IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

SUN LIFE ASSURANCE COMPANY OF CANADA,	)	
Plaintiff,	)	
v.	)	C.A. No. N18C-07-289 MMJ CCLD
WILMINGTON TRUST, NATIONAL ASSOCIATION, as Securities Intermediary, and SANFORD SCHMIDT	)	**CONFIDENTIAL FILING**
Defendants.	)	

SUN LIFE ASSURANCE COMPANY OF CANADA,	)	
Plaintiff,	)	C.A. No. N17C-08-331 MMJ CCLD
v.	)	**CONFIDENTIAL FILING**
WILMINGTON TRUST, NATIONAL ASSOCIATION, as Securities Intermediary,	)	
Defendants.	)	

Submitted: October 14, 2021
Decided: January 12, 2022

Upon Plaintiffs' Motion for Summary Judgement
GRANTED IN PART AND DENIED IN PART

Upon Defendants' Motion for Summary Judgement
GRANTED IN PART AND DENIED IN PART

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OPINION

JOHNSTON, J.

The question underlying this litigation is whether the insurance policies are Stranger Originated Life Insurance ("STOLI"). STOLI policies are illegal human life wagers under Delaware law. Plaintiff Sun Life Assurance Company of Canada ("Sun Life") contends that the policies were issued as part of a scheme that utilized a Delaware trust to conceal the illegal wager. Defendant Wilmington Trust argues that the policies are valid, lawful, and enforceable against Sun Life.

PROCEDURAL CONTEXT

The Court previously issued an Opinion dated August 9, 2018, concerning Sun Life's Motion to Dismiss Counterclaims and Motion to Strike Affirmative Defenses. The Court found that promissory estoppel is not an available counterclaim against an allegedly void *ab initio* contract. Thus, the Court granted Sun Life's Motion to Dismiss the counterclaim for promissory estoppel. The Court held that the breach of contract, breach of the implied covenant of good faith and

fair dealing, and the Massachusetts unfair and deceptive trade claim were sufficiently pled. Thus, the Court denied Sun Life's Motion to Dismiss the counterclaims of breach of contract, breach of implied covenant of good faith and fair dealing, and request for relief under Massachusetts unfair and deceptive trade practices.

The Court found that this Court lacks jurisdiction over claims for the equitable defenses of laches and unclean hands. The Court also found that the estoppel defense could not survive because a contract that is void *ab initio* may not be enforced through equitable estoppel. Thus, the Court granted Sun Life's Motion to Strike the equitable defenses of laches, unclean hands, and waiver and estoppel. The Court found that Wilmington Trust is entitled to argue that Sun Life lacks standing to attack the validity of the trust, but not the policy. The Court held that limited discovery was needed to determine whether New York or Delaware law applied. Thus, the Court denied Sun Life's Motion to Strike the affirmative defenses of standing, statute of limitations, and incontestability.

The parties filed cross Motions for Summary Judgement. This is the Courts' decision on these motions.

STANDARD OF REVIEW FOR CROSS MOTIONS FOR SUMMARY JUDGEMENT

Superior Court Rule 56(h) provides:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.[1]

For the first time, in its Opposition to Sun Life's Motion, Wilmington Trust argues: "There are, at the Very Least, Genuine Issues of Material Fact" that preclude summary judgement in Sun Life's favor. Notably, Wilmington Trust did not provide any counter-statement of fact section in any of its three briefs on these Motions. However, Wilmington Trust included certain factual assertions imbedded in the argument sections.

The Court will evaluate the contested facts pursuant to Rule 56(c). All facts are viewed in a light most favorable to the non-moving party.[2] The Court will evaluate the facts relating to each precise issue. The Court will take all reasonable inferences into consideration.

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[1] Super. Ct. Civ. R. 56.

[2] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del.).

FINDINGS OF FACT

The policies at issue are a $9 million policy ("Frankel Policy") insuring the life of Samuel Frankel ("Frankel") and a $10 million policy ("DeBourbon Policy") insuring the life of Bernard DeBourbon ("DeBourbon") (collectively, "Policies).

LPC Program

In 2005, attorneys Steven Lockwood ("Lockwood") and Martin Fleisher ("Fleisher") created a series of entities generally known as Life Product Clearing Program ("LPC"). The purpose of LPC was to use investor money to generate and acquire policies on the lives of certain seniors.

Fleisher and Lockwood testified that LPC's model was to communicate LPC's interest in acquiring certain types of prospective policies for six figures after they were put into force. LPC used the model as a way to cause those prospective policies to be effectuated. Fleisher conceded that the reason for having pre-issuance communication was to convince the potential insured to have the policy issued. The face value percentage price of 2% to 3%, was a method to get the potential insured to move forward with the underwriting process.

Lockwood testified that LPC informed its network of producers about the types of seniors and carriers LPC wanted policies on and from. Fleisher conceded that LPC acquired from producers both longevity and premium data on potential

seniors to identify prospective policies that "fit LPC's investment criteria." Once it was determined that LPC was interested, LPC would provide the producer or intermediary with an informal offer indicating the price they would be willing to pay for the policy. LPC would inform the intermediary of the type of trust required to apply for the policy. As a result, once the policy was issued, LPC could enter into a formal agreement to purchase the policy by buying the beneficial interest in the trust.

Lockwood admitted to his use of pre-issuance communications—which he interchangeably called "indications of interest" or "offers." Lockwood occasionally used the phrase "indication of interest," but regularly referred to the communications as "offers" and the resulting pre-arrangements as "deals." Fleisher conceded in his testimony that he would have preferred to refer to these types of communications in the ordinary course as "informal offers."

Lockwood also testified that during these pre-arrangements, the offer might need to be modified or rescinded if the premium rates changed. If an insured's attorney asked LPC to revise the sales agreement before it was signed, LPC would need to decide whether the changes were "deal breakers."

Fleisher conceded that the formal offer made to the insured almost always reflected the same terms as the "informal offer" made before the policy was

effectuated. LPC's marketing materials described its insurance strategy as one where the potential client was entitled to receive up-front compensation equal to 3% of the policies face amount if the client elected to participate.

Fleisher stated that LPC made it clear to seniors that if they put down the money to effectuate the policy, LPC would immediately reimburse the senior for the premium. Fleisher conceded that part of the appeal of LPC's program was the guarantee that the potential insured would receive a reimbursement of the premium plus the policy purchase price paid by LPC upon closing the deal. LPC's marketing materials explicitly state that "under the program, you will have no out-of-pocket expenses, nor will you be liable for any of the premium costs of the policy."

Lockwood testified that LPC's model involved observing perceived formalism to cause policies to issue. This enabled LPC to buy the policies as soon as they went into effect. Lockwood admitted that he and Fleisher retained law firms for the purpose of having the policy issued to a trust, then the insured puts the policy in force. Then Fleisher and Lockwood would have the beneficial interest transferred within a few weeks. LPC required a 25% commission from all agents who put senior insureds into the program. The agents were aware that without LPC's involvement, the policies would never be issued.

The Frankel Policy

In approximately 2006, Sanford Schmidt ("Schmidt"), an insurance broker, ran an insurance advisory firm called Schmidt Financial. Schmidt Financial had relationships with many different life insurance carriers, including Sun Life. Sun Life alleges that Schmidt—unbeknownst to insurance carriers at that time—was a promoter of STOLI policies. Sun Life alleges Lockwood introduced Schmidt to the LPC program in approximately 2005.

In 2006, Samuel H. Frankel ("Frankel") was a 73-year-old man living in Illinois. Schmidt introduced Frankel to the idea that a life insurance policy could be taken out on his behalf for investors in exchange for money. LPC promised that if Frankel provided the initial premium to put the policy into force, LPC would reimburse Frankel. Sun Life alleges that Frankel: (1) did not take out the policy for insurance purposes; (2) did not want or need the policy; and (3) did not intend to pay any of premiums with his own funds.

Schmidt Financial requested and received a life expectancy report for Frankel. Subsequently, emails were exchanged between Schmidt Financial's business manager, Sherry Long ("Long"), and Lockwood. The emails contained a life expectancy report and a premium illustration for a not-yet-issued $5 million Sun Life policy. Long specifically asked whether Frankel would qualify for the

LPC program. This email exchange was understood to be “shopping” the potential Frankel Policy to Lockwood.

Lockwood acknowledged that Frankel would qualify for 3% of the face value of the policy based upon the life expectancy report. Lockwood proposed that the funds could be distributed into a trust. Subsequently, Long sent a second life expectancy report to Lockwood that showed a longer life expectancy for Frankel. Long inquired whether the offer was still valid based on this report. Lockwood responded that LPC was willing to buy the intended Frankel Policy at 3% of the face value, plus premium reimbursement. Relying on Mr. Lockwood’s offer, Schmidt applied for the Frankel Policy.

On September 12, 2006, the Samuel Frankel Trust (the “Frankel Trust”) was created as a Delaware trust. The trust forms were provided to Schmidt Financial by LPC. The Frankel Trust listed a lawyer, “Berck”, as the initial trustee. Frankel had never met or communicated with Berck. Frankel had no input into the content of the Frankel Trust Agreement. The Frankel Trust Agreement expressly provided that the Frankel Trust would apply for and hold a policy insuring Frankel’s life. The Trust Agreement also provided that the beneficial interest in the Frankel Trust—the policy—could be sold to investors.

LPC made all decisions regarding the contents of the Frankel Trust Agreement. LPC's form Beneficial Interest Transfer Agreement was attached to the signed Frankel Trust Agreement. Sun Life alleges Frankel signed this sales form before the Frankel Trust and Frankel Policy were created.

The Frankel Trust then was used to apply for multiple policies on Frankel's life, including the Frankel Policy issued by Sun Life. Sun Life alleges that the Frankel Policy was applied for because it was the policy that LPC was interested in acquiring.

On September 14, 2006, Berck executed an application for the $9 million policy insuring Frankel's life on behalf of the Frankel Trust, Frankel, and Schmidt.

In conjunction with the application, Schmidt was to fill out the Sun Life "Life Insurance Source of Premium Eligibility Worksheet" ("Eligibility Worksheet"). The Worksheet inquired as to whether there had been any discussion about selling the proposed life insurance policy to a settlement company or group of investors within the next five years.

As Schmidt Financial was completing the Eligibility Worksheet, Schmidt's office manager, Chris Schuler, emailed Lockwood with questions. Lockwood responded with instructions regarding how to fill out the form—including

Lockwood's view that Schuler did not need to respond to certain questions. Schmidt and Lockwood did not inform Sun Life of the plan to sell the Policy.

On December 4, 2006, Sun Life issued the Frankel Policy. On December 13, 2006, Sun Life received a check in the amount of $25,285.00 from Berck—in his capacity as trustee—to put the policy into force. Frankel fronted the funds for the premium pursuant to LPC's promise to reimburse him as part of the policy sale.

On the same day, Fleisher wrote to Frankel to confirm that LPC would buy the beneficial interest in the Frankel Trust for $295,285.00. On December 15, 2006, Fleisher and Schmidt memorialized the formal beneficial interest transfer to LPC.

Schmidt received $333,854.96 from Sun Life as a first-year commission for serving as a broker on the Frankel Policy. Unbeknownst to Sun Life, Schmidt paid Lockwood 25% of Schmidt's commission. Schmidt conceded that this payment was made because the arrangement would not have been successful without LPC agreeing to buy the policy.

On December 20, 2006, Fleisher wrote another letter to Frankel with an enclosed check for $295,285.00. The letter explained the breakdown of the selling price and premium reimbursement.

The DeBourbon Policy

In late 2005, Bernard DeBourbon ("Bourbon") met with New Jersey estate planning attorney, Michael Strulowitz ("Strulowitz"), to discuss the prospect of allowing investors to take out a multi-million-dollar policy on DeBourbon's life. Sun Life alleges DeBourbon did not want or need a life insurance policy. No efforts were made to: (1) assess how much insurance DeBourbon would need; (2) conduct an estate planning analysis; (3) assess DeBourbon's ability to pay premiums; or (4) involve any tax, financial, or legal advisors for DeBourbon.

Strulowitz connected DeBourbon with Gregg Gottlieb ("Gottlieb"), an insurance broker. Gottlieb had connections with a brokerage house, Greenberg & Rapp, known to assist with STOLI transactions.

Greenberg & Rapp served as an intermediary for Fleisher's alleged STOLI programs—including LPC programs. Gottlieb and Strulowitz took all instructions in connection with the transaction from their contacts at Greenberg & Rapp, not DeBourbon. It is alleged that Greenberg & Rapp contacts were relaying instructions from other investors.

Strulowitz requested life expectancy reports on DeBourbon. Once received, the reports were forwarded to Greenberg & Rapp to subsequently send to the investors.

On August 31, 2006, Greenberg & Rapp provided Gottlieb with an agreement to create the Bernard DeBourbon Life Insurance Trust ("DeBourbon Trust"). Robert Wilcox ("Wilcox"), a lawyer, was named as trustee. Wilcox was authorized to apply for and sell policies on behalf of the Debourbon Trust. DeBourbon had never met or had contact with Wilcox. DeBourbon did not select Wilcox as trustee, nor did he give him any instructions. Greenberg & Rapp and/or their investors drafted the DeBourbon Trust. DeBourbon, Gottlieb, and Strulowitz did not have any part in drafting the DeBourbon Trust.

On September 8, 2006, Wilcox (as trustee), DeBourbon, and Gottlieb (as broker), executed an application for the $10 million policy on DeBourbon. The potential policy was pre-shopped to Fleisher.

On September 28, 2006, Sun Life issued the DeBourbon Policy insuring the life of DeBourbon. No premiums had yet been paid. On October 5, 2006, DeBourbon executed an agreement to sell the beneficial interest in the DeBourbon Trust to Ocean Gate, a Beneficial Interest program created by former LPC investors. Ocean Gate did not sign this agreement.

Strulowitz explained to DeBourbon that investors preferred the initial premiums to come from the insured. DeBourbon was not interested in or capable of using his own funds to pay the premium. As a result, Strulowitz coordinated

with an attorney friend, Jeffry Hollander ("Hollander"), to advance the initial premium from his IOLTA account. A document entitled "Escrow Agreement" was created between the law firm of Lauterbach Garfinkel Damast & Hollander, LLP ("LGDH") and DeBourbon to govern the transaction.

The Escrow Agreement provided that LGDH would send Sun Life $109,740.00 for the first two months' premiums on the DeBourbon Policy. Under the Escrow Agreement, the DeBourbon Trust would be sold "to LPC Holdings" in exchange for $409,740.00. The Escrow Agreement further provided that: (1) LGDH would retain $135,000.00 for its participation in consummating the transaction when the sale to LPC was complete; (2) if the sale were not completed, LGDH had the right to terminate the DeBourbon Policy and keep the premium refund; (3) and if there were no sale or refund, LGDH would take the policy for itself without compensating DeBourbon.

Some time prior to the DeBourbon Policy being issued, LPC made an informal offer to purchase it for 3% of its face value, plus a reimbursement of the premium.

On November 9, 2006, Gottlieb sent an executed delivery receipt form—including a check for $109,740 drawn on Hollander's IOLTA—to Sun Life to put coverage into force. Fleisher then sent a letter to DeBourbon confirming that

LPC would buy the DeBourbon Policy for $300,000 plus a reimbursement of already paid premiums. Six days after the DeBourbon Policy was put into force, an agreement was signed selling the DeBourbon Trust—including the DeBourbon Policy—to LPC for $409,740 (being 3% of the face value), plus a $109,740 reimbursement of the premium.

On November 20, 2006, LPC wired $409,740 to Hollander's IOLTA account. Subsequently, Hollander's IOLTA account distributed: (1) $247,000 to the Universal Foundation—allegedly intended for DeBourbon; (2) $1,000 to Strulowitz to repay him for financing the DeBourbon Trust bank account; and (3) $137,740 to itself.

ANALYSIS

Insurable Interest

In *PHL Variable Insurance Company v. Price Dawe 2006 Insurance Trust,*[3] the Delaware Supreme Court addressed three questions of law certified from the United States District Court for the District of Delaware.

1) Does Delaware law permit an insurer to challenge the validity of a life insurance policy based on a lack of insurable interest after the expiration of the two-year contestability period required by 18 *Del. C.* § 2908?

[3] 28 A.3d 1059 (Del. 2011).

2) Does 18 *Del. C.* § 2704(a) and (c)(5) prohibit an insured from procuring or effecting a policy on his or her own life and immediately transferring the policy, or a beneficial interest in a trust that owns and is the beneficiary of the policy, to a person without an insurable interest in the insured's life, if the insured did not ever intend to provide insurance protection for a person with an insurable interest in his or her life?

3) Does 18 *Del. C.* § 2704(a) and (c)(5) confer upon the trustee of a Delaware trust established by an individual insured an insurable interest in the life of that individual when, at the time of the application for life insurance, the insured intends that the beneficial interest in the Delaware trust would be transferred to a third-party investor with no insurable interest in that individual's life following the issuance of the life insurance policy?[4]

The *Price Dawe* Court held in response to Certified Question I:

> Under Delaware common law, if a life insurance policy lacks an insurable interest at inception, it is void *ab initio* because it violates Delaware's clear public policy against wagering.... [I]f no insurance policy ever legally came into effect, then neither did any of its provisions, including the statutorily required incontestability clause.... As a result, the incontestability provision does not bar an insurer from asserting a claim on the basis of a lack of insurable interest.[5]

In response to Certified Question II the Court established that 18 *Del. C.* §

2704(a) and (c)(5) does not

> prohibit an insured from procuring or effecting a policy on his or her own life and immediately transferring the policy, or a beneficial interest in a trust that owns and is the beneficiary of the policy, to a person

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[4] *Id.* at 1064.

[5] *Id.* at 1067-68 (internal citations omitted).

> without an insurable interest in the insured's life, if the insured did not ever intend to provide insurance protection for a person with an insurable interest in his or her life... so long as the insured procured or effected the policy and the policy is not a mere cover for a wager.[6]

In response to Certified Question III the Court held:

> Section 2704(c)(5) only grants the trustee of a Delaware trust an insurable interest in the life of the individual insured if the trust is "established" by the individual insured. The insured, as settlor or grantor, must both create and initially fund the trust corpus. This requirement is not satisfied if the trust is created through nominal funding as a mere formality. If the funding is provided by a third party as part of a pre-negotiated agreement—then the substantive requirements of sections 2704(a) and 2704(c)(5) are not met.
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> Thus, an individual insured can procure a policy and name his own trust as the owner and beneficiary of that validly procured life insurance policy, and the policy complies with the first clause of section 2704(a). Additionally, 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). In both scenarios, however, either the individual insured or the trustee must intend to purchase the policy for lawful insurance purposes, and not as a cover for a waging contract.[7]

The United States Supreme Court has addressed the public policy behind the requirement for an insurance interest.

> [T]here must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect

[6] *Id.*

[7] *Id.* at 1078.

> some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wage, by which the party taking the policy is directly interested in the early death of the assured. *Such policies have a tendency to create a desire for the event.*[8]

Over time a secondary market for life insurance emerged allowing policy holders "who no longer need life insurance to receive necessary cash during their lifetimes."[9] The secondary market is both legal and highly regulated.[10] However, virtually all jurisdictions prohibit "stranger originated life insurance" ("STOLI") policies. A STOLI policy is one where a third party creates a life insurance policy for the benefit of those who have no relationship to the insured. Thus, a STOLI policy lacks an insurable interest, resulting in an illegal wager on human life.[11]

"The Delaware Constitution prohibits all forms of gambling unless it falls within one of the enumerated exceptions."[12] However, "[t]he plain language of 18 *Del. C.* § 2704(a) is ambiguous because a literal reading of the statute would permit wagering contracts, which are prohibited by the Delaware Constitution."[13] Statutes must be interpreted in conformity with both Delaware law and the General Assembly's intent.[14]

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[8] *Id.* at 1069. (relying upon *Warnock v. Davis*, 104 U.S. 775, 779 (1881)).
[9] *Id.*
[10] *Id.*
[11] *Id.* at 1070.
[12] *Id.*
[13] *Id.*
[14] *Id.*

Delaware law has required an insurable interest and payment of premiums as a way to distinguish between insurance and wagering contracts.

> [T]he legitimate scheme of life insurance is inclined to be distorted and to some it affords an invitation for a mischievous kind of gambling. To avoid this misuse of a most useful character of undertaking, in which a beneficiary may become interested in the early death of the insured, it is held that the insurance upon a life shall be effected and resorted to only for some benefit incident to or contemplated by the insured, and that insurance procured upon a life by one *or in favor of one under circumstances of speculation or hazard* amounts to a wager contract and is therefore void, upon the theory that it contravenes public policy.[15]

Persons who validly procure or cause to be procured life insurance on the insured include: those having a lawful and substantial economic interest in the insured's life; parties to a contract for the purchase or sale of a business interest; and any relatives having a substantial interest engendered by love and affection.[16]

> The insurable interest requirement serves the substantive goal of preventing speculation on human life. For this reason, section 2704(a) requires more than just technical compliance at the time of issuance. Indeed, the STOLI schemes are created to feign technical compliance with insurable interest statutes. If a third party procures life insurance on another person or causes the procurement of life insurance on another person—the beneficiary of that contract must have an insurable interest in the life of the insured.
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> The statute defines the moment in time the insurable interest requirement applies—"the time when such contract was made," i.e., the

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[15] *Id.* at 1071 (relying upon *Baltimore Life Ins. Co. v. Floyd*, 91 A. 653, 656 (Del. Super. 1914), *aff'd*, 94 A. 515 (Del. 1915).
[16] *Id.*

> moment the life insurance contract becomes effective. Thus, the insurable interest requirement does not place any restrictions on the subsequent sale or transfer of a bona fide life insurance policy.[17]

Intermediaries cannot use Section 2704(c)(5) to accomplish what 2704(a) clearly prohibits parties from doing directly.[18]

Under the general rule,

> all persons have an insurable interest in their own life [and may] insure their life in good faith for the benefit of any person whom they see fit to name as the beneficiary, regardless of whether such person has an insurable interest in their life, provided it not be done by way of cover for a wagering policy. Thus, an individual insured can procure a policy and name his own trust as the owner and beneficiary of that validly procured life insurance policy....[19]

In *Sun Life Assurance Company Canada v. U.S. Bank National Association ("Sol")*,[20] the United States District Court for the District of Delaware interpreted the *Price Dawe* decision. The *Sol* Court found that a pre-existing arrangement is not required to show the existence of a wagering contract for the sale of policies.

> Defendant repeatedly asserts that the Policy cannot be a "cover for a wager" under *Dawe* because none of the parties involved in procuring the Policy ended up acquiring the Policy, and the parties had no prior arrangement for any of them to do so. Defendants' efforts to point to any place in *Dawe* in which the Delaware Supreme Court establishes this as a prerequisite for a policy to be a STOLI are unavailing. All of

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[17] *Id.* at 1074 (internal citations omitted).
[18] *Id.*
[19] *Id.* (internal citations omitted).
[20] 369 F. Supp. 3d 601, 615 (D. Del. 2019).

> the statements on which Defendants rely are non-exhaustive, non-limiting descriptions of the facts the Court was considering in *Dawe*. There, it was undisputed that the third parties involved in procuring the policy for the insured were also, by pre-arrangement, the same parties that would eventually come to purchase the policy from the insured.
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> Nor has Defendant identified a persuasive reason as to why, under Delaware law, the legality of the Policy should turn on whether the third party procuring the policy is also the same third party that will acquire the policy on the secondary market. Instead, the Court agrees with Sun Life that *Dawe* precludes strangers from procuring policies for strangers. It would turn [ ] *Dawe* on its head to take U.S. Bank's invitation to create a loophole where a stranger cannot create a policy for itself, but can do so for a different stranger.[21]

Price Dawe cannot be read as narrowly as Wilmington Trust urges. Other jurisdictions have addressed whether a STOLI policy lacks insurable interest, with reference to *Price Dawe*. The Eleventh Circuit in *Estate of Malkin v. Wells Fargo Bank, N.A.*,[22] discussed the public policy articulated in *Price Dawe*:

> We do not read *Price Dawe* to say that a policy lacks an insurable interest <u>only</u> when there is a pre-negotiated agreement to immediately transfer ownership. Rather, *Price Dawe* takes a broader view. It "requires courts to scrutinize the circumstances under which the policy was issued" and whether those circumstances show the person who is insured "purchase[d] the policy for lawful insurance purposes." Whether there was a pre-negotiated agreement between the person who is insured and the trust is just one circumstance the Supreme Court of Delaware specifically addressed and found to fail for lack of

[21] *Id.* at 615–16 (internal citations omitted).
[22] 998 F.3d 1186, 1196 (11th Cir. 2021).

> an insurable interest. Therefore the existence of an agreement to immediately transfer ownership is not dispositive of whether there is an insurable interest in the...Policy.[23]

Whether there is a lack of insurable interest involves consideration of several circumstances. A pre-negotiated agreement is only one of these circumstances.

Payment of Premiums

To determine who procured a life insurance policy—for the purpose of determining insurable interest—the Court looks at who pays the premiums.[24] 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. Stated differently if an insured procures a policy as a mere cover for a wager, then the insurable interest requirement is not satisfied."[25]

"Payment of the *premiums* by the insured, as opposed to someone with no insurable interest in the insured's life, provides strong evidence that the transaction is bona fide."[26] However, "if a third-party funds the premium payments by providing the insured the financial means to purchase the policy then the insured does not procure or affect the policy."[27] Thus, the "relevant inquiry is who

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[23] *Id.* (internal citations omitted).
[24] *Id.* at 1075.
[25] *Id.*
[26] *Id.* at 1076 (emphasis added).
[27] *Id.*

procured the policy and whether or not that person meets the insurable interest requirements."[28]

In *Principal Life Insurance Company v. Lawrence Rucker 2007 Insurance Trust,*[29] the United States District Court for the District of Delaware found that it is acceptable for an insured to borrow funds for premiums. The *Rucker* court stated: "*Price Dawe* does not foreclose an insured from borrowing money to pay for premiums. An insured's ability to procure a policy is not limited to paying the premiums with his own funds; borrowing money with an obligation to repay would also qualify as an insured procuring a policy."[30] However, the District Court made clear that it is not acceptable to borrow the funds from the investor. The *Rucker* court found that the material question of fact was whether the insured was financially induced to procure the policy. Thus, the Court must look behind the funding to determine who loaned the funds.

The Delaware Supreme Court recently considered STOLI policy law in the context of three questions certified by the United States District Court for the District of Delaware.[31] Question Two asks:

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[28] *Id.*
[29] 869 F. Supp. 2d 556 (D. Del. 2012).
[30] *Id.* at 563.
[31] *Lavastone Capital, LLC v. Estate of Beverly E. Berland*, 2021 WL 5316071 (Del.) (The first question involved the term "under the contract," which is not at issue in this case. The third

> Does 18 *Del. C.* § 2704(a) and (c)(5) forbid an insured or his or her trust to procure or effect a policy on his or her own life using a nonrecourse loan and, after the contestability period has passed, transfer the policy, or a beneficial interest in the trust that owns the policy, to a person without an insurable interest in the insured's life, if the insured did not ever intend to provide insurance protection beyond the contestability period?

The Delaware Supreme Court answered:

> No, 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" and the insured or his or her trust procured or effected the policy in good faith, for a lawful insurance purpose, and not as a cover for a wagering contract.[32]

In analyzing this Question, the Court considered factors including: the source of funding for the premiums; and whether the insured's intent was to transfer ownership after the end of the contestability period, rather than "immediately" as in *Price Dawe.*[33] The Court concluded: "If the use of nonrecourse funding allows the insured - individually or as settlor or grantor of a trust - to obtain the policy 'without actually paying the premiums,' then the

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question determined that "an estate may profit under 18 *Del. C.* § 2704(b) where the policy was procured in part by fraud on the part of the decedent and the decedent profited from the previous sale of the policy, [even] if the recipient of the policy benefits cannot establish that it was a victim of the fraud." Section 2704(b) provides that an estate may maintain an action to recover death benefits paid on a life insurance policy that was procured in violation of the insurable-interest requirement. The insured's "mere sale of the policy at a profit does not bar an estate's claim under Section 2704(b)....something more must be required to bar an estate's claim." The estates of the insureds are not parties to this litigation.).

[32] *Lavastone*, 2021 WL 5316071, at *1 (quoting *Price Dawe*, 28 A.3d at 1076).

[33] *Id.* at *6.

requirements of §§ 2704(a) and (c)(5) are not met."[34] Additionally, "if a third party financially induces the insured to obtain life insurance with the intent to immediately transfer the policy to a third party, the policy lacks an insurable interest."[35]

In this case, both Frankel and DeBourbon were financially induced to obtain the life insurance policies with the intent to immediately transfer the policies to a third party. Therefore, as determined by the Supreme Court in both *Price Dawe* and *Lavastone,* the policies lack an insurable interest. DeBourbon was not financially capable of paying even the initial premium. Frankel fronted the initial premium, in reliance on LPC's promise to shortly reimburse him as part of the policy sale. Therefore, the Court finds that Frankel's premium payment was illusory. Both Frankel and DeBourbon obtained the policies without actually paying the premiums themselves.

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The Court finds that the most salient considerations in this action are who procured the policy, and whether the insured was induced to procure the policy by

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[34] *Id.* (quoting *Price Dawe*, 28 A.3d at 1078).

[35] *Id.* at *7.

an investor. A pre-negotiated arrangement or agreement may be strong evidence of investor procurement.

The facts in this case demonstrate that Wilmington Trust's predecessors induced both Frankel and DeBourbon to procure the policies. Prior to the purchase of insurance, there was a pre-negotiated arrangement between each insured and the respective investors. The arrangements were for the insureds to sell the policies to the investors post-issuance.

The Court is not persuaded by Wilmington Trust's argument that these pre-negotiated agreements were merely "indications of interest." This contention is undermined by the testimony of Lockwood and Fleisher. Fleisher testified that he would have referred to these communications in ordinary course as "informal offers." Lockwood also routinely referred to the communications as "offers." Lockwood referred to the resulting pre-arrangements as "deals." Lockwood stated that "the offer had to be modified or rescinded."

Thus, it appears to the Court that the term "indication of interest" is an attorney suggestion to place the facts in the most favorable light. The Court concludes that counsel advised Lockwood to avoid problematic terms that would evidence pre-negotiated arrangements such as "offer, deal, rescinded, and deal breakers." Lockwood did, in fact, use these terms to describe the LPC

arrangements and agreements. These terms are evidence of pre-negotiated arrangements.

The Court must conclude that both the Frankel and the DeBourbon Policies lacked an insurable interest. The validity of a policy may be determined by evaluating who procured the policy itself. Pre-negotiated arrangements or agreements may be strong evidence of investor procurement.

The Court finds that Wilmington Trust's predecessors induced both Frankel and DeBourbon to procure the policies. There was a pre-negotiated arrangement between each insured and the respective investors to sell the policies to the investors immediately post-issuance. Neither Frankel nor De Bourbon actually paid even the initial premiums.

Therefore, the Court finds the Policies void *ab intio.*

Massachusetts Unfair and Deceptive Trade Practices

Under Massachusetts General Laws Chapter 93A Section 2(a), unfair or deceptive acts or practices in the conduct of any trade or commerce are considered unlawful.[36] Chapter 93A Section 11 creates a private right of action for

> Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property… as a result of the use or employment by another person who engages in any trade or commerce

[36] Mass. Gen. Laws Ann. ch. 93A, § 2 (West).

of an… unfair or deceptive act or practice declared unlawful by section two.[37]

An act is considered deceptive "if it could reasonably be found to have caused a person to act differently from the way he otherwise would have acted."[38]

To determine whether an act is unfair, the Court must look to the circumstances of each case.[39] The Court must evaluate: "(1) whether the practice is at least within the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; and (3) whether it causes substantial injury to consumers."[40]

Wilmington Trust relies on *Sol II* for the proposition that "[P]laintiffs may prevail on a 93A action founded on a misrepresentation without satisfying the common-law requirements of reasonable reliance…."[41] Wilmington Trust further relies on *Auto Flat Car Crushers, Incorporated v. Hanover Insurance Company,*[42] stating that—instead of actual reliance—plaintiff must show "a causal connection

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[37] *Id.* at § 11.

[38] *Sun Life Assurance Co. Canada v. U.S. Bank Nat'l Ass'n*, 2019 WL 2151695, at *2 (D. Del. 2019) (*"Sol II")*(internal citations omitted).

[39] *Id.* (internal citations omitted).

[40] *Id.* (quoting *Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 243 (1st Cir. 2005)).

[41] *Id.* (citing *Lincoln Ventures, Inc. v. FSL Associates, Inc.*, 2006 WL 1745804, at *1 (Mass. Super. 2006).

[42] 17 N.E.3d 1066 (Mass. 2014).

between the loss suffered and the defendant's unfair or deceptive method, act, or practice."[43]

Wilmington Trust argues that Sun Life's practices were unfair and deceptive because Sun Life allegedly internally treated the Policies as STOLI for almost a decade. Wilmington Trust further asserts that Sun Life began tracking ownership changes that occurred within the first three years after the Policies were in force. Thus, Wilmington Trust argues that Sun Life was aware that the Policies at issue were STOLI Policies as early as 2009. Wilmington Trust further argues that Sun Life purposefully intended to profit from the premiums on the Polices.

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 Wilmington Trust's predecessor, Viva. Wilmington Trust presents no authority to support the proposition that Sun Life had a duty to bring litigation sooner or to determine whether policies were illegal STOLI and therefore invalid. There is no authority that imposes a duty on Sun Life to inform policy owners that policies had been "flagged" as STOLI. Wilmington Trust also presents no authority that implies Sun Life had a duty to cease accepting premiums.

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[43] *Id.* at 1075.

Of course, the life insurance industry in general could consider whether such efforts to identify STOLI policies should become industry standards and practices. However, in the absence of statutory or regulatory authority to the contrary, insurers should be able to rely on the information submitted as part of the application for insurance, in order to determine insurable interest.

The Court finds no evidence of any actions by Sun Life inconsistent with insurance industry practices. The life insurance industry is highly regulated. There is no evidence Sun Life is in violation of any statute or regulations that directly addresses these issues.

The Court concludes that Sun Life's actions are not deceptive trade practices as defined by Massachusetts law. Therefore, the Court need not address whether Massachusetts is the "center of gravity." The Court also need not address whether the involved parties are entitled to treble damages or attorneys' fees.

Good Faith and Fair Dealing

The Court reiterates that Wilmington Trust has failed to establish that Sun Life has breached any duty. Therefore, the Court finds that Wilmington Trust has failed to demonstrate that Sun Life breached the implied covenant of good faith and fair dealing.

Premium Reimbursement

Wilmington Trust argues that the Policies are not STOLI policies because investors did not *induce* the Insureds to take out the Policies, nor was there a pre-negotiated arrangement. However, Wilmington Trust also argues that Sun Life has engaged in deceptive trade practices by: (1) identifying the Policies as STOLI; and (2) keeping premiums paid on the Policies.

Sun Life contends that the Policies are STOLI, and therefore the are void *ab initio* because they lack an insurable interest. Sun Life argues that "a court may never enforce agreements void *ab initio*, no matter what the intentions of the parties."[44] Sun Life asserts that the Court should not force death benefits to be paid. However, Sun Life argues that Sun Life gets to keep the premiums that it accepted pursuant to an agreement to pay the same death benefits at issue.

Sun Life relies on *Anguilla RE, LLC v. Lubert-Adler Real Estate Fund IV, L.P*[45] for the proposition that Wilmington Trust is not entitled to a "return" of premiums that it did not itself pay. Sun Life argues that as a matter of Delaware's unjust enrichment law, a party can only seek restitution of performance made by it, not performance made by alleged predecessors-in-interest.

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[44] *Price Dawe*, 28 A.3d at 1067.
[45] 2012 WL 28 A.3d (Del. Super.).

Sun Life misapplies *Anguilla.* In *Anguilla*, the Court found that the predecessor-in-interest was the proper party to pursue an unjust enrichment claim. The *Anguilla* predecessor would have been the party to suffer any alleged impoverishments. However, in *Anguilla* the pleadings were "devoid of any minimal factual allegations whatsoever to support a *prima facie* showing of impoverishment by any party."[46]

The Delaware Supreme Court has established that "it is against the public policy of this State to permit its courts to enforce an illegal contract prohibited by law."[47] Where a policy is void *ab initio,* "ordinarily… neither party has a remedy to any extent against the other."[48]

Section 198 of the Restatement (Second) of Contracts provides:

> 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: (a) he was excusably ignorant of the facts or of legislation of a minor character, in the absence of which the promise would be enforceable….[49]

"In determining whether ignorance of fact or law is excusable, any misrepresentations made by the other party are relevant."[50]

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[46] *Id.*, 2012 WL 5351229, at *6.
[47] *Della Corp. v. Diamond*, 210 A.2d 847, 849 (Del. 1965).
[48] *Id.*
[49] Restatement (Second) of Contracts § 198 (1981).
[50] *Id.* at § 180 cmt. a.

> Good faith is expected on the part of the party who claims ignorance and he cannot blind his eyes because he does not wish to see.... The matter of which he is ignorant must not be one as to which he is expected to have knowledge because of his expertise or his relation to the transaction.[51]

"The general rule that neither party is entitled to restitution is subject to an exception in favor of a party who is not equally in the wrong...with the party from whom he seeks restitution."[52] The exception to the rule applies where:

> (1) 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... [and]
> (2) 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.[53]

There is precedent for the proposition that premiums cannot be retained where the contract is void *ab intio*. Federal courts have established that insurers cannot retain premiums that they collected on policies that have been declared invalid by a court. "If an insurance company could retain premiums while also obtaining rescission of a policy, it would have the undesirable effect of

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[51] *Id.*
[52] *Id.* at § 198 cmt. b.
[53] *Id.*

incentivizing insurance companies to bring rescission suits as late as possible, as they continue to collect premiums at no actual risk."[54]

As a matter of public policy, it would not be fair for Sun Life to retain all premiums, while never having to pay death benefits as agreed in exchange for receiving premiums. It also appears unfair for investors to be reimbursed for premiums if they knew that they were inducing STOLI policies.

Unjust enrichment is defined as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[55] The elements of unjust enrichment are: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law.[56]

Unjust enrichment is an equitable cause of action. In this case, in a court of law, unjust enrichment may not be considered as a stand-alone cause of action. Rather, unjust enrichment may be a measure or method of determining damages.

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[54] *Sun Life Assur. Co. of Canada v. Berck*, 719 F. Supp. 2d 410, 418–19 (D. Del. 2010).
[55] *Anguilla RE, LLC*, 2012 WL 5351229, at *6.
[56] *Id.*

The Court finds that Sun Life cannot be absolved from any obligation to pay death benefits *and* yet retain premiums. Thus, Sun Life must disgorge premiums. The question remains: to whom should the premiums be given?

The Court finds that Wilmington Trust's predecessors knew that they were inducing insureds to procure STOLI policies through substantial inducements. Wilmington Trust's predecessor used intermediaries to consummate pre-negotiated agreements and arrangements.

There is an absence of statutory, regulatory, or legal authority directly applicable to these facts. The Court holds that premiums must be reimbursed to the party that paid them. The Court finds no reason for that reimbursement to include pre-judgement interest.

CONCLUSION

The Court finds that facts demonstrate that the insureds were induced to procure the Policies by investors. The pre-negotiated arrangements and agreements to immediately sell the Policies to investors were not mere "indications of interest." Neither Insured actually paid even the initial premiums. Therefore, the Court finds the Policies void *ab initio*.

For the same reasons, the Court finds that Wilmington Trust has failed to demonstrate that Sun breached the implied covenant of good faith and fair dealing.

The Court finds that Sun Life had no duty to bring litigation sooner or to determine whether the Policies were STOLI. Therefore, Sun Life's actions are not deceptive trade practices as defined by Massachusetts law. The Court declines to address whether Massachusetts is the "center of gravity" or entitlement to treble damages or attorneys' fees.

The Court finds that premiums cannot be retained where policies are declared invalid. However, there is an absence of applicable statutory, regulatory, and legal authority directly on point. The Court directs premiums to be reimbursed to the party that paid them. The Court finds no reason for that reimbursement to include pre-judgement interest.

THEREFORE, Sun Life Assurance Company of Canada's Motion for Summary Judgement is hereby **GRANTED IN PART AND DENIED IN PART**. Wilmington Trust, National Association's Motion for Summary Judgement is hereby **GRANTED IN PART AND DENIED IN PART**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston