



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

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INTRODUCTION

The Trust acknowledges and respects Delaware's strong public policy against STOLI, but rejects the Estate's position that this public policy overrides plain statutory text or erases the competing public policy interests embodied in statutes of limitations. The Court should answer the certified question by holding the three-year statute of limitations under Section 8106(a)—or, alternatively, the one-year statute of limitations under Section 8115—applies to a claim under Section 2704(b).

The Estate's legal arguments to the contrary are wrong, and its policy arguments—which would require rejecting any conceivable defense to a Section 2704(b) claim—are out of step with the careful consideration this Court's decisions require of any defense. Contrary to the Estate's view, holding Section 2704(b) claims subject to a statute of limitations does not make it impossible for estates to bring these claims. Until recently, the prevailing assumption has been that Section 2704(b) claims are subject to a three-year statute of limitations, and numerous estates have timely filed such claims. Furthermore, while the district court determined there was no basis for tolling on this record, plaintiffs can invoke equitable tolling where supported by the facts. The Estate gives this Court no good reason to carve Section 2704(b) claims out of Delaware's statute of limitations scheme.

ARGUMENT

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

The Estate’s brief contorts Section 8106(a) and this Court’s case law to arrive at its preferred result of no statute of limitations. The Trust maintains Section 2704(b) claims fall squarely within Section 8106(a)’s plain language.

A. A Section 2704(b) Action Is An “Action Based On A Statute.”

As the Trust explained in its opening brief, a Section 2704(b) action is an “action based on a statute,” within the meaning of Section 8106(a), because “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.” Opening Br. 12-13.

The Estate’s main response is to quote this Court’s previous statement that Section 2704(b) “codifies [a] longstanding common-law rule.” Response Br. 20 (quoting *Wells Fargo Bank, N.A. v. Est. of Malkin*, 278 A.3d 53, 61 (Del. 2022) (“*Malkin IP*”)). But this general observation—in a case that had nothing to do with Section 8106(a) or statutes of limitations—does not answer the more specific question of whether a Section 2704(b) action vindicates “a new right created by statute, as opposed to a right enforceable ... [at] common law.” *Butler v. Butler*, 222 A.2d 269, 272 (Del. 1966). As to that question, this Court repeatedly has referred to

a Section 2704(b) action as a “statutorily-created remedy.” *Lavastone Cap. LLC v. Est. of Berland*, 266 A.3d 964, 974 (Del. 2021) (“*Berland*”); *Malkin II*, 278 A.3d at 60 n.18. And, in the very sentence the Estate relies upon to say Section 2704(b) adds nothing to the common law, this Court described Section 2704(b) as “confer[ring] standing on the estate.” *Malkin II*, 278 A.3d at 61; *see also id.* at 61 n.22 (contrasting States that have statutes newly “conferring a right of action on an estate” with States where “the insurer is the only party that may raise the question of insurable interest”). The Estate cannot square its position with any of this language, so it simply ignores it.

The Estate has never shown that Delaware’s common law provided estates with the right conferred by Section 2704(b). In the only pre-Section 2704(b) Delaware case it cites—*Baltimore Life Ins. Co. v. Floyd*, 91 A. 653 (Del. Super. 1914), *aff’d*, 94 A. 515 (Del. 1915)—the Delaware Superior Court merely referenced *Warnock v. Davis*, 104 U.S. 775 (1881), in laying out the “general rule” that “a person without legal insurable interest in the life of another may not procure insurance upon the life of such other.” *Floyd*, 91 A. at 656. Far from proving an estate had a common-law right to sue and recover insurance proceeds akin to the right provided by Section 2704(b), *Floyd* involved a beneficiary’s (successful) suit to recover from an insurance company the proceeds of a life insurance policy despite allegations the beneficiary lacked an insurable interest. *See id.* at 654, 657. This

Court's more recent cases citing *Warnock* do so merely to state the "general rule" concerning insurable interest, while recognizing Section 2704(b) is a "statutorily-created remedy," which added to the rights and remedies previously available in Delaware. *Berland*, 266 A.3d at 974.

The Estate's further argument that "Delaware's principles of statutory construction provide ... proof that Section 2704(b) codified the common law rather than created a new cause of action," Response Br. 21, is misplaced. The principle that "[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," *id.* (quoting *Lobato v. Health Concepts IV, Inc.*, 606 A.2d 1343, 1348 (Del. Ch. 1991)), applies when determining whether a statute should be interpreted in a way that overrules settled common law. *See Lobato*, 606 A.2d at 1348 (examining whether "case law was overruled by the enactment of 8 *Del. C.* § 231"). It does not mean a statute does not create new rights unless it says it does, as the Estate suggests.

This Court has indicated Section 2704(b) adds to the rights that existed at common law in Delaware by giving estates—not just insurers—the right to sue for lack of insurable interest, allowing estates to recover death benefits they never paid for. *See Malkin II*, 278 A.3d at 61 n.23 (noting statutes like Section 2704(b) "modified the general rule that 'only the insurer can raise the objection of want of an insurable interest'"); *see also id.* at 61 (noting that "Section 2704(b) confers

standing on the estate”). The Estate’s citation to non-Delaware cases allowing such claims before Section 2704(b)’s enactment, *see* Response Br. 8-9, does nothing to refute this Court’s account of the rights enforceable at common law in Delaware. Indeed, the Estate admits “no one has located an old reported Delaware case where an insured’s estate brought an insurable interest claim.” Response Br. 24. Without such a case, the Estate cannot insist Section 2704(b) merely codified a preexisting right.

* * *

Ultimately, the debate as to whether a Section 2704(b) claim vindicates “a new right created by statute, as opposed to a right enforceable ... [at] common law,” *Butler*, 222 A.2d at 272, is not as consequential as the Estate makes it out to be. Where actions to recover money or property are concerned, Section 8106(a) generally reaches both statutory and common-law claims. If it were otherwise, Delaware courts would be inundated with challenges over whether particular statutory claims were sufficiently traceable to Delaware’s common law to evade the statute of limitations.

As things stand, Delaware courts face few of these challenges, because the question of whether an action to recover money or property is “based on a statute” tends to be outcome-determinative only where the claim otherwise would fall under an even shorter statute of limitations. For example, in *Harper v. State Farm Mutual*

Automobile Insurance Co., 703 A.2d 136 (Del. 1997), this Court had to determine whether a claim for personal injury protection (“PIP”) benefits under Delaware’s no-fault statute was an “action based on a statute” subject to Section 8106(a), or whether it was fundamentally a common law action against a tortfeasor for alleged personal injuries subject to 10 *Del. C.* § 8119’s shorter two-year statute of limitations. Because the Court concluded the plaintiff “would have no cause of action against its insurer for PIP benefits (special damages) without the enactment of [the statute],” it held that Section 8106(a)’s “three-year statute of limitations for statutory causes of action” applied. *Id.* at 138-40. Even though the statute arguably had common-law roots, the General Assembly’s choice to provide a “separate, statutory remedy” made the difference. *Id.* at 139.

Here, too, the Estate would have no cause of action under Delaware law without the enactment of the statute. *See Malkin II*, 278 A.3d at 61 nn. 22 & 23. Rather than merely codifying a “right enforceable ... [at] common law,” *Butler*, 222 A.2d at 272, the General Assembly provided, through Section 2704(b), a “statutorily-created remedy,” *Berland*, 266 A.3d at 974. While a few trial courts have suggested Section 8106(a) may not apply, the district court here thoroughly examined the issue and concluded the Trust “make[s] a good argument” that the claim is subject to Section 8106(a). Ex. A at 2. This Court now has the opportunity to provide clarity by recognizing that, while Section 2704(b) draws on the general

common law rule about insurable interest, the particular right of action established by Section 2704(b) is “based on a statute” within the meaning of Section 8106(a).

B. Section 8106(a) Still Applies If A Section 2704(b) Action Is A Common-Law Action To Recover Money Or Property.

The Trust contends a Section 2704(b) action is best understood as an “action based on a statute.” But even if this Court concludes estates “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 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.’” Opening Br. 16.

The Estate responds that reading Section 8106(a) to cover a Section 2704(b) claim even if it is based on a common-law right would render Section 8106(a) completely unbounded. *See* Response Br. 29-31. But the plain language of Section 8106(a)—reaching, as relevant here, any action “to recover damages caused by an injury unaccompanied with force”—provides the boundary lines. The Trust is not impermissibly expanding the scope of Section 8106(a) by recognizing the breadth of that language. As the Trust explained in its opening brief, the hook for subjecting unjust enrichment and constructive trust actions to Section 8106(a)’s three-year limitation appears to be this same residual-clause language. *See* Opening Br. 17. (And the Estate’s assertion that a Section 2704(b) action bears no similarity to these

actions is undercut by the fact that the Estate initially alleged a claim for unjust enrichment based on the same facts supporting its Section 2704(b) claim. *See* A59.)

Given Section 8106(a)'s broad language, it is no surprise this Court has viewed the provision as far-reaching, explaining that “[g]enerally, 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). (The Estate appears to overlook *Lehman Brothers*' reference to “a tort” or wrongs “similar” to a tort when it criticizes the Trust for relying on this case. *See* Response Br. 28 n.8.) The Trust does not err in saying that Section 8106(a) generally reaches actions to recover money or property, whether rooted in statute or common law. *See, e.g., Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989) (“A claim brought in this Court which seeks money damages, which is generally an action at law, will therefore generally be subject to the three-year limitations period of 10 *Del. C.* § 8106[.]”).

The Estate argues that if Section 8106(a) reaches “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 “action based on a statute” does not reach those common-law claims. Response Br. 30. The Estate misunderstands *Butler*. As the Trust explained in its opening brief, *Butler* emphasized that every part of Section 8106(a) *other than* the “action based on a statute” language related

to “common law actions for the recovery of money or property.” 222 A.2d at 271-72. In explaining that “action based on a statute” refers 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,” the *Butler* Court simply was responding to the concern that confining “action based on a statute” to “actions in which the object sought is either the recovery of money or property” would “emasculate” the “action based on a statute” provision, because the rest of Section 8106(a) already covered all such actions. *Id.* at 272. *Butler* addressed the concern that “action based on a statute” would, under its holding, add nothing to Section 8106(a)’s already-expansive scope by explaining that “action based on a statute” further expands that scope by reaching new statutory rights of action. In other words, the Court was not placing certain common-law actions for recovery of money or property outside the scope of Section 8106(a): It was recognizing that the rest of Section 8106(a) already covered them.

The Estate also argues a Section 2704(b) claim is not an action “to recover damages caused by an injury” because it involves neither damages nor injury. *See* Response Br. 26-27. But the Estate itself says “STOLI insureds and their families suffer injuries,” *id.* at 4, and federal courts considering estates’ standing to bring Section 2704(b) actions have rejected the argument that an estate has not been injured and therefore lacks Article III standing, *see, e.g., Est. of Boggess v. U.S.*

Bank, N.A., 2024 WL 100839, at *5 (D. Minn. Jan. 9, 2024) (“Plaintiffs seek relief for injuries caused by human life wagering.”). In the portion of *Malkin II* the Estate relies on to say there is no legal injury, this Court made the far narrower point that, “as a textual matter,” the estate in a Section 2704(b) action is not pressing an “adverse claim” within the meaning of Section 8-102(a)(1) of the UCC, *Malkin II*, 278 A.3d at 65. The Court was not saying the Estate suffered no legal injury whatsoever. And accepting *arguendo* the Estate’s view that a Section 2704(b) claim is simply a common-law claim—and thus not an “action based on a statute”—courts could not have allowed such a claim absent any injury, for “[i]t is a proposition too plain for citation that where no allegation of compensable harm has been made, there is no common law cause of action.” *In re: Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 2001 WL 1266317, at *5 (D.N.J. Sept. 30, 1997).

And a Section 2704(b) action is plainly an action for damages. Even if a more exacting definition of “damages” might apply in some other context, this Court has read Section 8106(a) to apply generally to an action “for the payment of money.” *Bokat v. Getty Oil Co.*, 262 A.2d 246, 250 (Del. 1970) (“The claims sought to be asserted against these individuals are for the payment of money, essentially damages. Actions seeking such damages must be instituted within three years from the time the causes of action accrued.” (citing Section 8106(a))). The Estate’s citation to *National Union Fire Insurance Co. v. Rhone-Poulenc Basic Chems. Co.*,

1992 WL 22690 (Del. Super. Ct. Jan. 16, 1992), only proves the point that the plain meaning of “damages” is broad enough to cover the payment at issue here. *See id.* at *11-*12 (observing that “the ordinary definition of ‘damages’” encompasses any “sums awarded” on claims, including “sums of money” paid because the defendant’s “acts or omissions affected adversely ... [the public]”). And the Estate’s related argument that Section 8106(a)’s residual clause is “a reference to torts” and a “Section 2704(b) action is not a tort,” Response Br. 27, fails for the same reason. A “tort” is a “civil wrong, other than breach of contract, for which a remedy may be obtained, usu. [i.e., usually] in the form of damages.” TORT, Black’s Law Dictionary (12th ed. 2024).

Tellingly, the Estate does not explain what a Section 2704(b) suit is, if not a suit for damages. The only alternative identified by either party is that Section 2704(b) imposes a penalty. *See supra* Part II; *see also Corvel Corp. v. Homeland Ins. Co. of New York*, 112 A.3d 863, 875-76 (Del. 2015) (Strine, J., dissenting) (explaining dichotomy between damages and a “statutory penalty,” defined as “a penalty imposing automatic liability on a wrongdoer for violation of a statute’s terms without reference to any actual damages suffered”). Yet the Estate, insisting Section 2704(b) defies all categorization, resists that label as well.

Finally, the Trust’s argument that Section 8106(a) covers an action under Section 2704(b) even if it is not “based on a statute” is not waived. The Trust’s

position in the district court, and its position now, is that “whether the Court considers a claim under Section 2704(b) to be ‘based on a statute’ or rooted in common law, the three-year statute of limitation under Section 8106(a) applies.”

A59. The Trust argued in the district court that a Section 2704(b) claim may be subject to Section 8106(a) in part because it is an action to recover damages “caused by an injury unaccompanied with force.” A52-53. And the Trust also noted in its initial motion-to-dismiss briefing that similar “common law claims like unjust enrichment and constructive trust[] ... have three-year statutes of limitations under Section 8106(a),” further supporting the conclusion that the same statute of limitations is appropriate here. A58. *Cf. Kerbs v. California E. Airways*, 90 A.2d 652, 659 (1952) (allowing party to present “additional reason in support of a proposition urged below”).

II. Alternatively, The One-Year Statute Of Limitations For Forfeiture Actions May Apply To A Claim Under 18 *Del. C.* § 2704(b).

In keeping with its view that Section 2704(b) claims defy any categorization, the Estate insists a Section 2704(b) claim—while neither an action based on a statute nor a common-law action for damages—also is not a “civil action for a forfeiture upon a penal statute” within the meaning of 10 *Del. C.* § 8115. *See* Response Br. 32-34. The Trust maintains Section 8106(a) is the most natural fit for Section 2704(b) claims, but the Estate is wrong that “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.” Response Br. 32.

The Trust is aware of no case in which this Court has considered Section 8115’s application outside the context of criminal proceedings and determined it does not apply. And the Estate cites no such case. *Staub v. Triangle Oil Co.*, 349 A.2d 209 (Del. 1975), did not address Section 8115. While it concluded that the statute authorizing a treble-damages remedy in that case was not penal, that determination was based in part on the understanding that “[t]he test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual.” *Id.* at 210 (quoting *Huntington v. Attrill*, 146 U.S. 657 (1892)). Given the Estate’s position that a Section 2704(b) claim is premised on a violation of public policy, *see* Response Br. 26-28, it would be reasonable to conclude under this “test” that Section 2704(b) is a “penal statute.”

The Trust was not wrong to observe that *Gardner v. Daniel*, 7 Del. 300 (Del. Super. Ct. 1860), “appl[ied]” the one-year statute of limitations for civil actions for forfeiture upon a penal statute to an “action of debt *qui tam*” under the usury statute. Opening Br. 19-20. The Estate’s attempt to distinguish *Gardner* on the basis that “the statute against usury was ‘a penal statute,’” Response Br. 33 n.14, does not reconcile *Gardner* with the Estate’s position that this one-year statute of limitations “applies only where there are underlying criminal proceedings and only with respect to a criminal defendant.” Response Br. 32. While the Estate is right that *Syed v. Hercules Inc.*, 2001 WL 34368377 (D. Del. Jan. 19, 2001), applied a different one-year statute of limitations, the Estate agrees *Gregorovich v. E.I. du Pont de Nemours*, 602 F. Supp. 2d 511 (D. Del. 2009), applied Section 8115’s one-year statute of limitations to a plaintiff’s civil penalty claim under ERISA § 502—outside the context of any criminal proceedings. And the Estate’s answer that the court in *Gregorovich* did so “only after finding the federal statute to be ‘penal in nature,’” Response Br. 34, only underscores the point that a statute may be “a penal statute” for purposes of Section 8115 even if it does not involve criminal proceedings with respect to a criminal defendant.

III. Neither Law Nor Policy Justifies The Estate's Position That No Statute Of Limitations Applies To Claims Under 18 Del. C. § 2704(b).

Without a valid argument as to why Delaware's comprehensive scheme for statutes of limitations does not reach Section 2704(b) claims as a matter of statutory interpretation, the Estate argues this Court has exempted Section 2704(b) claims from the application of any statute of limitations for policy reasons, *see* Response Br. 35-40, and, if it hasn't done so already, it should do so now, because the practical realities of Section 2704(b) litigation require such a blanket exemption, *see id.* at 41-44. These arguments misstate this Court's case law, ignore the public policy reasons underlying statutes of limitations, misrepresent the practical considerations, and, in any event, misunderstand the implications of those practical considerations for the statute of limitations question before this Court.

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 never suggested Section 2704(b) claims are exempt from statutes of limitations duly enacted by Delaware's General Assembly. The closest the Court has come to addressing this issue is its holding that Section 2704(b) claims are *not* generally exempt from defenses and counterclaims. In *Malkin II*, the Court made clear "Section 2704(b) does not supersede all defenses and counterclaims available to downstream purchasers." 278 A.3d at 61 (capitalization omitted). While the Estate elsewhere isolates language from *Malkin II* suggesting Section

2704(b) is not “inconsistent with common law,” wrongly reading that language as proof Section 2704(b) did nothing more than codify a right of action that existed at common law, *see* Response Br. 23, the Estate ignores the real holding of *Malkin II*: Section 2704(b)’s “express statutory language” is not “inconsistent with all common-law *defenses or counterclaims* that a downstream purchaser of a policy might assert against an estate.” 278 A.3d at 62 (emphasis added).

In suggesting defenses to Section 2704(b) claims must fail in all circumstances, the Estate takes this Court’s prior statements out of context. For example, while the Estate represents that a statute of limitations defense would “fly in the face of [this Court’s] repeated avowals that enforcement of a STOLI policy is not an option,” Response Br. 35 (quoting *Wilmington Tr., Nat’l Ass’n v. Sun Life Assurance Co. of Canada*, 294 A.3d 1062, 1072 (Del. 2023) (“*Frankel & De Bourbon*”)), what this Court was actually addressing was the possibility of “a court order requiring [an insurer] to pay the policies’ death benefits” on a STOLI policy, *Frankel & De Bourbon*, 294 A.3d at 1072. No such order to enforce a STOLI policy is sought here. And contrary to the Estate’s position, *Malkin II* rejected the blanket argument that “[n]o provision of Delaware law” can provide a complete defense to a Section 2704(b) claim. 278 A.3d at 64. Instead, it directed courts to “look to the elements of the common-law defenses or counterclaims asserted,” and it proceeded to examine the textual elements of the UCC defenses at issue. *Id.* at 62. Although

the Court found that those defenses failed, its analysis gave no indication that a similar element-by-element analysis of a statute-of-limitations defense also would fail.

B. Applying a statute of limitations is consistent with public policy.

As the Trust explained in its opening brief, “[s]ubjecting Section 2704(b) claims to a statute of limitations is not just the result that is most faithful to Delaware’s duly enacted law: It also is the result that best accords with public policy, for statutes of limitations themselves serve important public policy purposes.” Opening Br. 24. They “promote justice” by preventing plaintiffs from waiting to sue “until evidence has been lost, memories have faded, and witnesses have disappeared,” *id.* at 25 (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944))—protecting not just culpable defendants but also innocent defendants from harassing litigation many years after the fact. The Estate ignores these competing public policy considerations, offering no real response to this section of the Trust’s opening brief.

Instead, the Estate goes so far as to claim the General Assembly “lack[s] the authority” to enact a statute of limitations that covers Section 2704(b) claims “by virtue of Delaware’s Constitution, whose Article II, Section 17 forbids ‘[a]ll forms of gambling.’” Response Br. 38 n.15. That epitomizes the exceptionalism the Estate thinks should apply to Section 2704(b) claims. Although the General Assembly can

impose two-year statutes of limitations on, for example, claims for wrongful death or intentional constitutional rights violations, *see* Opening Br. 26, the Estate insists Section 2704(b) claims vindicate such a uniquely important interest that they must be exempt from any statute of limitations, allowing the decedent's estate to recover the death benefit in perpetuity "even when the decedent intentionally engaged in a STOLI scheme and received ample consideration for doing so," *id.* at 26.

The Estate attempts to suggest limitation-less claims are not so unusual, *see* Response Br. 18-19, but the only example it can muster is claims regarding contracts under seal, which Delaware law explicitly "exempts ... from the applicable statute of limitations," *Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983); *see also Kirkwood Kin Corp. v. Dunkin' Donuts*, 1995 WL 411319, *5 (Del. Super. 1995) (noting that, "[a]s early as 1741," Delaware's statute of limitations scheme explicitly exempted claims regarding contracts under seal from three-year limitation that otherwise would apply); 10 *Del. C.* § 8106(a) (explicitly confining application of the statute of limitations to "action[s] to recover a debt *not* evidenced by a record or by an instrument under seal" (emphasis added)). And the Estate misstates the law even as to contracts under seal, when it suggests their exception from Section 8106(a) means such claims can be brought in perpetuity. *See Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 10 (Del. 2009) ("Under Delaware law, a contract under seal is subject to a twenty-year statute of limitations."); *see also*

id. at 14 (Jacobs, J., dissenting) (agreeing that “a twenty-year limitations period has traditionally been imposed as a matter of common law”). The unique case of claims regarding contracts under seal—which are explicitly carved out of Section 8106(a) and still subject to a time limitation as a matter of common law—serves only to emphasize how unusual it is for Delaware’s strong public policy in favor of statutes of limitations to give way.

C. The Estate’s “practical considerations” do not reflect reality and, in any event, do not justify discarding the statute of limitations.

With no good argument on the law, the Estate’s final move is to reach outside the record to paint a picture of defendants that “conceal themselves and the true nature of [their STOLI] scheme,” urging this Court to find, in light of these “practical considerations,” no statute of limitations can apply. Response Br. 41. This argument is flawed on multiple levels.

First, the Estate drastically overstates whatever practical hurdles exist in identifying the proper Section 2704(b) defendants. As the Estate admits, a plaintiff is typically “able to name the bank as a defendant and obtain the information” it needs in discovery. Response Br. 43 n.21. Plaintiffs who sue the wrong parties or John Doe defendants can issue subpoenas and determine the right parties, as the Estate did here. *See* A32-33. And perhaps the best evidence that the Estate’s practical concerns about a statute of limitations are overblown is the fact there have been many Section 2704(b) suits filed within the three-year statute of limitations that

was long presumed to apply.¹ Indeed, there are numerous examples of Section 2704(b) claims filed just months after the insurer paid the benefit to the policy's beneficiary.²

The Estate's concern that a three-year statute of limitations will not allow time to open an estate also is unwarranted. Most claims against a decedent's estate are barred if they are not "presented ... within 8 months of the decedent's death." 12 *Del. C.* § 2102(a). This is consistent with Delaware's "special public policy in favor of prompt settlement of decedent's estates." *Criscoe v. Derooy*, 384 A.2d 627, 629 (Del. Ch. 1978); *see also* 12 *Del. C.* § 2311 (generally allowing executor or administrator of estate one year to settle the estate). In other words, Delaware law already presumes estates can and will be opened quickly, and subjecting Section

¹ *See, e.g., Est. of Greenberg v. Life Vehicle, LLC*, No. N24C-11-106, Complaint ¶ 50 (Del. Super. Ct. Nov. 8, 2024) (filed within three years); *Est. of Winrow v. Obra Capital*, No. N24C-12-078, Complaint ¶ 39 (Del. Super. Ct. Dec. 6, 2024) (same); *Est. of Levine v. Wells Fargo Bank*, No. N25C-02-340, Complaint ¶ 129 (Del. Super. Ct. Feb. 12, 2025) (same); *Est. of Glotzer v. Wilmington Trust N.A.*, No. N25C-04-056, Complaint ¶ 65 (Del. Super. Ct. Apr. 7, 2025) (same); *Est. of Rubin v. Wilmington Trust, N.A.*, No. N24C-07-032, Complaint ¶ 31 (Del. Super. Ct. July 3, 2024) (same); *Est. of Lee v. Life Trading Trust*, No. N24C-10-418, Complaint ¶ 107 (Del. Super. Ct. Oct. 29, 2024) (same). The Trust is happy to provide a much longer list upon this Court's request.

² *See, e.g., Est. of Rubin v. Life Trading Trust*, No. N25C-05-203, Complaint ¶ 76 (Del. Super. Ct. May 16, 2025) (filed within five months); *Est. of Casey v. Wells Fargo Bank, N.A.*, No. N25C-06-085, Complaint ¶ 88 (Del. Super. Ct. June 6, 2025) (filed in approximately five months); *Est. of McDuffie v. The GIII Accumulation Trust*, No. 1:20-cv-1189, Complaint ¶¶ 17-19 (D. Del. Sept. 4, 2020) (filed within four months).

2704(b) claims to Section 8106(a)'s three-year statute of limitations does not pose any unique concern in this regard.

Insofar as there were delays in opening the Frank Estate, those delays are attributable to the fact Harley Frank initially sought to file suit in his personal capacity, claiming he did not need to be appointed executor by the probate court because “he was named in Norman’s will as the Estate’s executor.” *Frank v. Wells Fargo Bank, N.A.*, 620 F. Supp. 3d 1024, 1027 (C.D. Cal. 2022); *see also* A29-30 (admitting Harley Frank filed suit before attempting to open the Estate). The court that considered Harley Frank’s argument in that regard rejected it, noting his decision to file in his personal capacity did not appear to be an “honest mistake”—particularly given that “Harley’s counsel has filed numerous STOLI cases for duly appointed executors.” *Id.* at 1029. In other cases, the time it takes to open an estate is highly unlikely to pose a problem—and the Estate does not identify any other case where it did.

If there are cases where, as the Estate claims, Section 2704(b) defendants engage in obfuscation and “conceal themselves,” Response Br. 41, throwing out the statute of limitations for all Section 2704(b) claims is not the answer. Rather, the statute of limitations in such cases may be subject to equitable tolling. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (“Even after a cause of action accrues, the ‘running’ of the limitations period can be “tolled” in certain

limited circumstances.”). It is well established that “concealment or fraud can toll the statute of limitations.” *ISN Software Corp. v. Richards, Layton & Finger, P.A.*, 226 A.3d 727, 736 (Del. 2020). Indeed, the Estate cites a case in which this Court pointed to equitable tolling, and not erasure of the statute of limitations, as the appropriate response in similar circumstances. *See* Response Br. 41 n.17 (citing *LGM Holdings, LLC v. Schurder*, 2025 WL 1162999 (Del. Apr. 22, 2025)); *see also* *LGM Holdings*, 2025 WL 1162999, at *8 (“Where a plaintiff has proved that the defendant fraudulently concealed facts necessary to put the plaintiff on notice, the statute of limitations ... governing a claim will be tolled.”). While the district court here rightly denied equitable tolling, explaining it was “not persuaded on this record that equitable tolling applie[d],” Ex. A at 2 n.3, the availability of equitable tolling in a case where there is evidence of fraudulent concealment easily disproves the Estate’s claim that reading out the statute of limitations is the only way to deal with the “practical considerations” it alleges, Response Br. 41.

CONCLUSION

For the foregoing reasons, this Court should hold that Section 8106(a)'s three-year limitations period—or, alternatively, Section 8115's one-year limitations period—applies to Section 2704(b) actions.

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