



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,

Defendants/Appellants/
Cross-Appellees,

v.

ESTATE OF PHYLLIS M. MALKIN,

Plaintiff/Appellee/
Cross-Appellant.

No. 172,2021

Certification of Questions of Law
from the United States Court of
Appeals for the Eleventh Circuit

No. 19-14689

D.C. No. 1:17-cv-23136-MGC

OPENING BRIEF OF APPELLANT WELLS FARGO BANK, N.A.

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**STATEMENT REGARDING ADOPTION OF
BRIEFS OF OTHER PARTIES**

To avoid repetition, Wells Fargo Bank, N.A. (“Wells Fargo”) joins in, and adopts by reference, the entirety of Section I of the Argument section of Appellant Berkshire Hathaway Life Insurance Company of Nebraska’s (“Berkshire’s”) opening brief filed July 7, 2021 (“Berkshire’s Brief”), which addresses Certified Question Number 1 regarding the application of certain defenses contained in the Delaware Uniform Commercial Code (“Delaware UCC”) to Section 2704(b) of the Delaware Insurance Code. Furthermore, and as noted in the relevant sections below, Wells Fargo also joins in, and adopts by reference, portions of the Nature of Proceedings and Statement of Facts sections of Berkshire’s Brief, with certain additions herein that are relevant to Wells Fargo-specific issues.

NATURE OF PROCEEDINGS

The issues before the Court concern the Estate's demand for the proceeds of a life insurance policy on the life of Phyllis Malkin (the "Policy"). Neither Wells Fargo nor Berkshire were involved in the application for, or procurement of, the Policy by Ms. Malkin in 2006. Rather, Berkshire purchased the Policy on the open market several years after it had been applied for by Ms. Malkin and issued by AIG. In connection with Berkshire's purchase of the Policy, Wells Fargo served *solely* in the limited role of a securities intermediary, and the Estate's complaint named Wells Fargo as a defendant *solely* in its capacity as a securities intermediary. Under the plain language of the Delaware UCC, this limited role of a securities intermediary should have wholly immunized Wells Fargo from liability in this lawsuit. Nevertheless, the Estate sued both Wells Fargo and Berkshire in federal court, alleging that the Estate is entitled to recover the Policy's proceeds under Section 2704(b) of the Delaware Insurance Code.

Wells Fargo filed an early motion for summary judgment based on the immunity granted to securities intermediaries under the Delaware UCC. Shortly before trial, the district court held that the Policy lacked an insurable interest, rejected Wells Fargo's UCC defenses, and granted summary judgment to the Estate under Section 2704(b). In a non-dispositive opinion, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's insurable interest finding under

Section 2704(b) and certified two questions to this Court, which this Court accepted on June 3, 2021.

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?

Eleventh Cir. Op. 31.

Wells Fargo joins in, and adopts by reference, the Nature of Proceedings section of Berkshire's Brief as it applies to Certified Question No. 1. While Wells Fargo acted solely as a securities intermediary with regard to the Policy, it endorses Berkshire's position and arguments regarding Certified Question No. 2.

SUMMARY OF ARGUMENT

Wells Fargo's only role in this matter is as a securities intermediary for the Policy proceeds. It is undisputed that Wells Fargo appropriately performed its role and disbursed the proceeds of the Policy to Berkshire immediately upon receipt in 2016. Under the Delaware UCC, Wells Fargo should have long ago been dismissed from this action, and the UCC's carefully crafted financial asset transfer rules should have been faithfully applied here.

1. The Court should answer the first portion of Certified Question No. 1 in the affirmative and hold that an innocent downstream purchaser of a financial asset such as a life insurance policy, or the securities intermediary receiving the financial asset in favor of that innocent purchaser—i.e., the entitlement holder—who is sued under Section 2704(b) may assert an affirmative defense under UCC Section 8-502. In addition, Wells Fargo is independently entitled to assert a bona fide purchaser defense under § 8-502 because, as Delaware law expressly provides, “a securities intermediary that receives a financial asset in favor of an entitlement holder is a purchaser for value of the financial asset.” Del. Code Ann. tit. 6, § 8-116.

2. The Court should also answer the second portion of Certified Question No. 1 in the affirmative and hold that the plain language of Section 8-115 of the Delaware UCC immunizes from liability a securities intermediary who has transferred the financial asset or its proceeds.

Section 8-115 of the Delaware UCC unambiguously provides such immunity to ensure that financial transactions are handled expeditiously and without fear of every ministerial transaction being turned into protracted litigation. Like any securities intermediary, Wells Fargo did not retain the financial asset for itself. Instead, in accordance with Section 8-115, Wells Fargo “acted promptly on the directions of [its] customer[.]” and immediately transferred the entire financial asset to Berkshire. Indeed, the parties are in complete agreement as to these key, relevant facts.

Moreover, there is no actual conflict between Section 8-115 of the Delaware UCC and Section 2704(b) of the Delaware Insurance Code. Section 2704(b) simply creates a cause of action to enable an insured’s estate to seek proceeds of an invalid policy. Recognizing the Delaware UCC’s securities intermediary defense to such a cause of action would not create any conflict. This Court can and should answer the certified question in the affirmative and find that the Estate’s claim against Wells Fargo is barred under Section 8-115 of the Delaware UCC. This outcome is strongly encouraged by Delaware’s public policy in favor of certainty and stability in commercial transactions. The flawed analysis applied by the district court has the effect of imposing strict liability – to the tune of over \$4 million – on an entity that undisputedly acted merely as an innocent securities intermediary.

STATEMENT OF FACTS

Wells Fargo joins in, and adopts by reference, the entirety of the Statement of Facts section of Berkshire's Brief, which lays out the background of the life settlement industry in Delaware, the details surrounding Ms. Malkin's procurement of the Policy from AIG, her intent to later sell it, the fact that she was later unable to profitably sell her Policy (and thus relinquished it), the details surrounding Berkshire's purchase of the Policy on the open market, and the prior proceedings in the federal courts. Wells Fargo makes the following brief additions that are specifically relevant to its role in the transactions at issue in this case.

First, Wells Fargo had no involvement in the application for, or procurement of, the Policy, or in the creation of the related Malkin trust, both of which occurred in 2006. *See* Doc 77-1 at ¶ 6; Doc 88, at ¶¶ 85, 87, 92. Rather, Wells Fargo's first involvement with the Policy was six years later when it replaced U.S. Bank as the securities intermediary for the Policy. *See* Doc 77 at ¶ 12; Doc 88 at ¶¶ 5, 96; Doc 188 at 4-5.

Second, the Securities Account Control Agreement between Wells Fargo and Berkshire, which defines the entire scope of Wells Fargo's role with regard to the Policy proceeds, explicitly states that Wells Fargo "agree[d] to take all instruction" from Berkshire with respect to the securities account. *See* Doc 132-29 at § 2(a). The

Control Agreement also states that Wells Fargo has no duty to “supervise or confirm any eligibility criteria of Financial Assets held hereunder...” *Id.* at § 4(b).

Third, it is undisputed that on October 29, 2014, Wells Fargo transferred the entirety of the Policy proceeds to Berkshire, pursuant to a signed entitlement order and in accordance with Wells Fargo’s role as securities intermediary. Doc 132 at ¶ 76 (“On October 29, 2014, Wells Fargo credited the \$4,013,976.47 to Berkshire’s securities account.”); Doc 88 at ¶ 5 (“Wells Fargo [upon receiving a check for the policy proceeds] paid this amount to Berkshire Hathaway Life Insurance Company of Nebraska...”); Doc 132-29 at § 2(a); *see also* Doc 77 at No. 9; Doc 77-1 at ¶¶ 10-12; Doc 114-1 at ¶¶ 3-4.

Fourth, approximately three years after Wells Fargo transferred the entirety of the Policy proceeds to Berkshire, Wells Fargo was sued by the Estate *solely* in Wells Fargo’s role as a securities intermediary. *See* Compl., Doc 1 and Am. Compl., Doc 88 (both naming “WELLS FARGO BANK, N.A., as SECURITIES INTERMEDIARY” as the defendant). *See also* Doc 1 at ¶ 8 (identifying Wells Fargo as a party in its capacity as a “Securities Intermediary”); *id.* at ¶ 100 (alleging that “Wells Fargo, as Securities Intermediary, [held] the Policy’s death benefit for the benefit of its principal.”); Doc 88 at ¶ 4 (alleging that the issuing insurance carrier did not challenge the Policy’s validity and chose instead to pay “Wells Fargo, as Securities Intermediary”).

ARGUMENT

WELLS FARGO IS ENTITLED TO ASSERT SECURITIES INTERMEDIARY DEFENSES UNDER THE DELAWARE UCC

I. Question Presented

Wells Fargo addresses only the first certified question¹ posed by the United States Court of Appeals for the Eleventh Circuit:

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. Christina 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?

Eleventh Cir. Op. 31. Wells Fargo joins in, and adopts by reference, the entirety of Section I of Berkshire's Brief, which addresses Certified Question No. 1.

II. 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).

III. Merits of Argument

The parties do not dispute that Wells Fargo served only in the limited, ministerial role of a securities intermediary. Indeed, the Estate's complaint named Wells Fargo as a defendant solely in that capacity. The undisputed facts established

¹ Wells Fargo endorses Berkshire's position and arguments regarding Certified Question No. 2.

that Wells Fargo was not involved in applying for, procuring, or paying premiums on the Policy at issue. Wells Fargo only became involved in this matter some years later when it was substituted as the securities intermediary for the Policy. Later, when AIG issued a check for the Policy proceeds, Wells Fargo immediately credited the amount to Berkshire's securities account. Solely as to Wells Fargo, the issue for this Court's determination is whether Delaware law allows a defendant to assert securities intermediary defenses in a Section 2704(b) proceeding.

Based on the undisputed facts, Wells Fargo's transfer of Policy proceeds to Berkshire's securities account is clearly governed by the Delaware UCC, and Wells Fargo was entitled to the protections provided therein. Nothing about the insurable interest statute suggests that it conflicts with the UCC's securities intermediary provisions, and even if there were such a conflict, the UCC provisions must control as the later-enacted statute. Finally, important policy considerations require courts to faithfully apply the Delaware UCC's securities intermediary immunity in these types of cases so that the legislature's significant public purpose can be served.

Wells Fargo is also independently entitled to assert a bona fide purchaser defense under § 8-502 because, as Delaware law expressly provides, "a securities intermediary that receives a financial asset in favor of an entitlement holder is a purchaser for value of the financial asset." Del. Code Ann. tit. 6, § 8-116. Accordingly, Wells Fargo joins in the entirety of Section I of the Argument section

of Berkshire’s Brief, which provides further support for establishing that UCC defenses are available to defendants in an action under Section 2704(b).

A. The Delaware UCC Applies to this Transaction and Is Not “Superseded” by the Insurable Interest Statute

As explained in Argument Section I of Berkshire’s Brief, which Wells Fargo joins and adopts in full, the Policy proceeds constitute a “financial asset,” which the Estate seeks to obtain through a Section 2704(b) action. Berkshire Br. at 19-22. Accordingly, it is irrelevant that the Eleventh Circuit deemed the underlying Policy void *ab initio* because the Policy *proceeds* are at issue and already have been disbursed. That argument applies with even greater force in the securities intermediary context.

As the Delaware UCC provides, “[a] securities intermediary that has transferred a financial asset pursuant to an effective entitlement order . . . is not liable to a person having an adverse claim to the financial asset” absent certain exceptions. Del. Code Ann. tit. 6, § 8-115. When the UCC grants immunity from liability, courts are not permitted to “rewrit[e] the UCC by holding otherwise.” *U.S. Claims, Inc. v. Flomenhaft*, 519 F. Supp. 2d 532, 539 (E.D. Pa. 2007). In the district court, the Estate did not and could not dispute that Wells Fargo transferred the Policy proceeds (a “financial asset”) to Berkshire based on its duty as a securities intermediary, that Wells Fargo accepted and transferred the Policy proceeds to Berkshire pursuant to a signed entitlement order, and that none of the statutory exceptions applied to this

case. *See* Statement of Facts herein; Wells Fargo Eleventh Circuit Opening Br. at 24-32; *see generally* Doc 188. Wells Fargo thus has no liability relating to the Policy.

Without disputing or even addressing these issues, the Estate and the district court wrongly asserted that Section 2704(b) categorically “supersedes” the Delaware UCC. As an initial matter, the Estate’s assertions before the Eleventh Circuit that the Delaware insurable interest statute is the “later-enacted” statute, and therefore “controls” over the UCC, is simply wrong. The Delaware legislature enacted Section 2704 in 1968, but the securities intermediary provisions of the Delaware UCC, Sections 8-115 and 8-116, were not codified until the 1997 amendments to that statute. *See* 1997 Del. Laws Ch. 75 (S.B. 139).

The Delaware legislature knew precisely what it was doing in 1997, and is presumed to have been well aware of the insurable interest statute, when it created protections for securities intermediaries and bona fide purchasers of financial assets. And because the relevant Delaware UCC provisions indisputably are the later enacted statute, Delaware law requires that these UCC defenses prevail over the earlier enacted Section 2704(b). *See, e.g., State v. Fletcher*, 974 A.2d 188, 193 (Del. 2009); *Dorsey v. United States*, 567 U.S. 260, 274 (2012).

B. Basic Principles of Statutory Construction Further Compel the Conclusion that the Delaware UCC Does Not Conflict with the Insurable Interest Statute

In any event, because there is no conflict between the UCC and the insurable

interest statute, they both must be given effect. It is well settled that two potentially competing 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). Here, the district court put the proverbial cart before the horse by concluding that the insurable interest statute “superseded” the UCC, without analyzing whether the statutes actually conflicted. To the contrary, particularly with respect to the securities intermediary provisions, each statute serves independent purposes that simply are not in conflict.

The UCC contains a carefully crafted set of asset transfer rules designed to ensure expeditious settlement of financial transactions. *See, e.g.*, Del. Code Ann. tit. 6, § 8-115, at cmt. 3. To achieve this goal, the legislature made the wise choice of immunizing securities intermediaries from suit, absent special circumstances. Del. Code Ann. tit. 6, § 8-115. On the other hand, if the purpose of the insurable interest statute is to prevent collusively procured life insurance policies, then there can be no conflict between these two statutory purposes. Indeed, the statutes are entirely consistent in that UCC Section 8-115 expressly creates an exception that precludes a securities intermediary defense in instances where collusion has occurred. *See* Del. Code Ann. tit. 6, § 8-115(2).

As the district court itself conceded, an entity that merely passes on proceeds

from what is later alleged to be a policy that lacks an insurable interest would not have liability under Section 2704(b). *See* Doc 199 at 22 (“[T]o the extent that Wells Fargo, after receiving the policy proceeds, merely passed them on in full to Berkshire, Wells Fargo would appear to have no liability under subsection [2704](b).”). That is exactly what Wells Fargo did here, and the district court’s ad-hoc conclusion fully illustrates why there is no conflict between Section 2704(b) and the Delaware UCC’s securities intermediary provisions. Accordingly, the UCC’s securities intermediary provisions must be given effect.

C. Public Policy Favors Protecting Securities Intermediaries.

The consequences of refusing to recognize the securities intermediary defense in this context are staggering as the vast majority of life settlement policies—as well as the much larger number of other financial assets—are held by securities intermediaries. Under the Estate’s flawed analysis, an entity that undisputedly acted merely as a securities intermediary (Wells Fargo) would be held strictly liable for over \$4 million to an entity (the Estate) that had no relationship or contact whatsoever with the intermediary. Moreover, adopting the Estate’s limitation of defenses under the Delaware UCC will impact financial transactions far beyond the life settlement industry. Such a result offends Delaware’s strong public policy of protecting securities intermediaries from liability. *See* Del. Code Ann. tit. 6, § 8-115, at cmt. 2.

If the Delaware legislature wanted to create an exception to the UCC to recognize some other policy, it knows how to do so. *See, e.g., Baker v. Gotz*, 387 F. Supp. 1381, 1391 (D. Del.), *aff'd*, 523 F.2d 1050 (3d Cir. 1975). Its decision to adopt and maintain UCC provisions without modification represents a policy choice, not the absence of one. *See LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1072 (3d Cir. 1996). That policy choice is presumed to take account of existing law (such as Section 2704(b)), and in the event of a conflict, to supersede it. *See, e.g., Fletcher*, 974 A.2d at 193.

A securities intermediary's role is to act as a clearing corporation or to maintain securities accounts for others. Del. Code Ann. tit. 6, § 8-102(14). As the comments to Section 8-115 make clear, Delaware has a strong interest in ensuring efficient, orderly financial transactions and protecting intermediaries from liability risk:

It is essential to the securities settlement system that brokers and securities intermediaries be able to act promptly on the directions of their customers. Even though a firm has notice that someone asserts a claim to a customer's securities or security entitlements, the firm should not be placed in the position of having to make a legal judgment about the validity of the claim at the risk of liability either to its customer or to the third party for guessing wrong.

Del. Code Ann. tit. 6, § 8-115, at cmt. 3. Accordingly, the legislature provided a clear, statutory grant of immunity for securities intermediaries, which should not be ignored. Del. Code Ann. tit. 6, § 8-115. This important immunity exists to ensure

that financial transactions are handled expeditiously and without fear that every ministerial transaction will result in securities intermediaries being dragged into litigation with significant potential liability. Here, Wells Fargo merely maintained securities accounts on behalf of Berkshire. Consistent with its role as a securities intermediary, it promptly acted at the direction of Berkshire to hold Policy proceeds received from AIG, long before any issues came to light regarding the Estate's claim. Wells Fargo was merely, as the statutory comment describes, part of the "securities settlement system."

Wells Fargo is entitled to rely on existing protections under the Delaware UCC, particularly where the governing statute provides only limited exceptions to the securities intermediary defense, none of which applies here. Judicial refusal to recognize the legislature's express grant of immunity not only undermines the sound operation of the business economy, but also violates the principles of separation of powers and due process. *See, e.g., Peter E. Shapiro, P.A. v. Wells Fargo Bank N.A.*, 795 Fed. Appx. 741, 748-49 (11th Cir. 2019); *Public Service Comm'n v. Wilmington Suburban Water Corp.*, 467 A.2s 446, 451 (Del. 1983) ("Judges must take the law as they find it, and their personal predilections as to what the law should be have no place in efforts to override the properly stated legislative will."); *Schueler v. Martin*, 674 A.2d 882, 888 (Del. Super. Ct. 1996) (to "engraft an exception onto [statutory] immunity . . . would be judicial legislating"). Moreover, "where the legislature has

preempted the field by enacting a provision in the UCC which establishes the rights of the parties, competing theories of liability are not permitted.” *Mahaffy & Assoc., Inc. v. Long*, 2003 WL 22351271, at *6 (Del. Ch. 2003). Put another way, when the UCC grants immunity from liability, courts cannot “rewrit[e] the UCC by holding otherwise.” *U.S. Claims*, 519 F. Supp. 2d at 539. The Estate’s expansive view of liability would “make a federal case” of every securities transaction, in direct contravention of the legislature’s stated intent, and would potentially make securities intermediaries the insurer of every transaction. Such a turn of events could inevitably lead securities intermediaries to implement unnecessary barriers in the securities settlement process, which is exactly the result the legislature sought to avoid. Securities intermediaries also may be forced to reevaluate their pricing structures or eliminate such services altogether in light of the additional risks they could face if courts undercut the securities intermediary defense.

Moreover, the district court decision is potentially very far reaching and will displace the UCC not only from life insurance transactions but also from an unknowable array of other financial asset transactions. Failure to recognize and enforce the immunity provisions of Delaware UCC Sections 8-502, 8-115, and 8-116, has the potential to disrupt all aspects of the indirect financial asset holding system that the Delaware legislature has carefully crafted and nurtured.

CONCLUSION

For the foregoing reasons, this Court should hold that defenses arising under Delaware UCC Sections 8-502, 8-115, and 8-116 are available to defendants in a Section 2704(b) action.

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