ENTERED
Sep. 3, 1998

COMMONWEALTH OF KENTUCKY
48TH JUDICIAL CIRCUIT
FRANKLIN CIRCUIT COURT
CASE NO. 94-CI-00017-AP-012

FRANKLIN CIRCUIT COURT
JANICE MARSHALL, CLERK

GEORGE NICHOLS, 111, LIQUIDATOR,
OF KENTUCKY CENTRAL LIFE
INSURANCE COMPANY,
PLAINTIFF,

VS. **ORDER**

R. DUDLEY WEBB, ET AL,

DEFENDANTS.

This cause was tried before the Court without benefit of a jury.

George Nichols, III (Nichols) is the present Commissioner of Insurance. As such he serves as the liquidator for the Plaintiff, Kentucky Central Life Insurance Company (KCL). Martin J. Huelsmann (Huelsmann) is the appointed Special Deputy Liquidator. Huelsmann is in charge of the day to day operations of the liquidation of KCL. The firm of Frost & Jacobs represents the liquidator in this and many other actions which result from the liquidation of KCL. There are three Defendants. Donald W. Webb (Donald) and his wife Julie H. Webb (Julie) were sued by KCL for approximately $10,000,000. R. Dudley Webb (Dudley) was sued for approximately $98.000,000. KCL's claims are based solely on the documents executed pursuant to the closing of loans between KCL and Donald, Julie, and Dudley.

In the early days of KCL, Garvis Kincaid (Kincaid) was the CEO. He individually made all decisions concerning real estate loans and investments. In the early 1970's, the relationship of KCL and Dudley began with the acquisition of property by Dudley and subsequent sale to a bank owned by Kincaid. Over time, Dudley discovered Kincaid had a plan for the development of downtown Lexington. Kincaid had both the vision and the financial resources to pursue this goal. Numerous business transactions between Dudley and KCL

through Kincaid were negotiated and completed. Kincaid required Dudley to sign a personal guarantee agreement on the loans. Dudley was assured by Kincaid these guarantees would not be enforced so long as Dudley did not divert money from the project that should be used to repay the loan and, if the project got into financial trouble, Dudley would convey the real estate back to KCL upon KCL's request. The purpose of the personal guarantee was to prevent stealing and to eliminate the delay litigation would create if foreclosure was required and/or the borrower files bankruptcy. (This will be referred to as the "promise".)

Kincaid died in 1975. William E. "Bud" Burnett (Burnett) succeeded Kincaid as the man in charge of the real estate transactions for KCL. Burnett was the CEO and exercised the corporate authority to make all decisions about real estate investments. The same "promise" was made by Burnett to Dudley, Donald and Julie. It is undisputed that this "promise" was made by Kincaid and Burnett to Dudley, Donald and Julie and that other borrowers received the same "promise". It is undisputed that many other insurance companies, including Aetna and Prudential, loaned millions of dollars for similar real estate development projects during the same time period without personal guarantees. KCL did not identify one example where KCL enforced a personal guarantee on any loan. This "promise" was clearly identified as an oral agreement and as a defense to KCL's claim by the Defendants in their original answer.

All loan proceeds were actually invested in the real estate projects. The usual fees for development and management were received by Donald, Julie and/or Dudley. KCL provided funding, Donald an Dudley did the development and management. There is no allegation or proof that any of the funds in this litigation were misused or diverted by the Webbs.

The record is replete with numerous other loans or projects entered into by KCL and Dudley. The majority of those loans were either repaid and/or satisfied by the reconveyance of the real estate. For purposes of illustration the Court will use the San Francisco Project at 135 Main Street, San Francisco, California. KCL funded $46,000,000 of a $50,000,000 commitment on that development. After development the property could not be sold to cover the loan. The loan was made to a limited partnership which included Dudley and others. No agreement could be reached between KCL and the partnership and consequently, KCL

initiated foreclosure. KCL ended up with 135 Main Street, San Francisco, California with a loan value of still $46,000,000. The value of the property at the time was approximately $25,000,000 to $30,000,000. KCL did not attempt to enforce the personal guarantee on any deficiency. When KCL went into rehabilitation in 1993, the decision was made to sell the building for approximately $19,000,000. It appears, and is undisputed, that KCL sold the property below actual market value when with a little bit of effort, knowledge, or patience, a significantly greater return may have been obtained.

The same thing happened with a project in New Orleans where some problems occurred and KCL took the property in lieu of foreclosure and did not seek any additional compensation pursuant to the personal guarantees. KCL also took back property in Colorado Springs, Colorado below the loan value and sought no compensation on the personal guarantees.

Burnett had always represented to Dudley that KCL would honor its "promise" because Burnett believed in real estate. The evidence establishes that KCL in the five years before rehabilitation did not attempt to collect deficiencies through personal guarantees against over 30 different borrowers on loans aggregating deficiencies in excess of **$140,000,000.** KCL's actions establish the "promise" made to these Defendants and that other personal guarantees on loans were only to protect KCL from theft or litigation delays.

KCL makes **a** claim against Donald and Julie for the deficit on **a** project called West Main Properties in Lexington, Kentucky. This project was begun as a civic project to clean up that section of Main Street before the 1985 NCAA Men's Basketball Championship held in Lexington, Kentucky. At the time the project was started the buildings and businesses located on the property were run down and an eyesore. The property **was** acquired and the buildings removed and turned into a parking lot during the tournament. At that time the liability was evenly divided (of approximately **$50,000** each) between three investors. After W.T. Young gave his interest to Transylvania College, Donald and KCL remained. KCL decided to put up the money to have the Webbs develop it into commercial property. This project was done with

the representation that KCL would take the property back in lieu of foreclosure if it was not profitable. Once again, the "promise" was made to Donald and Julie. Julie signed only because as Donald's wife she would have a dower interest in the property that would require her signature to convey upon KCL's demand. The development occurred and the original interest rate on the loan was reduced to a figure that would match the projected income from the property. During the operation of this property, KCL was both a lender and a partner. Interest was paid on the loan. Later the terms were converted to a loan for which payment was made by accepting the cash flow from the building. KCL also took an active part in the operation of this project. The dealings of the parties and the adjustment of the loan to a cash flow payment status implies a joint venture between KCL, Donald and Julie.

The only other claim that included Donald and Julie was KCL Loan No. 6355, this loan was made to Donald, Julie and Dudley on property called the Woodlands in Lexington, Kentucky. KCL acknowledged in March, 1998, that the personal guarantee on that loan was signed some sixteen months after the actual note was executed and the funds disbursed. This information was available to KCL long before that date. After that stipulation, the Defendants moved for Summary Judgment on this claim of approximately $8,000,000. At the hearing, Frost & Jacobs represented they would provide evidence that would indicate Donald, Julie and Dudley received additional consideration for the execution of that personal guarantee. That consideration would be additional loans made, forbearance of payment, forbearance of interest or some other legally binding consideration. Based upon those representations of these officers of the Court, the Court denied the motion for Summary Judgment. At that time Frost & Jacobs was told by the Court without additional evidence they could not withstand a motion for directed verdict. On the morning of the trial, Frost & Jacobs neither informed the Court they could not present evidence of additional consideration, nor did they move to dismiss that count. Instead KCL put on their case in chief without evidence of additional consideration. At the close of the Plaintiff's case, a motion for directed verdict was made by the Defendant. That motion was granted by the Court. Even if Frost & Jacobs believed at the time they made that

representation to the Court that it was correct, they absolutely knew on the morning of trial they had no additional proof. As officers of the Court, Frost & Jacobs had an obligation to inform the Court and the Defendant they would offer no additional proof and either move to dismiss that claim or permit the Court to make a ruling on appropriate motions made by the Defendant at that time to eliminate that claim. The failure of counsel either in misrepresenting the facts at the time the motion for Summary Judgment was heard and/or the failure to advise the Court before announcing ready that they had no additional proof resulted in wasted effort by the Defendants and this Court and is inappropriate practice before this Court.

After KCL went into receivership Burnett called Donald and told him the "promise" should be in writing so they would be protected. Burnett signed an affidavit reflecting the to promise" and its purpose. The Defendants attempted to take Burnett's deposition prior to his death. Everyone knew Burnett had brain cancer and had a short time to live. KCL's counsel, though procedurally correct, refused to cooperate in the early scheduling of Burnett's deposition. Consequently, Burnett's testimony is not available to the Court. But, his affidavit speaks loudly. KCL's failure to pursue anyone on a personal guarantee speaks loudly that the "promise" was made. Shortly after KCL went into receivership, the Webbs gave all this information and affidavits of Burnett to KCL and made suggestions as to how to handle the property. KCL while supposedly negotiating with Donald, Julie and Dudley, filed suit while literally at the table. After filing the suit, the representatives of KCL made statements to the news media indicating that Donald, Julie and Dudley were sued for claims in excess of $100,000,000. This statement was blatantly false. Donald and Julie were never sued for more than $10,000,000 to $15,000,000. KCL knew that, but the liquidator made the statements in the news media and did nothing to correct these misstatements. Donald testified that the income to Webb Properties went from approximately $2,000,000 per year to under $1,000,000 per year because these representations scared other lenders. Donald stated no lender would make loans for development purposes to Donald because of the claims reported in the newspaper. Lenders also refused to loan money to refinance some ongoing projects. Donald

lost money because he could not refinance them. Without question, Donald and Julie may have been adversely impacted by these misrepresentations of KCL.

Of great interest in this case is the fact that Don Stephens, who preceded George Nichols as the Commissioner of Insurance and was the person initially in charge of KCL when it went into receivership, admits under oath that he knew nothing about the facts of this case. He relied upon the representations of the then attorneys for KCL, the law firm of Stites & Harbison. Stites & Harbison has collected in excess of $12,000,000 in attorney's fees from KCL. After Stites & Harbison withdrew due to a conflict, Frost & Jacobs was retained at the direction of the Governor's Office. Frost & Jacobs has billed in excess of $7,700,000 for attorney's fees in this and other actions. It is important to note that in a liquidation of this nature, all the costs, administrative fees and attorney's fees are paid before anyone else receives any distribution. From the date of receivership to this point KCL has spent approximately of $50,000,000 on these administration fees. Almost one-half of those fees have been paid to the two law firms. Interestingly, only the law firms know or have any idea of the facts of KCL suits. The present Liquidator and Deputy Liquidator admit they know nothing about these claims except what Frost & Jacobs tell them. The attorneys for the Plaintiff in this case effectively make the decisions to pursue litigation and to settle or not settle. It appears no one with a personal monetary interest in the outcome of this litigation is now or has been permitted to be a watchdog to determine whether the amounts expended are justified by the expectation of recovery. For all practical purposes the fox is left guarding the hen-house. The aroma emanating from the decisions made as to who should be sued and who should not be sued, the cost and expense of the administration and the lack of real oversight of the liquidation of this company reminds this farm boy of the hogs at the trough. The smell is odorous, the consumption gargantuan, and the biggest and strongest get the best and consume the most while the weaker ones are relegated to the left over portion. It will be interesting to see if anything is left for the shareholders who actually have a real interest and financial stake hold in KCL and for whom all these decisions are supposedly made.

This case was assigned to this Court in 1997. At the first pretrial the parties were placed on notice of the expectations of the Court of discovery and trial. This Court informed the parties that all discovery processes should be open and complete. The phrase used by the Court is "we do not play hide the pea here." Even in light of those instructions, Frost & Jacobs failed miserably in their duties as officers of the Court to be forthcoming in their discovery. For example, in Plaintiff's response to document requests, KCL would include "General Objections." These included:

> A response that documents "have been produced" means only that if such documents are in the possession of Plaintiff they have been produced; it shall not be construed as a representation or admission that such documents actually exist or ever existed. Plaintiff has previously produced, and continues to make available to the Webb Group, a substantial quantity of documents.

The "substantial quantity of documents" means over 4,000,000 documents in over 1 1,000 banker's boxes in a room under the control of KCL. The effect of the "objection" is when KCL states it has "produced" documents - it means nothing. The purpose of discovery cannot be accomplished with this practice. This is a sham and shameful.

In January, 1998, the Defendants' requested, pursuant to CR 30.02(6), KCL designate an individual for deposition purposes who would be knowledgeable and able to answer written questions identified in the designation. KCL did identify such designee. The Civil Rule requires that the designee be "assisted and prepared" to answer the questions identi@ in the notice. The liquidator, the deputy liquidator, the attorneys representing the liquidator nor anyone else acting for the Plaintiff assisted the designee in preparation. The designee's deposition was taken five times over a period in February through March, 1998. The designee could never answer all the questions identified in the 30.02(6) notice. In depositions and later at trial it was revealed that the designee and others at KCL knew that Carolyn Hauter (Hauter) knew more about the real estate loans of KCL than anyone else. She had been employed by KCL since June of 1967. After KCL went into receivership, she went to work for Creamer

Realty in Lexington, Kentucky in August, 1994. (Creamer Realty billed over $7.7 Million of services to KCL in liquidation for managing real estate interests of KCL.) No one at KCL, or acting for KCL, ever asked her about these loans until May, 1998. After the request was made by Frost & Jacobs in May, 1998, Hauter was able to find the index identifying the possible files within 15 minutes and pulled the files that may have contained information in response to the CR 30.02(6) identified questions within two hours. This was information that should have been provided to the designee. When questioned about this, both Nichols and Huelsmann admitted they knew nothing about the litigation other than what Frost & Jacobs told them. They signed and verified informational documents in this litigation based completely upon information given to them by Frost & Jacobs. Frost & Jacobs, as attorneys and officers of the Court had a duty to fulfill the requirements of the Civil Rules. They were a complete and abject failure in fulfilling that duty on the CR 30.02(6) discovery. Their inaction resulted in significant time wasted by both parties in the depositions of the designee. Even though Frost & Jacobs failed to prepare the designee, the Court permitted them to put in by avowal any testimony from Hauter they so desired that might establish any action taken by KCL to collect deficiencies on real estate loans through any personal guarantees. None was offered. The Court finds that KCL never enforced a personal guarantee on any loan deficiency on real estate. [KCL offered in avowal that maybe ten suits were filed the first five years preceding receivership, but no specific loans or circumstances were proved though opportunity was granted by the Court to present same.]

The Court explored with the parties the possibility of submitting this case on the record without a bench trial because it appeared the facts were undisputed and fully developed in the record. Frost & Jacobs represented to the Court that there were many factual disputes which would require 30 days of trial. Upon those representations the Court gave them a total of ten days, while expressing the belief it could be tried in five or less. All evidence was taken and closing arguments heard within a total of four actual working days. The trial record reflects virtually no disputes as to the material facts in the litigation. Because the facts are undisputed and information at trial was contained in discovery, it appears every effort was made to protract

this litigation which results in more costs and attorneys fees to both parties. During this four day trial, Frost & Jacobs had at least two lawyers and at least two support staff in the courtroom at all times. All of this for the presentation of their case in chief which took less than two hours to complete. Their rebuttal testimony took less than one day. Neither presentation was complicated or unexpected, the cross-examination of defendants witnesses was also uncomplicated.

The defense has always been identified to be fraud in the inducement in the signing of those personal guarantees or an oral agreement requiring modification to reflect the true agreement. It has been obvious to KCL that the defense of Donald, Julie and Dudley was based upon the "promise" made by Burnett. KCL knew of the "promise" because they had Burnett's affidavit to that effect. They also knew of the "promise" based upon the recordings of Dr. Len Morrow (Morrow), which KCL discovered in litigation of Morrow against KCL. (That record is sealed in the Franklin Circuit Court.) Also, of interest in Morrow's testimony is that as a close friend of Burnett he was with Burnett at least once per week. After Burnett was diagnosed with cancer he was with him more often. In fact, Morrow was with Burnett the night before he died. Morrow states Burnett's mental frame was fine. He had no mental impairment and was very capable of understanding what was going on and remembering what went on, except for a very few brief moments during his illness. Also, Morrow's testimony indicates he feared the administration of KCL after being taken over by the state would become highly political based upon who was appointed to serve and the attorneys chosen. Consequently, Morrow recorded his conversations with Don Stephens to protect himself. Morrow proved to be astute.

Interestingly, Huelsmann had been told of the Morrow tapes by Frost & Jacobs, but never reviewed them. Also, Huelsmann never saw the payoff listings on notes that were attached to the deposition of Sarah Jean Art. Even though he did not see those documents, Huelsmann signed legal documents in this action containing information about them. Once again, Huelsmann relied completely on the advice and counsel of Frost & Jacobs. Huelsmann

signed interrogatories concerning the mortgage loan files without ever consulting Hauter, whom everyone agreed was more knowledgeable about these than anyone else in. the world. Hauter testified that she had a working knowledge of all the information concerning real estate loans of KCL. Hauter also testified no one from KCL ever asked her about that information until May, 1998, even though the suit was filed in 1994. Until the Defendants' took Hauter's deposition, no one had asked her anything about possible litigation by KCL to collect deficiencies on loans with personal guarantees. No one asked her to research this question nor asked her if she knew about it. Hauter knew numerous incidents where property was taken back in lieu of foreclosure when KCL sought no compensation on the personal guarantees on these loans even though there were deficiencies. Since this was a critical part of the Webbs defense it is reasonable to expect KCL through the liquidator, deputy liquidator or attorneys would explore this information soon after the answer was filed. They did not.

It is a frightening situation when decisions affecting many lives and millions of dollars are made based upon the representations and/or speculations of the representatives of parties and attorneys for the parties without real or reasonable effort being made to ascertain and evaluate available information from those individuals and documents, known to have such information and readily available to KCL.

KCL was also told by the Webbs about Christopher Fleming, Jim Knighten and Charles Henne, 11, all of whom testified affirming Burnett had made the "promise" to them. Though given this information, Stephens, nor Nichols, nor Huelsmann nor anyone acting for them ever talked to them to obtain and consider their information.

The Webbs never refused to convey property to KCL upon request. After KCL went into receivership and while the parties were literally at the table, this suit was filed. KCL then refused to accept transfer of property in lieu of the debts. To protect their interests, the Webbs filed bankruptcy concerning certain pieces of property. That action was taken by them only in response to KCL's failure to acknowledge and be bound by the representations made by KCL to the Webbs. The Webbs' action was not a violation of the agreement with KCL.

An overview of the evidence in this case is educational. It is undisputed that Burnett made the "promise" to Donald and Dudley that the personal guarantees were to insure honesty and avoid litigation delays. Don Stephens stated in the taped conversations with Morrow that he knew Burnett had made the "promise", but no one asked Stephens that question while on the stand in this Court. KCL knew it, no later than when the Defendants' plead this as a defense in 1994. Plaintiff knew or should have known no effort was ever made by KCL to collect a deficiency on any personal guarantee. The statements by KCL that KCL had sued Donald, Julie and Dudley for $100,000,000 were false. No effort was made by KCL to clarify these misstatements.

Huelsmann testified that many suits had been filed by KCL. KCL has sued employees of KCL for negligence in making or permitting loans below market interest rates. KCL has also sued individuals, such as the Bank of Louisville and Wallace Wilkinson, for receiving a preferential loan where the interest rate was below the market rate. Interestingly, KCL has not sued many borrowers identified by the Defendants who received similar loans like Rick Pitino, Larry Ivy, many other coaches at the University of Kentucky, as well as other prominent individuals. It appears KCL's decisions in enforcing these "legal" claims depends upon the whims of the attorneys directing the litigation because no one else knows anything and relies solely on advice of counsel. Is Dr. Morrow correct that this has become highly 'political?

Having determined the facts, the questions of law presented shall now be addressed. First, KCL cites.0enny v. Fishter, 36 S.W.2d 864 (1931) for the proposition that except for the document, "no evidence" relating to the actual agreement, understanding or intention of KCL and the Defendants should be admitted. Denny does not discuss or determine questions of admissibility of evidence.

KCL also claims under Denny that the Defendants are estopped from disclaiming liability on the notes and guarantees executed by them. Denny did address the Doctrine of Estoppel. Here, KCL offered no evidence to prove the elements of equitable estoppel: misrepresentation of material facts, expectation that the representation will be acted upon,

reliance on the representation, and conduct based upon the representation which will detrimentally change the position of the other party. Electric and Water Plant Board v. Suburban Acres Development, Inc., 513 SW 2d 489 (Ky. 1974). No evidence was presented that would support a claim of equitable estoppel on behalf of KCL.

KCL also cites Denny for the proposition that "oral side agreements are void," and that "oral side agreements are void under Kentucky law as against public policy." This is not the law and will be addressed later in this opinion. Denny simply holds that a party who participates under fraud to help a friend will be estopped to deny liability to third parties injured by the friend's fraud. The facts of Denny pictured a President of a bank in deep financial trouble asking a friend to help him falsity bank assets to create a more favorable appearance for the bank. The bank failed. The State Banking Commissioner took over and sued on the note. Denny is easily distinguished. The law applied in Denny concerns banks where federal funds insure the accounts. KCL is an insurance company, not a bank. The liquidator is the "functional equivalent of a receiver of a private company", Kentucky Central Insurance Company v. Park Broadcasting of Kentucky. Inc., 913 S.W.2d 330 (Ky. App. 1966), not the banking commissioner. The liquidation of KCL involves no public funds to guarantee policy values or any other claims against the insurance company. This case involves insurance liquidation law, not banking law.

Interestingly, the Court of Appeals in Kentucky Central Life Insurance Company v. Park Broadcasting of Kentucky, Inc., supra determined the liquidator is "the functional equivalent of a receiver of a private company .... who essentially steps into the shoes of the directors, officers, and managers of the insurance company." That Court determined the liquidator has no additional super legal powers: "a liquidator of any insurance company stands in the shoes of the insolvent, gaining no greater rights than the insolvent had .... liquidation cannot place the liquidator in a better position than the insolvent company he takes over." Stephens v. American Home Assurance Company, 811 F. Supp. 937, (S.D.N.Y. 1993).

KCL also cites D'Oench Duhme and Co., Inc., v. FDIC, 315 U.S. 447 (1942) and argues when read with Denny somehow creates applicability to this insurance company liquidation. The rationale of D'Oench Duhme is the furtherance of the "Federal Policy to Protect (the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the bank which [the FDIC] insures or to which it makes loans." Since no public funds were used to insure the obligations of the insurance company D'Oench Duhme does not apply to this case. Interestingly, that case was decided 55 years ago. Our legislature has not adopted similar rights for insurance company liquidators in that time. It would appear the Commonwealth of Kentucky does not wish to grant to a liquidator of an insurance company with the same rights as the liquidator of a bank.

Next, KCL opines that the Parole Evidence Rule precludes consideration of oral testimony to establish defenses based upon fraudulent inducement, reformation of a contract, or characterization of a business relationship as a joint venture. The Parole Evidence Rule does not preclude the general defenses asserted by the Defendants against the enforcement of the written guaranteed. Defendants' claim fraud in the inducement. "Parole Evidence is admissible to show that the making of a contract was procured by fraudulent representations." Hanson v. American National Bank & Trust Co., 865 S.W.2d 302 (Ky.1993); Bryant v. Troutman, 287 S.W.2d 918 (Ky. 1956).

Defendants also claim that Parole Evidence would support a reformation of the contract to reflect the actual agreement. This too can be proved by Parole Evidence. B.F.M. Buildings, Inc. vs. Trice, 464 SW 2d 617 (Ky. 1971); Restatement of Contracts 2d 214(e); 66 Am.Jur.2d Reformation of Instruments λ 18. Also, the claim of joint venture may be proved by Parole Evidence. Bromber-q and Ribstein on Partnership 213(c)(1997). "Everyone agrees that the Parole Evidence Rule does not apply to a separate agreement, that is, an agreement that has a separate consideration." Calamari & Pedilo, The Law of Contracts, 40 (West's Hornbook Series). The Defendants executed the written guarantee agreement with the understanding that the written documents were only to assure honesty and cooperation by the Defendants so

they would divert no funds and would cooperate in t he conveyance of the property if requested by KCL. The separate consideration for this promise was Defendants' agreement to sign guarantee agreements which KCL wanted for its own reasons. The Webbs' indicated they would have never signed the personal guarantees unless they believed that the limitation on enforcement had existed.

> "The mere fact that an oral agreement is contemporaneous with a written one does not necessarily involve the conclusion that they are the same contract. Two entirely distinct contracts each for a separate consideration may be made at the time and will be entirely distinct legally." Williston on Contracts 637.

The Kentucky Supreme Court adopted this interpretation in Texas Gas Transmission Corporation v. Kinslow, 461 S.W.2d 69 (Ky. 1970) when it stated:

> "An exception to the Parole Evidence Rule ... is the Doctrine of Collateral Contract .... [A] prior or contemporaneous oral agreement which is independent of, collateral to, and not inconsistent with, the written contract may be proved by parole evidence."

Parole Evidence also permits consideration of evidence establishing a subsequent agreement. Gannon v. Bronston, 55 S.W.2d 358 (Ky. 1932). The Defendants were told by KCL on numerous occasions after the execution of written notes and guarantee agreements in this litigation, that the written personal guarantees would not be enforced so long as the Defendants continued to cooperate in the management and transfer of the real estate as requested by KCL. This is evidenced by other transactions in which KCL released Dudley from all personal liability for a deficiency of approximately $20,000,000 on the San Francisco Project and deficiency of several million dollars on other projects in Louisiana, Colorado, and Texas.

Parole Evidence is also permitted to prove promissory estoppel. McCarthy v. Louisville Cartage Co., Inc., 796 S.W.2d 10 (Ky. App. 1990).

> "The whole theory of a promissory estoppel action is that detrimental reliance becomes a substitute for consideration under the facts of a given case. Calamari and Perillo, The Law of Contracts, Hornbook Series 105 (1970). Numerous oral and gratuitous promises have been enforced upon this basis."

The Parole Evidence Rule does not bar enforcement of a promise based on detrimental reliance by the persons to whom the promise is made. 3 Corbin on Contract, 594. Here the Defendants' relied on KCL's "promise"

Recently in Covacs v. Freeman, 957 S.W.2d 251 (Ky. 1997), the Kentucky Supreme Court held that the Parole Evidence Rule in Kentucky does not apply unless the writing embodies the entire agreement between the parties. When a written agreement is not an integrated or complete contract, parole evidence is admissible to supplement the writing. Here it is uncontested that the documents presented by KCL are not an integrated or complete contract. Burnett confirms by his affidavit, other borrowers confirmed by their testimony, and the actions of KCL in failing to pursue personal guarantees on numerous loans to these individuals and to others confirms these documents are not an integrated or complete contract.

The documents and guarantees signed by the Defendants were not believed by or intended by KCL or the Webbs to be a complete and exclusive recitation of all the terms of their agreements.

> "Whether any specific document has been assented to by the parties as the complete and accurate integration of the terms of their contract is an ordinary question of fact. In determining this question, no relevant evidence is excluded on the mere ground that it is offered in the form of oral testimony. No written document, however formal or lengthy, can prove ... the fact that either party assented to it as the accurate and complete embodiment of their agreement..... in innumerable cases, only a part of the terms of an agreement are reduced to writing; and the writing is not assented to as accurate and complete .... Many documents, executed in the performance of an agreement, are not intended by either party as complete expressions of the terms of the agreement. Among such documents are deeds of conveyances, bonds, bills of exchange, and promissory notes." 'Corbin on Contracts, 535-536.

Parole Evidence does exclude the evidence in this litigation.

Mountains of evidence indicate Burnett made the "promise" to the Defendants. Burnett confirmed that by sworn statement prior to his death. Plaintiffs evidence after years of litigation

and extraordinary legal fees on both sides, did not contradict the existence of this oral agreement.

Plaintiff did attempt to prove the loans were recourse loans by virtue of information in a tax return prepared by accounts or an internal checklist prepared by clerical employees of the Defendants. These documents are not dispositive of the conditions of the agreement between KCL and the Defendants. Federal Deposit Insurance Corporation v. Gamaliel Farm Supply, Inc., 726 S.W.2d 709 (Ky. App. 1977). The actual agreement between the parties was simple and straightforward.

Plaintiffs claim that in Exhibit J-34, a guarantee on the Elk Grove Village in Illinois loan, Defendant waived any defense other than payment. This waiver does not preclude the reformation determined by the Court to exist by virtue of the agreement and understanding of the parties to the contract. Having determined the promises were made and that Parole Evidence does not preclude consideration of the oral evidence because the agreements did not reflect the entire agreement, the Court shall consider the legal effects of these agreements.

If the statements were false when made by representatives of KCL to the Defendants then there was fraud in the inducement, 'which would provide the Defendants a complete defense against the liabilities asserted against them in this action. The past dealings and performances and the failure to pursue personal guarantees by KCL with the Webbs and others indicates the promises were not false. Their forbearance in collecting on personal guarantees on at least $200,000,000 spread among multiple borrowers indicates that the statements were true and honored by KCL.

The statements made were true and made by a representative of KCL to Donald, Julie and Dudley. The true agreement, understanding, and the intentions of the parties when the documents were executed limited enforcement of the personal guarantees. Consequently, the documents must be reformed to reflect that agreement. The reformed contract would reflect that so long as the Defendants diverted no funds and cooperated in the conveyance of the property when requested they would not be pursued on their personal guarantees. B.F.M.

Building, Inc. v. Trice, 464 S.W.2d 617 (Ky. 1971). There is absolutely no evidence offered at any point from any source that indicates that the Webbs diverted any funds on any loans. Over the 20 years of this relationship with KCL at any time KCL requested conveyance of the property, same was conveyed. Only after the takeover of KCL by the rehabilitator or liquidator and a refusal on behalf of KCL to acknowledge the "promise" and to accept the conveyance of the property in lieu of collection did the Webbs refuse to convey property and actually file for bankruptcy protection. As KCL's violation of the agreement caused the subsequent actions by the Defendants, the contract is still enforceable by the Defendants.

Even if the contracts were not reformed, KCL would not have a claim against the Defendant based upon the defense of separate contract and subsequent contract. KCL in writing, and publication in its SEC reports released Dudley of deficiencies in excess of $25,000,000. The basis of the defense is KCL's "promise" not to enforce the personal guarantees so long as the Webbs diverted no funds and conveyed the property when requested. The Webbs would execute the guarantee agreements which KCL wanted for their business purposes of assuring their honesty and avoiding litigation delays. The actions of the parties establish this defense.

> "When more than one contract is executed simultaneously and the contracts contain conflicting provisions, the rights and liabilities of the parties are evidenced by their conduct, and parole evidence may be introduced to establish the intention of the parties. [A previous case] we said '7here is an old saying of an English Judge: show me what the parties did under the contract and I will show you what the contract means." Holloway & Son Construction Company, Inc. v. Mattingly Bridge Co., 581 S.W.2d 568 (Ky. 1979).

The defense asserted by the Webbs in paragraph 13 of their initial answer is promissory estoppel. It is undisputed that the Webbs would never have signed these documents without the promise that no personal liability would attach unless they diverted funds or failed to cooperate. They signed these documents relying on those promises. The Webbs relied on these promises to their own detriment. Promissory estoppel creates an

obligation enforceable against KCL due to this reliance. McCarthy v. Louisville Cartage Co., Inc., 796 S.W.2d 10 (Ky. App. 1990).

The Court now addresses the last claim against Donald and Julie on the West Main Street Properties. This development started as a civic clean-up of downtown for the 1985 NCAA Men's Basketball Championship. It progressed from ugly run down buildings to a parking lot, then to office buildings. This was a joint venture. KCL is a 50% owner and Donald and Julie are 50% owners through the Webb Properties, but neither has a personal liability to pay off any losses from this project to the other.

The last issue to be resolved is Donald and Julie's claim for defamation. It is alleged and uncontradicted that statements were made by the liquidator to the newspapers that they had sued "the Webbs for $1 00,000,000". Though the niceties of the wording can be argued, the effect and the message repeatedly trumpeted by all the news medias at the time of filing and throughout the litigation is that Donald, Julie and Dudley were called to answer by KCL for up to $100,000,000. Donald and Julie were never liable to KCL for more than $12,000,000 to $15,000,000. They were defamed.

The liquidator admitted on the stand that the statements were false and that a simple telephone call or review of the complaint would have avoided these false statements. No evidence was offered that Donald is a "public figure".

The liquidator, through counsel, relies on the immunity provided him as a state employee. The liquidator and counsel for the liquidator should know that is not the law in the Commonwealth of Kentucky by virtue of the opinion from the Kentucky Court of Appeals in Kentucky Central Life Insurance Company v. Park Broadcasting of Kentucky, Inc., supra. There the Court states:

> "The Insurance Code creates a court-appointed position of rehabilitator that is legally distinguishable from the office of commissioner .... The 'commissioner' and the 'rehabilitator' are not one and the same entity .... Neither the rehabilitator nor Kentucky Central , enjoyed sovereign - immunity .... Clearly, the rehabilitator was not functioning as a unit of government ... He was the functional equivalent of a receiver of a private company in liquidation .... While he is appointed by the court ... he is not

> a public agency .... We have no doubt the legislature did not intend to convert companies such as Kentucky Central into public agencies through the Rehabilitation Acts."

As a receiver, the assets of the receivership, in this instance KCL's assets, are available to satisfy claims for torts committed by the receiver. Without question, the comments of the rehabilitator/liquidator and a subsequent failure to clarify or change the representations from that office concerning the liability of Donald and Julie as opposed to Dudley may have damaged Donald 's business and caused loss. The evidence offered concerning the alleged losses fails to establish the losses were caused by the misrepresentations of the liquidator. No lender was brought in to testify their refusal to loan was based upon those representations. No evidence was provided as to the actual incomes generated by the properties during the time of the alleged decrease. Consequently, there will be no monetary award for defamation to Donald and Julie, but they shall recover their costs. Any award shall be paid as a Class 1 claim against the assets of KCL.

After reviewing the record one must acknowledge the overwhelming evidence that was known to the liquidator prior to the filing of the litigation and information obtained thereafter that established the promises made to the Defendants. If any one, liquidator, deputy liquidator, or counsel for the Plaintiff's, reviewed the records to discover the actions of KCL they would have known KCL failed to enforce any personal guarantees on <u>any</u> real estate deficiencies. A reading of the case law submitted by both parties in this action is so clearly dispositive and was available to KCL from the beginning of this litigation, one must question why we came this far. Why did KCL file suit against Donald, Julie and Dudley on these notes and immediately provide it to the news media while literally at the table discussing settlement? When everyone knew Bud Burnett was dying of brain cancer, and a request was made to take his deposition to establish the facts the representatives of KCL, why did KCL forestall such a deposition until after Burnett had died? Why did KCL and their attorneys completely fail in the duty to prepare or give information and documents to the CR 30.02(6) designee to aid and assist him in answering the questions? Why does KCL, after being told by the Court that additional evidence of consideration would be required to overcome a motion for directed verdict and the

Plaintiff found no additional information, fail to notify either the Defendant or the Court prior to the close of his evidence that the claim would be withdrawn or to permit the Court to rule on same based upon the record? Why does KCL request 30 days of trial time because of the "extensive' evidence and contested facts to be presented, yet the trial was completed in four working days and virtually all evidence submitted at trial was already in the record or could easily be placed in the record? Why did no one for KCL talk to Carolyn Hauter about real estate loans and the practice of collection before May, 1998 after this litigation had been pending for four years? Why when permitted by avowal to put testimony of collection efforts, if any, made by KCL on any personal guarantees, the witness indicated approximately ten cases may have been filed in the last five years, did the attorneys for the liquidator failed to place into evidence any of those individual suits. Why did no one ask Sara Jean Art about the payoff property list before her deposition in March when the attorney for the Defendants asked that question? Why has the liquidator or the deputy liquidator never talked to Ron Newcomer or Bill Vanlnwegen who did legal work for KCL concerning certain loans? Why didn't the Plaintiff talk to Vanlnwegen who is an attorney involved in the execution of the guarantee agreement on the Woodlands Place, which was signed over 16 months after the original loan was made? Why do the liquidator and deputy liquidator know nothing about this or other KCL litigation?

All these questions confirm the inherent wisdom of my father's instruction that "you will never understand all you know." A reference to the lack of any real knowledge of the litigation by the liquidator or deputy liquidator and the costs incurred by KCL in the liquidation of the assets of KCL might provide some understanding or clue to the reasons for this protracted litigation. This Court has a great deal of empathy for the shareholders of KCL. The executives and board members and employees of KCL may have failed to protect the interests of the shareholders prior to receivership. The shareholders interests are not now and cannot be protected by a liquidator or deputy liquidator who know nothing about the case other than what their lawyers choose to tell them. The public trust placed in these individuals through the

legislature requires a greater attention to detail to fulfill the responsibility to protect the interests of those innocent shareholders.

WHEREFORE, IT IS HEREBY ORDERED:

1. The contracts between Kentucky Central Life and Donald Webb, Julie Webb and Dudley Webb are reformed to reflect that personal guarantees would only be enforced upon diversion of funds by any of the Defendants, or their failure to convey the property when requested by Kentucky Central Life.

2. No funds have been diverted by the Defendants in the claims of Kentucky Central Life in this action. Defendants' conveyed every property requested by Kentucky Central Life prior to liquidation. The only properties remaining, if any, are those for which the Defendants' filed for bankruptcy protection when Kentucky Central Life refused to abide by the reformed contract that any conveyance would preclude personal liability. Those shall be conveyed to Kentucky Central Life upon their request and the personal guarantees will be unenforceable.

3. The Defendants are entitled to the dismissal of all claims of Kentucky Central Life against them as a separate and subsequent contract existed binding Kentucky Central Life to the promise not to enforce the personal guarantees so long as the Defendants cooperated in the management and disposition of the properties secured by the loans.

4. The Defendants are entitled to a dismissal of all claims of Kentucky Central Life against them on the grounds of promissory estoppel. It is uncontested the Webbs would not have signed the personal guarantees without the promises having been made to them and in reliance on those promises they executed the documents. 5. The West Main Street Properties is a joint venture between the Defendants and Kentucky Central Life. Each is responsible for its own gains or losses in that investment.

5. The West Main Street Properties is a joint venture between the Defendants and Kentucky Central Life. Each is responsible for its own gains or losses in that investment.

6. Donald and Julie Webb's claim for defamation is granted, and they shall recover their costs, but there is insufficient evidence with which to further determine damages.

7. The liquidator shall provide to the Court within 20 working days from the date of this Order, a full and complete bill from attorneys for the liquidators for their work in this case with the liquidators recommendations as to any award. This Court shall review those bills to determine what, it any, attorneys fees will be approved for their efforts in this action.

8. The Court shall schedule a Rule 11 hearing to consider the actions of Frost & Jacobs in their failure to provide proper preparation to the 30.02(6) designee for deposition, and their failure to advise the Defendants and counsel and the Court prior to trial of their failure to acquire any additional information that would support their claim of additional consideration for the guarantee on the Woodlands Place, and for the failure of proper response to document production requests. The Rule 11 hearing shall be scheduled for November 3, 1998, at the hour of 1:00 p.m. in the Boyle Circuit Courtroom, Danville, Kentucky.

Given under my hand this 3 day of September, 1998.

STEPHEN M. SHEWMAKER

CIRCUIT JUDGE

RECEIVED MAR 19 1998

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 94-CI- 0017-AP-012 FPMKLIN CIRCUIT COURT

GEORGE NICHOLS, III, LIQUIDATOR
OF KENTUCKY CENTRAL LIFE
INSURANCF COMPANY
PLAINTIFF

DISTRIBUTION LIST

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