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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAVASTONE CAPITAL LLC,	)	
	)	No. 75, 2021
Defendant-Appellant,	)	
	)	Certification of Questions of
v.	)	Law from the United States
	)	District Court for the District of
	)	Delaware
ESTATE OF BEVERLY E. BERLAND,	)	
	)	No. 1:18-cv-02002-SB
Plaintiff-Appellee.	)	

APPELLANT'S REPLY BRIEF

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June 23, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 3

I. LAVASTONE DID NOT CONCEDE THAT SECTION 2704(B) CONFERS AN UNLIMITED CAUSE OF ACTION ON ESTATES 3

II. THERE IS NO UNLAWFUL HUMAN LIFE WAGER WHEN THE INSURED OWNS AND CONTROLS THE POLICY AT ITS INCEPTION 4

A. To Determine Whether A Transaction Is An Unlawful Wager, The Court Must Determine Who Owned And Controlled The Policy At Inception 4

B. No Unlawful Wager Occurred Under The PFP Program 6

III. THE ESTATE MISCONSTRUES THE VIATICAL SETTLEMENT ACT 11

IV. THIS COURT SHOULD IGNORE THE IRRELEVANT DECISIONS ON WHICH THE ESTATE RELIES 13

V. AN INSURED'S INTENTIONAL SALE OF HER POLICY OR MISCONDUCT DURING HER LIFE BARS HER ESTATE'S RECOVERY UNDER SECTION 2704 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Deuley v. DynCorp Int'l, Inc.,
8 A.3d 1156 (Del. 2010) 19, 21

Estate of Farrell ex rel. Bennett v. Gordon,
770 A.2d 517 (Del. 2001) 18

Estate of Phyllis M. Malkin v. Wells Fargo Bank, N.A., as Securities Intermediary, et al.,
2021 WL 2149344 (11th Cir. May 27, 2021) ..... *passim*

John Hancock Life Ins. Co. of New York v. Solomon Baum Irrevocable Family Life Ins. Tr.,
357 F. Supp. 3d 209 (E.D.N.Y. 2018), *aff'd*, 783 F. App'x 89 (2d Cir. 2019) 14

Lincoln Nat'l Life Ins. Co. v. Inzlicht-Sprei,
No. 16-cv-5171 (PKC) (RML), 2020 WL 1536346 (E.D.N.Y. Mar. 31, 2020), *aff'd*, 847 F. App'x 97 (2d Cir. 2021) 14

Lincoln Nat. Life Ins. Co. v. Joseph Schlanger 2006 Ins. Tr.,
2010 WL 2898315 (D. Del. July 20, 2010) 10

NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co.,
513 U.S. 251 (1995) 6

Parlin v. Dyncorp Int'l, Inc.,
2009 WL 3636756 (Del. Super. Sept. 30, 2009) 20-21

PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.,
28 A.3d 1059 (Del. 2011) ..... *passim*

Pierce v. Higgins,
531 A.2d 1221 (Del. Fam. 1987) 19

Shields Dev. Co. v. Shields,
1981 WL 7636 (Del. Ch. Dec. 8, 1981) 19

Skinner v. Peninsula Healthcare Servs., LLC,
2021 WL 1054101 (Del. Super. Mar. 19, 2021)..... 20-21

Snow v. Webb,
563 A.2d 1059 (Del. Super. 1989), *overruled on other grounds by Parker v. Breckin*, 620 A.2d 229 (Del. 1993).....18, 20

Wells Fargo Bank, N.A., et al. v. Estate of Phyllis Malkin,
No. 172, 2021 (Del. June 3, 2021) (Certification of Questions of Law from the United States Court of Appeals for the Eleventh Circuit) 17

Rules and Statutes

10 *Del. C.* § 3701 .....18, 20

18 *Del. C.* § 2704(b).....*passim*

18 *Del. C.* § 4801 *et seq.*.....5

18 *Del. C.* § 7502(14)(b)-(c).....11

18 *Del. C.* § 7511(a)..... 11-12

Delaware Viatical Settlement Act.....*passim*

PRELIMINARY STATEMENT

Under Delaware law, an insured may procure a policy on her life and name anyone as the beneficiary, utilize premium finance to pay premium on that policy, and transfer her policy to anyone. As the District Court found, and as the Estate concedes, these lawful component transactions occurred with respect to the Berland Policy, and as outlined by the *Amici*, these transactions are all common transactions in the life settlement markets. Exhibit A to Appellant's Opening Brief ("OB") (Certification of Questions of Law, D.I. No. 157) ("Ex. A") § (2) (¶¶ 1-3), § (3) (¶ 3(b.)); *see* Brief for *Amici Curiae* Life Insurance Settlement Association and European Life Settlement Association in Support of Appellant and its Positions with Respect to the Certified Questions, at 6-8, 16-19. Yet the Estate argues here that the mere legal use of nonrecourse premium financing nevertheless transformed lawful transactions into "unlawful human life wagers." Answering Brief ("AB") at 20-23, 26-27. This argument fundamentally misconstrues *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co*., 28 A.3d 1059 (Del. 2011) ("*Price Dawe*"), which requires a court to scrutinize the circumstances of a policy's procurement to determine whether the policy is supported by insurable interest or is simply cover for an unlawful wager.

As *Price Dawe* instructs, the essential distinction between lawful and unlawful procurement of insurance turns on whether that procurement is an unlawful

"wager" on human life by a third party. *Price Dawe*, 28 A.3d at 1067-68. There is no such third party "wager" where, as here, the insured owns and controls the policy at its inception and no third party would profit from the insured's death. Yet, the Estate asks this Court to rubber-stamp decisions from other courts that have guessed at how *Price Dawe* might apply to cases involving nonrecourse financing. AB at 24-25. These decisions, of course, are not binding, and in all events involved facts different from those of the present case. To decide *this* case, the Court should follow the instructions it outlined in *Price Dawe*, which the Delaware legislature adopted in the Viatical Settlement Act, and should thus "scrutinize the circumstances under which the policy was issued and determine who in fact procured or effected the policy" in order to determine whether it constitutes a human life wager. *Price Dawe*, 28 A.3d at 1076. Under this analysis, no wager occurs in a premium finance transaction where the insured owns and controls the Policy at its inception, as is the case with the Berland Policy.

Remarkably, the Estate also argues that it is not bound by fraud its decedent committed. AB at 35-36. This argument is contrary to Delaware law: the Estate is the legal successor to its decedent and is bound by her conduct. No provision of Section 2704 insulates the Estate from this straightforward application of Delaware law.

ARGUMENT

I. LAVASTONE DID NOT CONCEDE THAT SECTION 2704(B) CONFERS AN UNLIMITED CAUSE OF ACTION ON ESTATES.

The Estate argues that, by taking no position on Question 1, Lavastone concedes the answer that the Estate suggests. Lavastone conceded neither a yes nor no to Question 1; the Question simply has no relevance where, as here, the policy at issue was supported by insurable interest under Delaware law. Moreover, as Lavastone noted in its Opening Brief, a policy on which the carrier pays a death claim cannot practically be "void," since all parties have performed their contractual obligations. OB at 13-14. Lavastone takes no position on how the Court should resolve the notable tension, described by both the District Court and the *Amicus Curiae*, between the holding of *Price Dawe* and Section 2704(b) for the simple reason that the Estate has no cause of action under Section 2704(b) here. Ex. A at § (3) (¶ 3(a.)); Brief of *Amicus Curiae* Institutional Longevity Markets Association In Support of Appellant Lavastone Capital LLC at 5.

II. THERE IS NO UNLAWFUL HUMAN LIFE WAGER WHEN THE INSURED OWNS AND CONTROLS THE POLICY AT ITS INCEPTION.

The Estate's entire argument in response to Certified Question 2 is premised on a misapplication of *Price Dawe*, a decision in which the Court did not address premium financing transactions where an insured controls her policy for two years, but, instead, outlined factors that help identify unlawful human life wagers. AB at 20-23. The Estate asserts that, "if a third party provides the insured with the financial means to pay the policy premium – whether through a non-recourse loan or by any other means – then the third party has procured the policy" and, thus, the policy is an unlawful wager. AB at 20-21. This argument is fundamentally wrong under *Price Dawe*, the facts of this case, and the definition of a wager.

A. To Determine Whether A Transaction Is An Unlawful Wager, The Court Must Determine Who Owned And Controlled The Policy At Inception.

This Court held in *Price Dawe* that it is necessary to "scrutinize the circumstances under which the Policy was issued" to determine whether or not the policy is an unlawful wager. *Price Dawe*, 28 A.3d. at 1076. While *Price Dawe* noted that determining who paid policy premium is part of that inquiry, that decision did not address use of premium financing to pay policy premium on a policy an insured owned and controlled for years. Instead, *Price Dawe* addressed a scenario in which "a third party financially induces the insured to procure a life insurance

policy with the intent to immediately transfer the policy to a third party." *Price Dawe*, 28 A.3d. at 1075. Because the transfer to the third party was contemplated at the inception of the policy, the third party had an interest in the policy and was wagering on the life of the insured, a stranger.

In contrast, no immediate transfer existed or was promised here. Moreover, premium financing is lawful, which the Estate concedes, so the mere fact that an insured borrowed money to pay premium cannot be the sole basis on which to find an unlawful wager. *See* 18 *Del. C.* § 4801 *et seq.*; AB at 2; OB at 24-25; *infra* at 11. When the facts of the PFP Program at issue here are scrutinized, they definitively show that no wager occurred.[1]

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[1] Lavastone has not improperly expanded the record as the Estate argues. AB at 4. Rather, Lavastone's Appendix consists only of those documents submitted to this Court by the District Court in its Certification of Questions along with the exhibits to those documents. *See* Cover Letter to Certification of Questions of Law, D.I. No. 157-1, at 1. Lavastone included these exhibits to comply with this Court's direction that a court must scrutinize the circumstances under which the policy was issued to determine whether it constitutes an unlawful human life wager. *Price Dawe*, 28 A.3d at 1076. It is therefore particularly notable that the Estate, which does not dispute the terms of the PFP Program or the District Court's finding that Berland owned and controlled the Policy, objects to this Court's review of the relevant, certified facts. AB at 4. Instead, the Estate wants this Court to ignore these facts and findings in favor of an alternate reality in which an unlawful wager occurred. This Court should examine the facts as certified and recognize that there is no unlawful wager here or in any non-recourse financing transaction in which the insured owns and controls the policy.

B. No Unlawful Wager Occurred Under The PFP Program.

In an unlawful human life wager, a wagerer uses a life insurance policy to gamble on the insured's death. *Price Dawe*, 28 A.3d at 1070-71, 1075-76; AB at 5-7, 22-23. Such wagers are unlawful if they exist at a policy's inception or as part of an immediate transfer of the policy to the wagerer or its designee – in those circumstances, if the insured dies, the third party wagerer benefits. In contrast, Delaware law permits an insured to sell her policy, consistent with the policy's terms and the Viatical Settlement Act (if applicable), to an investor, even though that investor may profit from her death. *See Price Dawe*, 28 A.3d at 1074 ("section 2720 of the Delaware Insurance Code makes life insurance policies assignable to anyone, even a stranger, *subject to any contractual restrictions in the policy*.") (emphasis in original). The buyer of such a policy has an interest in the insured's early death and is effectively wagering on her life, but such a "wager" is no different than that of a life insurance company that issues a life annuity;[2] the "wager" is lawful because the insured procured the policy. *Price Dawe*, 28 A.3d at 1069-70 ("all jurisdictions permit the transfer or sale of legitimately procured life insurance policies.").

[2] "Annuities are contracts under which the purchaser makes one or more premium payments to the issuer in exchange for a series of payments, which continue either for a fixed period or for the life of the purchaser or a designated beneficiary." *NationsBank of N. Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995).

In a nonrecourse loan program, like the PFP Program at issue here, there is no wager at inception because the insured owns the policy and the rights to the death benefit by design, and no stranger investor would profit from the insured's early death at the policy's inception. OB at 27-30; A1769-70. Nor is there an immediate transfer of the rights to the policy's death benefit or an agreement or promise of such transfer: neither the lender nor its agents has any right to require a transfer of the policy, and the loan is not due for more than twenty-six months after it is made. *Id.*; A869 ("*Scheduled Maturity Date"). Indeed, contrary to the Estate's misstatements, the facts show the only person who would have benefitted from Berland's death, had she died during her loan term, was her own hand-picked policy beneficiary, whom only Berland had the power to appoint or change. A60 (¶¶ 12-13), A875 (¶ 2), A879-80 (¶¶ 14, 16), A881 (Recitals), A885 (§ 5). This is the definition of insurable interest under Delaware law. *Price Dawe*, 28 A.3d at 1078 ("all persons ... 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.").

Trying to manufacture a wager with the facts here, the Estate argues that *all* of the PFP Program participants somehow wagered on Berland's life because they participated in a loan program, which culminated in Lavastone buying the Berland Policy (AB at 9-10, 23, 26, 41), that was designed "to recruit seniors to

insure, to later purchase the policies back from the seniors after the contestability period passed, and to profit upon the senior's (hopefully early) death." AB at 9-10.[3] But this argument assumes that the lawful loan and the lawful life settlement sale were required and controlled by parties other than Berland, which is disproved by the evidence here. Ex. A § (2) (¶ 3).

In fact, the insured's control over the policy was a critical element of the PFP Program's design. The terms of each PFP Program loan document granted the insured, not the lender, control over the policy. A1535-41, 1558-1562, 1769 ("the [insured] life retains the right to change beneficiaries as and when they choose"; "there is no requirement to sell or offer to sell their policy").

Moreover, even if the Estate were correct about the motives for designing the PFP Program, and it is not,[4] providing financing to a willing insured so that she can buy a life insurance policy that she hopes to sell at a later date is not

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[3] This argument ignores the record facts concerning Berland's intentional participation in the PFP Program to make money. Far from being "recruited" as the victim of some nefarious "scheme," it was Berland who "approached" Simba with the hope of selling policies for money. Ex. A § (2). She succeeded, reaping a profit of $73,594.05 on the Berland Policy. *Id*. § (2) (¶ 3).

[4] The PFP Program was designed to generate loan income for ABN-AMRO and "highly profitable" credit insurance premium for Lexington under the PFIC insurance provided to the bank. A216 ("Business Rationale"). Lavastone was not part of the PFP Program.

unlawful conduct. Under *Price Dawe*, insureds are free to procure policies for later sale using premium finance regardless of their intent. *Price Dawe*, 28 A.3d at 1069 ("[t]he secondary market for life insurance is perfectly legal"), 1074-1076 ("a life insurance policy that is validly issued is assignable to anyone, with or without an insurable interest, at any time."); *see* OB at 24-27. The fact that Lavastone, an affiliate of one of the PFP Program participants (Lexington), ultimately outbid its competitors to purchase the policy cannot transform the Berland Policy into an unlawful wager where no investor had an interest in Berland's death at the policy's inception or immediately thereafter.

The Estate effectively admits as much by arguing:

> "***from the moment*** the scheme worked as designed and Lavastone became the beneficiary of the death benefit, Lavastone had a direct financial interest in Ms. Berland dying as soon as possible (because the longer she lived, the longer Lavastone had to pay the premiums).

AB at 23 (emphasis added). The "moment" that Lavastone became the beneficiary of the Berland Policy was not at the Berland Policy's inception or immediately thereafter; it occurred twenty-six months after the policy's inception pursuant to a lawful life settlement when, after retaining three brokers to auction her policy, Berland chose to sell her policy to Lavastone, the high bidder.

The fundamental distinction between this case and *Price Dawe* is that both of the underlying cases giving rise to the certified questions addressed in *Price*

Dawe involved pre-arranged, immediate transfers of policies to stranger investors. *See PHL Variable Insurance Company*, *v. Price Dawe 2006 Insurance Trust*, No. 10-cv-00964(BMS) (ECF No. 1) at ¶¶ 20-21 (D. Del. Nov. 10, 2010) (alleging Policy was controlled from inception by investor); *Lincoln Nat. Life Ins. Co. v. Joseph Schlanger 2006 Ins. Tr.*, 2010 WL 2898315, at *2 (D. Del. July 20, 2010) ("***Before the Application was submitted***, the applicants allegedly contracted or arranged with a third party to sell the Schlanger Policy …. to a stranger investor.") (emphasis added). Thus, from each policy's inception in the cases underlying *Price Dawe*, strangers were wagering on the insureds' early death because they contractually owned and controlled those policies. In contrast, no stranger unlawfully wagered on Berland's death because she owned and controlled the Berland Policy until she sold it in a lawful life settlement that occurred over two years after she procured the Policy.

III. THE ESTATE MISCONSTRUES THE VIATICAL SETTLEMENT ACT.

The Estate argues that the Viatical Settlement Act is "inapplicable and irrelevant" to the Certified Questions at issue. AB at 28. Lavastone agrees that the Act is inapplicable – it post-dates the underlying transactions – but it is nevertheless relevant as it answers Certified Question 2 with respect to polices procured after 2017 and thus provides insight into public policy. With the Act, the Delaware Legislature restricted unlawful wagers but permitted the type of premium finance transaction that Berland used to procure her policy. The Act defines "viatical settlement contract" to include loan transactions that are disguised wagers, which are prohibited for five years from policy issuance, and to exempt loans like the LaSalle loan Berland used here, where the loan does not create a transfer or the obligation to make a future transfer. *Compare* 18 *Del. C.* § 7502(14)(b)-(c), *with* 18 *Del. C.* § 7511(a) (restricting viatical settlement contracts within five years of policy issuance); *see* OB at 19-21, *citing* 18 *Del. C.* § 7502(14)(b)-(c).

To answer Certified Question 2 differently than the Legislature did, and to hold that the loan used by Berland was a wager by third parties when the Berland Policy was issued, this Court would have to find that the Legislature effectively legalized with the Act what was previously an unlawful loan transaction.

Contradicting its argument that the Act is "irrelevant," the Estate argues that Section 7511(a)(3) of the Viatical Settlement Act would prohibit Berland's sale

of her policy for five years due to the nonrecourse loan. AB at 28. But that section of the Act does not prohibit an insured from procuring a policy with nonrecourse financing; rather, it only requires her to wait five years before selling the policy, a time moratorium that the Legislature determined should be imposed on viatical settlements. The Act prohibits any person from entering into a "viatical settlement contract" within a five-year period from the date of issuance of the policy, with certain enumerated exceptions. 18 *Del. C.* § 7511(a)(1)-(3).

The Act therefore not only confirms the Legislature's view that loans such as the loan Berland used here are lawful, it also includes carefully crafted language to apply the *Price Dawe* anti-wagering elements to analyses of transactions conducted within five years of policy issuance to avoid wagering. Thus, the Act demonstrates the public policy of Delaware as stated in *Price Dawe*, and then codified by lawmakers.

IV. THIS COURT SHOULD IGNORE THE IRRELEVANT DECISIONS ON WHICH THE ESTATE RELIES.

Unable to escape the determinative fact that Berland owned and controlled the Berland Policy under the terms of the PFP Program, the Estate directs this Court to the same decisions that the District Court found to be inapplicable and that Lavastone addressed and distinguished in its Opening Brief. *Compare* AB at 24-25, n.5, *with* OB at 27, n.9. However, despite Lavastone's explanation regarding the factual differences between those cases and the one before this Court, the Estate asserts that the factual records in those decisions are "materially identical to the record in this case." AB at 24. In fact, all of those decisions are materially distinguishable because none involved factual findings that the insured owned and controlled the policy from its inception, as the District Court found here. Ex. A § (2) (¶¶ 2-3).

Each of the cases relied on by the Estate turned on that court's determination that a third party had made a wager on the insured's life and that the insured had no control over the policy. OB at 27-30. The record here is devoid of any wager by a third party, and is irrefutable that Berland controlled the Policy. Ex. A § (2) (¶¶ 2-3).

The only case that Lavastone did not address in its Opening Brief is *Estate of Phyllis M. Malkin v. Wells Fargo Bank, N.A., as Securities Intermediary, et al.*, 2021 WL 2149344 (11th Cir. May 27, 2021) ("*Malkin II*"), which was decided

after the Opening Brief was filed. That decision is as unhelpful as the other cases relied on by the Estate and cannot be reconciled with the District Court's decision below which held that *Price Dawe* does not apply to premium finance cases not involving an immediate transfer. Ex. A. § 3, ¶¶ 2., 3.(b). The *Malkin II* Court has certified questions to this Court, which have been accepted, but its holding that the policy there is void, to which the Estate cites, is no more authority on the subject that this Court is addressing here in Question 2 than the other decisions already discussed.[5]

Notwithstanding the inapplicability of *Price Dawe* to the insured's use of premium financing, the Eleventh Circuit in *Malkin II* found that Coventry and Simba (the agent for the insured) created an "illegal wagering contract by which

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[5] Unlike the Eleventh Circuit, the United States Court of Appeals for the Second Circuit has rejected attempts by estates and family trusts to recover policy proceeds in two cases where the underlying facts of a pre-arranged transfer to third parties were far more egregious than the record here. *John Hancock Life Ins. Co. of New York v. Solomon Baum Irrevocable Family Life Ins. Tr.*, 357 F. Supp. 3d 209, 212-213 (E.D.N.Y. 2018), *aff'd*, 783 F. App'x 89 (2d Cir. 2019); *Lincoln Nat'l Life Ins. Co. v. Inzlicht-Sprei*, No. 16-cv-5171 (PKC) (RML), 2020 WL 1536346, at *2 (E.D.N.Y. Mar. 31, 2020), *aff'd*, 847 F. App'x 97 (2d Cir. 2021) ("*Inzlicht-Sprei*"). On May 17, 2021, the Second Circuit held in *Inzlicht-Sprei* that the estate could not recover under a New York statute that is virtually identical statute to 18 *Del. C.* § 2704(b) because, even though the insured's only active role in procuring the policy was the medical exam and signing application forms in blank, she "came up with the idea to purchase and sell a policy on her life." *Inzlicht-Sprei*, 847 F. App'x at 99.

Coventry gambled on the insured's life and from which Coventry and Simba profited." *Malkin II*, 2021 WL 2149344 at *7. Here, the record is irrefutable that neither Coventry nor Simba wagered on Berland's life because they were paid fees and commissions regardless of whether she lived or died and had no ownership interest in the Berland Policy. A1783, ¶ 26; A1419, § 3.02(d); A1679-80, § 4.1; OB at 27-20.

The *Malkin II* court also found that "Coventry paid the initial premium" on the policy, seemingly ignoring its conclusion that Coventry was an administrator and servicing agent for LaSalle, the bank that made the loan. *Malkin II*, 2021 WL 2149344 at *3. Here, the role of Coventry Capital I LLC as agent for LaSalle, the lender under the PFP Program, has been clearly presented: LaSalle made the loan to Berland's trust, for which the risk of default was insured by Lexington, and Coventry's only recompense was fees, not an interest in the Berland Policy's death benefit.[6] The compensation paid to Simba and Coventry would be identical whether

[6] Any argument that LaSalle was not the real lender is directly rebutted by the record evidence. *See* OB at 28-30. The Delaware Department of Insurance reviewed the PFIC policy issued by Lexington under the PFP Program and concluded that premium earned under the PFP Program should be recorded on the company's annual statement as credit insurance issued to protect a lender, rebutting the Estate's insinuation that the loan was a sham transaction by a "nominal" lender to disguise a wager. A1770-72; AB 8-9.

Berland lived or died during the term of her loan, and therefore neither Simba nor Coventry was wagering on Berland's life. *See* OB at 26-30.

The factual findings of *Malkin II* also disprove the Estate's claims of an unlawful wager by Lavastone or the parties to the PFP Program. In *Malkin II*, as here, the life insurance carrier paid the death claim on the policy and made no assertion that the policy was void. The loan was made there, as here, by LaSalle Bank (although the *Malkin II* court found that Coventry had paid initial premiums) but the policy was *not* acquired by Lavastone, debunking the Estate's assertion in its Answering Brief that Lavastone used the loan program to acquire policies. *Malkin II*, 2021 WL 2149344 at *1; AB at 9-10, 23.

The Eleventh Circuit also misapplied *Price Dawe* by ignoring the distinctions between lawful and unlawful wagers. The court recognized that certain "STOLI schemes inherently conflict with § 2704(a) because they allow circumvention of the insurable interest requirement by having the insured purchase the policy in his own name ***with the speculator's money*** (***and, ultimately, for the speculator's benefit***)." *Malkin II*, 2021 WL 2149344, at *4 (emphasis added). Yet the court then held, contrary to *Price Dawe*, that the policy at issue was an unlawful wager merely because a stranger "persuades a senior citizen to obtain a life insurance policy on his own life so that the policy can subsequently be transferred and sold in the market." *Id*. at *5; *see Price Dawe*, 28 A.3d at 1075-76.

Finally, the Eleventh Circuit reached its decision with full knowledge that this Court had accepted the Certified Questions at issue here, yet it ignored that this Court's determination that those questions presented unsettled questions of Delaware law. The Eleventh Circuit also simultaneously certified other "unanswered questions of Delaware law" concerning the application of the Delaware Uniform Commercial Code for this Court's review, which this Court has accepted. *Wells Fargo Bank, N.A., et al. v. Estate of Phyllis Malkin*, No. 172, 2021 (Del. June 3, 2021) (Certification of Questions of Law from the United States Court of Appeals for the Eleventh Circuit). As such, the *Malkin II* cannot be persuasive here.

V. AN INSURED'S INTENTIONAL SALE OF HER POLICY OR MISCONDUCT DURING HER LIFE BARS HER ESTATE'S RECOVERY UNDER SECTION 2704.

The Estate argues that this Court should hold that an insured's misconduct does not undermine her estate's cause of action under Section 2704(b) but ignores the impact of Berland's sale of all rights to the Policy. AB at 2-3, 35. Putting aside the Estate's dispute of the record facts about fraud on which Certified Question 3 is premised (AB at 33), both Berland's fraud and her voluntary relinquishment of rights for money bar the Estate's claim.

First, with few exceptions not relevant here, an estate is the decedent's legal successor in interest of all causes of action that could be asserted by or against the decedent. *See* 10 *Del. C.* § 3701; *Est. of Farrell ex rel. Bennett v. Gordon*, 770 A.2d 517, 521 (Del. 2001) ("[t]he obvious purpose of the survival statute 'all causes of action' are assertable against the estate of any deceased person, whether the person dies before or during the pendency of the litigation."); *Snow v. Webb*, 563 A.2d 1059, 1062 (Del. Super. 1989), *overruled on other grounds by Parker v. Breckin*, 620 A.2d 229 (Del. 1993) ("where a person whose tortious conduct has caused injury has died, the proper defendant is the person who is authorized to administer the estate of the deceased tortfeasor."), *citing* 10 *Del. C.* § 3701. The Estate, therefore, has inherited Berland's conduct during her life.

The Estate completely ignores, and does not dispute, the facts found by the District Court that Berland sold her policy for $453,822.88, directed a portion of the proceeds to repay the loan from LaSalle, and retained a profit, after that repayment, of $73,594.05. Ex. A § (2) (¶ 3.). As a result of this sale, Berland gave up all rights to the Policy. A1102-1105, A1166-67, §§ 4-7, 14. The terms of Berland's sale were binding on her and they are binding on the Estate under bedrock principles of Delaware contract law. *Shields Dev. Co. v. Shields*, 1981 WL 7636, at *5 (Del. Ch. Dec. 8, 1981) (estate administrator bound by contract decedent made during his life "for his own benefit"); *Pierce v. Higgins*, 531 A.2d 1221, 1226 (Del. Fam. 1987) ("The governing general principle of law is that an administratrix stands in decedent's shoes and has no greater or other rights or powers than the decedent would have had if living."). This Court recognized as much in *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156 (Del. 2010), where it held that a decedent could contractually waive his estate's statutory survivorship claim in advance of his own death. *Id.* at 1165. Berland's sale extinguished any rights she or her Estate had to the Policy or its proceeds.

Ignoring the legal effect of the sale, the Estate argues that Berland's fraud on both the life insurance carrier and the life settlement purchaser has no "legal effect" on the Estate's cause of action under Section 2704(b) "because the cause of action codified by § 2704(b) belongs to the Estate, not the insured" and is therefore

not derivative of the decedent's conduct. AB at 35-36. This argument misstates Delaware law. Regardless of whether the Estate's cause of action is "derivative" of a cause of action held by Berland during her life, an Estate is bound by its decedent's conduct and nothing in Section 2704 insulates the Estate from the straightforward application of Delaware law. *See* 10 *Del. C.* § 3701; *Snow*, 563 A.2d at 1062. Thus, to the extent Berland committed fraud, her fraud is binding on the Estate and Lavastone may assert defenses and causes of action based on that fraud to bar the Estate's recovery under Section 2704(b), irrespective of the fact that the statute authorizes it to bring a claim following her death.[7]

In support of this argument the Estate analogizes its cause of action under Section 2704(b) to certain causes of action that Delaware law grants to a decedent's spouse following the decedent's wrongful death. AB 36 (discussing *Skinner v. Peninsula Healthcare Servs., LLC,* 2021 WL 1054101, at *1 (Del. Super. Mar. 19, 2021); *Parlin v. Dyncorp Int'l, Inc*., 2009 WL 3636756, at *6 (Del. Super. Sept. 30, 2009)). But causes of action that are granted to certain individuals who are

[7] Section 2704(b) also permits an insured to sue for benefits paid during her life. 18 *Del. C*. § 2704(b). While the Berland Policy here did not provide for lifetime benefits, many policies do, which the statute recognizes by permitting an insured or her estate to bring an action. The Estate's argument would apply different rules to claims by insureds, who would be bound by their conduct, than to claims by their estates, a result nowhere supported by law or legislative history.

legally distinguishable from the decedent and her estate are inapplicable to the question here. *See Skinner*, 2021 WL 1054101, at *1 (recognizing husband may have independent cause of action from deceased wife). Moreover, both *Skinner* and *Parlin*, like *Deuley*, recognize that an estate's cause of action may be waived by the decedent's conduct during his life, just as Berland waived the Estate's claim here when she sold the Policy. *Parlin*, 2009 WL 3636756, at *5; *Skinner*, 2021 WL 1054101, at *2; *Deuley*, 8 A.3d at 1165.

The absurdity of the Estate's argument that it is immunized from Berland's conduct is highlighted by the conflicting positions it has taken before this Court. In Appellee's Brief In Response to *Amicus* Briefs ("AR"), the Estate argues that an investor who purchases a policy in a life settlement may pursue remedies against the seller, in the event an insured's estate brings a claim under Section 2704(b). AR at 20. But the Estate simultaneously argues in its Answering Brief that estates are immune from liability for a seller's conduct during her life. AB at 35-36. The Estate cannot have it both ways.

As claims under Section 2704(b) necessarily arise after the insured's death and may only be asserted by the insured's estate, the Estate is effectively asking this Court for immunity from multiple counts of insurance fraud: first, when an insured like Berland procures a policy through fraud by misrepresenting her net worth and again by allowing her estate to profit after the insured has fraudulently

induced an investor into purchasing her policy through misrepresentations concerning net worth and insurable interest. In her Policy and loan applications, Berland misrepresented her financial condition and falsely stated that she was not procuring the Policy for later sale. A480; Ex. A § 2 ¶ 2.[8] She then sold her Policy to Lavastone for a substantial profit, representing to Lavastone that the Policy was supported by an insurable interest and that the information provided in her application for the Policy, including her statements concerning her net worth, were accurate. A1105, 3.1(xi), (xii), (xiii); A1166-67, §§ 4-7, 14. Berland's representations concerning her net worth and intent to sell were demonstrably false, and, by bringing this lawsuit, the Estate necessarily claims that Berland misrepresented the existence of insurable interest. Yet the Estate simultaneously asserts that Berland should reap further profits from her misrepresentations by her Estate receiving the entire death benefit paid under the Policy that Berland fraudulently induced Lavastone into buying. No statutory provisions or principles of equity justify such an absurd windfall. Accordingly, the Estate's claim must be barred both by Berland's fraud and her voluntary sale of the Policy.

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[8] Lavastone was comfortable with Berland's use of the PFP Program because it had been designed to prevent wagering by granting control of the policy to the insured and had been rigorously reviewed by outside law firms and senior counsel at AIG and American General Life Insurance Company. A230, ¶ 8; A1769-70; *see supra* at 8.

CONCLUSION

For all the foregoing reasons, and those stated in Lavastone's Opening Brief, a life insurance policy procured by the insured with premium financing is supported by an insurable interest and is freely transferable so long as it complies with *Price Dawe* and the Delaware Viatical Settlement Act. A policy the insured procures with nonrecourse premium financing cannot be an unlawful human life wager where the insured owns and controls the policy at its inception. Even if such a policy somehow lacked an insurable interest, an insured's estate is chargeable with the insured's conduct during her life, which should bar the Estate from recovery under Section 2704(b) where the insured intentionally sold the policy or was a knowing participant in the conduct that caused the policy to be void as an unlawful human life wager.

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2021, the foregoing ***Appellant's Reply Brief*** was served by File & Serve*Xpress* on the following attorneys of record:

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