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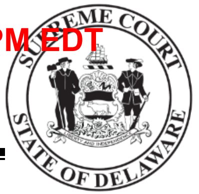

IN THE

Supreme Court of the State of Delaware

LAVASTONE CAPITAL LLC,

Defendant-Appellant,

v.

ESTATE OF BEVERLY E. BERLAND,

Plaintiff-Appellee.

No. 75, 2021

Certification of Questions of Law from the United States District Court for the District of Delaware

No. 1:18-cv-02002-SB

BRIEF FOR AMICI CURIAE LIFE INSURANCE SETTLEMENT ASSOCIATION AND EUROPEAN LIFE SETTLEMENT ASSOCIATION IN SUPPORT OF APPELLANT AND ITS POSITIONS WITH RESPECT TO THE CERTIFIED QUESTIONS

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56 Del. Laws Ch. 380 (1968),
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60 Del. Laws Ch. 406 (1976),
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81 Del. Laws Ch. 172 (2017),
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Other Authorities

1 Bertram Harnett & Irving I. Lesnick,
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Afonso V. Januário & Narayan Y. Naik,
Empirical Investigation of Life Settlements: The Secondary Market for Life Insurance Policies (2014),
<https://bit.ly/2RGk4Ms> 8, 11

Am. Council of Life Insurers,
Life Insurers Fact Book 2020 (2020),
<https://bit.ly/32dk5JQ> 12

Anne Marie Levin,
Year-End Wrap-Up—Why Are Delaware Trusts So Popular?,
40 Est. Plan. Rev.: The Journal 239 (2014) 13

Cameron Huddleston & Amy Danise,
Life Settlements Provide Escape Hatch When You Need Cash,
Forbes (last updated Mar. 28, 2021), <https://bit.ly/3x0F6pk> 11

Del. Dep't of Ins.,
Secondary Market for Life Insurance Policies— Report to the Delaware State Senate Pursuant to Senate Resolution No. 19 (Dec. 28, 2016), <https://bit.ly/3enVZSq> .... *passim*

Del. S. Res. 19,
148th Gen. Assembly (June 30, 2016) .... *passim*

Eli Martin Lazarus, Note,
Viatical and Life Settlement Securitization: Risks and Proposed Regulation,
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Expert Report of Hal J. Singer, Ph.D,
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ECF No. 144-4 7

Francis Flaherty,
Death Benefits Become Living Benefits, N.Y. Times
(Oct. 16, 1993), <https://nyti.ms/3mEGUiM> 10

Life Insurance Marketing & Research Association et al.,
Study Finds COVID-19 Spurs Greater Interest in Life Insurance
(Mar. 23, 2021), <https://bit.ly/3tcxLkf> 6

Loan,
Black's Law Dictionary (11th ed. 2019) 17

Michael G. Koutnik,
Long Live Life Settlements: The Current Status and Proposed Direction of the Life Settlement Market,
96 Marq. L. Rev. 913 (2013) 7, 9, 10

Original Synopsis,
S.B. 66, 149th Gen. Assembly (2017),
<https://bit.ly/2RvkULP> 16

Andre S. Blaze & Julian Movsesian,
Consider Premium Financing in Life Insurance Evaluations,
38 Est. Plan. 30 (2011)..7

Staff Rep. to U.S. Sec. & Exch. Comm'n,
Life Settlements Task Force (July 22, 2010).......................................8, 9, 10, 11

INTEREST OF AMICI CURIAE

The Life Insurance Settlement Association ("LISA") is the Nation's leading trade association dedicated to promoting the option of consumers to realize the full market value of their life insurance policies by selling those policies on the secondary market.[1] Established in 1994, LISA has nearly 100 different members who are all involved in the life settlement industry, including brokers, providers, investment firms, law firms, medical underwriters, consultants, actuaries, trustees, and escrow agents. LISA's members operate in all U.S. jurisdictions, including Delaware. Among other important functions, LISA regularly files amicus briefs in cases that raise issues of vital concern to the life settlement industry. *See, e.g.*, *Sun Life Assurance Co. v. Wells Fargo Bank, N.A.*, 208 A.3d 839 (N.J. 2019); *Wells Fargo Bank, N.A. v. Pruco Life Ins. Co.*, 200 So. 3d 1202 (Fla. 2016); *Kramer v. Phoenix Life Ins. Co.*, 940 N.E.2d 535 (N.Y. 2010); *First Penn-Pac. Life Ins. Co. v. Evans*, 313 F. App'x 633 (4th Cir. 2009).

The European Life Settlement Association ("ELSA" and together with LISA, "Amici") is the largest investor-focused trade association in the life settlement industry.[2] Established in 2009, ELSA's mission is to promote best practices in the industry and the positive development of the industry's reputation among life risk

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[1] *See* https://www.lisa.org/.

[2] *See* https://www.elsa-sls.org/.

and capital market participants and stakeholders. Today, ELSA has over 25 members who are all involved in the life settlement market, including institutional investors, banks, service providers, and intermediaries. ELSA's members operate not only in Europe, but elsewhere around the world, including Delaware.

This case presents questions of enormous importance to Delaware's life settlement market. One of those questions addresses whether a policy sold in that market is invalid if the consumer originally procured it with the assistance of nonrecourse loans (*i.e.*, "premium financing") and always understood that she had the option of selling the policy to a third party once a statutory "contestability period" ended. Another one of those questions addresses whether an investor who purchases a policy from an individual in this market, and who subsequently earns money from that policy, must disgorge that money to the individual's estate because the policy is purportedly invalid due to the decedent's own fraudulent misconduct. Answering "yes" to these questions would jeopardize hundreds of policies with a collective face value of hundreds of millions of dollars (at a minimum) and countermand the State's effort to foster the market. Accordingly, Amici have a substantial interest in this case and file this brief in support of Appellant Lavastone

Capital LLC ("Appellant"), which has correctly answered "no" to the questions here.[3]

[3] Pursuant to Delaware Supreme Court Rule 28(b), Amici have contemporaneously filed a motion for leave to file this brief. Appellant has consented to that motion; Appellee takes no position on that motion.

SUMMARY OF ARGUMENT

The "life settlement" market may sound arcane, but it serves critical functions. The advantages of a life insurance policy are self-evident: In exchange for making premium payments with savings or the assistance of loans, an individual can guarantee that her dependents will receive a cash payment from an insurer in the event of her death. But for some policyholders—often senior citizens—maintaining these policies is unnecessary or burdensome. To resolve the issue, policyholders can cease making premium payments or surrender their policies to their insurers for at least some value. But there is another—indeed, *better*—option that is often overlooked: Policyholders can sell their policies on the secondary market to third parties for even higher sums and then use the proceeds for other necessary expenses. The legitimacy of this life settlement market is well-established, and jurisdictions around the country have long sought to foster it.

Delaware is a prime example. For decades, the State has endeavored to make it easy to acquire life insurance policies, including by affirmatively authorizing "premium financing." For even longer, the State has made clear that policyholders are free to sell their policies to others. And although the State has regulated the life settlement market, it has never done so out of hostility to that market. To the contrary, the State's regulatory efforts reflect a desire to provide certainty to market participants and to improve the market. In reliance on this pro-life-settlement policy,

the State's market is now worth billions of dollars, and there is still considerable room for growth as more policyholders gain familiarity with its virtues.

This case raises two primary questions that have the potential to profoundly impact Delaware's life settlement market. The first concerns the legitimacy of life insurance policies traded in that market if consumers originally utilized premium financing to meet their premium obligations. The second concerns whether a decedent's estate may take money away from an investor in this market on the ground that the investor's purchased policy is invalid—notwithstanding that the policy's purported invalidity is the by-product of the decedent's own fraudulent misconduct (and notwithstanding that the decedent, and thus the estate, already profited from the sale of the policy to the investor). As Appellant correctly argues, these questions have straightforward answers under Delaware law: Premium financing is entirely lawful, and an estate may not capitalize on the decedent's own misdeeds. The contrary views would imperil hundreds of policies with a collective face value totaling hundreds of millions of dollars and disincentivize participation in the market—a result that directly undermines the State's efforts to cultivate the market.

ARGUMENT

A. The Life Settlement Market Enhances Consumer Welfare.

Life insurance is ubiquitous in the United States. Over 52% of all American adults currently maintain life insurance policies, and in light of the COVID-19 pandemic, many more have expressed interest in purchasing coverage. *See* Life Insurance Marketing & Research Association et al., *Study Finds COVID-19 Spurs Greater Interest in Life Insurance* (Mar. 23, 2021), <https://bit.ly/3tcxLkf>. Those policies have obvious and well-recognized benefits. For example, in exchange for making premium payments to an insurance company, a policyholder can ensure that loved ones (*e.g.*, a spouse or children) will receive a cash payment known as a "death benefit" in the event of the policyholder's death. *See, e.g.*, 1 Bertram Harnett & Irving I. Lesnick, *The Law of Life and Health Insurance* §1.01 (2020) (Harnett & Lesnick) ("In life insurance, the insurer contracts with the insured to pay money to the insured or to a designated beneficiary, on or before the death of the insured.").

Much like individuals pay for their homes, policyholders pay for those premiums either out-of-pocket or with the assistance of loans—*i.e.*, via premium financing. Premium financing offers numerous advantages. Among other things, premium financing enables individuals to "maximize their insurability, obtain insurance without tying up other their assets, retain their assets to invest for higher returns than the cost of borrowing, and secure optionality at the end of the term of

the loan." Expert Report of Hal J. Singer, Ph.D. at 8, *Malkin v. Wells Fargo Bank, N.A.*, No. 1:17-cv-23136-MGC (S.D. Fla. filed Sept. 28, 2018), ECF No. 144-4. For these and other reasons, estate planners and advisors often recommend premium financing in appropriate circumstances. *See, e.g.*, Andre S. Blaze & Julian Movsesian, *Consider Premium Financing in Life Insurance Evaluations*, 38 Est. Plan. 30, 34 (2011) ("A premium financing strategy offers benefits worth considering. … In the event a premium financing strategy is not appropriate, the trustee always has the option to pay premiums in cash.").

Sometimes, however, policyholders may no longer have a need for their life insurance policies or the desire to pay for them. For instance, a policyholder's spouse may die, children may no longer depend on the policyholder, or the policyholder may suffer a debilitating illness or injury for which treatment is expensive. In such circumstances, the policyholder could decide to allow the policy to "lapse" (*i.e.*, to cease premium payments) or to receive the policy's "cash surrender value," Michael G. Koutnik, *Long Live Life Settlements: The Current Status and Proposed Direction of the Life Settlement Market*, 96 Marq. L. Rev. 913, 915 (2013) (Koutnik), the latter of which is "the sum that the insured can get simply by surrendering … his policy to the insurance company," 1 Harnett & Lesnick §1.03. But in addition to these two options, there is a third one available to policyholders: They could decide to *sell* their policies to third parties—specifically, for a price

greater than the cash surrender value but *less* than the death benefit—thereby allowing the former to "maximize their asset" while giving the latter an opportunity to earn a return.[4] Staff Rep. to U.S. Sec. & Exch. Comm'n, *Life Settlements Task Force* 3 (July 22, 2010) ("SEC Report").

The law has long recognized the legitimacy and utility of this third option. Indeed, over a century ago, the U.S. Supreme Court—in a decision applying pre-*Erie* federal common law—concluded that, although an individual must have an "insurable interest" to initially procure a life insurance policy (*i.e.*, "an interest in having the life continue"), a policyholder may legitimately "transfer" a policy "to one whom he … is not afraid to trust" so long as that insurable-interest requirement is satisfied.[5] *Grigsby v. Russell*, 222 U.S. 149, 155 (1911). That is because "it is desirable to give to life policies the ordinary characteristics of property"—including

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[4] Prospective investors consider various different factors when deciding whether to purchase a life insurance policy in the life settlement market. All prospective investors, for example, rely on life-expectancy reports that policyholders agree to have generated, as those reports provide an estimate of how long an investor may have to make premium payments. *See* Afonso V. Januário & Narayan Y. Naik, *Empirical Investigation of Life Settlements: The Secondary Market for Life Insurance Policies* 8 (2014) (Januário & Naik), <https://bit.ly/2RGk4Ms> (explaining that, in a life settlement transaction, the insured's "medical records" are submitted to a "medical underwriter who provides a life expectancy report for each insured," thus enabling prospective investors to "value[] the policy and make[] an offer to purchase").

[5] As the U.S. Supreme Court recognized, "[a] contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end." *Grigsby*, 222 U.S. at 154.

the right to alienation, for the unnecessary restriction of that right "diminish[es] appreciably the value of the contract in the owner's hands." *Id.* at 156; *see also* 1 Harnett & Lesnick §2.01 (explaining that "courts have long recognized that, in reality, life insurance is not purely indemnity" and describing *Grigsby* as a "seminal case" for that proposition).

The *Grigsby* decision thus "paved the way" for the secondary life insurance market, which did not develop in earnest until the 1980s during the HIV/AIDS pandemic. Koutnik 925; *see also* SEC Report 3-4. Although "largely ineffective," treatment for HIV/AIDS often cost patients tens of thousands of dollars—an unaffordable amount for numerous patients, particularly given that the families of many of those patients "abandoned" them. Eli Martin Lazarus, Note, *Viatical and Life Settlement Securitization: Risks and Proposed Regulation*, 29 Yale L. & Pol'y Rev. 253, 254 (2010) (Lazarus). As such, with much to gain and little to lose given their short life expectancy, some patients chose to sell their life insurance policies to third parties in order to receive an immediate payout that could fund potentially life-saving care. *See ibid.* Ultimately, this sort of transaction earned the name "viatical settlement," a name derived from the term "viaticum"—*viz.*, "the Eucharist or communion given to Christians who are dying or are in danger of death." *Siporin v. Carrington*, 23 P.3d 92, 93 n.1 (Ariz. Ct. App. 2001).

Over time, treatment for HIV/AIDS improved, and—thankfully—fewer of those patients had a need for viatical settlements. *See, e.g.*, Lazarus 255. But the secondary life insurance market nonetheless continued to grow in popularity, first among individuals with other serious illnesses. *See, e.g.*, SEC Report 4; *see also* Francis Flaherty, *Death Benefits Become Living Benefits*, N.Y. Times (Oct. 16, 1993), <https://nyti.ms/3mEGUiM> ("Although relatively new, early payouts of life insurance are growing in popularity, and experts applaud the added flexibility."). Eventually, however, that market attracted individuals *without* any serious illness (often senior citizens) who simply wanted to rid themselves of their life insurance policies—a development that generated the modern "life settlement" market. *See, e.g.*, Koutnik 926; *see also* Del. Dep't of Ins., *Secondary Market for Life Insurance Policies—Report to the Delaware State Senate Pursuant to Senate Resolution No. 19* 4 n.4 (Dec. 28, 2016) ("Department of Insurance Report"), <https://bit.ly/3enVZSq> ("In life insurance industry parlance, a distinction usually is made between 'viatical settlements,' referring to the sale of life insurance policies by policy owners with very short life expectancies, commonly individuals with terminal illnesses, and 'life settlements,' referring to such transactions by policy owners who are not seriously ill.").

It is little wonder why the secondary life insurance market grew in this fashion. Statistics demonstrate—and market participants confirm—that the average

policyholder who enters into a life settlement contract can earn at least *four times* (and sometimes much more) the amount of the cash surrender value that she would otherwise receive from her life insurance company. *See, e.g.*, Januário & Naik 18 ("[W]e find that policyowners collectively receive an amount more than four times what they would have received had they surrendered their policies to their insurance companies."); *see also* Cameron Huddleston & Amy Danise, *Life Settlements Provide Escape Hatch When You Need Cash*, Forbes (last updated Mar. 28, 2021), <https://bit.ly/3x0F6pk> ("People typically get four to 11 times the cash surrender value of a policy[.]"). That individual can then use that money for any number of purposes, including "retirement, medical and other living expenses." Department of Insurance Report 5. Meanwhile, the third-party purchaser obtains an asset that may provide a favorable economic return even "during periods of unfavorable economic conditions." SEC Report 5. In short, life settlement contracts are not only entirely legitimate, but also indisputably advantageous.

B. Delaware Has Actively Sought To Cultivate A Robust Life Settlement Market.

Unfortunately, the majority of policyholders "are not familiar with [the] option to consider selling their life insurance policy." Del. S. Res. 19, 148th Gen. Assembly (June 30, 2016) ("Senate Resolution 19"). As a result, millions of life insurance policies whose collective face value totals many billions of dollars lapse every year—even though policyholders may have spent decades paying premiums.

See Am. Council of Life Insurers, *Life Insurers Fact Book 2020* tbls. 7.1, 7.4, 7.5 (2020), <https://bit.ly/32dk5JQ>. But because the welfare-enhancing benefits of life settlement contracts are undeniable, and because such contracts are superior to lapsation, "[a] majority of jurisdictions by common law or express statute" have sought to foster the life settlement market. 1 Harnett & Lesnick §2.01.

Delaware is no exception to that consensus. Over 50 years ago, Delaware codified the view that a life insurance policyholder may sell her policy to a third party so long as the contractual language permits. *See* 56 Del. Laws Ch. 380, §1 (1968), *codified at* 18 Del. C. §2720 ("A policy may be assignable or not assignable, as provided by its terms."). Moreover, over 40 years ago, Delaware codified the view that policyholders should have the option to utilize premium financing to procure and maintain those policies. *See* 60 Del. Laws Ch. 406, §1 (1976), *codified at* 18 Del. C. §4801 *et seq.*; *see also Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Tr.*, 869 F. Supp. 2d 556, 563 (D. Del. 2012) ("[I]nsurance companies and agents [in Delaware] are expressly permitted to loan premium funds to insureds."). Hence, Delaware has long endeavored to make it easy for consumers to purchase policies and to sell those policies on the open market if they so desired.

Delaware also has other distinctive features that make it particularly attractive to participants in the life settlement market. To take one example, life insurance policies are often held in trusts, and Delaware has "best in the nation trust laws."

Senate Resolution 19; *see also* Department of Insurance Report 2 (noting that policies underlying life settlement contracts "may be held in trusts in Delaware"); Anne Marie Levin, *Year-End Wrap-Up—Why Are Delaware Trusts So Popular?*, 40 Est. Plan. Rev.: The Journal 239, 239 (2014) ("Delaware is apparently the most popular jurisdiction for trusts as evidenced by the fact that there are more (non-private) trust companies in Delaware than in any other state."). Further, the market also has the judiciary's stamp of approval. A decade ago, in *PHL Variable Insurance Company v. Price Dawe 2006 Insurance Trust*, 28 A.3d 1059 (Del. 2011) (*Price Dawe*), this Court emphasized that "[t]he secondary market for life insurance" is "active" and "perfectly legal" in Delaware. *Id.* at 1069. Although the Court explained that a policy must satisfy a statutory "insurable interest" requirement[6] in the first instance—that is, a "stranger" with "no relationship" with a particular individual cannot procure a policy on that individual's life (including by using the individual as a straw purchaser) and thereby "wager" on whether he will live or die—

[6] *See* 18 Del. C. §2704(a) ("Any individual of competent legal capacity may procure or effect an insurance contract upon his or her own life or body for the benefit of any person, but no person shall procure or cause to be procured any insurance contract upon the life or body of another individual unless the benefits under such contract are payable to the individual insured or his or her personal representatives or to a person having, at the time when such contract was made, an insurable interest in the individual insured."); *see also id.* §2704(c) (defining the persons who have an "insurable interest"); *id.* §2704(b) (allowing an estate to recover death benefits paid "under" a "contract" that violates the insurable-interest requirement codified in §2704(a)).

a policyholder otherwise has the freedom to sell his policy to anyone on the secondary market ("even a stranger"), which "provides a favorable alternative to allowing a policy to lapse, or receiving only the cash surrender value." *Id.* at 1069-70, 1072-76; *see also id.* at 1074 ("[A] life insurance policy that is validly issued is assignable to anyone, with or without an insurable interest, at any time."); *id.* at 1069 ("This secondary market allows policy holders who no longer need life insurance to receive necessary cash during their lifetimes."). In light of this legislative and judicial support, it is thus unsurprising that Delaware's life settlement market is worth billions of dollars—and still only scratching the surface. *See* Department of Insurance Report 11 (noting that, as of 2016, the total value of individual life-settled policies in Delaware reached "approximately $2.5 billion," a "significant" sum but still a relatively "small percentage … of total face value of all individual life policies").

To be sure, as with any market, Delaware has not sought to grow its life settlement market at all costs. As viatical settlements gained popularity toward the end of the twentieth century, for instance, the State moved to regulate the market by statute, leading to the passage of the Viatical Settlements Act in 1999. *See* 72 Del. Laws Ch. 132, §1 (1999). And because that Act applied only to a "viator" in the truest sense of the term—*i.e.*, an "owner of a life insurance policy or a certificate holder under a group policy insuring the life of an individual with a catastrophic,

life-threatening or chronic illness or condition," *ibid.*—the General Assembly amended it in 2017 so that standard life settlement contracts now fall under its purview, *see* 81 Del. Laws Ch. 172, §1 (2017), *codified at* 18 Del. C. §7501 *et seq.*

But this regulation hardly reflects hostility to or skepticism of the life settlement market.[7] Quite the opposite, that regulation reinforced the market's legitimacy and societal value. As the Delaware Senate explained in a resolution passed in the lead-up to the 2017 amendments, "the Delaware General Assembly has an interest in … ensuring a robust life settlement market." Senate Resolution 19. That is because that market "benefits Delaware consumers—particularly senior citizens—by giving them the chance to sell a life insurance policy that they no longer want or need for a substantially higher price than the cash surrender value of the policy." *Ibid.* And any "uncertainty in the market" can "prevent Delaware consumers from taking advantage of selling their policies" and realizing these benefits. *Ibid.* The General Assembly thus sought to regulate the market not to discourage life settlement transactions, but rather to *encourage* them by providing the maximum degree of "certainty to investors who purchase life insurance policies."

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[7] Nor would the State have any reason to display hostility towards the life settlement market. Indeed, before the 2017 amendments to the Viatical Settlements Act, the Department of Insurance "ha[d] received no complaints from Delaware consumers regarding viatical settlements or the secondary market." Department of Insurance Report 12.

Ibid. In this way, the State perpetuated longstanding policy recognizing that it is a good thing to give a policyholder the option to exercise her full suite of property and contractual rights. *See* Original Synopsis, S.B. 66, 149th Gen. Assembly (2017), <https://bit.ly/2RvkULP> (explaining that the amendments to the Viatical Settlements Act "*continu*[*e*] to allow honest policyholders to exercise all of their individual and contractual rights" (emphasis added)).

C. The Certified Questions Have Significant Implications For Delaware's Life Settlement Market.

The two primary questions under review in this case—the second and third certified questions[8]—are critically important to the stability of Delaware's life settlement market. As Appellant correctly explains, those questions have straightforward answers under Delaware law. *See* Appellant Br. 16-45. And Appellant's answers are the only ones that can safeguard the market.

The second certified question concerns premium financing. In particular, it asks whether Delaware law prevents a consumer from using premium financing via

[8] Like Appellant, Amici take no position on the first certified question. That question asks whether a decedent's estate may seek to recover a death benefit paid to an investor pursuant to a life settlement contract if the underlying life insurance policy violates Delaware's insurable-interest requirement. *See* Appellant Ex. A at 7. Amici do not encourage violations of that requirement, and this case does not implicate any such violation. In all events, to award the death benefit to the estate in such a context is anomalous, for the decedent (and thus the estate) would have already profited from the sale of the policy, *see id.* at 5, and the insurer's decision to pay the investor in such circumstances is effectively gratuitous, *see* Appellant Br. 13-15.

a "nonrecourse loan"[9] to procure a life insurance policy if that consumer always understood that she had the option of selling the policy on the secondary market once the "contestability period"[10] ended. *See* Appellant Ex. A at 7; *see also* 18 Del. C. §§2704(a), (c)(5). But Delaware law does no such thing. As described above, Delaware law has explicitly authorized the use of premium financing for decades, and it nowhere suggests that nonrecourse loans are impermissible. *See* p. 12, *supra*; *see also* 18 Del. C. §4801 *et seq.* Nor does anything in the 2017 amendments to the Viatical Settlements Act disturb that conclusion. To the contrary, those amendments leave no doubt that they do *not* purport to regulate standard premium-financing arrangements. *See* 18 Del. C. §7502(14)(b)-(c). That being so, it follows that, so long as the lending institution is not using the insured as a strawman to purchase the policy, the policy is valid, and the policyholder may validly sell it on the secondary

[9] A nonrecourse loan is "[a] secured loan that allows the lender to attach only the collateral, not the borrower's personal assets, if the loan is not repaid." *Loan*, Black's Law Dictionary (11th ed. 2019). In this context, the collateral is the life insurance policy.

[10] Delaware law provides that "[t]here shall be a provision" in every life insurancy policy stating that the "policy shall be incontestable after it has been in force during the lifetime of the insured for a period of not more than 2 years after its date of issue." 18 Del. C. §2908. This two-year contestability period provides an opportunity for insurers to investigate "misrepresentations in the insurance application" while allaying consumer fears that insurers will refuse to honor the policies many years down the line. *Price Dawe*, 28 A.3d at 1065-66.

market consistent with settled law. *See Price Dawe*, 28 A.3d at 1074; *see also* 18 Del. C. §7511.[11]

Any other conclusion would impede consumers' ability to procure life insurance policies and hence their ability to sell them—all of which directly conflicts with the State's policy goals. As described, estate planners and advisors often recommend premium financing because it offers many advantages. *See* pp. 6-7, *supra*. But if such financing is disqualifying for Delaware consumers who may wish to participate in the life settlement market, the inevitable effect is that fewer Delaware consumers will have the ability to participate in that market. That is impossible to reconcile with the legislature's pronouncement that the State "has an interest in … ensuring a *robust life settlement market for Delaware seniors*." Senate Resolution 19 (emphasis added).

Making matters worse, if nonrecourse premium financing is illegitimate, it would imperil already-consummated life settlement contracts. Although statistics are not publicly available, Amici can attest based on their insight into the Delaware market that investors are currently holding hundreds of policies that consumers

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[11] Under the extant version of the Viatical Settlements Act, policyholders may enter into life settlement contracts immediately in some circumstances, while in other circumstances, they must wait at least five years. The latter restrictions did not exist before 2017; instead, policyholders could enter into life settlement transactions immediately in all circumstances.

originally procured with the assistance of nonrecourse premium financing, and the collective face value of those policies is in the hundreds of millions of dollars. Many investors, moreover, have already paid tens of thousands of dollars (and, in many cases, more) in premiums since acquiring those policies. But if the answer to the second certified question is yes, and if the use of nonrecourse premium financing taints those policies, those investors may have paid those premiums for naught, as they may no longer have the ability to recover the death-benefit payments for which they bargained. Yet again, that result would turn the State's policy objectives—*e.g.*, providing "*certainty to investors who purchase life insurance policies in the secondary market*," *ibid.* (emphasis added)—upside down and would only encourage investors to exit the market.

The third certified question is equally straightforward and no less consequential. That question addresses the circumstances under which a decedent's estate may seek to profit from a life settlement contract. More precisely, it asks whether Delaware law permits an estate to extract a death-benefit payment made to a third-party investor pursuant to a life settlement contract in circumstances where the decedent procured the underlying life insurance policy through fraudulent conduct. *See* Appellant Ex. A at 7; *see also* 18 Del. C. §§2704(a)-(b). It is inconceivable that the answer to this question is yes. Indeed, as Appellant correctly explains, such an answer would contravene settled principles of estate law, the

Uniform Commercial Code, and the Viatical Settlements Act. *See* Appellant Br. 34-45.

And here too, such an answer would greatly disturb Delaware's life settlement market. Investors have participated in that market on the understanding that, like other contracts, life settlement contracts are final and binding.[12] After all, the only reason why investors pay to acquire life insurance policies in the market, and the only reason why they dutifully make premium payments on those policies, is because they are guaranteed a payout in the end. Needless to say, a rule that allows an estate to pry that payout away from the investor after a decedent willingly relinquishes the right to that payout is unlikely to convince investors to participate in the market in the future, especially when the decedent himself is the wrongdoer.[13]

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[12] For this reason, as between an estate and an investor, it should make no difference whether the decedent ever engaged in fraud or not. Instead, once a decedent enters into a valid life settlement contract and secures a payment from an investor, neither the decedent nor his estate should have the ability to secure a *second* payment from the investor. That result is consistent with the Viatical Settlements Act. Although that Act gives a viator "an absolute right to rescind" a life settlement contract "before the earlier of 60 calendar days after the date upon which [it] is executed by all parties or 30 calendar days after the … proceeds have been sent to the viator," it recognizes that rescission "may be conditioned upon the viator … repaying to the viatical settlement provider within the rescission period all proceeds of the settlement and any premiums, loans and loan interest paid by or on behalf of the viatical settlement provider." 18 Del. C. §7510(c).

[13] As Judge Bibas recognized, allowing an estate to profit in these circumstances "suggest[s] that an Estate can profit twice from the insured's misdeeds"—first, by receiving a payment at the time of the life settlement contract (a payment that may

Thus, such a rule will ultimately produce effects that inure to the detriment of innocent consumers. And on top of that, such a rule is bound to generate uncertainty about numerous existing contracts. These results have nothing to recommend them; they are antithetical to everything that the State has sought to accomplish in this area; and this Court should not countenance them.

simply accede to the estate), and second, by receiving the death-benefit payment. Appellant Ex. A at 6.

CONCLUSION

For the reasons set forth above, this Court should adopt Appellant's positions regarding the certified questions.

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