18-7709 ORIGINAL

No. 18-A292

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In the Supreme Court of the United States

JOHN LASCHKEWITSCH,

Petitioner,

v.

LINCOLN LIFE AND ANNUITY DISTRIBUTORS, INC., d/b/a Lincoln Financial Group

Respondent.

PETITION TO THE FOURTH CIRCUIT COURT OF APPEALS FOR A WRIT OF CERTIORARI

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January 29, 2019

ISSUES PRESENTED FOR REVIEW

1. Whether contestability precedent from this Court, see *Hurni, Enelow, Stewart, Pickering, Wallerstein and Button;* the N.C. Supreme Court, see *American Trust Co.* and *Chavis;* and unanimous Circuit Courts of Appeals; and the NC Department of Insurance's N.C.G.S §58-58-22(2) mandate, Lincoln's broken contestability promise to insured, VP/Chief of Claim's contestable admission by claim denial. and VP/Chief Underwriter's Rule §30(b)(6) contestability admissions; and authorities holding that Lincoln must have filed its contest within its two-year contestable time period bar Lincoln's June 6, 2013, over fifteen month untimely filed contest? See Apps. 9, 11.

2. Whether Lincoln's breaches of its Agreement paragraphs 9(b), 19(a), (b) and (c), 20(a), 23 and 30; eleven day untimely filed extension request to file its Answer; and failure to meet the substantive requirements of Fed.R.Civ.P.§54(d)(B)(i-iv) in a Rule §54(d)(2)(A)"claim to be made by motion:" file a fee motion and bill of costs within 0-14 days after judgment entry; and adhere to Governing Indiana law and its drafted arbitration provision; and petitioner's special circumstances, bar Lincoln's fees?

3. Whether the courts below omitted Insured Ben's March 23, 2010 first specialist consult "for possible ALS" and petitioner's remaining claims, including that Lincoln: first contested the policy, application and agreement beyond applicable statutes of limitation, affirmed the policy through September 21, 2012, accepted premium after notice and knowledge, did not prove Fed.R.Civ.P. §9(b) time particularity over Ben's application admittedly dated by Mitchell, exercise due diligence or ever inquire of received statements, and committed eight or more unfair claim settlement practices and/or unfair and deceptive trade practices under N.C.G.S. §§ 58-63-15(11); 75-1.1?

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

TABLE OF CITED APPENDICES

APPENDIX 28: Evidence that Lincoln was denied access to insured Ben's records from UCSF and Duke Medical Center without HIPPA-compliant authorization

APPENDIX 29: Lincoln's admissions that authorization was required from Ben's next-of-kin spouse in order to request Ben's confidential and HIPPA-protected financial and medical records and its false statement that it was "required to use" Ben's expired authorization.

APPENDIX 30: Proof that the principal location of Lincoln Financial Group and Lincoln National Life Insurance Company's Life Insurance Service Center is Greensboro, North Carolina

APPENDIX 31: Petitioner's Declaration of injury, damages and hardship resulting in special circumstances, which warrants judgment reversal

APPENDIX 32: Page 1 excerpt of Lincoln's "bill of costs," which was filed 64 days before being "conditioned on a Rule 54(d) judgment" entry

APPENDIX 33: A "Motion for Attorneys' Fees Must Be Filed Within 14 Days From Judgment" and First Penn could not rescind the Policy because it had failed to contest the policy within two years; (citing *First Penn-Pacific Life Ins. Co.* v. *Evans*, et al. Civ. No. WDQ-05-0444 (2009, D. Md); (aff'd 4th Cir.)).

APPENDIX 34: Lincoln's eleven day untimely filed motion for an extension to file its Answer to petitioner's Complaint

APPENDIX 35: Lincoln's July 14, 2014 untimely filed declaration for fees, which was presumptively filed 64 days prior to being "conditioned on a Rule 54(d) judgment" entry, and false statement that it had filed for fees on June 2, 2014; DE 104, ¶ 2, DE 106, p. 1

APPENDIX 63: ABC 13 News Story of former Fayetteville Basketball Jeff Capel's December 13, 2017 death from ALS after being diagnosed by doctors at Duke

APPENDIX 64: Affidavit of Scott T. Laschkewitsch; insured Ben's Brother

APPENDIX 65: Insured Ben M. Laschkewitsch's obituary, lines 19-20

APPENDIX 66: Insured Ben's September 22, 2009 paramedical exam, which was received by Lincoln but not attached to the policy contract by Lincoln

APPENDIX 67: Lincoln's erroneous basis for denying petitioner's claim

APPENDIX 68: Insured Ben's signed and dated policy delivery amendment, which Lincoln failed to attach to the per "H/O error" reissued February 18, 2010 policy

APPENDIX 69: Lincoln's non-recorded or dated and unattached Application Part 2

APPENDIX 70: Excerpts of Dell Mitchell's deposition

APPENDIX 71: *Pearce* v. *N.C. State Highway Patrol Voluntary Pledge Comm.*, 312 S.E. 2d 421, 425-26 (N.C. 1984)

APPENDIX 72: *Shearin* v. *Lloyd,* 246 N.C. 363, 98 S.E.2d 508, 514 (1957)

APPENDIX 73: Lincoln's receipt of MIB Codes 200#EN and 200#ZN and internal acknowledgment of "MIB: Mtpl Hits, IAI"

APPENDIX 74: *Columbian National Life Ins. Co.* v. *Rodgers,* 116 F.2d 705 (10th Cir.1940), *cert. denied*, 313 U.S. 561, 61 S. Ct. 838, 85 L.Ed.1521

APPENDIX 75: Lincoln's May 16, 2012, first inquiry of Mutual of Omaha, which was over 27 months untimely

APPENDIX 76: Lincoln's acknowledged notice from petitioner that "Insured has been denied life insurance from multiple companies within the last nine months"

CITATIONS OF CASE LAW

Page(s)

US CODES, RULES AND NC GENERAL STATUTES

OTHER AUTHORITIES

— PETITION FOR A WRIT OF CERTIORARI —

On November 30, 2018 this Court extended the filing of this petition for 60 days, such as to be properly filed by no later than January 29, 2019. (App. 1).

OPINIONS BELOW

1. On June 28, 2018 the Fourth Circuit affirmed the district court by failing to adhere to its "2-year statutory contestability period" and "fees between 0-14 days *after* the district court issued its order" precedent. (App. 2; pp. 9, 13 & 25-26, below).

2. On December 11, 2017 the district court entered its erroneous Rules 60(a) and 60(b)(4) orders by omitting unanimous state and federal court contestability precedent, jurisdiction, agreement breaches and non-filed fees by motion. (App. 3).

3. On October 1, 2014 the district court entered its erroneous costs, damages, and fee order by omitting Lincoln's agreement breaches and Indiana Law. (App. 4).

4. On September 16, 2014 the district court entered its erroneous summary judgment order in favor of Lincoln by omitting all of petitioner's claims. (App. 5).

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

5 United States Codes §§552a(b) and (b)(6) are involved since Lincoln invaded the personal privacy of Ben by disclosing his medical records without authorization. 28 United States Codes §1251, §1331 are relevant since the contractual "principal place of business" is Greensboro, North Carolina, all activities occurred in North Carolina and no party controversy existed between two or more States. Fed.R.Civ.P. §12(a)(1)(A)(1) is involved since Lincoln moved to extend the filing of its Answer 11 days untimely. Fed.R.Civ.P. §§30(b)(6) and 54(d)(2) are involved because Lincoln's deponent admitted that Lincoln must contest the policy during two years from the Policy Date and Lincoln did not file for fees between 0-14 days *after* judgment entry.

A. STATEMENT OF THE CASE [1]

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 February 18, 2012. Lincoln Financial Group ("Lincoln") issued the first policy on February 18, 2010, reissued a policy per "H/O error" on February 19, 2010 and filed its contest by Answer on June 6, 2013 (DE 6), over fifteen months untimely. Thus, all of its defenses are barred.

The courts below also omitted Lincoln's repeated breaches of its non-mutual agreement, which petitioner will unequivocally prove. (pp. 18-21, below). Omitted further are petitioner's special circumstances and merited claims. And notably, no court below reviewed that Lincoln failed to file a required Fed.R.Civ.P. § 54 motion for its attorneys' fees or timely bill of costs, pursuant to EDNC Local Rule § 54.1.

The lower courts overlooked that insured Ben first consulted by referral with a specialist "for possible ALS" on March 23, 2010, over a month after the policy was issued, delivered and placed in force. The lower courts also omitted that Lincoln failed to inquire of five 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. Omitted as well is that Lincoln filed its first contest beyond NC three year applicable statutes of limitation for its defenses, accepted premium after notice and alleged knowledge, acted to keep the February 18, 2010 policy in force beyond two years and committed six or more unfair claim settlement practices and/or deceptive trade practices under NC law. (N.C.G.S. §§ 58-63-15(11), 75-1.1; App. 7, pp. 7-8)).

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[1] The Court is requested to review the letter to Lincoln from former Cumberland County Chief Superior Court judge Coy E. Brewer, Jr. (App. 6), regarding this Petition for a Writ.

B. SUMMARY OF THE CASE

1. The Incontestable Policy

The policy was reissued (App. 8) per H/O error with a February 18, 2010 Date of Issue (App. 9; DE 89-7). The policy and Ben's application became incontestable on February 18, 2012. (Apps. 9; 10, Ben's original application). Lincoln's first contest of the policy, and Ben's application within, was by answer on June 6, 2013 (App. 11; DE 6), over 15 months untimely and 66 days after service of petitioner's Complaint, pursuant to federal rule and NC statute; pp. 5; 26, n. 14, below. And by precedent from this Court, *Hurni*, *Enelow*, *Stewart, Pickering, Wallerstein and Button*; the NC Supreme Court, *American Trust Co.* and *Chavis*; and Circuit Courts of Appeals, pp. 6-15 below; Lincoln's defenses are all barred for filing its first policy and application contest over 15 months after the expiration of its two-year contestable time period.

2. Lincoln Breached Its Alleged Agreement, Failed to File A Fee Motion And Did Not File A Timely Bill Of Costs

Lincoln did not secure HIPPA-compliant written consent from Ben's spouse, his only next-of-kin. Lincoln then disregarded this fact and proceeded to repeatedly breach its agreement ¶9(b) (App.12, p. 2 of 7; DE 89-6 at 4), by seeking all of Ben's records absent authorization. Also, Lincoln breached the agreement by terminating its agreement on the improper basis of "Requested by Management" (App. 13; DE 89-6 at 217), which is not among its six contractually justified termination reasons. (App.12, pp. 4, 5, ¶19; DE 89-6 at 6, 7). Third, Lincoln erred by seeking the return of petitioner's commissions. (App. 12, ¶ 20). Fourth, Lincoln neither moved to stay nor to compel arbitration, despite drafting that "any dispute that may arise between the Producer and Lincoln...shall be settled by arbitration." (App.12, ¶ 23; DE 89-6 at 8).

With two or more attorneys, two or more paralegals and its corporate counsel all working on this case, and since Lincoln drafted the agreement, Lincoln proffered none and cannot support a reasonable excuse for not following its exclusive remedy of arbitration over its agreement controversy, not the district court. Fifth, petitioner signed stand-alone p. 7 of the agreement on January 22, 2010 (App. 12, p. 7 of 7), such that the NC statutes of limitation for breach and alleged fraud expired on January 22, 2013. But Lincoln first contested the agreement on June 6, 2013, which was over five months untimely, pursuant to NC law and North Carolina Supreme Court precedent. And sixth, Lincoln and the district court both relied exclusively on NC law, despite that "This agreement shall be construed in accordance with and governed by the laws of the State of Indiana." (App. 12, p. 7 of 7, ¶ 30; DE 89-6 at 8).

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 by VA neurologist Dr. Sampath Charya to determine whether he had ALS, which was over a month after the policy contract was issued. (App. 9, policy, p. 3, "Date of Issue February 18, 2010"). Further, neither court below addressed NC three year statutes of limitation, contestability precedent from this Court, the N.C. Supreme Court and all U.S. Circuit Courts of Appeals, NC statutory contestability authority or Lincoln's failures to inquire and plead or prove Rule 9(b) particularity, broken promises, policy contract affirmations beyond two years and its estoppel by depositing premium after notice and knowledge. Neither were Lincoln's unfair claim settlement practices and unfair and deceptive trade practices reviewed by the courts below. See **"REASONS,"** pp. 5-40 following; and N.C.G.S. §§ 58-63-15(11), 75-1.1.

REASONS FOR GRANTING THE PETITION

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

Lincoln reissued the policy on February 19, 2010 with a February 18, 2010 "Date of Issue" (App. 8, pp. 1-6), which became incontestable on February 18, 2012. (App. 9, policy, p. 3, "Date of Issue February 18, 2010")(N.C.G.S. § 58-58-22(2); App. 7, p. 6)). Lincoln contested the policy and Ben's application on June 6, 2013 (App. 11), which was over fifteen months after its 2-year contestable time period expired.

The policy was delivered in North Carolina and so is subject to NC law. See N.C. Gen. Stat. §58-3-1. (App. 7, p. 5). North Carolina's contestability statute, N.C. Gen. Stat. §58-58-22(2)(App. 7, p. 6), 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. 2, 3, 4 & 5).

On March 9, 2012 Lincoln was noticed of Ben's death. (App. 14, "Date Notice Rec'd"). And Lincoln kept the policy in force for over two years by accepting and then billing for premium over a month after it received notice. (App. 15, "04/18/2012 received" and deposited premium; App. 16, "Paid-To 03-21-12, Billed-To 06-21-12").[3]

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[2] "[A] precisely drawn, detailed statute pre-empts more general remedies" (quoting *Brown* v. *GSA,* 425 U.S. 820, 834, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976)); as in all statutory construction cases, we "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." *Hardt* v. *Reliance Standard Life Ins. Co.,* 560 US ___, ___, 130 S.Ct. 2149, 2156,176 L.Ed.2d 998 (2010). So, N.C.G.S. 58-58-22(2) controls.

[3] The district court erroneously held, with no evidence supporting its fictitious holding, that petitioner requested that Lincoln bill petitioner (App. 5, p. 16, ¶ 2), which is false.

By depositing petitioner's ninth premium three months after Ben's death and then again billing petitioner "To 06-21-12," Lincoln kept the policy paid and in force through September 21, 2012, over five months beyond Lincoln's contestable period. So, 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's contestable provision since the North Carolina State Legislature authored the mandate of N.C. Gen. Stat. § 58-58-22(2)(App. 7, p. 6). 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 February 18, 2010. (App. 9, p. 3, "Date of Issue"). *Mut. Ins. Co.* v. *Hurni Co.*, 263 U.S. 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 Lincoln], 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. 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." See *Hurni,* at 176.

"The rights of the parties under such an incontestable clause as the one contained in this [policy] 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.*

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;" see n. 2, supra. Thus 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 [other] 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 [of insured] may have occurred, action has 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." See *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 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 U.S. at 212, n. 2, n. 3 (S.Ct. 1937)(DE 142-8). And as here, Lincoln has no resort to equity or in law, pursuant to this Court's precedent, since it brought its contest after the 02/18/2012 contestable expiration period; and 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 U.S. 720 [44 S.Ct. 229, 68 L.Ed. 524] (1923). In *Pickering*, the Fifth Circuit held that "Under the terms of the policy now in question, the insurer's right to contest would have been lost, [here Lincoln'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 execution of the policy, which is charged to have been procured by alleged false statements." 293 F. 496. Thus, Lincoln's "right to contest the policy" was "lost" since it did not "invoke judicial action" by February 18, 2012; but, by its own volition, delayed the filing of its policy contest until June 6, 2013. (App. 11).

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. See *Sanderson* v. *Rice,* 777 F.2d 902, 905 (4th Cir.1985). However, by the Fourth Circuit's affirmation, the lower court omitted NC Supreme Court precedent.

American Trust Co. v. *Ins. Co. of VA*, 173 N.C. 558, at 612-620 (App. 17; DE 142-3), 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)(DE 142-7).[4] "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.*

[4] This NC Supreme Court precedent was briefed in both lower courts; however, omitted by both courts, which prejudiced petitioner. See DE 142; pp. 4-12; DE 149, pp. 3-5 (EDNC); and Doc. 12, pp. 8, 9 and 16-26; Doc. 20, pp. 6-12 (Fourth Circuit).

Also, "the incontestable clause covers this defense of the bad health of the insured [Ben] 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 [sole] 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 Lincoln] 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, [just as here], would be the nonpayment of premiums." *American Trust Co.,* at 615-16. (Emphasis added).

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, should thereafter be treated as valid." *Id.* at 617. (Emphasis added). However, this briefed and relevant NC Supreme Court precedent was omitted by the courts below.

"This is also in accordance with the authorities holding that if the defendant [here Lincoln] 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.*"

American Trust Co. N.C. at 620. "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.* As further held by the NC Supreme Court, "since the incontestability provision does not expressly permit [Lincoln] 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 Lincoln], from asserting this defense[s]." See *Chavis* v. *Southern Life Ins. Co.*, 347 S.E.2d at 427 (N.C. 1986)(App.18)(citing *American Trust Co.* v. *Ins. Co. of Va.*).[5]

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[5] Though briefed, the district court erred by omitting contestability precedents from this Court, the NC Supreme Court and all U.S. Circuit Courts of Appeals. (DE 142; pp. 4-12; DE 149, pp. 3-5). Moreover, *American Trust Co.* (App. 17) has been cited by this Court and the Second, Fourth, Seventh, Eighth, Ninth, Tenth and D.C. U.S. Circuit Courts of Appeals.

C. Unanimous Circuit Courts Of Appeals Contestability Precedents

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); *see also Pruco Life Ins. Co.* v. *Wilmington Trust Co.*, 721 F.3d 1(1st Cir. 2013)("The court expressly rejected the argument that there could not have been a mutual rescission because the terms of the policy would have prevented unilateral rescission (specifically, because the contestable period had expired)). The judgment of the district court is *affirmed.*" See also *Wallach* v. *Aetna Life Ins. Co.* ("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[s] 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"). 78 F. 2d 647, 648 (2d Cir. 1935).

"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". *New England Mutual Life Ins. Co.* v. *Gillette*, 171 F.2d 500(2d Cir. 1948). *See also Franklin Life Ins. Company* v. *Bieniek*, 312 F. 2d at 368 (3rd Cir. 1962)("The great weight of authority supports the position that the insurer must at least disavow liability within the contestable period to be relieved — not necessarily by legal action, but some definite step, specifying the ground of complaint, in such form as to effect a cancellation of the contract").

The Fourth Circuit holds that "The insurer has a statutory period in which to ascertain the facts and act thereon, and failing so to do it will not be heard to assert defenses precluded by a statute of incontestability." *Sutton* v. *American Health & Life Ins. Co.*, 683 F.2d at 96 (4th Cir. 1982)(N.C.G.S. 58-58-22(2); App. 7, p. 6)). 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 information ...given the Company as the basis of its acceptance of the risk, cannot reasonably 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"), just as here.[6]

In *Scharlach* v. *Pacific Mutual 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 (*cert. denied*), p. 9, supra. As well, 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).

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[6] Since both lower courts omitted Fourth Circuit contestability precedent, petitioner did not receive "equal justice under the law;" this Court's engrained and fundamental principle.

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); *cert. denied,* 302 U.S. 755, 58 S.Ct. 283, 82 L.Ed. 584. 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. 1926).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), *cert. denied,* 488 U.S. 909, 109 S.Ct. 261, 102 L.Ed.2d 250. And in *Stewart* v. *American Life Ins. Co.*, the Tenth Circuit held "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 the complainant [Lincoln] 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 [Lincoln] 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)(same).

"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 Mut. Life Ass'n*, 78 F.2d at 205-06 (D.C. Cir. 1935). See also App. 19, ¶s 2, 4, 5, 16, 51-60, 99, 100, 111, 120-121, 126, 131-132, 138-140, 146 and 153-159.[7]

D. Lincoln Three Times Admitted That It Must Contest The Policy By the February 18, 2012 Expiration Of Its Contestable Period

First, Lincoln noticed Ben with his application, by "**IMPORTANT NOTICE**," that "during the two year contestable period... a claim may be denied..." (App. 20, "Contestability"). Second, admitted by Lincoln's Vice President-Claims/Chief Claims Officer, in denying petitioner's claim, is that "A policy is considered 'contestable' for two years from its Issue Date" (App. 21, 7th ¶, third sentence), which expired on February 18, 2012. (App. 9, p. 3). Third, Lincoln's Vice President/Chief Underwriter twice admitted during his Fed.R.Civ.P. §30(b)(6) deposition that Lincoln can contest the policy during two years from the policy's Policy Date, which ended on February 18, 2012, as well. (App. 9, p. 3; App. 22, Carreira Dep. 18:5-22; and 80:22-81:10).

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[7] The lower courts abused their discretion since this Court, the NC Supreme Court and all Circuit Courts of Appeals hold that a life insurance policy contest must be commenced in court within an insurer's 2-year contestable time period, which Lincoln failed to do. See 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); & Annotation:"What Amounts to Contest within Contemplation of Incontestability Clause," 95 A.L.R.2d 420, §2 (1964), which all maintain the same. And this Court should firmly embrace its *Hurni, Enelow, Stewart, Pickering, Wallerstein, and Button* precedents.

Specifically, during Carreira's Rule 30(b)(6) deposition, he was asked about Lincoln's contestable right after two years and replied, in pertinent part, as follows:

> "Well, during the two year contestable period, we have the ability to make sure that the information presented to us was factual...Two years from the policy date"(App. 22, Carreira Dep. 18:5-15; DE 89-1, 2)... and "Yes," Lincoln's "contestability period is measured from the policy date" (App. 22, Carreira Dep. 80:21-25), which expired on February 18, 2012.

Fed.R.Civ.P. §30(b)(6) provides that "a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more *officers, directors, or managing agents, or designate other persons who consent to testify on its behalf.*" Fed.R.Civ.P. §30(b)(6) pertains to depositions of organizations, including corporate entities. "The organization is permitted to designate a person to testify on its behalf, and the organization is bound by that testimony." See *Covol Fuels No. 4, LLC* v. *Pinnacle Min. Co.*, LLC, 785 F. 3d 104, 113, n. 13 (4th Cir. 2015); *Reilly* v. *Natwest Markets Group, Inc.*, 181 F.3d 253, 268 (2d Cir. 1999). (Emphasis added).

"Others may be called to testify in the context of particular litigation as the designated representatives of their employers." See Fed.R.Civ.P. 30(b)(6)(requiring "subpoenaed organizations to designate witnesses to testify on their behalf"); *Lane* v. *Franks*, 134 U.S. 2369, 1284, 1289 (S.Ct. 2014). Under Fed.R.Civ.P 30(b)(6), when a party [here petitioner] seeking to depose a corporation [here Lincoln] announces the subject matter of the proposed deposition (App. 23, Sch. A, Topics 2, 24, 26, 46-49), the corporation must produce someone familiar with that subject [Carreira]. See James William Moore *et al., Moore's Federal Practice,* ¶ 30.25[3] (3d ed.1998).

A rule 30(b)(6) designee does not give his personal opinions, but presents the corporation's "position" on the topic. See *United States* v. *Taylor,* 166 F.R.D. 356, 361 (M.D.N.C.1996) (quoting 8A Charles Alan Wright *et al.,* Federal Practice and Procedure, § 2103, at 36-37 (2d ed.1994)).When a corporation produces an employee pursuant to a rule 30(b)(6) notice, it represents that the employee has the authority to speak on behalf of the corporation with respect to the areas within the notice of deposition. This extends not only to facts, but also to subjective beliefs and opinions. (citing 4 J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice ¶ 26.56[3], at 142-43 (2d ed.1984)); *Resolution Trust Corp.* v. *S. Union,* 985 F.2d 196, 197 (5th Cir.1993); *Brazos River Auth.* v. *GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006).

In a Rule 30(b)(6) deposition, there is no distinction between the corporate representative and the corporation. *Taylor,* 166 F.R.D. 356, 361, supra (M.D.N.C. 1996)(noting that in a Rule 30(b)(6) deposition "the corporation appears vicariously through its designee")). Particularly, "The Rule 30(b)(6) designee does not give his personal opinion. Rather, he presents the corporation's `position' on the topic." *Id.* (citing cases). "The designee testifies on behalf of the corporation [here Lincoln] and holds it accountable accordingly." *Starlight Int'l, Inc.,* v. *Herlihy,* 186 F.R.D. 626, 638 (D.Kan.1999) (holding that a corporation has a duty under Rule 30(b)(6) to provide someone who is knowledgeable in order to provide "binding answers on behalf of the corporation"[Lincoln]).[8] See App. 23, Topics 1-53. (Emphasis added).

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[8] Carreira's binding answer on behalf of Lincoln that "during the two year contestable period we have the ability to make sure the information given to us was factual" prevents Lincoln's pursuit of a contest after February 18, 2012. (App. 9, p. 3,"Date of Issue February 18, 2010; February 18, 2010 Policy Date").The lower courts erred by disregarding Carreira's admissions, by holding that "the insured's lifetime did not exceed two years from the Date of Issue" (App. 5, p. 15), and by ignoring Lincoln's over fifteen month untimely filed contest.

E. Lincoln Was Given A Mandate By NCDOI To Abide By N.C. Gen. Stat. § 58-58-22(2) And To Delete Its Fraud Exclusion

Lincoln attempted to insert a fraud exclusion within its contestability clause. However, the NC Department of Insurance denied Lincoln's filing and mandated that Lincoln must abide by N.C.G.S. § 58-58-22(2) for all policies delivered in North Carolina, which excepts "nonpayment of premium" only and mandates that a policy "shall not be contested after...in force for two years from its date of issue." (Apps. 7, p. 6, N.C.G.S. §58-58-22(2); 15; and 24, NCDOI letter and response from Lincoln)).

II. The Courts Below Omitted That Lincoln Breached Its Agreement, Failed To File A Fee Motion And Did Not File A Timely Bill Of Costs

A. Lincoln Breached Paragraph 9(b) Of Its Producer Agreement

Ben's 24-month "AUTHORIZATION FOR RELEASE OF INFORMATION" (App. 25) was dated February 2, 2010 by Mitchell and expired on February 2, 2012. Lincoln hired Broyles Claim Decision Support, Inc. ("Broyles") to secure all of Ben's confidential medical records. However, Broyles failed to secure a HIPPA-compliant authorization from Ben's widowed spouse, his only next-of-kin. (App. 26, pp. 1-12).

Nonetheless, Lincoln was undeterred. Lincoln used Ben's expired and non HIPPA-compliant authorization to pull records from Dr. Meltzer, Dr. Van Tran and the Fayetteville VAMC. (App. 27). But Duke Medical Center and UCSF repeatedly noticed Lincoln that it could not receive Ben's records without current authorization (App. 28, pp. 1-18), which Lincoln admitted was required. (App. 29, pp. 1-3).

Lincoln's procurement, use of and reliance on illegally obtained records from Dr. Meltzer, Dr. Van Tran and the Fayetteville VA Medical Center was a breach of agreement ¶ 9(b). Lincoln's breach was unauthorized access, use and disclosure.

In particular, Lincoln agreed by its own drafted terms, that it was "prohibited from using consumer or customer non-public personal information as required by state or federal law, regulation or code." Further agreed by Lincoln, is that it "would not disclose consumer or customer non-public personal information to any third party without prior written permission of the disclosing party." (App.12, p. 2, ¶9(b)).

Lincoln did not have written permission since it failed to get an authorization from Ben's next-of-kin and Ben's authorization was expired. So Lincoln violated and breached Ben's 2-year authorization; HIPPA laws; NC laws; 5 U.S.C. §§ 552 a(b), (b)(6); ¶9(b) of its agreement; and its Privacy Notices. (Addendum, pp. 1-15; App.12, p. 2, ¶9(b); App. 19, ¶s 67-71, 74-79, 82-84, 88-90, 112, 117, 125 & 137; & App. 25)).

B. Lincoln Breached Paragraphs 19(a), (b) and (c) Of Its Agreement

Lincoln was required under ¶19(a), of the agreement it drafted, to provide petitioner "upon 30 days written notice to the other party." [9] But on April 22, 2013 Lincoln terminated the agreement "effective 04/22/2013," the very same day (App. 13), which did not give petitioner "30 days written notice." Also, in ¶19(c) of its agreement, Lincoln agreed that "Termination for cause results in the forfeiture of any further payments and any accrued rights to participate in any plans, programs or benefits which require an active Producer's Agreement." (App. 12, pp. 4, 5).

Moreover, in "Termination for cause shall be:" Lincoln agreed to six specific termination reasons. (App. 12, p. 5, ¶19(c)). But Lincoln terminated the agreement over "Requested by Management" (App.13), which is not a permissible termination basis under agreement ¶s 19(b) or (c). Thus, Lincoln breached ¶s 19(a), (b) and (c).

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[9] Pages 1 and 7 only of the alleged agreement were received and submitted between the parties. And notably, pages 1 and 7 were sent as pages 04/010 and 05/010, but pages 2-6 of 7 were never mailed, scanned, faxed or otherwise received or submitted. (App. 12, pp. 1-7).

C. Lincoln Breached Paragraph 20(a) Of Its Producer Agreement

Lincoln's termination letter did not specify the term "for cause." (App. 13). Therefore, Lincoln agreed that "Vesting and compensation shall be as described in the Producer Compensation Plan for the Producer's classification in effect at the time of termination." (App. 12, ¶ 20(a);"Compensation Payable After Termination")). However, despite its own drafted terms, Lincoln improperly sought indemnification in the district court of all of petitioner's earned compensation and commissions.

This effort by Lincoln was an evident breach of ¶ 20 since producer petitioner was to keep his compensation payable, not forfeit his commissions. And the district court also manifestly disregarded ¶ 20 by awarding Lincoln treble damages against petitioner over all of petitioner's compensation payable. (App. 5, pp. 9-10 and 14-15).

D. Lincoln Breached Paragraph 23 Of Its Producer Agreement

With Lincoln's Smith Moore & Leatherwood, LLP large law firms in Raleigh and Charlotte, North Carolina, principal location of its life insurance operations in Greensboro, North Carolina (App. 30), and its foreign Indiana corporate counsel, Lincoln cannot proffer a reasonable excuse for failing to file a motion to stay and a motion to compel arbitration. Specifically, "all claims or controversies arising out of or relating to this Agreement shall be settled by arbitration." (App. 12, p. 6, ¶ 23).

"This paragraph provides the exclusive remedy for any dispute that may arise between the Producer and Lincoln. The arbitrator(s) shall have the authority to determine all disputes...may award compensatory damages, plus interest and specific performance...judgment upon the award may be entered in a court having jurisdiction...no claim may be made after the date... such dispute, would be barred by the applicable statutes of limitation," as here. (App.12, p. 6, ¶ 23); pp. 31-2 below.

Moreover, according to the exclusive remedy for any dispute, as drafted by but patently ignored by Lincoln, "Each party shall bear its own costs and expenses." (App.12, p. 6, ¶ 23, line 16). This proves that Lincoln again breached the terms of its agreement by seeking costs, fees and expenses and that the district court abused its discretion, pursuant to ¶ 23, by awarding Lincoln excessive costs, fees and expenses.

E. Lincoln Breached Paragraph 30 Of Its Producer Agreement

Lincoln constantly briefed North Carolina law before the district court and the district court used North Carolina law in granting judgment against petitioner. However, "This Agreement shall be construed in accordance with and governed by the laws of the State of Indiana." (App.12, p. 7, ¶ 30, "Governing Law"). Despite that Lincoln drafted its own agreement, not once did Lincoln cite Indiana law. And even though the district court allegedly reviewed the agreement, the lower court did not rely on law from the governing State of Indiana in reaching its erroneous holdings.

F. Lincoln Failed To File A Required Motion For Attorneys' Fees

Foremost, "the exclusive remedy for any dispute that may arise," pursuant to the terms of the agreement drafted by Lincoln, requires that "Each party shall bear its own costs and expenses." (App. 12, p. 6, ¶ 23, line 16). This fact alone calls for summary reversal of excessive fees and costs awarded Lincoln. (Emphasis added).

In addition, Lincoln did not file a motion for fees, as required by Fed.R.Civ.P. § 54(d)(2)(B). Lincoln alleges that it filed for fees via its summary judgment motion. But Lincoln's motion for summary judgment was not a motion for attorneys' fees. In fact, no filing in the district court record includes a motion for fees filed by Lincoln. And since Lincoln breached its agreement five or more times, the courts below erred by allowing Lincoln to claim fees as an element of contractual damages at trial.

Specifically, Fed.R.Civ.P. § 54(d)(2)(2018 Edition) states, as follows:

> (2) *Attorney's Fees.*
> (A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.
> (B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:
> (i) be filed no later than 14 days *after* the entry of judgment;
> (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
> (iii) state the amount sought or provide a fair estimate of it; and
> (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

Here, Lincoln did not claim its fees by motion, file "a claim to be by motion" no later than 14 days *after* the entry of judgment, specify in a fee motion a statute, rule or other ground entitling it to fees and state the amount sought by "a claim to be by motion," as required under Fed.R.Civ.P. §54(d)(2). And despite these recorded facts, the district court granted Lincoln excessive fees by applying North Carolina law, and thereby abused its discretion since the "Governing Law" is Indiana law.[10]

The district court further erred by granting Lincoln's fees since petitioner proved "special circumstances," which make the court's award "unjust," even though [Lincoln] prevailed. See 122 Cong. Rec. 33314 (1976) Senate Report 4; House Report 6; *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (*per curiam*). Therefore, petitioner again proves "special circumstances," which include health, property, personal, financial and relationship losses, damages and hardship, before this Court, since the courts below refused to review the same. (App. 31, ¶s 1-81).

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[10] Regarding fees, petitioner requests that the Court review Addendum, pp. 1-15; App. 12; ¶s 9(b), 19(a), (b) and (c), 20(a), 23 and 30; App. 19, ¶s 110, 112-119, 121, 124-25, 130, 133, 137, 143, 146-47 and 152-158 (DE 142-2); and Apps. 25-30; 31, ¶s 1-81; and 32-36.

"The plain language of that rule, [Rule 54(d)(2)(B)], states that the motion must be filed no later than 14 days *after entry of judgment*. (Emphasis added). It appears that the term "judgment" refers to the judgment of the district court." *Cf. Melkonyan* v. *Sullivan,* 501 U.S. 89, 96, 111 S.Ct. 2157, 115 L.Ed.2d 78 (1991). Also, there is no Local Rule in the Eastern District of North Carolina enlarging the time for the filing of a motion for attorney fees under Fed.R.Civ.P. § 54(d)(2)(B). (App. 7, p. 8). Nor can Lincoln's time to file have been enlarged, since Lincoln did not show good cause or excusable neglect for never filing. Fed.R.Civ.P. § 6(b)(App. 7, p. 3, 4).

Plus, "Claims for attorneys' fees are items of special damages which must be specifically pleaded under Fed.R.Civ.P. 9(g)."[11] (App. 7, p. 4). But Lincoln failed to specifically plead attorneys' fees in its over fifteen month untimely filed Answer (DE 6), summary judgment motion (DE 83-86) or never filed fee motion. And Lincoln did not file a bill of costs within 14 days from judgment, pursuant to EDNC Local Rule 54.1(a)(3) and Fourth Circuit precedent, which "**constitutes a waiver**" of its costs and over $168,000 in fees. (App. 7, pp. 3, 8; DE 104-06, 114); *Taniguchi* v. *Kan P. Saipan, Ltd.,* U.S., 132 S.Ct. 1997, 1999-2000, 182 L.Ed.2d 903 (2012); p. 25, below.

In addition, "Notwithstanding the American Rule, we have long recognized that federal courts have inherent power to award attorney's fees in a narrow set of circumstances, including when a party brings an action in bad faith." See *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).[12]

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

[12]Holding: "a court has power to award attorney's fees to a party whose litigation efforts directly benefit others, to sanction the willful disobedience of a court order and to sanction a party who has acted in bad faith, vexatiously, wantonly or for oppressive reasons."But here, none of these events occurred. So no "equal justice under the law" has been given petitioner.

Here, petitioner did not willfully disobey a court order, was never sanctioned and did not act in bad faith, vexatiously, wantonly or for oppressive reasons. On the contrary, Lincoln acted in bad faith by contesting the policy and application fifteen months beyond its contestable time period, repeatedly breaching its agreement and contesting its agreement five months beyond NC applicable statutes of limitation. (App. 7, p. 5, N.C.G.S. §§1-52(1), (9); p. 6, N.C.G.S. §58-58-22(2) and App. 12, ¶ 23)).

Moreover, although "the 14-day period is not jurisdictional, the failure to comply [with Rule 54] should be sufficient reason to deny the fee motion, absent some compelling showing of good cause." See 10 James Wm. Moore et al., Moore's Federal Practice § 54.151[1] (3d ed. 2000). But, as here, Lincoln did not show good cause for having never filed a fee motion within 14 days *after the entry of judgment.*

G. Unanimous Circuit Courts of Appeals Hold That A Fee Motion Must Be Filed Within Fourteen Days After The Entry Of Judgment

"...Rule 54 requires that a motion for attorney's fees be filed no later than 14 days after the entry of judgment, unless ... a court order provides otherwise." Fed. R.Civ.P. 54(d)(2)(B). "As the plaintiffs concede, Xcentric first filed a motion for fees on April 10, 2015, which was within 14 days of the District Court's March 27, 2015 summary judgment order." *Small Justice, LLC* v. *Xcentric Ventures, LLC,* 873 F. 3d 313, 326-7 (1st Cir. 2017). See also *16 Casa Duse, LLC* v. *Merkin,* 791 F. 3d 247, 263 (2d Cir. 2015)(same); *Weyant* v. *Okst,* 198 F.3d 311, 314 (2d Cir.1999)(same)(quoting Fed.R.Civ.P. 54 Advisory Committee Note (1993)); *Tancredi* v. *Met. Life, Ins. Co.,* 378 F.3d 220, 227-28 (2d Cir. 2004)(same). Further, in *Walker* v. *Astrue,* the Third Circuit held likewise. 593 F. 3d 274, 279 (3rd Cir. 2010). (Emphasis added).

"Accordingly, Rule 54(d) required the Union to submit a motion for attorneys' fees between 0-14 days *after* the district court issued its order. (Rule 54 expressly conditions a motion for attorneys' fees on an entry of judgment)...This the Union failed to do." *Brown & Pipkins, LLC* v. *SEIU*, 846 F. 3d 716, 730 (4th Cir. 2017). "Cameron...moved for fees within fourteen days after the district court entered judgment as required by Rule 54(d)(2)." *In re Deepwater Horizon*, 807 F. 3d 689, 699 (5th Cir. 2015). "It is undisputed that United did not file a motion for attorneys' fees within fourteen days of entry of judgment as required by Rule 54(d). This failure to file within the allotted period serves as a waiver of its claim for attorneys' fees." *United Industries, Inc.* v. *Simon-Hartley, LTD*, 91 F.3d 762, 764-6 (5th Cir. 1996).[13]

"The Murphs did not meet this requirement. Rule 54(d)(2)(B). Neither did they request an enlargement of time within the 14-day period, [just as here]. Under these circumstances, the district court could permit a late filing only if the delay was the result of excusable neglect." Rule 6(b)(2). See *Allen* v. *Murph*, 194 F. 3d 722, 724 (6th Cir. 1999); see also *Slep-tone Entertainment Corp.* v. *Karaoke Kandy Store, et al.* No. 14-3117, 316-17 (6th Cir. April 6, 2015)(same). (Emphasis added).

"The Plan missed the deadline under Rule 54(d)(2) and offers no reason for having done so." *Bender* v. *Freed*, 436 F. 3d 747, 750 (7th Cir. 2006)(ruling that motion for fees filed after 14-day deadline was untimely); *Crue* v. *Aiken*, 370 F. 3d 668, 680 (7th Cir. 2004)(same); *West* v. *Local 710, Inter. Bro., Team. Pension Plan*, 528 F. 3d 1082, 1087 (8th Cir. 2008)(same)(ruling that this rule requires the motion be made "no later than *14 days after entry of judgment.*" Fed.R.Civ.P. 54(d)(2)(B).

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[13] Lincoln filed its "bill of costs" 64 days prior to the entry of judgment. (Apps. 5 and 32). Notably, "All applications for costs must be made 14 days after the entry of judgment"...and such failure "**constitutes a waiver** of any claim for costs." (Local Rule 54.1, App.7, p. 8).

"The district court correctly ruled that the plaintiffs' motion for attorney's fees was filed after the applicable 14-day deadline." *See* Fed.R.Civ.P. §54(d)(2)(B); ("Unless a statute or a court order provides otherwise, the motion [for attorney's fees] must: (i) be filed no later than 14 days *after the entry of judgment. . .*"). *Farris* v. *Ranade*, No. 12-35949 (9th Cir. 2014); *Kona Enterprises, Inc.* v. *Estate of Bishop*, 229 F. 3d 877, 889 (9th Cir. 2000)(cited 1,471 times, including in *Brown & Pipkins, LLC* v. *SEIU*, 846 F. 3d 716, 730 (4th Cir. 2017)); *Perfect 10, Inc.* v. *Giganews, Inc.*, 847 F. 3d 657, 676 (9th Cir. 2017)(same).[14] *See also* Wright, Miller & Kane, § 2667; 10 James Wm. Moore et al., *supra,* § 54.151[1]; and App. 33. (Emphasis added).

Under the rule, motions for attorney's fees must also "state the amount sought or provide a fair estimate of it." Rule 54(d)(2)(B)(iii). *Gash* v. *Client Services, Inc.*, No. 13-1138 (10th Cir. 2013). *See also Quigley* v. *Rosenthal*, 427 F.3d 1232, 1236-38 (10th Cir. 2005)(holding the district court did not abuse its discretion in denying attorney's fees because plaintiffs' Rule 54(d)(2) motion was untimely and they had failed to show excusable neglect that would justify extending the time they had to file such a motion), just as applicable here. To support its finding, the district court relied on Fed.R.Civ.P. 54(d)(2)(B) which provides: "Unless otherwise provided by statute or order of the court, the motion [for attorney's fees] must be filed no later than 14 days after entry of judgment..." *Bergen* v. *Commissioner of Social Sec.*, 444 F. 3d 1281, 1285 (11th Cir. 2006).

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[14] Here, the district court's September 16, 2014 order that Lincoln "will prove" fees was never thereafter responded to by Lincoln by motion or otherwise. (App. 5, p. 17, DE 104-06). Also notable is Lincoln's admission of being served petitioner's Complaint on April 1, 2013, such that its Answer was due by April 22, 2013. (Fed.R.Civ.P §12(a)(1)(A)(1); App. 7, p. 4)). But Lincoln moved for an extension on May 3, 2013 (App. 34), eleven days untimely. So, on this basis alone, Lincoln's Answer, defenses and counterclaims should have been dismissed.

"The disposition of this case turns on whether the trial court erred in applying the fourteen-day filing requirement in the 1995 amendment to Rule 54(d)(2)(B)." *Breiner* v. *Daka, Inc.*, No. 00-CV-1611 (D.C. Cir. 2002). "In this case, the 14-day rule of Rule 54 was breached, and Amazon took no steps under Rule 6(b)(2) that could have afforded the district court a basis upon which to exercise discretion to enlarge the 14-day time period...the district court abused its discretion in enlarging the applicable time and in denying IPXL's motion to strike. The district court was here obligated to grant IPXL's motion, and the award of attorney fees and costs to Amazon is therefore reversed." *IPXL Holdings, LLC* v. *Amazon. com, Inc.*, 430 F. 3d 1377, 1386 (Fed. Cir. 2005). Here, the lower court also erred by enlarging the time.

Thus, unanimous U.S. Circuit Courts of Appeals precedents require that a fee motion be filed no less than 14 days after the entry of judgment, unless good cause to enlarge the time or excusable neglect is proven during the fourteen days. Here, the lower court entered judgment on September 16, 2014 and allowed Lincoln to then "will prove" its fees. (App. 5, p. 17; DE 114). Thus, Lincoln's 14 days after the entry of judgment expired on September 30, 2014. However, Lincoln filed no motion for its fees. Rather, Lincoln untimely filed for costs, n. 13, and a declaration for fees on "07/14/14" (Apps. 32, 35), presumptively 64 days prior to judgment entry.[15] And since Lincoln breached agreement paragraphs 9(b), 19(a), (b), (c), 20(a), 23 and 30, see pp. 18-21, supra, the lower courts erred by not holding that Lincoln breached its agreement and filed for fees before "conditioned on a Rule 54(d) judgment" entry.

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[15] Lincoln alleges that it moved for attorney fees on June 2, 2014 (App. 35, DE 104, ¶ 2), within its summary judgment motion. But this filing (App. 36, DE 85, pp. 29-31) was not a motion for fees and did not meet the substantive requirements of Fed.R.Civ.P.§§54(d)(2)(A), (B)(i-iv). Also, Lincoln stated that Lincoln "will prove [fees] by affidavit or declaration **upon an award** of summary judgment by this Court," but did not. (App. 36, p. 30, DE 85).

The District Court Omitted Ben's Decisional March 23, 2010 Referred Specialist ALS Consult And All Of Petitioner's Remaining Claims

A. Ben First Consulted "For Possible ALS" on March 23, 2010

On or about August 18-21, 2009 insured Ben volunteered as a "research only" participant at the UCSF Alzheimer and Disease Center, located in San Francisco, California. (App. 37; DE 142-33). Ben's Father was present with Ben at UCSF and confirmed under oath that Ben was not told by any member of the UCSF team that he had ALS; did not receive any of his "research only" records; was told to consult with an East Coast physician should he need to; and that "no further appointments were scheduled." (App. 38, ¶s 1-8; DE 89-4; App. 39, ¶s 17-21; DE 142-34).[16] Ben's widowed spouse, Imelda L. Laschkewitsch, was the only other non-research person present, who testified under oath that "my husband was told in UCSF that he might have the disease and was officially diagnosed on March, 2010 at Duke." (App. 42).

On August 24, 2009 Ben consulted with Dr. Morton Meltzer, who stated, also under oath, that if he had any reason to believe that Ben had an illness he would have referred Ben to consult with a specialist. (App. 43, Meltzer Dep. 63:22-64:14; DE 119-1). And on September 29, 2009 Ben had a General Physical Examination with U.S. Health Works wherein Ben personally recorded that he had no major illness, no injury, no mental illness and no muscle weakness, which is the first sign of ALS. (App. 44, questions 3, 8, 52; App. 45, p. 1, DE 143, Exhibit 37)(Under Seal).

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[16] 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. 40, "IMPRESSION," p. 7 of 8, excerpt). This UCSF finding that it was not possible to diagnose Ben with ALS in August, 2009 proves that the district court erred by alleging that Ben was diagnosed with ALS before August, 2009 and by relying on records not possessed by Ben or petitioner or produced until beyond Ben's death. Further, UCSF is not an "ALS Certified Center of Excellence" or a multi-disciplinary ALS clinic. (App. 41).

On December 15, 2009 Ben consulted with PA Michael Lischynsky, who was "unbelievably thorough [since] 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. 43, Dr. Meltzer Dep. 35:15-21, 40:14-41:1, and 63:22-64:14, DE 119-1; DE 89-6 at 114). Then on December 17, 2009 Ben consulted with neurologist Lucas Van Tran who recorded a normal exam (App. 46; DE 89-6 at 127-8), and testified that if he "suspected a 20% chance" that Ben had ALS, he would have referred Ben to see a specialist. (App. 47, Van Tran Dep. 46:6-25; DE142-35).[17]

On January 22, 2010 VA neurologist Dr. Sampath V. Charya consulted with Ben and recorded "Motor: full power and normal tone in all four limbs, able to toe-walk and heel-walk and tandem walking; no involuntary movements, fasciculations spacity, rigidity, or myoclonus, symmetric muscle bulk..." (App. 48, pp. 1-4).[18] Also recorded by Dr. Charya is "neuro eval pending...per specialist like neurologist to make that decision. Wife understands this." (App. 48, p. 5, LINCOLN 001670; DE 143-5). On the very same day, Dr. Charya referred Ben to Duke University Medical Center's multidisciplinary ALS Clinic, one of North Carolina's five "ALS Certified Centers of Excellence," for a March 23, 2010 consultation to "make that decision" of whether Ben had ALS? (App. 48, p. 5, "LINCOLN 001670," DE 143-5; App. 54, pp. 1-3, North Carolina's five "ALS Certified Treatment Centers of Excellence").

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[17] Dr. Lucas Van Tran testified that Ben appeared for a second opinion, with his spouse, and that he had never before met petitioner. (App. 47, Van Tran Dep. 9: 9-25). However, the court below erroneously held that Ben did not appear before Dr. Van Tran. (App. 5, p. 8).

[18] This proves that Ben did not have ALS by January 22, 2010 since the first known signs of ALS are progressive muscle weakness and the presence of a fasciculation. (App. 45, p. 1, DE 142-36; App. 49, pp. 1 and 2, DE 142-39; App. 50, pp. 1 and 2, DE 142-37; App. 51, DE 142-38; App. 52 and App. 53). See also App. 19, ¶s 10-15, 18-30, 48 and 50.

Moreover, the National ALS Association recommends a second opinion by an ALS expert for a confirmed diagnosis of possible ALS (App. 55, p. 5; DE 142-43, 45), and referral of a suspected ALS patient to an ALS specialist in a North Carolina "ALS Certified Center of Excellence." (App. 56, ¶s 2-18, DE 89-5; Apps. 57, p. 2; and 58-61). Here, Ben was first diagnosed with "possible ALS" during his first specialist March 23, 2010 consult with ALS 'expert' specialist Dr. Richard Bedlack (App. 62, DE 143, Ex. 40), in an "ALS Certified Center of Excellence." (Apps. 48, p. 5; 54, 60). And the first sentence in Dr. Bedlack's transcribed consult is "...consultation for Dr. Alejamma Jiji Mani for possible ALS..." (App. 62, first sentence).[19]

These facts are confirmed by Robert Hawkins, an Air Force veteran residing in Fayetteville, NC, just like Ben, who was first diagnosed with ALS in 2008 "after three years of inaccurate diagnoses." (App. 55, p. 4; DE 142-45). Further proof is by former Fayetteville State Basketball Coach Jeff Capel, Jr.'s death from ALS on December 13, 2017 after being "diagnosed by doctors at Duke University," not by doctors in Fayetteville, NC, where he also resided (App. 63, p. 1); the Affidavit of Scott Laschkewitsch (App. 64, ¶s 2-12); the Affidavit of Imelda L. Laschkewitsch (App. 42); and Ben's published obituary (App. 65, lines 19-20). So, the district court erred by disregarding that Ben was diagnosed with probable and definite ALS after March 23, 2010, which was over a month after the policy was issued, delivered and placed in force with applied premium. (App. 9, p. 3; App. 15; and App. 19, ¶s 18-50).

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[19] The known El Escorial diagnostic ALS categories are possible, probable, probable lab-supported and definite. (App. 45, pp. 1-3; Apps. 49, 61). And possible is the "least certain degree" of diagnosis. (App. 49, p. 1, "Diagnosis," 2nd ¶; DE 142-39). Thus, Ben's probable and definite diagnosis dates were after his March 23, 2010 specialist consult in one of North Carolina's "ALS Certified Centers of Excellence" (App. 54) "for possible ALS..." (App. 62).

B. The Lower Courts Omitted That Lincoln Contested The Policy, Application And "Agreement" Beyond NC Statutes Of Limitation

On September 22, 2009 Ben and/or EMSI Examiner Valerie Locke recorded, signed and dated Ben's paramedical examination (App. 66), which Lincoln failed to attach to the policy. (App. 9). On January 22, 2010 petitioner signed page 7 only of an Indiana Agreement. (App. 12, p. 7). On February 2, 2010 Ben's application Part 1 (App. 10, undated Application "Part 1") was admittedly dated by Dell Mitchell with McCall Ins. Group. (App. 9, dated application Part 1; App. 70, Mitchell Dep.16:1-24; 20:16-21:22; 33:1-34:25; 46:1-24; 52:1-55:25; 60:1-62:24; 67:2-69:25; and 81:6-82:2). On February 19, 2010 the policy was reissued with a "Date of Issue February 18, 2010." (Apps. 8; 9, p. 3). And on March 29, 2010 Lincoln applied premium. (App. 15). Further, Lincoln did not require Ben to answer any delivery amendment questions or attach Ben's March 15, 2010 dated amendment to the policy. (App. 9; App. 68).

Hence, no dated and signed document relied upon by Lincoln was attached to the policy.[20] Further, the NC statutes of limitation for alleged fraud and contract breach expired three years from Ben's unknown 2009 application "Part 1" date, over documents dated, but not attached to the policy, and petitioner's January 22, 2010 Indiana Agreement date, for its fraud and breach of contract defenses. (App. 7, p. 5, N.C.G.S. §§ 1-52(1), (9); Apps. 9, 10; App. 11, Lincoln's June 6, 2013 over five month limitation period untimely filed defenses; Apps. 12, 66, 68, 69 and 70, p. 31, 1st ¶)).

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[20] Lincoln denied petitioner's claim on the sole basis of unattached "Pt 2" exam question "5F," and "Pt 1" questions "51, 52" (App. 67). However, since Lincoln did not attach Ben's signed paramedical exam and amendment to the policy or require Ben to complete Part 2 of its application (App. 9, p. 5, "General Provision 3.1;" "The Contract;" App. 66 exam; App. 68, amendment; App. 69, Lincoln's "Application Part 2"), Lincoln's claim denial was erroneous. And since Mitchell dated Ben's undated application and Lincoln failed to inquire over "Pt 1" questions 54, 65, its reliance on questions 51, 52 has no basis. (App.10, p. 3 of 5; App. 70).

"It is a well-settled rule...that the [3-year] statute of limitations for a breach of contract claim is not tolled pending the injured party's discovery of the breach...' [Lincoln's] lack of knowledge concerning [its] claim does not postpone the running of the statute of limitations.'" *Pearce* v. *N.C. State Highway Patrol Vol. Pledge Comm.*, 312 S.E. 2d 421, 425-26 (N.C. 1984)(App. 71, DE 142-13)("Statutes of limitations are inflexible and unyielding...They operate inexorably without reference to the merits of [Lincoln's] cause[s] of action")(emphasis added). "This Court strictly adheres to and is bound by the following principles enunciated in *Shearin* v. *Lloyd,* 246 N.C. 363, 98 S.E.2d 508 (1957)." *See also Pearce*, supra, 312 S.E. 2d at 425 (N.C. 1958).

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

Id. "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 [NC] General Assembly." See *Shearin,*"[Lincoln's] lack of knowledge concerning [its defenses] does not postpone or suspend the running of the statute of limitations." 370, 98 S.E. 2d at 514. (App. 72); *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). So, Lincoln's defenses are all statutorily barred under NC law. And tolling for breach of contract and fraud is barred absent the exercise of reasonable diligence. *Rothmans Tobacco Co., Ltd.* v. *Liggett Group, 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)).

C. Lincoln Exercised No Due Diligence Or Inquiry Of Statements

North Carolina recognizes that fraudulent concealment of a material fact can toll the running of a statute of limitations. But "in order to avail itself of this relief, [Lincoln] must show that (1) plaintiff fraudulently concealed facts, and (2) [Lincoln] failed to uncover these facts during the statutory period despite (3) the exercise of due diligence," which Lincoln failed to do. *See Yancey* v. *Remington Arms Co.*, LLC, 2013 WL 5462205 at *6 (M.D.N.C. 2013). Lincoln failed inquiry and due diligence over MIB Codes 200#EN and 200#ZN and "MIB: Mptl Hits, IAI." (App. 73, pp. 1, 2; DE 89-6 at 171-173). This is confirmed by Lincoln's Rule 30(b)(6) deponent binding Lincoln by admitting that both "MIB Codes 200 represent a neurological disorder" and "warranted an inquiry." (App. 22, Carreira Dep. 23:13-16, 25:16; DE 89-1, 2). In addition, Lincoln did not prove that it ever made an MIB 200 Code inquiry.[21]

Lincoln received a September 22, 2009 Mutual of Omaha exam on Ben (App. 66, LINCOLN 000869; DE 89-6 at 213; DE 143-8), in February, 2010. But Lincoln did not attach Ben's exam to the policy, which statements noticed Lincoln that Ben had an electrocardiogram, x-ray or other diagnostic tests within the last five years. (App. 9; App. 66, question 5(d)). And although within its possession, Lincoln made no inquiry of Mutual of Omaha, insured Ben, petitioner, the paramedical examiner or otherwise until May 16, 2012; three years later. (App. 75; DE 89-6 at 77, 137, 151 -52). See *Colony Ins. Co.* v. *Charles A. Peterson,* (aff'd 4th Cir. 2014; holding: 27 days notice to the insurer [Lincoln] without inquiry was sufficient to support estoppel).

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[21] See *Columbian National Life Ins. Co.* v. *Rodgers*, 116 F.2d 705 (10th Cir.1940), *cert. denied*, 313 U.S. 561, 61 S. Ct. 838, 85 L.Ed.1521. (Insurer is charged with MIB notice)(App. 74, DE 142-6); *Knights of Pythias* v. *Kalinski*, 163 U.S. 289, 16 S.Ct. 1047, 41 L.Ed. 163. ("the continued receipt of assessments...up to the date of his death was a waiver" and "if the company ought to have known of the facts, or with proper attention to its own business would have been apprised... it has no right to set up its ignorance as an excuse"). *Id.*, 298-99.

"If an underwriter has any reason to want to get additional information, they can request an Inspection Report." (App. 22, Carreira Dep.17: 13-17; DE 89-1). Here Lincoln also received a statement from petitioner that "Insured has been denied life insurance from multiple companies within the last nine months." (App. 76; DE 142-47). But Lincoln never inquired of companies that had denied Ben for life insurance coverage.[22] In addition, Lincoln received a statement from Ben that life insurance declined by "West Coast Life & Others." (App.10, questions 54, 65; DE 89-6 at 208). But again Lincoln made no inquiry of why Ben was declined by "West Coast Life & Others" or of the identity of "Others" that declined Ben for coverage. (App. 77).[23]

On February 3, 2010 Lincoln was notified that insured had an application pending with AIG and ANICO. (App. 10, application question 51). But Lincoln did not inquire of Ben's applications with "Others" until 27 months after its receipt of notice.[24] (App.78, pp.1-4); *Colony,* supra, p. 33. Moreover, on March 14, 2012 Lincoln requested an IntelliScript Report (App. 79; DE 89-6 at 98), an underwriting tool for approving a proposed insured for coverage, not after. Thus, Lincoln did not inquire of received statements, exercise due diligence or prove reasonable *reliance*; n. 24.

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[22] As applicable here, "it is clear that the facts alleged cannot constitute common law fraud, as [Lincoln] cannot plausibly allege a false statement made... was reasonably relied upon." *Odom* v. *Little Rock & I-85 Corp.*, 299 N.C. 86, 91-92 (1980). In support, the Court should review App.19, ¶s 10-15, 22-23, 45, 48, 81, 86-87, 92, 108, 122-123, 128-129 and 142.

[23] Lincoln internally acknowledged during its claim review process that it had failed to inquire of "West Coast Life & Others" (App. 77); but, even then, Lincoln made no inquiry or exercise of due diligence from "West Coast Life & Others" or otherwise. See App. 6, pp. 2, 3.

[24] Lincoln must have relied on the representation and its reliance was reasonable; and have suffered damages because of its reliance." *Forbis* v. *Neal,* 649 S.E.2d 382, 387 (N.C. 2007), but did not. As well, Lincoln cannot establish justifiable reliance ... if it fails to make reasonable inquiry regarding the alleged statement," which it failed to do. *Dallaire* v. *Bank of America,* N.A., No. 51PA13, N.C. 2014 WL 2612658, at *5. (Emphasis added). Further, Lincoln "uncovered" all of its allegations beyond its statutory period. *Yancey,* supra, p. 33.

D. Lincoln Deposited Premium After Notice And Knowledge

On March 9, 2012 Lincoln received due notice of Ben's death. (App. 14, "Date Notice Rec'd 3/9/12;" DE 89-6 at 91). On April 2, 2012 Lincoln alleged knowledge by noting "several red flags are appearing" and consulting with its Legal Department. (App. 80; DE 142-48). Then on April 18, 2012 Lincoln deposited petitioner's ninth quarterly premium (App.15; DE 89-6 at 216), after receiving notice and knowledge, and then billed petitioner. (App. 16,"Billed To 06-21-12"). This act kept the policy in force beyond the February 18, 2012 end of Lincoln's two year contestable period.[25]

See also *Gouldin* v. *Inter-Ocean Ins. Co.*, 102 S.E.2d 846 (1958) 248 N.C. 161, wherein the North Carolina Supreme Court held, in particular, that:

> "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."

Lincoln's action of billing petitioner through 06-21-12 "recognized and treated the policy" to be "still in force" through 09-21-12. And its declaration and course of dealing led petitioner to believe that the policy was kept in force for over two years.

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[25] See *Northern Assurance Co.* v. *Grandview Building Assn.*, 183 U.S. 308, 311 (S.Ct. 1902)(holding: "By procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped"), see pp. 33-34, supra; *Phoenix Life Ins. Co.* v. *Raddin*, 120 U.S. 183, 196 (same); *Kalinski*, at 298; n. 21, supra. See also *Swartzberg* v. *Reserve Life Ins. Co.*, 113 S.E.2d 270 (1960) 252 N.C. 150, 277-8(DE 142-20)("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 remanded ... [for] a determination...of ... (1) waiver and estoppel and (2) the statute of limitations," see pp. 31-35, supra; *Brooks* v. *Hackney*, 329 N.C. at 173 404 S.E.2d at 859 (1991). ("A party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement);" *United States Life Ins. Co. in the City of New York* v. *Blumenfeld,* 92 A.D.3d 487,488-90 (2012) 938 N.Y.S.2d 84 (App. 81); & App. 6, pp. 1-2, which are all relevant here.

E. The Courts Below Omitted Lincoln's Unfair Claim Practices

"A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson* v. *Insurance Co.*, 300 N.C. 247, 263, 266 S.E.2d 610 at 621 (1980).[26] "An insurance company that engages in the act or practice of [n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear, N.C.G.S. § 58-63-15(11)(f), also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1." *Gray* v. *North Carolina Ins. Underwriting*, 529 SE 2d 676,683 (NC 2000)(citing *Marshall* v. *Miller*, 302 N.C. at 548, 276 S.E.2d at 403). Thus, "such conduct that violates N.C.G.S. § 58-63-15(11)(f) constitutes a violation of N.C.G.S. § 75-1.1, as a matter of law, without necessity of an additional showing of frequency indicating a general business practice." N.C.G.S. § 58-63-15(11). See *Gray, supra,* at 683.[27]

1. Lincoln Violated N.C. Gen. Stat. § 58-63-15(11)(a)

Lincoln "misrepresented pertinent facts and insurance policy provisions over the coverage at issue." First, Lincoln's President and Secretary misrepresented that Lincoln "promises to pay the Proceeds as shown on Page 4 to the beneficiary upon receipt at our Service Office of due proof of death of the Insured..." (App. 9, p. 1, 2nd ¶, February 19, 2010 reissued policy "per H/O error," DE 89-7)). See also App. 7, p. 6, N.C.G.S. §§ 58-38-40(a) and (b); and App. 7, p. 7, N.C.G.S. §58-63-15(11)(a).

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[26] The district court erred by granting N.C.G.S § 75-1.1 trebled fees against petitioner since petitioner, not Lincoln, is proven to be an injured consumer. (App. 31, petitioner's special circumstances of injuries, damages and severe hardship). See also App.19, ¶s 1-130.

[27] Lincoln violated N.C.G.S. §58-63-15(11)(f) regarding contestability precedent from this Court, the NC Supreme Court, all U.S. Circuit Courts of Appeals, N.C.G.S. §58-58-22(2), its NCDOI mandate, promises given Ben, claim denial admission and Rule 30(b)(6) admissions; repeated agreement breaches; and failure to file for attorneys' fees by motion. See pp. 2-27.

Second, Lincoln misrepresented "The Contract" General Provision regarding "We will not use any statement by or for the Insured to void this policy or to deny a claim unless it is contained in an application." (App. 9, policy, p. 5). No statement was made by or for Ben in the unsigned, undated and non-recorded "Amendment to Application..." and Lincoln did not attach Ben's exam, amendment or its Application Part 2 to the policy. (Apps. 9, Policy; 66, Exam; 68, Amendment; and 69, "Part 2").

Lincoln's claim denial letter did not rely on a misrepresented health question. (App.10, p. 3A of 5, "Application Part 1 Section A-Health Summary"; App. 21, claim denial letter, App. 67). Rather, Lincoln relied exclusively on questions 50 and 51. (App. 10, p. 3 of 5, questions 50, 51; App. 21, denial letter). Further, Lincoln sought thousands of documents unrelated to any health question(s) in the application and relied on as a particular basis for denying petitioner's claim. And since Mitchell, not petitioner or Ben, admittedly dated and submitted Ben's application (App. 9, policy application, p. 5; App. 10, Ben's original application, p. 5; App. 70), Lincoln's claim denial basis rings hollow and is completely without Fed.R.Civ.P § 9(b) particularity.

Third, Lincoln breached its "Incontestability" General Provision. See pp. 5-18, n. 27, supra. And fourth, by filing its motion to remand from Cumberland County Superior Court (DE 1), Lincoln violated General Provision 3.13 since "Our principal place of business as shown on Page 1" is Greensboro, North Carolina. (App. 9, pp. 1, 5; App. 30, LFG's and Lincoln's Greensboro, NC "principal place of business").[28]

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[28] Every party action occurred exclusively between Fayetteville and Greensboro, NC, which means that the district court lacked personal jurisdiction over the parties. Also, there is no evidence that any activities took place in another State. Further, Greensboro is where Lincoln is privately held, is Lincoln Financial Group's and Lincoln's addresses, and is the location "hereinafter referred to as the Company." (App. 30, pp.1-14). See also U.S.C. §1331, which allows diversity of citizenship over actions between citizens of different States and deems that the insurer is a citizen of where it has its principal place of business; & N.C.G.S. § 58-30-40, which will not "relieve an insurer from any provision." (App. 7, pp. 2, 3, and 6).

Fifth, Lincoln violated its "Change of Provisions" General Provision. (App. 9, p. 5, General Provision 3.4). Lincoln attempted to endorse the policy on March 29, 2010 with a "Policy Date" change to March 21, 2010 from the typed name of a New Business Associate. (App. 82; DE 89-6 at 198). However, "only one of our authorized officers can change the terms or waive provisions of this policy...Any such change must be in writing." (App. 9, p. 5). And Lincoln misrepresented that the change was used to "retain the insurance age" (App. 82, 2nd ¶) since retaining age is done by backdating, not forward dating. Further, insured Ben requested "No" to the "Save Age?" question asked by Lincoln. (App. 10, Ben's application, p. 1 of 5, question 21).

2. Lincoln Violated N.C. Gen. Stat. § 58-63-15(11)(b)

Lincoln "fail[ed] to acknowledge communications with respect to [petitioner's] claim arising under the... polic[y]." Lincoln's response to petitioner's appeal (App. 83; DE 89-6 at 159), was that "It remains our position that there were material misrepresentations in the application... The application was submitted by you and dated by you as the writing agent as well as the beneficiary on this policy on the life of your brother, Ben Laschkewitsch." [29] But Lincoln did not acknowledge petitioner's appeal issues a, b, c, d, e or f, statutory and legal authority, relevant considerations, summary, statement of facts or attached appendices. See DE 89-13, petitioner's full appeal. Further, Lincoln's denial basis that petitioner dated Ben's application was knowingly false since Lincoln knew that it received Ben's application on February 3, 2010 from Mitchell (App. 84, Fourth Interrogatory), who dated Ben's application on February 2, 2010. (App. 19, ¶s 31-33, 51-55, 97-98,104-105; App. 70, p. 31, supra).

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[29] Mitchell admitted receipt of Ben's undated application (App. 10) on January 22, 2010, no record of returning such application to petitioner and having submitted the February 2, 2010 dated application (App. 9) by one-day mail to Lincoln. (App. 70, pp. 52, 60-62 & 81-82).

3. Lincoln Violated N.C. Gen. Stat. § 58-63-15(11)(d)

Lincoln "refus[ed] to pay [petitioner's] claim without conducting a reasonable investigation based upon all available information." Lincoln acquired Ben's records from doctors Van Tran and Meltzer and the Fayetteville VAMC with an expired authorization (Apps. 25, 26, 27), which was unreasonable since Lincoln violated its Privacy Notices, Ben's 24-month Authorization, Agreement ¶9(b), NC laws, 5 U.S.C. §§ 552 a(b),(b)(6) & HIPPA laws. (Add., pp.1-15; App. 19, ¶s 60-64, 67-71, 74-9, 82-4, 88-90, 93, 112, 116-17,125). And Lincoln repeatedly sought Ben's records from Duke and UCSF, but was always denied because it failed to secure a HIPPA-compliant authorization, which kept it from getting all available information. (Apps. 28, 29).

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

This Court, the NC Supreme Court and all U.S. Circuit Courts of Appeal hold that an insurer, here Lincoln, must contest a policy within its two-year contestable time period. See pp. 5-18, n. 27, supra. Here, Lincoln filed its first contest by answer on June 6, 2013 (App. 11), over fifteen months untimely. Thus, Lincoln did not act in good faith to effectuate a "prompt, fair and equitable settlement" of [petitioner's] claim in which "liability has become reasonably clear" or "promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of [such] claim..." (App. 7, p. 7, N.C.G.S. §§58-63-11(f), (n)).

5. Lincoln Violated N.C. Gen. Stat. § 58-63-15(11)(i)

On January 22, 2010 petitioner sent his contracting forms and Ben's undated application to Dell Mitchell. (Apps. 10, 85). Mitchell was first required by NC law to process petitioner's agent contracting forms. (App. 7, p. 5; N.C.G.S. §58-33-40(a)). On January 27, 2010 Mitchell was noticed that petitioner was appointed. (App. 86).

Therefore, Mitchell could proceed to process Ben's undated application. (App. 10). In so doing, Dell Mitchell dated Ben's application on February 2, 2010. (App. 9, application, p. 5 of 5; p. 31, ¶ 1, n. 29, supra). And Lincoln admitted receipt of Ben's application in Greensboro, NC from Mitchell, in Charlotte, NC "on February 3, 2010 at approximately 12:49:40 P.M." (App. 84, Lincoln's Response to Interrogatory No. 4). Therefore, Lincoln "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." (App. 7, p. 7, N.C.G.S. § 58-63-15(11)(i); App. 21, 3rd ¶; App. 83, 2nd ¶)).

6. Lincoln Violated N.C. Gen. Stat. § Article 63 (Unfair Trade Practice Act) And N.C. Gen. Stat. §§ 58-60-15, 30

Lincoln failed to deliver or attach a Buyer's Guide and Policy Summary to the policy. (App. 9; "reissued" policy contract filing). Pursuant to N.C. law, the failure of Lincoln to do so is an unfair trade practice, which calls for treble damages. (App. 7, p. 6; N.C.G.S. §§ 58-60-15, 30; pp. 7-8, N.C.G.S. § 58-63-15(11)). (Emphasis added).

7. Lincoln Violated N.C. Gen. Stat. § 75-1.1

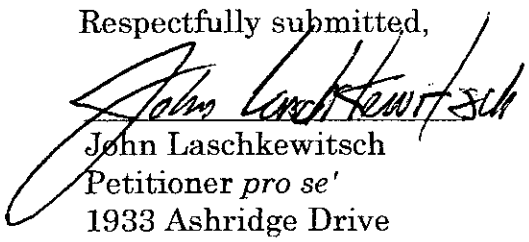
These unfair and deceptive trade practices are briefed at App. 19, ¶s 131-147.

CONCLUSION

For the foregoing reasons, the below courts' judgments should be summarily **REVERSED** with the policy proceeds trebled and pre- and post- judgment interest **AWARDED** petitioner OR petitioner's Petition for a Writ should be **GRANTED**.

This the 29th day of January, 2019

Respectfully submitted,



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