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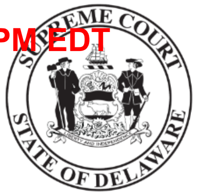

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILMINGTON TRUST, NATIONAL ASSOCIATION, as Securities Intermediary, Defendant/Counterclaim-Plaintiff Below, Appellant/Cross-Appellee v. SUN LIFE ASSURANCE COMPANY OF CANADA, Plaintiff/Counterclaim-Defendant Below, Appellee/Cross-Appellant	No. 126, 2022 Court Below: Superior Court of the State of Delaware C.A. No. N18C-07-289; N17C-08-331

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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Dated: August 8, 2022

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INTRODUCTION

Having correctly declared the Policies[1] void *ab initio* for lack of insurable interest, the trial court erred by ordering Sun Life to refund the premium. Instead, the court should have allowed Wilmington Trust to attempt to prove an entitlement to a refund of the premium *it* paid through a viable legal theory such as unjust enrichment. Wilmington Trust cannot prove such an entitlement here because its principal, Viva, did not pay the premium "reasonably unaware" of the Policy's insurable-interest problems. Indeed, before Viva paid a penny in premium—Viva knew [redacted] Thus, Viva is not entitled to a premium refund as a matter of law.

But even if Wilmington Trust could somehow prove an entitlement to a refund of the premium *it* paid, it cannot prove an entitlement to a refund of the premium paid by the Policies' prior owners (i.e., the premium Viva *did not pay*), including because Viva was not impoverished by those payments and because the prior owners (the LPC Entities) were the original wrongdoers, who fraudulently created these STOLI polices. As the original fraudsters, the LPC Entities have no right to a refund, and thus, could not possibly have assigned any such (non-existent) right to Viva.

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[1] Capitalized terms retain the meaning ascribed in Sun Life's Answering Brief on Appeal/Opening Brief on Cross-Appeal ("SL.Br."). Citations to "WT.AB" are to Wilmington Trust's Reply Brief on Appeal/Answering Brief on Cross-Appeal.

ARGUMENT

I. WILMINGTON TRUST IS NOT ENTITLED TO A PREMIUM REFUND.

Wilmington Trust cannot prove an entitlement to a premium refund for the reasons stated in Sun Life's Opening Brief, including because no rational juror could possibly conclude that Viva paid the premium "reasonably unaware of the [Policies'] insurable-interest problem." *Wells Fargo v. Estate of Malkin*, 2022 WL 1671966, at *13 (Del. 2022) ("*Malkin*"); SL.Br.1, 4-5, 8, 13-22, 44-47. Indeed, Wilmington Trust has the burden of showing that Viva paid the premium unaware of the Policies' insurable-interest problems and that Viva's unawareness was reasonable. Here, Wilmington Trust cannot possibly meet that burden because—far from being able to argue that it was reasonably *unaware*—

This cannot be reasonably disputed. Before paying a penny of premium,

And not only did Viva know [redacted], but Viva also knew t[redacted] We know this because (i) Viva concedes [redacted] and (iii) Viva's own trade organization (for which Viva's Attorneys serve as general counsel) instructs investors not to buy policies, like the Policies, that were taken out to be sold through financial inducements.

Although Wilmington Trust argues that a remand is needed and it "could devote [its] entire brief to explaining why Sun's factual arguments concerning Viva's knowledge are materially misleading" (WT.AB.23, 31), it does not actually identify a genuinely-disputed material fact from which a rational juror could decide that Viva bought the Policies reasonably unaware of the insurable-interest problem.

Wilmington Trust tries to argue (WT.AB.31-32) that Viva did not know how LPC was originating policies. But this argument ignores: (i) [redacted]

[2]; and (ii) ”[3] And, of course, Wilmington Trust concedes that Preston's knowledge is imputed to Viva. B141. .[4] *See Price Dawe*, 28 A.3d at 1075 ("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.").

Wilmington Trust also argues (WT.AB.33) that Viva's Attorneys (Ziser and Weinberger) did not "represent[] LPC in 2006-07." But, even if technically true, that is immaterial. Fleisher testified that and that

[2] A2892/259:1-260:22, 261:11-262:13; A2893/263:7-264:5; A2896/274:17-275:4; A2897/278:4-279:22, 280:13-282:14; A1968/¶¶ 7-21.

[3] A3044/285:15-286:19; A3011/152:4-15; A3018/178:9-180:16; A3037/256:22-257:7; A3038/259:24-260:19; A3039/262:6-19; A3043/281:14-282:18; A3044/282:23-283:9.

[4] Wilmington Trust tries to sidestep Fleisher's testimony (WT.AB.33) by arguing that although So what? Wilmington Trust does not (and cannot) deny that

Fleisher had A2888/245:17-246:9; A2898/285:20-286:9. Wilmington Trust also stated below (A656) A2566/270:24-271:17; A2568/281:2-25. This is powerfully confirmed by a February 2007 email sent shortly after LPC acquired the Policies, B519-21 (emphasis added). B678, B701. No rational juror could fail to conclude that Viva's Attorneys have been intimately involved with LPC, its investors, and its policies since before the Policies were issued.

Wilmington Trust also argues (WT.AB.33) that ILMA's minimum diligence guidelines—advising investors to interview insureds and producers prior to buying policies to learn how they were originated and instructing investors *not* to buy policies procured through financial inducements—somehow do not pertain to Viva because Viva buys policies from investors; whereas, the guidelines were supposedly only intended to apply to investors who buy policies from original owners. This too

is a distinction without a difference. The guidelines call for investors to investigate policies prior to buying them to ensure they were not created for investors. This should be important to *all* investors because courts have held that policies created by investors for investors are void.[5] *See Price Dawe*, 28 A.3d at 1070.

To be clear, these are the only alleged factual issues Wilmington Trust raises on appeal vis-à-vis Viva's knowledge, and none of them are genuine or material. Rather, the indisputable factual record shows [REDACTED] No rational juror could conclude that Viva paid the Policies' premiums "reasonably unaware of the insurable-interest problem." *Malkin*, 2022 WL 1671966, at *13.

This is sufficient to defeat Wilmington Trust's premium refund claim. In *Malkin*, this Court held that a downstream STOLI investor like Viva could *not* get a premium refund unless it was "reasonably unaware of the insurable-interest

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[5] [REDACTED]. A3013/159:5-160:14; A3030/226:12-22. [REDACTED]. Order Approving Settlement, *Fleisher v. Phoenix Life*, 2015 WL 10847814, at *1-3 (S.D.N.Y. Sept. 9, 2015).

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problem" because awarding restitution to an investor who paid premium for policies *it knew* had STOLI problems is not "consistent with 'the fundamental principles of justice or equity and good conscience.'" *Id.* The same logic applies here.

Wilmington Trust tries to wiggle out of this by arguing (WT.AB.27 n.9) that its burden to prove Viva was "reasonably unaware" of the STOLI problems only applies to STOLI cases brought by estates—arguing a carrier's knowledge must be considered when the carrier brings the same challenge and suggesting that an investor who buys a policy knowing it has STOLI problems can still get a refund if it proves the carrier also knew or should have known post-issuance of STOLI issues. But, *Malkin* did not remand with instructions to consider what the restitution *defendant* (there, the insured's estate; here, Sun Life) knew or should have known.

Wilmington Trust also tries to avoid *Malkin*'s holding in this regard by arguing (WT.AB.24, 26-27) that § 198(b)'s "not equally in the wrong" exception requires some sort of freewheeling "comparative culpability" analysis through which a *knowing* STOLI investor can recover premiums so long as it shows the carrier also knew or should have known. But that ignores the comments to § 198(b), which explain that §198(b) really only operates in two narrow categories of cases:

> For the most part, the exception is applied in two types of cases. In the first, the claimant is regarded as being less in the wrong because the public policy is intended to protect persons of the class to which he belongs and, as a member of that protected class, he is regarded as less culpable. . . . In the second type of case, the claimant is regarded as

> being less in the wrong because he has been the victim of misrepresentation or oppression practiced on him by the other party.

See Brighthouse Life Ins. Co. v. Geronta Funding, 2021 WL 4080672, at *1 n.8, 21, 24 (Del. Super. Ct. Aug. 20, 2021) ("*Seck*") (Section 198(b) only met in those same two narrow categories); *Farrington v. Stucky*, 165 F. 325, 330-31 (8th Cir. 1908) (recognizing same two narrow categories); *In re AIG Consol. Deriv. Litig.*, 976 A.2d 872, 885 (Del. Ch. 2009) ("*AIG*") (similar). Here, Wilmington Trust does not argue Viva is in a protected class; rather, it argues Sun Life tricked Viva into paying premium by allegedly implying through routine policy administration services that the Policies were valid and that Sun Life would not contest them. ***But an investor cannot be tricked into paying premiums if, as here,*** [REDACTED] Again, as *Malkin* recognized, if an investor did not pay the premium reasonably unaware of the STOLI problems, it cannot obtain a refund.

This is not a remarkable proposition: Courts routinely refuse to refund money knowingly paid into illegal agreements. *See, e.g.*, *Burns v. Ferro*, 1991 WL 53834, at *1-2 (Del. Super. Ct. Mar. 28, 1991) (plaintiffs who knowingly invested in illegal pyramid scheme not entitled to refund); *Design-4 v. Masen Mountainside Inn*, 372 A.2d 640 (N.J. Super. Ct. App. Div. 1977) (plaintiff who knowingly hired an

unlicensed architect not entitled to refund); *Potter v. Swinehart*, 184 P.2d 149 (Colo. 1947) (plaintiff who knowingly bought illegal liquor not entitled to money back).

But even if Sun Life's knowledge were relevant, no rational juror could accept Wilmington Trust's argument that Sun Life knew more about LPC's Program than Viva. Wilmington Trust does not even argue—let alone try to prove—that Sun Life knew or suspected the Policies of being STOLI *when Sun Life issued them in 2006*. Rather, Wilmington Trust concedes Sun Life was misled by, and was the victim of, LPC's scheme. Indeed, when Sun Life was underwriting the Policies, it was told legitimate policies were being taken out for legitimate reasons; it was not told that the insureds did not need the Policies; that they had been financially induced; that LPC was funding the premiums; or that arrangements had been made to clandestinely transfer the Policies to LPC shortly after issuance.

Instead, Wilmington Trust argues (WT.AB.33-34) that Sun Life, in the years that followed, learned that the Policies were associated with LPC; that Sun Life's lawyers talked to Sun Life about the Policies; that Sun Life challenged three other LPC-associated policies in 2009; and that Sun Life's lawyers in non-Sun Life cases deposed Fleisher and Lockwood as adverse witnesses. That is a far cry from the level of

Indeed, unlike Sun Life, which is alleged to have learned *some* information about *three* LPC policies,

Likewise, unlike Sun Life, which is alleged to have taken Fleisher's deposition *as an adverse witness in litigation*, And, of course, unlike Sun Life's attorneys, who are merely alleged to have had conversations with Sun Life over the years about LPC, No rational juror could accept Wilmington Trust's argument that Sun Life knew more than Viva.

What Wilmington Trust really seems to be arguing is that Sun Life and Viva both had sufficient data from which each could or did determine the Policies were STOLI. Sun Life denies this.[6] But even if that were true, it would, at most, tend to

[6] As the writer of policies for wealthy, older individuals, Sun Life was an unknowing target for STOLI promoters as the characteristics of STOLI policies, such as the insured's age and policy face amount, mimicked Sun Life's legitimate policies, making detection of STOLI policies difficult. And, as Wilmington Trust likes to boast (WT.AB.34), until the instant cases were adjudicated in 2022, every insurer who had brought an LPC case *had lost*. Moreover, as Wilmington Trust concedes (WT.AB.28), analyzing whether to bring STOLI challenges involves a series of complex legal and factual determinations, including a critical choice of law determination, because STOLI investors routinely argue—*as Wilmington Trust itself did throughout much of this litigation*—that the law of some other state governs the policies and renders them valid (here, Wilmington Trust argued New York law applied). Thus, before Sun Life elects to bring a STOLI challenge, it refers the matter to outside counsel for a full factual and legal investigation/analysis and does not

show that Viva and Sun Life were in *equal* positions—not that Viva was *less* in the wrong. And where both parties to an illegal agreement are "equally in the wrong," courts are not supposed to award restitution; rather, they should leave the parties as they find them.[7] Restatement (Second) Contracts § 198(b); *see, e.g.*, *Morford v. Bellanca Aircraft*, 67 A.2d 542, 547-48 (Del. Super. Ct. 1949) (performing party on allegedly illegal employment contract could not recover overpaid wages where both parties knew or should have known of illegality); *Central States Health & Life Co. v. Miracle Hills*, 456 N.W.2d 474, 478 (Neb. 1990) (denying return of funds to performing party where both parties had "equal access" to information and were both inexcusably ignorant of the illegality); *Nursing Home Consultants v. Quantum Health Servs.*, 926 F. Supp. 835 (E.D. Ark. 1996) ("leav[ing] parties as it found them" where both parties "voluntarily assumed the risk that their agreement might later be held to be illegal, and hence unenforceable").[8]

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bring a claim unless and until Sun Life is satisfied it can marshal the evidence needed to prove the policy was STOLI, including that a favorable body of law applies.

[7] For this reason, the *Sol* court's decision to award restitution to the STOLI investor was error; having found that both the carrier and the investor knew or should have known of the STOLI problems, the court should have left both where it found them.

[8] Wilmington Trust's citation to Restatement (Third) of Restitution and Unjust Enrichment § 54 changes nothing. Section 54 (cmt. a) requires satisfying § 32 (illegality), which itself requires the claimant prove unjust enrichment and that "allowance of restitution will not defeat or frustrate the policy of the underlying prohibition" *and* § 63, which forecloses restitution "for the claimant's inequitable conduct." Moreover, § 32 (cmt. a) makes clear it merely "reformulate[d]" the rules

Wilmington Trust's argument (WT.AB.25-26) that refusing to award it a refund would work a "disproportionate forfeiture" under Restatement (Second) Contracts § 197 is based on a fundamental misunderstanding of that concept. Disproportionate forfeiture is not concerned with whether denying restitution will cause the promisor to receive an alleged "windfall"; rather, it is concerned with whether the promisee will suffer a forfeiture *disproportionate to the promisee's misconduct* in light of the relevant public policy—not disproportionate to the money retained by the promisor. Restatement (Second) § 197 cmt. b.

Here, Viva's misconduct was buying the Policies and paying premium for them [redacted] in an attempt to lull Sun Life into paying the death benefits upon maturity. Failing to award restitution to such a party is not disproportionate: Delaware courts routinely refuse refunds to buyers who should have known better. *See Interim Healthcare v. Spherion*, 884 A.2d 513, 551 n.305 (Del. Super. Ct. 2005), *aff'd* 886 A.2d 1278 (Del. 2005) ("Delaware courts do not rescue disappointed buyers from circumstances that could have been guarded against through normal due diligence and negotiated contractual protections.").

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from §§ 197-98 of the Restatement (Second) of Contracts "without proposing to alter specific outcomes." As noted, the exceptions in § 198 summarize the situations where the common law found restitution would not frustrate public policy, and as also noted, Delaware's public policy against STOLI would be frustrated by refunding premium to knowing STOLI investors if and when they get caught.

This is particularly so given the public policy at stake. Awarding Viva the $6.9 million refund plus $4.9 million in interest it seeks would give it a roughly $6.9 million *profit* from its decision to knowingly buy STOLI. SL.Br.47 n.22. Allowing [redacted] to make millions is terrible public policy and would encourage them to keep doing precisely that, which will encourage promoters to again target Delaware with the next wave of STOLI.

Wilmington Trust's argument (WT.AB.20-21) that Delaware does not need to remain vigilant against STOLI because *Price Dawe* supposedly *changed* the law in Delaware by prohibiting STOLI is wrong. Delaware law has prohibited STOLI for over a hundred years. *Balt. Life Ins. Co. v. Floyd*, 91 A. 653 (Del. Super. Ct. 1914), *aff'd* 94 A. 515 (Del. 1915) ("*Floyd*"); *see Price Dawe*, 28 A.3d at 1071-72 (citing *Floyd*, 91 A. at 656). But that did not stop entities like LPC from targeting Delaware with massive STOLI schemes in the mid-2000s.

The reality is that STOLI is a cyclical phenomenon notwithstanding the law's repeated efforts over time to curtail it. *See Bergman*, 208 A.3d 839, 843-44 (N.J. 2019). And, as this Court has noted, modern STOLI is created by the market forces of supply and demand. *Price Dawe*, 28 A.3d at 1070. [redacted] [redacted], it will keep buying them,

[redacted]

and unscrupulous actors will therefore look to create more of them.[9] The only way to prevent Delaware from being targeted with the next wave of STOLI is to ensure that investing in Delaware STOLI policies is not profitable.[10]

Wilmington Trust's argument that Sun Life somehow tricked Viva into paying premium is also not one a rational juror could accept for the reasons set forth in Sun Life's Opening Brief, including because [redacted], if challenged, and because *Sun Life expressly reserved its rights before each and every ownership change—including the change to Wilmington Trust*—to challenge the Policies. SL.Br.47-50.

Wilmington Trust's argument (WT.AB.29-30) that the trial court did not already rule against it on this issue is wrong. In its motion for summary judgment on Wilmington Trust's unfair trade practices claim, Sun Life explained (B284-93) that Sun Life's alleged misrepresentations—that the Policies were valid and Sun Life

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[9] Wilmington Trust's argument that "[i]f ordering insurers to return premiums was going to facilitate new STOLI policies in Delaware, the market would have seen these policies by now" is wildly speculative. Wilmington Trust offers exactly zero support for this statement; whereas, history, and anecdotal evidence, suggest the opposite. *See* B. Samuelson, *The New Face of STOLI*, The Life Product Review (Aug. 4, 2020), *available at* https://web.archive.org/web/20200924140356/ https://lifeproductreview.com/2020/08/04/238-the-new-face-of-stoli/.

[10] Delaware's public policy against investors profiting from STOLI is further shown by 18 *Del. C.* § 2704(b), which authorizes estates to take STOLI death benefits from investors if carriers pay STOLI death benefits.

would not challenge them—could not have caused Viva's alleged injuries because [redacted] and because Viva knew Sun Life had expressly reserved its rights to challenge them. The court then stated: "The Court finds the facts presented by Wilmington Trust insufficient to show a causal connection between Sun Life's conduct and any losses allegedly suffered by . . . Viva." Opinion 29. Again, Viva's knowledge that the Policies would, if challenged, be deemed void is fatal to its premium refund claim.

Wilmington Trust's briefing relies heavily on *Sol*. But the *Sol* award was predicated on promissory estoppel, which, as discussed, is not applicable to a STOLI policy, including because a claim for promissory estoppel requires a promise, and this Court has been clear over-and-over again that STOLI promises can never be enforced. SL.Br.29-31. Moreover, having found the parties to be equally to blame, the *Sol* court should have left both of them where it found them, as discussed *supra* at 10-11. Finally, the trial court expressly found Sun Life *did not cause* damage to Wilmington Trust. To be clear, an investor who proves it bought a policy reasonably unaware of its insurable-interest problems can maintain a premium refund claim, but not on a promissory estoppel theory because STOLI promises can never be enforced.

Moreover, even if promissory estoppel was available to recover premium, an investor's knowledge that it was paying premium on a STOLI policy would be fatal because, like unjust enrichment, one cannot prove promissory estoppel unless

"injustice can be avoided only by enforcement of the promise." *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000). And *Malkin* was clear that awarding a premium refund to an investor who knowingly paid STOLI premiums would violate "fundamental principles of justice or equity and good conscience." 2022 WL 1671966, at *13.

II. EVEN IF WILMINGTON TRUST IS SOMEHOW ENTITLED TO A REFUND OF SOME PREMIUM, WILMINGTON TRUST IS NOT ENTITLED TO A "REFUND" OF THE PREMIUM *IT DID NOT PAY.*

Wilmington Trust is not entitled to a "refund" of the premium *it did not pay*, including because Wilmington Trust was not impoverished by its predecessors' premium payments and because the LPC Entities, the original wrongdoers, have unclean hands, and thus no right to a premium refund, and thus could not possibly have assigned those non-existent rights to Viva. SL.Br.50-52.

Wilmington Trust does not deny that the LPC Entities' payment of premium did not impoverish Viva. Rather, Wilmington Trust argues (WT.AB.37-38) this "misses the point," which according to it, is that Viva supposedly bought whatever rights the LPC Entities may have had to recover their premiums. But this argument fails, including because the LPC Entities are the original STOLI fraudsters here and thus never had any premium refund rights to assign in the first place.

Wilmington Trust's argument (WT.AB.38) that a STOLI fraudster that used seniors to wager on their lives is entitled to a refund of the premium it paid when its fraud is discovered is hard to take seriously. *See, e.g.*, *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 797-99 (6th Cir. 2009) (investor that financially induced insureds to take out STOLI policies for investor's benefit cannot recover premium refund due to its own unclean hands); *TTSI Irrevocable Tr. v. Reliastar Life Ins. Co.*, 60 So.3d 1148, 1149 (Fla. DCA 2011) ("Where a party wrongfully procures a life

insurance policy on an individual in whom it has no insurable interest, the party is not entitled to a return of premiums paid for the void policy.”).

Nor does Wilmington Trust deny (WT.AB.38-39) the blackletter legal principle that an assignee can take no greater right than possessed by the assignor. Here, that blackletter legal principle completely defeats Wilmington Trust’s claim for a refund of the premiums paid by its predecessors since those predecessors (the LPC Entities) fraudulently created the very STOLI Policies at issue. Opinion 27.

Wilmington Trust’s only response (WT.AB.38-39) is to *again* ask this Court to reverse well-settled law.[11] Wilmington Trust criticizes the rule that assignees stand in their assignors’ shoes by arguing that it is “unworkable”; that applying it will “involve mini-trials”; and that the relevant evidence might be unavailable. None of this provides a cogent reason to overrule the common law. What Wilmington Trust wants here is astounding: To obtain a refund of premium it did *not* pay based on an alleged assignment of rights it *cannot* prove and that *cannot* exist!

Nor are any of Wilmington Trust’s fears implicated here: LPC’s status as the original STOLI fraudster was proven as part of proving the Policies were STOLI; no trial (let alone mini-trials) was required; and the trial court found the evidence that LPC was running a STOLI program—which was supported by robust, first-hand

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[11] *C.f.* WT.AB.5-16 (asking this Court to reverse longstanding common law rule that void *ab initio* agreements can never be enforced).

testimony and contemporaneous documents—was overwhelming. Because Wilmington Trust cannot prove LPC *had* a right to a premium refund, LPC could not possibly have *assigned* any such right to Viva, and thus Wilmington Trust's claim for a refund of premium paid by its predecessors must fail.

Wilmington Trust's argument (WT.AB.40) that Sun Life should not get to "press 'reset' on the premium-refund calculation every time a policy trades" because STOLI policies sometimes trade frequently on the so-called tertiary market misses the point. STOLI policies *should not trade on any market* because sophisticated investors like Viva, who know better, should refuse to buy them. But Viva's whole business model includes [REDACTED] Awarding investors like Viva "refunds" of money *they did not pay* will only encourage STOLI policies to trade and proliferate.

Wilmington Trust also argues that denying Viva a premium refund here will somehow upset market expectations. Not so. The market has long known that *Price Dawe*'s holding that STOLI policies are void *ab initio* is fatal to its litigation arguments, including its argument for premium refunds. That is why the amicus in *Price Dawe* argued so hard for this court to hold STOLI policies merely voidable. That is also why, in the wake of *Price Dawe*, STOLI investors lobbied the General Assembly so hard to adopt automatic STOLI premium refund legislation (it

declined).[12] And that is why the amicus in *Berland* argued so hard for this Court to reverse *Price Dawe*'s ruling that STOLI is void *ab initio*. Declining to award a premium refund to Viva here will not upset market expectations, it will fulfill them.

Finally, although Wilmington Trust asks this Court to adopt the premium refund analysis in *Sun Life/Malkin*, *Van de Wetering*, *Bergman*, *Collins*, and *Corwell* (WT.AB.11, 26, 35), Wilmington Trust fails to mention that ***every single one of these decisions refused to "refund" premium to defendants who did not pay them***.

In *Sun Life/Malkin*, the court rejected the STOLI investor's request to be refunded premium paid by the prior owner, reasoning, *inter alia*, that it could not "cite to any Delaware authority mandating a return of premiums made by a third party." 2016 WL 3948059, at *2, *aff'd on this* 693 Fed. Appx. 838; *see Van de Wetering*. 2016 WL 8116141, at *19 (similar), *adopted* 2017 WL 347449.

In *Bergman*, the court found that the first group of premium payments had been funded by the original STOLI investors; the second group had been paid by an investor (LTAP) with funds borrowed from Wells Fargo; and the third group had been paid for by Wells Fargo, as securities intermediary for ATC Reality, a Wells Fargo entity that acquired the Policy from LTAP after LTAP went bankrupt. 2016 WL 6824367. The court refunded to Wells Fargo the second and third groups of

[12] Del. S.B. 220, 146th Gen. Assem. (2012); Del. H.B. 87, 147th Gen. Assem. (2013); Del. S.B. 71, 148th Gen. Assem. (2015).

premiums, but not the first group, reasoning that the latter two groups had been paid to the insurer *with Wells Fargo's own money*. *Id.* at *5-6 (emphasis added); *aff'd* 779 F. App'x 927, 929 (3d Cir. 2019) (affirming premium refund because "Wells Fargo was not responsible for *and did not have knowledge of the STOLI arrangement* when it continued to make payments on the Policy" (emphasis added)).

In *Collins*, the court ruled that the STOLI investor "will be limited to return of premiums paid after acquiring the ownership rights in the policy." 263 F. Supp. 3d 695, 704 (E.D. Tenn. 2017), *aff'd* 717 Fed. Appx. 600 (6th Cir. 2018) ("We also affirm the district court's order directing Sun Life to repay the premiums that Conestoga (but not the five other assignees) paid to Sun Life on this policy.").

Finally, in *Corwell*, the court dismissed the security intermediary's premium refund claim to the extent it sought a "refund" of STOLI premiums paid by prior owners, even if those prior owners happened to pay premium through the same securities intermediary, resulting in a premium refund of roughly $13,000 on a $5 million policy. 2018 WL 2100740, at *3, 5; 2020 WL 1503641, at *4, 14; Amended Judgment, No. 1:17-cv-06588 (N.D. Ill. Aug. 9, 2021), ECF 267.

Although Wilmington Trust also cites to the pre-*Price Dawe* cases of *Berck*, *Snyder*, and *Rucker*, all three were single owner cases. Thus, none of those courts were even asked to consider whether a downstream STOLI investor could obtain a refund *of the premium paid by its predecessors*.

III. WILMINGTON TRUST IS NOT ENTITLED TO AN AUTOMATIC REMEDY.

Wilmington Trust's argument that it is entitled to an automatic refund (what it refers to as a "rescission") is wrong for the reasons stated in Sun Life's Opening Brief and set forth by Brighthouse in the *Seck* case (No. 380,2021) currently before this Court.

The only new argument Wilmington Trust makes (WT.AB.18-19) is that, although this Court's *Malkin* decision held that a STOLI investor cannot obtain a premium refund unless it proves its entitlement through a viable legal theory such as unjust enrichment, a STOLI investor need not proceed by way of an unjust enrichment claim and can instead proceed through a "rescission theory." Not so. An unjust enrichment claim is precisely that, a cause of action that a party can try to prove. By contrast, rescission is not a cause of action; it is merely a remedy, and, as this Court has stated, it is "neither given nor withheld automatically." *Gotham Partners v. Hallwood Realty Partners*, 817 A.2d 160, 174 (Del. 2002). Thus, Wilmington Trust's argument fails because under *Malkin* a STOLI investor must *prove* it is entitled to a refund, not simply *declare* it is entitled to one.[13]

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[13] Wilmington Trust's argument (WT.AB.3) that Sun Life is the one seeking to enforce the Policies by arguing that Wilmington Trust cannot prove its premium refund counterclaim makes no sense. A court does not "enforce" an illegal contract by leaving the parties to it where they are found.

CONCLUSION

Respectfully, the trial court's premium refund decision should be reversed with instructions to deny Wilmington Trust's premium refund claim.

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