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Case Number 366,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VIDA LONGEVITY FUND, LP,	)	
	)	No. 366,2023
Defendant Below/Appellant,	)	
	)	
v.	)	Court Below: Superior Court of the State of Delaware
	)	
ESTATE OF MARTHA BAROTZ,	)	C.A. No. N20C-05-144-EMD-CCLD
	)	
Plaintiff Below/Appellee.	)	

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

SUMMARY OF ARGUMENT

This Court has consistently held that when the General Assembly enacted 18 *Del. C.* § 2704 ("Section 2704") in 1968, the legislature codified the common law insurable interest requirement. *See, e.g.*, *Lavastone Cap. LLC v. Est. of Berland*, 266 A.3d 964, 970 (Del. 2021) (citing *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1072–73 (Del. 2011)). And yet, if this Court affirms the Superior Court's judgment that the Policy is invalid because Mrs. Barotz never paid the premiums, it will mean (1) the statutory text of Section 2704 is irrelevant to the insurable interest analysis, and (2) the concept of an illegal "wager" bears no resemblance to its well-understood common law meaning—namely, the existence of a prearranged transaction between the insured and a third party who lacks an insurable interest in the insured's life. This case involves an issue of material fact over whether the subject policy was such an illegal wager at its inception that must be determined by a jury. The only thing this Court must do is correct the Superior Court's application of the Estate's incorrect and flawed legal analysis so that proper jury instructions can be crafted.

ARGUMENT

A. The Estate Misconstrues Section 2704(a) and *Price Dawe*.[1]

The Estate argues that if a third party procures a life policy "the policy is invalid *unless that third party had an insurable interest in the insured's life*." Estate Ans. Br. at 14 (emphasis added). This argument misreads the text of Section 2704(a) and *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust*, 28 A.3d 1059, 1072 (Del. 2011) ("*Price Dawe*"), and attempts to impose insurable interest requirements that do not exist.

The second clause of Section 2704(a), discussed at length by *Price Dawe* yet ignored entirely by the Estate, does not require a third party who procures a life policy to have an insurable interest in the insured; rather, it expressly *permits* a third party to procure a life policy so long as its death benefit is payable to someone with an insurable interest. *Price Dawe*, 28 A.3d at 1076 ("[T]hird parties are prohibited from procuring or causing to be procured insurance contracts on the life of the insured *unless the policy benefits are payable to someone with an insurable interest*.") (emphasis added). Thus, when a third party procures a life policy, the question is not whether that third party has an insurable interest in the insured's life, as argued by the Estate; rather, it is whether the policy proceeds are payable to

[1] Capitalized terms not otherwise defined herein have the same meaning as set forth in Defendant-Appellant Vida Longevity Fund, LP's ("Vida") Corrected Opening Brief.

someone with an insurable interest in the insured's life at the time that the policy was issued. *Price Dawe*, 28 A.3d at 1074 ("If a third party procures life insurance on another person . . . the beneficiary of that contract must have an insurable interest in the life of the insured."). If a third party procures a policy and its proceeds are payable to someone with an insurable interest in the insured's life, then that third party "meets the insurable interest requirements" of Section 2704(a). *Id.* at 1076.

Lavastone Capital LLC v. Estate of Berland, 266 A.3d 964, 972 (Del. 2021) ("*Berland*"), does not alter this analysis because *Berland* did not address the second clause of Section 2704(a). Instead, *Berland* addressed a narrow certified question about Section 2704(a)'s first clause—whether Sections 2704(a) and 2704(c)(5) "forbid *an insured or his or her trust to procure or effect a policy* on his or her own life using a non-recourse loan." *Berland*, 266 A.3d at 971. This Court answered, "[n]o, so long as the use of nonrecourse funding did not allow the insured or his or her trust to obtain the policy 'without actually paying the premiums.'" *Id.* at 966 (citation omitted). Thus, the second clause of Section 2704(a) was not at issue in *Berland*.

The second clause of Section 2704(a) is fatal to the Estate's argument and the Superior Court's holding that the Policy is *automatically* void if the insured did not pay any premium. If a third party paid the premiums, then that third party procured the Policy under *Price Dawe* and *Berland*. But procurement by a third party does

not mean that the policy automatically violates Delaware's insurable interest law. If the policy is payable to someone with an insurable interest in the insured's life when the policy was issued, then the second clause of Section 2704(a) has been satisfied. Since *Price Dawe* holds that "section 2704(a) requires more than just technical compliance at the time of issuance" (*Price Dawe*, 28 A.3d at 1074), if a policy satisfies the second clause of Section 2704, then the only question is whether the Policy was procured as a cover for a wager, which is necessarily a question of fact for the jury. *Baltimore Life Ins. Co. v. Floyd*, 91 A. 653, 655 (Del. Super. Ct. 1914), *aff'd*, 94 A. 515 (Del. 1915) (jury "sole judge" of whether policy was an unlawful wager). The Estate has no response to this argument. Indeed, the Estate does not even mention the second clause of Section 2704(a) *once* in its entire Answering Brief.

Here, the procurement of the Policy complied with the second clause of Section 2704(a) for two reasons.

First, Section 2704(c)(1) states that an individual who is closely related to the insured by blood or marriage has an insurable interest in the insured's life. At the time the Policy was issued, it was payable to Martha's spouse, Peter Barotz, and her children, Nathan, Celia and Naomi, through the trust structure that Martha and Nathan created. A848 (preamble), (Section 1.1); A1547 (preamble). Therefore, the second clause of Section 2704(a) was satisfied.

The Estate argues that the identity of the trust beneficiaries is irrelevant under Section 2704(c)(5) because the Family Trust was created by Coventry and was not created and funded by Martha Barotz. Estate Ans. Br. at 26-28. This is argument is wrong because Section 2704(c) does not require that a trust-owned policy satisfy paragraph (5) therein in order to satisfy the insurable interest requirement. A policy owned by a trust may satisfy the insurable interest requirement if the policy is payable to any of the persons listed under Section 2704(c). Here, the Policy was payable to members of the Barotz family who had insurable interest in Martha's life under Section 2704(c)(1).

Second, contrary to the Estate's argument (Estate Ans. Br. 27), the Policy satisfied Section 2704(c)(5). *Price Dawe* holds that under Section 2704(c)(5), "the individual insured can establish—create and initially fund—a trust for the purpose of procuring life insurance on the individual's own life and the trustee of that trust has an insurable interest under the second clause of section 2704(a) and section 2704(c)(5)." *Price Dawe*, 28 A.3d at 1078. That is *exactly* what occurred here. Martha formed *and funded* the Irrevocable Insurance Trust, of which Nathan was the sole trustee and Martha's children and spouse were beneficiaries. A848 (preamble), (Section 1.1). The terms of the Insurance Trust empowered Nathan to procure insurance on his mother's life under New York law. A851-53 (Section 4.1), A858 (Section 6.2); *see* N.Y. Est. Powers & Trusts Law § 11-1.1(b)(4). Nathan

therefore had an insurable interest in his mother's life by his role as trustee of the Insurance Trust. Nathan, as trustee of the Insurance Trust, then formed the Barotz Family Trust to own the Policy, procured the PFP loan, funded the Family Trust with the Policy,[2] and named the Insurance Trust as the Family Trust's beneficiary. A1547. Because the Policy satisfied the requirements of the second clause of Section 2704(a), the Superior Court erred by holding that the Policy was automatically void because Martha did not pay any premium.

[2] *Price Dawe* holds that a trust may be initially funded with the "policy or with money to pay its premiums." *Price Dawe*, 28 A.3d at 1078.

B. Genuine Issues of Fact Exist Concerning Whether the Policy was a Cover for a Wager.

The Estate argues that the Superior Court correctly determined that the Policy was an illegal wager for four reasons, each of which is incorrect.

1. Coventry's Alleged Procurement Is Not Dispositive.

The Estate argues that the Superior Court correctly granted summary judgment because the record detailed Coventry's alleged procurement and use of a network of insurance producers to originate policies for later sale. Estate Ans. Br. at 21-22. This argument fails because whether Coventry or any other third party procured the Policy is not the dispositive question under *Price Dawe* and *Berland*. Those cases *permit* a third party to procure a life policy so long as Section 2704(a) is satisfied. *Price Dawe*, 28 A.3d at 1076. The question is whether the Policy was obtained "in good faith and for a lawful insurance purpose, and not as a cover for a wagering contract." *Berland*, 266 A.3d at 971. This question is inherently factual and must be determined by a jury. *Baltimore Life Ins. Co.*, 91 A. at 655.

2. The Purpose For Which the Policy Was Procured is a Disputed Issue of Material Fact.

The Estate argues that Martha's intent and purpose for procuring the Policy is irrelevant under *Price Dawe*. Estate Ans. Br. at 30. But *Price Dawe* and *Berland* both hold that a nonrecourse loan transaction must be scrutinized to determine whether "the insured intended, when obtaining the policy, 'to purchase the policy for lawful insurance purposes, and not as a cover for a [wagering] contract.'"

Berland, 266 A.3d at 972 (quoting *Price Dawe*, 28 A.3d at 1078). Thus, Martha's intent and reasons for obtaining the Policy are certainly relevant on the question of whether the Policy was procured as a cover for a wager, and it is a materially disputed factual issue that must be resolved by a jury under Vida's fundamental due process rights. *Williamson v. Standard Fire Ins. Co*., 2005 WL 6318348, at *5 (Del. Super. Ct. Aug. 19, 2005) ("Intent . . . is generally a question left to a jury to decide.").

Vida submitted the *only* admissible evidence of the insured's reasons for causing the Policy to be procured: the documents that she signed, which clearly support the inference (indeed, specifically state) that the Policy had a lawful insurance purpose and was not an unlawful wager. Vida Op. Br. at 17-22. The documents show that Martha:

- verified that when the Family Trust applied for and purchased the Policy, the Policy benefitted her family because each beneficiary of the Family Trust was the spouse of the Insured or a child of the Insured. A866 (§ 2.6(i)).
- agreed to indemnify Midas and its assigns for any damages caused by "any lack by the Trust of an insurable interest" in her life, which is the exact claim that her Estate raises in this lawsuit. A1483 (§ 2.4).

- represented and warranted that she did not have any agreement to sell or assign the Policy at the time she procured it and that she had not engaged in any conduct that would preclude a buyer's recovery of benefits under the Policy. A1481-82 (§ 1.10).
- represented in the Policy application that the Policy would meet her "insurance needs and financial objectives" (A325) and that the beneficiary of the Policy would be the Family Trust (A317), which ultimately benefitted her family. A848 (Section 1.1); A1547 (preamble; Section 2); A1551 (Section 16).
- represented that all information in the Policy application was true and correct. A1480 (§ 1.4).

These representations by Martha support the inference that she had a lawful insurance purpose for obtaining the Policy, and only a jury can decide otherwise. *Cont'l Oil Co. v. Pauley Petroleum, Inc.*, 251 A.2d 824, 826 (Del. 1969); *Baltimore Life Ins. Co.*, 91 A. at 655 (jury is "sole judge" of insurable interest).

While the Estate makes a number of arguments as to why these documents signed by Martha should not control, including that "insureds almost always consent to STOLI transactions and then sell the policies" (Estate Ans. Br. at 32), it is for the jury, and not the Superior Court, to decide the factual inferences to be drawn from them. On the Estate's motion for summary judgment, all reasonable inferences were

to be construed in Vida's favor, meaning that the Policy should have been deemed to have been obtained by the family for a lawful purpose. The jury must decide if the Policy was legitimately procured and provided $8 million of life insurance protection to Martha's family from the time that it was issued until Martha and Nathan decided to sell it to Midas.

The Estate argues that Spalding's testimony provides evidence of Martha's intent. Estate Ans. Br. at 31. But as the Superior Court noted, "Ms. Spalding never met any member of the Barotz family" and "the record contains no evidence as to any discussions that may have occurred among the Barotz family and Mr. Stack [Spalding's colleague] regarding the family's insurance needs." Vida Op. Br. Ex. 1 at 2. Any testimony from Spalding concerning the insured's intent is inadmissible hearsay, and the Superior Court's role should be to determine which portions of Spalding's testimony are admissible to the jury, not to weigh and decide the evidence.

3. The Existence of a Pre-Arranged Transfer of the Policy is a Disputed Issue of Material Fact.

The Estate argues that the Policy was an illegal wagering contract because it was procured by an investor for later sale to an investor. Estate Ans. Br. at 24. In making this argument, the Estate asks this Court to expand the definition of unlawful wagering beyond what is required by Section 2704(a) and the common law it adopted. Instead, Section 2704(a) requires evidence of a prearranged transfer of the

Policy for an unlawful wager to exist. Here, Vida disputed the existence of an unlawful wager by submitting admissible evidence in opposition to the Estate's summary judgment motion that the Policy complied with the second clause of Section 2704(a) and there was no pre-arranged transfer of the Policy at the time it was issued. A442-44, 449-51.

Section 2704 does not prohibit insureds or third parties from procuring policies for later sale to investors so long as the requirements of Section 2704(a) are met. *Price Dawe*, 28 A.3d at 1076. However, *Price Dawe* is clear that third parties may not "feign" technical compliance with the second clause of Section 2704(a) by procuring a policy that is *technically* payable to someone with an insurable interest even though the death benefit is *in fact* payable to a third party without such an interest. *Id.* at 1074.

Since insurable interest is measured *only* at the policy's inception (*id.*), if a policy satisfies the second clause of Section 2704(a) when it was issued, then the *only* way that the second clause could be violated is if the policy were, in reality, payable to a third party without such an insurable interest by a prearranged transfer or assignment. *Id.* at 1078 ("In cases where a third party either directly or indirectly funds the premium payments as part of a *pre-negotiated arrangement with the insured to immediately transfer ownership*, the policy fails at its inception for lack of an insurable interest.") (emphasis added). *Price Dawe* explained that "the

insurable interest requirement does not place any restrictions on the subsequent sale or transfer of a bona fide life insurance policy. Indeed, section 2720 of the Delaware Insurance Code makes life insurance policies assignable to anyone, even a stranger . . . ." *Price Dawe*, 28 A.3d at 1074 (citing 18 *Del. C.* § 2720). This is precisely why *Price Dawe* requires lower courts to examine the substance of a transaction to determine whether a policy is a cover for a wager: if a third party procures a policy, courts must determine whether the policy is truly payable to someone with an insurable interest in the insured's life or to a third party who lacks an insurable interest at the time it is issued. *Id.* at 1076. But only a jury can decide the factual questions in dispute; not the judge.

Moreover, *Price Dawe* held that an insured may take out a policy intending to sell it *immediately* so long as the policy was procured in good faith and "not as a cover for a wagering contract." *Price Dawe*, 28 A.3d at 1075 (citation omitted). If, as the Estate argues, the mere intent to create a policy for later sale to an investor amounted to an unlawful wager, then this Court would have held in *Price Dawe* that such an intent was illegal. It would not have held instead that such an intent was *lawful* so long as the policy was not a cover for a wager. By definition, something more than the mere intent to buy or sell a policy on the secondary market is required. Under Section 2704(a) and *Price Dawe*, that something more is a pre-arranged

transfer of the policy or its death benefit to a third party lacking insurable interest at the time the policy is issued.

Price Dawe also holds that Section 2704(a) adopts the common law. *Price Dawe*, 28 A.3d at 1073. The two common law cases relied on by this Court in *Price Dawe* decided prior to the enactment of Section 2704 that held a policy void as an unlawful wager both involved an immediate or pre-arranged agreement to transfer the policy from the insured to the third party that procured it at the time the policy was issued. *Warnock v. Davis*, 104 U.S. 775 (1881); *Clement v. N. Y. Life Ins. Co.*, 46 S.W. 561, 564 (Tenn. 1898). The balance of the common law decisions cited in *Price Dawe* enforced policies where no such prearranged transfer to a stranger existed. *See Grigsby v. Russell*, 222 U.S. 149, 156 (1911) (distinguishing valid policy from invalid policy in *Warnock* because invalid policy had "been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once."); *Bussinger v. Bank of Watertown*, 30 N.W. 290, 294 (Wis. 1886); *Chamberlain v. Butler*, 86 N.W. 481, 483 (Neb. 1901); *Clark v. Allen*, 1877 WL 4932, at *2, 4-5 (R.I. Feb. 24, 1877); *Baltimore Life Ins. Co.*, 91 A. at 656-57.[3]

[3] In *Columbus Life Insurance Co. v. Wells Fargo Bank, N.A.*, 2023 WL 3243965, at *11 (N.C. Super. Ct. May 4, 2023), Judge Mark Davis, a former Associate Justice of the North Carolina Supreme Court, recently rejected the argument that an illegal wager could exist without a prearranged sale under North Carolina law: "The policy is void as a wagering contract only where there is evidence of an agreement—prior

Price Dawe, Section 2704(a), and the common law all recognize that requiring a prearranged transfer is the only principled way to distinguish between a valid policy taken out for sale—and permitted under *Price Dawe*—and an otherwise invalid wager. *Price Dawe*, 28 A.3d at 1075.

Here, Vida disputed every aspect of the Estate's theory that the Policy was an unlawful wager with admissible evidence. A430-34, A440-42. The documents that Martha executed in connection with the PFP loan and the Policy's later sale demonstrate that when the Policy was issued, its benefits were payable to Martha's family, who clearly had an insurable interest in her life under Section 2704(c)(1), not to any investor. Vida also disputed with admissible evidence the existence of a pre-arranged transfer between Martha or the Barotz Family Trust and Coventry, the Estate's purported "wagerer." Specifically, Martha represented that such an arrangement *did not exist*. A1481 (§ 1.10(f)).

The Estate argues that Coventry intended to procure the Policy as part of a wager. Estate Ans. Br. at 21. But the Estate has no evidence of Coventry's intent. Indeed, no Coventry witness was deposed in this case. The Estate's wagering theory consists entirely of its attorney's interpretation of the numerous contracts and

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to the policy's issuance—that the policy would be assigned to a third party *and that the third party participated in that agreement*." *Id.*

documents between non-parties to this case comprising the PFP loan program. Estate Ans. Br. at 5-9. But these documents are subject to multiple reasonable interpretations, which must be drawn in Vida's favor as the non-movant on summary judgment and, ultimately, decided by the jury. *See Empire of Am. Relocation Servs., Inc. v. Com. Credit Co.*, 551 A.2d 433, 435 (Del. 1988).

The terms of the PFP loan—the mechanism through which Coventry allegedly wagered according to the Estate—support the inference that the Policy had a lawful insurance purpose because the loan allowed Martha and her family to obtain $8 million of life insurance protection for two years, while granting them the option to pay off the loan *at any time* and keep the Policy, if they desired. A140 ("Prepayment"), A202 (¶¶ 1-3). Coventry had no right to acquire the Policy, and the terms and conditions of the loan never gave Coventry an interest in Martha's early death as opposed to her continued life, which is the hallmark of an illegal wager. *Price Dawe*, 28 A.3d at 1069 (citations omitted). The terms of the PFP loan therefore show that it enabled Martha and her family to obtain a valuable policy on a non-recourse basis without placing any of her personal assets at risk and preserving her right to acquire the Policy. These contractual terms support the inference that the loan was valuable to the insured and served a legitimate insurance purpose. Only the jury can decide otherwise.

4. "Other Coventry Cases" Are Not Evidence on Which the Estate May Rely to Achieve Summary Judgment.

The Estate argues that the Superior Court correctly held that the Policy was an unlawful wager because different courts in "many other Coventry cases" considering the same "indisputable" facts have concluded that Coventry was using seniors to create wagering contracts. Estate Ans. Br. at 23. On summary judgment, the Estate, as the moving party, had the initial burden to produce admissible evidence showing that there was no issue of material fact in dispute, and upon doing so, Vida had the burden to submit admissible evidence showing that there are material issues in dispute. *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citations omitted); *Phillips v. Del. Power & Light Co.*, 216 A.2d 281, 285 (Del. 1966) (citation omitted). The Estate cannot sidestep its burden by relying on summary judgment rulings in other cases. The courts in these other STOLI cases have consistently held that each case must be determined on its own merits. In *Estate of Berland v. Lavastone Capital LLC*, Judge Bibas, after receiving answers from this Court to his certified questions, flatly rejected the argument that decisions in other Coventry STOLI cases would collaterally estop the owner from litigating whether the subject policy was void, stating: "to determine whether a policy is void, courts must 'scrutinize the circumstances under which [it] was issued.' The circumstances here necessarily differ from those under which other policies were issued to other people." *Est. of Berland v. Lavastone Cap. LLC*, 2022 WL 15023450, at *4 (D. Del.

Sept. 28, 2022), *dismissed sub nom. Est. of Berland v. Lavastone Cap. LLC*, 2023 WL 4014472 (3d Cir. May 23, 2023) (quoting *Price Dawe*, 28 A.3d at 1076).

Moreover, the majority of the cases relied on by the Estate (all but one) are further distinguishable on the ground that they do not analyze or rely on the second clause of Section 2704(a), which is at issue and satisfied here. Estate Ans. Br. at 20-21 (collecting cases).

The only case relied on by the Estate that analyzes the second clause of Section 2704(a), *Sun Life Assurance Co. of Canada v. U.S. Bank National Ass'n*, 369 F.Supp.3d 601, 611 (D. Del. 2019) ("*Sol*"), *assumed* that the policy satisfied that section, but nevertheless determined that it was an illegal wager because there was no factual dispute that the insured did not have a lawful insurance purpose for purchasing the Policy. *Id.* at 615. *Sol* was wrongly decided for two reasons.

First, the court usurped the role of the jury when it concluded that the *Sol* policy was a wager based on inferences drawn from the evidence at issue in that case. *Id.* at 615-16. Whether the insured had a legitimate purpose or the policy was merely an unlawful wager is a question of fact for which a jury is the "sole judge" and is a genuinely disputed fact issue here. *Baltimore Life Ins. Co.*, 91 A. at 655.

Second, *Sol* was wrongly decided because it applied an incorrect definition of wagering that has no basis in the common law or the text of Section 2704(a). *Sol* held that *Price Dawe* does not require a prearranged transfer in all instances to find

an illegal wager. *Sol*, 369 F.Supp.3d at 615-16. But when a third party procures a policy, Section 2704(a) necessarily requires such a prearranged transfer in order for an illegal wager to exist.

C. Vida's Defenses and Counterclaims Are Viable And Further Delaware Public Policy.

1. Vida Does Not Seek to Enforce the Policy.

Vida's waiver defense and its breach of contract counterclaim do *not* seek to enforce the terms of the Policy; rather, they seek to enforce the terms of distinct contracts and promises entered into by the Estate's representatives and innocent third parties years after the Policy was issued.

In order to sell the Policy to Midas, which was an innocent purchaser unaffiliated with Coventry, Martha agreed to release Midas and each of its successors and assigns from all claims relating to the wrongdoing of third parties "*involved in the origination of the Policy or any financing of the premiums thereon*." A1483 (§ 2.3) (emphasis added). Martha also agreed to indemnify Midas, or any of its assigns, for any damages arising out of "any lack by the [Family Trust] of an insurable interest in the life of the Insured [Martha] at the time of the issuance of the Policy." *Id.* (§ 2.4). Vida acquired the right to enforce Martha's contractual obligations. A216 (Section 2.01).

Now, the Estate argues that the Barotz Family Trust lacked an insurable interest in Martha's life because the premium financing that Martha and Nathan used to acquire the Policy was a "STOLI scheme." Estate Ans. Br. at 5-9, 23. If the Estate is correct, then it breached Martha's contractual obligations which run to Vida, and Vida has been directly harmed as a result. Vida has been ordered to pay

the Estate not just the death benefit but also $2,872,884.00 in pre-judgment interest. Vida Op. Br. Ex. 3 ¶ 2. The Estate's argument that Vida seeks only to "breathe life" into the Policy rather than "some other measure of damages" from the Estate is incorrect. Estate Ans. Br. at 38-39.

The Estate's argument that Vida's defenses and counterclaims are not viable because "nobody can have a 'property interest' in a STOLI policy or its proceeds" (Estate Ans. Br. at 37) fails because Vida does not seek to enforce any property interest in the Policy; rather, it seeks to enforce the Estate's contractual obligations *against* the Estate. Those contractual obligations flow from agreements that are separate and distinct from the Policy and were entered into years after the Policy was issued.

The Estate's reliance on this Court's recent decision in *Wilmington Trust, National Ass'n v. Sun Life Assurance Co. of Canada*, 294 A.3d 1062 (Del. 2023) ("*Frankel & De Bourbon*"), *as revised* (Mar. 21, 2023), is misguided for the same reason. That case involved a dispute over the enforceability of a life insurance policy which the insurance carrier claimed was void *ab initio* as an unlawful wager under Delaware law. This Court held that an investor could not recover the proceeds of a STOLI policy from the issuing insurance company. *Id.* at 1065. Here, the carrier has paid the claim, and Vida seeks to enforce independent contracts that bind the

Estate and are based on independent considerations, not the Policy. As such, *Frankel & De Bourbon* does not apply.

2. Vida Defenses and Counterclaims Further Delaware Public Policy.

The Estate also argues that permitting Vida to assert its defenses and counterclaims would violate Delaware public policy by allowing "an illegal human life wagers to pay off." Estate Ans. Br. at 38. The Estate has this backwards: this Court must *permit* Vida to assert its defenses and counterclaims in order to prevent the Estate from reaping a grotesque and unjust windfall from its own participation in an illegal wager at the expense of an innocent purchaser that had no involvement in any illegal conduct. Allowing Vida to enforce its contracts against the Estate directly furthers both Delaware's anti-wagering public policy, as well as Delaware's significant public policy in enforcing contractual obligations.

In *Wells Fargo Bank, N.A. v. Estate of Malkin*, 278 A.3d 53, 69 (Del. 2022) ("*Malkin*"), this Court held that, "Section 2704(b) does not foreclose the assertion of common-law counterclaims" and defenses in response to an estate's claim for a policy death benefit. *Id.* Instead, to determine whether a defense or counterclaim is viable, *Malkin* requires a trial court to weigh the elements of the defense or counterclaim against Delaware's public policy against unlawful wagering. *Id.* at 63. *Malkin* held that an innocent downstream investor's unjust enrichment counterclaim

to offset premium that it paid for a void policy is viable because it does not violate the Delaware Constitution's general prohibition of wagering. *Id.* at 69.

Here, as with the unjust enrichment claim in *Malkin*, the elements of Vida's common law defenses and counterclaims do not violate any Delaware public policy against wagering. The Estate alleges that the Policy was procured by Coventry as part of an illegal scheme to wager on the lives of senior citizens. If true, then the Estate directly participated in this scheme. Indeed, Martha and Nathan signed every document necessary to enable the Policy's procurement, and subsequently directed its sale, reaping a $60,000 profit from what Nathan now claims was a STOLI scheme. A879-81.

In contrast, Vida did not participate in any illegal wager. It is merely a downstream assignee that acquired the Policy in good faith. Moreover, this scheme took place during the period in which the policy was procured and then sold to Midas. It is not an ongoing scheme, and the records of similar cases filed in Delaware courts demonstrate that every policy alleged to have been improperly procured for wagering was issued prior to 2009. To the extent that there is any public policy interest to be protected, that interest is not served by punishing a remote investor; the original parties, save for the Estate, are not before the Court.

By precluding Vida from asserting its defenses and counterclaims, the Superior Court condoned and rewarded the Barotz family's unlawful wagering that

has directly harmed an innocent downstream investor. This result flips Delaware's anti-wagering public policy on its head. Refusing to enforce the Estate's contractual obligations only rewards the party to this lawsuit whose predecessor, administrator, and beneficiary all participated in the alleged illegal wager.

Moreover, *Berland* stated that "*something more*" than the insured's mere sale of a policy at a profit would bar an estate's Section 2704(b) claim. *Berland*, 266 A.3d at 975 (emphasis added). That "something more" is satisfied by the Estate's representations and contractual obligations made to an *innocent* investor. While *Berland* recognized that Section 2704(b) dictates that an insured's estate is entitled to the policy proceeds to the extent an investor and the insured were both "engaged in a STOLI scheme" (*Berland*, 266 A.3d at 974), the statute does not require or permit such a result where the *insured* engaged in the STOLI scheme *but the investor did not*.

"It is a fundamental principle of contract law that the parties to a contract are bound by its terms, and have a corresponding right to enforce them. In addition, [Delaware] law seeks to promote reliable and efficient corporate laws in order to facilitate commerce." *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180-81 (Del. 2015) (footnotes omitted). Under Delaware law, "an agreement or promise will not be condemned as being against public policy unless it is clearly contrary to what the legislature or judicial decision has declared to be public policy."

Kelly v. Bell, 254 A.2d 62, 70 (Del. Ch. 1969) (citations omitted), *aff'd sub nom.*, 266 A.2d 878 (Del. 1970). Contractual waivers by a decedent of her estate's causes of action are enforceable (*Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1165 (Del. 2010)), and there is simply no public policy basis to preclude an innocent downstream purchaser from enforcing its contractual rights *against* a direct participant in and the cause of a purportedly illegal wagering scheme.

CONCLUSION

Reversal is required so a jury can decide the disputed issues of material fact, and guidance is required for the foregoing issues, including on prejudgment interest.

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