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APPENDIX A

SUPREME COURT OF LOUISIANA

No. 2025-C-01544

HENRY L. KLEIN, THE SUCCESSION OF FREDERICK P. HEISLER AND LEVY GARDENS PARTNERS 2007 LP

VS.

LEWIS TITLE INSURANCE COMPANY, INC. AND LISKOW & LEWIS, PLC AND JEFFREY MARTIN "JEFF" LANDRY, ATTORNEY GENERAL OF THE STATE OF LOUISIANA

On Writ of Mandamus to the Court of Appeal, Fourth Circuit

ORDER

Considering the application for writ of mandamus and stay of proceedings filed by the relators, Henry Klein, the Succession of Frederick P. Heisler, and Levy Garden Partners 2007, LP,

IT IS **ORDERED** that the application for writ of mandamus is **DENIED.** Relators' rehearing application in the court of appeal was untimely. *See Hooper v. Wisteria Lakes Subdivision,* 13-2433 (La. 1/27/14), 130 So.3d 954. Accordingly, the September 29, 2025,judgment of the court of appeal is final and

definitive. *See* La. C.C.P. art. 2166(A).

IT IS **FURTHER ORDERED** that the request for a stay of proceedings is denied as moot.

NEW ORLEANS, LOUTSTANA, this 23rd day of December 2025.

FOR THE COURT:

/s/
JUSTICE, SUPREME COURT OF LOUISIANA

APPENDIX B

HENRY L KLEIN, THESUCCESSION OF FREDERICK P. HEISLER AND LEVY GARDENSPARTNERS2007LP

VERSUS

LEWIS TITLE INSURANCE COMPANY, INC. AND LlSKOW & LEWIS, PLC AND JEFFREY MARTIN "JEFF" LANDRY, ATTORNEY GENERAL OF THE STATE OF LOUISIANA

(CIVIL DISTRICT COURT,
ORLEANS PARISH# 2017-01517)
Division "L"

NO. 2025-CA-0127
COURT OF APPEAL FOURTH CIRCUIT
STATE OF LOUISIANA

ORDER

* * * * * * *

Considering the Appellants, Succession of Heisler and Levy Gardens Partners 2007, LP's, Application for *En Banc* Rehearing mailed on October 14, 2025 and received by this Court on October 16, 2025, and further considering that this Court rendered its opinion in the above-captioned matter on September 29, 2025:

IT IS **ORDERED** that the Appellants'

Application for Rehearing is dismissed as untimely pursuant to Rule 2-18-2, Uniform Rules, Louisiana Courts of Appeal.

New Orleans, Louisiana this 7th day of November, 2025

RDJ
JUDGE RACHAEL D. JOHNSON

KKH
JUDGE KAREN K. HERMAN

NEK
JUDGE NAKISHA ERVIN-KNOTT

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APPENDIX C

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

SUCCESSION OF FREDERICK P. HEISLER AND
LEVY GARDENS PARTNERS 2007 LP

VERSUS

LEWIS TITLE INSURANCE COMPANY, INC. AND
LISKOW & LEWIS, PLC AND JEFFREY MARTIN II
"JEFF" LANDRY,ATTORNEY GENERAL OF THE
STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2017-01517, DIVISION "L"
Honorable Kern A. Reese, Judge

Judge Rachael D. Johnson

(Court composed of Judge Rachael **D.** Johnson, Judge Karen K. Herman, Judge Nakisha Ervin-Knott)

Henry L. Klein
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New Orleans, LA 70124

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COUNSEL FOR DEFENDANTS/APPELLEES

[DATE STAMP]
AFFIRMED; ANSWER TO
APPEAL DENIED AS MOOT
SEPTEMBER 29, 2025
/s/

RDJ
KKH
NEK

Appellants/Cross-Appellees, plaintiffs Henry L. Klein, the Succession of Frederick P. Heisler and Levy Gardens Partners 2007 LP ("Levy Gardens" and all plaintiffs collectively referred to as "Appellants"), seek reversal of the May 5, 2023 trial court judgment, denying their petition for declaratory judgment seeking a declaration that title insurance is not insurance but a contract of warranty. Appellees/Cross-Appellants, defendants Lewis Title Company, Inc. ("Lewis Title"), and Liskow and Lewis, PLC ("Liskow") (collectively referred to as "Appellees"), answered the appeal seeking review of the trial court's judgment

denying their exception of *res judicata.* For the following reasons, the trial court's judgment is affirmed. The Appellees' Answer to Appeal is denied as moot.

FACTS AND PROCEDURAL HISTORY

In 2008, Appellants purchased property in New Orleans East with the intent to develop the property into a multi-family housing complex. Appellants purchased three title insurance policies through Lewis Title. The title insurance policies were issued by Commonwealth Land Title Insurance Company ("Commonwealth").[1] The development envisioned by Appellants did not occur due to zoning issues, which were allegedly not disclosed at the closing.

Thereafter, on June 23, 2010, Appellants filed suit against Lewis Title and Commonwealth in the Civil District Court for the Parish of Orleans ("CDC"), seeking recovery of damages suffered as a result of the loss of right to develop the property. *Levy Gardens Partners 2007, LP, v. Lewis Title Ins. Co.,* CDC No. 2010- 5306. Appellants subsequently dismissed Lewis Title from the litigation on the basis of non-suit, and the matter was removed to the United States District Court for the Eastern District of Louisiana ("the Eastern District Court") by Commonwealth. After trial, the federal district court awarded Appellants damages in the amount of $605,000.00 against

[1] Appellants Henry Klein and the Succession of Frederick P. Heisler are not named insureds under any of the three policies.

Commonwealth. *Levy Gardens Partners 2007, LP, v. Lewis Title Ins. Co.,* 10-CV-04261 (E.D. La. Dec. 29, 2011).

Appellants filed another suit in CDC on April 2, 2012, *Levy Gardens Partners 2007, LP, v. Comm'r of Admin.,* CDC No. 2012-3236, alleging that Lewis Title and Commonwealth, are liable for negligent abstracting and asserting claims for negligent misrepresentation of the insurance policies and fraud. Pursuant to a motion of removal filed by Commonwealth, the lawsuit was removed to the Eastern District Court. Appellants filed a motion to remand that was denied by the federal district court. *Levy Gardens Partners 2007, LP v. Comm'r of Admin.,* 12- CV-01340, (E.D. La. Aug. 21, 2012). The Eastern District Court found that all non-fraud claims asserted against Lewis Title were perempted by La. RS. 9:5606.[2] The Court later determined that Appellants

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[2] Louisiana Revised Statute 9:5606 provides in pertinent part:

> A. No action for damages against any insurance agent, broker, solicitor, or other similar licensee under this state, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance services shall be brought unless filed **in** a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered. However, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed

did not assert a cause of action for fraud against Lewis Title and dismissed it from the litigation. *Levy Gardens Partners 2007, LP v. Comm'r of Admin.,* 12-CV-01340, (E.D. La. Oct. 30, 2012).

Levy Gardens filed a third-party demand in *First NBC v. Levy Gardens Partners 2007, LP,* CDC No. 2017~2315, on April 11, 2017, including Appellees as third-party defendants.[3] *First NBC v. Levy Gardens Partners 2007 LP,* 17-CV- 06652, 2019 WL 13227263, *1 (E.D. La. Apr. 29, 2019). Levy Gardens alleged that the Appellees were liable for negligent abstracting and sought a declaration that the policies issued by Commonwealth were not insurance contracts. First NBC was later closed by the Louisiana Office of Financial Institutions and the Federal Deposit Insurance Corporation in its capacity as receiver ("FDIC-R") was named as First NBC's receiver. *Id.* The FDIC-R removed the matter to the Eastern District Court. *Id.* Appellees later filed a motion to dismiss the

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> at the latest within three years from the date of the alleged act, omission, or neglect.
>
> * * *
>
> D. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

[3] In CDC No. 2017-2315, First NBC brought a foreclosure action by executory process against Levy Gardens.

third-party demand based upon the doctrine of *res judicata* that was granted by the Eastern District Court, which dismissed Appellees with prejudice. *Id.,* 17-CV-6652, 2019 WL 13227263, * 2.

Appellants filed the present lawsuit in April 2017, seeking declaratory judgments and damages for lost profits from the inability to develop the property as they had sought and alleged that the title insurance policies included zoning provisions that covered losses incurred if the property was not zoned to allow the planned construction of the multi-family housing unit. Appellants asserted that Lewis Title failed to identify and disclose, prior to closing, the zoning restriction that prevented it from developing the property as planned.

Appellants further pleaded that Commonwealth's policies were not insurance contracts but were contracts of warranty. Appellants sought a declaratory judgment that the Commonwealth policies were contracts of warranty and as such included recovery of lost profits. They also sought declaratory judgments regarding the actions of Appellees concerning the property transaction in 2008. On March 16, 2017, Appellees removed the case to the Eastern District Court. Appellants filed a motion to remand, which was granted on July 7, 2017. *Klein v. Lewis Title Ins. Co.,* 17-CV-2205, 2017 WL 2889370 (E.D. La. Jul. 7, 2017).

During the litigation, the parties filed numerous exceptions and motions. Appellees filed an exception of *res judicata,* which was denied by the trial court on

December 12, 2017.[4] Thereafter, Appellants filed an *Ex Parte Motion to Rule Nisi,* seeking to have the trial court rule on the declaratory judgment via a summary proceeding. The trial court denied the *ex parte* motion and converted the *rule nisi* to an ordinary proceeding on August 6, 2018.

Appellees filed a motion for summary judgment in July 2018, seeking dismissal of the petition for declaratory judgment with prejudice. Appellants filed a motion for partial summary judgment on the issue of unjust enrichment Appellees filed an exception of *res judicata* on September 8, 2020, asserting that the present litigation was barred because of the prior lawsuits filed in 2010, 2012 and 2017. After a hearing on January 28, 2021, the trial court took the matter under advisement.

Appellants also filed an *ex parte* motion to enforce La. R.S. 22:532, which the trial court granted in February 2023. Thereafter, Appellees filed a motion to reconsider the February 2023 judgment in part. After holding a hearing on the motion to reconsider on March 31, 2023, the trial court denied Appellants' motion to enforce and granted Lewis Title's motion for reconsideration.[5]

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[4] Appellees sought supervisory review of the trial court's denial of its exception of *res judicata.* This Court denied writs on February 14, 2018. *Henry L. Klein v. Lewis Title Ins. Co.* 2017-1063, unpub., (La. App. 4 Cir. 2/14/18).

[5] The judgment provides that "Defendants are not required to produce to the Plaintiffs any documentation regarding legal fees

After the hearing on March 31, 2023, the trial court rendered another judgment on May 5, 2023, denying Appellants' Petition for Declaratory Judgment and finding Lewis Title's Motion for Reconsideration of Order on Ex Parte Motion to Enforce La. R.S. 22:532 moot.[6] In its reasons for judgment, the trial court discussed Lewis Title's exception of *res judicata,* finding that the exception did not have merit.[7] The

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paid to Liskow and Lewis or Jones Walker related to the 2008 real estate closing at issue in this case."

[6] The trial court's judgment provided in pertinent part:

> For limited purposes, title insurance is insurance in the State of Louisiana. The Louisiana legislature took time legislatively to set forth parameters of what constitutes title insurance. Forty-nine states have title insurance. Only one, Iowa, has a different title offering. Based upon depositions, evidence and testimony, the Court cannot make a finding that Louisiana title insurance statutes fall outside the realm of insurance.

[7] "Generally, when a trial court judgment is silent as to a claim or demand, it is presumed the relief sought was denied." *Emery v. Ben,* 2024-0018, p. 6 {La. App. 4 Cir. 5/13/24), 390 So.3d 952, 959 (quoting *MJ. Farms, Ltd. v. Exxon Mobil Corp.,* 2007-2371, p. 12 (La. 7/1/08), 998 So.2d 16, 26). The trial court did not mention the exception *of res judicata* in its judgment, but the court issued the following reasons for judgment in regards to its denial of Lewis Title's exception of *res judicata:*

> In 2017, the United States District Court for the Eastern District issued a judgment in this case under case no. 17-2205 *Klein, et al. vs. Lewis*

trial court, however, failed to rule upon the exception of *res judicata* in its May 5, 2023 judgmeht. On August 11, 2023, the trial court issued a subsequent judgment dismissing Appellants' petition with prejudice. This timely appeal followed.

STANDARD OF REVIEW

The Louisiana Supreme Court in *West/awn Cemeteries, L.L.C.* v. *La. Cemetery Bd.,* 2021-01414, pp. 11-12 (La. 3/25/22), 339 So.3d 548, 558-559 discussed the standard of review for judgments relating to declaratory judgments, stating:

> [T]he decision to grant or deny declaratory relief is left to the wide discretion of the district court. *See Louisiana Supreme Ct. Comm. on Bar Admissions ex rel. Webb v. Roberts,* 2000-2517, p. 3 (La. 2/21/01), 779 So. 2d 726, 728; *Succession of Robinson,* 52,718 (La. App. 2 Cir. 6/26/19), 277 So. 3d 454, 458, *writ denied,* 2019-1195 (La.

Title Ins. Co. Inc. The case brought before the District Court requests for attorneys' fees pursuant to 28 U.S.C. § 1447(c) and sanctions for removal in bad faith. The Eastern District Court of Louisiana denied Plaintiffs request for attorneys' fees and declined to impose sanctions against defendants for removing the case in bad faith. This Court, takng notice of the distinct considerations asked of the Orleans Parish Civil District Court and the United States District Court for the Eastern District of Louisiana, decrees that this case is not *res judicata.*

> 10/15/19), 280 So. 3d 613. Although this decision is subject to an abuse of discretion standard of review, the judgment itself is still reviewed under the appropriate standard of review. *Fondel v. Fondel,* 2020-221, p. 4 (La. App. 3 Cir. 3/10/21), 312 So. 3d 1180, 1183, *writ denied,* 2021-0655 (La. 9/27/21), 324 So. 3d 93; *Martin* v. *Martin,* 52,401, p. 6 (La. App. 2 Cir. 11/14/18), 261 So. 3d 984, 989. Thus, questions of law are reviewed *de novo,* while questions of fact are subject to a manifest-error standard of review. *Fondel,* 2020-221, p. 4, 312 So. 3d at 1183. The determination of whether a statute or, in this case, an administrative rule, is constitutional presents a question of law, which is reviewed by this Court *de novo. See City of New Orleans v. Clark,* 2017-1453, p. 4 (La. 9/7/18), 251 So. 3d 1047, 1051 (citing *State v. Webb,* 2013-1681, p. 4 (La. 5/7/14), 144 So.3d 971, 975); *Mid-City Auto., L.L.C. v. Dep't of Pub. Safety & Corr.,* 2018-0056, p. 10 (La. App. 1 Cir. 11/7/18), 267 So. 3d 165, 175.

Likewise, the proper interpretation of statute is subject to the *de novo* standard ofreview1 thereby giving no deference to the trial court's interpretation of same. *225 Baronne Complex v. Roy Anderson Corp.,* 2024-0401, p. 10 (La. App. 4 Cir. 1/31/25) 408 So.3d 291,299 (citations omitted).

Appellate courts review a trial court's decision to grant or deny an exception of *res judicata* under a *de*

novo standard to determine if the ruling was "legally correct or incorrect." *Alexander v. La. State Bd. of Priv. Investigator Exam 'rs,* 2023-0159, pp. 26-27 (La. App. 4 Cir. 10/25/24) 409 So.3d 37, 59, *writ denied,* 2024-1438 (La. 2/25/25), 401 So.3d 659 (citing *Bd. of Supervisors of La. State Univ., Agr. & Mech. Coll. v. Dixie Brewing Co.,* 2013-0250, 0251, 0252, p. 2 (La. App. 4 Cir. 12/4/13), 131 So.3d 130, 132). However, if the trial court made any factual determinations in its *res judicata* ruling, then the appellate court reviews these under the manifest error/clearly wrong standard. *1955 Nola Holdings, L.LC. v. Windy Hill Pictures L.L.C.,* 2023-0050, p. 7 (La. App. 4 Cir. 10/2/23), 376 So.3d 200, 206 (quoting *In re Precept Credit Opportunities Fund, L.P.,* 2022-0067, 0068, p. 3 (La. App. 4 Cir. 9/16/22), 348 So.3d 844, 846).

DISCUSSION

Appellants assign two errors on appeal: the trial court erred in failing to enforce the United States Supreme Court's decision in *Group Life v. Royal Drug Company* as the supreme law of the land, opting to give higher deference to the Louisiana Insurance Code, notwithstanding the clear mandate of the Supremacy Clause of the U. S. Constitution; and the trial court erred in failing to enforce La. C.C. article 2298 regarding "enrichment without cause" as to Liskow's Affiliated Business Arrangement ("ABA").

In its answer to the appeal, Appellees assign as error the trial court's judgment denying its exception of *res judicata.* In the alternative, Lewis Title asks this

Court to grant its exception of *res judicata*.[8]

APPLICABILITY OF *GROUP LIFE V. ROYAL DRUG COMPANY*

Appellants contend that the trial court committed legal error by failing to apply *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979), and determining that Appellants were not entitled to a declaratory judgment[9] that title

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[8] Pursuant to La. C.C.P. article 2163(A) an "appellate court may consider a peremptory exception filed for the first time in that court if the exception is pleaded prior to a submission of the case for a decision and if proof of the ground of the exception appears of record."

[9] La. C.C.P. article 1871 allows for use of declaratory judgments.

> Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for; and the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The declaration shall have the force and effect of a final judgment or decree.

Moreover, the purpose of La. C.C.P. art. 1871 "is simply to establish the rights of the parties or express the opinion of the court on a question of law without ordering anything to be done." *Westlawn Cemeteries,21-01414,* p. 11, 339 So.3d at 558 (quoting *MAPP Const., LLC v. Amerisure Mut. Ins. Co.,* 2013-1074, p. 7 (La. App. 1 Cir. 3/24/14), 143 So.3d 520,528). "Use of the word

insurance is not insurance and that the Commonwealth policies were contracts of warranty. We disagree.

In *Group Life,* the Supreme Court determined that the McCarran-Ferguson Act[10] did not apply to

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'may,' rather than 'shall' evidences the legislature's intent to afford the trial court substantial discretion in deciding whether or not to render declaratory judgment." *Olano v. Karno,* 2020-0396, p. 4 (La. App. 4 Cir. 4/7/21), 315 So.3d 952, 956 (quoting *In re Interment of LoCicero,* 2005-1051, p. 4 (La. App. 4 Cir. 5/31/06), 933 So.2d 883, 886). "A declaratory judgment is a vehicle used to 'declare rights, status, and other legal relations whether or not further relief is or could be claimed.'" *Olano,* 2020-0396, pp. 4-5, 315 So.3d at 956 (quoting *LoCicero,* 2005-1051, p. 5, 933 So.2d at 886 (quoting La. C.C.P. art. 1874)).

[10] The McCarran-Ferguson Act, 15 U.S.C.A. § 1012, provides:

> **a) State regulation**
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation**
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended,

pharmacy agreements between Blue Shield and the individual pharmacies with which it contracted. *Id.,* 440 U.S. at 213-14, 99 S.Ct. at 1074-75. The Court found that the agreements were not "between insurer and insured." *Id.,* 440 U.S. at 216, 99 S.Ct. at 1075. "They [were] separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance." *Id.,* 440 U.S. at 216, 99 S.Ct. at 1075. The Court recognized that:

> "The relationship between insurer and insured, the type of policy which • could be issued, its reliability, interpretation, and enforcement-these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was-it was on the relationship between the insurance company and the policyholder." *SEC v. National Securities, Inc., supra,* [393 U.S. 453] at 460, 89 S.Ct. [564], at 568 [21 L.Ed.2d 668 (1969)].

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known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Id., 440 U.S. at 215-216, 99 S.Ct. at 1075.

In *Group Life,* independent pharmacists brought an antitrust action against Blue Shield and three pharmacies, alleging that the defendants violated the Sherman Act by entering agreements to fix the retail prices of drugs and pharmaceuticals and that the activities of defendants had constituted an unlawful group boycott. *Id.,* 440 U.S. at 207, 99 S.Ct. at 1071. The defendants argued that the agreements were exempt under the McCarran-Ferguson Act and obtained a summary judgment dismissing the plaintiff's petition. *Id.,* 440 U.S. at 207-08, 99 S.Ct. at 1071-72. The plaintiff pharmacies appealed, and the Fifth Circuit Court of Appeal reversed. *Id.,* 440 U.S. at, 208, 99 S.Ct. at 1072. The United States Supreme Court granted certiorari to resolve inter-circuit conflicts, and subsequently affirmed the judgment of the appellate court. *Id.* The Court held that the pharmacy agreements were not the "business of insurance" within the meaning of§ 2(b) of the McCarran-Ferguson Act. *Id.* The Court stated:

> The Pharmacy Agreements thus do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield. By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such cost-savings arrangements may well be

> sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the "business of insurance."
>
> The Pharmacy Agreements are thus legally indistinguishable from countless other business arrangements that may be made by insurance companies to keep their costs low and thereby also keep low the level of premiums charged to their policyholders.

Group Life, 440 U.S. at 214-15, 99 S.Ct. at 1075.

The United States Supreme Court reiterated the criteria the Court identified in *Group Life* as relevant in determining:

> [W]hether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): *first,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. *Pireno,* 458 U.S. 119, 129, 102 S.Ct. 3002, 3008-09, 73 L.Ed.2d 647 (1982) (emphasis added).

The Supreme Court further recognized in

Humana Inc. v. *Forsyth* that the "McCarran-Ferguson Act thus precludes application of a federal statute in face of state law 'enacted ... for the purpose of regulating the business of insurance,' if the federal measure does not 'specifically relat[e] to the business of insurance,' and would 'invalidate, impair, or supersede' the State's law." 525 U.S. 299, 307, 119 S.Ct. 710, 716, 142 L.Ed.2d 753 (1999) (citing *Dep't. of Treas.* v. *Fabe,* 508 U.S. 491, 501, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993)).

In the present matter, Appellants suggest that the title insurance policies issued to it do not meet the criteria established in *Group Life* to constitute the "business of insurance" and fall within the McCarran-Ferguson Act's exemption. Title insurance in Louisiana is governed and provided for in the Louisiana Insurance Code, found in Title 22 of the Louisiana Revised Statutes. Louisiana Revised Statute 22:47 includes title insurance as insurance and defines "title insurance" as "[i]nsurance of owners of property or others having an interest therein, against loss by encumbrance, or defective titles, or adverse claim to title, and services connected therewith." The Louisiana Title Insurance Act, enacted in La R.S. 22:511, provides:

> A. This Subpart shall be known and cited as the "Louisiana Title Insurance Act".
>
> B. The purpose of this Subpart is to provide the state of Louisiana with a comprehensive body of law for the effective regulation and supervision of title insurance, title insurers

> licensed to write title insurance in this state, title insurance producers, and the escrow, accounting, closing, and settlement practices of insurers and producers wherein title insurance is issued or contemplated to be issued.

Under La. R.S. 22:517, "[e]very title insurance producer licensed in the state shall provide, in a timely fashion, each title insurer with which it places business all information the title insurer may request in compliance with the licensing and reporting requirements of the department." Further, "[a]ll title insurers and title insurance producers shall be subject to all other applicable provisions of this Title unless specifically exempted by this Subpart." La. R.S. 22:534.

The title insurance policies issued to Appellants were issued in accordance with the provisions of the Louisiana Insurance Code and the Louisiana Title Insurance Act. The United States Supreme Court recognized that a title insurance company was an "insurance company" in *United States v. Home Title Ins. Co.,* 285 U.S. 191, 52 S.Ct. 319, 76 L.Ed. 695 (1932). The Court noted that prior to the issuance of a title insurance policy, a title insurance company prepares abstracts and conducts an examination of the title and that its fee for a title insurance policy is based on a scale dependent on · the face amount of the policy and includes fees for examinations, searches, and other sources incident to the transaction. *Id.* at 192- 93.

In a more recent case from the federal Sixth Circuit Court of Appeal, the appellate court considered whether title insurance rate-making was the "business of insurance" for purposes of the McCarran-Ferguson Act. *Katz* v. *Fid. Nat 'l Title Ins. Co.,* 685 F.3d 588, 592 (6th Cir. 2012). The Sixth Circuit considered the factors enunciated in *Group Life* and *Union Labor* to determine that title insurance is the business of insurance within the meaning of the McCarran-Ferguson Act. *Id.* at 594. The *Katz* Court referenced the *Union Labor* case which recognized that the first factor, *i.e.* whether the practice has the effect of transferring or spreading a policyholder's risk, "[r]equires that the product spread some risk; it does not specify any particular quantity." *Id.* at 593 (citing *Union Labor,* 458 U.S. at 129- 30, 102 S.Ct. at 3009). The court recognized that title insurance policies are priced well above most estimates of the risk involved and that "title-insurance rate-setting • is an integral part of the policy relationship between the insurer and the insured; and ... is limited to entities within the insurance industry." *Id.* (quoting *Union Labor,* 458 U.S. at 129, 102 S.Ct. 3002). The *Katz* court concluded, "[b]ecause title-insurance rate-setting spreads some risk, is a foundational piece of the policy relationship between the insurer and the insured, and has no application outside the context of insurance, it is clearly part of the business of insurance .... " *Id.*

Applying the criteria established in *Group Life* to the present matter supports a finding that the title insurance policies issued to Appellants are regulated by the Louisiana Insurance Code and the Louisiana Title Insurance Act and are within the business of

insurance. As noted above in *Katz,* title insurance spreads a policyholder's risk, the issuance of such policies is part of the policy relationship between the insurer and the insured, and the issuance of title insurance policies is limited to entities within the insurance industry. The trial court did riot err in determining that the title insurance policies issued to Appellants were within the "business of insurance" and fell within the exemption provided in the McCarran-Ferguson Act.

As such, Appellants were not entitled to declaratory judgments that the policies should be interpreted as contracts of warranty and entitled to damages for alleged violations under the contract of warranty law.

UNJUST ENRICHMENT

Appellants also asserts that the trial court erred in failing to enforce La. C.C. article 2298, regarding "enrichment without cause," as to the Liskow ABA. Recovery of damages under the theory of unjust enrichment is outlined in La. C.C.P. article 2298, which provides:

> A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The remedy declared here is subsidiary • and shall not be available if the

> law provides another remedy for the impoverishment or declares a contrary rule.
>
> The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.
>
> The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.

The Louisiana Supreme Court held that an unjust enrichment claim is established by five elements:

> (1) there must be an enrichment, (2) there must be an impoverishment, (3) there must be a connection between the enrichment and resulting impoverishment, (4) there must be an absence of "justification" or "cause' for the enrichment and impoverishment, and (5) there must be no other remedy at law available to plaintiff.

Baker v. Maclay Properties Co., 1994-1529, p. 18 (La. 1/17 /95), 648 So.2d 888, 897 (citations omitted).

This Court has recognized that all five elements must be met in order to succeed upon a claim for unjust enrichment. *See 3525 Prytania St. Condo. Ass 'n v. Prytania Inv. Properties,* 2023-0077, p. 6 (La. App. 4 Cir. 12/13/23), 382 So.3d 1028, 1033; *see also Fagot*

v. Parsons, 2006-1528, p. 4 (La. App. 4 Cir. 5/9/07), 958 So.2d 750, 752. Further, under La. C.C. article 2298, the remedy of unjust enrichment is "only applicable to fill a gap in the law where no express remedy is provided." *Walters v. MedSouth Record Mgmt.,* 2010-0353, p. 2 (La. 6/4/10), 38 So.3d 243, 244 (quoting *Mouton v. State,* 525 So.2d 1136, 1142 (La. App. 1 Cir. 1988)). In *Fagot,* this Court affirmed the dismissal of the plaintiff's petition on an exception of no cause of action because of the existence of alternative remedies against parties other than the defendant in the action. 2006-1528, p. 5, 958 So.2d at 753.

In the present matter, Appellants do not assert a cause of action for unjust enrichment in its petition for declaratory judgment, rather it asserts claims of breach of contract, fraud, intentional and negligent misrepresentation, false and deceptive advertising and negligence against Appellees. The trial court did not err in denying Appellants' claim for unjust enrichment because they failed to show that there are no other alternative remedies against Appellees.

EXCEPTION OF RES JUDICATA

In its Answer to Appeal, Appellees seek review of the trial court's ruling denying the exception of *res judicata.* In the alternative, Appellees ask this Court to grant its exception of *res judicata.* We pretermit these arguments for the reasons that follow.

At this point in the litigation, whether the trial court erred in denying Appellees' exception of *res judicata* is moot after our finding that the trial court

did not err in denying Appellants' petition for declaratory judgment and dismissing the petition with prejudice. Louisiana jurisprudence is clear that courts will not decide abstract, hypothetical, or moot controversies, or render advisory opinions with respect to such controversies. *Texas Brine Co. v. Naquin,* 2019-1503, pp. 14-5 (La. 1/31/20), 340 So.3d 720, 729~30; *Cat's Meow, Inc. v. City of Ne.w Orleans Through Dep't. of Finanr;e,* 1998-0601, p. 8 (La. 10/20/98), 720 So.2d 1186, 1193; *Granaio, LLC v. City of New Orleans,* 2024-0188, p. 4 (La. App. 4 Cir. 12/30/24), 408 So.3d 241, 244.

In the present matter, Appellees' exception of *res judicata* no longer presents a controversy because the trial court did not err when it denied the Appellants' petition for declaratory judgment . with prejudice. A ruling on the exception of *res judicata* would have no practical significance given the dismissal of Appellants' petition with prejudice. Therefore, a ruling on the.except~on of *res judicata* is moot as it would serve no useful purpose and give no practic~l relief or effect.

DECREE

For the foregoing reasons, we affirm the May 5, 2023 trial court judgment denying Appellants' petition for declaratory judgment and dismissing the petition with prejudice. Consequently, Appellees' Answer to Appeal is denied as moot.

AFFIRMED; ANSWER TO APPEAL DENIED AS MOOT

APPENDIX D

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS
STATE OF LOUISIANA

DOCKET NO. 2017-1517 DIVISION "L"

HENRY L. KLEIN, ET AL.
VERSUS
LEWIS TITLE INSURANCE COMPANY, INC., ET AL.

FILED: _____ _____
DEPUTY CLERK

FINAL JUDGMENT

This matter came before the Court on Thursday, August 3, 2023, upon the following motions: (i) a Request to Brief the U.S. Supremacy Clause filed by Plaintiffs Henry L. Klein, the Succession of Frederick P. Heisler, and Levy Gardens Partners 2007 LP ("Plaintiffs"), which the Court treated as a motion for reconsideration of its May 5, 2023 Judgment denying Plaintiffs' requests for declaratory relief (hereafter, the "Motion for Reconsideration"); and (ii) a Motion for Dismissal with Prejudice filed by Defendants Lewis Title Company, Inc. and Liskow & Lewis, PLC (together, "Defendants").

PRESENT WERE: Nicholas J. Wehlen,
Counsel for Defendants

Henry L. Klein, *pro se*

Michael G. Bagneris,
Counsel for Plaintiffs

The Court having considered the law, the evidence, the memoranda and oral arguments of counsel:

IT IS **HEREBY ORDERED, ADJUDGED AND DECREED** that Plaintiffs' Motion for Reconsideration be and it hereby is **DENIED;**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, considering the Court's May 5, 2023 Judgment denying all relief requested by Plaintiffs in this action. the Motion for Dismissal with Prejudice be and it hereby is **GRANTED;**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims, causes of action, and requests for declaratory or other relief (collectively, "Claims") asserted in this Civil Action No. 2017-1517 by Plaintiffs, Henry Klein, the Succession of Frederick P. Heisler, and Levy Gardens Partners 2007 LP, against Defendants, Lewis Title Company, Inc. and Liskow & Lewis, PLC, including but not limited to any and all Claims asserted or included by Plaintiffs in their Petition for Declaratory Judgment, be and they hereby are **DISMISSED WITH PREJUDICE;** and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Final Judgment is a final judgment within the meaning of La. Code Civ. P. arts.

1841, 1911, 1918, and 1919.

New Orleans, Louisiana, this 11th day of Aug., 2023.

/s/
DISTRICT COURT JUDGE KERN REESE
KERN A. REESE

APPENDIX E

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2017-01517 DIVISION: "L" SEC. 6
C/W: 2017-0042

HENRY KLEIN, ET AL.

VERSUS

LEWIS TITLE INSURANCE COMPANY, INC., ET AL.

FILED: _____ _____
DEPUTY CLERK

REASONS FOR JUDGMENT

This matter arises from a real estate closing. On October 7, 2008, the parties executed a real estate closing, which included the coverage of three title insurance policies. Plaintiffs allege that Defendants committed fraud by their practice of the agents keeping a majority of the title insurance premiums and sharing kickbacks amongst themselves. Plaintiff requests the Court grant a declaratory judgment that the title insurance policies are fraudulent securities contracts subject to 10-year prescriptive periods. They further seek the Court declare that Defendants had a

fiduciary duty to disclose the "common-split."

In its respective jurisdiction, a court "may declare rights, status, and other legal relations."[1] Declaratory judgments cannot be granted when there is an open objection to an action or proceeding on the same grounds upon which the declaratory judgment is prayed. Further, the existence of an alternate remedy does not preclude the granting of a declaratory judgment when it is appropriate. Such a declaratory judgment, has the full force and effect of a final judgment.

The sought judgment pertains to the insurance industry, an industry worth $1.4 trillion.[2] Black's Law Dictionary defines "insurance" as a contract, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.[3] Both state and federal laws regulate insurance and all that it entails. Federal law grants states the authority to legislate specifics of the insurance industry; but as public policy, it sets out

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[1] La. Code Civ. Proc. Art. 1871

[2] *Insurance industry at a glance* (2022) "Jnsurance Information Institute." The Institutes. <https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-theeconomy/introduction/insurance-industry-at-a-glance (Accessed: April 17, 2023)>.

[3] Black's Law Dictionary, 5th Edition

restrictions.[4] Insurance in the State of Louisiana is regulated by Title 22 of Louisiana's Revised Statutes. Title insurance occupies Subpart R of Title 22. Louisiana defines "title insurance policy" as:

> [A] contract, including any affirmative assurances, enhancements to coverage, or endorsements, insuring or indemnifying owners of, or other persons lawfully interested in, movable or immovable property against loss or damage arising from any or all of the following conditions existing on, before, or subsequent to the policy date and not specifically excepted or excluded:
>
> (a) Defects in or liens or encumbrances on the insured title.
>
> (b) Unmarketability of the insured title.
>
> (c) Invalidity or unenforceability of liens or encumbrances on the insured title of the movable, where a title search is required for the purpose of registration, or immovable property.
>
> (d) Title being vested otherwise than as stated in the policy.
>
> (e) Lack of a legal right of access to the land which is part of the insured title in a policy relating to immovable property.

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[4] 15 U.S.C.A. § 6701.

(f) Lack of priority of the lien of any insured mortgage over any statutory lien for services, labor, or materials as specifically described in the policy.

(g) Invalidity or unenforceability of any assignment of an insured mortgage subject to certain conditions.

(h) The priority of any lien or encumbrance over the lien of the insured mortgage.[5]

Plaintiff seeks a declaratory judgment decreeing that ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005 I 95 are not policies of insurance regulated by the Louisiana Insurance Code, Louisiana Revised Statutes, Title 22, but are retrospective Contracts of Warranty as to the title of the property and its permitted use as evidence by the public records of the jurisdiction where the property is located at the time the contract is issued and that all causes of action for breach are regulated by the 10-year prescriptive period set forth by Louisiana Civil Code Article 3499.

In the State of Louisiana a title insurance policy is an insurance policy. Insurance is defined above by Black's Law Dictionary, 5th edition. Louisiana codified its definition similarly in LA Revised Statute

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[5] La. R.S. § 22:512(23)

22:46(13)(a).[6] As defined above, Louisiana's Insurance Code further defined "title insurance policy."[7] The two definitions mirror each other. Both "insurance" and "title insurance" indemnify another party.[8] Title insurance rates are adopted and approved by the rating organizations regulated by general Louisiana insurance organizations. The insurance rates are fixed at a certain amount as required for insurance.[9] Contingencies of title insurance policies are governed by applicable provisions of the Insurance Code's Title 22 of Louisiana's Revised Statutes.[10] Insurance policies in the State of Louisiana indemnify another upon determinable contingencies.[11] Satisfying the general requirements of insurance in the State of Louisiana,

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[6] La. R.S. §22:46(13)(a) a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies. It shall include any trust, plan or agreement, popularly known as employee benefit trusts, not specifically exempted from state regulation under Public Law 93-406, except collectively bargained union welfare plans, single employer plans or plans of the state or political subdivisions. The term "insurance" shall not include any arrangement or trust formed under Subpart J of Part I of Chapter 10 of Title 23 of the Louisiana Revised Statutes of 1950.

[7] La. R.S. § 22:512(23)

[8] La. R.S. §22:46(13)(a). La. R.S. § 22:512(23)

[9] LA R.S. 22:516(A) LA R.S. 22:46(13)(a)

[10] La. R.S § 22:534

[11] La. R.S. §22:46(13)(a)

title insurance policies are insurance policies regulated by the Louisiana Insurance Code, Louisiana Revised Statutes, Title 22. This makes ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195, as title insurance policies, insurance policies. Therefore, Plaintiffs request for a declaratory judgment decreeing that ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 are not policies of insurance regulated by the Louisiana Insurance Code, Louisiana Revised Statutes, Title 22 is **DENIED.**

Plaintiff prays for a judgment declaring that as to ALTA Contracts E-14-0005523, L-14- 0005193 and L-14-0005195, any and all causes of action which may now be available to petitioners Henry L. Klein, the Succession of Frederick P. Heisler, and/or Levy Gardens Partners 2007 LP, or which may become available upon the entry of declaratory judgment(s) are not immunized by the McCarran-Ferguson Act, 15 U.S.C.A. § 1011, Mar. 9, 1945, c.20, § 1, 59 Stat. 33.

The McCarran-Ferguson Act applies to all three ALTA Contracts. The McCarran-Ferguson Act "declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest. Silence on Congress's part does not limit, restrict, or prohibit the regulation or taxation in the States.[12] The ALTA Contracts, as discussed above, are insurance policies within the business of insurance, which are immunized by the McCarran-Ferguson Act. Therefore, Plaintiff's request for

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[12] 15 U.S.C.A. § l 011, Mar. 9, 1945, c.20, § 1, 59 Stat. 33.

declaratory judgment that ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195, any and all causes of action which may now be available to petitioners Henry L. Klein, the Succession of Frederick P. Heisler, and/or Levy Gardens Partners 2007 LP, or which may become available upon the entry of declaratory judgment(s) are not immunized by the McCarran-Ferguson Act is **DENIED.**

Plaintiffs request a declaratory judgment that as to the October 7, 2008 Closing, wherein ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Garden Partners LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC, and the combination of the two is deemed to have been an affiliated business arrangement ("ABA") that, pursuant to HUD guidelines promulgated as 24 CFR Part 3500, Docket FR-3638-N-04, constituted the Liskow/Lewis ABA as a sham, subject to all regulations for the protection of the consumer as set forth by the Federal Real Estate Settlement Procedure Act (RESP A) and other federal and state regulations impacting sham ABAs.

The ALTA Contracts are subject are authentic and subject to Louisiana Insurance Code Regulations. Title insurance is subject to the Louisiana Insurance Code just as applicable provisions of insurance are subject to the Louisiana Insurance Code.[13] Title insurance is subject to the Louisiana Insurance Code's

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[13] La. R.S. § 22:534

"rules, regulations, and directives, in accordance with the Administrative Procedures Act to implement the provisions" of title insurance.[14]

Title insurance is not subject to the Federal Real Estate Settlement Procedure Act (RESPA) and other federal and state regulations. Therefore, Plaintiff's prayer for the Court to declare ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Garden Partners LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC, and the combination of the two is deemed to have been an affiliated business arrangement ("ABA") that, pursuant to HUD guidelines promulgated as 24 CFR Part 3500, Docket FR-3638-N-04, constituted the Liskow/Lewis ABA as a sham, subject to all regulations for the protection of the consumer as set forth by the Federal Real Estate Settlement Procedure Act (RESPA) and other federal and state regulations impacting ABAs is **DENIED.**

Plaintiffs request a declaratory judgment declaring that Liskow & Lewis, PLC and their respective partners, agents, members and affiliates are not entitled to any of the defenses set forth in the Louisiana Legal Malpractice Act because by acting as a sham ABA and because of other egregious violations of the rights of petitioners Henry L. Klein, the Succession of Frederick P. Heisler and Levy Gardens Partners 2007 LP, any benefits under law are forfeited

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[14] La. R.S. § 22:535

pursuant to the *Ex Turpi Causa* doctrine which provides that" .. . from a dishonorable cause no action arises ..."

Plaintiffs were not clients and therefore not entitled to any of the defenses set forth in the Louisiana Legal Malpractice Act. Plaintiff's requests for the defenses set forth in the Legal Malpractice Act are **DENIED.**

Plaintiff asks for a declaratory judgment that as to the Closing, wherein ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Garden Partners 2007 LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC, and the combination of the two is deemed reconstructed to bind defendants as if they had issued the Contracts of Warranty as to title of the property and its permitted use.

Title insurance is not a contract of warranty; therefore a party cannot be bound to the instrument as if it were a contract of warranty. As mentioned above, title insurance is subject to the Louisiana Insurance Code just as applicable provisions of insurance are subject to the Louisiana Insurance Code.[15] Again, title insurance is subject to the Louisiana Insurance Code's "rules, regulations, and directives, in accordance with the Administrative Procedure Act to implement the

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[15] La. R.S. § 22:534

provisions" of title insurance.[16] The ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 issued and/or sold to Levy Garden Partners 2007 LP are title insurance policies that are insurance policies in the same. Therefore, Plaintiff's request for a judgment declaring that the Closing, wherein ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Garden Partners 2007 LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC, and the combination of the two is deemed reconstructed to bind defendants as if they had issued the Contracts of Warranty as to title of the property and its permitted use is **DENIED.**

Plaintiff asks for a declaratory judgment declaring that as to the October 7, 2008 Closing, wherein ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Gardens Partners 2007, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC were fiduciaries who owed Levy Garden Partners 2007 LP and its principals a duty to disclose the "premium-split" with Commonwealth and the fact of Commonwealth's Rehabilitation proceedings in the State of Nebraska and that all causes-ofaction regarding that relationship are regulated by the 10-year prescriptive period set forth by Louisiana Civil Code Article 3499.

Plaintiffs were not clients and therefore not privy

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[16] La. R.S. § 22:535

to the disclosure of the "premium-split" with Commonwealth. Plaintiffs' request for a judgment declaring that as to December 3, 2007, commitment to issue ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195, any and all causes of action which may now be available to petitioners Henry L. Klein, the Succession of Frederick P. Heisler, and/or Levy Gardens Partners 2007 LP, or which may become available upon the entry of declaratory judgment(s) are matters involving abstracting duties regulating by the 10- year prescriptive period set forth by Louisiana Civil Code Article 3499 is **DENIED.**

Plaintiffs seek a declaratory judgment that any and all claims by Levy Gardens for overbilling are personal actions regulated by the 10-year prescriptive period set forth by Louisiana Civil Code Article 3499.

The claims pertain to title insurance. Title insurance is not regulated by the 10-year prescriptive period. Title Insurance rate filing is adopted and approved in accordance to Title 22 of Louisiana's Insurance Code. By adopting that of the State's regulatory authority for insurance, title insurance "shall not have its rates deemed to be excessive, inadequate, or unfairly · discriminatory."[17] Therefore, Plaintiffs prayer for a declaration that the claims by Levy Gardens for overbilling are personal actions regulated by the IO-year prescriptive period set forth by Louisiana Civil Code Article 3499 is **DEN1ED.**

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[17] La. R.S. § 22:516(A)

In 2017 the United States District Court for the Eastern District issued a judgment in this case under case no. 17-2205 *Klein, et al. vs. Lewis Title Ins. Co. Inc.* The case brought before the District Court requests for attorneys' fees pursuant to 28 U.S.C. § 1447(c) and sanctions for removal in bad faith. The Eastern District Court of Louisiana denied Plaintiffs request for attorneys' fees and declined to impose sanctions against defendants for removing the case in bad faith. This Court, taking notice of the distinct considerations asked of the Orleans Parish Civil District Court and the United States District Court for the Eastern District of Louisiana, decrees that this case is not *res judicata.*

This Court is also asked to consider the constitutionality of title insurance. To challenge a law constitutionally, the Attorney General must be a party. The absence of the Attorney General in this suit therefore, makes further adjudication of the constitutionality improper.

Most recently the matter came for hearing on the 31st day of March, 2023 on Defendant's Motion for Reconsideration of Order on *Ex Parte* Motion to Enforce LA R.S. 22:532, which this . Court hereby declares the Motion for Reconsideration of Order to be **MOOT.**

REASONS READ, RENDERED, AND SIGNED in New Orleans, Louisiana this 5th day of May 2023

/s/

Judge Kern A Reese
Division "L" Section 6
Orleans Parish Civil District Court

APPENDIX F

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2017-01517 DIVISION: "L" SEC. 6
C/W: 2017-0042

HENRY KLEIN, ET AL.

VERSUS

LEWIS TITLE INSURANCE COMPANY, INC., ET AL.

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

This matter came for hearing on the 31st day of March, 2023 on Defendant's Motion for Reconsideration of Order on *Ex Parte* Motion to Enforce LA R.S. 22:532. The matter was taken under advisement. The Court considered the entire record, initiated by Plaintiff Henry Klein's Petition for Declaratory Judgment, in its determination.

PRESENT: Michael Bagneris (LSBA No. 02658) and Henry Klein (LSBA No. 07440), Counsel for/and with Henry Klein

Phillip Wittmann (LSBA No. 13625) and Nicholas Wehlen (LSBA No. 29476), Counsel for/and with Lewis Title Insurance Company, Inc. and Liskow & Lewis

After considering the pleadings, the evidence, the arguments of the parties, and the law, the Court finds that the Plaintiff Henry Klein, et al. failed met their burden.

For limited purposes, title insurance is insurance in the State of Louisiana. The Louisiana legislature took time legislatively to set forth parameters of what constitutes title insurance. Fortynine states have title insurance. Only one, Iowa, has a different title insurance offering. Based on presented depositions, evidence, and testimony, the Court cannot make a finding that Louisiana title insurance statutes fall outside the realm of insurance.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's request for a declaratory judgment decreeing that ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 are not policies of insurance regulated by the Louisiana Insurance Code, Louisiana Revised Statutes, Title 22 is **DENIED.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's request for declaratory judgment that ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195, any and all causes of action which may now be available to

petitioners Henry L. Klein, the Succession of Frederick P. Heisler, and/or Levy.Gardens Partners 2007 LP, or which may become available upon the entry of declaratory judgment(s) are not immunized by the McCarran-Ferguson Act, 15 U.S.C. § 1011, Mar. 9, 1945, c. 20, § 1, 59 Stat. 33 is **DENIED.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's prayer for the Court to declare ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Garden Partners LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC, and the combination of the two is deemed to have been an affiliated business arrangement ("ABA") that, pursuant to HUD guidelines promulgated as 24 CFR Part 3500, Docket FR-3638-N-04, constituted the Liskow/Lewis ABA as a sham, subject to all regulations for the protection of the consumer as set forth by the Federal Real Estate Settlement Procedure Act (RESP A) and other federal and state regulations impacting ABAs is **DENIED.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's request for a judgment declaring that Liskow & Lewis, PLC and their respective partners, agents, members and affiliates are not entitled to any of the defenses set forth in the Louisiana Legal Malpractice Act and because of other violation of the rights of Henry L. Klein, the Succession of Frederick P. Heisler and Levy Gardens Partners 2007 LP, any benefits under law are forfeited pursuant to the *Ex Turpi Causa* doctrine

which provides that " ... from a dishonorable cause no action arises ..." is **DENIED.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's request for a judgment declaring that the Closing, wherein ALT A Contracts E-14-0005 523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Garden Partners 2007 LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC, and the combination of the two is deemed reconstructed to bind defendants as if they had issued the Contracts of Warranty as to title of the property and its permitted use is **DENIED.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's request for a judgment declaring that the Closing, wherein ALTA Contracts E-14-0005523, L-14-0005193 and L-:14-0005195 were issued and/or sold to Levy Garden Partners 2007 LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC were fiduciaries who owed Levy Garden Partners 2007 LP and its principals a duty to disclose the "premium-split" with Commonwealth and the fact of Commonwealth's Rehabilitation proceedings in the State of Nebraska and that all causes-of-action regarding that relationship are regulated by the 10-year prescriptive period set forth by Louisiana Civil Code Article 3499 is **DENIED.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's request for a judgment declaring that the December 3, 2007,

commitment to issue ALTA Contracts E-14- 0005523, L-14-0005193 and L-14-0005195, any and all causes of action which may now be available to petitioners Henry L. Klein, the Succession of Frederick P. Heisler, and/or Levy Gardens Partners 2007 LP, or which may become available upon the entry of declaratory judgment(s) are matters involving abstracting duties regulated by the 10-year prescriptive period set forth by the Louisiana Civil Code Article 3499 is **DENIED.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs request for a declaration that the claims by Levy Gardens for overbilling are personal actions regulated by the 10-year prescriptive period set forth by Louisiana Civil Code Article 3499 is **DENIED.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Reconsideration of Order on *Ex Parte* Motion to Enforce LA R.S. 22:532, which this Court hereby declares the Motion for Reconsideration of Order to be **MOOT**.

REASONS READ, RENDERED, AND SIGNED in New Orleans, Louisiana this 5th day of May, 2023

/s/
Judge Kern A. Reese
Division "L" Section 6
Orleans Parish Civil District Court

APPENDIX D

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 2017-1517 DIVISION "L"

[DATE STAMP]
VERIFIED

HENRY L. KLEIN, et als

versus

LEWIS TITLE INSURANCE COMPANY
and
LISKOW & LEWIS, PLC

FILED: _____ _____

BRIEF ADDRESSING THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

Henry Klein, the Succession of Heisler and Levy Gardens Partners 2007 ("the Levy Gardens Parties") respectfully address the following question presented:

> Q. IS THE LISKOW DEFENDANTS' RELIANCE ON THE LOUISIANA TITLE INSURANCE ACT AT R.S. 22:511 PREEMPTED BY CONGRESSIONAL

INTENT AND *GROUP LIFE v. ROYAL DRUG COMPANY*, 440 U.S. 205 (1979) PURSUANT TO THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION[1]?

A. YES.

The analysis begins with *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944), holding that the business of insurance was "commerce". Consequently, the prohibition of state taxation of interstate commerce threatened all states with the loss of substantial income. A review of 1945 Congressional comments is both illuminating and essential:

MICHIGAN SENATOR HOMER FERGUSON:

> "Some insurance companies had given notice to their states that they would not pay the tax which is being levied by those states, or that they would be paying under protest ... so it is advisable that the bill be passed quickly", *January 25, 1945 Congressional Record, at 479.*

WYOMING SENATOR JOSEPH O'MAHONEY:

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[1] This Constitution and the laws of the United States made in pursuance thereof ... shall be the supreme law of th eland; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

"Does the Senator from Michigan desire that the bill be interpreted as an intention of Congress to permit monopoly to be established in the insurance industry?

MICHIGAN SENATOR HOMER FERGUSON:

"No, by no means does the bill anticipate that any act would or should be passed that would create monopoly." *Id, at 480* ... "At the present time, every state rate-fixing authority violates the Sherman Act or the Clayton Act or both.", *Id, at 484.*

WYOMING SENATOR JOSEPH O'MAHONEY:

"Prior to Southeastern, insurance companies had to escape state regulation ... the Congress proposes by this bill to secure adequate regulation and control of the insurance business", *Id, at 480.*

MISSOURI REPRESENTATIVE JOHN COCHRAN:

"In my opinion, no honorable insurance company or honorable agent would want to be exempted from these acts. It will give an opportunity to fly-by-night insurance agents to indulge in all the false advertising they desire, and they will be exempt from prosecution if that provision in the bill stands." *February 12, 1945 Congressional Record, at 1027.*

ATTORNEY GENERAL FRANCIS BIDDLE:

> "Let me again emphasize the great desirability of speed; some of the taxes have been held up awaiting this issue ... but the main thing is the taxing ...", *February 18, 1945, at HR 1973, pp 4-5.*

TEXAS REPRESENTATIVE HATTON SUMMERS:

> "Congress expects the states to demonstrate their ability properly to govern the business of insurance. Insurance companies should do their best to remove from their practices anything that might be detrimental to the public interest.", *March 14, 1945 Congressional Record at Appendix 1190.*

1. Congress has spoken. The essence of the Supremacy Clause is to prohibit any state from passing legislation which conflicts with the will of the United States Congress. It provides that state courts are bound by, and state constitutions subordinate to, the supreme law, *The Priority of the Constitution over Federal Statutes – Mike Rappaport: Law & Liberty, April 13, 2012.* The Supremacy Clause is essentially a conflict-of-laws rule specifying that certain federal acts take priority over any state acts that conflict with federal law. It is *the* cornerstone of the United States' federal political structure, deeply entrenched by Supreme Court precedent since *Marbury v. Madison*, 5 U.S. 137 (1803), *McCulloch v. Maryland*, 17 U.S. 316 (1819) and *Cohens v. Virginia*, 19 U.S. 264 (1821).

While the Louisiana Legislature may typically be considered "... the will of the people ..." of Louisiana, the Louisiana Title Insurance Act, 22:511, et seq. cannot overcome the violations of Congressional Intent in the passage of the McCarran-Ferguson Act, 15 U.S.C. § 1011 and the interpretation thereof by the United States Supreme Court in *Group Life v. Royal Drug Company*, 440 U.S. 205 (1979) and its considerable progeny.

2. The severance of title insurers from the rest of the industry. At the heart of all debate in 1945 was the "...public interest...", expected to be uniformly protected by all recipients of the McCarran-Ferguson *gift* of immunity from the antitrust laws, a necessary exchange of governmental responsibilities. Fiscally, the states needed the income from the taxation of insurance premiums to protect compelling state interests. *The quid pro quo* was that Congress would let the states keep the income if the states would regulate "the business of insurance" – a fair bargain that has worked relatively well in all aspects of the insurance industry but the *severed* segment that sells contracts selling false hope named "title policies". The ways and means by which the title industry has been *severed* from the remainder of the industry has been bilateral: (1) all states but the enlightened State of Iowa have given the title industry a free pass from the rigor of filing Risk-Based-Capital Reports, the DNA of real insurers. The formulas, which would chase Pythagoras back to the Acropolis, look like this:

The Formulas

The formulas apply a covariance calculation to determine the appropriate risk-based capital. Simply stated, the covariance calculation reduced the aggregate amount of RBC because it is unlikely that all of the risk components will be impaired simultaneously.

Life Covariance Calculation = C0 + C4a + Square Root of $[(C1o + C3a)^2 + (Clcs + C3c)^2 + (C2)^2 + (C3b)^2 + (C4b)^2]$
P/C Covariance Calculation = R0 + Square Root of $[(R1)^2 + (R2)^2 + (R3)^2 + (R4)^2 + (R5)^2]$
Health Covariance Calculation = H0 + Square Root of $[(H1)^2 + (H2)^2 + (H3)^2 + (H4)^2]$

The levels of regulatory action are determined from the risk based capital after covariance. The covariance adjustment reflects the fact that the cumulative risk of several independent components is less than the sum of the individual risk. The formulas do not include the insurance affiliate equity investment risk and off-balance sheet risk inside of the covariance adjustment. The covariance adjustment follows the steps of adding together items that are believed to be correlated, leaving the balance of risks that not correlated. The covariance adjustment then squares these resulting groups, adds the resulting squares together and takes the square root of the sum of the squares. The covariance adjustment reduces the volatility of the smaller risks and increases the

> importance of the largest risks affected by the adjustment.

The list of "...free pass..." recipients is set forth in detail at ¶ 79 of the Petition filed in this case and is a matter of Judicial Notice. Other undisputed and indisputable statistics are set forth in the Complaint filed in *Klein v. ALTA*, Docket No. 12-1061 in the United States District Court for the District of Columbia, made *Exhibit A* hereto and incorporated herein fully and *in extenso*.

On the NAIC severance side, on December 13, 2013, the NAIC Title Insurance Risk-Based-Capital Subgroup disbanded because it could not create actuarial measures for filing RBC reports to regulators. That also eliminated title insurers from the inconvenience of adhering to the rigors of the Filed-Rate Doctrine pursuant to *Keogh v. Chicago & Northwestern*, 260 U.S. 156(1922) and *Square D v. Niagra Frontier Traffic Bureau*. 476 U.S. 409 (1986), discussed in *Klein v. ALTA* at ¶¶ 49-60. Indeed, NAIC concedes in its formal publications that title insurance is not like any other type of insurance – an understatement for all ages.

3. The deepest cut of all "...agent retention..." Money injected into an economy has a fiscal effect economists call a "multiplier". But money *drained* from an economy also saps consumer spirit. The societal damage that the title industry exacts is immensurable. To begin with, title insurers pay less that 4% of premiums collected in claims. To a claimant who fights for years for the pittance, the return is less than 2%

economically and sub-zero emotionally. But the fraud of "agent retention" is unprecedented in the annals of thievery. Demotech, Inc., the statistician of the title industry oligopoly, conceals "kickbacks" kept by closing notaries as "agent retention" without the consumer realizing that the underwriter will only receive 15% of the alleged premium paid. This *stealth* split of consumer dollars is a disincentive violating RESPA law, civil law, common law and moral law.

FORTY-NINE MILLION DOLLARS A DAY

Based on statistics filed into the record without objection by the Liskow Defendants and without dispute as to accuracy, the title insurance industry fleeces the American consumer out of $49 million dollars every day; not counting the negative economic multiplier.

4. Judgment on the pleadings and the inevitable declaration. The Liskow Defendants have only one defense: The Louisiana Title Insurance Act calls the contracts made of dust "...insurance...", a national *ipse dixit*. The product before this Court has none of the irreducible features required by *Group Life*:

- ❏ no pooling of risks;
- ❏ no protection *a futuro*;
- ❏ no state regulation;
- ❏ no actuarial data;

- ❑ no RBC reports;
- ❑ no filed-rate doctrine obedience;
- ❑ no *Proctor* relationship with policyholders;
- ❑ no reliability;
- ❑ no adjustors who adjust;
- ❑ no claims agents who pay claims;
- ❑ no disclosure of kickback schemes;

and, *most obscene of all*:

- ❑ no redeeming social value, *Roth v. United States*, 354 U.S. 476 (1957).

5. **The "...Necessary and Proper Clause..."** Article I, Section 8, Clause 18 of the United States Constitution provides that:

> The Congress shall have Power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Levy Gardens Parties close by citing the "necessary and proper" clause of the United States Constitution because this Court has oft-expressed a

concept that this state-court jurist should defer to a federal court to make the landmark ruling that title policies are not "...contracts of insurance..." Respectfully, this Court has humbly erred: Federalism treats both judicial branches as equals, which is why Judge James E. Boasberg ruled that *Klein v. Mnuchin* was for this Court to decide. The Necessary and Proper Clause is the modern term for what is often called the Sweeping Clause, *e.g.*, Federalist No. 33 (Alexander Hamilton).

This Court's ability to make the declaration sought will enforce the Congressional intent for the McCarran-Ferguson Act, as articulated by Senators Ferguson, O'Mahoney, Representatives Cochran and Summers and Attorney General Biddle. This Court cannot abdicate to the Louisiana legislature, whose meaningless *ipse dixits* defy the analysis in *Group Life* and its considerable progeny.

Article I, Section 8, Clause 18 of the United States Constitution has always advocated *consistent* interpretation of laws that control *national* conduct and governance as both "...necessary..." and "...proper..." This Court is not alone in recognizing that the contracts that ALTA markets are **false hope.**

The distinguished Professor at the Oklahoma School of Law and the author of the respected publication: *The Law of Title Insurance*, Joyce D. Palomar, has made the following observations in her scholarly works:

[1] Title insurance, as opposed to other types

of insurance, does not insure against future events, *Jourdanelle v. Old Republic*, 830 F.3rd 195; *Vestin Mortgage v. First American Title*, 101 P.3d 398.

[2] Title insurance is protection against future loss because of past events, *Lawyer's Title v. Novastar Mortgage*, 862 So.2d 793.

[3] Title insurance does not insure against future events, but against defects in title existing at the time when the policy was issued, *Foenrenbach v. German-American Title & Trust Co.,* 66 A. 561.

[4] A 1903 judicial assessment of title insurance that continues to be quoted today is that "...the risks of title insurance end where the risks of other kinds begin..." *Trenton Potteries v. Title Guarantee and Trust Co.,* 176 N.Y.65, 68 N.E. 132 (1903), *Exhibit B.*

Governmental studies in agreement with Professor Palomar include:

- ❏ 1977 Department of Justice: *The Pricing and Marketing of Insurance: A Report by the Department of Justice to the Task Group on Anti-Trust Immunities.*

- ❏ 1980 Peat Marwick Study conducted for the United States Department of

Housing and Urban Development: *Proposed Rule to Improve the Process of Obtaining Mortgages and Reduce Consumer Costs*.

- ❑ April 2007 Government Accountability Office Report GAO-07-401: *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*

Louisiana Legislative *ipse dixits* deserve no deference whatsoever. Certainly not sufficient to displace the *Supremacy* and *Necessary and Proper* clauses of the United States Constitution, both of which are binding on this Court.

6. Iowa. In 1947, Iowa declared title insurance illegal. This Louisiana jurist can and should do the same. The detractors of this industry have waited long enough for the guillotine to fall.

Respectfully submitted,

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APPENDIX H

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

[DATE STAMP]
FILED
2017 JAN 19 P 12:02
CIVIL
DISTRICT COURT

NO. 2017-0042 DIVISION M

HENRY L. KLEIN,
THE. SUCCESSION OF FREDERICK P. HEISLER
and LEVY GARDENS PARTNERS 2007 LP

versus

LEWIS TI'l'LE INSURANCE COMPANY, INC.
and LISKOW & LEWIS, PLC

FILED: _____ _____
DEPUTY CLERK

SYNOPSIS[*]

[*] This pleading supersedes and replaces the fax-filed version clocked-in at 2:24 PM, January 3, 2017. A Table of Contents and Authorities has been added and stylistic changes follow *Ex Turpi Causa* section at p. 25.

After Katrina, Petitioners endeavored to *assist the recovery and obtained HUD Grants for a 100-unit multi-family development in a devastated part* of *New Orleans East. Somehow, the task of obtaining title insurance and closing the transaction fell* to *the law firm of Liskow* & *Lewis, which had an in-house title agent, Lewis Title, which wrote for Commonwealth, an insurer at the brink* of *"run-off". Although the Liskow/Lewis team did* not *search the public records for zoning ordinances, it sold Levy Gardens $35,063,618* of *title insurance with zoning coverage, kept $168,269.50 in bloated fees and premiums and in the process violated federal law, state law, natural law and moral law.*

When Levy Gardens was $9+ million invested, a watchdog group sued to enforce a 1985 zoning ordinance the Liskow/Lewis team missed because it didn't look. When the courts ruled that public records *prevail, Commonwealth* ***engaged*** *in COLD-BLOODED fraud and litigation tactics led by perjured testimony* to *the effect that the $35,063,618 of insurance sold to Levy Gardens was really only $605,000.*

In a case filed by your first petitioner, Klein v. ALTA *the United States Supreme Court declined to test the* title *insurance industry's right to immunity from the Sherman Act and the FTC anti-deception laws as protected by the 1945 McGarran-Ferguson Act – SCALIA would have granted. The dismissal* of Klein v. ALTA, *however*, was based on *antitrust "standing" without rejecting* mu *argument* on *the merits.* Klein v. Lewis *is filed* to *complete what* Klein v. ALTA *started and to* collect *damages from the ultimate wrongdoers.*

PETITION FOR DECLARATORY JUDGMENT AND DAMAGES

1. Henry L. Klein, the Succession of Frederick P. Heisler and Levy Gardens Partners 2007 LP, ("Petitioners"), with respect represent:

2. Defendants Lewis Title Insurance Company, Inc., a title insurance ' agency and, Liskow & Lewis, a law firm sharing offices, employees and facilities at 5000 One Shell Square in New Orleans, are what the United States Government Accountability Office ("GAO") calls an "... affiliated business arrangement ..." and shall be referenced herein as the "... Liskow/Lewis ABA ..."

3. The gravamen of *this* case involves the initial failure of the Liskow/Lewis ABA to abstract for zoning ordinances, leading to an October 7, 2008 real estate closing ("the Closing") involving the sale of *worthless* contracts mislabeled as "insurance" and mushrooms thereafter, depending on this Court's rulings on Petitioners' *imprimis* requests for Declaratory Relief.

4. At the Closing, Levy Gardens paid $100,628.92 for three overpriced and ultimately *worthless* policies seemingly issued by Commonwealth Land Title Insurance Company ("Commonwealth"):

Owner's Policy Premium	$ 81,458.52
State of Louisiana Loan Policy Premium	$ 10,532.40
First NBC Loan Policy Premium	$ 8,638.00

5. On October 15, 2008, without any *disclosure,* Lewis Title paid Commonwealth 20% of the money it collected and kept $80,503.14, **Exhibit A**;

> "Also enclosed is our escrow check in the amount of $20,125.78 payable to Commonwealth Land Title Insurance Company *representing Commonwealth's portion ofthe premium(s) for this matter."*

6. The practice of title agents keeping the lion's share of premiums is a systemic fraud upon purchasers of title insurance, as explained in testimony by Robert Hunter to the House Committee on Financial Services Subcommittee on April 26, 2006, **Exhibit B-1**, at page 11:

> "It is illegal to pay someone for a referral, which is why they either do it illegally or via *Affiliated Business Arrqngements* (ABAs) ..... To secure these referrals, title insurers and title agents offer considerations to the real estate professionals and these considerations increase the cost of the insurance premium for the home buyer. Some considerations are legal in some states .... while most considerations and gifts are illegal kickbacks."

7. Because the premiums belonged to the issuer, the underwriter and the contract guarantor, the "...illegal kickback..." here was $80,503.14.

8. Moreover, the pittance sent to Commonwealth

(i) fundamentally skewed the balance of contract responsibilities, (ii) disincentivized Commonwealth from fulfilling *any* of the responsibilities under the contracts and (iii) gave Commonwealth a defense of inadequate consideration never intended.

9. As it has eventuated, Commonwealth used fraud *independent* of Liskow/Lewis (discussed *infra)* to pay as follows:

$ 18,323,070 Levy Gardens Owners' Policy
$ 668.314.33[1]

$ 11,614,548 OCD Lender's Policy $ -0-

$ 5,126,000 First NBC Bank Lender's Policy $ -0-

10. The value of a declaratory judgment is in its speed and finality:

The declaration shall have the* force *and effect

---

[1] Commonwealth *used perjury* to do its part, see Klein v. ALTA. at ¶ 24:

> Q. Is there a provision in the policy for the calculation of damages if there is a loss?
>
> A. Yes, there is Condition No. 8 that specifies how damages are to be determined.
>
> Q. And is there any other provision in the policy for calculating [losses]?
>
> A. *I am not aware of any other provision.*

of a final judgment* or *decree

- If this Court declares that the conduct of the Liskow/Lewis ABA made defendants the *de facto* issuers of the contracts of guaranty --- mislabeled as "insurance" --- and if this Court declares that the products sold by the Liskow/Lewis ABA are "securities", all defendants m. ust face the rigors of the federal securities laws and Rule 10b-5 promulgated to enforce the 1934 Securities Act.

- While insurance, *per se* may not pass the *SEC v. W. J. Howey* test for "securtities", 328 U.S. 293, ALTA touts (and Fannie Mae accepts) the deceptive proposition that ALTA policies are *vital* to the marketing and sale of mortgage-backed *securities* so "... bundled ..." and therefore inherent title insurance fraud becomes inherent securities fraud by the required "... tie ..." to ALTA and the compelled inclusion of mislabeled paper[2].

- If this Court declares that the conduct of the Liskow/LewisABA in keeping 80% of the Levy Gardens premiums constituted defendants' having "... stepped into the shoes of Commonwealth ..." or that the Liskow/Lewis ABA "... booked the bet ...", the 10-year prescriptive period for breach of contract as to the Lisk.ow/Lewis ABA would apply, not shorter periods sure to be invoked.

---

[2] See, Fannie Mae Internal Regulation B-7-2, **Exhibit B**.

- If this Court declares that the failure to disclose the "... commission-split..." was a *fiduciary* violation, the 10-year prescriptive period for personal actions would apply, not shorter periods sure to be invoked[3].

11. Criticism of the toxic aspects of ABAs is set forth in the *Consumer Federation of America* Report to Congress as follows (Exhibit B-1):

- "[p]urchasers [of title insurance] assume that the transaction intermediaries [including title agents] are acting in the buyers' interests, when in fact most intermedaries are acting in their own financial interests." p. 5.

- "The Federal Real Estate Settlement Procedures Act (RESPA) prohibits paying title agents kickbacks, defined as giving or accepting money .... Title agencies may create captive firms which receive premium rebates for *illusory* services to maintain their cut of the title insurance business." p.16.

- "Congress must do something to remove or sharply reduce the financial incentives for title insurance companies1 title agents and other intermediaries to engage in reverse competition

---

[3] See GAO Report 07-401, **Exhibit B-2**, at page 8: "In what is called a "... premium-split ...", agents retain a [large] portion of the premium .... agents have a fiduciary duty to account for premiums paid to them ..."

through kickbacks." p.17.

12. Similar criticism is set forth in GAO Report 07-401, *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers* as follows (Exhibit B-2):

- "Recent state and federal investigations into the sale of title insurance have identified practices by some title insurers, their agents and others involved in the sale of title insurance that allegedly allowed these entities to make undue profits at consumers' expense." p.1.

- "These alleged activities [of premium-splitting] which include referral fees, captive reinsurance arrangements and inappropriate ABAs potentially reduce price competition, and according to some insurance regulators, could indicate excessive pricing by insurers." p.4. (Over-billing claims prescribe in ten years), Shreveport Credit Recovery v. Modelist, 760 So.2d 681, 686 (2nd Cir. 2000).

- "... HUD has issued a policy statement ... .identifying a number of ABAs that were alleged to be "shell" title agencies that either had no physical location, employees, or assets or did not actually pe1-form any title services ... express[ing] concern that ABAs could be used as a means to mask refer1 -al fees, which are generally illegal under.RESPA ..." p.32.

13. The crux of what Petitioners present at **11** 10 -

12 is published in the *Marquette University Law School Faculty Blog* under the Title of "Measuring the McCarran-Ferguson Act's Antitrust Immunity" July 7, 2011, quoting petitioner Henry L. Klein as follows[4]:

> "Academicians like the Professors Eaton, Birnbaum, Hunter, Woolley and others have been calling for the guillotine to fall for years. The DOJ, HUD, GAO, FTC all say the same thing. The surveys submitted in Supreme Court Docket 14-929 have never been presented to a court of law. That is why McCray and other antitrust cases have lost. *Levy Gardens v. Commonwealth is a landmark case based on landmark inequities.*

14. In the Levy Gardens instance, the Likow/Lewis surrogate (Commonwealth) (i) turned against all three plaintiffs as soon as a claim was made, (ii) hired mega-lawyers to obstruct Levy Gardens' efforts to commence the adjustment process, (iii) refused to even *meet* with Levy Gardens principals for over 900 days, (iv) took the position that the $35,063,618 "Amount of insurance" was only $605,000 and (v) kept all the bloated premiums, (vi) all the while engaging in litigation tactics intended to wear Levy Gardens to a point of "... exhausted compliance

---

[4] Petitioner and *Klein v. ALTA* are recognized in "The Law of Title Insurance" by D. Barlow Burke and by other publications monitoring the Land Title Insurance Industry and this controversy.

...", a matter deplored in *Chambers v. NASCO*, 501 U.S. 82, (1991).

15. In the end, ***perjury*** as to Condition 8 killed Levy Gardens and now *Klein v. Lewis* is poised to finish what *Klein v. ALTA*. started, provided for this Court's ease of reference as *Appendix 1*.

I. BY HUD STANDARDS, THE LISKOW/LEWIS ABA WAS A SHAM

16. At the infirm Closing, the following legal fees and other charges which inured to the Liskow/Lewis ABA were distributed as follows: *Exhibit C*:

Legal Fees to Coats Rose for Owner	$ 30,000.00
Legal Fees to Coats Rose for Equity Closing	$ 40,000.00[5]
Legal Fees to Liskow & Lewis	$ 50,266.36
Legal Fees to Jones Walker	$ 30,000.00
Escrow to Lewis Title	$ 7,500.00

[5] Kelly Longwell of Coats-Rose did all the work that required intellectual rigor. The Coats-Rose legal fees paid at the Closing were well-earned.

Kickback payment to the Liskow/Lewis ABA
$ 80,503,14

17. On May 31, 1996, HUD promulgated a 10-point test to determine if an ABA was a "sham ... Federal Register at Volume 61, at 24 CFR Part 3500, Docket FR-3638-N-04, *Exhibit B-3*, concluding that the ABAs in the title industry failed to meet the test for *bona fide* Affiliated Business Arrangements:

> "Here, the capitalization, ownership and payment structure, ownership in separate 'divisions' is a method in which ownership returns or ownership shares vary based on referrals made and not on the amount contributed to the capitalization of the company. In cases where the percent of ownership interest or the amount of payment varies by the amount of business the real estate agent or broker refers, such payments are not *bona fide* returns on ownership interest, but instead, *are an indirect method of paying a kickback based on the amount of business referred."*

18. The Liskow/LewisABAfails HUD standards in at least the following respects (before discovery is had), at 29258: (1) the consumer must receive a written disclosure of the nature of the relationship and an estimate of the affiliate's charges; (2) the consumer is not required to use the controlled entity; and (3) the only thing of value received from the arrangement, other than payment for services rendered. is a return on ownership interests.

19. Because the Liskow/Lewis ABA *concealed* the 80/20 split of all the premiums, the threshold requirement of providing Levy Gardens a written disclosure ends the inquiry without the need to trace the $168,269.50 in suspect funds (although tracing the funds may have relevance under separate causes-of action such as unjust enrichment and/or conversion).

20. By any, measure, the Liskow/Lewis ABA was a *de jure* and *de facto* sham:

- Lewis Title can't be found in the white business pages of the phone book. *Exhibit B-3.1*;
- Lewis Title can't be found in the yellow pages of the phone book, *Exhibit B-3.2*;
- Lewis Title has no phone;
- Lewis Title can't be GOGGLED under "Title Insurance Agencies in New Orleans", *Exhibit B-3.3;*
- Lewis Title can't be GOGGLED under "Lewis Title Insurance", Exhibit B-3.4 (Liskow & Lewis shows up);
- Lewis Title didn't make ANGIE'S LIST, Exhibit 3.5;
- Lewis Title's first phone number on its invoice: (504) 581-7979 is Liskow & Lewis and the receptionist has no idea who Lewis

Title is;

- Lewis Title's second phone number on its invoice: (504) 556-4108 is a fax number for lawyer Andrew Kovak;

- Lewis Title does not belong to the National Association of Independent Land Title Agencies (NAILTA);

- Lewis Title did not attend the November 13 - 15, 2016 NAILTA meeting at the Ritz-Carlton in New Orleans.

21. The HUD 10-factor test, at 29262 of Exhibit B-3 confirms the sham status of the Liskow/Lewis ABA, to-wit (abbreviated):

Q1 Does the entity have sufficient initial capital and net worth to conduct the settlement business or is it undercapitalized?

A1 ***No.***

Q2 Is the entity staffed with its own employes or does it borrow from its parent?

A2 ***No.*** Lewis Title borrows employees from. Liskow.

Q3 Does the entity manage its affairs?

A3 ***No.***

Q4 Does the entity have a separate office?

A4 ***No.***

Q5 Is the entity providing substantial services?

A6 ***No,*** Abstracting titles can be accomplished with little effort, especially with increased use of title-plant data bases, which provide shared information and new technology; the level of gluttony in the title industrial exposes insubstantial costs for the supernormal profits[6].

Q6 Does the entity perform all of the substantioal services or contract out the services?

A6 ***No.*** In the case at bar, Commonwealth did *no* search of the public records to see if the proposed "use" was actually allowed. Rather, as is the case with all municipalities, the insurance company requests a letter from a

---

[6] "Predictably; the loss ratios reported by the title insurance industry, taken from statistics by Demotech, Inc. for ten years from 2000 to 3Q 2011 for the entire United States and Louisiana, are nothing short of vulgar: (¶ 95, *Klein v. ALTA*):

Sector	***Premiums Written***	***Losses Paid***	***% of PW paid***
United States	$164,047,576,699	$7,444,147,455	4.542%
Louisiana	$3,421,720,315	$62,318,521	1.821%

city employee *accepting* what was being asked, with no analysis by Commonwealth to see if the city employee writing the letter was correct[7].

Q7 Does the entity contract-out services from independent parties?

A7 ***No.*** Industry statistics show that the "affiliated parties" keep as much of the money as possible.

Q8 When the entity contracts-out any work, is the price paid reasonably equal to the value, or is the contractor involved receiving "value" as a referal fee or kickback?

A8 ***Kickback***.

Q9 Is the entity actively competing for the services to be rendered?

A9 No. The title industry is replete with anticompetitive traits presently immunized by the McCarran-Ferguson Act.

Q10 Is the entity spreading the business?

---

[7] On August 6, 2008, City of New Orleans municipal employee Edward Horan wrote to Henry Klein, opining that the property could be used as is, and no conditional permit was needed. That was *all* Lewis Title did to "abstract" zoning, *Exhibit C-1*.

A10 ***No.***

****

22. The ability of Sham ABAs to exist unregulated and undiscovered is enhanced because the market is so replete with the anticompetitive attributes articulated by HUD, FTC, GAO, the Anti-trust Division of DOJ and Klein v. ALTA-at ¶ 169:

> As *any* analysis of the title insurance industry will reveal: (i) the industry is *oligopolistic.* (ii) demand for the product is *inelastic.* (iii) price competition is *non-existent*. (iv) product costs are *excessive,* (v) the market relationship between insurers and title agents is *captive,* (vi) insurer profits are *supernormal,* and (vii) kickback schemes result from *reverse competition.*

23. Both defendants, as members of an "... affiliated business arrangement ..." that is a sham by HUD standards, are liable to Petitioners for all damages sustained as a consequence of the failed warranty as to the "use" of the property as intended.

24. In ruling on liability and coverage as to the Owner's Policy in *Levy Gardens v. Commonwealth*, U.S.D.C. Docket 10-4261 at Doc. 86. that court held:

> "This case arose because an otherwise valid Ordinance (i.e., 1985 Ordinance 10733), which had been a matter of public record since 1985. was simply missed and is now

being enforced.

II. MANIFEST BREACH OF DUTY TO DISCLOSE NEBRASKA REHABILITATION PROCEEDINGS AGAINST COMMONWEALTH

25. The most egregious breach of duty was the *concealment* of the fact that Nebraska was placing Commonwealth into Rehabilitation just when Levy Gardens was being sold three (3) *worthless* products. *Exhibit D*:

> "Commonwealth's policyholder's surplus, as of September 30. 2008. declined substantially to $163,554,727, a decrease of$112,379,967 or 69% from the policyholder surplus of 2007. This is a reduction in Commonwealth's policyholder surplus in excess of 50% in a twelve month period, constituting. a financial condition which renders the continuation of Commonwealth's business hazardous to its insureds, creditors, and the public, ¶ 7 and *passim*.

26. Since October 27, 2007, Liskow partner Andrew Novak was giving Levy Gardens quotes for (ultimately) $35 million in *new* insurance with zoning coverage, a somewhat reckless offer from an underwriter *in extremis. Exhibit E.*

27. Both sides of the Liskow/Lewis ABA knew or "... were reckless in not knowing ..." that Commonwealth's fiscal decline would have caused Levy Gardens (or Kelly Longwell) to ask for a healthy

underwriter ("the Rehabilitation Case").

28. On October 22, 2008, litigation by East New Orleans Neighborhood Advisory Commission ("ENONAC") began, resulting in an Order of Mandamus in CDC Docket No. 2008-11044 and ultimately, a ruling that the property was *not* zoned as warranted; CDC Docket No. 2009-00802 ('the Zoning Case").

29. The gravamen of both *ENONAC I* and *ENONAC II* was that, notwithstanding zoning endorsements which warranted that Levy Gardens had the right to use the property for multi-family housing purposes, an 1985 Ordinance missed by Commonwealth *prohibited* the intended use, causing the district court in *ENONAC II* to cancel the Levy Gardens permits.

30. All three Zoning Endorsements warranted that the Levy Gardens property could be used for a 100-unit multi-family development as intended:

> The Company insures against loss or damage sustained by the insured in the event that, at Date of Policy,
>
> a. According to applicable zoning ordinances and amendments, the Land is not classified Zone *RO (as to that portion of Lot L that was Lot 3A-6-1A-1) & B2 (as to that portion of Lot L that was Lot 3A-6-1A-2C*):
>
> b. The following use or uses are not allowed

> under that classification: *multifamily housing* (as to that portion of Lot L that was Lot 3A-6-1A-1); parking (as to that portion of Lot L that was Lot 3A-6-1A-2C)".

31. In the case at bar, the Liskow/Lewis ABA did *not* research the public records but took the "... easy way out ..." by getting the City of New Orleans to write a letter confirming the use, as per the Ed Horan letter, *Exhibit C-1*.

III. NEBRASKA v. COMMONWEALTH

32. As the Zoning Case unfolded in *ENONAC I,* the undisclosed Rehabilitation. *Nebraska v. Commonwealth,* moved quickly. as did a parallel bankruptcy case in Virginia, *In Re: LandAmerica Financial Group. Exhibit F.*

33. On November 26, 2008, the Nebraska Rehabilitaton filed the following significant pleading that should never have been *concealed:*

> *THE APPOINTMENT OF A REHABILITATOR IS NECESSARY TO PROTECT INSUREDS CREDITORS AND CLAIMANTS OF COMMONWEALTH; IT IS IN THEIR BEST INTEREST THAT THE APPOINTMENT OCCUR TO ALLOW TIME FOR THE DEPARTMENT TO ASSESS THE FINANCIAL CONDITION, REVIEW LITIGATION, AND DETERMINE WHETHER CLAIMS CAN CONTINUE TO BE PAID. THE DIRECTOR OF THE*

NEBRASKA DEPARTMENT OF INSURANCE AND HER SUCCESSORS, SHOULD BE APPOINTED REHABILITATOR OF COMMONWEALTH.

A MATERIAL DISCLOSURE LISKOW/LEWIS NEVER MADE.

34. The failure to apprise Levy Gardens that the policies were being written by a *failing* underwriter puts emphasis on the Government Accountability Office's conclusion about conflicts of interests, at page one:

> "... [b]ecause consumers generally do not pick their title agent or insurer, title agents do not market to them to the real estate and mortgage professionals who make these decisions. This can create a conflict of interests if those making the referrals have a financial interest in the agent (as with the Liskow/Lewis ABA)."

35. By hiding the "premium-split" and Commonwealth's Rehabilitation, Levy Gardens could *not* protect against the vicissitudes of a rehabilitation and lost the options set fo11;h by LEXOLOGY's publication, *Exhibit G*:

What Does this Means for You?

"Given the need for consent from the reinsurer, the short window during which a party may terminate and the uncertainty regarding reinsurer liability ... we

recommend that a buyer of title insurance from a LandAmerica subsidiary during the term of the reinsurance agreement obtain an affirmative reinsurance certificate and a closing letter from the reinsurer. As a practical matter, the ability of...[Commonwealth] to respond to a large volume of such requests in a timely manner may be limited.

ANOTHER MATERIAL DISCLOSURE LISKOW/LEWIS NEVER MADE

36. Significantly, on November 26. 2008, a Restraining Order issued against Commonwealth from proceeding *independently* from the Nebraska court, *Exhibit H*.

37. By this time, the Liskow/Lewis ABA had been monitoring the ENONAC case for two months, *Exhibit I,* yet said *nothing* to Levy Gardens or its principals, who were unaware that Commonwealth's incompetence was about to destroy a post-Katrina dream and two families[8].

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[8] The Klein family has been bit harder than the Heisler family. On October 14, 2016, Union Savings and Loan commenced foreclosure proceedings on the Klein's home, *Exhibit J,* emphasizing (in a different way) what the United States Supreme Court said 72 years ago in *United States v. South-Eastern Underwriters Association*, 232 U.S. 523, 64 S.Ct. 1162, 88 L.Ed.. 1440 (1944), noting that the rights of everyday human beings were impacted by "insurance", at 1167:

> "Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches

38. In the Virginia bankruptcy, that Court chronicled the fact that (i) Commonwealth was at the brink of "run-off", (ii) was for sale, (iii) Stewart Title's bid was rejected by the FTC and (iv) in due course, Fidelity National would be the only buyer of the infirm company.

39. Under-these circumstances, we request a Judgment decreeing that as to all transactions involving a title agent, the purchaser of insurance must be apprised of any "premium-split" between the agent and the underwriter.

IV. THE POLICIES THE LISKOW?LEWIS ABA SOLD TO LEVY GARDENS WERE WORTHLESS PRODUCTS MISLABELED AS "INSURANCE"

40, Support for this Court's granting declaratory relief is well-articulated in at least the following documentaries:

- *Title Insurance: A FLEECING OF AMERICA* by the Iowa State Bar Association., *Exhibit K.* and
- *The American Title Insurance Industry: HOW A CARTEL FLEECES THE AMERICAN CONSUMER,* Eaton & Eaton,

---

the home, the family, and the occupation or the business of almost every person in the United States."

Exhibit L.

41. In suggesting that the Liskow/Lewis ABA was selling *worthless* contracts *mislabeled* as policies of insurance, we are hardly "... a voice crying in the wilderness ..."; we have company:

42. The detractors waiting for the guillotine to fall includes: *Title Insurance Fees Paid by Borrowers Include Referral Costs*, Jack Guttentag, March 21, 2005; *Banks as Title Insurance Referral Agents?,* Boyer & Nyce, *Scientific Series,* Centre Interuniversitaire de Recherche Analyse des Organisations, September 2002; *Suit Calls for Reform, Refund,* Wendy Brown, The New Mexican, March 30, 2006; *Top Four Title Insurers Pay an Average of About 80% of Title Insurance Premiums to Their Title Agents in Form of Commissions,* J. Robert Hunter, Title Insurance Costs and Competition, April 20, 2007 @ p 11; and *Insurance Division Alleges Kickbacks,* Erin Johansen, Denver Business Journal, January 14, 2005, *The Truth about Title Insurance Needs to be Told,* The Iowa Lawyer, January 2003; *Inside America's Richest Insurance Racket,* Scott Woolley, Forbes, November 13, 2006[9]; *Why Title Insurance?,* Albert Rush, Mortgage Banker) August 2000; *How Long Will the Good Times Roll?* Auden and Palowski Special Report, March 20, 2008;

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[9] See, Klein y. ALTA. opening excerpts from Petition for Writ of Certiorari to the United States Supreme Court, at ii, *Exhibit M*:

TITLE INSURANCE FIRMS RAKE IN $18 BILLION A YEAR FOR A PRODUCT THAT IS OUTDATED, LARGELY UNNEEDED AND PROTECTED BY LAW.

Title Insurance: is it wanted here? New South Wales Law Journal, November 2002; *Title Insurance: Getting Ripped Off?* Les Cristie, Good Morning America, January 11, 2006; *Title Insurance Profits Excessive by Any Reasonable Measure,* Bernard Birnbaum, Report to California Insurance Commissioner, December, 2005; *The Antitrust Suits and the Public Understanding of Insurance,* George L. Priest, Vol 63, Tulane Law Review; *Despite Fines. Insurers likely to Keep Giving Kickbacks,* Los Angeles Business Journal, November 1, 1999: *Fidelity Title to Refund $2.2M to Florida Residents, Fined $1M,* The Title Report, September 2005; *Major Players in Title Industry Stifle Reform,* Jack Guttentag, Inman News, July 3, 2006; *The American Title Insurance Industry: How a Cartel Fleeces the American Consumer,* Eaton& Eaton, NYU Press, 2007.

43. In no uncertain terms, Commonwealth has engaged in anticipatory breach of contract, claiming that it "... would likely deny ..." the claims as to the ALTA Lenders Policies in-favor of First NBC Bank ($5,126,000), and the State of Louisiana ($11,614,548), and that (in essence) it owed *nothing* and will pay *nothing* to the lenders. *Exhibit N.*

V: FRAUD IN THE INDUCEMENT

44. Commonwealth, s sophistry is manifest: by *fraud* perpetrated in *Levy Gardens v. Commonwealth* and articulated in great detail in *Klein v. ALTA*, Commonwealth took the disingenuous position that they were *not* actually providing the First NBC Bank with $5,126,000 in lender's coverage, but much, much

less, *Id*, at page 4:

> "The measurement of loss under the policy, were the insured to foreclose and take ownership of the property and unsuccessfully seek a conditional use permit (and further assuming there were no other impediments to coverage) is the diminution of value in the Subject Property with the additional use restrictions [that Commonwealth missed]. **CLTIC has performed a diminution in value analysis in the Subject Property in connection with its ongoing litigation with [Levy Gardens] and determined that the dhninution in value is, at most, $605,000."**

45. That is *not* what any of the three policies said in Condition 8:

> "... The extent of liability of the Company for loss or damage under this policy shall be the lesser of (i) the Amount of Insurance (face value stated), or (ii) the difference between the **VALUE OF THE TITLE** as insured and the the **VALUE OF THE TITLE** subject to the risk insured against by this policy."

NOT THE VALUE OF "... THE PROPERTY ..."

46. There has *never* been anything wrong with the title: 100% fee simple before and 100% fee simple after.

47. Taking the dishonest position that Levy Gardens would *never* get more than $605,000 begs the question: so why did the Liskow/Lewis ABA sell Levy Gardens three policies for over $35 million in *illusory* coverage if the most Commonwealth would ever pay was $605,000?

48. Fraud in the inducement.

49. Lest there be any doubt about the thievery involved, Charles McCall repeated what he said (perjury) in. the Levy Gardens trial in federal court:

"THE COMPANY IS ONLY OBLIGATED TO PAY THIS LOSS ONCE"

50. Fraud in the execution.

51. In *Klein v. ALTA*. we made the following statement --- worth repeating --- about the outrageous manner in which our rights were trampled:

"In the instance of Complainant's insuredfmsurer relationship, Commonwealth (i) turned against Complainant as soon as there was a claim that required investigation, adjustment and payment, (ii) hired mega-lawyers to obstruct and fight off Complainant's efforts to commence-the adjustment process, (iii) refused to even *meet* with Complainant or anyone connected with Complainant for over 900 clays, (iv) took the position that the $35,063,618 Amount of Insurance sold was really only $605,000, and (v) kept all the premiums, all the while engaging in litigation tactics intended to wear Complainant down to the

point of "... exhausted compliance ...", a matter deplored by the United States Supreme Court in *Chambers v. NASCO*. 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 227 (1991)." *Id.,* @ ¶ 55.

52. Closing the circle, on September 20, 2012, Commonwealth rejected the claim by the State of Louisiana on similarly- slippery grounds, Exhibit O.

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VI. NO QUESTION ABOUT THE PERJURY

63. In *Klein v. ALTA*, confident that McCall lied under oath. we engaged in a third survey of the 49 members of the NAIC, save Iowa, and asked if any member ever heard of the limitation of liability by Condition 8 of the measure of damages (in a "use" impediment case) the way McCall *mendaciously* declared.

It has never happened before or after Levy Gardens. NEVER[10]

54. Should the Liskow/Lewis ABA wonder why it

---

[10] "In your capacity as regulating the business of insurance pursuant to the McCarran Ferguson Act, is your office aware or any instances in which the "Amount of Insurance" in a Title Policy has been reduced to "... the difference between the value ortbe Title as insured and the value of the Title subject to the risk insured against ..." *in the context of a "use" impediment?* and/or restrictive covenants *prohibiting the use of the property in any respect?",* Exhibit T, *infra.*

should take the hit for McCall's COLD BLOODED assassination of Levy Gardens' valid claim, the answer lies in the will of Karma: it will have taken *this* combination of shameless violations of federal law, state law, natural law and morallaw to reach the point where declaratory relief will lead to the damages due and owing in the correct contextof both facts and law.

VII. KLEIN v. ALTA

55. After being defrauded out of $35 million in *illusory* coverage by Commonwealth. an action was filed in the United States District Court for the District of Columbia, seeking the declarations identified in the Caption, to-wit:

ORIGINAL COMPLAINT FOR DECLARATORY JUDGMENT AS TO TITLE POLICY PROVISION 8(a); FOR DECLARATORY JUDGMENT THAT THE UNILATERAL RIGHT TO APPLY PROVISION 8(a) ELIMINATES PROTECTION UNDER THE *FILED-RATE DOCTRINE* BECAUSE IT MAKES *THE AMOUNT OF INSURANCE* A MOVING TARGET; FOR DECLARATORY JUDGMENT THAT TITLE INSURANCE IS NOT *"THE BUSINESS OF INSURANCE"* AND NOT PROTECTED BY MCCARRAN-FERGUSON

56. Adopting all arguments made in *Klein v. ALTA*, as if written out herein, fully and *in extenso,* your petitioners plead *further* as follows:

57. The land title insurance industry is controlled

by ALTA and four families which own subsidiaries, Commonwealth being a subsidiary of Fidelity National Financial Group --- all trading on the New York Stock Exchange.

58. In *Klein v. ALTA,* that court made the following finding, which did *not* adversely impact the declaratory relief sought here: Doc. 61 at page 6:

> Klein's alleged harm --- owing millions of dollars in guarantees to Levy Gardens' lenders and being forced into bankruptcy --- qualifies as an injury in fact ... fairly traceable to the defendants' challenged conduct insofar as Klein would have to pay the guarantees but for the Section 8 liability limitation, which he claims the defendants unlawfully conspired to include in all title insurance policies. And this monetary injury could be redressed by an award of damages to Klein. one of the types of relief requested in his complaint. True, as the defendants note. Klein did not purchase and was not insured under the lenders' policies ... but that does not diminish his injury in the Article III sense .... Tbe defendants' arguments are more appropriately addressed under the rubric of antitrust standing, which has more demanding requirements than Article III.

59. In *Klein v. ALTA*, the McCall tangled web was addressed thus:

> "Neither McCall nor ALTA nor Fidelity National nor Commonwealth. nor the industry can recant: in a case where $35 million in insurance was sold. McCall and Commonwealth persuaded a federal district judge that the Amount of Insurance was not the amount of insurance and a stunning victory was gained; the United States Court of Appeals for the District of Columbia has made it clear in *Konstantinidis v. Chen*, 626 F.2d 933 (D.C.C.1980); that when a party convinces one j1,ul.icial body to adopt factual contentions, that party cannot tell another court that those contentions were false:"

60. The die is cast: *The Industry Issues False Contracts of Warranty Under the ALTA Label of Insurance".*

61. More troublesome: *McCall's Perjury Makes Condition 8 "...a Moving Target ..." a Death-Knell to Filed-Rate Doctrine Protection.*

62. Today and in this case, the McCall declaration must pay the high price ofestoppel, as per *Zapata Gulf Marine v. Puerto Rico,* 731 F. Supp 747 (E.D. La.1990):

> The doctrine of judicial estoppel precludes a party in a legal proceeding from asserting a position that is contrary-to a position taken by that party in the same or a prior proceeding. *The doctrine is used to avoid damage* to *the integrity* of *the judicial* process ..."

****

VIII. MCCARRAN-FERGUSON IMMUNITY DOES NOT APPLY TO UNREGULATED CONTRACTS OF WARRANTY

63. Because the dismissal in *Klein v. ALTA* was on "standing", it has *no* detrimental impact on your first Petitioners' right to raise substantive issues here.

64. The differences between the present case and various prior (losing) cases brought against the title industry for antitrust violations is that your undersigned (Henry Klein) conducted three (3) surveys of the 49 members of the NAIC to establish that the title insurance industry is *not* regulated by state law and the title insurance policies are not "... contracts of insurance ..."

65. In this regard, the evidence gathered in *Klein v. ALTA* establishes beyond cavil that the regulation of the insured/insurer relationship is *non-existent,* as the following 49 members of the NAIC (save Iowa) responded to our FOI request, *Exhibit P*:

ARIZONA
Title insurance is *exempt* from regulation;

ARKANSAS
Title regulation is *limited* to licensing;

CALIFORNIA
Regulation is *limited* to rates and rebates;

CONNECTICUT

Response *promised;*

DELAWARE

Response *limited* to available public records;

GEORGIA

Insured claims are not monitored; disputes are sent to Consumer Services Division for possible resolution;

HAWAII

No affirmative steps are taken on *title* insurers;

IDAHO

No affirmative steps are taken on *title* insurers;

ILLINOIS

Request for information denied;

INDIANA

No records maintained responsive to request by Complainant;

IOWA

THE SALE OF TITLE INSURANCE IS *NOT* ALLOWED;

LOUISIANA

Complaints are sent to insurer for a response;

MAINE

Insurance department will *not* become involved;

MARYLAND

Upon receipt of complaints. order is sent to insurer to "... enforce statutes, regulations and policies...";

MASSACHUSETTS

Regulation *limited* to solvency;

MICHIGAN

Michigan takes action to protect the consumer through its Market Conduct Unit, whose oversight authority includes claims-handling and market conduct examinations. sometimes conducted at random; Michigan correctly separates title defects from use impediments and monitors unfair trade practices and failure to make prompt payments;

MISSISSIPPI

Regulation *limited* to consumer complaints;

MISSOURI

Request for information denied;

MONTANA

No affirmative steps taken;

NEBRASKA

Will investigate and prosecute unfair insurance trade practices;

NEVADA

Legal and Enforcement Section reports misconduct to NAIC, takes no action and *will not*

become involved in any matter pending in any court or forum;

NEW HAMPSHIRE

No response, but reference made to 2008 Report on Market Competition, concluding: there is **not** a reasonable degree of competition in the New Hampshire Title Insurance Marketplace ..."

NEW MEXICO

Request for information denied;

NEW YORK

Request for information denied;

NORTH CAROLINA

No affirmative steps taken;

NORTH DAKOTA

Reference to state statutes provided; *no evidence of affirmative action apparent;*

OHIO

Request for information denied;

OKLAHOMA

Request for information denied;

OREGON

Recent amendments regarding prompt and fair settlements appear to be a movement in the right direction;

PENNSYLVANIA

Request for information denied;

SOUTH CAROLINA

No proactive investigation of the claims-adjustment practice is conducted;

SOUTH DAKOTA

Request for information denied;

TENNESSEE

No affirmative steps taken;

VERMONT

Non-rate regulation *limited* to approval of (ALTA) forms and monitoring trade practices, but no details were submitted;

VIRGINIA

Limited to submission of complaints to title insurer to "... review the handling of the claim in question ...";

WEST VIRGINIA

Request for information denied;

WISCONSIN

Reference to Wisconsin general statutes;

WYOMING

Requests by insureds reviewed annually to see if a company should submit to market conduct examination.

66. The lack of uniformity is *manifest,* the

regulation of the claims process is *non-existent* and Iowa won't let title insurance salesmen cross the border because IOWA knows corruption when it sees it *Exhibit K*:

Title Insurance: A FLEECING OFAMERICA

67. The NAIC also conceded the point long, long ago, Exhibit P-1:

"Title insurance policies are indemnity policies [which] protect against losses arising from events that occur prior to the date of the policy, which is the date of closing. This is ***unlike*** other types of insurance policies, such as auto, or life insurance, which protect against losses resulting from accidents or events that occur after the policy is issued. A title policy is usually paid for with a one-time premium that is handled at the closing of the real estate transaction."

68. When Exhibit P-1 was filed in the D. C. Circuit (see superscription), its validity was not denied and its veracity is now a judicial admission *sub silentio.*

****

IX. THE CONTROLLING PRINCIPLES OF GROUP LIFE: THE BUSINESS OF INSU[RERS] IS NOT THE BUSINESS OF INSU[RANCE]

69. The Liskow/Lewis ABA was a business "arrangement" not immunized by McCarran-Ferguson because its conduct in connection with the infirm

Closing was the business of an insu***rer***, not the business of insu***rance***.

70. The United States Supreme Court decision in *Group Life & Health Insurance Company v. Royal Drug Company*, 440 U.S. 205 (1979) is so compelling and its principles so controlling that we provide the entire Supreme Court Report at 99 S. Ct. 1067 as *Appendix 2*, quoting some of its headnotes as general principles applicable to the facts of this case:

> [5] *Monopolies*. It does not follow that because an agreement is necessary to provide insurance, the agreement is also the "business of insurance" for purposes of the McCarran-Ferguson Act ...
>
> [6] *Insurance*. For purposes of determining whether a contract involves the element of "risk underwriting" that is an indispensable characteristic of insurance, there is an important distinction between "risk underwriting" and risk reduction; by reducing the total amount it must pay policyholders, and insurer reduces its liability and thus its risk but unless there is some element of spreading risks more widely, there no "risk underwriting".
>
> [9] *Monopolies*. lt would be plainly contrary to the language of the McCarran-Ferguson Act, which

> exempts from antitrust laws the "business of insurance" and not the "business of insurance companies" to interpret the Act so that every business decision of an insurance company could be the "business of insurance".
>
> [12] *Monopolies*. [W]hile the power of the states to tax and regulate insurance companies was reaffirmed, the Act also established that the insurance industry no longer had a blanket exemption from the antitrust laws.
>
> [13] *Monopolies*. The Act, considered as a whole, embodies a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws.

71. Commonwealth, having been paid a pittance by the Liskow/Lewis ABA, *abdicated* its role as the issuer of the infirm contracts, leaving Levy Gardens holding *worthless* paper saddled with a *worthless* piece of land: all because the Liskow/Lewis "sham" ABA did not abstract the issue of the "use".

72. Nothing about the conduct of the October 7, 2008 Closing by the Llskow/LewisABA or about its COLD-BLOODED aftermath is protected by law; nothing about the facts that led to the bilking of Levy Gardens is defensible: the defendants (i) didn't abstract the title or search the public records; (ii) began in December of 2007 quoting bloated numbers

(iii) for unnecessary coverage (iv) by a failing underwriter; (v) lied to Kelly Longwell about the availability of other insurers and about (vi) the need to charge *duplicative* premiums for *illusory* coverage apparently never intended to be paid.

73. The misconduct of the defendants' surrogate partner, Commonwealth, in the illicit and immoral"... arrangement ..." where a *worthless* product was sold under a "... misbrand ..." deserves the harshest of penalties available in. both law and equity.

****

X. THE FINAL CURTAIN: THE TITLE "INDUSTRY CAN'T FILE RISK-BASED CAPITAL ("RBC") *REPORTS THE DNA OF ALL REAL INSURERS*

74. The task is daunting, formulas are intimidating and regulators demand it: every real insurance company in the United States must face the music every year, replicated here directly from *Exhibit Q*. to make the point:

> **The Formulas**
> The formulas apply a covariance calculation to determine the appropriate risk-based capital. Simply stated, the covariance calculation reduced the aggregate amount of RBC because it is unlikely that all of the risk components will be impaired simultaneously.

Life Covariance Calculation = C0 + C4a + Square Root of $[(C1o + C3a)^2 + (Clcs + C3c)^2 + (C2)^2 + (C3b)^2 + (C4b)^2]$

P/C Covariance Calculation = R0 + Square Root of $[(R1)^2 + (R2)^2 + (R3)^2 + (R4)^2 + (R5)^2]$
Health Covariance Calculation = H0 + Square Root of $[(H1)^2 + (H2)^2 + (H3)^2 + (H4)^2]$

The levels of regulatory action are determined from the risk based capital after covariance. The covariance adjustment reflects the fact that the cumulative risk of several independent components is less than the sum of the individual risk. The formulas do not include the insurance affiliate equity investment risk and off-balance sheet risk inside of the covariance adjustment. The covariance adjustment follows the steps of adding together items that are believed to be correlated, leaving the balance of risks that not correlated. The covariance adjustment then squares these resulting groups, adds the resulting squares together and takes the square root of the sum of the squares. The covariance adjustment reduces the volatility of the smaller risks and increases the importance of the largest risks affected by the adjustment.

75. The RBC world at NAIC is divided into three distinct units: (i) Life Insurance, (ii) Property/Casualty

Insurance[11] and (iii) Health Insurance, *Id* so that actuarial data can be gathered and shared in the process of setting premiums based on the redistribution of risk *a futuro,* not the risk of "...later ..." finding a "... past .." impediment.

76. The Supreme Court in *Group Life* understood the reasons why insurers needed to be free to exchange actuarial data for purposes of rate-making, at page 221:

> "The theory of insurance is the distribution of risk according to hazard, experience and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors .... Because of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intraindustry cooperation,. the primary concern of both representatives of the insurance industry and Congress was that cooperative ratemaking efforts be exempt from the antitrust laws [price fixing]."

77. Finding actuarial data in the *restrospective* title world was impossible to accomplish, but *essential* to the concept of "... state regulation ..." and *necessary*

---

[11] The death-knell for this industry is that it has *nothing* to contribute to the Property/Casualty RBC subgroup at the NAIC, which gave up on December 13, 2013, *infra.*

for Company-protection pursuant to the Filed-Rate Doctrine, *Exhibit Q*:

> **"Overview.** The NAIC risk-based capital (RBC) system was created to provide a capital adequacy standard that is related to risk, raises a safety net for insurers, is uniform among the states, and provides regulatory authority for timely action .... The NAIC Risk-Based Capital system has two main components: 1) the risk-based capital formula, [which] establishes a hypothetical minimum capital level that is compared to a company's actual capital level, and 2) a risk-based capital model law that grants automatic authority to the state insurance regulator to take specific actions based on the level of impairment.

78. Unable to apply any RBC form~a or share any data with anyone, the title insurance industry did the only thing a powerful lobby can do:

buy a "free pass"

79. Rather than being "... regulated by state law ..." the super-wealthy industry obtained exemptions from every state or rode the coattails of the NAIC to pick up its $18 Billion yearly booty, to-wit, *Exhibit R*:

Alabama:
Alabama Code § 27-3-7;

Alaska:

A.S.A. 21:09.070;

Arizona:
R.S. § 20-1561(C);

Arkansas:
Ark. Code Ann. § 23-63-1302(8)(B)(iii);

California:
RBC not mentioned (just not done);

Colorado:
RBC not mentioned (just not done);

Connecticut:
Insurance Code § 38a-72-1(h);

Delaware:
Title 18, § 5801(7);

Washington D.C.:
DC Statutes § 31-2001(10);

Florida:
Title XXVII, Chapter 624.4085(j);

Georgia:
Georgia Code § 33~56-1(8);

Hawaii:
RBC not mentioned (just not done);

Idaho:
Insurers Act § 41-5401(8);

Illinois:
215 I.L.C.S. § 5/35A-5;

Indiana;
Indiana Code § 27-7-3;

IOWA:
TITLE INSURANCE NOT ALLOWED;

Kansas:
RBC not mentioned (just not done);

Kentucky:
806 K.A.R. 3:190 § 7;

Louisiana:
La. R.S. 22:6(9);

Maine:
Title 24-A, M.R.S. § 6451(6-A);

Maryland:
RBC not mentioned; (just not done)

Massachusetts:
211 C.M.R. § 20.01;

Michigan:
RBC not mentioned; (just not done)

Minnesota:
M.S.A. § 60A.60(8);

Mississippi:

Miss.Code Ann§ 83-5-401(g);

Missouri:
Title 18 § 5801(7);

Montana:
M.C.A. § 33-2-1902.210(iii)(b);

Nebraska:
Stock § 44-214, Risk Based Capital Act C;

Nevada:
RBC not mentioned; (just not done)

New Hampshire:
NH R.S.A. § 416-A;

New Jersey:
N.J.S.A. § l 7:46B-10.1;

New York:
NY Insurance Law § 1324;

North Carolina:
RBC not mentioned; (just not done)

North Dakota:
RBC not mentioned; (just not done)

Ohio:
response delayed;

Oklahoma:
O.S. Title 365 § 203-5;

Oregon:
NAIC regulations apply;

Pennsylvania:
NAIC regulations apply;

South Dakota:
S.D.C.L. § 58-4-48;

Tennessee:
TCA § 56-35-112;

Texas:
28 TAC § 7.401(a)(2);

Utah:
RBC not mentioned; (just not done)

Vermont:
NAIC regulations apply;

Virginia:
VA Risk-Based Capital Act § 38.2-5500;

Washington:
R.C.W. § 48.05.340;

West Virginia:
W.Va.Code § 33-3-5b;

Wisconsin:
RBC not mentioned; (just not done)

Wyoming:

W.S. § 26-48-101(a)(iii) & (iv).

XI. THE LAST NAIL ON THE ALTA COFFIN: "... PERMISSION TO DISBAND ..."

80. At the December, 2013 Fall Meeting of the NAIC at the Wardman Park Hotel in D.C., Chairman Alan Seeley of the Title Insurance Risk-Based Capital Subgroup *conceded* that developing RBC requirements £or title insurers was not feasible for two stated-reasons, *Exhibit S*:

> 1. The development of Title RBC would, as an initial condition, require uniform statutory accounting requirements among the states. This is currently not the case, as the accounting standards for statutory premium reserves and known claim reserves vary by state; and
>
> 2. Even if the states were to adopt such uniformity, the amount of work needed to develop an RBC methodology for title insurers would likely exceed the resources of the Subgroup and also would take numerous years to develop ..."

81. In what has to be a complete and unconditional surrender, the NAIC Title Insurance RBC Subgroup "... threw in the towel ..." on that fateful Friday the Thirteenth as follows:

> **"SINCE *THE MISSION OF OUR SUBGROUP APPEARS TO HAVE BEEN***

ACCOMPLISHED, WE RESPECTFULLY REQUEST "...PERMISSION TO DISBAND..."

82. The decision to "... disband ..." and thereby "... give up ..." on state regulation had a *double* impact on the suspect *title* insurance industry, eliminating McCarn-an Ferguson immunity *and* Filed-Rate Doctrine protection, which can be traced back to a duo of significant Supreme Court decisions, *Keogh v. Chicago & Northwestern*, 260 U.S. 156 (1922), and *Square D v. Niagra frontier Tariff Bureau*, 476 U.S. 409 (1986).

83. Affording ratemakers latitude is bottomed on the principle that commissioners are "expert" at understanding the calculus and actuarial statistics needed to set fair prices for premiums and market-appropriate tariffs.

84. The dogma set forth in Keogh and Square D teaches that ratemakers should "... not be second-guessed ..." by litigants different Pythagorean theories.

85. But on Friday, December 13, 2013 at Wardman-Park Hotel in D.C., the NAIC quit taking the "... first guess ...".

86. As a matter of *stare decisis*, the disbanding of the RBC subgroup was *not considered* in the following cases, which is why *Klein v. ALTA* controls that *terra nova* issue:

- *McCray v. Fidelity National*, Docket 10-

3576 (2012), 682 F.3d 299 (3rd Cir. 2012);

- *Katz v. Fidelity National,* District of Ohio Docket 08-677 (2009), 685 F. 3rd 451 (3rd Cir. 2012);

- *New JerseyTitle Insurance Litigation*, 3rd Circuit, 683 F.3d 451 (3rd Cir. 2012), and

- *In Re: Title Insurance Antitrust Cases,* 702 F.Supp 840 (N.D. Ohio 2010).

87. In the 72 years since McCarran-Ferguson was passed, the *title* insurance industry has had no *fiscal* regulation and will *not* be able to "... show cause ..." at the hearing on the *Rule Nisi* why the first two declaratory judgment requests should not be granted.

88. On May 23; 2013, Petitioner Henry L. Klein conducted a survey to see if anyone had *ever* heard of Condition 8 being used to measure damages in a "use" impediment case, *Exhibit T.*

No Commissioner supported McCall's perjured testimony

XII. EXTURPI CAUSA

89. Petitioners aver that by their conduct described above, respondents are barred from raising any *affirmative* defenses or counter-claiming pursuant to the precepts set forth in the *Ex Turpi Causa*

doctrine, which provides that "... from no dishonorable cause can an action arise ..."[12]

90. In the same legal and equitable context, laws enacted for the protection of the public interest must not be abrogated, diminished or ignored, as memorialized by the Louisiana Civil Code at Article 7:

> **Laws for the preservation of the public interest.**
>
> Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of those laws is an absolute nullity.

91. We quote again from the GAO Report 07-401 at p. 17:

> *CONGRESS MUST DO SOMETHING TO REMOVE OR SHARPLY REDUCE THE FINANCIAL INCENTIVES FOR TITLE INSURANCE COMPANIES, TITLE AGENTS AND OTHER INTERMEDIARIES TO ENGAGE IN REVERSE COMPETITION THROUGH KICKBACKS."*

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[12] *The Rights* of *Parties to Illegal Transactions, Chapter 8: The Ambit of the Ex Turpi Causa Principle*, The Federation Press, Neil Thompson, 1991:

"...Ex turpi causa non oritur actio ..."

XIII. FALSE AND DECEPTIVE ADVERTISING: "...21 REASONS FOR TITLE INSURANCE ..."

92. Should this Court declare that the title industry is *not* protected by McCarran-Ferguson, Section 5 of the FTC Act would apply to Commonwealth's deceptive publication: "... 21 Reasons for Title Insurance ...", providing liability for deceptive practices through the use of interstate commerce, *Exhibit U*.

93. The most egregious of all lies is in what happened when Levy Gardens attempted to make a claim and Commonwealth responded in COLD BLOOD, as articulated at ¶ 18 of *Klein v. ALTA*:

> "For over 900 days after a claim was made under the Zoning Endorsement, Commonwealth (i) *refused* to communicate with Complainant, (ii) *refused* to investigate the claim, (iii) *refused* to engage in any adjustment process, and (iv) *refused* to tender any payment under any of the three Policies of Title Insurance and Zoning Endorsements."

94. The 12th reason: Title Insurance covers attorney,s fees and court costs was an egregious misstatement, as was the hypocrisy to end all hypocracies:

"... rely on Commonwealth to* protect *your investment ..."

95. This is an industry that needs to disappear from the marketplace before more fiscal lives are lost; Commonwealth's "thank you" folder cover says: "this insurance provides for the protection of your real estate investment"; at trial, McCall predicably turned coat and testified that:

"... we insure the property, not the deal ..."

96. Fraud is a ruthless teacher and in the last nine years we have learned that there are at least 21 compelling reasons to run like the wind if a title agent happens upon a real estate transaction:

XIV. *"... 21 REASONS TITLE INSURANCE IS WORTHLESS ..."*

One:
It's not insurance;

Two:
Premium prices a fixed;

Three:
Premium prices are bloated;

Four:
ALTA writes Contracts for the benefit of the Four Families, not the Insured;

Five:
ALTA only writes Contracts of Adhesion;

Six:

The "Amount of Insurance" is not the amount of insurance;

Seven:
The Company will not defend its Insured;

Eight:
If the Insured makes a claim, the Company will attack its Insured with mega-lawyers;

Nine:
If the Insured hires a lawyer, the mega-lawyers will attack the lawyer;

Ten:
If the Insured wants to meet, the Insurer won't;

Eleven:
If the Insured wants an adjuster, no adjustor comes;

Twelve:
If the Insured needs to be paid, the Insurer will not pay;

Thirteen:
If a Lender needs to be paid, the Insurer will force the Lender to foreclose first, then fight;

Fourteen:
If a lender needs to be paid, he must first sue the Insured as a stepping-stone;

Fifteen:

If the Lender really needs to be paid, he must exhaust all remedies, and then exhaust the victim;

Sixteen:

If the Loan is well past-due, it won't matter;

Seventeen:

If the Insured is broke and broken, it won't matter;

Eighteen:

If the Insured takes his case to court, the language of the policy will change;

Nineteen:

If the Insured appeals, the Insurer will last longer;

Twenty:

If the Insurer is in "run-off', he runs off;

Finally, Reason Twenty-one:

TITLE INSURANCE FIRMS RAKE IN $18 BILLION A YEAR FOR A PRODUCT THAT IS OUTDATED, LARGELY UNNEEDED AND PROTECTED BY LAW.

XV. BREACH OF ABSTRACTING CONTRACT DUTIES

97. All ALTA Policies provide that "... This Policy, together with all endorsements attached to it by the

Company is the entire policy and *contract* between the Insured and the Company; abstracting is part of the contract obligations, *The Law of Title Insurance*, D. Barlow Burke, ¶ 112.01.

98. The standard of care for abstractors "... for negligent performance of a ***contract*** duty is a high one ..." Burke, at if 12.04, and it is a breach of that duty "... to assign any abstracting task to a non-lawyer ...", Burke, at ¶ 12.07.

99. The Liskow/Lewis ABA relied on a non-lawyer, Ed Horan, to provide an opinion as to the use of the property, but had Horan address the letter to Henry Klein, not to Lewis Title, *Exhibit C-1*.

100. Rather than abstracting the public records, the Liskow/Lewis ABA *orchestrated* the sending of the Horan letter directly to Henry Klein in a *stealth* maneuver highly-likely intended to avoid responsibility[13].

101. The responsibility of agents, however, is vicariously shared with the underwriter no matter how many *legerdemain* activities take place to mask the act, *Chicago Title Insurance Company v. Washington State Office of the Insurance Commissioner,* No. 87215-

[13] Exhibit C-1 does not have the markings of a Lewis Title response to discovery as does Exhibit V, *viz:* Lewis - 00016.

5, *en banc,* 309 P.3d 372 (2013)[14].

102. On information and belief, it is an industry *pattern* to rely on a municipal employee (hopefully) familiar with zoning to provide a letter such as Horan provided to Klein outside the scope of the zoning endorsement process and --- by illusion --- independent of the ATLA process.

103. Should the Court declare that the ALTA contracts at issue are *not* "... contracts of insurance ..." and therefore not protected by McCarran-Ferguson, then the use of a letter from a municipal employee as a means of *circumventing* the contractual duty to abstract will .be subject to enforcement by the Federal Trade Commission pursuant to Section 5, if not enforecable pursuant to Section 5 of the Sherman and Clayton Acts[15].

104. As to any reliance on a city employee in "stand-alone" support for a zoning endorsement, the court in the underlying case ruled, at Doc. 86, pp 8-9:

> "... Commonwealth asserts that on the date of the issuance of the policy, the property was zoned as insured and no coverage is owed to LG. The Court disagrees. The

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[14] *Washington Supreme Court Holds Title Insurance Underwriter for Regulatory Violations by Agent, Notwithstanding Underwriter's Lack* of *Control, Exhibit W.*

[15] See, *FTC Issues Statement* of *Principles Regarding Enforcement* of *FTC Act as a Competition Statute, Exhibit X.*

> Owner's Policy included a zoning endorsement [insuring multi-family housing] as a 'permitted use'. While this Court is not necessarily bound by the state court decisions on this issue, the undersigned agrees with those decision and finds that they support the fact that, on October 7, 2008, 1985 Ordinance 10733 which was "missed" did not allow LG to proceed under a "permitted use" scenario ....Indeed, the opinions relied upon by Lewis Title and Commonwealth ***seem*** **to** ***have been simply wrong*** ....

105. As to the requirement to conduct a "... thorough abstract ...", the district court continued:

> The issue of the zoning endorsement should have been preceded by thorough abstract which would have revealed 1985 Ordinance 10733, without asking a third party (even one in a position to know the correct answer) Notably, this ordinance had been a matter of public record for 22 years when the title closing took place. ***A thorough abstract was not conducted, however,*** and the parties fmd themselves in the situation herein because of that failure[16]."

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[16] One year prior to the Closing, Lewis Title obtained an earlier letter which made it clear Levy Gardens planned to build a multi-family development, *Exhibit V*.

106. Should this Court declare that the obligation to conduct a thorough abstract is a *contract* obligation subject to a prescriptive period of ten years, then liability will attach to the Liskow/Lewis ABA from December 3, 2007, when all three commitments were first issued, *Exhibit Y,* at page 2:

> "On December 3, 2007, Commonwealth issued commitments for the following policies: (1) Owners Policy" No. E-14 0005523 for LG in an amount to be determined; (2) Loan Policy No. L-14 0005193, for First National Bank ("FNB") for $5,954,250; and (3) Loan Policy No. L-14 0005196 for OCD for $11,614,548 ..."

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XVI. DECLARATORY JUDGMENTS SOUGHT

107. Although *Klein v. ALTA* also sought declaratory relief, it was dismissed on the non-prejudicial basis that your Petitioner did not have antitrust "standing"; the Court of Appeals for the District of Columbia Circuit affirmed on March 26, 2014 and Petitioner's Application for Writ of Certiorari was denied October 6, 2014 in Docket 13-1315.

108. On October 17, 2016, Petitioner filed a Motion to Reopen the D.C. District Case, Doc. 65, page 4 of 6, to-wit:

> "After the Viriginia Bankruptcy Court approved the transaction (the Fidelity

> purchase of Commonwealth) in late December, 2008, Commonwealth refused to engage in *any* adjusting process for over 900 days, Klein v. ALTA, at ¶ 18[17]. As to both lenders' policies, Commonwealth raised the so-called "Condition 8" to limit its liability to $605,000, and took the sophistic position that it was "... only obligated to pay this [$605,000] loss once ..."

109. Under oath, *that* statement was perjury.

110. On November 28, 2016, the D.C. Court denied the motion (a non-prejudicial ruling), meaning that there are no open actions where the declaratory judgments sought hereby can be adjudicated.

111. Moreover, although *this* pleading seeks declarations that federal securities laws should be "... declared [to apply] ...". that declaration has not yet been made and when such relief is ultimately GRANTED, the recent Supreme Court case in *Manning v. Merrill Lynch*, 578 U.S. __ (2016) will apply.

112. In *Manning*, the High Court correctly held that, where a litigant files an action in state court

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[17] "For over 900 days after a claim was made under the Zoning Endorsement, Commonwealth (i) *refused* to comunicate with [Klein], (ii) *refused* to investigate the claim, (iii) *refused* to engage in any adgustment process and (iv) *refused* to tender any payment under any of the three Policies of Title Insurance with Zoning Endorsements." *Footnote 4.*

asserting both state law claims (e.g., breach of contract, breach of fiduciary duty, breach of abstract obligations, overbilling, overcharging, fraud in the inducement, fraud in the execution and the sale of a worthless product), ***and*** violations of federal securities laws, the case cannot be removed, allowing the judicial system to give "... due deference to the important role of the state court ...", *Id.,* at 3.

113. This case has LANDMARK written all over it and the threshold issue presented here is exactly what declaratory judgments are meant to answer:

IS IT REALLY "INSURANCE" OR IS IT A PRETENDER?

114. In *Klein v. ALTA*. we briefed *that* issue, quoting from the Platters 1956 hit to make the point that title insurance is "... pretending to be insurance when it's not ..." crashing the McCarran-Ferguson party Congress gave in 1945:

"Oh-oh yes, fm the great pretender ...
Pretending to be what I'm not, you see ..."

115. Also, in *Klein v. ALTA,* we observed:

> When Congress convened on January 3. 1945, there was an aura of panic among the several states, as Senator Ferguson reported that "... some insurance companies had given notice to their States that they would not pay the tax which is being levied by those States. or that they would pay it under

protest .... so it is advisable that the bill be passed quickly ..." *Congressional Record, 79th Congress, at 479.* (¶ 97)

Senator O'Mahoney, one of the most skeptical lawmakers, expressed concern because prior to Southeastern . "... insurance companies had to escape State regulation ..." and more was expected, to-wit: "... the Congress proposes by this bill to secure *adequate* regulation and control of the Insurance business ...", *Id.* at 480. (¶ 98)

Finding substantial reluctance to give the insurance Industry blanket Immunity from the antitrust laws, Senator Ferguson described the situation as "chaos" and "chaotic" on four occasions in an impassioned plea to the President of the Senate, *Id.,* at 484, meaning that the Congress gave little thought to the quality or the quantity of the state "regulation" of such things as claims-adjustment and false and deceptive practices as has eventuated with provision s(a). (¶ 99)

At the House of Representatives two weeks later, on February 12, 1945, Missouri Representative COCHRANE was less delicate about the forthcoming protection, *Id,* at 1027:

"...in my opinion, ***no honorable insurance company or honorable agent would want to be exempted from these acts.*** It

> will give an opportunity to fly-by-night insurance agents and companies to indulge in all the false advertising they desire, and they will be exempt from prosecution if that provision in the bill stands ..." (¶ 100)

116. This Court can and should bring this travesty to an end; the manner in which your Petitioners were trashed for the past 9 years provides the perfect backdrop for the Declaratory Judgments we seek.

117. The 79th Congress did not enjoy input from industry analysts Hunter, Birnbaum, Wooley or the Professors Eaton who say that the *title* insurance industry doesn't need protection from the marketplace, but rather:

THE MARKETPLACE NEEDS PROTECTION FROM THE TITLE INDUSTRY

118. As we phrased it in the "Great Pretender Brief' in *Klein v. ALTA*:

THE PRODUCTS ARE CONTRACTS OF GUARANTY AS TO THE CONDITION OF FEE-SIMPLE TITLE AND/OR THE PERMITIED USE ON THE DAY THE CONTRACT IS ISSUED FOR A "FEE".WHICH IS NOT A PREMIUM.[18]

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[18] *A Policy of Insurance:* a written instrument by which an insurer, in consideration of a premium, agrees to indemnify an insured against a *contingent* loss by making him a payment in

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119. Pursuant to Louisiana Code of Civil Procedure Article 1871, petitioners are entitled to a declaration of their rights, status and other legal relations as to defendants and as to their rights under the three ALTA contracts at issue.

120. The key feature of the remedy is that "... the declaration stands by itself with no executory process following as a matter of course, so that it is distinguished from a direct action in that it does not seek execution from opposing litigants ..." *Billingsley v. Baton Rouge,* 673 So.2d 300 (181 Cir. 1996).

121. The existence or non-existence of adequate remedies is *not* a basis for objection and the availability of supplemental relief is *secondary* to declaratory judgment, which must *precede* ordinary relief by rule to show cause so the parties can litigate *supplemental* relief thereafter and thereupon.

122. *Imprimis*, an answer is *not* required: "... [i]t is in an answer that affirmative defenses are required

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compensation whenever the event *shall* happen by which a loss is to accrue. *Black's Law Dictionary,* 5th Edition.

A Premium is the price for insurance protection for a specified period of exposure to a *future* risk, *Id.*

Insurance is an Arrangement for Transferring and Distributing Risk a Futuro, 1 G. Richards, The Law of Insurance, cited with approval in *Group Life & Health v. Royal Drug Co.,* 440 U.S. 205 (1979).

...", *Perkins v. Perkins*, 388 So.2d 475 (2nd Cir. 1980); also, Succession of McLean, 580 So. 2d 935 (2nd Cir. 1991); a court of law in a Dec Action cannot grant ultimate relief, just clarify the "... rights available ..." to the parties.

123. For the Rule *Nisi* we seek, the defendants have *not* been cited to "... appear and answer ..." and no answer is required (i) by the pleadings. (ii) by Louisiana Code of Civil Procedure Article 2594 or (iii) by the Louisiana Declaratory Judgment Act, which is an *anticipatory* remedial statute to be "...liberally construed and administered ..." *Id.* at Article 1881.

124. The analysis by Wilson R. Ramshur, *Declaratory Judgments in Louisiana.* 33 L. Rev. 1 (1972), provides sage guidance to the process. viz:

- "... [a] declaratory judgment differs from a conventional remedy in that while a conventional remedy is accompanied by a granting of damages or other relief, the declaratory judgment stands alone."

- "The conventional type of judgment embodies two elements: (1) an ascertainment or declaration of the rights of the parties; and (2) a specific award of relief. The declaratory judgment embodies only the first element which, of course, is express."

- The key issue in any declaratory

judgment setting is the existence of a justiciable controversy wherein some declaratory relief will terminate the controversy or remove an uncertainty, all of which are present in the case at bar.

XVII. RESERVATION OF RIGHTS TO SEEK SUPPLEMENTAL RELIEF AFTER AFTER DECLARATION OF RIGHTS AND RELATIONSHIPS

125. Pursuant to Louisiana Code of Civil Procedure Article 1878, petitioners reserve the right to seek suplemental relief for damages depending on the Court's granting Declaratory Judgment[s] as follows:

□ Judgment declaring that ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 are not policies of insurance regulated by the Louisiana Insurance Code, Louisiana Revised Statutes, Title 22, but are retrospective Contracts of Warranty as to the title of the property and its permitted use as evidenced by the public records of the jurisdiction where the property is located at the time the contract is issued and that all causes of action for breach are regulated by the 10-year prescriptive period set forth by Louisiana Civil Code Article 3499.

□ Judgment declaring that as to ALTA Contracts E-14-0005523, L-14-0005193 and .L-14-0005195, any and all causes of action which may now be available to petitioners Henry L. Klein, the Succession of Frederick P. Heisler, and/or Levy

Gardens Partners 2007 LP, or which may become available upon the entry of declaratory judgment(s) are not immunized by the McCarran-Ferguson Act, 15 U.S.C. § 1011, Mar. 9, 1946, c. 20, § 1, 59 Stat. 33.

□ Judgment declaring that as to the October 7, 2008 Closing, wherein ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Gardens Partners 2007 LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC, and the combination of the two is deemed to have been an affiliated business arrangement ("ABA") that, pursuant to HUD guidelines promulgated as 24 CFR Part 3500, Docket FR-3638-N-04, constituted the Liskow/Lewis ABA as a sham, subject to all regulations for the protection of the consumer as set forth by the Federal Real Estate. Settlement Procedures Act (RESPA) and other federal and state regulations impacting sham ABAs.

□ Judgment declaring that Liskow & Lewis, PLC and their respective partners, agents, members and affiliates are not entitled to any of the defenses set forth in the Louisiana Legal Malpractice Act because by acting as a sham ABA and because of other egregious violations of the rights of petioners Henry L. Klein, the Succession of Frederick P. Heisler and Levy Gardens Partners 2007 LP, any benefits under law are forfeited pursuant to the *Ex Turpi Causa* doctrine which provides that "... from a dishonorable cause no action arises ..."

□ Judgment declaring that as to the Closing,

wherein ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Gardens Partners 2007 LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC, and the combination of the two is deemed reconstructed to bind defendants as if they had issued the Contracts of Warranty asto title of the property and its permitted use.

□ Judgment declaring that as to the October 7, 2008 Closing, wherein ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195 were issued and/or sold to Levy Gardens Partners 2007 LP, the conduct of that transaction was such that Lewis Title Insurance Company, Inc., Liskow & Lewis PLC were fiduciaries who owed Levy Gardens Partners 2007 LP and its principals a duty to disclose the "premium-split" with Commonwealth and the fact of Commonwealth's Rehabilitation proceedings in the State of Nebraska and that all causes-of-action regarding that relationship are regulated by the 10-year prescriptive period set forth by Louisiana Civil Code Article 3499.

□ Judgment declaring that as to the December 3, 2007, commitment to issue ALTA Contracts E-14-0005523, L-14-0005193 and L-14-0005195, any and all causes of action which may now be available to petitioners Henry L. Klein, the Succession of Frederick P. Heisler, and/or Levy Gardens Partners 2007 LP, or which may become available upon the entry of declaratory judgment(s) are matters involving abstracting duties regulated by the 10-year prescriptive period set forth by Louisiana Civil Code

Article 3499.

□ Judgment declaring that any and all claims by Levy Gardens for overbilling are personal actions regulated by the 10-year prescriptive period set forth by Louisiana Civil Code Article 3499.

WHEREFORE, Henry L. Klein, The Succession of Frederck P. Heisler and Levy Gardens Partners 2007, LP, pray that a Rule to Show Cause issue, addressed to Lewis Title Insurance Company, Inc., and Liskow & Lewis PLC, requiring that they show cause, if any they have or can, why declaratory judgments should not issue as requested, and thereupon, petitioners will exercise their reserved rights to seek supplemental relief by citation and ordinary process.

Respectfully submitted,

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