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SUPREME COURT OF TEXAS
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No. 13-0673

IN THE SUPREME COURT OF TEXAS

ROY SEGER, ET AL.,

Petitioners

v.

YORKSHIRE INSURANCE CO., LTD. and OCEAN MARINE INSURANCE CO., LTD.,

Respondents

On Petition for Review from the
Court of Appeals for the Seventh District of Texas

AMICUS BRIEF OF TEXAS INSURANCE COVERAGE LAWYERS IN SUPPORT OF PETITIONER

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IDENTITY OF *AMICI CURIAE*

Amici Curiae are a group of unassociated Texas Insurance Coverage Lawyers ("TICL") with extensive experience in practicing insurance law throughout the United States and particularly in the great State of Texas. These lawyers regularly contribute legal articles on insurance to various recognized publications, routinely teach and speak on insurance law at various conferences, including continuing legal education programs nationally and in Texas, and meaningfully participate in professional insurance organizations. Many have been lead appellate counsel on some of the major insurance decisions by this Court in the last decade. Most have been practicing for over twenty-five years. Many have been either founders of the Insurance Section of the State Bar of Texas, officers of the Section, or have been members of the Insurance Council, the governing arm of the Section. These lawyers have a demonstrable interest in ensuring that Texas insurance law is consistent in policy and statutory interpretation, protects the interests of both carriers and policyholders, and preserves statutory laws and regulations related to the efficient and fair conduct of the business of insurance.

In this particular appeal, the TICL *amici* are particularly concerned with protection of Texas individual and business policyholders who are generally unfamiliar with the distinction between admitted insurers on the one hand and unauthorized insurance and/or surplus lines insurers on the other, the significance

of those distinctions, and the potential consequences of dealing with each. TICL also have an interest in the Court maintaining meaningful enforcement of Texas insurance laws under Chapters 101 and 981 of the Texas Insurance Code, which serve as statutory protections for Texas insurance consumers, prevent surplus lines and unauthorized insurers from obtaining unfair advantages over Texas admitted insurers, and discourage unauthorized insurers from making Texas a safe harbor for the business of unauthorized insurance. The overarching goal of these statutes is to prevent unfair competition that can hurt both Texas insurance consumers as well as Texas admitted insurers.

Pursuant to Texas Rule of Appellate Procedure 11(c), no party to this appeal will contribute to paying any fees or costs for the brief. The TICL are donating their own time without remuneration from any source.

SUMMARY OF THE ARGUMENT

While the parties and other *amici* have devoted most of their efforts to the purported *Gandy*-like issue – the fully adversarial trial – TCL's brief will address the unauthorized and surplus lines law issues raised in this appeal.

Should this Court consider the unauthorized and surplus lines statutes, Chapters 101 and 981 of the Texas Insurance Code, Respondents Yorkshire Insurance Co., Ltd. and Ocean Marine Insurance Co., Ltd. (the "Insurers") and their *amicus* Lloyd's America, Inc. present an illogical and unworkable

interpretation of these statutes and their application. The interpretation urged by Respondents and *amicus* Lloyd's America:

- contradicts the purposes set out in these statutes, removing meaningful protections and safeguards for Texas insurance consumers;
- eliminates proper and necessary consequences for violations of Chapters 101 and 981;
- compromises any meaningful distinctions between admitted insurers and those that fall under Chapters 101 and 981; and,
- provides surplus lines and unauthorized insurers an unfair advantage over Texas admitted insurers.

Under Respondents' and *amicus* Lloyd's America's arguments, unauthorized and surplus lines insurers may simply sell their policies without ever determining the availability of like kind and class insurance coverage in the admitted market – in other words, sell the same coverage as an admitted insurer – all without regard to the legal ramifications thereby violating Chapters 101 and 981. The result would be that out-of-state, unlicensed and surplus lines carriers would receive unfair competitive advantages over admitted insurers. The State of Texas would lose because its regulatory framework, meant to encourage insurers to be admitted to protect consumers in important markets, would become meaningless. Admitted insurers would lose because their compliance with Texas regulatory laws would no longer be rewarded by allowing them protected access to important markets for insurance products. And Texas insurance consumers would

lose because they would no longer be meaningfully protected through the specific regulatory scheme set out by the Texas Legislature. Respondents and *amicus* Lloyd's America want meaningless regulatory oversight with no substantive coverage consequences for issuing noncompliant insurance policies. The Legislature, however, put this regulatory scheme (including adverse coverage consequences for noncompliant surplus insurers) in place for very good reasons. This Court should continue to preserve that scheme in accordance with existing precedent.

This Court has previously addressed the regulatory scheme for unauthorized insurers and surplus lines insurance including violations therefrom. *See Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83 (Tex. 2006). In *Strayhorn*, this Court specified the proof required to remove a policy from being treated as unauthorized insurance, the consequences for selling unauthorized insurance and for violations of Chapter 981, the legal effects for dealing with surplus lines insurance, and the heavy reliance on surplus lines agents to maintain statutory compliance. *Id*. at 86-89. This Court validated and reinforced its holdings in *Strayhorn* when it denied review in *Seger I*. *See Yorkshire Ins. Co., Ltd. v. Seger*, 279 S.W.3d 755 (Tex. App.—Amarillo 2007, pet. denied).

This Court should continue to reject the Insurers' argument that an unauthorized insurer could enforce its policy defenses if the insured sought to

enforce the unauthorized insurance policy or a policy that violated Section 981.005. The Insurers and its a*micus* have returned and now reiterate their argument which was twice before rejected by the Amarillo Court of Appeals which pointed out that an unauthorized insurance policy means the policy defenses – including exclusions – may not be enforced. *Seger I*, 279 S.W.3d at 762-766 n. 17 and *Yorkshire Ins. Co., Ltd. v. Diatcom Drilling Co*. (*Seger I(a)*), 280 S.W.3d 278, 282 n. 2 (Tex. App.—Amarillo 2007, no pet.).

Should this Court reach the unauthorized and surplus lines issues, then TICL request the Court keep the law consistent with the legislative purpose behind these statutes - to protect Texas policyholders and fair practices in the Texas insurance market, impose legal consequences for those that violate unauthorized and surplus lines regulations, deter those that promote and issue unauthorized insurance and/or surplus lines policies that violate Sections 101.201(a) and 981.005, including the Insurers, and not place admitted insurers, who have respected and complied with Texas insurance regulatory laws, at a position of competitive disadvantage against insurers who have chosen to *not* honor those laws. Respondents' position would amount to rewarding non-admitted insurers and those that assist them, and it would punish those insurers and their representatives who actually and meaningfully comply with Texas insurance laws.

Moreover, by accepting Respondents' position, the Court would disincentivize other insurers – including admitted insurers – from complying with regulatory requirements, completely undermining the Legislative scheme intended to protect Texas insurance consumers. It would also compromise Texas tax revenues and allow unfair practices in the business of insurance to be used to get unfair competitive advantages in the Texas insurance market. In short, were the Court to adopt the position taken by Respondents and *amicus* Lloyd's America, the Court would encourage insurers to become unauthorized or surplus lines insurers, which would make Texas a safe harbor for insurers and persons engaged in the unauthorized business of insurance or engaged in circumvention of surplus lines statutes.

TICL respectfully request the Court to maintain strict compliance with unauthorized and surplus lines statutes consistent with the Legislature's intent, continue to prohibit unauthorized insurers and surplus lines insurers who violate Section 981.005 from enforcing their contract-based defenses, and reaffirm this Court's holdings in *Strayhorn*.

ARGUMENT

I. The Fully Adversarial Trial Issue

Both Seger and the Insurers devote the majority of their respective briefs on the merits to whether the underlying liability judgment for purposes of *Stowers* is controlled by *Gandy* or *Atofina*. *See State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996) and *Evanston Ins. Co. v. Atofina Petrochemicals, Inc*., 256 S.W.3d 660 (Tex. 2008). Because this issue is thoroughly addressed in the parties' principal briefs, TICL will not burden the Court with further briefing and do not take a position on that issue in this specific appeal.

II. The Unauthorized Insurance And Surplus Lines Issue

While the Court may decide this appeal on the *Gandy/Atofina* issue, should it reach the unauthorized insurance and surplus lines points, TICL would demonstrate that the Insurers and their *amici* Lloyd's America and Lexington Insurance Company[1] ("Lexington") (in the Court of Appeals) present a legally flawed, misleading, and illogical argument to allow not only the Insurers, but any surplus lines insurer, to enforce an insurance policy that was illegally sold and

[1] The Lexington Amicus Brief in the Court of Appeals was authored by the Honorable Scott Brister, former Justice on this Honorable Court. Mr. Brister was the author of the majority opinion in *Strayhorn*. That opinion spelled out the consequences for unauthorized insurance and surplus lines violations – that being such policies cannot be enforced by the insurer. Lexington was the petitioner and loser in *Strayhorn.* 209 S.W.3d 83. Furthermore, Mr. Brister was a sitting Justice in this Court when *Seger I* was considered for review and denied.

issued to the insured. Disingenuously casting themselves as victims, the Insurers revert to legal misanalysis to avoid being held accountable for selling policies in violation of Texas law. Respondents and their *amici* seek to have themselves treated like an admitted Texas insurer who has complied with numerous Texas insurance regulatory requirements, all in order to avoid legal accountability for their illegal conduct.

A. The Statutory Framework for Unauthorized and Surplus Lines Insurance

Texas Insurance Code Section 101.201 provides:

> **§ 101.201. Validity of Insurance Contracts**
>
> (a) An insurance contract effective in this state and entered into by an unauthorized insurer is unenforceable by the insurer. A person who in any manner assisted directly or indirectly in the procurement of the contract is liable to the insured for the full amount of a claim or loss under the terms of the contract if the unauthorized insurer fails to pay the claim or loss.
>
> (b) This section does not apply to insurance procured by a licensed surplus lines agent from an eligible surplus lines insurer as defined by Chapter 981 and independently procured contracts of insurance, as described in Section 101.053(b)(4), that are reported and on which premium tax is paid in accordance with Chapter 225 or 226.

TEX. INS. CODE ANN. § 101.201.

This statute describes unauthorized insurance, why a policy can be taken out of unauthorized insurance, and the legal consequences for an insurer and those involved in unauthorized insurance transactions. *Id*. More specific to the facts in this appeal, in order to except a policy from unauthorized insurance, two

fundamental criteria must be satisfied, without exception: (1) the policy must be issued by an eligible surplus lines insurer; and, (2) the policy must be procured by a licensed surplus lines agent. *Mid-American Indem. Ins. Co. v. King*, 22 S.W.3d 321, 323-325 (Tex. 1995); *Seger I*, 279 S.W.3d at 762; *see also* TEX. INS. CODE ANN. § 101.053(b)(1).

The Texas Legislature unambiguously set out Texas policy and purposes in enacting unauthorized insurance statutes, particularly Chapter 101:

> § **101.001. State Policy and Purpose**
>
> (a) It is a state concern that many residents of this state hold insurance policies issued by persons or insurers who are not authorized to do insurance business in this state and who are not qualified as eligible surplus lines insurers under Chapter 981. *These residents face often insurmountable obstacles in asserting legal rights under the policies in foreign forums under unfamiliar laws and rules of practice.*
>
> (b) It is the policy of this state to protect residents against acts by a person or insurer who is not authorized to do insurance business in this state by:
>
> (1) maintaining fair and honest insurance markets;
>
> (2) protecting the premium tax revenues of this state;
>
> (3) protecting authorized persons and insurers, who are subject to strict regulation, from unfair competition by unauthorized persons and insurers; and
>
> (4) protecting against evasion of the insurance regulatory laws of this state;

> (c) the purpose of this chapter is to subject certain insurers and persons to the jurisdiction of:
>
> (1) the commissioner and proceedings before the commissioner; and
>
> (2) the courts of this state in suits by or on behalf of the state or an insured or beneficiary under an insurance contract.
>
> (d) It is also a concern that this state not become a safe harbor for persons or insurers engaged in the unauthorized business of insurance in this state, regardless of whether the insureds or other persons affected by the unauthorized business of insurance are residents of this state.

TEX. INS. CODE ANN. § 101.001 (emphasis added).

Unauthorized insurance is illegal and subject to civil and criminal penalties under Texas regulations. TEX. INS. CODE ANN. § 101.102, 101.105, and 101.106. But the legislature also expressly provided protection to policyholders from insurers that sell an unauthorized insurance policy – specifically, the unauthorized insurer may not enforce any aspect of its policies while the insured may enforce the aspects of the policy that it desires free from any affirmative policy defenses raised by the carrier. *Strayhorn,* 209 S.W.3d at 89; *Seger I,* 209 S.W.3d at 762 n. 7; and *Wheelways Ins. Co. v. Hodges*, 872 S.W.2d 776, 784, 785 n. 12 and 786 (Tex. App.—Texarkana 1994, no writ).

A lawful surplus lines transaction – that is, a transaction that meets the requirements of the exception set out in Section 101.201(b) – prevents the policy

from being treated as unauthorized insurance and places it under the regulatory scheme in Chapter 981, but only if, Chapter 981's distinct set of requirements regarding the enforceability of a surplus lines policy are met.

Like Chapter 101, Chapter 981 has similar purposes:

§ 981.001. Purpose

(a) An insurance transaction that is entered into by a resident of this state with an eligible surplus lines insurer through a surplus lines agent because of difficulty in obtaining coverage from an authorized insurer is a matter of public interest.

(b) The transaction of surplus lines insurance is a subject of concern and it is necessary to provide for the regulation, taxation, supervision, and control of these transactions and the practices and matters related to these transactions by:

(1) requiring appropriate standards and reports concerning the placement of surplus lines insurance;

(2) imposing requirements necessary to make regulation and control of surplus lines insurance reasonably complete and effective;

(3) providing orderly access to eligible surplus lines insurers;

(4) ensuring the maintenance of fair and honest markets;

(5) protecting the revenues of this state; and

(6) protecting authorized insurers, which under the laws of this state must meet strict standards relating to the regulation and taxation of the

> business of insurance, from unfair competition by unauthorized insurers.
>
> (c) To regulate and tax surplus lines insurance placed in accordance with this Chapter within the meaning and intent of 15 U.S.C. Section 1011 and 15 U.S.C. Chapter 108, this chapter provides an orderly method for each person whose home state is this state for a particular transaction to effect insurance with eligible surplus lines insurers through qualified, licensed, and supervised surplus lines agents in this state, if coverage is not available from authorized and regulated insurers engaged in business in this state, under reasonable and practical safeguards.

TEX. INS. CODE ANN. § 981.001 emphasis added.

Lawful surplus lines insurance is intended to provide coverage that cannot be obtained from an admitted insurer.[2] TEX. INS. CODE ANN. § 981.001(a) and § 981.004. In basic terms, lawful surplus lines insurance is coverage offered where the same "kind and class of insurance" is not available from an authorized insurer "after a diligent effort" is made to obtain coverage. *Id*. at § 981.004(a)(1). The amount of insurance coverage from a lawful surplus lines policy must be limited to the amount not available in the admitted market. *Id*. at (b). Summarizing, an eligible surplus lines insurer under Texas law may provide a surplus lines policy through a licensed surplus lines agent to a Texas individual or business insurance consumer when the Texas consumer is unable to obtain coverage of the same type

[2] Admitted or authorized insurers must meet Texas' strict standards relating to regulation, taxation, and participation in the Texas Guaranty Fund. *See* TEX. INS. CODE ANN. § 801.051.

(like kind and class) from an admitted insurer, but only in an amount that the admitted insurer will not write. TEX. INS. CODE ANN. § 981.004; *Noor Trading, Inc. v. Asian American Nations Ins. Group*, 2008 WL 3152971 at *5 (N.D. Tex. Aug. 6, 2008).

The sale and issuance of surplus lines insurance also involves the requirement of diligence. Section 981.004 addresses diligence – that is to confirm an admitted insurer will not write like kind and class coverage before the surplus lines policy is procured and/or issued. *Strayhorn*, 209 S.W.3d at 87; *Noor Trading*, 2008 WL 3152971 at *5. Surplus lines regulation "relies heavily on licensed surplus lines agents." *Strayhorn*, 209 S.W.3d at 870. The surplus lines agent "determines and certifies that coverage is unavailable from authorized insurers thus justifying surplus lines placement." *Id.* *See also* TEX. INS. CODE ANN. § 981.216. The sale and issuance of surplus lines policies compels an agent to provide an annual report on surplus lines sales, including a record of all transactions. *Id*. The agent must confirm the insurer is an eligible surplus lines insurer and financially sound. *Id.* at § 981.211. As this Court noted: "… the State's effort to *protect the public interest* in this area is almost entirely dependent on monitoring licensed surplus lines agents." *Strayhorn*, 209 S.W.3d at 88 (emphasis added). As *Strayhorn* (Justice Brister) noted, the consequences for non-compliance are "severe." *Id*. at 89.

Lawful surplus lines insurance policies are not enforceable by the insurer when there are violations of Section 981.005, i.e., "material and intentional" violations under Chapter 981. TEX. INS. CODE ANN. 981.005(b); *Strayhorn*, 209 S.W.3d at 89. Intentional and material violations include a lack of diligence in ascertaining whether like kind and class coverage is available from an admitted insurer and whether an admitted insurer would write like kind and class coverage for the insurance consumer. *Prodigy Comm. Corp. v. Agricultural Excess & Surplus Ins. Co.*, 195 S.W.3d 764, 768-769 (Tex. App.—Dallas 2006, *revs'd on other grounds*, 288 S.W.3d 374 (Tex. 2009)).

Unauthorized and surplus lines insurance have one crucial similarity – both an insurer for an unauthorized insurance policy and a surplus lines insurer whose policy was procured by an intentional and material violation of Section 981.005 cannot enforce their policies. *Strayhorn*, 209 S.W.3d at 89. Stated succinctly, the insurer/violators in these two circumstances may not enforce the conditions and exclusions – "contract-based defenses" in their policies. *Seger I*, 279 S.W.3d at 762 and n. 7 and 766 n. 17; *Wheelways*, 872 S.W.2d at 776, 784, 785 n. 12 and 786.

B. The Importance of Enforcing Statutory Mandates For Unauthorized and Surplus Lines Insurers

Texas statutory regulations dealing with unauthorized and surplus lines insurance are critical to Texas insurance consumers, taxpayers, and authorized

insurers. Compromised or weakened enforcement translates into permitting unregulated insurers to prey upon the unsuspecting public, including Texas insurance consumers, deprives the State of tax revenues, hides noncompliance from insurance regulators, deprives those that buy such policies of protections under the Texas Guaranty Fund for insolvent insurers, permits noncompliant insurers to unfairly compete with authorized insurers, and allows these insurers to sell insurance using forms, language, exclusions and conditions that the Texas Department of Insurance ("TDI") has neither reviewed nor approved. Treating the Insurers and other surplus lines insurers like an admitted insurer defies regulations and statutory purposes and ultimately provides a disincentive for any insurer to become a Texas authorized insurer. Any suggestion that Texas insurance consumer protections for noncompliance are limited to those imposed solely by Texas regulators such as civil and criminal penalties contradicts the clear statutory intent and language of both Chapters 101 and 981, as well as their purposes .

If unauthorized and surplus lines insurers who violate Texas statutes are not held accountable in terms of policy enforcement to their insureds, these lawless insurers have no incentive for compliance other than perhaps a slight increase in the costs of doing business when an occasional administrative penalty might be imposed. More to the point, violations might never be exposed at all because these regulations heavily depend on monitoring surplus lines agents, many of whose

actions are unseen, and the regulatory scheme depends on agents preparing accurate yearly reports. *Strayhorn*, 209 S.W.3d at 88; TEX. INS. CODE ANN. §981.215 and .216. Precluding insurers whose policies are either unauthorized or violate Section 981.005 from being able to enforce such policies makes logical sense, provides an immediate tangible impact, and acts as a meaningful deterrent for those insurers whose policies violate Sections 101.201 and 981.005. It is also required by the express language and intent of the statutes. An occasional fine or scolding by TDI is a very small price to pay by a surplus lines insurer who receives $951,004,365.97 in yearly premium revenue.[3] Instead, an insurer who is in violation of these statutes who cannot enforce policy defenses such as conditions or exclusions will get legally compliant very quickly and consistently when confronted with a large loss because of the exposure for unauthorized insurance or noncompliant surplus lines transactions.

Insurers who violate Chapters 101 and 981 must be held accountable to not only regulators but to the public, including Texas individual and business policyholders.

C. Unauthorized Insurance Means No Policy Defenses

It can hardly be disputed that the Yorkshire and Ocean Marine policies are unauthorized insurance. This critical fact has been determined long before this

[3] *See Brief* of *Amicus Curiae*, Lloyd's America, Inc., p. 1.

latest appeal. *Seger I*, 279 S.W.3d at 765-766. It was reconfirmed in the trial court. CR 1:29, RR 9:261-262; 6:139-143, 168, 179-171, 179-180, 185, 8:136 and 138; 10:83-88; PX 15.

Recognizing the overwhelming evidence, the Insurers attempt to describe their violations as technical or immaterial. *Respondents' Brief*, pp. 16 and 58-62. They argue that their policies are lawful surplus lines transactions – not unauthorized insurance – because Respondents were eligible surplus lines insurers, an obviously circular argument. *Id*. at pp. 54-61. Respondents further contend the judgment creditors (Segers) have no right to complain about any violations – that is, Petitioners have no standing. *Id*. at p. 56. The Respondents-Insurers proclaim the issue of unauthorized insurance was waived in the trial court because Petitioners failed to submit an issue on unauthorized insurance. They also assert that the remedy for unauthorized insurance or violations of Section 981.005 is rescinding the policy, not preclusion of contract-related defenses. *Id*. at pp. 57-58. Finally, the Insurers merge Chapters 101 and 981, failing to create any meaningful distinction between the two.

The Insurers' arguments in their brief to this Court represent material mischaracterizations of Chapters 101 and 981, complete disregard of the law of this case, and reliance on an *amicus* brief in the Court of Appeals authored by former Justice Brister who authored the *Strayhorn* opinion but now attempts to

qualify its impact. What the Insurers and their *amici* advocate directly contradicts Texas statutes, promotes a policy of disregard and lack of deterrence, treats the Insurers and surplus lines insurers like admitted insurers, and permits these insurers to take advantage of Texas insurance consumers.

The Insurers know from *Seger I*, and this Court's rejection of their petition for review, that in order to remove a transaction from the category of "unauthorized insurance," two fundamental elements are necessary: 1. an eligible surplus lines insurer; and 2. a licensed surplus lines agent. *Seger I*, 279 S.W.3d at 765: "However, more is required to meet the exception of Section 101.201(b). In addition to the insurer being eligible to provide surplus lines insurance, the insurance must be processed through a licensed surplus lines agent." *Id*. The Insurers and their *amici* characterize failure to satisfy the exemption in Section 101.201(b) or violations of Section 981.005 as merely "technical" and "immaterial." This reasoning is incompatible with *Strayhorn* and Chapter 101. Section 101.201(b) is unambiguous and demonstrably material in determining whether there is unauthorized insurance. *Strayhorn*, 209 S.W.3d at 86-87. The court of appeals told the Insurers what they had to prove – two (2) elements – so

they could not be surprised and they should not have ignored this clear legal holding regarding necessary proof.[4]

This Court's opinion in *Strayhorn* reinforced this two-part mandatory requirement to make a policy a lawful surplus lines transaction. *Strayhorn*, 209 S.W.3d at 86. The distinction between unauthorized and lawful surplus lines insurance is not, as this Court noted, insignificant. *Id*. at 86-88; *Mid-American Indem. v. King*, 22 S.W.3d at 326. The significance is not only for tax purposes but unauthorized insurance policies cannot be enforced by insurers. *Id*. at 89. The Insurers and their *amici* are wrong in suggesting that only "technical" or "immaterial" violations are presented in this appeal.

Employing a different strategy, the Insurers then contend that it was Petitioners' obligation to submit a jury issue regarding unauthorized insurance. Once more, in *Seger I*, the court of appeals instructed the Insurers that it was their burden to establish that they met the exception in Section 101.201(b) to take their policies out of the regulatory regime governing unauthorized insurance. *Seger*, 279 S.W.3d at 765 ("Because surplus lines insurance is excepted from the general

[4] This holding represents law of the case binding the Insurers to this determination of law made in an earlier appeal. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986); *Hurd Enterprises, Ltd. v. Bruni*, 828 S.W.2d 101, 105-106 (Tex.App.—San Antonio 1992, writ denied); and *Baptist Mem. Hosp. Sys. v. Smith*, 822 S.W.2d 67, 73 (Tex.App.—San Antonio 1991, writ denied). The law of the case applied when the Supreme Court of Texas denied review in *Seger I. Smith*, 822 S.W.2d at 73. Indeed, the Insurers acknowledge law of the case applies to previous decisions by the Court of Appeals. *Respondents' Brief*, pp. 51-52.

statutory restriction on unauthorized insurers, the burden of proving every fact essential to the invocation of the exception rests on Insurers.") The court of appeals in *Seger I* held the Insurers failed to establish the exception. *Id*. at 766. Here, the Insurers confess that they did not submit an issue, so the Insurers are not entitled to an exception. Any waiver falls on the Insurers, as it should be.[5]

The Insurers were confronted with the consequence of unauthorized insurance – one of which was that they could not enforce their policies. *Strayhorn*, 209 S.W.3d at 89; *Seger I*, 279 S.W.3d at 762-766. To these Insurers and their *amici*, not enforcing their policies merely means either the policy may be enforced as written or it may be rescinded at the election of the insured. *Respondents' Brief*, pp. 34-35, and 57. The Insurers do not cite any authority for this proposition but they do neglect to point out contrary authority, including *Seger I*.

In *Seger I*, the court of appeals discussed at length the ramifications for unauthorized insurance which included preclusion of contract-related defenses. *Id*. at 762-766. The Insurers made this exact "rescind or enforce" argument in *Seger I* – that is, "the statute does not preclude an unauthorized insurer's reliance on contract-based defenses in suits initiated by the insured …" *Id*. at 762. The court of appeals dispensed with the Insurers' argument: "We conclude that the Texas Supreme Court has specifically rejected Insurers' contention that the applicable

[5] This too is the law of the case. *Smith*, 822 S.W.2d at 73.

provisions do no more than preclude an unauthorized insurer from bringing suit." *Id*. at 762 n.7.

The court of appeals rejected the "enforce or rescind" argument again in a subsequent appeal by the Insurers. *Seger I(a)*, 280 S.W.3d at 282 n. 2. In *Seger I(a)*, the Insurers sought declaratory relief against their insured, Diatcom Drilling, regarding coverage and sought to reform the policy. *Id*. at 281. Specifically, the Insurers alleged the Leased-In Workers Exclusion precluded coverage for injury or death to leased-in employees/workers. *Id*. at 762-763. While the court of appeals determined, on this very narrow issue, that injury or death to leased-in employees/workers on the date of Randall Seger's death was excluded from the CGL policy at issue, *the court specifically held that if the CGL policy was unauthorized insurance then the Insurers' contract-related defenses were not enforceable which would include the Leased-In Workers Exclusion*. *Id*. at 282 n.2. The Insurers' repeated refusal to acknowledge that unauthorized insurance means contract-related coverage defenses may not be enforced is indicative of their intent to disregard unambiguous Texas statutes that directly apply.

Further, the title of Section 101.201 is "Validity of Insurance Contracts" – in simple terms, the section addresses how unauthorized insurance policies are treated. Subsection (a) begins with a statement that unauthorized insurance

policies may not be enforced by the insurer. This language is unambiguous and means the insurer may not enforce any contract-related defenses in its unauthorized insurance policy. *Wheelways Ins. v. Hodges*, 872 S.W.2d at 776, 784, 785 n. 12, and 786; *see also* former TEX. INS. CODE ANN. art. 1.14-2 § 8 now § 101.201.

The second sentence of subsection (a) of Section 101.201 is a statement of who is responsible when an authorized insurance policy is issued: "A person who in any manner assisted directly or indirectly in the procurement" of the unauthorized policy becomes liable "for the full amount of a claim or loss under the terms of the contract if the unauthorized insurer fails to pay the claim or loss." This sentence translates: for anyone other than the unauthorized insurer who is in any way involved with the procurement of the unauthorized insurance policy, they must pay if the unauthorized insurer does not.

The Insurers' attempt to merge the two sentences in subsection (a) by suggesting that the insured of an unauthorized insurance policy is confined to the terms of the policy as written – translation, the unauthorized insurance insurer may enforce its policy defenses. *Respondents' Brief* at 57. This interpretation turns the meaning and purpose of Chapter 101 and specifically Section 101.201(a) on its head and contradicts the first sentence of subsection (a) – which states the unauthorized insurer cannot enforce its policy. First, the term "person" in the second sentence of Section 101.201(a) has the same definition as "person" in

Section 541.002 of the Texas Insurance Code. TEX. INS. CODE ANN. § 101.101. An unauthorized insurer does not fall within the definition of "person" in Section 541.002. Next, the second sentence of subsection (a) specifically differentiates between "person" and "unauthorized insurer" ("a person … is liable … if the unauthorized insurer fails to pay the claim or loss."). TEX. INS. CODE ANN. § 101.201(a). Very simply, Section 101.201(a) draws a distinction between an "unauthorized insurer" and those that are involved in its procurement and sale; i.e., "person." *See Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987) (holding the duty of statutory interpretation is to "give effect to all the words of a statute and not treat any statutory language as surplusage if possible").

According to the Insurers, any claim or loss by the insured falling under an unauthorized insurance policy allows the Insurer to enforce its contractual right – particularly conditions and exclusions. Under the Insurers' interpretation, the first sentence of subsection (a) would have to read: "Unless the insured seeks to enforce its rights under the policy," the policy is unenforceable by the insurer. But this interpretation defies the purposes of Chapter 101, so the only consequence would be the Insurers must simply return an insured's premium for the policy, and the insured remains uncompensated for its loss. The Insurers' reading would render Section 101.201(a) contradictory. Under the Insurers' interpretation of Section 101.201(a), the Insurers' remedy of "rescind or enforce" would be

duplicative of already existing remedies. *See* TEX. BUS. & COMM. CODE ANN. § 17.50(b)(3); TEX. INS. CODE ANN. § 541.152(a)(3); *Italian Cowboy Partners v. Prudential Ins.*, 341 S.W.3d 323, 344 (Tex. 2011) (permitting rescission for fraud); and *City of The Colony v. North Tex. Mun. Water Dist.*, 272 S.W. 3d 699, 732 (Tex.App.—Fort Worth 2008, pet. dism'd) (permitting rescission for breach of contract). If the Legislature intended to limit Section 101.201(a) to "rescind or enforce," it could have easily said so. Given the purposes set out in Chapter 101, it is obvious that they did not do so.

The Insurers cannot cite any authority for their "rescind or enforce" analysis. In fact, the authorities are to the opposite effect. In *Wheelways*, the Texarkana Court of Appeals, confronted with an unauthorized insurance policy, held the insurer could not enforce its notice of suit clause as a defense to a judgment.[6] *Wheelways*, 872 S.W.2d at 784. The *Wheelways* court repeated this holding not once but twice in its opinion. *Id*. at 786 ("Because it was an unauthorized insurer, *Wheelways* cannot complain of its lack of notice of the underlying lawsuit").

Additionally, *Seger I* rejects the "rescind or enforce" mantra. The court of appeals affirmed the denial of the Insurers' motion for summary judgment on their coverage argument – the Leased Worker Exclusion – because they could not prove

[6] *Wheelways* deals with TEX. INS. CODE ANN., art. 1.14-1 § 8 now TEX. INS. CODE ANN. § 101.201. *See Strayhorn*, 209 S.W.3d at 89 n.42.

their policies were not authorized insurance. 279 S.W.3d at 766. The court of appeals held: "… Insurers would not be entitled to summary judgment on coverage even if they established that a contractual provision excluded coverage as a matter of law." *Id*. at 766, n. 17.

Seger I(a) likewise repudiates the "rescind or enforce" argument. While the opinion holds the Leased Worker Exclusion excludes liability for injury or death to leased-in employees/workers, the appellate court, in unambiguous language, noted its holding was limited by and would be subject to whether the Insurers' policies were unauthorized insurance where contract-related defenses are unenforceable. *Seger I(a)*, 280 S.W.3d at 282 n. 2.

In support of the Insurers' "rescind or enforce" argument, the Insurers cite to *Urreta v. Decker*, 992 S.W.2d 440 (Tex. 1999). *Urreta* involves the interpretation of insurance coverage (not unauthorized or surplus lines insurance) and a rental vehicle. *Id*. at 441-442. The plaintiff in *Urreta* alleged that he had been defrauded in agreeing to a settlement because the liability limits were greater than represented. *Id*. This Court determined the policy limits were as represented, there was no fraud, and the policy and rental contract (which was part of the policy) together determined the insurance policy limits. *Id*. at 443-444.

According to the Insurers, because *Urreta* sued under the policy, he was bound by its terms in spite of an unauthorized endorsement. *Id*. This Court in

Urreta relied on Article 5.06 of the Texas Insurance Code and was not confronted with: a specific statutory mandate such as Section 101.201(a); insurers who issued unauthorized insurance policies in defiance of Texas substantive law; and the stated policy and purposes of Chapter 101 including broad protections set out by the Texas Legislature. Moreover, Article 5.06 does not have language like that in Sections 101.201(a) and 981.005 specifying that an insurer may not enforce its policy. Lastly, Section 5.06 is a regulatory statute enforced by the Texas Department of Insurance, not insureds. *Urreta* does not aid the Insurers.

The Insurers next argue that the Petitioners may not complain about unauthorized insurance because the Segers have no standing and any assignment by the insured to the Segers is unenforceable under the insurance policy. *Respondents' Brief*, pp. 52-60. This argument has no merit. Petitioners are judgment creditors and therefore stand in the shoes of the insured. *Great American Ins. Co. v. Murray*, 437 S.W.2d 264, 266 (Tex. 1969); *State Farm County Mut. Ins. Co. v. Ollis*, 768 S.W.2d 722, 723 (Tex. 1989). As judgment creditors, any rights that the insured has under the insurance policies would equally apply to Petitioners. *Murray*, 437 S.W.2d at 266; *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.W.2d 38, 41 (Tex. 1998). Disallowing Petitioners from enforcing the statutory prohibitions of Section 101.201(a) would also punish the insured who now has a judgment against it, even though the statute was no doubt intended to protect the

insured from any attempt to deprive it of coverage under the unauthorized insurance policy.

Ironically, even if part of Petitioners' claims depends on any assignment by the insured, the Insurers are prohibited from enforcing same as a contract-related defense. *See Seger*, 279 S.W.3d at 765-766; *Wheelways*, 872 S.W.2d at 784 n. 10 and 786. Further, the assignment followed the judgment the Seger parties obtained and thus the "no action" clause did not apply where the Insurers had already breached their duties to defend the insured under their policies.

Lastly, Respondents' reliance on *Essex Ins. Co. v. Patrick Co*. is misplaced. No. Civ. A. SA 05 CA 337-06, 2006 WL 3779812, * at 5 (W.D. Tex. Oct. 16, 2006). *Patrick*, assuming that the federal district court correctly applied Texas law, is distinguishable. *Patrick* is a duty to defend case where the underlying liability plaintiff challenged Essex's policy as unauthorized insurance while the insured did not. *Id*. There was no judgment and no evidence the Essex policy was an unauthorized insurance policy. *Id*. The federal district court relied on the premise that a third party beneficiary without a judgment has no rights under a liability policy. *Id*. Moreover, the complaint in *Patrick* involved Section 981.101 (not 981.005), something that the Commissioner of Insurance addresses under his regulatory powers separate and apart from the regulations of unauthorized

insurance under Section 101.201 or Section 981.005 (intentional and material violations of the surplus lines statutes). *Id*. at *6.

As a throw-in argument, the Insurers, in a short paragraph, contend Sections 101.001(a) and 981.005 are unconstitutional as they relate to preclusion of enforcement of contract-related defenses. *Respondents' Brief*, p. 68. The Insurers cite no authority for this contention, it is inadequately briefed, and it was not preserved in the courts below. Further, *Strayhorn* rejected nearly identical challenges. *Strayhorn*, 209 S.W.3d at 89. Chapters 101 and 981 are not constitutionally infirm.

D. Violations of Section 981.005 Mean Contract-Related Defenses Are Likewise Unenforceable

As *Strayhorn* instructs, a lawful surplus lines policy (involving an eligible surplus lines insurer and a licensed surplus lines agent) may not be enforced by the surplus lines insurer where it was issued in violation of Section 981.005 – an intentional and material violation. *Strayhorn*, 209 S.W.3d at 89. In the trial court, the Segers submitted issues on intentional and material violations on Section 981.005 and the jury responded with affirmative answers. CR 5:1373-1377.

The same authorities and reasoning that apply to unauthorized insurance and enforcement of contract-related defenses are equally applicable to Section 981.005 violations. The title of Section 981.005 is virtually the same as Section 101.201 – "Validity of Insurance Contracts" versus "Validity of Contracts." The statutory

language precluding enforcement of the policy for intentional and material violations tracks Section 101.201(a), with the major difference being lawful surplus lines policies are enforceable absent intentional and material violations. TEX. INS. CODE ANN. § 981.005(a); *Patrick*, 2006 WL 3779812 at *6; *Noor Trading*, 2008 WL 3150971 at *5; and *Prodigy*, 195 S.W.3d 769-770.

A lawful surplus lines transaction creates an enforceable policy unless there is an intentional and material violation. But if the policy is a result of an intentional and material violation under Section 981.005, then like in the case of an unauthorized policy, the insurer may not enforce its contract-related defenses.

E. The Insurers And Their *Amici* Doomsday Proclamations

The Insurers and their *amici* unconvincingly offer doomsday proclamations in an attempt to convince this Honorable Court that violations of Sections 981.005 and 101.201(a) should not mean loss of contract-related defenses, regardless of what those statutes expressly say. Not surprisingly, they offer no evidence or case authority to back up their arguments.

1. *Amicus* Lloyd's America's Misanalysis

Amicus Lloyd's America complains that if a surplus lines insurer must satisfy the burden of the Section 101.201(b) exception to unauthorized insurance before the insurer can enforce contract-related defenses, it will unnecessarily cause the surplus insurer "to insert themselves … at the outset of every claim in order to

preserve the right to assert policy exclusions in the *Stowers* trial – even when the insured never satisfied the initial burden of establishing coverage." *Brief of Amicus Curiae Lloyd's America, Inc*., pp. 13-14. This again misconceives the way insurance statutes and insurance coverage works in this state. This Court has frequently *encouraged* insurers to "insert themselves…at the outset…in order to preserve the right to assert policy exclusions…"

A party seeking an exception from a statute has the burden to establish the exception – and not just under Section 101.201(b). *See Cramer v. Sheppard,* 140 Tex. 271, 167 S.W.2d 147, 155 (Tex. 1942); *Risk Managers Int'l, Inc. v. State,* 858 S.W.2d 567, 570 (Tex. App.—Austin 1993, writ denied). If a surplus lines insurer seeks to claim the exception to unauthorized insurance, then it becomes its burden to do so. For purposes of the Texas Insurance Code, issuance by an eligible surplus lines insurer is only one part of the two-part test for making a policy a lawful surplus lines transaction. *Strayhorn*, 209 S.W.3d at 86; *Mid-American Indem. v. King*, 22 S.W.3d at 323-324. Surplus lines insurers are not admitted or authorized insurers and they are not entitled to be treated similarly. *Strayhorn*, 209 S.W.3d at 86; *Mid-American Indem. v. King*, 22 S.W.3d at 323-324. In fact, the Texas Insurance Code treats surplus lines insurers as unauthorized and unlicensed insurers. *Strayhorn*, 209 S.W.3d at 86.

For proof purposes, a surplus lines insurer should be in the best position to: 1. determine if the policy is a result of a lawful surplus lines transaction; and 2. determine if there is a coverage question or issue for the claim that needs to be resolved. While Respondents and their *amici* argue that *Gandy* controls the underlying liability judgment, they have apparently disavowed the rest of the *Gandy* opinion. *Gandy* holds that an assignment of an insured's claims is invalid if among other reasons: "… Defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of Plaintiff's claim." *Gandy*, 925 S.W.2d at 714. This Court has consistently encouraged Insurers to early adjudicate coverage issues before the underlying liability suit – in other words, when there are coverage questions. *Id*.

Whether the exclusion or condition can be enforced is a necessary part of any coverage determination under a surplus lines policy. Thus, if a surplus lines insurer relies on an exclusion or condition to defeat coverage, it necessarily follows that it must also show that it may enforce the exclusion because it has complied with Sections 101.201(a) or 981.005. And the amount of proof necessary to satisfy the Section 101.201(b) exception is hardly complicated – proof of a policy issued by an eligible surplus lines insurer and procured by a licensed Texas surplus lines agent – information that can be obtained from TDI. *See* TEX. INS. CODE ANN. § 981.215 and .216. For a Section 981.005 issue, the surplus lines insurer may

refer to the statutory reports filed by the surplus lines agent. Either way, the surplus lines insurer should easily be able to show statutory compliance.

Considering the foregoing, the surplus lines *amici* make even less sense when considering a *Stowers* claim. A *Stowers* claim depends on three elements: 1. the claim against the insured is within the scope of coverage; 2. the demand is within the policy limits; and 3. the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *American Physician Ins. Exchange v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994). If there is no coverage then there can be no valid *Stowers* claim. *Id*. at 848.

More specifically, the surplus lines insurer at a *Stowers* trial would have a statutory burden to not only plead the exclusion to the coverage but prove the applicability of the exclusion. TEX. INS. CODE ANN. § 554.02; *Evergreen Nat. Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 675 (Tex.App.—Austin 2003, no pet.). And, as part of the proof necessary to establish the applicability of the exclusion, including its enforceability, the surplus lines insurer must show it satisfies the exception to Section 101.201(a). *Seger I*, 279 S.W.3d at 765. With regard to a Section 981.005 violation in a *Stowers* claim, once the insurer satisfied the Section 101.201(a) exception, the burden would shift requiring either the insured or the owner of the *Stowers* claim to show intentional and material

noncompliance in order to defeat any use of the exclusion by the surplus lines insurer. *Prodigy Comm'n*, 195 S.W.3d at 768.

A*micus* Lloyd's America is requesting this Court create new law that gives surplus lines insurers special treatment – even better than authorized or admitted insurers. An insurer, admitted or not, is obliged to seek a coverage determination of a claim where a coverage question exists. *Gandy*, 925 S.W.2d at 714; *J.E.M. v. Fidelity & Cas. Co.*, 928 S.W.2d 668, 671 (Tex. App.—Houston [1st Dist.] 1996, no writ). Such a determination would well serve any insurer, admitted or surplus lines, before it finds itself in a *Stowers* situation because uncertainty about coverage is not a defense to a *Stowers* claim. *Excess Underwriters at Lloyd's, London v. Franc's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 46 (Tex. 2008); *Garcia*, 876 S.W.2d at 849; *see also LSG Technologies, Inc. v. U.S. Fire Co.*, 2010 WL 5646054 (E.D. Tex. Sept. 2, 2010). A prudent insurer should involve itself regarding coverage early on to prevent a resulting *Stowers* lawsuit. *Amicus* Lloyd's America also offers a subtle threat to this Court, Texas regulators, and the Texas public. This *amicus* devotes two (2) pages of its Brief to its not so subtle argument that if this Court continues to hold that the contract defenses of the Insurers cannot be enforced, Lloyd's America may forego $951,004,365.97 in premiums received in Texas and go to Florida, California, and New York. *Brief of Amici Lloyd's America*, pp. 14-15.

Setting aside the arrogance inherent in this threat, it becomes apparent this *amicus* is asking this Court to not only ignore the law of this case, but to disregard unambiguous statutes and case authority interpreting same. To be sure, Sections 101.201 and 981.005 only invalidate insurers' contract-related defenses when there are either unauthorized insurance or intentional and material violations of the statutory regime. This is nothing new. Lloyd's America has been operating under these statutes for years.

Amicus Lloyd's America ends its Brief by pleading with this Court that if Petitioners prevail then CGL policies will become workers' compensation policies for employers who will not purchase workers' compensation coverage. This *amicus* offers no meaningful analysis for this assertion because there is none. Moreover, that is a risk that is easily controlled by any insurer - by simply not selling unauthorized insurance in violation of state laws.

Typically, the insurance policy, subject to its terms and conditions, determines coverage. *Kelly-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998); *Forbaw v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). However, if the policy is unauthorized insurance or a lawful surplus lines policy resulting from a Section 981.005 violation then the insurer may not enforce its contract/policy defenses. *Strayhorn*, 209 S.W.3d at 89; *Seger I*, 279 S.W.3d at 764; and *Wheelways Ins.*, 872 S.W.2d at 784. For law-abiding surplus lines

insurers, the consequences should be of little concern – either the surplus lines policy is excepted from Section 101.201(a) or the surplus lines policy is not a result of a Section 981.005 violation. But a CGL policy does not transform itself into a "workers' compensation policy" merely because it is a surplus lines policy. The terms of a *lawful* surplus lines policy still control coverage. All of Lloyd's America's doomsday scenarios are easily avoided by simple statutory compliance.

Amicus Lloyd's America contends this outcome will make surplus lines policies unaffordable. However, underwriters determine premiums on the basis of compliance with statutory laws, not noncompliance. *Amicus's* claim that premiums would increase if an insurer's violations of Texas law make the policy unenforceable by the insurer is not credible or persuasive. Risk is evaluated based on the insured's information, its business, its loss history, liability exposure, etc., not whether an insurer might have greater exposure because of its noncompliance with Texas law – something peculiarly within the insurer's control. There is no reason to believe that premiums will increase if this Court simply continues to follow long established precedent already known to the insurance industry and its agents and already followed by most of them. *Amicus* Lloyd's America's straw man argument based on fear of increased premiums has no credibility and is counterintuitive to underwriting principles.

2. The Insurers' Doomsday Analysis

Like its *amici*, the Insurers present similar doomsday scenarios that might arise if the courts continue to follow precedent and continue to apply the statutes as written. Predictably, the Insurers fail to acknowledge that the issue of enforcement of policy-related defenses has already been decided adversely to them. *Seger I*, 209 S.W.3d at 764; *Seger I(a)*, 280 S.W.3d at 282 n.2. And even if this principle of law had not already been decided against them, the Insurers' arguments and reasoning are utterly lacking in authority, failing to address *Strayhorn*, *Seger I*, *Seger I(a)*, *Wheelways*, and a host of other authorities. The Insurers also ignore that all these consequences could have been avoided by simple compliance. Instead, the Insurers seek a judicial pardon to allow themselves to be treated as an authorized or admitted insurer but with none of the corresponding obligations.

While the Insurers lament the ramifications of surplus lines insurers being unable to enforce policy-related defenses when those insurers violate Texas law, they fail to acknowledge this has been the law for years. Apparently this statutory scheme has been working well. Surplus lines insurers – or at least nearly all of them except Respondents – have complied with Chapters 101 and 981 for years and have not been faced with the legal consequences for noncompliance. The small number of reported decisions addressing surplus lines and authorized insurance – particularly the legal consequences for noncompliance with Sections

101.201(a) and 981.006 - suggest that surplus lines insurers are well aware of the legal ramifications for such violations and generally do not find themselves in Chapter 101.201(a) and Section 981.005 predicaments. The lack of any apparent disputes in the courts can be taken as a reasonable sign that there is not a problem. *See e.g. State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 895 (Tex. 2009) (holding that the few reported cases about appraisal suggest appraisal works to resolve disputes).

The Insurers' parade of horribles is illogical, and it is not a legal argument. It is the kind of policy polemic that has already been considered and rejected by the legislature in crafting the existing statutory regime. It should be given short shrift by this Court.

CONCLUSION

Should the Court reach the surplus lines and unauthorized insurance issues, this Court should remain firm and consistent with: the unambiguous statutory language in Sections 101.201 and 981.005, the purposes, and intent, and protections of these statutes, and the authorities interpreting these sections. In particular, the law of the case applies and the Insurers are bound by the previous determinations of law in prior appeals including that the insurer of an unauthorized insurance policy may not enforce its contract-related defenses. Finally, neither the Insurers nor the *amici* have shown why these statutes should not be enforced.

WHEREFORE, PREMISES CONSIDERED, TICL prays the Court remand this cause to the Court of Appeals to consider the remaining points should it reverse on the *Gandy* issue, and grant Petitioners such other and further relief to which they are entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 8th day of May, 2015, a copy of the foregoing was filed electronically with the Clerk of Court via the Court's electronic filing system and a true and correct copy of the foregoing was served via e-service or email on the following counsel of record:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4(e)

1. This brief complies with the type-volume limitation of Texas Rules of Appellate Procedure 9.4(e)(i)(2)(B) because, according to the Microsoft Word 2010 word count function, it contains 8,129 words on pages 2-37, excluding the parts of the brief exempted by the Texas Rules of Appellate Procedure 9.4(e)(i)(l).
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