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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WELLS FARGO BANK, N.A., as Securities Intermediary, and BERKSHIRE HATHAWAY LIFE INSURANCE COMPANY OF NEBRASKA,	)	No. 172, 2021
Defendants/Appellants/Cross-Appellees,	)	Certification of Questions of Law from the United States Court of Appeals for the Eleventh Circuit
v.	)	C.A. No. 19-14689 D.C. No. 1:17-cv-23136-MGC
ESTATE OF PHYLLIS M. MALKIN, Plaintiff/Appellee/Cross-Appellant.	)	

OPENING BRIEF OF APPELLANT BERKSHIRE HATHAWAY LIFE INSURANCE COMPANY OF NEBRASKA

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NATURE OF THE PROCEEDINGS

This proceeding addresses two certified questions of law from the United States Court of Appeals for the Eleventh Circuit. The underlying case concerns the proper disposition of the proceeds from a life insurance policy ("the Policy") on the life of Phyllis Malkin, which Berkshire Hathaway Life Insurance Company of Nebraska ("Berkshire") purchased as part of a portfolio of policies in 2013. Ms. Malkin procured the Policy using premium financing (i.e., a loan to pay the premiums), in pursuit of what the Eleventh Circuit described as a "risk free opportunity to make money." Ex. A, at 4. That is, she intended to sell the Policy to an investor on the open market, use the proceeds to pay back her premium loan, and retain the profit. She was ultimately unable to sell the Policy, however, and so she relinquished it to the lender. The Policy changed hands several times, eventually being purchased by Berkshire.

Berkshire was not involved in Ms. Malkin's procurement of the Policy. When it purchased the Policy, Berkshire received warranties, based in part on those originally made by Ms. Malkin, that the policies were procured in compliance with applicable insurance laws. Berkshire paid premiums on the Policy, and after Ms. Malkin passed away, the life insurance company paid the Policy's death benefit to Berkshire. Standing in Ms. Malkin's shoes, her estate (the "Estate") then sued Berkshire and its securities intermediary, Wells Fargo Bank, N.A. ("Wells Fargo";

collectively, "appellants"), claiming that the Estate is entitled to recover the Policy's proceeds under Section 2704(b) of the Delaware Insurance Code, 18 *Del. C.* § 2704(b), because Ms. Malkin had applied for the policy in 2006 as part of an illegal "stranger-originated life insurance" transaction.

In addition to defending the Policy's validity, Berkshire and Wells Fargo asserted an affirmative defense under Section 8-502 of Delaware's Uniform Commercial Code ("UCC"), which protects the reliance interests of innocent investors by barring adverse claims against "a person who acquires a security entitlement . . . for value and without notice of the adverse claim." 6 *Del. C.* § 8-502. Wells Fargo also relied on UCC Section 8-115, which bars claims against a securities intermediary. In addition, Berkshire counterclaimed for unjust enrichment, alleging that if Berkshire was ordered to pay the Policy's death benefit to the Estate, Berkshire would be entitled to restitution in the amount of the premiums that Berkshire paid on the Policy.

The district court held on summary judgment that the Estate was entitled under Section 2704(b) to recover the policy proceeds from Berkshire and Wells, and it rejected appellants' UCC and unjust-enrichment defenses.

In a nondispositive opinion, the Eleventh Circuit affirmed the district court's finding that the Policy was void for lack of an insurable interest and certified two questions to this Court. On June 3, 2021, the Court accepted these questions:

1. If an insurance contract is void under Del. Code Ann. tit. 18, § 2704(a) and *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, ex rel. Christiana Bank & Trust Co.*, 28 A.3d 1059, 1073 (Del. 2011), is the party being sued under § 2704(b), as a third-party purchaser of the contract and holder of the proceeds, entitled to assert either a bona fide purchaser defense under Del. Code Ann. tit. 6, § 8-502, or a securities intermediary defense under Del. Code Ann. tit. 6, § 8-115?

2. If an insurance contract is void under Del. Code Ann. tit. 18, § 2704(a) and *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, ex rel. Christiana Bank & Trust Co.*, 28 A.3d 1059, 1073 (Del. 2011), can the party that is being sued under § 2704(b) recover premiums it paid on the void contract?

Ex. A, at 31; No. 172, 2021 Order (June 3, 2021). Because the securities intermediary defense under UCC Section 8-115 applies only to Wells Fargo, this brief does not address that aspect of the first certified question.

This Court is currently considering certified questions concerning the proper interpretation of Section 2704(a) and (b) in *Lavastone Capital LLC v. Estate of Beverly E. Berland*, No. 75, 2021.

SUMMARY OF ARGUMENT

The certified questions concern whether the Section 2704(b) right of action to recover a void policy's death benefit overrides the defenses under the UCC and principles of equity that are available to innocent commercial actors in every other setting. This Court should protect the certainty and stability of commercial transactions by holding that the UCC innocent-investor defense, and principles of unjust enrichment, have full effect in suits under Section 2704(b).

1. The Court should answer the first certified question in the affirmative and hold that an innocent downstream investor in a life insurance policy who is sued under Section 2704(b) may assert an affirmative defense under UCC Section 8-502.

a. *First*, a party in Berkshire's position satisfies the statutory elements of the defense because it holds a security entitlement to a financial asset—the policy's death benefit—which it acquired for value and without notice of adverse claims. The Estate nonetheless contends, relying on decisions refusing to permit a bona fide purchaser to enforce void contracts or deeds, that the Policy's invalidity prevents Berkshire from relying on Section 8-502. But Berkshire is not seeking to use bona fide purchaser principles to enforce its contractual rights under a void policy. The Policy (whether or not it was void) has been rendered irrelevant: the parties to the Policy—Berkshire and the insurer, AIG—have performed their obligations under the Policy and the Policy has been reduced to proceeds. Berkshire paid premiums,

and AIG paid the death benefit to Berkshire. It is that death benefit that Berkshire obtained for value and without notice—and that the Estate seeks in this action.

b. *Second*, Section 2704(b) does not render the Section 8-502 defense categorically unavailable. Because Section 8-502 merely provides an affirmative defense to a subset of defendants in a Section 2704(b) action, there is no conflict between the two statutes. That conclusion is reinforced by equitable and public-policy considerations. As between the estate of an insured who participated in an illegal transaction, and an innocent downstream investor like Berkshire, the equities clearly favor the investor. Moreover, Delaware's enactment of the UCC reflects the importance of certainty in commercial transactions. Holding the UCC unavailable here would disregard that important policy and vitiate the legitimate market in life insurance policies.

2. The Court should answer the second certified question in the affirmative and hold that when an estate recovers policy proceeds under Section 2704(b), a defendant in Berkshire's position may be entitled to an offset to recover the premiums it paid while it held the policy. Permitting the estate to recover *more* than it would have if the insured had kept the policy and paid premiums would unjustly enrich the estate—which stands in the shoes of an insured who was involved in the policy's illegal procurement—to the detriment of an innocent third party. That

result is not required by Section 2704(b), and it would turn the equitable principles underlying unjust enrichment on their head.

STATEMENT OF FACTS

I. BACKGROUND

A. Delaware law holds that life insurance policies are fully alienable. 18 *Del. C.* § 2720. In the 1980s, insureds began selling their policies in order to monetize them during their lifetimes, creating a market known as the "life settlement market." *See* Staff Rep. to U.S. Sec. & Exch. Comm'n, Life Settlements Task Force 3-4 (July 2010).[1] That market, now worth billions of dollars, benefits insureds by permitting them to sell policies at a market value that typically far exceeds the cash surrender values offered by their insurance companies. *See, e.g.*, Afonso V. Januário & Narayan Y. Naik, *Empirical Investigation of Life Settlements: The Secondary Market for Life Insurance Policies*, at 3 (June 2013).[2]

B. The life settlement market is facilitated by Delaware's insurable-interest rules. An individual may procure a policy on her own life "for the benefit of any person," whether or not the beneficiary has an insurable interest in the insured's life (that is, an interest in having the insured's life continue). 18 *Del. C.* § 2704(a). The insured may also sell her policy to a third party, such as an investor, who need not have an insurable interest. *PHL Variable Ins. Co. v. Price Dawe 2006*

[1] https://www.sec.gov/files/lifesettlements-report.pdf.

[2] http://facultyresearch.london.edu/docs/Life_Settlements_FULL-_10_June_2013.pdf.

Ins. Tr., ex rel. Christiana Bank & Tr. Co., 28 A.3d 1059, 1069-70, 1076 (Del. 2011) ("*Price Dawe*").

By contrast, if a third party procures "insurance on the life of another," the death benefit must be payable to a person with an insurable interest. 18 *Del. C.* § 2704(a). A corollary to that rule is that "a third party having no insurable interest" may not evade the insurable-interest requirement by inducing the insured to procure a policy on the third party's behalf. *Price Dawe*, 28 A.3d at 1073-74.

Section 2704(b) provides that if the "beneficiary, assignee or other payee under any contract" made in violation of Delaware's insurable-interest requirements receives a death benefit from the insurer, the insured's estate "may maintain an action to recover such benefits from the person so receiving them." 18 *Del. C.* § 2704(b). In 1968, when Section 2704(b) was enacted, the secondary market for life insurance policies did not yet exist. The typical defendant in such an action therefore would have been the wrongdoing third party that collusively procured the policy on the insured's life. Today, by contrast, the defendant tends to be—as here—an investor who has purchased the policy downstream in the life settlement market, and who had no involvement in the transaction in which the policy was originally procured. *See, e.g.*, Ex. F at 2 (*Estate of Beverly E. Berland v. Lavastone Cap. LLC*, No. 1:18-cv-02002-SB, D.I. 157 (D. Del. Mar. 2, 2021) ("*Berland* Order")); *Est. of Daher v. LSH Co.*, 2021 WL 184394, at *3 (D. Del. Jan. 19, 2021).

Although Section 2704(b) has not been frequently invoked, the plaintiffs in recent cases tend to be the estates of insureds who procured life insurance policies as investment vehicles, using nonrecourse premium financing. In *Berland*, for example, the insured procured a $5 million policy and sold it on the life settlement market; after repaying the premium loan, the insured retained over $73,000 in profit. Ex. F, at 2 (*Berland* Order). Berland's estate now seeks to recover the policy's $5 million death benefit from the investor who ultimately bought the policy, paid premiums, and received the death benefit. *Id*. at 3. Similarly, here Ms. Malkin procured the Policy with the intent to sell it for a profit, but she was unable to do so and relinquished the Policy in satisfaction of the premium loan. Her estate now seeks to recover the Policy's proceeds from Berkshire, which purchased the Policy on the life settlement market, paid the required premiums, and received the death benefit.

II. THE MALKIN POLICY AND PROCEEDS

In 2005, Ms. Malkin approached The Simba Group LLC ("Simba"), an insurance broker whose clientele consisted of "healthy seniors with excess wealth who did not wish to purchase life insurance for their own personal use, but who wanted to make money off of their life insurance capacity." Ex. A, at 4. The Malkins "were simply interested in" what Simba presented as a "risk free opportunity to make money." *Id.* Ms. Malkin obtained a $4 million policy from AIG through Simba.

A166; A135-163 (Policy). She financed the premium payments with a nonrecourse loan, secured by the Policy, from LaSalle Bank. A317-318 ¶ 11; *Estate of Phyllis Malkin v. Wells Fargo Bank, N.A.*, No. 17-23136-Civ (S.D. Fla.), Dkt. No. 132-8 (note and security agreement between Malkin Trust and LaSalle Bank)[3]; Dkt. No. 132-13 (settlor-trustee agreement).

Ms. Malkin separately executed an agreement, drafted by her estate planning attorney, providing that her "plan will be to sell" the Policy "and retain the proceeds, after payment of all expenses and loans relating to" the Policy. A166. When Ms. Malkin attempted to sell the Policy in 2008, the Great Recession was underway and Ms. Malkin was unable to find a buyer. Dkt. No. 135-33, at 49. Ms. Malkin opted to satisfy the loan balance by relinquishing her rights to the Policy to Coventry Capital as servicing agent for LaSalle Bank. Ex. A, at 7; A270 ¶ 121. Coventry First LLC—a distinct company that acquires and sells life insurance policies—then bought the Policy. A247-248, ¶ 8; A169-178 (purchase agreement between Malkin Trust and Coventry First); A278 ¶ 4. Consistent with representations Ms. Malkin made in her loan application, the sale documents warranted that the Policy was supported by an insurable interest. A180 ¶ 7; A318-319 ¶¶ 13-14; A171-172 § 3.1(xi)-(xiii).

[3] "Dkt. No." refers to the electronic docket of the district court in this case, unless otherwise specified.

The Policy "changed hands several times" on the life settlement market. Ex. A, at 7. In June 2013, Berkshire purchased the Policy, including all rights thereunder, from LST Holdings Limited as part of a portfolio of 125 policies. A179-180 ¶¶ 3-5; A322 ¶ 23; A200-201 § 2.01. The purchase agreement includes a representation that none of the policies "originated in connection with a STOLI transaction." A208 § 4.08(c). In addition, Miravast, a company specializing in life settlements, detected no insurable-interest issues. A180 ¶¶ 5-6. Based in part on these assurances, Berkshire paid $322,102 for the Policy, and subsequently paid an additional $137,194.20 in premiums on the Policy to AIG. A322 ¶ 23. Berkshire had no knowledge of the circumstances of the Policy's procurement or any potential insurable-interest problem. A180-181 ¶¶ 6-13.

Wells Fargo served as Berkshire's securities intermediary—that is, a bank that holds a securities account for an account holder, 6 *Del. C.* § 8-102(a)(14). Pursuant to a securities agreement, Berkshire and Wells Fargo proceeded under Article 8 of the UCC, which governs the rights of parties who hold financial assets, such as securities and other property, through a securities intermediary. Wells Fargo thus agreed to hold the Policy and all proceeds as a financial asset under the UCC. A183-184 § 2; A131-132 ¶¶ 69-72.

In 2014, after Ms. Malkin passed away, AIG issued to Wells Fargo as securities intermediary a $4,013,976.47 check representing the Policy's death

benefit. A194-197. Wells Fargo credited that amount to Berkshire's securities account. *Id.*; A183-184 § 2(c)-(d); A89-90 ¶¶ 9-12.

III. FEDERAL PROCEEDINGS

A. In August 2017, Ms. Malkin's Estate filed this lawsuit in the United States District Court for the Southern District of Florida, contending that the Policy lacked an insurable interest and seeking to recover the Policy's death benefit under Section 2704(b) from appellants. As relevant here, appellants asserted that the Policy did not violate the insurable-interest requirement, and that even if it did, the suit was barred under UCC Section 8-502, which provides that "[a]n action based on an adverse claim to a financial asset . . . may not be asserted against a person who acquires a security entitlement under Section 8-501 for value and without notice of the adverse claim." 6 *Del. C.* § 8-502. Wells Fargo also asserted a securities-intermediary defense under Section 8-115.

Berkshire also counterclaimed for unjust enrichment, contending that if the Estate was entitled to the Policy's proceeds, Berkshire was entitled to an offset in the amount of the premiums it paid. A325 ¶¶ 41-47. Finally, Berkshire alleged that Malkin had made misrepresentations in applying for the Policy and the premium loan. A323-325 ¶¶ 26-40.

B. The district court granted summary judgment to the Estate. The court held that the Policy lacked an insurable interest, and that Section 2704(b)

categorically supersedes appellants' UCC defenses. Ex. E, at 14-22. The court also dismissed Berkshire's counterclaims for unjust enrichment and misrepresentation. Ex. C; Ex. D, at 19-20.

C. The Eleventh Circuit, in a nondispositive opinion, affirmed the district court's determination that the Policy was void under Section 2704(a) and certified the questions at issue here to this Court.

The court of appeals first held that the Policy lacked an insurable interest. The court explained that Ms. Malkin had not wanted insurance, but instead was "interested in Simba's risk free opportunity to make money." Ex. A, at 4 (internal quotation marks omitted). The court held that Ms. Malkin herself had not procured the Policy because she ultimately paid no premiums out of her own pocket—that is, she used a non-recourse loan to pay the premiums, and when she was unable to sell the Policy, she relinquished it to satisfy the loan. Despite the fact that the insurable-interest requirement applies only at the time of the policy's procurement, 18 *Del. C.* § 2704(a), the court rejected as "irrelevant" the evidence that at procurement, Ms. Malkin intended to sell the Policy on the market and repay the premium loan out of the proceeds, and therefore understood herself to be obligated to pay the premiums. Ex. A, at 14-15; *cf.* A166.

The court also characterized as "irrelevant" the evidence that Ms. Malkin had no arrangement with any third party at the Policy's inception that she would transfer

the Policy to the third party, and that she took an active role in the transaction. Ex. A, at 14-15, 19-20. The court understood *Price Dawe* to hold that the insured "must purchase the policy for lawful insurance purposes." *Id*. at 16. Scrutinizing "the circumstances under which the AIG Policy was issued," the panel concluded that "we believe those circumstances do not show Ms. Malkin, Simba, and Coventry intended to purchase the Policy for lawful insurance purposes."[4] *Id.* at 17-18.

The Eleventh Circuit then certified to this Court questions concerning appellants' UCC defenses and Berkshire's unjust-enrichment claim.[5] Ex. A, at 30-32.

[4] Although the Eleventh Circuit's holding represents law of the case for purposes of this Court's consideration of the certified questions, *Rales v. Blasband*, 634 A.2d 927, 931 (Del. 1993), Berkshire respectfully disagrees with the conclusion that the Policy lacks an insurable interest. This Court's forthcoming decision in *Lavastone Capital*, No. 75, 2021, may elaborate on the proper standard for determining whether a policy lacks an insurable interest. Therefore, although Berkshire assumes for purposes of this briefing that the Policy is void, Berkshire reserves the right to ask the Eleventh Circuit to reconsider its insurable-interest holding if warranted.

[5] The court also vacated the dismissal of Berkshire's misrepresentation claims and deferred decision on prejudgment interest. Ex. A, at 24-29.

ARGUMENT

Delaware law fosters the life settlement market by expressly permitting the sale of life insurance policies. 18 *Del. C.* §§ 2720, 2704. That market benefits individual insureds by permitting them to use their life insurance policies as sources of income, and it also benefits institutional investors such as Berkshire by enabling them to invest in assets whose performance is not tied to the overall economy. Delaware also has chosen to protect the stability of the market for transactions in financial assets such as insurance policies by enacting Article 8 of the UCC, which provides a defense to a party that acquires a security entitlement in a financial asset "for value and without notice of the adverse claim." 6 *Del. C.* § 8-502.

This case involves the intersection of Delaware's protection of the life settlement market with its prohibition against insurance policies that lack an insurable interest. The district court held, and the Estate agrees, that Section 2704(b) requires that the insured's estate recover a void policy's death benefit *in all cases*, thereby overriding the defenses under the UCC and principles of equity that would be available to innocent commercial actors in every other commercial setting. Accepting that extreme position is not necessary to further Delaware's prohibition on illegal life insurance transactions, and it would severely undermine the life settlement market. This Court should accordingly hold that the UCC Section 8-502 defense is available to defendants in a Section 2704(b) action. The Court should at

minimum hold that a party in Berkshire's position may be entitled to offset any award to the estate by the amount of premiums it paid.

I. UCC SECTION 8-502 PROVIDES AN AFFIRMATIVE DEFENSE TO A THIRD-PARTY PURCHASER OF AN INSURANCE POLICY IN AN ACTION UNDER SECTION 2704(b).

A. Question Presented

The Eleventh Circuit certified for this Court's review the following question:

> If an insurance contract is void under Del. Code Ann. tit. 18, § 2704(a) and *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, ex rel. Christiana Bank & Trust Co.*, 28 A.3d 1059, 1073 (Del. 2011), is the party being sued under § 2704(b), as a third-party purchaser of the contract and holder of the proceeds, entitled to assert either a bona fide purchaser defense under Del. Code Ann. tit. 6, § 8-502, or a securities intermediary defense under Del. Code Ann. tit. 6, § 8-115?

Ex. A, at 31.[6]

As to Section 8-502, this question encompasses two subsidiary issues: (1) whether, and in what circumstances, the downstream purchaser of an insurance policy that turns out to be void may be entitled to UCC Section 8-502's protection against adverse claims; and (2) whether Section 2704(b) abrogates Section 8-502, such that the protection against adverse claims that would be available in every other context is not available to a Section 2704(b) defendant.

B. Scope of Review

This Court reviews certified questions of law *de novo*. *See, e.g.*, *United States v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1123 (Del. 2020).

[6] Berkshire does not address the securities intermediary defense under UCC Section 8-115, which applies only to Wells Fargo.

C. Merits of Argument

This Court should hold that UCC Section 8-502 provides a party in Berkshire's position with a defense to a Section 2704(b) claim. The voidness of the underlying insurance policy does not change that conclusion. This case is not about a policy that does not exist for legal purposes; it is about the death benefit, which does exist and which Berkshire acquired for value and without notice within the meaning of the UCC. Notwithstanding the Policy's invalidity, the parties performed their obligations under the Policy: Berkshire paid premiums, and AIG paid the death benefit to Berkshire. Because the policy has already been fully performed, upholding Berkshire's entitlement to the death benefit under Section 8-502 does not entail enforcing the Policy despite its voidness. To the contrary, to recognize Berkshire's entitlement is simply to uphold the rights of an innocent downstream investor as against those of the representative of an insured who participated in the illegal insurance transaction.

The Court should further hold that Section 2704(b) does not conflict with Section 8-502, such that both may be given full effect. That result recognizes Delaware's important policy interest in protecting legitimate reliance interests in the life settlement market, while giving appropriate effect to Delaware's policy against illegal insurance transactions.

1. A downstream purchaser of a life insurance policy is entitled to the protection of UCC Section 8-502 notwithstanding the policy's invalidity.

a. A party in Berkshire's position satisfies the elements of the Section 8-502 defense.

Section 8-502 provides that "[a]n action based on an adverse claim to a financial asset . . . may not be asserted against a person who acquires a security entitlement under Section 8-501 for value and without notice of the adverse claim." 6 *Del. C.* § 8-502. To establish that it is entitled to the Section 8-502 defense, a party in Berkshire's position must show that (1) it holds a "security entitlement" to a "financial asset"; (2) that it acquired that security entitlement "for value and without notice of the adverse claim"; and (3) that this action is "an action based on an adverse claim to a financial asset." Berkshire satisfies each of Section 8-502's elements here as a matter of law.

i. *Security entitlement to a financial asset.* As an initial matter, the "financial asset" at issue in this case is the proceeds of the Policy, i.e., the death benefit that AIG paid to Berkshire. That follows from two points. First, because Section 2704(b) gives an estate a right of action "to recover *such benefits*" as the payee has received from the insurer, it is the Policy's proceeds that are at issue in this (and any) Section 2704(b) suit. 18 *Del. C.* § 2704(b) (emphasis added). Second, when such a suit is filed, the policy is by definition no longer in force, as such policies terminate upon payment of the death benefit. A151.

The Policy's death benefit constitutes a "financial asset" within the meaning of Section 8-502. "Financial asset" is defined to include "[1] any property [2] that is held by a securities intermediary for another person in a securities account if [3] the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under [UCC article 8.]" 6 *Del. C.* § 8-102(a)(9)(iii). The proceeds clearly constitute "any property." Wells Fargo and Berkshire expressly agreed in their Securities Account Control Agreement that Berkshire holds "a 'securities account' as such term is defined in Section 8-501(a) of the UCC"; that Wells Fargo would act as Berkshire's "securities intermediary" by taking direction from Berkshire; and that Wells Fargo would hold not only the Policy but also "the proceeds thereof," including any cash, "as 'financial assets' within the meaning of Section 8-102(a)(9) of the UCC." A183-184 § 2; 6 *Del. C.* § 8-102(a)(14).

For similar reasons, Berkshire holds a "security entitlement." *See* 6 *Del. C.* § 8-501(b)(1), (2); A183-184 § 2; A131-132 ¶¶ 69-72. A security entitlement arises, as relevant here, when a securities intermediary either (1) "indicates by book entry that a financial asset has been credited to the person's securities account," or (2) "receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account." 6 *Del. C.* § 8-501. The undisputed evidence demonstrates that Wells Fargo, as securities

intermediary, received the proceeds of the Policy from AIG on behalf of Berkshire and accepted the proceeds for credit to Berkshire's Securities Account (satisfying subsection (2)); and indicated the credit by book entry (satisfying subsection (1)). A183-184 § 2(c)-(d); A194-197; A89-90 ¶¶ 9-12; 6 *Del. C.* § 8-102(a)(9).

ii. *Acquisition for value and without notice*. Berkshire acquired its securities entitlement in the Policy's proceeds "for value." "[A] person gives value for rights if the person acquires them," as relevant here, "[i]n return for any consideration sufficient to support a simple contract." 6 *Del. C.* § 1-204. Berkshire paid $137,194.20 in premiums, as required by the terms of the Policy, in order to secure its right to obtain the Policy's death benefit. A322 ¶ 23. That is certainly sufficient consideration to support a contract.

Berkshire also obtained its securities entitlement without "notice" of the Estate's adverse claim. "Notice" is defined as actual knowledge, deliberate avoidance, or violation of a statutory or regulatory duty to investigate. 6 *Del. C.* § 8-105(a); *id*. cmt. 3. The Estate does not contend that Berkshire had notice as so defined. Nor could it. Berkshire received representations and warranties that the policies it purchased complied with insurable-interest requirements. A180-181 ¶¶ 6-13; p. 11, *supra*. Berkshire thus had no actual knowledge, and there is no evidence of deliberate avoidance. The Estate has argued that Berkshire should have known that the Policy might lack an insurable interest because some other policies had been

held void in other cases. A530-531. But the Estate has not suggested that Berkshire violated any statutory or regulatory duty to investigate, as the UCC would require.

iii. *Adverse claim*. Finally, the Estate asserts "an adverse claim to a financial asset." An "adverse claim" is "a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant" for the defendant to hold the asset. 6 *Del. C.* § 8-102. Here, the Estate claims a superior property interest in the Policy's death benefit because it relies on Section 2704(b), which confers on the Estate a right to file suit to "recover such benefits" as Berkshire has received. 18 *Del. C.* § 2704(b).

In sum, the elements of the Section 8-502 defense are satisfied here as a matter of law.

b. The invalidity of the underlying policy does not affect Section 8-502's application.

i. The Estate has argued that the Section 8-502 defense is categorically unavailable in a suit under Section 2704(b) in which the factfinder has concluded that the insurance policy is void. A517-521. But Section 8-502 contains no exceptions: the statute does not specify any circumstances in which the defense is unavailable. 6 *Del. C.* § 8-502. The invalidity of the underlying insurance policy therefore could render the defense unavailable only if that invalidity prevents one or more of Section 8-502's statutory prerequisites from being satisfied. But because the only financial asset subject to the Section 8-502 defense here is the policy's

proceeds—not the policy itself—none of the statutory prerequisites turns on the validity of the policy. *See* pp. 19-22, *supra*.

First, the Estate has contended that "a policy void *ab initio*" does not "exist[]" as a legal matter, and therefore cannot constitute a "financial asset." A517. But because a Section 2704(b) action seeks the policy's *proceeds*, it is the proceeds that must satisfy the definition of a "financial asset." The policy's proceeds indisputably *do* exist in Berkshire's securities account, and they equally clearly constitute "any property." 6 *Del. C.* § 8-102(a)(9)(iii).

Second, the Estate has contended that a void policy cannot give rise to a "security entitlement" in Berkshire's hands because the policy does not create any property interest. A517. That argument too is inapposite. Berkshire unquestionably has a "security entitlement" in the policy's *proceeds*. The UCC defines a "security entitlement" as the property rights that Berkshire, as entitlement holder, may exercise against Wells Fargo, as securities intermediary, with respect to the financial asset held in the securities account—here, the Policy's proceeds. 6 *Del. C.* § 8-102(a)(17) & cmt. ("security entitlement" is a package of rights against a securities intermediary); 6 *Del. C.* § 8-501 ("security entitlement" is acquired from the securities intermediary). Those rights do not arise out of, or depend on the validity of, the Policy; instead, they arise out of the Securities Account Control Agreement

in which Wells Fargo conferred on Berkshire a security entitlement to the Policy's proceeds under Article 8. A183-184 § 2; 6 *Del. C.* § 8-502 cmt. 2.

ii. Section 8-502's plain language thus establishes that the invalidity of an underlying insurance policy does not negate a payee's Section 8-502 defense with respect to the policy's proceeds. That result makes sense—and it also dovetails with the premises underlying Section 2704(b).

Even assuming that the Policy was void, that simply means that Berkshire had no contractual right to have AIG pay the policy's death benefit upon Ms. Malkin's death (and AIG had no contractual right to receive premiums from Berkshire). Regardless, Berkshire did pay the premiums, and AIG did pay the death benefit. The only party that would have had standing to contend that Berkshire had no contractual right to the proceeds—AIG—instead performed anyway. At that point, the validity of Berkshire's contractual rights against AIG became irrelevant, because both parties had performed, and Berkshire had obtained the Policy's proceeds for value and without notice of the Estate's adverse claim. Indeed, even if the Policy had been valid, it would have terminated upon payment of the death benefit. A151. There is no sound reason that the invalidity of an insurance policy that has already been reduced to proceeds should affect the availability of the Section 8-502 defense with respect to the policy's proceeds.

Permitting a policy's invalidity to vitiate the Section 8-502 defense as to the proceeds is also inconsistent with Section 2704(b)'s premises. Section 2704(b) provides a right of action to an estate only if the death benefit has been paid to the policyholder despite the policy's invalidity. The estate's very right to sue thus depends on the fact that the parties to the contract have gratuitously performed *despite* its voidness. *See* Ex. F, at 5 (*Berland* Order). Allowing an estate in a Section 2704(b) suit to turn around and rely on the policy's invalidity to negate defenses that otherwise would be available to the payee would permit the estate to have it both ways. That result would be illogical and unfair.

iii. The decisions on which the Estate has relied are not to the contrary.

First, the Estate has relied heavily on decisions declining to accord bona fide purchaser status to the holder of a mortgage based on a void deed. A518 (citing *Faraone v. Kenyon*, 2004 WL 550745, at *11 (Del. Ch. Mar. 15, 2004)). But decisions based on common-law bona fide purchaser principles say nothing about the availability of a defense under Section 8-502: as a creature of statute, the Section 8-502 defense is available if its statutory elements are fulfilled—as they are here, notwithstanding the policy's invalidity. In any event, the principles underlying common-law decisions concerning void deeds are inapposite here. *See* 6 *Del. C.* § 8-103(g) (with exceptions not relevant here, "a document of title is not a financial asset"). Such decisions reason that a void deed has no legal existence and therefore

cannot create and support downstream property interests; to recognize the downstream property interest would effectively be to enforce the void deed against others. *Faraone*, 2004 WL 550745, at *12. In the case of a contract that has already been performed and reduced to proceeds, however, the question whether the contract created a valid interest in the counterparty's performance has been rendered irrelevant. Regardless of the validity of the contractual right Berkshire purchased, AIG did perform, and Berkshire obtained the proceeds for value and without notice.

The Estate has also relied on decisions holding that the purchaser of a void *ab initio* policy may not rely on bona fide purchaser principles to *enforce* the terms of the policy against an insurer refusing to pay the death benefit. A519 (citing, e.g., *Pruco Life Ins. Co. v. Brasner*, 2011 WL 13117063, at *9 (S.D. Fla. Nov. 14, 2011)). But those decisions reason that a void contract cannot give rise to any contractual rights that are enforceable against the counterparty. Here, Berkshire does not seek to enforce a void contract—and, for the reasons stated above, applying the Section 8-502 defense in the circumstances presented here does not require the court to give effect to or enforce a void policy. This case is not about a contract that does not exist for legal purposes; it is about $4,013,976.47 that does exist and that Berkshire acquired for value and without notice.

2. Section 8-502 does not conflict with Section 2704(b), and both can be given full effect.

The certified question also encompasses the ground on which the district court rejected appellants' UCC defenses: the existence of a purported statutory conflict between Section 8-502 and Section 2704(b). No such conflict exists, and both provisions can be given full effect. Doing so furthers Delaware's important policy of protecting the reliability of commercial transactions without undermining the purposes of Section 2704(b).

a. As a matter of statutory construction, Section 8-502 should be given full effect in Section 2704(b) actions.

Delaware law holds that "when the General Assembly enacts a later statute in an area covered by a prior statute, it has in mind the prior statute," and the two statutes "must be construed together so that effect is given to every provision unless there is an irreconcilable conflict between the statutes, in which case the later supersedes the earlier." *State v. Fletcher*, 974 A.2d 188, 193 (Del. 2009) (citation omitted); *see Heath v. State*, 983 A.2d 77, 81 (Del. 2009). Here, there is no conflict, and if there were, Section 8-502 would prevail as the later-enacted statute.

Section 2704(b) provides that if the "beneficiary, assignee or other payee" under any contract made in violation of Delaware's insurable-interest requirements receives a death benefit, the insured's estate "may maintain an action to recover such benefits." 18 *Del. C.* § 2704(b). By providing that an estate "may maintain an

action," Section 2704(b) simply confers a right to sue on a category of parties who otherwise would lack state-law standing to enforce insurable-interest requirements. *See, e.g.*, *In re Al Zuni Trading, Inc*., 947 F.2d 1403, 1404 (9th Cir. 1991) (statute providing that an insured "may maintain an action" to recover policy proceeds confers standing to sue); *In re Est. D'Agosto*, 139 P.3d 1125, 1130 (Wash. Ct. App. 2006) (same). Indeed, Delaware statutes often use the "may maintain an action" formulation to confer a right of action. *See, e.g.*, 6 *Del. C.* §§ 15-405(a), 2708(b); 12 *Del. C.* §§ 3101, 3303(b).

Section 8-502 of the UCC provides a defense to otherwise-available causes of action to "a person who acquires a security entitlement . . . for value and without notice of the adverse claim." 6 *Del. C.* § 8-502. The provision "provides investors in the indirect holding system with protection against adverse claims," *id*. official cmt., furthering the UCC's overarching objective of "encouraging the efficiency and finality of transactions through a uniform and predictable application of the law," *Peters v. Riggs Nat'l Bank, N.A.*, 942 A.2d 1163, 1170 (D.C. 2008).

Causes of action such as Section 2704(b) are presumptively subject to defenses like that provided in Section 8-502. *See, e.g., Brady v. White*, 2006 WL 2790914, at *4 (Del. Super. Sept. 27, 2006); *Cohen v. Disner*, 36 Cal. App. 4th 855, 861 (1995) (California statutory claim was subject to, and did not conflict with, UCC defense, even though the statutory right of action did not mention the UCC defense);

Pierson v. Ray, 386 U.S. 547, 554 (1967) (42 U.S.C. § 1983, which provides a right of action against "[e]very person" acting under color of state law, is subject to various defenses). Thus, contrary to the district court's view, Ex. E, at 20-22, the legislature's mere provision of a right of action in Section 2704(b) does not suggest any intent that all defenses should be unavailable. And nothing in Section 2704(b) purports to expressly override any or all defenses that might otherwise be applicable.

In any event, even if one conceived of a cause of action and a defense as conflicting in some sense, Delaware law would require harmonizing the two provisions by giving effect to both. *See, e.g.*, *Chase Alexa, LLC v. Kent Cty. Levy Ct.*, 991 A.2d 1148, 1152 (Del. 2010). A cause of action and a defense may be harmonized simply by "incorporat[ing] the affirmative defense" into the cause of action, thereby giving both effect. *Coastal Agric. Supply, Inc. v. JP Morgan Chase Bank, N.A.*, 759 F.3d 498, 508 (5th Cir. 2014) (holding that UCC good-faith defense could be applied to common-law claims). To do so would simply shield a subset of purchasers of insurance policies—those who have received a policy's death benefit for value, with no notice of a potential insurable-interest problem, and who otherwise satisfy Section 8-502's prerequisites—from liability under Section 2704(b).

Giving Section 8-502 its full effect would not, as the Estate has suggested, leave Section 2704(b) with little practical import. As an initial matter, the typical defendant at the time of Section 2704(b)'s enactment would have been the

wrongdoing third party that collusively procured the policy on the insured's life—not any downstream purchaser that subsequently bought the policy as an investment. *See* p. 8, *supra*. The wrongdoing third party would not be entitled to the Section 8-502 defense because it would have notice of the insurable-interest problem. Applying the Section 8-502 defense therefore does not benefit the defendants the legislature would have had in mind in enacting Section 2704(b). The Estate has nonetheless argued that applying the Section 8-502 defense would render superfluous Section 2704(b)'s provision of a right of action against the "assignee" or "payee" of the policy's death benefits. A514. Not so. Although those terms are broad enough to encompass downstream third-party purchasers, those purchasers would be entitled to the Section 8-502 defense only if they satisfy that defense's prerequisites. Applying the Section 8-502 defense thus merely limits *which* assignees or payees may successfully be sued under Section 2704(b).

Finally, even if there were an irreconcilable conflict between the statutes, Section 8-502 must prevail because it is the later-enacted statute.[7] *See, e.g.*, *Fletcher*,

[7] Although a narrower version of UCC Article 8 predated the enactment of Section 2704(b), the current version of Section 8-502 reflects a "major revision" that substantially broadened the defense to encompass claims to "financial assets" rather than only "securities." 6 *Del. C.* art. 8, Refs & Annos, Prefatory Note; *see* 6 *Del. C.* §§ 8-102(a)(9), 8-502; 6 *Del. C.* §§ 8-301, 8-302, 8-102(1)(a) (1966). Section 8-502 is thus the later-enacted statute for harmonization purposes. *See, e.g.*, *Bash v. Bd. of Med. Prac.*, 579 A.2d 1145, 1151 (Del. Super. 1989).

974 A.2d at 193. Delaware's decision to adopt and maintain UCC provisions without modification to account for Section 2704(b) represents a policy choice. *See LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1072 (3d Cir. 1996); *Baker v. Gotz*, 387 F. Supp. 1381, 1391 (D. Del.), *aff'd*, 523 F.2d 1050 (3d Cir. 1975). That policy choice is presumed to take account of existing law, and in the event of a conflict, to supersede it. *See, e.g.*, *Fletcher*, 974 A.2d at 193.

b. As a matter of Delaware public policy, Section 8-502 should be given full effect.

The district court in this case held that Section 2704(b) precludes application of Section 8-502 "without exception and *as a matter of public policy*." Ex. E, at 20 (emphasis removed). That reasoning is incorrect. For one thing, the extent to which both statutes can be given effect is a matter of statutory construction rather than policy judgment. In all events, examining the policies underlying both statutes leads to the same conclusion: Section 2704(b) and Section 8-502 both can and should be given full effect.

i. Section 2704(b) reflects a determination that as a general matter, an insured's estate should be permitted to attempt to recover the policy's proceeds from the payee. But because rights of action are presumptively subject to defenses, the legislature's provision of a right of action has never been understood to reflect a policy judgment that plaintiffs should prevail on the merits in *all* instances. "[N]o legislation"—including rights of action—"pursues its purposes at all costs."

Mohamad v. Palestinian Auth., 566 U.S. 449, 460 (2012) (narrowly construing right of action for torture victims despite argument that doing so would render the right of action less powerful than Congress intended).

In all events, the policy judgments underlying Section 2704(b) must be understood in light of the insurance market that existed at the time of the provision's enactment. Any legislative judgment that the insured's estate was more deserving of the proceeds than the typical Section 2704(b) defendant in 1968—i.e., the wrongdoing third party itself—does not apply in the case of an innocent downstream investor *not* involved in the allegedly unlawful transaction. Barring the Section 8-502 defense would penalize *unknowing* investors—not the parties to the illegal transaction—thereby rendering *all* life insurance policies less attractive as investment vehicles. Given that Delaware has chosen to foster the life settlement market, the Court should hesitate before ascribing to the legislature an intent to discourage illegal transactions by injecting substantial uncertainty into the life settlement market *as a whole*.

Moreover, had the legislature considered the equities as between the type of defendant prevalent now—an innocent downstream purchaser in the life settlement market—and the insured's estate, the legislature could not possibly have viewed the estate's claim as categorically more deserving. In this case, for instance, the Eleventh Circuit held that Ms. Malkin procured the Policy not for "lawful insurance

purposes," Ex. A, at 18, but instead to pursue a "risk free opportunity to make money" by selling the Policy in the life settlement market without paying premiums, *id*. at 4. Ms. Malkin was by definition a participant in the scheme, and her estate stands in her shoes. *See Price Dawe*, 28 A.3d at 1075-76; *see Pierce v. Higgins,* 531 A.2d 1221, 1226 (Del. Fam. 1987). Whether or not one would characterize Ms. Malkin's actions as wrongful or inequitable on their own, there can be no question that as between her estate and an innocent downstream purchaser, the equities favor the downstream purchaser. *See Real Est. Tr. Co. of Phila. v. Washington A. & Mt. V. R. Co.*, 191 F. 566, 567 (3d Cir. 1911) ("[w]here one of two innocent persons must suffer by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud"). That conclusion has particular force in a case like *Berland*, where the insured succeeded in selling the illegal policy, thereby profiting off the transaction during her lifetime. *See* Ex. F, at 2-3 (*Berland* Order). Berland's estate thus seeks to use Section 2704(b) to obtain a double recovery. Although Section 2704(b) provides a right of action even in that situation, it strains credulity to think that the legislature affirmatively intended that an estate seeking to profit *twice* from an illegal

transaction should be able to do so regardless of any defenses the defendant would otherwise have.[8]

In sum, there is no reason to think that Section 2704(b) reflects any Delaware public policy that an estate of the insured who colluded in an illegal transaction should *at all costs* be entitled to the fruits of that transaction, even prevailing over an innocent downstream purchaser.

ii. Section 8-502 reinforces that conclusion, as it reflects Delaware's public policy in favor of promoting "the efficiency and finality of transactions." *Peters*, 942 A.2d at 1170. The UCC fosters that objective by protecting the rights and expectations of a third-party purchaser who lacks actual knowledge and was not willfully blind. *See* 6 *Del. C.* §§ 8-105, 8-502; *W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1132 n.5 (Del. 2010); *cf. Bankers Tr. Co. v. Litton Sys., Inc.*, 599 F.2d 488, 492-93 (2d Cir. 1979). In other words, the UCC facilitates commercial transactions by relieving downstream third parties of

[8] Indeed, holding that no otherwise-applicable defenses to Section 2704(b) are available could *undermine* Delaware's policy against unlawful insurance transactions by affording knowledgeable parties the opportunity to profit from the policy's sale *and* a later chance to use Section 2704(b) to obtain the entire death benefit. Moreover, given that the estate is better positioned than downstream purchasers to know the circumstances of a policy's issuance, it does not make sense to hold that the estate invariably has a superior claim to the proceeds.

any obligation to undertake extensive investigations before engaging in the transaction. *See Nat'l City Bank, Akron v. Azodi*, 62 Ohio Misc. 2d 746, 751 (1992).

That policy is especially salient here. The life settlement market consists of third parties buying and selling insurance policies that have been placed into commerce by the individual insureds who procured them. Often, as here, those policies then "change[] hands several times." Ex. A, at 7. As this case reflects, an institutional investor such as Berkshire receives warranties concerning the validity of the policies. *See* p. 11, *supra*. But because an illegal transaction "feign[s] technical compliance with insurable interest statutes," *Price Dawe*, 28 A.3d at 1074, it may be difficult or impossible for a nonparty to the original transaction confidently to determine whether it was illegal. In this case, for example, the Eleventh Circuit determined that the Policy lacked an insurable interest only after scrutinizing the insurance broker's practices and the course of conduct between Ms. Malkin, Simba, Coventry Capital, and AIG. Ex. A, at 15-19. A policy buyer in the life settlement market could not feasibly conduct a similar analysis—and even if it could do so, the need to do so for every single policy would present a significant transaction cost and would threaten the very existence of the life settlement market. That is precisely what the UCC seeks to avoid.

To hold that the UCC Section 8-502 defense is categorically unavailable in a Section 2704(b) action thus would vitiate the policies underlying the UCC in the

context of the life settlement market. But holding that the Section 8-502 defense is available when its elements are satisfied would not undermine the policies that should be understood to animate Section 2704(b). Defendants who were involved in the illegal transaction or otherwise have notice of its illegality have no UCC defense, while those entities that participate in the legitimate life settlement market would have the opportunity to demonstrate that they are entitled to the defense.

II. EVEN IF THE ESTATE IS ENTITLED TO THE PROCEEDS, BERKSHIRE SHOULD RECOVER THE PREMIUMS IT PAID.

At a minimum, if the Estate is entitled to the Policy's proceeds, Berkshire should receive an offset representing restitution for the amount it paid in premiums on the Policy (plus interest). Permitting the Estate to retain the proceeds without any setoff would be unjust enrichment.

A. Question Presented

The Eleventh Circuit certified the following question:

> If an insurance contract is void under Del. Code Ann. tit. 18, § 2704(a) and *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, ex rel. Christiana Bank & Trust Co.*, 28 A.3d 1059, 1073 (Del. 2011), can the party that is being sued under § 2704(b) recover premiums it paid on the void contract?

Ex. A, at 31.

This question encompasses two subsidiary issues: (1) whether, and in what circumstances, a policy's downstream purchaser may satisfy the elements of unjust enrichment in a case brought under Section 2704(b); and (2) whether, as the district court believed, Section 2704(b) abrogates an unjust enrichment counterclaim that a Section 2704(b) defendant would otherwise have under the common law.

B. Scope of Review

This Court reviews certified questions of law *de novo*. *See, e.g.*, *United States v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1123 (Del. 2020).

C. Merits of Argument

This Court should hold that a Section 2704(b) defendant that is ordered to pay the policy's death benefit to the estate is entitled to a restitutionary offset in the amount of the premiums it paid while holding the policy. The Court should further hold that Section 2704(b) does not abrogate common-law equitable claims for restitution to prevent unjust enrichment. Those conclusions are consistent with well-established principles of equity, the policies underlying Section 2704(b), and Delaware's important interest in safeguarding innocent downstream purchasers' ability to participate in the life settlement market.

1. This Court should hold that a party in Berkshire's position states a claim for unjust enrichment when it alleges that it has purchased a policy with no knowledge of any insurable interest problem; has paid premiums on that policy in the expectation of receiving the policy's death benefit; and is ultimately ordered under Section 2704(b) to turn over the policy's death benefit to the insured's estate.

Unjust enrichment is 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." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010). The elements of unjust enrichment "are (i) an enrichment, (ii) an impoverishment, (iii) a relation between the enrichment and impoverishment, (iv) the absence of justification, and (v) the absence of a remedy provided by law." *Id*.

"As its name implies, unjust enrichment is a flexible doctrine that a court can deploy to avoid injustice." *The Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 WL 1437308, at *42 (Del. Ch. Apr. 14, 2017). Because unjust enrichment is a matter of equity, the existence of a restitutionary remedy for unjust enrichment turns on the specific facts of a particular case.

a. Under the facts alleged here, each of the elements of unjust enrichment is satisfied, and permitting an offset comports with principles of equity. There can be no question that, if the Estate is permitted to recover the Policy's death benefit, the Estate will have been enriched as a result of Berkshire's payment of premiums. Had Berkshire not paid $137,194.20 in premiums, the Policy would have lapsed, and the Estate would have no death benefit to recover now. Berkshire's payment of premiums has left the Estate *better off* than if Ms. Malkin had procured the Policy for life insurance, not investment, purposes: in that scenario, she would have kept the policy and paid premiums, and upon her death, the Estate's net recovery would have been the death benefit minus any premiums that Ms. Malkin had paid. The Estate's gain is directly related to Berkshire's loss, as Berkshire paid the premiums out of pocket, and it will have to absorb that loss if it is required to turn over to the Estate the death benefit that Berkshire secured through its premium payment. *See,*

e.g., *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999). Finally, Berkshire does not have any other remedy at law to recover the premiums.[9]

There is no equitable justification for permitting the Estate to retain that benefit to Berkshire's loss. In purchasing the Policy, Berkshire acted as a participant in the life settlement market that Delaware has encouraged. And as Berkshire's counterclaim complaint alleges, Berkshire was free of any fault, as it was unaware of any insurable-interest issue and reasonably relied on warranties from both its counterparty and a life-settlement specialist. A310-311; *see* p. 11, *supra*. The Estate, by contrast, is seeking to benefit from Ms. Malkin's participation in an illegal transaction whose object was a "risk free opportunity to make money." Ex. A, at 4, 18. Permitting the estate of an insured to retain the premiums, such that the loss of the premium amount would fall entirely on an innocent downstream party that had nothing whatsoever to do with the illegal transaction, would turn equitable principles on their head. *Real Est. Tr. Co. of Phila.*, 191 F. at 567; *see* pp. 31-33, *supra*.

b. Delaware courts have recognized the availability of restitution to prevent unjust enrichment in circumstances similar to those presented here.

[9] If there were any doubt whether Berkshire failed to plead the elements of an unjust enrichment claim, Berkshire would be entitled to leave to amend, which it requested. *See* Dkt. No. 193, at 1; Dkt. No. 208, at 18.

In the related context in which an insurer refuses to pay a policy's death benefit to the policy's purchaser on the ground that the policy lacks an insurable interest, Delaware state and federal courts have held that principles of unjust enrichment permit the policyholder to recover its premiums in appropriate circumstances. *See, e.g.*, *Brighthouse Life Ins. Co. v. Geronta Funding*, 2019 WL 8198323, at *4 (Del. Super. Mar. 4, 2019) (holding that "[r]estitution exists as a remedy to unjust enrichment" in the case of a policy lacking an insurable interest, provided that claimant can show it was reasonably unaware of the insurable-interest problem); *Columbus Life Ins. Co. v. Wilm. Tr., N.A.*, 2021 WL 1820573, at *8-9 (D. Del. May 6, 2021); *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Tr.*, 774 F. Supp. 2d 674, 682 (D. Del. 2011); *Lincoln Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 565 (D. Del. 2010) (same); *Sun Life Assurance Co. of Can. v. Berck*, 719 F. Supp. 2d 410, 419 (D. Del. 2010). As these decisions have recognized, restitution should be available to prevent the insurer—who seeks to avoid paying the death benefit while retaining all of the premiums—from being unjustly enriched at the expense of the policyholder. *See, e.g.*, *Columbus Life Ins.*, 2021 WL 1820573, at *8-9; Restatement (Third) of Restitution and Unjust Enrichment § 32 (2011). Unlike in those cases, of course, Berkshire and the Estate are not contractual counterparties. But the availability of restitution to avoid unjustly enriching the insurer at the policyholder's expense demonstrates that equity protects the party that paid

premiums notwithstanding the voidness of the underlying policy. And there is no equitable distinction between the policyholders in those cases and a policyholder in Berkshire's position: both have paid premiums but do not receive (or retain) the death benefit because of an unknown-to-them insurable-interest problem.

Delaware courts also have permitted restitution in an additional context relevant here: where awarding damages to a plaintiff without an offset for the defendant's expenses would amount to unjust enrichment. *See Deere & Co. v. Exelon Generation Acqs., LLC*, 2014 WL 6674471, at *2 (Del. Super. Nov. 10, 2014) (declining to dismiss counterclaim for "an offset" against any damages to the plaintiff, where defendant incurred "substantial costs"); *Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *53 (Del. Ch. May 31, 2000) (corporate fiduciary subject to damages for breach of duty may receive a restitutionary offset as reasonable compensation for services "legitimately and beneficially performed for the plaintiff corporation[]"). Here, had Berkshire not paid premiums, the Estate would have no proceeds to recover. An offset in the amount of those premiums is therefore necessary to prevent the Estate from being unjustly enriched at Berkshire's expense.

2. Section 2704(b) does not require a different result. "The common law is not repealed by statute unless the legislative intent to do so is plainly or clearly manifested." *See, e.g.*, *A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A.2d 1114,

1122 (Del. 2009). Section 2704(b) reflects no such intent: it simply provides a right of action to recover the death benefit, without purporting to abrogate any common-law equitable defenses that the defendant may have.

Permitting an equitable setoff in Section 2704(b) cases in which the elements of unjust enrichment are satisfied does not undermine Section 2704(b)'s objectives. Section 2704(b) enforces the insurable-interest requirement by treating the estate as though the insured had procured the policy in a lawful insurance transaction. Insurance policies "do not come into effect without premiums," *Price Dawe*, 28 A.3d at 1076, and in a lawful transaction, an insured's estate would not receive the death benefit without having also paid premiums. Recognizing a setoff for premiums therefore is consistent with Section 2704(b) because it more closely approximates the position the estate would have occupied had the insured validly procured the policy. *See Technicorp*, 2000 WL 713750, at *53 (restitutionary setoff contemplates that "the property rights of the parties are readjusted remedially and after the fact to implement the maxim that equity regards as done that which should have been done") (internal quotation marks omitted). Permitting restitution therefore does not "defeat the policy of the underlying prohibition" on illegal transactions. Restatement (Third) of Restitution and Unjust Enrichment § 32 cmt. b.

Moreover, because restitution is a "flexible" doctrine, *The Frederick Hsu Living Tr.*, 2017 WL 1437308, at *42, courts may decline to permit an unjust enrichment claim in cases in which doing so would risk undermining Section 2704(b)'s policies. For instance, where the policy's payee has committed wrongdoing, equitable principles would not permit the payee to recover any of its premiums. *See* Restatement (Third) of Restitution and Unjust Enrichment § 63. Here, however, Berkshire had no knowledge of any potential insurable interest problem, and it relied upon express representations to the contrary. In that circumstance, principles of unjust enrichment amply support a restitutionary offset in the amount of the premiums that Berkshire paid.

CONCLUSION

For the foregoing reasons, this Court should hold that the UCC Section 8-502 defense is available to defendants in a Section 2704(b) action, and that a party in Berkshire's position may be entitled to offset any award to the estate by the amount of premiums it paid.

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