RECEIVED 06/15/2015 09:53 PM FLORIDA SUPREME COURT

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 LIFE INSURANCE SETTLEMENT ASSOCIATION IN SUPPORT OF APPELLANTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Life Insurance Settlement Association ("LISA") is the leading trade association promoting consumers' option to sell their life insurance policies on the secondary market. LISA members do business in all U.S. jurisdictions and include life settlement providers, who buy life insurance policies from policyowners, and life settlement brokers, who help consumers sell their contracts for their market value. LISA's mission is the promotion of the development, integrity, and reputation of the life settlement industry as a competitive alternative for life insurance consumers. LISA advocates for thorough and sensible regulation of the secondary market, which allows consumers to unlock the value of their policies and sell them for market value in excess of the issuing insurer's cash value offer—on average 300 to 500% higher. In furtherance of these goals, LISA promotes legislation and regulation promoting transparency and accountability in settlement transactions; offers training programs; publishes newsletters; operates a website; and hosts several industry conferences and seminars annually.

LISA has a direct interest in this matter because Appellee Pruco Life Insurance Company ("Pruco") proposes creating radical rules that would impair the marketability of life insurance policies and negatively impact the rights of life insurance consumers. Pruco's position, if adopted by the Court, could represent new precedent concerning incontestability and insurable interest that would

undermine the viability of the secondary market for life insurance in Florida. This would harm LISA members who engage in commerce in that market, and in turn, harm LISA members' clients: life insurance consumers. As recognized by the United States Supreme Court, consumers enjoy a bundle of property rights, and applying unnecessary restrictions on those rights—like those proposed by Pruco—will "diminish appreciably the value of the contract in the owner's hands." *Grigsby v. Russell*, 222 U.S. 149, 156 (1911). LISA believes that the policyowner's well-established property right to sell or assign his asset—a life insurance policy—for consideration will be fundamentally diminished if this Court adopts Pruco's position.

SUMMARY OF ARGUMENT

LISA urges the Court to answer both certified questions "no." The life settlement market provides significant benefits to consumers, including the opportunity to exercise their lawful property right to assign or transfer a life insurance policy and realize its full market value. The restrictions on this property right proposed by Pruco would greatly diminish the value of these policies in the hands of consumers and would undermine and destabilize the secondary market.

Pruco asks the Court to create an exception to the two-year contestability period for insurable interest challenges. But such an exception is not supported by the plain language of section 627.455 of the Florida statutes. Moreover, such an

exception would leave life insurance policies open to challenge at any time, thereby negating the absolute assurance of the benefit that the incontestability statute was designed to provide.

In addition, Pruco seeks to inject a subjective intent standard into the clear and objective insurable interest analysis set forth by section 627.404 of the Florida statutes. However, requiring that an insured intend never to transfer a policy contradicts not only the plain language of the statute, but also an insured's well-established property right to freely assign or transfer a life insurance policy. Furthermore, adoption of Pruco's proposed standard would allow insurance carriers to challenge all legitimate life settlements indefinitely based on an unclear standard and would discourage insurers from diligently investigating any insurable interest issues during the underwriting process or within the first two years after issuance. The Court should not adopt a standard that would benefit insurers while punishing informed consumers for the exercise of lawful property rights, particularly where the purpose of the insurable interest statute was to protect consumers.

For these reasons, LISA urges the Court to answer both certified questions "no."

ARGUMENT

Because Pruco did not pursue its action within the two-year contestability

period provided by Florida law, it argues that challenges to life insurance policies based on insurable interest grounds survive the contestability period. Pruco also argues that to establish insurable interest in Florida, an insured must not have had, at the time of issuance, any intent to transfer the policy at any time in the future. But there is no exception to Florida's incontestability statute for insurable interest challenges. To create such an exception would undermine the stability and certainty of the secondary market, resulting in investor uncertainty, lower purchase offers and significant harm to consumers.

Additionally, Florida's insurable interest statute does not contain any subjective "good faith" requirement whereby an insured is prohibited from purchasing a policy with an intent to transfer. Indeed, as far back as 1911, the United States Supreme Court recognized that life insurance policies, like any other property, may be sold, assigned or transferred. *See Grigsby*, 222 U.S. at 156. Thus, to punish an insured for being aware of and intending to exercise his lawful property rights would contradict more than a century of insurable interest precedent and Florida law. Accordingly, LISA submits that the Court should answer both certified questions "no."

Because the two issues on appeal may affect the secondary market for life insurance policies, LISA first provides some helpful background on the life settlement market that it believes will be useful to the Court in answering the

certified questions.

A. The Life Settlement Market, Which Is Highly Regulated By a Majority of States (including Florida), Benefits Both Consumers and Investors.

1. Life Settlements

Life insurance has been a core part of the U.S. financial fabric since its early development in the 1800s. Not only do life insurance policies protect an insured's beneficiaries who might experience financial hardships from the insured's death, they are also "one of the best recognized forms of investment and self-compelled saving," and are given by courts "the ordinary characteristics of property." *Grigsby*, 222 U.S. at 156. Thus, like any asset that is personal property, a life insurance policy can be alienated during the insured's lifetime for its market value. This simple premise is the foundation for the life settlement industry in the United States.

A life settlement is a lawful transaction that is heavily regulated in a majority of states. Indeed, forty-two states (*including Florida*) regulate life settlements, affording approximately 90% of the United States population protection under comprehensive life settlement laws and regulations.[1] *See, e.g.,* §§

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[1] Notably, there have been only two consumer complaints nationwide involving life settlements since 2012, according to the National Association of Insurance Commissioners (NAIC)—an excellent measure of success regarding how well the market is functioning in terms of consumer protection. This is in stark contrast to the more than 8,000 complaints against life insurance carriers in 2014 alone for

626.991–626.99295, Fla. Stat. A "life settlement" is the sale of a life insurance policy by the policyowner to a licensed life settlement provider. *See* § 626.9911, Fla. Stat. The original owner is paid an amount more than the cash surrender value that the owner could obtain from the insurer (on average, 300-500% more), and less than the current death benefit payable under the policy. In return for that payment, the buyer obtains all ownership rights under the policy, the responsibility of paying premiums, tracks the ongoing health status of the insured, and collects the death benefit paid under the policy when the insured dies. The owner of an eligible life insurance policy may opt for a life settlement when he no longer needs or wants the life insurance policy, such as when the policyowner experiences a change in estate planning needs or life circumstances (such as divorce or death), or when the policyowner can no longer afford the policy because of a change in financial circumstances. Investors, in turn, may opt for life settlements to diversify their portfolios.

Transparency is a key part of life settlement regulation around the nation. Most states, including Florida, have enacted comprehensive regulations that require policyowners to receive substantial consumer disclosure, including

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delays in paying claims. As further evidence of the growing acceptance of life settlements, in 2010, the National Conference of Insurance Legislators (NCOIL) adopted the Life Insurance Consumer Disclosure Model Act. This Act mandates that insurers provide written notice to senior policyowners who are facing the lapse or surrender of their policies. This written notice must clearly state that seniors have options regarding such lapse or surrender, one of which is a life settlement.

disclosure of the compensation paid to brokers (something not required in the primary market), and that require the licensing of life settlement brokers and providers, as well as the approval of forms for the life settlement contract. *See, e.g.*, §§ 626.9913–626.9923, Fla. Stat. In addition, most states require that consumers receive all offers and counteroffers and alternatives to settlements (not required in the primary market), and that they be advised of any risks relating to taxation and government assistance. *See, e.g.*, § 626.9923, Fla. Stat. Likewise, states require that life settlement companies adhere to applicable state and federal privacy laws and submit for approval anti-fraud plans to ensure that the policies they purchase have not been obtained and are not being sold illegally. *See, e.g.*, §§ 626.9927–626.99278, Fla. Stat. These provisions illustrate the highly transparent nature of the life settlement transaction.

The legal basis for life settlements as a legitimate option for life insurance owners is well-established in a slew of high court opinions dating back more than a century and a half. Justice Holmes' instruction that life insurance must have the "ordinary characteristics of property," *Grigsby*, 222 U.S. at 156, is the most famous, but far from the only definitive high court formulation of the fundamental property rights in life insurance policies. *See, e.g., St. John v. Am. Mut. Life Ins. Co.*, 13 N.Y. 31, 38 (N.Y. 1855) ("[W]ithout the right to assign, insurances on lives lose half their usefulness."); *Lyman v. Jacobsen*, 128 Or. 567, 580 (Or. 1929)

("The policy was his personal property. He had a right to transfer it to whom he pleased, to sell it, or to give it away just as any other personal property. . . . [H]e had the same right to dispose of it as he would have had he been given a horse, or an automobile, or any other personal property."); *Rahders, Merritt & Hagler v. People's Bank of Minn.*, 113 Minn. 496, 499 (Minn. 1911) ("[T]he insured ought to be permitted to realize at any time on the value of his policy . . . it is a species of property, and the value of life insurance as an asset would unnecessarily be lost, if not made assignable as other choses in action."); *Butterworth v. Miss. Valley Trust Co.*, 362 Mo. 133, 145–146 (Mo. 1951) ("In a commercial age and with a commercial people, and in recognition of commercial practices, . . . to . . . ignore the bona fides of assignments of convenience or necessity, would not only impair the value of such contracts as a plan of estate building and economic protection but would work unconscionable injury to policyholders who are no longer financially able to or who no longer desire to continue such contracts."); *Chamberlin v. Butler*, 61 Neb. 730 (Neb. 1901) ("[I]n this day, when almost every person carries life insurance of some character, [its] commercial value and usefulness . . . should be fostered, rather than crippled or minified.").

These rules, and their fundamental importance, are thus well-settled. Indeed, the Florida Insurance Code expressly recognizes that a life insurance policy may be assigned or transferred. *See* § 627.422, Fla. Stat.

2. The Secondary Market

The secondary market for life insurance, or "life settlement market," is a multi-billion dollar industry. In 2008, for example, the estimated total face value of policies sold by policyowners to investors ranged from $9 billion to $12 billion. *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*, at Introduction, "What GAO Found." The development of the secondary market has been of great benefit to consumers, including elderly Americans, because it creates competition among prospective purchasers of life insurance policies and thus provide insureds with fair market value for their policies that typically far exceeds what they otherwise collect from insurers by surrendering their policies. Indeed, a recent GAO Report reflects that policy owners received more than eight times[2] the cash surrender value of the policies they settled in 2009, and an even larger factor from 2006 to 2008. *See* GAO Study at App. III.

Historically, a policyowner who no longer wished to continue paying

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[2] These values come from a specific GAO study and vary from other figures—for example, the 300–500% figure cited above—depending on several factors, including the time period analyzed and the scope of the analysis. In any event, these figures demonstrate that the consumers significantly benefit from the secondary market.

premiums on a policy had few options because life insurers wielded "monopsony power" over the repurchase of their own policies. *See* Neil A. Doherty and Hal J. Singer, "The Benefits of Secondary Market for Life Insurance Policies," Real Property, Probate and Trust Journal, Fall 2003. The secondary market corrects this imbalance of power by providing consumers with an alternative to surrendering their policies to the issuing insurance carriers. The competition fostered by the secondary market among investors and the issuing carriers creates a natural tension that benefits consumers and allows them to realize fair market value for their unwanted policies.

Participants in the secondary market, however, depend on the stability and certainty created by the existing rules of incontestability and insurable interest. As explained below, if the Court were to adopt Pruco's position on the certified questions, the secondary market would be greatly affected by diminishing the demand for insurance policies from investors and thus the value of these policies in the hands of consumers.

B. To create an exception to Florida's statutorily-mandated incontestability provision would inject uncertainty in the secondary market and would provide perverse incentives for insurance carriers in investigating policies.

Pruco seeks to have the Court create an exception to Florida's incontestability statute that would permit insurers to challenge life insurance policies on insurable interest grounds after the statutorily-mandated two-year

contestability period has expired. But Florida's incontestability statute is absolutely clear that *a life insurance policy* cannot be challenged after two years *for any reason except nonpayment of premiums*.[3] *See* § 627.455, Fla. Stat. Because the Florida legislature chose not to include an exception for insurable interest challenges—as demonstrated by the plain language of the statute—this Court should not create one. *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952) (explaining that where legislature makes specific exceptions to statute of limitations, court cannot write into the law any other exception).

Florida's incontestability statute affords insurance carriers a generous two-year window in which to contest life insurance policies and identify any misrepresentations they failed to uncover during the underwriting process. Both the Eleventh Circuit and the Florida Supreme Court have recognized that the incontestability provisions act as a statute of limitations that balances competing interests. *Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1115 (11th Cir. 2005) (quoting *Prudential Ins. Co. of Am. v. Prescott*, 176 So. 875, 878 (Fla. 1937)). They allow insurers who fail to detect fraud during underwriting a second opportunity to detect and address fraud, while at the same time providing consumers with necessary certainty in their affairs after a reasonable period of

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[3] The statute contains two additional exceptions, but those exceptions relate to provisions relating to disability benefits and additional insurance against accidental death. *See* § 627.455, Fla. Stat.

time. *See Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1059 (11th Cir. 2007); *Miller*, 424 F.3d at 1115 ("The incontestability clause thus works to the mutual advantage of the insurer and the insured, giving the insured a guaranty against expensive litigation to defeat his policy after the lapse of the time specified, and at the same time giving the company a reasonable time and opportunity to ascertain whether the insurance contract should remain in force."). "The object of the 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, 102 (1920).

Incontestability provisions stem from "the legislative conviction that a policyholder should not indefinitely pay premiums to an insurer, under the belief that benefits are available, only to have it judicially determined after the death of the insured that the policy is void because of some defect existing at the time the policy was issued." *New England Mut. Life Ins. Co. v. Caruso*, 535 N.E.2d 270, 272 (N.Y. 1989). A ruling in Pruco's favor, however, will open the door to litigation challenging any assignment for consideration at any time, including after the filing of a death claim by investors. This would create a cloud on marketable title of life insurance and inhibit capital investment in the secondary market, resulting in substantial harm to policyowners. It would also create "an unnecessary

advantage" to the insurance carrier by "enabling it to avoid a claim it previously accepted." *Caruso*, 535 N.E. 2d at 272. "This inequity may be avoided, and the public purpose underlying the insurable interest requirement implemented, by a rule which encourages the insurer to investigate the insurable interest of its policyholders promptly within the two-year period." *Id.*

Not only do incontestability provisions provide a bright-line, objective standard that is simple for market participants to understand and for courts to apply, they also encourage insurance carriers to investigate policies in a timely manner. Without such provisions, carriers would have a perverse incentive to wait to challenge a policy until they determine whether that policy will be profitable (i.e., depending on how long the insured lives) or until presented with a death claim. Similarly, the incontestability provisions encourage insurance carriers to monitor the activity of their sales agents, to whom insurers often point as having been responsible for alleged fraudulent activity. Without the two-year limitation, insurers would be incentivized to turn a blind eye to their agents' activities while continuing to collect premiums on a policy they may choose to contest at a later date.

In enacting section 627.455, the Florida legislature determined that the public policy concerns behind the incontestability statute did not justify an insurable interest exception and could be dealt with in other ways, such as by

providing a cause of action to the insured's estate for insurable interest violations. *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."). The Court should not now extend the contestability period farther than envisioned by the legislature.

C. Adoption of the good faith intent standard set forth by Pruco will destabilize the secondary market for life insurance and increase litigation by insurance carriers seeking to avoid their payment obligations.

Adoption of Pruco's position—allowing insurers to challenge life insurance policies based solely on a retrospective examination of the insured's subjective intentions when procuring the policy—will curb consumers' ability to utilize their property rights and radically disrupt the secondary market for life insurance policies in Florida. Indeed, coupled with Pruco's argument that insurable interest challenges should survive the two-year contestability period, a rule permitting insurers to void policies based on the insured's intent when procuring the policy would leave all legitimate life settlements open to challenge indefinitely based on an unclear standard that would be entirely unworkable in practice.

In enacting section 627.404, the Florida legislature provided an objective standard for evaluating insurable interest that is clear, easy to apply, and protects both consumer and investor rights. *See* § 627.404, Fla. Stat. (providing 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). Indeed, the statute requires only that there be an insurable interest at inception. *See* § 627.404, Fla. Stat. ("The insurable interest need not exist after the inception date of coverage under the contract."). By requiring that insurable interest be present at policy inception only, the Florida legislature created a framework that plainly contemplates that consumers can properly take out a policy with the awareness that they may assign it to someone without insurable interest, and that they may consider this right—and an intent to act thereon—in their purchasing decisions. Finding that section 627.404 prohibits an insured from procuring a policy with the intent of transferring it to a third party in the future would be contrary to the explicit language of the statute and would undermine the policyowner's fundamental property right in the policy.

As explained previously, a life insurance policy is an asset that, like any other property, can be sold, transferred, or assigned. *Grigsby,* 222 U.S. at 156; § 627.422, Fla. Stat.. As with a "horse, or an automobile, or any other personal property," a consumer may consider one of the most basic "ordinary characteristics

of property"—i.e., its market value—when deciding whether to purchase a life insurance policy. *Lyman*, 128 Or. at 580; *Grigsby*, 222 U.S. at 156. But Pruco urges adoption of an unprecedented rule prohibiting a consumer from purchasing insurance on his own life with an awareness of its potential resale value and a generalized intent to capture its worth through sale or assignment at some point in the future. Indeed, reading into section 627.404 an intent never to transfer would render section 627.422—which specifically allows for the sale or transfer of a policy—meaningless. Pruco's argument also casts aside over 100 years of common law that establishes that unwarranted restrictions on assignment destroy property rights. *See, e.g.*, *Grigsby*, 222 U.S. at 156. The Court should not adopt a position that would essentially punish an informed consumer for exercising his lawful property rights.

The Court should be particularly hesitant to find an implied prohibition against procuring policies with the intent to transfer them because creating such an implied prohibition would also infuse significant uncertainty into the life settlement market. Like all markets, the life settlement market depends on clarity and certainty in order to function efficiently. Permitting challenges to life settlements based on the insured's intent at the time of issuance would create an unclear standard and would prevent investors from having certainty regarding their assets. Such a subjective intent requirement would allow virtually unlimited

challenges to these transactions and would also be impossible to judge. *See First Penn-Pacific Life Ins. Co. v. Evans*, 313 F. App'x 633, 636 (4th Cir. 2009) (citing LISA's amicus brief and participation in oral argument for its conclusion that "evaluating insurable interest on the basis of the subjective intent of the insured at the time the policy issues . . . would be unworkable and would inject uncertainty into the secondary market for life insurance").

Not only is it nearly impossible to divine an insured's intent well after procurement (indeed, often after they are dead, as such challenges often arise after a death claim has been filed), but the subjective intent standard would unfairly punish responsible investors. Even if an investor plays no role in the procurement of a policy it later purchases, it could face a challenge to the validity of its investment based on the insured's intent, not the investor's own actions. Additionally, because insurers typically raise insurable interest challenges only at the time a claim is made—after the insured is dead—an investor would be forced to defend the insured's intent without the best evidence of that intent: the testimony of the insured. Insurers, on the other hand, would have the advantage of using hindsight to argue that the fact that the policy was sold is evidence that the insured intended to sell it from the outset. Notably, this rule would also have potentially devastating effects on the families of insureds who have passed away. At the very time they are grieving their deceased family member, they will be forced to attend

depositions and testify about events that took place years prior. *See PHL Variable Ins. Co. v. Bank of Utah*, 780 F.3d 863, 870 (8th Cir. 2015) ("Subjecting insureds and their beneficiaries to this inquiry cannot be squared with the public policy declaration in *Grigsby* that 'it is desirable to give to life policies the ordinary characteristics of property.'").

The insureds/consumers—the very people insurable interest laws are designed to protect—would also suffer as a subjective intent standard would severely limit an insured's options after purchasing a policy. The increased risk of legal challenges to a policy would dissuade investors from purchasing policies altogether and from paying as much as they would otherwise pay if there were certainty that a policy could not be challenged based on an insured's subjective intent. As a result, there will be a significant decrease in the demand for, and value of, policies on the secondary market. This, in turn, would harm insureds who need to sell their policies for liquidity, to pay medical bills, or for any other important reasons because they would have fewer options for selling policies and would receive less value for their policies.

In contrast, insurance carriers would benefit greatly from such a standard. To be sure, insurance carriers (who have the most information available to them and are analyzing representations made at the time a policy is being procured) would have no real incentive to conduct the proper due diligence at the time of

procurement. Instead, they would be incentivized to wait and challenge every policy at the time a death claim is made. If they succeed, they will avoid having to pay the death benefit, and, if they lose, they simply must honor their contractual obligation.

Because insurable interest laws are created to protect the public interest, not insurers' commercial interests, an insurable interest standard that benefits only them—like the standard Pruco suggests—should be viewed with great skepticism. Florida's insurable interest statute should not be judicially rewritten to impose a subjective standard that makes it easier for insurer to deny claims after having happily accepted premiums until the insured's death.

CONCLUSION

For the foregoing reasons, LISA submits that the Court should answer both certified questions "no."

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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been sent via e-mail on June 15, 2015, to the following counsel:

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