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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 Court Below-United States District Court for the District of Delaware C.A. No. 1:18-cv-02002-SB

BRIEF OF AMICUS CURIAE INSTITUTIONAL LONGEVITY MARKETS ASSOCIATION IN SUPPORT OF APPELLANT LAVASTONE CAPITAL LLC REQUESTING THAT THE COURT ANSWER THE THREE CERTIFIED QUESTIONS IN THE NEGATIVE

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The District Court of Delaware has asked this Court to clarify certain issues relating to Delaware Insurance Law under 18 Del. C. § 2704 and this Court's prior decision in *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust*, 28 A.3d 1059 (Del. 2011) as they apply to the sale of a life insurance policy by an insured to an investor (a "life settlement"). The Institutional Longevity Markets Association ("ILMA") respectfully submits the following *amicus curiae* brief due to the importance of the certified questions to Delaware's life settlement industry.

PRELIMINARY STATEMENT

Life settlements involve the purchase of existing in-force life insurance policies by investors. This multi-billion dollar market provides consumers with valuable options to maximize the value of life insurance policies they no longer need or can afford. Policyholders can sell their unwanted policies and receive the substantial and fair market value for their property, instead of being forced to lapse or surrender the policies to the insurers for little or no cash value. The tertiary market, which resells these policies to institutional investors, provides stability and economic incentive for secondary market actors. The life settlement market provides a valuable and lawful service to Delaware policyholders by correcting a market imbalance that allows life insurers to collect years of policy premiums without ever having to provide contracted-for benefits, while providing substantial

up-front cash payments to insureds who often need such funds to obtain medical care, home assistance, or end-of-life services.

Like any market, this valuable insurance market can only survive if the application of the law is predictable and objective criteria are used to determine whether contracts are bona fide. This market stability, in turn, supports the demand for life insurance and provides all Delaware consumers with more options in a robust insurance market. This Court should answer the certified questions in a manner that injects stability into this multi-billion dollar market as it relates to policies governed by Delaware law—a market which has seen instability in the years since *Price Dawe* through lawsuits filed by both insurance carriers many years after the contestability period and the estates of decedents who willingly sold policies into the secondary market over 10 years ago and who are now seeking to recover under those policies which already have been paid out by insurance carriers to life settlement investors.

First, Third Circuit Judge Stephanos Bibas highlighted an unavoidable tension between *Price Dawe* and § 2704(b)—a statutory provision that this Court did not have the chance to consider in 2011 when it decided *Price Dawe*. If this Court is not willing to answer the first certified question "no" then, consistent with Judge Bibas' opinion, this Court should reexamine its holding in *Price Dawe* that policies procured in violation of § 2704(a) are void *ab initio*, which directly conflicts with the remedy the Delaware legislature established under § 2704(b). Harmonizing

§ 2704(a)'s prohibition against policies lacking an insurable interest at inception with the remedy for such violations provided under § 2704(b)–*i.e.,* recovery by innocent estates of amounts paid "under any contract"—requires a finding by this Court that the legislature supplanted the common law by providing a statutory remedy that does not invalidate the existence of the contract. Indeed, by its very terms § 2704(b) depends on the existence of a contract to effectuate that remedy. Without this Court's clarification, the holding of *Price Dawe* renders the statutory remedy of contractually-based damages under § 2704(b) meaningless.

Second, Delaware law recognizes that life insurance policies procured with premium financing are not, *per se*, illegal wagers. This Court should reject the arguments advanced by both estates of insureds who profited from the sale of policies into the secondary market and insurance carriers that, under *Price Dawe*, policies financed with non-recourse loans are illegal wagering transactions, and give guidance to lower courts on the legality of non-recourse premium financing—particularly in light of federal district courts decisions that have adopted this distorted application of *Price Dawe*.

Third, Delaware law does not permit an estate to assert a claim under § 2704(b) if the policy was procured by fraud on the part of the decedent or the decedent profited from the previous sale of the policy. Finding otherwise would lead to repugnant results under Delaware public policy, rewarding an insured *twice*

for his or her fraud–through the initial sale of the fraudulently procured policy and the subsequent recovery of the death benefits by the estate. Countenancing such pugnacious lawsuits by estates would also destroy the stability of the life settlement market, given that estates are seeking to recover the proceeds of policies that have already been paid out by insurance carriers to policy owners.

INTEREST OF AMICUS CURIAE

Amicus curiae ILMA is a not-for-profit trade association comprised of the leading institutional investors in the tertiary market. Since its formation in 2007, ILMA has helped to develop and promulgate best practices for life settlement investors, life settlement providers, banks, and other participants in life settlements.

ILMA has an interest in the regulation of the life settlement market, and in protecting the rights of both investors and policy owners, as its primary mission is to encourage a robust, consumer-oriented market. Because of ILMA's substantial participation in the life settlement industry, ILMA believes it is in a position to provide a unique and informed perspective on law and public policy that will enhance the Court's consideration of the certified questions it has agreed to review.

ARGUMENT

I. THE COURT SHOULD EITHER ANSWER THE FIRST CERTIFIED QUESTION "NO" OR REVISIT ITS HOLDING IN *PRICE DAWE* THAT VIOLATIONS OF § 2704(A) RENDER THE OFFENDING POLICY VOID *AB INITIO*, IN ORDER TO HARMONIZE THAT SECTION WITH THE REMEDY PROVIDED FOR IN § 2704(B), WHICH THE COURT DID NOT CONSIDER IN *PRICE DAWE*.

In its first certified question, the District Court asks this Court: "If an insurance contract is void *ab initio*" under § 2704(a) and *Price Dawe*, "is any resulting death-benefit payment made 'under any contract' within the meaning of 18 *Del. C.* § 2704(b)?"[1] The answer to this question, under a straightforward application of *Price Dawe*, is **no**.

The implication of this answer, however, is that *Price Dawe*'s holding that insurance policies that violate § 2704(a) are void *ab initio* inadvertently renders the statutory remedy provided to estates in § 2704(b) meaningless. Section 2704(b) was neither raised by the parties nor considered by the Court at that time. As discussed below, if this Court is not prepared to answer the first certified question "no" as a logical extension of *Price Dawe*, ILMA respectfully submits that the Court should revisit this aspect of its holding in *Price Dawe* in order to harmonize the two sections of the statute and effectuate the legislative purpose of providing a statutory remedy to innocent estates.

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[1] *Estate of Berland v. Lavastone Capital LLC*, No. 1:18-cv-02002-SB, Dkt. 157 at 7 (Del. Dist. Ct. Mar. 2, 2021) the "Cert. Order".

A. The *Price Dawe* holding introduces a statutory conflict.

In certifying the first question, Judge Bibas recognized the tension and inherent conflict between *Price Dawe's* conclusion that violations of § 2704(a) render the offending policy void *ab initio,* on the one hand, and that the statutory remedy available to estates for such violations under § 2704(b) relies upon the existence of a contract to effectuate the remedy, on the other.[2]

As Judge Bibas observed, the "legislature thus tied the remedy in § 2704(b) to a violation of the statute and a payment under a *contract*. But *Price Dawe* declared that any violation of § 2704(a) makes the 'contract' void ab initio." Cert. Order at 5 (emphasis in original). "As a result," Judge Bibas continued, "if § 2704(a) is violated, any death benefits paid by an insurance company are not technically made 'under any contract.'" *Id*. Accordingly, the first certified question "seeks guidance on a conflict between prior precedent and statutory text." *Id.* at 7.

This issue was not presented to the Court ten years ago; therefore, this Court has had no occasion to address it until now. Without any modification of *Price Dawe*, however, the remedy under § 2704(b) is illusory.

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[2] *See* 18 *Del. C.* § 2704(b) (providing "[i]f 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 … of the individual insured, the … executor … may maintain an action to recover such benefits from the person so receiving them") (emphasis added).

B. This Court should harmonize § 2704(a) and § 2704(b).

As noted in *Price Dawe*, Courts should "interpret statutory law consistently with pre-existing common law unless the legislature expresses a contrary intent." 28 A.3d at 1070. Indeed, "[t]he tenets of statutory construction require us to interpret statutes consistent with the common law unless the statutory language clearly and explicitly expresses an intent to abrogate the common law." *Id.* at 1072-1073.

This Court was not tasked with harmonizing §§ 2704(a) and 2704(b) in *Price Dawe* because the remedy under § 2704(b) was not properly before it. Applying these canons of statutory construction in this case demonstrates that the legislature created a statutory remedy that abrogates the common law in one important respect. Specifically, by expressly providing for a remedy contingent on the existence of a "contract," which is contrary to finding the violative contract never existed in the first place, the Delaware legislature abrogated the common law that had previously rendered such policies void *ab initio*. *See, e.g.*, *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114, 1122 (Del. 2009) (statute inconsistent with common law supersedes the latter where results conflict "and both cannot be carried into effect."). Any other construction would render § 2704(b) meaningless – if a violation of § 2704(a) retroactively eliminated the existence of the contract, an estate would never be able to recover any benefits paid "under any contract." Such a result runs counter to Delaware statutory construction, eliminating the legislatively created remedy and

rendering § 2704(b) impermissible "surplusage." *See Price Dawe*, 28 A.3d at 1070.

If this Court were to agree, effectuating the Delaware legislature's abrogation of the common law in this context would be consistent with courts in other jurisdictions that have considered other states' statutory schemes in the life settlement space and determined that legislatures abrogated the pre-existing common law.

For example, in *Sun Life Assurance Co. of Canada v. Wilmington Tr. Co.*, No. 2:15-cv-00758, 2017 WL 978997 (D. Utah Mar. 13, 2017), the United States District Court of Utah examined the Utah insurable interest statute, which (like Delaware's) prohibits a party lacking an insurable interest from procuring an interest in the proceeds of an insurance policy on the life of another.[3] The Utah state constitution prohibits such wagers and under the common law of Utah such policies were void *ab initio*, as a matter of public policy.[4] The Utah District Court, however, correctly observed that a provision in the statute provides that "[a]n insurance policy *is not invalid* because: (i) the insurance policy is issued or procured in violation of Subsection (2) [prohibiting procurement of a policy without an insurable interest in the life of the policy holder]."[5] The Utah statute also provides estates with a cause

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[3] Utah Code Ann. 1953 § 31A-21-104(2)(a)-(b) (2021).

[4] *See Com. Travelers' Ins. Co. v. Carlson*, 137 P.2d 656 (Utah 1943).

[5] *See* Utah Code Ann. 1953 § 31A-21-104(6)(a) (2020) (emphasis added).

of action to recover the proceeds of a policy that lacked an insurable interest.[6] In order to bring the two seemingly conflicting sections of the statute into harmony, and in light of the clear legislative intent to prevent the voiding of longstanding insurance policies, the District Court held:

> [T]he legislature, in enacting Section 21-104, has not authorized gambling; it simply changed the remedy for violating the insurable interest requirement. […] [T]here are important considerations for not invalidating a policy that potentially has no insurable interest. The legislature is within its right to limit the remedy for violating statutory provisions. In this case, the legislature makes the insurer responsible for failure to timely investigate.

Sun Life Assurance Co., 2017 WL 978997, at *6, *8.

Similarly, in a decision by Judge Posner, the Seventh Circuit came to the same conclusion in interpreting a Wisconsin insurable interest statute. *See Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n*, 839 F.3d 654, 657 (7th Cir. 2016) ("Gambling contracts, including life insurance policies that lack an insurable interest, are still forbidden. The statute changed only the [common law] remedy for violation[.]"). The Wisconsin statute—just like the Utah statute—also gives estates the right to recover the proceeds of a policy that lacks an insurable interest.[7]

Finally, the New York Court of Appeals held that a change in the statutory

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[6] *Id.* at § 31A-21-104(6)(b).

[7] *See* WIS. STAT. ANN. § 631.07 (2021).

language[8] from shall not "issue" (connoting voidness) to shall not be "procured" (the same word used in § 2704(a)) evinced the intent of the New York legislature to change the common law remedy of voiding contracts without insurable interests after the incontestability period. *See New England Mut. Life Ins. Co. v. Caruso*, 73 N.Y.2d 74 (1989).[9] Significantly, the court also noted that the presence of a provision permitting a representative or executor of the insured to maintain an action against the beneficiary if the individual who procured the policy was found not to have had an insurable interest (exactly as § 2704(b) provides), indicates that "the relief granted by the provision contemplates that such policies, although improper, may be issued and enforced." *Id*. at 80.

If this Court is not prepared to answer the first certified question "no" because it would render § 2704(b) meaningless, then Amicus asserts, respectfully, that this Court should reexamine *Price Dawe*'s holding that policies that violate § 2704(a) are void *ab initio* and follow the wisdom of the courts interpreting statutes in New York, Wisconsin, and Utah. In so doing, it would recognize that—as in New York—the Delaware legislature's use of the word "procure" in § 2704(a) and inclusion of the remedy for estates in § 2704(b) that is dependent on the existence of a "contract"

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[8] *See* N.Y. INS. § 3205 (2021).

[9] While this Court previously distinguished *Caruso* in *Price Dawe*, Amicus notes that it did so without the context of needing to harmonize §§ 2704(a) and (b).

abrogates the common law remedy of voiding, *ab initio*, life insurance policies procured without insurable interests.

II. THE COURT SHOULD ANSWER THE SECOND CERTIFIED QUESTION IN THE NEGATIVE, AND REJECT THE CONTRARY RESULT REACHED BY FEDERAL DISTRICT COURTS APPLYING *PRICE DAWE* ERRONEOUSLY.

The District Court's second certified question asks if §§ 2704(a) and (c) forbids an otherwise properly purchased policy if **(i)** the policy was purchased "using a non-recourse loan," and **(ii)** the policy was transferred "after the contestability period had passed" to someone "without an insurable interest in the insured's life," if **(iii)** the insured "did not ever intend to provide insurance protection beyond the contestability period." Cert. Order at 7. This Court should answer this question in the **negative**.

As set forth in Appellant's brief, none of the elements contained in question two are prohibited under *Price Dawe* or Delaware law, and there is no reason why the combination of each element should result in an illegal and unenforceable insurance policy. (*See* App. Br. at 16-31.) Additionally, as explained below, answering the certified question in the affirmative would be disastrous for the life settlement industry's tertiary market (one component of a highly regulated, multi-billion dollar industry), open the floodgates to even more unrestrained litigation by insurers and estates, and exacerbate perverse incentives for the life insurance industry and estates of insureds who previously profited from the sale of their policies into the secondary market.

A. Answering Question Two in the affirmative would destabilize a highly regulated, multi-billion dollar industry.

Life settlements are heavily regulated in 43 states and Puerto Rico, such that approximately 90% of the population of this country is protected under life settlement laws and regulations.[10] Delaware is one such state.

In December 2016, the Delaware Department of Insurance recommended to the Delaware State Senate that Delaware adopt the Model Viatical Settlements Act as adopted by the National Association of Insurance Commissioners (the "NAIC Model").[11] The Delaware General Assembly amended Title 18 of the Delaware Code based upon the NAIC Model, and it was signed into law in September 2017 (the "Delaware Viatical Settlements Act" or "Act"). 18 *Del. C.* §§ 7501 et seq. The General Assembly's legislative purpose included, *inter alia*, establishing a 5-year settlement prohibition targeting transactions with characteristics of stranger-originated life insurance and enabling regulators to identify and stop stranger-originated life insurance.

Significantly, the legislature did not characterize the type of transaction at issue here— in which an insured obtained a loan to pay premiums on a life insurance policy and later transferred the policy to a third-party investor—as violative of

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[10] Life Insurance Settlement Association, "Life Settlement Regulation by State Map" (Aug. 5, 2019), https://blog.lisa.org/member/life-settlement-regulation-by-state-map (last visited Apr. 17, 2021).

[11] Delaware Bill Summary, 2017 Reg. Sess. S.B. 66 (Apr. 25, 2017).

Delaware's insurable interest requirement or indicative of prohibited STOLI transactions. *See, generally,* 18 *Del. C.* §§ 7501 et seq. Against this statutory and regulatory backdrop—which post-dates the *Price Dawe* decision and codifies aspects of it—it is fair to say that the Court's answering question two in the affirmative would effectively extend the ambit of life settlement regulation in a way not contemplated by the legislature. Simply put, "it is for the legislature, and not the courts, to declare the public policy of the state." *See Seth v. State*, 592 A.2d 436, 440 (Del. 1991).

That a circumspect legislative approach to this issue is appropriate is also demonstrated by the sheer size and complexity of the life settlement industry. In 2015, the U.S. life settlement industry had an estimated $10 to $15 billion annual transaction volume and is expected to approach $200 billion in the next two decades.[12] This continued expansion is driven by, among other things, increased awareness of life settlements and their investment potential, and the demographic trend of dramatic increases in the retirement age population (constituents of which may tend to see life settlement transactions as sources of additional income). The industry has developed a strong tertiary market, represented by Amicus here, in which large institutional investors trade portfolios of life settlements among each

[12] Carlisle Management, White Paper/Life Settlements as an Investable Asset Class, https://luxlf.com/wp-content/uploads/2019/08/CMC-White-PaperOctober-2015.pdf (last visited Apr. 17, 2021).

other. These markets, whose operations rely on predictable legal parameters, would be disrupted if the Court insinuated itself into the regulatory space as sought by Appellee here.

B. Answering Question Two in the affirmative would open the floodgates to even more litigation from insurers and estates.

In 2012, shortly after this Court decided *Price Dawe*, the Delaware District Court expressly recognized that "Price Dawe does not foreclose an insured from borrowing money to pay for premiums." *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Tr.*, 869 F. Supp. 2d 556, 563 (D. Del. 2012). *See also Wilmington Sav. Fund Soc'y, FSB v. PHL Variable Ins. Co.*, No. 13-499-RGA, 2014 WL 1389974, at *9-10 (D. Del. Apr. 9, 2014) (holding that plaintiff properly pleaded sufficient facts to find an insurable interest where policies were purchased through, *inter alia*, non-recourse premium financing).

After *Rucker*, however, a series of decisions from federal courts applying Delaware law expanded (in Amicus' respectful view, erroneously) *Price Dawe* beyond its limited application—a pre-arranged transaction between an insured and a third-party investor for immediate transfer of a policy to a third-party who lacks an insurable interest[13]—based upon the faulty assumption that *the third-party*

[13] *Price Dawe,* 28 A.3d at 1075-76 ("if a third party financially induces the insured to procure a life insurance contract with the intent to immediately transfer the policy to a third party, the contract lacks an insurable interest" and "if A cannot

investor controlled all aspects of the transaction. *See, e.g., Estate of Malkin v. Wells Fargo Bank, N.A.*, 379 F. Supp. 3d 1263 (S.D. Fla. 2019), *appeal pending*, No. 19-14689 (11th Cir. 2020) (applying Delaware law; "Coventry . . . dictated the deal from its inception and ultimately purchased the [Sun Life] Policy").[14] By effectively holding that a policy in which the insured used non-recourse premium financing from a bank to pay premiums and then subsequently transferred the policy to a third-party more than two years later violates § 2704(a), those courts have strayed from *Price Dawe*'s focus on whether "a third party either directly or indirectly funds the premium payments as part of a pre-negotiated arrangement with the insured to immediately transfer ownership." *Price Dawe*, 28 A.3d at 1078; *see also id.* 1075-76. Indeed, in *Sol*, the third-party who purchased the policy at issue from the insured on the secondary market *had no involvement* in the original procurement of the policy. *Sol*, 369 F. Supp. 3d at 615-16.

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procure a life insurance policy on the life of B without having an insurable interest in B's life then A cannot induce B's procurement of a life insurance policy with the intent to allow A to immediately purchase the policy for a nominal sum").

[14] *See also Sun Life Assurance Co. of Canada v. U.S. Bank N.A.*, 369 F. Supp. 3d 601, 616 (D. Del. 2019), *appeal pending*, No. 20-1271 (3d Cir. 2020) ("*Sol*") (assuming that Coventry "directed" the program to purchase the policy); *see also Sun Life v. U.S. Bank,* No. 14-CIV-62610, 2016 WL 161598 (S.D. Fla. Jan. 14, 2016) *("Malkin"), aff'd in part, reversed in part and remanded,* 693 F. App'x 838 (11th Cir. June 12, 2017); *U.S. Bank Nat'l Ass'n v. Sun Life Assurance Co of Canada*, No. 14-4703 (SJF)(ARL), 2016 WL 8116141,*3 (E.D.N.Y. Aug. 30, 2016) ("*Van de Wetering*") (applying Delaware law; assuming that Coventry had funded premium finance loans).

A recently filed case in the Maryland District Court, interpreting a Delaware life insurance policy, exemplifies insurers' recent attempts to expand *Price* even further by equating policies procured with non-recourse loans as *per se* illegal wagers under *Price Dawe* – regardless of the actual facts.[15] The insurer alleges, in conclusory fashion:

> 40. The Policy was procured or caused to be procured by Coventry and its agents and others, all of whom lacked an insurable interest in the life of Mr. Schwartzberg, using the same two-year, non-recourse premium finance STOLI scheme that was addressed in detail in *Malkin*, *Van de Wetering*, and *Sol* and which has been illegal in Delaware for well over one hundred years.

Id. at 10. However, in lieu of relinquishing the Policy, Mr. Schwartzberg instead paid $800,000 in satisfaction of the loan. *Id.* at 11. In short, the insurer in *Schwartzberg* is attempting to invalidate a policy that was still held and fully controlled *by the insured* after the close of the policy's incontestability period, on the general grounds that two-year, non-recourse loans are *per se* evidence of STOLI schemes and thus violative of § 2704(a). They are not.

A finding by this Court that policies financed with non-recourse loans are invalid under *Price Dawe* would be disastrous to the multi-billion dollar life settlement market, which has already experienced uncertainty from challenges brought by insurance carriers long after the contestability period to policies that

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[15] *See* **Exhibit A** (Complaint in *Pac. Life Ins. Co. v. Wells Fargo Bank, N.A.* (*"Schwartzberg"*), No. 8:21-cv-737 PJM (Md. Dist. Ct. Mar. 23, 2021)).

insurance companies had flagged many years earlier as potentially invalid for lack of insurable interest. For example, in a post-trial decision in *Sol*, the Delaware District Court found that the insurer "may have been unaware at origination that some of its policies constituted illegal human life wagers, but [the insurer] admit[ted] (as the facts compel it to) that it subsequently developed a list of suspected STOLI policies," and "rather than notify policyholders that their policies were suspected STOLI, or that the validity of their policies may be challenged at any time, [the insurer] 'made the strategic decision not to pursue investigating [these] policies,' and continued to collect (often enormous) premiums." *Sun Life Assurance Co. of Canada v. U.S. Bank N.A.*, No. 17-75-LPS, 2019 WL 8353393 (D. Del. Dec. 30, 2019) ("*Sol III*") (citations omitted).[16]

Accordingly, for the reasons set forth above and those in Appellant's brief, the Court should answer the second certified question in the negative. (*See* App. Br. at 16-33.) By doing so, this Court will stem the tide of unrestrained litigation that will be brought by insurers seeking to avoid paying death benefits and estates seeking to recover death benefits if *Price Dawe*'s holding is further expanded by this Court to policies financed with non-recourse loans.

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[16] *See also Sun Life Assurance Co. of Canada v. U.S. Bank N.A.*, No. 17-75-LPS, 2019 WL 2151695 (D. Del. May 17, 2019), *appeal pending*, No. 20-1271 (3d Cir. 2020) ("*Sol II*"); *PHL Variable Ins. Co. v. ESF QIF Trust*, No. 12-319-LPS, 2013 WL 6869803 (D. Del. Dec. 30, 2013) ("*Griggs*").

III. THE COURT SHOULD ANSWER THE THIRD CERTIFIED QUESTION IN THE NEGATIVE AND FIND THAT AN ESTATE OF A DECEDENT WHO PROFITED FROM THE SALE OF A POLICY OR ENGAGED IN FRAUD CANNOT RECOVER UNDER § 2704(B).

This Court should answer the third certified question in the **negative**.

First, permitting an estate to profit from a decedent's fraud is contrary to Delaware's public policy and statutory enactments safeguarding against fraudulently procured life insurance policies. (*See* App. Br. at 39-46.) Allowing such a recovery would permit insureds to defraud both the life insurance and life settlement industries. It would create a perverse incentive for individuals to lie about their assets and income in policy applications, knowing that after securing a profit on the sale of the fraudulently procured policy their estates will be permitted to profit a second time by recovering the death benefits.

Second, estates whose decedents already profited from the sale of their policies should be precluded from any recovery under § 2704(b) for the reasons set forth in Appellant's brief. (*See* App. Br. at 35-39.) Allowing such a recovery would transform a statute meant to protect innocent insureds from illegal wagers being made on their lives and provide a remedy to the estates of such STOLI victims, into a mechanism through which insureds and their beneficiaries profit twice.

Third, allowing estates whose decedents profited from the sale of their policies to sue under § 2704(b) would be devastating to the life settlement industry. It would permit estates to lie in wait until death benefits are distributed under a policy

that had been sold by the decedent a decade or more earlier, and then sue an investor who purchased the policy in the tertiary life settlement market. Such improper estate challenges are even more disruptive than insurer challenges, as the death benefits on the policies have already been paid out and deposited into the investment vehicle prior to an estate's challenge. (*See, e.g.,* App. Br. at 12 (indicating $5 million Policy death benefit deposited into Lavastone's securities account prior to estate's challenge).) Putting aside the difficulty of unwinding these payments, countenancing such claims would threaten the viability of portfolios worth billions of dollars. Indeed, the value of the portfolio at issue in this matter was, at least at one point, close to $20 billion.[17] This robust life settlement market depends on the stability and certainty of the underlying transactions. Allowing estates to pursue claims under § 2704(b) against investors who lawfully purchased the policy through the highly regulated tertiary life settlement market, when the insured already benefited from the sale of the policy in the first place, would leave all legitimate life settlements open to challenge indefinitely, disrupting the entire market. Such a result is unjust and untenable and should not be countenanced by this Court.

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[17] As indicated by Lavastone in a separate proceeding, between 2001 and 2011 "Lavastone spent approximately $6.5 billion to purchase and maintain almost 7,000 Life Policies with a face value of almost $20 billion." *See* **Exhibit B** (Complaint in *Lavastone Capital LLC v. Coventry First LLC, et al*., No. 1:14-cv-07139-JSR (S.D.N.Y. Sept. 5, 2014) at ¶ 37).

CONCLUSION

For the foregoing reasons, this Court should answer all three certified questions in the **negative.** If this Court is not willing to answer the first question in the negative, it should modify *Price Dawe*'s holding that policies that violate § 2704(a) are void, *ab initio*, in light of the conflict between that holding and the legislative remedy provided in § 2704(b), which is explicitly tied to the existence of a "contract."

Dated: April 29, 2021

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