In The
COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
[redacted]

Mr. Doe [redacted] **APPELLANT**

V. **On Appeal from the Woodford Circuit Court**
Civil Action No. [redacted]

Our Client [redacted] **APPELLEE**

BRIEF FOR APPELLEE

Certificate Required By CR 76.12(6)

This is to certify that a true and accurate copy of the Appellee s Brief was served by mail, postage pre-paid this 3rd day of July, 2006, on [redacted] Appellee pro se and on Hon. [redacted], Judge, Woodford County Circuit Court, 130 Court Street, Versailles, Kentucky 40383. The undersigned also certifies that the record on appeal was returned to the Woodford Circuit Court Clerk on or before this date.

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STATEMENT CONCERNING ORAL ARGUMENT

Oral argument in this case is unnecessary and unlikely to give the Court any significant assistance. Appellant, [redacted] (hereafter "Mr. [redacted] has apparently not requested oral argument. Appellee, [redacted] (hereafter "[redacted] believes the issues are simple and easily resolved.

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COUNTERSTATEMENT OF THE CASE

No genuine issue of material fact exits in this case. Both parties agree that [redacted] has refused Mr. [redacted] demands that it redeem his Subordinated Surplus Certificate (issued in connection with Mr. [redacted] purchase of insurance from [redacted] The question for this Court is whether Mr. [redacted] can advance any legal claim which will entitle him to the relief he seeks. Two different Woodford Circuit Court judges have determined that he cannot.

The Proceedings Below:

Mr. [redacted] appeals from the Opinion and Order of the Circuit Court entered October 21, 2005 (by Judge [redacted]) (R. 213). Circuit Court Judge [redacted] issued his Order of Dismissal on Summary Judgment on February 22, 2005 (R. 151), but later vacated the Judgment and reassigned the case after Mr. [redacted] moved that Judge [redacted] disqualify himself. (Order Vacating Summary Judgment and Re-Assigning Case, April 27, 2005; R. 166.)

Mr. [redacted] is a lawyer and is the holder of a [redacted] of Kentucky 6% Subordinated Surplus Certificate, Series A, Certificate No. A-2565 (the "Certificate"), a copy of which is attached to the complaint in this case (R. 1).[1] The Certificate was purchased in 1989 for $1,275, as a condition to the providing of professional liability insurance by [redacted] to Mr. [redacted] The Certificate provides, in pertinent part:

> ***Redemption***. This certificate has no fixed maturity date. Subject to the prior approval of the Kentucky Commissioner of Insurance, this

[1] The Certificate is also attached hereto as Appendix 1.

> Certificate may, in the sole discretion of the Company's Board of Directors, be redeemed at any time at 100% of the Principal Amount hereof . . . any redemption of the Series A Certificates need not be made pro rata among the holders of such Certificates outstanding on the date of such redemption or by lot, and the Board of Directors may in its sole discretion determine the Certificates to be redeemed from time to time, in whole or in part.

(Emphasis supplied.) The Certificate also provides the following in paragraph 6:

> *Rights on Default*. Neither the registered holder of this Certificate nor any registered assignee or successor thereof shall have any right under any circumstance (including a default by the Company hereunder, whether by failure to pay interest or otherwise) to compel repayment or reduction of the Principal Amount hereof, and any such repayment or reduction shall be made in the sole determination of the Company's Board of Directors as provided in paragraph 3 above.

When Mr. Doe no longer desired professional liability insurance from Our Client he began demanding that his Certificate be redeemed. Our Client has made the decision that it is not in the best interest of the company to redeem all the certificates and has determined, consequently, to redeem only the certificates of those lawyers who have become judges and those lawyers who have passed away.[2] Our Client determined not to discriminate in favor of Mr. Doe and refused his demands for payment. Mr. Doe brought this lawsuit on or around March 24, 2004, alleging causes of action for "debt", breach of contract, rescission, and fraud.

Our Client successfully argued in the Circuit Court that it was entitled to summary judgment on Mr. Doe breach of contract claims because the Certificate clearly and unambiguously provides that the Certificate has no fixed maturity date and

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[2] The statements of fact made in this Brief are supported by the affidavit of [redacted] (R. 27) (the "Original Affidavit") filed with the Our Client original summary judgment motion and by the supplemental affidavit (R. 62) (the "Supplemental Affidavit") of Mr. [redacted] which was filed with the Our Client renewed motion for summary judgment. Mr. Doe has submitted no sworn testimony or other evidence to contradict any of the material statements made in the [redacted] affidavits.

will be redeemed only at the sole discretion of the [redacted] board of directors. [redacted] also argued that even if the Court found that the sole discretion of the board of directors must be exercised in good faith, the board of directors is entitled to the presumption that it acted in good faith and Mr. [redacted] has produced no evidence to overcome this presumption.

[redacted] also successfully argued in the Circuit Court that Mr. [redacted] fraud claims are barred by the applicable statute of limitations (5 years). The alleged misrepresentation Mr. [redacted] claims [redacted] made to him was made, if at all, on or before October 20, 1989 (the date Mr. [redacted] agreed to purchase the Certificate). [redacted] also made additional arguments which the Circuit Court did not address (no doubt because its decision on the statue of limitations made consideration of the other arguments unnecessary). These additional arguments are renewed below.

Approximately two weeks prior to the pre-trial conference (when the [redacted] renewed motion for summary judgment was to be heard), Mr. [redacted] filed a "motion for order permitting amended complaint" (R. 182) in which he sought leave to add two additional allegations. In this motion and the amended complaint attached to the motion, Mr. [redacted] alleged that because paragraph No. 6 of the Certificate explicitly provides that a Certificate holder shall have no right to compel redemption of the Certificate (which Mr. [redacted] is, of course, trying to do in this case), the contract between the parties lacks mutuality. Mr. [redacted] also alleged that the Certificate was void from the outset because the signatures of the [redacted] president and secretary on the Certificate were facsimile signatures and not "manual" signatures as Mr. [redacted] claims were required by paragraph No. 14 of the Certificate. Mr. [redacted] motion for partial

summary judgment (R. 194), filed at the pre-trial conference, rested on these same allegations.

During the pre-trial conference in this matter, held on September 7, 2005, counsel for [redacted] argued that the motion to amend should be denied as untimely and also argued that the amendment, even if allowed, did not allow Mr. [redacted] to avoid summary judgment. (See, Opinion and Order, R. 213.) The Circuit Court agreed that [redacted] was entitled to summary judgment notwithstanding these new allegations and this appeal followed.

Mr. [redacted] notice of appeal was filed November 21, 2005. His original brief was not timely filed, but (without objection from [redacted] the Court granted Mr. [redacted] motion for extension of time and ordered that Mr. [redacted] tendered brief be filed as of May 4, 2006.

The Issuance of the Certificate:

The [redacted] Series A Subordinated Surplus Certificates (the "Surplus Certificates") were issued by the company, beginning in 1987, as a way of raising capital to enable the company to operate as a mutual insurance company offering professional liability insurance to Kentucky Lawyers. Every lawyer insured by [redacted] was required to subscribe for one of the Surplus Certificates.

The Surplus Certificates were sold pursuant to an offering circular and offering circular supplements. The offering document (the "Offering Circular") which was delivered to Mr. [redacted] in 1989, when he purchased his Certificate, is attached as Exhibit A to Mr. [redacted]'s Original Affidavit (R. 27).[3] The Offering Circular is made up of two

[3] The Offering Circular is also attached hereto as Appendix 2.

documents: (a) the offering circular supplement (pages S-1 through S-16), dated January 10, 1989, which contains, primarily, financial information about Our Client and (b) the offering circular (pages 1-23), also dated January 10, 1989, which contains information about the offering of the Surplus Certificates to Kentucky lawyers desiring to purchase liability insurance from Our Client

Mr. Doe agreed to purchase his Certificate on or around October 20, 1989, and signed a subscription agreement (the "Subscription Agreement") on that day. Because Mr. Doe desired to purchase the Certificate on an installment basis, he also was required to sign an installment sale contract and pledge agreement (the "Installment Sale Contract"), also dated October 20, 1989. The Installment Sale Contract required Mr. Doe to make five annual installments of $255 each, due on the anniversary dates of the Contract. (The Subscription Agreement and the Installment Sale Contract were attached as Exhibits B and C to the Original Affidavit and are attached hereto as Appendix 3 and Appendix 4.)

The actual Certificate was not delivered to Mr. Doe of course, until after the Certificate was paid for, but a specimen form of the certificate (exactly the same as the Certificate except for certificate number, date and amount) was attached to the Offering Circular. The Certificate was delivered to Mr. Doe on February 2, 1995, after Mr. Doe made his final installment payment.

ARGUMENT

THE BREACH OF CONTRACT CLAIMS[4]

The Certificate unambiguously states that redemption will occur only at the discretion of the directors of [redacted]

There is not the least ambiguity about the Certificate. It provides unequivocally that redemption of Mr. [redacted] Certificate, if it is to be done at all, is to be done at the time and manner determined by the board of directors of [redacted] in its sole discretion. "Sole discretion" means plainly that [redacted] and not Mr. [redacted] determines when the Certificate is to be redeemed.

It is well settled that "the construction and interpretation of a contract, including questions regarding ambiguity, are questions of law to be decided by the court." *Island Creek Coal Company v. Wells*, 113 S. W.3d 100 at 103 (Ky. 2003), quoting from *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835 (Ky. App. 2000). Moreover:

> In the absence of an ambiguity a written instrument will be enforced strictly according to its terms and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence.

Id. at 104.

Mr. [redacted] may recover on his breach of contract claims only if this Court ignores, and instructs the Circuit Court and the jury to ignore, the plain meaning of the language

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[4] Mr. [redacted] "debt" and breach of contract claims are essentially the same claim – that [redacted] is obligated under the terms of its agreement with Mr. [redacted] to redeem the Certificate at Mr. [redacted] request. Until Mr. [redacted] brief to this Court, neither the parties nor the Circuit Court treated these causes of actions as distinct. Nor has Mr. [redacted] ever articulated how a cause of action for "debt" is distinct from a cause of action on the contract creating the debt.

of the Certificate. In fact, this Court can find that Mr. [redacted] is entitled to demand redemption only by completely rewriting the Certificate.

There was no breach by [redacted] of any implied duty of good faith.

Mr. [redacted] has argued that, in spite of the express terms of the contract, he can claim that [redacted] has breached an implied covenant of good faith by failing to redeem his certificates. However, there are a number of fatal problems with this theory. First, the implied covenant of good faith does not override express terms in the contract. Second, the business judgment rule in Kentucky prevents this Court from second-guessing the [redacted] board of directors. Last, but not least, Mr. [redacted] has no evidence that [redacted] has not acted in good faith. On the other hand, [redacted] has presented compelling evidence (in the Original and Supplemental Affidavits) that, in denying Mr. [redacted] demands, it acted in good faith and in accordance with its own determination of the best interests of the company.

No implied covenant of good faith can override the express terms of the Certificate giving the [redacted] board of directors sole discretion to determine when and if certificates were to be redeemed. The decision in *General Electric Capital Corporation v. DirecTV*, 94 F.Supp.2d 190 (D. Conn. 1999) is almost directly on point. In that case, GE Capital Corporation (GECC) purchased consumer accounts from dealers of DirecTV satellite dishes, but DirecTV and its parent, Hughes Electronics Corporation, guarantied the collectability of the accounts. The guaranty provided that GECC could bring an action on the guaranty whenever the accounts were written off and provided that "accounts will be characterized as written off when deemed uncollectible in GECC's **sole discretion**." 94 F. Supp.2d at 197 (Emphasis supplied.) GECC wrote off more than

23,000 accounts (with a face value of $16,000,000) and sued DirecTV and Hughes for the balance due. The defendants sought summary judgment on the GECC claims, arguing that the write-offs of the accounts were not commercially reasonable and not in good faith. The court rejected the arguments in the following language:

> DTV's argument that the accounts were collectible as a matter of law ignores the fact that it authorized GECC in the Agreement to make collectibility determinations in its sole discretion. It claims that no reasonable trier of fact could find that these accounts were uncollectible as a matter of law, but this is not the standard under the Agreement. Nor was it the standard that write offs must be commercially reasonable. **The Agreement places no constraints on GECC's "sole discretion." Implied provisions such as good faith cannot "override explicit contractual terms."** *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 679 (2d. Cir.1985).

Id. (Emphasis supplied.) To the same effect is *General Aviation v. Cessna*, 915 F.2d 1038 (6th. Cir. 1990).

Even if the Circuit Court had found that the [redacted] board had an obligation to exercise its sole discretion in good faith, the board is entitled, under the business judgment rule, to the presumption that it made its decision in good faith. The leading case in Kentucky on the business judgment rule appears to be *Allied Ready Mix Co. v. Allen*, 994 S.W.2d 4 (Ky. App. 1999). That case involved a shareholder's derivative suit brought by a shareholder claiming that certain directors benefited from insider transactions. The corporation appointed a litigation committee which investigated the claims and determined that it would not be in the best interest of the corporation for the claims to proceed. The Court of Appeals affirmed the trial court's dismissal of the shareholder's claims in an opinion which included the following language:

> "The business judgment rule is a presumption that in making a business decision, not involving self-interest, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action

> taken was in the best interests of the company." The party Doe the board's decision bears the burden to establish facts rebutting this presumption.

994 S.W.2d at 8, quoting from *Spiegel v Buntrock*, 571 A.2d 767, 774 (Del. 1990). No director of Our Client has any personal interest in Mr. Doe Certificate or will gain any personal financial benefit from the denial of Mr. Doe claim. (See, Supplemental Affidavit.) The business decision did not involve self-interest in other words and, consequently, it is entitled to the presumption that it was taken in good faith. Mr. Doe has no evidence to overcome that presumption. The mere fact that the board has elected not to redeem Mr. Doe Certificate is not evidence of bad faith. The board has not singled Mr. Doe out for disparate treatment; it has no malice toward Mr. Doe and no intent to harm him. The board has made the decision that it is in the best interest of the company not to redeem certificates except under very limited circumstances. (See, Supplemental Affidavit.) The issue is not whether the Court would make a different decision than the board did; the Court may not second-guess the board. If good faith is even an issue at all (and it should not be), the Court can only find that the board acted in "good faith" – that is, without malice towards Mr. Doe

THE FRAUD CLAIMS

Mr. Doe fraud claims are barred by the statute of limitations.[5]

The statute of limitations applicable to Mr. Doe misrepresentation and fraud claims is KRS 413.120(12) which provides that "[a]n action for relief or damages on the ground of fraud or mistake" must be brought within five years "after the cause of action

[5] Mr. Doe brief takes some pains to show that his contract claims are not barred by the statute of limitations. See, Appellant's Brief at p.8. Our Client has never made the claim that the contract claims are time-barred. As shown above, those claims are barred by the express language of the contract.

accrued." The question of when the cause of action accrued is settled by KRS 413.130(3), which provides:

> In an action for relief or damages for fraud or mistake, referred to in subsection (12) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten (10) years after the time of making the contract or the perpetration of the fraud.

Assuming that fraud occurred in this case, the fraud occurred and the contract was made no later than October 20, 1989 (the date the Subscription Agreement was signed by Mr. Doe This lawsuit was filed March 24, 2004 – well beyond the absolute ten-year limitations period imposed by KRS 413.130.

The absolute ten-year limitation is of long standing in the Commonwealth. See, for example, *Boyd's Executor v. Laurel County*, 140 Ky. 430, 131 S.W. 171 (Ky.1910). The statute has not been held to create an unconstitutional statute of repose. However, even if the Court were to find the absolute ten-year limitation period inapplicable, Mr. Doe fraud and misrepresentation claims must still fail because they were brought longer than five-years after the last date Mr. Doe discovered or should have discovered the fraud. Mr. Doe claims are for fraud in the inducement. In other words, he claims that he paid for the Certificate in reliance on misrepresentations from Our Client about the nature of its redemption obligation. Even assuming that Mr. Doe did not receive the Offering Circular in 1989 (even though he stated in writing, in the Installment Sale Contract, that he did receive the Offering Circular), the last date Mr. Doe should have discovered the "fraud" was February 2, 1995– the date he received his Certificate. He knew or should have known then that the express terms of the contract regarding redemption were materially different from what he was allegedly promised.

Mr. Doe cannot claim that his cause of action accrued any later than February 2, 1995. Kentucky courts have described the "discovery" rule in the following way:

> It has long been the rule that in order to recover damages resulting from a recently discovered fraud, the plaintiff must allege the time and means of discovery, why earlier discovery had not occurred and the diligence exercised by the injured party to discover the fraud. 37 Am.Jur.2d Fraud and Deceit s 432. Kentucky has followed the general rule requiring that when an action is brought later than five years after the alleged perpetration of the fraud there must be an allegation and proof that the fraud was not discovered within the five years **and by the exercise of ordinary care could not have been discovered within that time**.

Boone v. Gonzalez, 550 S.W.2d 571, 573 (Ky. App. 1977) (emphasis supplied). See, e. g., *Gillardi v. Henry*, 272 Ky. 188, 113 S.W.2d 1158 (1938); *Justice v. Graham*, 246 S.W.2d 135 (Ky.1952). On the question of what constitutes the exercise of ordinary care to discover the fraud, Kentucky courts have adhered to the rule that:

> One so situated may not sit supinely by and exercise no diligence to discover the wrong perpetrated upon him. He must bestir himself, and, if he could have discovered the fraud or mistake by the exercise of reasonable diligence, it is his duty to do so.

Johnson v. Fetter, 7 S.W.2d 241, 246 (Ky. App. 1928).

The decision of the Court of Appeals in *Schoolfield et al v. Provident Savings Life Assur. Society*, 158 Ky. 687, 166 S.E. 207 (1914) illustrates these principles in a case very similar to the case presented by Mr. Doe In *Schoolfield*, the plaintiff alleged that he had been persuaded to exchange an existing life insurance policy for a new policy on the basis of certain representations of the agent about the cash values which would accumulate on the new policy. The new policy, as delivered, was not consistent with these representations. Eleven years after the delivery of the new policy, the plaintiff sought to recover the promised cash values and, when the insurer refused, the plaintiff sought to recover on the contract as represented by the agent – claiming that he was

fraudulently induced by the agent's promises to enter into the contract. The trial court dismissed the action as barred by the statute of limitations. On appeal, the plaintiff (like Mr. Doe in this case) argued that the cause of action accrued at the time the insurance company refused to honor the agent's representations about the policy (in 1911), not when the agent's misrepresentations were made (1900). The Court of Appeals rejected this argument and in doing so quoted from its decision in the very similar case of *Provident Savings Life Assurance Soc v. Withers*, 132 Ky. 541, 116 S.W. 350 (1909):

> The plaintiff cannot have relief under the special contract relied on, because that was merged in the policies; and he cannot now have the policies corrected for fraud or mistake, because the action is not brought within five years after the perpetration of the fraud or the making of the mistake, and after he knew or by ordinary diligence should have known it. He had the policies. He could have looked at them at any time. He cannot accept them, and, after keeping them for seven years, and after the time has expired within which he might have had the policies corrected for fraud or mistake, have relief in equity. To do this would be to encourage or reward supineness; and it would be to establish a rule that would destroy the value of written contracts.

Schoolfield, supra, 166 S.W. at 208 (emphasis supplied). See, also *National Life Co. v. Wilkerson's Adm'r*, 254 Ky. 459, 71 S.W.2d 1034 (1934) (Recipient of insurance certificate which was inconsistent with the agent's representations was charged with knowledge of the certificate's contents.) The *Schoolfield* court went on to hold that:

> The fault of this argument [that the cause of action accrued when the insurer refused to honor the agent's representations] is that it overlooks or ignores the fact that the alleged fraudulent transaction, from which it is sought to obtain relief, occurred when the representations of the agent were made in 1900. It was in 1900 that the fraud, if any, was practiced. It was then that the false representations, if any, were made that induced the insured to surrender the old and accept the new contract. No misleading or fraudulent representations of any kind were made after 1900. It was the fraudulent representations then made that induced the insured to continue until 1911 to make the payments he now seeks to recover, and we think his cause of action accrued in 1900, and was peremptorily barred in ten years thereafter, and before the institution of this suit.

Id. at 209.

The alleged fraudulent transaction in this case took place on or before October 20, 1989 (when Mr. Doe purchased the certificate) – well outside the absolute 10-year bar found in KRS 413.130. He should have no more success than the plaintiff in *Schoolfield* in making the nonsensical argument that the fraud occurred more than 10 years after the alleged misrepresentation (i.e., that the fraud occurred – for limitations purposes - more than 10 years after the alleged fraud). Even if the Court were to find the 10-year bar inapplicable, Mr. Doe has neither alleged nor proven that that the fraud was not discovered within the five years and by the exercise of ordinary care could not have been discovered within that time. This he must do to avoid the 5-year statute of limitations period found in KRS 413.120. Mr. Doe is a lawyer. To paraphrase the *Schoolfield* decision, "He had the certificate. He could have looked at it at any time." When he got the Certificate he was obligated to "bestir himself" and read the paragraph entitled "Redemption" on the front of the Certificate. Had he done that, he would have learned then that the redemption obligation of Our Client is materially different from the understanding Mr. Doe says he had in that regard. The exercise of reasonable diligence required at least that Mr. Doe take one minute (or less) to read the paragraph entitled "Redemption." Had he done so, he would have discovered that the Certificate had no fixed maturity date and would be redeemed, if at all, only at the sole discretion of the board of directors of Our Client

The alleged misrepresentation amounted to no more than a prediction of future conduct and cannot form the basis of a fraud claim.

This case is remarkably similar to *Rivermont Inn v. Bass Hotels and Resorts*, 113 S.W.3d 636 (Ky. App. 2003). The plaintiff in that case alleged that he purchased a hotel based on the representation from the franchisor (Holiday Inn) that the transfer of franchise rights from the seller to buyer would be approved after the purchase. After the purchase the franchisor would not approve the transfer of the franchise without substantial improvements to the hotel. The plaintiff/buyer then sued the franchisor for fraud and the circuit court granted the franchisor's motion for summary judgment. The Court of Appeals affirmed the decision of the circuit court in an opinion which included the following language:

> Holiday argues that the statements attributed to Bloodworth are predictions of the future conduct of the Franchise Approval Committee, and therefore cannot be the basis of a fraud claim. *St. Martin v. KFC Corp.*, 935 F.Supp. 898, 909 (W.D.Ky.1996). We agree with the circuit court that the statement is a prediction, and not a statement of present or past material fact. . . . Bloodworth was asked to make a prediction regarding the approval of the application; taking the allegations as true for purposes of summary judgment, the circuit court nevertheless concluded that Bloodworth did no more than make a prediction, which is not sufficient to constitute fraud by misrepresentation.

Id. at p. 640. Emphasis supplied.

The statement allegedly made by the unknown Our Client receptionist – that the Certificate would be redeemed when the company gained sound financial footing – was not different in kind or degree from the prediction made by the franchisor representative in *Rivermont Inn, supra*. It was a prediction, not "a statement of present or past material fact."

The Offering Circular clearly contradicts the alleged misrepresentation.

The representations made to Mr. Doe in the Offering Circular (a copy of which is attached to the Original Affidavit) are entirely consistent with the redemption limits

found on the face of the Certificate. The Offering Circular provides, for example, on page 1:

> The Certificates have no stated maturity date and will be repayable solely in the discretion of the Board of Directors. **Holders of the Certificates will have no right to compel repayment or reduction of the principal amount for any reason**.

(Emphasis supplied.) Virtually the same disclosure is made on page 4 of the Offering Circular and on page 7 of the Offering Circular under the heading "No Due Date on Certificate". The Offering Circular also provided, on page 6:

> **The Certificates offered hereby have limited, if any, investment value**. No person should consider purchasing a Certificate with the expectation of receiving income from, or realizing gain on the sale of, the Certificate. Purchase of a Certificate should be viewed as a method of enabling Kentucky attorneys to own their own professional liability insurance company rather than as an economic investment.

(Emphasis supplied.) The Offering Circular clearly contradicted the representation Mr. Doe says he received about the redemption of his certificate. The clear representations made in the Offering Circular (and in the Certificate, a specimen of which was attached to the Offering Circular) establish, as a matter of law, that Mr. Doe was not fraudulently induced to purchase his Certificate.

Mr. Doe cannot now deny that the terms of the Offering Circular governed the obligations of Our Client and he cannot now deny that he received and read the Offering Circular. The Subscription Agreement signed by Mr. Doe (attached as Exhibit B to the Original Affidavit) provides in its very first paragraph that the purchase of the Certificate is "subject to the conditions set forth in this Subscription Agreement and in the Company's Offering Circular dated January 10, 1989, and the accompanying Offering Circular Supplement." In other words, the terms of the Offering Circular were

incorporated into the Subscription Agreement. In addition, in the Installment Sale Contract (Appendix 4) Mr. Doe acknowledged that he received and read the Offering Circular. Section 12 of the Installment Sale Contract provided, in Section 12 just above Mr. Doe signature on the last page:

> Reference is made to the Offering Circular and related Offering Circular supplement for certain pertinent disclosures and information concerning the Certificate. The Buyer acknowledges that it has received and read the Offering Circular and related Offering Circular Supplement.

The law, of course, is that Mr. Doe cannot now deny the language or effect of the documents he signed. The Kentucky law on this point has been made clear in *Cline v. Allis Chalmers*, 690 S.W.2d 764 (Ky. App. 1985):

> In general, a person who has the opportunity to read a contract, but does not do so and signs the agreement, is bound to the contract terms unless there was some fraud in the process of obtaining his signature. *Prewitt v. Estate Building and Loan Association*, 288 Ky. 331, 156 S.W.2d 173 (1941). *See Clark v. Brewer*, Ky., 329 S.W.2d 384 (1959). Thus, **his negligence in failing to read the contract prevents any reliance on oral representations at the time of his signing**.

690 S.W. 2d at 766. (Emphasis supplied.) Mr. Doe has not alleged that there was fraud "in the process of obtaining his signature." He has not alleged, for example, that he was told he was signing a receipt for his laundry when he signed the agreements. Consequently, Mr. Doe cannot not now deny that the terms of the Offering Circular were incorporated into the terms of his agreement with Our Client he cannot now deny that he received and read the Offering Circular; and he cannot rely on any alleged oral representation which is inconsistent with the terms of the Certificate and the Offering Circular. This rule should be applied especially strictly here, because Mr. Doe is a lawyer who was in a particularly good position to read and understand the agreements. *Cline, supra*. See, also, *Nunnellee v. Nunnellee*, 415 S.W.2d 114, 116 (Ky. 1967) ("It is

now well settled in this jurisdiction that one may not deny today what he solemnly swore was true yesterday.")

The decision of the Court of Appeals in *Rivermont Inn, supra*, is also relevant on this point. The plaintiff in that case had signed an agreement acknowledging that no representative had the authority to orally agree to the transfer of Holiday Inn franchise rights; yet, the plaintiff brought its fraud claim on the basis of an alleged oral agreement to transfer the franchise rights. The Court of Appeals rejected the claim in the following language:

> [W]e hold that as a matter of law, a party may not rely on oral representations that conflict with written disclaimers to the contrary which the complaining party earlier specifically acknowledged in writing, following the precedents established in other jurisdictions. *See Trifiro v. New York Life Ins. Co.,* 845 F.2d 30 (1st Cir.1988).

Rivermont Inn, supra, at pp. 640-641. The alleged misrepresentation in this case is directly in conflict with the written disclaimers contained in the Offering Circular – the receipt of which Mr. Doe acknowledged.

No Our Client representative had authority to make the alleged misrepresentation.

The Offering Circular makes clear that no individuals are authorized to make any contrary representations. It provides, on page S-2:

> No person is authorized to give any information or to make any representations other than those contained in this Offering Circular Supplement and the accompanying Offering Circular in connection with the offer made hereby and, if given or made, such information or representations must not be relied upon as having been authorized by the Company.

No representation that Mr. Doe would be able to redeem his Certificate was ever authorized by Our Client (See, Original Affidavit.) Mr. Doe has not been able to

provide the name of the alleged defrauder or any other relevant details about the alleged fraud. (See, Mr. Doe answers to Our Client Interrogatory Nos. 1-4, attached to Appellee's Renewed Motion for Summary Judgment [R.___] Exhibit 1.) Consequently, even putting aside for the moment the express language of the Offering Circular regarding authority, Mr. Doe cannot claim that the receptionist who answered the telephone when Mr. Doe made his first inquiry about purchasing insurance from Our Client had even apparent authority to enter into an oral contract with Mr. Doe or make representations about the terms of the written contracts Mr. Doe would be expected to sign. "Apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized." *Restatement (Second) of Agency* §8, Comment c (1958). It was manifestly not reasonable for Mr. Doe a lawyer, to believe that the unknown receptionist answering the telephone for Our Client had authority to bind Our Client to an oral contract or to make representations about the terms of the contracts which were inconsistent with the express written terms. Sophisticated parties like Mr. Doe and Our Client sign written contracts so that they do not have to rely on oral agreements or representations about what the contracts contain.

THE AMENDED RECISSION CLAIMS

Mr. Doe may not rescind the contract for lack of mutuality.

Mr. Doe claim respecting paragraph 6 of the Certificate is not materially different from his older arguments. He argues that if he does not have the right to force Our Client to redeem his Certificate, the contract must be null and void as lacking mutuality. Consequently, so the argument goes, Mr. Doe is entitled to get his money

back. If the Certificate were evaluated in a vacuum, Mr. Doe argument would have more force; but the Certificate was not issued in a vacuum. The Certificates were sold by Our Client to raise money to capitalize the company and enable it to offer professional liability insurance to Kentucky lawyers at attractive rates. In the early days of the company purchase of a Certificate was a pre-requisite to the purchase of insurance from Our Client

The requirement of mutuality of obligation is "closely related to the theory of consideration in the law of contracts." *Pace v. Burke*, 150 S.W.3d 62 (Ky. App. 2004). The question is whether the complaining party got something of value for what he gave up in the contracting process. The Court of Appeals has described the mutuality-consideration obligation in the following language:

> It is not required that parties have reciprocal rights of the same kind or nature. *David Roth's Sons, Inc. v. Wright and Taylor, Inc., Ky., 343 S.W.2d 389 (1961).* As said in Simpson on Contracts, 2nd Ed, page 86:
>
> > 'The fairness of an exchange is legally irrelevant. So long as a man gets what he has bargained for, and it is of some value in the eyes of the law, the courts will not inquire whether it is of any value to him, or whether its value is in any way proportionate to his promise given in return. The reason for the rule is not far to seek. Persons must be free to contract; and it is for the law to enforce the agreement they have made, not to make it or to correct it for them.'

Ligon v. Parr, 471 S.W.2d 1 at 4-5 (Ky. App. 1971). (Emphasis supplied.)

Mr. Doe got what he bargained for; even though he is not able to require that Our Client redeem the Certificate. He purchased the Certificate and, consequently, was entitled to apply for insurance and was, in fact, insured by Our Client for a number of years. See, Affidavit of Robert Breetz attached to Our Client memoranda in support of its motion. The Certificate is not void for lack of mutuality.

Moreover, rescission is allowed only where the parties can be returned to their former, pre-contract status. *C. C. Leonard Lumber Co. v. Reed*, 314 Ky. 703, 236 S.W.2d 961 (1951). Because he purchased the Certificate, Mr. [redacted] was able to obtain reasonably priced insurance for a number of years from [redacted] He received a benefit which cannot be returned.

The fact that an agent used a signature stamp does not entitle Mr. [redacted] to rescission.

Mr. [redacted] also claimed below that the Certificate was "invalid from the outset" because the signatures of the president and secretary of [redacted] on the face of the Certificate are not manual signatures as required by paragraph 14 of the Certificate. However, Mr. [redacted] misinterpreted paragraph 14, which provides, in relevant part:

> 14. Authentication. This Certificate shall not be valid or become obligatory for any purpose until authenticated by the manual signature of the authenticating agent."

It was not the signatures of the president and secretary which were to be manual, but the signature of the "authenticating agent." Mr. [redacted] now claims that the Certificate is invalid because the signature of the authenticating agent ([redacted], Inc.) on the front of the Certificate is a stamped signature. Mr. [redacted] has not alleged that the Company did not intend to issue the Certificate or that the signature of the authenticating agent was fraudulently obtained. Nor has Mr. [redacted] cited the Court to any authority for the proposition that a contract is void because it has a stamped signature instead of a manual signature. Section 14 of the Certificate was obviously meant to protect [redacted] from the unauthorized delivery of certificates. Mr. [redacted] has no standing to [redacted] the alleged defect in the authorization; he cannot claim to have been disadvantaged by the stamped signature and he has neither pleaded nor proved that the

stamped signature was not intended by the agent and Our Client to have the same force as a manual signature. In general, stamped signatures are effective if intended as the signature of the signing party. *See, Kaiser v. Jones*, 157 Ky. 607, 163 S.W. 741 (1914).

The very worst that can be said of the stamped signature is that it is an immaterial breach of the contract. The authenticating agent made a minor mistake about the requirements of the contract. Rescission is not allowed for such minor breaches of contract. *C. C. Leonard Lumber Co. v. Reed*, 314 Ky. 703, 236 S.W.2d 961 at 962 (1951) ("Ordinarily rescission of an executed contract for nonperformance or breach will not be allowed for a slight or casual breach of the contract. It will not be allowed even for a substantial breach unless the former status of the parties can be restored.")

The merits of the claim are of little moment, however, because the relevant statute of limitations, the 5-year period found in KRS 413.120, has run on this claim as well.[6] The last date Mr. Doe should have discovered this alleged problem with the signature on the Certificate was February 2, 1995– the date he received his Certificate. This date is more than five years before this action was commenced. The longer limitations period for actions to enforce a written contract is clearly not applicable here, because Mr. Doe claims that there was no contract.

CONCLUSION

Mr. Doe breach of contract claim must fail, as a matter of law, because the contract unambiguously denies him the remedy he seeks. Mr. Doe cannot claim that

[6] Mr. Doe claim here is best described either as: (i) "An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated" [KRS 413.120(7)], or (ii) "An action for relief or damages on the ground of fraud or mistake" [KRS 413.120(12)].

Our Client was obliged to exercise its discretion (regarding redemption) in good faith and he cannot prove that Our Client failed to act in good faith even if it had an obligation to do so.

Mr. Doe fraud claim must fail because: (a) the claim was not filed within the applicable statute of limitations period, (b) the claimed misrepresentation was merely a prediction of future events and, as such, cannot form the basis of a fraud claim, (c) the claimed misrepresentation is inconsistent with the express written representations contained in the Offering Circular Mr. Doe received before he purchased the Certificate, and (d) no representative of Our Client had any authority to make representations which were inconsistent with the Offering Circular.

Mr. Doe 11th-Hour rescission claims must fail because: (a) there was no lack of mutuality in the bargain Mr. Doe struck with Our Client (b) rescission is not an appropriate remedy for minor breach or where (as here) the parties cannot be returned to their pre-contract condition, and (c) the applicable limitations period expired before Mr. Doe filed his lawsuit.

This Court should affirm the judgment of the Woodford Circuit Court.

Respectfully submitted:

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