IN THE SUPREME COURT OF FLORIDA

No. SC15-382
L.T. Case Nos. 13-12135, 13-15859

WELLS FARGO BANK, N.A., ET AL.,

Appellants,

v.

PRUCO LIFE INSURANCE COMPANY,

Appellee.

BRIEF OF AMICUS CURIAE FULL VALUE PARTNERS L.P. IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Full Value Partners L.P. ("Full Value Partners") is a private investment fund that participates in the life insurance secondary market. Full Value Partners has a direct interest in this matter because resolution of the certified questions before the Court may impair the value and marketability of life insurance policies and thus its investment in the life settlement market.

Specifically, the position advocated by Appellee Pruco Life Insurance Company ("Pruco"), if adopted by this Court, would negatively impact the value of life insurance policies to the detriment of policyholders. If the Court were to establish a new exception to the incontestability period, there would be significant uncertainty as to whether a policy could be challenged by an insurer after two years. In fact, such an exception would reduce the incentive for insurers to conduct an adequate investigation within the two-year contestability period, which is precisely what the legislature intended for them to do. Moreover, if a carrier could contest a policy for lack of insurable interest at any time, investors would, before purchasing a particular policy, have to assess the likelihood that an insurer might bring such a suit. However, investors are ill-equipped to make such insurable interest determinations, particularly where a policy is sold several years after it was issued. Such efforts by investors would become even more costly and difficult if the insured's intent at the time of policy issuance were a relevant factor in the insurable

interest analysis. Because both the value and marketability of life insurance policies depends on the stability created by the existing rules of incontestability and insurable interest, Full Value Partners supports Appellants' position, which seeks to preserve this stability.[1]

SUMMARY OF ARGUMENT

Full Value Partners urges the Court to answer the two certified questions "no."

First, an insurer cannot challenge an insurance policy as being void ab initio for lack of insurable interest after expiration of the two-year incontestability period because the Florida legislature has not established such an exception to the incontestability provision. As a preliminary matter, however, the Court does not even have subject-matter jurisdiction to address a claim by an insurer that a policy is void for lack of insurable interest. Absent a clear intent by the legislature to allow private parties to sue for enforcement of a statute, such a right is unavailable. In section 647.404, the Florida legislature expressly authorized *an insured's representative* to assert a private cause of action based on lack of insurable interest, but deliberately omitted such a cause of action for *insurers*. Thus, an insurer cannot enforce a violation of 627.404, which is meant to protect the insured and his

[1] Life settlements are lawful in every state and are regulated by a majority of states. *See, e.g.*, §§ 626.991—626.99295, Fla. Stat. Indeed, the United States Supreme Court has recognized that life insurance policies can be used as investments and can be freely alienated for profit. *See Grigsby v. Russell*, 222 U.S. 149, 156 (1911).

representatives—not the insurers.

Moreover, nowhere does section 627.404 provide that a life insurance policy procured by a person lacking insurable interest is void ab initio. Indeed, in other sections of the Insurance Code, the legislature explicitly stated the circumstances under which a policy should be deemed void or unenforceable. Because it did not include such language in section 627.404, the Court should not entertain Pruco's attempt to void the polices at issue.

Second, section 627.404 does not require that an individual purchasing life insurance intend not to transfer the policy. In fact, the statute requires only that, at inception, the benefits of the policy be payable to someone having insurable interest in the insured's life. And Florida law recognizes that an insurance policy is fully assignable and transferable, like any other form of property. Thus, the Court should not incorporate a subjective, good-faith "intent" requirement that would be inconsistent with such a property right. For these reasons, as discussed in further detail below, the Court should answer the two certified questions in the negative.

ARGUMENT

I. AN INSURER CANNOT CHALLENGE A POLICY AS BEING VOID AB INITIO FOR LACK OF INSURABLE INTEREST AFTER EXPIRATION OF THE TWO-YEAR CONTESTABILITY PERIOD.

Full Value Partners supports Appellants' position that the answer to the first certified question is "no" because section 627.455 does not contain an exception for

claims seeking to void an insurance policy for lack of insurable interest. Indeed, after a policy has been in force for two years, it is incontestable for *any* reason (except nonpayment of premiums). Full Value Partners also submits, however, that the answer to the first certified question is "no" for two additional reasons: First, courts do not have subject-matter jurisdiction to address a claim by an insurer seeking to void a policy for lack of insurable interest because section 627.404 does not provide a private right of action to insurers. Second, the statute does not declare that a policy procured by a person lacking insurable interest is void and, in fact, provides for a private remedy that is inconsistent with such a contention.[2]

A. Section 627.455 bars all claims (except those specifically provided in the statute) after expiration of the two-year contestability period.

As Appellants explain in their brief, the incontestability clause in each policy—mandated by section 627.455—bars Pruco's claims. Section 627.455 specifies the ***only*** exceptions to incontestability—namely, claims for nonpayment of premiums and as to provisions relating to disability benefits and additional insurance against accidental deaths. *See* § 627.455, Fla. Stat. Notably, the statute does *not* contain any exception for claims that a policy is void ab initio due to its having been

[2] While the parties to this appeal did not raise these arguments, the arguments nevertheless address the first certified question on appeal and thus are advanced for consideration by the Court. *See Keating v. State*, 157 So. 2d 567 (Fla. 1st DCA 1963) (noting that "amicus is not confined solely to arguing the parties' theories in support of a particular issue").

procured by a person lacking insurable interest.

To create a judicial exception in addition to those expressly provided by statute would not only violate well-established principles of statutory construction and separation of powers, but would also undermine the very purpose of incontestability provisions. An incontestability provision is intended "to encourage insurance buyers to purchase insurance with confidence that after the contestability has passed they are assured of receiving benefits . . . as well as to reduce litigation." *New England Mut. Life Ins. Co. v. Doe*, 93 N.E.2d 1060, 1062 (N.Y. 1999). As the United States Supreme Court has explained, "[t]he object of the [incontestability] clause is plain and laudable—to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death, and as soon as it reasonably can be done." *Nw. Mut. Life Ins. Co. v. Johnson*, 254 U.S. 96, 101–02 (1920). Consumers depend on this "absolute assurance of the benefit" in purchasing insurance and planning around its financial protection, and investors and other participants in the secondary market depend on this benefit to establish marketability of title.

Incontestability provisions also provide insurers with a two-year "second bite at the apple" to investigate and address any fraud that they failed to identify during their underwriting. *See Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1115 (11th Cir. 2005) ("The incontestability clause . . . . giv[es the insurance] company a

reasonable time and opportunity to ascertain whether the insurance contract should remain in force.").

Here, Pruco attempts to evade its responsibility to conduct any investigation within the statutorily-allotted two-year contestability period by arguing that the Guild and Berger policies are void ab initio for lack of insurable interest. But as noted above, and explained in Appellants' brief, no Florida statute authorizes such an exception to incontestability. Additionally, the Eleventh Circuit has on multiple occasions rejected this argument. *See Miller*, 424 F.3d at 1115 (recognizing that incontestability clauses bars claims that a policy is void ab initio); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1063 (11th Cir. 2007) (same).

For example, in *Martinez*, seventeen life insurance companies filed an action seeking to have certain policies declared void ab initio. *Martinez*, 480 F.3d at 1063. The district court dismissed the insurers' complaint, and the insurers appealed. *See id.* at 1047. In affirming the dismissal, the Eleventh Circuit explained that: "[I]ncontestability clauses function much like statutes of limitations. While they recognize fraud and all other defenses, they provide insurance companies with a reasonable time in which to assert such defenses, and disallow them thereafter." *Id.* at 1059.

For each of the policies at issue in *Martinez*, the contestability period ended before the insurance companies filed suit. *See id.* at 1052. Thus, the Eleventh Circuit

analyzed the relevant incontestability statutes to determine whether the statutes contained any explicit exceptions for the claims at issue, including the claim that the policies were void ab initio.[3] *Id.* at 1059–1066. Finding that the relevant statutes barred *all* of the claims, the Eleventh Circuit affirmed the dismissal. *Id.*

Thus, there is no insurable interest exception to the statutorily-mandated incontestability provision.

B. Section 627.404 does not provide insurers with a private right of action to challenge a policy as void ab initio for lack of insurable interest.

1. Under Florida law, courts may not imply a private right of action where the legislature did not intend to create one.

Pruco seeks to void the policies claiming they violate Florida's insurable interest statute, section 627.404(1). However, absent a clear intent by the legislature to allow private parties to sue for enforcement of a statute, such a right (and any remedy arising from such right) is unavailable to them. *See Mailloux v. Briella Townhomes, LLC*, 3 So. 3d 394, 396 (Fla. 4th DCA 2009); *Jolley v. Seamco Labs., Inc.*, 828 So. 2d 1050, 1051 (Fla. 2d DCA 2002); *Baumstein v. Sunrise Cmty., Inc.*, 738 So. 2d 420, 421 (Fla. 3d DCA 1999). Indeed, this Court has consistently held that absent explicit expression of such intent, a private right of action will not be implied. *See QBE Ins. Corp. v. Chalfonte Condo. Apt. Assoc., Inc.*, 94 So. 3d 541,

[3] While *Martinez* addressed the incontestability statutes of Ohio, West Virginia, Massachusetts, California, and Illinois, the language of those statutes is effectively the same as Florida's incontestability statute.

553 (Fla. 2012); *Horowitz v. Plantation Gen. Hosp. L.P.*, 959 So. 2d 176, 186 (Fla. 2007); *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842 (Fla. 2003).

Accordingly, "the primary, perhaps the only, issue pertinent to the question of whether a private cause of action may be based upon the breach of a statute is whether the legislature intended that to be the case." *Baumstein*, 738 So. 2d at 421 (citing *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994)); *United Auto. Ins. Co. v. A 1st Choice Healthcare Sys.*, 21 So. 3d 124, 129 (Fla. 3d DCA 2009). "To conceive a statute's 'purpose' too broadly, too generally, or at a too remote level of abstraction, while subordinating the statute's text, promotes promiscuous judicial speculation and other judicial mischief." *Lemy v. Direct Gen. Fin. Co.*, 884 F. Supp. 2d 1236, 1239 (M.D. Fla. 2012) (emphasis added).

Here, Pruco is asking this Court to authorize a private right of action for insurers to enforce section 627.404(1). But "[j]udicially inventing a right to sue—based on a statute that provides no right to sue—arrogates to the judiciary a power of the legislature." *Id.* at 1238. As discussed below, there is no basis to find that the legislature intended to provide insurers with a private right of action under section 627.404(1).

2. The text and statutory structure of section 627.404 demonstrate that the Florida legislature did not intend to provide insurers a private right of action for violation of its insurable interest provision.

To determine the legislative intent behind a statute, courts must first look to

the text of the statute, the statutory structure or context in which it is used, and, *only if statutory text and structure do not resolve the issue*, the purpose behind the statute's enactment. *See QBE*, 94 So. 3d at 551–52; *Lemy*, 884 F. Supp. 2d at 1241; *see also Love v. Delta Airlines*, 310 F.3d 1347, 1352–53 (11th Cir. 2002). In other words, the primary guide in determining whether the Legislature intended to create a private cause of action is the "actual language used in the statute." *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006). "In determining the meaning of the language used, the court must look not only to the words themselves but also to the context in which the language lies." *QBE*, 94 So. 3d at 551 (internal quotations omitted). Finally, "if—and *only* if—statutory text and structure have not conclusively resolved whether a private right of action should be implied," courts may examine the legislative history of the statute to seek guidance regarding whether the legislature intended to create a private cause of action for the section's violation. *Love*, 310 F.3d at 1353; *see also QBE*, 94 So. 3d at 551–52.

Here, the text and context of the statute are unambiguous that section 627.404(1) does not provide a private right of action for an insurer to void any policy for violation of that section. Thus, "sound reason, binding authority, and the arc of history confirm that creating a right of action in this instance would impinge the authority of the legislature." *Lemy*, 884 F. Supp. 2d at 1238. Consequently, an insurer "lack[s] the right to sue." *Id.*

Section 627.404(1) states the following:

> 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. First, nothing in the statute itself evinces a legislative intent to create a benefit, let alone a private right of action, for insurers. The statute merely provides that no person (other than the insured) may "procure" a policy unless the benefits are payable to a person with an insurable interest in the life of the insured. *See id.*

Second, the language and structure of section 627.404 and other provisions in the Insurance Code "signal[] a deliberate omission" of a private right of action for insurers from the insurable-interest provision in the life insurance context. *See Lemy*, 884 F. Supp. 2d at 1241. Indeed, where the "legislature chose to permit insurance regulation through private enforcement, the insurance code *explicitly* allows private enforcement." *Id.* (emphasis added). In contrast, "if the legislature chose to limit insurance regulation to agency oversight, the insurance code omits private enforcement." *Id.* Under those circumstances, "the Office [of Insurance Regulation] enjoys an exclusive authority to protect the public by enforcing the

sections of the insurance code for which the legislature provides no private remedy." *Lemy v. Direct Gen. Fin. Co.*, 885 F. Supp. 2d 1265, 1273 (M.D. Fla. 2012). Indeed, section 624.307 of the code assigns the power to enforce the provisions of the code to the Office of Insurance Regulation and the Department of Financial Services. *See* § 624.307, Fla. Stat.

Importantly, section 627.404 does expressly authorize one private cause of action—a suit **by the insured's representative** to recover insurance policy benefits paid to any person (or assignee) who procured a life insurance policy covering the insured's life, but who did not have an insurable interest at the time the policy was issued. *See* § 627.404(4), Fla. Stat. ("If the beneficiary, assignee, or other payee under any insurance contract procured by a person not having an insurable interest in the insured at the time such contract was made receives from the insurer any benefits thereunder by reason of the death, injury, or disability of the insured, the insured or his or her personal representative or other lawfully acting agent may maintain an action to recover such benefits from the person receiving them."). This provision demonstrates that when the legislature intended to authorize a private right of action, it did so explicitly. Thus, the omission of a private cause of action for insurers should be deemed to be intentional.

Consequently, this Court should not construe section 627.404 as implying a

private right of action for insurers to void policies for lack of insurable interest.[4]

C. A violation of Section 627.404 does not render a policy void ab initio.

1. Under Florida law, a policy procured in violation of section 627.404 of the Insurance Code remains valid unless the code explicitly states otherwise.

The Florida Supreme Court has held that where the insurance code does not expressly state that a violation of a provision of the code renders a policy invalid or void, courts should assume that policy remains valid. *See QBE*, 94 So. 3d at 552; *Lemy*, 885 F. Supp. 2d at 1272. In doing so, this Court acknowledged that "the Legislature is perfectly capable of crafting an express penalty." *QBE*, 94 So. 3d at 553. It further noted that where the legislature fails to do so "there is no good reason for the courts to select one penalty over another." *Id.* Because section 627.404(1) does not provide for the remedy sought by Pruco (i.e., voidance of the Policies), this Court should not grant it.

2. The Florida Insurance Code does not state, and, in fact, contradicts the proposition, that a life insurance policy issued in violation of section 627.404(1) is void.

The text of section 627.404(1) states that "no person shall procure or cause to

[4] The obvious intent of the legislature was to benefit "the insured or his or her personal representative or other lawfully acting agent" by designating them as the *only* ones with the right to *recover* the death benefits paid by the carrier. It was certainly not the intent of the legislature to benefit insurers by releasing them from their obligations, including their obligations to abide by the incontestability provision or to pay the death benefit to the beneficiary named in the policy

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." § 627.404(1), Fla. Stat. Nowhere does it even suggest that a policy procured without insurable interest is rendered void *ab initio*. Notably, this language is materially different than that used in insurable interest laws in some other states that expressly state that policies are deemed void if procured in violation of those statutes. *See, e.g.*, Cal. Ins. Code § 10110.1(g) ("Any contract of life or disability insurance procured or caused to be procured upon another individual is void unless the person applying for the insurance has an insurable interest.").[5]

In contrast, when the Florida legislature wishes to make particular contracts void *ab initio* or unenforceable, it also does so explicitly. For example, unlike the portion of the Insurance Code addressing *life insurance*, the legislature adopted a statutory provision declaring that where a *property insurance policy* lacks insurable

[5] In enacting section 627.404(1), the Florida Legislature adopted language similar to New York's insurable interest statute rather than language similar to that contained in the California statute. *See* N.Y. Ins. Law § 3205. New York's insurable interest statute does not render a policy void *ab initio* even where the policy lacked insurable interest when procured. *New England Mut. Life Ins. Co. v. Caruso*, 535 N.E.2d 270, 272 (N.Y. Ct. App. 1989) ("The provisions of the Insurance Law do not make life insurance contracts void if the policyholder lacks an insurable interest in the insured's life.").

interest, it should be deemed void. § 627.405, Fla. Stat. Specifically, section 627.405 states that "[n]o contract of insurance of property of any interest in property or arising from property *shall be enforceable* as to the insurance except for the benefit of persons having an insurable interest in the things insured at the time of loss." § 627.405(1), Fla. Stat. (emphasis added). Because the legislature declared a *property* insurance policy unenforceable for lack of insurable interest, but *chose not* to do the same for a policy for *life* insurance, this Court should conclude that it made a deliberate decision not to extend the same remedy for the latter. Similarly, section 627.6474 of the Insurance Code, which addresses health care practitioner contracts, expressly states that "[a]ny contract provision that violates this section is void." § 627.6474, Fla. Stat.; *see also* § 627.415, Fla. Stat. (stating that "[a]ny policy provision in violation of this section [about charter, bylaw provisions] is invalid."). Thus, it is evident that the legislature knows what language to use to establish that a policy lacking insurable interest is void or unenforceable. Accordingly, this Court should find that the absence of such language in section 627.404 was intentional.

Additionally, section 627.404(4)—which, as discussed above, expressly provides an insured's representative with a private right to recover benefits paid on a policy that lacks insurable interest—necessarily acknowledges that a policy procured *without insurable interest* remains *valid with regard to the insurer's obligation to pay the death benefit*. Essentially, that section provides that the

insured's representative may recover the death benefits paid pursuant to a wrongfully procured policy. **Such a cause of action can *only* exist if such policy is valid and enforceable**. Pruco's proposed interpretation of section 627.404(1)—i.e., that such a policy is void—would render section 627.404(4) meaningless. Such an interpretation of the statute runs contrary to the well-established principle that courts should not construe a statute in a manner that would render any portion of the statute meaningless. *See United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972); *see also United States v. Chemaly*, 741 F.2d 1346, 1351 (11th Cir. 1984).[6]

Because the Florida legislature did not expressly state that a policy procured in violation of section 627.404(1) is deemed void or unenforceable—and, in fact, included language that cannot be reconciled with declaring it void—the Court should not entertain Pruco's claim and should answer the first certified question "no."

II. SECTION 627.404 DOES NOT REQUIRE THAT AN INDIVIDUAL WITH THE REQUIRED INSURABLE INTEREST ALSO INTEND TO NOT TRANSFER THE POLICY.

Full Value Partners supports Appellants' position that the answer to the second certified question is "no" because section 627.404 does not require that an individual intend never to transfer the policy after inception. In fact, both the statute

[6] Indeed, a New York court analyzing a similar provision in New York's insurable interest statute expressly recognized that "the relief granted by the provision contemplates that such policies, although improper, may be issued and enforced." *Caruso*, 535 N.E. 2d at 273 (analyzing N.Y. Ins. Law § 3205).

and relevant case law permit such a transfer. Logically, it cannot be improper to intend to do what the law allows.

As this Court has recognized, "when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984). Section 627.404 provides that where a person procures a life insurance policy on the life of another person, the benefits under the policy must, *at inception*, be payable to someone having insurable interest in the individual insured. *See* § 627.404, Fla. Stat. Indeed, the statute emphasizes that "[t]he insurable interest need not exist after the inception date of coverage under the contract." *Id.* The statute does not contain any reference to the intent of the individual procuring a life insurance policy, much less a requirement that the individual never intend to transfer the policy to someone without an insurable interest at some point in the future.

As Appellants noted in their brief, this Court has refused to read a subjective-intent element into statutes that do not contain one. And courts in various jurisdictions that have analyzed insurable interest statutes with similar language to Florida's have likewise refused to read any subjective-intent element into the insurable interest analysis. *See, e.g., Hartford Life & Annuity Ins. Co. v. Doris Barnes Family 2008 Irrevocable Tr.*, CV 10-7560, 2012 WL 688817, at *5 (C.D.

Cal. Feb. 3, 2012) aff'd, 552 F. App'x 664 (9th Cir. 2014) (holding that "intent to sell a policy in the future is legally irrelevant" where "the insurance code does not state or imply that the intent to sell a [p]olicy in the future is relevant to whether one has an insurable interest."); *Kramer v. Phoenix Life Ins. Co.*, 940 N.E.2d 535, 537 (N.Y. 2010) (noting that it is not the court's role "to engraft an intent or good faith requirement" onto a statute that permits an insured to immediately and freely assign such a policy); *Principal Life Ins. Co. v. DeRose*, No. 1:08-CV-2294, 2011 WL 4738114, at *7 (M.D. Pa. Oct. 5, 2011) (refusing to read intent requirement into insurable interest statute). Because the plain language of the statute does not support the existence of any intent requirement in analyzing the existence of insurable interest, the second certified question should be answered "no."

III. PRUCO'S POSITION ON THE TWO CERTIFIED QUESTIONS, IF ADOPTED BY THIS COURT, WOULD IMPAIR THE CONTINUED VIABILITY OF THE SECONDARY MARKET FOR LIFE INSURANCE.

The Court's answers to the certified questions will directly affect the life insurance industry, including millions of policyowners who purchase policies based on the belief that (1) the validity of those policies cannot be challenged by the insurer after the first two years and (2) those policies can be sold in the secondary market for considerably more than a policyowner would otherwise collect by surrendering the policy to the issuing insurer.

First, creating an exception to incontestability and adopting a subjective "good faith" intent standard to insurable interest will inject confusion and unpredictability into the secondary market, creating new hurdles for policyholders and investors. If the Court were to fashion an extra-statutory exception to the incontestability provision, thereby eliminating the guarantee that a policy cannot be challenged after two years, the marketability and value of life insurance policies as assets and investment tools would be greatly diminished. Indeed, because investors would be forced to assess the likelihood of claims by insurers at any time after the assignment or sale of the policy, the demand for life insurance policies would undoubtedly decrease. In turn, policyholders would be unable to realize the full value of their assets. The greatest harm would likely inure to seniors, who may wish to avail themselves of the benefits of the life settlement market to meet end-of-life needs. Further, if an insurer could contest a policy for lack of insurable interest at any time, it would reduce its incentive to investigate potential fraud during the two-year contestability period.

Second, the position advocated by Pruco, if adopted by this Court, would impair the fundamental and well-established property right of a policyowner to transfer a life insurance policy through a legitimate life settlement. The Supreme Court has long recognized that life insurance policies may be used as investments and can be freely alienated for profit. *See Grigsby*, 222 U.S. at 156. As Justice

Holmes explained:

> [L]ife insurance has become in our days one of the best recognized forms of investment and self-compelled saving. . . . To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands.

Id. Similarly, the Florida Insurance Code expressly recognizes that a life insurance policy may be assigned or transferred. *See* § 627.422, Fla. Stat.; *see also Lexington Ins. Co. v. Simkins Indus., Inc*., 704 So. 2d 1384, 1386 (Fla. 1998) (recognizing that life insurance policies can be freely transferred unless expressly prohibited by the terms of the contract). The secondary market vindicates this property right by allowing consumers to sell their policies for their highest value. The position advocated by Pruco to inject an "intent" standard into the insurable interest analysis would impair this fundamental right and would essentially punish an informed consumer for intending to exercise a legal right.

Moreover, to add a subjective "intent" standard into the insurable interest analysis would force investors to conduct the nearly impossible task of divining the policyowner's intent at the time of issuance. Indeed, in regulating life settlements and defining insurable interest, the Florida legislature did not include such an "intent" requirement. Instead, it imposed a straightforward and objective test to determine insurable interest that is far more workable and conducive to business transactions. An investor in the secondary market can certainly review the relevant

documents to determine whether a policy was supported by insurable interest, as defined by section 647.404, at the inception of the policy. However, investors are ill-equipped to determine whether, at the time of inception (which could be several years in the past), the policyowner had any intent to transfer the policy any point in the future.

Notably, Pruco ignores the very real threat to the secondary market and the benefits that market provides to consumers. The United States Congress Governmental Accountability Office ("GAO") did a comprehensive survey of the life settlement industry that included data from 25 life settlement providers. *See* U.S. Congressional GAO, *Report to the Special Committee on Aging, U.S. Senate, Life Ins. Settlements, Regulatory Inconsistencies May Pose a Number of Challenges* (2010) (the "GAO Study"), *available at http://www.gao.gov/new.items/d10775.pdf* (last visited May 28, 2015). The GAO Study found that in the four years beginning in 2006, policy owners were paid $5.62 billion more than they would have received from a surrender of their policies. The adoption of Pruco's position would reap rewards for insurers by destabilizing the entire life settlement market and the consumer benefits it provides.

CONCLUSION

For the foregoing reasons, Full Value Partners L.P. submits that the Court should answer the two certified questions "no."

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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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