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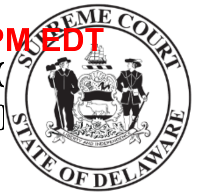

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The underlying action is a dispute pending in the District of Delaware between Appellee Estate of Beverly E. Berland (the "Estate") and Appellant Lavastone Capital LLC ("Lavastone"). On July 17, 2020, the parties filed cross-motions for summary judgment. (A73, 559).[1] On March 2, 2021, the Honorable Stephanos Bibas certified three questions of law to this Court (the "Certification Order"). Lavastone's opening brief was filed on April 14, 2021, and industry participants filed two *amicus* briefs on April 26, 2021.

[1] Citations to Lavastone's appendix are in the form of A__.

SUMMARY OF ARGUMENT

The Estate responds to Lavastone's summary of its arguments as follows:

1. Denied that the policy at issue was procured and issued in accordance with the insurable interest requirements of Delaware law. To the contrary: the policy was entirely funded, and therefore procured, by strangers. Denied that the insurance carrier's payment on a policy that is issued without insurable interest negates its status as void *ab initio*. Consistent with the distinction between "void" and "voidable" instruments, a policy issued without an insurable interest remains void *ab initio* after the insurer pays the death benefit. Denied that Delaware law does not permit an insured's estate to recover when the insured's conduct "contributed to the estate's claim that an insurable interest was lacking." Such a result is inconsistent with the plain language and policy of 18 Del. § 2704(b), and in any event, is inapplicable.
2. Admitted that a life insurance policy procured by the insured with premium financing is not *per se* an unlawful wager and is freely transferable if the policy complies with Delaware law, but denied that the policy at bar complies either with the Delaware Constitution and *Price Dawe* or, were it applicable, the Delaware Viatical Settlement Act.
3. Denied that an insured's acquiescence or participation in misconduct in the

procurement or sale of a policy precludes the insured's estate from recovery under § 2704(b), and further denied that the insured in this case engaged in any misconduct. To the contrary: both the plain language of § 2704(b) and Delaware public policy render the insured's alleged acquiescence or participation in fraud irrelevant to an estate's statutory right of recovery; and regardless, the issue does not arise here because the evidence establishes that the insured did not commit fraud.

STATEMENT OF FACTS

I. Lavastone's Improper Attempt to Expand the Factual Record

Lavastone's Opening Brief ventures far beyond the limited facts included in the Certification Order. Likewise, Lavastone submitted an appendix of over 1,800 pages and repeatedly cites to the appendix to (ostensibly) support its version of the facts, contravening both the rule that "certification acceptance is limited to the facts stated in the … Order of certification." *Kerns v. Dukes*, 707 A.2d 363, 367 (Del. 1998), and the need for "a stipulated set of facts to accompany certified questions of law to avoid confusion over disputed and undisputed facts," *Culverhouse v. Paulson & Co. Inc.*, 133 A.3d 195, 196 (Del. 2016).

Mindful of these rules, the Estate has endeavored to limit this brief to the facts contained in the Certification Order. The Estate cites to facts outside the Certification Order where necessary to contextualize a material issue implicated by Lavastone's recitation of the facts or to demonstrate the existence of disputed facts that inhibit this Court's ability to answer the certified questions. Any such citations are to Lavastone's appendix or to materials relied upon by Lavastone's *amici*. The Estate has not added any factual content to this filing.

II. STOLI Schemes

Since the advent of life insurance in the sixteenth century, "speculators have sought to use insurance to wager on the lives of strangers" through stranger originated life insurance ("STOLI") schemes. *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.,* 28 A.3d 1059, 1069 (Del. 2011) ("*Price Dawe*").

Since 1897, the Delaware Constitution has prohibited such wagers, Delaware Const. Art. II § 17, and for over a century, Delaware courts have condemned STOLI schemes as "mere speculation on the life of another … [that are] contrary to public policy, and therefore void." *Baltimore Life Ins. Co. v. Floyd*, 28 Del. 201 (Del. Super. Ct. 1914), *aff'd*, 28 Del. 431 (1915). At common law, Delaware utilized the concept of an "insurable interest" as a method "to distinguish between insurance and wagering contracts," and in 1968, this common law rule was codified in the Delaware Insurance Code. *Price Dawe,* 28 A.3d at 1071 (*citing* 18 *Del. C.* § 2704).

STOLI schemes have persisted and evolved over time. Most recently, in the early 2000s, "securitization emerged in the life settlement industry" through which "policies are pooled into an entity whose shares are then securitized and sold to investors." *Id.* at 1070. This "substantially increased the demand for life settlements, but did not affect the supply side, which remained constrained by a

limited number of seniors who had unwanted policies of sufficiently high value." *Id.* Consequently, "STOLI promoters sought to solve the supply problem by generating new, high value policies." *Id*.

STOLI schemers achieve this goal by luring elderly Americans to serve as vehicles to generate additional high-value policies:

> As the life settlement business evolved, certain investors moved beyond purchasing existing policies from insureds who no longer need them, to an arrangement in which an insurance agent or life settlement broker persuades a senior, often with a short life expectancy, to take out a life insurance policy not for the purpose of protecting beneficiaries, but as an investment, with the intention of selling the policy to an investor in the secondary market.[2]

These schemes "usually involve the same set of facts." *Wilmington Tr., N.A. v. Lincoln Benefit Life Co.,* 2018 WL 6308687, at *1 (S.D. Fla. Sept. 20, 2018). Those trademark facts are summarized below:

> The insured may be lured to participate by the promise of two years of free insurance, gifts of a car or a trip or cash, and the promise of a substantial profit on the sure sale of the policy. Typically, the broker or agent, under an arrangement with a life settlement company, will solicit a senior to purchase a life insurance policy with a high face value, with the company lending him the money to pay the premiums for two years, or whatever term state law sets as the period during which a claim can be contested by the insurance carrier. It is common for the insured to set up an insurance trust naming his spouse or other loved one as the trust beneficiary. If the insured dies within that period, his spouse, as

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[2] Del. Dep't of Ins., *Secondary Market for Life Insurance Policies—Report to the Delaware State Senate Pursuant to Senate Resolution No. 19,* at 11, 15 (Dec. 28, 2016).

> beneficiary of the insurance trust, will get the death benefit (the free insurance), pay back the loan plus interest from the proceeds, and often pay the broker up to fifty percent of the benefit received. If the insured lives beyond two years or the contestability period, then the life settlement company buys the beneficial interest in the insurance trust, paying the insured a lump sum percent of the face value of the policy, usually between ten and thirty percent, and the agent will get a commission of about ten percent or more of the purchase price. The life settlement company or its investors will continue to pay the premiums on the policy, and when the insured dies, they will get the death benefit. Clearly, the sooner the insured dies, the greater the company's profit. The legal problem with this arrangement is that the actual party for whom the policy is purchased, the life settlement company, has no insurable interest in the life of the insured and, therefore, it is against public policy designed to prohibit wagering on the lives of others and in violation of statutes in most states.

Susan Lorde Martin, *Betting on the Lives of Strangers: Life Settlements, Stoli, and Securitization,* 13 U. Pa. J. Bus. L. 173, 187 (2010); *see also* Douglas R. Richmond, *Investing with the Grim Reaper: Insurable Interest and Assignment in Life Insurance*, 47 Tort Trial & Ins. Prac. L.J. 657, 658–59 (2012) (similar).

In short, contemporary STOLI schemes involve a new twist on a centuries-old practice under which "both the initiative for purchasing the policy and the source of funding [for the premiums] are from outside investors or lenders who are totally unrelated to the insured." R. Marshall Jones, et al., *'Free' Life Insurance: Risks and Costs of Non-Recourse Premium Financing,* Estate Planning, at 2 (July 2006).

III. The Origination and Premium Financing Programs

"Coventry" is a group of affiliated entities that, as described below, is a central

actor in contemporary STOLI schemes and that "established and directed a program to increase the number of high-value life insurance policies available on the secondary market." *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.) ("*Sol*").

Lavastone is a subsidiary of AIG. (A86 ¶ 2). In 2001, AIG/Lavastone entered into an origination agreement to purchase life insurance policies from Coventry subject to various eligibility criteria designed to maximize AIG/Lavastone's profit. (Cert. Order at 1). For example, two key eligibility criteria were that: (1) the insured's life expectancy was 180 months or less; and (2) the policies had passed the two-year contestability period at the time of resale. (A169-171, 186-188).

A few years later in 2004, an AIG business unit called AIG Risk Finance—the unit that operated Lavastone—established a lending program called Premium Finance Plus ("PFP Program") with various entities (including Coventry) "to facilitate loans taken out for the purposes of paying the life insurance premiums for certain qualified policies." (A216). Coventry acted as the "program administrator" and "focal point for all PFP opportunities." (A222).

Under the PFP Program, a nominal lender would make a non-recourse loan to a new, unfunded trust to enable the trust to purchase one or more high-value life insurance policies. (A216-218, 221-226). The policy served as the sole collateral

for the loan, and because these loans was "non-recourse," if the insured did not repay the loan, the lender was foreclosed from pursuing the insured for failing to pay. (Cert. Order at 2; A216, 221-222). Consequently, the insured had no personal responsibility to repay the loan and the nominal lender had no recourse to the insured's assets. *Id*. When the loan matured after roughly 26 months (*i.e.*, shortly after the two-year contestability period), the insured could either pay off the loan and assume responsibility for paying the premiums, sell the policy, or relinquish the policy without further obligation. (A221-228).

To qualify for financing, insureds had to satisfy various eligibility criteria, which mirrored the eligibility criteria under the 2001 origination agreement. (A249-250). The same AIG/Lavastone personnel were responsible for managing both purchases of policies from Coventry under the origination agreement and the AIG/Lavastone's role in the PFP Program managed by Coventry. (A129, 141).

The creation of the PFP Program in 2004 coincided with the *Price Dawe* Court's observation that in the early 2000's, STOLI promoters sought to manufacture policies to overcome supply constraints. 28 A.3d at 1070. Internal documents describe AIG/Lavastone's "business rationale" as "creat[ing] new policies that ... we [AIG/Lavastone] could [later] purchase under our life settlement program. (A216). In short, AIG/Lavastone created the PFP Program to recruit

seniors to insure, to later purchase the policies back from the seniors after the contestability period passed, and to profit upon the senior's (hopefully early) death.

Under the origination agreement, AIG/Lavastone purchased approximately 7,000 policies from Coventry worth over $20 billion. (A134-136).

IV. Beverly Berland is Recruited to Create a $5 Million STOLI Policy

Coventry, as the "program administrator" for the PFP Program, "market[ed] the program to its network of approved producers." (A222). One such "producer" was Simba, an entity operated by an insurance agent named Larry Bryan. (A295). As Bryan explained under oath, Simba's entire business was generating unwanted and unnecessary insurance policies:

> Before I started Simba, I used to sell life insurance to people who actually needed it for traditional insurance reasons (e.g., to protect dependent family members or to minimize estate tax consequences, etc.). In those circumstances, I would spend a lot of time analyzing my client's needs and discussing those needs with them and how we could use insurance to satisfy them. That's not what we did at Simba. These conversations . . . never occurred because none of the seniors (i.e., the would-be insured's) actually wanted or needed life insurance.

Id.

Through these "life insurance capacity transactions," "funders" – such as the entities participating in the PFP Program– could "create one or more not-yet-in-existence, multi-million-dollar life insurance policies" on the lives of seniors they did not know. *Id.* The funders created the policies not based on the insureds'

legitimate life insurance needs, but rather so the funders could later "acquire these policies for investment purposes." *Id.*

Simba promoted these policies to seniors as an "opportunity … [t]o create dollars today by using a paper asset, (a life insurance policy not yet issued from a major insurance carrier insuring your life) in a joint venture type of arrangement with one or more of the major financing institutions that want to engage in these transactions." (A304 (emphasis original)). Simba touted there were "no obligations or out of pocket expenses to you." (A303).

Beverly Berland was one of the senior citizens recruited by Simba and Larry Bryan, which led to the issuance by Lincoln Benefit Life ("Lincoln") of a $5 million life insurance policy (the "Berland policy"). (A299). At the time the policy was issued in March 2006, Berland was a 76 year-old, unmarried widow who lived with a man named Murray Roffeld. (A298, 336). Roffeld was not financially dependent on Berland. (A329). Bryan describes the circumstances which led to the issuance of the policy:

> Based on my personal interaction with and knowledge of Mr. Berland as well as my understanding of the nature of the business Simba was running, I can confidently testify to the following:
>
> - Berland did not need the policies described above, nor was Berland interested in acquiring life insurance.

- No one at Simba had conversations with Berland about using life insurance as a way to mitigate risk or to minimize estate tax, nor did anyone at Simba engage in any traditional estate planning discussions with Berland.

- Berland never paid a penny of her own money for the policies or anything else, and, she never took any risk.

- Berland did not have any set death benefit amounts or issuing carriers in mind. Simba applied for these particular policies and amounts because we understood them to be among the sorts of policies that the funders with whom we be worked were interested in acquiring.

- Berland had no input into the creation of any trusts bearing her name; she did not choose their names; she did not choose their locations; she did not choose the law governing them; she did not have any input into any of the content of the agreements establishing them; she did not select the trustees; and she did not fund the trusts or choose how they might have been funded. These decisions (and others like them) were all made by the relevant funders.

- Berland was not a person that I would characterize as being overly financially astute in the areas of estate planning and tax. She probably had about "a minute or two's worth" of understanding of the deal.

A299-300.

Simba sent Berland's medical records to Coventry, which created a life expectancy report for Berland and shared the results with AIG. (Cert Order. at 2). After conducting medical and financial underwriting, AIG approved the transaction for participation in the PFP Program. (A144, 148-151, 375-395)

Coventry, acting under an expansive power of attorney solicited from Berland, created an unfunded Delaware-based trust to serve as the holder of the

policy. (Cet. Order at 2; A446-449). Wilmington Trust Company served as trustee of the trust, and Roffeld served as co-trustee and "beneficial owner." *Id.*

Coventry then secured a non-recourse 26-month loan of $380,228.83 (including interest and fees) at an effective interest rate of 20.52%. (A440). Consistent with the structure of the PFP Program, Berland had no personal obligation to repay the loan. (A441-445). Rather, the loan was made to an unfunded sub-trust (which Coventry created under the unfunded trust) and the policy itself served as the only collateral. After the 26-month repayment period – which coincided with the end of the two-year contestability period – the loan could be satisfied by simply forfeiting the policy. *Id.*

Simba then prepared the application for the policy. The application package included a form prepared by Simba, in its capacity as insurance agent – and not signed by Berland – that falsely stated that Berland had a net worth of $10 million and income of $180,000. (A527-528). Berland's handwriting appears nowhere on that form, which also does not appear in the application appended to the policy. (A330, 498-502). There is no record evidence that Berland saw the financial form prepared by Simba or knew about its misrepresentations. To the contrary: the record shows that as a matter of business practice, Simba employees left portions of the insurance applications blank, and Bryan would fill in the blanks with information

that made it "easier to get the case through the gatekeeper at the – at the insurance company if you were able to show a greater net worth." (A553). Roffeld similarly testified that Berland did not supply any of the figures on the form. (A337).

In March 2006, Lincoln issued the Berland policy to the unfunded trust that Coventry had established. (A400-429). Because Roffeld was the beneficial owner of the trust, he would have received the policy benefits if Berland died before the sale of the policy. (A330-333, 446).

V. Lavastone Purchases the Policy

Exactly as designed, in April 2008, soon after the 2-year contestability period passed, Coventry purchased the policy from the trust and, pursuant to the origination agreement, resold the policy to Lavastone. Berland received $73,594 from the proceeds of the sale. (Cert. Order at 2-3). After Berland died in November 2015, Lavastone sought and obtained the $5 million death benefit from Lincoln. (Cert. Order at 3; A6-7 ¶¶ 19-20).

ARGUMENT

I. Certified Question 1

A. Question Presented

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)?

B. Scope of Review

Question 1 presents an issue of statutory interpretation reviewed *de novo*. *Price Dawe,* 28 A.3d at 1064.

C. Merits of Argument

As Lavastone effectively concedes by "taking no position," (Op. Br. 13-14), the answer to Question 1 is "yes." Section 2704(b) expressly authorizes and confers a direct cause of action upon estates to bring claims against investors who purchase STOLI policies. Denying this right to recovery would render the statute a nullity and thereby directly contravene the express intent of the Delaware General Assembly when it enacted the statute.

Section 2704(a) "supports the fundamental concept against wagering contracts," *Price Dawe,* 28 A.3d at 1072 n. 54, by defining the "insurable interest" required to distinguish a bona fide insurance policy from a human life wager. In

turn, Section 2704(b) "puts [the] promise [of § 2704(a)] into effect" by providing estates with a cause of action to recover benefits paid out under a STOLI policy. *Estate of Malkin v. Wells Fargo Bank, N.A.,* 379 F. Supp. 3d 1263, 1275 (S.D. Fla. 2019) ("*Estate of Malkin I*"), *aff'd on relevant grounds. Estate of Malkin v. Wells Fargo Bank, NA,* __ F.3d __, 2021 WL 2149344 (11th Cir. May 27, 2021) ("*Estate of Malkin II"*). Specifically, § 2704(b) provides:

> If the beneficiary, assignee or other payee under any contract made in violation of this section receives from the insurer any benefits thereunder accruing upon the death, disablement or injury of the individual insured, the individual insured or his or her executor or administrator, as the case may be, may maintain an action to recover such benefits from the person so receiving them.

18 Del. C. § 2704(b).

To recover under § 2704(b), an estate must prove that the underlying insurance contract lacked an insurable interest, *i.e.,* that the policy violated § 2704(a) and was void *ab initio*. Consequently, if a contract that is void *ab initio* is not considered a "contract" under § 2704(b), then recovery under § 2704(b) would be impossible, because all policies that lack an insurable interest are void *ab initio*. Such an interpretation would render § 2704(b) meaningless because the predicate for liability—that the policy lacked insurable interest at inception and was void *ab initio*—would categorically defeat the cause of action. As the one court that has considered a parallel argument to date observed, this result is nonsensical:

> Section 2704(g) states that "[t]he existence of an insurable interest with respect to … [a] trust-owned life insurance policy *shall be governed by this section*[.]" Under Defendant's interpretation § 2704 would *not* govern the existence of an insurable interest because Plaintiff alleges there was no insurable interest in the Policy. Such interpretation, of course, makes no sense.

Estate of Hoefer v. ATC Realty Fifteen, Inc., 2021 WL 148087, at *3 (N.D. Cal. Jan. 15, 2021) (citation omitted).

A statutory provision is ambiguous "if a literal reading of its terms 'would lead to an unreasonable or absurd result not contemplated by the legislature.'" *Price Dawe,* 28 A.3d. at 1070. Simply put, there is no reasonable argument that the General Assembly intended to create an entirely illusory cause of action.

When interpreting an ambiguous statute, this Court "look[s] for guidance to its apparent purpose and place it as part of a broader statutory scheme," and considers the ambiguous provision "in light of all the others to produce a harmonious whole." *Id*. at 1070. In addition, this Court further "interprets statutory law consistently with pre-existing common law" unless the statute expresses an intent that is contrary to the common law. *Id*. at 1070.

The common law concept that the proceeds of a STOLI policy are payable to the insured's estate dates back at least 140 years. *Warnock v. Davis*, 104 U.S. 775, 782 (1881) (holding that estate was entitled to recover death benefits from assignee as "more fully in accord with the general policy of the law against speculative

contracts upon human life"); *see also* Grover C. Grismore, *The Assignment of a Life Insurance Policy*, 42 Mich. L. Rev. 789, 791-92 (1944) (awarding wagering proceeds to estate "would seem to be commendable in view of the fact that the deceased's beneficiaries are not themselves parties to the illegal transaction and it is better that they receive a windfall than that the assignee profit from his illegal venture.").

The Supreme Court's reasoning in *Warnock* was adopted into the common law of Delaware no later than 1914, when this Court affirmed a Superior Court judgment that insurance contracts/policies lacking an insurable interest are "void." *Baltimore Life Ins. Co. v. Floyd*, 28 Del. 201 (Del. Super. Ct. 1914), *aff'd*, 28 Del. 431 (1915). Section 2704 then codified the common law "in a statute which essentially restated the substantive considerations of *Floyd*." *Price Dawe*, 28 A.3d at 1072-1073. Section 2704(a) codified the common law prohibition on insurance contracts that lack an insurable interest, and Section 2704(b) codified the common law rule that the estate of an insured can recover benefits paid out under a STOLI scheme. Thus, both sections must be read consistent with the common law and in harmony with one another.

To avoid an absurd result, and to carry out the plain intent of the General Assembly's 1968 passage of § 2704(b), the Court should hold that a death benefit

paid under a life insurance policy that is void *ab initio* due to the lack of an insurable interest is made "under a contract" within the meaning of § 2704(b).

II. <u>Certified Question 2</u>

A. Question Presented

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?

B. Scope of Review

Question 2 presents an issue of statutory interpretation reviewed *de novo*. *Price Dawe,* 28 A.3d at 1064.

C. Merits of Argument

There is no legal difference between the policy at issue in *Price Dawe* that was sold by the insured approximately two months after it was issued, and the policy at issue in this litigation that was sold after the 24-month contestability period elapsed. The distinction between so-called "front-end" and "back-end" transactions – the amount of time between the issuance and sale of the policy – is legally irrelevant. Instead, *Price Dawe* instructs that the inquiry focuses on payment of the premiums. Specifically, if a third party provides the insured with the financial means to pay the policy premium – whether through a non-recourse loan or by any other

means – then the third party has procured the policy.

1. Insurable Interest Is Lacking at Inception Where Strangers Pay the Premiums and Use the Insured as an Instrumentality to Procure the Policy.

In *Price Dawe*, this Court—mindful that "STOLI schemes are created to feign technical compliance with insurable interest statutes"—held that § 2704 "requires more than just technical compliance at the time of issuance." 28 A.3d at 1074. Consequently, if a "third party uses the insured as an instrumentality to procure the policy," the statute is violated and the policy void. *Id.* at 1074-75.

Price Dawe held that "to determine who procured the policy" and whether the insured "procure[d] the policy at the behest of another," the relevant inquiry is "who pays the premiums." *Id.* at 1075.[3] The insured's payment of the premiums "provides strong evidence the transaction is bona fide." *Id.* at 1077. Conversely "if a third party funds the premiums by providing the insured the financial means to purchase the policy then the insured does not procure or affect the policy." *Id.*

[3] Even if an insured is found to have procured a policy, that does not end the inquiry. As *Price Dawe* instructs, "[a]n insured's right to take out a policy with the intent to immediately transfer the policy is not unqualified" and "[that right is limited to bona fide sales of that policy taken out in good faith," which "requires that the insured take out the policy in good faith—not as a cover for a wagering contract." *Id.* at 1075. As Judge Stark – citing the above passage from *Price Dawe* – observed in *Sol*, "the parties involved must procure the policy in good faith" and "[w]here they do not, the policy is not a valid insurance policy." *Sol*, 369 F.Supp.3d at 614.

The case at bar involves a straightforward application of these principles. The premium payments were funneled through the trust by a premium finance company pursuant to a non-recourse loan to the sub-trust. Berland supplied no portion of those funds and was not financially responsible for repayment. Thus, third-parties "fund[ed] the premium payments by providing the insured the financial means to purchase the policy." *Id*. at 1076. Moreover, even to the extent there was "technical compliance"—and there was not[4]— third-party investors hoping to profit from human life wagering cannot circumvent insurable interest requirements by using an "insured as an instrumentality to procure the policy." *Id.*

In *Price Dawe*, an investor recruited an insured to apply for a life insurance policy with the intent to sell the policy to an individual or entity lacking an insurable interest, and the policy was sold "less than two months after the policy went into force." 28 A.3d at 1064. Here, the sale occurred just over two years later, because the program leading to its origination was designed to wait for the contestability period to elapse. That difference in timing with respect to when a policy ***is sold***,

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[4] The trust structure lacked even feigned compliance because the nominal trustee and beneficiary of the trust—Roffeld—was not, as required to have an insurable interest, "related closely by blood or law" to Berland and was not financially dependent upon her so as to have a "substantial economic interest" in her continued life. *See* 18 *Del C.* § 2704. Thus, Roffeld did not have an insurable interest in Berland's life, and therefore his status as beneficial owner did not even achieve feigned technical compliance.

however, is a distinction without a difference, because the existence of an insurable interest depends on the circumstances at the time a policy ***is issued*** and in particular who paid the premiums for the policy. *Id*. at 1074 (explaining that § 2704(a) "defines the moment in time the insurable interest requirement applies" as "the moment the life insurance contract becomes effective").

In short, strangers to Berland financially incentivized her to lend her insurability – to serve as an instrumentality – to the strangers so that both could profit from the issuance of a life insurance policy that she did not need. The only differences between this case and STOLI schemes dating back centuries are: (1) here, the strangers undertook an actuarially acceptable risk that Ms. Berland could die during the 26-month period of the loan, and (2) the strangers created a complex web of companies and trusts to obfuscate the fact that this transaction was a human life wager. Indeed, from the moment the scheme worked as designed and Lavastone became the beneficiary of the death benefit, Lavastone had a direct financial interest in Ms. Berland dying as soon as possible (because the longer she lived, the longer Lavastone had to pay the premiums). Martin, 13 U. Pa. J. Bus. L. at 187 ("The life settlement company or its investors will continue to pay the premiums on the policy, and when the insured dies, they will get the death benefit. Clearly, the sooner the insured dies, the greater the company's profit.").

Nor does the fact that policy was technically purchased by a trust help Lavastone. A trustee of a Delaware trust only has an insurable interest if the trust was "established" by the insured. *Price Dawe*, 28 A.3d at 1078. In order for a trust to be "established" by the insured:

> The insured, as settlor or grantor, must both create and initially fund the trust corpus. This requirement is not satisfied if the trust is created through nominal funding as a mere formality. If the funding is provided by a third party as part of a pre-negotiated agreement—then the substantive requirements of sections 2704(a) and 2704(c)(5) are not met.

Id. at 1078.

Here, the trust was not established by Ms. Berland, and she did not contribute even a nominal sum to the trust. (A299, 303, 336, 446-449). Thus, the trust was not "established" by Berland. *See Price Dawe*, 28 A.3d at 1078; *Sol* 369 F. Supp. 3d at 612 (finding a lack of insurable interest under 2704(a) as a matter of law where the trust was nominally funded and the funds to pay premiums were provided by a third party).

As six consecutive courts applying *Price Dawe*—four federal district courts and two federal appellate courts – considering factual records materially identical to the record in this case have uniformly agreed that policies generated under this

scheme lack an insurable interest as a matter of law.[5] For example, Judge Stark concluded that "a reasonable juror, taking the evidence in the light most favorable to [the non-moving party], could only find that [the insured] did *not* procure the Policy." *Sol,* 369 F. Supp. 3d at 601 (emphasis original). Judge Stark explained in relevant part:

> The undisputed facts show, however, that [the insured] did not have a genuine obligation to repay the full amount of the Coventry/LaSalle loan. One reason for this conclusion is that it was not actually [the insured], but instead the Sub-Trust, which was the borrower on the loan (as well as being the holder of the Policy). The Sub-Trust, then, owed the obligation to repay the loan, not [the insured]. Thus, [the insured] herself did not have any personal obligation to repay the loan.
>
> Even if [the insured] is considered the borrower, the non-recourse nature of the loan meant that neither she nor the Sub-Trust had an "obligation to repay" sufficient to support a conclusion that [the insured] actually "procured" the Policy. Pursuant to the non-recourse nature of the loan, LaSalle secured an interest in the Policy (via the Trusts) as collateral but had no ability to collect monies from [the insured] or the Trusts beyond the value of the collateral, i.e., the value of the Policy. Consequently, it is undisputed that [the insured] could never have been personally liable to repay the loan. In other words, had the Sub-Trust (or even [the insured]) defaulted, the only loss to the Sub-Trust (and [the insured]) would have been its interest in the Policy, a policy that would not have existed but for the loan.

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[5] *Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n,* 2016 WL 161598 (S.D. Fla. Jan. 14, 2016), *aff'd on relevant grounds*, 693 F. App'x 838 (11th Cir. 2017); *Sol*, 369 F. Supp. 3d 601; *Estate of Malkin I,* 379 F. Supp. 3d at 1279; *Estate of Malkin II*, 2021 WL 2149344, at *6; *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).

Id. at 610-611 (citations omitted). Thus, even if the sub-trust was theoretically required to repay the loan (which it could do by simply relinquishing the policy), "the obligation to repay was nothing more than a cover" for a prohibited human life wager. *Id.* at 611.

Similarly, the Eleventh Circuit recently held:

> [T]he record shows [the insured] never paid any premiums on the AIG Policy. The loan application … may have listed the Trust as the premium payor, but Coventry paid the initial premiums on the Policy and Berkshire paid the remaining premiums after the Policy was sold. Neither the [the insured] nor the trustee procured the AIG Policy. Rather, these circumstances show that Simba and Coventry worked together to use the [the insured] "to do indirectly" what Delaware law prohibited them from doing directly. *See Price Dawe*, 28 A.3d at 1075, 1078. There is no insurable interest in the AIG Policy and it is therefore illegal and void under § 2704(a).

Estate of Malkin II, 2021 WL 2149344, at *7.

The facts in these cases are indistinguishable. Berland – an elderly widow – did not need or want any life insurance, let alone life insurance with a $5 million death benefit. (A299). Rather, she was one of many senior citizens targeted by sophisticated entities – including AIG/Lavastone, Coventry, and Simba – to "create dollars today by using a paper asset, (a life insurance policy not yet issued from a major insurance carrier insuring your life)" in a joint venture with a "funder" that bore "all financial risk" with "no obligations or out of pocket expenses." (A304). The entities that implemented the PFP Program "dictated every aspect of the

transaction" while Berland "was simply the conduit" through which the scheme was effectuated. *Malkin,* 2016 WL 161598, at *17.

This is STOLI in its rankest form. Using a non-recourse loan to an unfunded trust to effectuate the scheme does not save the policy from Delaware law, but rather seals its fate as an unlawful human wagering contract.

2. Lavastone's Remaining Arguments Do Not Save a Void Policy

Unable to overcome *Price Dawe's* clear-cut application to the Berland policy and resigned to contending that six unanimous decisions by federal courts applying Delaware law are incorrect, Lavastone resorts to fashioning a retroactive policy argument based on inapplicable legislation and makes unpersuasive attempts to distinguish the policies at issue in *Price Daw*e and this case. Both arguments are unavailing.

a. The 2017 Delaware Viatical Settlement Act is Inapplicable and Rejects the Very Transaction at Issue

Lavastone seeks shelter from the recently-enacted Delaware Viatical Settlements Act (the "Act"), claiming it "specifically permit[s] the nonrecourse loan transaction and sale proposed by Certified Question 2." (Op. Br. at 17, 20-21). This sleight of hand fails for three reasons.

First, the Act does not apply. The Berland policy was issued in 2006 and sold in 2008, while the Act was enacted and became effective September 2017. 2017

Delaware Laws Ch. 172 (S.B. 66), at § 7520 (Sept. 14, 2017). Consequently, the Act is inapplicable and irrelevant.

Second, the Act is designed to ***enhance*** Delaware law against STOLI schemes by "establishing strong consumer protections," including by "targeting transactions with characteristics of stranger-originated life insurance, such as ***non-recourse financing,*** settlement guarantees, or life expectancy valuations." *Synopsis*, Delaware Bill Summary, 2017 Reg. Sess. S.B. 66 (emphasis added). In this and other ways, the Act "strongly discourages STOLI policies" by providing additional protections. DEL. DEP'T OF INS., *Secondary Market for Life Insurance Policies—Report to the Delaware State Senate Pursuant to Senate Resolution No. 19,* at 24 (Dec. 28, 2016). The Act does not weaken preexisting law in the Delaware Constitution, § 2704, and *Price Dawe*, and indeed, Lavastone acknowledges that the Act "does not redefine or alter the requirement that all policies have insurable interest at inception. (Op. Br. at 20).

Third, far from permitting the scheme at issue, the Act prohibits entry "into a viatical settlement contract" within 5 years of the issuance of the policy unless (1) all policy premiums had been paid with the insured's own "unencumbered assets" or through a "fully recourse liability incurred by the insured;" (2) there was no understanding that any other person stood "ready to purchase the policy, including

through . . . forgiveness of the loan;" and (3) the insured had not "been evaluated for settlement."18 *Del. C.* § 7511(a)(3) (emphases added). Here, all of these conditions were violated: Lavastone evaluated the Berland policy for purchase from the outset, the policy was funded by a non-recourse loan, and that loan was forgiven twenty-six months after the policy was issued.[6]

b. The *Price Dawe* Policy and the Policy in this Case are Legally Indistinguishable

Lavastone attempts to distinguish *Price Dawe* by asserting that here, unlike *Price Dawe*: (1) there was no "pre-negotiated arrangement with the insured to immediately transfer ownership" because Ms. Berland could choose whether to repay the loan and retain the policy, and (2) Ms. Berland did not sell the policy until 26 months after its issuance. (Op. Br. at 22-26 (*quoting Price Dawe*, 28 A.3d at 1078)). These arguments collapse under the slightest scrutiny.

First, while the existence of a pre-negotiated agreement to sell a policy to a particular third party at a particular time plainly violates *Price Dawe*, the *absence* of such a pre-negotiated agreement does not magically creates an insurable interest where, as here, (1) strangers fund the trust that procures the policy, (2) the insured

[6] The Act also prohibits marketing policies as providing "free" coverage. *Id.* § 7512(d). Thus, were the Act in effect, it would have also prohibited both Simba's marketing of the policy as having "no obligations or out of pocket expenses" (A303).

has no personal financial liability for any premium, and (3) the facts show that strangers used the insured as a mere instrumentality to cause the policy's issuance. As the Eleventh Circuit recently held:

> We do not read *Price Dawe* to say that a policy lacks an insurable interest only when there is a pre-negotiated agreement to immediately transfer ownership. Rather, *Price Dawe* takes a broader view. It "requires courts to scrutinize the circumstances under which the policy was issued" and whether those circumstances show the person who is insured "purchase[d] the policy for lawful insurance purposes." Whether there was a pre-negotiated agreement between the person who is insured and the trust is just one circumstance the Supreme Court of Delaware specifically addressed and found to fail for lack of an insurable interest. Therefore the existence of an agreement to immediately transfer ownership is not dispositive of whether there is an insurable interest in the AIG Policy.

Estate of Malkin, 2021 WL 2149344, at *7 (citations omitted).

The Eleventh Circuit, under materially indistinguishable facts, then applied *Price Dawe* in holding that there was no insurable interest in the policy because (1) Coventry and the investor, rather than the insured, paid the policy premiums and (2) the "arrangement appears to accomplish 'indirectly' what Delaware law prohibits doing directly to create an illegal wagering contract by which Coventry gambled on [the insured']s life and from which Coventry and Simba profited." *Id.* at *7; *see also Sol*, 369 F. Supp. 3d at 615 & no. 10 (rejecting argument that the policy was not a STOLI policy because the parties involved in its procurement "had no prior arrangement" to acquire the policy); *Van de Wetering*, 2016 WL 811641, at *18

(similar).

Second, the *theoretical* opportunity that the Berland could repay the non-recourse loan and retain the policy at the end of the 26-month loan period misses the point. Under *Price Dawe*, the determination of whether an insurable interest exists looks to who procured the policy at *inception,* including most significantly who paid the policy premiums. *Id.* at 1075. Conversely, "the insured's subjective intent for procuring a life insurance policy is not the relevant inquiry." *Id.* at 1076. As a result, an insured's subjective intent as to what they would do when the loan came due 26 months later is irrelevant. Moreover, as described above, the premium finance program was designed to generate high-value policies for resale on the secondary market, and to that end, *none* of Simba's hundreds of clients ever exercised the theoretical option to purchase the policy. (A311). This is precisely the type of (attempted) feigned technical compliance that *Price Dawe* rejects.

Likewise, the fact that a beneficiary selected by Berland would receive the death benefits had she unexpectedly died before the non-recourse loan came due is irrelevant. As Judge Stark explains, ***"somebody*** had to be named as beneficiary during the contestable period," and doing so "does not render the Policy legal under § 2704(a)." *Sol*, 369 F. Supp. 3d at 615 (emphasis original).[7] Moreover Coventry,

[7] Even presuming any significance, this would not defeat the Estate's recovery under

AIG/Lavastone, and the other participants in the scheme obtained Berland's medical information to determine her life expectancy prior to entering the deal, thereby actuarially assuring themselves that her death during the 26-month period of the loan was an acceptable risk of the wager. In this way, the risk of Berland unexpectedly dying before the loan came due was "part and parcel of the gamble." *Malkin*, 2016 WL 161598 at *18.

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§ 2704(b) because the beneficial owner of the trust during the 26-month period prior to the sale of the policy did not have an insurable interest. *Supra* n. 4.

III. Certified Question 3

A. Question Presented

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?

B. Scope of Review

To the extent Question 3 presents an issue of statutory interpretation and the Court reviews the merits of Question 3, it is reviewed *de novo*. *Price Dawe,* 28 A.3d at 1064. However, as discussed below, Question 3 implicates issues of fact that are in dispute below and which likely cannot be resolved in this proceeding.

C. Merits of Argument

The Court should hold that Berland's (supposed) misconduct does not undermine the Estate's recovery under § 2704(b). Before addressing the question, however, the Estate wishes to advise the Court of certain procedural and factual issues that complicate this Court's review.

1. This Case Does Not Involve Fraud by the Insured

Question 3 asks whether an Estate may recover under § 2704(b) for benefits paid under a policy lacking an insurable interest that was "procured in part by fraud on the part of the decedent and the decedent profited from the previous sale of the policy." The question, however, rests on a false premise.

Turning to the Certification Order, the only potential "fraud on the part of the decedent" it alludes to is "a form that falsely stated that she had $10 million in assets and $180,000 in annual income" that was "included with" the policy application. (Cert. Order at 2). The use of passive voice, however, elides over critical questions, such as (1) who prepared the form, (2) who included the form with the application, (3) whether Berland knew of, authorized, or participated in any such misrepresentation.

To the extent the Certification Order implicitly suggests that Berland committed fraud through the misstatement on the policy application, the evidence points the other direction and establishes that: (1) the false financial information appears in an "agent's form" prepared and signed by Simba, *not* the insured; (2) it was Larry Bryan's and Simba's custom and practice to fill in the application *outside* the insured's presence; (3) it was Larry Bryan's and Simba's custom and practice to affirmatively mispresent the insured's financial situation by inflating it to "show a greater net worth;" (4) Larry Bryan and Simba did *not* obtain the financial information at issue from Berland and (5) Berland's handwriting appears nowhere in this form or anywhere else in the application (except on other pages that contain her signature). (A298-299, 330, 337, 498-502, 553).

This evidence establishes that Simba—acting as an agent for the insurer—

supplied this information without Berland's knowledge or approval. Moreover, the insurer (*did not attach* the financial form with the misrepresentation to the application that forms part of the insurance policy, (A1346, 1360-1409), and Lavastone's corporate representative admitted that "neither Berland nor the trust made any representations directly to Lavastone in connection with the sale of the Berland policy." (A267). Thus, there is no evidence that Berland made or knew about any false statement or that the insurer or Lavastone relied upon any false statement. These issues are, in turn, relevant to whether Berland engaged in "fraud." *See Stephenson v. Capano Dev., Inc.,* 462 A.2d 1069, 1074 (Del. 1983) (fraud requires, *inter alia,* "knowledge or belief that the representation was false, or was made with reckless indifference to the truth," "intent to induce," and "action or inaction taken in justifiable reliance upon the representation").[8]

2. An Insured's Supposed Misconduct Does Not Limit Recovery Under § 2704(b)

Assuming *arguendo* that Berland engaged in any misconduct with respect to the misrepresentation on the policy application, Berland's conduct has no legal effect

[8] Lavastone also appears to argue that Berland committed "fraud" by "falsely" certifying, when she sold the policy, that the original owners and beneficiaries had an insurable interest. (Lavastone Br. at 11). But Lavastone does not explain how Berland, a 76-year old high school graduate with no insurance industry background, could have the requisite knowledge that such a representation was false by operation of § 2704 and *Price Dawe*.

on the Estate's statutory right to recover under § 2704(b), because the cause of action codified by § 2704(b) belongs to the Estate, not the insured. By its terms, the cause of action providing the death benefit to the Estate did not arise until: 1) Ms. Berland died, and 2), the insurer has paid the death benefit to Lavastone. Viewed another way, while Ms. Berland was alive, she did not enjoy any such claim for *death benefits* that were payable only upon her death. Thus, the Estate's claim is not derivative of the insured's, i.e., the Estate does not stand in Ms. Berland's shoes, and the Estate is not chargeable with her conduct. For this reason, any affirmative defense founded on the insured's alleged wrongdoing fails as a matter of law. *See, e.g.*, *Skinner v. Peninsula Healthcare Servs., LLC*, 2021 WL 1054101, at *1 (Del. Super. Ct. Mar. 19, 2021) (wrongful death claim of decedent's spouse not subject to an arbitration agreement signed by the decedent because the spouse's wrongful death action is not a claim of the decedent); *Parlin v. Dyncorp Int'l, Inc.,* 2009 WL 3636756, at *6 (Del. Super. Ct. Sept. 30, 2009) (similar).

Turning to the underlying facts, some context is required. STOLI schemes operate by using seniors as conduits to generate high-value policies lacking an insurable interest by "persuad[ing the] senior citizen to obtain a life insurance policy on his own life so that the policy can subsequently be transferred and sold in the market." *Est. of Daher v. LSH CO. v. LSH Co.*, 2021 WL 184394, at *2 (D. Del.

Jan. 19, 2021); *see also* Martin, 13 U. PA. J. BUS. L. at 187 (similar). Thus viewed, STOLI schemes necessarily rely on some measure of involvement by insureds to generate STOLI policies. For that reason, "something more than simply applying for a policy or providing written consent to the policy's issuance" is required for the insured, as opposed to a stranger, to have procured the policy, and feigned technical compliance does not suffice. *Price Dawe*, 28 A.3d at 1076.

Moreover, *Price Dawe* recognized the reality that sophisticated entities exploit senior citizens as vehicles to facilitate STOLI schemes. This is why *Price Dawe* held that in circumstances where a "third party uses the insured as an instrumentality to procure the policy, then the third party is actually causing the policy to be procured." 28 A.3d at 1074. It would be absurd to allow nefarious actors to inoculate themselves from liability by pointing the finger at the insured's conduct, notwithstanding that they induced and facilitated this conduct.

Indeed, the law in this country for over 140 years has been that the insured's involvement in obtaining a policy lacking an insurable interest does not impair the estate's right to recover the policy's death benefit. For example, in *Warnock v. Davis,* 104 U.S. 775 (1881), the insured collaborated with an investor to apply for a life insurance policy. The insured: (1) understood that that purpose of the transaction was to create a policy for the benefit of the investor, (2) consented to participate, (3)

executed the necessary paperwork, and (4) received money in exchange for his participation. *Id.* Nonetheless, the Supreme Court awarded the death benefit to the insured's estate and characterized the insured's actions as "not of that fraudulent kind with respect to which courts regard the parties as alike culpable and refuse to interfere with the results of their action." *Id.* at *5; Grismore, 42 Mich. L. Rev. at 791-92 (similar).[9]

Turning to the policies animating the statute, § 2704(b) provides an insured's estate with a direct, unqualified cause of action to recover the proceeds of a policy on the deceased that lacks an insurable interest. The statute thus disincentivizes STOLI operators by making STOLI policies risky investments that, once the death benefit was received, were subject to attack by the deceased's estate, which would then receive the proceeds.

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[9] Cases in accord are numerous and long-standing. *See Gilbert v. Moose's Administrators*, 104 Pa. 74 (1883) (awarding proceeds to estate despite argument that "if it was a wager, [the insured] was the author of it, and his administration can now no more disaffirm it than he could have done"); *Helmetag's Adm'x v. Mille*, 76 Ala. 183, 188 (1884) (holding that policy proceeds should go to estate even where insured knowingly assigned full death benefit to creditor); *Vanormer v. Hornberger*, 21 A. 887 (Pa. 1891) (similar); *Quinn v. Supreme Council, Catholic Knights of Am.*, 41 S.W. 343 (Tenn. 1897) (similar); *Irons v. U.S. Life Ins. Co. of N.Y.*, 108 S.W. 904 (Ky. 1908) (similar); *Deal v. Hainley*, 116 S.W. 1 (Mo. App. 1909) (holding that award of proceeds to estate proper even where insured knowingly permitted beneficiary lacking insurable interest to take out policy and intended that beneficiary receive full death benefit); *McRae v. Warmack*, 135 S.W. 807, 811 (Ark. 1911) (similar); *Finnie v. Walker*, 257 F. 698 (2d Cir. 1919) (similar).

The General Assembly could have legislated a different outcome, such as depositing the proceeds of wagering policies into Delaware's General Fund or simply not recognizing the estate's cause of action. Instead, the General Assembly provided a financial incentive for estates to bring lawsuits like this one, effectively deputizing them to root our illegal wagering contracts by challenging suspect policies. Denying recovery to estates who undertake the burden and responsibility of filing and prosecuting lawsuits based on the statutory recovery promised by § 2704(b) would thus contravene the General Assembly's intent.

Relatedly, the General Assembly chose unqualified language when providing estates with a direct cause of action under § 2704(b). The statute contains no language that supports a "misconduct exception" to the bright line rule that the insured's estate is entitled to insurance proceeds paid under a policy lacking an insurable interest. Nor is there justification to read such an exception onto the statute. *State Farm Mut. Auto. Ins. Co. v. Mundorf,* 659 A.2d 215, 220 (Del. 1995) ("It is not the function of a court to read into, or carve out, exceptions to a clearly-worded legislative or regulatory enactment.").

Next, Lavastone argues that certain estoppel-based defenses based on Ms. Berland's supposed misconduct (*e.g., in pari delicto* and unclean hands) defeat the Estate's claim. This ignores settled Delaware rule that estoppel-based defenses have

"always been regarded … as without controlling force in all cases in which public policy is considered as advanced by allowing either party to sue for relief against the transaction." *Seacord v. Seacord*, 139 A.80, 81 (Del. Super. Ct. 1927). Delaware's public policy relating to STOLI – as expressed in the Delaware Constitution, § 2704, and *Price Dawe* – is perhaps the strongest in the nation. A STOLI scheme not only "violates Delaware's clear public policy against wagering," but "is a fraud on the court because it violates the constitutional prohibition against wagering." *Price Dawe*, 28 A.3d at 1068, 1070 n. 25. Consequently, these defenses are inapplicable. *See Van de Wetering*, 2016 WL 8116141, at *19 (*in pari delicto* and unclean hands defenses "fail as a matter of law as they are inapplicable to a STOLI policy which has been declared void *ab initio*"); *Malkin,* 2016 WL 161598, at *20 (similar).

The Certification Order questions whether these considerations apply "even when the defendant did not induce the transaction," suggesting that the answer may be different because the Estate seeks recovery from Lavastone, a third-party purchaser of the policy, rather than from a party who actively procured the policy in the first instance. (Cert. Order at 6). However, Section 2704(b) makes clear that recovery is available from any "beneficiary, assignee or other payee" that "receives from the insurer any benefits" from a STOLI policy, and thus expressly contemplates recovery against a third-party purchaser like Lavastone, which in any event takes no

greater rights in a contract than its assignor. *See Burton v. Willin*, 11 Del. 522, 539 (1883) (holding that assignee takes contract subject to all claims assertible against the assignor).

In addition, such an approach would "turn *[Price] Dawe* on its head" by "creat[ing] a loophole where a stranger cannot create a policy for itself, but can do so for a different stranger." *Sol,* F. Supp. 3d at 616 (quotation marks omitted). Simply put, a void policy cannot be resuscitated through resale to a putatively innocent third-party. *See Price Dawe*, 28 A.3d at 1071 ("ACLI correctly points out that under Delaware common law, an assignment may not be used as a formalistic cover for what in substance amounts to a wager.").

In any event, for the reasons described above, Coventry, Simba and AIG/Lavastone are hardly innocent third-parties that did not understand the risks of their conduct. Collectively they designed, funded, and operationalized, a multifaceted scheme to generate thousands of STOLI polices. More to the point, from the beginning, Coventry, Simba and AIG/Lavastone knew of the very risk presented here, namely, that once the death benefit was paid by the insurer, the estates of the deceased could sue them and obtain the death benefits. This has been

the law in the United States for over 140 years, and in Delaware, those rights were codified more than 50 years ago.[10]

Because the rights of estates to pursue STOLI policies have been settled for over a century, the arguments made by *amici* also ring hollow. *Amici* claim that answering the certified questions in a manner favorable to the Estate will somehow upset the expectations of the legitimate life settlement market and engender a parade of horribles. This argument presupposes that policies are legitimate life settlements where the insured initially purchased the policy because the insured needed life insurance, but later sold the policy when the insurance was no longer needed. *See, e.g., Price Dawe*, 28 A.3d at 1069 ("This secondary market allows policy holders who no longer need life insurance to receive necessary cash during their lifetimes."). The policies at issue here do not resemble such legitimate transactions. They are pure STOLI. And as such, answering the questions in favor of the Estate will not upset but rather will ***fulfill*** the expectations of these sophisticated STOLI investors, who well understood the risks of purchasing policies like the one at issue here,

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[10] Nor is Delaware alone in its codification of the rights of estates to recover the proceeds of a policy that lacks an insurable interest: 29 other states have similar statutes. *See e.g.,* Ala. Code §27-14-3(g); Alaska Stat. §21.42.020(b); Ariz. Rev. Stat. §20-1104(B); Ark. Code § 23-79-103(b).

including the risk that the estates of the deceased would exercise their common law and/or statutory rights and sue the investors for the proceeds.

3. Lavastone's UCC Defense Is Not Part of this Proceeding and Inapplicable

Lavastone attempts to invoke a defense under the Uniform Commercial Code ("UCC"). (Op. Br. at 36-37). This defense is procedurally and substantively without merit.

Procedurally, the Certification Order did not ask the Court to consider this issue, and the Court should decline Lavastone's attempt to inject legal issues that were not certified to this Court. *Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A.,* 103 A.3d 1010, 1013–14 (Del. 2014) (rejecting attempt "to reframe the certified question" where "[t]hat is not the question we have been asked to address").

Substantively, Lavastone's UCC defense is without merit. Lavastone claims protection against "adverse claims" as the purchaser of a "security entitlement" in "financial assets" that did not have "notice of the adverse claim." (Op. Br. at 36-37 (*citin*g 6 *Del. C.* § 8-502)). However, title to a void instrument cannot pass. *Faraone v. Kenyon*, 2004 WL 550745, at *10 (Del. Ch. Mar. 15, 2004); s*ee Sun Life Assur. Co. of Can. v. Wells Fargo Bank N.A.*, 779 F. App'x 927, 929 (3d Cir. 2019) (holding

that because STOLI policy is void *ab initio*, subsequent "innocent purchaser for value" had no claim to proceeds).

Even if Lavastone overcame these hurdles, its UCC defense would be subject to disputed issues of fact. For example, AIG/Lavastone's role in generating STOLI policies and their role with respect to the Berland policy implicate disputed fact issues as to whether Lavastone had "notice of the adverse claim," *i.e* whether Lavastone was "aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoid[ed] information that would establish" its existence. 6 *Del. C.* §8-105(a)(2).

CONCLUSION

For these reasons, the Court should answer the certified questions in the manner described above.

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