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 BRIEF IN RESPONSE TO *AMICUS* BRIEFS

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SUMMARY OF ARGUMENT

Pursuant to the Court's June 11, 2021 Order, the Estate files this response to the *amicus* brief filed by the Institutional Longevity Markets Association ("ILMA") and the joint *amicus* brief filed by the Life Insurance Settlement Association and European Life Settlement Association (collectively, "LISA") filed in support of Appellant Lavastone Capital LLC ("Lavastone").[1]

Amici, representing the views of investors who trade multibillion dollars pools of life insurance policies as commodities, view the certified questions through a backward lens. They assert that because a robust secondary market for life insurance exists, this Court must bend Delaware law to safeguard the stability of that market (even though the instability they claim to fear is illusory and the protection they seek would promote illegal human life wagering).

This is boorish reasoning. In this Court's seminal decision in *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.,* 28 A.3d 1059 (Del. 2011) ("*Price Dawe*"), the Court reaffirmed a century of precedent that has appropriately guided the proper functioning of the market since the beginning of the 20th century. Simply put: to the extent *amici* argue that this Court should turn a blind eye to human life wagering for the sake of generating further profit for their

[1] The Estate does not address the issues addressed by Lavastone in its Opening Brief to which the Estate already responded in its Answering Brief.

members, it is the market, not Delaware law and public policy, that must give way.

Amici make primary three arguments in support of their position. ***First***, ILMA asks the Court to repudiate its unanimous, *en banc* holding in *Price Dawe* that policies lacking an insurable interest are void. Procedurally, this issue is not properly before the Court since no party raised it and an *amicus* cannot inject new issues into the proceeding. Regardless, ILMA offers no basis to overturn *Price Dawe*, ignore *stare decisis*, and repudiate a century of Delaware precedent.

Second, *amici* argue that interpreting *Price Dawe* to permit estates to challenge policies under the facts present here would destabilize the secondary market. This argument is based on the false premise that the market was unaware that investing in policies like the one at issue in this case presented the risk of a subsequent challenge from the insured's estate. The truth is that estates have had this common law right for over 140 years, and that common law right was codified into statute in Delaware 40 years before the policy at issue here was purchased by Lavastone. Any investor employing even minimal due diligence would know that purchasing the policy at issue presented an enormous risk that the insured's estate would sue for the proceeds.

Further, accepting *amici's* argument would permit the secondary market to "cleanse" STOLI policies that Delaware law squarely prohibits, as six consecutive courts applying Delaware law have unanimously concluded.

Putting these stout reckonings aside, *amici* offer no support for their assertion that an adverse ruling will destabilize the life settlement marketplace, instead relying on nothing more than their own say-so to fatalistically predict that that an adverse decision will cascade into a parade of horribles. This predictable, but unsupported and unsound, fearmongering repeats the approach the same *amici* took in *Price Dawe*. Yet, a decade after *Price Dawe*, Delaware maintains a thriving life settlement marketplace. Further, *amici* ignore alternative protections available to any so-called "innocent" investors.

Third, ILMA addresses, in passing, the issue of the insured's alleged participation in a fraud scheme. However, ILMA adds nothing to the arguments already laid out in Lavastone's Opening Brief. Accordingly, the Estate only briefly addresses this argument and primarily relies upon its Answering Brief for its response.

ARGUMENT

I. The Court Should Not Consider, and In Any Event Reject, ILMA's Request to Reverse *Price Dawe*

Question 1 asks: "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)?"[2]

ILMA acknowledges that the remedy available under § 2704(b) would be meaningless if benefits paid under a void policy were not recoverable since all policies lacking an insurable interest are void. (ILMA Br. at 6-8). Consequently, ILMA is left to argue that this Court should repudiate the core holding in *Price Dawe* – a unanimous *en banc* decision from only ten years ago that reaffirmed a century of precedent – that a policy lacking an insurable interest is void. *Id*. The Court should not consider ILMA's argument, and even if it does, reject it on the merits.

ILMA's invitation to reverse *Price Dawe* is procedurally flawed, because Lavastone does not advance this position in its Opening Brief, and indeed, does not substantively address Question 1 at all. (Op. Br. at 14-15). ILMA's attempt to inject this issue through an *amicus* brief does not properly present the issue to the Court in light of the "well-established principle of appellate procedure that, if a party appellant is represented by counsel, an *amicus curia*e cannot raise separate or

[2] March 2, 2021 Certification Order, at 7.

additional issues for the consideration of an appellate court." *Turnbull for Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994).[3]

In any event, ILMA's argument fails on the merits. Under the doctrine of *stare decisis,* "[o]nce a point of law has been settled by decision of this Court, it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside ... and it should be followed except for urgent reasons and upon clear manifestation of error." *Account v. Hilton Hotels Corp.,* 780 A.2d 245, 248 el. 2001) (quotation marks and alteration omitted). *Stare decisis* is designed to serve "[t]he need for stability and continuity in the law and respect for court precedent," *id.* at 248, and "exists to protect the settled expectations of citizens." *State v. Barnes*, 116 A.3d 883, 891 (Del. 2015).

For over a century, policies lacking an insurable interest at inception have been void under Delaware law. *Baltimore Life Ins. Co. v. Floyd*, 91 A. 653, 657 (Del. Super. Ct. 1914), *aff'd*, 94 A. 515 (1915). *Price Dawe* reaffirmed this principle and extensively explained why STOLI policies violate Delaware's constitutional prohibition against gambling and Delaware's public policy against human life wagering, thus rendering such policies void *ab initio*. 28 A.3d at 1067-1068.

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[3] ILMA's contention suffers from a second procedural flaw. Under this Court's rules, "no subsequent panel can overrule a prior holding of the Court without consideration by the Court *en banc*." Del. Sup. Op. § IX(6). Thus, unless and until this case is considered by the Court *en banc*, overturning *Price Dawe* is not even an option.

Notably, ILMA filed an *amicus* brief in *Price Dawe* and argued at length that STOLI policies should be considered voidable, rather than void. (B007-012).[4] This Court flatly rejected that argument. *Price Dawe*, 28 A.3d at 1067-1068.

Ten years later, ILMA seeks a second bite at the apple but identifies no error in *Price Dawe,* let alone the "urgent reasons and … clear manifestation of error" required to repudiate established precedent. Instead, ILMA asserts that when the General Assembly enacted Section 2704, it intended to abrogate the longstanding common law rule that policies lacking an insurable interest are void.

This argument seeks to turn *Price Dawe* on its head, because the *Price Dawe* Court found the opposite. Specifically, this Court in *Price Dawe* found that in enacting Section 2704, the General Assembly sought to ***codify*** – not abolish – the common law rule that policies lacking an insurable interest are void. 28 A.3d at 1072. ILMA nonetheless argues that because § 2704(b) provides that an estate can recover the proceeds of a payment made "under any contract," the General Assembly could not have intended an insurance policy lacking an insurable interest to be void. *Id.* Otherwise, ILMA suggests that the General Assembly would not have referred to a "contract" in § 2704(b).

This stilted argument is meritless for the reasons described in the Estate's Answering Brief. (An. Br. at 15-19). Tellingly, ILMA cannot point to any court

[4] Citations to the Estate's contemporaneously-filed appendix are in the form of B__.

applying Delaware law for its argument. Instead, ILMA argues that this Court's unanimous, *en banc* decision in *Price Dawe* incorrectly determined Delaware law because courts in other jurisdictions, applying the laws of other states, have reached different conclusions. (ILMA Br. at 8-10).

ILMA's insistence that the life settlement market "can only survive if the application of the law is predictable" rings similarly hollow. (ILMA Br. at 2, 15). Investors have been on notice since at least 1881, when the United States Supreme Court's decision in *Warnock v. Davis* held that an insured's estate can sue an investor for the death benefit of a policy lacking an insurable interest. 104 U.S. 775, 782 (1881). This rule has been part of the common law of Delaware for over 100 years, *Floyd*, 28 Del. at 201, and was codified 1968 when the General Assembly enacted Section 2704. The application of this rule is more than predictable – it is assured.[5] Indeed, contrary to ILMA's putative desire for stability in the law, it is difficult to image a more drastic departure from the consistent and predictable application of law than upending a century of consistent precedent that policies lacking an insurable interest are void.

Finally, ILMA's argument necessarily implies that policies like the one at issue here should be voidable (as opposed to void *ab initio*) so that they are not

[5] Nor is Delaware's statute the only such legislation, as 29 other states have similar statutes. (An. Br. at 42 n. 10).

susceptible to challenge after the 2-year contestability period. This is a wolf in sheep's clothing. Actuarially speaking, most insureds do not die during the 2-year contestability period. The likelihood that an insurer would challenge a policy that it just recently approved and issued – and upon which no claim for death benefits has yet been made – is therefore remote. And given that the insured's estate does not have a right to challenge a policy until after the death benefit has been paid, the estate's right of recovery under § 2704(b) is not ripe during the contestability period. These outcomes considered together would effectively "cleanse" any STOLI policy that was in effect for more than 2 years (which is almost every policy), thereby increasing the value of these policies tremendously and incentivizing STOLI promoters to choose Delaware as fertile ground for STOLI operations.

II. *Amici* Represent the Interest of Sophisticated Investors Who Understand the Risks of Investing in Life Settlements

Amici attempt to paint a picture of innocent investors who purchased life insurance policies on the secondary market, only to be unfairly shocked when an estate sued for the proceeds on STOLI grounds. This image is a mirage: the reality is that the secondary market is populated by sophisticated investors, trading multi-billion-dollar securitized pools of life insurance policies, who have long understood the risks and who have been advised of the importance of conducting thorough due diligence of the assets they purchase. Thus, the risk of purchasing a STOLI policy is simply a variable that investors consider in evaluating whether to participate in the secondary marketplace and at what purchase price. And even presuming that any of the entities who participate in these markets is an innocent investor, that is certainly not the case where, as here, AIG/Lavastone was a primary actor in the scheme that created the STOLI policy in the first place.

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." *Price Dawe,* 28 A.3d at 1070.[6] This quickly transformed the

[6] These lucrative investment vehicles "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*. In response, "STOLI promoters sought to solve the supply problem by generating new, high value policies." *Id*.

modest life settlement marketplace into a "market … in which large institutional investors trade portfolios of life settlements among each other." (ILMA Br. at 14-15). For example, AIG/Lavastone once securitized 2000 policies with a face value of $8.4 billion.[7]

Sophisticated actors exchanging multibillion dollar life insurance assets have long understood the attendant risks, including the risk that such policies would be subject to STOLI challenges. Indeed, industry trade groups (like ILMA and LISA) caution their members about the importance of engaging in robust due diligence before investing, including by evaluating whether policies bear the characteristics often associated with STOLI policies. For example, ILMA's own "Life Settlement Provider Best Practices" include the following recommendations:

- "Providers should develop and follow procedures designed to determine whether any policy premiums have been financed where the policy or any interest therein secured a part or all of the loan, and disclose to the investors in writing if any such financing was involved."
- "Providers should retain or have on staff a medical professional or underwriter capable of comparing policy applications to medical records for material discrepancies."

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[7] Susan Lorde Martin, *Betting on the Lives of Strangers: Life Settlements, Stoli, and Securitization,* 13 U. Pa. J. Bus. L. 173, 197 (2010).

- “Providers should implement enhanced due diligence for policies that are less than four years old at the time they are being settled to ensure that the policies were not originated for the benefit of a person who does not have an insurable interest in the life of the insured.”
- “Confirm who paid the premiums on the policy.”
- “Confirm that the policy was not taken out with the intent to resell.”
- “If the policy is 4 years old or less and $1,000,000 or more: Proof of all premium payments from the owner to the carrier must be provided. … For entity owned policies, Provider will need proof of the source of funds provided for the premium payments to the carrier … The Insured must provide proof of net worth at time of application for the life insurance policy equal to the <u>lesser of</u> (a) the face amount of the policy and (b) the insured’s stated net worth on the policy application.”

(B046-056). Had any potential investor in the Berland policy undertaken even one of these recommendations, the investor would have been “warned away” from investing, because the Berland policy presented a red flag under every recommendation.

In addition to trade groups like ILMA and LISA, numerous industry commentators have long warned stakeholders about the risks of investing in life insurance policies that involve non-recourse premium financing. For example, in

May 2005, one commentator described:

> Of course, this 'free insurance for two years,' a/k/a 'non-recourse premium financing' scheme, is a thinly disguised attempt to skirt state insurable interest laws and create a market for huge amounts of insurance on foolhardy individuals' lives … Investors are now treating people's lives as fungible assets, just like stocks and bonds are assets, and they are in essence paying the insured to use their insurability.

(B057).[8] In July 2006, another industry commentator likewise advised that "[w]hen looking below the surface of a non-recourse premium financing transaction, a thorough review of the mechanics of the transaction may uncover undocumented or ignored elements that may (1) constitute a violation of state insurance law or regulations [and] (2) raise significant securities regulation and litigation issues." (B070)[9]; *see also* The Deal, *The Life Settlements Report*, Vol. II (Feb. 6, 2008) (similar commentary from industry perspective). Legal commentators also joined the chorus. *See, e.g.*, Martin, *supra* n. 8 at 187-189.

Meanwhile, even the entities who securitized investments subject to STOLI challenges were specifically warning investors that premium finance loans are subject to regulations in most states and presented material risks to such investments. (B106-107).[10]

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[8] Stephen R. Leimberg, *Stranger-Owned Life Insurance: Killing the Goose That Lays Golden Eggs!*, Tax Analysts, at 811 (May 2005).
[9] R. Marshall Jones, et al., *'Free' Life Insurance: Risks and Costs of Non-Recourse Premium Financing,* 33 Estate Planning 7, at 3 (July 2006).
[10] Genesis Voyage Equity II Corporation, *Confidential Private Offering Memorandum,* at 8-9 (Oct. 10, 2006) (filed in *SEC v. Private Equity Management*

Government agencies have also long echoed similar concerns. For example, in 2010, the Securities and Exchange Commission ("SEC") issued a lengthy report "to examine emerging issues in the life settlements market." (B130).[11] The SEC comprehensively described why "STOLI policies may introduce particular risks for investors who purchase the policies," including due to risk of litigation "brought by insurance companies, investors, and parties such as family members, who might otherwise have been beneficiaries under the policies." (B148-149). Consequently, the report highlighted the importance of due diligence in the underwriting process to review policies for signs of STOLI policies, such as premium financing and opaque trust structures:

> Insurance industry representatives told us that insurers make efforts to stop STOLI transactions in the underwriting process. Insurers may make inquires during the underwriting process to determine whether premium financing, which is a marker of a STOLI transaction, is involved. In addition, because investors may establish trusts to purchase life insurance policies in order to conceal STOLI transactions, insurers may make inquiries regarding policies being purchased on behalf of trusts.

(B149).

Shortly thereafter, the Federal Deposit Insurance Corporation ("FDIC") cautioned investors about the various risks of trading in life insurance policies.

Group, Inc. et al., 2:09-cv-02901, Dkt. No. 43-28 (May 7. 2009)).

[11] SEC Life Settlements Task Force, *Staff Report to the United States Securities and Exchange Commission* (July 22, 2010).

(B205).[12] For example, the FDIC identified: "**Litigation Risk** – The risk that the insured's family members (heirs) or previous beneficiaries will file legal action and the potential financial impact to the investor." (B209). The FDIC characterized these risks as "unquantifiable but severe" and, in remarkably candid language, concluded that "[s]ubstantial financial risks, aggressive and deceptive sales practices fueled by the opportunity for promoters to collect high commissions, STOLI deals, and fraud cast a dark cloud over the [life settlements] industry." (B215). Consequently, the FDIC advised that "investors, and consumers being approached with proposals to enter into life settlement transactions should exercise caution and carefully consider all risks associated with these transactions." (B215).

Congress expressed the same concerns well before *Price Dawe* was issued, holding an extensive hearing entitled "Betting on Death in the Life Settlement Market: What's at Stake for Seniors?" (B231).[13] Through that proceeding, Congress heard testimony that mirrored the above-described concerns from the industry, commentators, and regulatory agencies:

> [C]reative premium financing transactions are used to fund the purchase of high value life insurance policies. Seniors are being offered "free" or low cost premium financing for the first two years of the policy term. Often, the free or low cost financing term coincide with the state holding period for a life insurance policy before it is eligible

[12] FDIC, *Senior Life Settlements: A Cautionary Tale,* 7 Supervisory Insights 2 (Win. 2010).

[13] U.S. Sen. Sp. Cmte. on Aging, *Betting on Death in the Life Settlement Market: What's at Stake for Seniors*, No. 111-4 (Apr. 29, 2009).

> to be sold in a viatical transaction. At the end of the free or low cost financing period, the senior is offered a chance to pay for the policy. Often, the accumulated premium and finance charges are so high that it is cost-prohibitive for the senior to continue with the transaction. The fine print of the financing documents allows for the finance company to maintain the life insurance policy or sell it to a third party. Thus, a STOLI is born.

(B237).

In short, investors have long had the knowledge and the means to protect themselves against the risk that a policy whose issuance violates *Price Dawe* has no place in the life settlement market. That protection includes not only investor due diligence, but also the right to allocate by contract who bears those risks.

Amici's arguments ring particularly hollow in this case. As discussed in the Estate's Answering Brief, not only did the Berland Policy bear ***all*** of the earmarks of a STOLI policy, but the investor—AIG/Lavastone – created the scheme through which the policy came into existence! (An. Br. at 8-14, 21-32). AIG/Lavastone did so in order to increase the volume of financially-attractive policies issued on senior citizens in which AIG/Lavastone itself could invest after the two-year contestability period expired. (A216 (describing the "business rationale" to participate in the PFP Program as "creat[ing] new policies that ... we [AIG/Lavastone] could [later] purchase under our life settlement program"). Moreover, through its involvement in the scheme, AIG/Lavastone *knew* that the Berland policy – and thousands of others just like it – bore all the characteristics of a STOLI policy.

III. Policing STOLI Policies Promotes and Protects Legitimate Life Settlements

Amici focus their briefs on describing the secondary marketplace for life insurance policies, highlighting "the market's legitimacy and societal value," and hyperbolically claiming that a decision in the Estate's favor will somehow wreak havoc on the life settlement marketplace in Delaware. (*See, e.g.,* LISA Br. at 15). This argument is unfounded and unsound.

As a starting point, the benefits of *legitimate* life settlements are not at issue in this lawsuit. *Price Dawe* recognized that legitimate life settlements are "perfectly legal" and can provide benefits to consumers by "allow[ing] policy holders who no longer need life insurance to receive necessary cash during their lifetimes." 28 A.3d at 1069. The Estate does not dispute this.

However, the fact that the legal marketplace can provide financial benefits to consumers does not mean that it is unregulated or should be promoted at all costs. As relevant here, "[v]irtually all jurisdictions … prohibit third parties from creating life insurance policies for the benefit of those who have no relationship to the insured" through STOLI schemes. *Id.* at 1070. In Delaware, courts view insurable interest fraud with particular disdain in light of Delaware's constitutional prohibition against gambling.[14] In *Price Dawe*, the Court reaffirmed the rule that has existed in

[14] *Price Dawe,* 28 A.3d at 1068 n. 25 ("Fraud relating to insurable interest is a fraud on the court because it violates the constitutional prohibition against wagering.").

Delaware for over a century: "if a life insurance policy lacks an insurable interest at inception, it is void *ab initio*." 28 A.3d at 1067. Thus, *Price Dawe* reflects an appropriate balance between promotion of a legitimate life settlement marketplace with Delaware's longstanding prohibition against human life wagering.

Amici's arguments about the importance and benefits of the legitimate marketplace presume that the policy in this case was a legitimate policy. But as described above and in the Estate's Answering Brief – and as six federal courts have unanimously held ***as a matter of law*** under materially identical facts – policies generated by the AIG/Lavastone/Coventry scheme lack an insurable interest and are therefore void at inception. (An. Br. at 25 n. 5). By sidestepping any substantive engagement with the facts of this case, *amici* presuppose that this policy is one that Delaware *wants* to protect and promote, when in reality, it is a paradigmatic example of a policy that Delaware wants to forbid and deter.

Built on this faulty premise, *amici* engage in predictable fearmongering in suggesting that a decision in favor of the Estate will precipitate the collapse of the life settlement marketplace in Delaware and result in pervasive harm to consumers. Not shy of foregoing nuance or subtly, *amici* contend that an adverse result "would be disastrous for the life settlement industry's tertiary market," would "destroy the stability of the life settlement market" and 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." ((ILMA Br. at 4, 12, ILSA Br. at 2). Ironically, and contrary to *amici's* arguments, deciding the certified questions in Lavastone's favor would ***destabilize*** a stable set of expectations that are based on more than 100 years of consistent historical precedent.

If these fatalistic assurances sound familiar to the Court, it is because they are. In 2011, ILMA filed an *amicus* brief in *Price Dawe* in which it predicted that resolution of the issues in the manner the Court ultimately resolved them would "eliminate" the secondary market for life insurance. (B017). ILMA argued that a decision contrary to its position "would decrease the demand for, and the value of, policies in the Delaware life settlement market" and "would primarily harm Delaware insureds." (B019). Likewise, in 2009, LISA castigated attempts to regulate STOLI policies as "anti-competitive, anti-consumer, [and that] directly target seniors." (B253). Over a decade later, the doom and gloom *amici* promised has not developed. Indeed, the Delaware Department of Insurance conducted a study which concluded that Delaware has "a robust secondary market" for legitimate life settlements." (B290).[15]

Thus understood, *amici* offer no evidence that in the wake of *Price Dawe,* the legitimate life settlement market has suffered as a result (or even has been slightly

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[15] Del. Dep't of Ins., *Secondary Market for Life Insurance Policies—Report to the Delaware State Senate Pursuant to Senate Resolution No. 19,* at 1, 17 (Dec. 28, 2016).

impaired). There is a very good reason for that, namely, the large chasm between a legitimate life settlement and a STOLI policy. A legitimate life settlement occurs, for example, when the insured has a need for life insurance, but that need later evaporates due to changed circumstances, such as when a business takes out a life insurance policy on a "key person," but the business later falters and fails, rendering the key person irrelevant to the survival of the business. In that instance, the business owns a life insurance policy which is no longer needed, so having a market into which that policy can be sold is sound public policy. STOLI policies like the one at issue here present the opposite scenario. The insurance was not needed from the start and was created so that strangers could profit from Ms. Berland's death.

As ILMA has observed, "[a] well regulated and competitive marketplace best serves the interest of consumers and industry participants." (B275).[16] The Estate agrees. Answering the certified questions in favor of the Estate will ***purify and protect*** the legitimate market by ensuring that policies purchased on the secondary marketplace are *bona fide* policies, while simultaneously affirming Delaware's long-standing commitment to root out STOLI in all its forms.

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[16] Institutional Life Markets Association, *Statement to U.S. House Subcmte. on Capital Markets, Insurance, and Government Sponsored Enterprises*, at 84 (Sept. 24, 2009).

IV. Innocent Purchasers of STOLI Policies Are Not Left Without a Remedy

Amici repeatedly argue that the application of Section 2704(b) to a policy purchased on the open market by an innocent investor is an unfair result. But *amici* fail to note that such an investor – meaning an investor who did their due diligence before investing – would be exceedingly rare, because even the slightest due diligence (as recommended by *amici* themselves) would provide any investor with multiple red flags regarding the risks of proceeding with the transaction. And for any investor whose due diligence discovered no red flags, *amici* fail to note that investors retain their rights to proceed against the person/company that sold the investment to them. *PHL Variable Ins. Co v. Sheldon Hathaway Family Ins. Trust ex rel. Hathaway*, 2013 WL 6230351, at *10 (D. Utah Dec. 2, 2013) ("If Windsor Securities is truly an innocent party in this matter … it may file suit against … the … actors who caused it to become involved in a fraudulent scheme."); *Estate of Malkin v. Wells Fargo Bank, N.A.,* 2019 WL 12241007 (S.D. Fla. May 8, 2019) (court observing that "if there is any sort of restitution/setoff, that's between you guys and the marketplace that are arguing over this, and the marketplace is you and Coventry, not you and Mrs. Malkin's estate.").

V. Participation of the Insured Is Irrelevant

Amici argue that claims by estates under Section 2704(b) should be rejected unless the insured and/or the insured's estate are "innocent" parties who did not participate in the issuance of the policy. Like the argument that such policies should be voidable as opposed to void, this is a wolf in sheep's clothing. Limiting claims under Section 2704(b) to instances where the insured did not participate in the issuance of the policy would gut the statute, because STOLI schemes dating to the 1800's have consistently involved the consent and/or participation of the insured in the process. *See, e.g., Warnock v. Davis*, 104 U.S. 775, 782 (1881). Thus, consistent with this Court's holding in *Price Dawe* that such policies are so "egregiously flawed" that they amount to a "fraud on the court," "[a] court may never enforce agreements void ab initio, no matter what the intention of the parties." 28 A.3d at 1067.

CONCLUSION

For these reasons, the Court should answer the certified questions as described in the Estate's Answering Brief.

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