No. ______

In the

Supreme Court of the United States

NORMA L. COOKE,

Petitioner,

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY,
Successor to Southwestern Life Insurance Company
and Reassure America Life Insurance Company,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Steven B. Pollack
Counsel of Record
Pollack Law Firm
49 Sherwood Terrace
Suite 49-X
Lake Bluff, IL 60044
847-436-9566 Cell
888-491-9566 Fax
Steve@ECOESQ.COM

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1) Where the district court awarded fees to Petitioner under state insurance law for Respondent's unreasonable litigation conduct, did the Seventh Circuit err in reversing the award by holding the Federal Rules of Procedure provide exclusive remedies for conduct in federal court?

2) Where the Seventh Circuit dismissed Respondent's first appeal as premature but denied Petitioner's Rule 38 motion alleging that appeal was frivolous, and where the panel made the following accompanying statement:

> If it were permissible for a court to order both sides to pay a penalty—say, into the law clerks' holiday-party fund—we would be inclined to do so. But there's no such appellate power and no good reason for us to order Jackson to pay something to Cooke as a result of a problem that both sides missed.

did the panel show a deep-seated antagonism toward the widow-Petitioner and favoritism toward Insurer-Respondent requiring disqualification for apparent bias on Petitioner's later motion under 28 U.S.C. § 455(a)?

3) Where Respondent's initial appeal was dismissed for lack of appellate jurisdiction, in part, because that judgment was unsigned in violation of Rule 58(b)(2)(B), did the Seventh Circuit err in holding Petitioner's later cross-appeal to be untimely after the signed judgment was entered?

PARTIES TO THE PROCEEDING

Petitioner, Ms. Norma L. Cooke, is Decedent/insured's widow and the policy beneficiary, plaintiff in the district court and appellant[1] in the Seventh Circuit.

Respondent, Jackson National Life Insurance Company (successor to Southwestern Life Insurance Company and Reassure America Life Insurance Company), is the insurer, defendant in the district court and appellant in the Seventh Circuit.

[1] Pursuant to Circuit Rule 28(d) and court order, both appeals were deemed separate and each party an appellant. Pet. App. 2a.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

RULES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Norma L. Cooke respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion reversing judgment (Pet. App. 1a-11a) is reported at 919 F.3d 1024. The Seventh Circuit's opinion dismissing Respondent's first appeal (Pet. App. 12a-17a) is reported at 882 F.3d 630. The district court's opinion on summary judgment (Pet. App. 18a-58a) is reported at 243 F. Supp. 3d 987. The district court opinion denying judgment on the pleadings (Pet. App. 71a-92a) is unpublished but is available at 2016 WL 1070829.

JURISDICTION

The Seventh Circuit issued its opinion after remand on March 26, 2019. The Seventh Circuit issued its prior judgment finding absence of jurisdiction on February 9, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1011 provides:

> Declaration of policy - Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the

regulation or taxation of such business by the several States.

15 U.S.C. § 1011(a) provides:

> **State regulation** The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. § 1011(b) provides:

> **Federal regulation** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 2072(a) provides:

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

28 U.S.C. § 2072(b) provides:

> Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

215 ILCS § 5/155 provides:

> Attorney fees.
>
> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $60,000;

> (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.

INTRODUCTION

This petition raises an important issue of the scope of the Federal Rules of Procedure in diversity litigation, and asks this Court to settle an issue that will otherwise harm insurance claim litigants if the announced preemption of federal rules over state insurance law must first percolate through conflicts between the circuits. This holding is contrary to many federal cases finding improper litigation conduct a basis for award of fees under state law, including state insurance law. The Seventh and Ninth Circuits have made a significant change in law without discussing the analytic framework of relevant statutes and Supreme Court precedent.

STATEMENT OF THE CASE

A. Federal Law Vests Regulation of the Business of Insurance With the States, and Illinois Confers Oversight of Insurer Conduct With the Courts

In 1945, Congress passed the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, immunizing State insurance law regulating the business of insurance from being invalidated, impaired or superseded by federal law not specific to insurance.

Congress passed the Rules Enabling Act, 28 U.S.C. § 2072, under which federal rules of procedure are prescribed, prohibiting those rules from abridging, enlarging or modifying any substantive right.

In 1937 Illinois enacted, as part of a revision to its insurance code, a provision titled "Attorney Fees" at 215 ILCS § 5/155. This provision has been amended several times to its current version, to provide an award of attorneys' fees, and a penalty of the lesser of $60,000 or 60% of the amount recovered at trial, when it appears to the court the insurer has been vexatious and unreasonable. The two possible awards are interpreted to serve different purposes; the attorney fees as compensation to the insured and the penalty as punishment to the insurer. Neither award is mandatory by the court.

In federal diversity actions, federal procedural rules apply and state substantive laws apply. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

B. Petitioner's Claim, Complaint And The District Court's Denial of Petitioner's Motion For Judgment on the Pleadings

The actions giving rise to this petition are largely undisputed. Respondent is a life insurance company that sold a term life policy to Petitioner's husband, Charles Cooke, naming Petitioner as beneficiary. Pet. App. 19a-23a. The policy states a quarterly premium, but for 15 years, was paid on a monthly basis with Respondent's consent per the policy. *Id.* The policy provides a $200,000 death benefit. *Id.* Insured paid the monthly premiums of $348.70 by electronic funds transfer "EFT" for 15 years. *Id.* In year 16, the monthly premium rose to $2,835.85, and on May 30, 2013 Respondent gave Charles Cooke notice to that effect, including that the new premium would "be billed at the same frequency or mode as your current premium." *Id.* That EFT payment failed on July 28, 2013 due to insufficient funds and thus began the policy and statutory 31-day grace-period to pay the overdue premium, but making a claim payable within that period minus the overdue premium.

On August 9, 2013, 12 days into the grace period, Respondent sent notice of the failed payment and stated the policy would terminate if the $2,835.85 renewal premium was not received by the last day of the grace period. *Id.* On August 15, 2013, 18 days into the grace period, Respondent sent an undated letter revoking its consent to pay monthly, and demanded a quarterly premium of $8,637.94 by the end of the same grace period. *Id.*

Insured passed away on September 10, 2013, outside the grace-period beginning July 28, 2013, but within 31 days of the undated August 15, 2013 letter changing the premium due.

On January 27, 2015 Petitioner filed suit alleging breach of contract, modification, waiver, estoppel, and unreasonable and vexatious conduct. *Id.* Respondent Answered on March 23, 2015.

On July 2, 2015 Petitioner filed her motion for judgment on the pleadings. On March 15, 2016 the district court denied Petitioner's motion, stating material factual issues remained in dispute based on

Respondent's denial in its Answer of the date of its undated letter changing the premium to quarterly, and based on Respondent denying in its response that Petitioner attached the entire policy to her complaint. Pet. App. 83a-84a. The August 15, 2013 date of the insurer's undated letter became the key fact determining the outcome of this case. Pet. App. 18a-47a.

On April 13, 2016, following denial of Petitioner's motion, the parties appeared for status, at which time the court ordered Respondent to produce the full policy pursuant to Rule 26(a), based on the deficiency stated in the order. Pet. App. 64a-69a. Respondent argued it had produced the full policy pursuant to Rule 26(a), while Petitioner explained the issue was delineation of the policy scattered among 500 pages of Respondent's production, and Respondent's identification of 186 pages within, but most were not the policy. *Id.*

After subsequent communications between the parties, on April 18, 2016 Respondent finally stated: "In sum, the policy provisions appear at JCK00425-JCK00456 and in documents JCK0015-JCK00170, and more particularly...JCK00040-JCK00042, JCK00094-JCK00096, JCK00120-JCK000121. See also JCK0003-00006…JCK00422-JCK00424" and "JCK00017-JCK00022." The original 186 pages Respondent had stated were reduced to 54 pages, and included pages outside those initially delineated. Pet. App. 56a.

Petitioner amended her complaint to omit several counts based on the court's ruling on her motion, and attached the pages Respondent delineated. Pet. App. 23a-24a.

C. The Decision on Summary Judgment

On March 20, 2017 the court issued its opinion on cross-motions for summary judgment, in three main parts. The first part found Respondent had breached the policy, and that Respondent's assertion the applications to pay the premiums by EFT were "EFT Contracts" was unfounded, that these EFT "applications" were not relevant to interpreting the policy, and that Respondent's interpretation of its policy was unreasonable and would lead to absurd results which cannot be how a policy operates. Pet. App. 18a-47a.

In the second section, the court held that Respondent's failure to provide statutory notice under 215 ILCS § 5/234 was additional basis to find Respondent had breached the policy. Pet. App. 47a-53a.

In the final section, the district court denied Petitioner full fees under state insurance law, finding Respondent's denial was *bona fide* based on being consistent throughout litigation and there being no caselaw on the grace period issue. The court did find, however, Respondent's assertions in response to the motion for judgment on the pleadings to be unreasonable, as well as Respondent's refusal to delineate what it considered the full policy, and awarded to Petitioner partial fees under state insurance law for having to advance the case to summary judgment when it could have been resolved by the prior motion absent Respondent's delaying conduct. Pet. App. 53a-58a.

D. Respondent's Appeal and Dismissal for Lack of Appellate Jurisdiction

Respondent immediately appealed the decision on the merits and award of partial attorney's fees. On June 26, 2017 the parties attended mandatory mediation pursuant to appellate and circuit Rule 33, but did not settle. On August 15, 2017 Respondent paid petitioner the merits judgment, proceeded solely as to the award of fees, and filed its opening brief on August 31, 2017. Pet. App. 15a.

At oral argument, the panel questioned appellate jurisdiction and ordered the parties to file supplemental memorandum on the issue. Pet. App. 16a. The panel's questions also indicated they were considering if state law could even apply to litigation conduct in federal court, despite that neither party had raised that argument.[2]

The panel then issued its judgment dismissing the appeal for lack of jurisdiction on several bases, including that the "standard form used for judgments" by the district court "bears only the names of the district court's Clerk of Court and one Deputy clerk – though Fed. R. Civ. P. 58(b)(2)(B) provides that every judgment other than a simple one on a jury verdict (or one fully in defendant's favor) must be reviewed and approved by the judge personally," and also because the awarded fees were not quantified. Pet. App. 13a-17a.

---

[2] http://media.ca7.uscourts.gov/sound/2018/me.17-2080.17-2080_01_11_2018.mp3

The panel also denied Petitioner's Rule 38 motion for Respondent's appeal being frivolous, stating Petitioner did not bring an earlier motion, making her damages "largely self-inflicted." *Id.* The panel then stated: "If it were permissible for a court to order *both* sides to pay a penalty—say, into the law clerks' holiday-party fund—we would be inclined to do so. But there's no such appellate power and no good reason for us to order Jackson to pay something to Cooke as a result of a problem that both sides missed." *Id.*

The panel reserved to itself any successive appeal and "[u]nless either side wants to contest the amount of the award, it should be possible to submit a successive appeal for decision on the existing briefs" but the "parties should inform us promptly after any new appeal is taken whether they want to supplement the briefs already on file." *Id.*

E. Quantification of Fee, Appeals, Petitioner's Motion to Disqualify, and Finding The Federal Rules Exclusive Over State Law

After the court quantified the fee award November 20, 2018, Petitioner filed a motion to enter the award as a final judgment in a separate document signed by the judge, which was granted and entered November 26, 2018. R. 113.[3] Respondent filed its appeal notice November 28, 2018. Petitioner filed a motion to amend the judgment to correct errors,

[3] Petitioner's reference, R.__, is to the Pacer docket in *Cooke v. Jackson*, 15-cv-817, District Court for the Northern District of Illinois.

granted and entered December 4, 2018. R. 121. Petitioner filed her appeal notice December 5, 2018. R. 122.

On December 5, 2018 Petitioner filed with the Seventh Circuit a notice requesting a new briefing schedule pursuant to Fed. R. App. P. 28.1 because cross-appeals were filed. App.18-3527.R.6.[4] On December 5, 2018 Petitioner also filed a motion for the panel to disqualify itself pursuant to 28 U.S.C. § 455(a) for its prior stated desire to sanction her despite Respondent having filed the prior appeal. App.18-3527.R.5. The panel denied the disqualification motion without discussion. App.18-3527.R.9. The panel also ordered Petitioner to file "a brief memorandum explaining what relief she seeks by way of the cross-appeal." App.18-3527.R.8.

Petitioner filed her memorandum. App.18-3583.R.4.[5] The panel separated the two appeals, with Respondent's appeal being heard on the briefs previously filed because the "issues are the same, and further briefs are unnecessary." App.18-3527.R.11. The panel then held that Petitioner's appeal "presents issues not covered by the earlier briefs" and set a briefing schedule, thereby making both parties appellants. *Id.*

---

[4] Petitioner's reference, App.R.18-3527.__, is to the Pacer docket in Cooke v. Jackson, 18-3527, in the Seventh Circuit Court of Appeals.

[5] App.R.18.3583.___ is to the Pacer docket in 18-3583, in the Seventh Circuit.

On March 26, 2019 the panel issued its judgment reversing the district court award of partial fees under state law for Respondent's unreasonable litigation conduct, holding Respondent's conduct did not violate any Federal Rules of Procedure, which provide the exclusive remedy for conduct in federal court. Pet. App. 2a-11a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Review To Correct The Announced Exclusivity Of Federal Rules Of Procedure Over State Insurance Law Governing Insurer Conduct

Congress passed the McCarran-Ferguson Act to preserve for the States the regulation of the business of insurance, and the Rules Enabling Act limiting the federal rules from abridging substantive rights. Illinois enacted § 5/155 to make the courts the arbiters of vexatious insurer claim denials and unreasonable insurer delays.

The Illinois Supreme Court interprets § 5/155 as providing the insured attorney's fees, as well as a penalty. *Cramer v. Insurance Exchange Agency*, 675 N.E.2d 897, 901 (Ill., 1996)("...a plaintiff may also recover reasonable attorney fees and other costs, *as well as an additional sum that constitutes a penalty*")(emphasis added). That court found "In the absence of any allowance of attorneys' fees, the holder of a small policy may see practically his whole claim wiped out by expenses if the company compels him to resort to court action, although the refusal to pay the claim is based upon the flimsiest sort of a pretext." *Id.*

(quoting H. Havinghurst, Some Aspects of the Illinois Insurance Code, 32 Ill. L.Rev. 391, 405 (1937)). Further indicating the compensatory nature of attorney's fees under § 5/155, the court stated:

> Before the statute was enacted, a policyholder's only recourse was to seek a breach of contract action to receive the policy proceeds. Attorney fees and punitive damages are generally not available in breach of contract actions. Section 155 created a limited statutory exception to this rule. It was intended to make suits by policyholders economically feasible and to punish insurers.

Id. (citing *UNR Industries, Inc. v. Continental Insurance Co.*, 607 F.Supp. 855, 866-7 (N.D. Ill. 1984) (Holding the amendments to § 155 indicate "an intent to increase the effectiveness of the statute in achieving the two purposes identified in Mr. Havinghurst's article by separating the attorneys' fees award from the punitive damages award and allowing a court to impose both.")); *Kush v. American States Ins. Co.*, 853 F.2d 1380, 1386 (7th Cir. 1988)(155 "strikes a balance between the individual insured party's need for compensation and the broad societal interest in avoiding excessive damage awards...").

Illinois courts allow the imposition of § 5/155 attorney's fee awards for unreasonable delaying conduct during litigation. *Stevens v. Country Mut. Ins. Co.*, 903 N.E.2d 733, 740 (Ill. App. Ct. 2008)("In this case, we conclude that Country's contention…presented a bona fide dispute. However, this conclusion does not resolve the issue. We note that the trial court's imposition of attorney fees pursuant to section 155 of the Code was based on the 'several' motions Country filed … Thus, we remand to the trial court for reconsideration of its imposition …pursuant to section 155…under the totality of the circumstances excluding Country's motion for summary judgment."); *Korte Const. Co. v. American States Ins.*, 750 N.E.2d 764, 772 (Ill. App. Ct. 2001) ("should have raised these disputes in a declaratory judgment action…"); *Myrda v. Coronet Ins. Co.*, 582 N.E.2d 274, 278 (Ill. App. Ct. 1991) ("…defendant continued its previous course of contesting the matter up until the day of trial when there was no testimony presented on behalf of the defendant."); *Norman v. American Nat. Fire Ins.* Co., 555 N.E.2d 1087, 1100 (Ill. App. Ct. 1990) ("…courts should refrain from penalizing a lawyer or his client for such exercise of judgment absent a violation of applicable rules of ethics or procedure *or the attempted obstruction or deliberate delay of the judicial process.* Absent those circumstances, strategies and tactics of trial counsel are not an adequate basis for imposition of penalties under section 155 of the Code.")(emphasis added); *Kinzer on Behalf of City of Chicago v. Fidelity and Deposit Co. of Maryland*, 652 N.E.2d 20, 29-30 (Ill. App. Ct. 1995) ("Because the 'action' here was still open as long as the trial judge retained jurisdiction over the case, the disincentives created by section 155 remained in effect so as to further the policies evinced by that section and the cases that have interpreted it."); *Siwek v. White*, 905 N.E.2d 278, 285 (Ill. App. Ct. 2009)("In prosecuting this case over the course of two years, American filed five sets of affirmative defenses that were repeatedly dismissed, finally with prejudice. Moreover, none of American's successive affirmative defenses substantively countered the plaintiff's assertion that it was American itself that issued the May 14, 2003, amended declaration. In the end, and only after explicitly considering the totality of the circumstances, the trial court found American's actions to be vexatious and unreasonable."). Illinois courts distinguish between sanctions under Rule 137, (similar to Federal Rule 11), and fees under section 155. *Mobil Oil Corp. v. Maryland Cas. Co.*, 681 N.E.2d 552, 561 (Ill. App. Ct. 1997)("The two provisions for attorney's fees apply to different types of conduct.").

The practical consequence of the Seventh Circuit's decision that the punitive remedies in the federal rules provide the exclusive remedies for unreasonable delaying litigation conduct is to strip Illinois and other States with similar provisions from regulating delaying insurer conduct in federal diversity suits, while remaining available in State courts. Insurers will no doubt forum shop for federal diversity jurisdiction for this inequitable application of State insurance law, while insureds will avoid federal courts (if they can) for the same inequitable application. This very result is prohibited by the *Erie* doctrine.

In so ruling, the Seventh Circuit announces preemption by the federal rules without any discussion of its split of authority from other circuits that allow State insurance law to prevail on issues regarding conduct in federal court.

Certiorari is warranted to resolve the interplay between procedural and substantive law in diversity suits, with this decision conflicting with other circuit opinions as discussed below. Those other circuit opinions, however, rarely analyze the issue in terms of preemption, the *Erie* Doctrine, or the McCarran-Ferguson Act. Because of the conflict created by this decision, and the failure to analyze and settle the issues, certiorari is warranted to settle important federal questions that have not, but should be, settled by this Court.

A. The Opinion Does Not Follow This Court's *Erie* or *Chambers* Precedents, Or Analyze Conflicts With Other Circuits

This Court already answered in the negative if the federal rules present a comprehensive scheme preempting all other bases for fee awards, yet the Seventh Circuit now seeks to overturn that analysis. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 46 (1991). In *Chambers* this Court was presented with a similar situation where the litigant's overall conduct warranted sanction, yet the individual rules geared toward discrete conduct proved insufficient to the task. *Id.* at 41-2. The Court rejected the argument that the absence of a specific procedural rule or state law providing such sanction prevented the court awarding a fee to the other party, holding the court has the inherent power to make such an award. *Id.* at 43. In *dicta*, this Court cited fn. 31 in *Alyeska Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240, fn. 31 (1975) for the proposition that "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." (Citation omitted).

This circuit court analyzed if the conduct complained of by the district court could have been sanctioned under Rule 11, 26 or 37 and found it could not. Although Petitioner disagrees the circuit court properly defined Respondent's conduct by this analysis, *Chambers* makes clear that inherent power (or as referenced in *dicta*, State law) may be used "to impose attorney's fees as a sanction for bad-faith conduct." *Id.* at 50 ("This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions."). This Court also held that "neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could be sanctioned under the statute or the rules." *Id.*

The circuit court opinion cites this Court's opinions addressing federal and state law in diversity, including *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); *Burlington Northern R.R. v. Woods*, 480 U.S. 1 (1987); and *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), but does not provide any analysis why it finds the federal rules to be exclusive. "For the reasons we have already given, federal rather than state law governs how federal litigation is conducted, plus when (and who) may be penalized for misconduct." Pet. App. 11a.

The circuit court's reference to reasons already given does not illuminate its reasons. It analyzed if Respondent's conduct actually violated any of the federal rules, but found it did not. This implies the circuit court found the federal rules to be comprehensive, but because they do not prohibit Respondent's conduct, then State law prohibiting such conduct must conflict.[6]

Federal Rules being comprehensive goes against this Court's analysis that it is sometimes difficult to apply the specific federal rules, where, as here, "the falsity of the pleadings at issue did not become apparent until after the trial on the merits, so that it would have been impossible to assess sanctions at the time the papers were filed." *Chambers* at 50. That is precisely what frustrated the district court, that Respondent's denial of the date of its undated letter changing the premium due, and its assertion Petitioner failed to attach all relevant policy pages to her complaint, caused unnecessary delay because those assertions later turned out untrue. Pet. App. 57a.

The basis for rejecting *Chambers* and inherent power as an alternate basis to affirm was:

> the district court in our case did not invoke *Chambers* or treat §5/155 as a doppelganger of the *Chambers* doctrine. Instead it penalized Jackson for failing to attach evidence to a document at the pleading stage.

Section 5/155 mostly is a doppelganger to the *Chambers* doctrine. Both seek to give courts the ability to determine unreasonable litigant conduct, the former

---

[6] The panel was more explicit at oral argument, stating only the federal rules apply to sanction litigation conduct in federal court. http://media.ca7.uscourts.gov/sound/2018/me.17-2080.17-2080_01_11_2018.mp3

by statute as to insurers and the latter by inherent power as to all litigants. Both apply to the "totality of the circumstances" and therefore allow review of overall conduct that may evade the discrete conduct sanctionable by procedural court rules, and both are permissive. *Chamber*'s citation to *Alyeska Pipeline Service Co.*, 421 U.S. at 259 fn. 31, demonstrates this Court impliedly found state laws allowing fees would not be preempted by the sanctioning mechanisms in federal rules, (although the issue of fee-shifting presents a different focus than litigation conduct). Section 5/155 specifically addresses unreasonable delay, but the panel gives no analysis why that only applies to pre-litigation conduct and stops at the (federal) courthouse steps. The main difference is inherent power seeks to vindicate judicial authority, whereas § 5/155 seeks to compensate insureds faced with obstructive insurers, with attorney's fees. The specific sanctions in the federal rules are punitive and seek to vindicate discrete violations.

The Seventh Circuit tried to harmonize its own prior contrary opinion in *TKK USA, Inc. v. Safety National Casualty Corp.*, 727 F.3d 782, 795 (7th Cir. 2013), on which the district court here relied. Pet. App. 5a-6a. In *TKK* the insurer was sanctioned under § 5/155 for unreasonable litigation conduct. The circuit court excused its inattention to federal preemption in that case because "the insurer did not rely on *Shady Grove* and its predecessors" so therefore "we did not resolve an issue (the extent to which state law governs the conduct of federal litigation) that was neither briefed by the parties nor mentioned in the opinion." *Id.*

The circuit court also excused itself for not analyzing *Chambers* in that case, because the "parties and the panel in *TKK* understandably did not focus on the source of law, when § 5/155 and *Chambers* came to the same thing." Yet here the panel says they are not doppelgangers, and "Cooke has not used this doctrine to defend the district court's decision or asked us to remand so that the judge can consider Chambers." Pet. App. 7a. The court fails to explain why inherent power requires a litigant to invoke it.

The opinion does not mention another Seventh Circuit case analyzing Fed. R. App. P. 38, and if § 5/155, "a state standard should apply to the award of attorney's fees and/or costs for an appeal in federal court", holding that "if section 155 is deemed to create a substantive entitlement for the prevailing party once the jury finds, as it did here, that the insurer's refusal to pay was vexatious and unreasonable, as we have concluded, *then it is not a problem for a federal court to award appellate attorney's fees under state law in situations like this one, where the appeal is equally unreasonable and vexatious*, if not frivolous." *Rosenburg v. Lincoln American Life Ins. Co.*, 883 F.2d 1328, 1339-40 (7th Cir. 1989)(emphasis added). This comports with *Burlington Northern Railroad Company*, 480 U.S. at 4-8 (*Hanna* collision requiring preemption by Fed. R. App. P. 38, where fees are discretionary, as against Alabama procedural law making fees mandatory for affirmed appeals), because here § 5/155 is permissive, not mandatory.

The Eleventh Circuit in another case involving Respondent found its litigation conduct to be unreasonable and applied Illinois law to reverse the district court's denial of fees, finding § 5/155 provides a basis to award fees for delaying litigation conduct. *Mangano v. Jackson Nat'l Life Ins. Co.*, 723 Fed. Appx. 918, 925-7 (11th Cir. Feb. 5, 2018). There, Respondent failed to timely alert the court of dispositive facts it had previously learned. *Id.*

Other federal courts have generally allowed litigation conduct to form basis for awards under state insurance law. *Porn v. Nat. Grange Mut. Ins. Co.*, 93 F.3d 31, 33, fn.2, 7 (1st Cir. 1996)(plaintiff could have supported claim for bad faith based on insurer's litigation conduct); *Rottmund v. Continental Assurance Co.*, 813 F.Supp. 1104, 1109-10 (E.D.PA 1992) ("The Federal Rules of Civil Procedure address the conduct of actions in federal courts in general. There is no indication that they preempt a state law that attempts to address a very specific problem: bad faith conduct of insurers, even where that bad faith conduct occurs in the context of litigation."); *Krisa v. Equitable Life Assur. Soc.*, 109 F. Supp. 2d 316, 321 (M.D. Pa., 2000) ("an insurer could be held liable 'for bad faith conduct arising in the insurer-insured relationship which happens to occur during the pendency of an action'..."); *Timberlake Const. Co. v. U.S. Fidelity & Guar. Co.*, 71 F.3d 335 (10th Cir. 1995)(while litigation conduct is generally handled under the federal rules, in some cases it is admissible on issue of common law bad faith claim denial); *Sobley v. Southern Nat. Gas Co.*, 302 F.3d 325 (5th Cir. 2002) (Litigation conduct in advancing suit on inadequate investigation sanctionable under Mississippi insurance law).

Courts have allowed litigation conduct to form the basis for awards under other state laws depending if deemed substantive or procedural. In *Showan*, the court held a Georgia law requiring fees as compensation for opposing any party's frivolous claim or defense was substantive; was not in conflict with Rule 11 which is punitive to deter, so does not address same subject under *Shady Grove* analysis; and so applies under *Erie*. *Showan v. Pressdee*, 2019 WL 1891785 at *9-14 (11th Cir. April 29, 2019); *but see First Bank of Marietta v. Hartford Underwriters*, 307 F.3d 501 (6th Cir. 2002) (Finding Ohio law allowing fees to any party adversely affected by frivolous litigation conduct to be procedural, fee-shifting, and in conflict with Rule 11 regarding lack of safe harbor); *In Re: Larry's Apt. v. Carmel*, 249 F.3d 832, 837-9 (9th Cir. 2001) (holding all litigation conduct must be sanctioned under federal rules regardless if state law allowing award is substantive or procedural).

Here § 5/155 is a state insurance law allowing attorney's fee awards as compensation to prevent litigation from significantly reducing coverage, by providing "a remedy to insureds who encounter unnecessary difficulties resulting from an insurance company's unreasonable and vexatious refusal to honor its contract with the insured." *Korte Const. Co.*, 750 N.E.2d at 771. The federal district and circuit courts have taken various paths to answer this important question if sanctioning provisions in federal rules provide the exclusive basis for fee awards. These conflicts justify this Court accepting this petition.

B. Preemption Violates The McCarran-Fergusson Act Goal Of State Regulation of Insurance, And Will Have Far-Reaching Implications For Insurance Litigation

The circuit opinion ignores its own holdings regarding the McCarran-Ferguson Act by refusing to conduct any analysis despite Petitioner briefing it. *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992):

> Any effort to use federal law to prescribe or penalize the behavior of insurers must reckon with the McCarran-Ferguson Act. Section 2(b) of this statute, 15 U.S.C. § 1012(b), provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance"

See also Hennessy Indus., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 770 F.3d 676 (7th Cir. 2014):

> ...section 155 is a state regulation of the insurance business. Apart from the fact (not itself decisive) that it is part of the state's insurance code, it is concerned only with the conduct of insurance companies, specifically delay by them in paying claims to their insureds.

There is no basis to distinguish the focus of State laws regulating the business of insurance to prohibit insurers from engaging in unreasonable delaying conduct, whether occurring before or during litigation.

Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 460 (1969)("...whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the 'business of insurance.'").

On the one hand, the McCarran-Ferguson Act on its face provides inverse-preemption against interpreting federal law to impair State laws regulating the business of insurance. On the other hand, the holdings of this Court in *Shady Grove* and *Walker* require federal rules preempt conflicting State laws. Here, it is not the federal rules themselves impairing § 5/155, but rather the Seventh Circuit's interpretation of them as exclusive. *Humana v. Forsyth*, 525 U.S. 299 (1999) ("federal laws proscribing similar conduct as State law, yet providing materially different remedies" do not impair state law under the McCarran-Ferguson Act, nor do they collide, "because Insurers can comply with both.").

In its opinion, the circuit court cited no collision, and provided no analysis of the McCarran-Ferguson Act. This Court stated a three-part test:

> Royal Drug identified three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy

> relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Union Labor Life Insurance Company v. Pireno New York State Chiropractic Association, 458 U.S. 119, 129 (1982).

Here, litigation of coverage is part of the business of insurance because it is part of transferring and spreading risk between policyholders. Litigation delays create favorable settlement opportunities by extending litigation to force the insured into "a condition of exhausted compliance." *Chambers* at 41. The basic formula for insurance risk is collecting premiums, paying claims, and pricing the premiums based on the premiums collected and claims paid. If settlement payments go down by unreasonable litigation delay, it follows that a lower risk premium can be charged to the other policyholders, making claim litigation part of transferring and spreading insurance risk. Second, litigating exclusions to coverage is integral to the relationship between insurer and insured. *National Securities, Inc.*, 393 U.S. at 460. Finally, the benefit of seeking litigation delay is unique to insurers, because they are using the insured's own premiums to fund the delays and write it off as a cost of business. Further, contract damages only require the losing insurer to pay what it undertook in the first place. This gives the insurer every incentive to delay proceedings, with the worst case being judgment to pay the original obligation, and the best case being the insured getting worn down and accepting a low settlement offer. It is an asymmetry that makes insurance litigation unique among other types of diversity litigation.

Barring this remedy in federal court violates the McCarran-Ferguson Act by removing important tools from federal judges faced with unreasonable delaying conduct by insurers.

II. Review is Important Because Judges Easterbrook, Barrett and Stadtmueller Provide No Reasoning For Refusing Disqualification, And Review Provides An Important Check On Abuse Of Power By Lifetime Appointees

The circuit court exhibited extreme hostility toward Petitioner and favoritism toward Respondent that requires this Court's exercise of supervisory power. First, after Respondent filed a frivolous appeal prior to the quantification of the fee award, the panel made the parties file supplemental memorandum. While Respondent failed to cite relevant law, the panel acknowledged that Petitioner cited the appropriate law. Pet. App. 16a. But then the panel stated Petitioner only stated the obvious, denied her additional fees under Appellate Rule 38, stated her injuries were largely self-inflicted because she could have spoken up sooner, and stated a desire to sanction both parties but denied it had the authority. Pet. App. 17a.

Petitioner did not inflict her own injury as it was Respondent's appeal. Petitioner could not have filed a motion much sooner because Respondent only threw in the towel on the merits and paid that judgment two weeks before its opening brief was due, proceeding only on the fee award. Pet. App. 15a.

After the fee award, Petitioner filed a petition for the panel to disqualify itself because its stated intent to sanction her where it had no basis or authority, but not sanction Respondent despite having the authority and basis to do so, raising the possibility a reasonable person could believe the panel would decide the case on other than the merits. *Hook v. McDade*, 89 F.3d 350, 354 (7th Cir. 1996). This potential bias, while not from extrajudicial sources, may still require disqualification. *Liteky v. United States*, 510 U.S. 540, 555 (1994) ("In and of themselves (i.e., apart from surrounding comments or accompanying opinion), [judicial rulings] cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved."). Still, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *id.*

The final opinion continues to show hostility toward Petitioner and favoritism toward Respondent. For example, the panel used different standards regarding the parties' arguments. It announced preemption to find the district court abused its discretion by relying on state law to sanction Respondent's conduct, yet Respondent had never raised preemption in its initial appeal briefs which the panel stated formed the basis of its ruling. Pet. App. 2a. On the other hand, the panel refused to affirm the district court's award based on its inherent power, despite finding it a suitable basis to do so, because Petitioner did not raise that issue. Pet. App. 7a.

Where Petitioner sought fees for Respondent's baseless first appeal, the panel held Petitioner did not raise it soon enough and only stated the obvious, despite making both parties file supplemental briefs, but Respondent did not cite the (obvious) law. Pet. App. 16a.

The opinion ignored Petitioner's arguments that the McCarran-Ferguson Act and Rules Enabling Act provide inverse-preemption.

The panel misstates Petitioner's arguments. Petitioner's cross-appeal seeks to enlarge the award, including for full attorney's fees for Respondent's vexatious denial of claim and appeal. The panel states the opposite, that Petitioner does not seek to enlarge her award. Pet. App. 2a.

The panel avoided Petitioner's simpler basis to analyze whether the district court erred in holding Respondent had a *bona fide* basis to deny Petitioner's claim. The district court had analyzed the issue and used a subjective standard to find such a *bona fide* basis on Respondent's subjective belief in its position as shown by its consistency during litigation, and the lack of prior case law. Pet. App. 54a-55a. Petitioner argued on appeal that Illinois uses an objective standard, i.e. whether the insurer's position is based on any evidence.

"The key question in a section 155 claim is whether an insurance company's conduct is unreasonable and vexatious." *West Bend Mut. Ins. v. Nolton*, 940 N.E.2d 1176, 1179-80 (Ill. App. Ct. 2010) (citing *McGee v. State Farm Fire & Cas. Co.*, 734 N.E.2d 144 (Ill. App. Ct. 2000)). The term vexatious is an objective inquiry, meaning "without reasonable or probable cause or excuse." *Norman v. American Nat. Fire Ins.* Co., 555 N.E.2d 1087, 1100 (5th Dist. 1990)(citing Blacks Law Dictionary 1403 (5th ed. 1979).). "The relevant inquiry to determine whether an insurer's actions were 'unreasonable and vexatious' is whether it had a bona fide defense to the claim." *West Bend Mut. Ins.*, 940 N.E.2d at 1180. The test for a *bona fide* dispute is whether it is based on any evidence, not how heartfelt is the insurer's belief its dispute is *bona fide*. *Employers Ins. of Wausau v. Ehlco Liq. Trust*, 708 N.E.2d 1122, 1139-40 (Ill., 1999); *McGee*, 734 N.E.2d at 154 ("…an insurer's assertion of a defense to coverage does not create a bona fide dispute regarding coverage absent a factual basis supporting the defense.")(citing *Myrda v. Coronet Ins. Co.*, 582 N.E.2d 274 (2nd Dist. 1991)); *Morris v. Auto-Owners Ins. Co.*, 606 N.E.2d 1299, 1303 (Ill. App. Ct. 1993)("The proper focus…is only whether defendant reasonably relied upon evidence sufficient to form a bona fide dispute."); *Cernocky v. Indemnity Ins. Co. of North America*, 216 N.E.2d 198, 203 (Ill. App. Ct. 1966) ("The 'fraud' standard is not required" in "determining whether the insurer is liable beyond the policy limits…" and "We agree that the words 'good faith' and 'bad faith' are not particular words of art as used here…They mean either being faithful or unfaithful to the duty or obligation that is owed.")

Petitioner argued on appeal that based on the merits portion of the summary judgment opinion the district court had found no facts supported Respondent's denial. The district court states Respondent's denial position was not based on any evidence, leads to absurd results, and cannot be how a policy is read. Pet. App. 28a-47a. Petitioner alternately argued on appeal that Respondent's denial was not *bona fide* because the other basis the district court found, that the claim remained open six-months after the lapse in payment, (Pet. App. 53a) had already been litigated twice by Respondent in the Northern District of Illinois. The panel refused to consider this simpler basis to determine if the denial basis had previously been litigated.

The panel acknowledged the district court may have used the wrong standard, but affirmed by re-analyzing the facts on a seemingly objective standard. Pet. App. 9a-11a. Respondent had not briefed this issue on appeal, instead continuing to assert its denial was *bona fide* based on the same interpretation the district court had rejected. The panel, however, completely ignored Petitioner's simpler argument that the lack of proper statutory notice did not require any fact analysis because Respondent's consistency of position was unsupported by the statute and Respondent's two prior cases litigating the issue. *Wegrzyn v. Jackson National Life Insurance Company*, 10 C 2140 (N.D. Ill. July 8, 2011); *Nieder v. Jackson National Life Insurance Company*, No. 10 C 6766, 2011 WL 3798224 (N.D. Ill. Aug. 22, 2011).

The panel also found Petitioner's cross-appeal too late under *Budinich* for that portion seeking to challenge the district court's limitation of her merits award. Pet. App. 2a. Yet the panel had also based its initial ruling on lack of appellate jurisdiction because the district court failed to sign the original judgment (which was only signed after remand). Pet. App. 15a. The failure to sign that judgment, according to the panel, precluded it becoming final, yet that basis should have precluded the panel finding the cross-appeal too late after it was signed in the first instance. The panel said nothing about it.

In sum, the panel took every opportunity to limit Petitioner's relief, and every opportunity to limit Respondent's liability. In applying differing standards to the parties, the panel appears to have followed through on the very thing for which Petitioner sought its disqualification under 28 U.S.C. § 455(a), its stated desire to punish Petitioner, a widow who did nothing wrong.

III. Review Is Important Because The Decision Makes Difficult Determining Which Parts Of Judgments Are Final And Appealable

As stated above, the circuit panel held Petitioner's cross-appeal too late on the issue of the district court's post-summary judgment ruling allowing Respondent to keep the entire unpaid premium. The issue is that Insured died at the midpoint of the new three-month premium. While one part of the payment of proceeds provision allowed Respondent to deduct the unpaid (quarterly premium) from the total benefit, the next paragraph of the provision required Respondent to then return the unearned portion of any premium paid past the current month. The district court read the two provisions as separate, whereas Petitioner asserts they be read sequentially and together. R. 72.

The panel based its finding that the cross-appeal on this merits issue was too late by relying on *Budinich*, but that case holds the merits judgment and any subsequent fee award are separately appealable. Here, both the fee award for litigation conduct and denial for claim denial were made as part of the same merits judgment, not a later petition. For that reason *Budinich* would not require Petitioner to file her appeal until after the fee award was quantified.

The circuit panel also completely ignored that the merits judgment was not itself final because it originally held the district court had not signed it. Pet. App. 15a. The final judgment in the case was therefore never final until after the fees were quantified and the signed judgment was entered, making Petitioner's cross-appeal timely within 30 days of its entry. Certiorari is warranted to correct this decision on an important federal question in conflict with relevant decisions of this Court.

CONCLUSION

This Court should grant certiorari to address the important questions presented. Insurance policy claimants in diversity suits will suffer significant harm if this judgment is allowed to stand.

Respectfully submitted,

Steven B. Pollack
Counsel of Record
Pollack Law Firm
49 Sherwood Terrace
Suite 49-X
Lake Bluff, IL 60044
847-436-9566 Cell
888-491-9566 Fax
Steve@ECOESQ.COM

Counsel for Petitioner