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Case Number 374,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERONTA FUNDING, a Delaware Statutory Trust,	)	No. 374, 2023
Appellant,	)	Court Below: Superior Court of the State of Delaware
v.	)	
BRIGHTHOUSE LIFE INSURANCE COMPANY,	)	C.A. No. N18C-04-028 PAW
Appellee.	)	

APPELLANT'S OPENING BRIEF

Dated: November 21, 2023

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NATURE OF PROCEEDINGS

This appeal asks the Court to review an application of the fault-based test announced in *Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47 (Del. 2022) ("*Seck I*") that Delaware courts now use to determine the return of premiums paid on a life insurance policy declared void *ab initio* for lack of insurable interest. Specifically, Appellant Geronta Funding ("Geronta") asks this Court to reverse the trial court's determinations on remand that Geronta is only entitled to the premium payments that it paid on the Policy (defined below) and is not entitled to the premium payments paid by non-parties EEA Life Settlements, Inc. and its affiliate (together, "EEA"). The net effect of these determinations is that Appellee Brighthouse Life Insurance Company ("Appellee" or "Brighthouse") retains the vast majority of premium payments paid on the Policy even though Geronta is less at fault than Brighthouse under the fault-based test articulated in *Seck I*.

In *Seck I*, this Court expressed its intent that a fault-based test would "incentivize insurers to speak up when the circumstances suggest that a policy is void for lack of an insurable interest because they will not be able to retain premiums if they stay silent after being put on inquiry notice and they might also be responsible for interest payments." *Id.* at 72. On remand, the trial court found that Brighthouse was on inquiry notice that the policy in question was void more than five years before Geronta bought it, that Brighthouse—and only

Brighthouse—had actual knowledge that the policy was the product of a criminal fraud, and that Brighthouse stayed silent about what it knew. The trial court specifically held that Geronta was less at fault than Brighthouse, but nonetheless permitted Brighthouse to retain almost $1 million in premium payments made after it was on inquiry notice.

The life insurance policy premiums at issue relate to a $5 million insurance policy against the life of a fictional creation named Mansour Seck (the "Policy"). The policy originator, Pape Seck, was convicted of insurance fraud in New Jersey, among other crimes. Brighthouse wrote the Policy in 2007, was on inquiry notice of the void nature of the Policy by no later than April 2010, and had actual notice by no later than October 2011 that the Policy was the product of criminal fraud. Brighthouse remained silent and accepted premiums on the Policy until Geronta Funding discovered the criminal fraud for itself.

The Policy was first owned by a trust. The trust sold it in the secondary market in 2009 to EEA, who, in 2015, collateralized the Policy into a portfolio of other life insurance policies for resale. Geronta purchased that portfolio, including the Policy, in September 2015. As part of the transaction, Geronta purchased the right to all premiums paid on the Policy irrespective of the payor.

After Geronta unearthed the Policy fraud, Brighthouse sued Geronta (and not EEA) in April 2018 asking the trial court to leave the parties where the trial

court found the, *i.e.*, Brighthouse keeps all past premiums. Geronta requested legal rescission and the return of all premiums to restore the *status quo ante*, premised on a trio of decisions from the United States District Court for the District of Delaware. Alternatively, Geronta sought restitution. The parties agreed that the Policy was void *ab initio* under 18 *Del. C.* § 2704(a) for lack of insurable interest.

The trial court rejected Geronta's rescission request and ruled instead that restitution may be available under Restatement (Second) of Contracts (the "Restatement") sections 197-199. Following a seven-day trial, on August 20, 2021, the trial court issued a Decision After Trial (the "Initial Trial Decision") and awarded Geronta a portion of the premiums it paid on the Policy. Geronta appealed, arguing that rescission, and not restitution, was the correct remedy under Delaware law for the return of premiums paid upon a life insurance policy that is void *ab initio* for lack of insurable interest. Geronta also argued that, regardless of whether the correct remedy was rescission or restitution, Geronta was entitled to the return of all premiums paid by Geronta and EEA, approximately $1.17 million.

In *Seck I*, this Court adopted a fault-based test framed by Restatement sections 197-199 to determine whether premiums paid on a life insurance policy declared void *ab initio* for lack of an insurable interest should be returned. *Seck I*, 284 A.3d at 71-72. The matter was remanded to the trial court for it to reconsider factual findings in light of this newly adopted fault-based test. The trial court was

specifically directed to consider whether "the parties" (Geronta or Brighthouse) had inquiry notice of the void nature of the Policy. *Id.* There was no mention of EEA in the Court's remand.

On remand, applying the fault-based approach announced in *Seck I*, the trial court determined that Geronta and Brighthouse both were on inquiry notice of the void nature of the Policy, but held that Geronta was less at fault than Brighthouse. Ex. A (the "Remand Decision") at 18-23. The trial court's reasoning was three-fold. First, the trial court found that Brighthouse had been on inquiry notice of the void nature of the policy for more than five years prior to Geronta. *Id.* at 18-21. Second, the trial court found that by October 2011, Brighthouse had actual knowledge that the Policy was the product of criminal fraud, yet Brighthouse continued collecting premiums. *Id.* at 21-22. Third, relying on policy rationales stated by this Court in *Seck I*, the trial court decided that if it "were to conclude the parties here at equal fault, then an insurer would not be incentivized to speak up when it suspects a policy lacks an insurable interest, but only to wait and see if the policy is sold on the secondary market to an invest who does not conduct any pre-acquisition diligence." *Id.* The trial court nevertheless only awarded Geronta the premiums it paid on the Policy. *Id.* at 23.

Regarding EEA's premiums, the trial court required Geronta to separately prove that EEA is entitled to restitution under the fault-based approach. *Id.* at 25.

Because the trial court held that Brighthouse and EEA were equally at fault, Geronta was not awarded the premiums paid by EEA. *Id.* Despite its years of silence about what it knew about the fraudulent nature of the Policy, Brighthouse retains the $706,478.29 in premiums paid on the Policy by EEA.

SUMMARY OF ARGUMENT

The trial court erred:

(1) When it ignored the limited scope of this Court's remand in *Seck I*, which directed an inquiry into the relative fault of Brighthouse and Geronta alone, and when it thus required Geronta to separately prove that EEA is entitled to restitution under the fault-based approach in order to receive the return of premiums paid on the Policy by EEA.

(2) By holding that Brighthouse and EEA were "equally at fault" despite findings that Brighthouse was on inquiry notice of the void nature of the Policy prior to EEA and that Brighthouse (and neither EEA nor Geronta) had actual knowledge that the Policy was the product of criminal fraud.

(3) By holding that sound public policy did not compel a restitution award that included the premium payments paid by EEA to Brighthouse.

(4) By not awarding Geronta prejudgment interest on its award despite Geronta's affirmative request for prejudgment interest in its initial pleading.

STATEMENT OF FACTS[1]

This Court has recognized the legitimacy of life settlements as providing an favorable alternative to allowing a life insurance policy to lapse, or to receiving only its cash surrender value. *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.*, 28 A.3d 1059, 1069 (Del. 2011) ("*Price Dawe*"). The life settlement market for life insurance is legal and regulated. *Id.* It has, however, incentivized the creation of illegal investor-owned or stranger-owned life insurance ("IOLI" and "STOLI"). Brighthouse's internal policies prohibited the sale of IOLI policies, but it was aware of many attempts by unscrupulous brokers to place such policies in the 2000's. (A3425-3427; A3520; A3588.)

Geronta is a Delaware statutory trust. (A722, ¶143.) Leadenhall Capital Partners LLP ("Leadenhall") is the Transaction Manager for Geronta, including for purchases of life insurance policy portfolios. (A722, ¶144.) Leadenhall managed pension fund assets for the Royal Bank of Scotland. (A2242; A3674-3675.)

[1] The actual facts in this matter are largely undisputed, and have not changed since the *Seck I* appeal. In addition to this statement of facts, Geronta respectfully refers the Court to the factual recitation set forth in *Seck I*. *See* 284 A.3d at 51-58.

Brighthouse is a Delaware organized insurance company and is the successor to MetLife Investors USA Insurance Company. (A722, ¶141-142.)[2]

In July 2007, the Mansour Seck Irrevocable Life Insurance Trust (the "Seck Trust") applied to Brighthouse for a $5 million dollar life insurance policy on the life of a fictitious Mansour Seck ("Seck"). (A696, ¶2.) The Policy application identified Seck as a 74 year-old French citizen permanently residing in Jersey City, NJ. (A696, ¶2.) The application provided a birthday of January 1, 1933 and a Social Security number of 147-52-6554. (*Id.*) Seck reported an annual income of $400,000 to $500,000 per year, and a net worth of $18 to $20 million. (A3510-3512; A1937.) All of those statements were false. The insured Seck never existed, and no one named Mansour Seck applied for the Policy. (A697, ¶8; A705, ¶49)

On July 24, 2009, the Policy's two year contestability period expired. (A705, ¶51.) On August 11, 2009, EEA Life Settlements, Inc. and its affiliate (together, "EEA") purchased the Policy from the Seck Trust (A705, ¶¶52-53.)

On November 19, 2009 two of Brighthouse's internal investigators—Jean Phillip ("Phillip") and David Bishop ("Bishop")—began an investigation into one Mr. Pape Seck's application to Brighthouse to place three pending life insurance policy applications. (A707, ¶ 62; A3550-3551; A3552-3561.) That investigation revealed links between Pape Seck and Mansour Seck. An Accurint public records

[2] For brevity, "Brighthouse" refers to both MetLife and Brighthouse.

search for Pape Seck showed the same 170 Academy Street address in Jersey City that was purportedly Mansour Seck's home address. (A707-708, ¶¶66-68.) The report also listed a "Mansour Seck" as a possible relative of Pape Seck. (*Id.*)

On December 8 and 9, 2009, internal correspondence from Phillip reported that there were "IOLI flags and financial irregularities" associated with Pape Seck's policy applications. (A3562-3565; A708-710, ¶¶71-75.) Consequently, Pape Seck's appointment request was denied.

Eight days later, on December 17, 2009, Phillip and Bishop were alerted that the Policy's sale from the Seck Trust to EEA immediately after expiration of the contestability period raised "strong IOLI flags." (A3566-3568; A711, ¶84.) Brighthouse did nothing about those "strong IOLI flags." Anthony DeCarlo ('DeCarlo"), the Director of Brighthouse's Field Investigation Unit for Corporate Ethics and Compliance (and Phillip's supervisor), testified that once a policy was past its two year contestability period "we, in general, would not expend any time on those." (A3440-3441.)

On January 12, 2010 Phillip completed an Internal Investigation Report pertaining to Pape Seck for DeCarlo. (A3569-3572.) The report was distributed to at least 15 Vice Presidents or managers, one of whom was Robert Linzey ("Linzey"). (*Id.)* Linzey, also a Vice President, headed Brighthouse's Claims Investigative Unit. (A3437-3438, at p.28.)

On April 13, 2010, the New Jersey Attorney General's Office ("NJAG") published a press release (the "April 2010 Press Release") announcing that Pape Seck pleaded guilty to insurance fraud in connection with fraudulent insurance policies he had placed with two different insurance companies (not Brighthouse) in the name of Mansour Seck. (A713-714, ¶¶95-99; A3577-3578.) The April 2010 Press Release explained that no one named Mansour Seck had applied for the policies, and that the identification information used in the policy applications was cobbled together from three different people named Mansour Seck. (*Id.*)

On April 26, 2010 Brighthouse was subpoenaed by the Office of Insurance Fraud Prosecutor of the NJAG. (A715, ¶103.) The subpoena requested all of Brighthouse's documents pertaining to the Policy. The subpoena did not mention Pape Seck. (A715, ¶104; A3576.) However, the next day Bishop added Pape Seck to Brighthouse's Do Not Appoint list. (A1973-1974; A3732-3734.) The day after that, on April 28, 2010, someone at Brighthouse printed out the April, 2010 press release and placed it in Brighthouse's files. (A715, ¶105; A3577-3578; A1978.)

Brighthouse did not advise EEA of the "strong IOLI flags" it had associated with the Policy (A711, ¶85), or about any of the facts pertaining to Pape Seck's April 2010 conviction for insurance fraud, the April 2010 Press Release or the NJAG subpoena pertaining to the Policy. (A575, ¶108; A1489-1491.) Similarly,

none of these facts were shared with Geronta prior to this litigation. (A711, ¶85; A715, ¶108; A2037-2038.)

On October 17, 2011 the NJAG issued a second press release (the "October 2011 Press Release") which announced that Pape Seck had pleaded guilty to insurance fraud by making fraudulent statements to insurance companies, including Brighthouse, in policy applications. The October 2011 Press Release thanked Brighthouse for its cooperation with the investigation. (A720, ¶¶128–131; A3786-3787.) Seck pleaded guilty to fraud involving the Policy in October 2011.

Brighthouse obviously knew that the October 2011 Press Release and Pape Seck's guilty plea related to the Policy. On October 26, 2011 Jim McCarthy, an investigator in Brighthouse's claims investigation unit, ("McCarthy") sent an email to DeCarlo and Linzey alerting them to the fact of Pape Seck's October 17, 2011 conviction (the "McCarthy Email"). (A3579; A3436-3437, at 27-41.) The McCarthy Email's subject line contained the name "Mansour Seck," the Policy number, and Pape Seck's name and Brighthouse broker number. (A3579.) It referenced a "newspaper article" and said that, according to the article, Pape Seck was "recently sentenced" for insurance fraud involving "the above insured" and that Brighthouse had cooperated "with the authorities." (*Id.*) The McCarthy Email further asked DeCarlo "to whom this case was assigned in your area," noted that the Policy had recently been assigned to EEA, and that the assignment had raised

questions in Brighthouse's AML (Anti-Money Laundering) Unit. (*Id.*)

Brighthouse did *nothing* in response to the Pape Seck conviction. Brighthouse did not advise EEA or Geronta about any of the facts pertaining to Pape Seck's insurance fraud conviction relating to the Policy, or its assistance to the investigation that led to the conviction, prior to this litigation. (A720, ¶132.) It instead sat silently, taking monthly premiums upon an insurance policy that is actually knew was criminally fraudulent and thus void *ab initio*.

On September 2, 2015 Geronta purchased the Policy from EEA as part of a portfolio of 188 life insurance policies. (A722, ¶146.) Geronta sampled two dozen of the purchased policies to validate biometric data and premium projections. The Policy was not one of those sampled. (A724, ¶157; A3003-3006.) The EEA sale agreement specified that the entirety of the purchase price for the portfolio would be held in escrow, and that the purchase price for any particular policy would be released to EEA only after Geronta verified with the issuing insurance company that the policy was in good standing. (A3674-3676; A3677-3680; A3036-3037.) Each insurance company was called and asked to verify that each policy existed and was in force. (A3020-3022.) All of the policies, including the Policy, were reported to be in good standing. (*Id.*) Brighthouse told Geronta that the Policy was "active." (A725, ¶158.) Brighthouse did not reveal its actual knowledge that the Policy was the product of a criminal fraud. (A720, ¶132.)

On January 11, 2016, Geronta's third-party policy servicer stated that it could not locate Mansour Seck. (A725, ¶¶161-163.) Geronta reported its concerns to EEA, who then advised Geronta that Mansour Seck existed and was "locatable." (A726, ¶¶167-168.) In February 2017, Geronta hired a private investigator, who concluded that Mansour Seck was fictitious. (A728, ¶176.)

On April 21, 2017 Geronta informed Brighthouse that it questioned the legitimacy of the Policy. (A728, ¶177.) Through April 4, 2018 multiple communications between Brighthouse and Geronta discussed the Policy. Geronta provided Brighthouse with its evidence that Seck did not exist, including the April 2010 Press Release, the October, 2011 Press Release, and a complaint in the United States District Court for the District of New Jersey by another defrauded insurance company against Pape Seck and Krauss. (A729-730, ¶¶179-186.)

Brighthouse's first acknowledgment that the Policy lacked an insurable interest was the complaint in this lawsuit, filed on April 4, 2018. (A730, ¶187.)

The total premiums paid on the Policy are:

Payor	**Amount**
Seck Trust	$248,711.14
EEA Life Settlements	$706,478.29
Geronta Funding	$460,577.00

Totals	$1,415,766.43

(A705, ¶50; A722, ¶140; A730, ¶¶189, 191.)

Geronta holds the right to past premiums. The purchase and sale agreement between EEA and Geronta specified that all premiums paid on each policy purchased, all rights of recourse or recovery pertaining to those premiums, and all claims and causes of action pertaining to those policies and premiums, were conveyed to Geronta. (A723, ¶151; A3677-3680; A3685-3686, § 2.01.)

The initial Trial Decision awarded Geronta the premiums it paid on the Policy after April 2017, less taxes and commissions that Brighthouse paid after that same time, in the amount of $207,147.60. Brighthouse paid Geronta that award on December 16, 2021. The Remand Decision awarded Geronta all of the premiums it paid on the Policy (Ex. A at 23), in the amount of $460,577. Brighthouse paid Geronta the remaining $253,429.40 on October 4, 2023. The trial court did not award Geronta any prejudgment interest on its restitution award, despite Geronta's request in its pleading and on remand. *See* Exs. B and C.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT IGNORED THE LIMITED SCOPE OF THIS COURT'S REMAND IN SECK I, WHICH DIRECTED AN INQUIRY INTO THE RELATIVE FAULT OF BRIGHTHOUSE AND GERONTA ALONE.

A. Question Presented

In light of the scope of this Court's remand in *Seck I*, whether Geronta was separately required to prove that EEA was entitled to restitution in order to receive restitution for the premiums paid by EEA? (A931-932; A956-958; A972.)

B. Scope of Review

Questions of law are reviewed *de novo*. *Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument

Fundamental to the trial Court's ruling that Geronta was not entitled to a restitution award in an amount that included all of the premiums paid to Brighthouse on the Policy by EEA (even though Geronta had purchased the rights to those premiums when it purchased the policy) was an inquiry into whether EEA was less in the wrong than Brighthouse. Ex. A at 24. The trial court erred by engaging in this analysis at all, and the trial court also erred when it concluded that Brighthouse and EEA were equally at fault even though the Court rightly concluded that Brighthouse had *actual knowledge* that the Policy was the product of criminal fraud though it made no such finding about EEA. *Id.* at 21, 24.

This Court's remand in *Seck I* directed the trial court "to reconsider its factual findings in light of this Court's articulated [fault-based] test and specifically direct[ed] the [trial] court to consider whether ***either party*** had inquiry notice of the void nature of the Policy." 284 A.3d at 75 (emphasis added). It is well-settled that a trial court on remand "is required to comply with the appellate court's determinations as to all issues expressly or implicitly disposed of in its decision." *inTEAM Associates, LLC v. Heartland Payment Sys., LLC*, 200 A.3d 754 (Del. 2018). The trial court is required "[to] implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. The opinion becomes part of the mandate and must be considered as one." *Ins. Corp. of Am. v. Barker*, 628 A.2d 38, 40 (Del. 1993) (internal citations omitted).

The precise wording of this Court's remand limited the trial court's task to a weighing of the relative fault of Geronta and Brighthouse only. *See Seck I*, 284 A.3d at 75. This mandate was given with this Court's full awareness of EEA's role in the relevant events. Brighthouse spent many pages in its Answering Brief in *Seck I* recounting the facts of EEA's purchase of the Policy, and its after-purchase efforts to locate the purported insured. *Geronta Funding v. Brighthouse Life Ins. Co.*, No. 380, 2021 (Del.), Dkt. 33 at 6-8, 12-13. Geronta specifically argued for, *inter alia*, a restitution award equal to all premiums paid on the Policy. *See id.*,

Dkt. 20 at 25. In its Answering Brief, Brighthouse specifically argued to this Court that Geronta could not recover the premiums paid by EEA. *Id.*, Dkt. 33 at 37-40.

In *Seck I,* this Court took careful note of the facts of EEA's involvement in the matter. *See* 284 A.3d at 52-54. But this Court's analysis in *Seck I* nonetheless made it clear that the fault-based analysis applied in this case to determine whether Brighthouse should be ordered to return the premiums it collected on the Policy was to be focused solely on a comparison between Geronta and Brighthouse. *Id.* at 75. Critically, the Court *never mentioned EEA* in analyzing the issues or in setting its mandate for remand. Instead, the Court focused its analysis on a comparative fault analysis involving only Brighthouse and Geronta (*i.e.*, the parties). This Court's failure to mention EEA constitutes at least an implicit rejection of Brighthouse's argument that EEA's role in the relevant events needed to be part of the equation that would determine who was entitled to the premiums paid by EEA.

The Court's precisely worded-remand holding directed the trial court to determine "whether either party had inquiry notice of the void nature of the Policy" *Id.* The trial court committed legal error when it decided to ignore this Court's mandate in *Seck I* and deny Geronta restitution for all premiums paid to Brighthouse by Geronta and EEA, even though the trial court found that Geronta was less in the wrong than Brighthouse because (i) Brighthouse was on inquiry

notice more than five years before Geronta purchased the policy and (ii) only Brighthouse had *actual knowledge* the Policy was the product of a criminal fraud.

II. THE TRIAL COURT ERRED WHEN IT HELD THAT GERONTA WAS NOT ENTITLED TO RECOVER THE PREMIUMS PAID TO BRIGHTHOUSE BY EEA BECAUSE BRIGHTHOUSE IS MORE AT FAULT THAN EEA.

Geronta was not required to separately prove that EEA was entitled to restitution in order to be awarded the premiums paid by EEA on the Policy. But even if Geronta was required to do so, the trial court erred in its analysis of Brighthouse's and EEA's relative fault under the governing fault-based test.

A. Questions Presented

Whether the trial court erred by holding that Brighthouse and EEA were "equally at fault" despite that (i) Brighthouse was on inquiry notice before EEA that the Policy was void, and (ii) Brighthouse had actual notice that the Policy was the product of criminal fraud, while EEA did not. (A837-844; A980-987.)

B. Scope of Review

Questions of law are reviewed de novo. *Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument

The trial court found that by December of 2009 Brighthouse was investigating the Policy and Pape Seck due to the presence of red flags indicating the possibility that each was associated with prohibited "Investor Owned Life Insurance' ("IOLI"), and that Brighthouse's investigation also revealed a potential connection between the Policy and Pape Seck. Ex. A at 4-5. The trial court also found that Brighthouse was on inquiry notice as of April of 2010 that the Policy

was void because Mansour Seck was fictitious, and thus void. *Id.* at 15-16. And, most importantly, the trial court also found that by October of 2011 Brighthouse had *actual knowledge* that the Policy was a criminal fraud, but that it nonetheless kept silent about what it knew and continued to collect policy premiums from EEA, and then from Geronta. But the trial court never found—nor could it—that EEA had *actual knowledge* of the same thing. The trial court nevertheless concluded that Brighthouse and Geronta were equally at fault (Ex. A at 25), and by so doing impliedly held that actual notice and inquiry notice are to be equated in the comparable fault analysis ordained by *Seck I.* This is error.

Respectfully, the trial court's conclusion defies common sense. In *Seck I,* this Court announced that the correct test to determine whether premiums paid on an insurance policy later found to be void *ab initio* was a "fault-based analysis, framed under the Restatement." *Seck I*, 284 A.3d at 71-72. Section 198(b) of the Restatement provides that a "party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if…he was not equally in the wrong with the promisor." *See also Id.* at 71 ("the comment to Section 198(b) instructs courts…to determine whether the parties are *equally* in the wrong") (emphasis added). The trial court's determination that EEA and Brighthouse are equally in the wrong is incorrect as a matter of law, because it is perforce a determination that actual notice and inquiry

notice are scienters of equal culpability. They are not. Actual knowledge is more wrongful than the lack of knowledge which undergirds inquiry notice.

Assuming *arguendo,* as the trial court did, that Brighthouse's *actual knowledge* of the criminal fraud that was at the heart of the Policy is properly equated with EEA's mere inquiry notice, the trial court's finding that Brighthouse and EEA were equally at fault was error nonetheless. In fact, the time line tells the tale: Brighthouse is more at fault than EEA. The relevant points on the time line are these:

- August 11, 2009: EEA purchases the Policy (A705, ¶¶52-53.)
- November 19, 2009: two Brighthouse investigators begin an investigation into Pape Seck and run an Accurint public records search that shows Pape Seck and Mansour Seck as possible relatives who possibly live at the same address Mansour Seck used on the Policy application. (A707-708, ¶¶66-68.)
- December 8-9, 2009: the same two Brighthouse investigators share internal correspondence about "strong IOLI flags" associated with three policies place by Pape Seck (A3562-3565; A708-710, ¶¶71-75.)
- December 17, 2009: the same two Brighthouse investigators receive an email alerting them to the "strong IOLI flags" raised by the sale of the Policy to EEA. (A3566-3568; A711 ¶84). Brighthouse did *nothing* in response to these concerns, and did not share them with EEA. (A711, ¶85).

See also Ex. A at 4-5. These events all occurred before EEA was on inquiry notice that the Policy might lack an insurable interest because Mansour Seck did not exist. None of these events were ever shared with EEA by Brighthouse.

While it is true that EEA did not attempt to contact Mansour Seck or investigate his existence prior to purchasing the Policy, the unrebutted evidence at trial was that EEA relied upon an apparently reputable insurance company's underwriting processes to validate the existence of their insureds. (A1005-1006.) For the same reason, EEA never contacted an insured prior to purchasing a policy unless the insured himself or herself initiated contact. (A2195).

The trial court noted that EEA made several unsuccessful attempts to contact Mansour Seck. Ex. A at 25. But the trial record showed that neither EEA nor Geronta viewed the inability to contact Seck, absent more, as a reason to suspect that he did not exist. (A2195-2196; A2477-2478). On December 17, 2009, ViaSource, acting on EEA's behalf, sent a letter to Mansour Seck at the address used on the policy application. The letter was eventually returned as undeliverable. Of course, by this time Brighthouse was already investigating both the Policy and Pape Seck because of "IOLI flags" it had identified with each. Brighthouse did not share its suspicions with EEA.

On January 26, 2010, ViaSource reached out to the trustee of the Seck Trust to seek his assistance in locating Mansour Seck. However, EEA's inability to locate the insured was neither unusual or concerning. In EEA's experience, some insureds are uncommunicative after their policies are purchased. Consequently,

EEA maintained a "hard to track list" of such insureds. (A2196-2198) Eventually, Mansour Seck was added to the list. (A719, ¶ 123.)

The next set of relevant events occurred in April of 2010, when Brighthouse became aware of events which, according to the trial court, placed it on inquiry notice that the Policy might be void. Ex. A at 2-23. Again, the timeline tells the tale:

- On April 26, 2010, the NJAG subpoenaed Brighthouse for all documents pertaining to the Policy. *The subpoena did not mention Pape Seck*. (A715, ¶104; A3576.)
- On April 27, 2010, Pape Seck was added to Brighthouse's Do Not Appoint List (A1973-1974; A3732-3734.)
- On April 28, 2010 -- someone at Brighthouse printed out and filed a NJAG Press Release issued on April 13, 2010. The Press Release advised that Pape Seck had pleaded guilty to insurance fraud for placing bogus insurance policies in the name of a Mansour Seck who never existed and never applied for the polices. (A713-714, ¶¶ 95-99; A3577-3578.)

See also Ex. A at 5-6.

In response to all of these obvious indications that the Policy was a fraud, Brighthouse did *nothing*. It did not investigate the Policy. It did not cancel or rescind the Policy. And it did not share any of these facts with EEA. (A715, ¶105; A1978; A3577-3578.). And, none of the publicly-available facts linked the Policy owned by EEA to Pape Seck – only the information in Brighthouse's internal files did so. In other words, by April 28, 2010, before EEA had any reason to think

that the Policy was void *ab initio,* only Brighthouse was on inquiry notice as to that fact. By this point in the chronology (April of 2010) the only "red flags" confronting EEA was their inability to locate Mansour Seck by mail, or through his purported doctors. *Seck I*, 284 A.3d at 52-53. By contrast, Brighthouse had *actual knowledge* that the Policy and Pape Seck were under criminal investigation, by the NJAG and that Pape Seck had pleaded guilty to crimes for placing fictitious insurance policies in the name of Mansour Seck, who never applied for the policies. *Id.* at 55-56.

The next relevant event in the chronology occurred in October of 2011 when ViaSource ran a public record search for Mansour Seck which failed to identify anyone with pedigree information matching that supplied for Seck in the application for the Policy. (A719; ¶¶124-126.) Of course, Brighthouse itself *never* ran a public record search to determine if Mansour Seck owned property or even existed, and as discussed *supra* Brighthouse ignored the significance of a public record search done by its investigators in 2009 pertaining to Pape Seck which revealed troubling information about Mansour Seck. Of much greater importance is that by this time Brighthouse had *actual knowledge* that Pape Seck had been under criminal investigation pertaining to the Policy since April of 2010. While the trial court found facts suggesting that both EEA and Brighthouse were on inquiry notice that the Policy might be void, those facts did not begin to

accumulate in a meaningful way against EEA's side of the ledger until October of 2011, when EEA first ran a public records search that did not locate Mansour Seck. Of course, by that time Brighthouse had been on inquiry notice of the fact that the Policy might be void since April of 2010, and by October of 2011 Brighthouse had *actual knowledge* that the Policy was a product of criminal fraud.

The NJAG investigation of the Policy, which had involved Brighthouse since April of 2010, culminated with Pape Seck's guilty plea to insurance fraud on October 17, 2011 as a consequence of his placement of the Policy in the name of a fictitious Mansour Seck. The guilty plea was announced by the NJAG in a press release that thanked Brighthouse for its cooperation with the investigation. (A720, ¶¶128–131; A3786-3787.) And, on October 26, 2011, an investigator in Brighthouse's claims investigation units sent an email to multiple other investigators alerting them conviction. (A3579; A3436-3437, at p.27.) The email's subject line contained the name "Mansour Seck," the Policy number and Pape Seck's name (A3579.) These facts led the trial court to concluded that Brighthouse had *actual knowledge* of the fact that the Policy was a fraud. Yet, Brighthouse did *nothing* in response to the Pape Seck conviction, and it did not tell EEA about what it knew. (A720, ¶132.). Instead, Brighthouse kept silent and continued to collect premium payments from EEA until EEA sold the Policy to Geronta as part of a portfolio sale. EEA, for its part, was not found to have had actual knowledge of

the fraud, and there was no evidence introduced at trial that might conceivably have supported such a conclusion.

Given the both EEA and Brighthouse were on inquiry notice that the Policy might be void at around the same time, and only Brighthouse had actual knowledge that the Policy was the product of a criminal fraud, the trial court's determination that EEA and Brighthouse were equally in the wrong is erroneous. Simply put, actual notice is a more culpable scienter than inquiry notice. It is more wrongful, and so EEA was less in the wrong than Brighthouse.

III. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT SOUND PUBLIC POLICY DID NOT COMPEL A RESTITUTION AWARD THAT INCLUDED THE PREMIUM PAYMENTS PAID BY EEA TO BRIGHTHOUSE.

A. Question Presented.

Whether public policy considerations, which are implicit in the fault-based test announced in *Seck I* as a consequence of its reliance upon Sections 197 and 199 of the Restatement, compel a restitution award that forces Brighthouse to return the premium payments paid to it by EEA (and Geronta). (A842-843; A953-956; A987-989.)

B. Scope of Review.

Questions of law are reviewed *de novo*. *Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument.

In the instant case this Court is confronted with a zero-sum choice. Either Brighthouse will be permitted to retain the premiums it collected from EEA or those premium payments will be returned to Geronta (who purchased the rights to them) in restitution. If Brighthouse is permitted to retain EEA's premium payments, its silence—despite inquiry notice that the Policy was void and actual knowledge that the Policy was the product of criminal fraud—will be handsomely rewarded, and future silence by Brighthouse (and other similarly situated insurance companies in the future) will be incentivized.

In *Seck I,* this Court explicitly noted that "the fault of the parties *and public policy considerations* will determine which party is entitled to the premiums paid on an insurance policy that is void *ab initio* for lack of an insurable interest." *Seck I*, 284 A.3d at 73. (emphasis added). This Court again noted the importance of public policy considerations in cases such as this one in *Wilmington Tr., Nat'l Ass'n v. Sun Life Assurance Co. of Canada, 2*94 A.3d 1062, 1076 (Del. 2023), as revised (Mar. 21, 2023) ("*De Bourbon & Frankel*") (quoting *Seck I,* 284 A.3d at 73). Public policy considerations are also explicitly referenced by the comments to Restatement sections 197, 198 and 199, which form the basis of the fault-based test announced in *Seck I. See* 284 A.3d at 69-72. Given the facts of this matter, a decision permitting Brighthouse to retain premium payments made by EEA would be profoundly contrary to sound public policy.

1. To permit Brighthouse to retain the premium payments paid by EEA would constitute a disproportionate forfeiture within the meaning of Section 197 of the Restatement.

Section 197 of the Restatement was one of the three Restatement sections that this Court recognized as part of the tripartite framework of the fault-based analysis promulgated in *Seck I.* 284 A.3d at 68-69. The Court summarized Section 197 by noting that it set out a "disproportionate forfeiture exception" pursuant to which a party is entitled to receive restitution for a contract unenforceable on ground of public policy if "the denial of restitution would cause

disproportionate forfeiture." *Id.* (quoting Restatement § 197). The Court further observed that:

> [i]n determining whether the denial of restitution would cause disproportionate forfeiture, comment b to Section 197 articulates a balancing test that directs the court to weigh the cost of the forfeiture against the gravity of the public policy involved: "Whether 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.

Id. at 69 (citing Restatement § 197 cmt. b).

The trial court's decision to allow Brighthouse to retain premium payments made on the Policy by EEA would constitute a disproportionate forfeiture within the meaning of Restatement section 197 because public policy strongly favors Geronta's claim. This Court has recognized the legitimacy and public value of the life settlement market, which provides a favorable alternative to insureds to simply allowing a life insurance policy to lapse, or to receiving only its cash surrender value. *Price Dawe at* 1069.

Potential purchasers in the life settlement market assume that policies are underwritten by reputable insurance companies pursuant to a process that, among other things, determines whether the proposed insured actually exists. (A1005-1006; A3004-3006.) If purchasers cannot make that assumption, and must instead bear the cost of investigating the existence every insured in each policy they purchase, those policies will inevitably be devalued on the market, which means

that insureds who chose to sell their policies will receive less value for them. The trial court turned aside Geronta's public policy argument pursuant to Restatement section 197 by noting that the effect of its decision on the life settlement market "does not contravene any relevant public interest." Ex. A. at 27. The trial court's opinion does not cite to any authorities in support of this conclusion. This is not to fault the trial court: cases that construe the public policy exception of Restatement section 197 are few and far between, and none appear to be relevant to the present issues. In any event, a public policy determination of the type at issue here is one that is uniquely within the purview of this Court.

Permitting Brighthouse to retain the premiums it collected from EEA in light of its decision to remain silent in the fact of inquiry notice that the Policy was void, and actual notice that the Policy was the subject of criminal fraud would thus constitute a disproportionate forfeiture within the meaning of Section 197.

2. Section 199 of the Restatement supports Geronta's claim in restitution for the premium payments paid by EEA because such an award will end Brighthouse's retention of those funds, which is against the public interest.

The third Restatement provision cited by this Court in support of the fault-based analysis to be used in cases such as the instant matter is section 199. *Seck I*, 284 A.3d at 71. In relevant part, Section 199(b) permits a party to claim restitution pursuant to a contract that is unenforceable on grounds of public policy "if he did not engage in serious misconduct and…allowance of the claim would put an end to

a continuing situation that is contrary to the public interest." Restatement § 199(b). This Court further observed that Comment b. to Restatement section 199 explained that Section 199(b) applies "when the denial of restitution would leave property in the hands of one whose control of it would be contrary to the public interest, for example, because its status would be rendered so uncertain as seriously to restrain its alienation." *Seck I*, 284 A.3d at 71 (citing Restatement (§ 199, cmt b).

The trial court gainsaid Geronta's argument that the exception in Restatement section 199(b) warranted a restitution award to Geronta that included the premium payments made by EEA to Brighthouse by remarking that "permitting Brighthouse to retain the premiums paid by EEA would not be so contrary to public interest as to warrant restitution…." Ex. A. at 27-28. Once again, the trial court cites no authorities in support of its conclusion, and once again fairness compels the observation that there are few, if any, relevant authorities. But the essence of the fault-based test at issue compels the conclusion that the trial court erred. In *Seck I*, this Court spoke of the desirability of an analytical framework that incentivizes insurers to speak up when they become aware of circumstance that suggest a policy is void *ab initio*. *Seck I*, 284 A.3d at 72.

Here, the trial court permitted Brighthouse to retain $706,478.29 in premium payments paid to it by EEA while Brighthouse remained silent after first being on inquiry notice that the Policy was void, and then after being on actual notice that

the Policy was the subject of a criminal fraud. Had Brighthouse shared what it knew about the NJAG's criminal investigation of the Policy with either EEA or Geronta, or had it simply cancelled or rescinded the Policy, this litigation—commenced by Brighthouse—would have never happened. Brighthouse's inaction and silence are the cause of this dispute. This Court should not allow Brighthouse to retain EEA's premium payments lest inaction and silence be rewarded.

Under the unique facts of this case, public policy requires that Brighthouse be ordered to refund the premiums paid by EEA lest Brighthouse be incentivized for its choice to stay silent in the face of a criminal investigation and conviction involving the Policy. A bright-line rule that denies insurers the opportunity to retain premiums payments collected on a policy that is found to be void *ab initio* as the result of criminal fraud will serve to "put an end to a continuing situation that is contrary to the public interest," as that term is used in Restatement section 199(b).

IV. GERONTA IS ENTITLED TO PREJUDGMENT INTEREST

A. Question Presented

Whether the trial court erred by ruling that Geronta was not entitled to prejudgment interest based on waiver. (A124; A844; A959; A991.)

B. Scope of Review

Questions of law are reviewed *de novo*. *Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument

"In Delaware, prejudgment interest is awarded as a matter of right." *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992). "Prejudgment interest is appropriate 'if a plaintiff requests such an award in its pleadings or raises the issue at trial.'" *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1037 (Del. 2003) (quoting *Brandywine 100 Corp. v. New Castle County*, 541 A.2d 598 (Del. 1988)). That request places a defendant on notice that prejudgment interest will be awarded as part of the actual damages that the plaintiff suffered. *See NASDI Holdings, LLC v. N. AM. Leasing, Inc.*, 2020 WL 1865747, at *4 (Del. Ch. Apr. 13, 2020); *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2014 WL 30013, at *1 (Del. Ch. Jan. 2, 2014).

Geronta requested prejudgment interest in its answer and counterclaims when filed in 2018. (A124 ("Award Geronta pre- and post-judgment interest[.]").) On remand, Geronta likewise requested prejudgment interest. (A844 ("For the foregoing reasons Geronta respectfully requests that this Court enter an order …

awarding Geronta to restitution in the amount of $1,167,055.29, plus interest.").) Geronta's reference to "interest" on remand was to the pre- and post-judgment interest that Geronta requested in its initial pleadings. *See id.* Geronta's request for pre-judgment interest on remand was also consistent with this Court's public policy statement in *Seck I* that a fault-based analysis would incentivize "insurers to speak up when the circumstances suggest that a policy is void for lack of an insurable interest because they will not be able to retain premiums if they stay silent after being put on inquiry notice, and *they might also be responsible for interest payments*." 284 A.3d at 72 (emphasis added).

In the Remand Decision, the trial court awarded Geronta "the premiums it paid on the policy, plus interest." Ex. A at 23. Brighthouse then disputed whether the trial court awarded prejudgment interest to Geronta, as Geronta requested. In a letter to the parties, upon their request for clarification, the trial court ruled that Geronta was not entitled to prejudgment interest stating that "Geronta waived that argument on appeal, and on remand" because Geronta did not specifically raise prejudgment interest on appeal in *Seck I*. Ex. C at 1-2. This was legal error.

While it may be correct that Geronta did not specifically raise prejudgment interest on appeal in *Seck I*, it was because Geronta was asking this Court to determine as a matter of first impression the correct legal remedy available to claimants seeking premium payments on a life insurance policy declared void *ab*

initio. *Cf. Monessen S. R. Co. v. Morgan*, 486 U.S. 330, 335 (1988) ("The question of what constitutes 'the proper measure of damages' under the FELA necessarily includes the question of whether prejudgment interest may be awarded to a prevailing FELA plaintiff. Prejudgment interest is normally designed to make the plaintiff while and is part of the actual damages sought to be recovered."). And it was not until *Seck I* that this Court "recognized the role prejudgment interest plays in incentivizing the parties to potentially illegal agreements to behave in good faith." *De Bourbon & Frankel*, 294 A.3d at 1078 (determining the appropriate date for prejudgment interest to start to run for return of premiums via restitution). Moreover, the trial court's reconsideration of factual findings on remand led the trial court to recalculate the amount of Geronta's restitution damages, which should have included an award of prejudgment interest. *See Oneida Indian Nation of New York v. County of Oneida*, 214 F.R.D. 83, 93 (N.D.N.Y. 2003) (finding that Second Circuit's remand for "'recomputation of damages' necessarily included in that remand [] recalculation of prejudgment interest and concomitant issues such as the rate and accrual date of that interest").

The trial court did not grapple with any of the above principles. The trial court also did not address how it could award Geronta its premium payments based, in part, on public policy considerations to incentivize insurers to speak up (Ex. A at 21-22), yet ignore the critical role that prejudgment interest plays in

incentivizing insurers to speak up as this Court outlined in *Seck I* and *De Bourbon & Frankel*. The trial court instead cited cases that support the general proposition that issues not raised on appeal are waived. Notably, the trial court did not present or rely on any cases with similar circumstances or postures as this instant matter.

Geronta respectfully submits that it is entitled to prejudgment interest dating back to the time of its initial case pleading in 2018 and that it did not waive that right on appeal. The trial court's ruling to the contrary should be reversed.

CONCLUSION

Appellant respectfully requests that this Court reverse the trial court's Remand Decision as it relates to Geronta's entitlement to premiums paid on the Policy by EEA, and Prejudgment Interest Decision.

Dated: November 21, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2023, a true and correct copy of the **Appellant's Opening Brief** was served via File & ServeXpress on the following counsel of record:

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