Case No. 2012-cv-2073

In the United States Court of Appeals for the Fourteenth Circuit

FRANK KIPP, AS TRUSTEE FOR THE HICKS IRREVOCABLE LIFE INSURANCE TRUST, and PRESIDENTIAL HOLDINGS, LLC.

APPELLANT,

V.

GUARANTY LIFE INSURANCE COMPANY,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW TEJAS

BRIEF FOR THE APPELLEE

Team 53
Attorneys for the Appellee

QUESTIONS PRESENTED

1. Is there an insurable interest in a life insurance policy when a third-party investor was involved in every aspect of its procurement and constructively acquired all beneficial interest in that policy?

2. Is it appropriate to return life insurance premiums paid by a policyholder that lacked insurable interest and fraudulently induced the insurance company into providing the policy?

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TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT:

Appellee, Guaranty Life respectfully submits this brief in support of its request that this Court uphold the United States District Court for the District of New Tejas's order granting summary judgment in its favor as pertaining to the insurable interest, and reverse the district court's order denying Guaranty Life's motion for summary judgment as pertaining to policy premiums.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of New Tejas, *Frank Kipp, as Trustee for the Hicks Irrevocable Life Ins. Trust and Presidential Holdings, LLC. v. Guaranty Life Ins. Co.*, appears in the record at pages 1-15.

STATEMENT OF JURISDICTION

The judgment of the United States District for the District of New Tejas was entered on December 14, 2011. R. at 15. The plaintiffs cross appealed to the United States Court of Appeals for the Fourteenth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1332(a)(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of N. Tejas's insurance statute are as follows:

N. Tej. § 1408 – Rescission

If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false.

N. Tej. § 1409 – Insurable Interest (Amended August 28, 2009)

(a) An insurable interest, with reference to life and disability insurance, is an interest based upon a reasonable expectation of pecuniary advantage through the continued life, health, or bodily safety of another person and consequent loss by reason of that person's death or disability or a substantial interest engendered by love and affection in the case of individuals closely related by blood or law.

(b) 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.

(c) An insurable interest shall be required to exist at the time the contract of life or disability insurance becomes effective, but need not exist at the time the loss occurs.

(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.

(f) This section shall not be interpreted to define all instances in which an insurable interest exists.

(g) The 2009 Amendments are not to be applied retroactively.

STATEMENT OF THE CASE

I. Statement Of Facts

Both Don Juan W. Hicks ("Mr. Hicks") and his son, Sydney are men of modest means. R. at 11. The elder Mr. Hicks is a 72-year-old retired cab driver, living off his social security checks. Sydney is an engineer at a local petrochemical plant, earning $60,000 a year and living in a suburban New Tejas home valued at $150,000. R. at 11.

Pre-Policy Issuance

From the time Sydney Hicks was contacted by an insurance agent in early January 2007, R. at 10, it took only 60 days for a $20 million insurance policy on the life of his 72-year-old father to be delivered. R. at 8. On January 4, 2007, Reggie Hightower, an insurance agent with the Top Gun-Executive Insurance Agency, reached out to Sydney Hicks and the two discussed estate-planning matters for Sydney's father. R. at 10. Sydney explained that his father had no estate that needed planning, but Mr. Hightower did not seem terribly concerned. R. at 10. Mr. Hightower sent out a policy application and Statement of Client Intent ("SOCI") to the Hickses that same day. R. at 10. Less than a week later, Mr. Hicks agreed to purchase a $500,000 life insurance policy, but only because his son Sydney had agreed to "take care" of the premiums. R at 10.

The application for the life insurance policy failed to accurately convey this Mr. Hicks's information. R. at 11 & n.10. Instead of a retired cab driver, Mr. Hicks was purportedly a self-employed entrepreneur. R. at 7. Instead of living modestly in a low-income apartment, the application represented Mr. Hicks as living in an oceanfront property on Jupiter Island, New Tejas. R. at 7. And instead of living off social security, Mr. Hicks purportedly earned $8.5 million a year on a purported net worth of $1.2 billion. R. at 7. These misrepresentations, R. at 11, n.10, formed the basis for the $20 million policy application ("Policy") that was submitted to Guaranty Life Insurance Company on February 6, 2007. R. at 7.

On January 11, Sydney emailed his father's signed application and SOCI to Mr. Hightower (Sydney cannot recall if his father signed blank or completed forms), and Mr. Hightower promptly emailed Timmy Chung, Vice President of Business Development at Presidential Holdings LLC ("Presidential"). R at 10:

> Talked to Sydney Hicks, and we should be able to flip his old man's policy for 3% of the face value of the policy. Confirmed $20 million for the face value.

Unbeknownst to Mr. Hicks, R. at 10, the Hicks Irrevocable Life Insurance Trust ("Trust") was created on February 5, 2007—roughly a month after that first meeting between Mr. Hightower and Sydney. R. at 7. At its creation, Sydney Hicks was named the sole beneficiary of the Trust, Mr. Hicks the grantor, and attorney Bryan Jones as Trustee. R. at. 7. These are the only facts available regarding the creation of the Trust as all seven deponents questioned on its creation either "(1) pled their Fifth Amendment Rights, (2) could not remember any details regarding the creation of the trust, or (3) denied knowledge of the Trust's existence." R. at 7, n.3.

The next day the Trust submitted the completed policy application and SOCI to Guaranty Life seeking to insure Mr. Hicks's life for $20 million. R. at 7. The SOCI stated, R. at 7, 22-23:

> The policy was not being purchased in connection with any formal or informal program under which the proposed owner or proposed insured have been advised of the opportunity to transfer the policy to a third party within five years of its issuance.

Guaranty Life subsequently issued the Policy on February 16 after conducting an independent underwriting process. R. at 7-8. The face amount of the Policy remained $20,000,000, and the Trust was the named the owner and sole beneficiary of the Policy. R. at 8. At the time the Policy was delivered by Guaranty Life to the Trust on March 5, 2007, R. at 8, Sydney Hicks was still the sole beneficiary of the Trust. R. at 7-8.

Throughout the application process, Mr. Hightower continued to act as a liaison between the Hickses and Guaranty Life. R. at 8. He returned to Guaranty Life the executed Policy Acceptance form which indicated that all "statements in the application remain full, complete, and true as of this date." R. at 8. Mr. Hightower even agreed to reimburse Sydney Hicks for the initial $238,956.75 premium payment that was made on March 5th, R. at 8. Sydney would not have even purchased the $20 million Policy if not for the reimbursement. R. at 11. Mr. Hightower reimbursed him for the first three months premiums two days later on March 7. R. at 11-12.

How the face value of the policy increased from what Mr. Hicks understood was a $500,000 policy to the $20 million policy ultimately issued is unclear. R. at 10. Sydney Hicks cannot recall whether he discussed the policy face value with Mr. Hightower, and Mr. Hicks affirmatively denies knowing that the policy was worth

$20 million. R at 10-11. Mr. Hicks simply provided his signature when asked to do so. R. at 11. Nevertheless, on March 5, 2007, Guaranty Life did in fact issue a $20 million policy. R. at 8. Mr. Hightower subsequently received a $1.4 million commission related to the sale of the Policy. R. at 8, n.4.

Post-Policy Issuance

On March 5, 2007, less than a week after Guaranty Life delivered the Policy to the Trust and received the executed Policy Acceptance form, Sydney Hicks executed a Beneficial Interest Transfer Agreement ("BITA"). R. at 28-29. Executed on March 7th, the BITA transferred Sydney's 100% beneficial interest in the Trust to Presidential. R. at 28. Presidential paid Sydney Hicks $838,956.75 (equivalent to three months premiums plus 3% of the face value of the policy). R. at 9. This 3% figure is identical to the 3% figure referenced in the earlier email from Mr. Hightower to Mr. Chung at Presidential. R. at 10. Also on March 7th, the original Trustee, Bryan Jones resigned, and appointed Frank Kipp as successor Trustee. R. at 9, 30. Following the sale of the Trust's beneficial interest, Presidential became the only source of policy premiums. R. at 27.

Roughly a year-and-a-half passed before the Trust notified Guaranty Life that Sydney had sold his beneficial interest in the Policy to Presidential. R. at 27. The same October 21, 2008 correspondence also sought to transfer ownership of the Policy from the Trust to Presidential. R. at 27.

The Trust and Guaranty then exchanged a series of letters. Guaranty Life responded on November 19, 2008 that it was declining to process the change request and indicated it was reviewing the new information. R. at 36. The Trust then re-asserted its rights to make the requested changes to the Policy and threatened to "seek and recover damages" for a purported breach of contract. R. at 38. In a December 22, 2008 response, Guaranty Life refused to process the changes and requested more information to "confirm the accuracy" of representations made on the application. R. at 40. Guaranty Life informed the Trust that the Policy would be rescinded if the information was not provided to it by January 5, 2009. R. at 41. Guaranty Life's Chief Underwriter testified that it would not have issued the Policy to the Trust had it known the application and SOCI contained such misrepresentations R. at 12. The Trust did not directly respond to Guaranty Life's request; rather the Trust filed suit on January 5, 2009. R. at 12. Guaranty Life rescinded the Policy on June 6, 2009 and notified Presidential that no further premiums were due. R. at 13, n.11.

II. Procedural History

Frank Kipp as Trustee for the Trust, with Presidential as a co-plaintiff (collectively "Investors"), filed suit against Guaranty Life alleging claims of breach of contract, conversion, breach of the covenant of good faith and fair dealing, and fraud. R. at 13. On January 5, 2009, the Investors filed suit in the United States District Court for the District of New Tejas, seeking $5.3 million as damages from Guaranty Life ($4.7 million in Policy premiums that the Trust paid plus $600,000 paid to Sydney in exchange for the BITA). R. at 13. On June 6, 2009, Guaranty Life filed a Counterclaim against the Investors alleging that the Policy is void for lack of an insurable interest and thus was seeking to retain Policy premiums paid to date. R. at 13.

On May 12, 2011 the parties filed cross-motions for summary judgment. R. at 13. Guaranty Life filed its motion to rescind the Policy and retain premiums. R. at 13. The Investors filed its motion with respect to it claims for breach of contract and monetary damages resulting from the. R. at 13. The district court granted Guaranty Life's Motion for Summary Judgment that the Policy be rescinded, R. at 14, and denied its motion seeking to retain the Policy premiums. R. at 15. The court also denied the Investor's Motion for Summary Judgment concluding that as a matter of law the Policy failed for lack of an insurable interest at its inception thus violating New Tejas insurable interest law. R. at 14.

Both parties subsequently filed cross-appeals to this Court.

SUMMARY OF THE ARGUMENT

Guaranty Life's appeal urges this Court to join the rapidly expanding number of jurisdictions that condemn the secondary insurable interest market in which shrewd investors have found a niche. At its core, this case is about ensuring that a comforting aspect of modern existence for so many—life insurance—does not become corrupted by the cunning acts of a few. The purpose of life insurance is to replace uncertainty (when a person will die) with the guarantee that specified funds will be there to mitigate financial hardship, regardless of when death occurs. Companies like Guaranty Life provide that repose, and must be allowed to do so free from stranger-originated life insurance ("STOLI") scheming.

I.

The District Court properly voided the Hicks life insurance policy *ab initio*. Though New Tejas's insurable interest statute recognizes an individual's right to take out a policy of insurance on his or her own life--and have the policy made payable to whomever he or she pleases--the state firmly draws the line at refusing to honor policies procured by strangers through pre-arranged scheming. In 2009, New Tejas amended the statute to reflect this principle against "life wagering" and stop STOLI schemes from materializing. Yet this effort is nothing new; statutory law, common law, and public policy have always condemned life insurance taken out by individuals having no interest in the life of the insured. For the same reason that a person cannot buy fire insurance on a stranger's home, life insurance cannot be purchased on a stranger's life.

To that end, the district court properly asserted that individuals must apply for life insurance policies in good faith. Although "good faith" is not statutorily required, a surface reading of § 1409 leads to an absurd result and ignores the long-standing public policy against life wagering. The danger is clear: a plain meaning interpretation would not only allow, but encourage STOLIs. To avoid this, courts look for evidence of bad faith at each step in the policy's procurement. Otherwise, third-party conspirators would have a perverse, risk-free incentive to perpetrate insurance fraud with the comfort to walk away unscathed at any point. Even courts that have adopted a strict textual interpretation of insurable interest statutes acknowledge that free assignability cannot be used to cloak a third-party wagering transaction.

Courts have begun to unlock the pieces of the STOLI puzzle in order to recognize when this illegal scheme is hiding behind the appearance of an insurable interest. A policy lacks insurable interest when it is actually a wagering contract in disguise, so courts impose a good faith requirement on all actions. First, courts suspect foul play if an insurance policy would not exist but for a third party. Second, the right to transfer is not unlimited; agreements to sell a policy that predate its issuance are suspicious. Third, if a party pays an insured's premiums, courts view it as evidence of an illegal wagering contract. Finally, courts tease out straw man trusts set up to give the appearance of genuine insurable interest as evidence of an illegal wagering contract. Courts must be ever diligent against these strategic attempts to cloak the fact that a policy is not being procured to satisfy legitimate insurance needs.

This Court should affirm the district court's order voiding the Policy *ab initio*.

II.

For the same reasons, the district court mistakenly ordered Guaranty Life to return all premiums paid on the Policy to Presidential and the Trust. The decision does not comport with its finding that the Policy is void *ab initio* for lack of insurable interest. STOLI policies that are invalid from the beginning routinely compel courts to allow defrauded insurers to retain the premiums. The prevailing principle is that contracts that are illegal, immoral or against public policy will leave such parties in the exact position in which they have placed themselves.

Courts that have analyzed the issue of STOLI remedies land squarely on the view that the bad faith underpinnings of these wagering contracts violate insurable interest laws and preclude *status quo ante* relief. Moreover, several public policy reasons urge an equitable remedy for insurance companies. First, courts cannot become indirect participants in such bad faith acts by entitling wrongdoers to recoup their losses. Second, without equitable relief as a deterrent, courts would only incentivize those complicit in fraudulent STOLI schemes to use anti-STOLI laws to their benefit. Lastly, the insurance market's cost-sharing economic model, which determines policy and premium prices from years of experience and data compiled under tables of mortality, is extremely vulnerable to destabilization and corruption by STOLI schemes.

Moreover, employing the negligent misrepresentation analysis that the district court relies on is a completely misguided approach to illegal STOLI contracts. That standard does not apply to contracts such as the Hicks Policy that are void ab initio for lack of insurable interest, and, more to the point, cannot account for the bad faith acting and illegal life wagering that are at play in the STOLI context.

Finally, even if this Court does not find the Policy void *ab initio* and instead simply rescinds the contract, Guaranty Life still merits relief in the form of premium retention. Traditional rescission principles that return parties to their pre-contractual positions do not apply when a party was induced to enter into the contract by fraud or misrepresentation. As such, a defrauded insurance company that unwittingly issues a policy lacking insurable interest retains the premiums.

This Court should reverse the district court's order to return the premiums paid on the Policy and grant Guaranty Life's motion for summary judgment to retaining all premiums.

ARGUMENT AND AUTHORITIES

Guaranty Life asks this Court to affirm the district court's granting of summary judgment in its favor, declaring the Policy void *ab initio* for lack of insurable interest. Guaranty Life also asks this Court to reverse the lower court's denial of summary judgment as relating to the Policy premiums. This Court should do so because the record shows that the Policy represents an illegal wagering contract. As a matter of law, tradition, and public policy, these are not allowed. *See, e.g., Warnock v. Davis,* 104 U.S. 775, 779 (1881).

Known as stranger-originated life insurance ("STOLI") policies, these wagering contracts are a modern spin-off from a secondary insurance market in which existing life insurance holders sell their policies to third-party investors in exchange for immediate payment. R. at 3. STOLIs are a clever way to skirt insurance laws, and are designed to create the appearance of an insurable interest where none exists. STOLI schemes take advantage of elderly individuals and destabilize life insurance markets.

More than a century ago, courts began striking down contracts that encouraged one individual to bet on the life of another party. *Grigsby v. Russell,* 222

U.S. 149, 154 (1911). As such, courts have begun asserting that STOLIs are illegal wagering contracts because one party will earn more money if the other party dies more quickly, and thus they encourage betting against human life. *Id.* Despite that STOLI schemers continue to find ways to obviate the illegal nature of their policies, Courts have begun to tease out the true wagering nature of these contracts. *Hartford Life & Annuity Ins. Co. v. Doris Barnes Family 2008 Irrevocable Trust*, No. CV 10-7560 PSG DTBX, 2012 WL 688817 (C.D. Cal. Feb. 3, 2012) at *4; *Life Prod. Clearing, LLC v. Angel*, 530 F. Supp. 2d 646, 653 (S.D.N.Y. 2008); *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust, ex rel. Christiana Bank & Trust Co.*, 28 A.3d 1059, 1071 (Del. 2011). In situations like this, courts find that the policy lacked an insurable interest and declare it void *ab initio*. *See First Penn-Pac. Life Ins. Co. v. Evans*, 313 F. App'x 633, 636 (4th Cir. 2009); *Lincoln Nat'l Life Ins. Co. v. Schwarz*, No. CIV.A. 09-03361 FLW, 2010 WL 3283550 (D.N.J. Aug. 18, 2010); 44 Am.Jur.2d Insurance § 978 (2010).

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The court reviews a grant or denial of summary judgment *de novo*. *Duffee By & Through Thornton v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996). In doing so, courts view the evidence in the light most favorable to the nonmoving party. *St. Charles Foods, Inc. v. America's Favorite Chicken Co.*, 198 F.3d 815, 819 (11th Cir. 1999).

I. THE HICKS LIFE INSURANCE POLICY IS VOID *AB INITIO* BECAUSE IT LACKED AN INSURABLE INTEREST AT INCEPTION.

The district court properly declared the Policy void *ab initio*, and this Court should affirm. To do so, this Court should adopt the good faith requirement. Then, it should determine whether the Policy was really a veiled wagering contract.

A. The District Court Properly Required Parties to Apply for Life Insurance Policies in Good Faith.

The relevant provision of New Tejas's insurable interest law states: "An individual has an unlimited insurable interest in his or her own life . . .." N. Tej. § 1409(b) (2009). It continues: "An insurable interest shall be required to exist at the time the contract of life or disability insurance becomes effective, but need not exist at the time the loss occurs." *Id.* § 1409(c). Though this statute's plain language would allow Mr. Hicks to take out a policy in his own life and then transfer it immediately, this construction would lead to an absurd result. *See generally Lincoln Nat. Life Ins. Co. v. Gordon R.A. Fishman Irrevocable Life Trust*, 638 F. Supp. 2d 1170, 1179 (C.D. Cal. 2009) (stating that a plain interpretation leads to an illegal result). The Golden Rule of statutory interpretation allows courts to look beyond the plain meaning of a statute if the plain meaning would lead to an absurd result, so this Court should do the same. *Green v. Bock Laundry*, 490 U.S. 504 (1989); *Chung Fook v. White*, 264 U.S. 443 (1924) (holding that the intent of the law was more important than its text); *Dawe*, 28 A.3d at 1071.

1. The plain meaning of this statute would not only allow, but encourage STOLIs.

Because the person taking out the policy has an insurable interest in himself, the statute's plain meaning would require nothing other than the insured's signature on the procurement form. N. Tej. §1409(b). This would encourage third party investors to prey on the elderly, offer to pay them for their policies, obtain their coveted signatures, collect the policy, and then wait for them to die. *See Carton v. B & B Equities Group, LLC*, 827 F. Supp. 2d 1235, 1244 (D. Nev. 2011). Third parties will strategically choose older people who are healthy enough to qualify for a policy, but sick enough that the third party avoids carrying significant risk and will not have to pay premiums for very long. This is exactly how the STOLI industry emerged in the first place, and why legislatures and courts have so vehemently opposed them. Reading only the statute's plain language would lead to a result that violates 150 years of public policy and precedent, and that is absurd. *See Grigsby*, 222 U.S. at 156; *Schwarz*, 2010 WL 3283550 at *6-7 (citing cases).

2. Courts look for evidence of bad faith.

Accordingly, no court stops the inquiry at the signature line, and neither should this Court. *See* Martin, *supra*, at 179-80. Some courts impose a good faith requirement on procurement, while other courts look to discern the parties' intentions. At a bare minimum, courts seek to determine whether the parties attempted to conceal a wagering scheme, and whether the individual procuring the policy was a mere instrument in a third party's financial scheme. *Finnie v. Walker*, 257 F. 698, 701 (2d Cir. 1919) (explaining that the intent of the purchaser is important to determine the validity of a policy); *Travelers Ins. Co. v. Reiziz*, 13 F.

Supp. 819, 820 (E.D.N.Y. 1935). If they did, the policy is invalid regardless of whether an insurable interest appeared to exist at inception. *Id.* Even the courts with the most conservative rules regarding parties' intent still look beyond the signature line and examine the behavior of those involved. *See Kramer v. Phoenix Life Ins. Co.*, 940 N.E.2d 535, 540 (N.Y. 2010).

Courts require a gamut of proof before finding policies void for lack of insurable interest. *See, e.g., Evans*, 313 F. App'x 633 at 636; *Dawe*, 28 A.3d at 1059, *Kramer*, 940 N.E.2d at 550. Despite that some courts have more lenient rules, the majority rule is that the combination of a pre-arranged agreement and an actual third-party sale indicates intent to conceal a wagering scheme, and constitutes bad faith. In fact, the United States Supreme Court applied the good faith rule in 1911, establishing that a person with an insurable interest cannot "lend himself" to a party with no insurable interest because it violates good faith. *Grigsby*, 222 U.S. at 156; *see also Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 460 (1876) ("The essential thing is, that the policy shall be obtained in good faith.").

Next, in *Dawe*, the court stated that two factors are required to constitute a wagering contract that lacks an insurable interest: an intent to immediately transfer the policy to a third party and financial inducement by a third party to procure a life insurance contract on the insured. *Dawe*, 28 A.3d at 1068. The court determined that the inducement element is met if a disinterested third party pays the premiums. *Id.* at 1075.

On the whole, then, courts look beyond the signature line to determine if the policy was procured in bad faith and violates the spirit of the law. Given the range of approaches courts take to interpret relatively similar insurable interest language, this Court should choose the interpretation that does not violate the Golden Rule or centuries of policy.

3. This Court should reject the strictest standard.

Only two courts have adopted stricter requirements to find that their life insurance statutes permit STOLI schemes. *See Kramer*, 940 N.E.2d at 540 (narrowly holding that New York's statute allows third parties to plot with elderly persons to procure policies that will ultimately benefit the third party, unless there is evidence of coercion); *Fishman*, 638 F. Supp. 2d at 1178 (finding that a policy taken out by a trust, at the behest of third party investors, and then sold two years later was legal under California's insurable interest statute, despite that it violated public policy).

This Court should not adopt the strictest standards from *Kramer* and *Fishman* for three reasons. First, both of those cases are factually distinguishable from Mr. Hicks's situation. In both *Fishman* and *Kramer*, the courts held that regardless of the parties' intentions, the policies had an insurable interest at their inception because the person who signed the policy application was taking out a policy on himself. 638 F. Supp. 2d at 1178; 940 N.E.2d at 540. The parties also waited two years to transfer the policies to third party investors. Here, however, Sydney Hicks, who did not own the Policy, sold his beneficial interest within days of its delivery. R. at 8.

Additionally, in both *Fishman* and *Kramer*, there was evidence that the original policy owners, unlike Mr. Hicks, initiated the policies on their own accord. 940 N.E.2d at 543; R. at 10. Mr. Hicks only took out the Policy because his son suggested it and he would not have to pay the premiums. R. at 10. This ties into *Kramer* itself, which acknowledged that when an insured is “in substance acting for a third party” who has an interest in his death, as is the case here, the policy is void for lack of insurable interest. 940 N.E.2d at 543. This indicates that an insurable interest was never actually established, as the Policy did not have time to cure in the hands of someone with an insurable interest before it was transferred.

Second, most other courts have rejected the reasoning found in *Fishman* and *Kramer* as contrary to public policy. *See supra*; *Grigsby*, 222 U.S. at 156; *Schaefer*, 94 U.S. at 460; *Dawe*, 28 A.3d at 1075 (stating the majority of courts support the good faith requirement and that *Kramer* was "decided on a narrow set of issues . . .not applicable here."); *Carton*, 827 F. Supp. 2d at 1244; *PHL Variable Ins. Co. v. Charter Oak Trust*, No. HHDCV106012621S, 2012 WL 2044416, *3 (Conn. Super. Ct. May 4, 2012); 30 A.L.R.2d 1310, § 16(a).

Third, the court below expressly rejected the *Gordon* and *Kramer* standards. 638 F. Supp. 2d at 1178; 940 N.E.2d at 541; R. at 14. Instead, the district court adopted the good faith rule: “Such facts would demonstrate that the . . . [p]olicy was not procured in good faith, and that there was therefore no valid insurable interest.”

R. at 14 (quoting *Pruco Life Ins. Co. v. Brasner*, No. 10-80804-CIV-COHN, 2011 WL 134056, *4 (S.D. Fla. Jan. 7, 2011)). Requiring that the policy be procured in good faith means that this Court should look beyond the seemingly legitimate appearances presented by Sydney Hicks and Presidential, and uncover the concealed wagering contract. Not only does the court below reject the strictest standard, but most courts, including the Supreme Court, adopt the good faith requirement and look for evidence of bad faith. This Court should do the same.

B. A Policy Lacks Insurable Interest When it is Actually a Disguised Wagering Contract.

To expose the illegal contract, this Court should follow suit with the vast majority of courts and look at the following as evidence of a cover up: (1) whether the insurance policy would not exist *but for* a third party; (2) whether an agreement to sell the policy predated the policy itself; (3) whether the premiums were paid by someone other than the insured; and (4) whether the Hicks family set up a trust as a straw man. While not dispositive, courts consider the totality of the circumstances, using each of the above as evidence of a concealed wagering contract.

1. If an insurance policy would not exist *but for* a third party, it is suspect and may be a wagering contract in disguise.

To begin, Courts have found that an unlawful scheme exists if the policy would not otherwise exist *but for* the involvement of a third party who will ultimately benefit from it. *Lincoln Nat. Life Ins. Co. v. Snyder*, 722 F. Supp. 2d 546, 559 (D. Del. 2010); *AXA Equitable Life Ins. Co. v. Infinity Fin. Group, LLC*, 608 F. Supp. 2d 1349, 1357 (S.D. Fla. 2009); *Lincoln Nat'l Life Ins. Co. v. Calhoun*, 596 F.

Supp. 2d 882, 886 (D.N.J. 2009); *Kramer*, 940 N.E.2d at 541. At a bare minimum, such investor-driven agreements prior to the procurement of a life insurance policy are evidence that the individual procuring the policy is an instrument working for a third party's benefit. *See* Johnny C. Parker, *Does Lack of an Insurable Interest Preclude an Insurance Agent from Taking an Absolute Assignment of His Client's Life Policy?*, 31 U. Rich. L. Rev. 71, 109 (1997). This Court should consider these factors as evidence that a pre-arranged agreement to sell the policy existed, which is evidence of an illegal wager.

For example, in *Kramer*, the court found that individuals must obtain life insurance policies on their own volition. 940 N.E.2d at 541 (stating that the decision to purchase life insurance must "be knowing, voluntary, and actually initiated by the insured"). There, an insurance agent approached a business-savvy investor about participating in a STOLI scheme. *Id.* at 546. The investor then established two separate trusts and took out two separate life insurance policies on his own life, intending to transfer them immediately in exchange for payment. *Id.* Though some outside influence, like broker advice, is appropriate, the ultimate decision must have emerged organically and free from "nefarious influence." *Id.*

Last, in *Calhoun*, the insurance company stated sufficient evidence to prove that a policy lacked insurable interest when an insurance agent approached a 75-year-old woman to solicit her participation in a plan to apply for a life insurance policy and then sell it. 596 F. Supp. 2d at 886. A third party prepared the application for her and she signed it. *Id.* The woman neither sought nor wanted life insurance, and would not have applied for the policy *but for* the outside party's influence. *Id.*; *see also Snyder*, 722 F. Supp. 2d at 559 (finding an illegal scheme when two people approached a 76-year-old man and persuaded him to apply for a life insurance policy that he would not have bought *but for* their interference).

Applying the law to the present facts, the record clearly indicates that Mr. Hicks would not have initiated the policy *but for* a third-party influence. R. at 10. Unlike what Mr. Hicks's policy application falsely stated, he did not retain $1.2 billion net worth nor was he earning $8.5 million per year. R. at 11. Mr. Hicks never wanted a life insurance policy because he had no estate that needed planning. R. at 10. It was not until Mr. Hightower approached Mr. Hicks's son, and not Mr. Hicks himself, that he agreed to take out a policy that he did not have to pay for and from which he would never benefit. R. at 10. This is directly analogous to the facts in *Snyder* and *Calhoun*, in which third parties targeted senior citizens and persuaded them to buy policies that they did not want or need. 722 F. Supp. 2d at 549; 596 F. Supp. 2d at 886. Further, it is clear that the Policy was the product of Hightower's nefarious "*but for*" influence. *Kramer*, 940 N.E.2d at 541. Sydney offered to pay the $900,000 annual premiums, even though he could not afford them on a $60,000 salary. R. at 11. Nonetheless, he said would "take care of" them because Mr. Hightower offered to reimburse him. R. at 11. Sydney in fact stated that policy would not exist *but for* Mr. Hightower's offer to reimburse. R. at 12. These facts comprise the indisputable proof that the Policy was the exclusive product of a nefarious third party who sought to benefit from it. This satisfies the "*but for*" factor, and begins to show that the Policy was actually a wagering scheme.

2. It is suspicious when the insured makes an agreement to sell the policy to a third party that predates the policy.

Next, policies lack insurable interest when an insured has a pre-arranged deal for his or her policy to end up in a third party's hands. *AXA*, 608 F. Supp. 2d at 1357; *Angel,* 530 F. Supp. 2d at 648. Courts have held that an agreement predating the policy in which the insured does not intend to retain the policy and has somewhere to sell it is a sham and therefore void for lack of insurable interest. *Id.*; *Pruco*, 2011 WL 134056 at *4. The length of time between a policy's issuance and its transfer also helps unearth such an agreement.

i. Courts look for evidence of intent to sell.

To begin, in *Pruco*, a group of third party investors approached an older woman and asked her to participate in a STOLI scheme. *Id.* at *1. Ms. Brasner did not want a policy, and the parties agreed that she would transfer it to them after acquiring it. *Id.* The court struck down the policy because the fact that Ms. Brasner intended to sell the policy before it even existed indicated a sham. The court specifically noted that insurance policies must be procured in good faith, and the plan in this case violated the good faith requirement. *Id.* at *3.

In addition, the *Angel* court found that the aggrieved insurance company's complaint had alleged sufficient facts to claim that the insured formed an intent to transfer his life insurance policy to someone with no insurable interest prior to procuring it. 530 F. Supp. at 648. In this case, an insurance agent approached 77-

year-old Leon Lobel with the proposition that he could make some "quick cash" by taking out a life insurance policy on himself, having someone else pay the premiums, and then transferring the beneficial interest immediately after procurement. *Id.* at 649. The court stated that the policy itself was invalid because the owner obtained the policy intending to transfer it right away, amongst other things, because he had no interest in the policy in the first place and never intended to maintain it himself. *Id.* at 654. Because the intent existed before the policy did, the court recognized the attempt to skirt the prohibition against wagering policies; that an insurable interest appeared to exist was irrelevant. *Id.* at 648; *see also AXA,* 608 F. Supp. 2d at 1356-57 (stating that although policy applicants had an insurable interest on paper, there was evidence that the policy owners never planned to maintain the policies themselves, which was a plain attempt to conceal a wagering scheme); *Sun Life Assurance Co. of Can. v. Paulson,* No. CIV.07-3877(DSD/JJG), 2008 WL 451054, *2 (D. Minn. Feb. 15, 2008); *Equitable L. Assur. Soc. v. O'Connor's Admr.* 172 S.W. 496, 496 (Ky. Ct. App. 1915). *But see Barnes*, 2012 WL 688817 at *2-4 (finding that an insurable interest existed when a family took out a policy in which three people had an insurable interest, and when two parties emailed about selling the policy once the policy was executed.)

The case at bar involves a clear intent to transfer the Policy to a pre-determined third party—Mr. Hightower. R. at 10-11. Just like in *Angel*, Mr. Hightower sought out Sydney Hicks and arranged to pay the policy's premiums. 530 F. Supp. at 649; R. at 12. Sydney sold the trust just two days after it was issued, to the same third party that was involved in initiating the trust. R. at 8. This transfer was clearly arranged ahead of time.

The Hicks heist also mirrors those in *Pruco* and *Angel* because Mr. Hicks never intended to maintain the policy himself. R. at 10. As in those cases, the person who promised to maintain the policy procured it purely to sell it at a profit. *Pruco*, 2011 WL 134056 at *3; *Angel*, 530 F. Supp. at 649. Each party violated insurable interest laws because the intent to sell existed well before the policy itself. *Id.* Similarly, the Policy originated because an outside third party planted the seed, arranged the sale, and then bought the interest in the Policy right away. R. at 8-12. The fact that Mr. Hicks did not want the policy and that Sydney could not afford to maintain it indicates that the agreement to sell existed before the policy did. R. at 8-12. For all intents and purposes, as in the cases above, the third party was taking out the policy himself. *Pruco*, 2011 WL 134056 at *3; *Angel*, 530 F. Supp. at 649. And unlike in *Barnes*, Mr. Hightower offered to pay the Policy premiums before the Policy existed, and the email between Mr. Hightower and Presidential indicating that they would be able to "flip" the Hicks Policy was sent before the Policy existed. 2012 WL 688817 at *4; R. at 10, 11. Clearly, this agreement predated the Policy. This certainly violates the good faith requirement that the district court supported, and is also evidence of a disguised wagering contract. *Pruco*, 2011 WL 134056 at *3; *Angel*, 530 F. Supp. at 649; R. at 14.

ii. Courts also examine the length of time between issuance and transfer.

Also, to find a pre-existing agreement to transfer, courts look at the proximity between the policy's inception and its transfer. Immediate transfer is evidence that a policyholder is nothing more than a means to an end. It indicates that the third party would have taken out the policy if it could have. Because this is prohibited, however, third parties cleverly obtain a valid signature on the application, and then acquire the policy right away. *See Am. Gen. Life Ins. v. Goldstein*, 741 F. Supp. 2d 604, 616 (D. Del. 2010). This is illegal. *Id.*

For example, in *Goldstein*, the court found that the complaint sufficiently alleged that there was no insurable interest in a policy "*due to its immediate sale upon issuance*." 741 F. Supp. 2d at 616 (emphasis added). There, the policy owner never intended to benefit from or maintain the policy, and sold it within six days of receiving it. *Id.* at 615; *see also Penn Mut. Life Ins. Co. v. Wolk*, 739 F. Supp. 2d 387, 395 (S.D.N.Y. 2010) (stating that a policy was suspicious when shortly after issuance, the operator took all of the necessary steps to transfer the policy to a stranger investor); *Lawrence v. Travelers' Ins. Co.* 6 F. Supp. 428 (E.D. Pa.1934).

Here, Sydney and Presidential engaged in the exact same type of quick turnaround seen in *Goldstein*. 41 F. Supp. 2d at 616. Sydney transferred his interest in the policy merely two days after Guaranty received its first three premiums and delivered the policy. R. at 8-12. Combined with all the other arrangements that went on prior to issuance, such short turnaround time reveals that Mr. Hicks was merely a means to an end. R. at 8-12. Since the law requires an insurable interest, Mr. Hightower and Presidential found a senior citizen to sign their paperwork and then removed him from the picture so soon that it was like he never existed at all. R. at 8-12. This is evidence that Sydney intended to transfer his beneficial interest in the Trust before the Policy even existed.

iii. Misrepresentation on the application also indicates foul play.

Also, courts also consider fraud or misrepresentation in a policy application as evidence of a pre-policy agreement. *See Goldstein*, 741 F. Supp. 2d at 608; *Schwarz*, 2010 WL 3283550. For example, in *Goldstein*, the policy applicant misrepresented her income, net worth, and intentions, claiming that she had a net worth of over $5 million and earned $200,000 per year. 741 F. Supp. 2d at 609. She also signed SOCI stating that did not intend to transfer her policy. *Id.* In reality, she earned only $100,000 annually. *Id.* The insurance company claimed that material misrepresentations regarding the policy applicant's income, net worth, and intention indicated that there was a scheme in place to conceal a wagering contract. *Id.* at 616; *Schwarz*, 2010 WL 3283550, *1-5 (deciding that when a policy applicant grossly inflated her net worth to $10.3 million and her annual income to $433,000, and misrepresented about her reasons for procuring the policy, it was evidence that the policy was a sham).

Similarly, Mr. Hicks signed a blank application and believed he was getting a $500,000 policy. R. at 10. The Investors told Mr. Hicks that they would pay for a policy that he neither wanted nor intended to maintain. R. at 10. After Mr. Hicks signed a blank form, the application was made to state that Mr. Hicks had a $1.2 billion net worth and made millions per year. R. at 11. Consequently, he took out a

$20 million policy. R. at 10. Guaranty would not have issued the policy had it known about these misrepresentations. R. at 12. Also, Mr. Hicks indicated in his SOCI that he did not intend to transfer the policy. R. at 22. Yet because he did not control the policy, this too was a fabrication. R. at 22. Those misrepresentations were evidence that the wrongdoers behind the policy sought not to benefit Mr. Hicks himself, but rather their own wallets. *Goldstein*, 741 F. Supp. 2d at 608; *Schwarz*, 2010 WL 3283550. This is evidence that that there was no insurable interest, and this suggests a sham.

Accordingly, because Sydney intended to sell his interest in the policy before the policy even existed, and because there was a definite third-party buyer, the Policy satisfies the intent to transfer element.

3. If a third party pays an insured's premiums, courts view it as evidence of an illegal wagering contract.

Courts have also reasoned that the way policy premiums are paid and who pays them assist in distinguishing the policies procured in good faith from those procured as illegal wagering contracts or STOLI schemes. *Dawe*, 28 A.3d at 1075-76 (a policy may be a mere cover for a wager "if a third party funds the premium payments by providing the insured the financial means to purchase the policy."); *Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust*, No. 08-488-MPT, 2012 WL 2401717, *6 (D. Del. June 26, 2012); *Snyder*, 722 F. Supp. 2d at 561; *Charter Oak*, WL 2044416 at *2; *King v. Cram,* 69 N.E. 1049 (Mass. 1904). Policies whose premiums are paid by the insured are more likely to be deemed legitimate than those whose premiums are paid by third parties. *Rucker*, 2012 WL 2401717 at *5.

A majority of jurisdictions have recognized the highly suspect nature of policies that are *inter alia* financed by disinterested third parties. *Id.* For example, in answering certified questions, the Supreme Court of Delaware reasoned that a life insurance policy is void if the insured did not "procure or effect" the policy himself. *Dawe*, 28 A.3d at 1076. The court's answer rested in part on facts showing that premiums were likely funded by a third party as part of a pre-negotiated agreement. *Dawe*, 28 A.3d at 1075. In *Dawe*, unrelated third party investors purportedly financed Mr. Dawe's policy and financially induced him to procure the policy. *Id.* at 1064. Generally, the payment of premiums by the insured "provides strong evidence that the transaction is *bona fide*." *Id.* at 1076. An absence of such evidence cuts against the presumption that a policy is legitimate and lends itself towards a conclusion that the policy is a "mere cover for a wager." *Id.* at 1068; *see Carton*, 827 F. Supp. 2d at 1245 (finding that the insured were "technically the owners" of the policies at issue, but the "true owners" were the third party investors who financed the premium payments, and that premium-financing schemes are a "violation of the spirit if not the letter of the insurable interest law in every state in the country"); *see also Waldman v. Maini,* 195 P.3d 850, 859–60 (Nev. 2008) (holding that a party who pays the insurance premiums on the life of another has no insurable interest in the life of the insured).

The court in *Ohio National Life Assurance Corp v. Davis* rejected contentions that contested policies were purchased in good faith and rested its decision in part on the investor's payment of premiums. No. 10 C 2386, 2011 WL 2680500, *8 (N.D.

Ill. 2011). *Davis* is illustrative of a particularly egregious STOLI scheme. Defendants deceptively recruited senior citizens to apply for life insurance policies as "straw men" (*i.e.* the senior citizens did not intend to pay the policy premiums nor could they afford to do so). *Id.* at *5. The insured parties "provided [their] signature[s], but the nature of the scheme was that [they] would provide little more." *Id.* at *8.

On March 5, 2007, Sydney Hicks made the first premium payment in the amount of $238,956.75 to Guaranty Life. R. at 8. This was a sizeable sum for a man earning $60,000 a year and whose only identifiable liquid asset was a 401(k) plan valued at $19,000. R. at 11. Sydney Hicks, on behalf of this father, ensured that the proper documents were signed and filed, but provided little else. R. at 11. Sydney Hicks was not worried about spending such a lopsided amount of money on a life insurance policy because Mr. Hightower had agreed to reimburse him for initial premium payments. R. at 11. Mr. Hightower indeed was swift to make good on his word. He wired funds two days later to Sydney. R. at 11. Similar to the schemes at issue in *Dawe*, *Carton,* and *Davis*, the implications of disinterested third parties making premium payments cannot be overstated. *Dawe*, A.3d at 1076; *Carton*, 827 F. Supp. 2d at 1245; *Davis*, 2011 WL 2680500 at *8. If Mr. Hicks did intend to retain the policy for his own beneficial interest, such an intent would typically be evidenced by self-financing of policy premiums. *Rucker*, 2012 WL 2401717 at *5 (even a loan to pay the premiums would have been permissible). But the immediate reimbursement by Presidential justifiably runs counter to good faith intentions and raises the alarm. Presidential would not pay Mr. Hicks's policy premiums unless it expected (or at least hoped) to profit from its wager. The record is devoid of evidence that might indicate other motivations for Presidential's largess. The payment of Mr. Hick's policy premiums by Presidential, taken together with other factors *supra*, prove a sophisticated scheme intending to circumvent both the spirit and letter of New Tejas's insurable interest laws. *See* N. Tej. § 1409.

4. If a life insurance applicant sets up a trust to give the appearance of a legitimate interest, it is evidence of an illegal wagering contract.

Although the use of a trust to procure life insurance is not by itself impermissible, such use can also serve as evidence that an unlawful scheme may be afoot. *Sciaretta v. Lincoln Nat. Life Ins. Co.*, No. 9:11-CV-80427, 2012 WL 5195944, *6 (S.D. Fla. Feb. 15, 2012). Courts recognize that a trust retains an insurable interest in the life of its grantor, so it can lawfully procure a life insurance policy; a trust may also act as the transferee of a beneficial interest. *Dawe*, 28 A.3d at 1077; *see also Angel*, 530 F. Supp. at 656; *Fishman,* 638 F. Supp. 2d at 1178; *Butterworth v. Miss. Valley Trust Co.*, 362 Mo. 133, 144 (Mo. 1951) (discussing this general principle). However, this holds true only so long as the policy is procured for a legal purpose, and only so long as the trust is not utilized unlawfully as a straw man to conceal a wagering contract. *Dawe*, 28 A.3d at 1075; *see also Warnock*, 104 U.S. at 779.

a. Courts have addressed suspicious trusts.

In analyzing a Delaware statutory scheme similar in spirit to New Tejas's, the Delaware Supreme Court in *Dawe* provides useful insight into a nascent area of law. The *Dawe* court concluded that an individual can permissibly use a trust as instrument to procure life insurance, but explored ways that trusts can be used to obviate the law. *Id.* at 1077-79; *see also Calhoun,* 496 F. Supp. 2d at 889 (trust used in a purported STOLI scheme); *Paulson*, 2008 WL 451054 at *2. The *Dawe* court envisaged two permissible scenarios. An individual can procure a life insurance policy and name his trust as the owner and beneficiary of the policy. *Dawe*, 28 A.3d at 176. Alternatively, an individual may also permissibly create and initially fund a trust for the purpose of lawfully procuring a life insurance policy; the trustee will retain an insurable interest on the individual's life. *Id.* But in each of these scenarios the court imports a presumption of good faith—that is, the insured "must intend to purchase the insurance policy for lawful purposes." *Id.* at 1077; *see also Grigsby*, 222 U.S. at 156 (distinguishing wagering policies in which individuals are used as "cloaks" from those procured as an "honest contract sold in good faith"); *Snyder*, 722 F. Supp. 2d at 561 (it "is plausibly inferred from the alleged facts . . . [that] the Trust was used to purposefully conceal the true nature of the . . . policy").

Procuring life insurance via a trust may be rational and lawful, but a trust "merely acting as a 'straw man' to carry out a STOLI scheme is a different matter." *PHL Variable Ins. Co. v. Abrams*, No. 10CV521 BTM NLS, 2012 WL 10686, *4 (S.D. Cal. Jan. 3, 2012); *Rucker*, 736 F. Supp. 2d at 140. Public policy concerns against wagering contracts are not avoided by transferring a policy's ownership or beneficial interest "under the guise of a trust." *Id.* In *Rucker*, for example, the court relied in part on the parties' use of trusts as intermediaries to corroborate allegations that the policy was a cover of an unlawful scheme or plan. *Id.* There, a "multi-layer trust arrangement" was used to circumvent insurable interest laws. *Id.* at 135. Trust A ("Insurance Trust") was named as beneficiary of the insurance policy at issue, but then Trust B (set up by the third party investors) received a 100% beneficial interest in Trust A. *Id.* at 140. Third party investors would effectively receive any death benefit paid by the policy. *Id.* The court concluded that the Insurance Trust was established "solely to evade the law against wagering contracts" and was neither created nor utilized in good faith *Id.*

At the surface, the Hicks Irrevocable Life Insurance Trust and its creation appear routine, but one need not dig too deep to discern the irregularities. The Trust was created on February 5, 2007, and it named Mr. Hicks as the grantor, Sydney as the beneficiary, and attorney Bryan Jones as the Trustee. R. at 7. On February 6, 2007 the Trust, through Mr. Hightower, submitted an application for a life insurance policy on Mr. Hicks' life to Guaranty Life. R. at 7. All seven deponents questioned on the creation of the Trust conveniently failed to provide further clarity regarding details of its creation. R. at 7, n.3. On March 5, 2007, Guaranty Life delivered the Policy naming the Trust as the owner and sole beneficiary. R. at 8, 24-25. The Trust also executed the requisite Statement of Client Intent ("SOCI"). R. at 7, 21-23. Other than the Hicks life insurance policy, the Trust retains no other assets. R. at 7, n.2.

In light of the significant uncertainty surrounding the Trust's creation and the subsequent transfers, it becomes apparent that Mr. Hicks, Mr. Hightower, and Sydney were attempting to use the Trust as a straw man to provide cover for a policy procurement that is unlawful and against public policy. *See Rucker,* 2012 WL 2401717 at 140; *Abrams*, 2012 WL 10686 at *4. Similar to the suspect beneficial interest transfer discussed in *Rucke*r, Sydney executed a Beneficial Interest Transfer Agreement ("BITA") selling his 100% beneficial interest in the Trust to Presidential for $838,956.75 just two days after Guaranty Life delivered the Policy. R. at 8, 26-34. Further, the original trustee Bryan Jones tendered his resignation on the same day the BITA was executed; Frank Kipp became the Successor Trustee. R. at 7, 26-34. The Record does not provide evidence to support a conclusion that Mr. Kipp was in any way affiliated with Presidential nor beholden to its interests, but the timing of the appointment is curious and certainly supports an inference as such. The execution of the BITA represents precisely the sort of conspiratorial behavior the courts in *Abrams, Dawe*, and *Rucker* cautioned against. *See Rucker,* 2012 WL 2401717 at 140; *Abrams*, 2012 WL 10686 at *4; *Dawe*, 28 A.3d at 1078. By executing the BITA to Presidential, Sydney attempted to do "indirectly what that statute prohibited directly." *Id.*

Both the unamended and amended versions of § 1409(a)-(c) have codified common law insurable interest principles and require an insurable interest be present at policy inception. R. at 5-6 (citing N. Tej. § 1409(a)-(c). Thus, Presidential was prohibited from independently procuring a life insurance policy on Mr. Hicks's life. *See Warnock*, 104 U.S. at 778 (the Trust "[A]ssociation had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name"). Although the Trust was, and remains, the beneficiary of the Policy, Presidential now retains all rights and privileges associated with a 100% beneficial interest. R. at 8. The true effect of the BITA, together with the curious appointment of a new trustee and other corroborating evidence discussed *supra*, was for all intents and purposes to grant Presidential *de facto* ownership of the policy and receipt of any potential death benefit that would have been paid when Mr. Hicks died. Such use of the Trust enabled Mr. Hicks, his son, and Presidential to circumvent New Tejas's insurable interest laws and impermissibly execute what is more akin to a wagering contract then a good faith life insurance policy.

b. Trusts Can Violate Public Policy.

Prior to August 28, 2009, the insurable interest laws in New Tejas had regrettably failed to expressly prohibit STOLI schemes. The record lacks legislative history to explain why the New Tejas legislature amended § 1409 with subsection (e) which outlawed trusts in perpetuation of STOLI schemes, but arguably and perhaps most persuasively the legislature was merely codifying longstanding public policy. An absence of a codified prohibition could not possibly mean that the practice of using trusts to give the appearance of an (otherwise absent) insurable interest was lawful in New Tejas. Lawful insurance contracts must necessarily be purchased in good faith. *Grigsby,* 222 U.S. at 156; *see also Schaefer,* 94 U.S. at 460 ("The essential thing is, that the policy *shall be obtained in good faith*, and not for the purpose of speculating upon the hazard of a life.") (Emphasis added.); *Barnes*, 2012

WL 688817 at *4; *Carton*, 827 F. Supp. 2d at 1244 (citing *Warren v. Pilgrim Health & Life Ins. Co.*, 217 S.E.2d 891, 893 (S.C. 1950) (insurance policies not created in good faith are against public policy)); *Allen v. Hartford Life Ins. Co.*, 45 A. 955 (Conn. 1900). Good faith has surely always been imputed into New Tejas insurance contracts—to assume otherwise would be a debilitating end for New Tejas insurance industry. Policies devoid of these good faith intentions are thus against public policy and are unlawful at inception. Respectfully, this Court should give force to the good faith requirement and read these public policy concerns into the pre-2009 § 1409 of the New Tejas code. Permitting a trust or similar entity to add cover to a STOLI scheme or wagering contract saps the good faith requirement of its teeth and ignores prevailing public policy.

Not only does this trust create a cloud of suspicion, but Sydney Hicks's intent to transfer the policy to a third party before it ever existed, the fact that the transfer happened within two days of the policy's inception, and the fact that the policy would not have existed *but for* that third party all combine to show that there was, in fact, a cleverly concealed illegal wagering scheme in place. That, combined with the fact that Presidential Holdings paid all the premiums, paints an indisputable picture of a clever, illegal STOLI wager.

3. GUARANTY LIFE IS ENTITLED TO RETAIN THE PREMIUMS IT COLLECTED WHILE IT PROVIDED LIFE INSURANCE COVERAGE TO MR. HICKS.

The district court's decision to return premiums is grounded in untenable theory and violates public policy. The court below erroneously held that there is no legal basis for Guaranty Life's request for equitable balancing. R. at 14. A litany of recent STOLI cases citing both legal and public policy reasons wholeheartedly disagree. *See TTSI Irrevocable Trust v. ReliStar Life Ins. Co*, 60 So.3d 1148, 1150 (Fla. Dist. Ct. App. 2011); *Penn Mut. Life Ins. Co. v. Greatbanc Trust Co.*, No. 09 C 6129, 2012 WL 3437161, *5-8 (N.D. Ill. Aug. 15, 2012). The Policy was illegal for lack of an insurable interest and therefore standard rescission, which returns the parties to their *status quo ante* pre-contractual positions, is not an appropriate remedy. *See Greatbanc*, 2012 WL 3437161 at *4-8.

Rescission, however, does not address the bad faith tactics underlying illegal STOLI schemes. *See Puskar v. Hughes*, 533 N.E.2d 962, 966 (Ill. App. Ct. 1989). Those characteristics are not consistent with simple rescission. *See Greatbanc*, 2012 WL 3437161 at *5. "These scenarios do not always run afoul of state laws…but they often do." *Id.* at *1 (citing *Kramer*, 940 N.E.2d 535, 540-41 (N.Y. 2010)).

Accordingly, Guaranty Life is entitled to retain the premiums paid to date under the void *ab initio* standard properly articulated in *TTSI* and in furtherance of public policy. The district court erred in applying the *Barnes* and *Jolly* analyses to the Hicks illegal STOLI scheme. *See PHL Variable Ins. Co. v. Jolly*, 800 F. Supp. 2d 1205, 1207 (N.D. Ga. 2011); *Barnes*, 2012 WL 688817 4-5. Alternatively, even if this Court rescinds the policy, Guaranty Life must still keep the premiums because the Trust and Presidential fraudulently induced the insurers to enter into the contract.

a. Retaining Premiums Is the Appropriate Remedy for Insurance Policies That Are Void *Ab Initio* for Lack of Insurable Interest Under STOLI Schemes.

In ordering Guaranty Life to return the premiums paid to date on the Trust, the district court ignored the wave of recent cases carving out an exception for policies ruled void *ab initio* under STOLI schemes. *PHL Variable Ins. Co. v. Lucille E. Morello 2007 Irrevocable Trust*, 645 F.3d 965, 968-69 (8th Cir. 2011); *TTSI*, 60 So.3d at 1150; *Greatbanc*, 2012 WL 3437161 at *5-8.

Upon learning of the STOLI scheme, the Trust urged the district court to interpret Guaranty Life's action to void the policy as mere breach of contract. R. at 13. Such a claim is not surprising; the Trust has a strong interest in portraying Guaranty Life's motion for summary judgment as an action for rescission. If the contract were merely *rescinded*, the Trust would be entitled to recoup the monthly premiums it has paid to keep the policy in force. *See Barnes*, 2011 WL 759544 at *4. This characterization oversimplifies the issue and hopes to convince the court to turn a blind eye to the illicit contract wagering that is at the heart of this case. STOLIs are an egregious abuse of the purpose of life insurance and the typical relief of restoring all parties to *status quo ante* is insufficient to remedy the harms caused. By accepting the Trust's argument and applying general principles of rescission in ordering Guaranty Life to return all premiums, the district court mistakenly rejected the *TTSI* approach that this Court should adopt.

i. Bad faith violations of insurable interest laws preclude *status quo* relief.

As discussed, *supra* at I.A., New Tejas's amended insurable interest statute suggests that the state's policy regarding illegal STOLI schemes mirrors a good faith requirement. *See Knott v. State ex rel. Guar. Income Life Ins. Co.*, 186 So. 788, 789 (Fla. 1939) (stating that it has been "uniformly held" that a life insurance contract lacking valid interest is "a pure wager."). The statutory admonishment against devices, schemes, or artifices designed to give the appearance of an insurable interest where no legitimate one exists indicate that these particular violations of insurable interest laws involve a lack of good faith beyond the mere concealment, material misrepresentation, or material breach that typically applies in the case of rescission. *See* R. at 5 (citing N. Tej. § 1409(d)-(e)).

In *TTSI*, the Florida District Court of Appeals also adopted this interpretation, and further ruled that where a party wrongfully procures a life insurance policy on an individual in whom it has no insurable interest, the party is not entitled to its premiums back on the void policy. 60 So.3d at 1150. New Tejas's accordant public policy concerns regarding bad faith life wagering suggest that the *TTSI* remedy—not *status quo* rescission—is appropriate under this state's laws.

i. The *TTSI* analysis is appropriate for illegal STOLI schemes.

In *TTSI*, the trial court determined that the subject trust lacked an insurable interest in the insured's life and voided the contract *ab initio*. *Id.* at 1149-50. On appeal the TTSI trust challenged the court's ruling that it was not entitled to a return of any premiums paid, arguing the general proposition that a refund is required in order to restore the parties to *status quo ante*. *Id.* at 1150. Yet the appellate court easily distinguished the TTSI policy from other rescindable contracts as one that was void as contrary to public policy. *Id.* Accordingly, the court was bound to leave the parties "as the court found them." *Id.* (citing *Harris v. Gonzalez*, 789 So.2d 405, 409 (Fla. Dist. Ct. App. 2001)).

Similarly under Illinois law, a life insurance contract without an insurable interest is treated as an illegal wagering contract and therefore void *ab initio*. *Greatbanc*, 2012 WL 3437161 at *4. The District Court for the Northern District of Illinois recently declared that a contract void *ab initio* must be treated as though it never existed; no provision can be enforced. *Id.* at *5. In *Greatbanc*, an insurance trust conceded that the subject policy was procured based on material misrepresentations, that the policy owner lacked insurable interest at the time of issuance, and even that the policy was an unlawful STOLI scheme. *Id.* at *4. Consequently, the *Greatbanc* court did not order the return of the premiums on the voided policy. The court emphasized that its refusal stemmed solely from its determination that the law simply did not permit the Court to take further action with respect to a contract declared void *ab initio*. *Id.*

The same analysis applies to the Hicks arrangement. Sydney Hicks, Reggie Hightower, and Presidential, as discussed, *supra*, colluded to execute a STOLI on Mr. Hicks's life. Their machinations were nothing more than illegal wagers lacking insurable interest, and the *TTSI* and *Greatbanc* decisions direct this Court to keep the premiums with Guaranty Life. Even the court below came to the same conclusion that the Hicks policy lacked a valid insurable interest at inception in violation of New Tejas's insurable interest statute. R. at 14. Accordingly, this court should apply the *TTSI* analysis to this contract as to retention of premiums.

ii. Applying *Barnes* to these facts is an error.

As such, the district court erroneously relied on *Barnes*, a case that is discordant with the relief Guaranty Life merits. Given the congruous facts between the *TTSI* and *Greatbanc* cases and the Trust's STOLI scheme, the district court's reliance on *Barnes* was misguided. In this STOLI case, Hartford Life Insurance Company alleged that neither the subject life insurance policy nor its beneficiary trust were created for legitimate purposes and moved for summary judgment to retain all premiums. *Barnes*, 2012 WL 688817, at *5. The court determined that the Barnes policy was *not* void from the beginning for lack of an insurable interest, so it simply denied Hartford Life's request to retain premiums without needing to analyze the issue. *Id.* at *6.

Conversely, because the district court did find the Policy void *ab initio*, R. at 14, its reliance on *Barnes* was unwarranted. Moreover, it is worth noting that in the chamber proceedings prior to its decision, the *Barnes* court denied the Barnes trust's 12(b)(6) motion to dismiss and specifically stated that the *ab initio* relief Hartford Life sought "may be available, and it can come from the premiums collected." *Barnes*, 2011 WL 759554 at *5 (citing *PHL Variable Ins. Co. v. Clifton Wright Family Ins. Trust*, No. CV 09-2344 BTM, 2010 WL 1445186, *2-3 (S.D. Cal. April 12, 2010)). The district court thus had no reasonable basis to rely on *Barnes* when that court declined to even reach the issue of retaining premiums and the posture indicates that such relief was at least a possibility.

ii. Policies that are void as against public policy leave parties "as is" rather than returning them to *status quo ante.*

TTSI and *Greatbanc* stand for the principle that when STOLI schemes defraud insurance companies, the company retains the premiums. Public policy reasons support premium retention as well. If this court orders Guaranty Life to return the premiums paid to date, the insurance industry will suffer harm that will necessarily extend to the entire community. Such a ruling would (1) indirectly involve the court in investors' nefarious attempts to circumvent New Tejas's insurable interest laws for unjust gain, (2) incentivize individuals to wager on human lives, and (3) force insurance companies to raise their rates and destabilize the market.

i. Public policy demands retaining the premiums so as not to implicate the court in the bad faith acts of those skirting insurable interest laws.

Numerous courts that have broached the STOLI issue have landed squarely on the decision that STOLI policies that are no more than clever veils for wagering are precisely the type of contract that insults public policy. *See, e.g., Colgrove*, 175 N.E. at 572 (quoting *Warnock*, 104 U.S. at 779). Consequently, many courts have extended the general rule that "contracts that are void as contrary to public policy will not be enforced by the courts and the parties will be left as the court found them." *Greatbanc*, 2012 WL 3437161 at *6 (quoting *TTSI*, 60 So.3d at 1149); *see also Harris*, 789 So.2d at 409.

This sheds light on the fundamental problem in the arrangement between Sidney Hicks, Reggie Hightower, and Presidential; ultimately, the Investors got away with gaming the system through a clever loophole. *See Colgrove*, 175 N.E. at 571-72 ("To allow them to benefit by the death of others…is to allow them to do indirectly by a contract what they are not allowed to do directly."). The true wrong, however, stems from implicating the courts in these perfidious schemes. The *Greatbanc* court not only understood that illegal wagering contracts violated public policy and ought to be void *ab initio*, but also realized that enforcement of the illegal contract "makes the court an indirect participant in the wrongful conduct." 2012 WL 3437161 at *7 (quoting *Kedzie & 103rd Currency Exch., Inc. v. Hodge,* 619 N.E.2d 732, 738 (Ill. 1993)). Therefore, the court acknowledged that the practical effect of this proscription on enforcement is that the Court takes no further action. *See Greatbanc*, 2012 WL 3437161 at *7; (citing *Sellers v. Phillips,* 37 Ill. App. 74, 76 (Ill. App. Ct. 1890) ("[I]n the case of illegal contracts the courts would not, on one hand, undo what has been done, nor on the other, perfect what has been left unfinished.")).

Like the parties in *TTSI* and *Greatbanc*, the parties to the Hicks Policy cannot be returned to their pre-contract positions without implicating this Court in the Investor's bad faith attempt to defraud Guaranty Life. Accordingly, this Court must leave all parties as they currently stand and allow Guaranty Life to retain their premiums.

ii. ***Status quo ante* relief incentivizes individuals and investors to engage in life wagering schemes against public policy.**

Additionally, courts should allow insurance companies who are defrauded under STOLI schemes to retain the premiums paid so as to deter similar scheming. Currently, there is no penalty for attempting a STOLI arrangement even where such policies are declared void *ab initio*; under the district court's ruling the Trust and Presidential still get away with circumventing the insurable interest requirement and trying to cheat Guaranty Life out of millions of dollars. R. at 14. Notably, the district court even allows Mr. Hightower to keep the $1.4 million in commission payments Guaranty Life granted him—and now flat out loses—for the sale of the policy. *See Barnes*, 2011 WL 759554 at *5 (recognizing that defrauded insurers may suffer damages beyond the mere issuance of the policy, including the payment of commissions to the broker who sold it); R. at 8, n.4.

The Sixth and Eighth Circuit Courts of Appeals have favored retention of premiums under these circumstances because to do otherwise would incentivize the fraud by failing to penalize the wrongdoer. *Morello*, 645 F.3d at 970; *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 797 (6th Cir. 2009) (anticipating "the perverse effect of reducing the defrauders' risk relative to honest policyholders"). Recently, the *Morello* court adopted this rationale as part of its decision to deny a return of premiums, stating "the underlying rationale of this rule is to prevent insurance fraud from becoming a zero-sum game in which the insured bears no pecuniary risk in attempting to perpetrate fraud." 645 F.3d at 970. Accordingly, Guaranty Life merits equitable relief in the form of retaining the premiums in order to avoid incentivizing fraudulent conduct.

iii. Retaining premiums is necessary to keep cost sharing and premium calculations stable.

Upon discovering the fraudulent STOLI scheme, Guaranty Life acted prudently to mitigate both parties' financial losses. *See* R. at 9-13. The Hicks Trust and Presidential would have this Court believe that allowing Guaranty Life to retain the premiums properly collected is somehow a windfall award. *See* R. at 13. On the contrary, courts acknowledge that in these fraudulent cases, judicial authority can be exercised to void the contract and leave the parties as they are. *See, e.g., Lopez v. Life Ins. Co. of Am.*, 406 So. 2d 1155, 1159 (Fla. Dist. Ct. App. 1981) *approved sub nom. Life Ins. Co. of Ga. v. Lopez*, 443 So. 2d 947 (Fla. 1983).

Under similar circumstances, courts have praised insurance companies' attempts to minimize financial loss when cancelling a contract. A Florida District Court of Appeals aptly noted that an insurance company, upon learning of the illegal purpose of an issued policy, may proclaim the contract unenforceable and avoid payment of benefits. *Id.* Yet the court was quick to add that the insurer must fulfill the corresponding duty of immediately cancelling the contract "so as not to be unjustly enriched by future payments." *Id.*

In light of these policies, Guaranty Life handled the Hicks fraud fairly and responsibly. As soon as Guaranty Life discovered the Policy's misrepresentations, the company notified Presidential that the Policy was rescinded and that they would collect no further premiums. R. at 13, n.11. In line with the *Lopez* court's decree, Guaranty Life made the prudent choice to cancel the Hicks insurance contract in order to avoid paying death benefits on a fraudulent policy, then responsibly and timely released the Investors from the contract in order to mitigate their financial loss. *See Lopez*, 406 So. 2d at 1159; R. at 13, n.11. Guaranty Life chose to rightfully cancel the contract, evidencing the company's inclination toward equity.

In addition, retaining the premiums cannot constitute a windfall because fraudulent STOLI schemes manipulate the insurance industry and burden all consumers. *See Knott*, 186 So. at 791 (Buford, J., dissenting) (Life insurance is based on "sound economic principles" including the concept of shared risk). Insurance is not a standard buy-and-sell product. The premiums paid on each policy are utilized to pay out the company's collective benefits and the cost of a single policy is not determined in a vacuum; the price is derived in aggregate based on a cost-sharing economic model. *See id.* The logical correlation is that the premiums collected are separate and distinct from the policy itself. *See id.* Accordingly, if the insurance company voids the policy for legitimate reasons (such as a lack of insurable interest at inception), the insurer does not have an absolute right to lay claim to the premiums already paid.

Public policy demands that life insurance, a vital protection for individuals and their families, remain available for its primary purpose and not become diluted by fraudulent financial products. *See Kramer*, 940 N.E.2d at 544 (Smith, J., dissenting). Yet the Trust and Presidential attempted to one-up the insurance system by eliminating the legitimate "bet" described in *Kramer* with the immoral life wagering condemned by courts. *See id.* Retaining the premiums is critical in order to avoid implicating the courts in wrongdoing, deter STOLI scheming, and offset the loss the insurance industry would otherwise suffer. As a matter of policy, the money belongs with Guaranty Life.

b. The District Court Mistakenly Applied the Negligent Misrepresentation Analysis in *Jolly*.

The district court had no basis to rely on *Jolly* when it ordered Guaranty Life to return the premiums paid because the negligent misrepresentation standard applied in that case is inappropriate under this and other STOLI schemes. After a trial court rescinded the subject policy *ab initio* in *Jolly*, the sole remaining claims for the court to decide were counts of negligent misrepresentation and conspiracy against the trust. 800 F. Supp. 2d at 1207. Yet even a cursory comparison of the facts to the Hicks situation reveals that the New Tejas district court had no basis to rely on the *Jolly* negligent misrepresentation analysis.

A key distinction in *Jolly* is that the defendant trustee there had no knowledge of any facts about Mr. Jolly's income, net worth or criminal history that were misrepresented on his life insurance application. *Id.* at 1213. To the contrary, Sydney and Mr. Hightower, the driving forces behind the Trust, were undeniably aware that Mr. Hicks's life insurance application grossly falsified his income and net worth. R. at 7 (the Trust, through Mr. Hightower, submitted the fraudulent written application to Guaranty Life with the Trust as the sole beneficiary).

Moreover, at all material times, the sole beneficiary of the *Jolly* policy was the named trust and neither the beneficiary of the trust nor the trustee ever changed. The Hicks Trust, on the other hand, underwent a sale of ownership and beneficiary at the same time as Trustee Bryan Jones resigned and appointed Frank Kipp as successor—suspicious changes that were never an issue in *Jolly*. *See* 800 F. Supp. 2d at 1209; R. at 9. Most importantly, the *Jolly* facts do not suggest that Mr. Jolly intended to transfer his policy or trust to a third party or had any bad faith arrangement in place prior to the policy's inception. *See id.* at 1208-11. This is a stark contrast to the Hicks fraud. For one, the *Jolly* situation never raised a red flag by selling the trust beneficiary to a third party lacking insurable interest in Mr. Jolly's life, unlike when the Trust notified Guaranty Life that Sydney Hicks previously sold all beneficial interest in the Trust to Presidential. *See id.*; R. at 9. Therefore, no nefarious third-party actor was complicit in the *Jolly* trust and policy the way that Presidential is at the center of the Hicks STOLI scheme.

On the whole, the *Jolly* misrepresentations are not the same egregious evidence of illegal STOLI scheming that are at play in the Hicks policy. Accordingly, the negligent misrepresentation standard is insufficient to account for the bad acting that is central to the STOLI insurable interest violations. This court should give due weight to these critical differences between the facts in *Jolly* and the Hicks fraud to recognize that the district court erred in applying the negligent misrepresentation standard in this case.

c. Guaranty Life Should Retain the Premiums Based on General Principles of Contract Law Even If the Policy is Rescinded.

In the alternative, "there is a well-recognized exception by which the insurer is relieved from any duty to return the premium[s] when it was induced to enter into the contract by the actual fraud of the insured." *Morello*, 645 F.3d at 969 (quoting *Taylor v. Grand Lodge A.O.U.W. of Minn.*, 105 N.W. 408, 411 (Minn. 1905)). Even if this Court does not find that Guaranty Life is entitled to the premiums because the policy is void *ab initio* for lack of insurable interest, the money should still remain with the insurance company if the contract is simply rescinded.

The New Tejas rescission statute allows an injured party to rescind a contract from the time a material representation becomes false. N. Tej. § 1408. A typical insurance policy may be rescinded due to concealment, material misrepresentation, or material breach of warranty. *Black's Law Dictionary (9th ed. 2009)*. Those circumstances require restoring both parties their pre-contractual positions with each returning any benefits received under the contract. *Hassan v. Yusuf,* 944 N.E.2d 895, 920 (Ill. App. Ct. 2011).

Although the typical remedy for rescission is *status quo ante*, courts applying rescission principles in the illegal STOLI context opt to leave the parties as they found them. *See, e.g., Metro. Life Ins. Co. v. Felix*, 75 N.E. 941, 943 (Ohio 1905) (expressly conditioning rescission upon "there being no fraudulent conduct by the beneficiary"). Guaranty Life should therefore retain the premiums collected since it was induced by fraud to enter an unenforceable contract. Moreover, the Trust and Presidential cannot reasonably expect to recover premiums paid on a policy that was procured by such flagrantly invalid means. *See Wuliger*, 567 F.3d at 796-97 (6th Cir. 2009) (citing *Endress v. Ins. Co.*, 1 Ohio Law Abs. 553, 553 (Ohio Ct. App.

1923) where because the insured plaintiff knew at the time she paid premiums that she had no insurable interest, she cannot recover any premiums on the void policy).

Under general principles of contract law, rescission presumes the existence of an otherwise valid and enforceable contract and therefore cannot be the proper remedy when a contract is void *ab initio*. *Jensen v. Quik Intern.*, 820 N.E.2d 462, 467 (Ill. 2004). Several courts have applied this principle in the illegal STOLI context. *See, e.g., Morello*, 645 F.3d at 967. The Supreme Court of Delaware, for example, recently analyzed the state's insurable interest statute and found STOLI schemes to be illegal wagers on human life under Delaware law and thus void. *Dawe*, 28 A.3d at 1070-71. The court stressed the critical distinction between these void, unenforceable policies as distinguished from contracts that are merely *voidable* at the election of either party. *Id.* at 1067. The *Dawe* court emphatically declared that a court "may never enforce agreements void *ab initio*, no matter what the intentions of the parties." *Id.* Accordingly, this Court should leave the parties as is and allow Guaranty Life to retain the premiums.

The Eighth Circuit recently joined the growing list of jurisdictions entitling defrauded insurance companies to retain premiums paid on rescinded STOLI policies. *Morello*, 645 F.3d at 967. An insured's son in *Morello* was approached by a disbarred attorney with a record of bankruptcy fraud and tax evasion felony convictions to consider fraudulently acquiring life insurance for his mother. *Id.* A business associate of the attorney also reached out to Mrs. Morello, a retired cosmetologist, offering "free life insurance" if she agreed that any policies purchased on her behalf would eventually be sold to third parties. *Id.* Moreover, the associate also promised cash payments in exchange for Mrs. Morello's complicity in the scheme. *Id.* Once she consented, the associate utilized a phony financial statement that inflated Mrs. Morello's net worth to $34 million and her annual income to $800,000.00 in order to obtain a life insurance policy bearing a high-figure death benefit from the plaintiff insurance company. *Id.* The Court of Appeals upheld the policy as void *ab initio* and ruled that the insurer had no duty to return the payments to the lender that indirectly funded the purchase price and premiums on the "fraudulently-procured" Morello policy. *Id.* at 967-70.

The parallels between the *Morello* and Hicks STOLI schemes are overwhelming. Mr. Hightower first initiated contact with Sydney Hicks to discuss estate planning for Mr. Hicks and the two teamed up to procure a life insurance policy on Sydney's father. R. at 10. Sydney even testified that his father "had no discernable estate" that needed planning. R. at 10. The scheme raises suspicion even more once the collusive email between Mr. Hightower and Presidential's Timmy Chung reveals the intention to sell Mr. Hicks's policy to a third party. R. at 10. Finally, that Hightower reimbursed Sydney for his initial premium payment only two days after the policy took affect makes the similarity to *Morello* abundantly clear. R. at 11-12 (Sydney even testified that he never would have purchased the Policy if Hightower did not agree to immediately wire transfer the premium payments).

Guaranty Life was fraudulently induced to enter into its contract with the Hicks Trust in the same manner the Eighth Circuit condemned in *Morello*. Accordingly, Guaranty Life has no duty to return the premiums paid on the illegally procured Policy. When courts apply rescission to illegal STOLI schemes, they forgo the standard *status quo ante* remedy for the same policy reasons that courts voiding policies *ab initio* forgo the pre-contractual remedy. Thus even if this court rescinds the Policy, Guaranty Life retains the premiums.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States District Court for the District of New Tejas granting Guaranty Life's motion for summary judgment as pertaining to insurable interest, and reverse the judgment of the United States District Court for the District of New Tejas denying Guaranty Life's motion for summary judgment as pertaining to the premiums.

Respectfully submitted,

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