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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-382

L.T. Case Nos: 13-12135 & 13-15859

WELLS FARGO BANK, N.A., as Securities Intermediary and U.S. BANK, N.A., as Securities Intermediary,

Appellants,

vs.

PRUCO LIFE INSURANCE COMPANY

Appellee.

On Discretionary Review from a Decision of The United States Court of Appeals for The Eleventh Circuit Certifying Certain Questions

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ANSWER BRIEF OF APPELLEE PRUCO LIFE INSURANCE COMPANY

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STATEMENT OF THE CASE

The United States Circuit Court of Appeals for the Eleventh Circuit has certified two questions to this Court.

> 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?

Pruco Life Insurance Co. v. Wells Fargo Bank, N.A., 780 F.3d 1327, 1336 (11th Cir. 2015).[1]

The certification was the product of trying to reconcile different conclusions from different district courts of the Southern District of Florida regarding the interplay between Fla. Stat. §§ 627.404 (2008) and 627.455 (1982).

> Choosing between the two competing positions on this question, as it was required to do, the *Berger* court [Judge Cohn] decided to follow the majority view: that because a policy without an insurable interest was void *ab initio*, the incontestability clause never took effect,

[1] Pruco has filed two appendices in conjunction this initial brief on the merits. The first appendix, which is paginated PA.1 – PA.353, consists of the important publicly available documents. The second appendix, which is paginated PA.354 – 566, consists of documents that are part of the record, but were filed under seal. Citations to the record which are not included in the joint appendix will be to the respective district court docket, using the same citation convention as used in the Appellants' initial brief on the merits.

> and therefore it never expired. In lining up with the minority view, however, the *Guild* court [Judge Moreno] noted that an incontestability clause works to the mutual advantage of the insurer and the insured by giving the insured a guaranty against expensive litigation and giving the insurance company a reasonable period of time to ascertain whether the insurance contract is subject to any valid challenges.

Id. at 1334.

As the Court of Appeals recognized, in declaring the life insurance contract at issue void *ab initio*, the district court in the *Berger* case[2] had concluded that "sham assignments seeking to circumvent Florida's law prohibiting a wagering contract on the life of another, as embodied in § 627.404 … would be deemed to have been obtained in bad faith." *Id*. at 1335. Thus, if a person violates Fla. Stat. § 627.404, the policy does not go into effect at all, and the incontestability clause has no application. *Pruco Life Ins. Co. v. Brasner*, Civ. No. 10-80804-JIC, 2011 WL 134056, at *6 (S.D. Fla. Jan. 7, 2011).

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[2] The *Berger* case is captioned *Pruco Life Ins. Co. v. Brasner, et al.*, Civ. No. 10-80804-JIC, filed in the Southern District of Florida on July 9, 2010. Appellant Wells Fargo, as securities intermediary, appealed to the 11th Circuit Court of Appeals from a summary judgment ruling issued in Pruco's favor on November 14, 2011.

STATEMENT OF THE FACTS

The Court of Appeals for the Eleventh Circuit considered two cases which arrived in different procedural postures. The first, *Berger*, was decided on summary judgment. The second, *Guild*, was decided on a motion to dismiss.[3]

I. The Berger Policy

The *Berger* court found the following undisputed facts supported summary judgment in favor of Pruco.

- Mrs. Berger did not know that the application for the life insurance policy sought $10 million in coverage, (PA.82-83 at 68:20-71:18), and she did not provide the financial or other information that was used to procure a policy n that amount (*id.* at PA.80; PA.85-88);

- Mrs. Berger did not know that a trust was created in her name to own the policy (*id.* at PA.99 at 135:17-23), and her husband, Richard Berger, did not know that he had been installed as the nominal trustee of that trust (*id.* at PA.184 at 149:6-151:1);

- Mrs. Berger did not understand that the trust created in her name borrowed hundreds of thousands of dollars to pay the first two years of premium for the policy (*id.* at PA.93 at 113:3-24);

[3] The *Guild* case is captioned *Pruco Life Ins. Co. v. Richardson, et al.*, Civ. No. 12-24441-FAM, filed in the Southern District of Florida on December 17, 2012. Appellee Pruco appealed to the 11th Circuit Court of Appeals from a motion to dismiss ruling in favor of U.S. Bank, as securities intermediary, issued on August 20, 2013.

- Neither Mrs. Berger nor any of her family members paid the initial $81,871.75 premium (or any subsequent premiums), and they could not afford to pay those premiums (*id.* at PA.80 at 59:10-60:5; PA.105 at 159:15-23; PA.168 at 83:23-84:15);

- Mrs. Berger did not at any point control the policy, and from before the application was prepared she knew that the policy would come to be owned by strangers (*id.* at PA.81-82 at 65:20-67:2; PA.89-90 at 97:15-98:11; PA.164-165 at 69:17-71:6);

- Coventry, a life insurance secondary market company, took control of the policy in January 2006 – more than four months *before* the policy was issued – by having Mrs. Berger unwittingly sign a power of attorney that ceded control over the yet-to-be issued policy to Coventry (PA.26-28; *see also* PAS.357-358; PAS.426-429);

- Coventry paid the first premium, in the amount of $81,871.75, with only the policy itself as collateral (PA.260-264) and, shortly after the issuance of the Policy, the premium financing loan paid $331,077.29, the remaining premium required to bring the Policy past the ostensible expiration of the two-year contestable period in the Policy (PA.272); and

- Almost exactly two years after the policy was issued, Coventry purchased the Berger Policy (PAS.365-371) and then immediately sold the Policy to AIG Life Settlements[4], the company for which Wells Fargo presently acts as securities intermediary (PAS.365-371).

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[4] AIG Life Settlements, LLC, a subsidiary of AIG, subsequently changed its name to Lavastone Capital, LLC ("Lavastone") (PAS.470 at 5:9-19).

The circumstances surrounding the procurement of the Berger Policy are disturbing. In mid-2005, after asking their accountant about "free insurance," the Bergers were introduced to Steven Brasner, a licensed insurance broker who worked with a number of insurance carriers (PA.24-25). Brasner then introduced the Bergers to Coventry Capital I, LLC and Coventry First, LLC (collectively, "Coventry") (*id*. at PA.24-27).

Coventry and Brasner prepared a life insurance application for a $10 million policy – an amount chosen by Coventry without regard for the Bergers' net worth or assets (PA.28-30).[5] The initial premium on the $10 million policy was $81,871.75, which Brasner arranged to be paid by a non-recourse premium financing loan that was administered by Coventry and funded by LaSalle Bank, N.A., through a trust and sub-trust that Coventry created (PA.203-210; 260-272).

Richard Berger was named as co-trustee and beneficial owner of the trust, but the trust document stated on its face:

> [T]he Co-Trustee acknowledges and agrees that it is not expected or entitled to receive any [monies received by the Trust] or any other property or proceeds of the property of the Trust, but that if it does in fact receive any such moneys, property or proceeds, the Co-Trustee promptly shall notify the Trustee thereof and deliver the same to or at the direction of the Trustee.

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[5] To "support" the $10 million face value of the policy, Brasner fabricated a Confidential Financial Statement that identified Ms. Berger's total net worth as $15.95 million, purportedly signed by her accountant, but that was not based on Ms. Berger's net worth or assets (PA.28-29).

PA.265.

The supplement to the trust agreement further restricted the policy by requiring repayment of the loan before the policy could be relinquished to the trust (PAS.440) (although the policy could also be relinquished or foreclosed on) (PAS.444-445).[6] The sub-trust was the formal "applicant" for the high-interest[7] premium financing loan from La Salle that was collateralized only by the policy (PAS.451-452).[8]

Under the power of attorney Mrs. Berger signed in favor of Coventry, she expressly allocated to Coventry the right to apply for, originate, service, maintain, and liquidate any life insurance policies on her life and renounced any right to revoke the power of attorney or change the appointment. PA.26-28; *see also*

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[6] The Note, on the other hand, provided an option to satisfy the Loan from any death benefit paid (PA.203-210). It appears that when the Court of Appeals for the Eleventh Circuit observed that Mr. Berger may have received some of the death benefit if Mrs. Berger had died during the two-year period, it was looking at the language in the note rather than the language in the trust and sub-trust documents (*id.*; *see also* PA.19)

[7] The record shows that the stated rate of interest was 18.94 percent (PA.210).

[8] Brasner, Coventry and LaSalle were not able to finalize the Trust agreement until July 2006, even though the Berger Policy was issued in May 2006 (PA.203). Therefore, Mr. Berger was initially installed as the beneficiary of the Berger Policy (*id.* at PA.212). The Trust was then substituted as the beneficiary in July 2006 once the paperwork was completed (*id.* at PA.265-270). These machinations were of no moment to the plan, of course, because Coventry had for all intents and purposes seized control of the Berger Policy with the January 2006 power of attorney signed by Ms. Berger (PAS.357-358; PAS.426-429).

PAS.357-358; PAS.426-429). She agreed to indemnify Coventry and hold it harmless for any actions it took in reliance on the power of attorney (*id*.).[9]

When the initial premium came due, Coventry wired $81,871.75 to Brasner's bank account (PA.260). Brasner then had a cashiers' check issued in the same amount, made payable to Pruco but containing only "Berger" in the lower left-hand corner (*id.* at PA.263-264). Brasner sent that cashiers' check to Pruco as though it had come from Mrs. Berger directly (*id.* at PA.264). Once the premium finance loan was finalized, LaSalle sent Pruco a premium payment of $331,077.29, which paid the policy premiums for two years, and it sent Brasner a separate check for $81,870.75 (made out to Mrs. Berger, but signed over to Brasner), which he deposited, writing his own check in that amount to Coventry Financial, LLC, a Coventry affiliate (*id.* at PA.272-278).

In May 2008, almost exactly two years after the Berger policy was issued, Brasner arranged for a payment of $172,828.86 to be made to the Bergers as an "insurance disbursement" – compensation for their participation in the "free insurance" scheme (PA.171-172 at 94:21-98:14; PA.279-282). In September 2008, the day before the premium financing loan matured, Mrs. Berger signed an Irrevocable Seller Instruction Letter and formally relinquished all rights, interests, powers and privileges in the trust and sub-trust to Coventry, at the same time

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[9] In the power of attorney that Mr. Berger executed, he likewise agreed to indemnify and hold Coventry harmless (PAS.426-429).

executing a Second Supplement to Trust Agreement permitting Berger to step down as co-trustee (PA.31; *see also* PAS.410-413).

LaSalle notified the trust that the obligations had been satisfied (PAS.345; PAS.364-371), and sold the Berger Policy to Coventry, which, in turn, sold it to AIG[10] for $1.048 million (PAS.365-370). That amount included an origination fee, a premium reimbursement, and other fees (PAS.369-370). Pursuant to the contract between AIG and Coventry, Wells Fargo was installed as the record owner of the Berger Policy, as securities intermediary for Lavastone (PAS.506-507 at 148:11-151:5).[11]

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[10] Shortly after the powers of attorney were signed, AIG underwrote the transaction to identify whether it would provide "premium finance insurance coverage," which ensured that if LaSalle ended up with a loss on the loan, LaSalle would be made whole by AIG in return for the collateral – *i.e.*, the policy (PAS.490-492 at 84:5-7, 94:23-97:18).

[11] Lavastone has had a contract with Coventry since 2001 (PAS.499 at 120:9-121:22). Coventry originates life settlements (*i.e.* life insurance policies sold on the secondary market) for AIG, and it services those life settlements once they are owned by AIG (PAS.490-493 at 84:5-7, 94:23-97:18).

II. The Guild Policies[12]

Rosalind Guild was eighty years old when she was offered "free insurance" (PA.324 at ¶ 40). She, too, created a trust, the Rosalind Guild Family Insurance Irrevocable Trust, to be the record owner and beneficiary of the Guild policies (PA.321 at ¶ 28). Two applications – for a combined $10 million – were submitted to Pruco in September 2005, signed by her insurance broker, Mr. Richardson (PA.325 at ¶ 42), which identified Ms. Guild's daughter, Joan, as prospective beneficiary (PA.324-235 at ¶ 41). Wells Fargo was trustee (PA.331 at ¶ 68).

As with Mrs. Berger, the broker set the total $10 million amount without the knowledge or agreement of Ms. Guild, and the broker also fabricated the financial justification for that amount of insurance (PA.325-329 at ¶¶ 43, 44, 47, 48, 57, 58). Although the source for the initial and future premiums was reported as Ms. Guild's "current income or savings account," she never paid any premium for the Guild Policies and could not have afforded to (PA.327 at ¶ 51). The Guild Policies were issued on October 21, 2005 (PA.331 at ¶ 67). An initial premium payment of $374,150.00 was made for policy number V1200032 on or about November 4, 2005, and an initial premium payment of $327,000.00 was made for policy number

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12 Because the *Guild* case was decided on a motion to dismiss in the district court, the facts in the complaint are to be taken as true. *Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010); *see also Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1206 (Fla. 2010).

V1200034 on or about November 8, 2005, but neither of those, nor the subsequent premium payments, was made by Ms. Guild (*id*. at ¶ 68).

Prior to, and at all times following the submission of the Guild Applications, it was understood and agreed that Ms. Guild would not receive the death benefit from the Guild Policies upon Ms. Guild's death, but that the policies would be sold on the secondary market to a third-party investor (PA.329 at ¶ 58). A little over two years later, U.S. Bank purchased the policies (PA.332 at ¶ 70).

Against those factual backgrounds we turn to the applicable law.

SUMMARY OF THE ARGUMENT

These cases arise out of carefully planned and executed schemes to procure high face value life insurance policies on the lives of elderly Floridians. The sole objective of the schemes was to make money by transforming a life insurance policy into a tradable asset. To do that, the schemers had to deceive Pruco into issuing each of the three policies. These policies were always meant to benefit an investor – a stranger to the insured – and as a result, were not supported by an insurable interest as a matter of Florida law. The insurable interest requirement, which is mandated by Florida statutory and common law, assures the state, the public and the participants that at its inception a life insurance policy protects the value of a life for someone (a beneficiary) whose interest is in seeing the insured stay alive. The public policy reasons for this are obvious. In Florida, these policy

considerations are codified at Fla. Stat. § 627.404. If such an insurable interest is lacking at the inception of the policy, the life insurance policy is an illegal wagering contract, and therefore void *ab initio* because it is contrary to public policy.

Nevertheless, the Banks contend that, regardless of whether or not the Berger Policy was supported by an insurable interest at inception, Pruco's declaratory judgment claim is barred by the two-year contestability provision contained in each Policy. Pruco is mandated by statute (Fla. Stat. § 627.455) to include the contestability provision in its policies, however, the statute itself does not create a statutory contestable period. Therefore, the contestability period is a contractual provision just like any other. Further, Fla. Stat. § 627.455 requires the inclusion of a contestability provision in every "in force" life insurance policy. Since a policy lacking an insurable interest is void *ab initio* it never enters into force. Accordingly §§ 627.404 and 627.455 work together and complement each other nicely: if a policy is issued that is contrary to the public policy of Florida and is therefore void *ab intio*, the policy never takes effect, and the contestability provision never gains force. If, however, a policy enters into force, under the plain language of § 627.455, the contestability provision is then valid and enforceable. The facts in the instant cases establish that the policies at issue were void *ab initio*.

STANDARD OF REVIEW

As framed by the Court of Appeals, both questions certified to this Court require statutory construction, and thus raise questions of law subject to *de novo* and plenary review. *Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388, 390 (Fla. 2013).

ARGUMENT

I. UNDER FLORIDA LAW, INCLUDING FLA. STAT. § 627.404, AN INSURANCE POLICY IS VOID *AB INITIO* WHERE THE INSURANCE POLICY WAS UNSUPPORTED BY AN INSURABLE INTEREST AT INCEPTION

Florida's insurable interest statute, Fla. Stat. § 627.404(1) provides:

> (1) 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.

Fla. Stat. § 627.404(1).

The House Insurance Report explains that the statute was enacted because "[t]he circumstances under which a person may insure the life or health of another are not currently addressed in Florida statutes. However, the requirements have been established by Florida courts. The bill *codifies and clarifies these*

requirements." *See* 2008 Legis. Bill Hist., FL H.B. 375, PA.343.[13] In decisions tracing back to English common law, courts (including the United States Supreme Court and the Florida Supreme Court) have recognized that insurance policies that are unsupported by an insurable interest at inception are void *ab initio*. "A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him." *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 460 (1876)

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[13] This is the pertinent legislative history. The Banks characterize the fact that the legislature contemplated – but did not – adopt legislation that might have impacted the construction of the statute as "legislative history," but it is not. Banks' Br. at 32-33. Legislative history concerns the enactment of the statute at issue. That is why in *Canney v. Bd. of Pub. Instr. of Alachua Cnty*., 278 So. 2d 260, 263 (Fla. 1973) the Court found it significant that in *enacting* the statute the legislature contemplated but rejected different language. In that regard, the other cases on which the Banks rely are also inapposite. This is not a case where a local government sought to enact an ordinance to circumvent a statute, as in *Collier Cnty. v. State*, 733 So. 2d 1012, 1019 (Fla. 1999). And *State v. Ashley,* 701 So. 2d 338 (Fla. 1997), says precisely what Pruco does: statutes can coexist with – and not supplant – the common law. The section of *Ashley* excerpted in the Banks' brief states in full:

> This Court cannot abrogate willy-nilly a centuries-old principle of the common law – which is grounded in the wisdom of experience and has been adopted by the legislature – and install in its place a contrary rule bristling with red flags and followed by no other court in the nation. As we have said time and again, the making of social policy is a matter within the purview of the legislature – not this Court.

Id. at 342-43; *see also* Banks' Br. at 32-33. These words make sense and should be followed here. The long-standing common law of Florida establishes that the life insurance policies at issue in this case are void *ab initio*.

(recognizing that English law prior to 1688 prohibited policies in which the insured party was interested in the loss or destruction of what is insured); *Meerdink v. American Ins. Co.*, 188 So. 764, 766 (Fla. 1939) ("[F]undamental principles of insurance … require that a person shall have an insurable interest before he can insure: a policy issued when there is no such interest is void."); *Lopez v. Life Ins. Co. of America*, 406 So. 2d 1155, 1158 (Fla. 4th DCA 1981) ("Florida law requires that an individual contracting for insurance on the life of another have an insurable interest ... The obvious purpose of that requirement is to prevent so-called 'wagering' contracts."), *aff'd*, 443 So. 2d 947 (Fla. 1983).

Those who procured the Berger Policy – Coventry and Brasner – had no interest in the continued health and well-being of Ms. Berger. They were individuals and entities with no relationship or affinity to the insured who decided the pay-out they wanted to receive upon Ms. Berger's death, and they set that as the face amount of the "insurance." PA.28-29; *Knott v. State ex rel. Guar. Income Life Ins. Co.*, 186 So. 788, 789 (Fla. 1939) ("[I]t has been uniformly held that a contract of insurance upon a life in which the insurer has no interest is a pure wager, that gives the insurer a sinister counter-interest in having the life come to an end.").[14]

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[14] For this reason, *amici* for the Banks should instead be filing in support of Prudential. The individuals and entities that procured the policies at issue are not seeking to protect the interests of consumers, and particularly the most vulnerable

Full Value's *Amicus* brief argues that Prudential does not have a statutory cause of action under Fla. Stat. § 627.404 misses the mark because the authority for the action Pruco brought is the common law: the longstanding public policy that has been incorporated in Fla. Stat. § 627.404(1). *See Found. Health v. Westside EKG Assocs*., 944 So. 2d 188, 194 (Fla. 2006) (affirming the right to bring a common law claim based on allegations incorporating a statute with no express private right of action); *see also* Full Value's *Amicus Curiae* Br., at 7. For that reason, *QBE Ins. Corp. v. Chalfonte Condominium Apt. Assoc., Inc*., 94 So. 3d 541 (Fla. 2012) and *Lemy v. Direct Gen'l Fin. Co*., 884 F. Supp. 2d 1236 (M.D. Fla. 2012) are inapposite.[15]

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of consumers; they are seeking to manipulate them for profit. It is offensive that the Banks and their *amici* would describe Florida's senior citizens as "particularly vulnerable" to policy lapses and pretend to the Court that they are agents of compassion toward those who can no longer afford to maintain their insurance policies, Banks' Br. at 34, when, in the cases at bar, the procurers of the policies deliberately set the face amount (and correspondence premium required) at levels that were knowingly and deliberately unaffordable for the insureds and their families and did not address any legitimate insurance need – just the investment "needs" of the Banks. PA.36-42. If instead Ms. Guild and Mrs. Berger had sought insurance from Pruco in a legitimate insurance transaction, they would have been issued life insurance that they could afford and that would have protected them against a real risk of loss. *Id.*

[15] Indeed, until 2008 the Insurable Interest Statute contained only two provisions, one of which permitted an insurer to rely on the statements made by an applicant relating to whether the applicant has an insurable interest – a provision that remains in the statute, *see* Fla. Stat. § 627.404 – and a provision that allowed charitable organizations meeting the requirements of that section to own or purchase life insurance on an insured, so long as the insured consented in writing

A. The Insurable Interest Statute Protects Pruco as Well as Persons Such as the Bergers and the Guilds.

The Banks and their *amici* contend that the only interest that Fla. Stat. § 627.404 protects is that of the insured. That is belied by the statutory language. Neither the Banks nor their *amici* address Fla. Stat. § 627.404(3), which states that "[a]n insurer shall be entitled to rely upon all statements, declarations, and representations made by an applicant for insurance relative to the insurable interest which such applicant has in the insured; and no insurer shall incur any legal liability except as set forth in the policy, by virtue of any untrue statements, declarations, or representations so relied upon in good faith by the insurer." Fla. Stat. § 627.404(3).

This provision predated the 2008 amendment and confirms that the statute was not enacted solely for the protection of insureds. Additionally, the provisions of the statute, and the case law that the statute clarified and codified, set forth the clear and indisputable result of a policy unsupported by an insurable interest at inception: such policy is against public policy and void *ab initio*. *See Knott*, 186 So. at 789 (Fla. 1939). The Florida common law is also clear that insurers have regularly sought, and obtained, declarations from Florida courts that a wagering policy, which by its nature is unsupported by an insurable interest, is void. *See,*

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to the purchase of that insurance. *See* Senate Banking and Insurance Committee Analysis, PA.348-353. The current statute responded to confusion arising from cases in other jurisdictions. *Id.*

e.g., *Lopez v. Life Ins. Co. of America*, 406 So. 2d 1155, 1158 (Fla. 4th DCA 1981); *TTSI Irrevocable Trust v. ReliaStar Life Ins. Co.*, 60 So.3d 1148, 1149 (Fla. 5th DCA 2011). Of course, the statute also protects the interests of the insured by granting an insured (or his personal representative) a statutory right to recover benefits improperly paid out to a person who had no insurable interest. Fla. Stat. § 627.404(4). There is nothing remotely inconsistent about the statute providing such protections to both the insurer and the insured (or his personal representative); the former was already clear in the law; the latter was created by the legislature to provide a statutory right against a third person that was not express under the case law and that is not standard contract law.

Here, because the challenge arose before benefits had been paid out, it was the insurer who was harmed. Had benefits under the policy already been paid to Coventry, for example, Mr. Berger would have no complaint against *Pruco*, but as between the two payees, legislative wisdom determined that the stranger investor should not keep its ill-gotten gains. Thus, the statute is not – as the Banks suggest – concerned with protecting *the Banks*; it is instead concerned with (i) prohibiting illegal and illegitimate insurance transactions (and thereby protecting legitimate ones); and (ii) protecting both parties to such transactions against persons who manipulate the system to effect a wager prohibited by law.

B. The *Berger* Court's Construction of Fla. Stat. § 627.404 Does Not Limit Insureds' Property Rights.

The Banks argue that because Mrs. Berger and Ms. Guild were the record insureds and had ostensibly named family members as beneficiaries, they had the right to determine to transfer the policies after they purchased them, and that Pruco is unduly restricting insureds' right to alienate their property. Banks' Br. at 26-27. But the Bergers and Guilds did not have a property right to transfer or restrict; the families ceded control of the policies before they were ever written via powers of attorney. It does not restrict alienability to require that a policy be in effect and in the control of the policyholder as a precondition to its alienation any more than requiring ownership prevents a person from selling an item that is held on layaway or prevents an investor from rehypothecating pledged stock. *See Meerdink*, 188 So. at 766 ("Having no insurable interest in the property, he could sustain no loss and there was no eventuality for the insurer to insure him against."); *Aetna Ins. Co. v. King*, 265 So. 2d 716, 718 (Fla. 1st DCA 1972) ("The public policy of this state renders an insurance policy invalid when the insured has no insurable interest in the property or the risk insured on the grounds that same constitutes a wagering contract.").

Additionally, despite the parade of horribles wrongly predicted by the Banks and their *amici*, there is no public policy problem, nor difficulty for the courts, in differentiating between a policy lacking an insurable interest at inception (*i.e.*, a

wager contract) and a policy legitimately procured which the insured decides to later transfer. Indeed, the United States Supreme Court drew that very same distinction with ease a century ago, and, as the Banks and *amici* recognize, that line has fostered proper transfers of the property interest an insured holds in his policy while continuing to condemn the conduct that occurred here:

> [A] policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred.

Conn. Mut., 94 U.S. at 461.

The facts surrounding the procurement of the Berger Policy are clear and undisputed. They are perhaps the quintessential example of a life insurance policy where a "merely temporary interest" was set up in furtherance of a bad faith "intent to evade" the insurable interest rule. *Id.*

C. The *Berger* Court Did Not Impose an Additional Requirement on to the Insurable Interest Statute.

The Banks suggest that the district court or the Court of Appeals for the Eleventh Circuit "implied that" the insurable interest statute contained a "good-faith intent never to transfer a policy," requirement, Banks' Br. at 10, 15-16. The Banks then hypothesize that if Pruco prevails, a prospective insured would be required to form an affirmative intent not to transfer the policy. *Id.* at 27, 36. The

Banks' contention is flawed. The Banks try to conflate two different concepts in the hopes of making Pruco's position appear unreasonable; however, there is a significant difference between Pruco's actual position and the Banks' mischaracterization of it. Pruco's position is that Florida statutory and common law requires a life insurance contract to be procured in good faith, with the purpose of benefiting someone with a recognized insurable interest in the life insured. *Meerdink*, 188 So. at 766 ("[F]undamental principles of insurance … require that a person shall have an insurable interest before he can insure: a policy issued when there is no such interest is void."); *Knott*, 186 So. at 789.

When, on the other hand, a policy is procured with an understanding that its purpose is to benefit an investor whose sole interest in the insured is how quickly she passes away so that the investor can reap the death benefit, that violates the fundamental insurable interest requirement. *Grigsby v. Russell*, 222 U.S. 149, 154 (1911) ("A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end."). Therefore, contrary to the Banks' mischaracterization, Pruco does not contend that an applicant for insurance must intend, at the time the policy is procured, to *never* transfer ownership of the policy, but rather that a life insurance policy may not be procured for the purpose of later transferring it to an investor with no insurable interest in the life insured, thereby circumventing the

provisions of Florida insurable interest law. *See* Fla. Stat. § 627.404; *TTSI*, 60 So.3d at 1149.

The position advocated by Pruco on this issue, and adopted by the *Berger* district court, is not exceptional, or even unique to life insurance contracts. Indeed, whether or not it is in the context of insurance contracts, good faith is an integral element of Florida contract law. "Under Florida law, every contract contains an implied covenant of good faith and fair dealing, requiring the parties to follow standards of good faith and fair dealing designed to protect the parties' reasonable contractual expectations." *Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F.3d 1146, 1151 (11th Cir. 2005) (citing *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999)).

> [T]here is an implied covenant of good faith and fair dealing attached to Fla. Stat. § 627.404's requirement that there be an insurable interest at the inception of each insurance policy. Therefore if the insurance policy at issue "was procured with the intention that it will be assigned or otherwise transferred to a person or entity with no insurable interest in the life of the insured," it is void *ab initio*.

Sciaretta v. Lincoln National Life Ins. Co., 899 F. Supp. 2d 1318, 1325 (S.D. Fla. 2012) (quoting *AXA Equitable v. Infin. Fin. Group*, 608 F. Supp. 2d 1349, 1357 (S.D. Fla. 2009).

That makes sense; just as the conduct of a contracting party can demonstrate his or her disregard for the contractual obligation to deal fairly and in good faith, the conduct of a stranger orchestrating an insurance application process can demonstrate an intent to disregard the insurable interest statute. As the *Berger* district court found, there were two malevolent prongs to the Banks' deception, both of which were tied to Florida's statutes: first, to create an appearance of an insurable interest; and then to wait for two years before formalizing the transaction begun before the policy was issued. PA.37-42. An application for insurance is designed to be a simple and straightforward transaction to protect what a person has from risk. The elaborate scheme that Coventry, Brasner, AIG and others planned and executed to procure insurance on the lives of Ms. Berger and Ms. Guild was neither simple nor straightforward, and it did not protect the Bergers or Guilds from risk.

This was brought home to the district court by the testimony of Patricia Wagner, Brasner's assistant at the time, who called the procurement of the Berger policy "smoke and mirrors." PA.28-29. She further explained that the payment of the first premium to Pruco was designed to "appear[] to come from the client therefore it doesn't cause any red flags … So in essence … it was [designed] to mislead." *Id.; see also PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 28 A.3d 1059, 1075 (Del. 2011) (holding that, in determining whether a policy was

supported by insurable interest, a court should look at who procured the policy and "to determine who procured the policy, we look at who pays the premiums."). Thus, the bad faith which the *Berger* Court found was apparent from the Banks' attempted circumvention of the insurable interest statute by means of the incontestability statute.

There is nothing wrong with a legislative prerequisite to procuring a valid life insurance policy requiring that the party procuring a life insurance policy have an insurable interest in having the life of the insured continue. Nor does it impose an undue burden to hold that such a fundamental interest will be satisfied when the procurer of a life insurance policy applies for the policy in good faith. To give force to that inherent good faith requirement the law must hold that a life insurance policy procured by persons without an insurable interest in the life insured is an illegal contract that is void *ab initio* and consequently unenforceable. *See Schneberger v. Wheeler*, 859 F.2d 1477, 1481 (11th Cir. 1988) ("If a contract or note is void *ab initio,* it is a nullity."); *TTSI*, 60 So.3d at 1149 ("After determining … that TTSI did not have an insurable interest in Ms. Tennant's life, the trial court held: (1) the life insurance policy was void *ab initio*…."); *Sciaretta*, 899 F. Supp. 2d at 1324.

II. THE CONTRACTUAL CONTESTABILITY PROVISION DOES NOT APPLY TO AN ACTION TO DECLARE A POLICY VOID *AB INITIO* BECAUSE THE POLICY WAS UNSUPPORTED BY AN INSURABLE INTEREST.

The Banks, in effect, argue that the legislature intended to protect them, so long as they were able to disguise the lack of insurable interest for two years. Banks' Br. at 24-26. But the contestability statute is not, and never has been, a statutory bar from suit, but rather a requirement that insurers include a provision in their contracts to protect insureds from uncertainty and a risk that they might be unable to substantiate late-challenged information in a policy application. A contract provision is valid and enforceable only if the contract itself is valid and enforceable.

First enacted in 1955, section 627.455 of the Florida Statutes provides that:

> Every 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 except for nonpayment of premiums and except, at the option of the insurer, as to provisions relative to benefits in event of disability and as to provisions which grant additional insurance specifically against death by accident or accidental means.

Fla. Stat. § 627.455.

Although there have been no cases decided by this Court specifically addressing whether or not the incontestable provision in an insurance policy bars a challenge to the validity of a policy that was void *ab initio*, the decision in *TTSI*

Irrevocable Trust v. ReliaStar Life Insurance Company supports the view that whether or not a life insurance policy is void *ab initio* is a threshold issue:

> Because the statute clearly states that the contract shall provide that it is incontestable after it has been in force for two years, it follows that a policy that is void *ab initio* and was therefore never in force also never had an incontestability provision in effect. Accordingly, the terms of that policy do not bar a claim that there was no insurable interest.

60 So. 3d at 1150.

That reading is consistent with general principles of Florida law and with the conclusions of three of the four federal district courts that have applied Florida law in answering the question (the *Guild* district court decision is not in harmony). *See Sciaretta*, 899 F. Supp. 2d at 1328 ("[I]f the Policy is found to be void *ab initio* because there was no insurable interest at its inception, then the contestability period is not applicable."); *John Hancock Life Ins. Co. v. Rubenstein*, No. 1:09-cv-21741-UU, D.E. 28, at *5 (S.D. Fla. Sept. 1, 2009) ("[I]f the Policy is void *ab initio* because an insurable interest is lacking, the incontestability clause would be of no effect.").

First, the underlying purpose of statutory construction is "to give effect to legislative intent, which is the polestar that guides the court in statutory construction" and "legislative intent is determined first and foremost from the statute's text." *Raymond James Fin. Servs. v. Phillips*, 126 So. 3d 186, 190 (Fla.

2013). Thus, "significance and effect" is attributed to the words and phrases employed. *Id*. at 191. Here, the legislature drafted a statute that uses an adverbial clause, "after [the policy] has been in force," to define which policies can be incontestable. Beyond that, the legislature *did not say* "Every insurance policy shall be incontestable…." Instead, it placed an obligation on insurers to include a clause in their contracts, further emphasizing the importance of the contract being in force.

Although the Banks and their *amici* characterize Pruco as attempting to add "an exception" to the incontestability statute, Pruco is simply reading text that is already there. It is the Banks who are trying to *subtract from* the statute by ignoring the plain meaning of "in force."

Second, as this Court has explained:

> We have said that parties are free to contract around a state law so long as there is nothing void as to public policy or statutory law. However, a contractual provision that contravenes legislative intent in a way that is clearly injurious to the public good violates public policy and is thus unenforceable.

Franks v. Bowers, 116 So. 3d 1240, 1247 (Fla. 2013) (internal citations omitted).

What the Banks are asking this Court to do is precisely what the Court said in *Franks* it would not do: enforce a contract provision without regard to the validity of the underlying contract. Of four district courts that predicted the course this Court would take, only the *Guild* Court has agreed with the Banks. *See*

Brasner, 2011 WL 134056 at *6 ("[T]he Court will allow Plaintiff to pursue its claim that the Berger Policy is void *ab initio*, because should Plaintiff prevail, the incontestability clause never went into effect and therefore never expired."); S*ciaretta*, 899 F. Supp. 2d at 1328; *Rubenstein*, No. 1:09-cv-2174, D.E. 28 at *5.

A. The Banks Ignore the Distinction Between a Void Contract and a Voidable Contract.

The Banks ask this Court to apply Florida cases that stand for the proposition that an insurer is barred from *rescinding* a life insurance policy based on fraud more than two years after the issuance of such policy. Banks' Br. at 19-23. But Florida law (consistent with other jurisdictions) draws a distinction between *void* and *voidable*. *See B.H. v. State*, 645 So. 2d 987, 995 (Fla. 1994) ("In other words, the statute was illegally enacted and thus was void *ab initio*, as opposed to being merely voidable. All parts of an act void because of defective enactment never have any actual effect, including repealers"); *cf. Ludwinska v. John Hancock Mut. Life Ins. Co.*, 178 A. 28, 30 (Pa. 1935) (a "contract must be made by someone capable of contracting under the insurance law [and] [w]ithout this, neither the incontestable clause contained in the policy nor the policy itself has any life. The clause can rise no higher than the policy; the incontestable clause cannot of itself create the contract"); *Paul Revere Life Ins. Co. v. Fima*, 105 F.3d 490, 492 (9th Cir. 1997) ("California law provides that a policy which is void *ab initio* may be contested at any time, even after the incontestability period has

expired.”) (citations omitted); *Obartuch v. Sec. Mut. Life Ins. Co.*, 114 F.2d 873, 878 (7th Cir. 1940) (the incontestable clause “presupposes a valid contract and not one void *ab initio* – it cannot be used as a vehicle to sanctify that which never existed … the policies as issued were void and the incontestable clause without effect”); *Beard v. Am. Agency Life Ins. Co.*, 550 A.2d 677, 689 (Md. 1988) (holding that “[i]ncontestability does not apply to a policy which is void ab initio … [because] the invocation of an incontestability provision presupposes a basically valid contract”) (quoting *Crump v. Nw. Nat. Life Ins. Co.*, 236 Cal. App. 2d 149, 157 (Cal. 1st DCA 1965)); *see also Lincoln Nat'l Life Ins. Co. v. Joseph Schlanger 2006 Ins. Trust*, 28 A.3d 436, 440 n.18 (Del. 2011) (collecting cases).

B. **Fraud as to an Insurable Interest is Different in Kind from Fraud in an Application for Insurance.**

Likewise, the Banks contend that the Court should treat the fraud in this case the same way it treats fraudulent misrepresentations in an insurance policy application, arguing that because there was deception and subterfuge involved, the two-year bar should be absolute. *See, e.g., Paul Revere Life Ins. Co. v. Damus, Ecker, Rosenthal and Marshall, M.D.*, 864 So. 2d 442, 444 (Fla. 3d DCA 2003) (recognizing that the incontestability clause bars claims “based on misrepresentations or other conditions of coverage” after a brief time). Certainly, the lengths to which Coventry and Brasner went to hide the lack of insurable interest while at the same time ensuring that the Bergers and Ms. Guild could never

actually have insurance was "fraudulent." But the fraud involved here was merely a necessary step towards achieving the ultimate goal – procuring high face value life insurance policies that would ultimately benefit stranger investors with no interest in the continued life of Ms. Guild and Ms. Berger. In these cases, that investor was AIG.

In addition, the Banks posit that the legislature was trying to impose a duty upon insurers to investigate whether a party had an insurable interest. But such a notion is expressly contradicted by Florida Stat. § 627.404(3).[16] *See Sciaretta*, 899 F. Supp. 2d at 1330 (rejecting a duty to investigate based on the statute and *United Auto. Ins. Co. v. Salgado*, 22 So.3d 594, 601 (Fla. 3d DCA 2009)).

Thus, the statutes themselves differentiate between fraud *by* an insured and fraud *against* an insured. *Compare* Fla. Stat. §627.455 (requiring contract protections for policyholders) *with* Fla. Stat. § 627.404(3) (entitling an insurer to rely on representations as to insurable interest). The difference is this: when a person is trying to insure his or her own life, it is important that an insurer ascertain early on whether misinformation is the result of fraud in order to protect the insured. But where the fraud is by a sophisticated outsider (here, multiple

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[16] Section 627.404(3) states that "[a]n insurer shall be entitled to rely upon all statements, declarations, and representations made by an applicant for insurance relative to the insurable interest which such applicant has in the insured; and no insurer shall incur any legal liability except as set forth in the policy, by virtue of any untrue statements, declarations, or representations so relied upon in good faith by the insurer."

sophisticated outsiders), seeking illicit profits on the backs of a putative insured, with no interest in the insurance *qua* insurance, the law protects the insurer. *AXA Equitable*, 608 F. Supp. 2d at 1349; *Sciaretta*, 899 F. Supp. 2d at 1331.

Indeed, in January, 2009, Florida Insurance Commissioner Kevin McCarty released an Office of Insurance Regulation Report setting forth the agency's investigation into practices such as those engaged in by the individuals and entities that procured the policies at issue here. *See* Stranger Originated Life Insurance and the Use of Fraudulent Activity to Circumvent the Intent of Florida's Insurable Interest Law ("OIR Report"), PA.286-314. The OIR Report defines STOLI as "a practice or plan to initiate, or originate a life insurance policy for the benefit of investors who seek payment by purchasing life insurance on a stranger." STOLI policies are, by definition, policies that are "stranger originated" – *i.e.*, procured by persons with no incentive to prolong the life of the insured. PA.297; *see also PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 28 A.3d 1059, 1070 (Del. 2011) ("These policies, commonly known as "stranger originated life insurance," or STOLI, lack an insurable interest and are thus an illegal wager on human life.").

The OIR Report lists hallmarks of STOLI activity including, but not limited to:

- Seniors being induced to obtain life insurance they do not want or need for any legitimate purpose;
- Misrepresentations to insurers in the application for insurance; and
- Trust ownership of the resulting policy, with the trust applying for a non-recourse premium financing loan that allows the lender to take control of the policy and sell it in the secondary market following the expiration of the policy's two-year contestable period.

PA.297-301.

The agency condemned STOLI transactions, concluding that "it is imperative that we act to protect our seniors and all Floridians from becoming victims of fraudulent activity." PA.313. The Banks' conduct here mirrors that described in the OIR Report. PA.299-300.

In light of these concerns, courts across the country have found that an insurable interest defect is not "merely a species of fraud;" it negates the contract completely. *See Ludwinska v. John Hancock Mut. Life Ins. Co*., 178 A. 28, 30 (Pa. 1935); *Obartuch v. Sec. Mut. Life Ins. Co*., 114 F.2d 873, 878 (7th Cir. 1940) (the incontestable clause "presupposes a valid contract and not one void *ab initio* – it cannot be used as a vehicle to sanctify that which never existed … the policies as issued were void and the incontestable clause without effect"); *Beard*, 550 A.2d at

689 (holding that "[i]ncontestability does not apply to a policy which is void *ab initio* … [because] the invocation of an incontestability provision presupposes a basically valid contract").

III. HARMONIZING THE RESPECTIVE PUBLIC POLICIES ANIMATING FLORIDA STATUTES §§ 627.455 AND 627.404 IS THE ONLY WAY TO GIVE PROPER EFFECT TO BOTH STATUTES.

Based on the text employed in the two statutes, they flow seamlessly together: if there is no insurable interest, there is no policy in force, and the two-year contestable period cannot be enforced to render the insurable interest incontestable. Construed any other way, the two statutes conflict, because the insurable interest statute does not impose a time frame upon an insurer's reliance or its ability to avoid liability. Fla. Stat. § 627.404(3).

The Maryland Court of Appeals similarly harmonized its analogous statutes:

> [W]e are confronted with two statutes with seemingly conflicting underlying public policies. We conclude that while the incontestability statute serves the substantial public interest in protecting claimants from the possibility of expensive litigation, the public policy behind the statutory requirement that the procurer of insurance have an insurable interest in the insured is an even more compelling goal. Consequently, having found that Beard lacked an insurable interest … and that the contracts for insurance … were void *ab initio*, we hold that the incontestability clause does not apply in this case and is not a bar to the lack of an insurable interest defense.

Beard v. The Am. Agency Life Ins. Co., 550 A.2d 677, 690-91 (Md. 1988).

While the policy determination of another state's court of appeals is only persuasive to this Court, the Maryland Court of Appeals applied the same principles of construction that Florida applies and that are discussed above to give effect to the specific terms that its legislature chose. This Court has been clear that laws that "cover the same general field" should be construed in such a way that they harmonize, rather than conflict, favoring "a rational, sensible construction." *Boca Raton v. Gidman*, 440 So. 2d 1277, 1282 (Fla. 1983).[17] Here, the rational and sensible construction gives effect to all of the provisions of both statutes and preserves the legislative policies embodied in each statute by requiring an insurable interest in order for a policy to take effect; and then requiring a policy to take effect and be in force in order for a party to enforce the incontestability clause in the contract.

[17] If this Court were to find the statutes in conflict, the more specific statute – in this case, the insurable interest statute – would control. *See* Fla. Stat. § 624.13 ("Provisions of this code relative to a particular kind of insurance or a particular type of insurer or to a particular matter shall prevail over provisions relating to insurance in general or insurers in general or to such matter in general").

CONCLUSION

The Eleventh Circuit certified the following two questions to this Court:

> 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?

For all of the reasons set forth above, Pruco respectfully requests that the Court answer both questions "yes."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on July 24, 2015, this foregoing initial merits brief was electronically filed with the Clerk of the Court. I also certify that the initial brief is being served this day on all counsel of record, either via transmission of notices of electronic filing generated by the Court.

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CERTIFICATE OF COMPLIANCE

I certify that this Answer Brief is submitted in Times New Roman 14-point font, which complies with the font requirement. *See* Fla. R. App. P. 9.100(1).

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