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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-382

WELLS FARGO BANK, N.A., as Securities Intermediary,

and

U.S. BANK, N.A., as Securities Intermediary,

Appellants,

vs.

PRUCO LIFE INSURANCE COMPANY,

Appellee.

________________________________/

L.T. Case No(s).: 13-12135; 13-15859

ON DISCRETIONARY REVIEW OF A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CERTIFYING QUESTIONS FOR WHICH THERE IS NO CONTROLLING PRECEDENT

INITIAL BRIEF OF APPELLANTS WELLS FARGO BANK, N.A. AND U.S. BANK, N.A., as Securities Intermediaries

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STATEMENT OF THE CASE AND FACTS

These consolidated appeals arise from two federal-court cases briefed separately but argued together in the United States Court of Appeals for the Eleventh Circuit. Both involve the interplay between two Florida life-insurance statutes. One, Section 627.455, Florida Statutes (2010), requires that every life-insurance policy contain a two-year incontestability clause, and bars any challenge to a life-insurance policy not made within two years of the policy's issuance. The other, Section 627.404, Florida Statutes (2005), requires that every life-insurance policy have an insurable interest in the life of the insured at the policy's inception. The Eleventh Circuit's certified questions ask whether and how these statutes can be reconciled. We submit that they can, by holding that any challenge addressing the timing and existence of an insurable interest—as with every other challenge to a life-insurance policy—must be filed within two years of a policy's issuance.

The fundamental facts underlying the appeals are the same. In each, a senior citizen secured life insurance on her own life from Pruco Life Insurance Co. ("Pruco") and named a family member as the ultimate beneficiary. Each life-insurance purchase involved the creation of a trust as well as premium financing. In applying for each policy, the respective insurance broker misrepresented the insured's net worth and other financial information. Pruco then had the

opportunity to investigate the information in each application, and the broker, during the underwriting process.

After issuing the policies, Pruco had two years to investigate further. Despite this opportunity, Pruco continued to collect substantial premiums without challenging the policies. Each policy thus remained in force during the two-year contestability period, with an insured's family member remaining as the ultimate beneficiary. The policies ultimately were sold to third-party purchasers, with Wells Fargo Bank, N.A. and U.S. Bank, N.A. serving as the respective securities intermediaries.

Years later, after collecting over $2.7 million in premiums, Pruco filed separate federal-court lawsuits challenging the policies' validity, arguing that they were void *ab initio* for lack of an insurable interest at inception, but also claiming that it should retain the significant premiums paid over the years for the allegedly void policies. Wells Fargo and U.S. Bank countered that the policies could no longer be challenged because their contestability periods had long-since expired. Alternatively, they argued that the policies complied with the requirement that policies have an insurable interest at inception.

A. Facts Relevant to the Appeal

Although both cases have similar facts, we summarize each separately. The facts underlying the policy on Arlene Berger's life and the Wells Fargo appeal will

be discussed first. That case was resolved in Pruco's favor on summary judgment. The facts pertaining to the Rosalind Guild policies and the U.S. Bank appeal follow. That case was resolved in U.S. Bank's favor on a motion to dismiss.

1. The Berger Policy (Wells Fargo), Case No. 10-80804

Over two years after the statutory and contractual deadline for challenging the policy, Pruco sought to invalidate the $10 million life-insurance policy on the life of Arlene Berger, claiming that no insurable interest existed at the policy's inception (A. 11-12).[1] It also claimed that it could retain more than $600,000 in premiums it had collected over four years for a policy it now alleged was void (A. 29). Because the district court granted summary judgment in Pruco's favor on the insurable-interest issue, we present the facts in the light most favorable to Wells Fargo, the non-moving party. We include certain facts for context because the district court relied on them in granting summary judgment.

[1] Wells Fargo and U.S. Bank have created a joint appendix for this consolidated appeal. The Eleventh Circuit opinion appears first, the key Wells Fargo orders and entries appear next, and the U.S. Bank order, complaint and key entries appear last. Citations to the record which are not included in the joint appendix will be to the respective district-court docket. Docket entries from Case No. 10-80804-CIV-COHN will be preceded by "W.F.," and those from Case No. 12-24441-CIV-MORENO will be preceded by "U.S.B."

Mrs. Berger and her husband approached their accountant about obtaining free life insurance (W.F. D.E. 201-2 at 3).[2] The accountant referred the couple to Steven Brasner, a Florida-licensed insurance broker/agent for Pruco (W.F. D.E. 178 at 5). During the application process, Brasner provided false information to Pruco about Mrs. Berger's net worth (W.F. D.E. 246 at 3-4). Also during that process, LaSalle Bank, N.A., now known as Bank of America, N.A. ("LaSalle"), pre-approved the policy for a non-recourse premium-financing loan (W.F. D.E. 178 at 9). The loan arrangement included the creation of a trust that would own the policy, the creation of a sub-trust that would apply for the loan, financing of premiums through LaSalle, and program administration by Coventry Capital I LLC, which also would act as servicing agent for LaSalle (W.F. D.E. 178 at 9, 178-4).

Pruco issued the life-insurance policy (the "Berger Policy") to Mrs. Berger on April 27, 2006 (W.F. D.E. 178 at 13). The Berger Policy (and Pruco's files) named Mrs. Berger's husband as the sole beneficiary (W.F. D.E. 188 at 6). Although the receipt for the first premium payment showed that the payment came from Mrs. Berger, Coventry Capital had advanced the funds because the first premium was due before the documents for the premium-financing loan were

[2] In this context, "free life insurance" means a life-insurance policy secured with the benefit of premium financing through a non-recourse loan. *See, e.g. Lincoln Nat'l Life Ins. Co. v. Gordon R.A. Fishman Irrevocable Life Trust*, 638 F. Supp. 2d. 1170 (C.D. Cal. 2009).

executed (W.F. D.E. 201-1 at 8). The advance became part of the total loan amount due to LaSalle (*Id.*).

Several months after Pruco issued the Berger Policy, Mrs. Berger created The Arlene Berger 2006 Life Insurance Trust (the "Berger Trust") under a trust agreement naming Wilmington Trust Company as trustee and naming her husband as co-trustee and sole beneficial owner (W.F. D.E. 201-2 at 14-15). Mrs. Berger then requested that the owner and beneficiary of the Berger Policy be changed to the Berger Trust, and Pruco complied (W.F. D.E. 187-17 at 5). To be clear: although the trust owned the policy, Mr. Berger was the policy's sole beneficiary and entitled to all trust proceeds (W.F. D.E. 187-13 at 2).

In July 2006, the Berger Trust, through the sub-trust, executed the premium-financing note with LaSalle (W.F. D.E. 178-4, 187-11, 187-15, 187-18). The loan was secured by the Berger Policy (*Id.*). LaSalle issued two disbursements under the loan agreement: one to Pruco for premiums and one to Mrs. Berger to reimburse Coventry Capital for the first premium payment (W.F. D.E. 178 at 15).

In September 2008—two-and-a-half years after Pruco issued the Berger Policy—Mrs. Berger instructed the trustee of the Berger Trust, in writing, to relinquish the Berger Policy to LaSalle in satisfaction of the premium-finance loan (W.F. D.E. 187-27 at 4). Only then did Mr. Berger cease to be the Berger Policy's beneficiary (A. 99). In December 2008, a Coventry Capital representative

identifying herself as "from Wilmington Trust Company" called Pruco and obtained information about, among other things, the Berger Policy's cash-surrender value and beneficiary and also confirmed its incontestability (W.F. D.E. 178-27 at 2-3, 201-1 at 9). Later that month, Coventry First LLC, a licensed life-settlement provider, purchased the Berger Policy and sold it to Wells Fargo's client (W.F. D.E. 187-22). The price included over $400,000 in premiums already paid on the Berger Policy (A. 96). As part of the sale, Coventry received a life-settlement origination fee and reimbursement for the premium it paid in December 2008 (*Id.*). In January 2009, upon request, Pruco confirmed Wells Fargo as the Berger Policy's sole owner and beneficiary (W.F. D.E. 187-23). It began sending premium invoices and other policy materials to Wells Fargo (W.F. D.E. 187-24).

2. The Guild Policies (U.S. Bank), Case No. 12-4441

Pruco also sought to invalidate two $5 million policies on the life of Rosalind Guild (A. 137). This time, it waited *five* years after the two-year statutory bar date to challenge the policy (A. 135). Again, it claimed that no insurable interest existed at the policy's inception (A. 119), and again it claimed that it could keep the substantial premiums paid (roughly $2.1 million) over seven years (A. 137). Because the district court granted U.S. Bank's motion to dismiss, the facts are taken from the complaint (A. 229).

In September 2005, Gary A. Richardson, a Pruco broker, and others encouraged Mrs. Guild to apply for free life insurance (A. 123). Richardson and others provided false information to Pruco about Mrs. Guild's income, assets and net worth, the source of the premiums for the policies, and the purpose of the policies (A. 124). The insurance applications listed Mrs. Guild's daughter as the prospective policy beneficiary (A. 127). The policy was allegedly procured with premium financing (A. 130). And, as with the Berger Policy, a trust was created, the beneficiary of which was the insured's relative—here, a daughter (A. 127). Wells Fargo was the trustee (A. 134).

Pruco issued the two $5 million policies on the life of Mrs. Guild (the "Guild Policies") on October 21, 2005, with Mrs. Guild's daughter the beneficiary of the trust that owned the policies (A. 134). More than two years later, in 2008, Pruco received and approved a request for a change in the policy's ownership and beneficiary (A. 135). An investor in life-insurance policies thus became the owner of the policies, with U.S. Bank as the securities intermediary. *Id.*

B. Proceedings in the District Courts

The case involving the Berger Policy was resolved and appealed to the Eleventh Circuit first. The case involving the Guild Policies, which was assigned to a different district judge, followed. Until oral argument, the cases proceeded along separate tracks, as we explain below.

1. The Berger Policy (Wells Fargo)

More than four years after the policy issued, and while Mrs. Berger still was alive, Pruco filed a complaint against Brasner and others who participated in the misrepresentations (A. 14). Pruco alleged that Brasner and others—but not Wells Fargo—committed fraud, negligently misrepresented facts, and engaged in a civil conspiracy (A. 15-22). It also claimed that Brasner breached his broker agreement with Pruco (A. 16). The district court entered default judgments against Brasner and his company (W.F. D.E. 32, 33).

The complaint also included a declaratory-judgment count against Wells Fargo (Count I), the only count relevant here (A. 24). Pruco's complaint characterized the Berger Policy as a stranger-originated life-insurance ("STOLI") policy, obtained through Brasner's misrepresentations about Mrs. Berger's net worth, with the express goal of resale to third parties on the secondary market (A. 12-13). Through the count against Wells Fargo, and in an effort to avoid its coverage obligations, Pruco sought a declaration that the Berger Policy was void *ab initio* for lack of an insurable interest (A. 24). Despite claiming that the policy never was in force, Pruco sought to retain the benefit of the premiums paid from its May 2006 inception through June 2010 (A. 29).

Wells Fargo moved to dismiss, arguing that Florida's two-year incontestability statute operates as a statute of limitations and that the statute and

the policy's incontestability clause barred the belated challenge (W.F. D.E. 30 at 6-10). The statute provides that every Florida insurance policy is "incontestable after it has been in force during the lifetime of the insured for a period of 2 years from its date of issue." § 627.455, Fla. Stat. (2010). A clause in the policy mirrors the statute (A. 44). The district court denied Wells Fargo's motion, accepting Pruco's argument that a policy lacking an insurable interest at inception never was "in force," nor was its incontestability clause (A. 82).

Both parties later moved for summary judgment (W.F. D.E. 177, 186). Pruco argued, among other things, that the Berger Policy lacked an insurable interest at inception and was void *ab initio* as an illegal wagering contract (W.F. D.E. 177). Wells Fargo argued, among other things, that (1) under Florida's insurable-interest statute, section 627.404, an insurable interest existed at inception because the policy insured Mrs. Berger's own life and her husband was the policy's beneficiary; and (2) under section 627.422, Florida Statutes, Mrs. Berger was free to assign the Berger Policy at any time after inception (W.F. D.E. 186). It also re-asserted the incontestability clause (*Id.*).

The district court granted Pruco's motion for summary judgment, denied Wells Fargo's, and entered judgment (A. 116-17; W.F. D.E. 247). The court held that the Berger Policy was void *ab initio* as an illegal wagering contract and that Florida law permits an insurer to retain premiums paid for a fraudulently procured

policy (A. 105, 112). Although the insurable-interest statute does not address the prospective insured's intent, the district court engrafted a good-faith requirement onto the statute (A. 100).

Before the court ruled on the summary-judgment motions, Wells Fargo had moved to compel production of a document Pruco referred to as a confidential "Special Investigation Unit Report re: Arlene Berger" (the "SIU Report") (W.F. D.E. 242, 253-1). The document appeared likely to provide evidence about when Pruco first knew or should have known that its broker, Brasner, engaged in fraud relating to the Berger Policy (W.F. D.E. 242 at 3). Indeed, the report, ultimately obtained through a public-records request directed to the Florida Department of Financial Services, reflected that Pruco knew about Brasner's activities and the Berger Policy in 2008, but concluded that the policy was incontestable (W.F. D.E. 253-1 at 4).

Having obtained the report, Wells Fargo filed a pre-appeal motion for relief from judgment under Federal Rule of Civil Procedure 60(b) to secure the return of certain premiums (W.F. D.E. 253). But it was not until after Wells Fargo appealed that the district court granted the motion in part and denied it in part, setting a trial on the limited issue of the return of certain premiums (W.F. D.E. 276). After various jurisdictional proceedings before the Eleventh Circuit and the district court related to the post-appeal order on the SIU report, the parties settled the limited

issue set for trial (W.F. D.E. 311). The district court then entered a new judgment, from which Wells Fargo timely appealed (W.F. D.E. 313, 314).

2. The Guild Policies (U.S. Bank)

More than seven years after the Guild policies issued, and while Mrs. Guild still was alive, Pruco filed a lawsuit challenging these policies and their procurement (A. 118-19). As it did in the case involving the Berger policy, Pruco filed a complaint against the broker, Richardson, and others who participated in the misrepresentations (A. 120). Pruco alleged that Richardson and others—but not U.S. Bank— committed fraud, negligently misrepresented facts, and engaged in a civil conspiracy (A. 121-34). It also claimed that Richardson breached his broker agreement with Pruco (A. 126). And Pruco included a declaratory-judgment claim (Count I) against the securities intermediary, U.S. Bank (A. 136). That case was assigned to a different district judge (U.S.B. D.E. 2).

As with the Berger policies, Pruco sought to have the Guild Policies declared void *ab initio* for lack of an insurable interest (A. 119). And Pruco again claimed it was entitled to retain premiums paid for seven years (over $2 million for the Guild Policies) (A. 137). U.S. Bank moved to dismiss Count I, the only count relevant here (U.S.B. D.E. 15). As Wells Fargo had done, U.S. Bank argued that Florida's two-year incontestability statute operates as a statute of limitations and

that the statute and the Guild Policies' statutorily mandated incontestability clauses barred Pruco's challenge filed five years too late (*Id.*).

The district court granted the motion, holding that Pruco's challenge was barred by the incontestability statute and the corresponding policy provisions (A. 236). It reasoned that the incontestability statute and clauses apply to policies that are alleged to be void *ab initio*, not merely voidable, finding it "especially true in this case, in which the claim that the policy is *void ab initio* due to lack of an insurable interest is ultimately traceable to a claim of fraud." *Id.* Following this ruling, Pruco settled with Richardson and a related company and appealed the order dismissing the case against U.S. Bank (U.S.B. D.E. 45, 47, 53).

C. <u>Proceedings Before the Eleventh Circuit</u>

The appeals were briefed separately but consolidated before oral argument. Following oral argument, the Eleventh Circuit certified two questions:

> 1. Can a party challenge an insurance policy as being void *ab initio* for lack of the insurable interest required by Fla. Stat. § 627.404 if that challenge is made after expiration of the two-year contestability period mandated by Fla. Stat. § 627.455?
>
> 2. Assuming that a party can do so, does Fla. Stat. § 627.404 require that an individual with the required insurable interest also procure the insurance policy in good faith?

(A. 10).

D. Standard of Review

The certified questions present pure questions of law, which are reviewed *de novo*. *Rando v. Government Emps. Ins. Co.,* 39 So. 3d 244, 247 (Fla. 2010). Both questions involve interpretation of Florida statutes. The Court reviews the interpretation of a statute *de novo*. *Id*.

SUMMARY OF THE ARGUMENT

Section 627.455, Florida Statutes, grants the issuer of a life-insurance policy two years from the date a policy issues to challenge its validity. As this Court has held, incontestability clauses function like statutes of limitations. After a policy has been in force for two years, it becomes incontestable for any reason, including an alleged lack of insurable interest at inception. If the Florida Legislature wanted to create an exception for lack of an insurable interest, it would have done so. But it did not.

Instead, incontestability clauses grant insurers two years to investigate the information in policy applications (in addition to the pre-issuance opportunity to do so). This framework encourages insurers to diligently investigate policies and ensure that they comply with Florida law, including the insurable-interest requirement. It also prevents them from collecting handsome premiums, while failing to investigate red flags, and later claiming policies are void, all to the

insureds' detriment. And it provides certainty in the insurance marketplace for both insurers and insureds.

At times, policies procured by fraud survive the contestability period. When they do, they are immune from legal challenge because of the incontestability clause. This is the balance that the Florida Legislature—indeed, legislatures in all states—struck when weighing an insurer's right to investigate and challenge policies against consumer peace of mind in their insurance investments.

Here, Pruco waited more than *four years* to challenge the Berger Policy and more than *seven* to challenge the Guild Policies. The incontestability statute and clauses apply. The answer to the first certified question should be "no," mooting the second question.

If the Court does reach the second certified question, it should answer "no" to that question, too. The plain language of section 627.404, Florida Statutes, requires an insurable interest at the inception of a policy, but only then. The statute nowhere requires that the insured intend at inception to hold the policy until death. Nor do Pruco's policies. In fact, each policy here expressly permits the insured to change the policy's owner.

This Court has repeatedly confirmed that it does not add language to statutes. Adding an intent requirement here would ignore both Florida law governing life-insurance policies and the public policy supporting a secondary

market for such policies. Indeed, a judicial intent-to-hold requirement is inconsistent with the Florida Legislature's rejection of proposed legislation that would have restricted the secondary market for life-insurance policies. Florida's insurable-interest requirement is found within a larger legislative framework that expressly permits the free transfer of life-insurance policies. This framework benefits consumers, who would otherwise be forced, when faced with a policy they no longer need or can no longer afford, to allow the policy to lapse or to sell it back to the insurer for a fraction of its face value.

ARGUMENT

The Eleventh Circuit's opinion implies that the two statutes conflict and that one must "trump" the other. The court questioned, "when these two statutes collide, does Florida's interest in prohibiting the issuance of insurance policies purchased by an individual with no insurable interest trump its interest in requiring insurance companies to determine, within a designated period of time, whether a particular policy is subject to that or any other challenge?" (A. 3). As we demonstrate below, however, the two statutes complement one another generally and in these cases in particular. The Eleventh Circuit's opinion also implies that

Florida's insurable-interest requirement includes a good-faith intent never to transfer a policy. As we explain below, the statute requires no such intent.[3]

I. THE INCONTESTABILITY STATUTE AND THE RELATED CLAUSE IN THE POLICIES BAR PRUCO'S CLAIM BECAUSE THE TWO-YEAR PERIOD FUNCTIONS AS A STATUTE OF LIMITATIONS

Pruco's claims are barred by the policies' statutorily mandated incontestability clauses. Pruco attempts to circumvent the contestability period by describing the policies as void *ab initio.* But Florida's incontestability statute does not carve out such an exception. Indeed, this Court has recognized that an incontestability clause "recognizes fraud *and all other defenses*, but provides a reasonable time in which they may be, but beyond which they cannot be, established. Therefore, it is in the nature of, and serves a similar purpose as, a statute of limitations, the wisdom of which has been universally recognized." *Prudential Ins. Co. of Am. v. Prescott*, 176 So. 875, 878 (Fla. 1937) (emphasis added). Asserting that a contract is void *ab initio* is, of course, a defense. *Lennar Homes, Inc. v. Dorta-Duque*, 972 So. 2d 872, 879 (Fla. 3d DCA 2007) (noting that, when a contract is void *ab initio* for lack of a meeting of the minds, that is a defense to enforcement of the contract). And that defense, too, is barred.

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[3] We also disagree with the Eleventh Circuit's factual summary, although it does not affect this Court's answers to the certified questions.

As we explain below, (A) the statute's plain language prohibits an insurer from contesting a policy's validity after two years; (B) Florida courts have not recognized an exception to the two-year period; (C) neither has the Eleventh Circuit; and (D) sound public policy supports a deadline for contesting an insurance policy's validity.

A. The plain language of the incontestability statute prohibits an insurer from contesting a policy's validity after two years

During the contestability period, insurers may challenge policies for any number of reasons: concealment of an insured's health problems, fraudulent misrepresentations about the insured's net worth, or lack of an insurable interest at the policy's inception. But all of these challenges are subject to Section 627.455, Florida Statutes (2010), which states that "[e]very insurance contract shall provide that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of 2 years from its date of issue."

As the statute requires, the Berger and Guild policies issued by Pruco contain incontestability clauses:

> Except as we state in the next sentence, we will not contest this contract after it has been in force during the Insured's lifetime for two years from the issue date. The exceptions are: (1) non-payment of enough premium to pay the required charges; and (2) any change in the contract that requires our approval and that would increase our liability. For any such change, we will not contest the change after it has been in effect for two years during the lifetime of the Insured.

(A. 44, 158, 203). The exceptions do not apply here.

The statute contains no exception for a policy that an insurer claims is void *ab initio*. This Court should not rewrite the statute to create a third exception to incontestability. *See Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n*, 40 Fla. L. Weekly S266 (Fla. May 14, 2015) ("[W]here the Legislature articulates clear exceptions to a statute, 'no other exceptions may be implied.'") (internal citations omitted); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) ("The legislature made one exception to the precise language of the statute of limitations. We apprehend that[,] had the legislature intended to establish other exceptions[,] it would have done so clearly and unequivocally. . . . We cannot write into the law any other exception[.]"); *see also Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 841 (Fla. 2011) ("We are not at liberty to add words to statutes that were not placed there by the Legislature.") (internal citation omitted); *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008) ("It is a well-established tenet of statutory construction that courts 'are not at liberty to add words to the statute that were not placed there by the Legislature.'") (internal citation omitted); *Reynolds v. State*, 842 So. 2d 46, 49 n. 2 (Fla. 2002) ("When construing statutes, courts 'are not at liberty to add words to statutes that were not placed there by the Legislature.'") (internal citation omitted).

B. Florida courts have consistently enforced incontestability clauses to bar belated challenges

The Eleventh Circuit stated that "there are no cases decided by Florida courts that specifically address whether an incontestable provision bars a tardy challenge to the validity of a policy considered to be void *ab initio* because it lacked an insurable interest at its inception" (A. 6). The cases the district court cited in dismissing the *U.S. Bank* case, however, confirm that Florida courts have refused to create exceptions to the two-year contestability period. As that court noted, Florida courts treat the incontestability period as barring *all* claims, based on *any* allegations, outside the prescribed period (A. 233). *See Great S. Life Ins. Co. v. Porcaro*, 869 So. 2d 585, 587 (Fla. 4th DCA 2004) (barring an insurer from challenging the reinstatement of insurance on the basis of fraud after the contestability period); *Kaufman v. Mutual of Omaha Ins. Co.*, 681 So. 2d 747, 750 (Fla. 3d DCA 1996) ("No action was taken by the insurer . . . until after the two-year time period had run. Consequently, the insurance policy had become incontestable and the insurer was not allowed to rescind it on the basis of alleged misstatements in the insurance application."); *Home Life Ins. Co. v. Regueira*, 313 So. 2d 438, 439 (Fla. 2d DCA 1975) (explaining that challenges to the validity of an insurance policy are barred if not brought within the contestability period); *Prudential Ins. Co. of Am. v. Rhodriquez*, 285 So. 2d 689, 690 (Fla. 3d DCA 1973)

(barring a claim brought after the contestability period to rescind a policy based on fraudulent misrepresentations during the application process).

Indeed, no Florida court has distinguished between arguments that policies are "voidable"—which even Pruco agrees are barred after two years—and arguments that they are "void." Rather, as the district court noted in *U.S. Bank* (A. 234-35), Florida courts consider "whether the claim of the insurer relates to the *validity* of the policy or whether it relates to limitations of coverage. *If it relates to the former it is barred*; if to the latter it is not" (quoting *Paul Revere Life Ins. Co. v. Damus, Ecker, Rosenthal and Marshall, M.D.*, 864 So. 2d 442, 444 (Fla. 3d DCA 2003) (internal quotation marks omitted). In the Eleventh Circuit, Pruco did not dispute that it challenged the Policies' validity (Initial Brief of Appellant Pruco Life Ins. Co., Case No. 13-15859-E, at 16). It attempted to limit *Paul Revere* by arguing that it addressed a different issue (*Id*. at 33). But *Paul Revere* considered coverage only because the court already had reviewed what it correctly identified as "[t]he threshold question" and concluded that the challenge did not involve the policy's validity. *Paul Revere*, 864 So. 2d at 444. Had the insurer challenged validity, it would have been barred. *Id*. *Paul Revere* thus confirms that insurers cannot challenge a policy's validity after the contestability period. Based on these cases, too, the Court should answer the first certified question, "no."

C. The Eleventh Circuit also has confirmed that fraud challenges, like Pruco's here, are barred

The Eleventh Circuit has not limited the application of incontestability clauses. *See Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1115-17 (11th Cir. 2005). In *Miller*, the insurer challenged a life-insurance policy after the incontestability period, seeking to declare the policy void *ab initio* because an impostor allegedly appeared at the required medical examination. *Id*. at 1114. The court held that, while an insurer may assert a number of grounds "to rescind or void an insurance policy before the incontestability clause goes into effect, § 627.455 prevents an insurer from doing so once the policy has been in effect for two years during the life of the insured, except on the three grounds enumerated in the statute." *Id*. at 1116.

The Eleventh Circuit rejected the notion that section 627.455 would not apply in a suit "based upon a claim that the policy is void *ab initio*." 424 F.3d at 1116. As Pruco did here (W.F. D.E. 39 at 5-9), the insurer in *Miller* "argue[d] that it [was] not contesting the policy in a manner prohibited by § 627.455 because its suit [was] based upon a claim that the policy [was] void *ab initio*" and there was "no actual contract." *Id*. *Miller* rejected this argument. Following *Prescott*, the court held the challenge barred, recognizing that "incontestability clauses, such as the one contained in § 627.455, are 'in the nature of, and serve[ ] a similar purpose as, a statute of limitations.'" *Id*. at 1115 (quoting *Prescott*, 176 So. at 878).

Even if *Miller* applied only in fraud and impostor cases, the result should be the same here because Pruco's claims sound in fraud (A. 25, 137). Although Pruco cloaks its claims in lack-of-insurable-interest language, as the district court in *U.S. Bank* found (A. 237), its allegations confirm that, at their core, the challenges are grounded solely on fraud. Its challenge in *Wells Fargo* is rife with fraud allegations (A. 12 ("The Berger Policy . . . was the product of fraud."), A. 13 ("Ms. Berger's income, assets and net worth were fraudulently inflated"), A. 19 (listing "false" "material representations" made to Pruco about Mrs. Berger's net worth), A. 21 ("[Pruco] did, in fact, reasonably rely upon the fraudulent misrepresentations in the Financial Statement when determining that Ms. Berger qualified for a $10 million policy.")). Pruco's summary-judgment motion and statement of undisputed facts also were littered with fraud allegations (W.F. D.E. 177 at 8-19, 178 at 3-15, 18-19).

Allegations of fraud also permeate Pruco's challenge in *U.S. Bank*. Pruco characterized its claim as "an action for fraud, breach of contract, negligent misrepresentation and declaratory judgment" (A. 118).[4] It also claimed that the action arose "from the fraudulent procurement of two $5 million insurance

[4] Only Count I, for declaratory judgment, is at issue. That count does not distinguish between the fraud and the so-called STOLI nature of the Guild Policies, seeking both a declaration "that the Guild Policies are illegal wagering contracts" *and* that "[d]ue to the *fraudulent* nature of this STOLI scheme, Pruco is entitled to . . . retain some or all of the premium paid in connection with the Guild Policies" (A. 137) (emphasis added).

policies" (A. 118) and characterized the Guild Policies as "the product of fraud" (A. 119, 123). The complaint acknowledges that "many . . . STOLI policies are tainted by fraud in the application" (A. 123) and refers to "numerous fraudulent, material misrepresentations in connection with the applications for the Guild Policies" (A. 124). Pruco then identified Richardson as the chief architect "perpetuat[ing] the fraud" (A. 125), alleging: that Richardson engaged in conduct "intended to fraudulently induce Pruco to issue the Guild Policies" (A. 126); that Richardson and Guild were on notice that it is a violation of state law to "knowingly and intentionally give[] false or deceptive information . . . for the purpose of defrauding an insurance company" (A. 128-29); and that Richardson "created and submitted to Pruco a fraudulent estate analysis" (A. 129). Lest any doubt remain, Pruco also alleged that Richardson fraudulently misrepresented the purpose of the Guild Policies and his relationship with the insured (A. 129-30); that the "representations concerning Ms. Guild's income, assets and net worth" made to Pruco were "known by Mr. Richardson to be false" (A. 130); that "Mr. Richardson knew that the representations contained in the Client Information Form were false" (A. 131); and that Richardson knowingly provided a financial statement with fraudulent misrepresentations about the insured's income, assets, and net worth (A. 133). Finally, Pruco alleged that "the misrepresentations in the Client Information Form were part of a larger fraudulent scheme perpetrated by

Mr. Richardson . . . and others working in concert" (A. 131). Pruco even included two bullet-point lists detailing alleged fraudulent misrepresentations (A. 130, 133).

These allegations confirm that Pruco itself views these cases as alleging fraud. It cannot avoid the incontestability bar applied to fraud cases now by tweaking the description of its policy as void *ab initio*. For this reason as the well, the Court should answer the first question "no."

D. Sound public-policy reasons support a two-year deadline for contesting an insurance policy's validity

Incontestability clauses exist "for the mutual advantage of both the insurer and the insured." *Prescott*, 176 So. at 878. A categorical bar to suits brought after the incontestability period discourages insurers from ignoring indications of fraud—in particular with high-value policies like these—while also collecting large premium payments without fear of ever having to pay policy proceeds. Allowing such suits after the contestability period expires encourages insurers to avoid due diligence in their underwriting, to issue fraudulent policies, to fail to challenge the policies within two years of their issuance, and then, after collecting premiums for several years, to claim that the policies are void. A contestability period brings certainty to Florida insurers and policyholders and avoids the evidentiary gaps both may face in belated litigation. *See* 17 Couch on Insurance §240:5 (3d ed. 2013) (explaining the purpose of incontestability statutes). Such restrictions are even more important when an innocent third party purchases the

policy based on the insurer's representations that premiums were paid and the policy is in force and incontestable.

While acknowledging this concern, the district court in *Wells Fargo* concluded that it was outweighed by the fear that "if bad actors can disguise their fraud for two years, their hands are washed clean . . . and they are free to collect on their ill-gotten gains" (A. 82) (quoting *Settlement Funding, LLC v. AXA Equitable Life Ins. Co.*, No. 06 CV 5743(HB), 2010 WL 3825735, at *5 (S.D.N.Y. Sept. 30, 2010), decided under New York law). But Florida cases already recognize that some policies procured by fraud survive the contestability period and nevertheless are barred. The only issue here is whether the bar includes claims that no insurable interest existed at the policy's inception. But if incontestability clauses function as statutes of limitations, as this Court has held, then it must bar *all* claims contesting a policy's validity.

Incontestability statutes, which exist in most states, balance the tension between the need to discover fraud in life insurance applications and the need for certainty in life insurance transactions. *See* 17 Couch on Insurance §240:1 (noting that legislatures used the clauses to remedy the problem of policy challenges raised years after the policy issued and adding that "it is not difficult to see why both legislatures and courts have not looked kindly on this situation, even when the insured is, in fact, at least partly to blame because misrepresentations were made in

order to obtain the insurance"); *see also Killian v. Metropolitan Life Ins. Co.*, 166 N.E. 798, 800 (N.Y. 1929) (Cardozo, J.) ("Alike for insured and for beneficiaries, there is to be the peace of mind that is born of definiteness and certainty."). States struck a balance between the two by barring challenges after two years, even if it meant enforcing policies procured by fraud. Actuarial Society of America, *Transactions*, Vol. 36, Nos. 93, 94 at 54-55 (1935) ("[The incontestability clause] introduces a novel idea into the law, as it recognizes that one party may have secured the contract by defrauding the other but the parties agree that nevertheless the contract shall be valid.").

As the Eleventh Circuit noted in *Miller,* such clauses demand the vigilance of insurers, who are in the best position to unearth fraud during the two-year period: "The incontestability clause thus works to the mutual advantage of the insurer and the insured, 'giv[ing] the insured a guaranty against expensive litigation to defeat his policy after the lapse of the time specified, and at the same time giv[ing] the company a reasonable time and opportunity to ascertain whether the [insurance] contract should remain in force.'" *Miller*, 424 F.3d at 1115.

II. FLORIDA'S INSURABLE-INTEREST STATUTE DOES NOT INCLUDE AN INTENT-TO-HOLD REQUIREMENT

If the Court answers the first question "no," it need not answer the second question because the answer to the first question disposes of both appeals. If it answers "yes," however, it must then address the second question. Because the

district court in *U.S. Bank* disposed of that challenge on incontestability grounds alone, the insurable-interest issue was argued in the Eleventh Circuit only in *Wells Fargo*. The arguments below are thus drawn from that case.

The second question focuses on whether an insurable interest in the Berger Policy existed at the policy's inception. Wells Fargo submits that it did because the policy insured Mrs. Berger's own life and her husband was the beneficiary, as the plain language of the insurable-interest statute requires. Pruco argues that no insurable interest existed because Mrs. Berger procured the policy intending to *later* transfer it to a buyer without an insurable interest in her life. Pruco essentially argues that a person acquiring life insurance must intend, when procuring the policy, to hold the policy until the insured's death and never transfer it to someone without an insurable interest. But the statute does not require such intent—and in fact specifically permits such a transfer after inception.

As we explain below, (A) the insurable-interest statute does not require an intent at inception to hold the policy forever; (B) Florida Statutes permit the free transfer of life-insurance policies; and (C) sound public policy favors a plain-language reading of the insurable-interest statute.

A. The insurable-interest statute does not require that, when purchasing a life-insurance policy, an insured must intend to hold the policy until the insured's death

In 2008, the Florida Legislature passed Chapter 2008-36, § 1, codified at section 627.404, Florida Statutes, to clarify existing Florida common law on insurable interests (W.F. D.E. 186-2 at 5). Before that codification, courts had interpreted Florida law as prohibiting the issuance of a life-insurance policy to someone without an insurable interest in the insured, but "the statutory and case law provide[d] very little guidance on determining whether an insurable interest exist[ed]." Fla. S.B. 648 Analysis (W.F. D.E. 186-2 at 2). The 2008 statute clarified the framework for making that determination:

> Any individual of legal capacity may procure or effect an insurance contract on his or her own life or body for the benefit of any person, but no person shall procure or cause to be procured or effected an insurance contract on the life or body of another individual unless the benefits under such contract are payable to the individual insured or his or her personal representatives, or to any person having, at the time such contract was made, an insurable interest in the individual insured. *The insurable interest need not exist after the inception date of coverage under the contract.*

§ 627.404(1), Fla. Stat. (2008) (emphasis added). All parties agree that the statute applies.

The statute explains what "insurable interest" is required. Any life-insurance policy procured in Florida must be payable "to the individual insured . . . or to any person having, at the time such contract was made, an insurable interest

in the individual insured." *Id.* And the statute twice emphasizes that the insurable interest need exist *only* at the policy's inception (*id.)* ("at the time such contract was made," later adding "The insurable interest need not exist after the inception date of coverage under the contract."). The Florida Legislature did not require or prohibit a particular intent when procuring a life-insurance policy (much less an intent to hold it forever), an element it *has* included in another insurance statute. *Compare* § 627.404(1), Fla. Stat. (2008), *with* § 817.234(1)(a), Fla. Stat. ("A person commits insurance fraud punishable as provided in subsection (11) if that person, *with the intent to injure, defraud, or deceive …*") (emphasis added).

As this Court has noted, "courts should refrain from reading elements into a statute that plainly lacks such additional elements." *Richardson v. Richardson*, 766 So. 2d 1036, 1042 (Fla. 2000) (further noting that "[i]f this Court were to construe the statute narrowly by inserting a[n] . . . element, we would in effect be rewriting the statute and changing it in a manner not intended by the Legislature."). In particular, this Court has refused to read a subjective-intent element into a statute that does not contain one. *D.M.T. v. T.M.H.*, 129 So. 3d 320, 333-34 (Fla. 2013) (refusing to read a subjective intent element into a statute because "[t]his Court . . . is 'not at liberty to add words to the statute that were not placed there by the Legislature.'") (internal citation omitted).

In fact, this Court refuses to read *any* words into a statute that the legislature did not place there. *See also Bennett*, 71 So. 3d at 841 ("We are not at liberty to add words to statutes that were not placed there by the Legislature.") (internal citation omitted); *Lawnwood Med. Ctr.*, 990 So. 2d at 512 ("It is a well-established tenet of statutory construction that courts 'are not at liberty to add words to the statute that were not placed there by the Legislature.'"); *Reynolds*, 842 So. 2d at 49 n. 2 ("When construing statutes, courts 'are not at liberty to add words to statutes that were not placed there by the Legislature.'"); *Hayes v. State*, 750 So. 2d 1, 4 (Fla. 1999) ("We are not at liberty to add words to statutes that were not placed there by the Legislature."); *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991) ("[W]e are deeply troubled by [the] . . . suggestion that a court may read a[n] . . . element into a statute that plainly lacks one, in its pertinent parts.").

This Court should not judicially amend the insurable-interest statute by inserting an intent requirement. It should answer the second question "no."

B. An intent-to-hold requirement would conflict with Florida Statutes supporting the free transfer of life-insurance policies

Reading an intent-to-hold requirement into Section 627.404 also would contradict what the Florida Statutes expressly permit:

> [A]ny life or health insurance policy under the terms of which the beneficiary may be changed upon the sole request of the policyowner, may be assigned either by pledge or transfer of title, by an assignment executed by the policyowner alone and delivered to the insurer, whether or not the pledgee or assignee is the insurer.

§ 627.422, Fla. Stat. (2008). And as we noted above, the free, post-inception assignability of insurance policies is not limited by an insurable-interest requirement: "The insurable interest need not exist after the inception date of coverage under the contract." § 627.404(1). Judicially engrafting an intent requirement would nullify these statutes.

Adding an intent requirement also would contradict the policies at issue. Each Pruco policy expressly allows its assignment (A. 44, 158) ("You may change the ownership of the contract by sending us a request in a form that meets our needs."). And Pruco authorized assignments upon request (A. 22-23, 135).

Indeed, the Florida Legislature has enacted extensive legislation encouraging the transfer of life-insurance policies. The Viatical Settlement Act, Sections 626.991–.99295, Florida Statutes (2015), provides a comprehensive structure for so-called "viatical settlement contracts," defined as any "written agreement entered into . . . to transfer ownership or change the beneficiary designation of a life-insurance policy at a later date, regardless of the date that compensation is paid to the viator." § 626.9911(10). This framework includes regulations about the licensing of viatical-settlement providers (§§ 626.9912–.9913), the licensing of viatical-settlement brokers (§ 626.9916), the procedures and rules governing viatical-settlement contracts (§§ 626.9921–.9926), and an anti-fraud plan (§ 626.99278). This comprehensive statutory structure permitting and regulating

the transfer of life-insurance policies undercuts Pruco's argument that Section 627.404 implicitly restricts a policy's transferability.

In fact, the Legislature rejected proposed legislation that *would have* restricted the secondary market for life-insurance policies. During the 2009 legislative session, at least three bills proposed revisions to Florida's insurable-interest requirement and the transfer of life-insurance policies to those without an insurable interest in the life of the insured. Senate Bill 1882, for example, would have made void and unenforceable "[a]ny contract, agreement, arrangement, or transaction, including, but not limited to, any financing agreement, any written or verbal arrangement or understanding, express or implied, entered into for the furtherance or aid of a stranger-originated life insurance act, practice, arrangement or agreement." Senate Bill 1882, §13; *see also* House Bill 1167, §12. These bills never made it past the committee stage.

Also in 2009, House Bill 1461 proposed to make it unlawful for any person "[t]o engage in stranger-originated life insurance." House Bill 1461, §11. That bill died, too. "There is no question as to legislative intent, as the arguments made in this case were also made in the Legislature and rejected." *Canney v. Board of Pub. Instruction of Alachua Cnty.*, 278 So. 2d 260, 263 (Fla. 1973); *see also*, *Collier Cnty. v. State*, 733 So. 2d 1012, 1019 (Fla. 1999) ("While we do not know why the Legislature has declined to act . . . [t]o achieve the relief sought, the

counties must persuade the Legislature to provide the cure, not the courts."); *State v. Ashley*, 701 So. 2d 338 (Fla. 1997) ("[T]he making of social policy is a matter within the purview of the legislature—not this Court.").

The legislative fate of these proposals buttresses Wells Fargo's argument that the only requirements are those the statute lists. Had the Legislature wanted to prohibit or curtail the transfer of life-insurance policies to someone lacking an insurable interest in the insured, it would have done so. This Court should answer the second question "no."

C. An intent-to-hold requirement would conflict with Florida's public policy favoring a secondary market for life-insurance policies

Both national and state public policy encourage a secondary market for life-insurance policies. Millions of Americans hold life-insurance policies as part of their investment portfolios. U.S. Census Bureau, Statistical Abstract of the United States, Table 1220, Life Insurance in Force and Purchases in the United States – Summary: 1990-2009, 754-55 (2012). But many policies lapse without ever paying a death benefit. *Recent Innovations in Securitization: Hr'g before the Subcomm. on Capital Mkts., Ins. & Gov't Sponsored Enters. of the H. Comm. on Fin. Serv.*, 111th Cong. 86 (2009) (statement of Brian D. Pardo, Chairman and CEO of Life Partners Holdings, Inc.). Between 1991 and 2010, almost $24 trillion in coverage lapsed. Daniel Gottlieb and Kent Smetters, *Lapse Based Insurance*,

Nov. 17, 2013, available at http://www.princeton.edu/economics/seminar-present-week-schedule/lapse-based-insurance.pdf, at 4. About 25% of permanent insurance policies lapse within just three years; 40% lapse within ten years. *Id*. at 5. And almost 85% of term policies never result in a death claim. *Id*. at 4; *see also Recent Innovations in Securitization*, at 5 (Statement of Brad Sherman: "Roughly 90 percent of policies are surrendered or abandoned."). Florida's senior population is particularly vulnerable: 74% of term policies and 76% of life policies sold to seniors at age 65 never pay a claim. Gottlieb and Smetters, at 4.

The secondary market that Florida law encourages, and extensively regulates, provides relief for policyholders who no longer wish to or cannot afford to retain their policies, but who do not want to lose their value. In the absence of such a market, consumers have an asset that only can be re-sold to the insurer at a substantial loss. Ron Panko, *A Matter of Trust: Financial Planning*; Insurance Market, A.M. BESTWIRE, Dec. 1, 2002, at 22; s*ee also* Neil A. Doherty and Hal J. Singer, *The Benefits of a Secondary Market for Life Insurance*, 38 REAL PROP., PROB. AND TR. J., 449, 452 (2003).

By contrast, when policies are sold on the secondary market, consumers receive, on average, four to six times the policy's cash value. *Recent Innovations in Securitization* at 12 (Statement of J. Russel Dorsett, Co-Managing Director of Veris Settlement Partners, on behalf of LISA). A recent study found that policy

owners received, on average, four times more return by selling policies on the secondary market than they would have received from the insurer by surrendering the policy. Alfonso V. Januario and Narayan Y. Naik, *Empirical Investigation of Life Settlements: The Secondary Market for Life Insurance Policies* (June 2013), available at http://www.coventry.com/assets/Marketing_Tools_Pdfs/LifeSettlementsStudy_LBS.pdf, at 3. In some cases, consumers have realized as much as ten times more return from the sale of their policies than they would have received from the insurer. *Recent Innovations in Securitization* at 17 (Statement of Kurt Gearthart, Global Head of Regulatory and Execution Risk, Credit Suisse).

Life-settlement firms improved policyholder welfare by over $240 million in 2002. Doherty & Singer, at 473. And between 1999 and 2009, the life-settlement industry delivered $6 billion above what policyholders would have received through lapse or surrender. *Recent Innovations in Securitization* at 12 (Statement of J. Russel Dorsett, Co-Managing Director of Veris Settlement Partners). This market is particularly valuable to Florida's senior population. More than 20% of policyholders over the age of 65 are estimated to hold policies, the economic value of which exceeds their cash-surrender values. Doherty & Singer, at 452.

But the life-settlement industry is not merely a response to those who are unable to make payments on policies they can no longer afford. It also provides flexible financial planning to those who wish to purchase life insurance as part of

an investment portfolio. The secondary market also is a resource for those with policies issued for the benefit of persons now deceased or no longer in need of the benefits; those who have multiple policies and wish to sell one or more of them; those who wish to replace an individual policy with another form of life insurance; those who require funds to pay for medical care; those for whom the sale of the policy would improve their standard of living; those who wish to remove a policy from an estate; those who wish to reduce an estate to reduce tax liability; and those with increased liquidity that reduces the need for the policy. Doherty & Singer, at 453. Once again, Florida's senior population stands to benefit. When the economy is weak, vulnerable consumers in need of liquidity, such as senior citizens, can recoup 60-70% of what they paid for a policy. *Recent Innovations in Securitization*, at 23 (Brian D. Pardo, Chairman and Chief Executive Officer, Life Partners Holdings, Inc.).

Compelling courts to inquire about a policyholder's intent at the inception of a policy would restrict that market by introducing uncertainty about a policy's ultimate validity. Jacob Loshin, Note, *Insurance Law's Hapless Busybody: A Case Against the Insurable Interest Requirement*, 117 YALE L.J. 474, 478 (2007). And requiring a moment-of-procurement, good-faith intent not to transfer a policy would deny access to a secondary market that many insureds may need to use later. The Legislature has recognized the value of the life-settlement market, has enacted

legislation to regulate it, and has plainly stated that an insurable interest is not needed after a policy's inception. Engrafting an intent requirement would nullify its work and the current market flexibility, all in the name of protecting an insurer that collected substantial premiums for years while failing to investigate applications it now claims are fraudulent. Again, the Court should answer the second question "no."

CONCLUSION

For the reasons stated, this Court should answer the first certified question, "no." If it reaches the second question, it should answer "no" to that question, too.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, this brief is submitted in Times New Roman 14-point font, which complies with the font requirement. *See* Fla. R. App. P. 9.100(l).

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