EFiled: Aug 11 2025 03:37PM EDT
Filing ID 76840989
Case Number 110,2025

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

RESPONSE BRIEF OF PLAINTIFF-APPELLEE ESTATE OF NORMAN FRANK, BY ITS EXECUTOR HARLEY FRANK

OF COUNSEL:

MARCUS & MARCUS, LLC
Jerome M. Marcus
Daniel C. Simons
Isaac A. Binkovitz
A. Mayer Kohn
Justin Stern
P.O. Box 212
Merion Station, PA 19066
Phone: (215) 804-9666

RIGRODSKY LAW, P.A.
Herbert Mondros
1007 North Orange Street – Suite 453
Wilmington, DE 19801
Phone: (302) 295-5304
hwm@rl-legal.com
Del Bar. No. 3308

Attorneys for Plaintiff-Appellee

Dated: August 11, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DELAWARE CONSTITUTION

FEDERAL AND STATE STATUTES

ENGLISH STATUTES

RULES

OTHER AUTHORITIES

I. NATURE OF PROCEEDINGS

This proceeding presents a question of law certified to this Court under Rule 41. Plaintiff, the Estate of Norman Frank, by its Executor Harley Frank (the "Estate"), brought this action in 2023 in the Superior Court. (A7-A39) (Complaint). Pursuant to Delaware's Constitution, Delaware's common law, and 18 *Del. C.* 2704(b), the Estate sought to recover from GWG DLP Master Trust Dated 03/01/06 ("GWG Trust" or "Defendant") and Wells Fargo Bank, N.A. ("Wells Fargo") the proceeds they received under a stranger-originated life insurance ("STOLI") policy on the life of Norman Frank. After removing the case to federal court, GWG Trust and Wells Fargo sought dismissal, arguing that the Estate's claim is time-barred by virtue of the three-year limitations period under 10 *Del. C.* §8106(a) or, in the alternative, the one-year limitations period under 10 *Del. C.* §8115. (A52-60).

The District Court recognized that other courts that have addressed the issue have found no statute of limitations applicable to Section 2704(b) claims. Nevertheless, the court believed that the three-year limitations period under Section §8106(a) might apply. Mem. Order at 2, Sept. 26, 2024 (Ex. A to Def.'s Opening Br.). Rather than granting the motion to dismiss, however, the District Court certified the question to this Court, observing that "[t]he Delaware Supreme Court has never considered whether a claim under 18 Del. C. § 2704(b) is subject to the

three-year limitations period set forth in 10 Del. C. § 8106(a). Guidance would be welcome." Certification of Question of Law at 3, Mar. 4, 2025 (Ex. B to Def.'s Opening Br.). This Court then accepted the following certified question:

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

(B30-31).

II. SUMMARY OF ARGUMENT

1. **Denied**. Defendant wrongly assumes that some statute of limitations must apply. Statutes of limitations are precisely that—creatures of statute. Delaware has no catch-all statute of limitations. Therefore, a claim under Delaware law can be subject to a statute of limitations only if there is a specific statute of limitations that covers it. Although Defendant tries to shoehorn Section 2704(b) claims into 10 *Del. C.* §8106(a) or 10 *Del. C*. §8115, the statutes' plain language does not put a time limit on Section 2704(b) claims. Nor does any other statute. Therefore, there is no statute of limitations that is applicable to a claim under Section 2704(b).

1a. **Denied**. Because Section 2704(b) claims are rooted in the common law, an action to recover STOLI proceeds is not an "action based on a statute" under Section 8106(a). As this Court held in *Butler v. Butler*, 222 A.2d 269 (Del. 1966), "the language, 'action based on a statute,' is intended to be confined to 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*. at 272; and as this Court held in *Wells Fargo Bank, N.A. v. Estate of Malkin*, 278 A.3d 53 (Del. 2022) ("*Malkin*"), Section 2704(b) merely "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." *Id*.

at 61. Thus, for Section 8106(a)'s purposes, a Section 2704(b) claim is not "an action based on a statute."

1b. **Denied**. Equally inapposite is Section 8106(a)'s coverage of "action[s] to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant." Although STOLI insureds and their families suffer injuries, Section 2704(b) focuses instead on deterring and preventing human life wagers from coming to fruition in violation of Delaware's long-standing law, public policy, and Constitution. *Malkin*, 278 A.3d at 65.

2. **Denied**. Nor, finally, does a Section 2704(b) action fit within 10 *Del. C*. §8115, which covers actions "for a forfeiture upon a penal statute." As this Court has made clear, that statute applies only in the context of criminal proceedings. *See, e.g.*, *Crawford v. State*, 859 A.2d 624, 627-28 (Del. 2004) ("A cause of action for forfeiture under Section 8115 accrues on the date the criminal case ends, which, this Court has held, is the date of sentencing.") (internal quotes omitted).

3. **Denied**. In arguing that a Section 2704(b) claim must be subject either to Section 8106(a) or Section 8115, Defendant appears to start with the premise that every cause of action must necessarily be subject to a statute of limitations. But that gets the rule backwards. At common law, there is "no absolute bar due to the lapse of time." *Kirkwood Kin Corp. v. Dunkin' Donuts*, 1995 WL 411319, at *5 (Del.

Super. Ct. 1995), *abrogated on other grounds*, *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1 (Del. 2009). So if a claim is to be subject to a limitations period, that period must be prescribed by statute. In the absence of a legislatively-imposed limitations period, the common law applies, meaning that there is no limitations period.

3a. **Denied**. This Court has been "crystal clear" that courts can "never enforce" STOLI or allow "illegal human-life wagers to pay off," and that any defense or counterclaim whose effect would be to allow that to happen would violate Delaware's Constitution and "the State's strong public policy against human-life wagering," and would "fly in the face of our repeated avowals that enforcement of a STOLI policy is not an option." *Wilmington Trust, N.A. v. Sun Life Assurance Co.*, 294 A.3d 1062, 1072, 1074 (Del. 2023) ("*Frankel*") (rejecting legal viability of STOLI defenses, including laches); *see also PHL Var. Ins. Co. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1067 (Del. 2011) ("*Price Dawe*"); *Est. of Barotz v. Vida Longevity Fund, L.P.*, 2022 WL 16833545, at *11 (Del. Super. Ct. Nov. 9, 2022), *aff'd*, 320 A.3d 212 (Del. 2024) (adopting and affirming decision that, *inter alia*, dismissed affirmative defenses to estate claim which, if accepted, would have allowed the STOLI investor to keep the wagering proceeds). Interpreting Sections 8106(a) and 8115 in the manner proposed by Defendant would violate Delaware's

Constitution because it would require Delaware courts to allow human life wagers that violate Delaware's Constitution to pay off. *See Malkin*, 278 A.3d at 65, 69 (explaining that statutes should not be interpreted in a way that would ascribe to the legislature an intent to violate Delaware's constitutional prohibition against human life wagering or its "longstanding policy of preventing STOLI policies from paying out to investors"); *Price Dawe*, 28 A.3d at 1070-71 (ascribing to the legislature an intent to "permit wagering contracts" would be an "absurd result").

3b. **Denied**. Again, Defendant is reversing the applicable standard and policy. Unless the legislature has chosen to enact a limitations period, none applies. And imposing a new statute of limitations would be particularly inappropriate in STOLI recovery actions because of the self-concealing nature and operation of STOLI schemes. STOLI promoters routinely employ form documents that mislead insureds (and potential plaintiffs) into thinking they lack, or have surrendered, any claim to the policy proceeds. In addition, STOLI investors, like Defendant, use convoluted ownership structures and servicing relationships to further conceal the identities of potential defendants from the insureds or their families. Indeed, whether a STOLI policy has lapsed, whether a death claim has been made, whether the carrier has paid a death claim, and when and to whom the death claim has been paid are concealed from insureds and estates, and often can only be learned through court-

aided discovery. And even after counsel has been engaged, STOLI defendants mislead plaintiffs as to who are the proper defendants (as happened here).

III. SUMMARY OF FACTS

A. STOLI Is Illegal and, Under Delaware Law, the Estate of an Insured Under a STOLI Policy Can Recover the Death Benefit

Delaware law prohibits third parties from using seniors in whose lives they have no interest to manufacture life insurance policies for investors, a phenomenon referred to as "stranger-originated life insurance" or "STOLI." *Price Dawe*, 28 A.3d at 1070; *Malkin*, 278 A.3d at 56; *Barotz,* 2022 WL 16833545 (voiding policy procured through the same Coventry Program as the Policy here for lack of insurable interest).

Using insurance to wager on human life has long been illegal: Such transactions are repugnant to public policy and are "pure wager[s]" that give the policyholders "a sinister counter interest in having the life come to an end." *Malkin*, 278 A.3d at 59 n.13 (*quoting Grigsby v. Russell*, 222 U.S. 149, 154 (1911) (Holmes, J.); *id.* at 65 n.48 ("We stress that STOLI arrangements are unique in that they are not simply void *ab initio*, anathema to hundreds of years of public policy, or violative of the Delaware Constitution, but they boast all three of these unenviable qualities.").

To deter STOLI and prevent human life wagers from coming to fruition, the common law has long allowed an insured's family to take STOLI death benefits away from whoever may have received them upon the insured's death. *See, e.g.*, *Warnock v. Davis*, 104 U.S. 775, 782 (1881) (common-law decisions that follow

such a rule "seem more fully in accord with the general policy of the law against speculative contracts upon human life"); *Cammack v. Lewis*, 82 U.S. 643, 647-49 (1872) (affirming trial court's order awarding STOLI benefits to estate).[1]

At least 28 states have codified this common law rule into statute.[2] Delaware is among them. 18 *Del. C.* §2704(b). As this Court recently held: "By providing that an estate 'may maintain an action' to recover death benefits, Section 2704(b) confers standing on the estate and codifies the longstanding common-law rule that,

---

[1] *See also Nye v. Grand Lodge A.O.U.W.*, 36 N.E. 429, 437 (Ind. Ct. App. 1894) (where insurance policy originated as wager, "the weight of authority justifies the conclusion… that the amount collected… may be recovered by the personal representatives of the person insured."); *Amick v. Butler*, 12 N.E. 518, 519 (Ind. 1887); *Home Life Ins. Co. v. Masterson*, 21 S.W.2d 414, 418 (Ark. 1929) ("proceeds of that policy… should have been adjudged to have belonged to Annie Hays, as administratrix of the estate of Gilbert Hays."); *Helmetag's Adm'x v. Miller*, 76 Ala. 183, 187 (Ala. 1884); *Hess' Adm'r v. Segenfelter*, 105 S.W. 476, 476-78 (Ky. Ct. App. 1907); *Cheeves v. Anders*, 28 S.W. 274, 275-76 (Tex. 1894), *superseded by statute on other grounds*, Tex. Ins. Code §1103.053; *Gilbert v. Moose's Adm'rs*, 104 Pa. 74, 79 (1883) (*citing Warnock* and *Cammack*); *Cooper v. Shaeffer*, 11 A. 548, 549 (Pa. 1887); *Dutton v. Willner*, 52 N.Y. 312, 320 (1873).

[2] Alaska Stat. §21.42.020(b); Ariz. Rev. Stat. §20-1104(B); Ark. Code Ann. §23-79-103(b); Colo. Rev. Stat. §10-7-709; Fla. Stat. Ann. §627.404(4); Haw. Rev. Stat. Ann. §431:10-204(c); Idaho Code §41-1804(2); Kan. Stat. Ann. §40-450(c); Ky. Rev. Stat. §304.14-040(3); La. Stat. §22:901(B); Me. Rev. Stat. tit. 24-A, §2404(2); Md. Code Ann. Ins. §12-201(d); Minn. Stat. §60A.0789(1)(a); Miss. Code Ann. §83-5-251(2); Mont. Code §33-15-201(2); Nev. Rev. Stat. §687B.040(3); N.J. Stat. §17B:24-1.1(c); N.M. Stat. §59A-18-4(B); N.Y. Ins. Law §3205(b)(4); N.D. Cent. Code §26.1-29-09.1(2); Okla. Stat. tit. 36, §3604(B); Or. Rev. Stat. §743.040(2); R.I. Gen. Laws §27-4-27(b); S.D. Codified Laws §58-10-5; Wash. Rev. Code §48.18.030(2); W. Va. Code §33-6-2(b); Wyo. Stat. §26-15-102(b).

if the insurer pays the death benefit on a policy that lacks an insurable interest, the estate may sue to receive that benefit." *Malkin*, 278 A.3d at 61 (cleaned up).

B. GWG Trust and Wells Fargo Were Paid the Death Benefits Under a STOLI Policy on the Life of Norman Frank

In 2006, stranger-investors procured a STOLI policy on the life of Norman Frank (the "Policy"). (A23-24). The Policy was procured through a now-notorious STOLI scheme known as Coventry. (*Id.*). Every court that has applied Delaware law to a life insurance policy originated through this Coventry scheme—including this Court when affirming the recent *Barotz* case—has held, as a matter of law, that the policy was a void *ab initio* human life wager lacking insurable interest, and where the applicable insurers had paid those policies' death benefits to third parties, has awarded the death benefits to the insureds' estates. (A16) (collecting cases).

In 2008, GWG Trust acquired the Policy's beneficial interest, and held it until Norman's death in December 2018. (A26-27, A33). On February 19, 2019, the insurer paid the death benefit jointly to GWG Trust and Wells Fargo. (A28).

C. In December 2021, Norman's Son, Harley, Brought an Action to Recover the Death Benefit on Behalf of Norman's Estate

In December 2021, Norman's son, Harley Frank, whom Norman's will named as Executor, brought an action ("the California Action") under 18 *Del. C.* §2704(b). (A30). Harley brought the California Action in the Central District of California

against Wells Fargo and GWG Trust's former affiliate GWG Holdings, Inc, which had established GWG Trust and which was the entity that Harley believed to have been, along with Wells Fargo (which was GWG Trust's trustee), the Policy's owner at the time of Norman's death, and thus the recipient of the Policy's proceeds. (*Id*.); *see Frank v. Wells Fargo Bank*, 620 F. Supp. 3d 1024, 1026 (C.D. Cal. 2022). The California Action was assigned to the Hon. Terry J. Hatter, Jr.

In January 2022, GWG Holdings's counsel assured Harley's counsel that GWG Holdings had sold the Policy in 2010 and that neither GWG Holdings nor any affiliate had received the death benefit. (A31). A week later, GWG Holding's Chief Investment Officer, Brian Bailey, provided Harley's counsel with a sworn affidavit to that effect. (*Id*.). That affidavit also stated that in November 2010, the Policy had been sold to Life Assets Trust, with WestLB AG, New York Branch acting as administrative agent. (*Id*.). In reliance on these representations, Harley dismissed GWG Holdings from the California Action without prejudice, and filed an amended complaint naming Wells Fargo, Life Assets Trust, and Portigon (a successor of WestLB AG) as defendants, in addition to naming John Doe defendants. (*Id*.).

On May 4, 2022, through discovery, Harley obtained information revealing that—contrary to the assurances made in Mr. Bailey's affidavit—the Policy's death benefit had, in fact, been paid to a one-time affiliate of GWG Holdings: namely,

GWG Trust, of which Wells Fargo was the trustee. (A32). Thereafter, Harley's counsel sought clarification from counsel for Wells Fargo and GWG Holdings, but they refused to provide any clarification. (*Id*.). Only after Harley's counsel issued a deposition subpoena to Mr. Bailey did Mr. Bailey's counsel provide Harley with documents establishing that Mr. Bailey's affidavit had been untrue, and that in 2010 the Policy had been sold to GWG Trust, which never sold the Policy at all but rather continued to hold the Policy until Norman's death. (A32-33).

In the meantime, defendants in the California Action brought a motion to dismiss Harley's Section 2704(b) claim for lack of standing. *Frank*, 620 F. Supp. 3d at 1026. They argued that, even though Norman's will named Harley as executor, the probate proceedings were still ongoing and had not yet resulted in an order formally naming him as executor, and that he thus lacked standing to pursue the claim on behalf of his father's estate. *Id*. at 1027. On August 8, 2022, the court granted the motion, dismissing Harley's §2704(b) claim for lack of standing. *Id*. at 1026–27.

D. After Being Confirmed as Norman's Executor, Harley Brought This Action

On March 6, 2023, the probate court formally recognized Harley as Norman's executor and personal representative. (A30). On May 18, 2023, in his capacity as Norman's executor, Harley brought this action in Delaware state court on behalf of

the Estate. (A30). Shortly thereafter, Defendants removed the action to the U.S. District Court for the District of Delaware. (A2).

In July 2023, Defendants moved to dismiss, arguing that the Estate's claims were barred by either the three-year statute of limitations under 10 *Del. C*. §8106(a), or the one-year statute of limitations under 10 *Del. C*. §8115. (A52-60). The Estate opposed the motion, arguing that there was no applicable statute of limitations and that, even if there were, any limitations period would not have expired because: (1) the claim had not accrued until the Estate was opened on March 6, 2023; (2) equitable tolling applied because Defendants concealed themselves and then misled Harley about GWG Trust's role and identity; and (3) the claim was preserved by virtue of Delaware's Savings Statute, 10 *Del. C.* §8118(a), which entitled the claim to be brought for up to one year after the California Action's dismissal. (A77-90).

On September 26, 2024, the District Court granted in part and denied in part Defendants' motion to dismiss. (Mem. Order at 2, Sept. 26, 2024 (Ex. A to Def.'s Opening Br.)). The court noted that two other courts, including the only Delaware court to have addressed the issue, had found no statute of limitations applicable to Section 2704(b) claims (*id*. at 2 n.2, *citing Est. of Oristano by Tuchman v. Avmont, LLC*, 2024 WL 3876550, at *3 n.48 (Del. Super. Ct. Aug. 20, 2024) ("*Oristano*") and *Est. of Daher v. LSH Co*., 2023 WL 4317029, at *2-3 (C.D. Cal. June 13, 2023)

("*Daher*")). The District Court observed, however, that "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 suggested to the parties that the question might be a "good candidate for certification" to this Court. *Id*. at 2-3. The court thus directed the parties to confer on the issue and denied without prejudice the motion to dismiss on timeliness grounds. *Id*. at 2, 4.[3] The parties conferred, and the District Court certified the statute of limitations question on March 4, 2025. (Mem. Order at 2, Sept. 26, 2024 (Ex. B to Def.'s Opening Br.), which this Court accepted. (B30-31).

[3] In portions of the Memorandum Order not before this Court, the District Court also questioned plaintiff's arguments concerning the accrual date and tolling, without ruling on either issue. *Id*. at 2 n.2. The court also dismissed the claim against Wells Fargo based on its construction of the Delaware Statutory Trust Act, 12 *Del. C.* §3803(b), (c). *Id.* at 3-4. The Estate reserves its right to challenge these aspects of the District Court's order at an appropriate time.

IV. ARGUMENT

A. Questions Presented

This Court's March 19, 2025 Order sets forth the question presented: "What is the statute of limitations, if any, applicable to a claim under 18 *Del. C*. §2704(b)?"

B. Scope of Review

Because "this Court is addressing a certified question of law, as distinct from a review of a lower court decision, this Court must review the certified question in the context in which it arises." *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 39 (Del. 1996). This case arose on a motion to dismiss in federal court, so the Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (internal citation and quotation marks omitted).

C. Merits of Argument

1. Because No Statute of Limitations Covers Section 2704(b) Claims, They Are Not Subject to a Limiting Period

It is axiomatic that a claim must fit within a statute of limitations for it to be subject to the corresponding limitations period. If a claim does not fit within the ambit of any statute of limitations, it is not subject to any limiting period. *See Butler*, 222 A.2d at 272 (holding that because the cause of action at issue did not meet the express terms of Section 8106, "this means that there is in our statutes no general or specific statute of limitation which may be raised as a defense…"); *Hewitt v. Beattie*, 138 A. 795, 798 (Conn. 1927) ("[T]here is no applicable statute of limitation, and it is not for this court to establish one."); *Daughtry v. Nadel*, 242 A.3d 1158, 1180 (Md. Ct. Spec. App. 2020) (explaining that "no statute of limitations" applied to the particular claim before the court); *Gilley v. Nidermaier*, 10 S.E.2d 484, 488 (Va. 1940). *Cf. Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (applying Section 8106(a) only because Wal-Mart's claims were "tort, contract, and fiduciary duty claims" to which Section 8106(a) expressly applies).

This principle—that a cause of action that does not fit within the ambit of a statute of limitations is not subject to a limiting period—is a principle of the common law. "Common law courts put no time limitation upon litigants. They apparently viewed such limitations as the responsibility or prerogative of the king or the

Parliament, which acted infrequently and on an ad hoc basis. No rule or standard was formulated that could be applied indefinitely into the future." Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 B.Y.U. L. Rev. 917, 924 (1992). Thus, "[a]t both early Roman and early common law, rights in contract and in tort were, in theory, perpetual… Not until the reign of Henry VIII did Parliament enact legislation that moved in the direction of creating a self-perpetuating limitations system for real property actions." *Id*. Ultimately, it was not until almost a century later, under James I in 1623, that the English Parliament passed An Act for a Limitation of Actions and for Avoiding Suits in Law, which marked the beginning of limitation periods on personal actions. *Id*. at 926 (*citing* 21 Jac. I c.16 §1); *see also Developments in the Law Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1177-78 (1950). The key point is that limitations periods are creatures of statute, not creatures of the common law.

Delaware law accords with these principles; indeed, the statute of James I never had force in Delaware. *See Lynch v. Hill*, 6 A.2d 614, 617 (Del. Ch. 1939); *Hulley v. Sec. Tr. & Safe Deposit Co*., 5 Del. Ch. 578, 590-91 (1885).

Some states have chosen to enact catch-all statutes of limitations to cover claims not specifically covered by another statute of limitations.[4] Delaware, however, has chosen not to enact one. Thus, for a Delaware claim to be covered by a statute of limitations, there must be a statute of limitations that specifically covers the claim. Otherwise, the default common-law rule governs, meaning there is no limiting period.

This is clear not only from *Butler*, but from *Kirkwood Kin Corp.*, which recognized that "the limitation of actions in 10 *Del. C*. §8106 does not apply" to "contracts under seal," that actions for breach of such contracts are thus "'left by our statutory law, so far as limitations of actions are concerned, to the common law'"; that "'that law prescribes no absolute bar due to the lapse of time'"; and that therefore, "under common law going back to long before Delaware was a State,

[4] *See*, *e.g.*, Ala. Code §6-2-38(*l*); Alaska Stat. §09.10.100; Ariz. Rev. Stat. §12-550; Ark. Code Ann. §16-56-115; Cal. Civ. Proc. Code §343; Colo. Rev. Stat. §13-80-102(*i*); D.C. Code §12-301(8); Fla. Stat. Ann. §95.11(3)(o); Haw. Rev. Stat. Ann. §657-1(4); Idaho Code §5-224; 735 Ill. Comp. Stat. 5/13-205; Iowa Code §614.1(4); Kan. Stat. Ann. §60-511(5); Ky. Rev. Stat. §413.120(6); La. Civ. Code Art. 3499; Md. Code Ann. Cts. & Jud. Proc. §5-101; 14 Me. Rev. Stat. §752; Mich. Comp. Laws §600.5813; Miss. Code Ann. §15-1-49; Mo. Rev. Stat. §516.120(5); Nev. Rev. Stat. §11.220; N.M. Stat. §37-1-4; N.Y. C.P.L.R. 213(1); Ohio Rev. Code Ann. §2305.14; Or. Rev. Stat.§12.110(1); 42 Pa. C.S.A §5527(b); S.C. Code §15-3-600; S.D. Codified Laws §15-2-13(5); Tenn. Code §28-3-110(a)(3); Tex. Civ. P. & Rem. Code §16.051; Utah Code 78b-2-307(4); 12 Vt. Stat. Ann. §511; Va. Code Ann. §8.01-248; Wash. Rev. Code §4.16.130; W. Va. Code §55-2-12.

Plaintiffs seemingly may sue for… breach" of a contract under seal "in perpetuity." 1995 WL 411319 at *5 (*quoting Garber v. Whittaker*, 2 A.2d 85, 88 (Del. Ch. 1938); *see also Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983) (similarly recognizing that, if there is no applicable statute of limitation, there is no limitations period).

2. Section 8106(a) Does Not Apply to a Section 2704(b) Claim

Proceeding from the false premise that every claim must necessarily be subject to some statute of limitations, Defendant urges this Court to hold that either 10 *Del. C.* §8106(a) or §8115 somehow covers Section 2704(b) claims. This Court should reject the invitation because neither statute covers a Section 2704(b) claim.

a. A Section 2704(b) Claim Is Not an "Action Based on a Statute" Under Section 8106(a)

Defendant's primary argument is that a Section 2704(b) claim is an "action based on a statute" and is therefore covered by Section 8106(a). As Defendant admits, this Court has set forth a clear test for whether a particular claim is an "action based on a statute" for purposes of Section 8106(a): the claim must be "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***." (A53) (Defs.' Mot. to Dismiss at 7) (*quoting Butler*, 222 A.2d at 272) (emphasis in original).

Defendant's argument fails because, as this Court held in *Malkin*, §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. Therefore, a §2704(b) claim finds its roots in the common law, and is thus not an "action based on a statute" for purposes of §8106(a).

In addition to this Court's recognition in *Malkin* that Section 2704(b) codified the common law, Delaware's principles of statutory construction provide further proof that Section 2704(b) codified the common law rather than created a new cause of action that had previously not existed. Under those principles, "[a] statute will be construed as having changed the common law only where such a result is clearly indicated by express terms or by necessary implication from the legislative language used." *Lobato v. Health Concepts IV, Inc.*, 606 A.2d 1343, 1348 (Del. Ch. 1991) (cleaned up) (*citing Makin v. Mack,* 336 A.2d 230, 234 (Del. Ch. 1975) and 2A *Sutherland Stat. Const.* §50.05 (4th Ed.)). Because Section 2704(b) does not clearly indicate by express terms or by necessary implication that it was intended to change Delaware's common law, Section 2704(b) must be construed as being consistent with, and as having codified, Delaware's common law.

Defendant's argument—that the longstanding common law rule that estates can recover STOLI proceeds from whomever the insurer pays is somehow not the common law of Delaware—is wrong. Delaware's STOLI common law is based upon the federal common law decision in *Warnock v. Davis*, 104 U.S. 775 (1881), where the U.S. Supreme Court held that the estate of a STOLI insured was entitled to recover the death benefit paid to the STOLI investor. *See id.* at 782-83. In 1914, for example, the Delaware Superior Court relied on *Warnock* for the proposition that

"[p]ublic policy requires that a person having no insurable interest in the life of another shall not be permitted to speculate on such life and thereby become interested in its early termination[.]" *Baltimore Life Ins. Co. v. Floyd*, 91 A. 653, 656 (Del. Super. 1914), *aff'd* 94 A. 515 (Del. 1915). More recently, in 2011, this Court issued its seminal anti-STOLI decision in *Price Dawe*, and it again cited *Warnock* as the basis for Delaware's common-law rules concerning insurable interest. 28 A.3d at 1069 n.31. More recently still, in 2021, this Court cited *Warnock* in support of its observation that "[f]or hundreds of years, the law has prohibited wagering on human life through the use of life insurance that was not linked to a demonstrated economic risk," *Lavastone Capital LLC v. Est. of Berland*, 266 A.3d 964, 967-68 & n.3 (Del. 2021) ("*Berland*"), and recognized that Delaware had codified that principle, *id*. at 968. And in 2022, in *Malkin*, this Court made its most emphatic statement on the issue yet, stating 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," and citing *Warnock* as illustrating that rule. *Malkin*, 278 A.3d at 61 & n.23. In short, *Warnock* and Delaware's common law have long been one and the same.

* * *

Defendant now argues this Court was wrong to say in *Malkin* that §2704(b) codified the common law. In its briefs in the District Court, Defendant was even more strident and took the untenable position that this Court's holding in *Malkin* was mere "dicta." (A54) (Defs.' Mot. to Dismiss at 8); (B10) (Defs.' Mot. to Dismiss Reply Br. at 5). However framed, the argument is wrong.

Far from being "dicta," this Court's conclusion in *Malkin* that Section 2704(b) codified the common law was essential to its holding. There, the Court was presented with two certified questions, and its analysis began with the explanation that "[t]he threshold issue underlying the certified questions in this case is whether Section 2704(b) precludes a downstream purchaser of a policy that lacks an insurable interest from asserting any defense or counterclaim." 278 A.3d at 61. The third sentence of this Court's reasoning—which states that Section 2704(b) "codifie[d] 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"—was central to this Court's subsequent holding that §2704(b) is not "inconsistent with common law" and thus did not displace all defenses and counterclaims available to downstream buyers. *Id*. at 61-62. Calling it "dicta" does not make it so. But even if the language were somehow "dicta," it constitutes a recent, reasoned, and unanimous opinion of this Court in a case that addressed this very context.

Nor, in any event, can there possibly be any merit to Defendant's assertion that §2704(b) changed Delaware's common law to allow family claims for the first time. All Defendant says in support of that bald assertion is that because no one has located an old reported Delaware case where an insured's estate brought an insurable interest claim, the law somehow must have been that, prior to the enactment of Section 2704(b), only insurers could raise such claims in Delaware. This argument flies in the face of over a century of this Court's jurisprudence—going at least as far back as *Baltimore Life Insurance,* 91 A. at 656, *aff'd* 94 A. 515 (Del. 1915)—which recognizes Delaware law's categorical opposition to the enforcement of STOLI contracts, with no exceptions for the particular identity of the person against whom the contract's provisions are being invoked. Defendant's argument also contradicts the principle that, under Delaware laws of statutory construction, "[a] statute will be construed as having changed the common law"—*i.e.*, Delaware's common law—"only where such a result is clearly indicated by express terms or by necessary implication from the legislative language used." *Lobato*, 606 A.2d at 1348 (cleaned up). And the argument also contradicts the embrace of *Warnock* as explicating Delaware's STOLI common law in *Floyd*, *Price Dawe*, *Berland*, and *Malkin*. It is also inconsistent with the laws in many states that allow estate recovery actions. *See supra* n.1 (collecting cases). And it is notable that Defendant failed, both below and

in their opening brief, to point to any Delaware case holding that ***only*** insurers can challenge insurable interest.

In short, because Section 2704(b) "codifies," *Malkin*, 278 A.3d at 61, and has its roots in, the common law, it is not an "action based on a statute" for purposes of Section 8106(a). Other courts have reached this same conclusion. *See Daher*, 2023 WL 4317029, at *3 (applying Delaware law to find that Section "8106(a)'s statute of limitations does not apply to [Section] 2704(b) claims."); *Oristano*, 2024 WL 3876550, at *3 & n.48 (finding that if the court did "address the alternative argument that limitations periods do not apply to bar litigation based on STOLI policies," it would "follow the reasoning in *Daher* … [to] determine that the STOLI claim is not subject to 10 *Del. C.* §8106"); *Viva Capital 3, L.P. v. Estate of Garrett*, 2023 Cal. App. LEXIS 1023 (Cal. Sup. Ct. Feb. 17, 2023).

b. Section 2704(b) Claims Are Not Actions "To Recover Damages Caused by an Injury Unaccompanied with Force or Resulting Indirectly from the Act of the Defendant" Under Section 8106(a)

Revising its arguments before the District Court, Defendant now asserts that if a Section 2704(b) cause of action does not constitute an "action based on a statute" for purposes of Section 8106(a), it would still fit within Section 8106(a) by virtue of being an "action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant."

This fallback argument fails.

First, a Section 2704(b) claim is not an "action to recover damages caused by an injury." "Damages" are defined as "the estimated reparation in money for detriment or injury sustained,"[5] and an "injury" can be defined as "[t]he violation of another's legal right[.]"[6] Although the families of insureds who were put through STOLI schemes suffer injuries in connection with having their loved ones' lives wagered on, Section 2704 does not focus on awarding damages for such violations,

---

[5] *Nat'l Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *12 (Del. Super. Ct. Jan. 16, 1992) (*quoting New Castle County v. Hartford Accident & Indem. Co*., 933 F.2d 1162, 1189 (3d Cir. 1991)); *see also* Black's Law Dictionary (12th ed. 2024) (defining "damages" as "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury[.]") (emphasis added).

[6] *Brown v. E.I. duPont de Nemours and Co., Inc*., 820 A.2d 362, 369 n.26 (Del. 2003).

but on policing and deterring human life wagering. As this Court has confirmed: "[W]hen an investor receives [STOLI] proceeds it does not commit a violation of the rights of the claimant but rather a violation of Article II, Section 17 of Delaware Constitution and of the State's public policy." *Malkin*, 278 A.3d at 65 (cleaned up).[7]

Second, Section 8106(a)'s language—"action to recover damages caused by an injury"—is regarded as a reference to torts. *See*, *e.g.*, *Altenbaugh v. Benchmark Builders Inc.*, 271 A.3d 188 (Table), 2022 WL 176292, *2 (Del. Jan. 20, 2022) ("Pursuant to 10 *Del. C.* §8106(a), 'no action to recover damages 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.' Such statutes are commonly known as 'accrual' statutes, and causes of action under these statutes are deemed to have accrued, and time begins to run, at the time ***the tort*** is committed.") (cleaned up; emphasis added). A Section 2704(b) action is not a tort because, as discussed above, it is not brought to compensate the plaintiff for the injury it has suffered at the hands of the defendant. It is designed to

[7] In the District Court, Defendant conceded that a Section 2704(b) claim cannot be one for damages. (B12) (Mot. to Dismiss Reply at 7) (saying a "plaintiff suffers no damages.").

prevent human life wagers from coming to fruition and to restore a just and proper purpose (protection of loved ones) to insurance that has been perverted.[8]

The nature and purpose of a Section 2704(b) claim also explain why Defendant is wrong to analogize such claims to unjust-enrichment claims,[9] which are sometimes found to be subject to Section 8106(a). "[T]he purpose of unjust enrichment claims is to restore a benefit to a plaintiff… [But] Section 2704(b) claims do not restore a benefit to an estate; rather, they are designed to eliminate human life wagering." *Daher*, 2023 WL 4317029, at *4 (*citing Price Dawe*, 28 A.3d at 1078). Equally unavailing is Defendant's attempt to analogize Section 2704(b) claims to claims for constructive trusts, for constructive trusts "are remedies, rather than causes of action,"[10] and are thus not subject to a particular statute of limitations. *See*

[8] Defendants cite *Lehman Bros. Holdings, Inc. v. Kee*, 268 A.3d 178, 185 (Del. 2021) for the proposition that a three-year statute should be applied to claims for "breach of contract, or similar wrong." But the claim here has nothing to do with contract, and there is no basis for applying a contract statute of limitations. As this Court has ruled repeatedly, a STOLI policy is void *ab initio* and never comes into force. Thus, a Section 2704(b) claim "is not a contract case" for the contention is that "there is no contract at all[,]" *Est. of Barotz v. Martha Barotz 2006-1 Ins. Tr.*, 2023 WL 8714990, at *9 n.103 (Del. Super. Ct. Dec. 18, 2023) (cleaned up), and the plaintiff need not prove any contractual entitlement to the proceeds, nor is there any basis for such a requirement.

[9] *Cf. Schleiff v. Balt. & O.R. Co.*, 130 A.2d 321, 332 (Del. Ch. 1955) (refusing to apply statute of limitations "by analogy").

[10] *iBio, Inc. v. 16 Fraunhofer USA, Inc.,* 2020 WL 5745541, at *12 (Del. Ch. 2020); *see also Teachers' Ret. Sys. v. Aidinoff*, 900 A.2d 654, 670 (Del. Ch. 2006) (noting

Spano v. Morse, 2003 WL 22389542, at *1 (Del. Ch. Oct. 8, 2003) (observing claim was for "conversion" without which plaintiff is not "entitled to an order imposing a constructive trust"; selecting limitations period accordingly).[11]

Nor is there merit to Defendant's new suggestion that this provision is a catch-all encompassing all actions seeking to recover money. Defendant did not make such an argument below, and it should be deemed waived. And such a construction is contrary to the provision's plain language, which by its express terms applies only to actions that seek to "recover damages by an injury unaccompanied with force or resulting indirectly from the act of the defendant." Moreover, such a construction would render superfluous Section 8106(a)'s other provisions, all of which cover certain kinds of actions that seek money or property. Nor—contrary to what the Defendant seems to be arguing—does *Butler* support such a construction. *Butler* says that seeking money or property is a *necessary* condition for fitting within Section 8106(a); it does not say that seeking money or property is a *sufficient*

"court cannot impose the remedy of a constructive trust against a party unless that party is properly subject to an order of relief under a recognized cause of action.").

[11] Defendant references *Adams v. Jankouskas*, 452 A.2d 148 (Del. 1982), but that decision makes clear that constructive trusts are imposed to prevent unjust enrichment (*id*. at 152) and never suggests constructive trusts are claims in their own right. *See also East v. Tansey*, 1993 WL 487807, at *2 (Del. Ch. Oct. 22, 1993) (following *Adams* regarding allegations of "misappropriat[ion]" of money).

condition for fitting within Section 8106(a). And although Defendant latches onto language from *Reddy v. PMA Insurance Co.*, 20 A.3d 1281 (Del. 2011) that referred to Section 8106(a) as "the general statute of limitations," *id*. at 1284, the Court was just making the point that there was no statute of limitations specifically applicable to contribution claims, *id*., and that none of the particular exceptions to Section 8106(a)—namely, Sections 8108–8110, 8119 or 8127 of Title 10—applied, *id.* at 1290 & n.38. The important point is that the plaintiff's contribution claim was subject to Section 8106(a), not because Section 8106(a) applies to all claims that seek money, but rather because the plaintiff's contribution claim sought the recovery of money from a person "liable in tort for" an "injury" suffered by the plaintiff. *Id*.

Finally, if one were to construe the phrase "action to recover damages by an injury unaccompanied with force or resulting indirectly from the act of the defendant" as a catch-all "residual" provision that, as Defendant asserts, covers all actions for the recovery of money or property, *Butler* would essentially be rendered meaningless. For if Section 8106(a) covered all actions for the recovery of money/property—including actions for the recovery of money/property that had their roots in the common law—then there would have been no need for the *Butler* Court to explain that "the language, 'action based on a statute,' is intended to be confined to 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." *Butler*, 222 A.2d at 272.[12]

[12] Defendant suggests *Dep't of Labor, Div. of Indus. Affairs, ex rel. Cook v. Vepco of Del., Inc*., 1990 WL 74290, at *4 (Del. Super. Ct. May 3, 1990) involved a "statutory action[] based on the common law." Def.'s Opening Br. at 16. Not so. The plaintiff had "artfully drafted" its complaint by omitting the labor agreement that was the basis for the wages claimed in order to avoid the one-year statute for wage claims under 10 *Del. C*. §8111. No such artful pleading is at play here.

3. Section 8115 Does Not Apply to Section 2704(b) Claims Because It Is Not a "Penal Statute"

Defendant also suggests that Section 2704(b) claims should be subject to the brief one-year statute of limitations under Section 8115, which applies to "civil action[s] for a forfeiture upon a penal statute." A "penal statute" is a statute that "impos[e] punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon." *Staub v. Triangle Oil Co*., 349 A.2d 209, 210 (Del. 1975) (construing the term "penal statute" under 10 *Del. C.* §3701 by adopting the definition of "penal laws" given in *Huntington v. Attrill*, 146 U.S. 657, 667 (1892)).[13] Accordingly, this Court and other Delaware courts have made clear that Section 8115 applies only where there are underlying criminal proceedings and only with respect to a criminal defendant. *See*, *e.g*., *Crawford*, 859 A.2d at 627-28 ("A cause of action for forfeiture under Section 8115 accrues on the date the criminal case ends, which, this Court has held, is the date of sentencing.") (cleaned up); *State v. Rossitto*, 331 A.2d 385, 388

[13] It thus does not matter if, as Defendant suggests, Section 2704(b) is not about "compensation or restitution." (Def.'s Opening Br. at 20). The same was true of the treble-damages remedy in *Staub,* but the statute authorizing the remedy was found not to be a penal statute. "Statutes giving a private action against a wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal." *Staub*, 349 A.2d at 210 (*quoting Huntington*, 146 U.S. at 667).

n.11 (Del. 1974) ("In every forfeiture proceeding the burden is upon the State to prove by a preponderance of the evidence that the property in question was 'used in the commission of a crime."). *See also* 11 *Del. C*. §203 (recognizing that "penal statute[s]" are set forth in the Criminal Code).

Another reason why §2704(b) claims are not forfeiture actions is that forfeiture actions seek property. *See* Black's Law Dictionary (12th ed. 2024) (defining "forfeiture" as "[t]he divestiture of property without compensation."). By contrast, §2704(b) claims seek STOLI proceeds, which by their nature are not property. For as *Malkin* made clear, "[n]obody can have a 'property interest' in a STOLI policy or its proceeds, [] because, as this Court held in *Price Dawe*, such policies are 'nullities'—invalid human-life wagers that never come into legal existence." *Malkin*, 278 A.3d at 65 (*quoting Price Dawe*, 28 A.3d at 1068 & n.25).

In arguing that §2704(b) claims are forfeiture actions, Defendant misreads the authorities on which it relies. In *Gardner v. Daniel*, 7 Del. 300 (Del. Super. Ct. 1860), both parties *agreed* that the one-year statute for penal forfeitures applied (there, for violations of the usuary laws),[14] and only disputed the accrual date—a question this Court later resolved in *Crawford* by tying it to the end of criminal

[14] At the time, the statute against usury was "a penal statute[.]" *Daniel v. Cooper*, 7 Del. 506, 509 (Del. Super. Ct. 1862).

proceedings. In *Gregorovich v. E.I. du Pont de Nemours*, 602 F. Supp. 2d 511 (D. Del. 2009), the federal court drew an analogy to §8115 for a claim under 29 U.S.C. §1132(c)(1) only after finding the federal statute to be "penal in nature." *Id*. at 517. And in *Syed*, the federal courts borrowed a different one-year statute of limitations—that applicable to employment disputes under 10 *Del. C*. §8111, *see Syed v. Hercules Inc*., 214 F.3d 155, 161 (3d Cir. 2000)—which the district court adhered to on remand. *See Syed v. Hercules Inc.*, 2001 WL 34368377, at *3 (D. Del. Jan. 19, 2001).

4. Subjecting §2704(b) Claims to a Limitations Period Would Enable STOLI Schemes to Succeed, Which This Court Has Said Must Never Be Allowed to Happen

Defendant's argument that Section 2704(b) claims should be subject to Sections 8106(a) or 8115 not only lacks a basis in statutory language, but would, if accepted, permit human-life wagers to come to fruition in violation of Delaware's longstanding law, public policy, and its constitutional prohibition against all forms of non-enumerated wagering, including using insurance to wager on human life.

This Court has been "crystal clear" that courts can "never enforce" STOLI or allow "illegal human-life wagers to pay off," and that any defense or counterclaim whose effect would be to allow that to happen would violate Delaware's Constitution and "the State's strong public policy against human-life wagering," and would "fly in the face of our repeated avowals that enforcement of a STOLI policy is not an option." *Frankel*, 294 A.3d at 1072, 1074 (rejecting legal viability of STOLI defenses, including laches); *see also Malkin*, 278 A.3d at 65, 69; *Barotz*, 2022 WL 16833545, at *11, *aff'd*, 320 A.3d 212 (adopting and affirming decision that, *inter alia*, dismissed affirmative defenses which, if accepted, would have allowed STOLI investor to keep wagering proceeds).

It was for these reasons that this Court, in *Price Dawe*, rejected the proposition that Delaware's statutorily-mandated incontestability period—which this Court

described as serving "the same function as statutes of limitation and repose"—provided a STOLI defense and gave investors a basis to demand human life wagering proceeds. 28 A.3d at 1065-68. It was for these same reasons that this Court, in *Malkin*, rejected a statutory UCC defense, which if enforced would have allowed the investor to retain the human life wagering proceeds it had already received from the insurer, explaining that this Court could not "find any basis in the text of the Delaware UCC to conclude that the General Assembly intended to violate the Delaware Constitution's general prohibition of wagering or alter the State's longstanding prohibition of STOLI policies." 278 A.3d at 65. And it was for these same reasons that this Court held, in *Frankel*, that estoppel, waiver, unclean hands, and laches defenses are not legally viable in the STOLI context because they too would allow investors to profit from human life wagers that Delaware's Constitution and public policy prohibit. 294 A.3d at 1072.

Defendant's hyper-technical attempts to distinguish this Court's decisions in *Price Dawe*, *Malkin*, and *Frankel* ignore this Court's teaching that it would be "absurd" to ascribe to the legislature an intent to allow illegal human life wagers to pay off in violation of Delaware's constitutional prohibition of wagering and Delaware's "longstanding policy of preventing STOLI policies from paying out to investors." *Malkin*, 278 A.3d at 64-65, 69; *Price Dawe*, 28 A.3d at 1070-71.

In this regard, Defendant argues (Def.'s Opening Br. at 23-24) that this Court would have enforced the two-year incontestability provision in *Price Dawe* if the General Assembly had enacted a "direct ban" on challenges after two years instead of requiring the policies themselves to contain those bans. But that is not what *Price Dawe* said: *Price Dawe* said courts may "never" enforce STOLI policies. 28 A.3d at 1067; *Malkin*, 278 A.3d at 56; *Frankel*, 294 A.3d at 1072. And, of course, in *Malkin*, this Court held that a *statutory* defense was *not* legally viable by interpreting that statute in such a way as to avoid the "patent absurdity" of ascribing to the General Assembly the intent to "violate the Delaware Constitution's general prohibition of wagering or alter the State's longstanding prohibition of STOLI policies." 278 A.3d at 64-65; *see Price Dawe*, 28 A.3d at 1070-71 (explaining that it would be "absurd" to interpret a statute in a way that "would permit wagering contracts, which are prohibited by the Delaware Constitution" since the General Assembly cannot have intended to authorize or effect what Delaware's Constitution forbids). Here, the General Assembly could not have intended a limitations periods to apply in the *sui generis* context of STOLI because a court enforcing such a defense would "in effect" be allowing human life wagers to pay off due to the passage of time, which would violate Delaware's Constitution and "longstanding policy of

preventing STOLI policies from paying out to investors."[15] *Malkin*, 278 A.3d at 65, 69; *Frankel*, 294 A.3d at 1072.

Defendant tries to get around this by arguing (Def.'s Opening Br. at 22-23) that a court enforcing a statute of limitations in a Section 2704(b) action would not be "enforcing" an illegal human life wager because, Defendant says, the insurer has already paid the death benefit and thus, Defendant says, the human life wager has already been enforced and all the court would be doing in that instance would be refusing a remedy. This is the same hair-splitting argument the investor made and lost in *Malkin*.[16] And for good reason: There is no meaningful difference between a court allowing an investor to *obtain* wagering proceeds and a court allowing an investor to *retain* wagering proceeds. In either instance, the court is, in substance, allowing the human life wager to pay off in violation of Delaware's Constitution and public policy. *See Del. Bd. of Med. Licensure and Discipline v. Grossinger*, 224 A.3d 939, 956-57 (Del. 2020) (statute cannot be applied in way that would violate

[15] For the reasons set forth throughout this Brief, the General Assembly has never enacted a statute of limitations that would cover Section 2704(b) claims. But even if we were to assume solely for sake of argument that the General Assembly had intended to do so, the General Assembly would have lacked the authority to do so by virtue of Delaware's Constitution, whose Article II, Section 17 forbids "[a]ll forms of gambling" subject to exceptions not applicable here.

[16] *Wells Fargo v. Estate of Malkin*, No. 172, 2021, Berkshire Opening Br. at 18, 22-26, Filing ID 66745355 (Del. July 7, 2021).

the Constitution). Indeed, accepting Defendant's argument would result in the "illogical triumph of form over substance that would completely undermine the policy goals behind the insurable interest requirement." *Price Dawe*, 28 A.3d at 1071.

Defendant correctly states that to determine the viability of Section 2704(b) defenses "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[.]" *Malkin*, 278 A.3d at 62-63. But Defendant does not meaningfully grapple with that public policy or with the manner in which this Court applied that public policy in *Malkin* and its progeny.

In *Malkin*, this Court rejected as not legally viable defenses which if allowed to proceed would have permitted the investor to retain human life wagering proceeds, but accepted as legally viable (if proven) the premium setoff counterclaim because it "does not on its face violate the Delaware Constitution's general prohibition of wagering or the State's longstanding policy of preventing STOLI policies from paying out to investors." 278 A.3d at 69.

Likewise, in *Frankel*, this Court rejected defenses as legally non-viable—including time-based defenses like laches—where the investor sought to use them to obtain STOLI proceeds. 294 A.3d at 1072 ("Thus, the Superior Court did not err

by dismissing Wilmington Trust's promissory-estoppel counterclaim and striking its equitable defenses *to the extent that they sought recovery of the policies' death benefits*.") (emphasis added); *see id.* at n.40 (*citing Columbus Life v. Wilmington Tr.*, 2021 WL 3886370, at *7 (D. Del. Aug. 31, 2021)).

And, in *Barotz*, the Delaware Superior Court applied *Malkin*'s viability test to reject an investor's waiver and release defenses, holding that if those defenses "were accepted, they would allow a downstream purchaser to retain the death benefit paid under a void policy in clear contradiction to Delaware common law and Section 2704(a). Accordingly, those defenses are not 'viab[le]' in the STOLI context." *Barotz*, 2022 WL 16833545, at *11 (alteration in original). This Court adopted and affirmed that decision. *Barotz*, 320 A.3d 212 (Del. 2024).

5. Practical Reasons Support Finding That No Statute of Limitations Applies

STOLI schemes are particularly ill-suited to Defendant's proposed limitations periods not only because of the statutory, constitutional, and public-policy reasons discussed above, but also because of practical considerations: STOLI schemes are generally self-concealing.[17] STOLI originators often use form documents that make it appear to potential claimants that they would not have any viable claim.[18] They also employ complicated ownership structures to conceal themselves and the true nature of the scheme from the issuing carriers, the subject insured, and the insureds' families. This includes both using "sham trusts" to originate the agreements and to

[17] Claims are not subject to a running statutory clock where the defendants have "fraudulently concealed from a plaintiff the facts necessary to put [the plaintiff] on notice of the truth," particularly where "the defendant… either prevented the plaintiff from gaining knowledge of material facts or led the plaintiff away from the truth." *LGM Holdings, LLC v. Schurder*, __ A.3d __, 2025 WL 1162999, at *8 (Del. Apr. 22, 2025) (first alteration in original; citation omitted). Such artifice abounds in the STOLI context.

[18] For instance, the paperwork in the *Barotz* litigation included a purported release of claims by the insured and the estate. However, as Judge Davis noted, such a release itself is ineffective as it would enable STOLI defendants to keep the proceeds despite the General Assembly's prescription "that the estate should receive the proceeds of the policy [created through a STOLI scheme] as a matter of public policy." *Barotz*, 2022 WL 16833545, at *11 (alteration in original). Yet the very fact that STOLI organizers include such clauses in the first place will falsely lead a reasonable layperson to believe they lack any claim, have waived any claim, and/or that they will subject themselves to liability should they try to sue.

conceal their STOLI aspects,[19] and subsequent and frequent transfers of "beneficial interests" in the policy, which obscure who the actual "beneficial owner" is.[20]

Those owning the "beneficial interest" in a policy use another means to further hide. In nearly all STOLI cases, the "beneficial owners" do not take payment directly from the insurer, but rather have banks, in one capacity or another, serve as the initial recipient. *See, e.g., Malkin*, 278 A.3d at 58-59. Doing so allows the STOLI investors to conceal their involvement, obscuring even from the insurer that the policy is not for the benefit of the insured or his or her family. Thus, even after victims retain counsel, one may not immediately sue the "beneficial owner." This concealment affords potential defendants the opportunity to engage in further gamesmanship, and if Defendant is correct about statute of limitations, an opportunity to profit from illegal human life wagering by running out the clock. Here, for instance, GWG Holdings (or someone acting on its behalf) actively misled Harley as to Defendant's identity. *See* A32-33. In some STOLI cases, after an estate files suit, bank defendants even fight efforts to unmask the "beneficial owner" and

---

[19] *See*, *e.g.*, *Barotz*, 2023 WL 8714990, at *4 (recounting allegations that defendants "feign[ed] technical compliance with Delaware insurable interest statutes by creating a 'sham trust' which was used by the Defendants to pay all of the premiums on the Policy").

[20] *See*, *e.g.*, *Frankel*, 294 A.3d at 1065 (observing that "beneficial ownership of the policy has changed hands, in some cases several times.").

must be compelled to do so by courts. *See e.g.*, Second Am. Compl. ¶¶80-84, *Est. of Robert Jenkins v. U.S. Bank, N.A.*, No. C.A. No. N24C-11-152 EMD CCLD (Feb. 27, 2025) (ID 75732368).[21]

The result of such tactics is that potential claimants typically do not know a STOLI claim exists, whether the policy was kept up, whether the proceeds have been paid out, or to whom that money went (and thus whom to sue).[22]

And, as reflected in the record here, even after wrongdoing is uncovered, opening an estate can consume an inordinate amount of time, the extent of which depends on third parties and thus is not within the control of the potential plaintiff. Absent a STOLI claim, many victims would not need to open an estate, as assets are now more commonly transferred outside probate. *See* John H. Langbein, *The*

[21] In *Jenkins*, the plaintiff had already gained sufficient information to learn a wrong occurred but not the identity of the "beneficial owner." Given this Court's *Malkin* decision, the plaintiff was able to name the bank as a defendant and obtain the information. However, banks persist in their efforts to seek early exits from STOLI litigation, despite *Malkin*. Should they succeed, STOLI plaintiffs may be left with longer (or perhaps no) means to identify the "beneficial owner."

[22] In contrast, Defendant's Opening Brief at 26 cites instances where a plaintiff likely would have known an injury occurred, when the claim was ripe, and whom to sue. Indeed, the same is true of most of the types of claims encompassed by 10 *Del. C.* §8106(a). Defendant implies the legislature must pass a specific law to say a claim is exempt from time bars, but their example, 10 *Del. C.* §8145(a), was necessitated because such claims were previously time-limited and thus needed a special exemption. *See Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1251-52 (Del. 2011).

Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1108 (1984). Thus, discovery that the deceased was a victim of a STOLI operation results in a scramble to open an estate, but (as the record here shows) even counsel's zealous efforts cannot compel a backlogged probate court to move faster.

These real-world concerns counsel against judicial imposition of a statute of limitations, and certainly teach that the abbreviated three or one-year periods suggested by Defendant are too short on a practical level.

V. CONCLUSION

For all the reasons above, no statute of limitations applies to the claim here. Neither Section 8106(a) nor Section 8115 could plausibly apply to a Section 2704(b) claim, and the Estate respectfully submits that this Court should answer the certified question by so holding.

DATED: August 11, 2025

Respectfully submitted,

OF COUNSEL:

MARCUS & MARCUS, LLC

Jerome M. Marcus
Daniel C. Simons
Isaac A. Binkovitz (*pro hac vice*)
A. Mayer Kohn
Justin Stern
P.O. Box 212
Merion Station, PA 19066
Telephone: (215) 804-9666
Fax: (610) 664-1559
jmarcus@marcuslaw.us
dsimons@marcuslaw.us
ibinkovitz@marcuslaw.us
mkohn@marcuslaw.us

RIGRODSKY LAW, P.A.

/s/ Herbert Mondros

Herbert Mondros
1007 North Orange Street – Suite 453
Wilmington, DE 19801
Phone: (302) 295-5304
hwm@rl-legal.com
Del Bar. No. 3308

Attorneys for Plaintiff-Appellee
Estate of Norman Frank, by Its Executor, Harley Frank