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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

REPLY BRIEF OF AMICUS CURIAE INSTITUTIONAL LONGEVITY MARKETS ASSOCIATION IN FURTHER SUPPORT OF APPELLANT LAVASTONE CAPITAL LLC

BAYARD, P.A.
Stephen B. Brauerman (No. 4952)
600 N. King Street, Suite 400
Wilmington, DE 19899
(302) 429-4232

Attorneys for Institutional Longevity Markets Association

Of Counsel:

PILLSBURY WINTHROP SHAW PITTMAN LLP
Joseph D. Jean
Andrew C. Smith
Benjamin D. Tievsky
31 West 52nd Street
New York, New York 10019
(212) 858-1000

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The United States District Court for the District of Delaware has asked this Court to clarify certain issues relating to Delaware Insurance Law under 18 *Del. C.* § 2704 and this Court's prior decision in *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust*, 28 A.3d 1059 (Del. 2011) as they apply to the sale of a life insurance policy by an insured to an investor (a "life settlement"). The Institutional Longevity Markets Association ("ILMA") respectfully submits the following reply *amicus curiae* brief due to the importance of the certified questions to Delaware's life settlement industry.

PRELIMINARY STATEMENT

While the Estate sought and received leave to "respond" to ILMA's *amicus* brief, it instead proceeded to file a brief that: (i) contains baseless procedural objections to ILMA's brief (after the Estate did not object to ILMA's motion for leave); (ii) misrepresents ILMA's position with respect to harmonizing an estate's statutory remedy, dependent on the existence of a contract, with the holding of *Price Dawe* that no contract ever came into existence for policies with no insurable interests; (iii) misapprehends the role of "due diligence" in the tertiary life settlement market, and injects other unresponsive arguments untethered to the Certified Questions; and (iv) mischaracterizes ILMA's prior *amicus* brief in *Price Dawe* to support a false narrative that ILMA's arguments have already been rejected (when, in fact, the misquoted language from ILMA's prior brief was endorsed by this

Court).

In short, the Estate's "response" does not respond to any of ILMA's substantive arguments in any meaningful regard. Instead, it mischaracterizes ILMA's positions and responds to its own strawman arguments. ILMA respectfully submits this reply to correct and clarify the record.

INTEREST OF AMICUS CURIAE

This Court has already accepted for consideration *amicus curiae* ILMA's brief in support of Lavastone Capital LLC ("ILMA Brief" or "ILMA Br.") (D.I. 23). As interested *amicus curiae*, ILMA now seeks to address certain arguments and contentions raised by Plaintiff-Appellee Estate of Beverly E. Berland (the "Estate")—including arguments misattributed to ILMA—in the Estate's Brief in Response to Amicus Briefs (D.I. 34) ("Opp. Br.").

ARGUMENT

I. IT WAS PROPER FOR ILMA TO RESPOND TO THE FIRST CERTIFIED QUESTION.

The Estate argues that this Court should not consider ILMA's position on the First Certified Question because Lavastone does not advance this position in its principal brief or substantively address the First Certified Question. (Opp. Br. 4.) The Estate contends, therefore, that ILMA improperly "injects" its argument harmonizing *PHL Variable Ins. Co. v. Price Dawe 2006 In. Tr., ex. rel Christiana Bank & Tr. Co.*, 28 A.3d 1059 (Del. 2011) ("*Price Dawe*")[1] and 18 *Del. C.* § 2704(b). The Estate is wrong.

First, Rule 28 of the Supreme Court of the State of Delaware does not provide that an *amicus* brief must parrot the substantive arguments of the principal brief of which it is filed in support. Instead, Rule 28 provides that proposed *amicus* briefs be filed in connection with a "[m]otion for leave to file" that must clearly set out: "(1) the movant's interest; (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case; and (3) whether the parties to the appeal consent to or oppose the motion for leave to file." DEL. SUPR. CT. R. 28(b). ILMA filed its motion for leave to file a brief of amicus curiae on April 21, 2021 (D.I. 20) ("Motion for Leave to File"), in which it described its

[1] Unless indicated otherwise, capitalized terms herein have the meaning ascribed to them in the ILMA Brief.

significant interests in, and its learned and unique perspective on, each of the three certified questions.[2] The Estate did not oppose ILMA's Motion for Leave to File. Motion for Leave to File ¶ 7. On April 26, 2021 this Court granted ILMA's Motion for Leave to File (D.I. 21) ("April 26th Order") without reservation or limitation.

Accordingly, ILMA did not, as the Estate suggests, "inject" an argument on an irrelevant question into this lawsuit via its *amicus* submission. (Opp. Br. 4.) Rather, Third Circuit Judge Bibas specifically identified the inconsistency between *Price Dawe* and 18 *Del. C.* § 2704(b) that ILMA seeks to harmonize in responding to the First Certified Question. And this Court *accepted* that question for certification. Moreover, Judge Bibas expressly invited input of *amici* in responding to each of the three certified questions, and this Court accepted ILMA's status as *amicus* to assist this Court in providing guidance on all three certified questions (without objection from the Estate).[3] As a major industry participant with a significant interest in the outcome of all three legal questions certified to this Court, ILMA was entitled to provide its unique perspective and insight on each of the certified questions in order to assist the Court. Tellingly, the Estate acknowledges that it addressed this substantive issue (and devoted no less than four pages to it) in

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[2] *See* Motion for Leave to File ¶ 1 ("This appeal involves discussion of three certified questions, each of which is of great important to ILMA and life settlement market participants in Delaware[.]").

[3] *See* Certification Order at 7 (noting that "[a]ssistance of amicus curiae might be welcome.") (D.I. 157).

its answering brief yet argues that ILMA should not be permitted to do so. (Opp. Br. 6) (citing Estate's Answering Brief at 15-19 (D.I. 27)). The Estate simply cannot square this fact with its present argument that ILMA has somehow "injected" this issue through its *amicus* submission when it is manifest that Judge Bibas identified the issue and this Court accepted it for certification.

Second, the Estate attempts to sidestep Rule 28 and the Court's April 26th Order by citing to *Turnbull for Turnbull v. Fink* ("*Turnbull*"), for the proposition that *amici* may not raise separate or additional issues for consideration by an appellate court when appellant is represented by counsel. 644 A.2d 1322, 1324 (Del. 1994), *cited at* Opp. Br. 5. *Turnbull* is inapposite in almost every facet: (i) the case was up for review on claim of error, not for consideration of certified questions; (ii) the appellants expressly stated in their opening brief that they declined to raise issues related to constitutionality of certain limits imposed by the Delaware Code and instead deferred to *amicus curiae* to address those issues in its brief; (iii) appellants never raised the relevant constitutionality argument in their briefing; and (iv) the appellee properly raised this objection in opposition to *amicus curiae's* motion for leave to file a brief of *amicus curiae*.[4] Here the Court accepted the certified questions for consideration, including the First Certified Question, and the

[4] ILMA notes that the Court in *Turnbull* granted *amicus curiae's* motion for leave to file and afforded appellants 15 days to file an amended appellants' brief including the relevant constitutional argument. *See Turnbull*, 644 A.2d at 1324-25.

Estate did not oppose ILMA's Motion for Leave to File. Only now, in response to ILMA's substantive arguments, does the Estate attempt to prevent the Court from considering them on procedural grounds.

Finally, the Estate's suggestion that the doctrine of *stare decisis* somehow bars this Court's consideration of ILMA's response to the First Certified Question (Opp. Br. 5-7) makes no sense. In essence, the Estate argues that, despite having accepted Judge Bibas's invitation to clarify the conflict between an aspect of the *Price Dawe* holding and the statutory remedy for estates provided by the Delaware Legislature, this Court is prohibited from considering *amicus* input on this novel issue because it is bound by a previous ruling that never considered this question. Putting aside the Estate's hypocrisy in pressing its own analysis on this issue while seeking to bar ILMA's, resolution of the First Certified Question is not "a point of law" that "has been settled" by a decision of this Court that is afforded precedential weight. (Opp. Br. 5.) Indeed, the Estate's suggestion that this Court previously "rejected" ILMA's arguments in *Price Dawe* related to harmonizing Delaware's life settlement jurisprudence with the statutory remedy provided by 18 *Del. C.* § 2704(b) (Opp. Br. 6) is simply incorrect. Nether the Court, nor any of the parties—including *amici*—ever identified, let alone discussed, the conflict that exists between *Price Dawe*'s conclusion that insurance policies that violate 18 *Del. C.* § 2704(a) are void *ab* initio, and therefore not contracts at all, and the statutory remedy established by

the Legislature for estates under 18 *Del. C.* § 2704(b), which expressly exists only for payments made pursuant to a "contract".

ILMA has complied with Rule 28 and its positions are now properly before this Court for consideration alongside those of the parties.

II. THE ESTATE MISREPRESENTS ILMA'S POSITION ON THE FIRST CERTIFIED QUESTION.

Unable to launch a serious procedural challenge, the Estate proceeds to attack ILMA's substantive response by attributing arguments and positions to ILMA that it did not make or take. Specifically, the Estate accuses ILMA of ignoring over 100 years of common law establishing the right of an estate to "sue an investor for the death benefit of a policy lacking an insurable interest." (Opp. Br. 7.) Likewise, the Estate argues that adopting ILMA's position would somehow preclude any estate challenges brought under § 2704(b) outside of the 2-year contestability period. (Opp. Br. 8.) Neither of these positions is supported by ILMA's *amicus* brief because ILMA never made either of those arguments. To the contrary, ILMA's *amicus* brief seeks to "effectuate the legislative purpose of providing a statutory remedy to innocent estates." (ILMA Br. 5.)

Frankly, it is surprising that the Estate is arguing this point. There is nothing in the Statute that limits the time within which an estate may seek its remedy for payments made "under any contract" nor has ILMA ever made any such argument. Concluding that a policy that violates the Insurable Interest Statute is void *ab initio* (rather than simply voidable) only benefits the *insurance company*, not *the estate*, and allows insurance companies to challenge the validity of their own insurance policies beyond the 2-year contestability period by claiming that the contract never came into existence and, therefore, that they are not bound by the legislatively

required contestability clause. But the same conclusion – that there was no contract to begin with – is inconsistent with and defeats the Estate's statutory remedy that *depends on the existence of a contract*. The Estate's vehement opposition of ILMA's position that seeks to harmonize the *Price Dawe* decision with this statutory remedy, therefore, makes no sense. As a result, it is a mystery why the Estate would even take a position on the inconsistency between *Price Dawe* and the legislative remedy, let alone fight so hard to prevent the Court from considering *amicus*' position on this issue.

Simply put, ILMA is not trying to eviscerate the remedy for estates—it is offering the Court a way to harmonize that statutory remedy (which is predicated on a payment "under any contract") with the decision in *Price Dawe*, by reexamining *Price Dawe*'s holding that policies that violate § 2704(a) are not, in fact, "contracts." By doing so, ILMA is not seeking to "ignore" the common law rights of estates codified under § 2704(b), or trying to limit the time within which to assert such rights. It is trying to make such rights enforceable under this Court's prior precedent. Put differently, if this Court agrees with ILMA that policies that violate § 2704(a) are not void *ab initio* — but rather, voidable at the insurance carrier's discretion — then plaintiffs in the Estate's shoes will *benefit* from that decision.

III. THE ESTATE MISUNDERSTANDS THE ROLE OF DILIGENCE IN THE *TERTIARY* MARKET AND MISCONSTRUES ILMA "BEST PRACTICES" GUIDANCE FOR THE *SECONDARY* MARKET.

The Estate contends that "the *secondary market* is populated by sophisticated investors, trading multi-billion-dollar securitized pools of life insurance policies, who have long understood the risks and who have been advised of the importance of conducting thorough due diligence of the assets they purchase." (Opp. Br. 9. (emphasis added).) That assertion (even if true) is not applicable to ILMA's members. As ILMA noted in its opening brief, its members are the leading institutional investors in the *tertiary life settlement market*. (ILMA Br. 4.) These investors are active in buying, selling, and trading securitized life settlement investment portfolios containing (often) hundreds of life insurance policies. They are not involved in either the origination of life insurance policies or the secondary market in which life settlement providers purchase policies directly from insureds.

In support of its argument, the Estate points to ILMA's "Provider Best Practices" document, which recommends that appropriate diligence be taken to prevent the securitization and sale of STOLI policies into the tertiary market. (Opp. Br. 10-11.) This reliance is misplaced. ILMA's "Provider Best Practices", by its express terms, is directed to secondary market *providers* and not tertiary market ILMA members. The document urges such *providers* to avoid acquiring STOLI policies by undertaking robust diligence prior to purchasing policies from policy

holders. The "Provider Best Practices" diligence recommendations, cited by the Estate (Opp. Br. 10-11), would not be feasible for ILMA tertiary market members who are far removed from the policy procurement process and have no contact with insureds, their financial or other advisors, or brokers or other intermediaries.[5]

The Estate's reliance on certain industry publications and government documents is equally misplaced.[6] Unlike secondary market actors who can and should perform extensive diligence to determine whether a policy they purchase may be STOLI, tertiary market actors seeking to acquire previously securitized policies cannot realistically perform such policy-specific diligence, nor do they have access to the insureds or intermediaries to whom such diligence would be directed.[7] Put

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[5] *See e.g.*, "Provider Best Practices", included at Opp. Br. Exs. B047-056, Item C ("Providers should complete a phone interview with the insured and the policy seller […] covering the items set forth in Exhibit D.") (emphasis in original); Item G ("Providers should retain or have on staff a medical professional or underwriter capable of comparing policy applications to medical records for material discrepancies. If discrepancies are found, Providers should implement practices such as (i) ensuring that the medical records which include a discrepancy were provided to the insurance company at the time of underwriting, (ii) contacting the insurance company to determine whether the carrier had knowledge of the discrepancy, and/or (iii) any other method designed to ensure that any discrepancies were not caused by the fraud of the insured or insurance applicant….").

[6] For example, the Estate cites to a 43-page Securities and Exchange Commission ("SEC") task force report on the Life Settlement industry, which notes, in relevant part that "[investor] risk may be compounded, because whether a settled policy is the result of a STOLI transaction may be very difficult for investors to determine." SEC Life Settlement Task Force, *Staff Report to the United States Securities and Exchange Commission*, Opp. Br. Exs. at B148-49.

[7] ILMA rejects the Estate's insinuation that its role in the tertiary life settlement market somehow motivates STOLI promoters to generate fraudulent, high-value policies. (*See* Opp. Br. 9, n.6.) In fact, ILMA's "Life Settlement Best Practices," extensively cited by the Estate in its Opposition Brief, makes clear that "[p]roviders should develop and follow procedures designed to" prevent the acquisition and securitization of STOLI policies. (*Cited at* Opp. Br. 9-10.)

another way, ILMA members require that secondary market providers comply with the ILMA "Provider Best Practices" so that members can be assured that they are purchasing policies from providers that have carried out exacting diligence prior to purchasing those policies from primary market actors. Accordingly, the Estate's entire "due diligence" argument is without merit and does not properly respond to any of the issues raised in ILMA's brief.

Furthermore, the Estate's extensive reliance on various pre-*Price Dawe* authorities is untethered to the Certified Questions in this matter, and unresponsive to the points raised in ILMA's *amicus* brief specifically relating to the Certified Questions and developments since the *Price Dawe* decision. (*See* Opp. Br. 11-15.) Finally, the Estate's reference to the specific factual circumstances surrounding the Berland Policy at issue in the underlying dispute (*see* Opp. Br. 15) is not relevant to this Court's consideration of the Certified Questions. Fact-specific determinations of this kind remain properly within the discretion of the trial court.

IV. THE ESTATE MISCHARACTERIZES ILMA'S PRIOR *AMICUS* BRIEF IN *PRICE DAWE*.

The Estate likewise mischaracterizes ILMA's prior positions before this Court as an *amicus* in the *Price Dawe* matter. Implying that ILMA had previously made arguments that were rejected by this Court, the Estate erroneously asserts:

> If these fatalistic assurances sound familiar to the Court, it is because they are. In 2011, ILMA filed an *amicus* brief in *Price Dawe* in which it predicted that resolution of the issues in the manner the Court ultimately resolved them would "eliminate" the secondary market for life insurance. (B017). ILMA argued that a decision contrary to its position "would decrease the demand for, and the value of, the policies in the Delaware life settlement market" and "would primarily harm Delaware insureds." (B019).

(Opp. Br. 18.) But the Estate is wrong. This Court *agreed* with ILMA on the certified question that ILMA was addressing in the out of context and misleadingly quoted language from ILMA's prior brief. Specifically, ILMA was addressing *Price Dawe*'s second certified question, in which the insurer sought, and this Court rejected, an "intent" standard for determining an insurable interest:

> The result sought by Appellant would allow virtually unlimited challenges to lawful transactions based on largely circumstantial evidence of an insured's intent. … This would lead to insurers arguing that the fact that a policy was transferred is itself evidence that the insured intended to sell it from the outset – a claim that would be difficult to respond to without the [deceased] insured's testimony. **This would decrease the demand for, and the value of, policies in the Delaware life settlement market**, as investors would have to take into account the increased risk of litigation in determining whether to purchase, and how much to pay for, policies.
>
> Creating a prohibition against procuring policies with the intent to

> transfer them **would primarily harm Delaware insureds** – the very people insurable interest laws are designed to protect.

(B018-19 (language quoted by Estate in bold).) In rejecting the Appellant's position on this question, this Court held that "the insured's subjective intent for procuring a life insurance policy is not the relevant inquiry." *Price Dawe*, 28 A.3d at 1076. Accordingly, the Estate's commentary that "[o]ver a decade later, the doom and gloom *amici* promised has not developed" is misplaced. (Opp. Br. 18.)

CONCLUSION

For the reasons stated herein and in the Brief of Amicus Curiae Institutional Longevity Markets Association in Support of Appellant Lavastone Capital LLC (D.I. 23), this Court should answer all three certified questions in the **negative.** If this Court is not willing to answer the first question in the negative, it should modify *Price Dawe*'s holding that policies that violate § 2704(a) are void, *ab initio*, in light of the conflict between that holding and the legislative remedy provided in § 2704(b), which is explicitly tied to the existence of a "contract."

Dated: July 15, 2021

Respectfully submitted,

/s/ Stephen B. Brauerman

BAYARD, P.A.
Stephen B. Brauerman (No. 4952)
600 N. King Street, Suite 400
Wilmington, DE 19899
sbrauerman@bayardlaw.com
(302) 429-4232
Attorneys for Institutional Longevity Markets Association

Of Counsel:
PILLSBURY WINTHROP SHAW PITTMAN LLP
Joseph D. Jean
Andrew C. Smith
Benjamin D. Tievsky
31 West 52nd Street
New York, New York 10019
joseph.jean@pillsburylaw.com
andrew.smith@pillsburylaw.com
benjamin.tievsky@pillsburylaw.com
(212) 858-1000

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1. This brief complies with the typeface requirement of 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word Version: Office 365.

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/s/ Stephen B. Brauerman
Stephen B. Brauerman