EFiled: Nov 04 2022 11:34AM EDT
Filing ID 68350307
Case Number 126,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILMINGTON TRUST, NATIONAL ASSOCIATION, as Securities Intermediary, Defendant/Counterclaim-Plaintiff Below, Appellant/Cross-Appellee v. SUN LIFE ASSURANCE COMPANY OF CANADA, Plaintiff/Counterclaim-Defendant Below, Appellee/Cross-Appellant	No. 126, 2022 Court Below: Superior Court of the State of Delaware C.A. No. N18C-07-289; N17C-08-331 [redacted]

CROSS-APPELLANT'S ANSWERING SUPPLEMENTAL BRIEF

[redacted]

Gregory F. Fischer (#5269)
COZEN O'CONNOR
1201 N. Market Street, Suite 1001
Wilmington, DE 19801
(302) 295-2017

Attorneys for Sun Life Assurance Company of Canada, Plaintiff/Counterclaim Defendant Below Appellee/Cross-Appellant

Dated: October 19, 2022

[redacted]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILMINGTON TRUST, NATIONAL ASSOCIATION, as Securities Intermediary, Defendant/Counterclaim-Plaintiff Below, Appellant/Cross-Appellee v. SUN LIFE ASSURANCE COMPANY OF CANADA, Plaintiff/Counterclaim-Defendant Below, Appellee/Cross-Appellant	No. 126, 2022 Court Below: Superior Court of the State of Delaware C.A. No. N18C-07-289; N17C-08-331 [redacted]

CROSS-APPELLANT'S ANSWERING SUPPLEMENTAL BRIEF

Gregory F. Fischer (#5269)
COZEN O'CONNOR
1201 N. Market Street, Suite 1001
Wilmington, DE 19801
(302) 295-2017
gfischer@cozen.com

Attorneys for Sun Life Assurance Company of Canada, Plaintiff/Counterclaim Defendant Below Appellee/Cross-Appellant

Of Counsel:

Joseph M. Kelleher
Brian D. Burack
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
215-665-2000

Dated: October 19, 2022

[redacted]

TABLE OF CONTENTS

Page

[redacted]

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

[redacted]

INTRODUCTION

Wilmington Trust's brief is predicated on the false premise that Sun Life was on inquiry notice of the Policies' invalidity as early as 2009/10 and purposefully waited to challenge the Policies until the Insureds died. The reality, however, is that at no point prior to its 2017/18 death claim investigations did Sun Life possess sufficient information to file the instant actions or to take other protective action.

But even if this Court were to assume *arguendo* that Sun Life was, at some point, on inquiry notice, this does not get Wilmington Trust where it needs to be under *Seck* because Viva had [redacted] Thus, the absolute worst-case scenario for Sun Life is that both parties are deemed to have had some form of constructive ([redacted]) knowledge, and under *Seck*, when the claimant is more to blame, or the parties are in equipoise, restitution is improper.

Wilmington Trust also ignores that Viva knew far more about the Policies than Sun Life; that Sun Life exerted far more diligence effort than Viva; that [redacted]; whereas, Sun Life was tricked into issuing them; and that Viva's business model involves deliberately buying STOLI at a discount; whereas, Sun Life has worked for years to rid its books of STOLI.

[redacted]

ARGUMENT

I. SUN LIFE WAS NOT ON INQUIRY NOTICE PRIOR TO FILING SUIT AND DID NOT PURPOSEFULLY WAIT TO FILE ITS CLAIMS.

Sun Life was, for many years, in the business of selling high-face policies to wealthy seniors for estate planning. In the 2000s, Sun Life, along with other insurers, was the victim of a massive fraud assault perpetrated against them through a variety of STOLI schemes. Although the mechanics of these schemes differed, they were all stealth transactions designed to look legitimate and conceal from Sun Life (and other insurers) that investors were wagering on seniors' lives. SL.Op.Br. at 22.

In or around 2005, Sun Life recognized it was being targeted by these schemes, but did not know the details of how these schemes worked or how to differentiate surreptitiously-placed STOLI policies from legitimate business. *Id.* at 22-23. This put Sun Life in a difficult position. On the one hand, it did not know which policies it had issued were good and which were bad; did not know which state's law would be deemed to apply; did not know how state supreme courts would interpret their insurable interest statutes to deal with these various schemes; lacked, absent a lawsuit, the authority to demand information; and had no reason to believe that STOLI fraudsters would voluntarily reveal their fraud. *Id.* On the other hand, because these policies were already in-force, Sun Life owed contractual obligations to its policyholders; had to treat the policies as valid until a court declared them void;

[redacted]

and could not bring suit unless it was nearly certain a policy was invalid because, if wrong, it risked incurring bad faith damages and the ire of legitimate customers.

So, instead of filing numerous lawsuits without the facts and law needed to be confident that the right policies were being challenged, under the right body of state law, Sun Life tried to prevent further STOLI through the gatekeeping function of underwriting. In this regard, Sun Life developed new application questions designed to detect potential STOLI, asking whether insureds had discussions about potentially selling the policies or intended to sell them. A2359/87:11-88:14. A "yes" answer did not necessarily mean a policy would be deemed void STOLI by the applicable body of state law. But such answers were indicative of potential STOLI and thus indicated business Sun Life did not want. Although getting approval from insurance commissioners for these questions was a time-consuming process, while waiting, Sun Life sent directives to producers that it would not accept certain types of transactions it considered potential STOLI.[1] SL.Op.Br. at 22-23.

Sun Life also tried to evaluate how much it had been defrauded. This was possible because investor-owned policies behave differently from legitimate policies

[1] When Sun Life later learned that certain independent producers may have been complicit, it set out to identify, and where appropriate, terminate them. A2403/264:2-267:16. But that does not mean all business from terminated producers was STOLI; many also generated legitimate business. In any event, the producers at issue here were not so identified. A2253/76:19-79:24; A2408/283:4-285:1.

owned by non-investors. For example, a non-investor typically takes advantage of a policy's guaranteed-interest rate and uses a policy as a means of savings and investment; also, as a group, non-investors will also allow a certain percentage of policies to lapse. Investors, on the other hand, act very differently, minimally funding their policies and rarely allowing them to lapse, meaning the policies are typically not profitable to Sun Life. A2149/78:16-80:12; A2358/83:6-85:5; *see U.S. v. Carpenter*, 190 F. Supp. 3d 260, 269 (D. Conn. 2016).

As part of this evaluation, which required Sun Life [redacted] Sun Life generated certain policy lists. SL.Op.Br. 22-23. Wilmington Trust's argument that Sun Life was on inquiry notice relies heavily on these lists, characterizing them as "STOLI lists." But they were not. They were lists of policies having very high-level *potential* STOLI indicia such as elderly insureds, high-face-amount policies, and ownership changes three or less years post-issuance to an owner without an obvious insurable interest. *Id.*

Far from being "STOLI lists," this criteria was *extremely* over-inclusive and captured many legitimate policies that were validly life-settled and were not STOLI. *Id.*; B2260/¶¶ 5-7. These were *not* lists of policies Sun Life had identified as STOLI; void; or as policies it intended to challenge. *Id.*; A2260/102:10-103:8. This is proven by the fact that Sun Life has paid over 99% of death claims—1,682 out of 1,694

[redacted]

claims—received for policies on these lists. SL.Op.Br. 23-24. All told, these lists contain 10,307 policies, the vast majority of which are likely perfectly legitimate.

Nor would it have been reasonable for Sun Life to investigate, post-issuance, each of these 10,307 policies. Such an investigation would have been prohibitively expensive and time consuming and no rational actor would have conducted it because (i) as evidenced by Sun Life's pay rate, most of the policies on the lists are likely legitimate; (ii) the law—determining policy validity and the ability to bring post-contestable legal challenges—was (and is) still developing in many states; and (iii) Sun Life has no ability, outside of litigation, to compel production of the information needed to further evaluate these policies.

Nor, prior to Sun Life's death claim investigation, did it possess information to support filing the instant lawsuits or that would be sufficient to put a person of ordinary prudence on inquiry, which, if pursued, would lead to the discovery of such facts. Sun Life thoroughly underwrote the Policies and relied on the answers in the applications as it is entitled to do under 18 Del. C. § 2704(d). In those applications, Sun Life was lied to about the Policies' purpose and premium source. The applicants also failed to disclose the pre-issuance arrangements for LPC to acquire the Policies, and when the Trusts did, in fact, sell their beneficial interests to LPC shortly after issuance, Sun Life was not informed of that either. SL.Op.Br. at 22.

[redacted]

Sun Life did not learn of the existence of LPC until 2009. But Sun Life's knowledge about LPC, the different programs it ran, who was running those programs, how a policy procured through the LPC Program might be identified, and the facts about what, exactly, they were doing was still meager. *See, e.g.*, A2166/147:1-148:1. And, of course, this Court had not yet decided *Price Dawe*. Although Sun Life filed three lawsuits in 2009 in connection with policies owned by trusts administered by Berck where Sun Life believed the policies were sold to investors through beneficial interest transfers, that does not mean all policies issued to trusts administered by Berck were sold to investors (let alone sold through beneficial interest transfers) or that LPC was involved. Berck was a lawyer who served as a trustee, as many lawyers do. Just because Sun Life had reason to believe three specific policies associated with Berck were STOLI in 2009 does not mean Sun Life should have expected or investigated whether the Policies were STOLI.[2]

Wilmington Trust is also correct that Sun Life's lawyers represented other insurers in other STOLI lawsuits involving policies originated by LPC and/or LPC-related entities. But all of those lawsuits either settled or were lost by the insurer. It was not until *the instant lawsuits* that an insurer—for the first time—has been able

[2] One of the Policies was administered by Berck; the other was not.

[redacted]

to prove that LPC policies are void (which Wilmington Trust vigorously denied below and continues to deny to this day). SL.Reply.Br. at 10 n.6.

It is also true that Sun Life had communications with its lawyers about policies that included Frankel (in 2009) and DeBourbon (in 2014), but that is apropos of nothing. In 2009, Sun Life reasonably believed (pre-*Price Dawe*) that it was stuck with the Policies because the two-year contestable period had expired. And in 2014, Sun Life did not have the information that Viva had (e.g., [redacted]). Nor would a reasonable investigation have provided Sun Life with this information because Lockwood and Fleisher are adversaries of Sun Life who do not cooperate absent a subpoena and are the ones who hid this from Sun Life to begin with. Even in this litigation, Sun Life had to move to compel to get much of this information.[3]

Moreover, although it is true that, in 2012, Sun Life curtailed investigating in-force policies, even post-2012, when Sun Life is presented with facts sufficient to render an investigation reasonably worthwhile, Sun Life will (and has) investigated

[3] Although Sun Life had litigation interactions with Berck and Fleisher in 2009/10, those cases settled before discovery so Sun Life did not learn the details of how their program(s) worked.

[redacted]

in-force policies.[4] 2161/127:5-1314:24. Absent such information, Sun Life waits until death to investigate. There are many good reasons for doing this.

First, many policies, including many legitimate ones, lapse naturally for failure to pay premium and, thus, many never result in a death claim.

Second, Sun Life cannot file a lawsuit on mere suspicions. Insurers are subject to bad faith claims, and if they unsuccessfully challenge a policy with insufficient evidence, punitive bad faith damages can follow. And outside of litigation (i.e., without a subpoena), Fleisher, Lockwood, Berck and the producers would not have cooperated and would have continued concealing the facts from Sun Life. *Id.*

Third, although Delaware STOLI law, at least at a high level, became clearer in 2011 with *Price Dawe*, without STOLI evidence, Sun Life could not be sure the Policies would be invalid under *Price Dawe*. To confirm that this is true, the Court need look no further than Wilmington Trust's own briefs below through which it argued aggressively and at length that these Policies are *valid* under Delaware law.

Fourth, at the time, there was no case law deciding choice-of-law questions on facts such as these. Although these were Delaware-issued policies, Sun Life knew that STOLI investor-defendants are very aggressive in making choice-of-law arguments to try to get Delaware-issued policies decided under the law of states that

[4] *See, e.g.*, *Miller v. Sun Life*, No. 2184-CV-02466, Mass. Super. Ct., Sussex Cty.

[redacted]

are STOLI safe havens like New York. Again, to confirm that this is true, this Court need look no further than Wilmington Trust's conduct below where it denied in its pleadings that Delaware law applied, argued in dispositive briefing that Delaware law did not control, and did not concede that Delaware law applied until after two years of intense fact discovery. *See, e.g.*, A288-91; A373/39:21-41:16; *see also Sun Life v. U.S. Bank*, 2016 WL 161598, at *9-14 (S.D. Fla. Jan. 14, 2016) ("*Malkin*") (STOLI investor fighting aggressively to try to avoid Delaware law in connection with Delaware-issued policy), *aff'd*, 693 App'x 838 (11th Cir. 2017); *U.S. Bank v. Sun Life*, 2016 WL 8116141, at *9-14 (E.D.N.Y. Aug. 30, 2016) ("*Van de Wetering*") (same), *adopted*, 2017 WL 347449 (E.D.N.Y. Jan. 24, 2017).

Finally, Sun Life knew from experience that when it challenged in-force policies, it opened itself up to a whole other species of tortious interference/fraud counterclaims alleging that Sun Life's mere act of questioning/challenging a specific in-force policy put a cloud over that policy (or group of policies) rendering them valueless and triggering a massive cascade of damages. A2161/128:11-131:17.

Thus, absent actual evidence of STOLI, the most Sun Life reasonably thought it could do with an in-force policy was issue reservation of rights language in processing ownership changes. In response to those reservations of rights, at no time, did any investor, including Viva—who actually had access to all of the information Sun Life did not—disclose any information to Sun Life. The reason is that all of

[redacted]

those investors, including Viva, were perpetuating the cover-up by continuing to conceal from Sun Life the information they knew would cause Sun Life to file these lawsuits, and hoping that the Policies would fly under the radar so Wilmington Trust could cash-in on them and collect their illegal death benefits.

When the Insureds died, Sun Life sent the files to outside counsel specializing in STOLI and STOLI choice-of-law. These counsel had recently won choice-of-law battles (*see Malkin* and *Van de Wetering* above) that gave Sun Life confidence that Delaware law would be applied. A2205/304:18-306:21. Those same decisions also developed Delaware substantive STOLI law. Those decisions—as well as fraud evidence obtained by outside counsel's investigation—were the driving factors in Sun Life's conclusion that it could prudently bring a claim to have the Policies declared void and Sun Life's decision to file these lawsuits. SL.Op.Br. at 23.

The bottom line is that, at no point prior to the death claim investigation, would a reasonable person have engaged in a further investigation into the Policies that would have revealed facts sufficient to put Sun Life on notice of the claim and give Sun Life the comfort it needed to file the actions without bad faith exposure.

[redacted]

II. EVEN IF SUN LIFE WAS ON INQUIRY NOTICE, WILMINGTON TRUST STILL CANNOT PROVE VIVA WAS LESS AT FAULT.

Wilmington Trust dedicates most of its brief trying to prove that Sun Life was on inquiry notice and did nothing. For the reasons set forth above, Sun Life disputes this. But even if we assume for sake of argument that this is true, it remains that Viva engaged in the same conduct it alleges Sun Life engaged in: Viva knew or should have known the Policies were void and did nothing. And, under *Seck*, where the parties' fault is the same, the insurer retains the premiums. 2022 WL 3654872, at *14 ("[I]f the downstream investor was equally at fault with, or more at fault than, the insurer, [courts applying a fault-based approach have] left the parties where it found them, allowing the insurer to keep the premiums.").

Wilmington Trust also ignores that Viva knew far more about the Policies than Sun Life; that Sun Life conducted far more diligence than Viva; that Viva [redacted]; whereas, Sun Life was tricked into issuing them; and that Viva's business model involves knowingly buying STOLI at a discount; whereas, Sun Life has taken substantial effort to rid its books of STOLI.

The only argument Wilmington Trust really makes here is that so long as Viva was on inquiry notice *later in time* than Sun Life, Wilmington Trust automatically wins. Respectfully, this does not take *Seck* seriously. In *Seck*, this Court articulated a nuanced analysis that carefully scrutinizes the knowledge and culpability of *both*

[redacted]

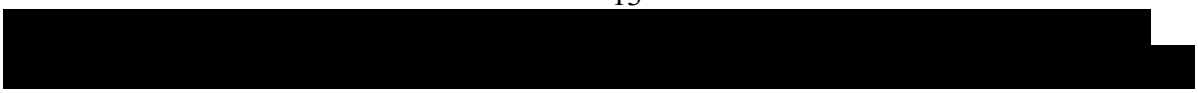
parties and incentivizes *all* parties to behave in good faith and held that if the parties' fault is the same, there is no restitution. This Court did not provide special cover for downstream STOLI investors, merely because they came later in time, which given the way STOLI policies currently trade, will almost always be true. This argument is little more than an attempt to back-door the automatic premium refund remedy *Seck* rejected and allow deliberate STOLI investors like Viva to continue buying policies they *know* are illegal under Delaware law secure in the knowledge that even if they get caught they will profit through massive premium "refunds" far in excess of the premium they actually paid. Indeed, one of the purposes of the *Seck* test is to incent good faith across the market, and what could possibly evidence bad faith more clearly than a sophisticated hedge fund buying [redacted] hoping it would not get caught? SL.Op.Br. at 18-22; A2961.

[redacted]

III. *SOL* WAS NOT CORRECTLY DECIDED UNDER *SECK*, AND THE MORE PERSUASIVE AUTHORITY IS *CORWELL*.

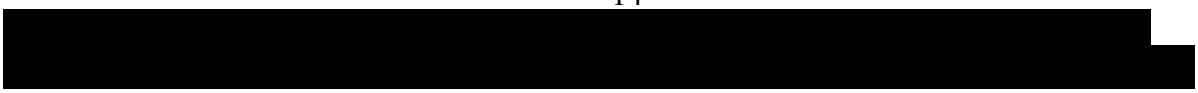
Wilmington Trust's argument that to understand why Sun Life was more at fault "this Court need look no further than *Sol*" is wrong. Not only was *Sol* a damages analysis after a jury verdict on a promissory estoppel claim that never should have gone to the jury, but the *Sol* court did not actually conduct the analysis this Court articulated in *Seck*. To be clear, the *Sol* court (without the benefit of *Seck*) did not conclude that either party was more or less at fault than the other. Instead, it found that both parties knew or should have known that there was a substantial probability that the at-issue policy lacked an insurable interest and that both parties did nothing about it. *Sun Life v. U.S. Bank*, 2019 WL 8353393, at *4 (D. Del. Dec. 30, 2019) ("*Sol*"). Having found that both parties possessed knowledge and did nothing, the court ordered Sun Life to refund premium, opining that since "no party here has shown itself to be an innocent victim . . . none should leave the Court an undisputed victor." *Id.* at *5. Respectfully, under *Seck*, this was error. Having failed to find that the investor was less to blame, the court should have applied the general rule that parties to illegal STOLI policies are *not* entitled to any relief and *denied* restitution.[5]

[5] The *Sol* court's single-sentence, conclusory statement in a footnote that because the investor had supposedly bought "the right to pursue the return of any premium that had already been paid on the Policy," it could obtain restitution of the premiums it did *not* pay is wrong for the reasons set forth in Sun Life's Opening Supplemental



An analysis more consistent with *Seck* is the recent *Corwell* decision. In *Corwell*, the Seventh Circuit reversed the trial court's decision to refund the investor (Vida) the premiums Vida paid for a STOLI policy. The court reasoned that Vida—like Viva here—"walked into the transaction as a highly sophisticated buyer fully aware of all the material facts and the significant risk that Corwell's policy would be found unlawful and void" and "took a calculated risk to try to profit from it by purchasing Corwell's policy at a discount and then attempting to cash in at his death." *Sun Life v. Wells Fargo*, 44 F.4th 1024, 1040 (7th Cir. 2022) ("*Corwell*"), *petition for rehearing denied* 2022 WL 4463134. Although there were, as here, allegations that the carrier knew or should have known that the policy was void, the court, viewing the facts "in the light most favorable to . . . Vida," held that "[t]here is no viable theory here under which Sun Life was at substantially greater fault than Vida." *Id.* at 1040. The same analysis and result should obtain here.

Brief. A restitution claimant cannot be awarded moneys it did not pay, and every single opinion this Court cited in *Seck* (other than *Sol*) declined to do that.



IV. WILMINGTON TRUST'S ARGUMENTS ABOUT PROMISSORY ESTOPPEL AND AFFIRMATIVE DEFENSES ARE WRONG.

As explained in Sun Life's prior briefs, a promissory estoppel claim is not an appropriate counterclaim in a STOLI case because promissory estoppel is premised on enforcing a promise that this Court has made clear, again-and-again, a '"court may never enforce."' *Seck*, 2022 WL 3654872, at *8 (quoting *PHL Var. Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1067 (Del. 2011)); SL.Op.Br. at 30-36.

Moreover, Wilmington Trust's argument that it can use equitable *defenses* to "bar the insurer from retaining premiums" makes no sense. Under *Seck*, Wilmington Trust is the claimant and must prove the elements of unjust enrichment as well as a fault-based exception to the general rule that parties to STOLI policies are left where they are found. A *claimant* cannot prevail by proving *defenses*. What Wilmington Trust is really inviting the Court to do is to rewrite *Seck* mere months after its issuance by adding even more exceptions to the general rule.

In any event, if anyone should be allowed to use laches and waiver in connection with a STOLI premium refund claim, it should be Sun Life. Viva had far better information about these Policies; knew Sun Life had reserved its rights; [redacted]; and deliberately decided not to bring its knowledge or concerns to Sun Life. Instead, Viva elected to

[redacted]

stay mum hoping it would eventually slip death claims past Sun Life's claims department. Then, after Sun Life challenged the Policies, instead of conceding they were invalid, Wilmington Trust dragged Sun Life through years of costly litigation over choice of law, validity, and baseless punitive counterclaims. If any party has waived its right to argue for premium it is Wilmington Trust.

[redacted]

V. WILMINGTON TRUST IS NOT ENTITLED TO INTEREST.

Wilmington Trust claims that if it can recover premiums, it should get prejudgment interest accruing on each payment from the date it was paid. Wilmington Trust says this is needed to effect the public policies articulated in *Seck* and that, without the threat of prejudgment interest, insurers will intentionally delay challenging policies. This is flawed for several reasons. As an initial matter, it is well-established that *Moskowitz* is good law and that prejudgment interest accrues in a refund case from the date it was demanded. *See, e.g.*, *Stonewall Ins. Co. v. E.I. Dupont de Nemours*, 996 A.2d 1254, 1262 (Del. 2010) (reversing decision awarding prejudgment interest accruing prior to demand for payment by insured). Indeed, given *Seck*'s confirmation that restitution (not rescission) is the proper remedy and that it must be proven (not *automatically received*), the premium payments were obviously not "due" back to Viva (automatically or otherwise) immediately on receipt by Sun Life—a demand was required. *See* SL.Op.Br. at 53-57.

Public policy reinforces this in STOLI cases where professional STOLI investors like Viva try to use prejudgment interest on premium refunds as a mechanism to claw back death benefits even after a policy is deemed void. If investors are allowed to abuse Delaware's prejudgment interest rules this way, *illegal human life wagering will be profitable in Delaware*, which is exactly what

[redacted]

Delaware's Constitution and strong anti-STOLI decisions prohibit.[6] Indeed, in a pair of STOLI cases pending in the District of Delaware, Viva has conceded that the at-issue policies are STOLI and—instead of seeking the $10 million death benefit—is arguing that it is entitled to a "premium refund" of *over $16 million*, which it calculates by applying prejudgment interest to its alleged entitlement to all of the premiums the insurer ever received (including the millions Viva did not pay)! Op. Br. of Wilmington Tr. at 1-3 & Ans. Br. of Columbus Life at 1-2, 40-44, *Columbus Life v. Wilmington Tr.*, No. 1:20-cv-735 (D. Del.), ECF Nos. 155 & 166.

[6] If Viva is awarded all the premium plus prejudgment interest accruing from date of payment (instead of demand), it will make a *net profit* of $6.9 million for knowingly investing in STOLI. *See* SL.Op.Br. at 47 n.22; SL.Reply.Br. at 13.

[redacted]

VI. SUN LIFE IS JUSTIFIED IN RETAINING PREMIUM.

Wilmington Trust refers to Sun Life's retention of premium as a "windfall" merely because Viva will be left without the proceeds of its illegal wager and without a wagering refund. But *Seck* reaffirmed Delaware's commitment to the rule that parties to illegal agreements, like STOLI, are generally left where they are found. Further, Wilmington Trust's "windfall" argument is legally irrelevant and simply not part of *Seck*'s restitution test. And even if it were, Wilmington Trust has failed to put forth any actual evidence on this and instead just relies on pure speculation.

In any event, Wilmington Trust is wrong: There is no windfall. Sun Life incurs substantial losses due to STOLI. First, as noted, STOLI investors act very differently than genuine life insurance customers. For example, contrary to Sun Life's expectations, STOLI investors do not participate in the savings and investment components of the policies they acquire and instead pay the minimum premiums. Also, STOLI investors, unlike Sun Life's genuine life insurance customers and contrary to Sun Life's expectations, rarely allow STOLI polices to lapse so the investors can reap the death benefits from their human life wagers. *Corwell*, 44 F.4th at 1035 n.3. As a result of the decreased profitability caused by these STOLI investor behaviors, Sun Life [redacted] A2149/77:16-80:13; A2156/108:21-112:13. That is a huge loss. A2135/22:4-7. Sun Life also incurs substantial expenses paying commissions and servicing costs.

[redacted]

In addition, the profitability (or lack thereof) of the Policies should not be viewed in a vacuum. Sun Life, for example, has paid out over 99% of the claims on its lists of potential STOLI policies, B2075, and was likewise at risk of being tricked into paying these Policies. Further, Sun Life has actually paid out—and investors, *including Viva*, have enjoyed—$22 million on three other Lockwood produced policies. N17C-08-331-MMJ-CCLD D.I.280 (Ex. QQQ) (excel sheet) at Rows 9863, 9903, 9946. Finally, as a carrier who is willing to step forward and seek to enforce Delaware's Constitutional wagering prohibition and other laws, Sun Life incurs massive costs litigating these cases and faces substantial risk (in the form of bad faith counterclaims) over a periods of years against aggressive, deep-pocketed STOLI investors who insist STOLI policies are not STOLI. This is no windfall.

[redacted]

CONCLUSION

Respectfully, the trial court's premium refund decision should be reversed with instructions to deny Wilmington Trust's premium refund claim.

Dated: October 19, 2022

/s/ Gregory F. Fischer
Gregory F. Fischer (#5269)
COZEN O'CONNOR
1201 N. Market Street, Suite 1001
Wilmington, DE 19801
(302) 295-2017
gfischer@cozen.com

Attorneys for Sun Life Assurance Company of Canada, Plaintiff/Counterclaim Defendant Below Appellee/Cross-Appellant

[redacted]