EFiled: Feb 08 2022 03:15PM EST
Filing ID 67300132
Case Number 380,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERONTA FUNDING, a Delaware Statutory Trust,	)	
	)	No. 380, 2021
Appellant,	)	Court Below: Superior Court of the State of Delaware
v.	)	
BRIGHTHOUSE LIFE INSURANCE COMPANY,	)	C.A. No. N18C-04-028 DCS
	)	REDACTED - PUBLIC VERSION FILED FEBRUARY 8, 2022
Appellee.	)	

APPELLANT'S CORRECTED OPENING BRIEF

Dated: January 24, 2022

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NATURE OF PROCEEDINGS

This appeal asks the Court to resolve, as a matter of first impression, the remedy for the return of premiums paid upon a life insurance policy that was always void *ab initio* for lack of insurable interest, in the specific case of a fictional insured based upon a criminal fraud. The policy originator was convicted of insurance fraud in New Jersey for this policy, among other crimes. The policy was sold in the secondary and tertiary markets, and those innocent subsequent purchasers paid premiums thereon for seven years. The insurer, plaintiff-below, had actual notice of the criminal conviction, but silently took premiums anyway. The question on appeal is who holds the right to those past monetary premiums. In addition to that question of law, numerous errors through trial require reversal.

The policy below is a $5 million insurance policy against the life of fictional creation named Mansour Seck (the "Policy"). Appellee Brighthouse Life Insurance Company ("Appellee" or "Brighthouse") wrote the Policy in 2007, and took premiums thereon until Appellant Geronta Funding ("Appellant" or "Geronta") discovered the fraud for itself. The policy was first owned by a trust. The trust sold it in the secondary market to a party called EEA, who collateralized it into a portfolio of similar policies for subsequent resale. Geronta purchased that portfolio, including the Policy, in September 2015.

After Geronta unearthed the Policy fraud, Brighthouse sued in April 2018. The parties agreed the Policy was void ab *initio* under 18 *Del. C.* § 2704(a) for lack of insurable interest. Geronta requested legal rescission and the return of all premiums to restore the *status quo ante*, premised on three decisions from the United States District Court for the District of Delaware (the "District of Delaware")—*Sun Life Assur. Co. v. Berck*, 719 F. Supp. 2d 410 (D. Del. 2010) ("*Berck*"), *Lincoln Nat'l Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546 (D. Del. 2010) ("*Snyder*"), and *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Tr.*, 774 F. Supp. 2d 674 (D. Del. 2011) ("*Rucker*")—holding that legal rescission and the automatic return of premiums is the remedy under Delaware law. Brighthouse asserted that the remedy for a contract void *ab initio* is to leave the parties where the Court finds them, meaning Brighthouse keeps all past premiums.[1]

In a March 4, 2019 Opinion on cross-motions for judgment on the pleadings (the "MJOP Decision"),[2] the Superior Court of Delaware (the "Trial Court") rejected *Berck*, *Snyder*, and *Rucker*, ruling instead that restitution may be available

[1] This issue is currently pending before this Court in *Wells Fargo Bank, N.A., et al., v. Estate of Phyllis M. Malkin* (No. 172-2021).

[2] A true and correct copy of the MJOP Decision is attached hereto as Exhibit A.

under Restatement (Second) of Contracts § 198 ("Section 198").[3] The MJOP Decision rejected the reasoning of the District of Delaware cited by many other jurisdictions. It changed Delaware law of remedies from rescission to restitution.

The Trial Court ordered six supplemental briefs on Section 198 issues, including (i) the bona fide purchaser for value defense; (ii) *scienter* in a Section 198 analysis; and (iii) the facts proving that Appellee actually knew that the Policy was void by no later than October 26, 2011. The Trial Court also ordered three pretrial conferences and four pretrial stipulations.

The case was tried for seven days in March 2021. Geronta's trial presentation was two-fold. First, Geronta was excusably ignorant of knowing that the Policy lacked an insurable interest at the time it bought the Policy in 2015. Second, Brighthouse was more in the wrong qua Section 198 because it had actual knowledge that the Policy was void no later than October 26, 2011, yet continued to collect premiums for the next seven years.

The Trial Court's August 20, 2021 Decision After Trial ("Trial Decision")[4] inexplicably ignored Geronta's "equally in the wrong" argument, despite that the

[3] The Trial Court denied Appellant's request for certification of an interlocutory appeal on March 14, 2019 (A257-267), and this Court refused Appellant's interlocutory appeal on March 28, 2019 (A268-270).

[4] A true and correct copy of the Trial Decision is attached hereto as Exhibit B.

Trial Court had repeatedly demanded supplemental briefing about it and verbally indicated acceptance of it. The Trial Decision states that Geronta was not excusably ignorant, in part because of its expertise in purchasing life insurance policies, and that Section 198's *in pari delicto* exception was inapplicable. The Trial Court ordered that the parties be left as they were through April 21, 2017, when Geronta issued a notice to Brighthouse questioning the legitimacy of the Policy. Brighthouse retains 85% ($1,208,618.33) of the Policy premiums.

SUMMARY OF ARGUMENT

The Trial Court erred:

(1) In the MJOP Decision, by holding that legal rescission and the automatic return of all premiums is not the remedy under Delaware law for a life insurance policy declared void *ab initio* for lack of insurable interest.

(2) In the Trial Decision, by ignoring Appellant's "equally in the wrong" argument based upon facts proving that Appellee knew, or should have known, that the Policy lacked an insurable interest by no later than October 26, 2011.

(3) By precluding Appellant from presenting trial testimony addressing its understanding of customary tertiary market due diligence, but then using Appellant's expertise to conclude that Appellant was not excusably ignorant.

(4) In the Trial Decision, by rejecting, *sub silencio*, Appellant's bona fide purchaser for value defense.

STATEMENT OF FACTS

This Court has recognized the legitimacy of life settlements as providing an favorable alternative to allowing a life insurance policy to lapse, or to receiving only its cash surrender value. *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.*, 28 A.3d 1059, 1069 (Del. 2011) ("*Price Dawe*"). The life settlement market for life insurance is legal and regulated. *Id.* It has, however, incentivized the creation of illegal investor-owned or stranger-owned life insurance ("IOLI" and "STOLI"). Brighthouse's internal policies prohibited the sale of IOLI policies, but there were many attempts by unscrupulous brokers to place such policies in the 2000's. (A2880-2882; A2975; A3043.)

Geronta is a Delaware statutory trust. (A582, ¶143.) Leadenhall Capital Partners LLP ("Leadenhall") is the Transaction Manager for Geronta, including for purchases of life insurance policy portfolios. (A582, ¶144.) Leadenhall managed pension fund assets for the Royal Bank of Scotland. (A1697; A3129-30.)

Brighthouse is a Delaware organized insurance company and is the successor to MetLife Investors USA Insurance Company. (A582, ¶141-142.)[5]

In July 2007, the Mansour Seck Irrevocable Life Insurance Trust (the "Seck Trust") applied to Brighthouse for a $5 million dollar life insurance policy on the

[5] For brevity, "Brighthouse" refers to both MetLife and Brighthouse.

life of a fictitious Mansour Seck ("Seck"). (A556, ¶2.) The sales agent was Talma Nassim (A556, ¶3.) The trustee of the Seck Trust was New York attorney Sandor Krauss ("Krauss"). (A556, ¶1.) Krauss executed a trust certification in which he promised to indemnify Brighthouse for, *inter alia*, all "losses or liabilities" that Brighthouse might incur because of Brighthouse's "reliance on this document…or actions by the undersigned." (A2963-2964.) Although Brighthouse relied upon the trust certification to conclude that Seck existed (A1224; A2964), it never attempted to contact Krauss during the application process. (A557, ¶10.) Krauss later testified that he never had any contact whatsoever with Seck. (A557, ¶9; A1573.) The Policy was issued on July 24, 2007. (A565, ¶47.)

The Policy application identified Seck as a 74 year-old French citizen permanently residing at 170 Academy Street in Jersey City, NJ. (A556, ¶2.) The application provided a birthday of January 1, 1933 and a Social Security number of 147-52-6554. Seck reported an annual income of $400,000 to $500,000 per year, and a net worth of $18 to $20 million. (A2965-2967; A1392.)

All of those statements were false. The insured Seck never existed, and no one named Mansour Seck applied for the Policy. (A557, ¶8; A565, ¶49) Other than a recorded telephone interview with someone who purported to be Seck, Brighthouse did nothing to verify any of the Policy application statements (A559,

¶21), and instead relied solely upon the general agent who sold the policy, even though Brighthouse had almost no other business with that agent. (A3021-3023.) Had Brighthouse searched Accurint public records database, it would have learned that no records match the identifying information provided for Seck. (A1332-1333.) The median income for the Jersey City neighborhood surrounding 170 Academy St was $32,625; Brighthouse's corporate representative testified that it would be "very unusual" for a person worth $18-$20 million to be living in such a neighborhood. (A1410-1411.)

Brighthouse's failure to independently verify the Policy information was contrary to its own underwriting guidelines. Brighthouse's guidelines required a full medical examination with full medical history, conducted by a medical doctor or board-certified internist, scheduled through a nationally-approved medical vendor. (A2934-37; A1278-1283.) Brighthouse instead waived the requirement, and instead accepted a one-page handwritten letter purportedly authored by a medical doctor in France, who did not claim to have performed a medical exam and which did not include a "full medical history." (A562, ¶32; A1282.) Brighthouse did nothing to verify the credentials of the French doctor. (A563, ¶33-34.) Brighthouse's guidelines also required that applicants for policies exceeding $1 million complete a personal financial statement. (A2940; A3003.) Brighthouse

waived that requirement and did nothing to independently confirm Seck's net worth or income. (A560, ¶27; A1308-1311.) After Policy issuance, Brighthouse's Regional Vice President for Sales (who assisted in the waiver of the medical exam) observed that "we need just a few dozen more of these to get us back on track to make our numbers." (A2999-3002; A3004.) Brighthouse waived these requirements to make its sales quotas, underwriting requirements be damned.

On July 24, 2009, the Policy's two year contestability period expired. (A565, ¶51.) On August 11, 2009, EEA Life Settlements, Inc. and its affiliate (together, "EEA") purchased the Policy from the Seck Trust (A565, ¶¶52-53.) On November 19, 2009 two of Brighthouse's internal investigators—Jean Phillip ("Phillip") and David Bishop ("Bishop")—began an investigation into one Mr. Pape Seck's application to Brighthouse to place three pending life insurance policy applications. (A567, ¶ 62; A3005-3006; A3007-3016.) That investigation revealed links between Pape Seck and Mansour Seck. An Accurint public records search for Pape Seck showed the same 170 Academy Street address in Jersey City that was purportedly Mansour Seck's home address. (A567-568, ¶¶66-68.) The report also listed a "Mansour Seck" as a possible relative of Pape Seck. (*Id.*)

On December 8 and 9, 2009, internal correspondence from Phillip reported that there were "IOLI flags and financial irregularities" associated with Pape

Seck's policy applications. (A3017-3020; A568-570, ¶¶71-75.) Consequently, Pape Seck's appointment request was denied.

Eight days later, on December 17, 2009, Phillip and Bishop were alerted that the Policy's sale from the Seck Trust to EEA immediately after expiration of the contestability period raised "strong IOLI flags." (A3021-3023; A571, ¶84.) Brighthouse did nothing about those "strong IOLI flags." Anthony DeCarlo ('DeCarlo"), the Director of Brighthouse's Field Investigation Unit for Corporate Ethics and Compliance (and Phillip's supervisor), testified that once a policy was past its two year contestability period "we, in general, would not expend any time on those." (A2895-2896.)

On January 12, 2010 Phillip completed an Internal Investigation Report pertaining to Pape Seck for DeCarlo. (A3024-3027.) The report was distributed to at least 15 Vice Presidents or managers, one of whom was Robert Linzey ("Linzey"). (*Id.)* Linzey, also a Vice President, headed Brighthouse's Claims Investigative Unit. (A2892-2893, at 28.)

On April 13, 2010, the New Jersey Attorney General's Office ("NJAG") published a press release (the "April 2010 Press Release") announcing that Pape Seck pleaded guilty to insurance fraud in connection with fraudulent insurance policies he had placed with two different insurance companies (not Brighthouse) in

the name of Mansour Seck. (A573-574, ¶¶95-99; A3032-33.) The April 2010 Press Release explained that no one named Mansour Seck had applied for the policies, and that the identification information used in the policy applications was cobbled together from three different people named Mansour Seck. (*Id.*)

On April 26, 2010 Brighthouse was subpoenaed by the Office of Insurance Fraud Prosecutor of the NJAG. (A575, ¶103.) The subpoena requested all of Brighthouse's documents pertaining to the Policy. (A575, ¶104; A3031.) The next day Bishop added Pape Seck to Brighthouse's Do Not Appoint list. (A1428-1429; A3187-88.1.) The day after that, on April 28, 2010, someone at Brighthouse printed out the April, 2010 press release. (A575, ¶105; A3032-33; A1433.)

Brighthouse did not advise EEA of the "strong IOLI flags" it had associated with the Policy (A569, ¶85), or about any of the facts pertaining to Pape Seck's April 2010 conviction for insurance fraud, the April 2010 Press Release or the NJAG subpoena pertaining to the Policy. (A575, ¶108; A1489-1491.) Similarly, none of these facts were shared with Geronta prior to this litigation. (A569, ¶85; A575, ¶108; A1492-1493.)

On October 17, 2011 the NJAG issued a second press release (the "October 2011 Press Release") which announced that Pape Seck had pleaded guilty to insurance fraud by making fraudulent statements to several insurance companies,

including Brighthouse, in policy applications. The October 2011 Press Release thanked Brighthouse for its cooperation with the investigation. (A580, ¶¶128–131; A31, A3240-41.) Thus, Seck pleaded guilty to fraud involving the Policy in October of 2011.

Brighthouse obviously knew that the October 2011 Press Release and Pape Seck's guilty plea related to the Policy. On October 26, 2011 Jim McCarthy, an investigator in Brighthouse's claims investigation unit, ("McCarthy") sent an email to DeCarlo and Linzey alerting them to the fact of Pape Seck's October 17, 2011 conviction (the "McCarthy Email"). (A3034; A2891-2892, at 27-41.) The McCarthy Email's subject line contained the name "Mansour Seck," the Policy number, Pape Seck's name, and Brighthouse broker number. (A3034.) It referenced a "newspaper article" and said that, according to the article, Pape Seck was "recently sentenced" for insurance fraud involving "the above insured" and that Brighthouse had cooperated "with the authorities." (*Id.*) The McCarthy Email further asked DeCarlo "to whom this case was assigned in your area," noted that the Policy had recently been assigned to EEA, and that the assignment had raised questions in Brighthouse's AML (Anti-Money Laundering) Unit. (*Id.*)

Brighthouse did *nothing* in response to the Pape Seck conviction. Brighthouse did not advise EEA or Geronta about any of the facts pertaining to

Pape Seck's insurance fraud conviction relating to the Policy, or its assistance to the investigation that led to the conviction, prior to this litigation. (A580, ¶132.) It instead sat silently, taking monthly premiums upon an insurance policy that is actually knew was criminally fraudulent and thus void *ab initio*.

On September 2, 2015 Geronta purchased the Policy from EEA as part of a portfolio of 188 life insurance policies. (A582, ¶146.) As part of customary due diligence, Geronta sampled two dozen of the purchased policies to validate biometric data and premium projections. (A2483.) The Policy was not one of those sampled. (A584, ¶157; A2458-2461.) The EEA sale agreement specified that the entirety of the purchase price for the portfolio would be held in escrow, and that the purchase price for any particular policy would be released to EEA only after Geronta verified with the issuing insurance company that the policy was in good standing. (A3129-131; A3132-35; A2491-92.) Each insurance company was called and asked to verify that each policy existed and was in force. (A2475-2477.) All of the policies, including the Policy, were reported to be in good standing. (*Id.*) Brighthouse told Geronta that the Policy was "active." (A585, ¶158.) Brighthouse did not reveal its actual knowledge that the Policy was the product of a criminal insurance fraud. (A580, ¶132.)

On January 11, 2016, Geronta's third-party policy servicer stated that it could not locate Mansour Seck. (A585, ¶¶161-163.) Geronta reported its concerns to EEA, who then advised Geronta that Mansour Seck existed and was "locatable." (A586, ¶¶167-168.) In February 2017, Geronta hired a private investigator, who concluded that Mansour Seck was fictitious. (A588, ¶176.)

On April 21, 2017 Geronta informed Brighthouse that it questioned the legitimacy of the Policy. (A588, ¶177.) Through April 4, 2018 multiple communications between Brighthouse and Geronta discussed the Policy. Geronta provided Brighthouse with its evidence that Seck did not exist, including the April 2010 Press Release, the October, 2011 Press Release, and a complaint in the United States District Court for the District of New Jersey by another defrauded insurance company against Pape Seck and Krauss. (A589-590, ¶¶179-186.)

Brighthouse's first acknowledgment that the Policy lacked an insurable interest was the complaint in this lawsuit, filed on April 4, 2018. (A590, ¶187.)

The total premiums paid on the Policy are:

Payor	Amount
Seck Trust	$248,711.14
EEA Life Settlements	$706,478.29
Geronta Funding	$460,577.00
Totals	$1,415,766.43

(A565, ¶50; A582, ¶140; A590, ¶¶189, 191.)

Geronta holds the right to past premiums. The purchase and sale agreement between EEA and Geronta specified that all premiums paid on each policy purchased, all rights of recourse or recovery pertaining to those premiums, and all claims and causes of action pertaining to those policies and premiums, were conveyed to Geronta. (A583, ¶151; A3132-3135; A3136-3186.)

The Trial Decision awarded Geronta the premiums it paid on the Policy after April 2017, less taxes and commissions that Brighthouse paid after that same time (Ex. B at 65), in the amount of $207,147.60. Brighthouse paid Geronta that award on December 16, 2021.

ARGUMENT

I. DELAWARE LAW REQUIRES LEGAL RESCISSION AND DISGORGEMENT OF ALL PREMIUMS PAID AS THE REMEDY FOR INSURANCE POLICIES DECLARED VOID *AB INITIO* FOR LACK OF INSURABLE INTEREST.

A. Question Presented

The parties stipulated, and the Trial Court declared, that the Policy is void ab *initio* for lack of insurable interest under 18 *Del. C.* § 2704(a) and *Price Dawe*. This appeal raises the following pure question of law:

> If an insurance contract is declared void *ab initio* under 18 *Del. C.* § 2704(a) and *Price Dawe*, is legal rescission and disgorgement of all premiums on the policy the appropriate remedy under Delaware law?

The question calls two subsidiary issues: (1) whether a downstream purchaser of a policy declared void *ab initio* for lack of insurable interest is entitled to *all* past premiums paid; and (2) whether and how an insurer is entitled to a refund for expenses incurred to issue a void *ab initio* policy. (A152-77.)

B. Scope of Review

Questions of law are reviewed *de novo*. *Price Dawe*, 28 A.3d at 1064.

C. Merits of Argument

Geronta demanded that Brighthouse disgorge all past premiums on the Policy as a straightforward application of the District of Delaware's *Berck*, *Snyder*, and *Rucker* decisions. (A151-177.) The Trial Court rejected that trio of case law

as a question of first impression, and held that restitution, not rescission, is the correct remedy for insurance policies void *ab initio*. *See generally* Ex. A. Simply, the District of Delaware is right, and the Trial Court is wrong, as a matter of law. The correct remedy for a contract (including insurance policies) void *ab initio* is rescission damages, not restitution.

1. *Berck, Snyder,* and *Rucker* Remain Good Law

The Trial Court's rejection of *Berck*, *Snyder*, and *Rucker* was, politely, puzzling. *Berck*, *Snyder*, and *Rucker* were the only pertinent Delaware law presented to the Trial Court; Brighthouse presented zero Delaware case law contradicting that trio of District of Delaware decisions. Indeed, the Trial Court was not presented with *any* Delaware law addressing how to treat premiums paid on an policy declared void *ab initio* for lack of insurable interest.[6] Bluntly, the Trial Court created a new restitution standard, without argument or suggestion by the parties. The MJOP Decision is error, requiring reversal.

[6] Several other federal district court decisions applying Delaware law have followed *Berck*, *Snyder*, and *Rucker*. *See, e.g.*, *Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n*, 2016 WL 161598, at *16 (S.D. Fla. Jan. 14, 2016), *aff'd on all grounds except prejudgment interest*, 693 F. App'x 838 (11th Cir. 2017) (applying principles of rescission under Delaware law and awarding refund of premium payments); *U.S. Bank Nat'l Ass'n v. Sun Life Assur. Co. of Canada*, 2016 WL 8116141, at *20 (E.D.N.Y. Aug. 30, 2016), *R&R adopted*, 2017 WL 347449 (E.D.N.Y. Jan. 24, 2017) (applying Delaware law granting policy owners a refund of premiums paid except for premiums paid by fraudulent procurer).

Part of the Trial Court's basis to reject *Berck*, *Snyder*, and *Rucker* was that those decisions "precede" *Price Dawe*. Ex. A. at 7. The Trial Court erroneously ignored (despite that Geronta raised it in briefing) that each of *Berck*, *Snyder*, and *Rucker* had been approvingly cited on several occasions, *including by this Court in Price Dawe*. (A244-45); *see Price Dawe*, 28 A.3d at 1059 n.46, 75. *Price Dawe* could not have rejected the District Court's rescission precedent by approvingly citing that precedent. The Trial Court also erroneously distinguished *Berck* and *Snyder* because, in those cases, the insurer (rather than the policy owner) sought rescission. Ex. A at 6-7. The party requesting rescission is irrelevant because the result should always be the same, *i.e.*, restoring the parties to the *status quo ante*. *Berck* and *Snyder* do not base their holdings upon which side demands rescission.

Notwithstanding the MJOP Decision, *Berck*, *Snyder*, and *Rucker* persist as authoritative statements of Delaware law. *See, e.g., Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n*, 2019 WL 8353393, at *4 (D. Del. Dec. 30, 2019) (relying on *Berck*, *Snyder*, and *Rucker* when awarding the return or all premiums paid to an insurer on a policy declared void *ab initio*). Conversely, the outlier MJOP Decision has been weaponized to wrongly suggest that Delaware law forbids legal rescission for policies declared void *ab initio* for lacking insurable interest. Indeed, the Eleventh Circuit recently cited the MJOP Decision when

certifying questions to this Court, noting that the Trial Court "reject[ed] a theory of rescission for the repayment of paid premiums where the contract was void." *Estate of Malkin v. Wells Fargo Bank, NA*, 998 F.3d 1186, 1199 (11th Cir. 2021). This Court should resolve this conflict of Delaware law.

2. Delaware Authorizes Legal Rescission for Void Agreements

Under Delaware law, rescission returns the parties to the *status quo ante* and requires a defendant "to repay all monies given her by plaintiff or its predecessor." *Deutsche Bank Nat'l Tr. Co. v. Goldfeder*, 2014 WL 7692441, at *1 (Del. Super. Ct. Dec. 9, 2014); *see Ravenswood Inv. Co., L.P. v. Estate of Winmill*, 2018 WL 1410860, at *21 (Del. Ch. Mar. 21, 2018) ("Rescission can be sought at law or equity. By ordering rescission … the court endeavors to unwind the transaction and thereby restore *both* parties to the *status quo*."). "A court of law may, upon adjudication of a contract dispute, determine…that a contract be rescinded, and enter an order restoring plaintiff to his original condition by awarding money or other property of which he had been deprived." *E.I. Du Pont de Nemours and Co. v. HEM Research, Inc.*, 1989 WL 122053, at *3 (Del. Ch. Oct. 13, 1989).

The Trial Court ruled that the Policy could not be rescinded, because it was void *ab initio*, and therefore no contract ever existed to "unmake." (Ex. A at 5-6.) That holding contradicts *Norton v. Poplos* (upon which the Trial Court relied) that

"rescission results in abrogation or 'unmaking' of an ***agreement***, and attempts to return the parties to the status quo." 443 A.2d 1, 4 (Del. 1982) (emphasis added); *see also Parke Bancorp Inc. v. 659 Chestnut LLC*, 217 A.3d 701, 710 (Del. 2019) (distinguishing rescission as an attempt to "'unmake' an agreement and returning the parties to the *status quo ante*" from reformation as an attempt to "correct an enforceable agreement's written embodiment…") (internal quotations omitted). Indeed, the terms "agreement" and "contract" are not synonymous. *See Siegman v. Columbia Pictures Ent't, Inc.*, 576 A.2d 625, 631 (Del. Ch. 1989); *Bryant v. Way*, 2012 WL 1415529, at *10 (Del. Super. Ct. Apr. 17, 2012); *see also Agreement*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract.").

This Court's recent decision in *Lavastone Capital LLC v. Estate of Beverly E. Berland*, --- A.3d ---, 2021 WL 5316071, at *5 (Del. Nov. 16, 2021), controls this analysis. In *Lavastone*, this Court clarified that "the word 'contract' is 'sometimes anomalously' used to refer to or describe what is actually a void—that is, nonexistent—agreement between parties." *Id.* (citing *Price Dawe*, 28 A.3d at 1037). Specifically, the term "contract" as used in 18 *Del. C.* § 2704(b) does not

require that "an enforceable contract must exist before an estate can recover death benefits paid on a policy that lacks an insurable interest." *Id.* Rather, "contract" in § 2704(b) refers generally "to the document that defines the death benefit and identifies the 'beneficiary, assignee or other payee[.]'" *Id.* According to *Lavastone*, legal rescission is therefore available on the Policy because it "defines the death benefit and identifies the 'beneficiary, assignee or other payee[.]'" *Id.*

Moreover, rescission is available under Delaware law even where an agreement is void for illegality. *See United Engineers & Constructors, Inc. v. Babcock & Wilcox Co.*, 1993 WL 50309, at *3 (Del. Ch. Feb. 11, 1993) ("The courts of this State, of course, can grant rescission for a number of reasons, *e.g.*, misrepresentation, some types of mistakes, duress, undue influence, illegality, lack of capacity and failure of consideration."); *Mkt. Am., Inc. v. Google, Inc.*, 2010 WL 3156044, at *7 (D. Del. Aug. 9, 2010) ("Delaware law allows for rescission where there has been…undue influence, illegality, lack of capacity, or failure or consideration.") (internal quotations omitted). *See also* Restatement (Third) Restitution and Unjust Enrichment § 54 (Rescission and Restitution) (Oct. 2021) (rescission may "reverse a contractual exchange and recover a performance thereunder, without regard to whether the underlying contract would be classified for other purposes as 'void' from its inception or merely 'subject to avoidance.'").

3. Public Policy Concerns Support a Legal Rescission Remedy

Delaware public policy favors legal rescission and the disgorgement of all premiums paid to the insurer on an insurance policy declared void *ab initio*. As articulated in *Snyder*:

> The payment of premiums is the consideration for which the insurer agrees to assume the risk specified in the policy. If an insurance company could retain premiums while also obtaining rescission of a policy, it would have the undesirable effect of incentivizing insurance companies to bring rescission suits as late as possible, as they continue to collect premiums at no actual risk.

Snyder, 722 F. Supp. 2d at 565; *see Berck*, 719 F. Supp. 2d at 418-19 (same). The Trial Court erroneously failed to analyze *Snyder*'s public policy rationale in the MJOP or Trial Decision.

Snyder is particularly apt. Geronta conclusively proved at trial (although it was ignored entirely in the Trial Decision) that Brighthouse knew, or should have known, that the Policy lacked an insurable interest by no later than October 2011. *See infra*. Precisely as the District of Delaware warned in *Snyder* would happen, Brighthouse collected premiums on the Policy at no actual risk for the next seven years. *See infra*. But rather than file suit to rescind the Policy, Brighthouse advocated to leave the parties as they were. The MJOP Decision denied

Brighthouse's request at the pleadings stage (Ex. A at 7-8),[7] but the Trial Decision gave Brighthouse that relief. (Ex. B at 65.) Indeed, of the $1,415,766.43 in premiums paid on the Policy, Appellee retains $1,208,618.33 (85%).

4. Legal Rescission Requires Disgorgement of All Paid Premiums, Including By Predecessors

Legal rescission requires the return of all premiums paid to an insurer, even if paid by a litigant's predecessor. *See Deutsche Bank*, 2014 WL 7692441, at *1; *Capital One, N.A. v. Bachovin*, 2015 WL 5968537, at *2 (Del. Super. Ct. Oct. 7, 2015). There was never a factual dispute that Geronta bought all rights to past premiums from EEA, which had bought them from the Seck Trust. The Trial Court never addressed that issue. In similar circumstances, however, the District of Delaware endorsed that the insurer should return all premiums to the last policy owner. *See Sun Life*, 2019 WL 8353393, at *4. The District of Delaware is correct and the Trial Court is wrong, as a matter of law.

5. Any Expense Award Should be Limited in Time and Scope

Rucker suggests that insurers may "seek damages for expenses incurred as in connection with issuing" the policy declared void *ab initio* for lack of insurable interest. 774 F. Supp. 2d at 682. Conversely, the District of Delaware in *Sun Life*

[7] Appellant did not demand that Appellee perform under the illegal Policy. Rather, Appellant sought to rescind, *i.e.*, unwind, the Policy altogether. (A250.)

did not award the insurer damages for expenses, despite citing to *Rucker*. *See* 2019 WL 8353393, at *4.

If the Court determines as a matter of first impression that insurers can recover expenses on void policies at all, such an award should be limited in time and scope. For instance, the Trial Court rightly excluded Brighthouse's reinsurance premiums that it allegedly paid as a measure to spread risk, which would have caused Brighthouse's "expenses" to swallow the total premiums paid, in part because Brighthouse failed to present any law showing it was an appropriate setoff expense. And consistent with the public policy concern articulated in *Snyder*, an insurer should not be entitled to any expenses paid after it knew or should have known that the at-issue policy lacked an insurable interest.

The MJOP Decision should be reversed. Rescission is the correct remedy for an insurance policy void *ab initio*. To hold otherwise would incentivize insurance companies to silently accept premiums on policies known to be void, on an unfair catch-me-if-you-can basis. *Berck*, *Snyder*, and *Rucker* are correct expressions of Delaware law, and the MJOP Decision is error.

II. APPELLANT IS ENTITLED TO RESTITUTION BECAUSE APPELLEE HAD ACTUAL KNOWLEDGE THAT THE POLICY LACKED AN INSURABLE INTEREST, OR WAS AT LEAST WILLFULLY BLIND TO SUCH EVIDENCE

Rescission, rather than restitution, is the correct remedy for an insurance policy void *ab initio*. But if restitution were the correct remedy, then the Trial Court erred by failing to properly address comparative fault between the parties as required by Section 198, and disproportionate forfeiture per Section 197. The unrebutted trial evidence is that Brighthouse had actual knowledge that the Policy was void no later than October 2011, but accepted premiums on the Policy for seven years anyway. Brighthouse is thus more at fault than Geronta, requiring restitution under Section 198. Additionally, the Trial Decision imposes a $1.2 million forfeiture upon Geronta and provides a $1.2 million windfall to Brighthouse, violating Section 197.

A. Questions Presented

Whether the Trial Court erred by holding that Appellant was not entitled to restitution in an amount equal to the premiums paid on the Policy. (A293-300; A396-397; A335-348; A799-811; A457-472; A946-1070.)

B. Scope of Review

This Court reviews questions of law *de novo*. *Concerned Citizens of Estates of Fairway Vill. v. Fairway Cap, LLC,* 256 A.3d 737, 743 (Del. 2021); *Backer v.*

Palisades Growth Capital II, L.P., 246 A.3d 81, 94 (Del. 2021) ([T]he applicable standard by which the defendants' conduct is to be judged ... is a legal question ... subject to de novo review by this Court."). This Court reviews a court's application of the law of the case doctrine *de novo*. *Frederick-Conaway v. Baird*, 159 A.3d 285, 296 (Del. 2017). Findings of fact are reviewed for abuse of discretion. *Hayward v. King*, 127 A.3d 1171 (Del. 2015).

C. Merits of Argument

On multiple occasions before trial the Trial Court held, and Geronta argued, that the question of whether Geronta was entitled to restitution under Section 198 was one of comparative fault. In turn, that question depended upon when Brighthouse had actual knowledge that the Policy was void for lack of an insurable interest because Mansour Seck was fictitious.

Accordingly, Geronta's trial presentation focused on comparative fault. Geronta proved that Brighthouse had actual knowledge that Seck was fictional no later than October 2011, and more realistically in April 2010. Nonetheless, the Trial Decision inexplicably ignored the unrebutted evidence of Brighthouse's actual knowledge, and with it the question of comparative fault. That ruling is baffling, because the Trial Court demanded multiple rounds of briefing specifically on comparative fault, and the issue consumed much of the seven-day trial.

Instead, the Trial Court applied an erroneous reading of Section 198 that it had not previously announced or discussed before trial to a modest subset of the evidence. The Trial Decision also entirely ignored the fully briefed argument that Brighthouse's position would cause a disproportionate forfeiture under Section 197. The Trial Decision also ignores the public policy underlying *Berck*, *Snyder*, and *Rucker*, and *Price Dawe*.

1. The Trial Court Repeatedly Stated That Restitution Was A Question of Comparative Fault.

On repeated occasions, Geronta argued—and the trial court affirmatively stated—that Section 198(b) is a comparative fault analysis. Section 198 states:

> **Restitution in Favor of Party Who Is Excusably Ignorant or Is Not Equally in the Wrong**
>
> A party has a claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy if:
>
> (a) he was excusably ignorant of the facts or of legislation of a minor character, in the absence of which the promise would be enforceable, or
>
> (b) he was not equally in the wrong with the promisor.

Restatement (Second) of Contracts § 198 (1981).

As early as the MJOP Decision the Trial Court ruled that Geronta's claim for restitution would be judged pursuant to Section 198 and that "[i]t is not clear from the pleadings whether either party was excusably ignorant of the facts or whether

each party failed to exercise due diligence." Ex. A at 9. Thereafter, Geronta repeatedly argued that Section 198 commended an inquiry into Brighthouse's knowledge and conduct, that the evidence would conclusively show that Brighthouse had actual knowledge that the Policy was fraudulent and lacked an insurable interest as early as April of 2010, and no later than October of 2011 (four or five years before Geronta purchased the Policy) and that consequently Geronta was both "excusably" ignorant and "not equally in the wrong." (*E.g.* A279-300; A319-33; A336-47; A402-429; A442-443; A448-450; A458-470; A484-85, 488-514, 525-26, 528, 534-36; A542.1-542.15; A543-50; A552-53, 556-81, 591-92, 601-02; A738-46, 762-67.)

The Trial Court had multiple opportunities before trial to rule that it disagreed that Section 198 required a comparative fault analysis. The Trial Court never did so, and in fact on several occasions explicitly indicated its agreement with Geronta's reading of Section 198. During the February 3, 2020 first pretrial conference, counsel for Geronta explained that:

> The basis of the relevance is we're in Restatement 198 land where we have to prove comparative fault. Both sides do. Who is more at fault here? And there's an e-mail saying we have actual knowledge. So it's relevant…

(A799-801.) After further discussion between the court and counsel, the following exchange took place:

> MR. DUPRE: Really so, as Your Honor knows, we're effectively in comparison fault land on that restatement test.
>
> THE COURT: You could put it that way, yeah.
>
> MR. DUPRE: Who's worse? That's what we're going to walk in and try. Who's more at fault.

(Id. at 20:20-21:2.) Three weeks later, during a second pretrial conference, the Trial Court again acknowledged the relevance of the issue of comparative fault to Section 198 by stating that whether Brighthouse was willful or reckless "*goes to the heart of the litigation*." (*Id.* at 53:22 (emphasis added).) The Court then ordered another round of supplemental briefing on the issue of comparative scienter "because that goes to the heart of [Geronta's] case." (*Id.* at 54:18.)

On March 9, 2020 Geronta filed the requested brief, providing the Trial Court with argument and authorities to support that comparative scienter was the crux of the test set forth in Section 198. (A455-472.) Then, during a third pretrial conference a year later on the eve of trial, when advised again by counsel that Geronta's position was that it was entitled to restitution pursuant to Section 198 because Geronta was less in the wrong than Brighthouse, the Trial Court replied "I understand your position… you don't have to keep repeating it" (A996 at 16:18) and "I understand that a lot of [Geronta's] case hinges around whether and when Brighthouse knew." (A1008 at 21-23; A1009 at 1.)

Despite all of this, in the Trial Decision the Trial Court held for the first time that Geronta had failed to meet its burden of establishing that *in pari delecto* analysis was applicable and that Section 198(b) was not applicable because Geronta had failed to show that it "was the victim of misrepresentation or oppression." Ex. B at 57. This exception to the rule set forth in Section 198(b) had never before been discussed by the Trial Court. As a matter of fact, as a matter of law, and as a matter of procedure, the Trial Court erred.

"The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation." *Frederick-Conaway*, 159 A.3d at 296. This Court has held that although the law of the case doctrine "usually requires the issue to have been "fully briefed and squarely decided" in the prior proceedings, "issues decided implicitly" satisfy the actual decision requirement. *State v. Wright*, 131 A.3d 310, 321 (Del. 2016). The Trial Court was well aware that the point of the trial was a comparative fault analysis. The Trial Court informally but explicitly agreed that Section 198(b) contemplated a comparative fault analysis. The Trial Decision did not explain why it abandoned the comparative fault regime to instead rule upon a misrepresentation standard not previously adopted by the Trial Court

during *three* pre-trial conferences or *six* pre-trial briefs. Simply, the Trial Court changed the rules of the game after the trial ended, and for no discernable reason.

The law of the case doctrine thus required the Trial Court to apply Section 198(b)'s comparative fault analysis as it announced it would before trial. The failure to do so is reversible error.

2. The Trial Court Erred By Ignoring Conclusive Evidence That Appellee Had Actual Knowledge That The Policy Was Void In 2011.

The Trial Decision makes no mention *at all* of the conclusive trial evidence (much of it stipulated) that Brighthouse had actual knowledge at some point between April 28, 2010 and October 21, 2011 that the Policy was the product of criminal fraud, and thus void for lack of insurable interest. The Trial Decision *completely* omitted the following facts:

1. On December 17, 2009, Brighthouse began investigating the Policy because its recent transfer to EEA had raised "strong IOLI flags." (A3021-3023; A571, ¶84.)
2. On April 27, 2010, the day after the NJAG's office issued a subpoena for all of Brighthouse's records pertaining to the Policy (A575, ¶103-04), Brighthouse added Pape Seck to its "do not appoint list" (which barred him from selling Brighthouse policies). (A1428-34.)

.

3. Two days after receiving the NJAG subpoena, someone at Brighthouse printed out the April 2010 Press Release and placed it in Brighthouse's files. (A575, ¶105; A1433-1434; A3032-33.)

4. The fact and contents of the McCarthy Email of October 26, 2011. (A3034; A2891-3892 at 27-41.)

The Trial Court's failure to consider all of this evidence as evidence of Brighthouse' actual knowledge that the Policy was fraudulent and void in the context of comparative fault qua Section 198(b), or even mention it, was erroneous as a matter of law. *See also Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, Del.Supr., 541 A.2d 567, 570 (1988) ("An abuse of discretion occurs when "a court has ... exceeded the bounds of reason in view of the circumstances, [or] ... so ignored recognized rules of law or practice so as to produce injustice.")).

The Trial Decision is poorly reasoned even on its own terms. Brighthouse had actual knowledge that the Policy was the product of criminal fraud and thus void in 2011, but it stayed silent and took enormous policy premiums from EEA and Geronta for years. Geronta did not know the Policy was fraudulent upon purchase of a bundle of 188 policies in 2015—but Brighthouse did. Geronta discovered that the Policy was fraudulent shortly thereafter, sought to verify that

fact with EEA, and then informed Brighthouse, who already knew. Brighthouse held actual knowledge, and reaped premiums for its own benefit. Geronta did not have actual knowledge, and paid premiums to its own detriment. The things that the Trial Decision criticized Geronta for not discovering before it purchased the policy were things Brighthouse *had actually known itself for four or five years*. Brighthouse is more at fault than Geronta.

3. The Trial Court Erred By Declining Restitution Based On An Erroneous Readings Of Section 198(b).

The Trial Court held that Geronta was not entitled to restitution because Section 198(b) was inapplicable to its claim. The Trial Court's conclusion was legally erroneous, as it misapplied Section 198(b). At trial, Geronta proved that Brighthouse and Geronta were not "equal" with respect to discovering the Policy's illegality because Brighthouse had actual knowledge that the Policy lacked an insurable interest by at least April 28, 2010, and no later than October 26, 2011. At worst, Geronta negligently failed to discover what Brighthouse *already* knew five years before Geronta purchased the Policy. Consequently, Geronta was entitled to restitution under Section 198.

Section 198(b) authorizes restitution where the party seeking affirmative restitution, although not excusably ignorant, was not "equally in the wrong" with its litigation counterpart. *See* Section 198(b); *see also* 5 Williston on Contracts §

12:6 (4th ed. 2019) (citing Section 198(b) to explain that even if party is "chargeable with some knowledge of facts rendering the transaction illegal, but not in *pari delicto*" it is entitled to restitution). There is a dearth of case law interpreting or analyzing Section 198(b), particularly in Delaware. However, it is clear that courts applying Section 198(b)'s "equally in the wrong" test endeavor to determine the less "culpable" party. *See Norman v. Salomon Smith Barney, In*c., 350 F. Supp. 2d 382, 389 (S.D.N.Y. 2004); *Blackburn & McCune, PLLC v. Pre-Paid Legal Services, Inc.*, 398 S.W.3d 630, 660 (Tenn. Ct. App. 2010) (stating that a restitution award pursuant to Section 198 requires consideration of "knowledge or culpability" of the parties). Accordingly, under Section 198(b), litigants with superior knowledge of facts regarding the illegality of a contract are more culpable (i.e., wrong) than their litigation counterpart.

More broadly, restitution is frequently awarded where the wronged party was not in *pari delicto* with the other party. *See Norman*, 350 F. Supp. 2d at 389 (restitution available to the party with lessor culpability on a contract void *ab initio* due to illegality or contravention of public policy); *Jipac, N.V. v. Silas*, 800 A.2d 1092, 1100 (Vt. 2002) (parties to a contract void for illegality not in *pari delicto* where they have "very different" degrees of culpability; restitution awarded to the less culpable party).

Other persuasive authority addressing the common law in *pari delicto* standard also supports that the party with greater knowledge of facts regarding the illegality of a contract are more culpable. *See, e.g., Orthodontic Ctrs. of Texas, Inc. v. Wetzel,* 410 Fed. App'x 795, 798 (5th Cir. 2011) ("Generally, under Texas law, courts find that parties are not in *pari delicto* where one party had access to facts indicating that the contract was illegal, and the party enforcing the contract did not."); *Nat'l Farmers Org., Inc. v. Kinsley Bank,* 731 F.2d 1464, 1439 (10th Cir. 1984) (finding that a borrower with no knowledge that a bank agreed to an illegal loan was not in *pari delicto* with the bank who knew the loan was illegal); *Jo Ann Howard & Assocs., P.C. v. Cassity*, 2014 WL 7408884, at *9 (E.D. Mo. Dec. 31, 2014) ("The focus [of in *pari delicto*] is on the relative culpability of the parties and will apply only where the plaintiff was equally or more culpable than the defendant or had the same or greater knowledge as to the illegality or wrongfulness of the action."); *Wager v. Pro,* 575 F.2d 882, 885 (D.D.C. 1976) ("When both parties to an illegal transaction have not, with the same knowledge, willingness and wrongful intent...or the undertakings of each are not equally blameworthy, a court may aid the one who is comparatively the more innocent and grant him affirmative relief.")

In *Columbus Life Ins. Co. v. Wilmington Tr., N.A.*, 2021 WL 1820614 (D. Del. May 6, 2021), *report and recommendation adopted*, 2021 WL 3886373 (D. Del. Aug. 31, 2021), the District of Delaware recently observed that:

> The Delaware Supreme Court has yet to tell us whether and under what circumstances restitution can be recovered from an insurer when a policy is found to be an illegal STOLI policy. But federal courts applying Delaware law have consistently permitted requests for the return of premium payments, even if they weren't expressly styled as claims for restitution.

Id. at *9. *See also Sun Life*, 2019 WL 8353393, at *4 (awarding restitution damages to a secondary market purchaser of an insurance contract where the issuing company "made the strategic decision not to pursue investigating [these] policies and continued to collect (often enormous) premiums.") (internal citations omitted); *Sun Life Assurance Co. of Canada v. Conestoga Tr. Servs., LLC*, 263 F. Supp. 3d 695, 704 (E.D. Tenn. 2017), *aff'd*, 717 Fed. Appx. 600 (6th Cir. 2018) (noting that Tennessee follows "the majority rule" that an assignee who has paid premiums in good faith is entitled to recover premiums paid if the policy is later declared void because of the misconduct of others); *Sun Life Assurance Co. of Canada v. Wells Fargo Bank*, N.A., 2018 WL 2100740, at *3 (N.D. Ill. May 7, 2018) ('The Bank, however, may be entitled to equitable relief of restitution for premiums innocently paid [on an insurance contract found to be void *ab initio*]. If

the Bank was not in *pari delicto* as to the unlawful contract, then Illinois allows it to recover from plaintiff the premiums it paid."); *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co.* 27 F.Supp. 252, 257-58 (D.SC. 1989) *aff'd in part, rev'd in part on other grounds*, 938 F.2d 502 (4th Cir. 1991). (insurance company's actual knowledge that a rebate provision was unenforceable made it more culpable than a plaintiff who was unaware of the illegality).

Many of these authorities were cited to the Trial Court, at its request, in pretrial supplemental briefing. (*See* A457-472.) However, the Trial Decision does not discuss or mention *any* of these authorities, and it ignores the reasoning they espouse. The failure to consider or discuss these authorities, particularly after requesting their submission, constitutes an abuse of discretion.

Instead, the Trial Court held Geronta was not entitled to restitution because it was not "the victim of misrepresentation or oppression." Ex. B at 57. The sole authority cited by the Trial Court in support of its conclusion was Comment b. to Section 198(b). The Trial Court's decision to rely upon Comment b. was erroneous. First, the Comment makes it clear that the "misrepresentation or oppression" concept is meant to apply when both parties to the contract entered into an illegal bargain together. Section 198(b), com b., illustration 3. The Trial Court did not provide *any* authorities to support that the limitation in Comment b.

should apply to an innocent successor not originally a party to contract. After diligent research, Geronta is unable to locate a single case from *any jurisdiction in the United States* that supports the Trial Court's application of the limitation in Comment b. in this context.

Second, the trial court ignored the full text of Comment b.

> The fact that the other party engages in improper transactions as a business or that he occupies a special position of trust or confidence may be critical. The exception stated in paragraph (b) is not usually available to a claimant whose misconduct is serious when viewed in the light of the threatened social harm. However, if the other party's conduct is especially reprehensible, the court may decide that it is more important to deprive him of his ill-gotten gains. This may be so, for example, where he has enticed the claimant into the transaction, where he has devised a scheme to defraud the claimant, or where he engages in the misconduct professionally.

Id.

The omitted portion of Comment b. makes clear that the limitation assumes a situation where the party seeking restitution has engaged in "serious" misconduct. Geronta did nothing of the sort—the worse that can be said is that it failed to discover information in 2015 that Brighthouse actually knew in 2011. Brighthouse concedes that it never told EEA or Geronta anything about the "strong IOLI flags" associated with the Policy or anything about the NJAG subpoena, the

facts of its assistance to the NJAG's investigation of Pape Seck, or his guilty plea to defrauding Brighthouse. (A571, ¶85; A575, ¶108; A580, ¶132; A1489-1493.)

Instead of canceling or rescinding the Policy, or warning potential purchasers, Brighthouse remained silent and collected $706,470.29 in premiums from EEA and $460,577.00 from Geronta. (A582, ¶140; A590, ¶189.) Brighthouse's conduct was "especially reprehensible" and constitutes "professional misconduct" within the meaning of the comment. The Trial Court's failure to consider the wrongfulness of Brighthouse's conduct constitutes legal error.

4. The Trial Court Ignored Restatement Section 197.

The Trial Court's application of Section 198(b) was only appropriate if it first decided that restitution was not available to Geronta under Restatement (Second) of Contracts § 197 ("Section 197"), which reads:

> Except as stated in §§ 198 and 199, a party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy *unless denial of restitution would cause disproportionate forfeiture.*

Restatement (Second) of Contracts § 197 (1981) (emphasis added). Determination of whether a forfeiture is disproportionate within the meaning of Section 197 is based on factors such as "the extent of the party's deliberate involvement in any misconduct, the gravity of that misconduct, and the strength of the public policy."

Section 197, Comment b. The Trial Court's decision to permit Brighthouse to retain 85% of premiums collected on the Policy causes disproportionate forfeiture.

The sparse case law interpreting Section 197 confirms that conclusion. In *Marketing Specialists, Inc. v. Bruni*, 129 F.R.D. 35 (W.D.N.Y. 1989), the Court applied New York law and cited Section 197 to determine whether declining to enforce an illegal contract between a manufacturer and distributor of hearing aids would work a disproportionate forfeiture. The analysis is telling:

> The first policy consideration involved in such a balance is the principle that the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, of preventing people from getting other people's property for nothing when they purport to be buying it.

Id. at 48 (internal citations and punctuation omitted). *See also Corbin on Contracts* § 39.10 (2019) § 39.10 ("Forfeitures Are Regarded With Disfavor. Courts do not favor forfeitures, meaning that they do not like to see a party to a contract getting something for nothing.").

Here, Brighthouse wants something for nothing. It knew in 2011 that it would never pay a death benefit on the Policy, but asserts a right to keep all of the premium payments that were made nonetheless. This contravenes the public policy statements espoused by the District of Delaware in *Berck* and *Snyder*. *Berck*, 719 F. Supp. 2d. at, 418-19; *Snyder*, 722 F. Supp. 2d at 565.

In light of these authorities, it is clear that the trial court erred by not awarding restitution to Geronta pursuant to Section 197.

5. The Trial Court Ignored the Deleterious Public Policy Consequence of its Trial Decision.

The Trial Court's decision rewards insurance companies that ignore credible evidence that a given policy is, or may be, void for illegality. If this view prevails, Brighthouse's decision to ignore the red flags about the Policy that were known to it by October 2011 will be rewarded by the retention of more than $1.2 million in premiums after it had actual knowledge that Seck did not exist. *See Sun Life,* 2019 WL 8353393, at *4 (D. Del. Dec. 30, 2019) (criticizing an insurance company for making a "strategic decision" not to investigate policies after discovering STOLI "red flags," and for failing to notify policyholders that their policies were suspected STOLI.) *See Wessel v. City of Albuquerque*, 463 F.3d 1147 (10th Cir. 2006) (Section 198(b) and Restatement (Third) of Restitution (2011) § 32 authorized restitution where the party seeking restitution was not equally in the wrong with the promisor, and where "it will deter future misconduct.").

This Court has recognized that over the last two decades that the life settlement market for life insurance policies serves an important public purpose by allowing policy holders who no longer need life insurance to receive necessary cash during their lifetimes, and by providing a favorable alternative to allowing a

policy to lapse or receiving only the cash surrender value. *Price Dawe* 28 A.3d at 1069. The Trial Court's decision, if allowed to stand, will increase the risk faced by downstream purchasers that they will be unable to recoup their premium payments on a policy later found to be void *ab initio.* Increased risk will ultimately lead to lower payments to those who are legitimately insured and decide that it is in their best interest to sell their policies on the secondary market.

These public policy considerations strongly weigh in favor of finding that the Trial Court erred in its decision to deny restitution to Geronta without considering the evidence that demonstrated that Brighthouse had actual knowledge that the Policy was fraudulent no later than October of 2011, and that the Trial Court erred in applying Sections 197 and 198 to the facts at hand.

III. APPELLANT'S UNDERSTANDING OF CUSTOMARY TERTIARY MARKET DUE DILIGENCE INFORMED ITS EFFORTS AND PROVES APPELLANT WAS EXCUSABLY IGNORANT

A. Question Presented

Whether the Trial Court erred by precluding Geronta's witnesses from testifying about their understanding of customary tertiary market due diligence. (A308-17; A350-356.)

B. Scope of Review

The decision to exclude evidence is reviewed for abuse of discretion. *Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1053 (Del. 2010).

C. Merits of Argument

The Trial Court abused its discretion by precluding Geronta from presenting testimony at trial that the due diligence conducted prior to purchasing the Portfolio was consistent with customary tertiary market purchases, in response to Appellee's Motion *in Limine* No. 1. (A308-14.) At the February 3, 2020 pretrial conference, the Trial Court ruled that testimony regarding an industry standard "requires an expert opinion or an expert explanation." Ex. C at 5:20-6:5.[8] The Trial Court's evidentiary ruling contravenes Rule of Evidence 701.

[8] Exhibit C is a true and correct copy of the transcript of the February 3, 2020 pretrial conference.

Geronta intended to offer this testimony to explain why it conducted the due diligence that it did—a fact of crucial import in a comparative fault case. When offered for this purpose, the testimony was not expert testimony at all but rather fact testimony offered by a fact witness. *See* Del. R. Evid. 701(a). Lay opinion testimony is permissible so long as it is based upon a witness's perception and personal knowledge. *See Donlin v. Philips Lighting North America Corp.*, 581 F.3d 73, 81 (3d Cir. 2009) ("When a lay witness has particularized knowledge by virtue of her experience, she may testify—even if the subject matter is specialized or technical—because the testimony is based upon the layperson's personal knowledge rather than on specialized knowledge within the scope of Rule 702."); *see also* Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 7.3 (4th ed. 2013) ("Witnesses who have strong background or experience in…the methods and practices of an organization or an industry" will often be permitted to give lay testimony pursuant to Rule 701). Indeed, lay opinion testimony from a witness knowledgeable about the operation of their industry of specialization is admissible when it is well-founded upon their personal knowledge, and not the after-the-fact knowledge applied to hypothetical questions that is the distinguishing feature of expert testimony pursuant to Rule 702. *See Lord & Taylor, LLC v. White Flint, L.P.*, 849 F.3d 567, 575 (4th Cir. 2017).

The Trial Court's evidentiary ruling prejudiced Geronta at trial. One of Geronta's witnesses (Dan Knipe) expressly limited his testimony based upon his understanding that he was "not supposed to talk about customary market practices," even though he personally knows those practices and acted in accordance with them. (A1761, 6-11.) Moreover, in the Trial Decision, the Trial Court used Mr. Knipe's understanding (as stated in an e-mail) of tertiary market standards to criticize Geronta's level of due diligence. Ex. B at 53-54. Indeed, the Trial Court held that Geronta could not be excusably ignorant under Section 198(a), in part, because Geronta "is a sophisticated company with knowledge and experience in the life insurance investor market" and one cannot be excusably ignorant "as to which he is expected to have knowledge because of his expertise or relation to the transaction." Ex. B at 52. Thus, the Trial Court barred Mr. Knipe from testifying for the industry reasons that Geronta it conducted its diligence, but then ruled that diligence was fault-worthy without ever hearing the reasons for it.

IV. THE TRIAL COURT ERRED BY REJECTING, *SUB SILENCIO*, APPELLANT'S BONA FIDE PURCHASER FOR VALUE DEFENSE

A. Question Presented

Whether a bona fide purchaser for value defense is available to tertiary purchasers of life insurance policies and whether Appellant proved application of a bona fide purchaser for value defense.[9] (A594, ¶219; A360-84; A457-72.)

B. Scope of Review

The availability and application of a legal defense is a mixed question of law and fact and subject to *de novo* review. *See Wilmington Stevedores, Inc. v. Steel Suppliers, Inc.*, 1986 WL 16973, at *1 (Del. June 11, 1986).

C. Merits of Argument

A "bona fide purchaser is one who acquires legal title to property in good faith, for valuable consideration, and without notice of any other claim of interest in the party." *Fletcher v. City of Wilmington UDAG*, 2006 WL 2335237, at *2 (Del. 2006) (internal quotations omitted). Geronta raised this defense (A594, ¶219) and submitted, at the Trial Court's request, two supplemental briefs addressing the bona fide purchaser for value defense. (A360-384; A457-472.)

[9] Whether a bona fide purchaser for value defense is available to tertiary market purchasers is also presented in the appeal *Wells Fargo Bank, N.A. v. Estate of Phyllis M. Malkin*, No. 172-2021 (Del.), albeit in slightly different circumstances.

The Trial Decision does not address the bona fide purchaser for value defense. Nevertheless, it is undisputed that Geronta purchased the Policy on the tertiary market for $1.4 million as part of the Portfolio. (A583, ¶ 148; A3180.) Moreover, Geronta did not participate in any of the fraudulent activities perpetuated in connection with originating the Policy and purchased the Policy without any knowledge of the non-existence of the named insured. The bona fide purchaser defense clearly applies, as a matter of law.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests that this Court reverse the Trial Court's MJOP Decision and Trial Decision.

Dated: January 24, 2022

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