No. 17-_____

In the
Supreme Court of the United States

JOHN LASCHKEWITSCH,

Petitioner,

v.

RELIASTAR LIFE INSURANCE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE FOURTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Hurni*, *Enelow*, *Stewart and Pickering* precedent from this Court; *American Trust Co.* and *Chavis* precedent from the NC Supreme Court; unanimous U.S. Circuit Court of Appeals precedent; N.C. Gen. Stat. §58-58-22(2); and other insurance authorities bar ReliaStar's claims, under Federal Rule of Civil Procedure 60(a), since ReliaStar's first contest of the policy contract was 400 days after its two-year contestable period expired, and since the lower courts omitted all of the same?

2. Whether ReliaStar's breaches of an alleged Producer Agreement, which was not submitted, timely received, dated, signed or agreed to by Petitioner, not made effective by ReliaStar, and does not record Petitioner as a party with ReliaStar, and ReliaStar's untimely attorneys' fee motion, with no affidavit of prevailing rates or timely filed bill of costs, permits fees against Petitioner under Federal Rule of Civil Procedure 60(a) and precedent from this Court, the N.C. Supreme Court, and all U.S. Circuit Courts of Appeal, since the lower courts omitted all of the same?

3. Whether the district court omitted Ben Laschkewitsch's first "possible ALS" diagnosis date, North Carolina applicable three year statutes of limitation, estoppel by depositing premium after notice and knowledge, and actions and declarations affirming the policy for over two years; and ReliaStar's failure to prove sufficient Fed.R.Civ.P § 9(b) particularity, reasonable due diligence, inquire of statements received; and its unfair claim settlement practices and unfair and deceptive trade practices bar ReliaStar's untimely filed claims and fees, under Federal Rule of Civil Procedure 60(a), since the lower courts omitted all such of Petitioner's defenses?

CORPORATE DISCLOSURE STATEMENT

Under Rule 29.6, Petitioner is not incorporated, has no incorporated business, and there is no parent or publicly held company owning 10% or more of stock in any corporation owned by Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

John Laschkewitsch petitions for a writ of certiorari to review the erroneous Rule 60(a) judgment granted ReliaStar by the district court, which was affirmed by the Fourth Circuit by its refusal to adhere to its own precedent over contestability, untimely filed attorneys' fees, Rule 9(b) particularity, 3-year statutes of limitations, unfair claim settlement practices, NC laws and NC Supreme Court precedent.

Opinions Below

A. Fourth Circuit Court of Appeals, Case Number 17-2308 affirmation, dated April 23, 2018. (Appendix 1).

B. Eastern District of North Carolina, Case Number 5:13-CV-210-BO denial of Rules 60(a), 60(b)(4) Motions, dated October 12, 2017. (Appendix 2).

Jurisdiction

The Fourth Circuit Court of Appeals affirmed the district court's judgment on April 23, 2018. (Appendix 1). This Court has jurisdiction under U.S.C. §1254(1).

Constitutional And Statutory Provisions Involved

Interpretation of the due process element of the Fourteenth Amendment to the United States Constitution is involved since Petitioner's defenses have not been heard. Article III, § 2 of the U.S. Constitution is relevant since ReliaStar did not suffer an injury-in-fact, which was concrete and particularized, prove traceability to Petitioner, but to AFG, or that its untimely contest and fee motion are redressable. Also, Federal Rules, U.S. Codes, EDNC Local Rules, and N.C. General Statutes are involved by designated page or *in passim* throughout. See Appendix 3, pp. 1-6.

STATEMENT OF THE CASE

A. INTRODUCTION

This Court, the North Carolina Supreme Court and every U.S. Circuit Court of Appeals hold that a policy contest must be filed in court within the statutory and contractual contestability period, which here ended on February 16, 2012. ReliaStar filed its first contest on March 22, 2013 (DE 1), such that all of its claims are barred.

The courts below also omitted ReliaStar's breaches of an alleged Agreement, which was not signed or dated by either party, does not record Petitioner as a party, and was not made effective by ReliaStar, submitted by Petitioner or produced until ReliaStar filed its motion for summary judgment. (DE 83-6). Further omitted are Petitioner's special circumstances and merited defenses. And neither court below reviewed that ReliaStar began this action 400 days untimely and filed its fee motion 2 days untimely with no timely bill of costs or affidavit of prevailing rates, pursuant to this Court's precedent and Fed.R.Civ.P. §§ 54(d)(2)(B)(i-iii). (App. 3, pp. 2, 3).

The lower courts overlooked that insured Ben first consulted by referral with a specialist "for possible ALS" on March 23, 2010, over a month after the policy was issued and delivered, and beyond a week after the policy was placed in force. Also, the lower courts omitted that ReliaStar failed to inquire of a dozen or more received statements, prove sufficient Fed.R.Civ.P. § 9(b) particularity of who, when or where, and time and place, and prove reasonable due diligence. Further overlooked is that ReliaStar filed its contest beyond the NC three year statutes of limitation for its fraud and breach of contract claims, deposited premium after notice and alleged knowledge, acted to keep the policy in force beyond two years and committed unfair claim settlement and deceptive trade practices. N.C.G.S. § 75-1.1. (App. 3, pp. 4, 5).

B. SUMMARY OF THE CASE

1. The Incontestable Policy

The policy was issued on February 16, 2010, but corrected ("per HO error") on February 22, 2010, proving that the original policy Issue Date is February 16, 2010. (App. 4,"Print Completion Date/Time: 02/16/2010 11:13; "Reissued... per HO error"); DE 95-1, 2, 4-8, 51, 94. The policy became incontestable on February 16, 2012 or by February 22, 2012. (App. 5); DE 131-6. ReliaStar did not bring its contest prior to February 16, 2012. ReliaStar brought its first contest on March 22, 2013 in the Eastern District on North Carolina. And pursuant to holdings from this Court, see *Hurni*, *Enelow*, *Stewart* and *Pickering*; NC Supreme Court precedent, see *American Trust Co.* and *Chavis*; and U.S. Circuit Courts of Appeal precedent, pp. 7-15, below, all of ReliaStar's claims are barred for filing its first contest 400 days untimely.

2. ReliaStar's Agreement Breaches And Untimely Fee Motion

On March 21, 2013 ReliaStar terminated a non-existent "Employee Benefits Agent Contract," which Petitioner was no party to, was not produced by ReliaStar and could not apply to Petitioner since Petitioner was not an employee of ReliaStar. (App. 6); DE 95-187. On March 22, 2013, ReliaStar mended its hold by relying on a non-produced, mutual or agreed upon Producer Agreement. (App. 7, pp. 1, 8), DE 1.

But ReliaStar's Agreement is not signed or dated by either party, was never made effective by ReliaStar, records ReliaStar only as a party, not Petitioner, and was not submitted by Petitioner. Further, ReliaStar's alleged Agreement was first received by Petitioner with ReliaStar's motion for summary judgment. (Apps. 8, 9, 10); DE 83-6, Ex. U; DE 181-2, ¶s 2-27, DE 181-3, 4, 5, 6. See also pp. 20-23, below.

In addition to mending its hold over an agreement, ReliaStar breached the alleged Producer Agreement it drafted, (App. 7), by never filing a motion to compel arbitration and/or motion to stay, pursuant to the terms of the agreement. (App. 7, "ING Life Companies Producer Agreement," pp. 6-7, Section IX, General Provisions, D. Arbitration); DE 83-6, DE 181-3. Also, there is no "Authority" over the agreement by either party since neither party signed the Agreement. (App. 7, p. 7, Section IX, General Provisions, I. Authority; p. 8). Breached again by ReliaStar and omitted by the lower courts is tying Petitioner to an Agreement that only ReliaStar is a party to, is not signed by either party and was not made effective by ReliaStar. (App. 7).

With no mutual, consented to or agreed upon Producer Agreement, the courts below erred in awarding ReliaStar fees as an element of contractual damages. As well, ReliaStar filed its fee motion sixteen days after the entry of judgment (DE 141, 2, DE 144), which was two days untimely. The courts below also omitted unanimous Circuit Court of Appeals precedent and Fed.R.Civ.P. 54(d)(2(B), which requires a fee motion to be filed no later than fourteen days after the entry of judgment. Pp. 15-18, following. And there is no Local Rule for the enlargement of time from fourteen days in the EDNC. Also, ReliaStar never filed a Fed.R.Civ.P § 6(b) motion or show good cause or excusable neglect for filing untimely. (App. 3, p. 2). And ReliaStar failed to file a timely bill of costs and a required affidavit of prevailing market rates.

Moreover, Petitioner did not bring this action, (DE 1), or bring "vexatious, wantonly or oppressive reason" defenses, pp. 5-40, below, benefit others or willfully disobey a court order. And the lower courts omitted the American Rule, ReliaStar's excessive fees and Petitioner's special circumstances. See pp. 15-18, following.

3. The Lower Courts Omitted Petitioner's Legitimate Defenses

Beyond the incontestable policy and no mutual agreement, the lower courts refused to review or address any of Petitioner's remaining defenses. Foremost, the lower courts omitted indisputable evidence that Ben first consulted by referral "for possible ALS" on March 23, 2010, which was beyond a month after the policy was issued and delivered, and after the policy was placed in force. See pp. 25-28, below.

The lower courts further abused their discretion by omitting NC Supreme Court precedent since ReliaStar declared the policy paid to February 19, 2012, over two years after issuing the policy on February 16, 2010, issued a duplicate policy on the contestable expiration date and deposited premium after notice and knowledge. Pp. 28-31, below. Omitted as well by both lower courts is that ReliaStar failed to plead sufficient Fed.R.Civ.P. § 9(b) particularity of when, where and time and place in support of its fraud claim or inquire of more than a dozen received statements to support *reliance* for its fraud claim. (App. 3, p. 2). ReliaStar's failed inquiries also prove its lack of due diligence to toll the NC three year statutes of limitation. Pp. 31-37, below. And since no document was signed or submitted after March 15, 2010 (App. 11), and ReliaStar first contested the policy on March 22, 2013 (DE 1), its claims are also barred by N.C.G.S. §§ 1-52 (1), (9)(App. 3, p. 3). Pp. 35-37, below.

Moreover, no court below reasonably reviewed ReliaStar's unfair practices. ReliaStar altered Ben's application, without insured's knowledge or consent, and failed to adhere to its Contract, Contestability and Payment of Premium provisions, effectuate a fair settlement, deny Petitioner's claim within a reasonable time or act reasonably promptly upon claim communications. ReliaStar also committed three or more UDTP violations. DE 181-2, ¶s112-133; Doc. 17, pp. 42-50. Pp. 37-40, below.

REASONS FOR GRANTING THE PETITION

I. This Court, The NC Supreme Court And All U.S. Circuit Courts Of Appeal Require A Court Contest Within The Contestable Period

The policy was issued on February 16, 2010 and again on February 22, 2010. The contestable period expired on February 16 or 22, 2012. (Apps. 4; 5, Policy, p. 1, "Issue Date February 22, 2010);" DE 131-6. ReliaStar first contested the policy on March 22, 2013 (DE 1), which was 400 days after its contestable period expired.[1]

The policy was delivered in North Carolina and so is subject to NC law. See N.C. Gen. Stat. § 58-3-1; (App. 3, p. 3). North Carolina's contestability statute, N.C. Gen. Stat. § 58-58-22(2) (App. 3, p. 4), states, in pertinent part, as follows:

> Incontestability.–"A provision that the validity of the policy shall not be contested, except for nonpayment of premium, once it has been in force for two years after its date of issue..."

Notably, the controlling statute does not include the phrase "during insured's lifetime,"[2] which was omitted by both lower courts. In fact, the lower courts did not consider, review or ever respond to N.C. Gen. Stat. § 58-58-22(2). See Apps. 1 and 2.

The policy was kept in force with ReliaStar's depositing premium payments for seven months beyond February 16, 2012. On March 6, 2012 ReliaStar deposited premium. (App. 12); DE 95-71-73. And on June 7, 2012, ReliaStar again deposited premium, after deciding to "Return to Customer...DNP." (App. 13); DE 95-74, 76.

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[1] This Court is respectfully requested to review DE 181, pp. 13-20; DE 181-2, ¶s 56-77, 86-9, 98, 113-115, 122-3, 125-7, 142, 154 159-60; and DE 181-24, 26-29, in the district court record, and Doc. 12, pp. 10-11, 18-26, in the Fourth Circuit record, regarding contestability.

[2] "[A] precisely drawn, detailed statute pre-empts more general remedies" (quoting *Brown* v. *GSA,* 425 U.S. 820, 834, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976)); as in all statutory construction cases, we "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." *Hardt* v. *Reliance Standard Life Ins. Co.,* 560 U.S. ___, ___, 130 S.Ct. 2149, 2156,176 L.Ed.2d 998(2010)(emphasis added).

Therefore, the single statutory exception of "nonpayment of premium" does not apply. And "during insured's lifetime" is not relevant since it is not statutorily included or excluded for policies delivered in North Carolina, as here. Moreover, the NC contestability statute trumps the policy's contestable provision since the North Carolina State Legislature authored the mandate of N.C. Gen. Stat. § 58-58-22(2).

Further, federal courts are courts of limited jurisdiction and are supposed to follow rulings from the highest Court, when spoken, in the State in which they sit. However, by the Fourth Circuit's affirmation, the lower court disregarded its own precedent. See *Sanderson* v. *Rice,* 777 F.2d 902, 905 (4th Cir.1985).

A. North Carolina Supreme Court Contestability Precedent

American Trust Co. v. *Ins. Co. of VA,* 173 N.C. 558, at 612-620 (DE 181-29), as applicable here, has been cited by this Court and the North Carolina Supreme Court. See *American Life Ins. Co.* v. *Stewart,* 300 U.S. 203 at n. 3 (S.Ct. 1937)(DE 181-26); and *Chavis* v. *Southern Life Ins. Co.,* 347 SE2d at 427 (N.C. 1986).[3] "The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision." *Trust Co.,* 173 N.C. 558 at 612. Also, "the incontestable clause covers this defense of the bad health of the insured at the time of the delivery of the policy as well as false and fraudulent statements in the application and the policy and if this is not the legal effect of the clause, why insert it, except for the purpose of deceiving and misleading the insured?" *Id.* at 615-16.

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[3] This NC Supreme Court precedent was briefed to the lower courts; however, omitted by both lower courts, which prejudiced Petitioner. See DE 181, pp. 13-16, 19-20; Doc. 12, pp. 18-22 25-26; Doc. 17, pp. 5-6,19-20, 31, 42-46; Doc. 18, pp. 1, 14-19; Doc. 27, pp. 10-15.

"The authorities are practically uniform in holding that an incontestable clause, which gives a reasonable time for the insurance company to make investigation, is valid, and that it means what it says, and that is that after the time named in the clause has expired no defense can be set up against the collection of the policy, unless it comes within the excepted classes named in the clause itself, which in this case would be the nonpayment of premiums." *Trust Co.*, at 615-16. So, "it has become an almost universal practice with insurance companies to provide against any contest or forfeiture of their policies after a certain length of time, greater in some cases and less in others." *Id.* at 616. "The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, *within which limited period the insurer must, if ever, test the validity of the policy*." *Id.* at 616-17. (Emphasis added). Moreover, "While fraud is obnoxious, and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid." *Id.* at 617. "This is also in accordance with the authorities holding that if the [plaintiff] wishes to contest and to avoid the payment of the policy and the force of the incontestable clause, it must take affirmative action within the time limited by the policy." *Id.* at 619. The meaning of the terms, "take affirmative action," "test the validity of the policy," if in doubt, is made clear by the decision in *Wright* v. *Benefit Association.*, 43 Hun., 65, which was affirmed in 118 N.Y. 237, in which the court, speaking of a policy which became incontestable after two years, says:

"Its effect is not to prevent the insurer from annulling the contract upon the ground of the fraudulent representations of the insured, provided *an action is brought* in the lifetime of the insured and *within two years from the date of the policy," Id.,* 620 (emphasis added). "We are, therefore, of opinion, as the [defendant] had an insurable interest in the life of the insured when the policy was issued, and as no action was brought by the [plaintiff] within one year from the date of the policy to have the contract of insurance canceled or rescinded, that the incontestable clause was in force at the death of the insured, and that the [plaintiff] is precluded thereby from relying on the defenses set up." *Id.* (Emphasis added). As further held by the NC Supreme Court, "since the incontestability provision does not expressly permit the company to contest the policy on grounds of material misrepresentations by the insured beyond the two-year limit, ordinary rules of contract construction [precludes] the company, here [ReliaStar], from asserting this defense." *Chavis* v. *Southern Life Ins. Co.*, 347 S.E.2d at 427 (N.C. 1986)(citing *American Trust Co.*)[4]

Notably, ReliaStar promised four times to contest Ben's "initial application" only (DE 181-2, ¶s 58-75),[5] which provision states, in relevant part:

> "We have a right to contest the validity of this Policy based on material misrepresentations made in the initial application for two years from the Issue-Date, during which time the Insured was living. Thereafter; we may contest this Policy only If premiums due are not paid by the end of the Grace Period." (App. 5, policy, p. 3).

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[4] Though briefed, the district court abused its discretion by omitting contestability precedent from the NC Supreme Court, this Court, and all U.S. Circuit Courts of Appeal and by relying on an inapposite ERISA case from the MDNC. (DE 141, pp. 12-13).

[5] Claim status letters that Petitioner received from ReliaStar dated April 26, 2012, May 24, 2012 and June 22, 2012 all relied on the "contestability provision of the policy" (Apps. 14-16); DE 95-144-146. Moreover, on October 10, 2012 ReliaStar denied Petitioner's claim on the basis of the "contestability provision of the policy." (DE 95-118, denial letter, p. 1).

Notably, Ben's "initial application" questions do not include Ben's delivery amendment or paramedical exam, neither of which ReliaStar attached to the policy. (App. 5). And Jackie Brantley, with AFG, ReliaStar's third-party General Agent, admittedly dated Ben's application and answered both of Ben's "initial application" questions. (DE 91-1, Brantley Dep. 18:5-20:1, 21:8-25:5; App. 5, application, p. 3).[6]

Thus, ReliaStar's four direct promises to contest only Ben's initial application restricts its contest beyond the initial application answers recorded by Brantley and should bar ReliaStar from contesting Petitioner's unattached Agent's Report, Ben's unattached delivery amendment and Ben's unattached paramedical exam. (App. 5); DE 131-6; (Apps. 11, amendment; 17, exam). Also, Ben's "initial application" does not include numerous documents relied on by ReliaStar, which are not included in Ben's "initial application." (App. 5, policy application, pp. 1-3 and 5 of 5); DE 131-6.

B. United States Supreme Court Contestability Precedent

"A 'contest' within the purview of the policy contract has generally been held to mean a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter." *American Life Ins. Co.* v. *Stewart*, 300 U.S. at 212, n.2, n. 3 (S.Ct. 1937)(DE 181-26). Thus, "under the rule of the federal courts, and that obtaining in most every jurisdiction, is the running of the period fixed by the incontestable clause is stayed only by a legal contest." *Id.* See also *Mutual Life Ins. Co. of New York* v. *Hurni Packing Co.*, 263 U.S. 167, at 176-178 (S.Ct. 1923).

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[6] The alleged injury to [petitioner] is highly indirect and "results from the independent action of some third party not before the court," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 42 (emphasis added). Also, this Court should note that *American Trust Co.* v. *Life Ins. Co.* of VA, 173 NC 558 has been cited 65 times, including by the Second, Fourth, Seventh, Eighth, Ninth, Tenth and District of Columbia U.S. Circuit Courts of Appeal.

"A contest, then, begins when the insurer avoids, or seeks to avoid, the obligation of the contract by action or defense. The contest takes its start when the insurer serves an answer disclaiming liability. If insured and beneficiary hold back, preferring to wait till the time for contest has expired, the point of beginning is the time when the insurer sues in equity to declare the policy annulled." *Stewart*, U.S., supra, at 210, 212, 213; (DE 181-26). (Emphasis added).[7]

In the opinion in this Court's *Enelow Case, Mr. Chief Justice Hughes used this significant language: "The instant case* is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms is to become incontestable." See *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379, 384-5 (S.Ct. 1935). See also *Northwestern Mutual Life Insurance Co.* v. *Pickering*, 293 F.496, 499 (5th Cir.) cert. denied, 263 U.S. 720 [44 S.Ct. 229, 68 L.Ed. 524] (1923). In *Pickering*, the Fifth Circuit held that "Under the terms of the policy now in question, the insurer's right to contest would have been lost, [here ReliaStar's], if the insurer had not contested the policy by invoking judicial action to that end within two years from the date the policy took effect, not from the date of the execution of the policy, which is charged to have been procured by alleged false statements." 293 F. 496. (Emphasis added).

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[7] Here, this action began on March 22, 2013 with ReliaStar's 404 day untimely "point of beginning" from its February 12, 2010 approval of Ben's application (App. 18; DE 95-102), which made "the policy take effect." (DE 1, ReliaStar's March 22, 2013 first contest; App. 4, p. 3, Delivery Receipt, "Issue Date February 16, 2010"); DE 181-2, ¶s 34-42.

C. U.S. Circuit Courts Of Appeal Contestability Precedent

The First Circuit holds that "Incontestability clauses set temporal limits on an insurer's right to challenge its insurance policy based on alleged misstatements in the insurance application." *Velez-Gomez* v. *SMA Life Assurance Co.*, 8 F.3d 873, 875-76 (1st Cir. 1993); *Pruco Life Ins. Co.* v. *Wilmington Trust Co.*, 721 F.3d 1 (1st Cir. 2013)("The court expressly rejected the argument that there could not have been a mutual rescission because the terms of the policy would have prevented unilateral rescission (specifically, because the contestable period had expired). The judgment of the district court is *affirmed.*" See also *Wallach* v. *Aetna Life Ins. Co.*, 78 F. 2d 647, 648 (2nd Circuit 1935)("If the two-year period, after which the policy became incontestable except for nonpayment of premiums, ran for all purposes..., the answer set up no defense and summary judgment was properly granted... Accordingly, if more than two years had elapsed since the date that the policy bore, though somewhat less than two years had elapsed since the date when the policy was delivered, the company could not avoid payment on the ground of fraud for the reason that such a defense was barred by express agreement of the parties;" *New England Mutual Life Insurance Co.* v. *Gillette*, 171 F.2d 500 (2nd Cir. 1948)("The gravamen of the action was that, as all claims made under the policy became incontestable after two years from its issue, it was necessary for the insurer to establish its defense within that period").[8]

[8] See also *Franklin Life Ins. Company* v. *Bieniek*, 312 F. 2d at 368 (3rd Cir. 1962)("The great weight of authority supports the position that the insurer must at least disavow liability within the contestable period to be relieved — not necessarily by legal action, but some definite step, specifying the ground of complaint, in such form as to effect a cancellation of the contract").

The Fourth Circuit holds that "The insurer has a statutory period in which to ascertain the facts and act thereon, and failing so to do it will not be heard to assert defenses precluded by a statute of incontestability." *Sutton* v. *American Health & Life Ins. Co.*, 683 F. 2d at 96 (4th Cir. 1982). See also *Provident Mutual Life Ins. Co.* v. *Parsons*, 70 F.2d 863, 866 (4th Cir. 1934)("...a rule of law which imposes on the applicant the simple duty of reading the contents of his application to assure himself of the accuracy and completeness of the information to be given the Company as the basis of its acceptance of the risk, cannot reasonably be said to be too rigorous or exacting; especially where the policy contains an incontestable clause, limiting the time during which the Company may contest its liability on the ground of fraud or misrepresentation to a relatively short period")(emphasis added).

In *Scharlach* v. *Pacific Mut. Life Ins. Co.*, the Fifth Circuit held that "The District Court also erred in striking out that part of the amended answer which sought to set out affirmatively that the insured was in bad health and suffering from a fatal disease. It is true that a clause in a life insurance policy making it incontestable after one year imports [a] contest by litigation, and that a mere denial or repudiation by the insurer of liability, accompanied by a tender of the premium paid, is not a contest within the meaning of such clause." 9 F. 2d 317, 318 (5th Cir. 1925). See also *Pickering,* 293 F.496, 499, supra, at 11. The Sixth Circuit holds that "The weight of authority is to the effect that contest, within the meaning of clauses of this kind, means some affirmative or defensive action taken in court." *Rose* v. *Mutual Life Ins. Co. of New York*, 19 F. 2d 280 (6th Cir. 1927).

The Seventh Circuit holds that "The incontestability clause is in the nature a statute of limitation and repose, and while conscious fraud practiced in inducing another to act, to his detriment, is extremely obnoxious, yet the law recognizes that there should be a limitation of time in which an action may be brought or a defense set up."*Columbian Nat'l Life Ins. Co.* v. *Wallerstein*, 91 F.2d 351, 352 (7th Cir.1937). In *Peake* v. *Lincoln Nat. Life Ins. Co.*, the Eight Circuit held that a "Contest, within the meaning of the provision of the [contestable] clause in question, is confined to appropriate court proceedings within the time limited." 15 F. (2d) 303 (8th Cir.).

The Ninth Circuit holds that "The purpose of an incontestable clause is to annul all warranties and conditions that might defeat the right of the insured after the lapse of the stipulated time." *Button* v. *Connecticut General Life Ins. Co.*, 847 F.2d at 588 (9th Cir. 1988). In *Stewart* v. *American Life Ins. Co.*, the Tenth Circuit held that "That by the foregoing provisions said policy is incontestable after two years from its date of issue; that by reason of said provision said policy of insurance must be contested by this complainant on or before the expiration of the said period of contestability, notwithstanding the intervening death of the insured; that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud..." 85 F.2d 791,792 (10th Cir.1936). See also *Hurt* v. *New York Life Ins. Co.*, 51 F. 2d 936, 938 (10th Cir. 1931).

"Incontestability clauses function much like statutes of limitations. While they recognize fraud and all other defenses, they provide insurance companies with a reasonable time in which to assert such defenses, and disallow them thereafter." *American United Life Ins. Co.* v. *Martinez*, 480 F.3d at 1059 (11th Cir. 2007); See also *Allstate Life Ins. Co.* v. *Miller*, 424 F. 3d 1113, 1115-17 (11th Cir. 2005). And "The clause, in effect, if not in form, is a statute of limitations, established by convention, and like the statute is directed to remedies in court." *Densby* v. *Acacia Mutual Life Association*, 78 F. 2d at 205, 6 (D.C. Cir. 1935). (Emphasis added).[9]

II. ReliaStar Untimely Filed Its Fee Motion And Breached The Alleged Never Signed, Dated, Received, Submitted Or Agreed To Agreement

A. ReliaStar Filed Its Attorneys' Fee Motion Two Days Untimely

"The plain language of that rule, [Rule 54(d)(2)(B)], states that the motion must be filed no later than 14 days *after entry of judgment.*"(emphasis added). It appears that the term "judgment" refers to the judgment of the district court. *Cf. Melkonyan* v. *Sullivan,* 501 U.S. 89, 96, 111 S.Ct. 2157, 115 L.Ed.2d 78 (1991). Also, there is no Local Rule in the Eastern District of North Carolina enlarging the time for the filing of a motion for attorney fees under Fed.R.Civ.P. § 54(d)(2)(D)(App. 3, p. 3). Nor can ReliaStar's time to file have been enlarged, since ReliaStar did not show good cause or excusable neglect for filing untimely. Fed.R.Civ.P. § 6(b)(App. 3, p. 2).

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[9] Therefore, the lower courts abused their discretion since this Court, the NC Supreme Court and all U.S. Circuit Courts of Appeal hold that a contest over a life insurance policy must begin in a court within the two year contestable period, which ReliaStar failed to do. Moreover, Couch, Vol. 8, § 2155b; 18 Couch et al., § 72:71 (2d ed. rev. vol. 1983); 1A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 332 (rev. vol. 1981); N.C. Gen. Stat. § 58-58-22(2); and the Annotation "What Amounts To Contest Within Contemplation Of Incontestability Clause," 95 A.L.R.2d 420, § 2 (1964), all maintain the exact same and have been cited by this Court and all U.S. Circuit Courts of Appeal.

Here, the district court entered judgment on May 28, 2014. (DE 141-1, 2). So, ReliaStar's fee motion was due by no later than June 11, 2014, the fourteenth day thereafter. Fed.R.Civ.P. § 54(d)(2)(B)(i-iii)(App. 3, pp. 2, 3). But ReliaStar untimely filed its fee motion on June 13, 2014. (DE 144), which the lower courts omitted.

Further, it was unconscionable for the district court to charge fees for three or more attorneys and multiple paralegals against *pro se*' Petitioner and to accept ReliaStar's claim of 379 hours of attorney time to fight a single claim.[10] (DE 169, pp. 2, 3). 379 hours (47.38 eight-hour days) to defend a single counterclaim is excessive since ReliaStar: (1) briefed its response to Petitioner's summary judgment motion in less than four pages and cited but one legal case within (DE 107, pp. 21-24); and (2) its counsel, two law firms, claims to be an insurance litigation expert. (DE 181-23).

"Claims for attorneys' fees are also items of special damage which must be specifically pleaded under Fed.R.Civ.P. 9(g)."[11] (App. 3, p. 2). But here, ReliaStar failed to specifically plead attorneys' fees in its 400-day untimely filed action (DE 1) and within its 2-day untimely filed fee motion (DE 144). Moreover, ReliaStar failed to file an affidavit of prevailing market rates. See *Blum* v. *Stenson*, 465 U.S. 886, 888-96 (S.Ct. 1984). Nor did ReliaStar file a bill of costs by June 11, 2014, pursuant to EDNC Local Rule 54.1(a)(3) and 28 U.S.C. § 1920. (App. 3, pp. 1, 6); *Taniguchi* v. *Kan P. Saipan, Ltd.*, U.S., 132 S.Ct. 1997, 1999-2000, 182 L.Ed.2d 903 (2012).

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[10] The district court untimely let ReliaStar brief fees for defending Petitioner's unfair claim settlement practice claims, over five weeks after issuing judgment, (DE 153, 154 and 159, pp. 5, 6), and omitted that ReliaStar untimely filed its fee motion by two full days.

[11] See *Western Casualty & Surety Co.* v. *Southwestern Bell Tel. Co.*, 396 F.2d 351, 356 (8th Cir.1968); *In re American Casualty Co.*, 851 F.2d 794, 802 (6th Cir.1988); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1310 (1990).

Under the "bedrock principle known as the American Rule, [e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."[12] *Hardt,* 560 U.S., at ___, 130 S.Ct., at 2157 (quoting *Ruckelshaus* v. *Sierra Club,* 463 U.S. 680, 683, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983)). Moreover, "Notwithstanding the American Rule, we have long recognized that federal courts have inherent power to award attorney's fees in a narrow set of circumstances, including when a party brings an action in bad faith." See *Chambers* v. *NASCO, Inc.,* 501 U.S. 32, 45-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)(explaining that a court has power to award attorney's fees to a party whose litigation efforts directly benefit others, to sanction the willful disobedience of a court order and to sanction a party who has acted in bad faith, vexatiously, wantonly or for oppressive reasons).[13]

Moreover, in *Newman* v. *Piggie Park Enterprises, Inc.*, this Court held that "A prevailing party should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. 400, 402 (1968)(per curiam). And Petitioner has proven special circumstances; See IFP App., attached.

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[12] The district court omitted ReliaStar's requirement to demand arbitration, rather than filing its claims in district court, and that "judgment upon the award may be entered in any court with jurisdiction." (App. 7, p. 7 of 8, D. Arbitration, ¶ 4); DE 181-6. Further, since any decision over an alleged Agreement dispute was for three arbitrators, not the district court, this Court should REVERSE ReliaStar's award of multiple attorneys' fees over the never signed, dated, submitted, timely received or made effective Agreement, which records only ReliaStar as a party, and was repeatedly breached by ReliaStar, not Petitioner. Id., pp. 1, 8.

[13] Here, Petitioner did not "bring an action in bad faith, vexatiously, wantonly or for oppressive reasons." Rather, ReliaStar brought its untimely action in bad faith by filing its first contest of the policy over a year beyond its contestable period. (DE 1); pp. 6-15, supra. ReliaStar further acted in bad faith by breaking its contractual terms that "Any dispute between a Company and Producer will be settled by arbitration...which will take place in Atlanta, Georgia...the award rendered by the arbitrators will be final" since ReliaStar never filed a motion to stay or to compel arbitration. (App. 7, alleged Producer Contract, p. 7 of 8, Section IX, General Provisions, D. 4; Arbitration).

In both lower court proceedings, Petitioner also proved special circumstances which render the district court's judgment and order unjust. (DE 185-1, Declaration of John Laschkewitsch; Special Circumstances; see also Doc. 12, Exhibit A, ¶s 1-29). However, both lower courts omitted Petitioner's special circumstances.

B. Unanimous Circuit Court Precedent Requires Timely Filed Fees

"A motion for attorney's fees must be filed *no later than* 14 days after the entry of judgment." Fed.R.Civ.P. 54(d)(2)(B)(i). *Villoldo* v. *Castro Ruz*, 821 F.3d 196, 204 (1st Cir. 2016); *Tancredi* v. *Met. Life Ins. Co.*, 378 F.3d 220, 227-28 (2d Cir. 2004)(same); *Walker* v. *Astrue*, 593 F. 3d 274, 279 (3rd Cir. 2010)(same). "Rule 54(d) required the Union to submit a motion for attorneys' fees between 0-14 days *after* the district court issued its order." (Rule 54 expressly conditions a motion for attorneys' fees on an entry of judgment). "This the Union failed to do," as ReliaStar also failed to do. *Brown & Pipkins, LLC* v. *SEIU*, 846 F. 3d 716, 730 (4th Cir. 2017).

"Cameron requested fees in its amended complaint and moved for fees within 14 days after the district court entered judgment as required by Rule 54(d)(2)." *In re Deepwater Horizon*, 807 F. 3d 689, 699 (5th Cir. 2015); *United Industries, Inc.* v. *Simon-Hartley, LTD*, 91 F.3d 762, 764-6 (5th Cir. 1996)(same); *Allen* v. *Murph*, 194 F. 3d 722, 724 (6th Cir. 1999)(same). "Neither exception applies here. The Plan missed the deadline under Rule 54(d)(2) and offers no reason for having done so," just like ReliaStar. *Bender* v. *Freed*, 436 F. 3d 747, 750 (7th Cir. 2006)(cited 41 times). "This rule requires the motion be made "no later than 14 days after entry of judgment," Fed.R.Civ.P. 54(d)(2)(B)...*West* v. *Local 710, International Brotherhood of Teamsters Pension Plan*, 528 F. 3d 1082, 1087 (8th Cir. 2008).

"Unless a statute or a court order provides otherwise, the motion [for attorney's fees] must: (i) be filed no later than 14 days after the entry of judgment." *Farris* v. *Ranade*, No. 12-35949 (9th Cir. 2014); *Kona Enterprises, Inc.* v. *Estate of Bishop*, 229 F. 3d 877, 889 (9th Cir. 2000)(same)(cited 1,227 times; including in *Brown & Pipkins, LLC* v. *SEIU*, 846 F. 3d 716, 730 (4th Cir. 2017); *Perfect 10, Inc.* v. *Giganews, Inc.*, 847 F. 3d 657, 676 (9th Cir. 2017)(same). *See also Quigley* v. *Rosenthal*, 427 F.3d 1232, 1236-38 (10th Cir. 2005)(same).

The fourteen-day limit applies "[u]nless otherwise provided by ... order of the court...." *Tire Kingdom Inc.* v. *Morgan Tire & Auto, Inc.*, 253 F. 3d 1332, 1335 (11th Cir. 2001); *Bergen* v. *Commissioner of Social Sec.*, 444 F. 3d 1281, 1285 (11th Cir. 2006)(same). "The disposition of this case turns on whether the trial court erred in applying the fourteen-day filing requirement in the 1995 amendment to Rule 54 (d)(2)(B)." *Breiner* v. *Daka, Inc.,* No. 00-CV-1611 (D.C. Cir. 2002); *IPXL Holdings, LLC* v. *Amazon.com, Inc.*, 430 F. 3d 1377, 1386 (Fed. Cir. 2005)(same).[14] As well, ReliaStar committed a breach of renunciation, pursuant to North Carolina Supreme Court precedent, over its fee request and alleged Agreement. See Doc. 17, pp. 28-29.

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[14] Since this Court and every U.S. Circuit Court of Appeals hold that a fee motion must be filed within fourteen days after the entry of judgment under Rule 54(d)(2)(b), the district court's judgment against Petitioner should be summarily REVERSED. Further, Petitioner briefed additional recent holdings, requiring Rule 54(d)(2)(b) fee motions to be timely filed in Fourth Circuit proceedings, which the Fourth Circuit omitted. See Doc. 17, pp. 21-29. This Court is respectfully requested to also review Doc. 17 about Fourth Circuit "Rule 54(d) precedent," pp. 9-13; 2018 Rule 54(d), pp. 14-16; and reasons why: (1) "ReliaStar should not have been the prevailing party," pp. 17-20; (2) "ReliaStar's fee request was excessive," pp. 29-30;" (3) Petitioner's defenses "have foundation, merit and are reasonable," pp. 30-32; (4) Petitioner "should not be liable for fees of multiple attorneys" and paralegals, pp. 32-33; (5) Petitioner's well-briefed "special circumstances warrant judgment reversal," pp. 33-37; (5) ReliaStar failed to file a required bill of costs and an affidavit of prevailing market rates, p. 38; (6) the district court did not follow the Fourth Circuit's Johnson factors, p. 39; and (7) the American Rule should be applicable in this case, pp. 40-41.

C. No Agreement Was Dated, Signed, Made Effective, Recorded Petitioner As A Party Or Received Or Submitted By Petitioner

The lower courts omitted that the alleged Agreement, relied on by ReliaStar, was not a mutual or effective agreement between the parties. Petitioner has proven and here shows that no agreement was signed, dated or listed Petitioner as a party, made effective by ReliaStar or submitted or received by Petitioner. (App. 7, pp. 1-8). Without an effective, mutual and consented to agreement, the district court erred in awarding fees against Petitioner as an element of contractual damages.[15] (DE 181, pp. 21-22; DE 181-2 ¶s 2-27; Doc. 12, pp. 7-9, 16-18; Doc. 17, pp. 2-4, 12-13,16).

In August, 2009 Petitioner received from AFG, ReliaStar's General Agent, a 4-page "Application for Appointment" ("Application")(App. 8), which required a copy of Petitioner's "Life and Health" license in order to be appointed by ReliaStar, and a copy of a "voided check" in order to be able to receive commissions from ReliaStar. (Apps. 8, 9); DE 181-3, 4. The "Application" contains a "General Agent Checklist," which includes all that ReliaStar required from Petitioner in order to be appointed as a producing agent. (App. 8, p. 4 of 4, Section K, "General Agent Checklist").

The Checklist within Petitioner's "Application" includes ten bullet items. But, no item references the term "Producer Agreement." (App. 8, p. 4 of 4, Section K, "General Agent Checklist"). Moreover, none of the four pages in such "Application" includes the term or have attached a "Producer Agreement" or any other agreement received by Petitioner from ReliaStar or Advisors Financial Group ("AFG").

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[15] ReliaStar first produced the alleged producer agreement with its motion for summary judgment (App. 7); DE 83-6, Ex. U, which is nugatory and void for indefiniteness, pursuant to North Carolina law. *Boyce* v. *McMahan,* 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974); *Miller* v. *Rose,* 138 N.C. App. 582, 587-88, 532 S.E.2d 228, 232 (2000)(citing *Boyce*).

On January 12, 2010 Petitioner certified by signature, in Petitioner's only "Application" with ReliaStar, that his taxpayer identification number was correct, that he was not subject to backup withholding and that "I am a U.S. citizen," and nothing further. (App. 8, p. 4 of 4, Section J, Authorizations and Acknowledgments). On the same day Petitioner returned his 4-page "Application for Appointment," 1-page cover sheet and a 1-page copy of Petitioner's Life and Health agent license, with a voided check, to AFG, which totaled six pages. (Apps. 8, 9); DE 181-3, 4.

On January 22, 2010 AFG completed page 2 of Petitioner's "Application" and the bottom of page "4 of 4." (App. 8, pp. 2 of 4 and 4 of 4). Also on January 22, 2010, Pam Lane, with AFG, marked "Urgent" and faxed five of the six pages, with her own cover page, to licensing at "ING/ReliaStar/SLD" at fax number "877-788-5122." (App. 10, "Number of Pages: 6"); DE 181-5. So, licensing at ReliaStar received only Petitioner's 4-page Application, agent license and voided check from Pam Lane at AFG, with her own cover page, which totaled six pages. Thus, ReliaStar's 8-page "Producer Agreement" was never received or submitted between the parties. (Apps. 8, 10, footers, pp. 1/6 – 5/6 "RCVD AT 01/22/2010 12:28:54 PM"); DE 181-3, 5.

On page "1 of 8" of its "Producer Agreement," ReliaStar is listed as "Parties. Party A. Company:" (App. 7, p. 1 of 8, "1. Parties. Party A. Company)." However, Petitioner is NOT listed as "Party B. Producer:" or as any other "Party." Therefore, Petitioner was NOT and is NOT a party to an Agreement "between the following parties." (App. 7, p. 1 of 8, 1st ¶; p. 1 of 8, "1. Parties"). Further, there exists no "effective date" in a "Producer's ING Life Companies Application for Appointment and Contract" and no application so named was ever received by Petitioner.

As well, Petitioner is NOT a "Party" or "Producer" to ReliaStar's "Producer Agreement" since Petitioner did not sign or date any page in the "Agreement," first received the "Agreement" with ReliaStar's motion for summary judgment, is NOT listed as the "Parties. B. Producer:" or as an "individual or legal entity" in the "Agreement" and Petitioner's "Address: Fax: E-mail:" are not recorded within the alleged "Agreement" as the "Parties. B. Producer:" (App. 7, pp. 1 and 8 of 8). Also, Petitioner's Application (App. 8, pp. 1-4 of 4) is not titled "Producer's ING Life Companies Application for Appointment and Contract." In addition, neither party signed page 8 of 8 of the alleged "Agreement," such as to be bound by such an "Agreement." (App. 7, p. 8 of 8; "Company: (Signature), Producer: (Signature))."

Further, Petitioner never signed, dated, recorded, received or submitted an "ING Application for Life Appointment and Contract that includes the form of this Agreement deemed as an attachment" to ReliaStar or AFG, such as to be bound by an "Agreement." (Apps. 7, pp. 8 of 8; Apps. 8, 9, and 10). Thus, ReliaStar breached the Agreement, not Petitioner, since none of the 8 pages were received by Petitioner.

As a result, the parties did not "assent to the same thing in the same sense, and their minds meet as to all terms," *Normile* v. *Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985), or "show the essential elements of a valid contract," *Smith* v. *Joyce,* 214 N.C. 602, 604, 200 S.E. 431, 433 (1939) and "`the *intent* and *obligation* of the parties.'" *Rape* v. *Lyerly,* 287 N.C. 601, 615, 215 S.E.2d 737, 746 (1975). And since ReliaStar's proposed terms [were] not settled, [and] no mode agreed on by which they may be settled, there is no agreement.'" *Boyce* v. *McMahan,* 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974). See n. 15, p. 20, supra. (Emphasis added).

No contract is formed without an agreement to which at least two parties manifest an intent to be bound. *Croom* v. *Goldsboro Lumber Co.,* 182 N.C. 217, 220, 108 S.E. 735, 737 (1921)(mutual assent is an "essential element" of every contract). *See also Kirby* v. *Stokes Cty. Bd. of Educ.,* 230 N.C. 619, 626, 55 S.E.2d 322, 327 (1949) ("A contract is an agreement between two or more persons or parties [based] on sufficient consideration to do or refrain from doing a particular act").

In law, this agreement is commonly called mutual assent and is customarily described as a "meeting of the minds." *Charles Holmes Mach. Co.* v. *Chalkley,* 143 N.C. 181, 183, 55 S.E. 524, 525 (1906)("The first and most essential element of an agreement is the consent of the parties, an *aggregatio mentium,* or meeting of two minds in one and the same intention, and until the moment arrives when the minds of the parties are thus drawn together, the contract is not complete, so as to be legally enforceable"). The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that *until executed by all it is inchoate and incomplete and never takes effect as a valid contract, and this is especially true where the agreement expressly provides or its manifest intent is, that it is not to be binding until signed.*" *Hilliard* v. *Thompson,* 81, N.C.App. 344 S.E.2d, 589, 591(1986). See App. 7, p. 7, Section IX (I); p. 8.

It is undisputable that Petitioner did not sign, date or submit any agreement to AFG or ReliaStar; Petitioner is not a party to an agreement; and that ReliaStar first produced an ineffective agreement with its summary judgment motion. Thus, the lower court's reliance on a party agreement for fee damages was erroneous.

D. ReliaStar, Not Petitioner, Breached The Ineffective Agreement

On March 21, 2013, ReliaStar terminated an alleged "Employee Benefits Agent Contract," which Petitioner had never signed, seen or possessed, and could not apply to Petitioner because Petitioner has never been an employee of ReliaStar. (App. 6); DE 95-187. On March 22, 2013 ReliaStar mended its hold by relying on a non-produced Producer Agreement. (DE 1, pp. 3-4). By blowing hot and cold in the same breath and by swapping horses midstream, an insurer, [here ReliaStar], has mended its hold and is thus estopped, pursuant to North Carolina Supreme Court precedent.[16] Thus, ReliaStar is barred from swapping its reliance on a contract or agreement other than its non-existent "Employee Benefits Agent Contract."

ReliaStar also breached the alleged Agreement by failing to follow the terms, which it drafted. (App. 7, "ING Life Companies Producer Agreement," pp. 6, 7, Section IX, General Provisions, D. Arbitration); DE 83-6; see also n. 12, n. 13, supra. Further breached by ReliaStar and omitted by the lower courts is the "Authority" provision of the alleged agreement. (App. 7, p. 7 of 8, Section IX(I)). Specifically, authority over the agreement is effective only when "Each party represents that the person signing this Agreement on its behalf has the authority and capacity to bind the party." But here, since no party signed the agreement on its behalf, neither party had authority or capacity to bind itself or the other party. (App. 7, p. 8 of 8).

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[16] "[I]t is well understood that, except in proper instances, a party to a suit should not be allowed to change position with respect to a material matter in the course of litigation." *Roberts* v. *Grogan,* 222 N.C. 30, 33, 21 S.E.2d 829, 830 (1942) (adding that a party "cannot swap horses in midstream"); *Kannan* v. *Assad,* 182 NC 182 N.C. at 78, 108 S.E. at 384 (1921)(adding that a party should not be permitted to "blow hot and cold in the same breath"); *Hylton* v. *Mount Airy,* 227 N.C. 622, 626, 44 S.E.2d 51, 54 (1947)(same); *Whitacre Partnership* v. *Biosignia, Inc.*, 591 SE 2d 870, 887 (N.C. 2004)(same).

Also breached by ReliaStar is attempting to hold Petitioner to an agreement which ReliaStar only, not Petitioner, is recorded as party. (App. 7, pp. 1, 8 of 8). In particular, Petitioner is NOT a Producer to the agreement since Petitioner was not recorded as a party or was ever "Appointed with a Company and holds an ING Life Companies Producer Agreement." (App. 7, p. 2, Section II(K))(emphasis added).[17]

III. The Lower Courts Omitted Insured's March 23, 2010 First Specialist Referred Consult "For Possible ALS" And All Of Petitioner's Defenses

A. Insured Ben's First Specialist Consult "For Possible ALS"

On August 1, 2009 Examiner Felipita Quinonnes with Exam One met alone with Ben at Ben's residence. Quinonnes recorded "No health history" and "NA" for any "Past or Present Medical Condition or Disorder." (App. 19, p. 1 of 3, questions 5-7; p. 3 of 3, question 21). From about August 18-21, 2009 insured Ben voluntarily participated in a "Research Only" study at the UCSF "Alzheimer Disease Center" in San Francisco, CA. (App. 20, 2nd ¶, "Research Only"); DE 95 at 171. During the out brief, Ben was NOT told that he had ALS, did not receive any research records, had no follow up scheduled and was only told that he should find a physician in North Carolina "should the need arise." (DE 94-1, ¶s 6, 8; App. 21, ¶s 17-21); DE 148-1.[18]

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[17] Petitioner's four-page Application for Appointment and Contract (App. 8) is not titled an "ING Life Companies Application for Appointment and Contract" and does not reference ReliaStar's ING Life Companies Producer Agreement or bind Petitioner to such Agreement. And Petitioner did not hold an ING Life Companies Producer Agreement until receipt of ReliaStar's motion for summary judgment. (App. 7); DE 83-6, Exhibit U. See n. 15, supra.

[18] A research "IMPRESSION" of Ben's voluntary participation was found by ReliaStar following Ben's death, wherein UCSF stated: "The gene for FTD/ALS, which resides on chromosome 9, has not been identified, and therefore a definitive test for diagnosing his illness is not possible." (App. 22,"IMPRESSION," p. 7 of 8, excerpt). This UCSF finding that it was not possible to diagnose Ben with ALS in August, 2009 proves that the district court erred in alleging Ben was diagnosed with ALS in August, 2009 and by relying on records not possessed by Ben or Petitioner or produced until after Ben's death. Also, UCSF is not an "ALS Certified Center of Excellence" or a multi-disciplinary ALS clinic. (Apps. 20, 23).

On August 24, 2009 Ben consulted with Dr. Meltzer who testified that if he or his staff "would have seen anything or any reason to make a referral, he would have done so." (App. 24, Meltzer Dep. 62:7-64:14). On September 11, 2009 Ben "denied any mental or nervous disorder" in his health examination for West Coast Life. (App. 25, WCL 000026). Thereafter on September 22, 2009 Ben met with Examiner Valerie Locke who recorded no "DETAILS" regarding Ben's affirmative response to Question 5(d), which concerned an electrocardiogram, x-ray and other diagnostic tests over the past five years. (App. 17; "Statements to Examiner" for MOA); DE 95-42, 43. And notably, ReliaStar never inquired regarding this incomplete statement.

On September 29, 2009 Ben had a General Physical Examination with U.S. Health Works. Therein, Ben stated he had no major illness or injury and no mental illness or muscle weakness. (App. 26, questions 3, 8 and 52). And muscle weakness is the first sign of ALS. Thus, Ben did not then believe that he had ALS.

On December 15, 2009 Ben consulted with PA Michael Lischynsky, who was "unbelievably thorough; you could come in with a hangnail and he'd find out everything about you" and would have referred Ben to see a specialist if he believed that Ben had an illness. (App. 24, Meltzer Dep. 35:15-21, 40:14-41:1, 63:22-64:14); DE 95 at 60, 145. On December 17, 2009 Ben consulted with Dr. Lucas Van Tran who recorded a normal exam and testified that if he "suspected a 20% chance" that Ben had ALS he would have referred Ben to see a specialist. (App. 27, Van Tran consult record; App. 28, Van Tran Dep. 46:6-25); DE 91-6; DE 95 at 62-63.[19]

[19] Ben's Brother Scott recalls that during the last week in December, 2009 Ben held the leash of a "75 lb golden retriever," who is known to aggressively pull on her leash, while walking about a mile each day, and that Ben never fell down. (App. 29, ¶s 6-12).

On January 22, 2010 VA neurologist Dr. Sampath Charya referred Ben to Duke University Medical Center's multidisciplinary ALS Clinic, which is one of North Carolina's ALS Certified Centers of Excellence. (App. 30, p. 5, "he has fee basis neuro eval pending"); DE 182, (Ex. 13); Doc. 12, Add., Ex. D. And concurrently or thereafter recorded by Dr. Charya in Ben's VA medical records is "per specialist like neurologist to make that decision...Wife understands this." (App. 30, p. 5); DE 182, Ex. 13. Also on January 22, 2010 Dr. Charya transcribed "Motor: full power and normal tone in all four limbs, able to toe-walk, heel-walk, tandem walking; no involuntary movements, fasciculations... symmetric muscle bulk," from his January 22, 2010 consultation with Ben. (App. 30, pp. 1-4). This neurological evaluation of Ben is proof from a certified neurologist that Ben did not have ALS in January, 2010 since the first signs of possible ALS are progressive muscle weakness and a visible fasciculation. (App. 31, p. 1, Table 1, p. 3, "Possible ALS," DE 181-13; App. 32, p. 1, 1st ¶, DE 181-14; App. 33, p. 1, DE 181-16; App. 34, p. 1, DE 181-17).

On March 23, 2010 Ben consulted by referral with ALS specialist Dr. Richard Bedlack at Duke Medical Center, one of North Carolina's five ALS Certified Centers of Excellence "to make that decision" of whether or not Ben had "possible ALS?" The first sentence in Dr. Bedlack's March 23, 2010 transcription states "consultation... for possible ALS..." (DE 95 at 173, first sentence), which was over a month after the policy's February 16, 2010 Issue Date and over a week after ReliaStar's March 16, 2010 receipt of premium. (App. 35; "Received Quarterly amount $557.83"); DE 95 at 44, 45-6. And significantly, the ALS diagnostic categories are possible, probable, probable lab-supported and definite (App. 31, p.1; App. 33; App. 34; App. 36), with "possible" being the "least certain degree." (App. 32, "Diagnosis," 2nd ¶); DE 181-15.

Also, the diagnosis of ALS requires a second opinion by an ALS "expert" in a "multidisciplinary clinic," designated an "ALS Certified Center of Excellence." (App. 37, p. 5); DE 181-20. This is highly recommended since "there are false positive diagnoses, ailments with symptoms that mimic ALS and people diagnosed with ALS have lived for ten or more years."(App. 38, ¶s 3-13, 18; App. 32, p.1 "Diagnosis," 1st ¶, p. 2); DE 94-4; DE 181-2, ¶s 1-17, 22-24, 36-51. See also Apps. 39, 40, 41 and 42.

Further confirming Ben's March 23, 2010 consult "for possible ALS" is the story of Robert Hawkins, an Air Force veteran residing in Fayetteville, NC, just like Ben, who was finally diagnosed with ALS in 2008 "after three years of inaccurate diagnoses" (App. 37, p. 4); DE 181-20; former Fayetteville State Basketball Coach Jeff Capel, Jr.'s death from ALS on November 13, 2017 after being "diagnosed by doctors at Duke University," not by doctors in Fayetteville, NC, where Coach Jeff Capel also resided (Doc. 12, Add., Ex. E p. 2); the Affidavit of Scott Laschkewitsch (App. 29, ¶s 2-12); and Ben's obituary (App. 43; lines 19-20); DE 95-133.

Thus, ReliaStar's and the lower court's reliance on a "possible ALS" diagnosis date earlier than March 23, 2010 on Ben has no merit. And the lower courts abused their discretion by relying on documents outside of Ben's initial application, not in Petitioner's or Ben's possession during Ben's lifetime and the policy contract issued on February 16, 2010 (App. 4) with March 16, 2010 applied premium. (App. 35).

B. ReliaStar Is Estopped, By Depositing Premium After Notice And Knowledge And Its Actions, By NC Supreme Court Precedent

Both lower courts omitted that ReliaStar deposited premium after notice and knowledge. On February 27, 2012 ReliaStar received notice of Ben's death. (App. 44, call number 295 from Petitioner's phone number 910 286-8008); DE 90-4, p. 7 of 8.

Proving such notice is that call 295 was answered by ReliaStar's "Customer Contact Center" phone number 1-877-886-5050. (App. 4, p. 2, ¶ 4,"Customer Contact Center, 1-877-886-5050"); DE 95-2. On February 29, 2012, two days later, ReliaStar requested "Late Premium Notice(s)."(App. 45); DE 90-5.On March 5, 2012 ReliaStar terminated the policy. (App. 46); DE 90-7. On March 6, 2012 ReliaStar deposited premium, over a week after notice of Ben's death. (App. 12); DE 95-71, 72.[20] And on June 11, 2012, ReliaStar deposited Petitioner's tenth quarterly premium check after recording Do Not Process ("DNP"),"Return to Customer."(App. 13); DE 95-74-76.[21] This acceptance of premium was 101 days after notice of Ben's death and after ReliaStar began alleging knowledge of a false answer. (Apps. 14-16), DE 95-59-64, 144-145; (App. 47), DE 95-169,178; (App.48), DE 95-201-202; (App. 49), DE 95-175.

In *Swartzberg* v. *Reserve Life Ins. Co.*, 113 S.E.2d 270, 277-78 (1960) 252 N.C. 150, the North Carolina Supreme Court held, in pertinent part, as follows:

> "As indicated, with reference to estoppel and waiver, the burden of proof was on plaintiff to show that defendant had paid claims or accepted premiums after it acquired such knowledge or notice... Accordingly, the judgment is vacated and the cause remanded to the end that there may be a determination...of the... issues relating to (1) waiver and estoppel and (2) the statute of limitations.

Thus, by accepting premiums after acquiring notice and receiving knowledge, this Court should summarily REVERSE the district court's judgment/order and the Fourth Circuit's mandate based on North Carolina Supreme Court precedent.

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[20] ReliaStar falsely alleges that it did not hold premium after receiving notice of Ben's death by claiming that it placed premiums received from Petitioner in its lockbox. However, this allegation holds no merit because ReliaStar owns its lockbox, deposits premiums in its lock box and knows when premiums are received by and held within its owned lockbox.

[21] Regarding Petitioner's waiver and estoppel defenses, this Court is requested to review DE 181-2, ¶s 52-80; and App. 50, Expert Affidavit of Daryll W. Martin, JD, MBA, DE 94-6.

Moreover, as also held by the North Carolina Supreme Court:

> "In general, any act, declaration, or course of dealing by the insurer, with knowledge of the facts constituting a cause of forfeiture *** which recognizes and treats the policy as still in force and leads the person insured to regard himself as still protected thereby will amount to a waiver of the forfeiture *** and will estop the insurer from insisting on the forfeiture or setting up the same as a defense when sued for a subsequent loss."

Gouldin v. *Inter-Ocean Ins. Co.*, 102 S.E.2d 846 (1958) 248 N.C. 161. ReliaStar also acted to treat "the policy as still in force" by declaring the policy paid up through February 19, 2012 (App. 45, p. 4, "Premium Paid to: 02/19/2012"); (App. 51), DE 95-114, which was over two years after ReliaStar had approved Ben's application on January 12, 2010, issued coverage and corrected the policy because of its admitted "per HO error." (Apps. 4, pp. 8, 9; 18); DE 95-51, 94, 102. ReliaStar also declared "the policy still in force" on February 22, 2012, the contestable expiration date of the reissued February 22, 2012 policy.(App. 5, p.1, February 22, 2012 letter from Donna L. Peterson; policy, p.1, "Issue Date: February 22, 2010"); DE 95-57, 177; DE 131-6.

Further, ReliaStar's February 29, 2012 notices declared that "Your policy needs immediate attention! To keep your policy in good standing ReliaStar Life Insurance Company must receive your premium by 03/21/2012." (App. 45, pp. 2, 4, 1st, 2nd ¶s; "Pay No Later Than: 03/21/2012;" (App.12, p. 3, App. 45, p. 4). These statements were further declarations by ReliaStar, beyond the February 16, 2012 contestable expiration date, that the policy remained in force on February 29, 2012 since ReliaStar then twice requested more premiums. Further, ReliaStar's March 5, 2012 action to terminate the policy on its Policyholder's Status website (App. 46), DE 90-7; and acceptance of demanded premium on March 6, 2012 (App. 12), DE 95-71; led Petitioner to believe the policy as still in force beyond its contestable period.

Hence, this Court should determine that ReliaStar's actions and declarations treated "the policy as still in force" after June, 2012 by having deposited Petitioner's tenth quarterly premium after notice, knowledge and expiration of its contestable period. (App. 13); DE 95-74-76. So, these facts "will estop [ReliaStar] from insisting on the forfeiture or setting up the same as a defense [with its suit] for a subsequent loss," pursuant to North Carolina Supreme Court precedent. (Emphasis added).

C. ReliaStar Failed To Plead Fed.R.Civ.P. § 9(b) Particularity

Fed.R.Civ.P. § 9(b) requires that a plaintiff, [here, ReliaStar], must, "at a minimum, describe the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *United States* v. *Triple Canopy, Inc.*, 775 F.3d 628, 634 (4th Cir. 2015). But ReliaStar did not prove time and place, when, how and where for its alleged fraud.

Jackie Brantley, with Advisors Financial Group ("AFG"), ReliaStar's General Agent, admitted that she dated Ben's application and Petitioner's Agent Report and answered the only health questions in Ben's "initial application." (DE 91-1; Brantley Dep. 18:5-20:1, 21:8-25:5 and 27:8-29:14).[22] Therefore, all that remains within the policy contract is ReliaStar's undated, unsigned and never agreed to or previously received amendment; "Additional Statements to Application." (App. 5, "Additional Statements to Application"); DE 131-6.

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[22] This Court is respectfully requested to review DE 181, pp. 23-27, DE 181-2, ¶s 100, 109, 134,159 regarding ReliaStar's failure to plead sufficient Fed.R.Civ.P 9(b) particularity. Further, this Court should take judicial notice that ReliaStar cannot plead sufficient particularity over Ben's paramedical examination (App. 17); DE 95-42, and 43 or "delivery amendment" (App. 11); DE 95-45, since ReliaStar failed to attach either document to the policy. (App. 5); DE 131-6, sealed. Moreover, ReliaStar promised four times, including in its claim denial letter, that it would only contest Ben's "initial application" (Apps. 14-16); DE 95-118, 144-146, which was admittedly dated and answered by Brantley, with AFG.

With no dating by Petitioner or Ben of any document within the application or policy, as relied on by ReliaStar, ReliaStar did not and cannot plead sufficiency of time, where or when the application, amendment and Agent's Report were signed. Nor can ReliaStar rely on Ben's unattached exam and original amendment. (Apps. 11, 17), DE 95-42, 43, 45; (App. 5, p. 3, General Provisions, "THE CONTRACT").

Likewise, because ReliaStar's Agreement was not signed or dated by either party, made effective by ReliaStar or received or submitted by Petitioner (App. 7), ReliaStar did not prove time, place or who, what, when, where and how regarding the alleged Agreement. Pp. 20-23, supra. Therefore, this Court should REVERSE the district court's granting of ReliaStar's unfair and deceptive trade practices claim and fraud claim and the Fourth Circuit's erroneous mandate against Petitioner.

D. ReliaStar Failed To Inquire Of Received Statements

"To state a claim for actual fraud, the plaintiff [ReliaStar] must allege facts plausibly showing that (1) defendant made a false representation of a material fact; (2) defendant made the representation with the intent to deceive plaintiff; (3) plaintiff relied on the representation and its reliance was reasonable; and (4) plaintiff suffered damages because of its reliance." *Forbis* v. *Neal,* 649 S.E.2d 382, 387 (N.C. 2007)(DE 185-2). "A plaintiff, in other words, cannot establish justifiable reliance ... if it fails to make reasonable inquiry regarding the alleged statement." See *Dallaire* v. *Bank of America,* N.A., No. 51PA13, N.C.; 2014 WL 2612658, at *5.

Here, ReliaStar failed to inquire of a dozen or more statements received, any one of which bars justifiable reliance for its fraud claim against Petitioner. First, ReliaStar was given a statement by Ben's spouse that she suspected that Ben might be ill before it issued the policy, but did not inquire. (DE 95-178, 179; last two lines).

Second, ReliaStar received Ben's MIB Report statements from Mutual of Omaha and North American reporting MIB Codes 200#ZN and 200#EN (App. 48); DE 94-11; DE 95-201-202; but, never inquired, despite admitting that both Codes represent a "neurological disorder." (DE 92, 93; Nelson Dep. 52:24-54:4).[23] Third, ReliaStar received statements that Ben was denied coverage by other companies (DE 95-87); and Mutual of Omaha (Apps.17, 49), DE 95-42,175; but did not inquire.

Fourth, ReliaStar received Ben's blood profile, urine sample, pulse, blood pressure, height and weight, and his MIB Report, which stated "Significant MIB codes have been received" (App. 48, p. 2); DE 95-201-202, but did not inquire. Fifth, ReliaStar had possession of a medical interview by a certified examiner (App. 17); but, ReliaStar chose not to inquire with its own paramedical examination of Ben (DE 92, Nelson Dep. 54:20-55:14, 141:18-141:22; 159:6-161:2), or over the outcome of an application with other companies listed by statements in Ben's MIB Report and its statement of "Significant MIB codes..." (DE 94-11; DE 95-201, 202; Nelson Dep. 47:16-48:1, 60:3-62:8 and 72:21-76:8). Sixth, ReliaStar failed to inquire with "other options" available to check on Ben's other stated insurance applications, which had previously declined Ben for coverage.(DE 92, 93, Nelson Dep. 40:7-41:4, 41:21-43:12, 96:13-9:25, 143:5-144:1). Seventh, ReliaStar's underwriter admittedly failed to look up the underwriting determination of MIB Codes 200#EN, 200#ZN statements by not inquiring within its Swiss-Re electronic underwriting manual. (DE 92, Nelson Dep. 52:22-53:12). See also DE 90-2 (full 8-page MIB Report received by ReliaStar).

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[23] See *Columbia Nat'l Life Ins. Co.* v. *Rogers*, 116 F.2d 705 (10th Cir.1940)(Insurer is charged with MIB notice)(DE 181-30). And this holding is from the same Court of Appeals that Neil M. Gorsuch, the most recently confirmed U.S. Supreme Court Justice, served on.

Eighth, ReliaStar received, but failed to inquire of Mutual of Omaha's underwriting department statement, which showed receipt of five years of Ben's medical history records. (App. 49); DE 95-175; Nelson Dep. 47:6-48:1, 60:3-61:25, 62:24-63:11, 96:13-25,111:24-114:24. Ninth, ReliaStar could have made a referred inquiry with its employed Medical Directors regarding any of these statements, but did not. (DE 92, Nelson Dep. 39:18-40:11, 55:23-56:1). Tenth, ReliaStar failed to run a ScriptCheck inquiry on Ben, which would have provided ReliaStar with "a five-year history statement; detailed drug and insurance eligibility information, treating physicians, drug indications, pharmacy information and probable diagnoses" since it entered his incorrect name, gender and date of birth. (App. 52); DE 95-61; DE 92, 93, Nelson Dep.132:1-141:15, 174:12-179:17, 180:24-181:2; www.examone.com.

Eleventh, ReliaStar could have inquired with a customary Inspection Report (Nelson Dep. 38:25-39:17, 55:19-55:22), and with health questions beyond only two questions in its Medical Transfer Statement (App. 5; application, p. 3, questions I(3) and I(4)), but did not. (Nelson Dep. 152:17-153:10, 166:3-166:8). Twelfth, ReliaStar could have ordered a customary underwriting inquiry or required Ben to complete "Part 2" of its application, which includes ReliaStar's application medical questions, but it waived doing so. (App. 53); DE 95-101; Nelson Dep. 159:1-161:2. Thirteenth, ReliaStar could have ordered a personal history interview and could have had its chief underwriter or "quality control" team inquire regarding Ben's underwriting file statements; but did not. (Nelson Dep. 148:5-148:23, 150:18-151:23; DE 181-2, ¶s 32-46, 55). Fourteenth, ReliaStar could have inquired with a physician from Exam One, ReliaStar's preferred vendor, to examine Ben, but chose not to.

Fifteenth, ReliaStar could have inquired over Ben's non-disclosed statement to question 5(d) of Ben's Examination for Mutual of Omaha (App. 17), DE 95-42, 43; which relates to five years of Ben's medical history, but chose not to. Sixteenth, ReliaStar could have inquired of any of Ben's physicians by requesting a customary APS (Attending Physician Statement) before approving his application, but chose to delay until over three months after approving Ben's application, and then made no further inquiry. (App. 4. p. 8); DE 95-51. Seventeenth, ReliaStar did not inquire regarding when Ben had completed and signed his undated application statements.

ReliaStar relied on AFG, who admittedly completed and dated Petitioner's Agent's Report and dated and answered Ben's only two "initial application" health questions. By relying on AFG, ReliaStar's *reliance* and failed inquiries are imputed on itself.[24] The alleged injury to [plaintiff] is highly indirect and "results from the independent action of some third party not before the court." See *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. at 42. (Emphasis added).

E. ReliaStar Filed Its Contest Beyond NC Statutes Of Limitation

The statute of limitations over contracts breached and alleged fraud in North Carolina is three years, N.C. Gen. Stat. §§ 1-52(1), (9)(App. 3, p. 3), "which is inflexible and unyielding and does not permit tolling based on an injured parties' discovery." *Flexible Foam Prod., Inc.* v. *Vitafoam Inc.*, 980 F. Supp. 2d 690, 701 (W.D.N.C. 2013)(quoting *Pearce* v. *N.C. State Highway Patrol Voluntary Pledge Comm.*, 312 S.E. 2d 421, 425-26 (N.C. 1984)(DE 185-5). (Emphasis added).

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[24] Without reasonable inquiries, ReliaStar did not rely on Petitioner or Ben, and was not damaged, but for its own *reliance* on Advisors Financial Group. See DE 181-2, ¶s 29-30, 32-46, 55 and 99. See also App. 54; "Expert Report of Daryll W. Martin, JD, MBA," DE 94-5.

"This Court strictly adheres to and is bound by the following principles enunciated in *Shearin* v. *Lloyd,* 246 N.C. 363, 98 S.E.2d 508 (1957)."*See also Pearce,* supra, 312 S.E. 2d at 425 (N.C. 1958).

> "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of [claimant's] cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all."

"It is not for us to justify the limitation period prescribed for actions such as this." *Id.* "Suffice to say, this is a matter within the province of the General Assembly." See *Shearin* at 370, 98 S.E.2d at 514. "A plaintiff's lack of knowledge concerning his claim does not postpone or suspend the running of the statute of limitations." *Lewis* v. *Shaver,* 236 N.C. 510, 73 S.E.2d 320 (1952). "Equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man."*Coppersmith* v. *Insurance Co.,* 222 N.C. 14, 17, 21 S.E.2d 838, 839 (1942).

On September 22, 2009 Ben or EMSI Examiner Valerie Locke dated Ben's paramedical exam (App. 17), DE 95-42, 43, which ReliaStar did not attach to the policy. (Apps. 5, DE 131-6; 17). Brantley, with AFG, admitted dating Ben's initial application and Petitioner's Agent's Report on January 22, 2010. On March 15, 2010 Ben signed an ambiguous, undated and untitled delivery amendment (App. 11); DE 95-45, which ReliaStar did not attach to the policy. (App. 5); DE 131-6.[25]

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[25] "This policy, the attached application, and any attached riders, endorsements or amendments make up the whole contract," which does not include Ben's HIPPA-Protected or "Research Only" medical records, unattached paramedical examination or his unattached delivery amendment. (App. 5, policy, p. 3, General Provisions, "THE CONTRACT," 1st ¶). See also N.C.G.S. §§ 58-38-40(a), (b). (App. 3, pp. 3, 4).

Thus, the only document dated by Ben or the Examiner is Ben's paramedical exam. (App. 17); DE 95-42, 3. However, Ben's September 22, 2009 unattached exam cannot be contractually or statutorily contested. And even if ReliaStar could contest Ben's unattached exam or the unattached and last-dated March 15, 2010 delivery amendment (App. 11), it is barred by the NC three year statute of limitations on contracts since ReliaStar filed its untimely first contest on March 22, 2013. (DE 1).

Under NC law, tolling for an alleged breach of contract and fraud is barred absent the exercise of reasonable diligence. *Rothmans Tobacco Co., Ltd.* v. *Liggett Grp., Inc.*, 770 F.2d 1246, 1249 (4th Cir. 1985) (citing *Wilson* v. *Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873, 884 (1970). Here, ReliaStar's breach of contract and fraud claims cannot be tolled due to its failures to exercise reasonable diligence through repeated inquiry failures. Pp. 32-35, supra. Moreover, pursuant to Fourth Circuit precedent, ReliaStar's claims are barred since "The insurer has a statutory period in which to ascertain the facts and act thereon, and failing so to do it will not be heard to assert defenses precluded by a statute of incontestability." *Sutton* v. *American Health & Life Ins. Co.*, 683 F. 2d at 96 (4th Cir. 1982)(DE 181-28).[26]

F. ReliaStar Committed Unfair Claim Settlement Practices And Unfair And Deceptive Trade Practices

Petitioner requests that this Court retrieve and review Doc. 12, pp. 42-49, Doc. 17, pp. 42-50, and DE 181-2, ¶s 112-133 regarding ReliaStar's unfair practices.

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[26] The policy was issued on February 16, 2010 and reissued on February 22, 2010 "per HO error." (App. 4, pp. 3, 8, 9; App. 5, policy, p. 1, "February 22, 2010 Issue Date"). The NC incontestability statute expired on February 16, 2012. (App. 3, p. 4, N.C.G.S. § 58-58-22(2)). ReliaStar filed its first contest on March 22, 2013. (DE 1). So, ReliaStar's claims cannot be heard. However, the district court and Fourth Circuit omitted Fourth Circuit precedent.

ReliaStar's unfair claim settlement practices and unfair and deceptive trade practices were briefed to the lower courts, but overlooked by both courts. ReliaStar "misrepresented insurance policy provisions relating to coverage at issue," pursuant to the policy's "CONTESTABILITY" and "THE CONTRACT" General Provisions and the "Payment of Premium" Policy Provision. (App. 5, policy, pp. 3-4); See Doc. 12, pp. 42-43; Doc. 17, pp. 42-44; N.C.G.S. §58-63-15(11)(a))(App. 3, p. 4). ReliaStar repeatedly promised; but failed to "acknowledge and act reasonably promptly upon communications" with respect to Petitioner's appeal because ReliaStar promised to determine Petitioner's appeal "within 60 days," but did not do so. (App. 55); DE 181-2, ¶s122-126; DE 181-7, 11 and 12; N.C.G.S. §§58-63-15(11)(a), (b))(App. 3, p. 4).

ReliaStar also failed to "deny coverage of [Petitioner's death] claim within a reasonable time after proof-of-loss statements had been completed" since ReliaStar commenced its investigation after its contestability period expired, received notice of Ben's death on February 27, 2012 (Apps. 4, p. 2; 44), but did not deny Petitioner's claim until October 12, 2012.(DE 95-118-122); (Doc. 12, p. 44; Doc. 17, pp. 44-45); N.C.G.S. §58-63-15(11)(e)(App. 3, p. 4). Also, ReliaStar did not act in good faith to effectuate a "prompt, fair and equitable settlement" of [Petitioner's] claim in which "liability has become reasonably clear" since ReliaStar did not contest the policy by February 16, 2012; ReliaStar's contestability basis is tied solely to Ben's "initial application;" ReliaStar's contestability basis is overridden by majority federal and state court precedent; ReliaStar did not attach Ben's paramedical exam or delivery amendment to the policy contract; and facts show that open "DETAILS" existed to Ben's incomplete statement to question 5(d) in Ben's paramedical exam. (Doc. 12, pp. 45-46; Doc. 17, pp. 45-48; Apps. 5, 17; N.C.G.S. § 58-63-15(11)(f))(App. 3, p. 4).

ReliaStar also failed in good faith to effectuate a "prompt, fair and equitable settlement" of [Petitioner's] claim in which "liability has become reasonably clear" since ReliaStar failed to inquire of more than a dozen received statements. (Doc. 12, pp. 32-35; Doc. 17, pp. 1, 8, 11, 35; and pp. 32-35, supra). N.C.G.S. §§58-63-15(11)(f), (n)(App. 3, pp. 4, 5). Further, ReliaStar settled Petitioner's claim "on the basis of an application which was altered without notice to, knowledge or consent of, the insured" because Brantley admitted that she dated and answered the only health questions within Ben's "initial application" and thereafter forwarded Ben's altered application to ReliaStar without noticing the insured or seeking his knowledge or consent. (Doc. 12, p. 44; Doc. 17, pp. 44-45; N.C.G.S. § 58-63-15(11)(i))(App. 3, p. 5).

ReliaStar committed unfair and deceptive trade practices by making false and misleading statements that it would send Petitioner a check in the amount of $4,626.64 (App. 56); DE 90-9, Ex. I, since ReliaStar had certified before the court on March 22, 2013 that it had tendered the same premiums to the court. (DE 1, p. 8, ¶ 29); that it would turn Petitioner's ninth and tenth quarterly premium payments over to the State of North Carolina as "abandoned property;" (App. 57); DE 181-8-10; and that "both you as the owner and the insured signed and dated the ReliaStar application on January 22, 2010. (DE 95-120). And ReliaStar failed within its claim denial letter to allege an application question believed to have been misrepresented in Ben's "initial application;" failed to inquire of "other insurance on Insured's life" in Ben's application and amendment; terminated a non-existent "Employee Benefits Agent Contract;" filed its untimely complaint (DE 1) the next day; and purposefully redacted non-confidential critical dates (App. 58), which are all UDTP violations. (Doc. 12, pp. 47-49; Doc. 17, pp. 48-50); N.C.G.S. §§ 75-1.1, 75-16. (App. 3, pp.4, 5).

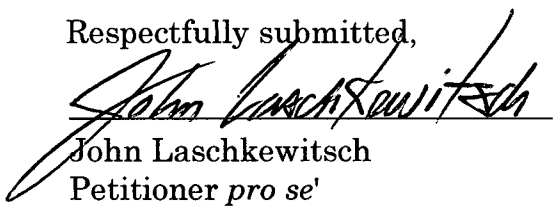
"A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson* v. *Insurance Co.,* 300 N.C. 247, 263, 266 S.E.2d 610 at 621 (1980).[27] "An insurance company that engages in the act or practice of "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," N.C.G.S. § 58-63-15(11)(f), also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1." *Gray* v. *North Carolina Ins. Underwriting,* 529 SE 2d 676,683 (NC 2000)(citing *Marshall* v. *Miller,* 302 N.C. at 548, 276 S.E.2d at 403). Thus, such conduct that violates N.C.G.S. § 58-63-15(11)(f) constitutes a violation of N.C.G.S. § 75-1.1, "as a matter of law, without necessity of an additional showing of frequency indicating a general business practice," N.C.G.S. § 58-63-15(11). See *Gray* at 683.[28]

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the district court's judgment and the Fourth Circuit's mandate. Alternatively, this Court should GRANT petitioner's petition for a writ of certiorari with assigned representation.

This the 20th day of July 2018

Respectfully submitted,



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[27] The district court abused its discretion by untimely granting N.C.G.S § 75-1.1 fees against Petitioner since Petitioner, not ReliaStar, is an injured consumer. (DE 159, 169).

[28] Here, ReliaStar violated N.C.G.S. §58-63-15(11)(f) over contestability precedent from this Court, the N.C. Supreme Court and all U.S. Circuit Courts of Appeal, and again over untimely filed fees and no effective, mutual, signed, dated, submitted or received Agreement, which it repeatedly breached, pursuant to North Carolina Supreme Court precedent.