Case No. A-08-520

IN THE NEBRASKA COURT OF APPEALS

TEX R. HARVEY; JOAN E. KOONS; ELIZABETH A. KORT; BERNARD L. PARR; RYAL W. REIS; DONALD ROSENTHAL and SHIRLEY ROSENTHAL; RONALD E. CADDY; VIRGIL M. FREDERICKS and MILDRED E. FREDERICKS; JEAN S. SMITH; BURDETTE D. THOMSEN and DARLENE THOMSEN; ROBERT H. ZERSEN and MARLENE A. ZERSEN; RICHARD KOONS and MARTHA S. KOONS; KAREN KRAUS; ELEANOR THOMSEN; FREDA M. L'HEUREUX and TAMARA DIRKS; HELEN ADAIR REVOCABLE TRUSTS, LLOYD ADAIR, TRUSTEE; TAMMY L. SMITH and DALLAS E. DUFFY and WAUNETA L. DUFFY,

Plaintiffs/Appellants/Cross-Appellees,

v.

NEBRASKA LIFE AND HEALTH GUARANTY ASSOCIATION,

Defendant/Appellee/Cross-Appellant.

APPEAL FROM THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA
Hon. Jodi L. Nelson, District Judge

BRIEF OF AMICUS CURIAE
THE AMERICAN COUNCIL OF LIFE INSURERS

Submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Council of Life Insurers ("ACLI") is the nation's largest life insurance trade association. It represents 353 member companies, 298 of which are licensed to do business in Nebraska. ACLI members are the leading providers of financial and retirement security products covering individual and group markets. They provide life, long-term care, and disability income insurance; annuities; pension products; and reinsurance. ACLI member companies account for 93 percent of the industry's total assets and 93 percent of life insurance premiums nationwide. In 2006, 93 percent of all life insurance and annuity payments to Nebraska residents were made by ACLI member companies.

ACLI frequently files amicus briefs in cases like this one that raise issues important to the life insurance industry. Upon reconsideration, the district court correctly decided that the Nebraska Life and Health Insurance Guaranty Association ("Guaranty Association") is not obligated to provide coverage to Nebraska residents who invest in viatical settlement companies that later become insolvent. If this decision is overturned, the Guaranty Association will have to obtain the funds necessary to guarantee such investments by imposing assessments on its member insurers. These assessments could have far-reaching negative implications for the life insurance industry and the public. ACLI therefore urges this Court to uphold the district court's decision that Plaintiffs are not entitled to reimbursement under the Nebraska Life and Health Insurance Guaranty Act (the "Guaranty Act").

In deciding that Plaintiffs cannot pursue their claims against the Guaranty Association, the district court relied on a provision of the Guaranty Act that excludes from coverage any policy or contract under which the risk is borne by the policyholder. In a prior order, however, the district court held that Plaintiffs' claims met two other fundamental requirements of the Guaranty Act: (1) the company in which Plaintiffs invested, Future First Financial Group, Inc.

("Future First"), was a "member insurer," and (2) the purchase request agreements between Plaintiffs and Future First were "supplemental contracts" for the distribution of insurance proceeds. ACLI submits that these holdings, which the district court declined to disturb on reconsideration, are wrong: Plaintiffs have stipulated that Future First did not issue insurance policies, and there were no contracts at all between Plaintiffs and the insurers that did issue the policies in question and were responsible for distributing their proceeds. Thus, entirely apart from the question of who bore the risk, the language and purpose of the Guaranty Act command the conclusion that the Guaranty Association is not required to reimburse Plaintiffs for losses incurred in connection with their investments in Future First. ACLI urges this Court to reject the district court's interpretation of the Guaranty Act on these points.

STATEMENT OF JURISDICTION

ACLI joins in the Appellee/Cross-Appellant's Statement of Jurisdiction.

STATEMENT OF THE CASE

ACLI joins in the Appellee/Cross-Appellant's Statement of the Case.

PROPOSITIONS OF LAW

I. The purpose of the Nebraska Guaranty Act and the Guaranty Association is to protect Nebraska residents who own insurance products from the consequences of insurer insolvency.

NEB. REV. STAT. § 44-2701 (Reissue 2004).

Neb. Life & Health Ins. Guar. Ass'n v. Dobias, 247 Neb. 900, 531 N.W.2d 217 (1995).

II. Insurance is a social good that protects against life's uncertainties.

Am. Gen. Life Ins. Co. v. Schoenthal Family, L.L.C., 248 F.R.D. 298, 313 (N.D. Ga. 2008).

III. The Guaranty Association is designed to pay insurance policy benefits and provide continuation of coverage in the event an insurer becomes insolvent and cannot meet its obligations.

NEB. REV. STAT. § 44-2701 (Reissue 2004).

IV. To determine a statute's legislative intent, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language.

Neb. Life & Health Ins. Guar. Ass'n v. Dobias, 247 Neb. 900, 531 N.W.2d 217 (1995).

V. A viatical settlement is not an insurance policy, and the business of selling fractional interests in insurance policies is no part of the business of insurance.

S.E.C. v. Life Partners, Inc., 87 F.3d 536, 542 (D.C. Cir. 1996).

VI. The Guaranty Act covers the obligations of "member insurers" who are authorized to transact life, health, or annuity policies in Nebraska.

NEB. REV. STAT. §§ 44-2702(8), 2703(2)(a) (Reissue 2004).

VII. When a member insurer becomes insolvent, all other member insurers writing the same business as the insolvent insurer (life, health, or annuity) may be required to pay an assessment that the Guaranty Association uses to ensure performance of the insolvent member's obligations.

NEB. REV. STAT. § 44-2708 (Reissue 2004).

VIII. The Nebraska insurance director may enforce the duties of a member insurer by suspending or revoking its certificate of authority to transact insurance in Nebraska.

NEB. REV. STAT. § 44-2710(2) (Reissue 2004).

IX. In a viatical settlement transaction, a policyholder, or viator, sells his life insurance policy to a viatical settlement company for an amount that is lower than the death benefit but higher than the policy's surrender value; the amount is based on a current evaluation of the insured's life expectancy and the premiums needed to keep the policy in force until the insured dies.

Gander v. Livoti, 250 F.3d 606, 608 n.2 (8th Cir. 2001).

X. Fraud is not uncommon in the viatical settlement industry.

Liberte Capital Group, LLC v. Capwill, 462 F.3d 543 (6th Cir. 2006).

People ex. rel. Wood v. Innovative Fin. Servs., Inc., No. D04555, 2006 WL 392030, at *3 (Cal. App. Feb. 17, 2006) (unpublished).

FACTS

ACLI joins in the Appellee/Cross-Appellant's Statement of Facts submitted in this matter.

ARGUMENT

I. THE NEBRASKA GUARANTY ACT DOES NOT APPLY TO INVESTMENTS IN VIATICAL SETTLEMENTS.

The purpose of the Nebraska Guaranty Act is to protect Nebraska residents who own insurance products from the consequences of insurer insolvency. *See* NEB. REV. STAT. § 44-2701 (Reissue 2004). In this case, no insurer has become insolvent or failed to distribute policy proceeds. Future First was a company that bought and sold interests in life insurance policies on the secondary market; it was not an insurance company and not a member insurer under the Guaranty Act. Thus, contrary to Plaintiffs' contentions, they are not entitled to recoup their failed investment in Future First at the expense of the Guaranty Association, its member insurance companies, and the public.

A. The Guaranty Act's Purpose Is To Protect Policy Beneficiaries From Insurer Insolvency.

Life insurance is a social good because it permits individuals "to secure their estates and their families against the unknown." *See Am. Gen. Life Ins. Co. v. Schoenthal Family, L.L.C.*, 248 F.R.D. 298, 313 (N.D. Ga. 2008). The proceeds of a life insurance policy diminish the financial hardship that families or businesses often suffer when an individual dies. Governments have strengthened this protection against hardship by comprehensively regulating the insurance industry and by creating guaranty associations to provide coverage in the event of insurer insolvency. *See, e.g.*, NEB. REV. STAT. ch. 44 (Reissue 2004) (extensively regulating all aspects of the insurance industry in Nebraska); *see also* NEB. REV. STAT. §§ 44-2701 through 44-2720 (creating the Nebraska Guaranty Association).

In Nebraska, the purpose of the Guaranty Association is "to protect resident policyowners and insureds against the failure of an insolvent or financially impaired insurer to perform its contractual obligations and to assist in the detection and prevention of insurer insolvencies." *Neb. Life & Health Ins. Guar. Ass'n v. Dobias*, 247 Neb. 900, 902, 531 N.W.2d 217, 219 (1995); *see* NEB. REV. STAT. § 44-2701 (Reissue 2004). This statutory safety net protects the good social purposes of life insurance by guaranteeing payment of benefits (up to certain statutory limits) and continuation of coverage if an insurer becomes insolvent.

In this case, no insurer has become insolvent; no insurance policy benefits have gone unpaid; no matter of public interest has been invoked that implicates the statutory safety net. It is undisputed that Future First never engaged in the practice of insurance. *See* Stipulation of Facts ¶ 8 (E1:2, separate envelope). Thus, the liability Plaintiffs seek to impose on the Guaranty Association does not flow from a policy issued by Future First. Rather, any claims Plaintiffs have against Future First arise under state law—*e.g.*, the Nebraska Securities Act or the common law of contracts or fraud—rather than from the terms of an insurance policy. *See* Part II.C., *infra*. As the Nebraska Supreme Court has held, the Guaranty Association is not liable for such claims. *Dobias*, 247 Neb. at 905-06, 531 N.W.2d at 221 (concluding that Guaranty Act does not "encompass liability of an insolvent insurer arising under law rather than under the provisions of the policy such insurer issued").

The subject matter of the entire Guaranty Act is insurance policies and the insurers that issue such policies. In light of this focus, the Guaranty Act cannot reasonably be interpreted to apply to agreements with an entity that has never engaged in the business of insurance. *See Dobias*, 247 Neb. at 902; 531 N.W.2d at 219 ("To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act . . . .").

B. The Guaranty Act Is Not Intended To Protect Investments In The Viatical Settlement Market.

A brief description of the viatical settlement industry—the business of buying and selling previously issued life insurance policies—confirms that the agreements between Future First and Plaintiffs are investment vehicles that bear no relation to the traditional insurance transaction protected by the Guaranty Association. The fundamental aspects of a viatical settlement transaction are fairly simple: a policyholder, or viator, sells his or her life insurance policy to a viatical settlement company (such as Future First) for an amount that is lower than the death benefit but higher than the policy's surrender value; that amount is based on a current evaluation of the insured's life expectancy and the premiums needed to keep the policy in force until the insured dies. *See Gander v. Livoti*, 250 F.3d 606, 608 n.2 (8th Cir. 2001); *see also* Jonathan Wegner, *Life Settlements Become More Common*, OMAHA WORLD-HERALD, Aug. 5, 2005, *available at* 2005 WLNR 12465842.

There are circumstances in which it makes good economic sense for a policyholder to sell an insurance policy to a viatical settlement company. For example, viatical settlements are useful when policyholders have outlived their beneficiaries or the original purpose of the life insurance is no longer present. *See* Neil A. Doherty & Hal J. Singer, *The Benefit of A Secondary Market For Life Insurance Policies*, 38 REAL PROP. PROB. & TR. J. 449, 459 (2003). In addition, policyholders may wish to sell their policies if they no longer can afford to pay premiums or need cash, perhaps because of catastrophic illnesses. The secondary market for life insurance policies—of which viatical settlement providers, along with their investors and clientele, are a part—has exploded in recent years, increasing both the liquidity of policies and their value in the primary market. *Id.*

To finance the purchase of life insurance policies and pay their continuing premiums, viatical settlement providers typically find investors, borrow money, or utilize capital markets. After the original policyholder sells the policy, the person whose life is insured by the policy remains the same, but the viatical settlement company that purchased the policy names itself as the new beneficiary. The viatical settlement company may remain the policy's beneficiary or it may, as in this case, contractually agree to sell all or part of the death benefit to one or more third parties. Upon the death of the insured person, the viatical settlement company (or its designee) collects the policy's death benefit from the insurer. *Gander*, 250 F.3d at 608 n.1.

The primary risk of a viatical investment is that the insured will live longer than the investor expects—*i.e.*, that the policy purchase price plus the premiums paid to keep it in force until the insured dies will exceed the amount of the death benefit. *See* Sachin Kohli, Comment, *Pricing Death: Analyzing The Secondary Market For Life Insurance Policies And Its Regulatory Environment*, 54 BUFF. L. REV. 279, 282 (2006); Matthew Goldstein, *Life Settlements: Betting On Death*, BUS. WK., July 30, 2007, *available at* http://tinyurl.com/3nbn53. Predicting when someone is going to die is difficult under the best of circumstances, and this difficulty is often exacerbated by unforeseeable advances in medical science and technology that extend the life expectancy of elderly and terminally ill insureds. *See* Doherty & Singer, 38 REAL PROP. PROB. & TR. J. at 452; Matthew Goldstein, *Profiting From Mortality*, BUS. WK., July 30, 2007, *available at* http://tinyurl.com/2o4xxs. These basic statistical risks are compounded by the questionable or outright fraudulent behavior that has plagued the viatical industry since its inception, as discussed in Part II below.

Although the viatical settlement industry involves buying and selling insurance policies, "[a] viatical settlement [contract] is not an insurance policy, and the business of selling fractional interests in insurance policies is no part of the business of insurance." *S.E.C. v. Life Partners, Inc.*, 87 F.3d 536, 542 (D.C. Cir. 1996) (internal quotation marks omitted). The purpose of purchasing insurance policies in the secondary market is unquestionably to make money: the quicker the insured dies, the higher the rate of return on the investment. *See id.* at 537; Goldstein, *Life Settlements*, *supra*. This profit motive is fundamentally different from the purpose that drives the purchase of life insurance in the primary market: to provide financial protection for one's family or business in the event of death.

As explained above, the Guaranty Act focuses on the primary market, providing protection to policyholders and beneficiaries if an insurer becomes insolvent. Nothing in the Act indicates that the Unicameral intended to guarantee a return to speculators in the secondary market. Investors in a viatical settlement company that purchases policies in the secondary market and later becomes insolvent have no right to expect a profit on their investment from the Guaranty Association.

The language of the Guaranty Act confirms that Plaintiffs do not seek the protection that the Guaranty Association provides. The Act requires the Association to "guaranty . . . payment of benefits and . . . continuation of coverages" under life insurance policies. *See* NEB. REV. STAT. § 44-2701 (Reissue 2004). Here, no insurers have failed to pay benefits to the designated beneficiaries and no coverage has been discontinued. In fact, many Plaintiffs were never even named beneficiaries of insurance policies. *See* Stipulation of Facts ¶ 20. Rather, Plaintiffs are attempting to hedge bad investments they made in a now-defunct viatical settlement company at the expense of the Guaranty Association and its members. Allowing Plaintiffs to do so would be fundamentally unfair and would distort the stated purpose of the Guaranty Act.

C. Future First Is Not A "Member Insurer" And The Purchase Request Agreements Are Not "Supplemental Contracts".

The mechanics of the Guaranty Act also show that it does not guarantee Plaintiffs' investments. The Act covers the obligations of "member insurers" who are authorized to transact "life, health, or annuity policies" in Nebraska. NEB. REV. STAT. §§ 44-2702(8), 2703(2)(a) (Reissue 2004); *see also* NEB. REV. STAT. § 44-303 (Reissue 2004) (requiring insurance company to have a certificate of authority to transact insurance business in Nebraska). When a member insurer becomes insolvent, all other member insurers writing the same line of business as the insolvent insurer (life, health, or annuity) may be required to pay an assessment that the Guaranty Association uses to ensure performance of the insolvent member's obligations. NEB. REV. STAT. § 44-2708 (Reissue 2004). The Nebraska insurance director may enforce the duties of a member insurer by suspending or revoking its certificate of authority to transact insurance in Nebraska. NEB. REV. STAT. § 44-2710(2) (Reissue 2004).

Future First was never a member of the Guaranty Association and was never subject to the duties or procedural enforcement mechanisms of the Guaranty Act: it was not an insurance company, had no certificate of authority to transact insurance in the state of Nebraska, was not subject to Nebraska's insurance regulations, and has never paid any money to the Nebraska Guaranty Association. *See* Stipulation of Facts ¶¶ 7, 8, 10. In light of the Guaranty Act's purposes, it would be inappropriate to characterize Future First as a member insurer and allow its investors to reap the benefit of a system designed to guarantee continuation of coverage and payment of death benefits to policy beneficiaries.

Moreover, Plaintiffs' contracts with Future First are not covered by the Guaranty Act as "supplemental contracts" to life insurance policies. NEB. REV. STAT. § 44-2703(2)(a) (Reissue 2004). The Act defines such contracts as agreements "for the distribution of policy . . . proceeds." NEB. REV. STAT. § 44-2702(15) (Reissue 2004). Here, none of the insurers that issued the life insurance policies in question have failed to distribute proceeds when required, and none agreed to distribute those proceeds to Plaintiffs who were not named beneficiaries. *See* NEB. REV. STAT. § 44-2701 (Reissue 2004) (Act covers only "supplemental contracts *of member insurers*" (emphasis added)). While Future First (the policies' owner) agreed with Plaintiffs that they would be named as beneficiaries, it repeatedly breached these agreements by failing to direct the insurers to change the beneficiaries. *See* Stipulation of Facts ¶¶ 17, 20. Those breaches are not the responsibility of the insurers or the Guaranty Association. In effect, Plaintiffs reason that even if an insurer properly distributes proceeds to a beneficiary, the Guaranty Association must provide coverage to a remote assignee who did not receive those proceeds because someone earlier in the assignment chain became insolvent. The text of the Guaranty Act simply cannot be squared with this reasoning, which would subject the Guaranty Association to a torrent of claims that bear no resemblance to the Act's limited purpose as discussed below. For these additional reasons, the Court should hold that Plaintiffs have no claims under the Guaranty Act.

II. REQUIRING THE GUARANTY ASSOCIATION TO INSURE RISKY AND FRAUD-PRONE INVESTMENTS IN VIATICAL SETTLEMENT COMPANIES WOULD UNDERMINE ITS PURPOSE.

Just as insurance serves a useful social purpose, the Guaranty Association benefits society by protecting beneficiaries from insurer insolvency. Plaintiffs seek to exploit this statutory protection by arguing that the Guaranty Act encompasses investments made in viatical settlement companies that later become insolvent. For the legal reasons given above, the district court correctly concluded that the Act does not cover such investments. Important practical considerations also support this conclusion.

A. Insuring Viatical Investments Would Be Costly Because The Viatical Settlement Industry Is Prone To Fraud And Insolvency, And The Costs Would Ultimately Be Borne By The Public.

If Plaintiffs prevail, the Guaranty Association could be overwhelmed by the claims of viatical investors seeking to recoup their investment losses. Such claims are likely to be numerous and costly. While many viatical settlement transactions are legitimate, the viatical settlement industry is not heavily regulated, and fraud and insolvency are persistent problems. *See Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 547 (6th Cir. 2006) (noting that many policies underlying viatical investments had been procured through fraud); *People ex. rel. Wood v. Innovative Fin. Servs., Inc.*, No. D045555, 2006 WL 392030, at *3 (Cal. App. Feb. 17, 2006) (unpublished) (observing that risk of fraud is somewhat common in the viaticals business); *see also* Danielle M. Green, *The Security of Death: The Viatical Industry & Protection of Investors*, 15 WIDENER L.J. 347, 350, 356 (2006) (discussing regulation of viatical settlements); Wegner, *Life Settlements Become More Common*, *supra*. Future First is not the first viatical settlement company that has collapsed to the detriment of its investors. *See* Kohli, 54 BUFF. L. REV. at 297-98 (noting that Personal Choice Opportunities, a Florida viatical settlement company, was nothing more than an elaborate ponzi scheme and that the company's owner pleaded guilty to cheating investors out of $95 million); *see also* Goldstein, *Profiting From Mortality*, *supra* (detailing a California viatical settlement scheme that resulted in criminal charges).

Under these circumstances, and given the risks of viatical investments discussed in Part I.B. above, requiring the Guaranty Association to cover investments in viatical settlement companies exposes the Association and its members to risks that far exceed those found in the highly regulated insurance industry. The Guaranty Act created the Association to guarantee payment of benefits (up to certain limits) and provide continuation of coverage; it should not be manipulated to protect investments in a distinct, less stable, less regulated market.

Moreover, insulating Plaintiffs from the consequences of their failed investments would diminish any incentive for investors to investigate diligently the viatical settlement companies with which they do business. Investors could continue to invest in whatever viatical settlement company they choose, secure in the knowledge that the Guaranty Association would protect them if the company in which they invested collapses. Requiring insurance companies to pay assessments to guarantee risky investments in viatical settlement companies would give investors a windfall, would be costly given the instability and fraud in the secondary insurance market, and would do nothing to improve the state of the viatical settlement industry.

Ultimately, if viatical settlement companies like Future First are held to be "member insurers" of the Guaranty Association, the substantial assessments necessary to fund their investors' claims against the Association could result in lower state tax revenues and higher insurance premiums. Many states allow insurers to offset their assessments against their tax liabilities. *E.g.*, NEB. REV. STAT. § 44-2716(1) (Reissue 2004). Some states do not allow full or even partial tax offsets, however, and even those insurers that can utilize full tax offsets must do so over several years, resulting in lost investment income. Thus, some of the costs of these assessments may also be passed on to policyholders in the form of increased premiums, limiting many consumers' choice in the insurance market. NEB. REV. STAT. § 44-2708(7) (Reissue 2004). Those consumers and their loved ones would lose the economic benefits provided by life insurance, and society would lose the value provided by the widespread distribution of risk. Sacrificing tax revenue, raising insurance costs, and limiting consumer choice simply to encourage risky investment is a bad policy solution for society as a whole and is clearly not what the Unicameral intended when it adopted the Guaranty Act.

B. Plaintiffs' Arguments For Reimbursement Of Their Market Losses Are Applicable Whenever A Third Party Purchases A Life Insurance Contract On The Secondary Market.

The secondary market for life insurance is not an insurance market but a capital market in which investors buy, sell, and trade life insurance policies for financial gain. Participants in such a market should bear the attendant risks.

Viatical settlement providers are increasingly capitalized by institutional investors. *See* Kohli, 54 BUFF. L. REV. at 287. Many financial institutions see viatical settlements as the next stage in the "securitization" trend, in which policies are pooled together and then sold off to investors in the form of bonds or pieces of bonds. *See id.* at 287-88; Goldstein, *Profiting from Mortality*, *supra*. Foreign investors have become aware of this developing market and are actively buying policies in the U.S. secondary insurance market. *See Grave Investments*, COLUMBUS DISPATCH, April 28, 2008, *available at* http://tinyurl.com/3hmedv (describing a story in a New Zealand newspaper that detailed "how to buy and then cash in 'the life insurance policies of rich, elderly and soon-to-die Americans'"); Goldstein, *Profiting From Mortality*, *supra* (noting that there is a bustling market in Germany and London for viatical settlement-backed bonds).

If Plaintiffs prevail here, investors in viatical settlement companies will be insulated from the market effects of their investment by an Association created to protect individuals who purchase insurance in the primary market. Funds intended to diminish the financial strain associated with death or disability in the event an insurance company becomes insolvent should not be diverted to investors in capital markets. The Guaranty Act was not intended to provide a safety net for large, institutional investors that enter into investment contracts with viatical settlement companies. Under Plaintiffs' interpretation of the Guaranty Act, however, any individual or entity that invests in a viatical settlement company that later fails will have a claim against the Guaranty Association for the value of their investment.

C. Plaintiffs' Claims Are Properly Resolved Under The Nebraska Securities Act Or The Common Law Of Contracts Or Fraud, Not The Guaranty Act.

As explained above, the losses sustained by Plaintiffs are not due to the insolvency of the insurers who issued the life insurance policies owned by Future First. Rather, their losses flow from Future First's failure to designate many of the Plaintiffs as beneficiaries of the policies it owned as provided in the purchase request agreements. Thus, Plaintiffs lost the money they paid to Future First without gaining the financial asset they contracted to receive: the rights to future death benefits from policies insuring the lives of other individuals. Any cause of action Plaintiffs have lies against Future First, not the Guaranty Association and its member insurers.

Ruling that Plaintiffs' claims are not covered under the Guaranty Act does not leave them without a remedy. Rather, Plaintiffs may pursue claims against Future First under the Nebraska Securities Act or the common law of contracts or fraud. *See* Stipulation of Facts ¶ 20 (noting that the conservator appointed to oversee the liquidation of Future First found that Future First breached its contracts with Plaintiffs); Br. of Appellee 18-19. Plaintiffs may also file a claim against Future First in the conservatorship proceeding in Florida.

The financial losses that Plaintiffs suffered were not caused by the Guaranty Association or any of the insurance providers it was created to insure. Plaintiffs should not be allowed to recover against the Guaranty Association in lieu of Future First merely because Future First is insolvent.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order that the Guaranty Association is not required to reimburse Plaintiffs. This Court should reverse the district court's holding that Future First is a member insurer for purposes of the Guaranty Act and that the purchase request agreements were supplemental contracts under the Act.

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The undersigned, being first duly sworn on oath, deposes and states that two true and correct copies of the above and foregoing brief were sent by United States certified mail, postage prepaid and return receipt requested, on this ___ day of October, 2008, to each of the following:

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