003, well, then they might want to say, well, what would
19 those expectations look like today if we redid them. And
20 they have an analysis that James Rouse walks through in
21 detail in his report called, Historical Mortality
22 Improvement, which essentially brings old expectations
23 up-to-date.
24 And what ReliaStar itself concludes is that its
25 own mortality expectations have continued to improve for all

1 class policies at a rate of approximately .75 percent per
2 year. That's in Rouse's opening report. He's got seven
3 pages on this -- or seven paragraphs on this 112, 119
4 discussing this at length.
5 Those historical mortality improvements apply to
6 all the class policies. That's in Appendix 2, Pages 64 to
7 65 of the Rouse report and in Paragraphs 73 and 74 of the
8 Rouse report.
9 So where all class policies that applies to them,
10 ReliaStar itself are saying our mortality expectations keep
11 on getting better, but they haven't changed their rates in
12 over 20 years. So it's at least a question for the jury as
13 to whether ReliaStar has been basing its mortality on its
14 current updated mortality expectations when it's never
15 changed in 20 years in the face of continually improving
16 experience.
17 Mr. Leigh pointed out that for Ms. Arnold, one of
18 the policy members, there was some years or some months
19 where there's no damages. But the fact there's some months
20 where there are no damages doesn't bar our claim and that's
21 part of our own analysis.
22 The overwhelming number of months show that there
23 was significant overcharges. And, in fact, our analysis
24 shows there's over $40 million in overcharges just in the
25 last, you know -- during the class period.

1 It's a question for the jury, again, whether
2 ReliaStar is using based on as a principle ingredient, its
3 mortality expectations of principle ingredient in COI rates
4 when it's ignored 20 years of improvements.
5 Mr. Leigh cited the one -- one year, 2011 where
6 ReliaStar redid some of its tables. And if you look at the
7 expert report what it says is the rates went up and down.
8 Mortality got better for some people, worse for others. But
9 that doesn't mean it got better from pricing, what it means
10 is it got better from the prior year. So they had a
11 mortality rates assumptions from 2010 and then in 2011 they
12 redid it and they found that some rates got better and some
13 got worse.
14 Well, that has nothing to do with our case because
15 it doesn't matter that it got better from 2011 to 2010, the
16 question is, were your COI rates based on your mortality
17 expectations. If they're far, far better from pricing
18 mortality expectations and you haven't changed your COI
19 rates, well, then you breached the contract. It doesn't
20 matter that in one year it got better or worse. And it
21 certainly can't be ground for summary judgment that in one
22 year, you know, the mortality got better or worse.
23 The other problem with Mr. Leigh's argument is
24 that it ignores historical mortality improvement, which I've
25 actually discussed. And we actually even have a different

1 damages model that shows -- that shows what damages would be
2 under this historical mortality improvement model.
3 And so it shows that -- if you assume, you know,
4 .75 percent historical mortality every year, like ReliaStar
5 itself does, what the damage would be for all class
6 policies. And in that analysis there are no negatives. He
7 showed, you know, there's some months where there's zero
8 damages. Well, on the historical mortality improvement
9 model there are no zeros. There's always damages for every
10 month. But the fact that there -- and that's the part of
11 our motion they just ignore. And the fact that, again,
12 there's some months with no damages is not relevant.
13 Mr. Leigh also pointed out that mortality
14 assumptions that they use apply across all Vogt companies.
15 I don't understand the relevance of that because it applies
16 to ReliaStar and that's our point. Is that you have
17 continually improving mortality expectations that apply to
18 these policies by ReliaStar. They apply to these policies
19 and their COI rates are not being based on those improved
20 mortality expectations.
21 I'm trying to see if there's anything else in his
22 argument that I need to respond as to. I don't think so,
23 unless Your Honor had questions about it.
24 The -- you know, there were a lot of other
25 arguments in their brief about EFME being allowed to include

1 other factors such as probability of death and so forth.
2 It's addressed in our brief. Those are all factual
3 questions and a factual question as to what ReliaStar's
4 expectations of future mortality experience are and that's
5 for the jury to decide.
6 Their brief makes a lot of argument about the from
7 time-to-time clause. Mr. Leigh didn't mention that today.
8 I think the simple mistake that they make in their
9 brief is they tried to read the for time-to-time clause in
10 isolation. Let me just pull up the contract again real
11 quick.
12 So it says, "Monthly costs insurance rates will be
13 determined from us from time to time. These rates will be
14 based on our expected future mortality experience." So
15 really in context, you know, the sentence of will be based
16 from time to time, we agree that doesn't mean annual as a
17 matter of law nor does it mean, you know, more than 20 years
18 as a matter of law. It's up to the jury to decide how often
19 they should have increased their adjusted rates in the
20 context of the fact of this case.
21 If you look in the next sentence it informs when
22 mortality rates -- or sorry, cost insurance rates should be
23 updated. They must be updated, they will be updated when
24 their expected -- when their expected future mortality
25 experience changes. That's what the next sentence says.

1 So the from time-to-time clause doesn't help them,
2 if anything it helps us. It certainly can't be argued as a
3 matter of law that ReliaStar's failure to adjust their COI
4 rates for more than 20 years despite materially changing and
5 improving mortality experience in that time satisfies the
6 time-to-time clause. That's for the jury to decide.
7 So, Your Honor, there are other points that are
8 raised in the brief that we can rest on in the brief.
9 The last point I'd just say on this annual issue,
10 again, Mr. Leigh didn't raise it, but Mr. Rouse, of course,
11 points out that even if ReliaStar were right that, you know,
12 it didn't have to update its COIs annually. That wouldn't
13 be a ground to grant this motion because Mr. Rouse, our
14 expert, in his rebuttal report, Paragraph 3.1 explains that
15 you could easily do the same analysis even if the jury found
16 that you only needed to change COIs every three years or
17 five years. You could just chose one year of EFME. It
18 doesn't have to be every year. And, of course, it's a fact
19 question for the jury how often it has to be.
20 So, Your Honor, unless you have any other
21 questions, I can pass the argument to Mr. Weiss.
22 THE COURT: I'll move over to, is it Mr. Weiss or
23 Weiss?
24 MR. WEISS: It's Weiss, Your Honor.
25 THE COURT: All right. So whenever you're ready,

1 counsel.
2 (Court reporter interrupted.)
3 THE COURT: So will it work for counsel if we take
4 15 minutes here before we hear from Mr. Weiss and then
5 rebuttal from defense counsel?
6 MR. LEIGH: That's fine, Your Honor.
7 THE COURT: Does that work for everybody?
8 MR. WEISS: That's fine with the plaintiffs, Your
9 Honor.
10 So, Ms. Sampson, can you put everybody, however
11 you do that in a waiting room or do they all want to kind of
12 sing while Lynne's taking a break?
13 MS. SAMPSON: Well, honestly, Your Honor, if they
14 want they can just, you know, mute their mics --
15 THE COURT: Okay.
16 MS. SAMPSON: -- and stop their video feed. If
17 they want to go back to the waiting room --
18 THE COURT: That's probably easier --
19 MS. SAMPSON: They can just --
20 THE COURT: -- we can just mute mics and video.
21 And I'm sure that for this break those of you that
22 aren't in Minnesota are disappointed you can't be in the
23 minus 8, minus 20 below zero weather, so let's --
24 Lynne, will 15 work for you?
25 (Court reporter responded.)

1 THE COURT: Okay. We'll take 15 here. And then I
2 think it's fine if we just mute the video. And I'll save
3 the story about a couple of my zoom stories when lawyers
4 thought they were on mute and they weren't. I won't do that
5 now.
6 So let's take 15 and we'll be right back to you.
7 All right. All right. So we'll go on mute and you can stop
8 your video, too, if you wish.
9 (Recess at 11:01 a.m.)
10 (Reconvened at 11:14 a.m.)
11 THE COURT: I'll inquire of plaintiffs' counsel
12 first. Do we have everybody on you'd like to have on before
13 we continue?
14 MR. ARD: Yes, we do, Your Honor.
15 THE COURT: And same inquiry for defense counsel?
16 MR. LEIGH: We do, Your Honor.
17 THE COURT: All right. So whenever you're ready,
18 counsel, you may proceed.
19 MR. WEISS: Good morning, Your Honor. Ryan Weiss
20 with Susman Godfrey on behalf of the plaintiffs. And I'll
21 be addressing release, standing and limitations.
22 THE COURT: All right.
23 MR. WEISS: I'll first start with release. And
24 the key question here, Your Honor, is whether plaintiff
25 Curtis could have brought her claim before the 1999 *Alten*

1 settlement and the obvious answer to that question is a
2 resounding no and here's why.
3 The earliest claim asserted by plaintiff Curtis in
4 this case is that in 2012 ReliaStar updated its expected
5 future mortality experience, as it does every year, but in
6 violation of its ongoing contractual obligation it did not
7 redetermine its COI rates so that they were based on that
8 updated expected future mortality experience.
9 Now it should go without saying that Ms. Curtis
10 could not have alleged such a breach in 1999 when the *Alten*
11 settlement was reached. ReliaStar's expected future
12 mortality experience for 2012 did not yet exist and
13 ReliaStar would not deduct the COI charges that Curtis now
14 challenges for another 13 years. And that's just common
15 sense that she couldn't assert such a claim and in fact
16 you heard opposing counsel concede the same thing this
17 morning.
18 The only way that the 1999 *Alten* settlement can
19 have any impact on Ms. Curtis's claim alleging wrongful
20 conduct from 2012 to the present is if the two claims share
21 an identical factual predicate, meaning that they depend
22 upon the very same set of facts.
23 And as the Supreme Court held just 20 months ago
24 in the *Lucky Brand* case, two claims failed this test -- and
25 I'm quoting here, "If the complaint of conduct in the second

1 action occurred after the conclusion of the first action."
2 *Lucky Brand* is on all fours here, Your Honor. All
3 of the conduct complained of in the *Alten* action necessarily
4 predated that 1999 settlement and by contrast, all of the
5 conduct complained of here took place more than a decade
6 after that 1999 settlement.
7 And what's particularly telling, Your Honor, is
8 that *Lucky Brand* is cited in nearly all of our papers. It's
9 cited in our reply on class certification as well as in the
10 introduction and the body of our summary judgment
11 opposition. And rather than try to distinguish *Lucky Brand*,
12 ReliaStar ignores it entirely. And you didn't hear them
13 mention it once today in their presentation. And there's a
14 good reason for that, Your Honor, it is fatal to their
15 release argument.
16 And what is more here, is the logic of *Lucky Brand*
17 that Ms. Curtis could not have asserted her claim in the
18 *Alten* action is corroborated by ReliaStar's own reply brief
19 and discovery in this case.
20 And I'm going to share my screen. And do you have
21 that up? Just to confirm.
22 THE COURT: Yes.
23 MR. WEISS: All right. And so as you can see
24 here, Your Honor, this is from defendant's reply brief at
25 Page 14. And, you know, they put it better than I honestly

1 could, Your Honor.
2 The claim that COI rates should be been lowered in
3 2017 naturally could have not have been presented in *Alten*
4 in 1999. We absolutely agree and that's why the *Alten*
5 release doesn't apply and ReliaStar's corporate
6 representative admitted the same thing in his deposition.
7 If you go to the next slide you can see -- here,
8 let me put this in presentation mode, so.
9 You can see there that what Mr. Brantzeg said as
10 he was asked, "Could the policyholders have known in 1999
11 what the cost of insurance rates and what the expectations
12 of future mortality experience were going to be in 2013?"
13 And his answer -- his answers was -- was honest and
14 forthcoming and simple. He said no.
15 Sorry. One second. And those forthcoming, yet
16 devastating admissions here, Your Honor, are enough standing
17 alone to deny ReliaStar's motion.
18 But what makes this --
19 THE COURT: No. Go ahead -- go ahead.
20 MR. WEISS: What makes this case even stronger,
21 Your Honor, is that we don't even know what was alleged in
22 the *Alten* action to assess, whether it depends on the very
23 same set of facts or the identical factual predicate as Ms.
24 Curtis's claim here.
25 Now, Mr. Leigh claimed today that the *Alten* action

1 involved a COI increase. Your Honor, there's no evidence in
2 the record of that and indeed ReliaStar hasn't provided
3 plaintiffs, much less the Court, with a copy of the *Alten*
4 complaint in discovery or otherwise. And as best can be
5 inferred from *Alten's* companion case *Blanke*, of which they
6 were a part of a joint settlement, *Alten* had nothing to do
7 with COI charges or COI rates and certainly didn't allege
8 failure to determine COI rates based on expected future
9 mortality experience.
10 In fact, if you look at the *Blanke* complaint,
11 which, you know, for our purposes here we assume is going to
12 end up being similar to the *Alten* complaint, it mentions
13 cost of insurance just twice and it does so only in defining
14 other terms that are used in the complaint, not in any
15 substantive allegations.
16 We also heard Mr. Leigh today say that this case
17 is similar to *Freeman* from the Third Circuit. But *Freeman*
18 is inapposite here, Your Honor.
19 In *Freeman* the release permitted claims that arose
20 exclusively after the end of the class period as is required
21 by the identical factual predicate test, but the later
22 complaint fell outside of that exception because it alleged
23 monthly breaches of contract that were recurring as early as
24 1999 which was during that prior class period. That is not
25 what Ms. Curtis alleges here. She alleges breaches

1 exclusively that postdate the *Alten* settlement, and *Freeman*
2 therefore doesn't apply.
3 THE COURT: So what would be then the relevance?
4 One of the things that defense counsel pointed to
5 both in their argument and then the brief is that the --
6 there was a contractually agreed-upon Court-approved cost of
7 insurance rate.
8 Are you saying, well, that was back then that
9 wouldn't -- that wouldn't be relevant to that issue today
10 or in 2012?
11 MR. WEISS: That is correct, Your Honor. That was
12 an altercation to the cost of insurance rates that were
13 reached at that time as a result of the *Alten* settlement.
14 Now, what could not have happened, what the *Alten*
15 settlement was not intended to do was to alter the terms of
16 the policy so that as long as ReliaStar was applying those
17 same costs of insurance rates that were instituted as a
18 result of the *Alten* settlement they were complying with the
19 terms of the policy.
20 And, in fact, I think that's a great segue into
21 what -- into the language of the *Alten* release itself and it
22 responds to this exact point, Your Honor.
23 Section 12.18 of the *Alten* release -- and I'm
24 going to share my screen again. Give me one --
25 Your Honor, Section 12.18 of the *Alten* release

1 speaks to this issue. And it says that, "Neither of this
2 settlement agreement nor any of the relief to be offered
3 under the proposed settlement shall be interpreted to alter
4 in any way the contractual terms of any policy or to
5 constitute a novation of any policy."
6 And that makes sense, Your Honor, because under
7 the terms of the *Alten* settlement the policies were going to
8 remain in force for many years to come. This wasn't a
9 settlement where ReliaStar was going to wipe its hands clean
10 of any obligations under the policies. Instead what it was
11 going to do was keep insuring the policies subject to the
12 *Alten* release and keep collecting premiums and other charges
13 and keep paying out death benefits going forward.
14 And the Section 12.18 of the *Alten* release makes
15 clear ReliaStar was going to do so pursuant to the terms of
16 the policies it drafted, which meant that the costs of
17 insurance rates needed to be based on its continuously
18 changing expected future mortality experience.
19 There's nothing in the *Alten* settlement that said
20 that as long as ReliaStar ended up applying to the same
21 rates from 1999 that it would not be in breach of the
22 policy.
23 And ReliaStar's argument here, quite frankly Your
24 Honor, is even broader than simply the fact that these costs
25 of insurance rates were instituted one time back in 1999.

1 They seem to suggest that going forward that any future
2 claims based on any costs of insurance charges would be
3 encompassed by the *Alten* release as it contains a passing
4 reference to future claims.
5 Now that, Your Honor, simply cannot be the case at
6 all because, again, it would impermissibly alter the
7 contractual terms of Ms. Curtis's policy.
8 And, Your Honor, if you look at the following
9 slide, what ReliaStar is essentially asking the Court to do
10 is add a clause to Ms. Curtis's policy and every other
11 policy with similar language. And rather than having it say
12 that cost of insurance rates will be based on our future
13 expected mortality experience going forward, what
14 ReliaStar's preferred interpretation is to change that
15 policy language to say, well, before 1999 those rates will
16 be based on our expected future mortality experience but
17 after 1999 those rates will be whatever we choose in our own
18 discretion, whether that's keeping the same rates that were
19 instituted in 1999 or changing those.
20 ReliaStar's interpretation is simply that any such
21 claim that arises from any cost of insurance -- from any
22 cost of insurance provision whatsoever is released by the
23 *Alten* settlement and that simply isn't the case.
24 ReliaStar cannot use a prior settlement to change
25 the terms of the policies by Fiat. And that's the exact

1 purpose of Section 12.18 of the *Alten* release and ReliaStar
2 doesn't engage in that argument at all, either in its
3 papers. We didn't hear anything today either.
4 And now there's another reason as well, Your
5 Honor, why ReliaStar's *Alten* -- why ReliaStar's argument
6 about the *Alten* release fails and that's because it runs
7 headfirst into contrary Connecticut law, which the parties
8 agree governs the *Alten* settlement agreement.
9 As the *Muldoon* case explains, which is cited on
10 Page 35 of our brief, releases that purport to cover claims
11 based on events that have not yet occurred run contrary to
12 public policy and are barred as a matter of law.
13 And that's the interpretation that's offered by
14 ReliaStar here today. It argues that the *Alten* release bars
15 all future claims, including claims that target future
16 conduct, as is the case here, so as long as they arise out
17 of or relate to the policies or an extremely broadly-defined
18 set of release transactions that applies to essentially
19 every aspect of the policies.
20 But under Connecticut law, Your Honor, the only
21 lawful interpretation of that provision is that -- is that
22 the *Alten* release applies only to claims that existed at the
23 time of the *Alten* release, but which had not yet manifested
24 themselves, not future claims targeting future conduct like
25 Ms. Curtis alleges here.

1 And that's precisely how this settlement agreement
2 was interpreted in the *Estate of Raven* case and it's exactly
3 how other costs of insurance-related settlements have been
4 interpreted in cases such as the *Feller* and the *In Re*
5 *Conseco* cases cited in our briefs.
6 So it's our position, Your Honor, that the *Alten*
7 release simply does not apply here. It cannot bar Ms.
8 Curtis's claim.
9 I'm going to turn real briefly here to standing,
10 Your Honor, because Mr. Sklaver hit many of the points that
11 I would make in his presentation.
12 The only additional point to really -- that I'd
13 adhere is that ATLES indisputably owns the policy which is
14 one of the grounds on which ReliaStar moves. ReliaStar has
15 stipulated to that fact already and it tries here to
16 backtrack from that stipulation by arguing that it's somehow
17 mooted by discovery, including by ATLES's deposition
18 testimony and, Your Honor, that's simply false.
19 One second. And here we have a screen shot from
20 the deposition testimony from ATLES's corporate
21 representative, Mr. Espinoza. And what he testified at his
22 deposition is not that ATLES lacks an ownership policy -- an
23 ownership interest in the policy at issue. You could go
24 through the entire, you know, nearly a 100-page deposition
25 transcript and he does not say that once. Rather, what he

1 testified to is that, "All of the policies owned by the
2 position holder's trust are owned, by record -- of record,
3 by ATLES who serves as the securities intermediary for the
4 position holders trust." And it's as straightforward as
5 that.
6 And rather than moot ReliaStar's stipulation
7 earlier in this case discovery, in addition to ATLES's
8 corporate representative testimony, corroborates it.
9 Your Honor, ReliaStar's own documents produced in
10 discovery in this case list ATLES as the owner of the policy
11 that it is sued under here. And on this slide, Your Honor,
12 here is an excerpt from one such document that we cited on
13 Page 37 of our brief.
14 And if you look at the left-hand side of this
15 document, which is an Annual Report provided by ReliaStar to
16 policyholders, it lists Advance Trust & Life Escrow,
17 plaintiff ATLES, as the owner of the policy. There's zero
18 support for ReliaStar's assertion that ATLES does not own
19 the policy it is sued under and at worst it is a disputed
20 question of fact.
21 And, Your Honor, not only is ReliaStar's argument
22 wrong but has already been asserted against ATLES and
23 subsequently rejected in litigation against ReliaStar's
24 sister company *Security Life of Denver*.
25 In that case, which is cited on Page 38 of our

1 brief, the Court found that ATLES has a personal stake in
2 this matter and a particularized injury and characterized
3 *Security Life of Denver*'s argument to the contrary as
4 difficult to square with this documents referring to ATLES
5 as the policy owner. That's exactly the case here. Just as
6 in the *Security Life of Denver* case, ReliaStar here has
7 admitted that Advance Trust owns the policy. ReliaStar's
8 own documents list Advance Trust as the owner of the policy
9 and the exact same result should follow here.
10 Your Honor, again, as I noted early, Mr. Sklaver
11 hit the second argument as to why ATLES lacks standing, that
12 its interest is only hypothetical. We disagree there.
13 There's a diminution in the cash value. ATLES is the owner
14 of the policy. As the policyholder it has a cognizable
15 property in that cash value and the diminution of that cash
16 value constitutes a cognizable injury in fact for purposes
17 of Article III standing.
18 And finally, Your Honor, I would like to address
19 the recycled argument that Judge Wright correctly rejected
20 more than a year ago that ATLES's claim for breach of the
21 waiver rider is somehow time-barred.
22 Judge Wright correctly reasoned that ATLES does
23 not allege a single breach but rather a series of breaches
24 occurring each time that a rider charged in excess of the
25 specified rate was charged. In other words, ReliaStar

1 breached the rider renew unless a new claim accrued each
2 year when the insured was charged a rider rate that exceeded
3 the rate specified for that attained age.
4 Now, while Judge Wright was considering that issue
5 on a motion for leave to amend, which we obviously concede,
6 the law she reviewed on this legal question is the same and
7 her thorough analysis explains why ReliaStar's position
8 should be rejected.
9 And, you know, this is not a case -- we heard a
10 couple cases today cited by Mr. Leigh. This is not a case
11 like the *Hamann* case, for example, where the plaintiff
12 alleged that the defendant breached a present contractual
13 obligation a single time and that it was simply that there
14 were damages that flowed prospectively from that one-time
15 breach nor is this a case like the *Beavers* case which Mr.
16 Leigh relied on today, which turned exclusively on tolling
17 doctrines and, in fact, the plaintiff in that case conceded
18 that if they were -- that if tolling did not apply that,
19 therefore, their claim would be time-barred.
20 Plaintiff ATLES here does not make such an
21 concession. It, in fact, emphatically argues to the
22 contrary and plaintiff ATLES also is not relying on any
23 tolling doctrines so *Beavers* is inapposite.
24 Rather, this is a case like *Levin* and *Garden*
25 *Ridge*, which are cited in our brief and *Levin* is a case that

1 Judge Wright expressly relied on --
2 THE COURT: Uh-huh.
3 MR. WEISS: -- where the plaintiff alleged that
4 the defendant committed a series of ongoing breaches that
5 could occurred only at the time that ReliaStar overcharged
6 ATLES. Each of those overcharges constitutes a separate
7 breach, states a separate cause of action and has a separate
8 accrual date for purposes of statute of limitations.
9 The only new argument that we have today here from
10 ReliaStar is that this nonpublic 1989 memorandum somehow
11 transforms ReliaStar's several breaches into a single breach
12 that accrued one time more than three decades ago.
13 But whether ReliaStar's rider obligation is a
14 one-time obligation or an ongoing one is a legal question,
15 not a factual one. And it's our position that Judge Wright
16 correctly ruled that that obligation is an ongoing
17 obligation and that each of those breaches constitutes a
18 separate breach.
19 It therefore makes no difference whether the first
20 of these several breaches, you know, happened in 1989 or in
21 2012 or quite frankly, Your Honor, even in 1950. All that
22 would impact is when the first claim accrued.
23 What matters here is that since 1990 ReliaStar has
24 committed separate breaches each year and it continues to do
25 so today. And all of those claims that we're asserting here

1 beginning in 2012 are plainly within the limitations period.
2 Just real briefly on laches, Your Honor, that
3 doctrine is available only in suits of equity, not a
4 contract claim like ATLES's claim here. But even if laches
5 was available to ReliaStar, it still couldn't bar ATLES's
6 claim because there's a disputed question of fact as to
7 whether or not ReliaStar is to blame for ATLES's delay in
8 asserting its claim, given that ReliaStar didn't even know
9 about this issue until discovery, in fact, until it was
10 identified by plaintiffs in this case.
11 And, second, that ReliaStar hasn't demonstrated
12 that its position changed because of any alleged delay.
13 And to be clear, Your Honor, ReliaStar didn't
14 respond to a single one of these points in its reply brief
15 and that's because laches simply has no impact on ATLES's
16 claim here.
17 So unless Your Honor has any further questions, we
18 would ask that you deny ReliaStar's motion and allow this
19 case to continue to proceed to trial. Thank you.
20 THE COURT: I'll see. We'll go -- I may or may
21 not have, but I'll see where defense counsel focuses.
22 Whenever you're ready, counsel?
23 MR. LEIGH: Thank you, Your Honor. I'll try and
24 be brief.
25 With respect to the based on piece of this, just

1 quickly, you know, I think it's notable to take -- to take
2 note of what it is that the plaintiffs here are asking this
3 Court to do.
4 On the one hand, they want the Court to follow the
5 SLD case out of District of Colorado with respect to some
6 things but then resist that Court's holding that their
7 claims are unmeritorious.
8 They want this Court to apply the *Vogt* Court's
9 interpretation of Missouri law across the country, but they
10 want this Court to completely disregard the Slam Dunk's
11 interpretation of Florida law. You know, we rejected that
12 is the appropriate result and as articulated before, you
13 know, ReliaStar believes that the provision in *Slam Dunk* is
14 materially the same as the provision here and that the *Vogt*
15 provision is materially different.
16 It's hard to square, Your Honor, I believe, an
17 argument by the plaintiffs that which focuses so intensely
18 on the reference of the 1958 table as demonstrating that
19 based on can be exclusive because of the reference to the
20 1958 table while on screen showing the analysis of their
21 expert taking that table and doing mathematical formulations
22 to prove their point.
23 Again, the point is all of the uses of based on
24 have different words that follow within the same provision
25 and it necessarily has to be the case that all of those

1 based ons do not connote exclusivity and must as a matter
2 law connote nonexclusivity as a result. There is no other
3 way to consistently read the revision. Counsel's creative
4 arguments about present and tenses withstanding.
5 With respect to *Phoenix* just very briefly. I'd
6 note that, you know, counsel brought up the *Phoenix* case as
7 being something that strongly supports their position
8 because there the Court did draw a distinction between the
9 rates set at the time the policy was issued, the policy date
10 on the policy versus the rate at the other times.
11 I'd note and just command to Your Honor's
12 attention, Footnote 1 of our brief addresses this
13 specifically. And the reason for that is because in the
14 *Phoenix* policy the COI provision specifically was divided
15 into a provision at the time of the policy date and then
16 starting in the month after the policy date at all times
17 thereafter. So it was not a judicial construction of a
18 policy provision like that in our case that resulted in that
19 commentary by the Court. The policy itself contained
20 express words demarcating the different times in which COI
21 would be calculated.
22 So we don't think that the *Phoenix* case for that
23 reason really lends the plaintiff any support.
24 With respect to the assertion that, again, that
25 there has just been unceasing, that there is some proof of

1 unceasing improvement of ReliaStar's expectations of future
2 mortality, you know, that is a contention made on the back,
3 again of, you know, generic company or nationwide
4 propositions.
5 The fact that ReliaStar uses a .75 mortality
6 improvement assumption across its entire company, for
7 example, or that *Voya* frankly uses that across all of its
8 companies, does not answer the question as to the policies
9 at issue in this case, have they experienced improved
10 mortality or not.
11 And just to put a factual point as to how
12 plaintiffs' arguments rest on generic propositions and, you
13 know, sort of the esoteric calculations of its expert, which
14 stand in contrast to what the actual contemporaneous record
15 shows, I'd share the couple of documents that we've looked
16 at already today or one that we looked at already and
17 another that plaintiffs' counsel discussed in their
18 argument. One is -- let's see, I'm going to get my screen
19 share up here, Your Honor.
20 And we want to focus on the year 2011. In 2011,
21 Your Honor, ReliaStar's actual mortality experience is
22 recited here in this contemporaneous document. They
23 acknowledge that some rates went up and some went down but
24 they say, "In particular, we significantly increased
25 mortality rates for business written originally on

1 Security-Connecticut Life." That's the policies at issue in
2 this case. Significantly increases Your Honor knows means
3 mortality is significantly worse than we imagined it would
4 be.
5 Now, draw the contrast, Your Honor, to plaintiffs'
6 position in this case. And, again, let's use Ms. Arnold.
7 So, again, this is in 2011. Business written on
8 Security-Connecticut Life is significantly worse from a
9 mortality perspective. But plaintiff says in the year 2011
10 Ms. Arnold was substantially overcharged, meaning that
11 they've come up with some creative analysis, some math that
12 shows that contrary to what the contemporaneous record shows
13 was the actual expected mortality analysis by ReliaStar in
14 2011, we think there was an overcharge.
15 That just doesn't work, Your Honor. And it goes
16 to expose the fact that Advance Trust and Ms. Curtis, they
17 have come up with a lot of creative ideas, as have
18 plaintiffs in a number of these cases, for having to get
19 around releases and settlement agreements, for how to get
20 around what the contemporaneous evidence shows on the back
21 of their hired experts and the creative math that they come
22 up with so that they can throw around numbers like
23 $40 million. But that evidence stands in contrast to the
24 actual contemporaneous evidence of what expectations of
25 future mortality are at specific points in time and exposes

1 the fact that they don't have any evidence that shows, other
2 than their expert opinion, again, that supports their
3 interpretation of the contract or that ReliaStar had in
4 obligation to reduce the COI rates.
5 Just very quickly, we talked about turning to the
6 arguments that Mr. Weiss addressed just very briefly.
7 You know, with respect to the *Alten* settlement,
8 you know, we did address the arguments in reply. You know,
9 we simply disagree that through frankly artful pleading one
10 can take a claim that they released in the plain terms with
11 respect to cost of insurance charges and say, oh, but we
12 only want to start it after the release and just simply
13 recycle a claim over and over again.
14 I think, you know, I would just highlight for Your
15 Honor, you know, the practical impact of that is to vitiate
16 settlement agreements reached in multidistrict litigation
17 and class actions that contain future releases, you know,
18 across the country.
19 I certainly don't think that is the intention and
20 I think that's why the case law, you know, irrespective of,
21 you know -- you know, they found some cases that go their
22 way on this but why the case law says that the actual
23 increase was the subject matter of the claim being asserted,
24 something that could have been asserted in the prior
25 litigation. And here it obviously is and we know that for a

1 number of different reasons but principally we know it
2 because Ms. Curtis alleges that for 30 years this thing has
3 been going on. Right? This conduct that she complains of.
4 Meaning way before *Alten* and at all times after *Alten*.
5 So the concept that this is something that there
6 is any conduct that existed purely after the *Alten*
7 settlement is simply factually incorrect and legally not the
8 analysis to be made.
9 And let me just look at my notes, here, Your
10 Honor.
11 You know, again, I mean, in the *Alten* settlement,
12 again, just to be clear, it is not ReliaStar's position that
13 contrary to plaintiffs' argument today that we believe that
14 the contract provision for COI should be written that --
15 rewritten such that before 1999 it has to be based on
16 expected future mortality as well as the other based on
17 attributes of that provision and then after whatever
18 ReliaStar wants it to be. And other than the PowerPoint
19 slide, there's no demonstration that that's ReliaStar's
20 position or that ReliaStar acted in conformity with that
21 proposition.
22 In fact, the evidence -- there is zero evidence to
23 suggest that ReliaStar has not calculated COI rates in
24 exactly the same way in 1980, in 1990, in 1999 and today,
25 except that it is the case that we agreed to reduce Ms.

1 Curtis's COI rate in connection with that settlement
2 contract and we have not changed it since. Not because we
3 believe that we couldn't but because, again, we believe that
4 the evidence shows that the expected future mortality
5 experience, as well as the other factors in the contract,
6 the contract allows ReliaStar to consider in setting COI
7 rates, don't justify changing it.
8 I suspect that frankly just as a practical matter,
9 if we had changed that COI already, we'd probably be here on
10 Ms. Curtis's complaint that you promised me you were going
11 to charge a certain COI rate in a class action settlement in
12 1999 and now you've changed it.
13 So, you know, again I think that the concept that
14 we believe the provision means anything than other than it
15 says is not well-taken.
16 With respect to the rider claim, we went through
17 that at length and I'll rely on the briefs for that. I
18 don't have anything to add to that.
19 You know, again, you know, we simply -- except to
20 say that we simply reject the concept again that simply by
21 pleading that you're not talking about conduct in 1989 but
22 contact after that, you get around the factual, you know,
23 the matter of the fact that the conduct you are complaining
24 about happened in 1989 and first caused you damages in 1990.
25 Those are the indisputable facts and there's just simply no

1 way around that other than argument of counsel, frankly,
2 Your Honor.
3 With respect to standing. I would again, refer,
4 primarily to the briefs except to note, as we do in our
5 papers, that it is simply incorrect that parties can
6 stipulate to the constitutional ability of this Court to
7 hear a case because a party has standing.
8 The fact that we stipulated that they were a
9 record owner of policies, the fact that they list themselves
10 as a record owner of a policy, as the Supreme Court in
11 *Ramirez* reminded us, doesn't matter.
12 If we look at all of Espinoza's depositions as a
13 corporate representative of ATLES, he admits that the actual
14 owner of the policies is Life Partners Position Holders
15 Trust. There's no question that Life Partners Position
16 Holders Trust for whatever reason, you know, hides that fact
17 or for convenience lists with insurance companies that
18 Advance Trust is the record owner that they want the
19 insurance company to send correspondence to, that they want
20 death benefits to be paid to. But not because those death
21 benefits are kept or used in any way by Advance Trust, it's
22 because Advance Trust is a bank account, Your Honor.
23 Mr. Espinoza admitted that Advance Trust has never
24 paid a dime itself in support of the premiums for any policy
25 that it owns. Mr. Espinoza admitted that Advance Trust has

1 never received itself a dime of death benefits paid on the
2 policy that it sues on.
3 And Mr. Espinoza admitted that -- and it's a quote
4 from his deposition, Your Honor, cited in our brief, it's at
5 Page 17 of his deposition, that Advance Trust, "Does not
6 have an economic interest in" the policy.
7 So, you know, again, this is what Ramirez was
8 reminding us, Your Honor, that there's a difference between
9 an esoteric legal injury and an injury in fact. And what
10 standing is concerned with is whether the person standing in
11 Court has an actual factual injury that they're complaining
12 about. Not just that they've come up with an academic
13 breach that they want to go to court and try to secure some
14 money on. Money which, by the way, doesn't even go to
15 Advance Trust even if they win. You know, now, you know, it
16 may be a fact that the money if Advance Trust wins might
17 pass through Advance Trust as an escrow bank account, but
18 that money is actually Life Trust Partners Position Holder
19 Trust or Life Partners Position Holder Trust.
20 So in any event, we disagree that the fact that
21 Advance Trust is listed in ReliaStar's records ends the
22 standing inquiry and we'd rely on our brief for the rest of
23 the arguments.
24 To the extent Your Honor has any questions, I'm
25 happy to address them but otherwise I don't have anything

1 further at this time.
2 THE COURT: Then I'll hear any brief response from
3 one or both plaintiffs' counsel.
4 MR. ARD: Yes, Your Honor. Very briefly.
5 First, they say we are resisting SLD's holding on
6 the based on clause. That's a very curious statement
7 because there was no based on clause on the SLD contract.
8 That was the whole point of the Court's holding there was
9 that the contract was silent. Didn't have any numerating
10 factors at all. It didn't say based on expected future
11 mortality experience. It didn't use the word based on at
12 all and that was the basis for the opinion.
13 Second, they're saying that we're asking for
14 Missouri law be applied nationwide. We're not asking that.
15 We're just asking the Court to follow *Vogt's* interpretation
16 of the plain language of materially the same sentence. And
17 all states follow the rule that the plain language in the
18 contract is the most -- at least the most important thing
19 interpreted in the contract.
20 They can claim that Mr. Rouse does some math to
21 prove that the max COI rates are equal to mortality rates.
22 I don't understand that complaint. He opines that the
23 maximum COI rates are equal to the mortality rates in the
24 1958 tables. The contract says, "Maximum COI rates are
25 based on the 1958 rates." That shows what based on means.

1 The best evidence you could possibly have. It's in the same
2 provision. And in that provision, if you do the math, you
3 can find out, he opines to this, it's the least disputed
4 issue for the jury, that the max rates are equal to
5 mortality rates which is, you know, our main theory of
6 damage in this case.
7 ReliaStar complains about our use of their own
8 mortality improvement assumption, the .75 percent per year,
9 saying that's generic. Well, as I walked through in oral
10 argument and in our briefs, it's ReliaStar that applies
11 those mortality improvement assumptions to all its policies
12 including the class policies. Again, that's explained in
13 Rouse's report Paragraphs 112 to 19, 73 to 74 and the
14 Appendix, 64 to 65.
15 These memoranda that set forth the historical
16 mortality improvement apply to all class policies:
17 And, lastly, he -- counsel went back to the 2011
18 issue. And he put up a quote saying, We significantly
19 increased mortality rate for Security-Connecticut policies
20 in 2011.
21 Well, first, it's one year so even assuming that's
22 true, doesn't have any impact on really almost this entire
23 case, which is about the, you know, where the limitations
24 period starts after 2012, '13 for almost everybody, but even
25 for the other policies like Kentucky I think go back to

1 2003, but still it's just one year.
2 But more important, it says that we significantly
3 increased mortality rates for Security-Connecticut policies
4 but then say increased from what?
5 It's not increased from pricing because they lost
6 their pricing assumptions. It's increased from the year
7 before. But just because it's increased from the year
8 before it doesn't follow that COI rates still aren't too
9 high and higher than the increased survivor than the
10 increased mortality. That's a fact question for the jury.
11 And Mr. Leigh made that point for us because he
12 pointed out that if you look at the damages model and the
13 damages analysis for Ms. Arnold there's an overcharge for
14 that year. He, himself just pointed that out. That's
15 because COI rates were higher than even the increased
16 mortality rates for that year for that policy. This is all
17 for the jury. This can't be decided now.
18 ReliaStar didn't even move for summary judgment on
19 the theory that its EFME deteriorated. This is oh, mostly
20 new oral argument. It's hotly disputed in the expert
21 reports and it's a battle of the experts just like in
22 *Phoenix* and other cases and can't be a ground for summary
23 judgment.
24 So unless you have any other questions, Your
25 Honor, I'll pass to Mr. Weiss.

1 THE COURT: Mr. Weiss.
2 MR. WEISS: Yes, Your Honor. Also real briefly.
3 So, first, opposing counsel tries to, you know,
4 claim that this is just sort of artful pleading. That all
5 of these claims arise post the *Alten* release, but that's not
6 artful pleading, Your Honor.
7 As ReliaStar itself admitted today in its reply
8 and as its corporate representative admitted, there's simply
9 no possible way that the claims that are being asserted in
10 this case could be asserted back before the *Alten*
11 settlement. There's simply no way and opposing counsel
12 conceded that.
13 So this isn't a matter of artful pleading trying
14 to get around -- you know, creatively trying to get around
15 release, it's the simple fact that these claims did not
16 exist until later on.
17 Second, opposing counsel also tried to suggest
18 that it's not their position that they can necessarily end
19 up changing the COI rates -- oh, I guess either one -- they
20 sort of make two different arguments.
21 One, they can -- as long as they keep it at the
22 1999 rates they're fine or, two, that any, you know, future
23 conduct related to the COI charges has been released.
24 And, Your Honor, it may not be their position
25 expressly that they're saying that, oh, we can do whatever

1 we want, but that isn't by implication.
2 If you look at their reply brief -- and this is on
3 Page 14, and I'm quoting here, they say, "The settlement by
4 its plain terms bars future claims including any claim which
5 arises in its entirety from facts and circumstances arising
6 after the settlement to the extent the claims relate to
7 policy charges, including costs of insurance charges."
8 The natural implication of that position is
9 ReliaStar could charge $2 million as a cost of insurance
10 charge and that claim would necessarily be released. That's
11 the -- if you take their logic that is exactly the result
12 you end up reaching and that's obviously an untenable
13 result.
14 Your Honor, on the rider claim, I'm just -- real
15 briefly that ReliaStar continues to try to say that, you
16 know, that all this conduct took place back in 1989. That's
17 simply not the conduct that Ms. Curtis is -- excuse me, that
18 ATLES is complaining of. It's in 2012, 2013, 2014,
19 performing COI -- excuse me, performing rider overcharges
20 that necessarily could not have happened until those charges
21 where actually deducted.
22 Going back to standing. We heard opposing counsel
23 say that, well -- on their stipulation, that they say, well,
24 you can't stipulate to standing. And our position is not
25 that ReliaStar could stipulate to standing necessarily.

1 What our position is is that ReliaStar stipulated to facts
2 that actually demonstrate standing. And we didn't -- we
3 didn't cite this at all because we didn't have the
4 opportunity to reply to them but as authority for that,
5 *Sherbrooke Turf, Inc., versus Minnesota Department of*
6 *Transportation,* which is 345 F.3d 964, 967 to 68. And in
7 that case the court affirmed the district court's conclusion
8 that plaintiffs had standing in light of stipulated facts
9 that demonstrated that the plaintiffs had suffered a
10 concrete injury and had an interest in the case. And that's
11 exactly the fact here. You have stipulated facts that are
12 corroborated by discovery that shows that ATLES has suffered
13 a concrete injury and has a particularized injury in fact.
14 And, Your Honor, the only case that ReliaStar cites
15 on that point, the *Lehman Brothers* case, doesn't hold to the
16 contrary at all. In fact, the *Lehman Brothers* case didn't
17 involved standing. It instead involved the
18 constitutionality of Section 636 of the Magistrate's Act.
19 And, additionally, on top of that, although ReliaStar
20 doesn't indicate this in its papers, the portion that
21 ReliaStar cites actually come from the dissenting opinion.
22 So it's our position that that case is inapposite
23 here, not only legally but also factually because the point
24 is simply that ReliaStar stipulated to the facts that
25 demonstrate standing.

1 ReliaStar also seemed to suggest that because
2 the -- any recovery in this case would necessarily end up
3 eventually going through the securities intermediary down to
4 the contractual owners. That, therefore, ATLES lacks
5 standing. But we cited the *Sprint Communications* case in
6 our brief which holds that, standing concerns whether the
7 injury itself alleged is likely to be redressed through the
8 litigation and not on what the plaintiff ultimately intends
9 to end up doing with that recovery.
10 And that -- this case is sort of analogous to
11 where you have a trustee asserting a claim and that whatever
12 they end up receiving, it ends up going to the trust
13 beneficiaries. It doesn't mean the trustee lacks standing,
14 it just means that that recovery will end up going downhill,
15 which is exactly the case that will happen here and, of
16 course, trustees would end up having standing to bring such
17 a claim.
18 ReliaStar also suggests that plaintiff ATLES
19 testified that they don't have an economic interest at all
20 in the policies. And that, Your Honor, is taken out of
21 context.
22 If you look at Page 17, Lines 18 through 20 of Mr.
23 Espinoza's deposition, he testifies that what he means by
24 not having an economic interest is that ATLES doesn't
25 participate in the death benefits. And he really says,

1 ATLES does not pattern in the death benefits is what I'm
2 trying to say. And we concede that fact that that doesn't
3 have anything to do with ATLES's standing here because it's
4 focused on the cash value and the diminution of that cash
5 value and not in any pay out of the death benefit.
6 And, yep, and that hits all of the points that I
7 have here, Your Honor.
8 THE COURT: All right.
9 MR. WEISS: So unless you have any further
10 questions, I'm happy to turn it over.
11 THE COURT: Again, the last word to defense
12 counsel if you want it, counsel?
13 MR. LEIGH: I'll refrain, Your Honor.
14 THE COURT: All right. Anything further, Mr.
15 Sklaver?
16 MR. SKLAVER: No. Other than to thank the Court
17 for having a three-hour hearing and taking the time and the
18 court reporter to hear everybody and to allow all of us to
19 argue. We really appreciate it.
20 THE COURT: Mr. Johnson, anything further?
21 MR. JOHNSON: I would just echo Mr. Sklaver's
22 thanks. We appreciate it. And also thanks for saving us a
23 trip to that frozen tundra.
24 THE COURT: I do have a question for you, Mr.
25 Johnson, admittedly it doesn't relate to the case.

1 When you kind of shut off your video, there was a
2 picture of you. Where were you at in that picture?
3 MR. JOHNSON: Well, I was on the Ferris Wheel at
4 the Tuileries in Paris with my daughters on my lap probably
5 ten years ago, so.
6 THE COURT: Okay. Well, that's an interesting
7 picture to have there.
8 So I could leave you -- speaking of daughters --
9 well, first let me say this on the case, so then I can
10 let -- my one little story we can -- I can ask my court
11 reporter to rest her hands. Not quite yet, Lynne.
12 But, one, I'll seriously thank everyone for their
13 argument and the extensive briefing, it's generally my
14 practice -- and thank you for your arguments today, it's
15 generally my practice, I'll have my chamber send out to your
16 respective law firms in the next week or so, timing for when
17 my decision will be out. Because sometimes it's frustrating
18 to lawyers and more frustrating to their clients, well
19 what's the Judge mean under advisement? When are we going
20 to hear from the Judge?
21 Well, so I'll send something out saying when I'll
22 file my memorandum, opinion and order in the case.
23 And then I -- there's probably, given the status
24 of the case now, probably everybody's willing to kind of --
25 probably not just willing but needs to sit tight until they

1 get that decision, as opposed to something happening in the
2 next few days or few weeks. Because sometimes we might be
3 in the middle of discovery or some other issue, but I think
4 probably the next step is to get my decision and then we go
5 from there?
6 MR. JOHNSON: Yes, Your Honor.
7 MR. SKLAVER: Yes. The case is on total ice.
8 THE COURT: All right.
9 MR. SKLAVER: Fact discovery's closed.
10 THE COURT: So you'll hear -- we'll send out --
11 I'll have my chambers send out an e-mail saying, here's when
12 we'll have a decision out so you can -- so everybody knows
13 okay, so here's when the Judge said.
14 And then depending on that decision then if we
15 need a status conference or anything else we can -- I
16 usually let people absorb the decision then we can take next
17 steps in the case, so.
18 But the -- so, Lynne, I'm going to -- and I don't
19 think the lawyers are going to say on the record, on the
20 record, but I'll tell one story about my daughters -- it
21 goes way, way back for me, so you don't have to take this
22 down, Lynne, and honestly if one of the lawyers says, we
23 need it on the record, but.
24 (Off-the-record discussion.)
25 THE COURT: Anything further then at this time by

1 plaintiffs' counsel?
2 MR. SKLAVER: No, Your Honor.
3 THE COURT: For defense?
4 MR. LEIGH: No, Your Honor.
5 MR. JOHNSON: Have a nice weekend. Thank you.
6 THE COURT: All right. Take care everybody. Be
7 safe, be well in these kind of complicated times we're
8 living in.
9 And I see, Mr. Elsass, you know, they're really
10 disappointed that they couldn't come and walk in this cold
11 weather up here and so.
12 MR. ELSASS: Yeah. Well, maybe they'll get
13 another opportunity.
14 THE COURT: So in any event, take care everybody,
15 and we stand in recess. All right. Thank you.
16 MR. LEIGH: Thank you, Your Honor.
17 MR. SKLAVER: Thank you. Your Honor.
18 MR. WEISS: Thank you.
19 THE COURT: Take care.
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1 REPORTER'S CERTIFICATE
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I certify the foregoing pages of typewritten
4 material constitute a full, true and correct transcript of
my original stenograph notes via video proceeding, as they
5 purport to contain, of the proceedings reported by me at the
time and place hereinbefore mentioned.
6
7 /s/Lynne M. Krenz
Lynne M. Krenz, RMR, CRR, CRC
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