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Case Number 435,2020D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE OLGA J. NOWAK IRREVOCABLE TRUST,	§	Public Redacted Version
	§	Filed: March 23, 2021
	§	
Plaintiff Below, *Appellant*,	§	No. 435,2020
	§	
	§	On Appeal from the Superior
v.	§	Court of the State of Delaware,
	§	C.A. No. N17C-05-254 FWW
	§	
VOYA FINANCIAL, INC.; SECURITY LIFE OF DENVER INSURANCE COMPANY,	§	
	§	
	§	
	§	
Defendants Below, *Appellees*.	§	

CORRECTED APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The Olga J. Nowak Irrevocable Trust (the "Trust") purchased a life insurance policy issued by Defendant-Appellee Security Life of Denver Insurance Company's predecessor with a face amount of $4 million (the "Policy"). The Policy insured Olga J. Nowak. The Policy states that when she reached age 100, the death benefit converts from the $4 million face amount to the amount of the Policy's cash surrender value. Ms. Nowak passed after her 100th birthday and Security Life offered to pay the Policy's cash surrender value upon her death.

Despite the Policy's clear language, the Trust demanded that Security Life pay the $4 million. When Security Life refused, the Trust sued for breach of contract. It also brought claims for bad-faith breach of contract, consumer fraud, contract reformation, unconscionability, and unjust enrichment. The Trust asserted claims against both Security Life and its parent company, Voya Financial Inc. ("VFI"), though VFI is merely a holding company and does not engage in the business of insurance. Beyond the contract claim, the Trust generally argued that Security Life and VFI are liable for issuing inaccurate in-force Policy illustrations five to ten years after the Policy was purchased.

The parties agreed that this case involved only legal questions, as the material facts were undisputed. They filed cross motions for summary judgment. Judge Wharton granted summary judgment for Security Life and VFI, finding the Policy

was capable of only one interpretation—the insurer's. On the statutory claims, he agreed that Delaware's Consumer Fraud Act does not apply to claims against insurers and also found that the inaccurate illustrations could not support a CFA claim since they all post-dated the sale. And because Security Life did not breach the Policy, he also disposed of the Trust's remaining extra-contractual claims.

The Trust appealed and now asks this Court to answer the same legal questions. The lower court's judgment should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. This is primarily a matter of contract interpretation. The Policy states that if the insured passes away before attained age 100,[1] the "Death Benefit" is the Policy's $4 million face amount. If she passes away after attained age 100, the Death Benefit is equal to the Policy's surrender value.

Through this litigation, the Trust tries to rewrite the Policy so that it provides $4 million regardless of Ms. Nowak's age at her passing. The Trust's reading ignores the Policy's provisions that define the Death Benefit Proceeds before and after age 100. The Trustee (Ms. Nowak's son) agrees: he read the Policy many times over the years and also concluded that the Death Benefit changed at age 100. The Trust also applied for the Policy after receiving quotes and pre-sale documents showing a $4 million death benefit was available until age 100. It then received the Policy itself, which states that the $4 million face amount is available until age 100 and states that the life insurance benefit is available for seventeen years. Ms. Nowak was 83-years old when the Policy was issued.

For seventeen years, Security Life insured Ms. Nowak's life for $4 million. Ms. Nowak simply outlived that coverage. Nothing about this ordinary insurance

[1] "Attained Age" is a defined Policy term that means the insured's age on the Policy's anniversary date. For purposes of this case, there is no difference between the insured's actual age and attained age because she lived beyond both.

arrangement constitutes a contract breach, let alone fraud, bad faith, unjust enrichment, or is unconscionable.

2. Denied. *See* response to paragraph 1.

3. Denied. *See* response to paragraph 1.

4. Denied. *See* response to paragraph 1.

5. Denied. *See* response to paragraph 1.

6. Denied. *See* response to paragraph 1.

7. Denied. *See* response to paragraph 1.

8. Denied. The Trust's claims under the Consumer Fraud Act also fail. As this Court has affirmed, the CFA does not create a private right of action against an insurer for selling insurance. Even if it did, the CFA applies only to misrepresentations made before or at the time of sale. No document issued before or at the time of sale misrepresents the Policy's death benefit. Instead, the Trust relies on illustrations issued five to ten years after the Policy's sale that cannot ground a CFA claim.

9. Denied. *See* response to paragraph 8.

10. Denied. *See* response to paragraph 8.

11. Denied. *See* response to paragraph 8.

12. Denied. *See* response to paragraph 8.

13. Denied. Nor is the Trust entitled to relief under its claims for bad faith, unconscionability, or unjust enrichment. When no breach occurs, no bad faith breach occurs either. Here, Security Life reasonably interpreted the Policy (even the Trustee and Judge Wharton read the Policy the same way), precluding any bad faith claim. Further, when a contract exists, an unjust enrichment claim cannot. Finally, when a party freely purchases an insurance contract that Delaware's insurance department approved, the Policy cannot be unconscionable.

14. Denied. *See* response to paragraph 13.

15. Denied. *See* response to paragraph 13.

16. Denied. *See* response to paragraph 13.

17. Denied. *See* response to paragraph 13.

18. Denied. Because the Trust's claims fail as a matter of law, the trial court did not decide whether any affirmative defenses apply. This Court need not either. Or it should hold that they do apply because the Trust's claims are time-barred. The Trust's claims accrued no later than (and likely years before) February 2011. That it waited six years to sue means its claims are barred by limitations. Moreover, the Trust has no standing to sue under Delaware law. Only the Trustee does—and the Trustee is not a party.

Judge Wharton correctly reached these same conclusions and rendered summary judgment in favor of Security Life and VFI. This Court should affirm.

STATEMENT OF FACTS

1. The Trust buys a life-insurance policy with a $4 million death benefit until attained age 100.

In 1999, 83-year-old Olga Nowak began preparing for the future, as no one in her family had lived past 86. As her son, the Trustee, said, "We thought age 100 for Mom would just not happen. 86 years old was our longest living relative." B131, 265. Estate planning became their focus. B265, 57–58. Given the anticipated size of Ms. Nowak's estate, a Virginia consultant was retained to limit her estate tax exposure. B57–58, 261–264. Based on his advice, and because life insurance proceeds are generally not taxed upon the insured's death, Ms. Nowak created a trust to purchase an insurance policy on her life. *Id.* Ms. Nowak's assets would fund the policy, and the Trust would be the beneficiary. *Id.* Robert Nowak, her youngest son, was named Trustee. B57–58, 660.

The Trustee was interested in only two factors when shopping for life insurance: price and the insurer's financial strength. B157–158, 263–264. His financial advisors, Mark Wilcock and Ed Wetherell, reviewed policy illustrations from several insurers, including Security Life's predecessor, Southland Life. B327–357, 158, 122. Each policy matured when the insured reached age 100. *Id.* Wilcock and Wetherell explained that they discussed the $4 million death benefit expiring at age 100 with the Trustee. B122, 152.

The Trust ultimately purchased the Southland Life policy in Virginia on September 1, 1999. B549. In doing so, the Trustee signed an illustration showing that, if the necessary premiums were paid, the applied-for $4 million face amount was available until the insured reached age 100. B543–548. The Trustee also received a Statement of Policy Cost and Benefit Information reflecting that the $4 million was available for seventeen years and that the Policy matured at age 100. B676–677, 549–550.

2. The Policy provided seventeen years of insurance benefits.

The Policy's terms are standard; they derive from a Southland Life policy form that insurance regulators approved in Virginia, Delaware, and across the United States. B591–592, 701–795. Though the Trustee confirmed to Southland Life that he understood the Policy's terms, he later admitted that he did not actually read the Policy when he bought it, even though the Policy's cover page instructed him to "Please Read Your Policy Carefully." B625–653, 549–550, 271–272. Had he read it, he would have seen that the Policy provided a 10-day "free look" period during which he could have returned the Policy. B625.

The Policy Summary section instructs the reader to "check the Schedule on pages 4, 5 and 6[.]" B631. Despite the Trust's claim now, the Policy Schedule makes clear that the Policy provides 17 years of benefit:

Summary of Benefits

	Minimum Monthly Premium	Years of Benefit
LIFE INSURANCE	$20,645.00	17

B630. Again, Ms. Nowak was 83 at the time, so 17 years of life insurance benefit would last until age 100.

The Policy's cover page defines "Death Benefit Proceeds Payable at Insured's Death." B625. "Death Benefit Proceeds" is a defined term that refers to the Policy Proceeds section. B632. The definitions of "Death Benefit" and "Face Amount" also refer either directly to the Policy Proceeds section or incorporate a term whose definition refers to the Policy Proceeds section. B631–632. The Policy Proceeds section defines what benefits are paid and when. B639–640. It draws a line at attained age 100, stating on page 15 that if the insured dies "Prior to Attained Age 100," the insurer will pay the full $4 million. B639.

On the next page (page 16) and in the same Policy Proceeds section, this "Prior to Attained Age 100" is complemented with a second provision that explains what happens "Beyond Attained Age 100." B640. In that circumstance the "Death Benefit" is limited to the "Surrender Value":

Continuation Beyond Attained Age 100
The Policy will be continued beyond Attained Age 100, if at Attained Age 100 the Insured is living and this Policy is in force. During such continuance, the following applies to your Policy:

1. The Death Benefit at any time will be the Surrender Value.
2. The Surrender Value at any time will be the Surrender Value at Attained Age 100 increased with interest in the same manner as prior to Attained Age 100 less any Debt and withdrawals occurring after Attained Age 100.
3. No further Monthly Deductions will apply.
4. No more premiums may be paid.

B640. "Surrender Value" is also a defined term, generally calculated to return any built-up cash value less any debts or charges. B633.

Under the Policy, Ms. Nowak reached Attained Age 100 in February 2016. B628, 631–633.

3. Years after the Policy was issued, a software glitch illustrated the $4 million beyond age 100.

After the Policy was purchased, periodic illustrations were issued. The first, issued in 2002 (about three years after the Policy was purchased), showed the $4 million benefit ending at age 100, consistent with the Policy and the at-issuance illustration. B361. Around 2003, however, Security Life migrated to new illustration software. That migration resulted in illustrations from 2004 to 2009 to erroneously reflect the $4 million extending beyond 100. B175–182, 363–392. That error self-corrected as part of a 2009 administration system conversion. B237–244, B177–182. Because the error was created by a computer migration and corrected as part of conversion to new software, no one knew the 2003 migration created an error or that the 2009 conversion corrected it—it was a silent error. B237–241. In any event, the

Trustee does not recall receiving or reviewing any illustrations before 2010; he only came by the earlier illustrations years later, more than a decade after the Policy was purchased. B288–289.

Even if he had reviewed them earlier, each illustration states that it is just that—an illustration—and that it does not and cannot replace or modify the Policy. (*See, e.g.* B369, 375–376, 381–382, 386–387, 391–392.) The illustrations disclaim any guarantee as to their accuracy and instruct that if a conflict exists with the Policy, the Policy controls. *Id.*

Illustrations issued in 2010 and thereafter resumed depicting the $4 million ending at age 100. B411–415. Consistent with the Policy's terms, the sixteen illustrations issued from 2011 onward reflect both that the $4 million ended at age 100 and that only the Surrender Value would be paid after 100. B431–538, 808–915.

4. The Trustee finally reads the Policy in 2010 and agrees that the $4 million in coverage ends at attained age 100.

In mid-March 2010, the Trustee emailed a financial advisor, Tony Fulkerson, to solicit advice. B681. [redacted]

A week later, he reiterated the same understanding to Fulkerson, pointing to page 16 of the Policy excerpted above: [redacted]

[redacted]

That same day, he emailed his insurance broker, Mark Wilcock, for advice on funding the Policy based on his (correct) understanding that the $4 million was not available after age 100. B684. He again pointed to page 16 and again gave his interpretation: [redacted] B684. Like Judge Wharton, the Trustee reached this understanding by simply reading the Policy. B276–277.

Though Wilcock did not have a copy of the decade-old Policy (and he was no longer appointed with Security Life), he replied to his long-time client that he read page 16 as saying $4 million is the surrender value, even though the Policy defines Surrender Value as the remaining cash in the Policy less any debts. B127–128, 138–139, 253–255, 587–589, 684, 633. Wisely, the Trustee did not rely on Wilcock's incomplete and inaccurate interpretation. Instead, the Trustee confirmed his reading of the Policy with Security Life on a call. B685–694.

5. The Trustee confirms with Security Life that the $4 million death benefit ends at attained age 100 and tells his brothers.

About a year after reading the Policy and conferring with his financial advisors, the Trustee confirmed his understanding during a February 2011 call with Security Life. *Id.* On that call, the Security Life representative told Mr. Nowak that "Basically this—this policy's got a maturity date of February 21, 2016, and at that point in time if the insured is still alive, basically [the] payout [is] whatever the surrender value is at that point in time." B689 (cleaned up). Mr. Nowak followed up: "Okay. Now, if she dies before then, then the payment is the 4 million; is that correct?" B689–690. The representative confirmed: "Correct, it's 4 million …" B690. After more discussion, Mr. Nowak triple checked with the representative:

> MR. NOWAK: So there's no way of continuing the policy after one hundred?
>
> MR. JOHNSON: Correct.
>
> MR. NOWAK: So it's dead at a hundred.
>
> MR. JOHNSON: Correct.
>
> MR. NOWAK: Okay. I gotcha. Okay. Well, thanks for the clarification.

B693.

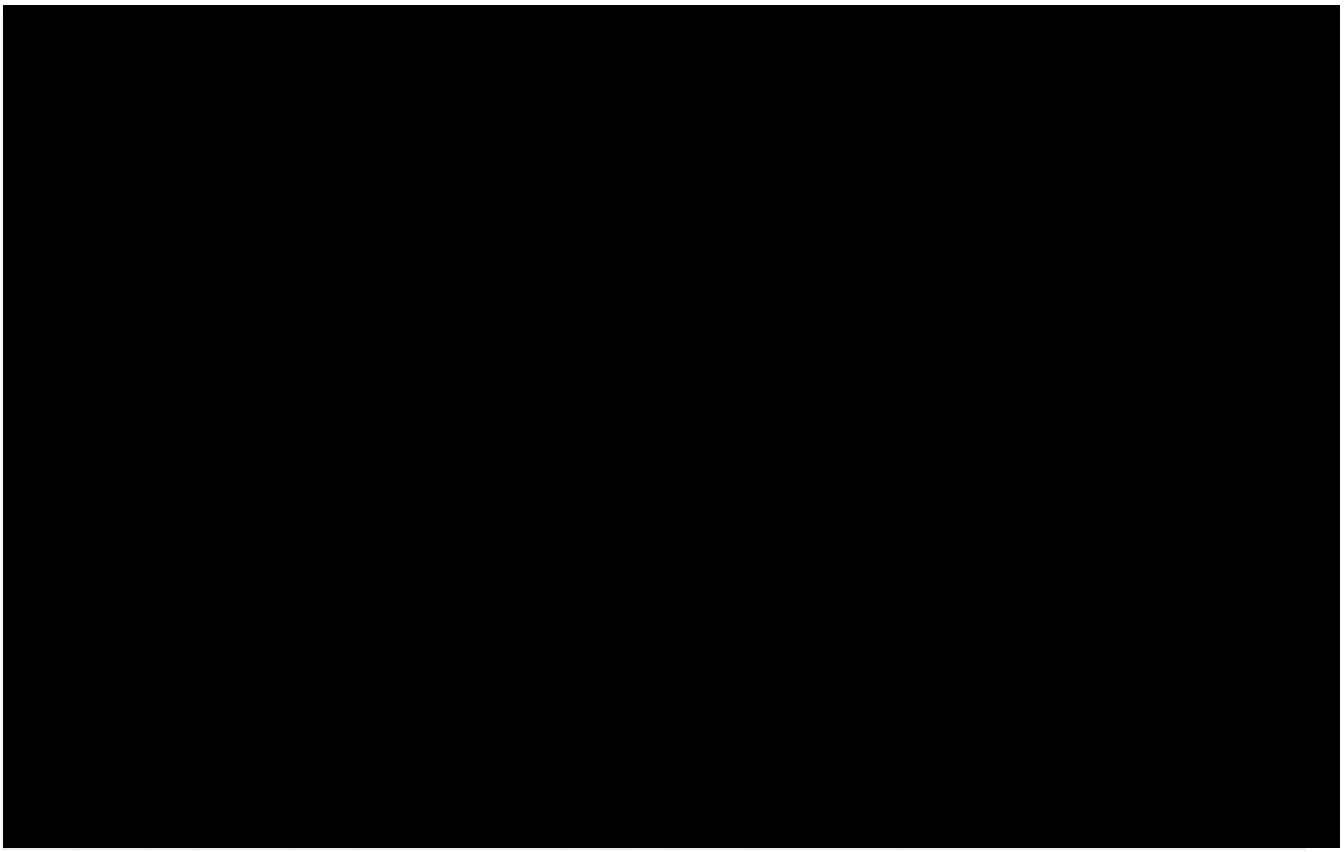
A few weeks later, he met with Wilcock about the Policy, now mindful his mother may outlive the coverage. B679–680. Wilcock took notes from the meeting that show that the Trustee was weighing different options, including "surrendering

the policy at age 98." *Id.* They also show that Mr. Nowak grappled with the risk of surrendering early, weighing the risks of keeping the Policy. *Id.* [redacted] *Id.* When Wilcock asked to visit Ms. Nowak, Mr. Nowak joked, [redacted] *Id.*[2]

The notes also show that Wilcock proposed suing Security Life over the faulty illustrations—understanding then, it seems, that those intermediate 2005–2009 illustrations were inaccurate. *Id.* [redacted]

Ultimately, the Trustee kept the Policy. As Ms. Nowak's 100th birthday neared, the question was not whether the $4 million ended at 100 but whether it ended on her 100th birthday in August 2015 or attained age 100 in February 2016. B698. Once again, the Trustee answered that question—by simply reading the Policy:

[2] Security Life includes this statement not to disparage Mr. Nowak's reputation, but to illustrate his knowledge of what would happen if Ms. Nowak lived beyond 100.



Id. In interpreting the Policy, the Trustee reached the same interpretation that the lower court did: If Ms. Nowak passed before attained age 100, the Trust receives $4 million; if she passed after, the Trust receives the surrender value. *Id.*

6. Ms. Nowak lives past attained age 100. The Trust sues and loses.

In February 2016 Ms. Nowak reached attained age 100. B590. Four months later, she passed away. *Id*. Following her death, the Trust did not submit an insurance claim. Instead, it sued Security Life and its parent holding company, VFI, alleging that $4 million was owed regardless of Ms. Nowak's age or what the Policy said.

The Trust initially sued VFI in May 2017 and added Security Life as a defendant in September 2017. B8. After discovery, each party moved for summary judgment. On November 30, 2020, the trial court granted Defendants' summary

judgment motions and disposed of all claims, adopting Defendants' arguments as its basis for doing so.[3] B1. The Trust noticed this appeal on December 22, 2020.

[3] The lower court did not grant Defendants' summary-judgment motion on the affirmative defenses, including their defense of limitations. B1. It denied the motion as moot after granting Defendants' summary-judgment motions on the Trust's claims. B1.

ARGUMENTS AND AUTHORITIES

1. Security Life did not breach the Policy because the Policy did not entitle the Trust to $4 million after Nowak turned 100.

A. Question Presented

Whether this Court should affirm the trial court's summary judgment ruling that Security Life and VFI did not breach the Policy by declining to pay the $4 million benefit. B969–971, 992–996, 1005, 15–19.

B. Legal Standard and Scope of Review

Security Life agrees with the Trust that the trial court's summary judgment order is reviewed *de novo*.

C. Merits of the Argument

(1) Principles of Contract Interpretation

A life insurance policy is a legal contract. "Delaware adheres to the 'objective' theory of contracts, i.e., a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). Delaware's rules for contract interpretation "give[] meaning to every word in the agreement[,] and avoid[] interpretations that would result in 'superfluous verbiage.'" *Khan v. Delaware State Univ.*, No. CV N14C-05-148, 2017 WL 815257, at *4 (Del. Super. Ct. February 28, 2017).

"To determine what contractual parties intended, Delaware courts start with the text." *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d

836, 846 (Del. 2019) "'When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions,' without resort to extrinsic evidence." *Id.* (citation omitted).

Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005); *see also Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 558 (1904) ("where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms").

These rules of contract interpretation apply equally to insurance policies. "Clear and unambiguous language in an insurance policy should be given its ordinary and usual meaning." *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).[4] When a Policy is unambiguous, "'a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.'" *Id.* (citing *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398, 399 (Del. 1978)).

[4] The Policy was issued in Virginia and is governed by Virginia law, which is identical to Delaware law on these issues. *Harleysville Mut. Ins. Co. v. Dollins*, 109 S.E.2d 405, 409 (Va. 1959).

(2) The Policy clearly and consistently states that the $4 million face amount was available only until attained age 100.

The Trust claims that the Policy provides the $4 million face amount upon the insured's death, no matter when that occurs. Though the Trust points scattershot to other parts of the Policy, the core of this dispute is about the Policy Proceeds section on pages 15 and 16, which even the Trustee repeatedly referenced in his interpretations and correspondence. B639–640.

The "Policy Proceeds" section defines what benefits are payable and when. The section contains two key provisions. The first, titled "Proceeds Payable at Death **Prior to Attained Age 100**" says that if — *if* — the insured dies before age 100, then "We will pay the Death Benefit Proceeds," which "will equal" the "Death Benefit," which in turn equals the "Face Amount" ($4 million) less deductions or debts. B639. But, for "**Continuation Beyond** Attained Age 100," "the Death Benefit at any time will be the Surrender Value." B640. The Surrender Value is "the Cash Value less any Debt." B633. This provision also halts any further charges and premiums. *Id.* Read together, the face amount is available until attained age 100, at which time all charges in and out of the Policy stop. This accords the Policy Schedule showing life insurance benefit available for only 17 years. B630.

Disregarding the plain meaning, the Trust insists the $4 million is due even after attained age 100. It reads the "Continuation" provision backwards to mean that the Surrender Value somehow becomes the $4 Million (the Face Amount) rather

than the Death Benefit becoming the Surrender Value. Brief at 31–32. This flips the terms: the Policy plainly says the "Death Benefit will be the Surrender Value." B640. "Surrender Value" is the fixed term. Lest there be any doubt, the very next sentence of that provision confirms that "The Surrender Value at any time [after attained age 100] will be the Surrender Value at Attained Age 100" increased with interest and reduced by any debts:

Continuation Beyond Attained Age 100
The Policy will be continued beyond Attained Age 100, if at Attained Age 100 the Insured is living and this Policy is in force. During such continuance, the following applies to your Policy:

1. The Death Benefit at any time will be the Surrender Value.
2. The Surrender Value at any time will be the Surrender Value at Attained Age 100 increased with interest in the same manner as prior to Attained Age 100 less any Debt and withdrawals occurring after Attained Age 100.
3. No further Monthly Deductions will apply.
4. No more premiums may be paid.

If the Trust's reading is accepted, then Surrender Value becomes $4 million, yet also somehow remains as the Surrender Value "at Attained Age 100" less debts. The Trust's exegesis gives the term two contradictory meanings. The Trust's reading ignores this point completely. Instead, the Trust accuses Judge Wharton of "tak[ing] a single sentence out of the context and construes it to conflict with other Policy provisions." Brief at 29. But it is not a "single sentence," it is an entire provision. And it is not out of context, but plainly follows the "Before Attained Age 100" provision on the page prior and accords the Policy Schedule showing that the Policy provides seventeen years of benefit.

(3) Other Policy provisions consistently show only 17 years of insurance coverage to age 100—not a Face Amount payable at "any age."

The Trust ignores the referenced Policy Schedule and other Policy provisions. B630. Above the definitions on which the Trust focuses, the Policy Summary urges the reader to "check th[at] Schedule," to "be sure it reflects the type and amount of insurance [] requested." B631. Other issuance documents say the same. The illustration signed at application only shows the $4 million extending to Policy year 17, at the Insured Age 100. B321–326. Additionally, both Policy riders are available for only 17 years. B630. The Statement of Policy Cost and Benefit, also provided at application, states that the Policy "Matures at Age 100" and shows the $4 million payable only through 100. B676–677, 549–550. The Trust disregards these manifold statements.

Rather than addressing the complete Policy Proceeds section, the Policy Schedule, the Riders, and the Statement of Policy Cost and Benefit, the Trust pretends (as it must) that they do not exist. But Delaware law requires the Policy to be read as a whole. *Osborn ex rel. Osborn*, 991 A.2d at 1159 . When it is, the terms are clear.

(4) The Trust willfully misreads the Policy's definitions and ignores other provisions entirely.

The Trust claims that the "flow of definitions" is clear, (Brief at 31), but then misreads those definitions. While the Face Amount is "used to determine the Death

Benefit," that does not mean it always equals the Death Benefit. *Id.* If the two terms were always equal, then having two defined terms would be superfluous. The Death Benefit *is* "applicable in determining" the "Death Benefit Proceeds" (*id.*)—it's just that, if the insured lives long enough, that Death Benefit is reduced to the Surrender Value.

In reality, the chain of definitions runs from Face Amount to Death Benefit to Death Benefit Proceeds. The last link in that chain—Death Benefit Proceeds—directs the reader to "See the Policy Proceeds section at pages 15-16," which includes the Continuation Beyond Attained Age 100 provision. B631–632 In any event, the Policy definitions do not conflict with the Continuation Provision, as the Trust claims: they *incorporate* and refer to it. That provision then employs the definitions, stating that the "Death Benefit" equals the "Surrender Value."

That last term in the definitional chain, "Death Benefit Proceeds," is defined as "the amount payable to the Beneficiary at the Insured's death if the Policy is in force." It is *not* defined as $4 million, nor any other static amount. It certainly does not say it is always equal to the Policy's Face Amount, as the Trust argues. The terms are separately defined because they have different meanings.

Stripped down, the Trust argues that $4 million was *guaranteed* and would be paid either on the insured's death or could be cashed in after the insured turned 100. Nothing in the Policy says that, nor does the "Continuation" provision remotely

suggest that $4 million became instantly available upon the insured turning 100. When read as a whole, the Policy plainly leads to the conclusion reached by Security Life, the Trustee upon first reading it, and the trial court.

(5) The Policy's terms are not illusory under the trial court's reading.

The Trust suggests that enforcing the Continuation Provision renders parts of the Policy illusory. It complains that reducing the Death Benefit to equal the Surrender Value conflicts with the Policy's Termination Provision and other Policy definitions. And it insists that enforcing the Continuation Provision violates consumers' reasonable expectations. None of these theories is true.

First, the trial court's interpretation does not conflict with the Policy's Termination Provision. The Termination Provision defines circumstances when the Policy may terminate, such as if premiums are not paid. B643. Obviously, though, under Security Life and the trial court's reading, the Policy did not *terminate* when Ms. Nowak reached age 100: it remained an enforceable contract, but the Death Benefit available was reduced to the Surrender Value.[5] The "Continuation" title on page 16 simply means that the right to receive the Surrender Value continues beyond

[5] Terminating the Policy at age 100 and paying the Surrender Value to the Policy owner (i.e., the Trust) could have tax consequences to the Trust. *See, e.g.,* Rev. Rul. 2009-13, 2009-21 I.R.B. 1029 (2009); B549. By allowing the Policy to remain in force and the Surrender Value to pass to the Trust as a Policy beneficiary, tax issues may be avoided. *See, e.g., Annuity & Life Ins. Contracts with A Long-Term Care Ins. Feature*, 2011-36 I.R.B. 205 (2011); B549.

age 100, though other contractual rights and obligations change.

The Trust further argues that because the Surrender Value is already present, defining the Death Benefit to equal it is senseless. This misses the point. Before age 100, the owner may surrender the Policy for the Surrender Value, and the Face Amount is payable as the Death Benefit Proceeds if the insured dies. The Continuation provision changes this so that the Death Benefit Proceeds payable at death is the Surrender Value. That the owner may still surrender the Policy after age 100, rather than waiting for the insured to pass, does not render the provision redundant.

Nor is this reading inconsistent with any consumers' "reasonable expectations." Brief at 32. A reasonable consumer would expect to receive exactly what the Policy provides (seventeen years of life-insurance benefits). It is why the Trust was asked to read the Policy carefully when the Policy was originally delivered and why the Trust had the right to return the Policy during a 10-day free look period. Here, when the Trustee finally got around to reading the Policy, he understood exactly what would happen when the insured reached the attained age of 100.

(6) Third parties, like the Trust's financial advisor, cannot alter the Policy.

The Trust finally tries to bolster its reading with third-party interpretations that it says support its reading. Those third parties—primarily Mr. Wilcock—are the Trust's biased financial advisors who did not even have the complete Policy to

evaluate.

That Wilcock may have agreed with the Trust is irrelevant. Though the Trust tries to paint Wilcock as Security Life's agent, Mr. Nowak used Wilcock for his personal financial planning years before (mid-90s) and considered Wilcock to be his financial advisor. B253–254. Wilcock also helped with Ms. Nowak's estate planning, beyond just the Policy. B254. He advised her to create a charitable trust, for which he set up annuities and mutual funds to generate income. B254–255. Moreover, when Mr. Wilcock made the passing statement to the Trustee that he thought the $4 million would still be payable, he was not even appointed with Security Life, and his statements are not imputable to it. B127–128, 138–139, 587–589, 684. He did not have a copy of the Policy in his possession and could not have analyzed it as a whole, as the trial court did and as this Court must. *Id.* Even if he was somehow Security Life's agent, an agent cannot change the Policy's terms. B642.

Most importantly, contract interpretation is the Court's domain, not Mr. Wilcock's. *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997) ("the interpretation of contract language is treated as a question of law"). A lay witness's contract interpretation—even when that witness actually has the contract to interpret—has no legal effect.

(7) The Trust is not otherwise entitled to contract benefits.

The Trust finally claims if the trial court's interpretation is correct (and it is), the "conflicts" the Trust concocted between the definitions of Face Amount and Death Benefit require the "conflict be resolved in favor of the Plaintiff." Brief at 34. The Trust does not actually label the Policy ambiguous; to the contrary, it argues elsewhere the Policy is unambiguous. But if the Policy is unambiguous, it is unclear what "conflict" the Trust wants this Court to resolve in its favor.

If the Trust is trying to manufacture an ambiguity, it fails. "[C]ontract language must be susceptible to two or more *reasonable* interpretations to be deemed ambiguous." *Fisher v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 95C-06-307, 1997 WL 817893, at *2 (Del. Super. Ct. Dec. 11, 1997).[6] Because interpretational disputes are easy to fabricate, the Court cannot render a policy "ambiguous solely because parties do not agree as to its construction." *Id.* (citation omitted). Rather, "[a]n insurance policy is ambiguous 'only when the provisions in controversy are *reasonably* or *fairly* susceptible of different interpretations or may have two or more different meanings.'" *Id.*

Here, the Trust posits, with no contractual basis, that the $4 million is to be paid regardless of when the insured dies. For that result, the "Continuation Past Age

[6] Virginia law is again identical. *See Am. Bankers Ins. Co. of Florida v. Jefferson Pilot Fire & Cas. Co.*, 21 Va. Cir. 3 (Va. 1989) (emphasis added).

100" sub-section of the Policy must be read out of the Policy completely, and the Policy Schedule, riders, and at-issuance documents must be ignored. The Court must ignore that the Policy defines Face Amount, Death Benefit, and Death Benefit Proceeds independently and differently. Putting on blinders to read the Policy is unreasonable. Only one fair and reasonable interpretation of the Policy language exists: after the insured reaches the attained age of 100, only the Policy's Surrender Value is owed.

The Trust finally tries to create statutory liability by claiming the Policy violates 18 Del. C. § 2927, which forbids a Policy from containing a provision for settlement "of less value than the amount insured." Brief at 34. The dispute here is about what amount *was* insured after age 100. Regardless, (as addressed below) no private right of action exists under Chapter 18, so the Trust cannot ground a claim on it. Even if it could, the remedy for violating the provision is that a Policy shall not be "delivered or issued for delivery in this State." 18 Del. C. § 2927. But this Policy was issued in *Virginia* for delivery in either Virginia or Maryland, where the Trustee resided. B654, 659 676. And, Delaware's insurance department approved the Policy form. B701.

The Trust's authorities do nothing to illuminate how the Policy's terms violate public policy. It cites two cases in support, but neither helps. *Frank v. Horizon Assurance Co.* held that an "other motor vehicle" exclusion, which excludes

coverage for a claim arising out of an accident involving a vehicle owned by the insured but not listed on the policy, is void. *Frank* reasoned that, because uninsured-motorist coverage is personal to the insured not the vehicle, public policy prohibited a limitation on the coverage based on how the insured is injured. 553 A.2d 1199, 1205 (Del. 1989). *Frank* has no applicability to the case at hand.

Similarly, *O'Brien v. Progressive* is an auto insurance case that found that an insurer updating policy language in later policy forms was not an admission of an ambiguity in the first version of it. Regarding public policy, the case held only that accepting a post-remedial measure as evidence would discourage changes to contract forms. 785 A.2d 281, 286 (Del. 2001). How these cases connect to this life-insurance case is neither obvious nor explained.

2. Security Life is not liable under the Consumer Fraud Act because the Act does not apply to insurance cases nor representations made after the sale.

A. Questions Presented

Does the Delaware Consumer Fraud Act (CFA) permit a private right of action against an insurer where the insurer's conduct is subject to the jurisdiction of the Insurance Commissioner? B 973–975, 997–999, 1005, 22–26.

If a private right of action exists, does the Trust have a viable claim under the CFA where the alleged misrepresentations occurred years after the Policy was issued? B973–975, 997–999, 1005, 26–28.

B. Legal Standard and Scope of Review

Security Life and Voya agree that this Court reviews the grant of summary judgment *de novo*.

C. Merits of the Argument

(1) The Consumer Fraud Act does not apply to this insurance dispute.

As to the Delaware CFA claims, "[Section] 2513(a) of Delaware's Consumer Fraud Act is inapplicable to [a] private, non-administrative action." *Price v. State Farm Mut. Auto Ins. Co.*, No. CIV.A. N11C-07069RRC, 2013 WL 1213292, at *10 (Del. Super. Ct. Mar. 15, 2013), *aff'd*, 77 A.3d 272 (Del. 2013); *Christiana Care Health Servs., Inc. v. PMSLIC Ins. Co.*, No. CV 14-1420-RGA, 2015 WL 6675537, at *7 (D. Del. Nov. 2, 2015) ("[S]ection 2513(a) does not give rise to a private cause

of action for complaints against insurance companies."). Hence the Trust may not sue under § 2513.

The Trust disagrees, citing outdated cases. Two decades after those cases were decided, however, the Delaware Superior Court decided *Price*. 2013 WL 1213292. There, the court held that "§ 2513(a) cannot be read without the limitations provided in § 2513(b)(3)," which states that the CFA does not apply "to matters subject to the jurisdiction of the . . . Insurance Commissioner[.]" *Id.* at 10. *Price* found that because the "Insurance Commissioner is responsible for investigating complaints against insurance companies," the CFA "is inapplicable to this private, non-administrative action." *Id.*

Price was affirmed by this Court. *Price*, 77 A.3d 272. The Trust minimizes this Court's review by calling it a "summary affirmance." Brief at 36. But that "summary affirmance" came after the private-right-of-action issue was briefed and raised at oral argument. The appellant's brief argued that "The Superior Court erred in holding that the Delaware Insurance Commissioner's authority preempts any private right of action by an insured against his insurer pursuant to the Consumer Fraud Act [], 6 *Del. C.* § 2513[,]" which Price contended "contravened 25 years of [] precedent." *Edward F. Price, III, Plaintiff Below/Appellant, v. State Farm Mut. Auto. Ins. Co., Defendant Below/Appellee*, 2013 WL 3579492 (Del. Supr.), 31–32 (collecting cases).

At oral argument, this Court asked about the CFA, acknowledging the issue of the "private right of action" and "preempt[ion] by the insurance commission." *Edward F. Price, III, Plaintiff-Appellant, v. State Farm Mut. Auto. Ins. Co., Defendant-Appellee*, 2013 WL 6896480. When counsel tried to moot the question by claiming it was not pleaded, the Court pointed to the briefing (excerpted above):

> JUSTICE: Is there a fundamental legal [inaudible] difference between a, quote, bad faith insurance case, a general contractual duty of the implied covenant of good faith and fair dealing and the Consumer Fraud Act that you set forth in your brief as a basis for a private action that you argue is not preempted by the insurance commission? Or -- how does this all relate together?
>
> MR. SPADARO: Well, we -- we didn't plead the Consumer Fraud Act. We -- we -- we referred to it in a footnote to try to illustrate the kind of -- level of candor the general assembly would like to see [. . .]
>
> JUSTICE: It's in your -- what's in your brief, though.

Id.

This Court affirmed the Superior Court's decision "on the basis of and for the reasons set forth in its decision[.]" *Price*, 77 A.3d 272. Those "reasons" include the lack of private right of action because the matter fell within the province of the Insurance Commissioner, which the statute excludes. Subsequent decisions follow *Price. See Benson v. Amgaurd Ins. Co.*, No. CV 16-196, 2017 WL 2672078, at *4 (D. Del. June 21, 2017) (private parties "may not bring an [insurance] action under § 2513(a)."); *Christiana*, 2015 WL 6675537 at *7 (the Supreme Court of Delaware "recently affirmed a Superior Court judgment [*Price*] holding. . . that section

2513(a) does not give rise to a private cause of action [] against insurance companies."). The Trust cites both *Benson* and *Christiana Care* on other points (though it stretches their actual holdings), acknowledging the cases' significance and validity. Brief at 9.

Beyond the recency of these authorities, their reasoning is correct. The statute plainly states that it does not apply to "matters subject to the jurisdiction of the . . . Insurance Commissioner." As *Price* noted when it reached its conclusion, "§ 2513(a) cannot be read without the limitations provided in § 2513(b)(3)," which states that the CFA does not apply "to matters subject to the jurisdiction of the . . . Insurance Commissioner[.]" *Price*, 2013 WL 1213292, at 10. Because the "Insurance Commissioner is responsible for investigating complaints against insurance companies," the CFA "is inapplicable to this private, non-administrative action." *Id.* The same is true here.

(2) The Trust's contrary authorities are outdated and their reasoning fails the statute.

The Trust's central argument is that cases before *Christiana* and *Amguard* reached a different conclusion. Brief at 35–36 (citing *DiSimplico v. Equitable Variable Life Ins. Co.*, No. C.A. 85C-JA-79, 1988 WL 15394 at * 4 (Del. Super. Ct. Jan. 29, 1988)*; Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 663 (Del. Super. Ct. 1992), *aff'd*, 632 A.2d 63 (Del. 1993).)

But courts following *Price* note that prior authority and instead follow *Price*

on the strength of this Court's review. *Christiana* noted that, *despite* the prior, contrary authority, "The Delaware Supreme Court recently affirmed a Superior Court judgment holding, in the alternative, and *contra* the previous line of cases, that section 2513(a) does not give rise to a private cause of action for complaints against insurance companies." 2015 WL 6675537, at *7 (citing *Price*). Notably, even after "[a]ssuming for the sake of argument that [the CFA] does apply to private actions," did the *Christiana* court gave other grounds for dismissal. *Id.*

Further, the reasoning of the Trust's older cases does not lead to their conclusion that a private right of action exists under the CFA. *DiSimplico* (and now the Trust) point to Insurance Code § 2308(f) stating that an order from the Insurance Commission does not preclude another remedy against an insurer if that alternative remedy is otherwise available at law. *DiSimplico*, 1988 WL 15394 at *2 (citing 18 Del. C. § 2308(f).); *Whaley*, 622 A.2d at 663 (citing *DiSimplico*). In other words, a penalty levied by the Commissioner may be added to another civil remedy *if* that other remedy is otherwise available.

But the whole point of the CFA's exclusion at § 2513(b)(3) is that the remedy under the CFA is *not* otherwise available. That provision plainly states that the CFA does not apply "to matters subject to the jurisdiction of the . . . Insurance Commissioner[.]" So an insurer's wrongful conduct may be subject to an investigation and penalties by the Commissioner, and it may still be liable to a

private party for claims like breach of contract, bad faith, or common law fraud based on the same conduct. But it is, per § 2513(b)(3), exempt from CFA claims. Until the legislature changes the statute, the only way to permit a CFA claim against an insurer for conduct subject to the Commissioner's authority is to ignore § 2513(b)(3).

For its part, *Whaley* also noted that, when it was decided in 1993, the U.S. District Court in Delaware also reasoned that the private right of action was available—a condition now cured by *Christiana* and *Amguard*, described above. *Whaley*, 622 A.2d at 663 (citing *Correa v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 618 F. Supp. 915, 926 (D. Del. 1985)); *cf. Christiana*, 2015 WL 6675537 at *7 *and Benson*, 2017 WL 2672078 at *4.

The Trust also argues that "The legislature did not exempt 'insurance' from the broad definition of merchandise" at 6 Del. C. § 2511(6)). But the legislature *did* exempt insurance claims at § 2513(b)(3)—at least, it exempted claims subject to the purview of the Insurance Commissioner. At most, the Trust bickers with *how* the legislature chose to exempt the claim. But a plain reading of the statute cannot seriously claim that it did not do so.

Finally, the Trust points to a recent 2021 decision, *LCT Capital LLC v. NGL*, as supposed authority that this Court has affirmed the Trust's position because it "cited with approval" No. 565, 2019, 2021 WL 282645, at *12 (Del. Jan. 28, 2021) (citing *Lewis v. Citizens Agency of Madelia, Inc.*, 235 N.W.2d 831 (Minn. 1975)).

Hardly. That case cited *Lewis* only as an example of "authority allowing a plaintiff to recover benefit-of-the-bargain damages without an enforceable contract," a circumstance not present here *Id.* Moreover, the Minnesota case from the 1970's dealt with a representation to a woman made to induce her into an amended application and initiate new policy terms. This case deals with a policy that was issued and unchanged, and whose terms were available to the Trust had it simply bothered to read it. Above all, that Minnesota case did not decide Delaware's Consumer Fraud Act. It certainly did not hold that any "action lies" under the CFA for a misrepresentation made after a policy is issued. Brief at 38.

(3) The Trust's other statutory claims under Chapter 18 allow no private right of action.

Given Section 2513's inapplicability, complaints against insurers must instead be made under 18 Del. C. § 2301 *et seq*. Aside from its CFA claim, the two remaining statutory claims are for alleged Insurance Code violations.[7] But Chapter 18 contains no private right of action—its remedies are available only to the Insurance Commissioner. *Yardley v. U.S. Healthcare, Inc.,* 698 A.2d 979, 988 (Del. Super. Ct. 1996), *aff'd,* 693 A.2d 1083 (Del. 1997) ("This Act does not permit a private cause

[7] "Count VIII, is, . . . the illustrations concealed that the Policy violated Delaware law prohibiting settling life insurance policies at death for less than face amount," referring to 18 Del. C. § 2927(a). And, "Count IX, . . . is for misrepresenting Voya's involvement in violation of Delaware law" referring to 18 Del. C. § 2304(9). B998.

of action." (collecting cases)). These claims were properly dismissed.

(4) The CFA prohibits misrepresentations that induce a sale, not misstatements made years after a product was purchased.

Even if the Trust could sue under the CFA, the conduct it points to occurred after the Policy was issued. Under the CFA, misrepresentations are only actionable as related to the "sale, lease, or advertisement of merchandise." 6 Del. C. § 2513; *Johnson v. Gov't Employees Ins. Co.*, No. CV 06-408, 2014 WL 1266832, at *3 (D. Del. Mar. 26, 2014). The CFA only protects consumers in the procurement of merchandise; post-purchase representations are not actionable. *Benson*, 2017 WL 2672078 at *4 ("Plaintiff has failed to state a claim under § 2513(a) because the complaint does not allege that Defendant's conduct occurred 'as part of the sale, lease, or advertisement of the insurance policy.' " (citation omitted)); *Price*, 2013 WL 1213292 at *11 ("[Section] 2513(a) is inapposite because it protects consumers who are deceived while purchasing merchandise . . .."). In other words, the Trust must identify a misrepresentation made at or before issuance in 1999. Instead, its CFA claims are rooted in the inaccurate illustrations issued from 2004 to 2009.

To try and shoehorn its claim inside the statute, the Trust says "two illustrations were pre-issuance[.]" Brief at 38. But this is misleading. Two illustrations were issued pre-issuance, but neither say anything about the Policy offering $4 million after age 100. Both show that the Policy provided the $4 million only to age 100. B321–326, 331–335. They do not illustrate benefits to age 110, as

the later 2005–2009 illustrations did. *Id*. The Trust seems to think that because the at-sale materials only illustrate the $4 million to age 100, they do not preclude the possibility that $4 million might have been available to 110. This is nonsense. How there can be a misrepresentation for what was not represented is unclear.

The Trust's effort to treat the Policy as an installment contract similarly fails. First, the type of contract does not change the law. The statute limits concealments or misrepresentations used "in connection with the sale, lease, or advertisement of any merchandise." § 2513(a). The "merchandise" here is the Policy, and it was already purchased. Regardless, the premiums here were set out by the Policy from its inception. Those premiums paid the monthly insurance cost on the Policy. The Trust suggests that it may not have made any premium payments had it received accurate illustrations. This, of course, is unsupported by the record, as the Trustee did not review these illustrations when they were received. B288–289. And, the Trust did pay premiums when it received the at-issuance illustration showing the $4 million to age 100. That the Trust could have overfunded or prepaid on the Policy account (i.e., that the premium amount was not fixed) does not change the analysis.

The bottom line remains that the trial court's judgment correctly held that without a pre-sale misrepresentation, the CFA claims fail.

(5) There is no CFA claim for misrepresenting a contract's terms.

No CFA violation occurred because the alleged misrepresentations are about

Policy terms and a CFA claim cannot be based on a representation about contract terms. *Ridley v. Bayhealth Med. Ctr., Inc.*, No. N17C-04-306, 2018 WL 1567609, at *5 (Del. Super. Ct. Mar. 20, 2018); *Bresler v. Wilmington Tr. Co.*, 348 F. Supp. 3d 473, 492 (D. Md. 2018) ("misrepresentations related to the contractual provisions and obligations . . . cannot sustain a separate cause of action under the [CFA].").

The Trust claims that the illustrations misrepresented how long the Policy's coverage lasted (i.e., beyond age 100), but the length of coverage is a term of the Policy. Because this representation is about the Policy's terms, and because the Trust held the contract, this "misrepresentation" is not actionable under the CFA.

(6) The misrepresentation claims outside the illustrations also fail.

The Trust claims a misrepresentation in using Voya's name and logo "in dealing with the Policy owner, including in illustrations, conduct prohibited by 18 Del. C. § 2304(9)." This provision is also in the Insurance Code and not actionable. *Yardley,* 698 A.2d at 988. Regardless, no misrepresentation occurred in acknowledging that Security Life is a Voya Financial subsidiary (it is). Nor were any benefits or contract rights misrepresented. There was no false statement.[8]

[8] The Trust also claims the amount of damages for the imagined violations was undisputed. Brief at 39. It is wrong: SLD disputes the calculation, made by the Trust's expert, which is based on each premium payment made over the Policy's life. The Trust asked the Court to assume every premium payment resulted from a misrepresentation, though it never explains how that could be. Security Life made these arguments in opposition in summary-judgment briefing. B953.

3. The Trust's remaining claims (for unconscionability, unjust enrichment, and bad faith breach) cannot survive the disposition of its primary claims.

A. Questions Presented

Whether a contract agreed to by the parties and approved by state regulators is unconscionable just because the Death Benefit converted to the Surrender Value at a defined age. B976, 1001–1002, 1005, 29–32.

Whether premiums paid under a contract can be recovered through an unjust enrichment claim, though unjust enrichment claims are not permitted in the presence of a contract. B975–976, 1000–1001, 1005, 32–33.

Whether there can be any bad-faith breach of contract where the insurer's interpretation is at least reasonable, even if ultimately rejected by a Court. B971–972, 996, 1005, 19–22.

B. Legal Standard and Scope of Review

Security Life and Voya agree that this Court reviews the grant of summary judgment *de novo*.

C. Merits of the Argument

(1) No factual dispute saves the Trust's unconscionability claim.

The Trust also brought—and Judge Wharton rightly dismissed—a claim that the Policy's terms are unconscionable. On appeal, the Trust now claims, for the first time, that the Policy contract is unconscionable because the Trust was not shown the Policy "until it was purchased," because some retroactive payment was required, and

was "never told there was any age limitation." Brief at 41.

Of course, the Trust never complained when it received the Policy, did not even read the Policy when the Trustee received it, and had a free-look period where it could have returned the Policy for any reason. The Trust then simply reiterates that "settling a life insurance contract at maturity for less than the face amount is against public policy," echoing again its statutory claim under Chapter 18 for which there is no private right of action.

(2) No factual dispute saves the Trust's unjust enrichment claim.

The Trust paid $3.2 million in premiums over seventeen years for the coverage provided by the Policy. It now claims that the $3.2 million was not paid under the Policy, but rather "arises from the misrepresentations in the illustrations, which are not part of the contract." Brief at 42. This is nonsense, and there is no dispute about what those funds were: even the Trust calls them "premiums." Brief at 43. A premium is by definition the amount required *by the Policy* to pay for the insurance provided through the Policy. B635. Security Life provided the coverage it said it would provide in exchange for the premium payments. Further, in the face of a contract, the unjust enrichment claim fails. *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009) ("[w]hen the complaint alleges an express, enforceable contract that controls the parties' relationship . . . a claim for unjust enrichment will be dismissed." (citation omitted)).

(3) No factual dispute saves the Trust's bad-faith breach of contract claim.

Nor does any factual dispute save the bad-faith claim. First, because the Policy was not breached, the bad-faith claim must be dismissed. *See Enrique v. State Farm Mut. Auto-Mobile Ins. Co.*, No. K12C-10-028, 2015 WL 6330920, at *3 (Del. Super. Ct. Oct. 14, 2015).[9] Regardless, Security Life's interpretation, even if ultimately rejected, is at least reasonable—even the Trustee reached the same interpretation, and Judge Wharton agreed with it in granting summary judgment. Because it is at least reasonable, it forecloses a bad-faith claim. *See Feingold v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, No. CIV. A. 90C-08-013, 1991 WL 269885, at *5 (Del. Super. Ct. Nov. 19, 1991).

[9] Virginia also requires coverage as a condition to a bad-faith claim, which sounds in contract. *Reisen v. Aetna Life and Casualty Co.,* 225 Va. 327, 302 (Va. 1983). Virginia courts also consider whether the insurer's conduct was based on a reasonable interpretation. *Cuna Mut. Ins. Soc. v. Norman*, 237 Va. 33, 38 (Va. 1989).

4. The Trust lacks standing to sue Security Life or Voya.

A. Question Presented

Under Delaware law, does a trust have capacity (and therefore standing) to sue, or must the suit be brought by the Trustee? *Sua sponte* issue, B1053, 1083.

B. Legal Standard and Scope of Review

The question of standing was not part of the trial court judgment, but any summary-judgment ruling would be *de novo*.

Standing may be raised and evaluated *sua sponte* by a Court. Regardless, any standing is a "constitutional question" and so may be raised by a Court *sua sponte*. *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194, 208 (Del. Super. Ct. 2020) (citing *Mills v. Trans Caribbean Airways, Inc.*, 272 A.2d 702, 704 (Del. 1970) ("[S]tanding to present a constitutional question is so fundamental as to permit examination thereof at any time, including inquiry by the Court Sua sponte.").

C. Merits of the Argument

This lawsuit was not brought by the Trustee but by the Trust, which Delaware law does not permit. This Court should dismiss its claims because it lacks standing.

Trusts are not independent legal entities and lack the capacity to sue or be sued. *See* 1 A. Scott & W. Fratcher, The Law of Trusts § 2.3, at 41–42 (4th ed. 1987) (describing a trust as a relationship); Restatement (Third) of Trusts §§ 2, 3, 105, 107 (same; and, claims against trust are brought against *trustee*, and claims against other

parties are brought *by* trustee) (2003). Delaware law accords this general rule. *Mennen v. Wilmington Tr. Co.*, No. CV 8432-ML, 2013 WL 4083852, at *9 (Del. Ch. July 25, 2013) ("[u]nder the current state of [Delaware] law, the common law rule is that a trust is ***not*** a separate legal entity, unless specifically defined as such for purposes of a particular statute." *Id.* (emphasis added).) The only exception is that a *statutory* trust may sue. *Cf.* 12 Del. C. § 3804(a). The Olga J. Nowak Irrevocable Trust is not a statutory trust, but an irrevocable life insurance trust. B660.

In the trial court, the Trust cited cases where trusts sued, but the trusts in those cases were statutory. *See City Investing Co. Liquidating Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1195 (Del. 1993) (liquidation trust was a statutory trust because "Section 279 of the General Corporation Law permits the appointment of a trustee or receiver at the behest of any creditor or stockholder…"); *In re Dow Chemical Intern. Inc.*, No. CIV. A. 3972-CC, 2008 WL 4603580, at *2 (Del. Ch. Oct 14, 2008) (regarding a § 279 corporate-dissolution trust).

Under Delaware law, the Trust lacks standing and capacity to sue. Instead, the Trustee must bring suit. Even the Trust document states the *Trustee* "is exclusively empowered to…prosecute or defend any action for the protection of the Trust[.]" B668–669. On this basis, its claims should be dismissed.

5. The rest of the Judgment should not be vacated and was not merely dicta.

A. Question Presented

Is a substantive, alternative basis for a trial court ruling merely "dicta"? Can this Court "vacate" parts of an order as dicta? B29.

B. Legal Standard and Scope of Review

While summary-judgment orders are reviewed *de novo*, the Trust here asks this Court to define what is dicta and to vacate parts of an order that are dicta. This relief is so unusual it is unclear what standard of review to apply, as the review the Trust seeks is inappropriate. The Trust provides no authority on the issue.

C. Merits of the Argument

(1) The affirmative defense motions were properly denied as moot—regardless, Security Life would also succeed on them.

If this Court affirms, then the Trust's summary judgment motion on affirmative defenses is indeed moot. The Trust agrees, and only asks the Court to rule on the affirmative defense briefing because it believes the trial court erred in granting summary judgment on the affirmative claims. But even if this Court considers the summary judgment motions on the affirmative defenses, Security Life would still succeed. As described earlier, those affirmative defenses include the Trust's lack of capacity to sue. Additionally, many of its claims were barred by limitations, as the alleged inaccurate illustrations were corrected about seven years

before the Trust sued. Those arguments are independently meritorious, even if there were somehow a contract violation.[10]

(2) The Court's footnoted reasoning is not dicta.

The Trust finally argues the remainder of the Judgment is dicta and should be vacated. It takes particular issue with footnote 115, which decided the merits of the Trust's equitable claims. Above the line, the Court found no jurisdiction for those claims, but in the footnote it alternatively held the claims lacked merit because

> Count IV, Reformation Due to Mutual Mistake fails because, at a minimum, the Defendants were not mistaken as to the Policy's terms. Count V, Reformation Based on Mistake Coupled with Inequitable Conduct fails because any unilateral 'mistake' on the Trust's part arose only as a result of the 'misleading' illustrations and not when the Policy was issued" and because "there is no reason to believe that SLD was aware of the Trust's alleged mistaken understanding.

B29 (citations omitted).

The Trust seeks to vacate that footnote to keep its equitable, reformation claims alive by transferring them to Chancery Court under 10 Del. C. § 1902. But § 1902 only permits a transfer if lack of jurisdiction was the *sole* basis for dismissal. Del. Code Ann. tit. 10, § 1902 ("No civil action, suit or other proceeding brought in

[10] VFI also cannot be liable because it was not a party to the Policy. B1006–1008. VFI is a holding company; it does not issue or administer insurance policies, nor is it authorized by any state to do so. B304–308. Its sole connection is that it is Security Life's parent company, which alone cannot create liability. *See BASF Corp. v. POSM II Properties P'ship, L.P.*, No. CIV.A. 3608-VCS, 2009 WL 522721, at *8 n.50 (Del. Ch. Mar. 3, 2009).

any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal."). Footnote 115 is not dicta; it provides alternative, substantive grounds for ruling against the Trust. Because it does, no transfer is warranted. Without any supporting authority, the Trust seeks to vacate the trial court's substantive ruling to have a second shot at its equitable claims in a new court. This Court should decline that gamesmanship and affirm the judgment, including the footnoted ruling.

CONCLUSION

For these reasons, the Court should affirm the trial court's summary judgment.

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Corrected Date: March 16, 2021

CERTIFICATE OF SERVICE

I certify that, on March 23, 2021, I caused a copy of the public redacted version of the *Corrected Appellees' Answering Brief* to be served by File and *ServeXpress* on the following counsel of record.

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