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Whither *Grigsby*? STOLI and the Assault on Insurable Interest

by
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I. INTRODUCTION

In 1911, Oliver Wendell Holmes, writing for the majority of the United States Supreme Court, unequivocally (if unknowingly) established the legal distinction between the secondary life market and what has become known as stranger originated life insurance ("STOLI").[1] The common law in both England and the United States long-abhorred insurance without an interest as a "mischievous kind of gaming" and so developed the insurable interest doctrine *i.e.*, that an owner of a policy must have an interest in that insured.[2] However, the application of the doctrine to specific cases involving the purchase of life insurance produced varied results throughout the Eighteenth and Nineteenth Centuries.[3] In *Grigsby v. Russell*, Justice Holmes established that a life insurance policy, once purchased in good faith, could subsequently be assigned or otherwise alienated by its rightful owner.[4] *Grigsby* brought clear, manageable legal principles to nearly two

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[1] Grigsby v. Russell, 222 U.S. 149, 156–157 (1911).

[2] *See* Geoffrey Clark, Betting on Lives: The Culture of Life Insurance In England, 1695–1775 (1999).

[3] Conn. Mut. Ins. Co. v. Schaefer, 94 U.S. 457 (1876); Knickerbocker Life Ins. Co. v. Norton, 96 U.S. 234 (1877); Oakes v. Mfrs. Fire & Marine Ins. Co., 135 Mass. 248 (1883); Aetna Life Ins. Co. v. France, 94 U.S. 561 (1876); Mutual Life Ins. Co. v. Armstrong, 117 U.S. 591 (1886).

[4] *See* Grigsby v. Russell, 222 U.S. 149, 155–156 (1911).

centuries of inconsistent jurisprudence on the insurable interest doctrine, principles that were subsequently adopted by statute in all of the jurisdictions of the United States.[5]

For much of the Twentieth Century, the meaning and the application of insurable interest, as defined by *Grigsby* and later codified by statute, was largely uncontroversial. In the 1980s, however, a highly profitable secondary market in life insurance emerged due largely to (i) the outbreak of HIV/AIDS among a relatively youthful and insured demographic and (ii) the gap between the market value and surrender value of the newly created universal life policy.[6] The return on investment created by these opportunities resulted in the development of a well-funded secondary life market as well as a plethora of schemes to circumvent or outright violate states' insurable interest statutes. These schemes, much as they had in earlier centuries, use an individual's unlimited interest in his own life as a "cloak" for an investor's purchase of an interest in an insurance policy (or now in a trust that owns the policy) that the investor hopes will pay out from the insured's death. While these schemes have become more sophisticated in their attempts to strictly comply with state statutes, the intention remains to allow investors to gamble on the lives of strangers. Curiously, many courts in assessing these schemes for insurable interest fail to draw on the principles so clearly set forth in *Grisgby* between the secondary market and STOLI, chief among them that the sale of a policy must be preceded by a good faith purchase. The courts recent failures to draw such a distinction has tainted the broader secondary market while giving some legitimacy to STOLI promoters. The Delaware Supreme Court's recent decision in *PHL Variable Ins. Co., v. Price Dawe 2006 Ins. Trust*,[7] by contrast, represents the most definitive and thorough reaffirmation of the insurable interest doctrine since *Grigsby* and may signal a reversal in the doctrine's fortunes. *Price Dawe* directly addresses the application of insurable interest to these new, complex schemes to violate insurable interest in a manner consistent with the common law and state statute, and in doing so, breathes new life into Justice Holmes' original opinion in *Grisgby*.

II. THE ORIGINS OF THE INSURABLE INTEREST DOCTRINE

The best hedge against loss under any insurance policy is its rightful owner. That is because the law requires anyone purchasing an insurance policy to have

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[5] *See e.g.*, Iowa Code § 502.102(31A); 32 Me. Rev. Stat. § 16102(32); Neb. Rev. Stat. § 8-1101(17); N.J. Stat. § 49:3-49(W); Ohio Rev. Code Ann. § 1707.01; Utah Code Ann. § 61-1-13(L)(V); Wis. Stat. § 551.102(32).

[6] *See* Michael K. Stanley, *The Man with the Plan: 6 Questions for Alan Buerger*, National Underwriter Life & Health Magazine (Aug. 2012); Denise M. Schultz, *Angles of Mercy or Greedy Capitalists? Buying Life Insurance Policies from the Terminally Ill*, 24 Pepp. L. Rev. 99, 100 (1996).

[7] PHL Variable Ins. Co., v. Price Dawe 2006 Ins. Trust, 28 A.3d 1059, 1064 (Del. 2011).

an interest in the preservation of the property or the longevity of the life insured.[8] Policyholders' natural inclination to protect their property and care for their immediate family is further reinforced through proper valuation, deductibles, co-pays, and limitations on coverage. By these measures, policyholders are generally steered clear of moral hazard and insurance policies remain primarily a means to mitigate loss, not produce gain.[9]

The insurable interest doctrine dates back to the English Parliament's passage of the Marine Insurance Act of 1745 (the "Marine Act").[10] The Marine Act invalidated insurance policies procured by anyone without a pecuniary interest in the cargo transported. The Act was passed because it was found "by Experience, that the making Assurances, . . . without further Proof of Interest than the Policy, hath been productive of many pernicious Practices, whereby great Numbers of Ships with their Cargoes, have . . . been fraudulently lost and destroyed."[11] The insurance itself had become, in certain instances, a source of the destruction of the cargo insured. Similarly, it was common in Eighteenth-Century England to place wagers on the lives of famous personages or on those awaiting trial for capital crimes.[12] The English Parliament hoped to curb this practice with the passage of the Life Assurance Act of 1774 (the "Life Act"). The preamble to the Life Act states that "the making insurances on the lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gambling . . . ."[13] Indeed, the Life Act provided that "no greater sum shall be recovered or received from the insurer . . . than the amount of value of the interest of the insured in such life or lives, or other event or events."[14]

In 1803, a Pennsylvania court, in setting forth the insurable interest doctrine as the Commonwealth's public policy, referenced the Marine Act:

> "We have adopted the policy and principles which gave rise to . . . [The Marine Act of 1745] both in courts of justice and by commercial usage; but we are not prepared to say, that every particular provision or resolution under it, has been engrafted into our system of law. An insurance amongst us, is a contract of *indemnity*. Its object is, not to make a *positive* gain, but to avert a *possible loss*. A man can never be said to be indemnified against a loss which can never happen to him."[15]

In 1815, a Massachusetts court dismissed an insurer's claim questioning the

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[8] Home Ins. Co. v. Adler, 269 Md. 715 (1973) (property); Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir. 1947) (life).

[9] Tom Baker, *On the Genealogy of Moral Hazard*, 75 Tex. L. Rev. 237 (1996).

[10] Marine Insurance Act of 1745, 19 Geo. 2, C. 37 (Eng.).

[11] Marine Insurance Act of 1745, 19 Geo. 2, C. 37 (Eng.).

[12] Robert H. Jerry, II, Understanding Insurance Law 292 (3d ed. 2002).

[13] Life Insurance Act of 1774, 14 Geo. 3, C. 48 (Eng.).

[14] Life Insurance Act of 1774, 14 Geo. 3, C. 48 (Eng.).

[15] Pritchet v. Ins. Co. of N. Am., 3 Yeates 458, 464; 1803 Pa. LEXIS 26 (Pa. 1803) (emphasis added).

validity of a policy taken out by a sister on the life of her brother, who worked as a merchant marine.[16] The court agreed that "a life insurance policy without an insurable interest would be contrary to the general policy of our laws . . . ."[17] However, the court found that no one would question the "interest" of a sister in that of her brother. The court chastised the carrier for questioning the policy's validity only after the loss "when it does not appear that any doubts existed when the contract was made; although the same subject was then in their contemplation."[18]

In 1881, the United States Supreme Court addressed the issue of insurable interest in *Warnock v. Davis* and the language of its opinion is synonymous with the modern doctrine.[19] The facts in *Warnock* will appear all too familiar to those knowledgeable about STOLI transactions. Henry Crosser applied for a policy on his life in the amount of $5,000.[20] The same day he entered into an agreement with Scioto Trust Association, assigning nine-tenths of the policy's face amount to the association and the remaining one-tenth to his wife, Kate Crosser.[21] In exchange for the assignment, the association agreed to keep the policy in-force, paying "all dues, fees, and assessments due and payable on said policy."[22] The following day, after the issuance of the policy by Protection Life Insurance Company, Mr. Crosser assigned his rights, title and interest in the policy to the association. Mr. Crosser died 18 months later and the association, in accordance with the agreement, paid the deceased's widow $500 less certain fees and sought to keep the remainder.[23] The court noted it was not always possible to define insurable interest with precision and thereby to distinguish between valid life insurance and a mere wager policy. "It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life."[24] The court acknowledged that the advantage or benefit need not be capable of "pecuniary estimation." A parent has an insurable interest in the life of his child, a child in the life of the parent, and a wife in that of her husband—but that interest cannot be precisely calculated. "The natural affection in cases of this kind is considered as more powerful—as operating more

[16] Lord v. Dall, 12 Mass. 115, 120 (1815).

[17] Lord v. Dall, 12 Mass. 115, 118 (1815).

[18] Lord v. Dall, 12 Mass. 115, 119 (1815).

[19] Warnock v. Davis, 104 U.S. 775 (1881).

[20] Warnock v. Davis, 104 U.S. 775, 778 (1881).

[21] Warnock v. Davis, 104 U.S. 775, 778 (1881).

[22] Warnock v. Davis, 104 U.S. 775, 778 (1881).

[23] Warnock v. Davis, 104 U.S. 775, 778 (1881).

[24] Warnock v. Davis, 104 U.S. 775, 779 (1881).

efficaciously—to protect the life of the insured than other consideration."[25] The court held, "[I]n all cases, the court held, 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."[26] Absent such an interest, the policy is a mere wager, by which the holder is directly "interested" in the early death of the assured that creates a tendency to desire the event. "The law ought to be, and we think it clearly is, opposed to such speculations in human life."[27] As such, wager policies, independent of any statute on the subject, are "condemned as being against public policy."[28] The court held Mr. Crosser's assignment valid only in order to refund the association's premium payments and other costs, plus interest—to indemnify the association for its costs. "To hold it valid for the whole process would be to sanction speculative risks on human life and encourage the evils for which wager policies are condemned."[29]

The same principle runs through the Marine Act, Life Act, *Lord v. Dall*, and *Warnock v. Davis*: that insurance only mitigates loss and should never result in gain to a policyowner or beneficiary. The measurement of an interest in property, however, is far more precise than in that of a life, as the *Warnock* court acknowledged. Under a property policy, insurable interest is generally measured at the time of loss, perhaps years after purchase of the policy. Under a life insurance policy, insurable interest is measured at inception, at the time of purchase. The interest that one has in a spouse or blood relation is generally limited only by one's ability or willingness to pay for the coverage. The principle of indemnity, therefore, so central to property insurance, takes on an abstract quality when applied to life insurance. This fundamental difference in property and life insurance bedeviled courts throughout the Eighteenth and Nineteenth Centuries until Justice Holmes' decision in *Grigsby*.

In *Grigsby*, John Burchard purchased an insurance policy on his life.[30] Mr. Burchard had made the first two premium payments but was unable to make the third; he was also in need of an operation that he could not afford.[31] As a result, Mr. Burchard struck a deal with Dr. Grigsby, who accepted an assignment of the policy in exchange for a payment of one hundred dollars. Upon the death of the insured, Dr. Grigsby and Mr. Burchard's estate each made a claim to the policy's proceeds, which the insurance company then deposited with the court through

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[25] Warnock v. Davis, 104 U.S. 775, 779 (1881).

[26] Warnock v. Davis, 104 U.S. 775, 779 (1881).

[27] Warnock v. Davis, 104 U.S. 775, 779 (1881), *citing* Franklin Life Ins. Co. v. Hazzard, 41 Ind. 116, 121 (1872).

[28] Warnock v. Davis, 104 U.S. 775, 780 (1881).

[29] Warnock v. Davis, 104 U.S. 775, 781 (1881).

[30] *See* Grigsby v. Russell, 222 U.S. 149, 154 (1911).

[31] Grigsby v. Russell, 222 U.S. 149, 154 (1911).

interpleader.[32] The lower court "in deference to some intimations of [the Supreme Court], held the assignment [to Dr. Grigsby] valid only to the extent of the money actually given for it and the premiums subsequently paid."[33] The court denied the validity of the assignment to a person with no insurable interest due to "the public policy that refuses to allow insurance to be taken out by such persons in the first place. 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."[34] Here, the lower court, not without reason, measured Dr. Grigsby's interest to be purely that which he was out of pocket and sought to limit any potential gain from the assignment. To do otherwise, the court suggested was to endorse a wager and encourage an interest in the cessation rather than the longevity of the life insured. In reversing the lower court, Justice Holmes acknowledged that "the chance that in some cases [insurance proceeds] may prove a sufficient motive for crime is greatly enhanced if the whole world of the unscrupulous are free to bet on what life they choose."[35] Nevertheless, the law, has "no universal cynic fear of the temptation created by a pecuniary benefit accruing upon a death."[36] The objection to "life insurance without interest in early English cases was not the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming."[37] Life insurance, Justice Holmes acknowledged, is not simply a mechanism for mitigating loss but "one of the best recognized forms of investment and self-compelled saving."[38] As a result, "[s]o far as reasonable safety permits, it is desirable to give life policies the ordinary characteristics of property."[39] "To deny the right to sell except to persons having such an interest is to diminish appreciably the value of the contract in the owner's hands."[40] Justice Holmes was not willing, however, to treat one's "interest" in a life, even one's own, as property. *Grigsby* requires that a policy be purchased *and* sold (or assigned) in "good faith" *i.e.*, that an insurable interest exists at inception. Only subsequent to a good faith purchase is the owner able to assign his interest in the policy. One may not lend himself to another as a "cloak to what is in its *inception* a wager."[41] The court cites *Warnock* as an example of the latter, where the policy was purchased "for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and

[32] Grigsby v. Russell, 222 U.S. 149, 155 (1911).
[33] Grigsby v. Russell, 222 U.S. 149, 154 (1911).
[34] Grigsby v. Russell, 222 U.S. 149, 154 (1911).
[35] Grigsby v. Russell, 222 U.S. 149, 155 (1911).
[36] Grigsby v. Russell, 222 U.S. 149, 155–156 (1911).
[37] Grigsby v. Russell, 222 U.S. 149, 156 (1911).
[38] Grigsby v. Russell, 222 U.S. 149, 156 (1911).
[39] Grigsby v. Russell, 222 U.S. 149, 156 (1911).
[40] Grigsby v. Russell, 222 U.S. 149, 156 (1911).
[41] Grigsby v. Russell, 222 U.S. 149, 156 (1911).

having been assigned to it at once."[42] By circumscribing alienability to the period after a good faith purchase, Justice Holmes, perhaps unknowingly, ensured that the "interest" in the life insured more closely corresponds to the face value of the policy. Life insurance is generally calculated as a multiple of the insured's annual salary based on the numbers of years he is anticipated to draw an income.[43] The policy is meant to mitigate only the financial hardship created by a presumably much greater personal loss. The purchase, however, of a $10 million policy on the life of an individual with a $50,000 annual income would create a moral hazard for the insured as well as her beneficiaries *i.e.*, she is worth more dead than alive. This is the origin of the suicide exclusion. Until recently, there was no reason to regulate situations of this kind. An applicant with an annual salary of $50,000 cannot afford a $10 million policy and if that same applicant had such resources, it would (or at least should) raise a red flag with the agent selling the policy. The face value of a policy, purchased in good faith, generally corresponds to the owner's net worth, ability to pay, and life expectancy. When the purchase of a policy is freed from these natural constraints, by premium financing or other means, it creates an asymmetry between the actual "interest" in a life and the value of the policy. This asymmetry is further exacerbated when, false statements about an individual's net worth or medical status are made in an insurance application in order to secure a higher face value for a policy at lower cost, improving the value of the policy in the secondary market.[44] In such instances, the purpose in purchasing life insurance is not to secure against loss or mitigate what might be personal or economic hardship, but to profit from someone's death. The principles of *Grigsby*, while not perfect in application, ensure the viability of a secondary life market while largely preventing gambling on human life.

III. THE SECONDARY LIFE MARKET

A. The Rise of the Secondary Life Market

1. Reasons for the Rise

The vibrant secondary life market that emerged in the 1980s was due to two separate and wholly unrelated events. The first was the epidemic of HIV/AIDS among a relatively young and affluent population. The second was the insurance industry's creation of a universal life policy with low cash value and high dollar death benefit.[45] The HIV/AIDS epidemic brought attention, investment, expertise and, ultimately, regulation to what became the secondary life market. The universal life policy made the secondary life market a permanent fixture of the insurance industry and has given certain investors an incentive to continue to test the limits of the states' insurable interest statutes.

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[42] Grigsby v. Russell, 222 U.S. 149, 156 (1911), *citing* Warnock v. Davis, 104 U.S. 775 (1881).

[43] Association of British Insurers, "A Guide to Life Insurance".

[44] *See* Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *20 (Cal. Ct. App. May 17, 2011).

[45] Life and Health Insurance Foundation for Education, "Glossary."

2. Viatical Settlements

A viatical settlement is the term used for a settlement of a life insurance policy involving a terminally ill insured.[46] Typically, an owner sells his life insurance policy to a third party for more than its cash surrender value, but less than its net death benefit. In the transaction, the purchaser pays the owner of the policy an immediate lump sum in exchange for an assignment of the policy (much as Mr. Burchard had assigned his policy to Dr. Grigsby in exchange for $100). The seller of the policy remains the *cestui que vie* and his almost certain early demise results in a net gain to the purchaser, or assignee.

The outbreak of HIV/AIDS in the early 1980s amid a highly defined population created an unprecedented and wholly unique opportunity for investors in viatical settlements.[47] Those affected by HIV/AIDS were, by and large, relatively young, affluent, homosexual men insured through employment or estate planning. These individuals had severely shortened life-spans, low policy premium payments, and generally no wives or children—the traditional beneficiaries of life insurance. The cost for medical treatment for the disease was extraordinary and the secondary life market offered those affected an opportunity to turn their life insurance assets into cash, an opportunity not always made available by the insurance industry. The new interplay between the terminally ill, investors, profit-making intermediaries, and the insurance companies resulted in widespread consumer and investor abuse and fraud. The terminally ill were encouraged to apply for life insurance; investors were promised returns by intermediaries that could not be sustained; and life insurance companies were accused of discrimination.[48]

Regulation was the natural result of such abuse. The first step toward regulation only occurred in 1993 but within a few years the landscape in the secondary life market would radically shift. Improvements in medical treatment for those affected by HIV/AIDS greatly enhanced life expectancy and mortality for those with HIV/AIDS began to subside. The change in fortunes for the thousands of HIV/AIDS victims resulted in the insolvency (and investigation) of intermediaries selling interests in viaticals.[49] As a consequence, investor interest (and money)

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[46] *See* Webster's Concise Dictionary of the English Language (2000 ed.) (viatical derives from *viaticum*, a Roman Catholic rite that includes giving the Eucharist to the dying).

[47] *See* Denise M. Schultz, *Angles of Mercy or Greedy Capitalists? Buying Life Insurance Policies from the Terminally Ill*, 24 Pepp. L. Rev. 99 (1996).

[48] Nancy Vogel, *Dozens of AIDS Patients Arrested in Life Insurance Scams*, L.A. Times, Sept. 26, 2000 *available at* http://articles.latimes.com/2000/sep/26/news/mn-26891; Michael Berens, *Lack of Regulation Leaves Viatical Industry Open to Fraud*, Chicago Tribune, July, 4, 2004 *available at* http://articles.chicagotribunecom/2004-07-04/news/0407040350_1_viatical-mutual-benefits-policies/4; *California Man Admits to Viatical Fraud*, L.A. Times, Nov. 14, 1997 *available at* http://articles.latimes.com/1997/nov/14/business/fi-53568; *An Official Says Industry Can Police Policy-Buying*, N.Y. Times, Nov. 14, 1994 *available at* http://www.nytimes.com/1994/11/14/business/an-official-says-industry-can-police-policy-buying.html; *Watchdog Condemns AIDS Insurance Scam*, Capital Times, Aug. 20, 1992.

[49] Carl Hall, *Viatical Firm's Stock Hit Hard*, San Francisco Chronicle, July 18, 1996 *available*

would move from viatical (death) settlements to life settlements, from the terminally ill to the merely elderly. Many of these elderly targets were now also owners of the industry's newly created universal life policies.

3. Opportunity in Universal Life

The secondary life market was also enhanced by the insurance industry's development of a new product: universal life. All life insurance was originally some form of term life.[50] In response to consumer demands, life insurers created whole life, insurance that covered the insured for her whole or entire life.[51] These policies had a cash surrender value that built up against the fixed claim or the death benefit. Whole life was designed so that the policy's cash value approached the fixed benefit as the insured reached her anticipated time of death.[52] The cash value of such a policy approximated what would have been market value, and this symmetry left little or no room for a secondary market purchaser. In the 1980s, insurers introduced universal life because consumers were increasingly disinclined to keep substantial cash assets locked up in a life insurance policy and wanted the ability to terminate a policy if their economic situation changed. Like whole life, universal life is a permanent product designed to provide coverage for the entirety of the insured's life-span. Under the terms of a typical universal life policy the excess of premium paid above the cost of insurance is credited to the policy's cash value. Unlike whole life, however, universal life may have flexible premium payments and a much lower cash surrender value, while maintaining a large death benefit.[53] This gap between the cash value and the market value of such policies added to the growth of an already well-funded secondary life market that has not abated since the introduction of universal life.

B. Regulating the Secondary Life Market

The advantages of the secondary market are easily understood and widely acknowledged, even by the insurance industry.[54] An illiquid asset is converted into ready cash that might be used, in the viatical context, by its owner for medical care and treatment. More generally, the secondary market provides an alternative for the disposition of an unwanted or even burdensome financial asset. Most universal life policies have a surrender value and allowing an independent market to make a second offer on the value of a policy keeps the insurance industry

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at http://www.sfgate.com/bayarea/article/Viatical-Firm-s-Stock-Hit-Hard-2974339.php.

[50] *Whole Life Insurance*, The Asset Protection Book.

[51] N.Y. Dept. of Financial Services, "Basic Types of Policies," *available at* http://www.dfs.ny.gov/consumer/cli_basic.htm (last visited July 2, 2013).

[52] N.Y. Dept. of Financial Services, "Basic Types of Policies," *available at* http://www.dfs.ny.gov/consumer/cli_basic.htm (last visited July 2, 2013).

[53] N.Y. Dept. of Financial Services, "Basic Types of Policies," *available at* http://www.dfs.ny.gov/consumer/cli_basic.htm (last visited July 2, 2013).

[54] N.Y. Dept. of Financial Services, "Basic Types of Policies," *available at* http://www.dfs.ny.gov/consumer/cli_basic.htm (last visited July 2, 2013).

honest and owners unafraid to invest in these assets. The existence of a secondary market has even resulted in insurance companies permitting insureds to access life insurance assets for critical care or other needs.[55] Regulators have had to weigh these advantages as they have attempted to eliminate or curb abuse and fraud through the enforcement of insurable interest statutes and new regulations.

Warnock gave nationwide credence to the principles first established by English statute involving the insurable interest doctrine. Those principles were reaffirmed by *Grisgby* and subsequently adopted by statute in every jurisdiction in the United States. Almost all of these state statutes contain language paraphrasing the Supreme Court's decisions in *Warnock* and *Grigsby* to the effect that a person purchasing a policy on the life of another must have an pecuniary or filial relation to the insured. Most of the state insurable interest statues pre-date the rise of a vibrant secondary life market. The Delaware statute, which is typical of state insurable interest statutes, provides:

> "Any individual of competent legal capacity may procure or effect an insurance contract upon his/her own life or body for the benefit of any person, but no person shall procure or cause to be procured any insurance contract upon the life or body of another individual unless the benefits under such contract are payable to the individual insured or his/her personal representatives or to a person having, at the time when such contract was made, an insurable interest in the individual insured . . . . 'Insurable interest' as to such personal insurance means that every individual has an insurable interest in the life, body and health of himself or herself and a person has an insurable interest in the life, body and health of other individuals as follows: (1) In the case of individuals related closely by blood or by law, a substantial interest engendered by love and affection; (2) In the case of other persons, a lawful and substantial economic interest in having the life, health or bodily safety of the individual insured continue, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the individual insured."[56]

This type of language proved wholly insufficient to combat the abuses of the viatical settlement industry. As a result, departments of insurance sought to buttress their insurable interest statutes with new regulations.

In 1993, the National Association of Insurance Commissioneers ("NAIC") issued the Viatical Model Act (the "Viatical Act") in order to provide guidance to the various state regulators at the height of the HIV/AIDS crisis.[57] The Viatical Act was amended in 2000 and again in 2007 to ensure that the regulations cover the sales of in-force life insurance without regard to the health or medical condition of the *cestui que vie*. As a result, the Viatical Act, in the states where it has been adopted, regulates both viatical and life settlements. The Viatical Act was

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[55] Neil A. Doherty and Hal J. Singer, The Benefits of a Secondary Market For Life Insurance Policies (Wharton, Univ. of Penn. 2002).

[56] Del. Code. Ann. tit. 18, § 2704.

[57] NAIC, Viatical Settlements Model Act, 697, 11A(3) (1993).

intended to end STOLI transactions and strengthen consumer protections in the life settlement area, while not infringing on legitimate estate planning transactions. The Viatical Act limits the most obvious form of STOLI—the sale of life insurance policies originated or manufactured solely for the purpose of third party investment and requires life settlement brokers to disclose to policy owners information regarding settlement transactions, such as broker commissions and any competing offers to purchase. The Act also recognizes a policyholder's right to sell or a assign a policy but initially placed a two-year waiting period on any such sale; it was later amended to a five-year waiting period.[58] The five-year holding period, if adopted, could be a formidable obstacle to those gambling in viaticals or life settlements, generally. It tests the insured's "good faith" purchase by imposing a holding period, during which the insured must make costly premium payments. It also tests the investors' risk tolerance, as they cannot be certain that an insured will survive the holding period in order to assign the policy. The Viatical Act, however, is less effective in combating schemes that use trusts, financing, and beneficial interests in the trusts as a means of gambling on the lives of strangers.

The Viatical Act originated by the NAIC was followed by the National Conference of Insurance Legislators ("NCOIL") own model act: The Life Settlements Model Act (the "NCOIL Act").[59] The NCOIL Act more directly addresses the multitude of schemes that life insurers have faced since the Viatical Act's promulgation. As a result, the NCOIL Act is much broader in scope and attempts to bring within its prohibitions all manifestations of STOLI, including indirect sales of beneficial interests in trusts or policies. STOLI is defined as a

> "practice or plan to initiate a life insurance policy for the benefit of a third party investor who, at the time of the policy origination, has no insurable interest in the insured. STOLI practices include but are not limited to cases in which life insurance is purchased with resources or guarantees from or through a person, or entity, who, at the time of the policy inception, could not lawfully initiate the policy himself or itself, and where, at the time of inception, there is an arrangement or agreement, whether verbal or written, to directly or indirectly transfer the ownership of the policy and/or the policy benefits to a third party. Trusts, that are created to give the appearance of insurable interest, and are used to initiate policies for investors, violate insurance interest laws and the prohibition against wagering on life."[60]

This expansive definition is buttressed by regulations governing the transactions as well as the players involved. Life settlement brokers and providers are required to be licensed. When settling a contract, a broker cannot use a provider, and vice versa, unless each knows that the other is licensed under the NCOIL Act. Licensed brokers and providers must report annually to state insurance commissioners

[58] NAIC, Viatical Settlements Model Act, 11(A) (2009).

[59] NCOIL, Life Settlements Model Act (2007).

[60] NAIC, Viatical Settlements Model Act 2(H)(1)(a)(x) (2007).

regarding their internal controls, including their "anti-fraud plan" that must include procedures for (i) detecting possible fraudulent acts, (ii) resolving material inconsistencies between medical records and insurance applications, (iii) reporting fraudulent insurance acts, (iv) providing anti-fraud education of and training for underwriters and others, and (v) outlining personnel to investigate and report activities that may be fraudulent.[61] Premium finance providers, once the life blood of the life settlements market, are restricted from receiving or collecting payments from the policy or policyholder in addition to amounts required to pay premiums, interest, and service charges under the premium finance agreement. The NCOIL Act also permits life insurers to advise applicants in premium-financed transactions of possible adverse consequences resulting from subsequent settlement of a policy, thereby limiting any claims of tortious interference with contract by life settlement intermediaries.[62]

Thirty eight states have adopted the Viatical Act in some form; eleven states have adopted some form of the NCOIL Act.[63] Nearly every state has an insurable interest statute as well as common law that squarely condemns insurance without an interest as against public policy.

Despite the abundance of regulations and a consensus regarding the insurable interest doctrine, schemes to violate insurable interests laws continue to flourish and have had success in the courts. The latest jurisdictional split on the insurable interest doctrine is between two of the most important states for the insurance industry: Delaware and New York. The Delaware Supreme Court and the New York Court of Appeals each addressed, via certified questions from their respective federal courts, the insurable interest in the context of largely similar fact and law. The courts nevertheless reached wholly different conclusions, highlighting the courts difficulty in uniformly addressing a practice that is universally condemned.[64]

IV. INSURABLE INTEREST BEFORE THE COURTS

A. New York's Assault on the Insurable Interest Doctrine

In a case much celebrated by STOLI promoters, the New York Court of Appeals in 2009 eviscerated the state's insurable interest statute by refusing to acknowledge its good faith element or even address the manifest motivations of those involved in the transaction. In *Kramer v. Phoenix Life Ins. Co.*, the New York Court of Appeals, responding to a certified question from the U.S. Court of Appeals for the Second Circuit, held that New York's insurable interest statute did not preclude an insured from purchasing an insurance policy on his life and, by

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[61] NAIC, Viatical Settlements Model Act 2(H)(1)(a)(x) (2007).

[62] NAIC, Viatical Settlements Model Act 2(H)(1)(a)(x) (2007).

[63] *See* Jared Heady, Regulating the Secondary Market for Life Insurance: Promoting Consistency to Maximize Utility, 62 Rutgers L. Rev. 849, 851 (2010).

[64] *See, e.g.*, Ala. Code § 27-40-1 *et seq.*; Cal. Ins. Code § 778 *et seq.*; Fla. Stat. § 627.826 *et seq.*; N.Y. Banking Law § 554 *et seq.*; Wash. Rev. Code 48.56.010 *et seq.*

prior agreement, transferring that policy to a third party.[65] Arthur Kramer, a prominent New York attorney, was approached by Lockwood Pension Services about participating in a STOLI transaction.[66] In accordance with the scheme, Mr. Kramer established insurance trusts and named his children as beneficiaries. Thereafter, he made application for several insurance policies totaling $56 million in order to fund the trusts. The interests in the trusts were immediately assigned to investors with no insurable interest in Mr. Kramer's life. Neither Mr. Kramer nor his children (who had been named as beneficiaries under the various policies held by the trust before assigning their respective interests) ever paid any premiums on the policies.[67] The transaction was by all accounts nothing other than STOLI, *i.e.*, policies manufactured solely for the purpose of sale to investors. The court, however, found that New York's then existing insurable interest statute did not permit the court to void the transaction.

Upon Mr. Kramer's death, his wife—after refusing to turn over a copy of his death certificate—filed suit in federal district court seeking to collect on the death benefits due under the policies.[68] Mrs. Kramer claimed that her late husband's procurement of the policies violated New York's insurable interest laws because the policies had been obtained without any intention of ever providing insurance for anyone with an insurable interest in his life. As a preliminary matter, the federal district court determined that the insurers were precluded from attempting to void the policies due to the incontestability clause, as the policies had been in force more than two years at the time of the insurers' challenge. The district court nevertheless ruled that the third-party investors in the policies violated New York's insurable interest statute when they caused Kramer to procure the policies.[69] Noting the substantial ground for difference of opinion on the application of New York Insurance Law to STOLI arrangements, the court certified its order allowing for an interlocutory appeal, from which the Second Circuit then certified the question to the New York Court of Appeals.[70]

On appeal, the plaintiff and insurers advanced three basic arguments: (i) a policy obtained with the intent to assign it to a party lacking an insurable interest violates the New York insurable interest statute; (ii) STOLI transactions are precluded by a common-law rule that an insured can only assign a policy to one without an insurable interest if the policy was obtained "in good faith" compliance with the insurable interest rule; and (iii) one who obtains insurance on one's own life in accordance with a prior arrangement with a third party, as alleged here, does not act "on his own initiative" within the meaning of New York's insurable

[65] *See* Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 539 (2010).

[66] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 546 (2010).

[67] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 546 (2010).

[68] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 546 (2010).

[69] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 547 (2010).

[70] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 547 (2010).

interest statute.[71] The New York Court of Appeals conceded from the outset that New York's common law insurable interest requirement was designed to distinguish an insurance contract from a mere wager on the life of another.[72] An insurable interest, the court noted, was defined as "in the case of persons closely related by blood or by law, a substantial interest engendered by love and affection" or, for others, a "lawful and substantial economic interest in the continued life, health or bodily safety of the person insured."[73] The court then turned to the language of New York's insurable interest statute, as it existed prior to 2009, as well as its legislative history. The court's review led it to conclude that the policies were validly assigned and the benefits were payable to the trusts.[74] Specifically, the court found that the "twin provisions" of New York's then-existing insurable interest statute reflected divergent requirements as between those policies obtained on one's own life as compared to those obtained on the life of another.[75] The pre-2009 provision addressing insurance obtained on one's own life required only that the insured: (1) be "of lawful age" and (2) that he "acts on his own initiative." Further, the statute permitted the insured to "procure or effect a contract of insurance upon his own person for the benefit of any person, firm, association or corporation."[76] By contrast, the provision addressing the procurement of insurance on the life of another provided that "[n]o person shall procure or cause to be procured, directly or by assignment or otherwise any contract of insurance upon the person of another unless the benefits under such contract are payable to the person insured or his personal representatives, or to a person having, at the time when such contract is made, an insurable interest in the person insured."[77] The court found it significant that the statute invested the insured taking out a policy on her own life with "total discretion in naming a policy beneficiary" as well as the insured's ability to "immediately transfer" the policy after purchase. The statute provided that "[n]othing herein shall be deemed to prohibit the immediate transfer or assignment of a contract so procured or effectuated."[78] The court found that an insured's "total discretion" in procuring a policy for the benefit of another in combination with his ability to "immediately transfer" the same, made clear Mr. Kramer had not violated the insurable interest laws when he obtained the policy solely for the purpose of sale. "The statutory text," the court said, "contains no intent requirement; it does not attempt to prescribe the insured's motivations. To the contrary, it explicitly allows for

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[71] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 547–549 (2010).

[72] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 547–549 (2010).

[73] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 548 (2010).

[74] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 559 (2010).

[75] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 548 (2010).

[76] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 549 (2010).

[77] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 545 (2010).

[78] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 558 (2010).

'immediate transfer or assignment.' "[79] This phrase, the court suggested, anticipates that an insured might obtain a policy with the intent of assigning it, since one who " 'immediately' assigns a policy likely intends to assign it at the time of procurement."[80] Finally, the court read the requirement that the insurance be procured at the insured's "own initiative" as meaning nothing more than procured within the insured's "discretion" and without unacceptable outside influence or duress.[81]

The court's examination of the legislative history, it said, only reaffirmed its conclusions. The "immediate transfer or assignment" language in the provision addressing insurance on one's own life was meant to address an IRS letter ruling suggesting that if a person obtained insurance with the intent of transferring it to a charitable organization lacking an insurable interest that the transfer would violate New York's insurable interest statute. The statutory revisions, according to the court, demonstrated a legislative intention to allow for such "immediate transfers" not just to charitable organizations, but to any third-party chosen by the insured as a beneficiary. The court concluded by stating: "we recognize the importance of the insurable interest doctrine in differentiating between insurance policies and mere wagers, [ ] and that there is some tension between the law's distaste for wager policies and its sanctioning an insured's procurement of a policy on his or her own life for the purpose of selling it. It is not our role, however, to engraft an intent or good faith requirement onto a statute that so manifestly permits an insured to immediately and freely assign such a policy."[82] Accordingly, the court answered the certified question in the negative, finding no violations of the then-existing insurable interest laws, and found in favor of the trusts.

The dissent in *Kramer* was, rightly, not persuaded. "[W]here, as in this case, an insured purchases a policy on his own life for no other purpose than to facilitate a wager by someone with no insurable interest, the transaction is unlawful."[83] STOLI, wrote Judge Smith, the dissent's author, is simply a "new name for an old idea," and one that had long ago been rejected by the U.S. Supreme Court in *Warnock*.[84] Moreover, the phrase "on the insured's own initiative," a "rather mysterious phrase" commanded a different result than that reached by the majority. Instead, according to Judge Smith, it clearly echoes the rule recognized in *Grigsby*—"that an insured may not, in procuring a policy, act as an agent for a third-party gambler without an insurable interest."[85] The "initiative" require-

[79] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 541 (2010).

[80] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 540–541 (2010).

[81] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 551 (2010).

[82] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 553 (2010).

[83] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 553 (2010).

[84] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 554 (2010).

[85] Kramer v. Phoenix Life Ins. Co., 15 N.Y.3d 539, 558 (2010).

ment, he said, is akin to the insured's intent.

Indeed, the court's reasoning is truly baffling. First, the statute's "immediate transfer" language is of no moment. Neither *Grigsby* nor the insurable interest statutes as they existed prior to the prevalence of STOLI transactions placed any waiting period on an insured's ability to convert his good faith purchase into property. After a good faith purchase of a policy it becomes, "to the greatest extent possible," property.[86] "To deny the right to sell except to persons having [ ] an [insurable] interest," Justice Holmes observed, "is to diminish appreciably the value of the contract in the owner's hands."[87] The only precondition to a life insurance policy instantly becoming an owner's property is that the insured's purchase was made in good faith, for the purpose of acquiring coverage on his own life. Second, churches, synagogues, and charitable organizations have an insurable (economic) interest in their members and donors. The test for insurable interest at least since *Warnock* and *Grigsby* has always been based on either economic or filial relationship. Churches and charitable organizations are not part of Justice Holmes "world of the unscrupulous" anxious to gamble on the lives of strangers. Such organizations have a vested economic interest in their members and donors, and will suffer a loss at their deaths. Most state statutes, in fact, have been revised to explicitly permit such institutions to purchase insurance on the lives of its members, although it is not clear that such clarification was even necessary. Transferring (or planning to transfer) a policy to one that already has a right to purchase such a policy (*e.g.*, a husband, a wife, a business partner) in his own name therefore is of no consequence. However, if an insured wishes to transfer or assign a policy on her life to someone with no interest she may freely do so immediately after purchase, provided that the purchase was taken at her own initiative *i.e.*, not at the initiative of another without an insurable interest. Otherwise, the insured is being used as a "cloak" so that investors might gamble on her life. The New York Court of Appeals adopted, what many have called, a strict reading of New York's then-existing insurable interest statute and declined to read in a "good faith" requirement into the statute. That decision, according to the court, was properly left to the legislature. The New York legislature, in fact, subsequently enacted legislation to prohibit the type of transaction exemplified by *Kramer*.[88]

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[86] *See* Grigsby v. Russell, 222 U.S. 149, 153 (1911).

[87] Grigsby v. Russell, 222 U.S. 149, 153 (1911).

[88] The New York Legislature had already revised New York's insurable interest laws to more fully prohibit STOLI arrangements. In 2009, the Legislature added several new provisions to the Insurance Law regulating permissible "life settlement contracts," *i.e.* agreements by which compensation is paid for: the assignment, transfer, sale, release, devise or bequest of any portion of: "(A) the death benefit; (B) the ownership of the policy; or (C) any beneficial interest in the policy, or in a trust . . . that owns the policy." *See* N.Y. Ins. Law § 7802(k)(1). In addition to regulating the life settlement industry (see N.Y. Ins. Law art. 78), this new law prohibits "stranger-originated life insurance," defined as "any act, practice or arrangement, at or prior to policy issuance, to initiate or facilitate the issuance of a policy for the intended benefit of a person who, at the time of policy

B. California Initially Joined the Assault on the Insurable Interest Doctrine

Since *Kramer*, few courts outside of New York have chosen to adopt its reasoning although several important decisions reach the same result by relying upon what those courts describe as clear legislative pronouncements vis-à-vis the state insurable interest statutes. In *Lincoln Life and Annuity Co. of New York v. Berck*, the California Court of Appeal reversed the lower court's ruling that life insurance policies were void *ab initio* due to a lack of insurable interest. In *Berck*, a father and son artificially inflated the father's net worth in an application for life insurance by roughly $45 million. As in *Kramer*, the insured established a trust that procured several life insurance policies, with the father acting as settlor of the trust and the son as the beneficiary.[89] Once the policies were issued, the son transferred his interest in the trust to third-party investors and the life insurer later sued to rescind the policies and to retain all premiums (at that point over $2 million). During the application process, several red flags had been raised indicating that a potential STOLI transaction was afoot. The insurer therefore required the father to execute separate declarations reaffirming that the transaction was not STOLI. These blatant misrepresentations in the applications, however, were later precluded from challenge as a result of the incontestability clauses in the policies.[90] The lower court nevertheless ruled that the life insurance policies were void *ab initio* due to a lack of insurable interest.

On appeal, the trust challenged the lower court's finding, contending that under California's insurable interest laws, as they existed prior to 2009, the father as settlor of the trust had an unlimited interest in his own life and the statutorily protected ability to name whatever beneficiary he chose.[91] The statute, California Insurance Code § 10110.1(b), then solely provided in pertinent part: "An individual has an unlimited insurable interest in his or her own life, health, and bodily safety and may lawfully take out a policy of insurance on his or her own life, health, or bodily safety and have the policy made payable to whomsoever he or she pleases, regardless of whether the beneficiary designated has an insurable interest."[92] The son as beneficiary when the policies were issued, had an insurable interest in his father's life.[93] The court concluded that, whatever the "intent"

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origination, has no insurable interest in the life of the insured under the laws of this state" N.Y. Ins. Law § 7815(a). It also prohibits anyone from entering into a valid life settlement contract for two years following the issuance of a policy, with some exceptions. N.Y. Ins. Law § 7813(j)(1). These provisions did not go into effect until May 18, 2010.

[89] *See* Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *20 (Cal. Ct. App. May 17, 2011).

[90] Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *10 (Cal. Ct. App. May 17, 2011).

[91] Cal. Ins. Code § 10110.1(b).

[92] Cal. Ins. Code § 10110.1(b).

[93] *See* Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub.

behind the transaction, an insurable interest existed as inception and that this interest "need not exist when the loss occurs."[94] The court concluded that, under a plain reading of California's then-existing insurable interest statutes, the policies were adequately supported by the necessary insurable interest when the policies were issued, notwithstanding that "the evidence shows the trust intended that [third-party investors] ultimately would acquire the beneficial interest in [the] policies . . . ."[95] Quite simply, the court refused to look beyond the "formalities of the transaction" to engage in a meaningful analysis of the actual intent in procuring the policies, which manifestly allowed investors to gamble on the lives of strangers.

Like New York, California has since amended its Insurance Code to prohibit the type of STOLI transaction that the court ratified in *Berck* under the prior legislative regime. As the *Berck* court noted, the legislature had since passed an act that made insurance transactions like those before it unlawful and invalid.[96] Among other things, the legislature amended California Insurance Code § 11010.1 to add the following two subdivisions:

> "(d) Trusts and special purpose entities that are used to apply for and initiate the issuance of policies of insurance for investors, where one or more beneficiaries of those trusts or special purpose entities do not have an insurable interest in the life of the insured, violate the insurable interest laws and the prohibition against wagering on life.
>
> "(e) Any device, scheme, or artifice designed to give the appearance of an insurable interest where there is no legitimate insurable interest violates the insurable interest laws."[97]

Under the new legislation, the definition of a "life settlement contract" includes a written agreement solicited, negotiated, or entered into in this state between a provider and an owner, establishing the terms under which compensation or anything of value will be paid, "which compensation or thing of value is less than the expected death benefit of the insurance policy or certificate, in return for the owner's assignment, transfer, sale, devise, or bequest of the death benefit or any portion of an insurance policy or certificate of insurance for compensation, provided, however, that the minimum value for a life settlement contract shall be greater than a cash surrender value or accelerated death benefit available at the time of an application for a life settlement contract."[98] The definition also includes

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LEXIS 3669, at *20 (Cal. Ct. App. May 17, 2011).

[94] Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *20 (Cal. Ct. App. May 17, 2011).

[95] Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *20–21 (Cal. Ct. App. May 17, 2011).

[96] Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *22–24 (Cal. Ct. App. May 17, 2011).

[97] Cal. Ins. Code § 11010.1.

[98] Cal. Ins. Code § 11010.1.

the transfer for compensation or value of ownership or beneficial interest in a trust or other entity that owns such policy if the trust or other entity was formed or availed of "for the principal purpose of acquiring one or more life insurance contracts, which life insurance contract is owned by a person residing in this state."[99] The court held that these revisions to the act did not apply retroactively, and thus held that the trust had validly obtained the policies, and the lower court's holding that the policies were void *ab initio* was reversed.

C. Pennsylvania Joined the Assault on the Insurable Interest Doctrine

Like the *Kramer* and *Berck* courts, the U.S. District Court for the Middle District of Pennsylvania in *Principal Life Ins. Co. v. DeRose* strictly construed Pennsylvania's insurable interest statute and, in relying on language from *Kramer*, refused to "engraft an intent or good faith requirement" into the procurement and subsequent transfer of life insurance under a statute that, according to the court, did not expressly provide for the same.[100] In *DeRose*, JoAnn DeRose established a trust and obtained policies to be held by and for the benefit of the trust. In procuring the insurance, DeRose executed a Policy Owner Intent form, which was meant to confirm that no form of STOLI—"including non-recourse premium financing" arrangements—was being implemented or facilitated by the applicant.[101] Just prior to the expiration of the incontestability period, the insurer filed a declaratory judgment action seeking a declaration that the policies were void because they were "part of a STOLI scheme" and "the Trustees concealed their intended use of non-recourse financing on the application for the policies."[102]

Pennsylvania's insurable interest statute, 40 Pennsylvania Consolidated Statutes § 512, is substantially similar to the prior versions of those in New York and California, discussed above, and provides that a person has an unlimited interest in his or her own life. The statute does not speak in terms of any intent or good faith requirement, and the court refused to read any such requirement into the statute. Noting that the Pennsylvania Supreme Court has yet to decide whether intent is relevant to the insurable interest requirement in the statute, the court reviewed relevant state precedents and predicted that the Pennsylvania Supreme Court would not examine intent.[103] As the court explained "the relevant statute is unambiguous."[104] The statute also defines the insurable interest requirement solely in terms of the relationship between the insured and policy beneficiary. Furthermore, the court claimed, the statute explicitly states that "no transfer of such policy or any interest thereunder shall be invalid by reason of a lack of

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[99] Cal. Ins. Code § 11010.1.

[100] Principal Life Ins. Co. v. DeRose, No. 1:08-CV-2294, 2011 U.S. Dist. LEXIS 114847 (M.D. Pa. Oct. 5, 2011).

[101] *DeRose*, 2011 U.S. Dist. LEXIS 114847 at *3–5.

[102] *DeRose*, 2011 U.S. Dist. LEXIS 114847 at *11.

[103] *DeRose*, 2011 U.S. Dist. LEXIS 114847 at *23.

[104] *DeRose*, 2011 U.S. Dist. LEXIS 114847 at *17.

insurable interest of the transferee in the life of the insured or the payment of premiums thereafter by the transferee" if an insurable interest existed at inception.[105] The statute does not, the court emphasized, contain any language referencing the "intent of the parties" at inception or that subsequent transfers of policies must be in "good-faith." The insurer did not argue that the statute was ambiguous. Instead, the insurer asked the court to view the statute in the "proper legal context," by which it meant that the court should look to intent.[106] In response, the court said that it could not ignore the plain language of the statute "under the pretext of pursuing its spirit."[107] The court concluded that the Pennsylvania Supreme Court would not depart from what it said was the plain and unambiguous language of the statute.[108] The *DeRose* court also looked to "analogous case-law from other jurisdictions," and found the most analogous decision to be the New York Court of Appeals decision in *Kramer*.[109]

The *Kramer*, *Berck*, and *DeRose* courts each steadfastly refused to look beyond the formalities of the transactions and insisted that the state statutes did not contain a good faith element. However, as the dissent in *Berck* rightly suggested that the "court is not required to blind itself to what is—and was from the inception—a massive fraud" and to facilitate that by allowing the transactions to stand.[110] The purpose of insurable interest requirements are to prevent third parties from purchasing insurance on a stranger and thereby enter into a wager contract. A trial court is empowered to consider facts beyond the documented formalities to determine "whether the policy was in fact supported by an insurance interest at its inception."[111] This purpose is thwarted if a court cannot undertake such an investigation. The dissent in *Berck* found that the "trial court was well within its authority to inquire as to whether the policies were in fact supported by a legitimate insurance interest" at the time of inception and to determine "who took out" the policies on the insured's life.[112] "The court's extensive findings of fact make it very clear that it was not [the insured] or his sons who took out the policies, but instead a group of third party investors, who had no insurable interest in the insured's life.[113] Moreover, the defendant did not dispute any of the trial

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[105] *DeRose*, 2011 U.S. Dist. LEXIS 114847 at *17–18.

[106] *DeRose*, 2011 U.S. Dist. LEXIS 114847 at *18.

[107] *DeRose*, 2011 U.S. Dist. LEXIS 114847 at *18.

[108] *DeRose*, 2011 U.S. Dist. LEXIS 114847 at *17–18, *23.

[109] *DeRose*, 2011 U.S. Dist. LEXIS 114847 at *24–25.

[110] *See* Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *28 (Cal. Ct. App. May 17, 2011).

[111] Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *29 (Cal. Ct. App. May 17, 2011).

[112] Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *32 (Cal. Ct. App. May 17, 2011).

[113] Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *32 (Cal. Ct. App. May 17, 2011).

court's factual findings that the dissent said made clear that the entire transaction was a "massive sham and a fraud."[114]

D. The Delaware Supreme Court Resurrects the Insurable Interest Doctrine

1. Overview

Kramer was seemingly a nadir in the life of the insurable interest doctrine. The New York Court of Appeals armed with common law, state statute, and public policy found no room to void a transaction that clearly allowed investors to gamble on the life of a stranger. The revival of the insurable interest doctrine, if there is found to be one, will be credited to the Delaware Supreme Court's opinion in *PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust* ("*Price Dawe*").[115] Faced with both transactional facts and governing law that were largely similar to those in *Kramer*, Chief Justice Myron T. Steele, writing for the court, reaffirmed the potency of the insurable interest doctrine in combating abusive tactics employed by STOLI promoters. The court's opinion derived from two separate cases that were pending in the United States District Court for the District of Delaware.[116] In each case, the life insurer sought a declaratory judgment that the policies issued by the insurers were void *ab initio* on the basis that the policies lacked an insurable interest as they were the product of STOLI. The District Court denied both motions to dismiss and certified three questions of law to the Delaware Supreme Court. The questions presented were whether (i) state law permits an insurance company to challenge the validity of a life insurance policy based on a lack of insurable interest, after the expiration of the incontestability period, (ii) the state's insurable interest statute is violated if the insured procures a policy with the intent to immediately transfer the policy to a third party without an insurable interest, and (iii) Delaware law confers upon a trustee an insurable interest in the life of the individual insured who established the trust if the insured intends to transfer the beneficial interest in the trust to a third-party investor.[117] The court held that Delaware's incontestability statute did not exclude an insurer's challenge to a policy as void *ab initio*, even after the expiration of the statute's two-year limitation. Second, the insured's intent to immediately transfer a policy does not violate the state's insurable interest statute, provided that the policy was procured in good faith by the insured. Finally, the trustee of a trust established by the insured has an insurable interest in the insured even if the insured intends to sell the interests, provided that the policy is properly procured and in good faith.

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[114] Lincoln Life and Annuity Co. of N.Y. v. Berck, No. D056373, 2011 Cal. App. Unpub. LEXIS 3669, at *45 (Cal. Ct. App. May 17, 2011).

[115] 28 A.3d 1059 (Del. 2011).

[116] *See* PHL Variable Ins. Trust v. Price Dawe 2006 Ins. Trust, No. 10-964-BMS, at *1 (D. Del. Nov. 12, 2010); Lincoln Nat'l Life Ins. Co. v. Schlanger 2006 Ins. Trust, No. 09-506-BMS, 2010 U.S. Dist. LEXIS 72637 (D. Del. July 20, 2010).

[117] *See* PHL Variable Ins. Co., v. Price Dawe 2006 Ins. Trust, 28 A.3d 1059, 1064 (Del. 2011).

2. The Incontestability Clause

As is the case in most states, every life insurance policy issued in Delaware must contain an incontestability clause, which precludes an insurer from voiding a policy if it has been in force for more than two years.[118] STOLI promoters regularly rely upon the incontestability clause to insulate themselves from misrepresentations in the application as well as other abuses and fraud. As a consequence, transfer or assignment of manufactured policies, or interests in trusts that own such policies, regularly occur 24 to 28 months after their inception.[119] The Delaware Supreme Court held that an insurer may contest the validity of a life insurance policy after the expiration of the incontestability period.[120] Although an incontestability period bars an insurer from contesting the validity of a policy based on misrepresentations in the application, the court found that such contractual provisions cannot be operative if the policy never came into existence in the first instance.[121]

The incontestability clause was a creation of the insurance industry as a means of assuaging consumer mistrust.[122] The accounts of insurers voiding policies, after years of premium payments, for material as well as immaterial misrepresentations in applications were legion.[123] As a result, the industry developed the incontestability clause to provide greater certainty and security in financial planning. Such clauses also provide the insurer a two year window to investigate and discover any misrepresentations in the application. Thereafter, the insurer is barred from voiding a policy based on such misrepresentations. Incontestability clauses were eventually codified by state statute. At least 43 states require that life insurance contracts contain an incontestability clause. Delaware's statute provides:

> "There shall be a provision that the policy shall be incontestable after it has been in force during the life time of the insured for a period of not more than 2 years after its date of issue, except for (i) nonpayment of premiums . . . ."[124]

The defendants in *Price Dawe* argued that the plain language of the incontestability clause makes clear that an insurer is barred from any challenge after its expiration. In response, the court said, "this argument ignores the fact that the

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[118] PHL Variable Ins. Co., v. Price Dawe 2006 Ins. Trust, 28 A.3d 1059, 1066–1067 (Del. 2011).

[119] PHL Variable Ins. Co., v. Price Dawe 2006 Ins. Trust, 28 A.3d 1059, 1066–1067 (Del. 2011).

[120] PHL Variable Ins. Co., v. Price Dawe 2006 Ins. Trust, 28 A.3d 1059, 1065 (Del. 2011).

[121] PHL Variable Ins. Co., v. Price Dawe 2006 Ins. Trust, 28 A.3d 1059, 1065 (Del. 2011).

[122] PHL Variable Ins. Co., v. Price Dawe 2006 Ins. Trust, 28 A.3d 1059, 1065–1066 (Del. 2011).

[123] PHL Variable Ins. Co., v. Price Dawe 2006 Ins. Trust, 28 A.3d 1059, 1065–1066 (Del. 2011).

[124] Del. Code Ann. tit. 18, § 2908.

[legislature] chose to implement its goals through a mandatory contractual term, as distinguished from a direct ban on challenges to policy validity after a certain time."[125]

Courts are divided as to whether an incontestability clause applies to bar a claim that a contract is void *ab initio*. The majority of courts, however, like those in Delaware, holds that an incontestability clause is of no effect where a policy is void *ab initio* for lack of an insurable interest.[126] In such jurisdictions, insurers may raise a void *ab initio* claim even after the incontestability period has expired. A Maryland court explained that "while the incontestability clause 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."[127] The incontestability clause can only apply to a valid contract, otherwise it could be used "as a vehicle to sanctify that which never existed."[128] A minority of jurisdictions, including New York, hold that an incontestability clause bars an insurer from raising claims even about the validity of a policy.[129] In those jurisdictions, the burden is the insurer to determine within two years if an applicant lacked an insurable interest at the time of application. Often such detection is impossible, as would likely have been the case in *Kramer*.

3. The Insured's Intent in Purchasing the Policy

In both complaints, the insurers alleged that the policies were purchased solely for the benefit of third parties without an insurable interest in the insured. In support of this assertion, the complaint in *Price Dawe* alleged that within three months of a policy being issued to the trust, the beneficial interest in the trust was sold to a third-party investor.[130] The question presented to the Delaware Supreme Court concerned whether the statutory insurable interest requirement is violated where the insured procures a life insurance policy with the intent to immediately transfer the benefit to an individual or entity lacking a valid insurance interest. The court answered "no," as long as the insured procured or effected the policy and it is not a mere cover for a wager.[131]

Delaware's insurable statute, like that in almost every other state, including

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[125] *See* PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1066 (Del. 2011).

[126] 7 Williston on Contracts § 17:5, n. 23 (2010).

[127] Beard v. Am. Agency Life Ins. Co., 314 Md. 235 (1988).

[128] Obartuch v. Sec. Mut. Life Ins. Co., 114 F.2d 873, 878 (7th Cir. 1940). *See also* Pruco Life Ins. Co. v. Brasner, No. 10-80804, 2011 U.S. Dist. LEXIS 1598 (S.D. Fla. Jan. 7, 2011); Wood v. N.Y. Life Ins. Co., 783 F.2d 990, 996 (11th Cir. 1986).

[129] New England Mut. Life Ins. Co. v. Caruso, 73 N.Y.2d 74 (1989).

[130] *See* PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1063–1064 (Del. 2011).

[131] PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1068 (Del. 2011).

New York, provides that an individual may "procure or effect [the procurement of] an insurance contract upon his/her own life or body for the benefit of any person."[132] It also provides that a person may not purchase life insurance on a third party unless the benefits of the policy are payable to a person which has an insurable interest in the life of the insured when the policy is issued."[133] Like the *Kramer* court, the *Price Dawe* court found these provisions within the statute inconsistent if not contradictory. The statute's language is ambiguous because "a literal reading would permit wagering contracts, which are prohibited by the Delaware Constitution" and state common law.[134] The tenets of statutory construction required it, the court said, to interpret statutes consistent with the common law, unless the statutory language explicitly abrogated the same.[135] Delaware common law has for more than a century required insurable interest as a means of distinguishing insurance from a wager contract.[136] The court relied on *Baltimore Insurance Company v. Floyd*, which holds that "insurance upon a life shall be effected and resorted to only some benefit incident to or contemplated by the insured, and that insurance procured upon a life by one or in favor of one under circumstance of speculation or hazard amounts to a wager contract" and is void as it contravenes public policy.[137] Delaware's insurable interest statute codifies the essential elements set forth in *Floyd*.[138]

The insurable interest requirement serves the substantive goal of preventing speculation on human life. For this reason, the statute "requires more than just technical compliance at the time of issuance."[139] Indeed, STOLI schemes, such as those in *Kramer* and *Berck*, are designed specifically to feign technical compliance with insurable interest statutes. The statute, like those discussed in *Grigsby* and *Floyd*, permits an insured to assign a valid policy immediately upon purchase. "The key distinction is that a third party cannot use the insured as a means or instrumentality to procure a policy that, when issued, would otherwise lack an insurable interest."[140] The test for insurable interest does not turn on the intent of

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[132] Del. Code Ann. tit. 18, § 2704(a).

[133] Del. Code Ann. tit. 18, § 2704(a).

[134] *See* PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1070 (Del. 2011).

[135] PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1070 (Del. 2011).

[136] PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1071 (Del. 2011).

[137] PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1071 (Del. 2011), *citing* Baltimore Life Ins. Co. v. Floyd, 91 A. 653, 655 (Del. 1914).

[138] Del. Code tit. 18, § 2704(a).

[139] *See* PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1074 (Del. 2011).

[140] PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1074 (Del. 2011).

the insured, but on the policy's procurement.[141] If the insured procured a policy at the behest of another, it may be void. An insured's right to procure policy with the intent to immediately transfer, therefore, is not unqualified. That right is limited to bona fide purchases of a policy. "A bona fide insurance policy sale or assignment requires that the insured take out the policy in good faith—not as a cover for wagering contract."[142] Anyone purchasing a policy would understand that there may be an ability to later sell that policy. For an insured to consider such an option, even before a purchase, does not in and of itself render the purchase void or otherwise erode the good faith element of her purchase. A third party, without insurable interest, however, cannot use an insured as a means to procure a life insurance policy. If a third party "uses the insured as an instrumentality to procure the policy, then the third party is actually causing the policy to be procured" and that is proscribed.[143] Further, if a third party financially induces the insured to procure a life insurance contact with the intent to immediately transfer the policy to him, the contract lacks an insurable interest. The statute, the court said, "requires courts to scrutinize the circumstances under which the policy was issued and determine who in fact procured or effected the policy."[144] This is precisely the investigation or scrutiny that the *Kramer* and *Berck* courts found unnecessary.

4. Status of the Trustee's Insurable Interest

The final question addressed by the court was whether the trustee of a trust established by the insured has an insurable interest, even if the insured intends to assign the beneficial interest in the trust to a third party. Again, the court answered, "Yes." When the policies at issue were purchased, Delaware Code Annotated title 18, § 2704(c)(5) provided that "the trustee of a trust established by an individual has an insurable interest in the life of that individual . . . ." Section 2704(c)(5) was subsequently amended and now provides that

> "[t]he trustee of a trust *created and initially funded* by an individual has an insurable interest in the life of that individual . . . without regard to:
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> a. the identity of the trust beneficiaries;
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> b. whether the identity of the trust beneficiaries changes from time to time; and
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> c. the means by which any trust beneficiary acquires a beneficial interest

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[141] PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1074 (Del. 2011).

[142] PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1075 (Del. 2011).

[143] PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1073 (Del. 2011).

[144] PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1073 (Del. 2011).

in the trust."[145]

The court stated in its opinion that the amendment, while more detailed, did not change the meaning of the statute.[146] On that basis, the court concluded that under both versions of the statute a trustee has an insurable interest in the life of the person who creates and initially funds a trust, without regard to whether the beneficial interest in the trust is subsequently sold or transferred."[147]

5. After *Price Dawe*

In order to harmonize Section 2704(c)(5) with the state's insurable interest statute, the court concluded that the requirements were not satisfied if the trust is created through nominal funding as a mere formality, when "the funding is provided by a third party as part of a pre-negotiated agreement." Where an "individual insured creates a trust to hold a life insurance policy on his life and funds the trust with that policy or with money to pay its premium then the trustee has the same insurable interest that the settlor has in his own life."[148] If the "individual insured creates and initially funds the trust, then the trustee has an insurable interest without regard to how the trust beneficiaries obtained their interest."[149] A policy fails, for lack of an insurable interest, in cases "where a third party either directly or indirectly funds the premium payments as part of a pre-negotiated arrangement with the insured to immediately transfer ownership."[150]

In a memorandum opinion issued in *Principal Life Insurance Company v. Lawrence Rucker 2007 Insurance Trust* on June 26, 2012, a federal district court applied the Delaware Supreme Court's holding in *Price Dawe* to reverse an earlier order voiding a policy for lack of insurable interest.[151] The *Rucker* opinion, which also concerned a beneficial interest transfer transaction, recognizes that under *Price Dawe*, a policy is not necessarily void either because the insured intended to sell it on the secondary market or because the insured obtained the policy through premium financing.[152] *Rucker* involved a STOLI arrangement whereby

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145 Del. Code Ann. tit. 18, § 2704(c)(5) (emphasis added).

146 *See* PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1077 (Del. 2011).

147 PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1077 (Del. 2011).

148 PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1078 (Del. 2011).

149 PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1078 (Del. 2011).

150 PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1078 (Del. 2011).

151 *See* Principal Life Ins. Co. v. Rucker, 2007 Insurance Trust, 869 F. Supp. 2d 556, 568 (D. Del. 2012).

152 Principal Life Ins. Co. v. Rucker, 2007 Insurance Trust, 869 F. Supp. 2d 556, 564 (D. Del. 2012).

the insured applied for a life insurance policy on his own life with the intent to sell the policy on the secondary market. The insurer issued the policy to a trust formed by the insured to hold the policy. Soon after the policy was issued, the beneficial interest in that trust was transferred to a third-party investor. The insured paid the initial premiums on the policy with funds borrowed from the insurance agent who sold the policy, although there was no formal loan agreement. After the beneficial interest transfer was concluded, the insured repaid the loan. Prior to the issuance of *Price Dawe*, the *Rucker* court granted summary judgment in the insurer's favor, holding that the insured's intent to transfer the policy and his agreement with the insurance agent to arrange for the sale established a lack of insurable interest.

Following the decision in *Price Dawe*, the *Rucker* court reversed its prior order and found that there were genuine disputed factual issues that precluded judgment as a matter of law. In particular, the court refused to rule in the insurer's favor in the absence of uncontroverted evidence that an investor, or a person acting on an investor's behalf, funded the insured's trust and paid the premiums on the policy. The court distinguished *Price Dawe*, where the investor paid the premiums, on this ground and concluded that a reasonable jury could find Rucker procured the policy himself and paid the premium by obtaining a loan from the insurance agent.[153] The Delaware Supreme Court in *Price Dawe* noted that "if a third party funds the premium payments by providing the insured with the financial means to purchase the policy then the insured does not procure or affect the policy."[154] While that language might seemingly be construed to cover premium finance transactions, the *Rucker* court held that under *Price Dawe* "an insured's ability to procure a policy is not limited to paying the premiums with his own funds; borrowing money with an obligation to repay would also qualify as an insured procuring a policy."[155] For the same reason, the court refused to necessarily conclude that an investor used the insured as a means to procure the policy as a "mere cover for a wager" despite evidence of (i) misrepresentations in the policy application; (ii) the insured's intent to transfer the policy; and (iii) the insured's complete lack of knowledge regarding the formation and purpose of the trust used to procure and transfer the beneficial interest in the policy.[156] The *Rucker* court explained that under *Price Dawe*, "for a policy to constitute a wager voiding any insurable interest, both an intent to immediately transfer the policy to a third party and a financial inducement by a third party to procure a life insurance contract on

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[153] Principal Life Ins. Co. v. Rucker, 2007 Insurance Trust, 869 F. Supp. 2d 556, 564 (D. Del. 2012).

[154] *See* PHL Variable Insurance Co. v. Price Dawe 2006 Insurance Trust, 28 A.3d 1059, 1076 (Del. 2011).

[155] *See* Principal Life Ins. Co. v. Rucker, 2007 Insurance Trust, 869 F. Supp. 2d 556, 563 (D. Del. 2012).

[156] Principal Life Ins. Co. v. Rucker, 2007 Insurance Trust, 869 F. Supp. 2d 556, 564–565 (D. Del. 2012).

the insured are required."[157] In the absence of conclusive evidence, the court left it to a jury to decide whether an investor used the insured as an "instrumentality" to procure the policy by providing a financial inducement. The court found that there was conflicting evidence surrounding the procurement of the policy that would have to be resolved by a jury.[158] The *Rucker* court's decision highlights the fact-intensive nature of the inquiry needed under *Price Dawe* to ascertain the existence of an insurable interest.

V. CONCLUSION

Insurable interest, as defined by Justice Holmes in *Grigsby*, was uncontroversial for nearly a century. That came to end in the 1980s with an unexpected opportunity made possible by an epidemic. Nineteenth-century jurists were less concerned with the criminality than immorality of gambling on strangers' lives. The foundation of the insurable interest doctrine in the United States was largely based on public policy. There is a difference between selling one's life insurance policy and selling an interest in one's own death. Until recently, that distinction was apparent without explanation. *Price Dawe* provides a thoughtful analysis that will undoubtedly guide other jurisdictions over this rocky legal terrain in the coming years. The fact intensive nature of the inquiry it sets out, however, insures that it will not be the last word on the subject.

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[157] Principal Life Ins. Co. v. Rucker, 2007 Insurance Trust, 869 F. Supp. 2d 556, 565 (D. Del. 2012).

[158] Principal Life Ins. Co. v. Rucker, 2007 Insurance Trust, 869 F. Supp. 2d 556, 564 (D. Del. 2012).