

1 SUPERIOR COURT OF CALIFORNIA

2 COUNTY OF SACRAMENTO

3 BEFORE THE HONORABLE TALMADGE R. JONES, JUDGE PRESIDING

4 DEPARTMENT NUMBER 39

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6 INSURANCE VENTURES, INC.,)

7)
7 Plaintiff,) Case No. 04AS00268

8)
8 vs.)

9)
9 VESTA FIRE INSURANCE CORP, et)

10 al.,)
10)

11 Defendants.)
11 _____)

12

13 Reporter's Transcript of Proceedings

14 Motion for Judgment

15 Monday, June 19, 2006

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18 APPEARANCES OF COUNSEL:

19 For Plaintiff:

20 Colton & Roesser
28202 Cabot Road, 3rd Floor
21 Laguna Niguel, CA 92677
By: ROLAND C. COLTON, Attorney at Law
22

23 For Defendants:

24 Barger & Wolen
650 California Street, Ninth Floor
25 San Francisco, CA 94108
By: JOHN S. PIERCE, Attorney at Law
26 MICHAEL D. HAUPT, Attorney at Law

27

28 Reported by: MICHELLE LELEVIER, CSR No. 6967

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1 MONDAY, JUNE 19, 2006, SACRAMENTO, CALIFORNIA

2 AFTERNOON SESSION

3 The matter of Insurance Ventures, Inc., Plaintiff, versus

4 Vesta Fire Insurance Corp, et al., Defendant, Case Number

5 04AS00268, came on regularly this day before the Honorable

6 Talmadge R. Jones, Judge of the Superior Court of the State of

7 California, for the County of Sacramento, Department 39.

8 The Plaintiff, Insurance Ventures, Inc., was represented
9 by Roland C. Colton, Attorney at Law, of Colton & Roesser.

10 The Defendant, Vesta Fire Insurance Corp, et al., was
11 represented by John S. Pierce and Michael D. Haupt, Attorneys at
12 Law, of Barger & Wolen.

13 The following proceedings were then had:

14 --o0o--

15 THE COURT: Good afternoon, counsel.

16 ALL PRESENT: Good Afternoon, Your Honor.

17 THE COURT: Thank you for laboring and preparing for me
18 additional materials on the issue of legality which has been
19 helpful to me this morning in knowing your positions and
20 understanding the law in certain areas. I very much appreciate
21 your diligence in doing that over the weekend. I know that
22 perhaps detracted from your family time, but from my point of
23 view it was worth it for me, if that's any consolation for you.

24 Before my hearing argument, I just wanted to cover a
25 couple of things. One was the judicial notice of the 1994 San

26 Diego case in which Mr. Colton was deemed the alter ego of

27 Alliance.

28 MR. PIERCE: Assurance International Unlimited, Your

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1 Honor.

2 THE COURT: That's right, Assurance. And that was May

3 2nd, 1994.

4 Do we have an exhibit number attached to that?

5 MR. PIERCE: I do, Your Honor. I have it right here. The

6 exhibit number is 766. If the Court would like a copy --

7 THE COURT: No, I've seen it. It's a couple of pages, is

8 it not?

9 MR. PIERCE: Yes, Your Honor, it is.

10 THE COURT: Do you want to be heard on that, Mr. Colton?

11 MR. COLTON: On whether there should be judicial notice?

12 THE COURT: Correct.

13 MR. COLTON: I don't think it's a certified copy of the

14 judgment. On its own footing, it really is taken completely out
15 of context.

16 THE COURT: Well, you can certainly argue that it's an
17 interpretation by me, but its sole issue is whether I should
18 take judicial notice of a San Diego Superior Court matter.

19 MR. COLTON: I would only say I think it's irrelevant,
20 remote in time and for those reasons prejudicial under 352 and
21 shouldn't be considered.

22 THE COURT: Very good. The objection is overruled. The
23 Court will take official notice or judicial notice of Exhibit
24 766, the San Diego matter involving Assurance dated May 2nd,
25 1994.

26 The second matter is the nature of the exhibits. And for
27 the record, the clerk has received from both counsel a list of
28 their exhibit numbers that they feel were utilized during the



1 progress of the case. The Court has prepared its own Exhibit

2 list together with the court reporter and the clerk and will
3 compare the two lists to make sure that prior to the time we
4 leave again all those -- we leave today all those exhibits are
5 properly admitted.

6 Are both sides in agreement to proceed without the
7 exhibits being finalized?

8 MR. PIERCE: Yes, Your Honor, we are.

9 MR. COLTON: Yes.

10 I just wanted to make one correction on the record. I
11 have not yet had a chance to go through my notes for the exhibit
12 numbers. I just wanted to reflect that, and I would like the
13 opportunity to be able to audit those and see if there may have
14 been some that may be missing.

15 THE COURT: Absolutely.

16 MR. PIERCE: Your Honor, for the record, we submitted our
17 exhibit list and also Mr. Colton's exhibit list after taking
18 meticulous notes as to which ones both we and Mr. Colton
19 submitted.

20 THE COURT: And perhaps what I could do, at the end of

21 today, Mr. Colton, is to admit the ones that are on your list,
22 at least what we think are properly before the Court and giving
23 you leave of a day or two, whatever you need, to augment the
24 exhibits if for some reason we've inadvertently overlooked one.
25 Would that be fair?

26 MR. COLTON: That's fair. Thank you.

27 Okay. As both sides know, the Court is now hearing oral
28 argument pursuant to a stipulation of the Court to hear both

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1 legal and factual matters on the issue of illegality.
2 I, for the record, read not only the briefs that you just
3 filed this morning but have gone over your previous briefs.
4 Both of you, I think -- Mr. Colton, you filed at least one
5 other, and I know in the case of defendants at least two other
6 briefs, both of which I've read again and reacquainted myself
7 with. I've also gone over 180 pages of my own notes
8 encompassing five tablets of very detailed descriptions of the

9 testimony, and I've also looked at and read some of the cases
10 again just so that I would be up to speed with all of you for
11 this afternoon's proceedings.

12 Let me say initially that I don't think there is much
13 dispute about the fact that the defendant -- strike that, that
14 Mr. Colton, the plaintiff, or that the attorney representing the
15 plaintiffs, Insurance Ventures, has previously been convicted of
16 a violation of 28 USC, Section 7206 sub (2) which is aiding and
17 assisting in the preparation of filing a false income tax
18 return, a felony. That was in 1979. There is no question that
19 it was either a felony. There is some argument about whether it
20 involved any specific intent. But in looking at the cases, it's
21 clear, I think, not only that the crime involves specific
22 intent, that is, to defraud, but it also involves the element of
23 dishonesty. And the cases are abundantly clear on that, and I
24 think it's pretty hard to argue otherwise.

25 That brings us to the US code section which is 18 USC,
26 Section 1033 sub (E) sub (1) sub (A), which prohibits someone
27 convicted of a crime involving dishonesty of engaging in the

28 business of insurance whose activities affect interstate

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1 commerce or who participates in such a business. The statute
2 sets forth a fine as well as imprisonment of not more than five
3 years for a violation of that US code section. That offense,
4 unlike the offense involving the false tax return, namely 28 USC
5 7206 sub (2), is a general intent crime. It does not require
6 any specific intent but merely willful conduct of engaging in
7 the business of insurance.

8 The statute that is 18 USC 1033 also provides an avenue or
9 an exception for the ability to engage in insurance, namely
10 written consent of any insurance regulatory official, which in
11 this case would be the California Commission of Insurance. And
12 I think it's pretty much undisputed that there has been no
13 exception or exemption by the California Insurance Commissioner.
14 Essentially, Mr. Colton has argued that his status as a lawyer
15 should exempt him from that requirement. And, furthermore, that

16 the implementing statute and regulations came into affect after
17 the contract in this matter was entered into, which was October
18 of 2002, and he suggests to the Court that that might raise
19 equal protection or due-process issues.

20 But by and large, I think it's pretty hard to argue
21 against the fact that there is a narrow exception for engaging
22 in the business of insurance once you have been convicted of a
23 felony involving dishonesty.

24 The regulations that implement the exception, that is,
25 permission of the California Insurance Commissioner, is set
26 forth in 10 CCR 2175.2 and following. The Court has reviewed
27 those, and they provide very specific and very narrow and
28 specific requirements of obtaining the consent of the Department

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1 of Insurance. On their face they seem to be very strong
2 regulations making it clear that California as a state wants to
3 make sure that only honest and forthright individuals are able

4 to engage in the insurance business in our state.

5 Which brings us to this case and, that is, the issue

6 really being whether the Court should apply violations of these

7 statutes, that is, a crime involving dishonesty that occurred in

8 1979 to a contract that has been reached in 2002, a

9 multi-million dollar lawsuit that would foreclose the plaintiff,

10 Insurance Ventures, from relief. That is a very serious

11 consequence and one which I have not taken lightly, which is why

12 I've given it so much attention and time in this case.

13 And I appreciate the two of you, that is, your mutual vote

14 of confidence in allowing me, rather than the jury, to decided

15 that case, and I'm trying to earnestly to be fair in doing that.

16 But it seems to me in rendering my tentative decision to each of

17 you that you should kind of know where I'm coming from and that

18 I agree with the Congress and the state regulators that our

19 insurance industry should be free from those who may have

20 questionable background or may present a danger to the honesty

21 and integrity of the industry. That's good for everybody. It's

22 good for business, but more importantly it's good for the

23 public, that is, that their homeowner policies or life or
24 disability or other kinds of insurance be backed up and
25 administered by people of integrity. That's very, very
26 important. And our history shows on occasion that has not been
27 the case, and I suspect that accounts for the very strong
28 regulations on this subject.

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1 So when Congress speaks, even to a crime that occurred so
2 long ago, I think it requires that the Court take a very careful
3 look at whether the federal law has been violated and whether
4 the state has somehow granted an exception to that. For the
5 moment, I don't think so.

6 As I have been reviewing the facts in this case, I think
7 it's going to be very hard for Mr. Colton to argue that he and
8 his partner, Mr. Roesser, are not alter ego individuals of
9 Insurance Ventures. I have read with some attention the
10 defendant's brief in this case and, just as an opening comment,

11 I think it's on the mark. I've looked back over my own notes
12 very carefully on the weekend and virtually everything that has
13 been pointed out by the defendants in their latest brief on the
14 issue of legality are consistent with my own notes, that is, in
15 terms of the participation of the various parties in Insurance
16 Ventures.

17 I am most persuaded by the testimony of the plaintiffs own
18 witnesses that testified both on the merits and on the issue of
19 illegality. For example, Mr. Seifert, who we've described as
20 the founder of homeowner's, or the founder of homeowner's I
21 think was a very fine person, obviously with a distinguished
22 record in the industry. And when he told us that he resigned
23 because he was uncomfortable about transferring the money or
24 financial conditions to San Diego or Del Mar, wherever it was,
25 and then when Mr. Roesser got up here and said he had nothing to
26 do with transferring the money to San Diego, it frankly left
27 Mr. Roesser's testimony in a questionable light because I found
28 Mr. Seifert to be very credible on most issues. I think at the

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1 outset he was making very many, if not most, of the decisions
2 under this business model that was chosen by Insurance Ventures,
3 namely, the use of a third-party administrator and using the
4 attorneys for legal work and allowing the agents, of course, to
5 sell the insurance and equity to process them.

6 Let me say at the outset I don't think there is
7 necessarily anything wrong with the business model. It
8 certainly worked for Mr. Seifert before he started Insurance
9 Ventures.

10 What gives us heartburn in this case is the fact that some
11 of the parties participating had been convicted of a felony.
12 And when I say "parties," I mean "parties" because I agree with
13 the defendants that to the extent Mr. Colton may have been
14 tainted by his 1979 conviction that spills over to Mr. Roesser
15 and vice versa. They are partners and associates of a law firm,
16 and I agree that they -- the acts of one are really the acts of
17 the other. So I think it's very hard to argue that what

18 Mr. Roesser does should not be attributable to Mr. Colton or

19 vice versa. In either event I digressed.

20 My opening point was that Mr. Seifert's earlier comment

21 about being uncomfortable about transferring the money seemed to

22 signal issues that lied ahead, and they did. In this case it

23 was ample proof to the fact that had Mr. Seifert still been

24 running this business from Texas none of us would probably be

25 here.

26 Virtually all of the parties had very little to do with

27 the operations of Insurance Ventures, that is, the financial

28 end, and virtually all of them testified to having very little

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1 knowledge about what happened in the offices of Colton and

2 Roesser.

3 Mr. Owens, who I think is a problem child in this case,

4 testified that he considered Mr. Colton and Mr. Roesser a part

5 of management. Although he's not the strongest witness on that

6 issue, he did consider them principals in the business and
7 clearly noted that they from time to time and rather
8 periodically requested disbursements from Vesta's trust account.
9 He himself did not know of Mr. Colton's conviction until 2005
10 from his own attorney.

11 Mr. Roesser took the position early in this case that he
12 saw no duty on his part or the duty on the behalf of Colton and
13 Roesser to notify anybody about Mr. Colton's conviction. And
14 normally that would be the case but for the federal and state
15 statutes we've been talking about which I think puts a very
16 different perspective in terms of one's duty.

17 But most importantly, I think, to me, as the judge and
18 fact finder, were the testimony of both Ms. Smith and Mr. Frank,
19 who I found to be very honest, personable, forthright
20 administrators and managers in the business field.

21 Ms. Smith, of course, felt that Mr. Colton and Mr. Roesser
22 were the owners of the business for seven and a half years and
23 clearly indicated that Mr. Roesser handled the money, as did
24 Mr. Frank. Ironically, Mr. Roesser gets up here and says, well,

25 you better check with Mr. Frank about the money, I don't have
26 anything to do with the money, and that's just plain false.
27 That's just way off the mark. From everybody's testimony in
28 this case, clearly Mr. Roesser had control over the checkbooks,

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1 calculating commissions and doing many or most of the things
2 that constituted the profit end of the business, namely where
3 the money went and who -- and from what account it should come.
4 And clearly money flowed through many corporations controlled by
5 Mr. Roesser and Mr. Colton in this case.

6 Stephanie Smith confirmed the fact that Mr. Roesser
7 requested to take over the finances while Mr. Seifert was in
8 Texas and quoted him as saying, I don't want to be present if I
9 can't control the funds, close quoted. That confirmed to me
10 early that the statement by Mr. Rosser was likewise off the
11 mark. Clearly Mr. Seifert said so and Ms. Smith said so, that,
12 namely, the money was transferred from Texas to California at

13 the request of Mr. Roesser. Mr. Roesser denies it, but I think
14 there is clearly the case, and therein lay many of our problems.

15 Ms. Smith, furthermore, was never aware that she was named
16 the CFO of the corporation, and she never authorized her name as
17 the director of CNP, which is an affiliate corporation. She was
18 totally surprised by that and never authorized either of these
19 things which indicated to me that decisions were being made by
20 Colton and Roesser without the participation of Ms. Smith or of
21 anyone else, or even the president of the corporation, either
22 Mr. Seifert or Mr. Frank.

23 Mr. Frank, as I stated earlier, testified that he felt the
24 financial things were handled by Mr. Roesser, that extraordinary
25 expenses were already approved by him and that he felt that
26 Colton and Roesser were a part of the management team, that he
27 reported directly to them, and that he was told from time to
28 time by Colton and Roesser how to perform his job. And he, like

1 Ms. Smith, ironically, had to have his name stricken from the
2 corporation as a director. He didn't want his name as a
3 director, but he had to ask them to take his name off the rolls
4 as a director.

5 As pointed out in the defendant's brief and from my own
6 notes, Mr. Frank monthly advised Colton and Roesser of the
7 number of agents that have been undertaking their work; the
8 number of premiums written; the number of other carriers being
9 considered to carry the business; issues involving the
10 third-party beneficiary, that is, Equity; employment issues,
11 that is, hiring and firing; and Mr. Frank said he discussed with
12 Colton and Roesser not only legal but nonlegal matters
13 indicating that Mr. Colton and Roesser were clearly a part of
14 management rather than just legal advisors. He said that
15 although Mr. Colton handled largely the legal matters, sometimes
16 the two things overlapped, and he found himself from time to
17 time talking to Mr. Colton about managing issues as well as
18 Mr. Roesser.

19 As I stated earlier, I don't know if that makes a whole

20 lot of difference because the action of one is really the action

21 of the other when you're dealing with a law firm.

22 Mr. Frank, who is a veteran and I found a very credible

23 witness and a good fellow, was largely in the dark about many of

24 the things that are the subject of this lawsuit, including the

25 promissory notes, transfers of large amounts of funds from

26 account to account and was really out of the loop with respect

27 to many of the issues involving the profitability of the

28 corporation which I found rather appalling and mysterious given

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1 the fact that he was hired because of his background and

2 expertise in making the business profitable. He was not aware

3 of the ultimate shortcomings in the trust account of Vesta in

4 July of '03 and was pretty much in the dark about most of the

5 documents shown to him on the screen in my courtroom. He, I

6 think, legitimately and honestly testified that he had no

7 knowledge of many of those things. Although, he did testify

8 that had he known, it wouldn't make any difference in how he
9 conducted his job. Mr. Frank said he never received very much
10 financial information about the corporation and felt Mr. Roesser
11 was the person who was responsible for that.

12 Mr. Roesser himself testified and, again, as I told you,
13 testified that he never asked to control the finances which, as
14 I said earlier, I really don't think is consistent with all the
15 other testimony in this case. Although, I think it is true that
16 both Mr. Seifert and, to some extent, Mr. Frank from time to
17 time did calculations on the commissions, but that was
18 ultimately done, I think, by Mr. Roesser and Mr. Roesser only.

19 It's notable, as pointed out in the defendant's brief that
20 Mr. Roesser, and I believe Mr. Colton as well, guaranteed
21 Mr. Seifert's salary at the outset, although there was never any
22 out-of-pocket expenses. It indicates to the Court that it's
23 Mr. Colton and Mr. Roesser that are the actual de facto or alter
24 ego owners of this corporation. Mr. Colton wrote checks from
25 the operational account.

26 And Mr. Colton as I -- I'm sorry, Mr. Roesser stated in

27 his testimony that he wasn't aware of Mr. Colton's felony until
28 the mid '90s, well after they had formed their partnership. He

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1 also was not aware of Mr. Colton's judgment in 1994 dealing with
2 the alter ego issue of Assurance International which I found
3 somewhat surprising. Mr. Roster did not advise any of the
4 principals in this case, namely Russ Seifert, Stephanie Smith,
5 either ICW or Vesta about Mr. Colton's felony.

6 What I find very persuasive in this case on the alter ego
7 theory are Exhibits Number 863 and 554. These are brochures
8 that were issued in an attempt to find new carriers to help with
9 the -- with either the ICW or Vesta issues at later points in
10 time, and both of them contain language that makes it clear to
11 the Court that Mr. Colton and Mr. Roesser were far more than
12 legal counsel or general counsel in this case but rather deeply
13 engaged in the management, administration and direction of
14 Insurance Ventures. Both of these are, I believe, CNP brochures

15 which I believe Mr. Frank testified everybody had a chance to
16 review, and I'm quoting him from his testimony. Namely,
17 everybody saw this and approved it, and it pretty much nails
18 down word for word the role of Colton and Roesser in the
19 formation, not only of CNP but this corporation, which is
20 Insurance Ventures.

21 The record is also clear from other exhibits, namely 868
22 and 534, that moneys flowed freely between the various
23 corporations, that is, either affiliates or parent corporations
24 of Insurance Ventures, and that includes CNP and Starboard and
25 others in an effort to lend start-up moneys to Insurance
26 Ventures. These other corporations were started by and run by
27 Mr. Colton and Mr. Roesser as a part of the family business.

28 I'll note also in passing that in reading the arbitration



1 by Judge Moon in San Diego he made it pretty clear that
2 Insurance Ventures was part and parcel of a family business run,

3 owned by, supported by Mr. Colton and Mr. Roesser on behalf of
4 their families, and they were deeply into running personally
5 Insurance Ventures.

6 That is not binding upon me, of course, and that decision
7 is not final, but it is somewhat corroborative of the fact that
8 Insurance Ventures, like Assurance, is the alter ego of both
9 Mr. Colton and Mr. Roesser personally.

10 Mr. Roesser had the courage to tell the Court, I am not
11 the most knowledgeable about finances, that Carl Frank is the
12 person you should talk to. That was perhaps the most incredible
13 statement I heard during the entire trial. I like Mr. Roesser.
14 He's been very successful in his practice. But these various
15 inconsistencies and statements that are totally inconsistent
16 with the people that he hired make me question the rest of his
17 testimony and put it in some doubt.

18 So those are my preliminary observations on credibility
19 and perception. As you know, I judge credibility of witnesses,
20 and I wanted to give both sides kind of my view on that,
21 especially you, Mr. Colton, since you're kind of on the downside

22 of this issue. I think the people that you hired are good
23 people. They're honorable people. They're -- they had a lot of
24 credibility with me. And so when Mr. Roesser came in as your
25 closing witness and put them in a different spot, it made me
26 question whether Mr. Roesser was being really up front with me.
27 In either event, I want to commend both counsel on how
28 you've tried this case. There have been nasty accusations; the

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1 words stealing, thief, felony conviction. And there is plenty
2 of reason for both of you to get personal, and neither of you
3 have done that. And I want to commend both of you for keeping
4 your cool; especially you, Mr. Colton, since the finger has been
5 pointed at you a lot during this trial, and you've acted and
6 conducted yourself honorably and admirably in my courtroom while
7 those accusations have been made. That puts you in a good light
8 with me, not a bad light.

9 And I think I told you earlier, Mr. Colton, if you were to

10 take the stand, and that was a big if, I had no intention of
11 allowing that 1979 conviction to be used against you for
12 impeachment purposes. I see by reading the arbitration by Judge
13 Moon that he agreed with me. It's too far out there. It's too
14 remote to question your credibility, that is, to allow the jury
15 to hear about that as a part of deciding your credibility were
16 you to testify as a witness. So in my normal rules as a judge,
17 I would never let something that old be used against you.

18 But as I stated at the outset of this issue, this is a
19 whole different thing. We're dealing with a whole different
20 issue here and that is, am I to wink and disregard what are very
21 clear federal statutes and state statutes and federal
22 regulations and federal guidelines with respect to your ability
23 to engage in the business of insurance.

24 All the things described by the defendants and some of the
25 things that I've described momentarily before I hear oral
26 argument makes it pretty darn clear to me that Colton and
27 Roesser were engaged in the business of insurance way over the
28 line, not just on the cusp, but way over the line, deeply

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1 involved in the business of insurance. And so you can certainly
2 argue against that point if you wish, and I'll give you an
3 opportunity to do that, but you need to know kind of where I'm
4 thinking and where I'm coming from when I say that I think there
5 is lot of evidence about that without a lot of ambiguity. But
6 you can certainly make your arguments to the contrary.

7 I think where your time would be best spent, Mr. Colton,
8 is whether the illegality issue should be used to preclude you
9 from advancing to this jury issues other than the breach of
10 contract claim, and you've raised and attached to your points
11 and authorities numerous other things that would seem to
12 indicate that the Court should not allow illegality to be used
13 against you on what are purely tort claims where illegality, as
14 I recall it, is used to impute negligence per se or negligence
15 of some kind in the jury's consideration of the tort case,
16 rather than in contrast cutting you off at the knees and saying

17 you have no license or you have no business exception under
18 California insurance statutes and, therefore, you cannot sue
19 under a contract theory in the California courts. That may be a
20 very different issue. So that's where I think your time would
21 be best spent, but how you use it is certainly up to you.

22 I've devoted this afternoon to this issue, and I promise
23 to hear you out, but I thought I would kind of start things off
24 by letting you know my take on your briefs, my take on the
25 evidence that I heard and give you a chance to react to that and
26 steer me straight if I've wandered off the path.

27 The defense has the burden on the issue of the illegality,
28 and I'm considering this as a motion for nonsuit or motion for

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1 judgment based on illegality. And as I stated earlier, much of
2 the points you raise, Mr. Pierce, in your brief I concur with.

3 Mr. Colton has now raised in his brief, well, wait a
4 second, what about the contract claims and the other claims?

5 Going back to one of your earlier briefs, I think you pointed
6 out that if the other claims every inextricably intertwined with
7 the contract claim they, too, should be dismissed. In fact, in
8 looking at one of Mr. Colton's cases that he attached, I think
9 it's the very first one, there is some language. I think it's
10 the Robinson case. There is some language that would seem to
11 indicate that. It's only where the other claims are independent
12 of the breach of contract that perhaps the illegality issue
13 should not be applied. But that's what I find to be the
14 interesting issue here.

15 As I stated, I've been pretty much convinced that
16 Mr. Colton has been convicted, it was a crime involving
17 dishonesty, he's engaged in the business of insurance without an
18 exception from the California Insurance Commissioner and that he
19 is the alter ego of Insurance Ventures; they are one and the
20 same, much like the Assurance case for the reasons I just
21 described and which you've described in your brief. If I'm
22 wrong on that, Mr. Colton will certainly set me straight.

23 But with that kind of general background, why don't I let

24 you have the floor for a while, Mr. Pierce, and then I'll hear

25 from Mr. Colton.

26 MR. PIERCE: Thank you, Your Honor.

27 And I don't think there is any need for me to go over the

28 factual issues because I think the Court notes and our notes

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1 seem to be one and the same in terms of what it shows.

2 Procedurally, we've called this a motion for judgment, and
3 the reason we've done that is a motion for nonsuit, the standard
4 is different from what I understand from reading it. The Court
5 I think has to weigh the evidence in the best light of the
6 opposing party. Since we have stipulated that the Court be the
7 judge and the trier of fact on this issue and the Court can
8 weigh the credibility of the witnesses, we have fashioned this
9 as a motion for judgment. I really don't care what label there
10 is we put on it. It effectively is -- it's the issue of whether
11 or not the illegality of the contract bars the rest of this

12 case.

13 I think I would like to focus, if I can, briefly on the
14 comment the Court just made about the Robinson case that Mr. --
15 and I noted the same thing the Court had done, Robinson
16 Helicopter versus Dana, 105 Cal. App. 4th 749, is a case cited
17 by Mr. Colton on the proposition that fraud in the inducement is
18 a separate and distinct tort, and he quotes language in that
19 case which is not from the Robinson court but from the Callaway
20 case that is cited in that decision. But actually, if you look
21 at the holding of Robinson at page 697, 698, the Court actually
22 concludes that there is no -- no independent tort fraud and the
23 inducement exists because the fraud claims in the case were not
24 independent of the contract. And the language I'm reading from,
25 and I can quote says, quote:

26 "Even a cursory examination of these claims,
27 however, demonstrates they are not independent of
28 the breach of contract and warranty claims but are



1 inextricably intertwined therewith and but for the
2 contract breach would not even exist."

3 And then it skips down a line or so and says, quote:

4 "The fact that Dana's breach of a contractual
5 commitment also may have violated a federal
6 regulation does not provide a basis for allowing a
7 tort remedy in favor of Robinson. Moreover, such
8 circumstances did not occasion Robinson any
9 additional damage."

10 So it is our position, Your Honor, that -- has the Court
11 located that?

12 THE COURT: Yes. I've marked it myself.

13 MR. PIERCE: You're there?

14 THE COURT: You quoted a line or two more than me, but I
15 have it highlighted.

16 MR. PIERCE: The -- each of the claims in this case --
17 each of the claims in this case are inextricably entwined with
18 the contract. The claim of fraud and the inducement, of course,

19 is because fraud is fraud in the inducement of the contract.

20 That is not a separate and distinct fraud claim. The

21 damages that are being sought from that are damages that relate

22 to the contract itself. The same with misrepresentation cause

23 of action, which is both intentional misrepresentation and

24 negligent misrepresentation. Again, the representations with

25 respect to inducing a party to enter into the contract. But for

26 that contract, there would be no damages that flow from those

27 representations or misrepresentations. And the case that I

28 think we have cited a number of times in our brief says that if

20

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1 an illegal contract is the foundation of a lawsuit, recovery is

2 denied in its entirety. That's Hooper versus Barranti

3 B-a-r-r-a-n-t-i, and I don't have the cite, unless the Court

4 would like me to --

5 THE COURT: I'm familiar with Hooper.

6 MR. PIERCE: There is a --

7 THE COURT: What about the ramp-up costs that were
8 incurred by Insurance Ventures, for example, with Equity in
9 tweaking its system to accommodate the various unique technology
10 of Vesta or other agents that have their own computer systems?
11 I've learned from this case that this was kind of an addition
12 that Insurance Ventures felt that carriers would really like,
13 namely, you don't have to change your system, we'll change ours.
14 And we know that from Bobbie Owen's testimony that's exactly
15 what they did. They made changes in their computer system so
16 that they could take questions and issues and policies
17 themselves directly from the carrier rather than having the
18 carrier accommodate their unique -- rather than having Equity
19 change its system to become familiar with theirs. So I'm sure
20 there were ramp-up or start-up costs in doing all that.

21 MR. PIERCE: I think the Court has accurately described
22 the testimony of Mr. Owens with respect to the start-up costs.
23 But as the Court will recall, those are start-up costs that are
24 borne by Equity, a nonparty to this litigation, and they would
25 have probably have been incurred for any potential insured that

26 stepped up to the plate, whether it be ICW or Vesta or even
27 State National or Travelers or American Modern, any one of those
28 carriers. And those were part of the costs of doing business

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1 for Mr. Owens and for Equity.

2 THE COURT: Did Insurance Ventures agree to pay Equity the
3 cost of that technical development and change to accommodate
4 Vesta and other carriers, ICW, for example?

5 MR. PIERCE: I don't believe there has been any testimony
6 to that effect, at least that I'm aware of, and I've looked
7 through my notes to that effect. And as the testimony was
8 coming in from Mr. Owens, I thought it was a bit of a shell game
9 because it appeared -- I have not seen any documents in the
10 years that I've been involved in this case which indicated that
11 Insurance Ventures bore any of those costs. There may have been
12 some adjustments on the part of Insurance Ventures, but that's
13 the cost of doing business with any carrier, and those would be

14 incidental contract costs.

15 The intention of interference with economic advantage,
16 there were a series of subcontracts that Insurance Ventures had
17 with subcontractors. And, of course, if Insurance Ventures and
18 Colton Roesser are engaged in the business of insurance then any
19 subcontract they entered into would also be illegal as well.

20 And I think that's the Beamer case, is right on point. So we
21 can't have interfered with a subcontract. That would also be
22 illegal as well, and that goes with any of the cause of action
23 that deal with intentional interference with economic advantage
24 or negligent interference with economic advantage.

25 And then there is negligent interference with perspective
26 economic advantage, and that theory effectively is that
27 Insurance Ventures -- that Vesta somehow interfered with
28 potential or future contracts that would have entered into with



1 subagents or third parties. And, again, those third parties --

2 those contracts would similarly have been illegal if Colton and
3 Roesser and Insurance Ventures were engaged in the business of
4 insurance in violation of a federal statute.

5 So I think it covers pretty much all the causes of action.

6 I think those are the issues we have addressed in a separate
7 brief that I believe is --

8 THE COURT: Yes, I have it. It's in your supplemental
9 brief.

10 THE COURT: Yes, Your Honor. I think it was the one that
11 was dated.

12 THE COURT: Filed on May 16th.

13 MR. PIERCE: May 15, Your Honor. Probably filed May 16th.

14 Yes, that's the one. Those issues are addressed there.

15 THE COURT: Yes, I have them.

16 Let me ask you this, if you know, and that is can
17 Insurance Ventures do business with MGA without a contract with
18 an insurance carrier?

19 MR. PIERCE: My understanding from the custom and
20 practice, and I'm not going to testify in this case, is that

21 there normally has to be a contract, either a verbal contract or
22 written contract, which authorizes it. And the custom and
23 practice in the business, I think it was testified to by Mr. Don
24 Way and also by the expert on behalf of Insurance Ventures is
25 that normally they are MGA contracts with provisions very
26 similar to the ones we've seen in this case.

27 THE COURT: I suspect that they vary from contract to
28 contract in terms of, for example, whether there is going to be

23

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1 a policy fee as we know?

2 MR. PIERCE: Yes, Your Honor.

3 THE COURT: Who is going to do the servicing of the
4 contract? What is going to be the commission? That's a big
5 ticket item involving millions.

6 So it seems to me that without a contract it's highly
7 unlikely that numbers that large with hundreds of agents
8 involving millions of dollars is going to be undertaken without

9 a contract.

10 MR. PIERCE: I would say, Your Honor, that based on the
11 witness's testimony almost invariably there is an MGA contract
12 which covers all the provisions that we've seen in the issues
13 that you've talked about.

14 I can address any other questions that the Court has, but
15 I think that's the fundamental issue that the Court wanted us to
16 focus on.

17 THE COURT: Yes, it is. Why don't we hear from Mr. Colton
18 since you have the burden here.

19 Mr. Colton.

20 MR. COLTON: May I have the pulpit? Do you mind?

21 THE COURT: Not at all. I won't disturb me in the
22 slightest. If it makes you more comfortable or it's easier for
23 you to make your presentation, have at it.

24 MR. COLTON: Thank you, Your Honor. I appreciate your
25 comments.

26 The time that you have devoted to this case and the
27 attention you've paid to it, it's clear that you have taken very

28 careful notice of testimony and evidence.

24

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1 There are a number of points that were raised regarding
2 alter ego where I think the evidence may have been not quiet as
3 stated, more so, I'm referring to the briefs of the defendants.
4 But I'm not going to waste any time going over that. I think
5 there are some distortions and some exaggerations and certain
6 cases things didn't occur the way they did.

7 One case in point being Russ Seifert. While he did
8 indicate that he was uncomfortable remaining as president in
9 handling the finances, he clearly made it clear that he had no
10 problem with Mr. Roesser taking it over. It wasn't like he felt
11 there was something nefarious thing going on. He just said that
12 if he was to remain president that he wanted to have that
13 control.

14 THE COURT: Correct. I think that's accurate. I don't
15 think there was any fear by him that the financial end was

16 transferred to California that somebody was going to rip off
17 Insurance Ventures. I never felt that or thought that he
18 testified in that manner, but I think some of your witnesses
19 testified that, oh, golly, whiz, he was going to retire to
20 Florida and so he goes. And I don't think it went down that
21 way.

22 I think Mr. Roesser and perhaps your decision to transfer
23 the finances to California was handwriting on the wall for
24 Mr. Seifert that perhaps he needs to retire, and that's exactly
25 what he did. I don't think from anything that I've heard that
26 Mr. Seifert decided to saddle his horse and ride off into the
27 sunset to Florida. That just isn't the way that I think it
28 happened.

25

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1 MR. COLTON: I won't offer my own opinion, because I
2 can't testify in this case, Your Honor, but I do think Insurance
3 Ventures does have a strong difference of opinion on that issue.

4 THE COURT: All right.

5 MR. COLTON: I would like to jump into the other area
6 because I think that's really critical here.

7 I don't think there is much question that in California
8 the illegality defense, if it's upheld, only applies to contract
9 claims. And I think it would be a grave injustice not only
10 in -- not in accordance with California law to in effect contain
11 every other cause of action in this case.

12 The Robinson case, Your Honor, was cited and provided on
13 the issue of economic loss. Now, that's a completely different
14 issue than illegality. And it also says in that case that the
15 rules should be applied differently where it relates to fraud in
16 the performance versus fraud in the inducement. That's right in
17 the very beginning of the decision. I'm not even sure I
18 highlighted it, but --

19 THE COURT: You did.

20 MR. COLTON: And there is no question that fraud and
21 inducement is a cause of action.

22 I don't think defense counsel's statement has any merit at

23 all. Be that as it may, it was -- it was submitted for the
24 purpose of establishing that there is a distinction under the
25 law between contract law and tort law, and the Court has to be
26 aware of that. They are two different areas of law that have
27 primary rights in both instances.

28 Now, I have attached the treaties which is as recent as

26

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1 you can get, the 2006 treatises, California affirmative
2 defenses, that was Exhibit 2.

3 THE COURT: Yes, I have it.

4 MR. COLTON: And it states that certain causes of action
5 are not barred by a determination of illegality and
6 enforceability, unenforceability of a contract, and it cites
7 several, including fraud and fraudulent inducement to enter into
8 a contract.

9 There are a number of cases that California courts have
10 held that where a person or contract is illegal, the common

11 cases of a contractor, that contractor cannot sue for damages on
12 a breach of contract, but the law is clear that he can sue for
13 fraudulent inducement on a tort claim. And these are cases
14 where there is no way.

15 I mean this inextricably intertwined just really doesn't
16 apply. That's kind of the excuse, the catchall if someone is
17 predisposed to go to a certain direction. The law doesn't say
18 that.

19 We have another case where there is an illegal franchise
20 agreement, Your Honor. And the only reason it was illegal is
21 because there hadn't been a consent obtained which I think is
22 very similar to this case. If Mr. Colton had known about the
23 statute and had believed he was in the field of insurance, he
24 would have had the mechanism for obtaining consent and that is
25 the key here. He didn't know about it, and so it never
26 happened. But under that case the Court was very clear.

27 Fraudulent inducement, the plaintiff may recover, even
28 though the franchise agreement is illegal, and this is the law

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1 in California. Even the case that was cited by defendants,
2 Hooper, in their brief, if you Shepardize this case, I don't
3 know if you still call it that, but if you check out the current
4 cases there are four that had a negative commentary on it. A
5 2005 case, and I'll give you the citation -- I just research it
6 this morning -- after reviewing their brief -- is the City and
7 County of San Francisco, right here, almost here in your
8 backyard, versus Tutor, T-u-t-o-r, hyphen Saliba, S-a-l-i-b-a,
9 Corporation, it's cited as 2005 WL 645389, in parentheses, (N.D.
10 Cal), And I have a copy here if the Court is inclined to look at
11 it.

12 THE COURT: It sounds like a federal case.

13 MR. COLTON: It's a federal case, but it's applying
14 California law.

15 And it says here that in distinguishing it from the Hooper
16 case:

17 "that plaintiffs are not proceeding with their

18 contract based upon the illegalities. Plaintiff's
19 claims for fraud, false claims and unfair business
20 practices are not based upon the illegal contract
21 but upon the misrepresentations that were made by
22 the Tudor defendants in attempting to obtain and
23 then to comply with the contracts.

24 Here, Your Honor, we have a situation where Vesta misled
25 Insurance Ventures before there was ever a contract. Insurance
26 Ventures is not trying to enforce the contract, and that's
27 important on the fraudulent inducement claims for the
28 misrepresentation.

28

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1 THE COURT: Well, let's assume we went that route. How do
2 you prove your damages without the contract?

3 MR. COLTON: That's my point, Your Honor. This is the
4 key to the whole theory right here. Mr. Pierce said that
5 Robinson says if your claims -- your damages under the contract

6 are the same as fraud then you have no difference. That's not
7 the case. Let me explain this.

8 If Insurance Ventures was trying to obtain damages based
9 on breach of contract, their claim would be we want Vesta to pay
10 us the commissions that they received and failed to pay over.

11 Now, keep in mind, Vesta only retained 20 percent of the
12 book. So that number would be 4 or 5 million dollars.

13 No, but Insurance Ventures is asking for the value of
14 their business before the contract was entered into. And
15 therein lies the key to this whole analysis, Your Honor. One
16 may say, well, Mr. Colton, because of his involvement and past
17 conviction, Insurance Ventures, can you be in business? Well, I
18 don't think that's true, but let's assume it is.

19 Your Honor, Insurance Ventures can still sell their book
20 of business to someone else, can't they? Mr. Colton won't be
21 involved in the business after it's sold. They have a valuable
22 asset here that can be transferred to a third party. And that's
23 what Mr. Money was explaining when he rendered his opinion as to
24 damages. He set forth what the book of business was worth.

25 That's his whole calculation. This is a book of business that
26 has a history of 30, 40 million dollars worth of business. If
27 we calculated going forward, if it's sold on the open market,
28 that's what he said. It's the revenue stream that is looked at,

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1 and this is what he does when he evaluates businesses.

2 THE COURT: You're setting up a scenario that doesn't
3 exist, though. Because, as I said earlier, whether we like it
4 or not, I felt your involvement in the firm of Colton and
5 Roesser, which was in turn the alter ego of Insurance Ventures,
6 that made Insurance Ventures illegally involved in the business
7 of insurance and you and Mr. Roesser being the alter ego of the
8 business. You're saying, well, it's a valuable book of
9 business.

10 If you were to sell it right now in its current form,
11 you're kind of caught in a conundrum, aren't you? Just about
12 anything that you do with that business is illegal as long as

13 you're involved in it and as long as it's the business of
14 insurance. You're talking about divesting yourself of the
15 business which would, as I stated earlier, probably clean up our
16 scenario.

17 I saw nothing wrong with the business model that was used
18 here except for the fact that you have the tainting felony
19 conviction and Mr. Roesser's acts are your acts and the whole
20 thing gets tainted by your involvement in it. Now you're
21 painting a different scenario where you're out of the picture
22 and Mr. Roesser is back in.

23 MR. COLTON: Not necessarily. The business is sold, Your
24 Honor, and then neither one would be in. And if there had been
25 an awareness, Insurance Ventures says, oh, my gosh, we're in
26 violation of federal statute, if Colton and Roesser had backed
27 out and someone else replaced them, we don't have a problem any
28 more.

1 The key here is Vesta really only has standing to assert
2 that the contract that they entered into with Insurance Ventures
3 was illegal. They don't have standing to say, oh, before that
4 contract was entered into, you guys didn't have a valid book of
5 business. They don't have a right to do that.

6 And the key here, Your Honor, is Insurance Ventures was,
7 if you will, tricked into this contract which is another term
8 that we see in the case law.

9 Insurance Ventures expended a considerable amount of money
10 on that basis. There has been testimony that Insurance Ventures
11 had to pay for the electronic interface to Equity. Equity had
12 some expenses on their own, but we're talking about hundreds of
13 thousands of dollars that were expended here. So here we have
14 this valuable book of business that exists before the contract
15 is entered into. Vesta comes to Insurance Ventures and then
16 makes these fraudulent representation or negligent
17 representations, however you want to characterize them or
18 however the trier of facts want to, but we keep getting back to
19 the fact, just like a contractor. If a contractor is

20 unlicensed, Your Honor, he can't get into business. He can't

21 sue for a contract and recover damages, but he can sue to

22 recover damages from fraudulent inducement.

23 So you can make the same argument, well, if Insurance

24 Ventures couldn't have been legally involved in the business,

25 well, the same argument would apply to a contractor; the

26 contractor can't be legally involved in a business. Why do the

27 courts allow the contractor time and time and time again, I've

28 cited two or three cases here, to recover tort damages, and

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1 that's the key here. It would be a manifest injustice for the

2 defendants to be able to use the illegality defense to shield

3 them from wrongdoing.

4 We also have another case here, Your Honor, or treatise, I

5 should say, which is in the Corpus Juris Surrendum (ph). It's

6 Exhibit 10. Secundum, I'm sorry. And I've highlighted the

7 portion that is applicable.

8 THE COURT: Was your Tutor case attached to your Ps and

9 As?

10 MR. COLTON: No, because I just researched it this

11 morning.

12 THE COURT: All right.

13 MR. COLTON: And in the Corpus Juris Secundum it states:

14 "a tortfeasor is not to be granted exemption from

15 liability because the act was committed in the

16 performance of an invalid contract."

17 So we have two reasons or theories that require, I

18 believe, the Court to allow Insurance Ventures to go forward.

19 Insurance Ventures will be disabled if they're not allowed to

20 pursue their breach of contract claim. There is no question

21 about it. It puts them at a disadvantage in this lawsuit. But

22 at the same time, there is nothing in the law that prohibits

23 them from proceeding on claims that existed precontract.

24 And if I may, the Robinson case, which has been previously

25 referred to, talks about fraud in the inducement addresses a

26 situation where the claim is that one party was tricked into

27 contracting. It is based on a precontractual conduct.

28 So the Robinson case which they're asserting invalidates

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1 our claim, the Courts recognize if it's a precontractual conduct

2 it gives rise to a claim for relief. The same holds true for

3 the negligence misrepresentations; it's the same family as a

4 fraudulent inducement, as is the negligent inducement.

5 And I would go so far as to say there is also a general

6 negligence theory, Your Honor, that is outside the parameters of

7 the contract. And let me explain what it is. If it can be

8 shown that there was a duty on the part of Vesta to not enter a

9 contract if they knew their rating was in jeopardy and if they

10 breached that duty then there is liability as a result. If they

11 knew that by entering into that contract, Insurance Ventures was

12 going to lose business, then that would support a negligence

13 claim.

14 Conversion is another one that is specifically excised

15 from a defense that applies to illegality. As I cited in the
16 affirmative defense treatise, it says, if someone steals your
17 business, they have to pay. The law is very clear on that. We
18 have a case going all the way back to 1858. It's never been
19 different than that. So we have 150 years of precedent that
20 support the fact that if someone steals your business, even
21 though the contract is illegal, you can still recover.

22 There is a case that I cited where a bank tried to -- was
23 involved in an illegal rebate program but they were still able
24 to recover a depositor's funds or the bank's funds, if you will,
25 even though they couldn't enforce the contract.

26 So we have time and time again tort claims being
27 distinguished from contract claims. Now, I will agree there
28 could be tort claims that would be subject to the contract, such



1 as a tort that occurred in the performance of the contract.
2 That one the Court would have to say that's inextricably

3 intertwined with the contract, and therefore, we would have to
4 deny it.

5 THE COURT: Your Corpus Juris cite says exactly that. It
6 talks about performance, not inducement.

7 MR. COLTON: That's correct. Performance we have a
8 problem with. Inducement is a different animal.

9 And I would say the cases in California are consistent
10 time and time again. There is no case that should invalidate
11 Insurance Ventures' right to proceed on precontractual claims,
12 tort claims, fraudulent inducement and negligent
13 misrepresentation, misrepresentation and negligence in the
14 inducement. There isn't any basis for invalidating those.

15 THE COURT: How would you argue your damages to the jury
16 without any reference to the contract in this case?

17 MR. COLTON: How would you do that? We don't need the
18 contract. Let me explain why, Your Honor.

19 The value of that business is based on its own revenue
20 stream that existed prior to the contract being entered into.

21 It doesn't need reference to that.

22 THE COURT: Which was what? About ten, wasn't it? Nine

23 or ten million?

24 MR. COLTON: What?

25 THE COURT: Nine or ten million?

26 MR. COLTON: No, it had increased, Your Honor, to

27 30 million in 2002.

28 THE COURT: All right.

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1 MR. COLTON: The revenue?

2 THE COURT: All right.

3 MR. COLTON: It had been ten, but North American had had

4 Countrywide about ten months earlier. So the evidence is

5 irrefutable that it was nearly \$30 million in business.

6 Now, maybe the difference is this. We can't go to

7 45 million or 50 million. I suppose one could make that

8 argument, but there is no reason to assume that the business

9 value of the model would include the potential of this book of

10 business going forward, and that potential was linked to the
11 agents themselves.

12 THE COURT: This is why I went back to my question of
13 Mr. Pierce, and that is, do MGAs, such as Insurance Ventures, do
14 business with a carrier without a contract? Clearly not. So if
15 you're trying to show the jury that golly, whiz, you got tricked
16 into dealing with Vesta prior to October of 2002 on the fluff of
17 Mr. Watje, your business was hurt because you did business with
18 them and they were downgraded. You would not have done business
19 with them without a contract, and that's kind of the lynch pin
20 of this. You can't really explain to the jury how you got
21 downgrades unless you explain to them there is this contract
22 which brings us back to the same conundrum that we're in.

23 MR. COLTON: Your Honor, but that's the same problem that
24 exists in every single case involving illegality and fraudulent
25 inducement. Every single case has the same set of facts. There
26 is an illegal contract and the plaintiff is claiming if I had
27 known that the facts were different than they were, I would
28 never have entered into that contract. The misrepresentations

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1 occur before the contract is entered into. The plaintiff is
2 still permitted in each and every case and inducement. There
3 aren't any exceptions that I have been able to find. The
4 plaintiff is always able to recover the damages based on the
5 precontractual misrepresentations that were made.

6 The only -- the only issue here, Your Honor, that I can
7 see is would the value of the business somehow be different, and
8 that's why I keep going back to the fact that the -- if you look
9 at what the damages are in cases where there has been a finding,
10 Robinson I guess being one, where the damages for breach of
11 contract of fraud are the same and sometimes the Court will say
12 there really is no difference. Here, we're not asking for that.
13 Insurance Ventures is not basing their claim on Vesta's failure
14 to pay commissions under the contract. If that were the case,
15 the claim for damages would be much, much lower.

16 And in the case of Witkin, Witkin pointed out the Reeder

17 case, which I've cited as well, saying, the Reeder case, if you
18 look at the damages, it supports the fact that the amount
19 clearly shows it's related to fraud in the inducement, as
20 opposed to breach of contract.

21 So the point here is that tort and contract claims are
22 separate, separate theories. There are some times when they may
23 overlap, but that's only in the performance. Whenever it's in
24 the inducement phase, the plaintiff is permitted to go forward.

25 The plaintiff in this case, Insurance Ventures, needs to
26 go forward or there will be a grave misjustice. Vesta will have
27 the opportunity to go over Stephanie Smith, Carl Frank and other
28 defendants in federal court and try to assert now the contract

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1 works and we can pursue it. And the whole point of being in
2 court is for justice to prevail.

3 The Court if you -- if the breach of contract claims are
4 knocked out, it is disabling to some degree, but it certainly

5 doesn't prevent Insurance Ventures from going forward under tort
6 claims.

7 Thank you.

8 THE COURT: Thank you, Mr. Colton.

9 Mr. Pierce.

10 MR. PIERCE: Thank you, your Honor.

11 I would like to point out a couple of things.

12 THE COURT: Why don't we give Michelle five minutes.

13 (A short break was taken.)

14 THE COURT: We're back on the record. Everyone is
15 present.

16 During our break I ascertained that the Robinson case was
17 reviewed by our California Supreme Court, who depublished the
18 case. So it's only of intellectual value to the Court. It may
19 have some cases in there that will help us understand the law a
20 little better, but it's certainly not precedent. In any event,
21 I'm seeing if there is any good case law in there upon which we
22 can base a decision.

23 Mr. Pierce, you have the floor.

24 MR. PIERCE: Thank you, Your Honor. And I may be able to
25 help you in that regard.

26 Mr. Colton has cited a series of cases involving
27 contractors, and I want to address that, if I can, because there
28 are three cases where one of them is the Grant case and

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1 certainly the Pickens case which had been subsequently addressed
2 by the California Supreme Court. And that case is Hydrotech
3 versus Oasis. It's a 1991 case and the citation there is 52 Cal
4 3rd 988.

5 Before I get into Hydrotech, I want to talk, if I can,
6 about the Grant case, which is a 1954 case, by the way. That
7 was cited by Mr. Colton for the proposition that unlicensed
8 contractors may sue for fraudulent inducement to enter into a
9 contract. But the facts are distinguishable, and the fraud
10 claim is not intertwined with the contract claim.

11 Here the contractor was not seeking to enforce the terms

12 of an illegal contract. The claim of fraud was not fraudulent
13 inducement. The contractor's claims of fraud were separate and
14 distinct from the contract. They were, and there were two of
15 them. One was representation that the property was
16 unincumbered; the other party had made a representation that the
17 property was unincumbered that was separate and distinct from
18 the contract. And the second representation that they made was
19 that there was fraudulent concealment of the deed of trust that
20 existed on the property.

21 In Grant in many ways actually supports Vesta's position
22 or holds that an unlicensed contractor may not recover
23 compensation where the right thereto rests upon an express or
24 implied promise which the law denounces as invalid. The -- that
25 and Pickens relies primarily on Grant. So I won't get into the
26 details of that.

27 But I would like to say for the very last time, the last
28 court ever to cite Grant was the California Supreme Court in the



1 Hydrotech Systems case that I just mentioned. And in that case
2 the Appellant was a contractor, was a foreign corporation that
3 made and installed wave-making devices, and it had several
4 claims. The lower court dismissed --

5 THE COURT: Wave-making devices?

6 MR. PIERCE: Wave-making devices.

7 THE COURT: For these recreational pools that the kids go
8 to?

9 MR. PIERCE: It kind of implied that was it, but I'm not
10 really sure.

11 THE COURT: Usually we try not to make waves.

12 MR. PIERCE: The lower court dismissed the Appellant's
13 claim for compensation because the Appellant was not licensed to
14 perform contracting work in California as required by the
15 statute, but it allowed the fraud claim to go forward. However,
16 the Court of Appeals reversed the lower court as to the fraud
17 claim finding that the Appellant was merely asserting its claim
18 for payment that was barred by the licensing statute under a

19 separate tort theory. It explained that the purpose of the
20 licensing law was to protect the public from incompetence and
21 dishonesty in those that provide building and construction
22 services, much the same way the purpose of this federal law is
23 to protect a class of insurers from individuals with backgrounds
24 in dishonesty.

25 The -- I would like to read a quote from the Hydrotech
26 case. It's talking about both Pickens and also Grant. It says
27 quote:

28 "Dicta in these decisions suggests that tort

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1 damages are not prohibited compensation and that
2 Section 7031 is inapplicable whenever the
3 unlicensed contractor asserts he was induced to do
4 illegal work by, quote, fraudulent, unquote,
5 promises or representations. Taken out of context
6 such a rule is naive, overbroad, unsupported by the

7 authorities cited and is impossible to reconcile

8 with our reasoning in Lewis and Queen."

9 It goes on. I think Justice Broussard wrote the opinion.

10 It goes on:

11 "Louis and Queen makes it unclear that any claim

12 against a person protected by a licensing law falls

13 squarely within Section 7031. In such cases courts

14 may not resort to equitable considerations in

15 defiance of the statute."

16 And finally the Court says at page, I believe 379, it

17 says:

18 "We conclude, however, that Grant and its prodigy

19 are properly interpreted in the context of their

20 particular facts. In each case the plaintiff's

21 involvement as an unlicensed contractor was

22 incidental to the overall involvement -- overall

23 agreement or transaction between the parties."

24 In our case the damages that are being sought by Insurance

25 Ventures flow directly from the contract. They're not

26 incidental to the contract. Without an MGA agreement, no
27 policies would have been written, there would have been no
28 premium for which commissions and policy fees could be paid.

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1 I would also like, if I could, to -- and I guess Insurance
2 Ventures can't establish damages without some reference to the
3 contract. For example, Mr. Colton mentioned a moment ago the
4 allegation of theft of a program or conversion. He referred to
5 cases involving conversion.

6 Well, there is no class of action for conversion in the
7 complaint. The cause of action is breach of contract and breach
8 of the provisions of the contract which relate to payment of
9 commissions after termination. That's the theft of the business
10 he's talking about. That's inextricably intertwined with the
11 terms of our contract. So the case that he's referring to
12 involving conversion are irrelevant. They don't have any
13 relationship to the facts here.

14 THE COURT: Your Hooper case, I read on the break, is very
15 broad. It's -- it indicates that a contract that's illegal and
16 void against public policy precludes legal -- all legal and
17 equitable claims in a court of law citing quite a number of
18 cases for that principle.

19 MR. PIERCE: And there is some particular language in
20 Hooper that says, and I'll quote that.

21 "The test is whether a demand connected with an
22 illegal transaction is capable of being enforced,
23 is whether the plaintiff would requires the aid of
24 the illegal transaction to establish his case. If
25 the plaintiff cannot establish his case without
26 showing he has broken the law, the Court will not
27 assist him, whatever his claim in justice may be
28 upon the defendant."



1 And this, by the same way, is the same language quoted --

2 Mr. Colton was kind enough to provide me with his copy of the
3 City and County of San Francisco case versus Tutor-Saliba
4 Corporation. And that's quoted right in that -- on page seven
5 of that opinion that I have here. I can't tell you what page
6 that would be of Westlaw.

7 And again, there is a distinction that was made. I think
8 Mr. Colton read from a portion of this. If you listen to the
9 language of the Tutor-Saliba case, it says:

10 "Plaintiffs are not proceeding with their contract
11 claims based on the illegal MBE slash WBE
12 ordinance; however, Plaintiff's claims for fraud,
13 false claims, Rico and unfair business practices
14 are not based upon the illegal contract but upon
15 misrepresentations made by the Tutor defendants in
16 attempting to obtain and then comply with the
17 contracts."

18 The -- one of the issues raised by Mr. Colton was the
19 business and the ownership of the business. If Insurance
20 Ventures during the years 2002, 2003 and 2004 was being operated

21 by someone who is in violation of 18 USC Section 1033, what
22 could they do with the business? Could they enter into another
23 contract with a third carrier. That contract would still be
24 illegal. And the evidence in this case is unrefuted that Colton
25 and Roesser through the entire period of time that our contract
26 was in place and thereafter were the alter egos of Insurance
27 Ventures. So what could they do with the business?
28 The other thing I would like to point out to the Court is

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1 if you look at the board over here, you'll see I started to with
2 one of the witnesses, with Mr. Way, outline who owns the
3 business. Is it owned by the MGA or is it owned by the
4 subcontractors? And I think the testimony -- in fact, I didn't
5 get a chance to get through that with Mr. Way because I believe
6 the Court said it's cumulative. Insurance Ventures' own expert
7 witness testified that the business was owned by the subagents
8 when there is an MGA there.

9 This is an illusory issue that the Mr. Colton is raising
10 at the present time. Even if they do own the business, which
11 they don't, what would they do with it, and what damages would
12 flow from that?

13 I guess it's our contention, Your Honor, no matter how you
14 turn, how you look at it, every claim in that complaint makes
15 reference to or has its basis the contract which we believe and
16 assert is illegal.

17 THE COURT: Thank you, Mr. Pierce.

18 Mr. Colton, I'll allow you some final remarks and then I
19 have a couple more things to read and then I'll come out and
20 give you my decision.

21 MR. COLTON: Okay. Can I look at the Hydrotech case for
22 one second. And also I'll need my other cases back.

23 THE COURT: We're off the record.

24 (A discussion was held off the record.)

25 THE COURT: Back on the record.

26 MR. COLTON: I just wanted to finish something real
27 quick.

28 THE COURT: Sure.

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1 MR. COLTON: Your Honor, I --

2 THE COURT: Try not to break the furniture, will you?

3 MR. COLTON: I'll fix that in a minute.

4 THE COURT: We'll put it on your tab.

5 Q. BY MR. COLTON: I read Hydrotech. Hydrotech has no
6 application to this case whatsoever, and let me explain why.

7 It is clear in that case that the contractor was suing to
8 enforce the contract. He may have called it fraud, but he was
9 suing to enforce the contract. And if you look at in fact
10 something that Mr. Pierce put up, it says:

11 "In a garden-variety dispute over money owed an
12 unlicensed contractor, the contractor cannot evade
13 Section 7031 by alleging an expressed or implied
14 contract for -- the promise to pay was fraudulent."

15 In other words, they're just saying this contractor is

16 trying to enforce the contract. Since he can't do it under
17 breach of contract law or theory, he's now doing it under a
18 fraud theory. That's not what we're talking about here, Your
19 Honor.

20 If Insurance Ventures was trying to enforce the contract
21 with Vesta, they would be trying to recover moneys that Vesta
22 didn't pay them. Now, that's part of the breach of contract
23 claim, but it's not part of the fraud inducement cause of
24 action. And the fraud and inducement cause of action has never
25 been disendowed by any court. In fact, in the 2005 case I
26 cited, it still exists in the leading authority up through 2006.
27 It is still shown as a clear case where illegality does not
28 apply.

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1 So we have to look at the cases that relate to what's
2 going on here. And I wanted to, if I can, just read a couple of
3 points.

4 What Grant talks about is different. If you look at --

5 let's see if I can get the citation here quickly.

6 THE COURT: 123 Cal. App. 2d 34. It's on page seven of

7 our decision. And for the record, we are looking at the

8 Hydrotech decision reported at 52 Cal. 3d 988. The Court took a

9 brief recess to review this case cited by Mr. Pierce in his oral

10 argument.

11 Mr. Colton.

12 MR. COLTON: Now, if I may, Your Honor, I want to show

13 you the -- some cases from my brief which I previously referred

14 to. And in particular, if you look at Exhibit 3, which contains

15 that case, and go to the area that's highlighted, which I have

16 on the lower tab, it should be fairly easy to locate.

17 THE COURT: Yes, I have it.

18 MR. COLTON: It says in the left-hand corner where it was

19 highlighted, I'm going to go down about four lines down, it

20 says:

21 "Plaintiff's right is the outgrowth of the deceit

22 practiced upon him by the defendants. The validity

23 or invalidity of his contract does not affect that

24 right."

25 And that's what we're talking here. Whether the contract of

26 Insurance Ventures/Vesta is legal or not doesn't affect the

27 fraud and deceit that Vesta perpetrated on Insurance Ventures.

28 It wasn't -- here is the distinction, Your Honor.

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1 Vesta didn't enter into the contract -- did not enter into

2 the contract to get the business and then say, well, we're going

3 to stiff you on the fees. Okay. That's not what -- that may be

4 the contract claim, but separate and distinct from the fraud

5 claim the allegation is Vesta committed fraud in not informing

6 Insurance Ventures that their rating was going to go down.

7 That's much different than the Hydrotech case where the

8 complaint is saying, well, I'm not going to pay him because he

9 doesn't have the license because I'll let him do the work

10 anyway.

11 If we use that same analogy, the theory would be, well,
12 Vesta is saying, Mr. Colton, or Insurance Ventures can't legally
13 enter into that business, so when we get that business we're not
14 going to pay him. That's not what the fraud and inducement
15 claim is all about. That is the book of business was destroyed
16 because they misled Insurance Ventures about their rating. It's
17 not collateral to the enforcement of the agreement for
18 commissions. It's separate and distinct, just as all these
19 other cases, Pickens and Grant. And that's what Grant was all
20 about. If you look at Hydrotech and you read it literally, all
21 it is is a decision that you can't sue for the same damages that
22 you would have gotten under a breach of contract under a fraud
23 theory.

24 THE COURT: There is one rather global statement made at
25 the end of the decision that reads:

26 "No California case has squarely held that an
27 unlicensed contractor may transform a barred claim
28 into a permissible one simply by alleging that the

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1 unenforcible process of payment which induced him
2 to perform were false when made."

3 MR. COLTON: Your Honor, I think that makes perfect
4 sense.

5 THE COURT: And they earlier say that you can't use a tort
6 cause of action to circumvent that of which is barred as a
7 contract claim.

8 MR. COLTON: And I agree.

9 THE COURT: And you're saying this is clearly unrelated to
10 a contract claim, it is totally independent.

11 MR. COLTON: Absolutely.

12 THE COURT: And separate from the contract claim.

13 MR. COLTON: And that's why the damages are different,
14 Your Honor. That's one of the indications that Witkins cites as
15 well as Reeder.

16 Again, I don't mean to belabor this point, but if Vesta
17 had gotten into the contract knowing it's illegal and decided

18 it's not going to pay commissions that claim can't exist, and we
19 have lost that based on the Court's expected rule on illegality.
20 But we haven't lost the claim that relates to the fraud they
21 committed where they misled Insurance Ventures that the rating
22 is going down and this business is going to be lost anyway or
23 most of it. That's completely separate. That's not an
24 affirmative act on their part to not pay commissions. It's
25 important that we make that distinction.
26 And we have -- excuse me one second. I just wanted to --
27 the Robinson case --
28 THE COURT: One of the dilemmas I have, we're getting back

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1 to something you said before, that is, if you were induced to do
2 business with Vesta when you could have done business with
3 somebody else, don't you have that albatross on your back,
4 namely a felony disqualifying conviction that's going to
5 disqualify your future contract with another carrier that the

6 Court has already indicated is applicable to the Vesta contract,
7 namely, that that MGA contract is tainted regrettably by 18 USC
8 1033? Why wouldn't all the other contracts, the book of
9 business, so to speak, that formed an MGA agreement with other
10 carriers not be vulnerable to the same analysis that I'm
11 applying to the Vesta contract?

12 MR. COLTON: For the reason I stated earlier. The
13 measure of damages here, Your Honor, is the value of the
14 business. The business can be sold.

15 A case in point, Florida Select. That's the California
16 Select dba Court Selects, one of the defendants in this case.
17 Vesta purchased their homeowners business for \$67 million. They
18 paid whoever owned Florida Select \$67 million in order to get a
19 homeowners business in the State of California.

20 THE COURT: Are you arguing that it's not the business of
21 insurance if you sell the book of business to another MGA?

22 MR. COLTON: It's the relationships, it's the electronic
23 interacting, it's the knowledge of underwriting. It's all
24 aspects having a third-party administrator that can be a virtual

25 insurance company and do everything. It's the whole package
26 that you -- you're essentially bringing a virtual insurance
27 company to a new company, and Insurance Ventures may well
28 have -- decided to sell their business at any time. And once

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1 they sell that and Mr. Colton is no longer associated with it,
2 it's not a problem anymore. Mr. Colton, if he had known, could
3 have backed out at any time. So it's unfair to say, well --
4 THE COURT: But you're adding -- you keep adding a
5 hypothetical to your scenario that doesn't apply, namely, you,
6 as you stand there, are the alter ego of Insurance Ventures.
7 You're telling me that if you decided to part with Colton and
8 Roesser and no longer become a part of their alter ego, that is,
9 Insurance Ventures, everything is fine. But we don't have that
10 scenario. We have still have you as part and parcel of the
11 alter ego. That's what we're stuck with. We don't have some
12 other scenario that you're positing. Are you going to argue to

13 the jury, well, I might part company with Mr. Roesser and, if I
14 did that, the business would be saleable and valuable on the
15 open market which it might be? Conceivably it would be.

16 MR. COLTON: But -- I'm sorry. I didn't mean to
17 interrupt.

18 THE COURT: How do you change the facts? You keep
19 changing facts. How do you change the facts?

20 MR. COLTON: We don't need to change the facts. As Chris
21 Money said, you value a business based on its revenue stream.
22 Insurance Ventures has a revenue stream before Vesta comes into
23 the picture. Whether it's legal or not, it has a revenue
24 stream.

25 THE COURT: I don't doubt that. Maybe you're missing my
26 question.

27 MR. COLTON: Let me just finish the thought.

28 THE COURT: Okay.

1 MR. COLTON: In addition to that, the value of the
2 business is not based on Mr. Colton, an attorney. Whether he's
3 controlling finances or otherwise, the value of that business is
4 the relationships which Mr. Colton didn't have. That has
5 nothing to do with -- one person stepping down has nothing to do
6 with the intrinsic value that existed at the time.

7 THE COURT: I don't discount any of that. I don't
8 discount that Insurance Ventures has value on the open market if
9 there is somebody out there that would buy it.

10 What I'm positing is how do you part with this albatross
11 that I mentioned, and I don't mean that in a derogatory sense.
12 It's unfortunate that you had that conviction and that you're in
13 this dilemma that you're in, but you're the alter ego of
14 Insurance Ventures. And now you're saying what if; what if I
15 were no longer a part of that alter ego. Why shouldn't I be
16 able to argue to the jury this lost value by reason of the fraud
17 and inducement by Vesta?

18 MR. COLTON: Your Honor, because Vesta only has standing
19 to challenge the validity or the legality of the contract that

20 they had with Insurance Ventures. They don't have standing to
21 assert that they cannot -- that Insurance Ventures cannot or
22 would not have been able to continue to be in business or
23 continue to generate revenue. And I think that's an important
24 distinction here. They can't -- on interference claims with
25 subagents, they can't step into the subagent's shoes and say
26 your contract is illegal because of Mr. Colton.

27 THE COURT: I'm not saying they have any part in that.
28 I'm concerned as in a court like other cases where purportedly

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1 illegal contracts are before juries and judges are, I think, to
2 try to keep from a standpoint of public policy illegal contracts
3 from being honored and enforced in the courts of our state.
4 Quite aside from whether the defendant even raised that, I think
5 the Court can raise it on its own. I suspect -- I suspect there
6 are cases like that, where neither party has raised illegality
7 and a judge somewhere has raised it. I don't have the case at

8 my fingertips, but I don't doubt it exists.

9 MR. COLTON: Well, that probably happened, but the cases
10 here in California are very clear that fraud and inducement is
11 separate and distinct from a contract claim. And if the Court
12 renders a contract illegal, it doesn't affect the fraud and
13 inducement. The Court is engaging, I suppose, in a logical
14 analysis but one that doesn't apply to the cases here. There
15 was a value there, and it only relates to whether or not the
16 contract would be enforced. Insurance Ventures, once a breach
17 of contract issue is resolved or no longer exists, is not trying
18 to enforce the contract.

19 THE COURT: You've made your point there, and I think I
20 understand your argument, Mr. Colton. And you've tried to make
21 it clear to me, if I can give you feedback here, if that, don't
22 get caught up in the breach of contract cause of action barred
23 by illegality, look at this as a separate tort independent and
24 distinct from the contract claim for which there is damages
25 based not on the terms of the contract but on other theories.

26 MR. COLTON: Exactly.

27 THE COURT: Namely the loss of book of business.

28 MR. COLTON: And finally --

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1 THE COURT: Right? Do I have it right?

2 MR. COLTON: Yes, that's right.

3 And in the Reeder case, if you could go to the highlighted
4 portion again, Your Honor. This is under Exhibit 7.

5 THE COURT: And Reeder, for the record, is 3 Cal. App. 3d
6 995.

7 MR. COLTON: The lower right-hand corner, do you see
8 where it's highlighted?

9 MR. PIERCE: Page reference?

10 MR. COLTON: It's page -- if you look in the upper
11 right-hand corner here, it's page three of four.

12 MR. PIERCE: Got'ya.

13 THE COURT: It's on page three of the attachment.

14 MR. PIERCE: Thank you, Your Honor.

15 Q. BY MR. COLTON: In looking at the highlighted portion --

16 let's start first with number one. It says:

17 "Plaintiff is not seeking to enforce an illegal

18 contract, but rather to recover damages suffered

19 when defendants fraudulently induced it to enter

20 into the illegal transaction."

21 What I'm looking for, number two and three, the portion

22 highlighted below:

23 "Since plaintiff's complaint sounds in tort, rather

24 than contract, its sufficiency must be tested by

25 the general rules of tort law."

26 Illegality doesn't even enter into that equation.

27 "So tested, it adequately states a cause of action

28 for fraud and deceit. A plaintiff may recover

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1 fraud when he shows that by reason of a defendant's

2 misrepresentation he has sustained some pecuniary

3 damage or injury by a reason of having been put in
4 a position worse than he would have occupied had
5 there been no fraud."

6 Well, I don't think it can be argued that Insurance
7 Ventures was placed into a position worse as a result of the
8 downgrade, of the fraudulent representation concerning that.
9 And that, again, becomes then the measure of damages, the loss
10 of the book of business based upon that misrepresentation.

11 THE COURT: Yes. I read this earlier. I have it
12 highlighted as well.

13 MR. COLTON: And finally, I said that once before, but I
14 just want to just refer to -- I guess this may be also the
15 Reeder case. Let me -- I had another cite there. Okay. It's
16 quoted in my brief. So it's not highlighted in the case. But
17 let me, if I can, direct the Court's attention, to page three of
18 my brief.

19 THE COURT: I'm there.

20 MR. COLTON: I'm sorry, page four. Page four, line 24.

21 THE COURT: Is this a test?

22 MR. COLTON: It is for me.

23 THE COURT: I'm with you.

24 MR. COLTON: Page four, line 24, quote:

25 "If plaintiff had sued to recover the promised

26 rebate, the action would have been to enforce the

27 contract and recovery would have been denied on the

28 ground of illegality." Here, however, the action

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1 was in tort for damages for fraud in inducing

2 plaintiff to enter into the contract this is --

3 this was shown by the amount demanded."

4 Again, take a look at the amount Insurance Ventures is

5 claiming for damages, and you can see clearly that it's not

6 based on the contract. If the Court concludes that Insurance

7 Ventures is not trying to enforce the contract by its fraud

8 claim then the Court must allow Insurance Ventures to proceed on

9 this case.

10 And I would submit, Your Honor, we have two, maybe three
11 more days of live testimony at most with closing arguments and a
12 potential jury verdict. If this case is not allowed to go to
13 verdict with the jury, and let's say --

14 THE COURT: I'm about to -- I don't want to interrupt you,
15 but I understand the consequences of the Court's action, namely,
16 a very expensive trial to both of you will have to be retried if
17 I'm wrong.

18 MR. COLTON: In two years. And Vesta, at C plus plus,
19 will not be in existence probably then. So there wouldn't be
20 any justice available.

21 So I think, at a minimum, the Court should allow the case
22 to go to jury verdict. And if the Court feels there are some
23 legal reasons for not allowing the verdict to stand on appeal,
24 we at least have a decision by the jury.

25 In addition to that, Your Honor, if the jury rules against
26 Insurance Ventures, it's a moot point. So it's a win-win for
27 the defendants.

28 Allow this case. We've got five weeks invested or four

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1 weeks, two or three more days. Let's get the case decided,
2 whatever the result may be. And if the Court determines for
3 whatever reasons that some of the causes of action cannot stand
4 then we can at least have an appellate court make that decision.
5 That would be justice.

6 THE COURT: That even crossed my mind, believe it or not,
7 Mr. Colton.

8 So let me hear from Mr. Pierce.

9 MR. PIERCE: I'll try to be brief.

10 THE COURT: And you realize the consequence of my
11 decision.

12 MR. PIERCE: I fully understand, Your Honor. I do.

13 THE COURT: And as many resources as Vesta Insurance
14 Company has, it's going to be an expensive case to retry for
15 everyone, and not to mention good people, all of them were good
16 people, have to shlep back to Sacramento to retry this matter

17 when it's pretty much 80-percent done.

18 Go ahead.

19 MR. PIERCE: But again, the Court commented earlier, and I
20 agree with the Court, how do you put an illegal contract before
21 a jury? How does the Court put before a jury and request a jury
22 to effectively enforce an illegal contract?

23 Your Honor, the would have beens, should have beens and
24 could have beens that have been raised by Mr. Colton are all
25 very interesting, and I think let's go back to basics, and
26 basics is the complaint for fraud.

27 The cause of action for fraud, and he's characterized it
28 in a bunch of different ways, but I'll put it up on the screen

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1 here, the complaint. This is the cause of action for fraud
2 which appears in page 18 of the document.

3 THE COURT: I have it right in my hands.

4 MR. PIERCE: And low and behold, paragraph 99 tells us

5 what damages Mr. Colton and Insurance Ventures are now seeking
6 as a direct and proximate result of the conduct of defendants
7 and the facts alleged herein, plaintiff has been damage in an
8 amount in excess of 20 million dollars, representing the loss of
9 past and future commissions and policy-fee income, taken right
10 out of the contract, profit-sharing income, including the value
11 of IV's business which amount will be proven at trial. Those
12 are the damages as framed in the complaint by Mr. Colton. They
13 are contract damages, and the fraud claim is inextricably
14 intertwined with the contract based on what he has written and
15 that cannot -- he cannot stand up here today and parse those
16 damages. They are what they are.

17 THE COURT: I'll try to give you a ruling here in ten or
18 15 minutes. You can take a stretch, if you would like, and then
19 I'll be back on the bench.

20 (A short break was taken.)

21 THE COURT: The Court has read and considered the briefs
22 of counsel and have enjoyed your excellent argument this
23 afternoon. And having considered your argument and your briefs,

24 will abide by my tentative decision and dismiss the matter and
25 enter judgment for the defense on the grounds that the contract
26 is void as legal for the reasons that I stated at the outset of
27 today's proceedings.

28 Of help to the Court were two cases, one of which everyone

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1 is familiar with, which is Beamer versus Netco, reported at 411
2 Fed Supp. 2d 882, and that helps the Court with respect to
3 engaging in the business of insurance. And there the Court
4 found indeed that Beamer had engaged in the business of
5 insurance by developing and creating a software program which
6 produced insurance forms for insurance title agencies. Beamer
7 initiated and maintained relationships with insurance
8 underwriters, helped negotiate contracts with underwriters, set
9 up relationships when it's employer expanded to other states,
10 participated in management meetings regarding expansion of the
11 business and participated in the operational aspects of the

12 business. Moreover, Beamer software provided computerized forms
13 and databases which agents used to produce insurance documents.
14 Beamer, as a form creator, designed the boilerplate language of
15 the forms while the agent merely inserted the insured's name and
16 the company on the form to create a legally binding contract.
17 Thus, Beamer was not merely a seller of software, instead he was
18 involved in the business of insurance by creating legally
19 binding contract language. And I'm quoting from the Beamer
20 decision at pages 889 and 890.

21 In this case, the acts of Mr. Beamer are out distanced by
22 the conduct of both Mr. Roesser and Mr. Colton in this case for
23 the reasons stated in the defendant's brief on this issue, as
24 well as the reasons I stated at the outset of the proceeding.
25 So I don't think there is much question that Insurance Ventures
26 was engaged in the business of insurance, nor the fact that
27 Mr. Colton was disqualified under 18 USC 1033 having previously
28 been convicted of the crime with which you are all aware, namely



1 aiding and assisting in the filing of a fraudulent tax return.

2 Equally important to the Court has been the Hydrotech
3 case, which we have discussed previously on the record, reported
4 at 52 Cal 3d 988. Conceitedly the case is not squarely on point
5 because it involved a specific statute, namely B&P Code, that's
6 Business and Professions Code 7031, which bars unlicensed
7 contractors from suing for contracting work in the courts.

8 However, the reasoning of the Hydrotech case has been
9 particularly important in assessing whether an independent cause
10 of action, such as fraud in the inducement, should be permitted
11 to stand even though there is a void contract.

12 The Court finds that if the underlying statutes here were
13 designed to protect third parties, such as Vesta, then -- and
14 the contract is illegal, which I found it to be, and that there
15 are lawsuits resulting out of the illegal contract, the third
16 party, in this case Vesta, is entitled to protection under the
17 law. And if the contract is void, the Court finds it really a
18 conundrum to be arguing whether you can even negotiate what is a

19 fraudulent contract.

20 Mr. Colton has argued that his loss of book of business,
21 the loss of their business value, so to speak, of Insurance
22 Ventures, are literally lost by virtue of the fraud of the
23 defendants. But it's all part and parcel of the same thing,
24 namely the Vesta/Insurance Ventures contract.

25 The second-amended complaint quoted by Mr. Pierce confirms
26 that, that is, that the damages sought by Insurance Ventures are
27 one and the same and not distinct from the contract that forms
28 the basis of this lawsuit.

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1 In some cases cited in Hydrotech certain causes of action
2 were permitted to stand, namely where the fraud was separate and
3 distinct from the underlying contract. But here this Court
4 finds that the fraud claim is not distinct and separate from the
5 contract, rather it is part and parcel of the same.

6 This contract that's before the Court, that is, the Vesta

7 insurance contract, is a void contract, and Insurance Ventures
8 should never have been engaged in the business of insurance and,
9 therefore, the plaintiff, Insurance Ventures, can't claim fraud
10 in the inducement because Insurance Ventures, particularly with
11 Mr. Colton and Mr. Roesser participating, should not have been
12 even negotiating the contract.

13 Therefore, I find it very difficult, if impossible, to
14 believe that some fraud in the inducement cause of action
15 remains, despite Mr. Colton's arguments to the contrary.

16 For these reasons, the Court finds that good cause exists
17 by a preponderance of the evidence and by the law to dismiss the
18 plaintiff's causes of action, all of them as set forth in the
19 second-amended complaint by virtual of the illegality of the
20 contract which we've discussed on the record today and which is
21 the subject of various pleadings.

22 For the record, Mr. Pierce, I would like you to formulate
23 a written decision consistent with my comments at the outset of
24 oral argument, together with the comments I've just made today
25 at the conclusion of today's proceedings that would capture the

26 Court's views on this.

27 I'm sure the issue is important to Mr. Colton. It

28 wouldn't surprise me if you would like to have the appellate

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1 courts take a look at my decision, and for that reason my
2 written decision, which Michelle will produce for you, that is,
3 my comments at the end of the proceeding and my comments at the
4 outset of the proceeding, can be encapsulated in that decision.
5 You can run it by Mr. Colton, if you would like, and, of course,
6 I'll be free to change it if I don't think it's consistent with
7 what I've said on the record today.

8 MR. PIERCE: I'll run it by Mr. Colton certainly, Your
9 Honor.

10 THE COURT: Give it to him as to form. And basically, you
11 have the laboring oar, Mr. Pierce, to prepare it. And I think
12 we need something like that so the court of appeal can clearly
13 see my rationale and reason.

14 MR. PIERCE: I agree, Your Honor.

15 THE COURT: That will conclude today's proceedings.

16 MR. COLTON: Thank you, Your Honor.

17 MR. PIERCE: Thank you.

18 THE COURT: Good luck to both of you. It's been a
19 pleasure having both of you in my courtroom.

20 MR. PIERCE: Thank you, Your Honor.

21 MR. COLTON: Likewise.

22 (The proceedings concluded.)

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STATE OF CALIFORNIA)

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) ss.

COUNTY OF SACRAMENTO)

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I, MICHELLE A. LELEVIER, hereby certify that I am an
Official Certified Shorthand Reporter and that at the times and
places shown I recorded verbatim in shorthand writing
proceedings in the following described action completely and
correctly to the best of my ability:

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Court: SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

9

Judge: HONORABLE TALMADGE R. JONES
DEPARTMENT 39

11 Action Number: 04AS00268

12 Action Title: INSURANCE VENTURES, INC.

13

vs.

14

VESTA FIRE INSURANCE CORP, et al.,

15

Date: Monday, June 19, 2006

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I further certify that my said shorthand notes have been
transcribed into typewriting and that the preceding pages 1
through 60 constitute an accurate and complete transcript of all
of my shorthand writing for the dates and matter specified.

18

I further certify that I have complied with CCP 237(a)(2)
in that all personal juror identifying information has been
redacted if applicable.

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Dated: June 20, 2006

06-19-06-PM JUDICIAL DETERMINATION ROLAND COLTON IS A CONVICTED FELON

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MICHELLE A. LELEVIER, CSR #6967

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