IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-382

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

and

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

Appellants,

vs.

PRUCO LIFE INSURANCE COMPANY,

Appellee.
_____/

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

BRIEF OF AMICUS CURIAE THE AMERICAN COUNCIL OF LIFE INSURERS

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Identity and Interest of Amicus Curiae

The American Council of Life Insurers ("ACLI") is a Washington, D.C.-based trade association with approximately 284 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 90 percent of industry assets and premiums. In Florida, 238 member companies provide financial and retirement security to families through life insurance, annuities, long-term care and disability income insurance, and retirement plans. ACLI members pay approximately 92% of the total of all life and annuity benefits and provide 91% of the total life insurance coverage in the United States.

ACLI is working actively in public policy forums to combat a phenomenon known as stranger-originated life insurance ("STOLI"), which involves the misuse of insurance products as vehicles for wagers on human lives by third-party strangers. STOLI violates the long-standing and nearly universal prohibition on illicit wagers. In addition, the procurement of STOLI policies typically involves fraud regarding the need for the policy and/or the insured's assets and net worth.

By opposing STOLI, ACLI and its member companies seek to protect the integrity of the life insurance product by ensuring that it is used for legitimate purposes.

Summary of Argument

STOLI has been rightly referred to as "a rogue subset of the life settlement industry"[1] and "the illegitimate offspring of the viatical and life settlement industry."[2] STOLI is not about legitimate life insurance, but instead facilitates wagering agreements under a veneer of legitimacy accomplished through complex documents, overt fraud, and harmful exploitation of Florida's seniors. Appellants seek to hide these transactions from court scrutiny by seeking a change in Florida law to remove the good faith requirement in the policies' procurement and misuse standard incontestability clauses to give validity to otherwise illegal contracts. The changes to the law advocated by Appellants will protect fraudsters at the expense of Florida seniors, the insurance industry and legitimate life settlements. For these reasons, the Court should answer "yes" to both certified questions.

I. Historical Background of Life Insurance and Insurable Interest

A. Life Insurance Serves a Vital Social Function

Life insurance developed in Genoa, and was introduced in England by

[1] Katherine A. Scanlon, *Anti-Stoli Legislation, Panacea or Pandora?*, 31 N. 5 Ins. Litig. Rep. 125, 1 (April 7, 2009).

[2] Eryn Matthews, *STOLI on the Rocks: Why States Should Eliminate the Abusive Practice of Stranger-Owned Life Insurance*, 14 Conn. Ins. L.J. 521, 525 (Spring 2008).

Italian merchants in the middle of the sixteenth century. *See* Susan Lorde Martin, *Betting on the Lives of Strangers: Life Settlements, STOLI and Securitization*, 13 U. Pa. J. Bus. L. 173, 175–6 (2010). The driving force behind life insurance's development was lenders' desire to diminish the economic risks associated with merchant borrowers' death. *Id.* These lenders diminished their individual economic risks by shifting them to an insurer, who, being the insurer of other similarly situated lenders, distributed the risk among a larger group.

These three elements: (1) an identifiable economic risk, (2) risk shifting, and (3) risk distribution, became the defining hallmarks of legitimate insurance. *See Comm'r v. Le Gierse*, 312 U.S. 531, 539 (1941) (noting that "actual 'insurance risk' [must be present] at the time the transaction was executed" and that "risk-shifting and risk-distributing are essential to a[n] . . . insurance contract"); *see also Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (listing pre-existing risk, transfer and distribution as criteria that qualify an activity as the business of insurance). While the role of life insurance today has greatly expanded, at its core remain fundamental economic risk shifting and risk distribution.

B. Misusing Life Insurance for Wagering Violates Public Policy

Soon after the first Genoa merchants were insured, speculators sought to use insurance, not for risk shifting purposes, but simply to wager on strangers' lives. *See* Martin, *supra*, at 175. In England, this became a popular pastime. *Id.* In

response, Parliament enacted the Life Assurance Act of 1774, prefaced as "[a]n Act for Regulating Insurances upon Lives, and for Prohibiting All such Insurances Except in Cases Where the Persons Insuring Shall Have an Interest in the Life or Death of the Persons Insured." 14 Geo. 3, c. 48 (Eng.). The Act stated:

> Whereas it hath been found by experience that the making of insurances on lives . . . wherein the assured shall have no interest[,] hath introduced a mischievous kind of gaming[,] . . . no insurance shall be made . . . on the life . . . of any person . . . wherein the person . . . for whose . . . benefit . . . such policy . . . shall be made, shall have no interest, or by way of gaming or wagering. . . . and in all cases where the insured hath interest in such life . . . no greater sum shall be recovered . . . from the insurer . . . than the amount of value of the interest of the insured in such life.

Id., Preamble, §§ 1, 3. In other words, Parliament prohibited wagering contracts masquerading as insurance and only permitted recovery on policies where a demonstrated economic risk existed.

The Act's notion of insurable interest became firmly rooted in the general law of the United States and the common law of every state. *See* Martin, *supra*, at 177. In 1815, in one of the earliest American cases addressing insurable interest in life insurance, the Massachusetts Supreme Court examined American and English law and opined that a contract would be valid where the beneficiary had a familial or pecuniary interest in the insured's life. *Lord v. Dall*, 12 Mass. 115, 118 (2 Mass. (1 Tyng) 1815). However, failing such an interest, "it would be a mere wager-policy, which we think would be contrary to the general policy of our laws, and therefore void." *Id.* This accorded with an 1803 decision of the Supreme

Court of Pennsylvania, which held that although the Life Assurance Act was not legally binding, the Act's principles had been adopted in the United States. *See Pritchet v. Ins. Co. of N. Am.*, 3 Yeates 458, 460, 1803 WL 757 (Pa. 1803).

During the latter half of the nineteenth century, the expression of public policy prohibiting wager contracts on human lives would be echoed in dozens of jurisdictions, leading one court to conclude that it was the common law of "all the states except where it has been altered by statute" that "all policies of insurance in favor of parties who had no interest in the life of the insured were wager policies, and null and void." *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294, 299 (Conn. 1871). The United States Supreme Court concisely expressed this public policy in *Warnock v. Davis* by stating that for there to be insurable interest:

> there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. *They are, therefore, independently of any statute on the subject, condemned, as being against public policy.*

104 U.S. 775, 779 (1881) (emphasis added).[3]

[3] *See also Grigsby v. Russell*, 222 U.S. 149 (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."); *Lamont v. Grand Lodge Iowa Legion of Honor*, 31 F. 177, 180 (C.C.N.D. Iowa 1887) ("Where a third party, without any insurable interest in the life of another, procures a policy of insurance on the life of such person, either by having a policy issued directly to himself, or by having the person whose life is insured take out a policy to himself,

C. Life Insurance Procured in Good Faith May Be Transferred to One Without an Insurable Interest

While confirming the public policy prohibiting wagering contracts and the necessity of insurable interest, courts also addressed the desire of some insureds to sell unwanted policies. The Supreme Court of Wisconsin noted in 1886 that an insured under "a valid policy should [not] be prevented from realizing the value of the same to him, before his death, by a *bona fide* sale or assignment thereof." *Bussinger v. Bank of Watertown*, 30 N.W. 290, 294 (Wis. 1886). The court limited this right to bona fide sales of policies initially procured in good faith. *Id.* Indeed, this requirement – for the sale of a policy to be bona fide, it must be procured in good faith and not as a cover for a wagering contract – is central to almost every opinion on this issue. *See Chamberlain v. Butler*, 86 N.W. 481, 483 (Neb. 1901) (assignment to one without an insurable interest permitted where the transaction is "wholly independent of and subsequent to the" issuance of the policy, and if the

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and then assign it, these facts . . . conclusively show that the transaction is a mere speculation on the life of another, and as such is contrary to public policy, and therefore void."); *Aetna Life Ins. Co v. France*, 94 U.S. 561, 564 (1876) ("[A]ny person has a right to procure an insurance on his own life and assign it to another, provided it be not done by way of cover for a wager policy."); *Gordon v. Ware Nat'l Bank*, 132 F. 444 (8th Cir. 1904) (noting that a life insurance policy procured by one without an insurable interest in the insured is void); *Metro. Life Ins. Co. v. Elison*, 83 P. 410 (Kan. 1905) (same); *Rittler v. Smith*, 16 A. 890 (Md. 1889) (same); *Cisna v. Sheibley*, 88 Ill. App. 385, 1899 WL 4656 (Ill. App. Ct. 1899)(invalidating a policy procured through a STOLI-style scheme as cover for a wager contract); *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 1872 WL 5534 (Ind. 1872)(same).

transfer "agreement had existed prior to the issuance of the policy, or contemporaneous therewith" the policy would be void); *Clement v. New York Life Ins. Co.*, 46 S.W. 561, 564 (Tenn. 1898) (voiding policy where insured transferred policy immediately after issuance because "the transfer and assignment must be made in good faith, and not as a mere colorable evasion of the provision in regard to wagering contracts, [ ] in order to validate or legalize the same").[4]

The United States Supreme Court addressed the issue definitively in *Grigsby v. Russell*, noting that while "[s]o far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property . . . cases in which a person having an interest lends himself to one without any, as a cloak to what is, in its inception, a wager, have no similarity to those where an honest contract is sold in good faith." 222 U.S. at 156. This principle is applied in the modern STOLI context. In *Dawe*, the Supreme Court of Delaware recognized that an assignment

[4] *See also Crosswell v. Connecticut Indem. Ass'n*, 28 S.E. 200, 204 (S.C. 1897) ("The essential thing (in life insurance) is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest." (quotations omitted)); *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 13 A. 673, 677 (Conn. 1888) ("[W]e think the weight of argument is in favor of permitting the owner of a contract of life insurance which has the sanction of the law to sell it upon the most advantageous terms, having the world for a market, provided it is an honest exchange of property, and not a mere cover for a wagering transaction."); *Mut. Life Ins. Co. of New York v. Allen*, 138 Mass. 24, 31 (Mass. 1884) (holding that an assignment made "in good faith for the purpose of obtaining [the policy's] present value, and not as a gaming risk between [an insured] and the assignee, or a cover for a contract of insurance between the insurer and the assignee" is permitted regardless of the fact that an assignee lacks an insurable interest).

may be a cover for a wager and "ignoring intent would result in an illogical triumph of form over substance that would completely undermine the public policy goals behind the insurable interest requirement." *Price Dawe 2006 Ins. Trust, ex rel. Christiana Bank & Trust Co.*, 28 A.3d 1059, 1071 (Del. 2011). Aware that "STOLI schemes are created to feign technical compliance," the court focused on whether the policy is obtained in good faith and not as a wagering contract:

> [I]f an insured procures a policy as a mere cover for a wager, then the insurable interest requirement is not satisfied . . . A bona fide insurance policy sale or assignment requires that the insured take out the policy in good faith—not as a cover for a wagering contract. . . . Thus, [Delaware law] requires courts to scrutinize the circumstances under which the policy was issued and determine who in fact procured or effected the policy.

Id. at 1074-75.[5]

[5] *See also AXA Equitable Life Ins. Co. v. Infinity Fin. Grp., LLC*, 608 F. Supp. 2d 1349, 1356 (S.D. Fla. 2009) (Florida law permits the assignment of life insurance policies to persons without an insurable interest in the life of the insured, but the rule "extends only to assignments made in good faith, and not to sham assignments made simply to circumvent the law's prohibition on 'wagering contracts.'"); *Sciaretta v. Lincoln Nat'l Life Ins. Co.*, 899 F. Supp. 2d 1318, 1324 (S.D. Fla. 2012) ("I find that there 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*."); *PHL Variable Ins. Co. v. Abrams*, 10CV521 BTM NLS, 2012 WL 10686 (S.D. Cal. Jan. 3, 2012) (policy would lack insurable interest if trust owner was a "straw man" carrying out a STOLI scheme); *PHL Variable Ins. Co. v. Sheldon Hathaway Family Ins. Trust ex rel. Hathaway*, 2:10-CV-67, 2013 WL 6230351 (D. Utah Dec. 2, 2013) (rescinding STOLI policy for fraud).

D. Florida Prohibits Evading the Insurable Interest Requirement

Florida has long recognized the distinction between insurance and wagering contracts. Before the codification of Florida's insurable interest laws, Florida courts utilized insurable interest as a tool to differentiate between legitimate insurance contracts to protect against a cognizable risk and "contracts" that serve only as wagers. The prohibition against wagering contracts has been firmly rooted in the state's jurisprudence since at least 1939, when the Florida Supreme Court found that an insurance policy lacking an insurable interest at inception constitutes an impermissible wager and is void as against public policy. *Knott v. State ex rel Guaranty Income Life Ins. Co.*, 186 So. 788, 789–90 (Fla. 1939) ("'It has been uniformly held that a contract of insurance upon a life in which the insurer has no interest is a pure wager' . . . a wagering contract is against the public policy of the state of Florida."); *Meerdink v. American Ins. Co*., 188 So. 764, 766 (Fla. 1939) ("[T]he fundamental principles of insurance . . . require that a person shall have an insurable interest . . . a policy issued [without] such interest is void.").

Following *Knott* and *Meerdink*, Florida courts consistently held that a life insurance policy issued without a valid insurable interest violates the state's public policy against wagering contracts and is void. *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 ground that the same constitutes a wagering contract."); *Atkinson v. Wal-Mart Stores, Inc.*, No. 8:08-cv-691-T-30TBM, 2009 WL 1458020, at *3 (M.D. Fla. May 26, 2009) ("Florida courts have long held that insurable interest is necessary to the validity of an insurance contract and, if it is lacking, the policy is considered a wagering contract and is void *ab initio* as against public policy."); *Brockton v. S. Life & Health Ins. Co.*, 556 So. 2d 1138, 1139 (Fla. 3d DCA 1989 ("It is well established in Florida that the 'insurable interest' is universally regarded as indispensable to the enforceability of an insurance contract . . . so as to preclude the existence of a merely betting interest in someone else."); *Life Ins. Co. of Am. v. Lopez*, 443 So. 2d 947, 948 (Fla. 1983) ("Florida law prohibits issuance of an insurance policy to one who has no insurable interest. The obvious purpose of that requirement is to prevent so-called 'wagering' contracts." (internal citations omitted)).

E. STOLI Speculators Exploit Consumers and Seek to Evade Insurable Interest Requirements Through Sham Transactions

Beginning in 2004, demand for life settlements far outpaced the supply of existing, bona fide policies. *See* Martin, supra, at 192–93. STOLI speculators sought to eliminate this problem by skipping the steps whereby an insured acquires life insurance in good faith for a legitimate insurance need, spends years funding premiums (and receiving insurance coverage), and then decides to sell the policy once the economic risk against which the policy was intended to mitigate has

dissipated. Instead, STOLI speculators generated new, high-face amount policies on older insureds, inducing them into participating in the schemes by offering a combination of cash payments, "free" insurance, or a share of the profits when the speculators sold the policy on the secondary market. *Id.* at 187–88.

F. Abusive Practices Target and Impact Seniors and the Industry

By 2009, over 17.6% of Florida's population was over 65, and in the decade from 1990 to 2000 the number of seniors increased by 438,000 or 18.5%.[6] STOLI targets seniors and thus a prolific amount of STOLI transactions occur in Florida. As Florida's Deputy Insurance Commissioner Mary Beth Senkewicz testified before the Senate Committee on Aging in April 2009:

> [STOLI] arrangements in particular provide little public benefit or satisfy any financial need in the marketplace. Instead, these products exist solely for profiting on the tax exempt status of life insurance proceeds. Whatever meager benefits are achieved through this arrangement do not override public policy concerns of wagering on human life, and exposing seniors to potential tax liabilities and litigation.[7]

Months earlier, the Florida Office of Insurance Regulation ("OIR") conducted a hearing on STOLI and issued findings in a detailed report, commenting that "[o]ne of the key issues addressed at the hearing was the harm and victimization that

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[6] TESTIMONY OF MARY BETH SENKEWICZ, DEPUTY INSURANCE COMMISSIONER, FLORIDA OFFICE OF INSURANCE REGULATION, LIFE SETTLEMENTS AND THE NEED FOR REGULATORY TRANSPARENCY, BEFORE THE SENATE SPECIAL COMMITTEE ON AGING at 12 (2009) [hereinafter Senkewicz Testimony], *available at* http://www.aging.senate.gov/imo/media/doc/hr207ms.pdf

[7] *Id*. at 13-14.

arises from STOLI transactions, in addition to the public policy concerns regarding wager policies."[8] Florida's Commissioner and others have identified risks to seniors and the insurance industry as a result of STOLI transactions, including:

1. Seniors are encouraged to overstate their income and net worth on the insurance applications.
2. Seniors may exhaust their insurance purchasing capability should they later want or need to purchase life insurance for a legitimate purpose.
3. The cash and other incentives to the seniors, as well as any cancellation of indebtedness, may subject them to unexpected tax liabilities.
4. Strangers will have access to the seniors' confidential health information and may contact the seniors inquiring about their health status.
5. Seniors could be sued by the insurer or the premium finance company.
6. A proliferation of STOLI could cause an increase in insurance rates related to increased lit6igation costs and other factors.
7. STOLI transactions may reduce the availability of insurance to persons over the age of 70.
8. Offers of free insurance or rebates may violate Florida's Unfair Insurance Trade Practices Act.
9. Seniors become unwitting participants in insurance fraud.[9]

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[8] FLORIDA OFFICE OF INSURANCE REGULATION, REPORT OF COMMISSIONER KEVIN M. MCCARTY: STRANGER-ORIGINATED LIFE INSURANCE (STOLI) AND THE USE OF FRAUDULENT ACTIVITY TO CIRCUMVENT THE INTENT OF FLORIDA'S INSURABLE INTEREST LAW at 16 (2009),
available at http://www.floir.com/siteDocuments/stolirpt012009.pdf.

[9] *Id.* at 17-22 (points 2, 3, 5, 6, 7); Senkewicz Testimony at 7, 13-14 (points 1-5); TESTIMONY OF MICHAEL T. MCRAITH, DIRECTOR OF INSURANCE, STATE OF ILLINOIS, BEFORE THE SENATE SPECIAL COMMITTEE ON AGING at 37-38 (2009) *available at* http://www.aging.senate.gov/imo/media/doc/4292009.pdf (points 2-5); Kevin C. Glasgow and Alan P. Jacobus, *A Price on Your Head? You Bet. Stranger*

The OIR issued a December 2013 report rejecting proposed legislative changes, which included making intent irrelevant to insurable interests and prohibiting insurable interest challenges after the contestability period.[10] The OIR found that "courts are addressing these issues based on the fact-specific circumstances of each case, and there is a significant concern that enacting these legislative changes may have the unintended consequence of encouraging STOLI and fraud."[11] The OIR also explained: "An attendant problem to the existence of STOLI schemes is that individuals are encouraged at the outset to procure more life insurance than would be needed if being purchased for legitimate insurance purposes. This treatment of life insurance solely as a commodity from inception is at odds with the purpose of life insurance and may have negative ramifications for the industry, to the detriment of Florida consumers, life insurance companies, and the legitimate viatical settlement industry."[12] What the OIR rejected as unnecessary and potentially harmful to consumers should not be provided to STOLI speculators by the changes of law Appellants advocate in this case.

Owned or Originated Life Insurance Policies: Problems and Solutions, 26 No. 3 Westlaw Journal White-Collar Crime 2 at 7-8 (2011) (points 1-3, 6, 9); Eryn Matthews, *STOLI on the Rocks: Why States Should Eliminate the Abusive Practice of Stranger-Owned Life Insurance*, 14 Conn. Ins. L.J. 521 at 531-35 (Spring 2008) (points 2, 4-6).

[10] THE FLORIDA OFFICE OF INSURANCE REGULATION: SECONDARY LIFE INSURANCE REPORT TO THE FLORIDA LEGISLATURE at 2-3 (2013) *available at http://www.floir.com/siteDocuments/SecondaryLifeInsMarketReport2013.pdf* .

[11] *Id.* at 3.

[12] *Id.* at 51.

II. Incontestability Clauses Do Not Apply To STOLI Policies

A. The Incontestability Clauses Only Apply To In Force Policies

"A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction." *Larimore v. State*, 2 So.3d 101, 106 (Fla. 2008). The analysis begins with the statutory language, which "should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts." *D.M.T. v. T.M.H.*, 129 So.3d 320, 332 (Fla. 2013) (quoting *Acosta v. Richter*, 671 So.2d 149, 153-54 (Fla. 1996)). The operative language of the incontestability statute reads:

> 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….

§ 627.455, Fla. Stat. (emphasis added). The words "in force" are critical because they evince the legislative intent that the incontestability clause required in an insurance contract only applies to an "in force," i.e., legally enforceable, contract. But a life insurance policy without an insurable interest at the time of issuance is never "in force" because it is legal nullity. *Schneberger v. Wheeler*, 859 F. 2d 1477, 1481 (11th Cir. 1988) ("If a contract or note is void *ab initio*, it is a nullity."); *Local No. 234 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Indus. Of United States and Canada v. Henley & Beckwith, Inc.*, 66 So.2d 818, 823 (Fla. 1953) ("Agreements in violation of public

policy are void because they have no legal sanction and establish no legitimate bond between the parties."). In other words, the incontestability clause cannot make valid an otherwise illegal contract since it is never in force.

Following this logic, the only Florida state court case to directly address whether an incontestability clause is applicable to an insurable interest challenge held that if a policy is void for lack of insurable interest, its incontestability clause never comes into effect and cannot bar an insurable interest defense. *TTSI Irrevocable Trust v. ReliaStar Life Ins. Co.* (*TTSI I*), No. 2009 CA 3111, 2010 WL 8721575, at *1 (Fla. 9th Cir. Ct. Feb. 9, 2010) As the court explained, "[t]he existence of an actual insurable interest is a fundamental pre-requisite to the creation of an insurance policy. Because no insurable interest existed in this case, there was no insurance policy to which § 627.455 could apply." *Id.* at *9. The court reasoned that the language of § 627.455, which provided that a "'policy shall be incontestable after it has been *in force* during the lifetime of the insured for a period of 2 years,'" *Id.* (quoting § 627.455, Fla. Stat.) (emphasis in original), applied "only to a policy that is 'in force.'" *TTSI I*, 2010 WL 8721575, at *9. The court emphasized that a policy lacking an insurable interest "is void and does not even come into being." *Id.* Thus, when a policy is "void *ab initio*, the

incontestability statute cannot serve to revive it." *Id.* at *10.[13] Notably, the majority of courts that have addressed this issue held that the lack of insurable interest at inception may be raised notwithstanding an incontestability provision.[14]

The distinction between *void* and *voidable* contracts is critically important in understanding why Florida courts overwhelmingly adopted the court's holding in *TTSI I*. While voidable policies are subject to the two-year contestability period, void *ab initio* policies are legal nullities. As the Court of Appeal explained on the appeal of *TTSI I*, "neither party could elect to give effect to the policy at issue because it was void at the outset." *TTSI Irrevocable Trust*, 60 So.3d at 1150. Since a void *ab initio* policy is a nullity, its provisions, including the incontestability clause, are void and unenforceable. *John Hancock Life Ins. Co. v. Rubenstein*, No. 09-cv-21741-UU, DE 28 at 5 (S.D. Fla. Sep. 1, 2009) ("if the

[13] The trial court's decision in *TTSI I* was affirmed on appeal in *TTSI Irrevocable Trust v. ReliaStar Life Ins. Co.*, 60 So. 3d 1148, 1151 (Fla. 5th DCA 2011).

[14] *See PHL Variable Ins. Co.*, 28 A.3d at 1064-68 (incontestability provision does not apply because a policy that lacks an insurable interest is void ab initio and thus part of the policy ever came into effect); *Paul Revere Life Ins. Co. v. Fima*, 105 F.3d 490 (9th Cir. 1997); *Minnesota Mutual Life Ins. Co. v. Ricciardello*, 1997 WL 631027, *2 fn.2 (D. Conn. Sept. 17, 1997); *Kentucky Cent. Life Ins. Co. v. McNabb*, 825 F. Supp. 269, 272-73 (D. Kan. 1993); *Commonwealth Life Ins. Co. v. George*, 28 So. 2d 910, 912 (Ala. 1947); *Home Life Ins. Co. v. Masterson*, 21 S.W.2d 414, 417 (Ark. 1929); *Carter Cont'l Life Ins. Co.*, 115 F.2d 947, 947-48 (D.C. Cir. 1940); *Wood v. New York Life Ins. Co.*, 336 S.E.2d 806, 811-12 (Ga. 1985); *Charbonnier v. Chicago Nat'l Life Ins. Co.*, 266 Ill. App. 412, 421-22 (1932); *Bromley's Adm'r v. Washington Life Ins. Co.*, 92 S.W. 17, 18 (Ky. 1906); *Goodwin v. Fed. Mut. Ins. Co.*, 180 So. 662, 665 (La. Ct. App. 1938); *Harris v Sovereign Camp*, 1940 WL 2917, at *2 (Ohio Ct. App. Feb. 19, 1940); *Henderson Life Ins. Co. of Va.*, 179 S.E. 680, 692 (S.C. 1935).

Policy is void *ab initio* because an insurable interest is lacking, the incontestability clause would be of no effect."); *Sciaretta v. Lincoln Nat'l Life Ins. Co. (Sciaretta I)*, No. 0:11-cv-80427-DMM, DE 32 at 5–6 (S.D. Fla. Sep. 9, 2011) (counterclaim that policy is void *ab initio* not barred by Florida's incontestability clause).

When the Supreme Court of Delaware answered a certified question on this issue based on a nearly identical statute requiring a two-year incontestability provision in life insurance policies, the court distinguished between contracts that are void *ab initio* and those merely voidable. *PHL Variable Ins. Co.*, 28 A.3d at 1067. The court held that a policy lacking an insurable interest at inception is void *ab initio*—from the outset. *Id.* at 1067-68. Further, since the legislature "chose to implement its goals through a mandatory *contractual* term" in insurance policies, it made "the statute to be entirely subject to Delaware's existing law of contract formation," meaning that the provision "should be treated like any other contract term" whose enforceability depends on whether there was an insurable interest as inception. *Id.* at 1066-68. The court found further support in the statutory words "in force" that "make the incontestability period *directly contingent* on the formation of a valid contract." *Id.* at 1066-67. In short, "if no insurance policy ever legally came into effect, then neither did any of its provisions, including the statutorily required incontestability clause." *Id.* at 1067-68. Consistent with "the majority of courts," the court held that insurers may challenge a policy for lack of

an insurable interests outside of the two-year incontestability period. *Id.* at 1065.

B. Appellants Seek a Departure from Longstanding Law

Appellants advocate the untenable notion that an incontestability provision breathes life into a void contract after two years. This ignores the statute's "in force" language and runs counter to the Court's refusal to enforce contracts that are void as against public policy. *Local No. 234*, 66 So.2d at 823 ("The cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity"). As the Court of Appeal explained: "This principle is founded upon public policy; that is, the objection which avoids the illegal contract comes from the public at large who demand that there can be no legal remedy for that which is itself illegal. Indeed, there rests upon the courts the affirmative duty of refusing to sustain that which by the valid laws of the state, statutory or organic, has been declared repugnant to public policy." *Gonzalez v. Trujillo*, 179 So.2d 896, 897 (Fla. 3d DCA 1965). Even express waivers will not overcome public policy: "A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reason." *Citizens' Bank & Trust Co. v. Mabry*, 136 So. 714, 717 (Fla. 1931) (quoting *Coppell v. Hall*, 74 U.S. 542, 558-59 (1868)). Nor can parties contract around public policy. *See Franks v. Bowers*, 116 So.3d 1240, 1242 (Fla. 2013). Thus, a provision in the illegal contract cannot overcome the taint of illegality.

Appellants' position violates other statutory construction principles, including that "[s]tatutes are construed to effectuate the intent of the legislature in light of public policy." *White v. Pepsico, Inc.*, 568 So.2d 886, 889 (Fla. 1990). Further, "[u]nless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law." *State v. Ashley*, 701 So.2d 338, 341 (Fla. 1997) (quoting *Thornber v. City of Fort Walton Beach*, 568 So.2d 914, 918 (Fla. 1990)). Here, the statute does not purport to alter the common law on insurable interests, and doing so will only benefit STOLI investors and promote fraud and the exploitation of seniors and the insurance industry. *See In re Rugg's Estate*, 32 So.2d 840, 843 (Fla. 1947) ("any ambiguity or uncertainty of such intent should receive the interpretation that best accords with the public benefit."). As such, the ACLI respectfully urges this Court to reject Appellants' position.

III. The Good Faith Intent Standard Will Permit Court Scrutiny

Appellants oppose a "good faith" standard in the § 627.404, Fla. Stat. requirement of an insurable interest at the inception of every life insurance policy. Their argument that such a requirement is unworkable rings hollow since the concept of "good faith" has proven itself workable as a part of Florida law in other contexts. *See Meruelo v. Mark Andrew of Palm Beaches, Ltd.*, 12 So.3d 247, 250 (Fla. 4th DCA 2009) ("implied covenant of good faith and fair dealing applies to

every contract"); § 671.203, Fla. Stat. ("Every contract or duty within this code imposes an obligation of good faith in its performance and enforcement."). Further, their argument ignores that the good faith requirement has for over a century been included in most opinions addressing insurable interest, including the recent *Dawe* decision by the Delaware Supreme Court, and nothing in § 627.404, Fla. Stat. explicitly eliminates the common law good faith requirement.

Appellants' position also ignores the reality of STOLI transactions, which involve complex paperwork designed to keep the insured, insurer and regulators in the dark as to the true nature of the transaction. Against the backdrop of transactions designed to appear legal on paper, the rejection of a good faith requirement in favor of "form over substance" would reduce insurable interest requirements to a technicality easily papered around in the design of the transaction. While this would profit STOLI investors, it will do so at the expense of Florida seniors and the insurance industry for all the reasons already addressed.

IV. Conclusion

For all of the reasons addressed above and in Pruco's brief, the changes to longstanding insurable interest law sought by Appellants and the expansion of the incontestability statute are unsupportable and would be to the detriment of Florida consumers and the insurance industry. The Court should answer "yes" to both certified questions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief has been sent via the Court's electronic service on July 31, 2015 to all parties identified below.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I hereby certify that the font used in the Motion is 14-point Times New Roman and is in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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