

No. 17-9345

**In the
Supreme Court of the United States**

JOHN LASCHKEWITSCH,

Petitioner,

v.

TRANSAMERICA LIFE INSURANCE COMPANY

Respondent.

PETITIONER'S RULE 44 PETITION FOR A REHEARING

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I. REASONS FOR GRANTING A REHEARING ENBANC OR BY QUORUM

A. Transamerica's Unsigned, Undated, Ineffective, Untimely Received And Future Producer Contract Is "Nugatory And Void For Indefiniteness"

North Carolina "courts hold a contract, or offer to contract, leaving material portions open for future agreement is nugatory and void for indefiniteness." "The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified. Therefore, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974)(App. A); *Miller v. Rose*, 138 N.C. App. 582, 587-88, 532 S.E.2d 228, 232 (2000); 1 Elliot on Contracts, sec. 175.

Petitioner's Sales Contract (Pet.App. 6, pp. 1-4) does not include the terms arbitration or dispute resolution and has no arbitration provision within. On April 13, 2009 petitioner signed the Sales Contract, but did not receive or ever sign or date any page of Transamerica's ten-page Producer Contract. (Pet.App. 8, pp. 1-10). And though ordered to produce proof of when petitioner had received such Producer Contract, Transamerica twice admitted that it had "nothing further to produce." (Pet.Apps. 27, p. 6, request sixteen; 28, 29). Thus, the parties did not "assent to the same thing in the same sense or meet minds as to all the terms, as required for an agreement. *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735, citing 13 C.J. 264; 6 R.C.L. 644; 1 Page on Contracts, sec. 28; *Elks v. Ins. Co.*, 159 N.C. 619, 75 S.E. 808. See also *Goeckel v. Stokely*, 236 N.C. 604, 73 S.E.2d 618; *Sprinkle v. Ponder*, 233 N.C. 312, 64 S.E.2d 171; *Kirby v. Board of Education*, 230 N.C. 619, 55 S.E.2d 322.

Also, "If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement," which is the language used by Justice Adams in *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735. But here, no arbitration proceeding was agreed upon by the April 13, 2009 Sales Contract, such as to form a party agreement. And there was no agreement to enter into a future contract since the Sales Contract does not specify any material and essential terms for a dispute between the parties to enter into arbitration. *Boyce, supra*, 208 S.E.2d 692, 695. Moreover, ("We conclude that under N.C.G.S § 25-2-207, the governing law (App. 5, pp. 3, 4), the arbitration clause was not part of the sales contract."). *Supak & Sons Mfg. Co. Inc. v. Pervel Ind., Inc.*, 593 F. 2d at 137 (4th Cir. 1979).

Pursuant to NC Supreme Court and Fourth Circuit precedent, there was no arbitration agreement in a March 31, 2014 future Producer Contract (Pet.App. 8, pp. 1-10) from an April 13, 2009 Sales Contract (Pet.App. 6, pp. 1-4) without an arbitration clause, meeting of minds between Transamerica and petitioner and with no settled or agreed to terms of arbitration. Simply put, the Sales Contract does not express an agreement of both parties to arbitrate. See *Boyce, supra*, at 695.

Here, an over four and a half year future Producer Contract was admittedly first printed by Misty A. Murray for Transamerica on March 31, 2014. (Pet.App. 9, p. 2, ¶ 6). But no page is signed, initialed or dated by either party. And no proof was produced proving that petitioner had received such Contract before April, 2014. (Pet.App. 27, p. 6, production request number sixteen; Pet.App. 28, order; Pet.App. 29, Transamerica's two responses). Therefore, the parties never mutually agreed to arbitrate Transamerica's dispute without mutual consent or a disclosed agreement.

See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). ("Who has the primary power to decide arbitrability" turns upon what the parties agreed [to] about *that* matter); *AT&T Technologies*, 475 U.S., at 649 (arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration);" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (same); see also *Steelworkers v. Warrior & Gulf Navigation Co.* 363 U.S. 574 at 583, at n. 7. (Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so). Also, an arbitration agreement must be according to the intentions of the parties. *Mitsubishi Motors*, 473 U.S., at 626; *Allied-Bruce*, 513 U.S., at 271. And this Court has been careful to avoid forcing parties to resolve their disputes through means not intended at the time of contract formation. *E.g.*, *Stolt-Nielsen*, 559 U.S. at 681, 130 S.Ct. 1758.

Neither party signed, initialed or dated any page of the Producer Contract. (Pet.App. 8, pp.1-10). Transamerica never made the Independent Producer Contract effective. And notably, the alleged Producer Contract records Transamerica only as a party. In particular, the first paragraph reads, in pertinent part, as follows:

"This is an agreement, effective on the Date of Contract set forth below, between Transamerica Life Insurance Company (referred to as "we," "us" or "the Company") and the **Independent Producer** named below (referred to as "you"). The terms of this agreement are as follows:

Significantly, no "Date of Contract" is "set forth below" and no "**Independent Producer**" is "named below." (Pet.App. 8, p. 1,1st ¶). And no page lists an effective date or records petitioner as an "**Independent Producer** named below."

So Transamerica only, not petitioner, is a party to the non-effective Producer Contract. And since petitioner is not named within or included as a party, petitioner cannot be bound to the Contract under California law, as determined applicable by the arbitrator. Therefore, this Court should dismiss the arbitrator's award and all of Transamerica's claims, pursuant to CCP §1287.2. (Pet.App. 5, p. 8).

Further, with no arbitration provision within the Sales Contract, the parties did not agree in advance to arbitration. *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. at 651(1986)(DE 54-6), and petitioner never agreed so to submit to arbitration, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). Rather, the arbitrator forced petitioner to resolve disputes through means not intended at the time of contract formation, *E.g., Stolt-Nielsen*, 559 U.S. at 681, 130 S.Ct. 1758, and in disregard of the "basic precept that arbitration `is a matter of consent, not coercion.'" *Id.* (Emphasis added).

And in North Carolina "A contract does not exist where the parties merely negotiate with anticipation that their agreement will ultimately be memorialized in a later document." *Parker v. Glosson*, 182 N.C.App. 229, 641 S.E.2d 735, 737 (2007). Agreements containing unmet conditions are unenforceable. *Id.* Thus, the parties did not "assent to the same thing in the same sense, and their minds meet as to all terms." See *Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985).

This Court and the NC Supreme Court hold that an agreement in advance at the time of contract formation with meeting of minds, settled proposed arbitration terms, mutual consent and which specifies all essential and material terms with no term left for future negotiation is required. Thus, arbitrability did not here exist.

B. The Arbitrator Lacked Jurisdiction With No California Contact From Petitioner, Pursuant To This Court's Precedent

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (S.Ct. 1985) (citing *International Shoe Co. v. Washington*, 326 U.S., at 319); *Hanson v. Denckla*, 357 U. S. 235, 253 (1958). See also *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297(1980).

Petitioner did not avail himself or step foot anywhere within California. On April 14, 2009 petitioner sent his four-page Sales Contract (Pet.App. 6) to Crump Life Insurance, Services, Inc. ("Crump") in Harrisburg, PA by facsimile. (Pet.App. 6, Sales Contract, pp. 1-4, headers). On or about July 20, 2009, insured Ben, a former insurance agent, signed and then submitted his Application Part 1 to Crump after his wife witnessed his Application Part 1 at Ben's residence. (App. B, Affidavit, ¶s 9-29; Pet.App.13, Ben's Application "Part 1," pp. 3, 4, "Date;" Pet.App. 26; receipt by Crump).¹ On August 4, 2009 Joyce Morgan, with EMSI, submitted Ben's application Part 2 to Misha Patel with Crump. (Pet.Apps. 11, 12).² Then on August 12, 2009 the incontestable policy was delivered by Crump in Pennsylvania to petitioner in North Carolina. Thus, every contact, tie and/or relation by petitioner was between North Carolina and Pennsylvania. And petitioner had no contact in or with California.

¹ "App." refers to appendices attached to this petition for rehearing, "Pet.App." refers to numbered appendices attached to petitioner's petition for a writ of certiorari, "Doc." refers to Fourth Circuit filings and "DE" refers to Eastern District of North Carolina filings.

² Transamerica never proved who submitted Ben's "Application Part 1" to Crump since Transamerica never sought any records from Crump. (Pet.App. 27, p. 4, tenth production request; Pet.App. 28, order; Pet.App. 29, Transamerica's responses); DE 35- 37, 38 and 39. And petitioner submitted no application part such as to be bound to a Producer Contract.

The constitutional touchstone remains whether the defendant purposefully established "minimum contacts" in the forum State, here California. *International Shoe Co.*, supra, at 316. The Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). And "particularly in the commercial context [just as here], parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction." *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964). However here, petitioner's Sales Contract (Pet.App. 6, pp. 1-4) does not stipulate a particular jurisdiction for resolution of Transamerica's controversy and/or claims.

Where a forum [CA] seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). But as proven here, petitioner did not direct any activities at residents in California. And with respect to interstate contractual obligations, this Court has often emphasized that "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223 (1957); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984). However here, petitioner not once reached out or created any relationships or obligations or a contact or tie with a citizen in California.

This Court frequently draws from its reasoning in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). As a rule in these cases, this Court has inquired whether there was "some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, California, thus invoking the benefits and protections of its laws." See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)(same); *Burger King Corp.*, *supra*, 471 U.S. at 462, 474-475(same); *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 105, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987)(same). Here, petitioner never acted to avail himself by conducting an activity in the State of California such as for the California arbitrator to hold jurisdiction over petitioner.

"In every case where we have applied this test, we have focused solely on the magnitude of the defendant's in-state contacts..." *Daimler Ag v. Bauman*, 134 S.Ct. 746, 767 (S.Ct. 2014), which in this case were none. And in *Goodyear Dunlop Tires Operations, SA v. Brown*, this Court added the phrase "essentially at home" to this Court's prior formulation of the rule. 564 U.S., at ___, 131 S.Ct. at 2851 (S.Ct. 2011). See also *Daimler*, *supra*, at 746, 769. However, in denying petitioner's petition for a writ, this Court disregarded its "every case" precedent since petitioner had no in-state contacts and was never "essentially at home" within the State of California.

Also, "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State. Two related aspects of this necessary relationship are relevant in this case. *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (S.Ct. 2014). First, the relationship must arise out of contacts that the "defendant *himself*" creates with the forum State. *Burger King Corp*, *supra*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

Second, this Court's "minimum contacts" analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there. See, e.g., *International Shoe, supra*, at 319, 66 S.Ct. 154 (Due process "does not contemplate that a state may make binding a judgment *in personam* against an individual ... with which the state has no contacts, ties, or relations")(Emphasis added); *Hanson, supra*, at 251, 78 S.Ct. 1228 ("...a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him"). (Emphasis added).

Thus, since petitioner had no minimal contacts, ties or relations in California, the arbitrator lacked jurisdiction over petitioner. So this Court should, on this basis, follow its "in every case...essentially at home" jurisdictional due process precedent and summarily REVERSE the arbitrator's award and judgments of the lower courts against petitioner under the Fourteenth Amendment. (Emphasis added).

C. The Policy And Application Parts 1 And 2 Became Incontestable On August 12, 2011 And The Policy Does Not Permit Any Legal Process Against The Beneficiary Petitioner

The policy and application parts 1 and 2 within (Pet.App. 7), was issued on August 12, 2009 and became contractually and statutorily incontestable on August 12, 2011. (Pet.App. 7, policy, p. 6, General Provision, Incontestability of the Policy; Pet.App. 5, p. 4, N.C. Gen. Stat. §§ 58-38-40(a),(b), 58-58-22(2)). Because application parts 1 and 2 were made in North Carolina and the policy was delivered in North Carolina, the policy, including its attached application parts 1 and 2, is subject to North Carolina law. (Pet.App. 5, p. 4, N.C. Gen. Stat. § 58-3-1). See also Pet.App. 7, the policy contract, p. 6, General Provision, "This Policy is Our Contract with You."

Thus, the policy and application parts 1 and 2 could not have been contested by Transamerica beyond August 12, 2011. Moreover, North Carolina insurance law binds Transamerica to the policy's contractual provisions. See Pet.App. 5, p. 4, N.C. Gen. Stat. § 58-38-40(a), which states, in pertinent part, as follows:

"The provisions of this Article will not operate to relieve any insurer from any provision of law regulating the contents or provisions of insurance policies or contracts nor operate to reduce an insured's or beneficiary's rights or protection granted under any statute or provision of law."

Moreover, North Carolina's contestability statute, N.C. Gen. Stat. § 58-58-22

(2) (Pet.App. 5, 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,"³ which was overlooked by the arbitrator and both lower courts. The policy was in force from its August 12, 2009 Date of Issue through Ben's death on January 15, 2012, over two years and five months. And premium was accepted electronically by Transamerica beyond Ben's death, such that the only statutory exception on non-payment of premium does not here apply.⁴ Therefore, pursuant to North Carolina law, "the validity of the policy shall not be contested" by Transamerica. And North Carolina Supreme Court precedent precludes Transamerica's untimely contest.

³ "[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). So, N.C.G.S. 58-58-22(2) controls.

⁴ Evidence that Transamerica received premium after Ben's death is that Transamerica refunded applied premium from Ben's January 15, 2012 death through February 12, 2012 within its first interest only check mailed to petitioner. (App. C; Pet.App. 4, p. 7, lines 1-6).

1. United States Supreme Court Contestability Precedent

"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. *Mutual Ins. Co. v. Hurni Co.*, 263 U.S. 167, 175 (S.Ct. 1923). Here, insured Ben lived for over five months beyond the August 12, 2011 expiration of Transamerica's contestable period. (App. D).

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 U.S. 379, 384 (S.Ct.1935).⁵

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 U.S. at 212, n. 2, n. 3 (S.Ct. 1937). Here, Transamerica's March 31, 2014 first contest was waged over two years and seven months after its contestable time period had expired.

⁵ The policy's contestability period expired on August 12, 2011. And Transamerica's first policy contest was on March 31, 2014. So, pursuant to this Court's precedent, Transamerica has no resort to equity and no opportunity to contest the liability of the policy at law.

Moreover, this Court affirmed the Fifth Circuit in *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, 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 execution of the policy, which is charged to have been procured by alleged false statements." 293 F. 496. Thus, Transamerica's "right to contest the policy" was "lost" since Transamerica did not "invoke judicial action" by August 12, 2011; but, by its own volition, delayed commencing its first contest until March 31, 2014.

2. North Carolina Supreme Court Contestability Precedent

American Trust Co. v. Ins. Co. of Virginia, 173 N.C. 558, at 612-620 (App. E), as cited by this Court and the NC Supreme Court, controls. See *American Life Ins. Co. v. Stewart*, 300 U.S. 203, n. 2 (S.Ct. 1937); *Chavis v. Southern Life Ins. Co.*, 347 SE2d at 427 (N.C. 1986). "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.* In addition, "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. "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..." (Emphasis added).

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, [just as here], would be the nonpayment of premiums." *Am. Trust Co.*, at 615-16. (App. E)(Emphasis added). As well, "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. (App. E)(Emphasis added).

As also held by the North Carolina 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 Transamerica], from asserting this defense[s]." See *Chavis v. Southern Life Ins. Co.*, 347 S.E.2d at 427 (N.C. 1986)(citing *American Trust Co. v. Ins. Co. of Virginia*)(Emphasis added).

3. Unanimous Circuit Courts Of Appeals Contestability Precedent

"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). ("If the 2-year period, after which the policy became incontestable, except for nonpayment of premiums, ran for all purposes..., the answer set up no defense[s] and summary judgment was properly granted. *Wallach v. Aetna Life Ins. Co.*, 78 F. 2d 647, 648 (2nd Cir. 1935); *Franklin Life Ins. Co. v. Bieniek*, 312 F. 2d at 368 (3rd Cir. 1962) (same)." "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. Am. Life Ins. Co.*, 683 F. 2d, 96 (4th Cir. 1982).

See also *Provident Mutual Life Ins. Co. v. Parsons*, 70 F.2d 863,866 (4th Cir. 1934). ("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"). *Scharlach v. Pacific Mutual Life Ins. Co.*, 9 F. 2d 317, 318 (5th Cir. 1925); *see also Pickering*, 293 F.496, 499 (*cert. denied*).

"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). Also, ("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). "A Contest, within the meaning of the provision of the clause in question, is confined to appropriate court proceedings within the time limited." See *Peake*, 15 F. (2d) 303 (8th Cir.). ("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 Gen. Life Ins. Co.*, 847 F.2d at 588 (9th Cir. 1988); *Stewart v. American Life Ins. Co.*, 85 F.2d 791,792 (10th Cir.1936)(same). "Incontestability clauses function much like statutes of limitations. While they recognize fraud and all other defenses, they provide insurance companies 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); *Densby v. Acacia Mut. Life*, 78 F. 2d, 205, 6 (D.C.Cir.1935).

Thus this Court, the NC Supreme Court and all U.S. Circuit Courts of Appeal hold that an insurer must commence a contest within its statutory and contractual 2-year contestable time period, which Transamerica failed to do by over two years and seven months. Further, "The Beneficiary" General Provision in the policy states that "To the extent permitted by law, no death benefit will be subject to the claims of the Beneficiary's creditors or to any legal process against the Beneficiary." See Pet.App. 7 policy, p. 3, "Protection of the Death Benefit." (Emphasis added).⁶

D. The Arbitrator's Award Is Deeply Flawed And Should Be Reversed

The arbitrator admitted that the policy, which includes Ben's application, is incontestable (Pet.App. 4, p. 6, lines 17-18), that no false answer was made in Ben's application Part 1 (App. 4, p. 6, lines 11-16), "there is no evidence that Respondent instructed Ben to lie in his answers to the paramedic... preparing Part 2 of the application" (Pet.App. 4, p. 5, lines 11-13; p. 6, lines 11-16)... and "At that time, this was 'apparently true'...He knew that he probably had ALS and FTD, but had not yet been diagnosed or treated for it, or told by a doctor that he had it." (Pet.App. 4, p. 4, lines 18-23). Yet, he held that petitioner made omissions in Ben's incontestable application without relying on a false answer. And this is untrue since Ben was first referred to a specialist in an "ALS Certified Center of Excellence" for a March 23, 2010 consultation "for possible ALS." (Petition, pp. 35-37; App. G, pp. 1-5; App. H).

⁶ Pursuant to N.C.G.S. §58-38-40(a), "The provisions of this Article will not operate to relieve any insurer from any provision of law regulating the contents or provisions of insurance policies or contracts nor operate to reduce an insured's or beneficiary's rights or protection granted under any statute or provision of law." (Pet.App. 5, p. 4). And pursuant to N.C.G.S. §58-58-95 "When a policy of insurance is affected by any person on his own life, or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof... is entitled to its proceeds against the creditors and representatives of the person affecting the insurance." (App. F). (Emphasis added). Further, the arbitrator determined the "Protection of the Death Benefit" to be ambiguous (Pet.App. 4, p. 15, lines 3-5), which goes against the drafter, Transamerica, and in petitioner's favor.

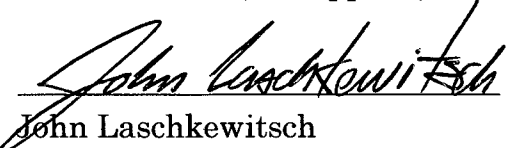
The arbitrator admitted that Transamerica holds the full \$500,000 in policy proceeds. (Pet.App. 4, p. 7, lines 1-10, p. 16, lines 9-10; App. I, petitioner's first and twenty sixth statements of his personally owned account.)⁷ The arbitrator did not rule on the admissibility of evidence or unconscionability, as he had promised to do by order (Pet.App. 4; p. 8-11; Pet.App. 15), misapplied this Court's final judgment precedent over *res judicata*, and disregarded this Court's precedent over jurisdiction and arbitrability. (Petition, pp. 7-24; pp. 1-8, supra). The arbitrator failed to apply CCP §1287.2 (Pet.App. 5, p. 8) since petitioner is not a party with Transamerica to the Producer Contract, pp. 1-4, supra. And the arbitrator agreed to determine fees "by further order or award" and petitioner's counterclaims. (Pet.Apps. 16-21). But the arbitrator then refused to determine petitioner's counterclaims over petitioner not paying fees under AAA Rule 57 before having determined his fees "by further order or award" and without specifying a Rule 57 applicable subpart. (Pet.App. 22).

CONCLUSION

Based on the foregoing, the Court should rehear petitioner's writ and petition for rehearing en banc or by quorum and REVERSE the below judgments and award. And petitioner's counterclaims and amount should be GRANTED. (Pet.App. 19).

Respectfully submitted,

This the 25th day of October, 2018


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⁷ Despite this admission, the arbitrator awarded Transamerica his fees in the amount of \$27,058.82 and (\$500,000). (Pet.App. 4, p.16). An amount listed in parentheses is negative, not positive. Thus, the awarded amount is \$27,058.82. See Pet.App. 4, p. 16, lines 22-23. However here, the district court increased the arbitrator's \$27,058.72 award to \$540,723.76 (Pet.App.3, p.2), which was an erroneous 2,000 percent increase of the arbitrator's award.

**In the
Supreme Court of the United States**

JOHN LASCHKEWITSCH,

Petitioner,

v.

TRANSAMERICA LIFE INSURANCE COMPANY

Respondent.

**PETITIONER'S RULE 44 CERTIFICATE OF GOOD FAITH
AND NO PURPOSE FOR DELAY WITH SPECIFIC GROUNDS
FOR SUMMARY REVERSAL OF THE ARBITRAL AWARD**

John Laschkewitsch
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October 25, 2018

Petitioner files this certificate in good faith and for no purpose of delay. The specific thirty two grounds for rehearing this case are as follows:

1. Petitioner had no contact, ties or relations to California in order for the California arbitrator to have jurisdiction under the Fourteenth Amendment;

2. There is no arbitration provision or stipulation for jurisdiction within petitioner's 4-page Sales Contract (Pet.App. 6, pp. 1-4);

3. Petitioner is not a party to the alleged 10-page Producer Contract (Pet. App. 8, pp. 1-10; petition for rehearing, pp. 1-4);

4. California law, as determined applicable by the arbitrator over the 10-page Producer Contract, requires that a "court shall dismiss the proceeding under this chapter as to any person named as a respondent if the court determines that such person... is not a party to the arbitration" (Pet.App. 5, p. 8; CCP §1287.2);

5. Neither party initialed, signed or dated any page of the alleged 10-page Producer Contract (Pet.App. 8, pp. 1-10);

6. No effective date is recorded on any page of the Producer Contract;

7. Misty A. Murray admitted that she first printed the Producer Contract on March 31, 2014 from her firm's watermarked paper (Pet.App. 9, p. 2, ¶ 6);

8. In April, 2014 Petitioner first received the 10-page Producer Contract with Transamerica's demand for arbitration, which was erroneously attached to the April 13, 2009 4-page Sales Contract;

9. Petitioner did not submit any part of Insured Ben's application such as to be bound to a Producer Contract (App. B, ¶s 9-29, attached; Doc. 25, Exhibit 1);

10. The policy, which includes Ben's application Parts 1 and 2, was issued on August 12, 2009 and became incontestable on August 12, 2011 (Pet.App. 5, p. 4, N.C.G.S. § 58-58-22(2); Pet.App. 7, policy, p. 1, "August 12, 2009 Date of Issue"));

11. Insured Ben died on January 15, 2012, over five months after the NC statutory and contractual expiration of Transamerica's two year contestable time period (App. D, attached);

12. This Court, the North Carolina Supreme Court and all U.S. Circuit Courts of Appeal hold that an insurer must commence a contest within its two year contestable period, not after (petition for rehearing, pp. 8-14, supra);

13. The arbitrator agreed by order, but did not address the admissibility of evidence or unconscionability in his award (Pet.App. 4; p. 8-11; Pet.App. 15);

14. The arbitrator disregarded this Court's final judgment precedent in his erroneous *res judicata* holding (petition for a writ, p. 19; Pet.App. 4, pp. 8, 9);

15. The arbitrator disregarded this Court's due process specific jurisdiction precedent since petitioner had no contact, ties or relations to California;

16. The arbitrator disregarded this Court's arbitrability precedent since no arbitration provision is within petitioner's Sales Contract, the parties did not agree in advance to arbitration, there was no mutual consent or stipulated agreement at the time of contract formation and petitioner was coerced to arbitrate;

17. The arbitrator held that no false answer was made in Ben's application Part 1, that petitioner was not involved in recording or submitting application Part 2, and that at such time Ben probably had ALS and FTD, but had not yet been diagnosed or treated for it, or told by a doctor that he had it (petition, p. 14, supra);

18. The arbitrator disregarded that Ben was referred to an ALS specialist on January 22, 2010 (App. G, pp. 1-5, attached) and first consulted with an ALS specialist in an "ALS Certified Center of Excellence" on March 23, 2010 "for possible ALS" (App. H, attached, first sentence), which was beyond eight months after the policy contract was issued, delivered and in force (petition for a writ, pp. 35-37);

19. The arbitrator disregarded that Transamerica contractually promised "no legal process against the beneficiary" and then declared such policy provision "ambiguous" (Pet.App. 4, p. 15, lines 3-5; Pet.App. 7, policy, p. 3, "Protection of the Death Benefit"), which goes against Transamerica, the drafter of such provision;

20. The arbitrator refused to review petitioner's counterclaims over his fees not being paid yet before he had apportioned his fees by further order or award, as he had promised by order to do (Pet.Apps. 16-22);

21. The arbitrator manifestly disregarded the three year applicable statute of limitations in North Carolina for fraud and breach of contract, which applies to Ben's application Parts 1 and 2, and expired no later than August, 2012 (petition for a writ, pp. 2, 16, 35, 38; Pet.App. 5, p. 3, N.C.G.S. §§1-52(1), (9));

22. The arbitrator manifestly disregarded that Transamerica insufficiently served its demand for arbitration by First Class Mail, pursuant to California law (Pet. App. 5, p. 8, CCP § 1290.4(b)(2); Pet.App. 10));

23. The arbitrator disregarded that Transamerica did not incorporate CCP §1283.05 into its Sales Contract, which bars all of Transamerica's discovery under CCP §1283.1(Pet.App. 5, p. 3, CCP §1282.2(a)(F); pp. 5, 6, CCP §1283.05; CCP §1283.1(a); and CCP §1283.1(b));

24. The district court manifestly disregarded the arbitrator's insufficient service of his award by electronic mail, pursuant to California law (Pet.App. 5, p. 7, CCP §1283.6; Pet.App. 24);

25. The lower courts overlooked that Transamerica filed its petition to confirm eight days after service of the award, three days untimely, such that the arbitrator's award cannot be enforced (Pet.App. 5, p. 8, CCP §1288.4; Pet.App. 25);

26. The lower courts manifestly disregarded that Transamerica still holds the full \$500,000 in policy proceeds and interest and that the arbitrator held that "Respondent John Laschkewitsch is required to pay Transamerica Life Insurance Company \$27,058.82" (Pet.App. 4, p. 16, lines 22-23);

27. The lower courts erred by holding petitioner liable to Transamerica for \$540,723.76 since Transamerica holds the full \$500,000 and interest and half of the arbitrator's fees is \$27,058.82 (Pet.App. 4, p. 16);

28. The arbitrator and lower courts manifestly disregarded petitioner's American Arbitration Association "Affidavit for Waiver of Fees" and no income indigent status, which pursuant to California law, as determined applicable by the arbitrator, means that petitioner cannot be liable for any arbitration fees (Pet.App. 5, p. 7, CCP § 1284.3(a), CCP § 1284.3(b)(1) and CCP § 1284.3(b)(3); Pet.App. 23));

29. The lower courts disregarded North Carolina law under N.C.G.S. § 25-2-207 and Fourth Circuit precedent because no arbitration clause or provision was included within petitioner's Sales Contract and no stipulated agreement to arbitrate was made in writing with an expression of acceptance by petitioner in a reasonable time from April 13, 2009 (Pet.App.5, pp. 3, 4; Pet.App.6; petition for rehearing, p. 2);

30. The lower courts manifestly disregarded the arbitrator's violations of 9 United States Code §§ 10(a)(1), 10(a)(2), 10(a)(3) and 10(a)(4) (petition for a writ, pp. 28-40; Pet.App. 5, p. 2);

31. The lower courts disregarded that the arbitral award "did not include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy" since the arbitrator agreed by his own orders to determine the admissibility of evidence, unconscionability, and all of petitioner's counterclaims, but failed to do so (Pet.App. 4; Pet.App. 5, p. 6, CCP § 1283.4; Pet.Apps.15-22); and

32. The lower courts disregarded that the arbitral award "did not include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy" since the arbitrator misapplied this Court's final judgment, jurisdiction and arbitrability precedent and heard, but ignored North Carolina 3-year statutes of limitation over the policy and application and Transamerica's failures to reasonably inquire and prove due diligence (Pet.App. 4, pp. 8-11; Pet.App. 5, p. 3, N.C.G.S. §§ 1-52(1), (9), p. 6, CCP § 1283.4; petition for a writ, pp. 7-24, 34-35; petition for rehearing, pp. 1-8)).

On rehearing this petition, the Court is requested en banc or by quorum to review the thirty two grounds for rehearing with cited appendices and references. In addition, the Court is requested to follow its specific jurisdiction, arbitrability and contestability precedent. The Court should also follow two year contestability and future contract precedent from the North Carolina Supreme Court and unanimous contestability precedent from the Circuit Courts of Appeals. Further, on rehearing, the Court should review the arbitrator's violations of 9 U.S.C. § 10. See ¶ 30.

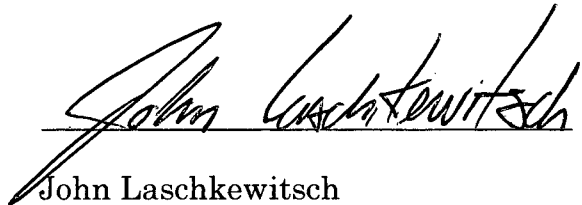
Moreover, since the arbitrator agreed by order to review petitioner's counter-claims, but then refused on the basis of his fees not being paid before apportioning his fees "by way of further order or award," as he also promised by order, the Court should give petitioner an opportunity to brief his counterclaims on the merits.

Finally, the Court is respectfully asked to review petitioner's entire affidavit (App. B, ¶s 1-127) and the supporting exhibits from pages 25-79 at Doc. 25-2, which are all in support of this petition for rehearing.

Petitioner hereby certifies that this petition for rehearing is filed in good faith with grounds and evidence supporting summary reversal and is not for any purpose of delay, under Rule 44 of this Court.

This the 25th day of October, 2018

Respectfully certified and submitted,

A handwritten signature in black ink, reading "John Laschkewitsch", written over a horizontal line.

John Laschkewitsch

Petitioner *pro se*

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Fayetteville, NC 28304

(910) 286-8008

**Additional material
from this filing is
available in the
Clerk's Office.**