IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-382

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

and

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

Appellants,

vs.

PRUCO LIFE INSURANCE COMPANY,

Appellee.
_____/

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

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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

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Pruco's answer brief ignores the plain text of Florida's incontestability statute. Section 627.455, Florida Statutes, does not carve out an exception for void *ab initio* challenges. Nor does it conflict with the insurable-interest statute. Instead, it gives the insurer two years to bring *any* challenge. Pruco failed to challenge the Berger and Guild policies—from which it handsomely profited—within that time; and it is barred from doing so now (four and seven years, respectively, after the policies issued). The answer to the first certified question should thus be "no."

Rather than addressing the incontestability statute, Pruco's answer brief is premised on the mistaken assumption that Mrs. Berger and Mrs. Guild did not have insurable interests in their own lives when the policies issued. They did. But Pruco disregards those insurable interests, focusing instead on the conduct and intent of others, including Pruco's agents, to argue that the policies were void *ab initio* because someone other than the insureds planned to transfer the policies, at some point, for profit. The decisive factor, however, is whether an insurable interest existed *at inception*, as Florida law requires. Mrs. Berger's and Mrs. Guild's interests in their respective lives met that requirement, as did their chosen beneficiaries' interests. Whether and how those interests later changed is irrelevant because Pruco permitted assignment of the Berger and Guild Policies, although

section 627.422 allowed it to prohibit assignment (A. 22-23, 44, 135, 158), and "[t]he insurable interest need not exist after the inception date of coverage under the contract," § 627.404(1), Fla. Stat. (2008). Pruco's answer brief never addresses these arguments.

Instead, Pruco seeks to engraft an intent-not-to-transfer requirement—which it now recasts as a "purpose" inquiry—found nowhere in the statute. Any such subjective standard would be unworkable and overreaching, as it would handcuff Floridians who acquired life-insurance policies, intending to hold them, but later needed to transfer them for any of the foreseeable reasons discussed in the initial brief (br. at 34-37). But the discussion is ultimately academic because, whatever the advisability of an innocent-purpose requirement, only the Legislature can add one. Therefore, the Court, if it reaches the second question, should answer "no."

I. PRUCO'S "STATEMENT OF THE FACTS" REQUIRES CORRECTION

Pruco's answer brief includes inaccurate contentions that go well beyond the Eleventh Circuit's certified questions, without helping to answer either. We rectify the principal ones here.

Pruco first suggests that Mrs. Berger's husband never was entitled to policy proceeds (ans. br. at 5). Yet as a direct beneficiary, which Pruco concedes he was for several months (ans. br. at n.8), or as the trust beneficiary, which he remained until the policy's transfer (A. 99), Mr. Berger was entitled to benefits. Had Mrs.

Berger died within two years after her policy's inception, her husband would have been the policy's beneficiary (W.F. D.E. 187-13 at 2). Neither the trust documents limiting his recovery as a co-trustee, nor the power of attorney Pruco repeatedly cites, changes that result (ans. br. at 4, 6, 7, 8). Contrary to Pruco's insinuations, the supplement to the trust agreement merely addressed the priority of loan repayment (ans. br. at 6 & n.6).

The powers of attorney that Mr. and Mrs. Berger signed did not, as Pruco contends, allow Coventry to "seize[] control of the Berger Policy" (ans. br. at 6 n.8). Coventry testified that it did not control the Berger Policy before it was relinquished (W.F. D.E. 201-1 at 4-6). Indeed, "[t]he purpose and use of the Power of Attorney was limited to ensure that Coventry . . . could take only the necessary steps to perform its obligations as administrator under the Note Agreement." *Id.* But more importantly, the powers of attorney were not used to remove Mr. Berger as beneficiary before Mrs. Berger relinquished her policy. And Pruco's record citations do not support its claim that Mrs. Berger signed the power of attorney "unwittingly" (ans. br. at 4).

Pruco also refers to an "elaborate scheme that Coventry, Brasner, AIG and others, planned and executed to procure insurance on the lives of Ms. Berger and Ms. Guild" (ans. br. at 22). But there is no evidence to support Pruco's contention that Wells Fargo, U.S. Bank, their clients or any of their clients' affiliates

participated in procuring the Berger or Guild Policies. To the contrary, the evidence confirms that they did not (W.F. D.E. 188, ¶39 (citing depositions of Lavastone (W.F. D.E. 175-26 at 242) and Wells Fargo representatives (W.F. D.E. 175-27 at 134)). In fact, Lavastone and Wells Fargo were not involved with the Berger Policy until December 2008—more than two years after its inception—when Lavastone acquired the policy in the legitimate secondary market for life insurance (W.F. D.E. 187-22). And the district court recognized that Wells Fargo itself committed no fraud (W.F. D.E. 271 at 13). Because the case involving the Guild Policies was resolved on a motion to dismiss, no evidence supports Pruco's allegations as to U.S. Bank and those policies. Indeed, the complaint does not even allege that U.S. Bank was involved in their procurement (A. 123-133).

That said, the answers to the two certified questions do not turn on the facts of this or any other case. Instead, this Court must answer these questions based on Florida law and primarily by applying the plain language of the incontestability and insurable-interest statutes. As we explain below, the plain language of both statutes mandates answering the certified questions "no."

II. THE TWO-YEAR CONTESTABILITY PERIOD APPLIES

Not until page 24 of its answer brief does Pruco address the threshold incontestability question. When it does, it ignores the plain language of the incontestability statute. But section 627.455, Florida Statutes, nowhere creates the

exception for void *ab initio* challenges that Pruco hopes this Court will read into it. Had the Legislature wished to create that exception, it would appear in the statute.

Faced with problematic statutory text, Pruco attempts to minimize the statute: "[T]he 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 . . . ." (ans. br. at 24). But this Court has held that statutorily mandated incontestability clauses *do* function like statutes of limitations; and they *do* bar suits. *See Prudential Ins. Co. of Am. v. Prescott*, 176 So. 875, 878 (Fla. 1937) (noting that such clauses are "in the nature of, and serve[] a similar purpose as, a statute of limitations"). This case is no different.

To avoid the incontestability provisions, Pruco relies on *TTSI Irrevocable Trust v. ReliaStar Life Insurance Co.*, 60 So. 3d 1148 (Fla. 5th DCA 2011), arguing that it makes insurable interest—not contestability—the threshold question (ans. br. at 24-25). But *TTSI* addresses the return of premiums, not contestability or the order of analysis. And even if *TTSI* required the insurable-interest issue to be resolved first, the Court still would have to decide incontestability here because Mrs. Berger and Mrs. Guild had insurable interests in their respective lives at the policy's inception, as did their family-member beneficiaries (br. at 27, W.F. D.E. 201-2 at 3, 188 at 6; A. 127, 130, 134). Therefore, even under Pruco's argument, the policies were "in force" during the two-year contestability period and qualify

for application of the incontestability provisions (br. at 25-26). And because Pruco's only argument for *not* enforcing these provisions is lack of an insurable interest—which exists here as to both policies—the Court need go no further before answering the first certified question "no."

The United States Court of Appeals for the Eighth Circuit recently addressed the absurdity of Pruco's "in force" argument: "To declare that a facially valid policy on which PHL collected substantial premiums for over four years was never 'in force' is simply a fiction." *PHL Variable Ins. Co. v. Bank of Utah*, 780 F.3d 863, 871 (8th Cir. 2015). Here, Pruco earned over $2.7 million in premiums over the course of *seven* years for policies it now claims never existed (A. 29, 137). And it wants to *keep* those premiums (A. 29, 137). It cannot claim $2.7 million for itself and also argue that the policies never were in force. *See id.*

Pruco next refers to unspecified "general principles of Florida law" and decisions from the Southern District of Florida (ans. br. at 25). *Sciaretta v. Lincoln National Life Insurance Co.*, 899 F. Supp. 2d 1318 (S.D. Fla. 2012), followed the mistaken lead of the district-court opinion in *Wells Fargo* and was wrongly decided for the same reasons the district court erred there. And *John Hancock Life Insurance Company v. Rubenstein*, Case No. 09-21741-CIV-UNGARO (S.D. Fla. Aug. 31, 2009), was decided at the motion-to-dismiss stage, was not published, is

not binding on this Court and, for the reasons discussed in this reply, also was wrongly decided.[1]

Pruco argues that Wells Fargo and U.S. Bank ignore the distinction in Florida between void and voidable contracts (ans. br. at 27-28). But Pruco's survey of "Florida law" cites one Florida case (about legislation, not an insurance policy) and five cases from other jurisdictions (ans. br. at 27). In any event, as Wells Fargo and U.S. Bank explained in their initial brief (at 19-20), in this context, Florida courts do not distinguish between life-insurance policies alleged to be void and those alleged to be voidable. Rather, as the district court in *U.S. Bank* acknowledged (A. 234-35 n.2), they consider "whether the claim of the insurer relates to the validity of the policy or whether it relates to the limitations of coverage. If it relates to the former, it is barred; if to the latter it is not." *Paul Revere Life Ins. Co. v. Damus, Ecker, Rosenthal and Marshall, M.D.*, 864 So. 2d 442, 444 (Fla. 3d DCA 2004) (reversing summary judgment against an insurer because it did not challenge the policy's validity, and hence the incontestability clause did not bar the claim).

[1] Pruco also relies on *Franks v. Bowers*, 116 So. 3d 1240 (Fla. 2013) (ans. br. at 26). But that case involved an attempt to contract around a statutory requirement. *Id.* at 1247. Here, the policies *include* the required incontestability provisions.

Perhaps realizing that Florida law bars untimely challenges based on fraudulent misrepresentations during the application process, Pruco attempts to cast the fraud here as one of a different kind:

> [W]hen 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 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.

(ans. br. at 29-30).[2] This distinction is unconvincing. Investigating fraud—regardless of the source—protects the insurer, which has no obligation to save a would-be insured from herself, as Pruco suggests (ans. br. at 29). It also ignores Pruco's own assertions of Mrs. Berger's involvement in the fraud (Answer Brief of Appellee Pruco Life Ins. Co., Case No. 13-12135-E, at 7-8, 12-13). And as the cases cited in Wells Fargo and U.S. Bank's initial brief demonstrate (at 19-20), Florida courts have consistently held that allegations of fraud as a basis for invalidating a policy must be asserted within two years of the policy's inception.

Pruco cites section 627.404(3), in isolation, as the basis for distinguishing this case. That statute shields an insurer from liability, except as set forth in the

[2] Pruco has finally receded from its position that this case is not about fraud: "Put simply, Pruco's claim against U.S. Bank is not about fraud" (Initial Brief of Appellant Pruco Life Ins. Co., Case No. 13-15859-E, at 31).

policy, when it relies in good faith on an applicant's statements about insurable interest. *See* § 627.404(3), Fla. Stat. (2015). But it does not absolve an insurer from investigating a policy's validity, as Pruco suggests (ans. br. at 29). And it does not create an exception to the contestability period (ans. br. at 29). Indeed, courts recognize that the purpose of the two-year contestability window is precisely to give insurers a reasonable time to investigate policies for fraud before being finally bound. *Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1115 (11th Cir. 2005) ("The incontestability clause thus works to the mutual advantage of the insurer and insured . . . giv[ing] the company a reasonable time and opportunity to ascertain whether the [insurance] contract should remain in force"); *Bankers Sec. Life Ins. Soc. v. Kane*, 885 F.2d 820, 821 (11th Cir. 1989) ("Appellants correctly argue that the purpose of this statute [section 627.455] is to create a reasonable time period during which insurance companies can investigate applicants and void policies issued in error, while protecting consumers from untimely efforts to void policies.").

If anything, section 627.404(3) confirms that the Legislature knew how to write "good faith" into a statute, a requirement notably absent from the insurable-interest subsection *in the same statute*. *Compare* §627.404(3), Fla. Stat. ("[N]o 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.") (emphasis added) *with* §627.404(1), Fla. Stat. (not mentioning "good faith" or any other intent requirement). The proximity of these subsections underscores the Legislature's purposeful omission of that term in subsection (1).

In relying heavily on section 627.404(3), Pruco also disregards another neighboring and pertinent subsection, section 627.404(4). There, the Legislature provided a vehicle for insureds or personal representatives to recover when an insurer pays benefits "under any insurance contract procured by a person not having an insurable interest in the insured at the time such contract was made." *See* § 627.404(4), Fla. Stat. The insured or personal representative may look to the "beneficiary, assignee, or other payee" under the policy procured without an insurable interest for the policy benefits. *Id.* This statutory remedy—and the underlying presumption that the insurer will pay benefits on such a policy—undermine Pruco's argument that these policies never came into existence.

Pruco also relies on the January 2009 Office of Insurance Regulation Report ("OIR") (br. at 30-31). That report explains what the insurance industry would like Florida law to be, not what the law is. As Wells Fargo explained in its initial brief (at 32-33), the Legislature rejected proposed legislation that would have restricted the secondary market for life-insurance policies, as the report suggested. Had the Legislature wanted to change the law based on the report, it could have done so. That it did not demonstrates its determination to maintain the status quo. *See*

Alachua Cnty. v. Expedia, Inc., 2015 WL 3618004, at *5 (Fla. 2015) (holding, where an issue was raised as proposed legislation and the Legislature repeatedly declined to revise the statute, "that the Legislature's presumptive awareness of the issues for which the Counties now seek redress reflects the Legislature's willingness to maintain the status quo[.]"). This Court should not now step into the Legislature's role. *State v. Ashley*, 701 So. 2d 338, 343 (Fla. 1997) ("[T]he making of social policy is a matter within the purview of the legislature—not this Court.").

Similarly, Pruco's amicus discusses OIR reports and ways in which so-called STOLI practices harm seniors (amicus br. at 12-13). But the OIR does not make Florida law, and Florida law is not as amicus wishes it to be. Amicus should petition the Legislature—not this Court—for enactment of its wish list.[3]

III. THE POLICIES SATISFY THE REQUIREMENTS OF FLORIDA'S INSURABLE-INTEREST STATUTE

Pruco dedicates much of its insurable-interest argument to a question not before this Court: whether Florida law requires 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" (ans. br. at 10). Pruco repeats its argument at least six times: "A man cannot take out insurance on the life of a total

[3] Amicus ignores the harms, discussed in the initial brief (at 33-37), that would result from restricting the transferability of life-insurance policies. The harms amicus cites (amicus br. at 12) are not caused by so-called STOLI schemes, but from the insurance industry's opposition to the free transferability of such policies.

stranger" (ans. br. at 13); "[A] person shall have an insurable interest before he can insure" (ans. br. at 14); "Florida law requires that an individual contracting for insurance on the life of another have an insurable interest" (ans. br. at 14); "[T]he clear and indisputable result of a policy unsupported by an insurable interest at inception [is that] such policy is against public policy," (ans. br. at 16); "[A] wagering policy, which by its nature is unsupported by an insurable interest, is void" (ans. br. at 16); and "A contract of insurance upon a life in which the insured has no interest is a pure wager" (ans. br. at 20). These truisms are irrelevant here.

The Berger and Guild Policies complied with the insurable-interest requirement. As the initial brief explains, Mr. and Mrs. Berger procured the Berger Policy, Mr. Berger was its sole beneficiary, and Mrs. Berger had an insurable interest in her life, as did her husband (br. at 27; W.F. D.E. 201-2 at 3, W.F. D.E. 188 at 6). The Arlene Berger 2006 Life Insurance Trust (the "Berger Trust") facilitated the premium payments under a trust agreement naming Wilmington Trust Company as trustee and Mr. Berger as co-trustee and sole beneficial owner (br. at 4-5; W.F. D.E. 201-2 at 14). He was entitled to all the policy proceeds (br. at 5; D.E. 187-13 at 12), and as explained above, neither the trust documents nor the powers of attorney change that result (section I at 3).

Similarly, Mrs. Guild procured the Guild Policies (A. 123). Her policies were obtained with the aid of premium financing, and held in trust, the beneficiary

of which was a family member (A. 127, 130, 134). Mrs. Guild had an insurable interest in her life, as did her daughter. Pruco cannot ignore this reality by deflecting attention to the fraud of Pruco's agents (ans. br. at 14, 22, 23).

Pruco does not argue that Florida prohibits premium financing. Rather, it suggests that a court should look to who pays the premiums (ans. br. at 22-23) (citing *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust*, 28 A.3d 1059, 1075 (Del. 2011)). But in Florida (as in other states), financing of insurance premiums is regulated and lawful. See §§ 627.826 - .849, Fla. Stat. (2010).

IV. ADDING AN INTENT REQUIREMENT WOULD BE UNWORKABLE AND WOULD CONTRADICT THE LEGISLATURE'S DECISION TO ALLOW THE TRANSFER OF LIFE-INSURANCE POLICIES

Distilled to its essence, Pruco's entire answer brief advocates for the addition of a subjective intent-not-to-transfer requirement to the insurable-interest statute. The Court should reject Pruco's request for two main reasons: the plain language of the insurable-interest statute and—should it look beyond that—the sheer unmanageability of any such requirement.

As Pruco concedes, the statute itself contains no good-faith or other subjective requirement on insurable interest. If anything, it implies the opposite by noting that "[t]he insurable interest need not exist after the inception date of coverage under the contract." § 627.404(1), Fla. Stat. (2008). The statute is thus agnostic about what occurs after the policy's inception, defeating Pruco's argument

that a policy initiated with an intent to transfer is void *ab initio*.

Moreover, any such requirement would be unmanageable. Pruco defends the *Berger* court's addition of a good-faith requirement by summarily claiming that "there is no public policy problem, nor difficulty for the courts, in differentiating between a policy lacking an insurable interest at inception . . . and a policy legitimately procured which the insured decides to later transfer" (ans. br. at 19). But Pruco fails to explain how a court can securely impose a subjective intent requirement without ensnaring policyholders who originally intended to keep policies but later decided to transfer them (ans. br. at 18-23). Floridians procure life-insurance policies for a variety of reasons and may later transfer them for a variety of reasons. They also may finance premiums for a variety of reasons. No subjective-intent test or requirement can foresee all these variables and assure policyholders—or would-be policyholders—that a court will not delve into their intent decades after the incontestability period has expired and erroneously divest them of a policy—or its benefits—when their intention was to hold the policy throughout their lives.

And as the initial brief demonstrated (at 26-32), Florida expressly permits the transfer of life-insurance policies—even to one lacking an insurable interest in the life of the insured. In addition to section 627.404(1) ("[t]he insurable interest need not exist after the inception date of coverage under the contract"), section

627.422, Florida Statutes, expressly allows that "any life or health insurance policy under the terms of which the beneficiary may be changed upon the sole request of the policyowner, may be assigned . . . ." Here, the Berger and Guild Policies contained assignability provisions (A. 44, 158), and Pruco authorized assignments upon request (A. 22-23, 135). Pruco could have prohibited or restricted the transfer of its life-insurance policies; but then its policies would not be as marketable.

Perhaps recognizing the dearth of legislative support for its good-faith requirement, Pruco invokes the general proposition that "[u]nder Florida law, every contract contains an implied covenant of good faith and fair dealing," (br. at 21 (citing *Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F.3d 1146, 1151 (11th Cir. 2005)). But that covenant is not violated by an action that both Florida law and the Policies expressly permit.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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