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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERONTA FUNDING, a Delaware Statutory Trust,	)	No. 380, 2021
Appellant,	)	Court Below: Superior Court of the State of Delaware
v.	)	
BRIGHTHOUSE LIFE INSURANCE COMPANY,	)	C.A. No. N18C-04-028 DCS
Appellee.	)	

APPELLANT'S REPLY BRIEF

Dated: March 17, 2022

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INTRODUCTION[1]

In at least three opinions relied upon throughout the country as the law of Delaware for more than a decade, the District of Delaware correctly stated that life insurance policies void *ab initio* for lack of insurable interest are remedied by rescission and a return of premiums. The Trial Court discarded that objective test, to substitute a Restatement (Second) of Contracts §198 subjective comparative fault test. Then, *the Trial Court did not even bother to do its own new Section 198 comparative fault test to render judgment*. The Trial Court eliminated a bright-line rule grounding a multi-billion dollar Delaware asset class, for an ambiguous subjective test that even the Trial Court found too laborious to apply. The opinion below has been justly criticized by other courts, by *amici*, and by commentators as ruining Delaware as a forum for life settlements. It should be reversed now.

Brighthouse argues as a pure question of law that *Price Dawe*[2] <u>*silently*</u> overruled *Berck, Snyder*, and *Rucker*'s[3] holdings that rescission is the Delaware remedy for void *ab initio* life insurance contracts. *Price Dawe* did no such thing.

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[1] Capitalized terms utilized but not defined herein shall have the meanings ascribed in Geronta's Opening Brief. Geronta's Opening Brief is cited herein as "OB __." Brighthouse's Answering Brief is cited herein as "AB __."

[2] *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 28 A.3d 1059 (Del. Sept. 20, 2011) ("*Price Dawe*").

[3] *Sun Life Assur. Co. of Canada v. Berck*, 719 F. Supp. 2d 410 (D. Del. June 29, 2010) ("*Berck*"); *Lincoln Nat. Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546 (D. Del. July 15, 2020) ("*Snyder*"); and *Principal Life Ins. Co. v. Rucker*, 774 F. Supp. 2d 674 (D. Del. March 30, 2011) ("*Rucker*").

Other Superior Court and District of Delaware opinions have rejected that erroneous reasoning, creating a split of authority appropriate for resolution.

Next, Brighthouse argues on liability (as a mixed question of law and fact) that the Trial Court conducted a comparative fault test under Section 198(b). No such analysis appears in the record below. The Trial Court inexplicably refused to do the Section 198 analysis that the Trial Court itself said was required, to instead ground its decision on a misreading of a Comment to Section 198(b) that has never before been so applied, anywhere. On this record, the Trial Court erroneously imposed no liability test at all: subjective or objective. That error applies equally to Brighthouse's *bona fide* purchaser and lay witness testimony arguments.

Finally, on damages, Brighthouse argues as a pure question of law that legal rescission does not require return of payments made by contract predecessors. Yet, Brighthouse ignores Geronta's cited authority about predecessor payments (at OB 23), which need not be repeated.

ARGUMENT IN REPLY

I. RESCISSION AND AN AUTOMATIC RETURN OF PREMIUMS IS THE CORRECT REMEDY FOR A LIFE INSURANCE POLICY VOID *AB INITIO* FOR LACK OF AN INSURABLE INTEREST

Legal rescission is the correct remedy for a life insurance contract void *ab initio* for lack of insurable interest. *See* OB 18-21 (citing *Norton v. Poplos*, 443 A.2d 1, 4 (Del. 1982) and *Lavastone Capital LLC v. Estate of Beverly E. Berland*, 266 A.3d 964, 970 (Del. 2021)). Rescission unwinds void *ab initio* policies and returns the parties to the *status quo ante* by requiring a return of all premiums paid thereunder. *See id.* It also eliminates the "undesirable effect of incentivizing insurance companies to … continue to collect premiums at no actual risk." OB 22 (citing *Snyder*, 722 F. Supp. 2d at 565, and *Berck*, 719 F. Supp. 2d at 418-19). The MJOP Decision erroneously rejected legal rescission.

The core dispute is whether *Price Dawe* silently overruled the rescission holdings and rationale of *Berck*, *Snyder*, and *Rucker*.[4] If the latter three cases remain accurate statements of Delaware law after *Price Dawe*, then the MJOP Decision must be reversed, and all other liability arguments are moot. *Only* this Trial Court, and no other court in Delaware or throughout the United States, has idiosyncratically held that *Price Dawe* silently overruled the *Berck* line of cases.

[4] This is also a pending issue in *Wells Fargo Bank, N.A., et al., v. Estate of Phyllis M. Malkin* (No. 172, 2021).

A. *Price Dawe* Did Not Overrule *Berck, Snyder, and Rucker*

Brighthouse's lead argument is that *Price Dawe* created an anti-rescission distinction between voidable and void life insurance contracts. AB 19. Because *Price Dawe* states that Delaware law does not *enforce* void contracts, Brighthouse argues that Delaware law also does not *rescind* void contracts. *Id*. Instead, Brighthouse argues that subsequent purchasers of a void policy are limited to a restitution remedy *qua* Section 198, which was adopted for the first time in the MJOP Decision below, not by *Price Dawe*. AB 20-22. Brighthouse's argument is wrong as a matter of law, for four reasons.

First, Brighthouse correctly acknowledges that *Price Dawe* affirmed the holdings of *Berck*, *Snyder*, and *Rucker* in that it is unlawful to enter a life insurance contract with intent to immediately sell it as a wager upon the life of another. *Price Dawe*, 28 A.3d 1059, 1072 n. 46 (Del. 2011); AB 22. The Supreme Court did not overrule *Berck* and progeny while simultaneously citing them as good law. *Cf. Makin v. Mack*, 336 A.2d 230, 234 (Del. Ch. 1975) ("[R]epeal of common law rights and duties is not favored and is to be announced only in clear cases.") (internal citations omitted).

Second, and substantively, "to rescind" is the opposite of "to enforce." As this Court has explained: "[a]voiding or rescinding a contract essentially results in the abrogation or 'unmaking' of an agreement, and attempts to return the parties to

the status quo ante." *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665 (Del. 2013) (*citing Norton*, 443 A.2d at 4) (internal punctuation omitted). Delaware law has recognized this distinction for at least a century, as the Court of Chancery explained in *Hegarty v. American Commonwealths Power Corp.*, 163 A. 616, 619 (Del. Ch. 1932):

> **Furthermore it is fundamental that if the choice be made of rescission, there must be a restoration of the *status quo ante*, not only of the complainant but as well of the defendant**. It is therefore necessary that the rescinding party should offer or tender such a restoration to the other, and that the court should be able to effectuate it by decree. … **This is the settled law…** I know of no case where the relief of rescission has been afforded unless a just and equitable restoration of the substantial status quo ante could be accomplished.

(internal citation omitted and emphasis added).

Numerous Delaware cases agree. *See, e.g., Obara v. Moseley*, 692 A.2d 414 (Del. 1997) (TABLE) ("The equitable remedy of rescission results in abrogation or 'unmaking' of an agreement, and attempts to return the parties to the status quo."); *Northpointe Holdings, Inc. v. Nationwide Emerging Managers, LLC*, 2010 WL 3707677, at *9 (Del. Super. Ct. Sept. 14, 2010) ("Legal rescission requires the court to declare the contract null and void and award damages that put the parties back in the position they were in before the contract."); *accord Deutsche Bank Nat'l Trust Co. v. Goldfeder*, 2014 WL 7692441, at *1 (Del. Super. Ct. Dec. 9,

2014); *Brinckerhoff v. Enbridge Energy Co.*, 2012 WL 1931242, at *4 (Del. Ch. May 25, 2012).

Third, and relatedly, *Price Dawe* clarifies that rescission is the *only* remedy for insurance policies void *ab initio*. Ordinary rescission cases involve voidable contracts that would be enforceable but for some non-contractual deficiency, such as lack of capacity or mistake. In such cases, the wronged party must elect to sue for damages or for rescission; it cannot have both remedies. *Hegarty*, 163 A. at 619. But as explained in *Price Dawe*, void contracts are *always* unenforceable because they are illegal. *See* 28 A.3d at 1068. It is impossible to elect to affirm those illegal contracts, leaving rescission as the only remedy.

Fourth, Brighthouse (not Geronta) is the party attempting to affirm and enforce, rather than rescind, the illegal Policy. Brighthouse asserts that it keeps all the premiums paid upon the contract, rendering itself better off than the *status quo ante*. But keeping those premium payments is a right grounded upon the void Policy; Brighthouse has no other claim to that money. Brighthouse thus is attempting to enforce the illegal Policy against Geronta in breach of *Price Dawe*.

B. There Is No Delaware Law Distinction Against Rescinding Void Insurance Policies

Brighthouse's argument against rescinding void insurance contracts lacks any support beyond *Price Dawe*, which it misapplies by treating antonyms "rescission" and "enforcement" as synonyms. *See* AB 21-22; *supra I.A.* To the

contrary, rescission is available for void contracts. *See Creative Research Mfg. v. Advanced Bio-Delivery LLC*, 2007 WL 286735, at *8 (Del. Ch. Jan. 30, 2007) ("Rescission would result in the Alliance Agreement being annulled and regarded as void *ab initio*."); *Northpointe*, 2010 WL 3707677, at *9 (same).

Contrary to Brighthouse's assertion, *Berck*, *Snyder*, and *Rucker* also addressed rescission for void policies. *Rucker*, 774 F. Supp. 2d at 682; *Berck*, 719 F. Supp. 2d at 418; *Snyder*, 722 F. Supp. 2d at 565.

Brighthouse failed to rebut the pronouncement in the Restatement (Third) of Restitution and Unjust Enrichment § 54 that a void versus voidable distinction is irrelevant to rescission. *See* OB 21 (rescission may "reverse a contractual exchange and recover a performance thereunder, without regard to whether the underlying contract would be classified for other purposes as 'void' from its inception or merely 'subject to avoidance.'").

Finally, the Answering Brief does not dispute that the Trial Court erred by conditioning rescission on whether the insurer is plaintiff or defendant. OB 18. Geronta was the natural plaintiff here; Brighthouse filed a first-strike declaratory judgement as a superficial pleading gambit, irrelevant to rescission. *Id.*

Contrary to Brighthouse's argument, *Berck*, *Snyder*, and *Rucker* do not "contradict" *Della Corp. v. Diamond*, 210 A.2d 847 (Del. 1965) or *Eisenman v. Seitz*, 25 A.2d 496 (Del. Ch. 1942). AB 18-19. In *Eisenman*, two parties *in pari*

delicto obtained a fraudulent liquor license in the name of only one, and that one kept all the money. The court simply enforced the nominal name on the liquor license; rescission was not mentioned. *Della* refused to order a party illegally selling liquor in the name of a another to make payments to its *in pari delicto* counterparty on their illegal "sham" agreement. *See* 210 A.2d at 850. Neither case applies to the facts of this one; both were enforcement rather than rescission cases. *Morford v. Ballanca Aircraft*, 67 A.2d 542, 547 (Del. Super. Ct. 1949) is a similar irrelevant *in pari delicto* case. AB 19.

C. The Trial Court's Error Caused A Split In Delaware Authority

Berck, *Snyder*, and *Rucker* are still cited by other Superior Court and District of Delaware decisions, over the erroneous MJOP Decision.

In *Sun Life Assurance Co. of Canada v. Wilmington Trust, N.A.*, 2022 WL 179008, at *13-14 (Del. Super. Ct. Jan. 12, 2022) ("*Frankel/DeBourbon*"),[5] the Superior Court relied upon *Berck* to order a return of all premiums paid on a policy void *ab initio* for lack of insurable interest. Likewise in *Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n*, 2019 WL 8353393, at *4 n.6 (D. Del. Dec. 30, 2019) ("*Sol*"), the District of Delaware relied upon *Berck*, *Snyder*, and *Rucker* to order the return of all premiums paid on a policy void *ab initio* to the last policy owner who, like Geronta, had purchased all interest in the policy, including the

[5] *Frankel/DeBourbon* was released publicly after Geronta filed its Opening Brief.

right to premiums. Brighthouse cursorily mentions *Frankel/DeBourbon* and *Sol* in a footnote. AB 38 n.10.

Bluntly, other Delaware courts see that the MJOP Decision is wrong, and are refusing to follow it, creating an authority split.

D. Brighthouse Seeks To Recover A Windfall

Brighthouse received $1,415,766.43 in premium payments on the Policy, without risk of paying $5 million upon the death of the fictional insured. Conversely, Geronta and its predecessors paid more than $1.4 million in premiums, without gaining the right to a death benefit. Thus, Brighthouse got something for nothing on this void contract. American law enforces "the policy of preventing people from getting other people's property for nothing when they purport to be buying it." *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 271 (1909).

In a similar case, the Eastern District of Tennessee held:

> Tennessee follows the majority rule that an assignee who has paid premiums in good faith is entitled to recover premiums paid if the policy is later declared void because of the misconduct of others. As stated in *U.S. Bank Nat'l v. Sun Life Assur. Co. of Canada*, "an insurance company cannot have it both ways" by obtaining rescission of a life insurance policy and simultaneously retaining the premiums paid on the policy. The court agrees. **Conestoga is not to blame for the fraud here; it merely acquired a life insurance policy from a predecessor assignee and that policy turned out to be**

> **void. Allowing Sun Life to retain the premiums would be a windfall to the company.**

Sun Life Assur. Co. v. Conestoga Trust Servs., LLC, 263 F. Supp. 3d 695, 704 (E.D. Tenn. July 12, 2017) (internal citations omitted) (emphasis added).

Brighthouse correctly argues that rescission causes a known public policy outcome. AB 24. It simply gets that outcome wrong, by arguing against the majority rule of premium disgorgement. *Id.* Denying rescission creates a deleterious "Heads-Insurers-Win-Tails-Insureds-Lose" public policy. Brighthouse would allow *insurers* to rescind contracts procured through fraud, to avoid paying death benefits. But it would deny innocent tertiary market *purchasers* the reciprocal right, granting windfalls procured by fraud to insurers.

Brighthouse fails to cite a single decision endorsing its policy concerns or adopting Section 198 in the context of a policy void *ab initio* for lack of insurable interest.[6] Indeed, the majority rule is the opposite. *Id.*

E. This Court Determines Delaware Rescission Common Law

Brighthouse misleadingly cites legislative history to argue that the General Assembly has declined to codify the common law rule stated in *Berck*, *Snyder*, and *Rucker*. AB 23. That argument is procedurally useless. Absent a statute, this

[6] *Siner v. Am. Gen. Fin.*, 2004 WL 2441185, at *10-11 (E.D. Pa. Oct. 28, 2004) is a Pennsylvania law case enforcing a truth-in-lending statute against a bank, irrelevant on both law and facts.

Court determines Delaware common law. *Cf. Shea v. Matassa*, 918 A.2d 1090, 1095 (Del. 2007) (noting Delaware's "well settled law that the judiciary has the power to overturn *judicially-created doctrine*, so long as that doctrine has not been codified in statute") (internal quotes omitted). Further, "the General Assembly is presumed to be aware of common law precedent's effect on its statutes" (*Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 512 (Del. 2012)), and legislative silence in the face of established common law "must be taken as the General Assembly's intent to retain that rule." *See Kelley v. Purdue Farms*, 123 A.3d 150, 158 (Del. Super. Ct. 2015).

Substantively, Brighthouse's own citations (AB 23) endorsed *Snyder* as Delaware's common law. Like the Superior Court in *Frankel/DeBourbon* and the District Court in *Sol*, the General Assembly knows that *Berck* and progeny accurately state Delaware law. The synopsis of Del. S.B. 220, 146th Gen. Assem. (2012) explicitly states the bill was intended to codify a "clear and unambiguous rule that is consistent with existing case law." *See* Ex. G hereto (proposed legislation and synopsis). *Snyder* is cited therein to state that Delaware courts "have consistently held that when an insurer rescinds a life insurance policy, the insurer must return the premiums that it has collected on the policy." (*Id.*) The Department of Insurance likewise examined *Snyder* as an example of Delaware law on policies void ab *initio* for lack of insurable interest. *See* AB, Ex. 2 at 9.

F. *Bergman* Is Not Persuasive

Brighthouse urges the Court to follow *Sun Life Assurance Co. of Canada v. Wells Fargo Bank, N.A.*, 208 A.3d 839 (N.J. 2019) ("*Bergman*"). AB 26. That persuasive authority is inapt. *Bergman* does not adopt or apply Section 198. Rather, *Bergman* was decided on New Jersey common law doctrines not relevant here, and thus does not aid consideration of the Trial Court's rejection of *Berck* and its progeny in favor of adopting Section 198.

II. THE TRIAL COURT ERRED BY DENYING RESTITUTION TO GERONTA AS COMPELLED BY A CORRECT READING OF RESTATEMENT SECTIONS 197 AND 198

A. Brighthouse Misstates The Applicable Standard Of Review

Brighthouse wrongly asserts the Trial Court's refusal to properly consider the issue of comparative fault between the parties under Section 198 is a "factual finding" reviewed for "clear error." AB 27. The Trial Court's interpretation of the law of restitution set forth in Sections 197 and 198 is a question of law reviewed *de novo.* OB 25-26. Moreover, because the Trial Court refused to engage in a comparative fault analysis under Section 198(b), there is no relevant fact finding to review. The Trial Court *did* find that Brighthouse did not learn that Mansour Seck did not exist until 2017 (OB, Ex. B at 56), but that finding of fact was "clearly wrong." *Shipley v. New Castle Cty*., 975 A.2d 764, 767 (Del. 2009).

B. Brighthouse Was Not "Excusably Ignorant"

Brighthouse's argument that the Trial Court found its underwriting to be competent (AB 1) or "thorough" and "sound" (AB 27) is false. The Trial Decision made no such findings, but instead merely noted that "Geronta has failed to prove that MetLife's underwriting was irresponsible or lacked good faith" and that it had followed its own guidelines. OB, Ex. B at 56, 58. Brighthouse also misleadingly argues that it was not excusably ignorant because its underwriting was "in line with its internal guidelines." AB 27-28. But Brighthouse's guidelines could be "waived" (*i.e.*, ignored) whenever necessary to sell a lucrative policy, and were

here. (A2999-3002; A3004.) Specifically, before selling a $5 million life insurance policy to a 74 year-old man, Brighthouse waived a medical exam by a physician, a medical history, a personal financial statement, and a basic public records search, *i.e.*, all the information needed to write a valid insurance policy. OB 8-9. It further ignored a specific lie that it did uncover and considered an IOLI signal: that (fictional) Mansour Seck had other policy applications pending, despite affirming that he did not. (A1297, 18-23; 1298, 1-8.) As applied here, Brighthouse's internal underwriting guidelines were meaningless. AB 5.

C. Brighthouse Had Actual Knowledge That Mansour Seck Did Not Exist At Some Point Between April 2010 And October 2011

Brighthouse argues "there has never been a shred of evidence" that it knew Mansour Seck did not exist prior to April of 2017. AB 28-29. That too is false. The trial evidence included (at OB 9-13):

- an investigation in December 2009 by two of Brighthouse's internal investigators into Pape Seck because of "IOLI flags" in three policies he was attempting to place;
- communications in December 2009 between the same two investigators alerting them to the fact that the recent sale of the Policy had raised "strong IOLI flags;"
- the April 2010 Press Release by the NJAG announcing that Pape Seck pleaded guilty to insurance fraud involving the placement of fraudulent insurance policies in the name of a fictitious Mansour Seck;
- an April 26, 2010 subpoena from the NJAG to Brighthouse for all of its documents pertaining to the Policy;

- Pape Seck being added to Brighthouse's Do Not Appoint list on April 27, 2010;
- someone at Brighthouse printed out a copy of the April 2010 Press Release on April 28, 2010 and added it to Brighthouse's files;
- the October 2011 Press Release from the NJAG announcing that Pape Seck had pleaded guilty to insurance fraud for defrauding Brighthouse by making fraudulent policy application statements, including false pedigree information;
- the October 26, 2011 McCarthy Email from one of Brighthouse's investigators alerting several other investigator and supervisors to the guilty plea in an email with the name "Mansour Seck" in its subject line, along with the Policy's number.

Brighthouse next argues that "none of the press releases say that Mansour Seck was not a real person." AB 29. Again, false. The April 2010 Press Release stated that no one named Mansour Seck had applied for the policies and that the Mansour Seck used to apply for the fraudulent policies was a fictional creation using pedigree information from three real people named Mansour Seck. (A3032.)

Similarly, Brighthouse minimizes the McCarthy Email that discussed the October 2011 Press Release (A3034) by arguing that the email did not explicitly say that Mansour Seck did not exist. AB 29. However, the email *did* say that Pape Seck had pleaded guilty to defrauding Brighthouse by placing *the Policy* using false pedigree information. Worse, Brighthouse *already knew* that Mansour Seck was Pape Seck's fictional creation. Investigators had matched the October 2011 Press Release with the Policy, and Brighthouse's files *already* contained the April 2010 Press Release clearly stating that Pape Seck had pleaded guilty to insurance

fraud for creating a fictitious Mansour Seck. At least as early as April of 2010, and certainly by October of 2011, Brighthouse knew that Mansour Seck did not exist.

Brighthouse cites *Frankel/DeBourbon* as a purported safe harbor for insurers who willfully blind themselves to evidence that an insured does not exist. But that case strongly supports *Geronta's* position. Though the Superior Court observed that the insurer had no duty to warn subsequent purchasers of a life insurance policy that it had flagged as potentially void *ab initio* for lack of insurable interest, or to stop accepting premium payments on the policy, it did so in the context of analyzing a deceptive trade practices claim under Massachusetts law. *See* 2022 WL 179008, at *12. Much more relevant here, the Superior Court ordered the insurer *to disgorge in restitution all of the premiums paid on the void ab initio policy*, as a matter of public policy, relying upon Section 198 and the *Snyder* decision that Brighthouse contends is overruled. *Id.* at *13-14.

D. Geronta Proved That It Was Entitled To Restitution Pursuant To Section 198(b), And The Trial Court Erred By Refusing To Perform The Requisite Comparative Fault Analysis

1. The Trial Court Ignored Most Of The Evidence Proving That Brighthouse Knew, No Later Than October 2011, That Mansour Seck Never Existed, The Trial Court Never Performed A Comparative Fault Analysis, And Brighthouse Has Waived Any Argument To The Contrary

Brighthouse concedes that restitution is proper under Section 198 if Geronta proved that, although not excusably ignorant, it was not "equally in the wrong"

with Brighthouse. AB 38; *see also* Section 198(b). But the Trial Decision ignored nearly all of the evidence discussed *supra* and in the Opening Brief that proved that Brighthouse and Geronta were not equally in the wrong because Brighthouse knew (or, at least, should have known) that Mansour Seck did not exist, and thus the Policy was void for lack of insurable interest, four or five years before Geronta bought the Policy. OB 31-32. In fact, Brighthouse makes no mention at all, thus waiving argument on the issue. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999). Similarly, Brighthouse waived any challenge to Geronta's assertion that the Trial Court completely failed to perform the comparative fault analysis required by Section 198(b) by failing to address the issue. *Id.*

2. Brighthouse Ignores Authorities That Support Restitution To The Less Culpable Party Per Section 198(b)

Brighthouse completely ignores *all* of Geronta's authorities supporting that Section 198's "equally in the wrong" test awards restitution to the less culpable party (OB 33-35), without supplying any contrary case law. Brighthouse also ignores *all* of Geronta's authorities holding that restitution is frequently awarded where the wronged party was not in *pari delicto* with the other party. OB 34-35.

Instead, Brighthouse cites *AIG Consol. Deriv. Litig. v. Smith*, 976 A.2d 872 (Del. Ch. 2009) to argue that Delaware only awards restitution pursuant to Section 198(b) if the claimant "is in the class of persons the law is designed to protect." AB 33. But *AIG* is yet another *in pari delicto* case: co-conspirators who each took

a knowing and substantial role in a criminal bid rigging scheme. *Id.* There is no *in pari delicto* allegation here; Geronta is a tertiary market purchaser thrice removed from the initial misconduct on the Policy. *Conestoga*, 263 F. Supp. 3d at 695. Doctrines against criminal co-conspirators suing each other do not apply.

3. Like The Trial Court, Brighthouse Failed To Identify Any Authorities That Suggest That Comment b. To Section 198(b) Was Applicable To Deny Restitution

The Trial Court relied upon Comment b. to Section 198(b) to justify its artificial limitation on the use of Section 198(b) except in situations involving "misrepresentation or oppression." OB, Ex. B at 57; AB 33. Geronta represented that it was unable to find a single case from any jurisdiction in the United States that applied that comment outside of *in pari delicto* criminal misconduct. OB 38. Brighthouse also failed to cite *any* authorities from *anywhere* that apply Comment b. to situations other than those involving *mutual* illegality. And, like the Trial Court, Brighthouse does not allege that Geronta engaged in serious misconduct that "threatened social harm," as *explicitly* required by the limitation in Comment b. The Trial Court's application of Comment b. was legal error.

4. Geronta's Excusable Ignorance Is Irrelevant To The Application of Section 198(b)

Brighthouse argues that Geronta cannot recover because it was not excusably ignorant. AB 31. That is wrong as a matter of law. Section 198 is a *comparative* fault test; Geronta need not be excusably ignorant. OB 27. The case

law cited in the Answering Brief (p. 31) does not apply comparative fault, and thus is irrelevant. Moreover, all of those cases involved the diligence of the original parties to a contract; not a long removed tertiary market purchaser of an asset. And worse, when Geronta directly asked Brighthouse the status of the Policy, Brighhouse's simple reply—that the Policy was "active"—was misleading.

Brighthouse argues that Geronta understood that one of the risks of buying life policies on the investor market was "widespread origination fraud." AB 8. But none of Brighthouse's four record citations support Brighthouse's assertion *at all.* In the first citation (A1779, 10-16), Dan Knipe described his perception of the risk of "origination fraud" as a "theoretical possibility" that "wasn't at the top of his list at the time." (A1778, 19-20; A1779, 3-11.) The other citations are to articles in American publications which Mr. Knipe, a resident of Great Britain, testified that he had never read. (A1798, 12-14.)

5. Geronta Easily Satisfies The Comparative Fault Analysis Prescribed by Section 198(b)

Brighthouse's argument that Geronta could not prevail on the Section 198(b) comparative fault analysis, had the Trial Court bothered to do one (AB 34), is wrong for at least five reasons.

First, as argued *supra* (§ II.B), Brighthouse's underwriting of the Policy was not robust, and, the Trial Court never said that it was.

Second, Brighthouse's argument ignores *everything* that Brighthouse learned about Pape Seck and the Policy in 2009, 2010 and 2011. *See supra* § II.C.

Third, Brighthouse ignores the fact, conceded at trial, that it never told Geronta (or EEA) *anything* about *any* of the relevant events of 2009, 2010 or 2011, until after it sued Geronta, nearly a year after Geronta told Brighthouse that Mansour Seck did not exist. OB 38-39.

Fourth, Brighthouse criticizes Geronta for not making full use of the information Geronta could have accessed in 2015 (AB 35) while ignoring that the same information was *actually known* to Brighthouse no later than 2011. Brighthouse also ignores that some information in its files, including its identification of the Policy as having "strong IOLI flags," the fact of the NJAG subpoena in April 2010 pertaining to the Policy, and the facts shared among Brighthouse's fraud investigators in the McCarthy Email in October 2011, was available *only to Brighthouse*.

Fifth, had Brighthouse done *anything* in response to all of the red flags pertaining to the Policy, culminating in Pape Seck's conviction for fraud in its application, this case would not be before the Trial Court or this Court.

At bottom, Geronta merely failed to uncover in 2015 what Brighthouse already knew or should have known no later than 2011.

E. The Trial Court's Failure To Award Restitution Pursuant To Restatement Section 197 Caused A Disproportionate Forfeiture

Brighthouse argues that restitution would encourage investors "not to look carefully" at policies purchased in the life settlement market. AB 36. But Brighthouse's argument would reward insurers for winking at origination fraud, and for collecting premium payments for fraudulent policies upon which they bear zero risk of ever paying a death benefit, as presciently warned by the District of Delaware. *See Snyder*, F. Supp. 2d at 565.

In fact, Brighthouse's policy was to do *nothing* to investigate the validity of a policy after the contestability period passed. (AB 14; A1256-1257; A1335-1336; A2895.) Former Chief Judge Stark explained why restitution damages are required in this exact context, in *Sol*:

> Sun Life may have been unaware at origination that some of its policies constituted illegal human life wagers, but Sun Life admits (as the facts compel it to) that it subsequently developed a list of suspected STOLI policies. With the release of *Price Dawe*, Sun Life also knew (or should have known) that it could invalidate STOLI policies even after the two-year incontestability period. Yet, rather than notify policyholders that their policies were suspected STOLI… Sun Life "made the strategic decision not to pursue investigating [these] policies" and continued to collect (often enormous) premiums. Sun Life knowingly assumed the risk that someday a court would order it to repay some or all of the millions of dollars it collected in such premiums.

2019 WL 8353393, at *4 (internal citations omitted).

Comment b. to Section 197 provides that "[w]hether the forfeiture is "disproportionate" for the purposes of this Section will depend on the extent of that denial of compensation as compared with the gravity of the public interest involved and the extent of the contravention." *Price Dawe* held that the life settlements industry provides the public value by creating a market for ordinary people to sell insurance policies that they no longer need. *See* 28 A.3d at 1069. Brighthouse's position devalues those assets by foisting all the risk of bad underwriting off the insurer (who did the underwriting) and onto later tertiary purchasers. By increasing the risk to tertiary purchasers, the public will be harmed by lower prices when selling their policies, and insurers will receive a windfall. That outcome contradicts Delaware's public policy as stated by *Price Dawe*.

III. D.R.E. 701 CONTROLS THE WRONGFULLY EXCLUDED TESTIMONY

Brighthouse argues as if the disputed Knipe testimony was offered as expert testimony. AB 41-42. Brighthouse never addressed Geronta's argument that the testimony was admissible per D.R.E. 701, and that the testimony would have been given by a fact witness to explain his own behavior. OB 43. This error was material. The Trial Court wrongly imposed a Section 198 comparative fault standard, and then further wrongly barred Geronta's lay witnesses from explaining their own actions to establish lack of comparative fault.

IV. THE TRIAL COURT DID NOT RULE ON GERONTA'S BONA FIDE PURCHASER FOR VALUE DEFENSE

Brighthouse does not dispute that Geronta raised a bona fide purchaser defense or that the Trial Decision does not mention the defense. AB 42-43. Brighthouse nevertheless argues that the Trial Court ruled upon the defense as a factual matter. It did not. A determination that Geronta performed "limited" due diligence is not a ruling that Geronta knew the Policy was void *ab initio* prior to purchase. Moreover, the *Faraone v. Kenyon*, 2004 WL 550745, at *11 (Del. Ch. Mar. 15, 2004) case involved enforcing a mortgage on a void deed, and not a policy void *ab initio* for lack of insurable interest.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests that this Court reverse the Trial Court's MJOP Decision and Trial Decision.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2022, a true and correct copy of the **Appellant's Reply Brief** was served via File & ServeXpress on the following counsel of record:

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