



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

GWG DLP MASTER TRUST DATED  
03/01/06,

Defendant-Appellant,

v.

ESTATE OF NORMAN FRANK, by its  
Executor, Harley Frank,

Plaintiff-Appellee.

Case No. 110, 2025

Certification of Question of Law  
from the United States District Court  
for the District of Delaware

C.A. No. 23-584-JLH

**APPELLANT'S OPENING BRIEF**

OF COUNSEL:

**ORRICK, HERRINGTON &  
SUTCLIFFE LLP**

Khai LeQuang  
Aaron M. Rubin  
Janista Lee  
2050 Main Street, Suite 1100  
Irvine, CA 92614-8255

Elise Baranouski  
2100 Pennsylvania Avenue, NW  
Washington, DC 20037

**K&L GATES LLP**

Steven L. Caponi (No. 3484)  
Matthew B. Goeller (No. 6283)  
Megan E. Hunt (No. 6569)  
600 N. King Street, Suite 901  
Wilmington, DE 19801  
Phone: (302) 416-7000  
steven.caponi@klgates.com  
matthew.goeller@klgates.com  
megan.hunt@klgates.com

*Attorneys for  
Defendant-Appellant*

Dated: June 5, 2025

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITES .....	iii
NATURE OF PROCEEDINGS.....	1
SUMMARY OF ARGUMENT .....	2
STATEMENT OF FACTS .....	5
A.    The Estate Alleges The Trust Received The Policy Proceeds In February 2019.....	5
B.    Harley Frank First Files Suit In 2021 To Recover The Benefits .....	5
C.    The Estate Files A New Action In 2023 to Recover The Benefits.....	6
ARGUMENT .....	8
(1) QUESTION PRESENTED .....	8
(2) SCOPE OF REVIEW .....	8
(3) MERITS OF THE ARGUMENT .....	9
I.    The Three-Year Statute Of Limitations Under 10 <i>Del. C.</i> § 8106(a) Applies To A Claim Under 18 <i>Del. C.</i> § 2704(b) .....	9
A.    Section 8106(a) Applies Because A Section 2704(b) Action Is An “Action Based On A Statute.” .....	12
B.    Alternatively, Section 8106(a) Applies Because A Section 2704(b) Action Is A Common-Law Action To Recover Money Or Property .....	15
II.    If Section 8106(a)’s Three-Year Statute of Limitations Does Not Apply, Then The One-Year Statute Of Limitations For Forfeiture Actions May Apply To A Claim Under 18 <i>Del. C.</i> § 2704(b).....	19
III.   The Estate’s Contrary Argument That No Statute Of Limitations Applies To Claims Under 18 <i>Del. C.</i> § 2704(b) Is Unsupported .....	21

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
A. This Court has never indicated that the statute of limitations is not a defense to a claim under Section 2704(b).....	21
B. Applying a statute of limitations here accords with public policy .....	24
CONCLUSION .....	28

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Adams v. Jankouskas</i> , 452 A.2d 148 (Del. 1982) .....	17
<i>In re Al Zuni Trading, Inc.</i> , 947 F.2d 1403 (9th Cir. 1991) .....	14, 15
<i>Butler v. Butler</i> , 222 A.2d 269 (Del. 1966) .....	<i>passim</i>
<i>Corvel Corp. v. Homeland Ins. Co. of N.Y.</i> , 112 A.3d 863 (Del. 2015) .....	20
<i>Dep’t of Labor, Div. of Indus. Affs., ex rel. Cook v. Vepco of Del., Inc.</i> , 1990 WL 74290 (Del. Super. Ct. May 3, 1990) .....	16
<i>East v. Tansey</i> , 1993 WL 487807 (Del. Ch. Oct. 22, 1993) .....	17
<i>Est. of Malkin v. Wells Fargo Bank, N.A.</i> , 379 F. Supp. 3d 1263 (S.D. Fla. 2019) .....	14
<i>Frank v. Wells Fargo Bank, N.A.</i> , 620 F. Supp. 3d 1024 (C.D. Cal. 2022) .....	5, 6
<i>Freedman v. Beneficial Corp.</i> , 406 F. Supp. 917 (D. Del. 1975) .....	17
<i>Gardner v. Daniel</i> , 7 Del. 300 (Del. Super. Ct. 1860) .....	19
<i>Gregorovich v. E.I. du Pont de Nemours</i> , 602 F. Supp. 2d 511 (D. Del. 2009) .....	19
<i>Hall v. Yacucci</i> , 723 A.2d 839 (Del. 1998) .....	26
<i>ISN Software Corp. v. Richards, Layton &amp; Finger, P.A.</i> , 226 A.3d 727 (Del. 2020) .....	25

<i>Jenkins v. Hill</i> , 96 P.2d 168 (Cal. App. 1939) .....	15
<i>Lavastone Cap. LLC v. Est. of Berland</i> , 266 A.3d 964 (Del. 2021) .....	13, 26
<i>Lehman Bros. Holdings, Inc. v. Kee</i> , 268 A.3d 178 (Del. 2021) .....	9
<i>Lewis v. Wal-Mart Stores, Inc.</i> , 2005 WL 3263377 (N.D. Okla. Dec. 1, 2005) .....	27
<i>PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank &amp; Tr. Co.</i> , 28 A.3d 1059 (Del. 2011) .....	8, 23, 24
<i>Rabadi v. Lysaght Law Grp. LLP</i> , 753 F. App'x 463 (9th Cir. 2019) .....	15
<i>Railroad Telegraphers v. Railway Express Agency, Inc.</i> , 321 U.S. 342 (1944) .....	25
<i>Reddy v. PMA Ins. Co.</i> , 20 A.3d 1281 (Del. 2011) .....	9
<i>Syed v. Hercules Inc.</i> , 2001 WL 34368377 (D. Del. Jan. 19, 2001) .....	19
<i>Wal-Mart Stores, Inc. v. AIG Life Ins. Co.</i> , 860 A.2d 312 (Del. 2004) .....	17
<i>Warnock v. Davis</i> , 104 U.S. 775 (1885) .....	14
<i>Wells Fargo Bank, N.A. v. Est. of Malkin</i> , 278 A.3d 53 (Del. 2022) .....	<i>passim</i>
<i>Wilmington Tr., Nat'l Ass'n v. Sun Life Assurance Co. of Canada</i> , 294 A.3d 1062 (Del. 2023) .....	22, 23
<b>Statutes</b>	
6 Del. C. §8-502 .....	22

10 <i>Del. C.</i> § 8106 .....	9
10 <i>Del. C.</i> § 8106(a).....	<i>passim</i>
10 <i>Del. C.</i> § 8107 .....	26
10 <i>Del. C.</i> § 8108-8110.....	9
10 <i>Del. C.</i> § 8115 .....	<i>passim</i>
10 <i>Del. C.</i> § 8119 .....	9, 10, 26
10 <i>Del. C.</i> § 8127 .....	9
10 <i>Del. C.</i> § 8145(a).....	25, 26
18 <i>Del. C.</i> § 2704 .....	6
18 <i>Del. C.</i> § 2704(b).....	<i>passim</i>
18 <i>Del. C.</i> § 6856(3)(a) .....	26
ERISA § 502 .....	19
UCC § 8-115 .....	22
UCC § 8-502 .....	22

## **Rules**

Fed. R. Civ. P. 15(a)(2).....	6
Fed. R. Civ. P. 17(a)(3).....	6

## **Other Authorities**

3 Couch on Insurance § 41:5 (3d ed. 2024).....	15
51 Am. Jur. 2d <i>Limitation of Actions</i> § 5 (Nov. 2019) .....	25
BLACK’S LAW DICTIONARY, “Penalty” (11th ed. 2019) .....	20

## NATURE OF PROCEEDINGS

This proceeding addresses a certified question of law from the U.S. District Court for the District of Delaware. The underlying case is an action under 18 *Del. C.* § 2704(b) (“Section 2704(b)”) filed by the Estate of Norman Frank (the “Estate”) to recover the proceeds of a life insurance policy on Mr. Frank’s life (the “Policy”), which the Estate alleges were paid to GWG DLP Master Trust Dated 03/01/06 (the “Trust”) in February 2019.

The Estate filed this action in May 2023, more than four years after the Trust allegedly collected the proceeds on the policy. The Trust moved to dismiss on the basis the Section 2704(b) claim was time-barred, because either 10 *Del. C.* § 8106(a)’s three-year statute of limitations or 10 *Del. C.* § 8115’s one-year statute of limitations applied. The Estate responded by arguing a claim under Section 2704(b) is not subject to any statute of limitations.

Recognizing the statute of limitations question was dispositive of the case, the district court certified the following question to this Court.

What is the statute of limitations, if any, applicable to a claim under 18 *Del. C.* § 2704(b)?

On March 19, 2025, this Court accepted the certified question.

## SUMMARY OF ARGUMENT

1. The Court should answer the certified question by holding the three-year statute of limitations under Section 8106(a) applies to a claim under Section 2704(b). Section 8106(a) is the default statute of limitations for actions to recover money or property, and a Section 2704(b) action is an action to recover money or property. Whether this Court views Section 2704(b) as an “action based on a statute” or a common-law “action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant,” Section 8106(a) provides the relevant statute of limitations.

1a. Section 8106(a) applies because a Section 2704(b) action is an “action based on a statute.” Section 2704(b) created a right not clearly established by Delaware’s common law—the right of an estate to bring an action to recover life insurance benefits from a payee when it alleges the life insurance policy violates the insurable interest laws. Thus, it is controlled by Section 8106(a)’s statute of limitations as an “action based on a statute.”

1b. Alternatively, if this Court views Section 2704(b) as simply codifying a right enforceable at common law rather than creating a new statutory right, Section 8106(a) still applies to a Section 2704(b) action as a common-law “action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant.” Like actions claiming unjust enrichment or seeking



imposition of a constructive trust, a Section 2704(b) action is controlled by Section 8106(a)'s statute of limitations.

2. If Section 8106(a)'s three-year statute of limitations does not apply, then the one-year statute of limitations for forfeiture actions should apply to a claim under Section 2704(b). While the Trust submits that Section 8106(a) is the more natural fit, it would be appropriate to apply Section 8115's one-year limitations period for actions for "forfeiture upon a penal statute" if the Court views Section 2704(b) as imposing a penalty, rather than requiring payment of damages.

3. The Estate's contrary argument that no statute of limitations applies to claims under Section 2704(b) is unsupported.

3a. This Court has never indicated the statute of limitations is not a defense to a claim under Section 2704(b). While this Court explained certain defenses may fail on their terms in Section 2704(b) cases, given that the underlying policy contract is deemed void and cannot be invoked as a source of rights or obligations, this Court has made clear that Section 2704(b) does not preclude common-law or statutory defenses where the particular elements of those defenses are satisfied.

3b. Applying a statute of limitations here accords with public policy. Statutes of limitations themselves serve important public policy purposes in ensuring timely and efficient litigation of claims. The Estate asserts the public policy interest in enabling Section 2704(b) claims is so great that no statute of limitations should

apply. But if the General Assembly had wanted to take the drastic step of exempting Section 2704(b) claims from any statute of limitations, it could have done so. It did not. Even actions to recover damages for intentional constitutional rights violations and wrongful death are subject to limitations periods. Public policy does not justify a special exemption from the statute of limitations defense for Section 2704(b) claims.

## STATEMENT OF FACTS

### **A. The Estate Alleges The Trust Received The Policy Proceeds In February 2019.**

In the operative Complaint, the Estate alleges Principal Life Insurance Company (“Principal Life”) issued an insurance policy on Norman Frank’s life (the “Policy”) in early 2006, and the Trust became the owner and beneficiary of the Policy sometime thereafter. *See* A24-26, 33. The Estate further alleges that, following Norman Frank’s death on December 24, 2018, Principal Life paid \$5,019,227.40 in death benefits to the Trust on February 19, 2019. *See* A27-28.

### **B. Harley Frank First Files Suit In 2021 To Recover The Benefits.**

On December 23, 2021, Harley Frank, in his individual capacity, filed an action in the Central District of California against GWG Holdings, Inc. and Wells Fargo Bank, N.A., as Securities Intermediary and/or Trustee (“Wells Fargo”), to recover the death benefit. *See Frank v. Wells Fargo Bank, N.A.*, 620 F. Supp. 3d 1024, 1026 (C.D. Cal. 2022); *see also* A30-33.

On January 24, 2022, Harley Frank amended his complaint to allege two claims against Wells Fargo and other newly added defendants for: (1) recovery of insurance benefits under 18 *Del. C.* § 2704(b) and (2) unjust enrichment. *See Frank*, 620 F. Supp. 3d at 1026. However, because Harley Frank admitted he had not yet been appointed as executor of the Estate, *see id.* at 1027, the named defendants moved to dismiss for, *inter alia*, failure to state a claim on the basis that Harley Frank

lacked standing under 18 *Del. C.* § 2704. *See id.* at 1026. The defendants also moved to dismiss the unjust enrichment claim for failure to state a claim, which Harley Frank did not oppose. *See id.* The U.S. District Court for the Central District of California agreed with the defendants and dismissed the action on August 8, 2022. *See id.* at 1027.

In dismissing the action, the court expressly rejected Harley Frank’s argument that he should be given an opportunity to amend his complaint later to substitute the Estate as a plaintiff under Fed. R. Civ. P. 15(a)(2) or 17(a)(3). *See id.* at 1028.

**C. The Estate Files A New Action In 2023 to Recover The Benefits.**

Following Harley Frank’s appointment as executor, the Estate filed this action in Delaware on May 18, 2023 against the Trust, which was not a party to the prior action, and against Wells Fargo, alleging the Estate was entitled to the \$5 million in proceeds under Section 2704(b). *See* A7. The Trust and Wells Fargo moved to dismiss the claim based on, *inter alia*, the fact that it was time-barred. *See* A51-60. They asserted that the statute of limitations for such a claim is three years, either because a claim under Section 2704(b) is “based on a statute” within the meaning of 10 *Del. C.* § 8106(a) or because a Section 2704(b) claim is analogous to common-law claims like unjust enrichment and constructive trust, both of which are governed by 10 *Del. C.* § 8106(a). *See* A51-59. In the alternative, the Trust and Wells Fargo

argued the statute of limitations may be one year under 10 *Del. C.* § 8115, which governs civil actions for forfeiture. *See* A60.

On September 26, 2024, the U.S. District Court for the District of Delaware dismissed the claims against Wells Fargo as barred by the Delaware Statutory Trust Act holding “[t]he remainder of the motion (pertaining to the statute of limitations)” was dismissed “without prejudice to refile after certification of the legal question to the Delaware Supreme Court.” Ex. A at 4. The court noted the parties agreed “the Delaware Supreme Court has never answered the question of what limitations period (if any) applies to a claim by an estate under § 2704(b),” and it observed that “[t]he answer to this question appears to be dispositive of this case.” *Id.* at 2. After expressing its own view that “Defendants make a good argument the claim is subject to the three-year limitations period in 10 *Del. C.* § 8106(a),” *id.*, the court ordered the parties to meet and confer on the possibility of certification, *see id.* at 3.

Subsequently, the U.S. District Court for the District of Delaware certified the dispositive statute of limitations question to this Court, *see* Ex. B, and this Court accepted the certification.

## **ARGUMENT**

### **(1) QUESTION PRESENTED**

In its March 4, 2025 Order, the U.S. District Court for the District of Delaware certified the following question of Delaware law to this Court:

What is the statute of limitations, if any, applicable to a claim under 18 *Del. C.* § 2704(b)?

### **(2) SCOPE OF REVIEW**

The question presented is an issue of law, which this Court decides *de novo*. *See PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.*, 28 A.3d 1059, 1064 (Del. 2011).

### (3) MERITS OF THE ARGUMENT

#### I. The Three-Year Statute Of Limitations Under 10 *Del. C.* § 8106(a) Applies To A Claim Under 18 *Del. C.* § 2704(b).

This Court should resolve the certified question by holding the three-year statute of limitations under 10 *Del. C.* § 8106(a) (“Section 8106(a)”) applies to a claim under 18 *Del. C.* § 2704(b) (“Section 2704(b)”). Section 8106(a) provides:

No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no *action based on a statute*, and no *action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant* shall be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.

10 *Del. C.* § 8106(a) (emphasis added). A Section 2704(b) claim is either an “action based on a statute” or an “action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant.”

Section 8106(a) is a “general statute of limitations” establishing a default three-year limitations period for civil actions to recover money or property. *Reddy v. PMA Ins. Co.*, 20 A.3d 1281, 1284 (Del. 2011). “Generally, a party harmed by a tort, breach of contract, or similar wrong must file suit within three years of when that cause of action accrued[.]” *Lehman Bros. Holdings, Inc. v. Kee*, 268 A.3d 178, 185 (Del. 2021) (citing Section 8106). This default statute of limitations is subject

to certain carveouts, specified in Section 8106(a) itself, but those carveouts largely shorten rather than lengthen the statute of limitations and are, in any event, inapplicable. *See* 10 *Del. C.* § 8106(a) (carving out, for example, actions for damages based on personal injuries, which are subject to 10 *Del. C.* § 8119’s shorter two-year statute of limitations).

This Court’s decision in *Butler v. Butler*, 222 A.2d 269 (Del. 1966), illuminates the scope of Section 8106(a). The question in *Butler* was whether a divorce action filed under the fault-based divorce statutes that existed at the time was “based on a statute” and subject to Section 8106(a)’s three-year statute of limitations. *See id.* at 270. In answering this question, the Court first observed that, apart from “action based on a statute,” the items listed in Section 8106(a) all related to “common law actions for the recovery of money or property.” *Id.* at 271, 272. Applying *noscitur a sociis* and *ejusdem generis*, the Court then held the phrase “action based on a statute” can refer “only to such actions in which the object sought is either the recovery of money or property.” *Id.* at 272. The Court concluded that because the object of a divorce action is not “the recovery of money or property,” Section 8106(a) did not apply. *See id.*

After reaching its conclusion, the Court raised a possible objection to its reading of “action based on a statute”—that by narrowing that language to actions for the recovery of money or property, the Court was “emasculat[ing]” Section



8106(a) and effectively “nullifying the provision as to actions based on a statute.”

*Id.* In other words, the Court imagined that, because the other items listed in Section 8106(a) covered the field of common-law actions for the recovery of money or property, the phrase “action based on a statute” added nothing. In response to this hypothetical concern, the Court explained that “action based on a statute” added to Section 8106(a)’s scope by reaching “an action to recover money or property when the right to do so is a new right created by statute, as opposed to a right enforceable by action in the courts which finds its roots in the common law.” *Id.* In other words, actions to recover money or property based on statutory rights are captured by “action based on a statute,” and actions to recover money or property based on rights enforceable at common law are captured by the remainder of Section 8106(a). Thus, for example, only “action based on a statute” reached “a suit by the City to recover a license fee imposed by ordinance.” *Id.*

A Section 2704(b) action falls squarely within Section 8106(a). Unlike the divorce action at issue in *Butler*, it is undeniably an action to recover money or property. This Court may wish to clarify whether it is better viewed as an “action based on a statute” or a “common law action for the recovery of money or property,” *Butler*, 222 A.2d at 271, but the answer to that question does not change the answer to the certified question in this case. Either way, Section 8106(a)’s default three-year statute of limitations applies. This Court could conclude that a Section 2704(b)

claim vindicates a statutory right, in which case a Section 2704(b) claim is governed by Section 8106(a)'s three-year statute of limitations, because it is an action "based on a statute." Or this Court could conclude Section 2704(b) simply codified a right that existed at common law, in which case a Section 2704(b) claim—like an unjust enrichment claim, or a claim for a constructive trust—would be controlled by Section 8106(a)'s three-year limitation on actions "to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant." Alternatively, this Court could simply recognize that a Section 2704(b) claim comes within the scope of Section 8106(a) and decline to delineate the precise origins of the right at issue. All this Court need decide is the question that was certified to it, and the best answer to that question is that Section 8106(a)'s three-year statute of limitations applies.

**A. Section 8106(a) Applies Because A Section 2704(b) Action Is An "Action Based On A Statute."**

As explained above, *Butler* held that "an action based on a statute," within the meaning of Section 8106(a), is "an action to recover money or property when the right to do so is a new right created by statute, as opposed to a right enforceable by action in the courts which finds its roots in the common law." 222 A.2d at 272.

Applying *Butler*, the Trust submits that a Section 2704(b) claim is "based on a statute" because (1) it plainly seeks to "recover money or property"; and (2) Section 2704(b) created a right that was not clearly established by Delaware's

common law—namely, the right of an estate to bring an action to recover life insurance benefits from a payee when it alleges the life insurance policy violates the insurable interest laws. *See Wells Fargo Bank, N.A. v. Est. of Malkin*, 278 A.3d 53, 60 n.18 (Del. 2022) (“*Malkin II*”) (describing Section 2704(b) as a “statutorily-created remedy” and quoting *Lavastone Cap. LLC v. Est. of Berland*, 266 A.3d 964, 974 (Del. 2021) (“*Berland*”)).

The Estate has not disputed a Section 2704(b) claim seeks to “recover money or property,” but it argues such a claim is not “based on a statute” because the right at issue is a right that existed at common law. Again, the fight over whether such a claim is “based on a statute” is somewhat beside the point, because an action to recover money or property based on a right that existed at common law is also governed by Section 8106(a), as *Butler* itself makes clear. But insofar as this Court wishes to pinpoint the precise language within Section 8106(a) that best fits a Section 2704(b) claim, the Trust’s position is that “action based on a statute” is most fitting because Section 2704(b) creates a statutory right that did not clearly exist under Delaware common law.

In support of its position that a Section 2704(b) action is not an “action based on a statute,” the Estate previously cited this Court’s statement in *Malkin II* that Section 2704(b) “codifies the longstanding common-law rule that, if the insurer pays the death benefit on a policy that lacks an insurable interest, the estate may sue to

receive that benefit.” 278 A.3d at 61 (citing *Warnock v. Davis*, 104 U.S. 775, 782 (1881)). The Estate views that statement and the citation to *Warnock* as proof Section 2704(b) simply codified Delaware common law. *Warnock*, however, is a pre-*Erie* federal common law case that does not address Delaware common law at all. Notably, the Court in *Malkin II* described Section 2704(b) as a “statutorily-created remedy.” *Id.* at 60 n.18. Thus, the Court’s general observation that Section 2704(b) had built upon a common-law tradition was just that—a general observation. Indeed, the “based on a statute” inquiry was not before the Court in *Malkin II* because the trial court had accepted that Section 8106(a)’s three-year statute of limitations for actions “based on a statute” applied, and that ruling was not at issue.<sup>1</sup>

Additionally, the Court in *Malkin II* recognized statutes like Section 2704(b) represented a departure from the common law insofar as they “confer[red] standing on the estate” to contest insurable interest and thus “modified the general rule that ‘only the insurer can raise the objection of want of an insurable interest.’” *Id.* at 61 & n.23 (quoting *In re Al Zuni Trading, Inc.*, 947 F.2d 1403, 1404 (9th Cir. 1991)).

---

<sup>1</sup> See *Est. of Malkin v. Wells Fargo Bank, N.A. (Malkin I)*, 379 F. Supp. 3d 1263, 1282 (S.D. Fla. 2019), *aff’d in part, vacated in part*, 998 F.3d 1186 (11th Cir. 2021), *certifying question sub nom. Wells Fargo Bank, N.A. v. Est. of Malkin*, 278 A.3d 53 (Del. 2022), *and aff’d in part, vacated in part, remanded sub nom. Est. of Malkin ex rel. Guarnero v. Wells Fargo Bank, NA*, 2022 WL 2285884 (11th Cir. June 23, 2022) (vacated on other grounds) (finding that “the statute of limitations pose[d] no bar to the Estate’s claim” under Section 2704(b) because it “was filed within the three-year limitations period for statutory claims under [Section 8106(a)]”).

Thus, the majority of courts in States that have not enacted statutes equivalent to Section 2704(b) continue to hold that only insurers have standing to challenge insurable interest. *See* 3 Couch on Insurance § 41:5 (3d ed. 2024) (“The majority of courts that have considered the issue of who may question the lack of an insurable interest hold that only the insurer can raise the objection of want of an insurable interest.”); *see also, e.g., Rabadi v. Lysaght Law Grp. LLP*, 753 F. App’x 463, 465 (9th Cir. 2019) (“In California, ‘the insurer is the only party who can raise the question of insurable interest, and . . . if the insurer waives the question of [insurable] interest and pays the money to the named beneficiary, or into court,’ a third party may not later challenge the existence of an insurable interest.” (quoting *Jenkins v. Hill*, 96 P.2d 168, 170 (Cal. Dist. Ct. App. 1939))).

In sum, while Section 8106(a)’s statute of limitations would not be displaced even if the Estate were right that Section 2704(b) codified Delaware common law, *see infra* Section I.B, the Trust submits that a Section 2704(b) action is best regarded as an action “based on a statute.”

**B. Alternatively, Section 8106(a) Applies Because A Section 2704(b) Action Is A Common-Law Action To Recover Money Or Property**

For the reasons explained above, a Section 2704(b) action is probably best understood as an action “based on a statute.” But if this Court disagrees that Section 2704(b) created a statutory right, then Section 2704(b) merely codified a common-

law right. If that is the case, the Estate's suit is a common-law action to recover money or property and is covered by Section 8106(a) on that basis.

The Estate argued in the district court that "Section 2704(b) claims are rooted in the common law *and thus not subject to Delaware's 3-year statute of limitations*," A80 (emphasis added). It is clear from *Butler*, however, that the second proposition does not follow from the first. As the *Butler* Court explained, "common law actions for the recovery of money or property" are explicitly covered by Section 8106(a). 222 A.2d at 271-72. The inclusion of "action based on a statute" extends Section 8106(a)'s coverage to actions to recover money or property based on "new right[s] created by statute," but the rest of Section 8106(a) comprehensively covers any similar actions rooted in the common law. *Id.* at 272. That includes statutory actions based on the common law. *See, e.g., Dep't of Labor, Div. of Indus. Affs., ex rel. Cook v. Vepco of Del., Inc.*, 1990 WL 74290, at \*4 (Del. Super. Ct. May 3, 1990) (applying Section 8106(a)'s three-year statute of limitations for actions "based on a promise" where wage claim under Delaware statute was rooted in common-law claim for breach of contract).

If the Estate had a right at common law coextensive with the right codified by Section 2704(b), then a Section 2704(b) action falls within Section 8106(a)'s broad residual clause as a common-law action "to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant." The

fact common-law actions claiming unjust enrichment or seeking imposition of a constructive trust also come within Section 8106(a)'s three-year statute of limitations lends further support to this conclusion, as those common-law claims are substantively similar to a Section 2704(b) action. Delaware courts apply Section 8106(a)'s statute of limitations to unjust enrichment claims. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (recognizing that unjust enrichment claims are controlled by Section 8106(a)'s statute of limitations). Delaware courts also apply Section 8106(a) to claims for a constructive trust. *See East v. Tansey*, 1993 WL 487807, at \*2 (Del. Ch. Oct. 22, 1993) (recognizing that Section 8106(a) "governs an action to impose a constructive trust" (citing *Adams v. Jankouskas*, 452 A.2d 148, 157-58 (Del. 1982))). The application of Section 8106(a) to those kinds of claims also has been understood to rely on the provision's broad residual clause. *See, e.g., Freedman v. Beneficial Corp.*, 406 F. Supp. 917, 923 (D. Del. 1975) ("[T]his cause of action, essentially one of unjust enrichment, would seem to fit within the scope of an 'action to recover damages caused by an injury unaccompanied with force.'").

In sum, saying a Section 2704(b) claim merely codifies a common-law right does not, as the Estate contends, mean such a claim falls through a hole in Delaware's statute of limitations scheme and is left without any statute of limitations whatsoever. If that were the case, any claim based on a statute that merely codifies

a common-law right of action would also fall through that gaping hole. Fortunately, Delaware's law on this subject is far more sensible and unified than that, and it provides a clear answer: Whether a Section 2704(b) claim vindicates a common-law right or a statutory right, it is an action for the recovery of money or property, and it is not subject to any more specific statute of limitations. So just like similar claims for unjust enrichment and constructive trust, it is governed by Section 8106(a)'s general three-year statute of limitations.



**II. If Section 8106(a)'s Three-Year Statute of Limitations Does Not Apply, Then The One-Year Statute Of Limitations For Forfeiture Actions May Apply To A Claim Under 18 Del. C. § 2704(b).**

While the Trust submits Section 8106(a)'s statute of limitations plainly applies to Section 2704(b) claims, if the Court determines such claims are not “based on a statute” and do not come within Section 8106(a)'s broad language covering common-law actions for recovery of money or property, then the only viable alternative is 10 Del. C. § 8115's one-year statute of limitations would apply. Section 8115 provides: “No action for a forfeiture upon a penal statute, whether at the suit of the party aggrieved, or of a common informer, or of the State, or otherwise, shall be brought after the expiration of 1 year from the accruing of the cause of such action.”

While Section 8115 comes up most often in connection with criminal forfeiture, courts have also applied Section 8115's one-year statute of limitations where a civil statute imposes a penalty. *See Gregorovich v. E.I. du Pont de Nemours*, 602 F. Supp. 2d 511, 517 (D. Del. 2009) (finding that Section 8115's one-year statute of limitations applied to plaintiff's civil penalty claim under ERISA § 502); *see also Syed v. Hercules Inc.*, 2001 WL 34368377, at \*3 (D. Del. Jan. 19, 2001), *aff'd*, 276 F.3d 580 (3d Cir. 2001) (same); *cf. Gardner v. Daniel*, 7 Del. 300 (Del. Super. Ct. 1860) (prior to enactment of Section 8115, applying then-existing one-year statute

of limitations for civil action for forfeiture upon a penal statute to action of debt *qui tam* under statute against usury).

Insofar as Section 2704(b) automatically requires the “beneficiary, assignee, or other payee” of an insurance policy to forfeit the death benefit to the estate in the event of a violation of Section 2704(b), without reference to any actual damages suffered, it is penal in nature. *See* BLACK’S LAW DICTIONARY, “Penalty” (11th ed. 2019) (defining “statutory penalty” as “[a] penalty imposed for a statutory violation; esp., a penalty imposing automatic liability on a wrongdoer for violation of a statute’s terms without reference to any actual damages suffered.”); *see also Corvel Corp. v. Homeland Ins. Co. of N.Y.*, 112 A.3d 863, 875-76 (Del. 2015) (Strine, C.J., dissenting) (explaining that penalties exact money as punishment rather than compensation). Thus, if this Court understands Section 2704(b) to impose not compensation or restitution but a penalty, it should find that Section 8115’s one-year statute of limitations applies to claims under Section 2704(b).

### **III. The Estate’s Contrary Argument That No Statute Of Limitations Applies To Claims Under 18 *Del. C.* § 2704(b) Is Unsupported.**

In the district court, the Estate’s principal argument was that Section 8106(a)’s three-year statute of limitations does not apply to Section 2704(b) claims because *no* statute of limitations applies to such claims. *See* A77-80. This extraordinary assertion finds no support in this Court’s case law and cannot be justified on public policy grounds.

#### **A. This Court has never indicated that the statute of limitations is not a defense to a claim under Section 2704(b).**

This Court has addressed Delaware’s law on insurable interest on multiple occasions and has never suggested a Section 2704(b) claim exists outside of Delaware’s statute of limitations scheme.

In *Malkin II*, the Court explicitly held Section 2704(b) “does not supersede all defenses and counterclaims.” 278 A.3d at 60. The Court observed that “Section 2704(b) does not expressly limit any defenses or counterclaims that the recipient [of the benefits] might assert” and further found that Section 2704(b) does not impliedly “supersede common law defenses or counterclaims.” *Id.* at 61, 62. It then explained that “courts must look to the elements of the common-law defenses or counterclaims asserted—and, where appropriate, the public policy underlying the ban on human-life wagering—to decide the viability of such defenses or counterclaims.” *Id.* at 62.

While the *Malkin II* Court went on to find certain contract-based defenses under the Delaware Uniform Commercial Code are not available to the defendant in a Section 2704(b) action, its analysis does not indicate a statute of limitations defense is similarly unavailable. The Court first considered a UCC § 8-502 defense, which bars any “adverse claim to a financial asset” against a party “who acquires a security entitlement . . . for value and without notice of the adverse claim.” *Id.* at 64 (quoting 6 *Del. C.* §8-502). The Court found this defense was unavailable because it determined Section 2704(b) defendants “are not faced with an ‘adverse claim’ as the Delaware UCC defines that term.” *Id.* at 66.

The Court next considered a UCC § 8-115 defense and reached the same conclusion. It found that because “a Section 2704(b) action is not an ‘adverse claim’ under the Delaware UCC,” the defense is not available. *Id.* at 67. In other words, the Court “look[ed] to the elements” of the two defenses, *id.* at 62, and found they were not satisfied. That does not say anything about whether a statute of limitations defense would be available based on the text of Section 8106(a) or Section 8115.

Nor do this Court’s decisions discussing Delaware’s insurable interest law more generally suggest that Section 2704(b) claims would be exempt from any statute of limitations. In the district court, the Estate placed great emphasis on this Court’s statement that “Delaware courts will never enforce” STOLI policies. *See* A78 (quoting *Wilmington Tr., Nat’l Ass’n v. Sun Life Assurance Co. of Canada*, 294

A.3d 1062, 1072 (Del. 2023) (“*Frankel & De Bourbon*”). That is certainly true, and it is reflected in the Court’s opinions discussing situations where insurers were seeking declaratory judgments that a policy is void and unenforceable after the two-year contestability period has expired. *See, e.g., PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co.*, 28 A.3d 1059, 1068 (Del. 2011) (“*Price Dawe*”) (holding that “insurer can challenge the enforceability of a life insurance contract after the incontestability period where a lack of insurable interest voids the contract”); *Frankel & De Bourbon*, 294 A.3d at 1074 (declining “to award the death benefit” to purchaser of STOLI policy based on contract-based and equitable defenses asserted against insurer).

Section 2704(b) actions, however, arise only after the insurer has already paid the death benefit on the policy—i.e., enforced the policy. By allowing an estate to recover the benefit for itself under Section 2704(b), a court provides a remedy, but does not undo enforcement of the policy. A court holding a Section 2704(b) action is barred by the statute of limitations simply finds that this remedy is time-barred.

Furthermore, this Court’s holding in *Price Dawe* does not mean there can be no time limit on an estate’s ability to sue and recover the benefits under a policy it alleges violated the insurable interest laws. In *Price Dawe*, this Court held that an incontestability clause contained in a life insurance contract does not bar an insurer from seeking, after the contestability period but before it pays the death benefit, a

declaratory judgment that a policy is void for lack of insurable interest. *See* 28 A.3d at 1068. The Court’s reasoning was clear: The incontestability clause was a “*contractual* term,” and so its viability was “*directly contingent* on the formation of a valid contract.” *Id.* at 1066, 1067. Where a policy is found to be void *ab initio*, its provisions never “legally came into effect,” and so the incontestability clause was just as unenforceable as the rest of the policy. *Id.* at 1068. The Court rightly noted, however, the situation would be different if the General Assembly had enacted “a direct ban on challenges to policy validity after a certain time”—in other words, if it had enacted a statute of limitations. *Id.* at 1066. In sum, *Price Dawe*’s rejection of a contract-based time limit in the context of an insurer’s claim for a declaration the contract itself is void does not indicate a statutory time limit for an estate’s claim for monetary relief can or should be set aside.

**B. Applying a statute of limitations here accords with public policy.**

Subjecting Section 2704(b) claims to a statute of limitations is not just the result is most faithful to Delaware’s duly enacted law: It is also the result that best accords with public policy, for statutes of limitations themselves serve important public policy purposes. “Statutes of limitation are intended to promote the timely and efficient litigation of claims, and further the policy that one must diligently pursue one’s legal rights at the risk of losing them if they are not timely asserted.” *ISN Software Corp. v. Richards, Layton & Finger, P.A.*, 226 A.3d 727, 732 n.17

(Del. 2020) (quoting 51 Am. Jur. 2d *Limitation of Actions* § 5 (Nov. 2019)). In the words of the U.S. Supreme Court, limitation periods “promote justice by preventing surprises through [plaintiffs’] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944).

Section 2704(b) claims are particularly prone to the staleness concerns that statutes of limitation seek to combat: They concern the circumstances of a life insurance policy’s issuance, but since they do not accrue until the death benefit is paid, the claims are generally not brought until many years after the underlying events took place. Here, for example, the Trust must defend against claims related to alleged actions taken by unrelated parties at the time the Frank Policy was issued in 2006. The longer an estate is allowed to delay its Section 2704(b) suit, the more likely it becomes that documents will be lost, companies will dissolve, and witnesses will become unavailable. There is no reason to think the Delaware General Assembly wanted these claims to be available indefinitely. If it had, it could have explicitly exempted Section 2704(b) actions from any statute of limitations—a measure it has taken for certain actions for damages based on the sexual abuse of a child by an adult. *See* 10 Del. C. § 8145(a) (“A cause of action based upon the sexual abuse of a minor by an adult may be filed in the Superior Court of this State at any

time following the commission of the act or acts that constituted the sexual abuse.”); 18 *Del. C.* § 6856(3)(a) (“Notwithstanding any provision to the contrary, a cause of action based on the sexual abuse of a child patient by a health-care provider may be brought at any time following the commission of the act or acts that constituted the sexual abuse.”).

It would be bizarre indeed if Section 2704(b) claims were exempt from any statute of limitations for public policy reasons while claims regarding, for example, intentional constitutional rights violations and wrongful death remain subject to two-year statutes of limitations. *See Hall v. Yacucci*, 723 A.2d 839 (Del. 1998) (“[A]ny civil rights violations in Delaware are governed by the two-year statute of limitations in personal injury actions under Title 10 *Del. C.* § 8119.”); 10 *Del. C.* § 8107 (“No action to recover damages for wrongful death . . . shall be brought after the expiration of 2 years from the accruing of the cause of such action.”). The injustice of that hypothetical state of affairs comes into even starker relief when one considers that Section 2704(b) allows a decedent’s estate to recover the death benefit even when the decedent intentionally engaged in a STOLI scheme and received ample consideration for doing so. *See Berland*, 266 A.3d at 974. Surely the public interest in allowing an estate to recover the policy proceeds in those circumstances does not outweigh the public interest in allowing, for example, parents to recover damages for the wrongful death of their child.



It also bears mentioning that other States have statutes like Section 2704(b), and courts interpreting those analogous statutes have not hesitated to apply statutes of limitations. For example, courts applying Oklahoma law have subjected Oklahoma's analog to Section 2704(b) to Oklahoma's statute of limitations for actions predicated on statutory liability. *See Lewis v. Wal-Mart Stores, Inc.*, 2005 WL 3263377, at \*7 (N.D. Okla. Dec. 1, 2005). There is no reason for this Court to take the dramatically different approach of setting aside statutes of limitations entirely.

## CONCLUSION

For the foregoing reasons, this Court should hold that Section 8106(a)'s three-year limitations period applies to Section 2704(b) actions.

Dated: June 5, 2025

### **K&L GATES LLP**

/s/ Steven L. Caponi

Steven L. Caponi (No. 3484)  
Matthew B. Goeller (No. 6283)  
Megan E. Hunt (No. 6569)  
600 N. King Street, Suite 901  
Wilmington, DE 19801  
Phone: (302) 416-7000  
steven.caponi@klgates.com  
matthew.goeller@klgates.com  
megan.hunt@klgates.com

OF COUNSEL:

### **ORRICK, HERRINGTON & SUTCLIFFE LLP**

Khai LeQuang  
Aaron M. Rubin  
Janista Lee  
2050 Main Street, Suite 1100  
Irvine, CA 92614-8255

Elise Baranouski  
2100 Pennsylvania Avenue, NW  
Washington, DC 20037

*Attorneys for  
Defendant-Appellant*