



## **I. BACKGROUND**

In February 2022, the Court granted in part Plaintiff's Motion for Class Certification. As relevant here, it determined Kansas law governs Plaintiff's claims, (Doc. 136, p. 16),<sup>2</sup> and Kansas's statute of limitations applies. (Doc. 136, pp. 22-23 & n.10.) Based on these determinations (and others that need not be detailed here), the Court certified a Class consisting of individuals who, *inter alia*, owned certain policies issued by Defendant that were active on or after January 1, 2002. (Doc. 136, p. 25.) The class definition did not include a commencement date.

On March 27, 2023, the Court granted in part the parties' separate motions for summary judgment. Some of the issues addressed in that Order related to the statute of limitations. The Court:

1. Adhered to its conclusion that Kansas's statute of limitations applied;
2. Held the statute of limitations for the contract claims (Counts I – III) was five years, and all breaches occurring within five years of the suit's filing (June 18, 2019) were timely;
3. Held that, under certain circumstances, Kansas will equitably estop a defendant from asserting the statute of limitations as a defense; and
4. The parties' arguments did not permit the Court to determine whether equitable estoppel applied in this case.

(Doc. 243, pp. 6-12.) The Court then construed the meaning of relevant Policy provisions and determined, *inter alia*, Defendant had considered improper factors (such as expenses and profits) in determining the COI Rate. (Doc. 243, pp. 12-17.) These determinations (which need not be detailed further here) essentially granted Plaintiff summary judgment on liability with respect to some of his claims. The Court also interpreted Policy provisions relevant to his other claims.

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<sup>2</sup> All page numbers are those generated by the Court's CM/ECF system.

Shortly after the summary judgment order was issued, the Court participated in a telephone conference with the parties, and thereafter the parties submitted supplemental briefs. Among other things, the parties agreed the facts relevant to equitable estoppel were to be determined by the Court and not the jury. (Doc. 253, pp. 14-15; Doc. 254, pp. 18-19.)

At a subsequent pretrial conference, the Court indicated it needed to hear evidence before it could rule on the issue of equitable estoppel and decided the appropriate course was to proceed to trial and allow the parties to present any additional evidence that related solely to equitable estoppel outside the jury's hearing. (Doc. 292, p. 10.) To avoid the need for a second trial, the Court also proposed having the jury return a verdict regarding damages for two time periods based on the application (or not) of equitable estoppel. (Doc. 292, pp. 10-11.)

For the two time periods at issue, the jury

1. Awarded damages for Defendant's consideration of improper factors in setting the COI Rate,
2. Determined damages for Defendant's consideration of expenses was zero, and
3. Found Defendant did not breach the Policy by failing to apply its then-current mortality rates.

(Doc. 311.)

In the Decertification Order, the Court concluded individualized issues related to reliance (and corresponding manageability concerns) precluded deciding the equitable estoppel issue on a class-wide basis. Consequently, the Court partially decertified the class, limiting its temporal scope to those who held a relevant policy within five years prior to suit, and entered judgment for the newly defined class based on the jury's verdict for that period. Then, to minimize prejudice to

the class members, all claims based on charges incurred before the limitation period commenced were dismissed without prejudice.

Plaintiff seeks reconsideration of the Decertification Order. He argues (1) estoppel can be based on Defendant's silence, (2) reliance on Defendant's silence can be inferred for the entire class, so equitable estoppel can be applied without an individualized showing of reliance, and (3) even if this is not the case, decertification was inappropriate. Defendant opposes Plaintiff's arguments, and the Court addresses them below.

## **II. DISCUSSION**

### **A. Equitable Estoppel**

As stated earlier, the statute of limitations for a breach of contract claim under Kansas law is five years. And under Kansas law, a breach of contract claim accrues when the breach occurs; Kansas law does not apply a "discovery rule" and accrual does not depend on when the plaintiff learned (or should have learned) about the breach. *E.g., Great Plains Trust Co. v. Union Pac. R. Co.*, 492 F.3d 986, 993 (8th Cir. 2007) (citing *Pizel v. Zuspann*, 795 P.2d 42, 54 (Kan. 1990)); *Dunn v. Dunn*, 281 P.3d 540, 548 (Kan. Ct. App. 2012). Kansas law also does not recognize the "fraudulent concealment" doctrine, under which the statute of limitations is tolled against a party that has tried to conceal its breach. *E.g., Freebird, Inc. v. Merit Energy Co.*, 883 F. Supp. 2d 1026, 1035 (D. Kan. 2012) (analyzing Kansas law).

However, a defendant is equitably estopped from asserting the statute of limitations as a defense if,

by acts, representations, admissions, or silence when [the defendant] had a duty to speak, [it] induced the [plaintiff] to believe certain facts existed. The [plaintiff] must also show that [he] reasonably relied and acted upon such belief and would now be prejudiced if the [defendant] were permitted to deny the existence of such facts.

*L. Ruth Fawcett Trust v. Oil Producers Inc. of Kansas*, 507 P.3d 1124, 1144 (Kan. 2022) (quotation omitted) (hereafter “*Ruth Fawcett Trust*”). More succinctly, the defendant’s actions must create “a false sense of security that prevented the plaintiff from timely suing.” *Id.* at 291; *see also Dunn*, 281 P.3d at 544; *Newman Mem. Hosp. v. Walton Const. Co.*, 149 P.3d 525, 542 (Kan. Ct. App. 2007); *Robinson v. Shah*, 936 P.2d 784, 798 (Kan. Ct. App. 1997). “To determine whether the doctrine applies, courts must look at the facts and circumstances of each case and should not apply it in a formulaic manner.” *Ruth Fawcett Trust*, 507 P.3d at 1144.

Plaintiff has described Defendant’s silence (and the facts it purportedly failed to disclose) in various ways. In the instant motion, he describes it as Defendant’s “silence that it was deducting more money from policyholders’ accounts than the policies permitted for decades . . . .” (Doc. 331, p. 10 n.2.) All other formulations are variations on this theme, distilling to an assertion Defendant failed to (1) disclose it breached the Policy or (2) supply information that would permit class members to determine it had breached. (*See* Doc. 253, pp. 10-11.) This reasoning does not justify estopping a defendant from asserting the statute of limitations as a defense. If estoppel can be based on a failure to confess a breach of the contract, the exception for equitable estoppel would effectively create a discovery rule or extend the statute of limitations based on a defendant’s fraudulent (or non-fraudulent) concealment—both of which would be contrary to Kansas law. Kansas courts are wary of applying estoppel when the argument for it, carried to its “logical extreme,” eliminates other aspects of Kansas law. *E.g., McCaffree Fin. Corp. v. Nunnink*, 847 P.2d 1321, 1332 (Kan. Ct. App. 1993); *see also Murray v. Miracorp, Inc.*, 522 P.3d 805, at \*9 (Kan. Ct. App. 2023) (citing *McCaffree*).

The added fact of Defendant’s superior knowledge about how it calculated the COI charge does not alter the analysis. A party frequently has superior knowledge about its own performance,

and extending the limitation period for failure to disclose such knowledge would (as discussed above) create a discovery rule or fraudulent concealment rule—which Kansas law does not recognize. Moreover, the Court is not convinced Plaintiff’s reliance on cases discussing fraud by silence (such as *Zhu v. Countrywide Realty, Co.*, 165 F. Supp. 2d 1181 (D. Kan. 2001)), is appropriate in the estoppel context. Fraud by silence occurs before a contract is reached and is, as Plaintiff states in his Reply Suggestions, based on the principle of contract law requiring a party disclose material facts before entering an agreement. (See Doc. 346, p. 8.) There is, however, no freestanding obligation under Kansas law to disclose facts that would permit another party to determine that a contract has been breached. Finally, there are no Kansas cases that support application of equitable estoppel in such a broad context.<sup>3</sup>

To the best of the Court’s knowledge, Plaintiff has cited one instance where a Kansas court applied estoppel based on silence, (see Doc. 227, p. 40 (citing *Ferrell v. Ferrell*, 719 P.2d 1 (Kan. Ct. App. 1986))), but the facts in that case were both (1) unique and (2) different from (and narrower than) those here. In *Ferrell*, the parties resolved a dispute involving real property by agreeing the surface rights would be assigned to Lloyd Ferrell and the mineral rights would be assigned to Garland Ferrell, but the deed prepared to effectuate this agreement erroneously assigned all rights to Lloyd. 719 P.2d at 229. The parties nonetheless acted in accordance with their agreement.

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<sup>3</sup> In addition to Defendant’s superior knowledge, Plaintiff argues that Defendant had a duty to fully disclose how the COI charge was calculated based on (1) the contractual obligation to provide accurate billing statements and (2) the fact Defendant disclosed the COI charge (which purportedly obligated Defendant to tell policyholders all details about its calculation). (Doc. 253, pp. 10-11.) For the reasons discussed above, the Court disagrees. Plaintiff also contends a fiduciary relationship existed between the parties because Defendant “holds policy owners’ money for them in their accounts and has the contractual authority to make deductions therefrom using information only within [Defendant’s] possession as the basis for the deductions.” (Doc. 253, p. 12.) The Court is not persuaded those facts create a fiduciary relationship. The case Plaintiff relies on mentions that one of the requirements is that the purported “fiduciary is in a position to have and exercise, and does have and exercise influence over another.” *Denison State Bank v. Madeira*, 640 P.2d 1235, 1241 (Kan. 1982); see also *Olson v. Harshman*, 668 P.2d 147, 151 (Kan. 1983). The fact that Plaintiff expected Defendant to properly calculate the COI Rate and deduct a properly calculated COI charge does not create a fiduciary relationship. In any event, even if there was a fiduciary relationship, Plaintiff has not provided a legal basis for its conclusion that this required Defendant “to disclose the entire basis” for its calculations. (Doc. 253, p. 12.)

Lloyd discovered the error four years later but did not disclose it to anyone (except his attorney); he also allowed Garland to continue receiving royalties on the oil and mineral rights and pay the corresponding taxes. *Id.* The error came to light years later, when Garland’s heirs stopped receiving royalties (apparently, at the insistence of Lloyd’s heirs)—but by then, the statute of limitations for reforming the deed had expired. In these unique circumstances, the Kansas Court of Appeals held that Lloyd’s “silence concerning the conflict between the deeds and the settlement agreement *combined with* his continued failure to object to the royalty payments made to [Garland], and his allowing Garland to pay all taxes associated therewith is sufficient conduct to invoke the doctrine of equitable estoppel.” *Id.* at 234 (emphasis supplied). *Ferrell* is distinguishable from the present case because estoppel was not based simply on Lloyd’s failure to disclose that the settlement agreement had been breached.<sup>4</sup>

Finally, even if estoppel by silence is a viable theory in this case, the Court does not believe Plaintiff has presented evidence from which class-wide reliance on Defendant’s silence can be inferred. Plaintiff correctly observes reliance was found on a class-wide basis in *Ruth Fawcett Trust*, (Doc. 346, p. 7), but the Court already explained why that decision was distinguishable, both (1) on the facts and (2) because of the defendant’s failure to challenge the certification decision. (Doc. 329, pp. 9-10.) Here, the only class-wide evidence Plaintiff presented regarding estoppel was that (1) Defendant sent all class members an Annual Statement and (2) neither in the Annual Statements or elsewhere did Defendant detail for the class members how it calculated the COI rate. The Decertification Order explains why the Annual Statement cannot be utilized to

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<sup>4</sup> If the purported estoppel is based on silence, the party invoking estoppel must also demonstrate the other party had an intent to deceive. *E.g.*, *Ruth Fawcett Trust*, 507 P.3d at 1146. The Court’s discussion makes it unnecessary to consider whether Plaintiff’s evidence establishes Defendant intended to deceive class members when it did not divulge the mathematical operations it conducted to calculate the COI charge—but the Court will observe that the evidence on this issue is rather weak.

establish reliance class-wide. In addition, Defendant’s failure to provide (in the Annual Statement or elsewhere) details about its calculations is relevant only if Defendant had a duty to disclose the information—and no such duty has been established. Thus, there is no basis for inferring reliance for each member of the class.<sup>5</sup>

### **B. Decertification/Recertification**

The next issue is whether (and if so, how) the Court’s conclusion that equitable estoppel cannot be resolved on a class-wide basis impacts its prior decision to certify a class. Rule 23 of the Federal Rules of Civil Procedure allows a class to be certified if, among other things, (1) there are questions of law or fact common to the class and (2) the common questions of law or fact predominate over individual questions. *See* Fed. R. Civ. P. 23(a)(2), 23(b)(3). As the Court discussed in more detail when it certified the class, the common questions included determinations regarding Policy interpretation, choice of law issues, the appropriate statute of limitations, and whether certain doctrines (such as fraudulent concealment or the discovery rule) were permitted under Kansas law. (Doc. 136, pp. 23-25.) The Court held damages—which typically require individualized assessments—did not prevent a class from being certified because there was a way to effectively address the matter while still allowing the common issues to predominate. (*E.g.*, Doc. 136, pp. 5-14.) However, equitable estoppel was not discussed by the parties when the issue of class certification was raised, so the Court did not have occasion to consider its impact on the Rule 23 analysis.

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<sup>5</sup> Plaintiff augments his argument by emphasizing that Defendant’s improper calculation of the COI rate was “material.” (*E.g.*, Doc. 331, p. 10.) This observation is true, in the sense that whether a contract was breached can be regarded as “material”—but as explained, parties are not obligated to announce they have breached a contract, and Plaintiff’s observation does not help establish the requirements for equitable estoppel under Kansas law. Similarly, Plaintiff’s reliance on cases from (1) other jurisdictions and (2) other contexts is not persuasive in establishing the requirements under Kansas law for equitably estopping a party from asserting the statute of limitations as a defense. (*E.g.*, Doc. 331, pp. 10-11 (discussing reliance as an element for claims asserting ERISA violations, securities fraud, common law fraud, breach of warranty, and negligence).)



“[A]fter initial certification, the duty remains with the district court to assure that the class continues to be certifiable throughout the litigation,” *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612 (8th Cir.), *amended*, 855 F.3d 913 (8th Cir. 2017), and when (as is the case here) a court concludes the original certification’s scope is too broad, it may alter or amend the order certifying the class. Fed. R. Civ. P. 23(c)(1)(C). In the Decertification Order, the Court concluded the class it had originally certified was too broad, necessitating a partial decertification.

Plaintiff correctly observes that the presence of individual issues does not automatically preclude class certification, but this general statement does not demonstrate the Court erred. Had the issue of equitable estoppel been fully presented by the parties at the time of class certification, the Court would have had to consider whether—and to what extent—the individualized issue of reliance affected the certification decision, including with respect to the class definition. Plaintiff asserts certification was required (and decertification is not permitted) simply because there were common issues regarding Defendant’s liability. (*E.g.*, Doc. 346, p. 2.) The Court disagrees; it was required to consider all the issues in the case (including defenses) to determine whether to certify the class and how to define it. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). And, after considering its ruling on equitable estoppel, the Court concluded there was no ready means of addressing the issue on a class-wide basis and that decertification was appropriate.

Plaintiff further contends decertification was not justified because the Court failed to balance the individualized issue of estoppel against the common issues. (Doc. 331, pp. 13-16.) But Plaintiff’s arguments (and the cases he cites) address the larger question of whether a class should be certified at all, and not how the class should be defined. The Court did not decertify the entire class; altering the class definition only imposed a temporal limit on the class—a limit the

Court could have (and, as its holding insinuates, would have) imposed when the class was certified if the estoppel issue had been fully aired at the time.

In certifying a class consisting only of undeniably timely claims, the Court has certified a class that fully resolves common issues—such as the meaning of the contract language, Defendant’s methods for calculating various fees and expenses, and the amount of any improper fees and expenses charged within the limitation period—and entered judgment on those timely claims. Whether to include untimely claims is a separate question that is not automatically answered simply because a class is certified to resolve timely claims. Here, the issue of estoppel injects an issue that is not only individualized but is distinct from the common issues of liability and damages. Thus, the Court has (and had) two choices with respect to the class definition; it can (as the Court has done) define the class to include only timely claims. Alternatively, the Court can (as Plaintiff urges) define the class to (1) include an entirely distinct and individualized issue that is (2) is not a part of, and does not need to be addressed to resolve, the common issues or the timely claims. The Court has the discretion to define the class to include only timely claims.

Plaintiff suggests the Court should have considered alternatives to decertification and reiterates the suggestion he made when opposing the Motion to Partially Decertify; specifically, that the Court should allow each of the approximately 6,000 class members “to come forward to prove their reliance in follow on proceedings.” (Doc. 313, pp. 14-15 n.10.) The Decertification Order rejected this suggestion, (Doc. 329, p. 10), and the Court continues to believe such a procedure is unmanageable. *See* Fed. R. Civ. P. 23(b)(3)(D). In addition to requiring the Court to consider evidence regarding each class member, a jury would have to be convened to assess damages for any the Court believes are entitled to invoke equitable estoppel—which would be unworkable.

Plaintiff also argues the Court's Order eliminates the efficiency associated with the results of the litigation because it deprives the parties of the benefits of the proceedings to date. The Court disagrees. It is true, as Plaintiff contends, that class members who believe they are entitled to invoke equitable estoppel will have to do so in a separate proceeding, but those class members can still rely on the rulings made in this case, so there will be no need for another court to construe the policies.<sup>6</sup> Relatedly, Plaintiff suggests the Court should "re-certify the issues of liability and damages under Rule 23(c)(4), such that policyholders may file individual lawsuits without having to relitigate those already resolved class-wide determinations." (Doc. 331, p. 19.) The Court is not persuaded this step is necessary to make the Court's rulings applicable in subsequent proceedings between class members and Defendant. The Court has construed the relevant language (which has not changed over time) and Defendant cannot relitigate its meaning. Just as the judgment in this case collaterally estops Defendant from relitigating the meaning of the Policy in a suit over charges it makes in the future, the judgment collaterally estops Defendant from relitigating the issues in a suit over charges it made before June 18, 2014.

### **III. CONCLUSION**

For the reasons stated, Plaintiff's Motion for Partial Reconsideration, (Doc. 331), is

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<sup>6</sup> In a footnote, Plaintiff suggests res judicata may bar class members from bringing suits based on charges made before June 18, 2014 (the start of the class period) and cites a Fifth Circuit case discussing claim splitting. (Doc. 331, p. 17 n.7.) Plaintiff does not fully analyze the issue, and the Court does not agree with his suggestion. Missouri's preclusion rules apply to the Court's judgment. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Claim splitting raises concerns related to res judicata, but this is not an instance of claim splitting because claims involving different charges made at different times would not be barred by the judgment in this case. *See, e.g., King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. 1991) (en banc) (discussing claim splitting). This is not the first time the Court has discussed how each charge is a separate transaction and a separate claim; it previously made the same point when it ruled the statute of limitations runs separately for each improper charge. (Doc. 243, pp. 7-8.) In contrast, the Court's judgment conclusively resolves the meaning of the relevant policy language, which can be utilized by class members who elect to pursue claims for charges incurred outside the class period.

**GRANTED** but the Court **ADHERES** to its prior Order partially decertifying the class.

**IT IS SO ORDERED.**

DATE: September 14, 2023

/s/ Beth Phillips  
BETH PHILLIPS, CHIEF JUDGE  
UNITED STATES DISTRICT COURT