PUBLIC VERSION
Filed April 16, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAVASTONE CAPITAL LLC,	)	
	)	No. 75, 2021
Defendant-Appellant,	)	
	)	Certification of Questions of
v.	)	Law from the United States
	)	District Court for the District of
ESTATE OF BEVERLY E. BERLAND,	)	Delaware
	)	
Plaintiff-Appellee.	)	No. 1:18-cv-02002-SB

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This proceeding addresses certified questions of law from the United States District Court for the District of Delaware. The underlying case arises out of Beverly Berland's procurement of a life insurance policy insuring her life using a nonrecourse loan and her subsequent sale of that policy in 2008 to Lavastone. Following Berland's death in 2015, Lincoln Benefit Life Company ("Lincoln"), the issuing insurance carrier, paid the death claim on the policy to Lavastone. Certification of Questions of Law, D.I. No. 157 ("Ex. A") §§ 1, 2 (¶¶ 2-3).

On December 17, 2018, Berland's estate (the "Estate") filed an action in the United States District Court for the District of Delaware seeking to invalidate Berland's sale of her policy and asserting that the Estate is entitled to the entire death benefit under 18 *Del. C.* § 2704(b) because the policy lacked an insurable interest at its inception due to unlawful wagering in violation of *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co*., 28 A.3d 1059. (Del. 2011) ("*Price Dawe*"); A42-44 (D.I. 45 ¶¶ 75-82).

On July 17, 2020, after the close of discovery, Lavastone and the Estate cross-moved for summary judgment. A11-12 (D.I. 86-96); Ex. A § 1. Lavastone argued, *inter alia*, that the policy was supported by an insurable interest because Berland procured the policy, but that in the event the court determined that the policy

lacked insurable interest, Berland's intentional sale of the policy and fraud in connection with that procurement and sale, and Lavastone's status as a purchaser for value of a securities entitlement under Section 8-502 of the Delaware Uniform Commercial Code, foreclosed any possible recovery by the Estate. A11 (D.I. 91).

On November 5, 2020, Judge Stephanos Bibas of the United States Court of Appeals for the Third Circuit was appointed to preside over the case. A17 (D.I. 154).

On March 2, 2021, Judge Bibas certified the following three questions to this Court:

1. If an insurance contract is void *ab initio* under 18 *Del. C.* § 2704(a) and *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust*, 28 A.3d 1059 (Del. 2011), is any resulting death-benefit payment made "under any contract" within the meaning of 18 *Del. C.* § 2704(b)?

2. Does 18 *Del. C.* § 2704(a) and (c)(5) forbid an insured or his or her trust to procure or effect a policy on his or her own life using a nonrecourse loan and, after the contestability period has passed, transfer the policy, or a beneficial interest in a trust that owns the policy, to a person without an insurable interest in the insured's life, if the insured did not ever intend to provide insurance protection beyond the con-testability period?

3. May an estate profit under 18 *Del. C.* § 2704(b) if an insurance policy in violation of 18 *Del. C.* § 2704(a) was procured in part by fraud on the part of the decedent and the decedent profited from the previous sale of the policy?

Ex. A § 5.

By Order dated March 12, 2021, this Court accepted the certified questions and directed that Lavastone be the appellant for purposes of the consideration of the certified questions. This is Lavastone's Opening Brief on the certified questions.

SUMMARY OF ARGUMENT

1. Because the policy at issue was procured and issued in accordance with the insurable interest requirements of Delaware law, Lavastone takes no position on the apparent ambiguity or inconsistency in Section 2704 noted by the District Court. As a practical matter, where a life insurance carrier pays a claim on a policy, that policy is not factually void *ab initio* because all contractual obligations have been performed. Moreover, Delaware law does not permit the insured's estate to recover where the insured's conduct contributed to the estate's claim that an insurable interest was lacking.

2. Under Delaware law, a life insurance policy procured by the insured with premium financing is not an unlawful wager and is freely transferable so long as the transfer complies with *Price Dawe* and the Delaware Viatical Settlement Act.

3. An insured's intentional sale of a policy, subsequent acquiescence to the terms of the policy's sale, or fraud in connection with the procurement or sale of that policy precludes the insured's estate from recovering under Section 2704(b).

STATEMENT OF FACTS

I. BERLAND PROCURES THE POLICY

In 2006, Beverly Berland approached a business called "Simba," hoping to engage in "life insurance capacity transactions." Ex. A § 2. As Simba explained it, these transactions would allow Berland to acquire life insurance that she could sell for cash on the secondary market. *Id*.

Berland agreed to participate in two transactions with Simba, including a transaction by which Lincoln issued policy number 01N1287587, insuring her life for $5 million (the "Policy"). To pay the premiums under the Policy, Berland applied for a nonrecourse loan. Ex. A. § 2.

To pay the Policy's initial premiums, Berland submitted an application for a nonrecourse loan from LaSalle Bank, N.A. under the bank's Premium Finance Plus Program ("PFP Program"). A60 (¶¶ 14-15), A221, A860, A1776-77 (¶¶ 7-9), A1779 (¶17). The PFP Program was governed by a series of arm's-length contractual arrangements between and among LaSalle Bank, N.A. ("LaSalle") and its then-parent company, ABN-AMRO, Lexington Insurance Company ("Lexington"), and certain Coventry entities that provided administrative services. A1776-77 (¶¶7-9), A1779-80 (¶¶17-18), A1785 (¶34).

Under the PFP Program, ABN-AMRO, through its subsidiary LaSalle, made retail loans to insureds like Berland, and Lexington insured the risk that those loans might not be repaid through its premium finance insurance coverage ("PFIC") program. A222-225, A1776-77 (¶¶ 7-9), A1779-80 (¶¶ 17-18). Each role played by the parties was governed by a specific program agreement that had been negotiated by ABN-AMRO, Lexington, and Coventry. A216, A1776 (¶¶ 7-9), A1782 (¶ 23), A1794 (¶ 63).[1] Coventry Capital I LLC served as LaSalle's Program Administrator and Sub-Servicer for all loans applied for and issued by LaSalle. A1670-96, A1445-60. Coventry Servicing LLC served as Lexington's PFIC Administrator and PFIC Liquidation Agent. A1698-1726.

The loan application Berland completed and signed included the documents necessary to form the Berland Insurance Trust (the "Trust"), which would own the Policy during the loan term as the borrower. A875-880. Because the loan was nonrecourse, the Trust agreement creating the Trust was designed and

[1] A1416-41 (Amended and Restated Sub-Servicing Agreement), A1445-60 (Amended and Restated Master Participation Agreement), A1464-1648 (Amended and Restated Credit Agreement), A1650-68 (Amended and Restated Security Agreement), A1670-96 (Amended and Restated Program Administration Agreement), A1698-1726 (Lexington PFIC Services and Liquidation Agent Agreement).

required by ABN-AMRO and LaSalle under the PFP Program to protect the lenders' security interest in the Policy (A1494-1495, A1512-13 (§ 7.2.2-7.2.3), A1535-1541, A1484 ("Loan Documentation Package")). Accordingly, Wilmington Trust was required to be named as trustee, along with the insured's selected co-trustee. *Id.* Berland was the Settlor of the Trust and she named her longtime live-in partner, Murray Roffeld, as Co-Trustee. Ex. A § 2, ¶ 1. Although the Trust was the borrower, it is undisputed, and the District Court found, that only Berland controlled the Policy's disposition as the Trust's Settlor under the PFP Program loan documents. Ex A § 2, ¶¶ 2-3.

The loan Berland obtained had a 26-month term. A869 ("*Scheduled Maturity Date"). If Berland died during the loan term, then the Policy death benefit would have been paid to the Trust and to the named Trust beneficiary, whom only Berland had the power to appoint or change. A60 (¶¶ 12-13), A875 (¶ 2), A879-80 (¶¶ 14, 16). At the end of the loan term, Berland alone could decide whether to: (i) repay the loan and keep the Policy; (ii) relinquish the Policy in full satisfaction of the loan, or (iii) sell the Policy on the open market, and retain any sale proceeds in excess of the loan balance. Ex A § 2, ¶ 3; A61 (¶ 17), A862 ("***Relinquishment***"), A224.

Under the agreements governing the PFP Program, if Berland relinquished the Policy in satisfaction of the loan or simply failed to repay it, then LaSalle could submit a claim to Lexington for the outstanding balance of the loan; Lexington would pay the claim and obtain LaSalle's rights to the Policy.[2] A224, A1779-80 (¶ 18). In the event that either LaSalle or Lexington obtained the Policy through foreclosure or relinquishment, they could not control to whom the Policy would be sold or transferred: the terms of their agreements with Coventry Capital and Coventry Servicing *required* them to sell the Policy to the highest bidder on the open market. A1421-22 (§ 3.04(c)); A1705 (§ 3.02). No PFP Program participant other than Berland could control when, to whom, or at what price the Policy was sold or transferred. Ex. A § 2, ¶ 3; A1776-77 (¶¶ 7-9), A1779-80 (¶ 18).

Once her financing application to LaSalle was approved, Berland, through Simba, submitted an application for the Policy to Lincoln. Berland's application contained a form that falsely stated she had $10,000,000 in assets and

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[2] Under the Amended and Restated Sub-Servicing Agreement, LaSalle had the option of foreclosing on the Policy and directing its Sub-Servicer, Coventry Servicing LLC, to sell the policy on the open market to the highest bidder rather than submitting a PFIC claim. A1421-22 (§ 3.04).

(Continued . . .)

$180,000 in annual income. Ex. A § 2, ¶ 2. Lincoln issued the Policy and the loan funded the premium.[3]

II. BERLAND SELLS THE POLICY

Berland engaged a number of life settlement brokers to market the Policy for sale on the secondary market prior to the LaSalle loan's maturity date. She ultimately accepted an offer from Coventry First LLC, acting on behalf of Lavastone,[4] that was presented to her by one of these brokers, Four Seasons Financial Group, in July 2008. Ex. A § 2, ¶ 3.

Coventry First LLC agreed to buy the Policy from the Trust for a purchase price of $453,822.88 pursuant to the terms of a Life Insurance Policy

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[3] Berland also participated in another transaction with Simba pursuant to which Security Life of Denver also issued a policy insuring her life for $5 million (the "SLD Policy"). In a prearranged sale, Berland sold the SLD Policy through a beneficial interest transfer in which the beneficial interest in a separate trust which Berland had established to own the SLD Policy was sold to an investor. A59 (¶ 10). The beneficial interest transfer resulted in a payment to Berland of $150,000. A59 (¶ 10), A794, A797, A813, A842. Following Berland's death, the SLD Policy was paid in full, and the Estate filed a separate action in Delaware District Court against the party that received that death benefit, which has been dismissed. *See* A58 (¶ 3) (*Estate of Berland v. Beverly Berland Insurance Trust*, C.A. No. 18-1493- MN, D.I. No. 51 at 1 (D. Del. May 5, 2020)).

[4] Pursuant to the Delaware Viatical Settlement Act (18 *Del. C.* § 7502), Coventry First LLC is a licensed viatical settlement provider (Search Results (Continued . . .)

Purchase Agreement (the "Purchase Agreement"). Ex. A § 2, ¶ 3; A1101-1177, A1119 ("Purchase Price").

In the Purchase Agreement, and at Berland's direction, the Trust represented that the Policy was incontestable and supported by an insurable interest. A1105 (§§ 3.1(iv), 3.1(ix), A1161-1164. The Trust also represented its understanding that a consequence of the sale "will be the loss of the death benefit . . . payable under the Policy to the current beneficiary or beneficiaries of the Policy being sold, transferred or assigned." A1132 (¶ 13). The Trust beneficiary and Co-trustee, Murray Roffeld, also waived, released and forever discharged any and all "claims of damages, demands, rights, actions, and causes of action of whatsoever kind or nature arising out of the assignment of the Policy to Buyer or the change of beneficiary of the Policy, including all rights to receiving any proceeds from the Policy." A1137.

Berland personally represented in the Purchase Agreement that all of her representations to the issuing carrier, as well as the Trust's representations in the

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for Coventry First, LLC, Nat'l Ass'n of Ins. Comm'ns, https://sbs.naic.org/solar-external-lookup/lookup/licensee/summary/1305543?jurisdiction=DE&entityType=BE&licenseType=VSB, last visited April 14, 2021) while Lavastone would meet the definition of a "financing entity." 18 *Del. C.* § 7502(5).

Purchase Agreement, were true and correct (A1166 (¶ 4, 14)) and that, "in accordance with any applicable laws, each of the original owner and original beneficiaries of the Policy had an insurable interest (as defined in, and required under, any state law or regulation governing the original issuance of the Policy) in the life of the Insured." A1166 (¶¶ 4-7), A63-65. Berland also agreed to indemnify Coventry First for any losses arising out of any claim by her Estate if the original owner or any beneficiary of the Policy lacked an insurable interest in her life. A1167 (¶ 14).

Berland directed the Trust to use the purchase price to repay the balance of the loan due to LaSalle. Berland retained the $73,594.05 difference between the sale price and the loan balance as profit.[5] Ex. A § 2, ¶ 3.

Lavastone acquired the Policy from Coventry First and assigned it to U.S. Bank, as securities intermediary, pursuant to a Life Policies Origination Agreement. U.S. Bank held title to the Policy, as well as any proceeds from it, in a securities account. A67-68 (¶¶ 38-41), A1154-55, A1202-71, A1308-09.

Berland died on November 9, 2015. A68 (¶ 45).

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[5] Coupled with her sale of the SLD Policy, Berland reaped a total profit of almost $225,000 as a result of the two separate life insurance capacity transactions in which she participated. A842, Ex. A § 2, ¶ 3.

U.S. Bank subsequently submitted a claim for the Policy's $5 million Policy death benefit. Lincoln paid the death benefit, which was deposited into Lavastone's securities account pursuant to a Securities Account Control Agreement between Lavastone and U.S. Bank. A67 (¶¶ 40-41), A68 (¶¶ 45-46), A69 (¶ 47), A1308-09.

On December 17, 2018, over a decade after Berland sold the Policy, the Estate filed the underlying lawsuit seeking the death benefit, ignoring the fact that Berland, who had sole authority to determine whether or to whom to sell the Policy, had sold the Policy, and, in doing so, specifically represented that the original owner and beneficiaries of the policy had an insurable interest therein, and released all claim to the policy's death benefit. A3 (D.I. 1), A42-44 (¶¶ 75-82).

ARGUMENT

I. BECAUSE THE POLICY WAS PROCURED AND ISSUED IN ACCORDANCE WITH THE INSURABLE INTEREST REQUIREMENTS OF DELAWARE LAW, LAVASTONE TAKES NO POSITION ON THE APPARENT AMBIGUITY OR INCONSISTENCY IN SECTION 2704 NOTED BY THE DISTRICT COURT.

A. Question Presented:

Certified Question 1: If an insurance contract is void *ab initio* under 18 *Del. C.* § 2704(a) and *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust*, 28 A.3d 1059 (Del. 2011), is any resulting death-benefit payment made "under any contract" within the meaning of 18 *Del. C.* § 2704(b)? Ex. A. at 7.

B. Scope of Review:

This Court reviews certified questions of law *de novo*. *Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument

Price Dawe holds that a policy that violates Delaware's insurable interest statute is "void *ab initio*" and never comes into force. *Price Dawe*, 28 A.3d at 1067-68. Where a life insurance carrier determines that a claim is payable and pays the claim, however, the policy may not be deemed factually "void" because the

contractual obligations of its parties have been performed.[6] If a subsequent attack on the policy were held to override the carrier's determination to pay, the carrier's payment would presumably be deemed gratuitous, and as the District Court postulated, no "contract" would exist at the time the payment was made. Question 1, as framed by the District Court, presents an issue that the parties did not raise. It also calls into question whether the estate of an insured who sold her policy may ever recover such a subsequent benefit payment, because no life insurance contract would have been operative at the time of payment. Lavastone, takes no position on this Question since the facts here clearly show that the Policy was supported by an insurable interest.

Moreover, as discussed below at § III(3), to the extent a policy were void *ab initio* under *Price Dawe* as an unlawful wager, Delaware law would prohibit an insured's estate from recovering under Section 2704(b) regardless of whether any

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[6] This is especially true here because the Policy contained a "Conformity With State Law" clause that states "[t]this policy is subject to the laws of the state where the application was signed. If any part of the policy does not comply with the law, it will be treated by us as if it did." A636 ("Conformity With State Law"). The application was signed by Berland in Florida. A576 (46:12-47:2). The Florida Supreme Court has held that a life insurance policy procured with the proceeds of a nonrecourse loan may not be challenged for lack of insurable interest once it has been in force for two years. *Wells Fargo Bank, N.A. v. Pruco Life Ins. Co*., 200 So. 3d 1202, 1204 (Fla. 2016).

"contract" existed where, as here, the insured was a willing participant in the purported unlawful wager that rendered the policy void.

II. UNDER DELAWARE LAW, A LIFE INSURANCE POLICY PROCURED BY THE INSURED WITH PREMIUM FINANCING IS SUPPORTED BY AN INSURABLE INTEREST AND IS FREELY TRANSFERABLE SO LONG AS IT COMPLIES WITH *PRICE DAWE* AND THE DELAWARE VIATICAL SETTLEMENT ACT.

A. Question Presented:

Certified Question 2: Does 18 *Del. C.* § 2704(a) and (c)(5) forbid an insured or his or her trust to procure or effect a policy on his or her own life using a nonrecourse loan and, after the contestability period has passed, transfer the policy, or a beneficial interest in a trust that owns the policy, to a person without an insurable interest in the insured's life, if the insured did not ever intend to provide insurance protection beyond the contestability period? Ex. A. at 7.

B. Scope of Review:

This Court reviews certified questions of law *de novo*. *Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument

The answer to Certified Question 2 is "no." As this Court recognized in *Price Dawe*, life insurance policies are freely transferable and Delaware law permits an insured to procure a policy on her own life, even if she has the intention of selling it later, so long as the policy is not an unlawful wager. *Price Dawe*, 28 A.3d at 1070

("all jurisdictions permit the transfer or sale of legitimately procured life insurance policies."). And Delaware law permits an insured to use premium financing to procure life insurance. 18 *Del. C.* § 4801. The only relevant question, then, is whether the loan transaction constitutes an unlawful wager under the *Price Dawe* factors, which are now codified in the Delaware Viatical Settlements Act. 18 *Del. C.* § 7501, *et eq*. (the "Act"). The District Court correctly found that there was no such wager, as it held that Berland had the sole and exclusive right to decide what to do with the Policy at all times.

Following *Price Dawe*, the Act established statutory requirements for the transfer of life insurance policies which are not applicable to the transactions at issue here but specifically permit the nonrecourse loan transaction and sale proposed by Certified Question 2. *See* 18 *Del. C.* § 7502(14)(c)(3) (excluding from the definition of "Viatical settlements contracts" "[a] loan made by a bank or other licensed financial institution in which the lender takes an interest in the life insurance policy solely to secure repayment of a loan or, if there is a default on the loan and the policy is transferred, the transfer of such a policy by the lender, if the default itself is not pursuant to an agreement or understanding with any other person for the purpose of evading regulation under this Act."). The Act also details what elements of a transaction are not permissible in connection with a loan, by defining a "Viatical

settlement contract" to include loans with certain characteristics, which are markers of a wager—but which do not appear in the transaction at issue here and are not posited by this Certified Question. *Id*. § 7502(14)(a) and (b). Under both the Act and *Price Dawe*, where an insured owns or controls her policy's disposition at its inception, there is no unlawful wager because no third party would profit from her death. As a result, absent the prohibited markers of a wager, Certified Question 2 must be answered in the negative because the transactions presented in the Question are lawful.

1. Delaware law specifically permits full transferability of policies and their use as investment products.

More than a century ago, in *Grigsby v. Russell*, 222 U.S. 149 (1911), the United States Supreme Court held that life insurance policies are fully transferable. *Grigsby* held that the common-law requirement that every life insurance policy must be supported by an "insurable interest"—that is, "an interest in having the [insured's] life continue"—does not prevent an insured from assigning her policy to a third party, even if the assignee does not have an insurable interest in her life. *Grigsby*, 222 U.S. at 155; *PHL Variable Ins. Co. v. Bank of Utah*, 780 F.3d 863, 867-68 (8th Cir. 2015).

The *Grigsby* decision laid the foundation for an extensive and lawful secondary market in life insurance policies, commonly known as the "life/viatical settlement" or "secondary" market in which insurance policies are bought and sold. The Delaware Insurance Code requires all life insurance policies to be supported by an insurable interest at inception (18 *Del. C.* § 2704(a)) but specifically permits and promotes the secondary market by making life insurance policies assignable to anyone, even a stranger, subject to any contractual restrictions in the policy. 18 *Del. C.* § 2720; *Price Dawe*, 28 A.3d at 1076. The Policy at issue here expressly permits assignment. A629-30.

In 2016, the Delaware Legislature asked the Delaware Department of Insurance to examine the secondary market and recommend legislation. As a result, the Legislature in 2017 enacted the Viatical Settlements Act "to establish strong consumer protections while protecting policyholder rights." Original Synopsis, https://legis.delaware.gov/BillDetail?LegislationId=25656 (last visited April 14, 2021). While not applicable to the underlying transactions here, the Act defines and limits "Viatical settlement contracts" and certain agreements made in connection with loans, and mandates licensing for life settlement providers and brokers and the use of contracts only after Department of Insurance approval. *See* 18 *Del. C.* §§ 7502(14), 7503, 7505. The Act was based on model legislation used by other

states that, in addition to consumer protections, defined and outlawed certain prohibited stranger originated life insurance ("STOLI") practices by which third parties lacking insurable interest procure life insurance on insureds. *See* Original Synopsis, https://legis.delaware.gov/BillDetail?LegislationId=25656 (last visited April 14, 2021).

The Act does not redefine or alter the requirement that all policies have insurable interest at inception, but balances the danger posed by STOLI activity with the benefit provided by the secondary market for life insurance. The Act mandates a five-year waiting period before an insured may enter into a "Viatical settlement contract" to sell a life insurance policy (18 *Del. C.* § 7511(a)) and treats certain types of premium finance loans as viatical settlement contracts (and thus impermissible for the statutory waiting period) *only if* they bear the hallmarks of an unlawful wager, including: (i) the viator or insured receives a guarantee of a sale price for a future sale of the policy; (ii) the viator or insured agrees to sell the policy later as a part of the loan transaction; (iii) the loan proceeds provide cash for purposes other than the loan; or (iv) where the lender is, as here, a bank, the future default has been pre-arranged. *See* 18 *Del. C.* § 7502(14)(b)-(c) (defining "Viatical settlement contract"). These codified markers of a wager are consistent with *Price Dawe*, which defined wagers to include any pre-arranged transfer of a policy to a third party. *Price Dawe*,

28 A.3d at 1075-76. The Act specifies clearly what agreements are not permissible after 2017 and these prohibited pre-arrangements are consistent with the prohibited practices identified by this Court in *Price Dawe*. *Id.*

2. An insured may procure a policy insuring her own life, name anyone as the beneficiary, and transfer the policy to anyone regardless of her intent at the policy's inception.

Delaware law follows *Grigsby* in permitting an insured to procure a life insurance policy and sell it to a third-party investor. *Price Dawe,* 28 A.3d at 1073. Under Section 2704 of the Delaware Insurance Code, an individual "may procure or effect an insurance contract ***upon his or her own life or body for the benefit of any person***." 18 *Del. C.* § 2704 (emphasis added); *Price Dawe*, 28 A.3d at 1073. An insured may even procure a policy on her own life with the express intent to sell the policy to an investor on the secondary market pursuant to the Act—including to a stranger who has no insurable interest in her life. *Price Dawe*, 28 A.3d at 1069-70, 1074–1076. Where an insured settlor's trust owns the policy at its inception, the trustee has the same insurable interest that the trust settlor has in her own life, so long as the insured creates and initially funds the trust. *Price Dawe,* 28 A.3d at 1077-78.

However, Section 2704(a) provides that a third party may "procur[e] insurance on the life of another" *only if*, "*at the time when such contract was made*," the death benefit is payable to a person with an insurable interest (*i.e.*, a close family member or other person with an enumerated relationship to the insured or an interest in having the life or bodily safety of the insured continued). *Price Dawe*, 28 A.3d at 1073 (emphasis in original); *accord*, 18 *Del. C.* § 2704(c). A corollary to that rule is that a third party having no insurable interest may not collude with an insured to evade the insurable interest requirement by having the insured procure a policy on the third party's behalf. *Price Dawe*, 28 A.3d at 1074.

As the Court stated in *Price Dawe*, an unlawful wager is one in which a third party, A, and the insured, B, both contemplate, at the time the insured takes out the policy, that B will transfer the policy to A, who lacks an insurable interest in B's life. *Id.* at 1075-76. Parties thus may not evade the insurable interest requirement by using a "pre-negotiated arrangement with the insured to immediately transfer ownership." *Id.* at 1078. As noted above at § II.C.1., such impermissible pre-arrangements described in *Price Dawe* in connection with a loan were subsequently codified in the Act and include pre-negotiated future transfers that are agreed at the time of the loan. *See* 18 *Del. C.* § 7502(14)(b).

The relevant inquiry, then, in determining whether a policy satisfies Section 2704(a) is not the insured's subjective intent in procuring the policy, but rather whether a third party, who would otherwise lack insurable interest, has used the insured as a straw-purchaser to procure ownership of the policy. *Id*. at 1074-76. Here, because Berland controlled the disposition of the Policy at all times and could direct Wilmington Trust, the Trustee, to sell the Policy to anyone, she was not a straw purchaser.

Berland had the exclusive right to all incidents of ownership from procurement of the Policy to its sale: she decided to approach Simba and engage in the life insurance capacity transaction (Ex. A § 2, ¶ 2); she applied for and executed the documents necessary to create the Trust and obtain the LaSalle loan and the Policy (*Id*.; A60-61 (¶13-16), A648-49, A860-909; A576 (45:18-25), A578-85 (57:14-21, 59:3-22, 61:10-69:12, 71:4-21, 75:18-77:25, 78:13-79:2, 80:1-8, 81:2-3); she decided, when the loan came due, whether to repay it and retain the Policy, surrender the Policy in satisfaction of the loan, or sell the Policy (Ex. A § 2, ¶ 3; A583 (74:4-16), A224); she decided to engage life settlement brokers to market the Policy and to sell the Policy for a significant profit (Ex. A § 2, ¶ 3); and she directed the repayment of the LaSalle loan from the proceeds of her life settlement. *Id*.

Berland's ultimate ownership and control of the Policy is thus indisputable, as is her insurable interest in her own life.

While Berland used a nonrecourse loan to fund the Policy premium through her Trust, the record here shows that the loan was lawful and that the bank made no wager. Far from being an unlawful wager, the evidence is undisputed that the Policy complies with Section 2704(a) because Berland applied for the loan for her own financial gain and owned and controlled the Policy's disposition from the outset.

3. No unlawful wager occurs where an insured procures a policy insuring her own life using lawful premium financing and controls the policy's disposition at its inception.

As noted above at § II.C.1, Delaware law permits an insured to use premium financing to pay policy premium. *See* 18 *Del. C.* § 4801; 18 *Del. C.* § 7502(14)(c); *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Tr.*, 869 F. Supp. 2d 556, 563 (D. Del. 2012) ("Premium financing allows an insured to obtain money from a bank to pay premiums on a policy which he intends to sell at a later date.").

A premium finance loan may be secured by outside collateral by the policy itself, and the latter type of loan is often referred to as nonrecourse. Ex. A § 2, ¶ 1; A60-61 (¶¶ 14-16); A1776 (¶ 8). In a nonrecourse loan, if the insured

defaults, the lender is limited to foreclosing on the policy to satisfy the loan. Because premium financing has well-accepted advantages—including increasing the amount of insurance an insured can afford and securing optionality at the end of the loan term—it is common, and financial planners, insurance companies, and advisors often recommend it.[7]

Under Delaware law, the form and content of premium finance agreements are regulated and certain premium finance lenders must be licensed. 18 *Del. C.* §§ 4802, 4806. National banks like LaSalle, which made the loan to the Trust here, are regulated by federal law and are exempt from the licensing requirement, but must comply with "all other provisions" of Chapter 48 of the Insurance Code ("Insurance Premium Financing") if they "engage in the business of financing insurance premiums in the state." *See* 18 *Del. C.* § 4810(a)(2).[8]

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[7] Premium Financing, Lincoln Financial Group, https://www.lfg.com/public/industryprofessional/insuranceannuities/productsandsolutions/individuallifeinsurance/premiumfinancing (last visited April 14, 2021); Premium financing for high-net worth clients, Equitable, https://equitable.com/selling-life-insurance/sales-ideas/wealth-transfer/premium-financing-high-net-worth-clients

(last visited April 14, 2021).

[8] Berland's premium finance loan was governed by Illinois law, which also exempts national banks from that state's premium financing statute. A865 ("Applicable Law"), A869; 18 *Del. C.* § 4806(a); 215 ILCS 5/513a1.

The record demonstrates that, in contrast to the policy at issue in *Price Dawe*, the LaSalle loan was not an unlawful wager to procure the Policy because neither the lender (LaSalle) nor any participant in the PFP Program under which the loan was made was wagering on Berland's life. As the District Court found, under the heavily negotiated PFP Program loan documents (i) no participant could control whether or to whom the Policy would be sold except for Berland (Ex. A p. 2, § 3), and (ii) Berland's hand-picked Trust beneficiary would receive the Policy's death benefit, net of the loan repayment, if Berland died while the LaSalle loan was outstanding. *See* A60-61 (¶¶ 12-17), A875, A879-80 (¶¶ 14, 16), A884 (§ 2), A1779-80 (¶ 18), A216-221, A223-224.

As noted above at pages 8-9, LaSalle and Lexington had no right to acquire any ownership interest in the Policy absent default, and they did not participate in the PFP Program to acquire policies. A221–225. Upon default (an event solely in Berland's control as Settlor of the Trust), LaSalle could foreclose on the Policy or submit a claim to Lexington, which would pay the claim and obtain subrogation rights to foreclose on the Policy. A885-87 (§§ 5-7(a)-(e)), A1779-80 (¶ 18), A1698, A1705-08 (Section 3.02), A1421-23 (Section 3.04). But under the parties' contracts, if either LaSalle or Lexington had received the Policy after foreclosure or relinquishment, it would be required to sell the Policy to the highest

bidder on the open market for salvage value and neither company could control to whom the Policy was sold. Accordingly, neither company could retain the Policy as a wager on Berland's life. A1698, A1705-08 (Section 3.02), A1421-23 (Section 3.04). Since only Berland controlled the Policy at its inception, neither LaSalle nor any other party to the PFP Program was wagering on her life.

Despite the evidence to the contrary, the Estate claims that "Coventry" procured the Policy as an unlawful wager. A42-44 (¶¶ 75-82). This argument relies entirely on a series of cases misapplying *Price Dawe* to the same loan program Berland used here.[9] The cases on which the Estate relies are readily distinguishable as in each case the court found based on an incomplete record concerning the PFP Program and the specific facts before it that a third party had made a wager on the insured's life—the critical element that is absent here. Moreover, except for *Estate*

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[9] *Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n*, 2016 WL 161598 (S.D. Fla. Jan. 14, 2016) ("*Malkin*"), *aff'd in relevant part per curiam*, 693 F. App'x 838 (11th Cir. 2017); *U.S. Bank Nat'l Ass'n v. Sun Life Assurance Co. of Canada*, 2016 WL 8116141 (E.D.N.Y. Aug. 30, 2016) ("*Van de Wetering*"), *report and recommendation adopted*, 2017 WL 347449 (E.D.N.Y. Jan. 24, 2017); *Sun Life Assurance Co. of Canada v. U.S. Bank N.A*, 369 F. Supp. 3d 601 (D. Del. 2019), *appeal pending*, No. 20-1271 (3d Cir. 2020) ("*Sol*"); and *Estate of Malkin v. Wells Fargo Bank, N.A.*, 379 F. Supp. 3d 1263 (S.D. Fla. 2019), *appeal pending*, No. 19-14689 (11th Cir. 2020) ("*Estate of Malkin*").

(Continued . . .)

of Malkin, each case involved carrier challenges after the contestability period, which were approved by *Price Dawe*.

The critical (and we believe) incorrect determination underlying the decisions on which the Estate relies—that "Coventry" procured each policy by paying premium or arranging financing so that it could acquire them as a cover for a wager on the insured's life[10]—cannot be supported by the record here. While several Coventry entities were involved in the procurement and sale of Berland's policy, the scope of their involvement was strictly limited by negotiated contractual arrangements, none of which gave any Coventry entity a right to acquire the Policy or otherwise wager on Berland's life.

As the record here demonstrates, "Coventry" did not control the terms of the PFP Program or fund any loans because funding came from ABN-AMRO. A225 ("**Loan Facility**"), A1779-80 (¶¶ 17-18), A1782 (¶¶ 23-25). This funding arrangement resulted in all security interests in each policy being assigned to ABN-

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[10] *Sol*, 369 F. Supp. 3d at 616; *Malkin*, 2016 WL 161598 at *17; *Estate of Malkin*, 379 F. Supp. 3d at 1276; *Van de Wetering*, 2016 WL 8116141 at *18.

(Continued . . .)

AMRO, the ultimate funder of the PFP Program.[11] A1652, A1655 (Art. II, § 2.1); A1779-80 (¶¶ 17, 18).

Coventry Capital I LLC acted as Program Administrator for LaSalle under an Amended and Restated Program Administration Agreement, and Sub-Servicer pursuant to an Amended and Restated Sub-Servicing Agreement pursuant to which it administered PFP Program loan applications and loans made by LaSalle and specifically disclaimed any ownership interest in loans or financed policies. A1416-1417 (Section 2.01), A1419-20 (Section 3.03), A1430 (Section 5.03), A1670-73 (Section 2.1), A1677 (Section 3.3). LaSalle was the actual lender, using funds ultimately provided by ABN, and its name was on each loan. A225, A1779-80 (¶¶ 17-18), A1782-83 (¶ 25). LaSalle earned interest on its loans and protected the value of its loan with credit insurance from Lexington. Coventry Capital I LLC earned fee income pursuant to the Amended and Restated Program Administration and Amended and Restated Sub-Servicing Agreement. A1419 (Section 3.02(d)), A1679-80 (Section 4.1).

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[11] LaSalle sold participations in the loans it made to a different Coventry entity, PFP Funding I LLC, but that is of no moment, as the Coventry entity transferred its rights in the loans to ABN-AMRO to secure funding for the loans. A225, A1652, A1655; A1779-80 (¶¶ 17-18).

As the District Court found, Coventry also exercised no control over the disposition of the Policy. Ex. A § 2, ¶ 3; *see* A1779-80 (¶¶ 17-18), A1786-87 ¶ 38). The only time Coventry (or any other party) could receive any rights in the Policy under the PFP Program would be if Berland elected to default on the loan or surrender the Policy to satisfy the loan. Even in those circumstances, neither Coventry nor anyone else had any right to benefit from the Policy. Under the Lexington PFIC Services and Liquidation Agreement, Coventry Servicing LLC served as Lexington's liquidation agent in the event Lexington obtained subrogation rights to a policy financed by LaSalle. A1698. Coventry Servicing was required to sell any policy Lexington acquired and therefore could not control to whom or for how much the policy would be sold. A1705-08 (Section 3.02).

While Coventry First LLC ultimately purchased the Policy from the Trust, it did so on behalf of Lavastone pursuant to an Origination Agreement, and was able to purchase the Policy only because it was the highest bidder—not because it had any right or prearranged agreement to do so. A67 (¶ 38), A1202-71, A582-83 (72:19-74:16); Ex. A § 2, ¶ 3. At no point from the Policy's inception until the time the Policy was sold did any third party, including any Coventry entity, have any right to recover the Policy's death benefit or control the Policy under any agreement or arrangement.

As this Court recognized in *Price Dawe*, the mere fact that a third party ultimately profits from an insured's death following her life settlement does not render the life settlement an unlawful wager because an insured is free to procure a policy and later sell that policy on the secondary market. Delaware also permits an insured to use premium financing. Accordingly, an insured may use premium financing to procure a policy on her own life so long as the transaction is not cover for a wager. As the facts of the underlying transaction here show, Berland's Policy was not a wager and complied with Delaware law.

4. The Delaware Viatical Settlement Act specifically permits the transactions contemplated by Certified Question 2.

Following *Price Dawe*, and the underlying transactions at issue here, the Delaware Legislature enacted the Act, which specifically permits the types of transactions contemplated by Certified Question 2. Thus, while the Act is not applicable to the underlying transactions at issue here, it provides the public policy answer to the Certified Question 2.

The Act regulates the "business of viatical settlements," which it defines to include "the offering, soliciting, negotiating, procuring, effectuating, purchasing, investing, financing, monitoring, tracking, underwriting, selling, transferring, assigning, pledging, hypothecating or in any other manner, acquiring

an interest in a life insurance policy by means of a viatical settlement contract." 18 *Del. C.* § 7502(2). Under the Act, a "viatical settlement contract" must contain certain required provisions and disclosures (*id.* §§ 7508, 7510) and is defined generally as a written agreement entered into between a seller and a viatical settlement provider:

> [E]stablishing the terms under which compensation or anything of value is or will be paid, which compensation or value is less than the expected death benefits of the insurance policy or certificate, in return for the viator's [seller's], present or future assignment, transfer, sale, devise, or bequest of the death benefit or ownership of all or any portion of the insurance policy or certificate of insurance.

Id. § 7502(14)(a). In order to engage in the business of viatical settlements, certain market participants like "viatical settlement providers" and "viatical settlement brokers" must be licensed. 18 *Del. C.* §§ 7503-04.

The Act specifically prohibits the type of immediate or pre-arranged transfer of a life insurance policy addressed in *Price Dawe* by prohibiting parties from entering into viatical settlement contracts "prior to the application or issuance of a policy" or for five years after issuance. 18 *Del. C.* § 7511(a). As discussed above at II.C.(1), loan transactions with markers of wagers are considered viatical settlement contracts and are thus not permitted for the five-year statutory period.

However, the Act permits the type of loan transactions proposed by Certified Question 2.

III. AN INSURED'S INTENTIONAL SALE OF A POLICY, SUBSEQUENT ACQUIESCENCE TO THE TERMS OF THE POLICY'S SALE, OR FRAUD IN CONNECTION WITH THE PROCUREMENT OR SALE OF THAT POLICY PRECLUDES THE INSURED'S ESTATE FROM RECOVERING UNDER SECTION 2704(B).

A. Question Presented:

Certified Question 3: May an estate profit under 18 *Del. C.* § 2704(b) if an insurance policy in violation of 18 *Del. C.* § 2704(a) was procured in part by fraud on the part of the decedent and the decedent profited from the previous sale of the policy? Ex. A. at 7.

B. Scope of Review:

This Court reviews certified questions of law *de novo*. *Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument

The answer to Certified Question 3 is "no." Under Delaware law, an estate stands in the shoes of its decedent and is bound by the decedent's contracts and conduct. Thus, once an insured sells a policy in an arm's-length transaction, and acquiesces to the terms of that sale for the better part of a decade, her estate has no legal basis to set that sale aside. In addition, any person who commits fraud in the acquisition or sale of a life insurance policy is barred from thereafter seeking to

recover the policy's benefits under Delaware common law and the Delaware insurance code. This is particularly true where, as here, the purchaser of the policy is a purchaser for value under the Delaware Uniform Commercial Code ("UCC").

1. An Insured's Intentional and Voluntarily Sale of Her Policy Bars the Estate's Claim.

A decedent's estate is bound by the decedent's contractual obligations. *Shields Dev. Co. v. Shields*, 1981 WL 7636, at *5 (Del. Ch. Dec. 8, 1981) (estate administrator bound by contract decedent made during his life); *Pierce v. Higgins*, 531 A.2d 1221, 1226 (Del. Fam. Ct. 1987) ("The governing general principle of law is that an administratrix stands in decedent's shoes and has no greater or other rights or powers than the decedent would have had if living.").[12] Accordingly, where an insured intentionally and voluntarily sells her life insurance policy during her life, no basis exists to set aside that contract after her death.

Here, Berland purposefully and knowingly signed all of the documents necessary to sell her Policy for substantial profit and to waive the exact claims

[12] Delaware and Florida law, under which the Estate was formed, have specifically codified procedures by which claims based on the decedent's contract or conduct that arose before or after the decedent's death may be brought against a decedent's estate. 12 *Del. C.* §§ 2102-2104; F.S.A. § 733.710.

brought by her Estate in this case. A860-914, A1101-1177; A578-85 (57:14-21, 59:3-22, 61:10-69:12, 71:4-21, 75:18-77:25, 78:13-79:2, 80:1-8, 81:2-3), A576 (45:18-25). She also represented, in both her application for the LaSalle loan and in the Purchase Agreement, that the Policy's owners had an insurable interest in her life. A60-61 (¶ 16), A909, A1166-67 (¶ 7). As such, the Estate is bound by the documents Berland executed to intentionally sell her Policy. Nothing in Section 2704(b)—and no provision in the Act—gives the Estate a mechanism to set aside a valid life settlement a decade later, and the Estate has not provided any basis upon which to do so.[13]

Moreover, where a purchaser of a policy qualifies as a purchaser for value under the Delaware's Uniform Commercial Code ("UCC"), as is the case here, allowing an insured's estate to unwind the sale of that policy would also directly contradict the express terms of 6 *Del. C.* § 8-502 of the UCC, which was enacted long after Section 2704 and clearly states that:

> An action based on an adverse claim to a financial asset . . . may not be asserted against a person who acquires a

[13] The Act now grants a viator with the "absolute right to rescind the contract before the earlier of 60 calendar days after the date upon which the viatical settlement contract is executed by all parties or 30 calendar days after the viatical settlement proceeds have been sent to the viator." 18 *Del. C.* § 7510.

> security entitlement under Section 8-501 for value and without notice of the adverse claim.

6 *Del. C.* § 8-502. "[T]his section provides that once a person has acquired the [security entitlement], someone else cannot take it away on the basis of assertion that the transaction in which the security entitlement was created involved a violation of the claimant's rights." *Id*. at cmt. 1; *S.E.C. v. Credit Bancorp, Ltd*., No., 2000 WL 1752979, at *25 (S.D.N.Y. Nov. 29, 2000), *aff'd*, 290 F.3d 80 (2d Cir. 2002); *COR Clearing, LLC v. Calissio Res. Grp., Inc*., 2017 WL 5157607, at *11 (D. Neb. Nov. 6, 2017).

In the present case, and as is common in life settlement transactions, Lavastone meets the requirements of Section 8-502 as it (1) acquired a security entitlement under Section 8-501; (2) for value; and (3) without notice of an adverse claim—indeed, the insured specifically waived any adverse claim and represented that no such claim existed. 6 *Del. C.* § 8-502; A60-61 (¶ 16), A909, A1103 (§ 1.3), A1105 (§ 3.1), A1161, A1166-67 (¶¶ 4, 7), A1308-09. Allowing an insured's estate to unwind her intentional sale to a purchaser for value is not only inequitable to that purchaser, but has the potential to destabilize the certainty on which participants in transactions governed by the UCC rely. To the contrary: Delaware law is clear that

an estate is bound by the terms of the documents the decedent signed during her life and her estate may not unwind those contractual obligations after her death.

2. An insured's estate cannot recover where the insured acquiesced to the terms of her policy's sale during her life.

Where the insured intentionally and knowingly sells her policy and takes no action to repudiate the sale, the insured's estate cannot unwind that sale because the insured acquiesced to it.

Under Delaware law, a party is deemed to have acquiesced to a complained-of act where the party "has full knowledge of [her] rights and the material facts and (1) remains inactive for a considerable time; or (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved." *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1047 (Del. 2014) (citations omitted).

Here, acquiescence by the Estate to the terms of the sale of her Policy is clear. Berland knowingly and intentionally sold her Policy for a profit of almost $75,000 through a sale in which she represented that the Policy was supported by insurable interest and that she understood that a condition of the sale would be her and her Estate's relinquishment of any death benefits under the Policy. A60-61

(¶ 16), A909, A1103 (§ 1.3), A1105 (§ 3.1), A1161, A1166-67 (¶¶ 4, 7, 14), A583 (77:16-25). For over seven years, she enjoyed her profits did "nothing to repudiate the sale." *See John Hancock Life Ins. Co. of New York v. Solomon Baum Irrevocable Family Life Ins. Tr.*, 357 F. Supp. 3d 209, 219, fn. 6 (E.D.N.Y. 2018), *aff'd*, 783 F. App'x 89 (2d Cir. 2019) ("*Baum*") (insured's trust ratified policy sale where it was aware of sale but did nothing to repudiate it). As the United States Court of Appeals for the Second Circuit recognized in *Baum*, such conduct constitutes acquiescence to the terms of the sale. *Id*. at 90. This Court should likewise recognize that where an insured acquiesces to the terms of the sale of her policy, her estate, which stands in her shoes, is bound by that acquiescence.[14]

3. An Insured's Fraud in Connection with the Procurement or Sale of a Policy Precludes the Insured's Estate from Recovering under Section 2704(b).

As discussed above at § II, the instant case does not present a violation of Section 2704 because the Policy was supported by an insurable interest. To the extent that the Court finds otherwise, however, any failure of the Policy to comply

[14] Furthermore, allowing the insured's estate to recover the entire death benefit having paid zero premium to keep the Policy in force after the insured sold it would be an unjust windfall to the estate.

with the strictures of Delaware law is a direct result of Berland's fraudulent conduct: in obtaining the Policy, she misrepresented her assets and annual income—without these false statements, which Berland had to have known were false, the Policy never would have issued. Ex. A § 2, ¶ 2; A59 (¶¶ 6-7), A527, A714. In addition, in the LaSalle loan documents and Purchase Agreement, Berland represented that the original owner and beneficiary of the Policy had an insurable interest in her life and that neither she nor her Estate would challenge the validity of the Policy. A60-61 (¶ 16), A909, A1103 (§ 1.3), A1105 (§ 3.1), A1161, A1166-67 (¶¶ 4, 7, 14). Indeed, Berland personally agreed to indemnify Lavastone for the very claim the Estate has raised. A1166-67 (¶ 14). Without these false representations, Lavastone would not have purchased the Policy. As such, under *Abry Partners, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1059-62 (Del. Ch. 2006), as well as the doctrines of *in pari delicto* and unclean hands, the Estate may not profit from its decedent's fraud.

Section 2704(b) provides that if a beneficiary, assignee or payee under any contract made in violation of Section 2704 receives from the insurer benefits procuring upon the death of the individual insured, the individual insured or his or her executor or administrator may maintain an action to recover such benefits from the person so receiving them. However, the Statute does not address the situation in which the individual obtains the Policy through deliberate fraud, and later profits

from the sale of the Policy pursuant to a transaction in which the insured (i) represents that she had an insurable interest when she obtained the Policy and (ii) agrees not to challenge the sale transaction.

Delaware is a contractarian state. Accordingly, when a party agrees to forgo remedies as part of a contractual arrangement, that agreement will be honored. *Abry Partners*, 891 A.2d at 1059-62; *Express Scripts, Inc. v. Bracket Holdings Corp.*, 2021 WL 752744 (Del. Feb. 23, 2021). Indeed, the only time that a Delaware court will ***not*** enforce a contractual limitation on remedies is when the party seeking to enforce the limitation seeks to shield itself from its own fraud. *Id*. at 1063-64. The reason for this limitation is that Delaware public policy against fraud is so strong that the party committing fraud may not bargain for absolution from its own fraud, even if the counterparty knowingly agrees to such a limitation.

Here, however, Delaware's public policy against permitting a party to insulate itself from the consequences of its own fraud cuts against the Estate. As noted above, the Estate stands in the shoes of Berland, and it was Berland whose fraud caused the Policy to issue, misrepresenting insurable interest as well as her annual income and net worth. Moreover, Berland benefited from her fraud: she voluntarily sold the Policy to Lavastone, and netted a significant profit as a result of that transaction. Now, incredibly, her Estate seeks to benefit a second time from

Berland's fraud, by asserting (erroneously and in contravention of Berland's representations) that the Policy was invalidly issued and, as a consequence, the Estate may maintain an action pursuant to Section 2704(b) to recover the Policy proceeds.

Under Delaware law, an insured's estate is bound by her fraudulent and tortious conduct. *In re Ortiz' Estate*, 27 A.2d 368, 373 (Del. Ch. 1942) (executor of fraudulent transferor cannot recover property for purpose of distributing it to donees under decedent's will, or distributees under intestate laws); *Shuttleworth v. Abramo*, 1991 WL 160260, at *5 (Del. Ch. Aug. 15, 1991) (fraud claims based on decedent's conduct properly raised against decedent's estate). As a result, Delaware law does not permit an insured's estate to profit from misconduct that would have barred the decedent from recovering.

"Under the doctrine of *in pari delicto*, a plaintiff is barred from asserting a claim if the plaintiff participated in the wrongdoing that was a substantial cause of the alleged damages." *Zazzali v. Hirschler Fleischer, P.C.*, 482 B.R. 495, 512 (D. Del. 2012). A person's conduct is a substantial cause for purposes of *in pari delicto* if that person acts with scienter in furtherance of the alleged scheme; Delaware courts do not distinguish based on degree of participation or fault. *In pari delicto* may be raised against a plaintiff wrongdoer even if that plaintiff "was led

into a path of crime by one more culpable." *Stewart v. Wilmington Tr. SP Servs., Inc.*, 112 A.3d 271, 302 (Del. Ch.), *aff'd*, 126 A.3d 1115 (Del. 2015). Accordingly, "[a] plaintiff who participates in a fraudulent scheme may not sue and recover for injuries that arise out of the same transaction." *Burns v. Ferro*, 1991 WL 53834, at *2 (Del. Super. Mar. 28, 1991) (citation omitted); *Morford v. Bellanca Aircraft Corp.*, 67 A.2d 542, 547 (Del. Super. 1949); *see Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985) ("denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.").

Similarly, "[t]he doctrine of 'unclean hands' provides that 'a litigant who engages in reprehensible conduct in relation to the matter in controversy … forfeits his right to have the court hear his claim, regardless of its merit.'" *Portnoy v. Cyro–Cell Int'l, Inc.*, 940 A.2d 43, 80–81 (Del. Ch. 2008) (internal citation omitted). "Fraud will typically suffice to hold a party ineligible for relief under the unclean hands doctrine." *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205, 237 (Del. Ch. 2014) (citation omitted).

In the insurance context specifically, an insured's misrepresentations in a policy application constitute insurance fraud, and Delaware insurance law does not permit an insured to profit from such fraud. To the contrary: it is a crime. 18 *Del.*

C. § 2401, *et seq*.; 11 *Del. C.* § 913. Delaware law does not allow a party to recover for what amounts to criminal conduct.

The Estate's claim here is premised on "Coventry's" alleged control of a scheme designed to evade Delaware insurance law, allegedly procuring "void" policies that lacked insurable interest and were merely unlawful wagers. D.I. 44, ¶ 21–22 (Amended Complaint). As set forth above, the Policy had insurable interest at inception, and thus did not involve any wager on Berland's life by any third party. But the record also demonstrates that even if the Estate's allegations were true, then the insured, Berland, would be a knowing participant in that scheme because she intentionally applied for the LaSalle loan, submitted false statements of net worth and income and represented that the Policy had insurable interest in connection with both that loan and the Purchase Agreement. A59 (¶¶ 6-7), A60-61 (¶ 16), A527, A714, A909, A1103 (§ 1.3), A1105 (§ 3.1), A1166-67 (¶¶ 4, 7, 14). As such, if the Policy lacked insurable interest, it did so because of Berland's conduct.

4. The Viatical Settlement Act Forecloses An Estate's Claim Where the Insured Sold Her Policy and Committed Fraud in Connection with Its Sale.

The Viatical Settlement Act has also codified Delaware common law prohibitions on an insured profiting from her misconduct. Under the Act, fraud by

the insured in the sale of a policy would qualify as a "fraudulent viatical settlement act" under the Act. 18 *Del. C.* § 7502(6). A fraudulent viatical settlement act includes:

> Presenting . . . false material information or concealing material information, as part of, in support of or concerning a fact material to 1 or more of the following:
>
> . . . .
>
> G. The solicitation, offer, effectuation, or sale of a viatical settlement contract or insurance policy.
>
> H. The issuance of written evidence of viatical settlement contract or insurance.

18 *Del. C.* § 7502(6)(a)(1)(G)-(H).

Had the underlying life settlement at issue here been entered into after the enactment of the Act, then it is indisputable that Berland would have committed a fraudulent viatical settlement act. Berland specifically represented in the Purchase Agreement that her Policy was supported by insurable interest and that she was indemnifying Lavastone for the exact claim the Estate now raises. Thus, if the Estate's claim succeeds, then Berland's representations were false. While no Delaware courts have addressed the ramifications of "fraudulent viatical settlement acts," it would defy logic to permit a person to profit from the commission of a fraudulent act specifically prohibited by the Act.

CONCLUSION

For all the foregoing reasons, a life insurance policy procured by the insured with premium financing is supported by an insurable interest and is freely transferable so long as it complies with *Price Dawe* and the Delaware Viatical Settlement Act. Even if such a policy somehow lacked an insurable interest, an insured's estate may not recover under Section 2704(b) where the insured intentionally sold the policy or was a knowing participant in the conduct that caused the policy to be void *ab initio*.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2021, the foregoing document was served by File & Serve*Xpress* on the following attorneys of record:

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