No. 17-_____

In the
Supreme Court of the United States

JOHN LASCHKEWITSCH,

Petitioner,

v.

AMERICAN NATIONAL INSURANCE COMPANY

Respondent.

Petition For A Writ Of Certiorari
To The Fourth Circuit Court Of Appeals

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Hurni, Enelow, Stewart and Pickering* contestability precedent from this Court; *American Trust Co.* and *Chavis* precedent from the NC Supreme Court; unanimous United States Circuit Courts of Appeal precedent; N.C. Gen. Stat. § 58-58-22(2); and other cited insurance authorities bar ANICO's defenses since ANICO's first contest of the policy contract was over thirty four months after its two-year contestable time period had expired, which the lower courts manifestly disregarded?

2. Whether ANICO's breaches of an Agreement not submitted, timely received, dated or agreed to by petitioner, not made effective by ANICO, and which does not record petitioner as a party; fee motion, with no affidavit of prevailing market rates or timely filed bill of costs, which is redundant, bundled, ambiguous, unrelated and excessive; final and exclusive Texas arbitration remedy, over which fees are waived; failure to file a position statement, as ordered; and improperly filed fee affidavit, with case law citations within, permits fees against petitioner under precedent from this Court and the NC Supreme Court, all of which the courts below omitted?

3. Whether the district court omitted Ben Laschkewitsch's first "possible ALS" diagnosis date, North Carolina Supreme Court collateral estoppel precedent, NC three year applicable statutes of limitation, estoppel by depositing premium after notice and knowledge and actions and declarations affirming the policy for beyond two years; and ANICO's failure to prove Fed.R.Civ.P § 9(b) particularity, reasonable diligence and inquire of statements received; and unfair claim settlement practices and unfair and deceptive trade practices bar ANICO's untimely contest, excessive fees and defenses since the lower courts omitted all such of petitioner's claims?

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.

TABLE OF CONTENTS

CITATION OF APPENDICES

APPENDIX 1: The Fourth Circuit's affirmation of the District Court's erroneous judgment/order

APPENDIX 2: The District Court's erroneous summary judgment/order

APPENDIX 3: The District Court's erroneous attorneys' fee order

APPENDIX 4: The District Court's erroneous Rules 60(a), 60(b)(4) order

APPENDIX 5: U.S. Codes, Federal Rules and North Carolina General Statutes

APPENDIX 6: The policy contract with a "March 15, 2010 Date of Issue"

APPENDIX 7: Ben's undated original application sent to Mitchell on 01/12/2010

APPENDIX 8: Contract Checklist, Agreement page 1 and six non-contract pages

APPENDIX 9: The non-mutual, undated and ineffective Agreement

APPENDIX 10: ANICO's 28-day termination notice of the alleged Agreement

APPENDIX 11: Petitioner's Affidavit in Opposition to ANICO's fee request

APPENDIX 12: ANICO's April 11, 2012 acceptance of quarterly premium

APPENDIX 13: ANICO's June 18, 2012 acceptance of quarterly premium

APPENDIX 14: ANICO's September 12, 2012 acceptance of quarterly premium

APPENDIX 15: ANICO's five page Agreement; first produced on October 12, 2015

APPENDIX 16: "Plaintiff's Brief In Opposition To Attorney Fees and Damages"

APPENDIX 17: Petitioner's Declaration Of Facts And Special Circumstances

APPENDIX 18: ANICO's known misrepresentation that it "properly contested the policy's validity" within its two year contestable period

APPENDIX 19: ANICO's March 13, 2010 policy approval letter with promises

APPENDIX 50: ANICO's September 17, 2012 offer to Petitioner from its President and Secretary to convert the in force Policy with a Credit Conversion Privilege

APPENDIX 51: ANICO's Term Select brochure given to Ben when he signed, but did not date his ANICO life insurance application

APPENDIX 52: ANICO's October 10, 2012 claim denial letter which contains two material misrepresentations and no allegation of a false application answer.

APPENDIX 53: ANICO's admission "that American National provides with the policy" a Buyer's Guide, which ANICO failed to do and which is an unfair trade practice under North Carolina law

APPENDIX 54: ANICO's June, 2010 notice from Duke University Hospital and First Health of the Carolinas that it could not receive Ben's confidential medical records without proper authorization or Testamentary/Letters of Administration.

TABLE OF CITED AUTHORITIES

Page(s)

U.S. CODES, FEDERAL RULES AND NC GENERAL STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

John Laschkewitsch petitions for a writ of certiorari to review the erroneous judgments granted ANICO by the district court, which were affirmed by the Fourth Circuit by its refusal to adhere to its precedent over contestability, notice/inquiry failures, collateral estoppel, statutes of limitation, Rule 9(b) particularity, estoppel and waiver, contract breaches, unfair practices and Ben's delayed diagnosis date.

Opinions Below

A. Fourth Circuit Court of Appeals, Case No. 17-2309 affirmation, dated June 4, 2018. (Appendix 1).

B. EDNC, Case No. 5:15-CV-0021-D, denial of Rules 60(a),(b)(4) motions, opposition to attorneys' fees and summary judgment motion. (Appendices 2, 3 & 4).

Jurisdiction

The Fourth Circuit Court of Appeals affirmed the district court's judgment on June 4, 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 claims have not been heard. Article III, § 2 of the U.S. Constitution is involved since ANICO did not suffer an injury-in-fact, which was concrete and particularized, prove traceability to petitioner, but to McCall, or that its untimely contest and improper fee motion are redressable. Also, U.S. Codes, Federal Rules, EDNC Local Rules and N.C. General Statutes are involved, as designated by page number or *in passim*. (App. 5, pp. 1-8).

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 expired on March 15, 2012. American National Insurance Company ("ANICO") filed its untimely first contest by answer on February 5, 2015 (DE 6), such that all of its defenses are barred. Pp. 6-16 below.

The courts below further omitted ANICO's repeated breaches of its alleged Agreement, which petitioner never received, dated or submitted to ANICO. Omitted as well are petitioner's special circumstances and merited claims. And significantly, neither court below reviewed that ANICO began this action over thirty four months untimely, failed to file a required affidavit of prevailing market rates or bill of costs and filed a bundled, redundant, unnecessary, unrelated and ambiguous fee request.

The lower courts overlooked that insured Ben first consulted by referral with a specialist "for possible ALS" on March 23, 2010, over a week after the policy was issued, delivered and placed in force. Also, the lower courts omitted that ANICO failed to inquire of seven or more received statements, prove sufficient Fed.R.Civ.P. § 9(b) particularity of who, when, where, time and place or identity and prove due diligence. Further overlooked is that ANICO filed its contest beyond the NC three year statutes of limitation for collateral estoppel and all of its defenses, deposited premium after notice and alleged knowledge, repeatedly acted to keep the policy in force beyond two years and committed at least five unfair claim settlement practices and a deceptive trade practice. (N.C.G.S. §§ 58-63-15(11), 75-1.1))(App. 5, pp. 5-8).

B. SUMMARY OF THE CASE

1. The Incontestable Policy

The policy was issued on March 15, 2010. (App. 6); DE 1-2. The policy became incontestable on March 15, 2012, which includes Ben's application. (App. 7); DE 1-3. ANICO's first contest of the policy contract, and insured Ben's attached application within, was in the Eastern District of North Carolina on February 5, 2015. (DE 6). This was over two years and ten months untimely. And pursuant to holdings from this Court, see *Hurni*, *Enelow*, *Stewart* and *Pickering*; North Carolina Supreme Court precedent, see *American Trust Co.* and *Chavis*; and unanimous Circuit Courts of Appeal precedent, pp. 6-16, below, all of ANICO's claims are barred for filing its first contest over thirty four months beyond the expiration of its contestable period.

2. ANICO's Repeated Agreement Breaches And Improper, Excessive, Redundant, Ambiguous, Duplicated and Unrelated Fee Request

ANICO's General Agent, McCall Insurance Group, Inc. ("McCall"), provided petitioner a Contract Checklist with no reference to or inclusion of a full Agreement. (App. 8, p. 1); DE 1-4. ANICO requested that petitioner sign and "Return Signature Page Only" (App. 8, p.1, "Required Documents For Contracting"), which does not list or include pages 2-6 of the alleged Agreement, as relied on by the district court. On January 12, 2010 petitioner signed and submitted the only received "Page I" with a "Contract Checklist," six agent appointment pages and Ben's undated application to McCall. (Apps. 7, 8). Thus, petitioner is not bound, but for the undated "Page 1."[1]

[1] Since ANICO filed its summary judgment motion before a discovery conference, initial disclosures or any discovery, ANICO did not and cannot prove that petitioner ever received from or submitted any of pages 2-6 of its "Texas Agreement" to either McCall or ANICO.

Petitioner did not sign, date, receive or submit any of pages 2-6 of ANICO's "Texas Agreement," neither party dated Agreement "Page 1" and ANICO failed to make the agreement effective by assigning an effective date. (App. 9, p. 1). Further, ANICO did not name petitioner as an appointed party or as a Senior General Agent.

On July 9, 2012 ANICO terminated petitioner's "existing contract with the company." (App. 10); DE 1-16. ANICO failed to provide petitioner with a contractual reason for terminating such contract or give full 30-day notice. (App. 9, Form 4736, p. 5, "Termination"); DE 1-4. Then sometime in April, 2013 ANICO terminated the Agreement again *for cause* with the NC Department of Insurance. But ANICO failed to provide petitioner with 30-day contractual or NC required overnight notice, which breached the Agreement and violated NC law. (App. 9, p. 5,"Termination," 1st ¶); N.C.G.S. § 58-33-56(d)(App. 5, p. 4). The NC Department of Insurance then notified petitioner, not ANICO, as required by NC law, and demanded a response. And petitioner responded to ANICO's *for cause* termination attempt. (DE 34-5).

Petitioner received, signed and submitted "Page 1" only of the Agreement in North Carolina on January12, 2010. (App. 8). Thus "Page 1" only is subject to North Carolina law. (N.C.G.S. § 58-3-1; App. 5, p. 3). ANICO did not contest the alleged Agreement until February 5, 2015. (DE 6). Therefore, ANICO breached the alleged Agreement again by first contesting the Agreement over two years beyond the NC applicable three year statutes of limitation. (N.C.G.S. §§1-52(1), (9)); App. 5, p. 3).

ANICO again breached its alleged Agreement by not adhering to the terms of arbitration that it drafted. (App. 9, p. 6,"Arbitration"). With multiple attorneys from two law firms representing ANICO, including its corporate counsel, ANICO cannot proffer a valid or reasonable basis for not following the terms of its agreement.

Specifically,"Any dispute or controversy out of or relating to this Agreement... will be resolved exclusively and finally by arbitration...,"not the district court. Thus, ANICO further breached its alleged agreement by not filing a motion to stay and to compel arbitration in district court proceedings. See pp. 16-21, notes 6, 7, 8, below.

ANICO's fee request is from twenty invoices paid to ANICO's counsel by ANICO. (DE 49-2). All of ANICO's fees are from unspecific categories, such as brief writing, editing, reviewing, researching and filing, conferences, emails, checking dockets, tracking, responding, discussing, drafting, advising, analyzing, outlining, proposing and considering, non-filed or served discovery efforts, preparing exhibits, reviewing rules and speaking with clerks, most of which were excessive, redundant, unrelated and/or unnecessary. DE 49-2, pp. 2-106; (App. 11, ¶s 42-50). In addition, ANICO failed to timely file a required bill of costs and an affidavit of prevailing market rates. Moreover, ANICO did not file a position statement regarding fees, as ordered by the district court. (DE 45, Order; DE 49). And within his supporting fee affidavit, Laite improperly briefed eight legal cases. (DE 49-1). See pp. 18-21, below.

3. The Lower Courts Omitted Insured Ben's Referred Specialist "Possible ALS" Diagnosis Date And All Of Petitioner's Claims

The lower courts omitted that Ben was referred to a specialist for a March 23, 2010 consult to determine whether or not he had ALS, which was over a week after the policy was issued. (App. 6, policy, p. 1, "March 15, 2010 Date of Issue"). Further, neither court below addressed NC statutes of limitation, NC contestability statutory authority and precedent, ANICO's failures to inquire and plead or prove Rule 9(b) particularity, ANICO's broken promises and affirmations of the policy beyond two years or ANICO's unfair claim settlement and deceptive practices. Pp. 6-40, 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 and application within were issued by ANICO on March 15, 2010 and became incontestable on March 15, 2012. (App. 6, policy, "March 15, 2010 Date of Issue;" App. 7, Ben's application); (N.C.G.S. § 58-58-22(2)); App. 5, p. 5). ANICO first contested the policy and Ben's application on February 5, 2015 (DE 6), which was over two years and ten months after its 2-year contestable period had expired.

The policy was delivered in North Carolina and so is subject to NC law. See N.C. Gen. Stat. § 58-3-1. (App. 5, p. 3). North Carolina's contestability statute, N.C. Gen. Stat. § 58-58-22(2) (App. 5, p. 5), 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). (Apps. 1, 2, 3, 4).

The policy was kept in force with ANICO's depositing premium payments for six months beyond the March 15, 2012 expiration of its contestable period. On April 11, 2012 ANICO accepted and deposited quarterly premium. (App. 12); DE 1-10. On June 18, 2012 ANICO again accepted and deposited premium. (App. 13); DE 1-13.

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[2] "[A] precisely drawn, detailed statute pre-empts more general remedies" (quoting *Brown* v. *GSA,* 425 US 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 US ___, ___, 130 S.Ct. 2149, 2156,176 L.Ed.2d 998(2010). (Emphasis added).

On September 12, 2012 ANICO accepted and deposited quarterly premium again (App. 14); DE 1-17, which kept the policy paid and in force through December 15, 2012, nine months beyond ANICO's contestable period. Consequently, the single statutory exception of "nonpayment of premium" does not here apply. And "during insured's lifetime" is not relevant since it is not statutorily included or excluded for policies delivered in North Carolina. Also, the NC contestability statute trumps the policy contract's contestable provision since the North Carolina State Legislature authored the mandate of N.C. Gen. Stat. § 58-58-22(2)(App. 5, p. 5). See n. 2, supra.

A. United States Supreme Court Contestability Precedent

Here the words, referring to the written policy, are "from its date of issue." "While the question... is not certainly free from reasonable doubt... that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of actual execution of the policy or the time of its delivery but to the date of issue as specified in the policy itself," which here, is March 15, 2010. (App. 6, p. 1, "Date of Issue"). *Mutual Ins. Co.* v. *Hurni Co.*, 263 US 167, 175 (S.Ct. 1923). "The argument advanced is that a policy of insurance necessarily imports a risk and where there is no risk there can be no insurance; that when the insured dies what had been a hazard has become a certainty and that the obligation then is no longer of insurance but of payment; that by the incontestability clause the undertaking is that after two years, provided the risk continues to be insured against for the period, the insurer will make no defense against a claim under the policy; but that if the risk does not continue for two years (that is, if the insured dies in the meantime) the incontestability clause is not applicable." *Id.*

"Only in the event of the death of the insured after two years, it is said, will the obligation to pay become absolute. The argument is ingenious [and] fallacious, since it ignores the fundamental purpose of all simple life insurance, which is not to enrich the insured but to secure the beneficiary, who has, therefore, a real, albeit sometimes only a contingent, interest in the policy." *Id.* at 176. (Emphasis added).

"It is true... that the contract is with the insured and not with the beneficiary but, nevertheless, it is for the use of the beneficiary and there is no reason to say that the incontestability clause is not meant for his benefit as well as for the benefit of the insured. It is for the benefit of the insured during his lifetime and upon his death immediately inures to the benefit of the beneficiary." As said by the Supreme Court of Illinois in *Monahan* v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 141: "Some of the rights and obligations of the parties to a contract of insurance necessarily become fixed upon the death of the insured. The beneficiary has an interest in the contract, and as between the insurer, [here ANICO], and the beneficiary, [here petitioner], all the rights and obligations of the parties are not determined as of the date of the death of the insured. *Id.* The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured as much as it inures to the benefit of the insured himself during his lifetime." *Id.*

"The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured." *Id.* at 177. (Emphasis added)."The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue; — not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event," just as here. *Id.*

Here, as aforementioned, pursuant to this Court's precedent, N.C.G.S. § 58-58-22(2) controls, which does not include "during insured's lifetime," n. 2, supra. So here, as in *Hurni*, the NC contestability statute "plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue; — not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event." We "are constrained to hold that it admits of no other interpretation than that the policy became incontestable upon the sole condition that two years had elapsed," as here. *Id.*, 178.

As further held by this Court, "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, [as here], is to become incontestable." *Enelow* v. *New York Life Ins. Co.*, 293 US 379, 384 (S.Ct.1935).

Citing *American Life Ins. Co.* v. *Stewart*, "on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly file its affidavit of defense."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." 300 US at 212, n. 2, n. 3 (S.Ct. 1937)(DE 58-6). In this case, ANICO has no resort to equity or in law, pursuant to this Court's precedent, since it brought a court contest after expiration of the March 15, 2012 period and after the policy by its terms became incontestable.

Moreover, this Court affirmed the Fifth Circuit in *Northwestern Mutual Life Insurance Co.* v. *Pickering*, 293 F.496, 499 (5th Cir.) cert. denied, 263 US 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 ANICO'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, [issue date], not from the date of the execution of the policy, which is charged to have been procured by alleged false statements." 293 F. 496. So ANICO's "right to contest the policy" was "lost" since ANICO did not invoke judicial action by March 15, 2012, but chose, by its own volition, to delay its first contest until February 5, 2015. (DE 6).

B. North Carolina Supreme Court Contestability Precedent

Foremost, 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 omitted NC Supreme Court precedent. See *Sanderson* v. *Rice,* 777 F.2d 902, 905 (4th Cir.1985).

Am. Trust Co. v. *Ins. Co. of VA*, 173 N.C. 558, at 612-620 (DE 58-5), as cited by this Court and the NC Supreme Court controls. See *American Life Ins. Co.* v. *Stewart*, 300 US 203 at n. 2 (S.Ct. 1937)(DE 58-6); *Chavis* v. *Southern Life Ins. Co.*, 347 SE2d at 427 (N.C. 1986)(DE 58-9).[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."*Id.*

[3] This NC Supreme Court precedent was briefed in the lower courts; however, omitted by both lower courts, which prejudiced petitioner. See DE 58, pp. 8-20; DE 58-2, ¶s 76-92, 94, 112 and 113; Doc. 19, pp. 23-25, 37-45; Doc. 30, pp. 21-23, 35; and Doc. 31, pp. 11, 17-20.

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. (Emphasis added). "The authorities are practically uniform in holding that an incontestable clause, which gives a reasonable time for the insurance company [here ANICO] 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. (N.C.G.S. 58-58-22(2))(App. 5, p. 5).

Thus, "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 [two years from the policy's issue date], establishing the invalidity of the contract of insurance, [the policy] should thereafter be treated as valid." *Id.* at 617. (Emphasis added).

"This is also in accordance with the authorities holding that if the [defendant] 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.* at 620 (emphasis added)."We are, therefore, of opinion, as the [plaintiff] had an insurable interest in the life of the insured when the policy was issued, and as no action was brought by the [defendant] 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 the [defendant] 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 ANICO], from asserting this defense." *Chavis* v. *Southern Life Ins. Co.*, 347 S.E.2d at 427 (N.C. 1986)(citing *American Trust Co.*).[4]

[4] Though briefed, the district court erred by omitting contestability precedent from the NC Supreme Court, this Court, and all U.S. Circuit Courts of Appeal. (DE 58, pp. 8-20). Also, *American Trust Co.* has been cited 101 times, including by this Court and the Second, Fourth, Seventh, Eighth, Ninth, Tenth and D.C. United States Circuit Courts of Appeal.

C. Unanimous 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); ("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;*" *Pruco Life Ins. Co.* v. *Wilmington Trust Co.*, 721 F.3d 1 (1st Cir. 2013). ("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." *Wallach* v. *Aetna Life Insurance Co.*, 78 F. 2d 647, 648 (2nd Circuit 1935).

See also New England Mutual Life Ins. 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"); *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). See also *Bell* v. *Philadelphia Life Ins. Co.*, 78 F. 2d 322 (4th Cir.1935).

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).[5]

II. ANICO Breached Its Agreement, Improperly Filed Its Fee Request, Did Not Follow The District Court's Order And Requested Bundled, Redundant, Unnecessary, Duplicated And Ambiguous Attorneys' Fees

The lower courts abused their discretion by never reviewing or addressing ANICO's breaches of its alleged Agreement. First, ANICO's termination letter did not identify any of four particular contractual reasons permissible for termination. (App. 9, p. 5, "Termination;" App. 10). Specifically, "The Company may terminate this Agreement at any time upon the occurrence of any of the following events:" In spite of this, ANICO breached its Agreement by failing to identify any of the four listed events. Also, ANICO's notice before termination was 28 days from its dated letter, not "30 days," as required by its drafted agreement. (App. 9, p. 5; App. 10).

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[5] 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 life insurance policy contest must be commenced in a court within the two year contestable time period, which ANICO failed to do. Also, 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, the NC Supreme Court and all U.S. Circuit Courts of Appeal.

Second, "Either party may terminate this Agreement by giving thirty (30) days written notice prior to the date fixed for termination." (App. 9, p. 5, Termination, 2nd sentence). However, ANICO gave petitioner no notice before sending an unknown and unproduced letter to the NC Department of Insurance to terminate its Agreement *for cause*. Not only did ANICO again breach the Agreement by failing to give petitioner "30 days written notice," but ANICO also breached North Carolina law with no overnight notice. (N.C.G.S. §58-33-56(d)); App. 5, p. 4); ANICO's third breach. In further support of ANICO's third breach, of North Carolina law, is that, as drafted by ANICO, "Licensing of agents shall be in compliance with the statutory and regulatory requirements of the Departments of Insurance." (App. 9, p. 2, 1st ¶).

Fourth, ANICO first contested the alleged Agreement on February 5, 2015, which was over five years after petitioner signed stand-alone "Page 1" on January 12, 2010. (App. 8, Form 4736, Form 3779; DE 6). This breach is confirmed since it was over two years after the three year statutes of limitation for breach of contract and fraud in North Carolina had expired. (N.C.G.S. §§1-52(1), 1-52(9)); App. 5, p. 3).

Fifth, ANICO drafted that "Any dispute or controversy arising out of or relating to this Agreement...will be resolved exclusively and finally by arbitration... if the amount in controversy is greater than $50,000, the arbitration shall be conducted before three arbitrators...the arbitrator shall not award attorney's fees... those damages hereby being waived...any decision rendered in such arbitration proceeding shall be final and binding...judgment may be entered thereon in a court of competent jurisdiction." (App. 9, p. 6, "Arbitration"). And ANICO's fifth breach is proven since ANICO did not file either a motion to stay or to compel arbitration.

Sixth, ANICO drafted that "This Agreement...constitutes the sole agreement and supersedes all prior agreements between you and the Company." (App. 9, p. 6). Therefore, ANICO's further breach is that petitioner's stand-alone Page 1 signed on January 12, 2010 is superseded by ANICO's six page non-mutual, never submitted or received agreement. (App. 9, pp. 1-6). This breach is confirmed since the five page agreement, first produced by ANICO on October 12, 2015 (App. 15); DE 26-6, Ex. 4(a); was not dated by either party, made effective by ANICO or listing petitioner as an included party or agent on January 12, 2010 or before October 12, 2015.(App. 9).[6]

In addition, ANICO's fee request (DE 49, 49-1, 2) did not include an affidavit of prevailing market rates. See *Blum* v. *Stenson*, 465 US 886, 888-96 (S.Ct. 1984). Neither did ANICO timely file a required bill of costs, pursuant to EDNC Local Rule 54.1(a)(3); 28 U.S.C. § 1920. (App. 5, pp. 2, 8). See also *Taniguchi* v. *Kan P. Saipan, Ltd.*, US, 132 S.Ct. 1997, 1999-2000, 182 L.Ed.2d 903 (2012). Moreover, the district court ordered both parties to brief a position statement regarding attorney fees; but, ANICO failed to brief a position statement, as ordered by the district court. (DE 45, DE 49, 49-2). And Laite improperly briefed eight legal case citations in his affidavit supporting fees since briefing legal cases within an affidavit is improper. DE 49-1.[7]

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[6] ANICO first produced its alleged agreement (App. 15) in its October 12, 2015 motion for summary judgment (DE 26-6, Ex. 4(a)), which is "nugatory and void for indefiniteness," pursuant to NC law. See *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*).

[7] The district court abused its discretion by manifestly disregarding that "the execution and performance of this Agreement involves transacting business in the State of Texas by you and the Company" (App. 9, p. 6, "Law Applicable"), which never occurred here in order for petitioner's performance to be questioned or the agreement to be executed as a mutual party agreement. And since "all actions with respect thereto are to be brought in a court of competent jurisdiction in the State of Texas" (App. 9, p. 6, "Law Applicable"), which neither occurred, the contract cannot be enforced under NC law or jurisdiction. (App. 3, pp. 2-12).

The district court erred by holding petitioner liable to pay ANICO's fees for: (1) checking dockets and tracking for timely service; (2) communications with non parties and between ANICO and its counsel; (3) researching known rules, case law & CM/ECF procedures; (4) communicating with the Clerk of Court & Judge Dever's case manager; (5) FedEx duplicate service since petitioner also received all service by First Class Mail; (6) indiscernible bundled services; (7) work on a memorandum and exhibits in support of a motion to seal since neither were required; (8) discovery work since there was no discovery conference or plan, no initial disclosures and no party discovery; (9) work on a protective order since no protective order was signed by the parties or filed and signed by the court; (10) work on motions to dismiss, strike, open sealed filings, partial summary judgment, intervene or for attorney fees since none of such motions were filed or served; (11) review of court notices and orders; (12) review of unrelated "companion" cases; (13) counterclaims and defenses other than collateral estoppel; (14) excessive, redundant and unnecessary time; (15) unidentified, ambiguous and unrelated time; (16) drafting letters to petitioner; (17) emailing petitioner; (18) duplicated efforts between its counsel; (19) monitoring, discussing, analyzing, considering, advising and outlining without itemization; (20) reading and reviewing petitioner's filings, including replies; (21) reviewing unfair and deceptive trade practices since Mr. Laite claims to be an expert with N.C.G.S. Chapter 75; (22) "revising its motions, memorandums and exhibits;" (23) review of docketed filings; (24) speaking with a Supreme Court clerk; (25) ANICO's fees of $20,668.50 (DE 49, p. 1) since such fees are not attorney fees and the fees are not itemized or in a "bill of costs;" (26) "review of federal cases discovered for Plaintiff;" (27) final reviews of documents and filings; and (28) contestability research.

Neither should petitioner be held liable for ANICO's (29) letters drafted but not filed; (30) communication between the parties; (31) receipt of orders and filings; (32) extended study of the application; and (33) "continued review" of filings beyond the first review and/or first revision. And the exclusive method of arbitration for a dispute does not allow attorney fees; rather, such fees are deemed waived. (App. 9).

A few examples illustrate a continuous pattern of ANICO's excessive charges. ANICO billed four hours and six minutes for a three-page settlement demand that it mailed petitioner. (DE 49-2; pp. 43, 48). ANICO billed nineteen hours and forty two minutes for a memorandum and exhibits in support of ANICO's motion to seal, neither of which is required by EDNC Rules. (DE 49-2; pp. 53-59). ANICO charged fourteen hours for "analyzing" and its two-page response to petitioner's Motion in *Limine*. (DE 39, DE 40; DE 49-2; pp. 86-91). So this Court should review ANICO's excessive billing since the district court and Fourth Circuit both refused to do so.

The district court omitted that ANICO should not have been the prevailing party since it first contested the policy over thirty four months after expiration of its contestable period. Pp. 6-16, supra. And to support fees, North Carolina requires proof of a willful violation by petitioner, that ANICO suffered actual injury, that the case be adjudicated *on the merits*, an unwarranted refusal to settle by petitioner, and that petitioner's actions were frivolous and malicious, none of which happened.

Petitioner briefed these requirements before the district court with cited case law; however, the lower courts refused to consider any of them. Consequently, this Court should review "Plaintiff's Brief In Opposition To Attorney Fees and Damages" (App. 16); DE 51, and petitioner's "Affidavit" in support. (App. 11, ¶s 1-50); DE 51-3.

The district court erred again by omitting petitioner's special circumstances. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 US 400, 402 (1968)(per curiam); See attached IFP Application, IFP Motion and App. 17, ¶s 21-78. Moreover, 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."[8] *Hardt,* 560 US, at ___, 130 S.Ct., at 2157 (quoting *Ruckelshaus* v. *Sierra Club,* 463 US 680, 683, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983)). And "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 US 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 willful disobedience of a court order and to sanction a party who has acted in bad faith, vexatiously, wantonly or for oppressive reasons).[9](App.11, ¶s 1-43; App. 17, ¶s 1-21).

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[8] The district court omitted ANICO's "exclusively and finally" requirement to resolve its dispute by arbitration, rather than filing its contest in the district court, and that judgment upon the award, which was rendered by three arbitrators, may be "entered thereon in a TX court of competent jurisdiction." (App. 9, p. 6 Arbitration); DE 1-4. Also omitted is that the alleged Agreement was not dated by petitioner, was not dated or made effective by ANICO, was not submitted by petitioner, and was first received by petitioner in 2015 with ANICO's summary judgment motion (App. 15) and ANICO's six breaches of such Agreement. Thus, the district court erred by awarding ANICO fees based on ANICO's non-mutual, ineffective contract applicable to Texas law. Pp. 16-20, supra. So this Court should REVERSE ANICO's award of multiple attorneys' and paralegals' fees over such not submitted, timely received or dated and ineffective Agreement, which records only ANICO as a TX party. (Apps. 8 and 9).

[9] Here, petitioner did not "bring an action in bad faith, vexatiously, wantonly or for oppressive reasons." Rather, ANICO brought its untimely action in bad faith by filing its first contest over thirty four months beyond its contestable period. (DE 6); pp. 6-16, supra. ANICO also acted in bad faith by breaching its contractual Agreement terms, by not filing a motion to stay or to compel arbitration in Texas (App. 9, p. 6; Arbitration, Applicable Law) and by knowingly and willfully misrepresenting to the court below that ANICO "properly contested the policy's validity." (App. 18, 2nd ¶; Doc. 24, p. 27 of 48). See pp. 6-16, supra.

III. The Lower Courts Omitted Ben's ALS Specialist Referral Date And Petitioner's Collateral Estoppel Defense And All Claims

A. Ben's March 23, 2010 Specialist Referral Date For "Possible ALS"

The courts below omitted that insured Ben first consulted with a specialist by referral to determine whether he had ALS on March 23, 2010, which was beyond a week after the policy was approved and issued. (App. 6, policy, p. 1, App. 19). From August 18-20, 2009 Ben voluntarily participated at UCSF's "California Alzheimer's Disease Center" for "research only." (App. 20, 2nd ¶). 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 he should find an "East Coast specialized physician... should the need arise." (App. 21, ¶s 3-8, DE 1-12; App. 22, ¶s 17-21, DE 58-14).[10]

On August 24, 2009 Ben consulted with Dr. Morton Meltzer regarding his concern over elevated cholesterol. Dr. Meltzer testified that if he or his staff "would have seen anything or any reason to make a referral, he would have done so." (App. 25, Meltzer Dep. 62:7-64:14); DE 31-5. On September 29, 2009 Ben had a General Physical Examination with U.S. Health Works. Therein, Ben stated that he had no major illness, injury, mental illness or muscle weakness. (App. 26, questions 3, 8, 52); DE 31-7. And progressive muscle weakness is the first sign of ALS. (Apps. 27, 28); DE 58-16, 19. Therefore, Ben did not then have or believe that he had ALS.

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[10] A research "IMPRESSION" of Ben's voluntary participation was discovered 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. 23, "IMPRESSION," p. 7 of 8, excerpt). This finding from UCSF that it was not possible to diagnose Ben with ALS in August, 2009 proves that the district court erred in alleging that Ben was diagnosed with ALS by August, 2009 and by relying on records not possessed by Ben or petitioner or ever produced until after Ben's death. Also, UCSF was not then an "ALS Certified Center of Excellence" or a multi-disciplinary ALS clinic. (App. 24).

On December 15, 2009 Ben consulted with PA Michael Lischynski, 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. 25, Meltzer Dep. 35:15-21, 40:14-41:1, 63:22-64:14); DE 31-5. Then 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 at Duke or Chapel Hill, N.C. (App. 29, Van Tran consult record; App. 30, Van Tran Dep. 46:6-25); DE 31-8.

On January 22, 2010, VA neurologist Dr. Sampath Chárya met with Ben and thereafter transcribed "Motor: full power and normal tone in all four limbs, able to toe-walk, heel-walk and tandem walking; and no abnormal involuntary movements, fasciculations... symmetric muscle bulk" from his consultation with Ben. (App. 31, pp. 1-4). Also on January 22, 2010 VA neurologist Dr. Charya referred Ben to Duke University Medical Center's multidisciplinary ALS Clinic, (App. 31, p. 5, "he has fee basis neuro eval pending"); DE 31-9, which is one of North Carolina's five "ALS Certified Centers of Excellence." Dr. Charya concurrently recorded "per specialist like neurologist to make that decision. Wife understands this." (App. 31, p. 5). This neurological evaluation of Ben is proof from a certified VA neurologist that Ben did NOT have ALS on January 22, 2010 because the first signs of possible ALS are progressive muscle weakness and a visible fasciculation (App. 27, p. 1, Table 1, p. 3, "Possible ALS," DE 58-16; App. 28, p. 1, 1st ¶, 2nd ¶, p. 2, DE 58-19; App. 32, DE 58-18) and the median time from onset to diagnosis is 11 months. (App. 33).[11]

[11] The courts below had this evidence, but erroneously held petitioner to have known more than Dr. Meltzer, Dr. Van Tran, Dr. Charya and PA Lischysnki. (DE 31, 58, 59, 60).

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..." (App. 34; DE 60), which was ten days after ANICO approved Ben's application and after the "March 15, 2010 Date of Issue." (Apps. 6, 19). And significantly, the ALS diagnostic categories are "possible, probable, probable lab-supported and definite" (App. 27, p.1; App. 28; App. 30, p. 46; App. 35; and App. 36), with "possible" ALS being the "least certain degree." (App. 28, "Diagnosis," 2nd ¶).

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 58-23, and requires a mediated process. This is because "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, 16-19, DE 1-20; App. 28, "Diagnosis," 1st ¶, p. 2; Apps. 27, 36, 39, 40, 41; DE 58-2, ¶s 1-17, 22-24, 43-51).

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 58-23, the story of Terry Herring (App. 42), 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 he also resided (App. 43, p. 2); Doc. 19, Ex. 3, the Affidavit of Scott T. Laschkewitsch (App. 44, ¶s 2-12); DE 58-15, Imelda L. Laschkewitsch's Affidavit (App. 45, pp. 1, 2); DE 1-11, and Ben's obituary. (App. 46; lines 19-20).

Thus, ANICO's and the lower courts 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 the policy and Ben's application, not in petitioner's possession during Ben's lifetime and the policy contract approved on March 13, 2010 (App. 19), with a March 15, 2010 "Date of Issue." (App. 6, p. 1).

B. The District Court Erred By Granting ANICO Collateral Estoppel

It is well known that courts only award fees for successful claims or defenses. Here, ANICO succeeded only on its collateral estoppel defense. (App. 4, pp. 2, 4-6; DE 33, 43). In granting such defense, the district court erred by not following the NC Supreme Court's most recent precedent. In *Turner* v. *The Hammocks Beach Corp.*, No. 450A08 (N.C. 2009)(DE 51-1), the North Carolina Supreme court held that "To successfully assert collateral estoppel as a bar to claims," a party:

> "would need to show that the earlier suit resulted in a final judgment *on the merits*, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [defendant] and [plaintiff] were either parties to the earlier suit or were in privity with parties."

Id. at 773-4. The district court abused its discretion by holding a previous judgment to be final, disregarding over twenty non-identical issues and omitting that ANICO and petitioner were never parties to an earlier suit or in privity with another party, pursuant to North Carolina Supreme Court precedent. Also, this Court has held that a federal judgment becomes final "when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari," or, if a petitioner does not seek certiorari, "when the time for filing a certiorari petition expires." *Clay* v. *United States,* 537 US at 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003).

Therefore, the district court erred by holding any prior judgment final before being appealed or petitioned before this Court. And without the final judgment element, ANICO's collateral estoppel defense fails. Further, the district court made no final judgment *on the merits*, as required by North Carolina Supreme Court precedent for collateral estoppel to apply, since there was no evidentiary hearing.[12]

Petitioner briefed over twenty non-identical issues in this case in relation to any other case, in lower court proceedings, which were never reviewed or addressed by the courts below. Thus, this Court should retrieve and review the twenty plus non-identical issues. See DE 58, pp. 3-7 (district court, 5:15-CV-0021-D); Doc. 19, pp. 30-37 (Fourth Circuit; 17-2309). See also ARG III (G) at pp. 33-40, below.

Here, both petitioner and ANICO "were [n]either parties to the earlier suit [n]or in privity with parties," pursuant to North Carolina Supreme Court precedent. Thus, none of the three required elements for collateral estoppel to apply were met or proven by ANICO. And the district court abused its discretion by not following precedent from the North Carolina Supreme Court, by granting ANICO excessive fees for defenses not prevailed on, for briefs never served or filed and over ANICO's "exclusively and final" dispute remedy, over which fees are "waived." (App. 9, p. 6).

Nonetheless, should this Court uphold the lower courts award of excessive fees against petitioner over collateral estoppel and ANICO's untimely contest, then this Court should allow ANICO attorney fees for its successful collateral estoppel defense only. And notably, ANICO itemized ".2" (twelve minutes) of time spent in researching, reviewing and briefing its collateral estoppel defense. (DE 49-2 at 16).

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[12]*See also Thomas M. McInnis & Associates, Inc.* v. *Hall*, 349 SE 2d 552, 557 (NC S.Ct. 1986); *King* v. *Grindstaff*, 200 SE 2d 799, 805-808 (NC S.Ct. 1973).

C. The Courts Below Omitted That ANICO's Defenses Are Barred By North Carolina Applicable Statutes Of Limitation

The Fourth Circuit affirmed the district court's failure to apply NC statutes of limitation and NC Supreme Court precedent regarding NC statutes of limitation. Regarding the alleged undated Agreement (App. 9), the limitations period began no later than on January 12, 2010 when petitioner signed and sent page 1, a Checklist and six non-agreement pages with Ben's undated application to McCall. (Apps. 7, 8).

So the three year statutes of limitation for breach of contract and fraud over the alleged Agreement expired on January 12, 2013. And prior to January 29, 2013 the limitations period expired on Ben's application, which was dated by Mitchell with McCall. (N.C.G.S. §§ 1-52(1), (9); App. 5, p. 3; App. 6, App. 7 and App. 47)).[13]

An NC statute of limitation 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 58-13). (Emphasis added). And "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).

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[13] At 1:31 PM on Friday, January 28, 2010 Mitchell requested that Ben sign and return two copies of ANICO's Replacement Form and one ADB Notice copy (App. 47), which proves Mitchell then had and was processing Ben's application. Since Ben's application is dated "January 29, 2010" (App. 6, policy, application, p. 6, "Date"), Mitchell dated Ben's undated application. (App. 7). Proving this is that ANICO received Ben's application from Mitchell on Wednesday, February 3, 2010 (App. 48), which could not by then have arrived if dated and sent from Fayetteville, NC to McCall in Charlotte, NC on January 29, 2010. In fact, if sent from Fayetteville, NC on January 29, 2010, Ben's application would not have been received by Mitchell in Charlotte, NC before Monday, February 1, 2010. And since Mitchell took over two days to process Ben's application, and had to first process petitioner's six appointment forms, ANICO would not have received the application by February 3, 2010.

> "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."

Pierce, at 425. "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 [parties]'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).

As well, ANICO cannot rely on the policy's amendment (Modification of Life Insurance and Annuity Application)(App. 6, Form NIA (4-81)) since it is not dated or signed and is not witnessed. Further, it is ambiguous because, if signed, Ben would have only affirmed that "This is to acknowledge that I have received my Policy..." Moreover, the attached exam for Mutual of Omaha was signed and dated by Ben or EMSI paramedical examiner Valerie Locke on September 22, 2009, such that the statutory limitations period expired on September 22, 2012. (App. 6, exam).

Since ANICO first contested Ben's application and its alleged Agreement on February 5, 2015 (DE 6), all of its defenses are barred by N.C.G.S. §§ 1-52(1), (9) and North Carolina Supreme Court precedent; *Pierce, Shearin, Shaver*, and *Coppersmith*, supra, because the NC limitations periods are "inflexible and unyielding" and cannot be suspended based on ANICO's discovery and "lack of knowledge." Thus, this Court should summarily REVERSE judgment over NC law and NC precedent.

D. The Courts Below Omitted That ANICO Did Not Plead Or Prove Federal Rule Of Civil Procedure 9(b) Particularity

Fed.R.Civ.P. §9(b) requires that a [party] alleging, [here, ANICO], 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 ANICO did not prove time, place, when, how, where or identity over its fraud and breach of contract or other defenses regarding Ben's application and its Agreement.

On January 12, 2010 petitioner mailed McCall Ben's undated application and ANICO's Agreement "Page 1" with six non-contract, but appointment pages. (Apps. 7, 8).[14] Since Mitchell, not Ben or petitioner, dated Ben's application, ANICO cannot prove when, where, place, or identity over Ben's application. Petitioner did not date the alleged Agreement (Apps. 8, 9); so, neither can ANICO prove when, where, time, or place over its alleged Agreement. The policy amendment (App. 6, Form NIA (4-81)) is not dated. So likewise, ANICO cannot prove particularity over such form.[15] All that remains is the attached exam for Mutual of Omaha. But the exam is not part of the "Application for this Policy" and is barred by N.C.G.S. §§ 1-52(1), (9).

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[14] NC law requires that an agent's appointment must be approved before an insurance application is submitted. (N.C.G.S. §58-33-40(a)); App. 5, p. 3). Therefore, Mitchell delayed processing Ben's application until receipt of petitioner's appointment agent number. This is confirmed since on January 28, 2010 Mitchell noticed petitioner that "Your agent number for ANICO is G1468, effective 01-10-2010" and simultaneously requested that Ben sign two attached forms "where it says applicant and fax back to me at 704-940-0250" (App. 47) so that she could attach them to Ben's application (App. 7), which was then in her possession.

[15] The undated Form NIA (4-81) controls since "No statement will be used to contest the Policy or be used in defense of a claim under it unless (1) it is contained in the Application for this Policy; and (2) a copy of the Application for this Policy is attached to the Policy." (App. 6, policy, p. 3, Section 4, General Provisions, "Contract and Representations;" Form NIA (4-81)). See also N.C.G.S. §§ 58-38-40(a), (b)(App. 5, pp. 4, 5). (Emphasis added).

E. The Courts Below Omitted That ANICO Is Estopped By Accepting Premium After Notice Or Knowledge And Affirmations Of The Policy Beyond Its Two Year Contestable Period

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."

On April 6, 2012 ANICO received notice of insured Ben's death (App. 49). On April 11, 2012 ANICO deposited petitioner's ninth quarterly premium. (App. 12). On June 18, 2012, ANICO again deposited premium. (App. 13). And on September 12, 2012 ANICO accepted and deposited premium again. (App. 14). Thus, ANICO willfully deposited and retained premium over five months after received notice.[16] Therefore, by accepting premiums for over five months after acquiring notice, this Court should summarily REVERSE judgment or remand this case to the end that the issues of waiver and estoppel and the statutes of limitation may be determined.

Moreover, by affirming the policy beyond two years, ANICO led petitioner to believe that the policy remained in force beyond ANICO's 2-year contestable period. By depositing premium through September 12, 2012 ANICO affirmed the policy for two and a half years. And on September 17, 2012 ANICO's President and Secretary affirmed the policy again by offering petitioner a Conversion Credit Privilege option on the in force policy. (App. 50). Had ANICO not then have held the policy as still in force on September 17, 2012, it would not have then extended petitioner such offer.

[16]ANICO also deposited premium after notice of alleged knowledge. (DE 58-2, ¶s 52-64).

In *Gouldin* v. *Inter-Ocean Ins. Co.*, the NC Supreme Court held that:

> "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."

102 S.E.2d 846 (1958) 248 N.C. 161. Pursuant to this precedent, ANICO "recognized and treated the policy as still in force" by depositing premium for eleven quarters and offering a policy change over two and half years after the policy was issued and after Ben's death. So, ANICO is "estopped from insisting on forfeiture of the policy or from setting up the same as a defense." Therefore, this Court should summarily REVERSE judgment over estoppel, waiver and NC statutes of limitation.

F. The Courts Below Omitted That ANICO Failed To Make Inquiry Over Statements Received

ANICO failed to make inquiry over statements received, which means that ANICO's defensive reliance is unreasonable.[17] And since these facts were manifestly disregarded by the district court, this Court should reverse judgment of ANICO's excessive attorneys' fees based upon the non-mutual, undated, never submitted or timely received, ineffective and unsigned agreement pages 2-6. (App. 9, pp. 2-6).[18]

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[17] *Dallaire* v. *Bank of America*, N.A., No. 51PA13, N.C.; 2014 WL 2612658, at *5 ("A plaintiff, in other words, cannot establish justifiable reliance... if it fails to make reasonable inquiry regarding the alleged statement."

[18] See *Forbis* v. *Neal*, 649 S.E.2d 382, 387 (N.C. 2007)("To state a claim for actual fraud, the [defendant] must allege facts plausibly showing that (1) [plaintiff] made a false representation of a material fact; (2) [plaintiff] made the representation with the intent to deceive [defendant]; (3) [defendant] relied on the representation and its reliance was reasonable; and (4) [defendant] suffered damages because of its reliance." Here, ANICO's reliance was not reasonable and it did not prove suffering damages because of its reliance.

ANICO received (1) a statement of Ben's physicians, but did not request a customary Attending Physician's Statement (App. 7, Ben's application, question 17); DE 1-3, (2) a statement that Ben's application was undated, but failed to inquire of Ben's application completion and signature date (App. 7, undated application); DE 1-3, (3) a statement that, within the last five years insured Ben had "consulted or been treated or examined by a physician or practitioner for any cause not previously mentioned in this application," but did not inquire about the physician or reason for "any cause" or for Ben's noticed "treatment of examination" (App. 7, application, question 16(a)); DE 1-3, and (4) a statement that, within the past five years, Ben had received an "electrocardiogram, x-ray or other diagnostic tests" (App. 6, Policy, "MOA Statements to Examiner," question 5(d), DETAILS of "Yes" answers), but again, ANICO did not inquire regarding Ben's statement regarding question 5(d).

Thus, ANICO failed to make reasonable inquiry of at least four statements. So, pursuant to North Carolina Supreme Court precedent, ANICO cannot establish justifiable reliance or Rule 9(b) particularity. And on these bases, ANICO's fraud, collateral estoppel and unfair and deceptive trade practice counterclaims must fail.

Moreover, 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). Consequently, with ANICO's failed due diligence from failed inquiry over received statements, North Carolina's 3-year statutes of limitation cannot be tolled. (N.C.G.S. §§ 1-52(1), (9)); App. 5, p. 3).

G. The Courts Below Omitted ANICO's Unfair Claim Settlement Practices And Unfair And Deceptive Trade Practices

In enacting N.C.G.S. §§ 75-1.1 and 75-16 (App. 5, pp. 6-8), the NC legislature intended to effect a private cause of action for consumers. *See Marshall* v. *Miller,* 302 N.C. 539, 276 S.E.2d 397 (1981); see also *Stanley* v. *Moore,* 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995). In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs. See N.C.G.S. § 75-1.1(a). "In *Marshall* v. *Miller,* 302 N.C. at 548, 276 S.E.2d at 403, this Court noted that a practice is deceptive if it has the tendency to deceive. Moreover, where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice." *See also Johnson* v. *Beverly-Hanks & Assocs.,* 328 N.C. 202, 208, 400 S.E.2d 38, 42 (1991).

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); (App. 5, p. 7), also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1... without the necessity of an additional showing of frequency indicating a "general business practice," N.C.G.S. §58-63-15(11). (App. 5, pp. 6, 7). *Gray* v. *North Carolina Insurance Underwriting,* 529 SE 2d 676, 683 (N.C. 2000). (Emphasis added).

1. ANICO Violated N.C. Gen. Stat. § 58-63-15(1)

ANICO is not a consumer and committed an unfair claim settlement practice by "misrepresenting the terms of the policy issued and the benefits or advantages promised thereby." (N.C.G.S. § 58-63-15(1)); App. 5, pp. 5, 6); *Miller, Moore,* supra.

ANICO's President and Secretary contractually promised that "The Death Benefit is payable upon receipt at the Company's Home Office in Galveston, Texas, of due proof of the Insured's death if it occurs before the Term Expiry Date or during any period for which the Policy is renewed." (App. 6, policy, p. 1). The only way to renew a policy is with payment of premium. (App. 6, policy, p. 4, Section 4, General Provision, Nonpayment of Premium). ANICO renewed the policy for eleven quarters (2 years, 9 months), but misrepresented "the benefit is payable during any" period renewed. Further, by relying on documents outside of the policy, ANICO misrepresented that "No statement will be used to contest the policy or be used in defense of a claim under it unless it is contained in the Application for this Policy." (App. 6, policy, p. 3, Section 4, General Provision, Contract And Representations).[19]

ANICO misrepresented that "your policy is backed by one of the strongest companies in the insurance industry... while in force it offers a guarantee of financial protection." (App. 19, 4th ¶); DE 1-7. Moreover, ANICO misrepresented in its Select Term brochure that: (1) "It's all about protecting your business...your family's future...your home...in case you are not there to do the job;" and (2) "Safety And Security." (App. 51, pp. 3-5, 6); DE 1-24. (N.C.G.S. § 58-63-15(1)); App. 5, p. 6).

2. ANICO Violated N.C. Gen. Stat. § 58-63-15(2)

The making of an "assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading" is an unfair settlement practice.

[19] NC insurance law does not "allow alteration of the legal effect of any provision of any insurance policy or contract." (N.C.G.S. §§ 58-38-40(a), (b)); App. 5, pp. 4, 5).

ANICO's President and Secretary promised petitioner he could convert the renewed policy "to a new permanent life insurance policy" and receive from ANICO a "term conversion credit to the premium for the new policy" over six months after its two year contestable period expired, which was misleading. (App. 6, policy, p. 1, "Date of Issue;" App. 50). ANICO made a false representation that it had included interest with its premium refund check, which was untrue and deceptive. (App. 6, policy, "Policy Data Page," Quarterly Premium $329.66; App. 52, ¶ 7; p. 3, check for eleven quarterly premium payments of $329.66 each, with no included interest). ANICO made an untrue and deceptive statement of "representations given to the Company on the Application signed by Ben Laschkewitsch on January 29, 2010" (App. 52, p. 1, 2nd ¶); DE 1-19, since the undated application was in Mitchell's possession on or before January 28, 2010. See App. 7, Ben's undated application; App. 47, Mitchell's notice; n. 13, n. 14, supra. (N.C.G.S. § 58-63-15(2)); App. 5, p. 6).

3. ANICO Violated Article 63 (Unfair Trade Practice Act)

ANICO has admitted that "The Policy's terms control the parties' contractual relationship" (DE 24, p. 24, 1st ¶; Doc. 24, p. 34); however, ANICO did not attach a Buyer's Guide to the policy, as required by N.C.G.S. §§ 58-60-15, 30 and Article 63 (Unfair Trade Practice Act)(App. 6, policy; App. 5, p. 5). ANICO falsely asserts that it was petitioner's duty to attach a Buyer's Guide to the policy by printing a copy from a website unknown to petitioner. However, the statute states that "the insurer shall provide..." the Buyer's Guide, not agent petitioner. And ANICO admitted "that American National provides with the policy," regarding such Guide. (App. 53, p. 41, 2d ¶); Doc. 24. (N.C.G.S. §58-60-30, Article 63 (Unfair Trade Practice)); App. 5, p. 5).

4. ANICO Violated N.C. Gen. Stat. § 58-63-15(11)(a)

Here, ANICO misrepresented pertinent facts and insurance policy provisions relating to the coverage at issue over the policy's General Provisions of "Contract And Representation" and "Nonpayment Of Premium" regarding its broken promise that the "Death Benefit is payable if death occurs...during any period for which the policy is renewed upon receipt of due proof of death..." (App. 6, policy, Form ART07 (03) cover page, pp. 3, 4). ANICO further misrepresented two pertinent facts within its policy brochure (App. 51); DE 1-24, two pertinent facts in its claim denial letter (App. 52); DE 1-19, a pertinent fact regarding its promised "guarantee of financial protection" (App. 19, 3rd ¶); DE 1-7, and a pertinent fact of being able to convert the policy six months beyond its contestable period and after Ben's death. (App. 50); DE 1-18; (N.C.G.S. § 58-63-15(11)(a), N.C.G.S. §§ 58-38-40(a), (b)); App. 5, pp. 4, 5, 6).

5. ANICO Violated N.C. Gen. Stat. § 58-63-15(11)(d)

ANICO refused "to pay claims without conducting a reasonable investigation based upon all available information" since it was twice denied access to its requests for obtaining Ben's medical records by failing to obtain a valid authorization. (App. 54). As a result of its delay, ANICO conducted post-claim underwriting from April 6, 2012 through October 10, 2012. (Apps. 49, 52). As well, ANICO's investigation was unreasonable because ANICO demanded that petitioner complete, sign and have witnessed a nine question "Soliciting Agent's Statement" (DE 1-15) after petitioner had already submitted a second statement. (DE 1-14). Further unreasonable is that ANICO's claim denial allegations are from Ben's application dated by Mitchell. And ANICO did not allege a specific application question believed to be false. (App. 52).

6. ANICO Violated N.C. Gen. Stat. §§ 58-63-15(11)(f), (n)

ANICO did not "attempt in good faith to effectuate prompt, fair and equitable settlement" of petitioner's claim "in which liability has become reasonably clear," an unfair claim settlement practice, which calls for treble damages. This is primarily so because this Court has four or more times held that an insurer must bring a contest forward within its contestable period. See *Hurni, Enelow, Stewart* and *Pickering*, supra, pp. 3, 6-10. Also, the North Carolina Supreme Court has held so in *American Trust Co.* and *Chavis* and has again cited *Trust Co.* six or more times, which has also been cited by this Court and the Second, Fourth, Seventh, Eighth, Ninth, Tenth and District of Columbia U.S. Circuit Courts of Appeal. Pp. 10-12, supra. And every U.S. Circuit Court of Appeals has held that an insurer, here ANICO, must contest an insurance policy in a court of law within its contestable period. Pp. 13-16, supra. But here, ANICO first contested the policy more than thirty four months untimely.

This Court has also held that "[A] precisely drawn, detailed statute pre-empts more general remedies" and that we "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." n. 2, supra. Thus, N.C.G.S. §58-58-22(2) controls, as required by N.C.G.S. §58-3-1. (App. 5, pp. 3, 5). N.C.G.S. § 58-58-22(2) states 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." And ANICO kept the policy in force for over 2 years and affirmed the policy in force beyond 2 years. Thus, ANICO did not effectuate a fair settlement.[20]

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[20] ANICO admitted in the lower court that this Court's holding in *American Life Ins. Co.* v. *Stewart* requires a contest within the contestable period. However, ANICO asserted that *Stewart* is inapplicable since it is not required in the policy. (App. 18; Doc. 24, p. 27).

In addition, ANICO: (1) promised, on the day that the policy was assembled, that "your policy is backed by one of the strongest companies in the insurance industry...while in force it offers a guarantee of financial protection... and will help provide security and peace of mind" (App. 19); DE 1-7; (2) contractually promised that "The Death Benefit is payable upon receipt at the Company's Home Office in Galveston, Texas, of due proof of the Insured's death if it occurs before the Term Expiry Date or during any period for which the Policy is renewed." (App. 6, Policy, Form ART07(03) cover page; DE 1-2)); (3) ANICO's contestability period expired on March 15, 2012; and ANICO (4) received notice of Ben's death on April 6, 2012; (5) renewed the policy with acceptance of premium on April 11, 2012; (6) renewed the policy with acceptance of premium on June 18, 2012; (7) renewed the policy with acceptance of premium on September 12, 2012; (8) on September 17, 2012 ANICO's President and Secretary affirmed the renewed policy to remain in force by sending a "Conversion Credit Privilege Offer" whereby petitioner could convert in force term Policy No. 14771789 "to a new permanent life insurance policy;" and (9) ANICO first contested the policy on February 5, 2015, which was over thirty four months after expiration of its two-year contestable period. (DE 6; Apps. 6, 12, 13, 14, 49 and 50).

None of these issues were heard or determined in any other court proceeding. (DE 52, pp. 8-20; DE 52-2, ¶s 35, 40, 41, 54-5, 58, 62-64 and 76-92 and DE 52-4-9). Moreover, ANICO did not prove sufficient particularity of when, where, time, place or identity over Ben's application (App. 7); DE 1-3, which was dated by Mitchell, and which ANICO falsely relied upon as being signed by Ben on January 29, 2010 in denying petitioner's claim. (App. 52; DE 58, pp. 6, 24-25, n. 15; DE 58-2, ¶s 20-21, 25-30; notes 13, 14, supra).(N.C.G.S. §§ 58-58-63-11(f), (n), 75-1.1)); App. 5, pp. 7, 8).

ANICO did not make reasonable inquiry regarding the alleged statements since ANICO did not inquire of: Ben's (1) application recording and signature date; (2) disclosed physicians within his application; (3) lab reports obtained by its own Examiner; (4) question 5(d) "Details" within Ben's MOA Statements to Examiner; (5) health or other insurance upon policy delivery; (6) his undiagnosed illness with particularity within its application; or a (7) customary ScriptCheck, Intelli-Sript or Inspection Report. (DE 58, pp. 24-25, n. 15; DE 58-2, ¶s 28, 31-34, 37-39 and 104). (N.C.G.S. §§ 58-58-63-11(f), (n), 75-1.1)); App. 5, pp. 7, 8; and App. 7).

Moreover, (1) Ben's paramedical examination was dated and recorded by Valerie Locke on September 22, 2009, (2) only the first page of the Agreement was signed by petitioner on January 12, 2010 and then rubber-stamped by ANICO on an unknown date (App. 8), (3) Ben's application was dated by Dell Mitchell on January 29, 2010, (4) petitioner's Agent's Report was not attached by ANICO to the policy issued and delivered by ANICO (App. 6), (5) Ben's Amendment within the policy is neither dated nor signed (App. 6, Form NIA (4-81)), and (6) ANICO did not rely on any exam or application question in denying petitioner's claim. (App. 52); DE 1-19.

7. ANICO Violated N.C.G.S. § 58-63-15(11)(i)

ANICO attempt[ed] to settle petitioner's claim "on the basis of an application which was altered without notice to, or knowledge or consent of, the insured." The evidence proves that Mitchell received Ben's undated application sent by petitioner on January 12, 2010 before January 28, 2010. See n. 13, n. 14, supra. After receipt of Ben's signed Replacement Form and ADB Form and issuance of petitioner's agent number on January 28, 2010, Mitchell dated Ben's application on January 29, 2010.

Mitchell never inquired of when Ben signed and completed his application or sought Ben's knowledge or consent or noticed Ben that she dated his application, which is imputed to ANICO.[21] And ANICO denied petitioner's claim on the alleged "basis of representations given to the Company on the Application signed by Ben Laschkewitsch on January 29, 2010." (App. 7, Ben's undated application; App. 47, Mitchell's January 28, 2010 notice; App. 52, p.1, 1st ¶, 1st sentence, ANICO's basis for denying petitioner's claim). (N.C.G.S. § 58-63(11)(i)); App. 5, p. 7; Apps. 6, 7).

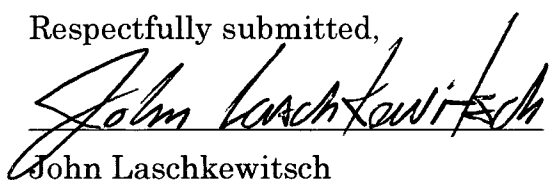
Petitioner has been injured. Petitioner lost over $144,000 in lost premiums on a policy covering his Father's life, has a $48,000 IRS residential tax lien, has no working heat/air, microwave, refrigerator or clothes dryer, electrical and plumbing problems, damaged credit, damaged property, lost retirement funds, no working car, excessive debt and many health issues. (IFP Application/Motion, App. 17, ¶s 22-84).

CONCLUSION

Based upon the foregoing, the courts below should be summarily REVERSED with treble damages and pre- and post-judgment interest. In the alternative, this petition for a writ should be GRANTED or remanded with assigned representation.

This the 1st day of September, 2018

Respectfully submitted,



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[21] So ANICO's alleged injury 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 US at 42. Also, this Court should review DE 58, DE 58-2-26, DE 59 and DE 60.