EFiled: Mar 8 2004 12:47PM EST
Filing ID 3225382

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WAL-MART STORES, INC., and WACHOVIA BANK OF GEORGIA, N.A., in its capacity as Trustee of the WAL-MART STORES, INC. CORPORATION GRANTOR TRUST,	)	
Plaintiffs,	)	
v.	)	C.A. No. 19875
AIG LIFE INSURANCE COMPANY; HARTFORD LIFE INSURANCE COMPANY; WESTPORT MANAGEMENT SERVICES, INC.; INTERNATIONAL CORPORATE MARKETING GROUP, LLC; NATIONAL BENEFITS GROUP, INC., d/b/a MARSH FINANCIAL SERVICES; SEABURY & SMITH, INC., MARSH, INC., and MARSH & McLENNAN NATIONAL MARKETING CORPORATION, now known as J&H MARSH & McLENNAN PRIVATE CLIENT SERVICES, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Submitted: January 9, 2004
Decided: March 2, 2004
Revised: March 8, 2004

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LAMB, Vice Chancellor.

I.

In the early 1990s, a large national retailer embarked on a plan to acquire corporate owned life insurance ("COLI") policies covering an enormous number of its employees. The principal purpose of this plan was to generate substantial federal income tax benefits for the owner of the policies. The retailer, working with a number of insurance brokers and insurers, began purchasing blocks of policies in 1993 and continued these purchasers until 1995. By then it owned life insurance policies covering hundreds of thousands of its employees.

At the time the retailer began its COLI purchases, there was widespread media coverage discussing the tax law and other legal risks associated with COLI schemes. In 1996, Congress enacted legislation that effectively eliminated the future tax benefits associated with all but a few of the retailer's COLI plans. Soon thereafter, the Internal Revenue Service (the "IRS") began to bring enforcement actions claiming that employers participating in COLI plans, including the retailer, underpaid past taxes. Moreover, employees and the estates of deceased employees also filed litigation claiming that the proceeds of any policies should be paid to them, rather than to the retailer. In the face of these developments, the retailer began to surrender its insurance policy plans in 1996. In 2002, it settled with the IRS.

In September 2002, nearly a decade after making its first COLI investment, the retailer brought suit against all the parties involved in its purchase of these plans. Its complaint alleges a broad range of legal and equitable claims against the insurance brokers and providers—all seeking to recover from them the losses it incurred in

connection with this risky tax avoidance scheme. On a motion to dismiss, the court concludes that the retailer's claims are all barred by the relevant 3-year statute of limitations. The claims alleged all arose between 1993 and 1995, when the retailer purchased the plans. Thus, there is no question that its September 2002 complaint is time barred. Moreover, there are no grounds in this case to resort to principles of equitable tolling of the limitations period, as the record is irrefutably clear that the retailer either knew (or was on inquiry notice) of the substantial risks associated with the scheme at the time it began purchasing policies in 1993.

II.

A. The Parties

Plaintiff Wal-Mart Stores, Inc. ("Wal-Mart Stores") is incorporated in Delaware with its principal place of business located in Bentonville, Arkansas. Wal-Mart is a "large and sophisticated" retail sales company with over 1 million employees.[1] Plaintiff Wachovia Bank of Georgia, N.A. is the trustee of the Wal-Mart Stores, Inc. Corporation Grantor's Trust (the "Wal-Mart Trust").[2] The Wal-Mart Trust was set up in December 1993 for the sole purpose of facilitating the COLI plans that are at the heart of this case. Starting in December 1993, Wal-Mart purchased COLI plans from defendants AIG Life Insurance Company ("AIG") and Hartford Life Insurance Company ("Hartford")

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[1] Am. Compl. ¶¶ 1, 29. For the purposes of the pending motions to dismiss, the court takes the well-pleaded factual allegations of the complaint as true.

[2] For simplicity, this opinion will refer to plaintiffs Wal-Mart Stores and the Wal-Mart Trust collectively as "Wal-Mart."

(collectively, the “Insurers”). Defendant AIG is incorporated in Delaware with its principal place of business in Wilmington, Delaware. Defendant Hartford is incorporated in Connecticut with its principal place of business in Hartford, Connecticut.

Defendant Westport Management Services, Inc. (“Westport”) is a Delaware corporation with its principal place of business in Trumbull, Connecticut. Defendant International Corporate Marketing Group, LLC (“ICMG”) is a Delaware limited liability company with its principal place of business in Florham Park, New Jersey. Westport and ICMG, respectively, acted as representatives of AIG and Hartford in connection with the COLI policies that are the subject of this action.

Defendants Seabury & Smith, Inc., Marsh Financial Services, Marsh, Inc., and Marsh & McLennan National Marketing Corporation[3] (collectively, the “Marsh Entities”) and National Benefits Group, Inc. (“NBG,” together with the Marsh Entities the “broker-defendants”) are insurance brokers who worked with Wal-Mart in soliciting and evaluating COLI proposals from a number of insurance companies.[4]

B. The COLI Policies

1. Wal-Mart’s COLI Program

In the early 1990s, Wal-Mart, like other large employers at that time, began considering the acquisition of broad-based COLI plans. Broad-based COLI plans are life

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[3] On September 20, 2002, J&H Marsh & McLennan Private Client Services, formerly known as Marsh & McLennan National Marketing Corporation, was dissolved.

[4] The Marsh Entities are Delaware corporations with their principal places of business in New York, New York. NBG is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota.

insurance policies purchased by a corporate employer covering the lives of a large number of employees.[5] The fundamental purposes of the COLI plans, according to Wal-Mart, were: (i) to provide certain free death benefits to classes of associates at Wal-Mart; (ii) to provide financial benefits to Wal-Mart in order to compensate the company for costs related to the death of associates; and (iii) to provide tax benefits to the company in connection with funding the premiums and other costs of the plans.[6] Under the COLI plans, the corporate employer secures loans from the insurers to fund the insurance premiums and then deducts the interest paid on those loans from its income taxes, thereby enjoying the investment return on these policies on a tax-free basis.

In mid-1993, Wal-Mart hired the broker-defendants to advise the company in connection with the purchase of the COLI plans. Specifically, Wal-Mart hired the broker-defendants to "oversee[] the design and structure of an appropriate broad-based COLI plan for Wal-Mart, prepare[] questions for, and solicit[] proposals from, insurance companies involved in such COLI plans, select[] the appropriate insurance company or companies to underwrite the COLI plans, and negotiate[] the best available terms and conditions for Wal-Mart."[7]

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[5] The COLI plans are modeled on "key man" life insurance policies used by corporations for decades to lessen the costs incurred when key employees died. The broad-based COLI plans extend the practice to insure broader classes of corporate employees. Am. Compl. ¶ 21.

[6] *Id.* ¶ 3.

[7] *Id.* ¶ 29.

On December 28, 1993, after working with the defendant-brokers for several months, Wal-Mart purchased a block of more than 20,000 COLI policies from Hartford[8] and a block of nearly 200,000 COLI plans from AIG. The initial premium payments for these two blocks of COLI policies exceeded $800 million. Wal-Mart made five subsequent purchases from AIG, from June 1994 through July 1995, adding approximately 135,000 policies and approximately $300 million in initial premium payments. In total, Wal-Mart acquired approximately 350,000 COLI policies. Wal-Mart acquired these policies through Wal-Mart Trust, a Georgia entity that was created specifically to take advantage of Georgia laws that recognize employers' "insurable interests" in the lives of corporate employees.[9]

2. <u>The Risks Associated With The COLI Program</u>

Although the COLI plans were not prohibited by the Internal Revenue Code (the "Code") as it existed at the time they were created, there were well-known concerns about potential legal objections to such plans under federal tax law.[10] There was also a known risk that Wal-Mart would be found to lack an insurable interest in the lives of its rank-and-file employees, as evidenced by the use of a Georgia trust to purchase the policies.[11] Wal-Mart's awareness of and concern about these risks is reflected in the very

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[8] These policies covered the "managerial group" and provided higher policy limits than the policies purchased from AIG. *Id.* ¶ 42(a).

[9] *Id.* ¶ 37.

[10] "From the beginning of its exploration of COLI plans, Wal-Mart recognized that continued favorable tax treatment was essential to the viability of the plans." *Id.* ¶ 40.

[11] *Id.* ¶ 37.

application it filed for the AIG policies. Wal-Mart and AIG executed a Letter of Understanding as part of that application process that specifically addresses Wal-Mart's concerns with "the tax consequences of loans and/or withdrawals from the Policies and the deductibility thereof."[12] An exhibit to this letter deals with the possibility that Wal-Mart might be found to lack an "insurable interest" in the lives of its employees.

There was also high-level media coverage of the risks associated with the COLI plans beginning even before Wal-Mart first purchased a COLI policy. For example, *The Wall Street Journal* ran an article in 1992 reporting that the United States Treasury Department characterized the use of COLI plans as "tax arbitrage" and discussing proposed legislation initiatives to narrow their use.[13] Media coverage continued during the years Wal-Mart was purchasing policies. In August 1995, *The Wall Street Journal* published another article on the risks of the COLI plans and the possibility of IRS

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[12] Letter of Understanding, Hartford Mot. Ex. A at 2. In general, matters outside of the pleadings are not considered in a motion to dismiss. A court, however, may consider, for limited purposes, documents that are "integral to or incorporated by reference in the complaint." *In re Lukens Inc. S'holders Litig.,* 757 A.2d 720, 727 (Del. Ch. 1999), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (citing *In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 69-70 (Del. 1995)). Wal-Mart argues that the Letter of Understanding is only a representation and not a warranty and therefore is not part of the contract for the COLI policies (which has already been incorporated by reference) and cannot be considered by the court. The Letter of Understanding, however, is referenced in the complaint so the court may consider it. Am. Compl. at ¶ 80(e).

[13] Rick Wartzman, *Insurance Loans Stir Controversy Over Tax Breaks,* Wall St. J., Mar. 26, 1992, at B1.

enforcement actions.[14] *The New York Times* ran a story in 1995 characterizing COLI plans as "one of those twists in the tax law that rarely capture much public attention yet provide a hidden bonanza for corporations sophisticated enough to know how to exploit them."[15] The *New York Times* article specifically identified Wal-Mart as one of the companies profiting from the use of COLIs.[16] A month later, *Newsweek* ran a story describing a proposed congressional attack on COLI plans, again identifying Wal-Mart as "by far the biggest player in this particular tax game" and quoting the head of Wal-Mart's employee benefits department as stating that "[w]e studied this long and hard before we put in."[17]

C. Congress Changes The Law And The IRS Acts

In August 1996, Congress enacted the Heath Insurance Portability and Accountability Act ("HIPAA"), which among other things, eliminated interest deductions (as of January 1, 1996) on COLI loans and on borrowings to fund COLI plans adopted after June 20, 1986, with transitional relief provided for 1997 and 1998 for up to 20,000

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[14] Lee Burton, *IRS May Cut Breaks on Life Insurance That Firms Own, Agency Sets Drive to Limit Deductions, Investment Gains on Such Policies,* Wall St. J., Aug. 7, 1995.

[15] Michael Quint, *Earning It; A Tax Threat to Company Insurance,* N.Y. Times, Sept. 24, 1995.

[16] *Id.*

[17] Alan Sloan, *How America's biggest corporations are cashing in on your mortality,* Newsweek, Oct. 23, 1995, at 46.

policies.[18] Within a few months, Wal-Mart began unwinding the COLI plans and by January 2000, its last COLI policies were canceled.

Beginning in 1997, the IRS initiated enforcement actions against a number of employers who had claimed tax deductions for interests on loans under COLI plans for tax periods prior to 1996.[19] Additionally, in 1998 and 1999, the IRS issued Technical Advisory Memoranda ("TAM") presenting its legal opinion on COLI plans and determining that the interest deductions should be disallowed because they lack economic substance.[20] The IRS challenged the Wal-Mart COLI program, and Wal-Mart settled with the IRS in August 2002.[21]

Employees and estates of deceased employees also began challenging the COLI plans starting in 2001, arguing that employers do not have "insurable interests" in their lives under applicable state law.[22] Several actions were filed challenging the notion that Wal-Mart has an "insurable interest" in the lives of its deceased employees and

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[18] Am. Compl. at ¶ 46.

[19] *See Am. Elec. Power Co., Inc. v. United States*, 136 F. Supp. 2d 762 (S.D. Ohio 2001), *aff'd,* 326 F.3d. 737 (6th Cir. 2003) (upholding IRS disallowance of interest deductions on loans made against COLI policies); *In re CM Holdings, Inc.*, 254 B.R. 578 (D. Del. 2000), *aff'd,* 301 F.3d 96 (3d Cir. 2002) (upholding bankruptcy claim for unpaid taxes); *Winn-Dixie Stores, Inc. v. Commissioner*, 113 T.C. 254 (1999), *aff'd*, 254 F.3d 1313 (11th Cir. 2001) (upholding disallowance of interest and administrative expense deductions).

[20] Tech. Adv. Mem. 9812005 (Mar. 20, 1998) (available without pagination at 1998 WL 123675); Tech. Adv. Mem. 199901005 (Jan. 8, 1999) (available without pagination at 1999 WL 5679).

[21] Wal-Mart is not seeking recovery for the "substantial unanticipated tax liability" from its settlement with the IRS. Am. Compl. ¶ 49.

[22] *Id.* ¶ 7.

demanding that courts impose a constructive trust on death benefits that Wal-Mart may have received under the COLI plans.[23] In the most advanced action against Wal-Mart, a federal court in Texas applied Texas law instead of Georgia law in holding that Wal-Mart did not have an "insurable interest" in the lives of its Texas employees.[24]

D. Wal-Mart's Claims

Wal-Mart filed this action on September 3, 2002, to recover its losses resulting from the failed COLI program. Wal-Mart alleges that since the COLI policies "failed in their fundamental purpose," namely, to secure substantial financial benefits for Wal-Mart, the parties involved in Wal-Mart's purchase of the COLI policies should share in the loss. Wal-Mart does not argue that the failure of its COLI program is due to the 1996 change in the tax code. Instead, Wal-Mart alleges that the failure of the COLI plans is "the product of risks never contemplated by the parties, *i.e.*: (i) the disallowance of interest deductions under pre-HIPAA federal tax law and (ii) attacks on the COLI plans mounted by the estates of insureds that have been predicated on Wal-Mart's alleged lack of 'insurable interest' in the lives of its employees . . . .[25]

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[23] These actions are pending in federal courts in Texas, New Hampshire and Oklahoma. *Id.* *See, e.g., Lewis v. Wal-Mart, Inc.,* No. 02-CV-944-EA (M) (N.D. Okla. filed Dec. 18, 2002); *Miller v. Wal-Mart, Inc.,* No. 02-4015 (S.D. Tex. filed Oct. 22, 2002); *Rice v. Wal-Mart*, *Inc.,* No. C-02-390-B (D.N.H. filed July 23, 2002); *Waller v. AIG Life Ins. Co.,* No. 4:02-CV-00120 (N.D. Tex. filed Feb. 15, 2002).

[24] *Mayo v. Hartford Life Ins. Co.,* 220 F. Supp. 2d 794 (S.D. Tex. Aug. 8, 2002), *aff'd*, 2004 WL 14654 (5th Cir. Jan. 5, 2004).

[25] Answering Br. of Wal-Mart Stores, Inc. in Opp'n to AIG's and Hartford's Mot. to Dismiss the Am. Compl. at 11.

Wal-Mart asserts that the defendants owed it the "highest duties of care, including a duty of good faith, a duty of full disclosure, a duty of loyalty, and a duty to meet the exacting standards of their respective professions."[26] Wal-Mart alleges that the defendants breached their fiduciary duties in "developing, promoting, recommending, advising, selling, and administering" the COLI plans.[27] Furthermore, Wal-Mart argues that had certain disclosures been made, it would not have entered into the COLI plans. Specifically, Wal-Mart alleges that the defendants did not disclose the "full range and magnitude" of the risks involved in the COLI plans.[28] Wal-Mart complains that it relied to its detriment on the defendants in their roles as fiduciaries, experts, advisors, agents, and providers of the COLI plans.

Wal-Mart's amended complaint alleges breach of contract, breach of fiduciary duties, professional negligence,[29] and violation of the Delaware Consumer Fraud Act,[30] and seeks to recover its losses associated with the failed COLI plans. Wal-Mart also claims unjust enrichment, restitution, and equitable fraud, and seeks to recover and impose a constructive trust upon the profits that the defendants made in connection with Wal-Mart's COLI plans. In addition, Wal-Mart seeks declaratory relief requiring the

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[26] Am. Compl. ¶ 54.

[27] *Id.*

[28] *Id.* ¶¶ 80(a)-(c).

[29] Wal-Mart's professional negligence claim is asserted exclusively against the broker-defendants.

[30] 6 *Del. C.* § 2513.

defendants to compensate it for any future losses associated with the failed COLI plans, including the costs that may be incurred from the "insurable interest" litigation.

E. The Motions To Dismiss

The defendants have moved to dismiss the amended complaint on the grounds that it is barred by the applicable statute of limitations and fails to state a claim upon which relief may be granted. The court agrees that the applicable statute of limitations bars all of Wal-Mart's claims and, therefore, does not reach the remaining arguments in favor of dismissal.

III.

A. Standard Of Review

A court of equity may grant a motion to dismiss on the ground that the plaintiff's claims are barred by the applicable statute of limitations.[31] Moreover, it is "well settled that where the complaint itself alleges facts that show that the complaint is filed too late, the matter may be raised by [a] motion to dismiss."[32]

When considering a motion to dismiss, the court is to assume the truthfulness of all well-pleaded allegations of fact in the complaint.[33] Although "all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true . . .

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[31] "Although statutes of limitation do not generally apply directly in equity, equity follows the law and will apply a statute of limitations by analogy in appropriate circumstances." *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *3 (Del. Ch. July 17, 1998).

[32] *Id.* (quoting *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993)).

[33] *Grobow v. Perot*, 539 A.2d 180, 187 & n.6 (Del. 1988).

neither inferences nor conclusions of fact unsupported by allegations of specific facts . . . are accepted as true."[34] That is, "[a] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences."[35] On a motion to dismiss, the court may consider for certain limited purposes the contents of documents that are referred to in the complaint.[36] As already stated, the court will take judicial notice of the Letter of Understanding executed by Wal-Mart and AIG that formed a part of the application for the COLI policies. Moreover, the court can take judicial notice of publicly available documents, including government publications such as the TAMs and news articles, for the limited purpose of identifying what information was available to Wal-Mart during the limitations period.[37]

B. <u>All Wal-Mart's Claims Are Time Barred</u>

1. <u>The Applicable Statute Of Limitations</u>

Under Delaware law, the appropriate statute of limitations to be applied to tort, contract and fiduciary duty claims is three years.[38] In addition, a three-year limitation governs a claim for unjust enrichment.[39] While a court of equity is not bound to apply

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[34] *Id.*

[35] *Id.*

[36] *See In re Santa Fe*, 669 A.2d at 69-70 & n.9.

[37] *Id.*

[38] 10 *Del. C.* § 8106. *See Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999), *aff'd*, 752 A.2d 112 (Del. 2000). In accordance with 10 *Del. C.* § 8121, the court has no occasion to consider whether some other state's law would provide for a longer limitations period.

[39] *See Merck & Co. v. SmithKline Beecham Pharms. Co.*, 1999 WL 669354, at *42 (Del. Ch. Aug. 5, 1999), *aff'd*, 766 A.2d 442 (Del. 2000).

the statute of limitations, it will apply the statute of limitations by analogy when appropriate.[40]

2. Time Of Accrual And Tolling

It is well-established law in Delaware that the statute of limitations begins to run at the time of the alleged wrongful act, regardless of whether the plaintiff is aware of the injury.[41] Wal-Mart first brought suit on September 3, 2002. Thus, in order for its claims to be timely, the wrong alleged must have occurred no earlier than September 3, 1999.

The wrongful act underlying each of Wal-Mart's claims is the defendants' alleged failure to disclose the truth about the COLI policies *at the time* that Wal-Mart purchased them. Indeed, Wal-Mart alleges that it never would have purchased the COLI policies had it known the full extent of the risks it would have faced in the future from the IRS and the "insurable interest" litigation. Accepting these allegations as true, Wal-Mart could have sued, and therefore its causes of action accrued, at the time that it purchased the various COLI policies between 1993 and 1995. More specifically: Wal-Mart could have brought its fraud-based claim as soon as it purchased the COLI policies in reliance on what it alleges were misrepresentations and omissions by the defendants;[42] Wal-Mart could have brought its fiduciary duty claim as soon as it purchased the COLI polices that

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[40] *See In re Dean Witter*, 1998 WL 442456, at *3.

[41] *Id.* *4.

[42] *See Playtex, Inc. v. Columbia Cas.,* 1993 WL 390469, at * 3 (Del. Super. Sept. 20, 1993) (holding that where plaintiff claims that it was fraudulently induced to enter into an insurance contract, a cause of action for fraud accrues at the effective date of the policies at which time the "fraud is successfully perpetrated") (citations omitted).

it now says it would not have purchased had its alleged fiduciaries fully disclosed the extent of the risk;[43] Wal-Mart could have brought its breach of contract claim as soon as the defendants allegedly failed to disclose "all material information" about the COLI plans when Wal-Mart entered into the contract;[44] Wal-Mart could have sued for unjust enrichment at the time that the alleged omissions and misrepresentations were made;[45] and, Wal-Mart could have brought its negligence claim against the broker-defendants at the time it purchased the COLI policies in reliance on the "expertise and superior knowledge" of the broker-defendants in buying the plans.[46]

Even if Wal-Mart did not know the extent of all of its damages or later suffered some additional damage, the time of accrual is still when Wal-Mart purchased the policies. In *Kaufman v. C.L. McCabe & Sons, Inc.*, for example, the insureds brought

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[43] *See In re Dean Witter,* 1998 WL 442456, at * 4 (footnotes omitted) ("Plaintiffs allege that defendants breached their fiduciary duties in recommending and selling to plaintiffs Partnerships that would never (and could never) achieve their promised objectives. Accepting this allegation as true, plaintiffs' injury occurred *when they purchased* their Partnership interests as a result of defendants' alleged misrepresentations. Thus, plaintiffs' cause of action accrued when they invested in the allegedly fraudulent Partnerships.").

[44] *See United States Cellular Inv. Co. v. Bell Atl. Mobile Sys., Inc.,* 677 A.2d 497, 503 (Del. 1996) (holding that an action for breach of contract accrued at the time of the alleged breach of the contract).

[45] *See Merck,* 1999 WL 669354, at *42 (quoting *Kahn,* 625 A.2d at 277 and holding that the statute of limitations for unjust enrichment is three years from the wrongful act because "'where the statute bars the legal remedy, it shall bar the equitable remedy in analogous cases or in reference to the same subject matter'").

[46] *See Kaufman v. C.L. McCabe & Sons, Inc.,* 603 A.2d 831, 834 (Del. 1992) (holding that a negligence claim in connection with buying an insurance policy accrues at the time the policy was delivered).

suit against the insurer and the insurance agent for negligent procurement of insurance coverage after discovering that the policy did not cover loss of use.[47] The plaintiffs in *Kaufman* claimed that their cause of action accrued at the time they suffered a loss and became aware of the limits of their coverage. The trial court disagreed and the Delaware Supreme Court affirmed, holding that the plaintiffs suffered injury "at the moment" they purchased the policy in connection with which the agent was allegedly negligent.[48] Applying the rationale of *Kaufman* to this case, Wal-Mart could have brought its claims at the time that it purchased the COLI policies. Thus, its claims accrued no later than when it purchased its last block of COLI policies in 1995.

Wal-Mart also has not shown any basis to support an equitable tolling of the limitations period. Under Delaware law, tolling is only applicable in very limited circumstances, and the plaintiffs have the burden of pleading specific facts to prove that tolling is warranted.[49] Moreover, even if tolling of the statute is appropriate, the running of the limitations period is "suspended only until a plaintiff discovers his rights or, by exercising reasonable diligence, should have discovered such rights."[50] The limitations period resumes once the plaintiff is "objectively aware of the facts giving rise to the wrong, *i.e.,* on inquiry notice."[51] Therefore, equitable tolling could be of aid to Wal-Mart

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[47] *Id.* 832.

[48] *Id.* 834.

[49] *Fike*, 754 A.2d at 261 (citations omitted). *See In re Dean Witter,* 1998 WL 442456, at *6.

[50] *Merck*, 1999 WL 669354, at *42 (citations omitted).

[51] *In re Dean Witter*, 1998 WL 442456, at *6 (citations omitted).

only if the facts of the underlying claim were so well hidden that it could not have reasonably discovered them until September of 1999 at the earliest.[52] As hereinafter discussed, the Wal-Mart claims fail all of these tests.

The court has also considered and rejects Wal-Mart's arguments that its claims did not accrue until it settled its dispute with the IRS in 2002 or, at the earliest, when the last of the COLI plans was completely surrendered and canceled in 2000. Neither of these dates is relevant in determining when the underlying claims accrued. The date of Wal-Mart's settlement with the IRS in 2002 is particularly inapposite. It marks only the date when Wal-Mart decided to compromise rather than continue its defense of its earlier tax position. That date bears no relation to any conduct of the defendants and cannot possibly mark the first date on which Wal-Mart could have filed suit. That settlement does not even bear the weak relation of fixing the amount of damages because Wal-Mart is *not* seeking to recover the monies paid as a result of the IRS settlement.

Wal-Mart's argument that the clock should start in 2000 when it finished canceling its COLI plans ignores the fact that Wal-Mart started unwinding the large majority of its approximately 350,000 COLI policies in November 1996, shortly after HIPAA was passed. Unmistakably, Wal-Mart knew as early as 1996 that the projected benefits of the planned interest deductions would never be realized.[53] Even if Wal-Mart

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[52] *See id.* *5.

[53] Wal-Mart's reliance on two Ninth Circuit decisions where the court allowed rescission of the contract because the commercial purpose of the transaction was frustrated is misplaced. *Walker v. Cont'l Life & Accident Co.,* 445 F.2d 1072 (9th Cir. 1971); *W. L.A. Inst. for Cancer Research v. Mayer,* 366 F.2d 220 (9th Cir. 1966). In both

were suing to recover those benefits (and it is not), it would not have been entitled to wait to bring its claim until the last policies were finally unwound.

Finally, Wal-Mart's attempted reliance on the open-ended limitations period found in 10 *Del. C.* § 8108 ("mutual running accounts") is unavailing. The purpose of Section 8108 is to postpone the running of the limitations period until the date of the last transaction of parties that have mutual and running accounts.[54] None of Wal-Mart's claims are based on any account, mutual or otherwise.[55] Wal-Mart argues that the

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cases, the issue of risk allocation is at the forefront of the court's rulings that excused nonperformance by promisors under Arizona and Oregon contract law. In *Mayer,* stockholders were excused from performance of an agreed-upon stock transfer after an IRS revenue ruling which rejected the tax premise on which the stock transfer was based under Oregon's doctrine of commercial frustration. The court in *Mayer* held that there was substantial evidence that the stockholders had not assumed the risk of an adverse tax ruling. In *Walker*, the court sustained the rescission of certain annuity loan transactions on the ground of commercial frustration after a Supreme Court decision eliminated the tax benefits of the contract. The court in *Walker* recognized that no claim for frustration exists when there is risk allocation in the contract, but the court did not reach the issue because the insurer did not raise it at trial and "[t]he general rule is that this Court will not reverse the trial court on a contention that was never presented to it." 445 F.2d at 1074 (citations omitted). Wal-Mart was clearly on notice of the risks associated with the COLI policies when it entered into them, therefore Wal-Mart would be precluded from rescission under the doctrine of commercial frustration, even if it had pleaded such a claim for relief.

[54] *See Brown v. Consol. Fisheries Co.,* 165 F. Supp. 421, 423 (D. Del. 1955) ("It is equally clear that both from the terms of the Delaware Statute and from the uniform current of authority that, where there is a mutual open account, there is an implied agreement of the parties that each item shall not constitute an independent debt, due at its date, but that the Statute shall not begin to run until the date of the last transaction.").

[55] Delaware courts have defined a "mutual account" as an account "upon which the items of either side belong and on which they would reciprocally operate so that a balance between the two may be ascertained." *Brown,* 165 F. Supp. at 423. *See Chrysler Corp. v. Airtemp Corp.,* 426 A.2d 845, 848 (Del. Super. 1980) (defining and discussing the nature of an "account" for Section 8108 purposes).

defendants had a continuing obligation under the COLI policies "to correct their misrepresentations and to disclose material information relating to the COLI plans, but they failed to do so."[56] Even if there were such an alleged continued duty of disclosure it does not give rise to a "mutual running account" within the meaning of Section 8108.

3. Was Wal-Mart On Inquiry Notice?

Wal-Mart argues that it was "inherently unknowable" that its COLI program would fail until, at the earliest, the IRS litigation was concluded. Wal-Mart claims that it was "blamelessly ignorant that the cause of action existed"[57] until the IRS litigation concluded in a determination that the COLI plans were economic shams. Wal-Mart's argument attributes its state of ignorance to "its lack of expertise in COLI plans and the complexities of accounting, actuarial and operating principles in the life insurance industry."[58] This argument falls far short of showing grounds that could possibly warrant a tolling of the limitations period. The "inherently unknowable" standard is a "discovery" rule whereby the plaintiff need only be "on inquiry [notice] which, *if pursued,* would lead to the discovery of the injury."[59] Wal-Mart clearly had reason to inquire about the risks of its COLI program long before the IRS cases were decided. Wal-Mart, as a large sophisticated employer, could have discovered and timely pursued

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[56] Am. Compl. ¶ 55.

[57] *Bridgestone/Firestone Inc., v. Cap Gemini Am., Inc.,* 2002 WL 1042089, at *6 (Del. Super. May 23, 2002).

[58] Am. Compl. ¶ 56.

[59] *In Re Dean Witter,* 1998 WL 442456, at *7 (citations omitted).

its claims even if discovery would require special tax expertise.[60] Indisputably, it was not a "practical impossibility" for Wal-Mart to discover the wrongdoing alleged in its complaint long before September 3, 1999.[61] On the contrary, the record is rife with "observable or objective factors" that should have put Wal-Mart on inquiry notice as early as 1993.[62]

The barrage of relevant information readily available in the marketplace before September 3, 1999 was more than sufficient to put a company of the size and sophistication of Wal-Mart on notice of its claims long before September 3, 1999.

IV.

For all of the foregoing reasons, the motion to dismiss is granted, and the amended complaint is dismissed on the ground that the claims asserted therein are barred by the statute of limitations. IT IS SO ORDERED.

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[60] *See Ambase Corp. v. City Investing Co.*, 2001 WL 167698, at *5 (Del. Ch. Feb. 7, 2001) (dismissing claims even though "complex" tax issues were involved because the IRS Code is not a "secret document"); *In re ML/EQ Real Estate P'ship Litig.,* 1999 WL 1271885, at *11 (Del. Ch. Dec. 21, 1999) (dismissing plaintiffs' claim that the statute of limitations should be tolled because plaintiffs required an "expert" to discover the claim); *In re Dean Witter,* 1998 WL 442456, at * 8 (dismissing plaintiffs' claim that the limitations period should be tolled because plaintiffs as investors could have reasonably inquired into the "health of their investments" before having an expert review the public filings).

[61] *In re ML/EQ,* 1999 WL 1271885, at *2 n.12 (quoting *In re Dean Witter,* 1998 WL 442456, at *5).

[62] *In re Dean Witter*, 1998 WL 442456, at *5.