
**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 07-2020

FIRST PENN-PACIFIC LIFE INSURANCE COMPANY,
Appellant,

v.

WILLIAM R. EVANS, CHARTERED, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

**BRIEF OF APPELLANT
FIRST PENN-PACIFIC LIFE INSURANCE COMPANY**

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Dated: December 31, 2007

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No. 07-2020 Caption: First Penn-Pacific Life Insurance Company v. Evans et al.

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makes the following disclosure:

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 YES NO
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 YES NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations: First Penn Pacific Life Ins. Co. is wholly-owned subsidiary of Lincoln National Life Ins. Co. Lincoln National Life Ins. Co. is a wholly-owned subsidiary of Lincoln National Corp.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
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12/31/07
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I. JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(a). Diversity of citizenship is satisfied because plaintiff First Penn-Pacific Life Insurance Company (“First Penn”) is incorporated under the laws of Indiana and has its principal place of business in Illinois, while defendant William R. Evans, Chartered (“Evans”) and intervenor Invotex, Inc. (“Invotex”) are incorporated under the laws of Maryland and have their principal places of business in Maryland. The amount-in-controversy is satisfied because First Penn’s complaint sought, among other things, a declaration that a \$2 million life insurance policy was rescinded and void *ab initio*.

This Court has jurisdiction under 28 U.S.C. § 1291 because the appeal is from a final judgment disposing of all claims. On June 21, 2007, the district court entered an order granting summary judgment in favor of Evans and Invotex and against First Penn. JA 964. On September 4, 2007, the district court denied the parties’ respective motions to alter or amend the judgment. JA 983-84. On September 28, 2007, First Penn filed a timely notice of appeal. JA 985-86. On October 12, 2007, Evans and Invotex filed a notice of cross-appeal, which was later withdrawn. JA 7 (Docket no. 70). On December 3, 2007, this Court ordered the dismissal of the cross-appeal. JA 9 (Docket no. 88).

II. STATEMENT OF ISSUES

A. Whether the district court erred as a matter of law by concluding the Policy was not rescinded by mutual agreement when the Policy owner negotiated the premium refund check.

B. Whether the district court erred as a matter of law by concluding the insured's scheme to viaticate the Policy did not render the Policy void for lack of insurable interest.

III. STATEMENT OF THE CASE

On March 6, 2001, First Penn filed its initial action against Evans, the owner of First Penn life insurance policy T101158758 (the "Policy"), in the United States District Court for the District of Maryland. *See* Compl., Civil Action No. 01-680 (3/6/01) (Docket no. 1). First Penn sought a declaration that the Policy was (i) rescinded and void because the insured, Stanley Moore, made material misrepresentations in the Policy application; and (ii) the Policy was void for lack of an insurable interest because Moore had fraudulently obtained the Policy for the sole purpose of viaticating it.

Invotex, as receiver for Answer Care, Inc. ("Answer Care"), a viatical settlement company, intervened and moved to dismiss the action based on the

Burford abstention doctrine. Civil Action No. 01-680 (Docket no. 11).¹ Invotex argued that, based on Answer Care's purported property interest in the Policy, the dispute should be resolved in the pending state court receivership proceeding. *See id.* The district court agreed and dismissed the action. Civil Action No. 01-680 (Docket no. 18). This Court affirmed based on the *Burford* abstention doctrine. *See First Penn-Pacific Life Ins. Co. v. William R. Evans, Chartered*, 304 F.3d 345 (4th Cir. 2002), *cert. denied*, 538 U.S. 944 (2003).

On June 5, 2002, First Penn filed a timely claim seeking rescission or cancellation of the Policy in the state court receivership proceeding. JA 391. In a separate state court appeal involving disposition of the receivership, it was determined that neither Answer Care nor Invotex was the owner or beneficiary of any life insurance policies. JA 457. The circuit court overseeing the receivership, therefore, declared the state court claims adjudication process, which was the putative basis for the *Burford* abstention, void *ab initio*. JA 465.

First Penn filed a motion to reopen the federal court action and to reconsider the order permitting Invotex to intervene. *See* Civil Action No. 01-680 (Docket

¹ On September 22, 2000, the Securities Commissioner of Maryland filed a complaint against Answer Care and its president, alleging multiple violations of the Maryland Securities Act. JA 409. Answer Care purported to have ownership interests in many life insurance policies, including the Policy. JA 18. On October 16, 2000, the Circuit Court for Baltimore City appointed Invotex (formerly known as Maryland First Financial Services, Inc.) as receiver for Answer Care. JA 34 (Answer ¶ 62).

no. 26). As a protective measure, First Penn also filed the present action. JA 11. The district court denied the motion to reopen, holding the filing of the present action rendered the motion moot. Civil Action No. 01-680 (Docket no. 28). On appeal, this Court vacated the district court's denial of the motion to reopen and instructed the district court to hold the motion in abeyance pending a determination of the timeliness of the present action. *See First Penn-Pacific Life Ins. Co. v. William R. Evans, Chartered*, 193 F. App'x. 221, 223 (4th Cir. 2006).

First Penn's complaint in the present action again sought a declaration that the Policy was rescinded and void for lack of insurable interest. JA 26. Evans moved to substitute Invotex as a defendant. JA 1 (Docket no. 8). The district court denied Evans's motion to substitute, but allowed Invotex to intervene. JA 3 (Docket no. 22).

After discovery, the parties filed cross-motions for summary judgment. On June 21, 2007, the district court entered summary judgment in favor of Evans and Invotex. JA 964. Although the district court found that Moore purchased the Policy as part of a fraudulent scheme, the court further found that First Penn failed to file a judicial rescission action within the Policy's two-year contestability period as required by Arizona law. JA 965, 981. The Policy, therefore, could not be rescinded based on material misrepresentations. JA 981. The district court additionally found the Policy owner, Evans, endorsed the rescission check to

Answer Care, but concluded there was no mutual rescission because Answer Care never manifested an intent to accept the refund and rescind the Policy. JA 970, 971-72 (note 5). Finally, the district court concluded that, although the evidence indisputably showed Moore was engaged in a scheme to viaticate life insurance policies and to defraud First Penn, an insurable interest existed because Moore was not working with others to viaticate the Policy. JA 966, 974.

IV. STATEMENT OF FACTS

A. Moore Initiates A Fraudulent Scheme To Obtain And Viaticate Numerous Life Insurance Policies

In September 1997, Stanley Moore, a resident of Arizona, commenced a scheme to acquire and viaticate numerous insurance policies. JA 966. A viatical settlement is “an investment contract pursuant to which an investor acquires an interest in the life insurance policy of a terminally ill person – typically an AIDS victim – at a discount of 20 to 40 percent, depending upon the insured’s life expectancy.” JA 966 (quoting *Sec. & Exch. Comm’n v. Life Partners, Inc.*, 87 F.3d 536, 537 (D.C. Cir. 1996)). Upon the death of the insured, “the investor receives the benefit of the insurance.” *Id.*

On or about September 18, 1997, at the beginning of his scheme, Moore asked his physician, Dr. Hovan, to falsify his medical records by stating that Moore suffered from a terminal illness. JA 86, 967. Dr. Hovan refused and noted the request in Moore’s medical records. JA 86, 967.

Moore also asked Dr. Hovan to complete a form known as a physician's letter of competency. JA 967. This form, which is widely available on the Internet, is necessary to sell a life insurance policy to a viatical settlement company. *Id.* Dr. Hovan certified that Moore "was of sound mind" and "under no constraint or undue influence," but refused to certify that Moore suffered from a terminal illness. JA 150.

B. Moore Acquires Seven Different Life Insurance Policies From Four Different Life Insurance Agents

On November 13, 1997, Moore applied to First Penn for a \$2 million life insurance policy. JA 967. On that same day, Moore applied for another \$2 million life insurance policy from Transamerica Occidental Life Insurance Company ("Transamerica"). *Id.* Moore submitted these policy applications through Stuart Daniels, an insurance broker with Total Financial and Insurance Services, Inc. ("Total Financial"). *Id.* In the Policy application, Moore represented that he (i) had only one other policy for \$500,000; and (ii) had not applied for any other life insurance in the preceding 90 days. JA 967-68. Moore concealed from First Penn his application for \$2 million in life insurance with Transamerica. JA 968.

A few weeks later, on December 4, 1997, Moore applied for two additional life insurance policies through Ed Kaplan, another insurance broker. Moore applied for a \$500,000 policy from Jackson National Life Insurance Company ("Jackson National"), and a \$500,000 policy from Valley Forge Life Insurance

Company (“Valley Forge”). JA 968, 165, 169. In each policy application, Moore did not reveal his other pending policy applications. JA 968.

Eleven days later, on December 15, 1997, Moore applied for three additional life insurance policies. Moore used a third insurance broker, Alan Hill, to apply for a \$1 million policy from Midland Mutual Life Insurance Company (“Midland”), and a \$500,000 policy from Federal Kemper Life Assurance Company (“Kemper”). JA 968 (note 4), 176, 177. Moore also applied for a \$1 million life insurance policy from Lincoln Benefit Life Insurance Company (“Lincoln Benefit”) through a fourth insurance broker, Mike Baxley. JA 968 (note 4), 178-81. Notably, on all seven policy applications, Moore listed his sister, Donna Brooks, as primary beneficiary. JA 153 (First Penn), 157 (Transamerica), 169 (Valley Forge), 173 (Midland), 177 (Kemper), 178 (Lincoln Benefit), 299 (Jackson National).

On December 15, 1997, Moore also faxed medical records to First Penn as part of the Policy application. JA 968, 102-09. Prior to sending the medical records to First Penn, Moore removed Dr. Hovan’s letter of competency and note stating that Moore had asked him to misrepresent Moore’s medical condition. JA 968. First Penn reviewed the medical records and declined Moore’s application based on his medical condition. JA 968.

In December 1997, Transamerica and Jackson National each issued life insurance policies to Moore in the amount of \$2 million and \$500,000, respectively. JA 967-68. On December 30, 1997, a representative of Total Financial (the brokerage firm through which Moore obtained the Transamerica policy) requested that First Penn reconsider Moore's application because his lab results for the Transamerica application were more favorable than those provided to First Penn. JA 968-69. First Penn reconsidered and approved Moore's application with a "standard" rating, rather than the "preferred" rating requested on his application. JA 969. Moore was required to amend his application to reflect the higher premium offered. JA 969.

On January 5, 1998, while the Valley Forge, Lincoln Benefit, Midland, and Kemper applications were pending, and before the Policy became effective, Moore met with viatical broker Laura Clarkson to discuss selling some or all of his policies. JA 969, 231-34, 238-39. The following day, January 6, 1998, Valley Forge issued a \$500,000 life insurance policy to Moore. JA 31 (Answer ¶ 27), 169. On January 7, 1998, Lincoln Benefit issued a \$1 million policy to Moore. JA 31 (Answer ¶ 28), 178.

On January 27, 1998, Moore executed the amendment to the First Penn application. JA 969, 255. In the amendment, Moore falsely asserted that the representations made in his November 13, 1997, application were still valid.

JA 969. In fact, since signing the application, Moore had obtained four new policies with death benefits totaling \$4 million and had two additional applications pending. *Id.* If Moore had disclosed this information, then First Penn would not have issued the Policy. *Id.*

On February 4, 1998, Kemper issued a \$500,000 life insurance policy to Moore. JA 33 (Answer ¶ 47).

C. Moore Viaticates Two Life Insurance Policies And Converts All Seven Policies To 20-Year Term Policies

By February 4, 1998, viatical broker Laura Clarkson had found a buyer for Moore's Transamerica and Jackson National policies. JA 265. Kelco, Inc. ("Kelco") agreed to purchase the two policies, on the condition that Moore convert them from 10-year term to 20-year term policies. JA 969-70.

The next day, after learning 20-year term policies were more attractive to viatical companies, Moore asked First Penn to reissue the Policy as a 20-year term policy. JA 970. First Penn reissued the Policy as requested on February 5, 1998. *Id.* The delivery notice accompanying the Policy instructed the insurance broker not to deliver the Policy if Moore's insurable status had changed since the date of the application. JA 267. The issue date of the Policy was February 5, 1998. JA 274, 973.

Moore likewise converted his other policies to 20-year term policies. JA 970. Transamerica reissued Moore's policy on February 7, 1998, as a 20-year

term policy. JA 296-97. Valley Forge reissued Moore's policy as a 20-year term policy on February 18, 1998. *See* JA 301-02. Jackson National reissued Moore's policy as a 20-year term policy on February 20, 1998. JA 298-99.

On February 20, 1998, Moore amended his Midland application to a 20-year term policy. JA 304. That same day, Midland issued the 20-year term policy with a \$1 million benefit. JA 33 (Answer ¶ 47). Lincoln Benefit converted Moore's policy to a 20-year term and increased the death benefit to \$2 million on March 9, 1998. JA 309-11. The Kemper policy also was converted to a 20-year term. JA 312.

By March 1998, Moore had applied for and obtained seven life insurance policies, totaling \$8.5 million in coverage. JA 970-71. At least six of these policies, worth \$8 million, were sold to viatical settlement companies. JA 971.²

D. Moore Viaticates The First Penn Policy, And Evans Becomes Owner And Beneficiary Of The Policy

On March 6, 1998, viatical broker Laura Clarkson contacted Kelco about purchasing Moore's First Penn and Kemper policies. JA 970. Kelco purchased both the First Penn and Kemper policies. *See id.* Kelco then sold the Policy,

² Discovery did not reveal whether the Valley Forge policy was viaticated before it was rescinded. JA 378. Moore, however, procured that policy in the same manner as the other six policies, named his sister as beneficiary (JA 169), and later sought to convert the coverage to a 20-year term (JA 301).

Kemper policy, and the previously purchased Jackson National policy to Answer Care. *Id.*

On or about April 13, 1998, Evans submitted a change of beneficiary and ownership form to First Penn, changing the owner and beneficiary of the Policy to “William R. Evans, Chartered.” JA 330.³ As a result of the viatication of the life insurance policies, Moore’s sister, Donna Brooks, less than a year after originally being named beneficiary, no longer stood to receive benefits under any of the viaticated policies. *See* JA 330 (First Penn), 333 (Lincoln Benefit), 350 (Midland), 812 (Jackson National), 813 (Kemper), 815 (Transamerica).

E. First Penn Learns Of The Fraud, Evans Negotiates The Rescission Check, And The Policy Is Mutually Rescinded

On May 11, 1999, Kemper wrote to Evans advising him that it was rescinding the Kemper policy because of the excessive life insurance coverage obtained by Moore through his concealment of the Transamerica policy. JA 372-73. Kemper included a premium refund check with the letter. JA 834. Evans responded to the letter on May 21, 1999, seeking reinstatement of the Kemper policy and returning the premium refund check. JA 835-36. On June 9, 1999, Kemper reaffirmed its decision to rescind and returned the premium refund check

³ Notably, Answer Care was not identified as the Policy owner or beneficiary. JA 330.

to Evans. JA 837. On September 2, 1999, Kemper wrote again to Evans, advising him that it had learned of the Policy with First Penn and reiterating its decision to rescind the Kemper policy. JA 838.

In an undated letter, Evans wrote to Kemper requesting reissuance of the premium refund check. JA 846. Kemper issued a new premium refund check and sent it to Evans on April 22, 2000. JA 847-48. Evans specially endorsed the check to Answer Care. JA 849.

In October 1999, First Penn's reinsurer discovered evidence of Moore's fraudulent scheme, including the existence of the undisclosed Jackson National policy, Lincoln Benefit policy, Valley Forge policy, Midland policy, and Kemper policy. JA 94-99, 130-31, 360. On October 12, 1999, First Penn sent a letter to Evans, the Policy owner, rescinding the Policy and refunding all premiums. JA 971, 368-69. That same day, First Penn sent a letter to Moore, informing him that the Policy was rescinded and explaining the reasons for the rescission. JA 971, 370-71.

When faced with rescission of the Policy, Evans followed a pattern of behavior similar to the Kemper rescission process. Evans initially contested the rescission of the Policy and refused to accept the premium refund check. JA 324-25, 380. On October 15, 1999, Evans returned the refund check to First Penn. JA 380. On October 19, 1999, First Penn reaffirmed its rescission and returned the

check to Evans. JA 382-83. On October 21, 1999, Evans again contested First Penn's rescission of the Policy. JA 384-85. This time, Evans retained the premium refund check, but informed First Penn that he did not intend to cash it, noting that it would be "ludicrous to keep sending this check back and forth." JA 384. In reply, First Penn informed Evans that it would not reverse its decision to rescind the Policy. JA 386.

Later, by undated letter, Evans requested that First Penn reissue the premium refund check to "William R. Evans," rather than "William R. Evans, Chartered." JA 387.⁴ By letter of May 15, 2000, First Penn refused, noting that the Policy owner was "William R. Evans, Chartered," and reissued the check to William R. Evans, Chartered. JA 388. Once again, Evans specially endorsed and delivered the check to Answer Care. JA 389-90, 850.

V. SUMMARY OF ARGUMENT

Evans, the owner of the Policy, specially endorsed the premium refund check tendered by First Penn and delivered that check to Answer Care. Evans's negotiation of the premium refund check constitutes a mutual rescission of the Policy as a matter of law. The district court erred by considering the subjective intentions of Answer Care, a non-contracting party, in ruling that the Policy was not mutually rescinded.

⁴ Unlike the prior letters from Evans, this letter did not indicate that Evans did not intend to negotiate the check being requested.

The district court further erred as a matter of law by finding the existence of an insurable interest. Although the district court found undisputed evidence of a lack of good faith in formation of the Policy, the court failed to apply Arizona law requiring good faith in determining insurable interest. The district court further erred by imposing an “involvement of others” requirement as a legal prerequisite to finding a lack of insurable interest. Even if involvement of others were a legal prerequisite to finding a lack of insurable interest, the facts found by the district court prove that, before the Policy was issued, Moore involved others in his scheme to evade the insurable interest requirement and to viaticate the Policy.

VI. STANDARD OF REVIEW

A district court’s summary judgment ruling is reviewed *de novo*. See *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only when “there is no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The court must view the facts and inferences drawn therefrom in the light most favorable to the non-moving party. See *Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418, 423-24 (4th Cir. 2004) (reversing entry of summary judgment in declaratory judgment action involving obligations under insurance contract). Accordingly, the Court must view the facts and inferences in

this case in the light most favorable to First Penn because the cross-motion for summary judgment was decided against First Penn.

VII. ARGUMENT

A. The District Court Erred As A Matter Of Law By Concluding The Policy Was Not Rescinded By Mutual Agreement Because The “Beneficial Owner” Never Consented To The Rescission

It is well established that the knowing and voluntary negotiation of a premium refund check issued by an insurer for the express purpose of rescinding a policy results in the mutual rescission of that policy as a matter of law. *See, e.g., Aetna Life Ins. Co. v. Dodd*, 103 F.2d 793, 796 (8th Cir. 1939) (holding policy rescinded by mutual consent where premium refund checks were negotiated by insured); *Kincaid v. N.Y. Life Ins. Co.*, 66 F.2d 268, 270 (5th Cir. 1933) (holding insured’s negotiation of premium refund check, even after initially disputing rescission, resulted in mutual rescission of policy); *Avemco Ins. Co. v. N. Colo. Air Charter, Inc.*, 38 P.3d 555, 557 (Colo. 2002) (en banc) (holding mutual rescission occurred when insured entity knowingly and voluntarily negotiated premium refund check tendered for express purpose of effecting rescission); *Mut. of Omaha Ins. Co. v. Korengold*, 241 N.W.2d 651, 652 (Minn. 1976) (per curiam) (holding policy rescinded by mutual consent when defendant, a lawyer, negotiated premium refund check); *Warren v. N.Y. Life Ins. Co.*, 58 P.2d 1175, 1181 (N.M. 1936) (holding retention of premium refund check and failure to repudiate wife’s

unauthorized endorsement and deposit of check resulted in mutual rescission); Lee R. Russ, *Couch on Insurance* § 31:55 (3d ed. 2005) (“[W]hen an insured cashes a premium refund check and the insured understands the reason for the check, rescission has occurred.”); *cf. Scheffacker v. Hoopes*, 77 A. 130, *13 (Md. 1910) (holding conversion of check into certificate of deposit, when check was offered to settle a disputed claim, established acceptance of terms of settlement).

The endorsement and delivery of a check to a third party constitutes negotiation of the instrument. *See* Md. Code Ann., Com. Law § 3-201 (“[N]egotiation requires transfer of possession of the instrument and its [e]ndorsement by the holder.”).⁵ Evans negotiated the rescission check by endorsing it to Answer Care and by delivering the check to Answer Care. JA 971 (note 5), 850-51, 389-90. Once the rescission check was endorsed and delivered to Answer Care, the right to enforce payment on the check vested solely in Answer Care. *See* Md. Code Ann., Com. Law § 3-301; 2A Frederick M. Hart & William

⁵ The endorsement and delivery of the check occurred in Maryland and, therefore, Maryland law governs. *See* Md. Code Ann., Com. Law § 1-105 (providing that absent agreement of the parties, the Maryland Commercial Code applies to “transactions bearing an appropriate relation to this State”). Even if Arizona law were deemed to apply, *see infra* note 7, there is no conflict of law because the applicable provisions of the Arizona Commercial Code (Ariz. Rev. Stat. Ann. § 47-3201) and the Maryland Commercial Code (Md. Code Ann., Com. Law § 3-201) are identical. *See Mallinckrodt, Inc. v. Whitaker M.A. Bioproducts, Inc.*, 566 A.2d 1113, 1116 (Md. Ct. Spec. App. 1989) (“Since there is no conflict of laws...on the issue presented in this case, there is no need for a choice of law between the two.”).

F. Willier, *Negotiable Instruments Under the Uniform Commercial Code* §§ 12.01, 12.02[5] (2006) (describing rights of holders who acquire negotiable instruments to enforce them); *see also* Ariz. Rev. Stat. Ann. § 47-3203 (“Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course...”); Md. Code Ann., Com. Law § 3-203 (same); *Fore v. Bles*, 721 P.2d 151, 152 (Ariz. Ct. App. 1986) (“[T]ransfer of an instrument from a holder vests in the transferee the right to sue in his own name on the instrument.”); *Weast v. Arnold*, 474 A.2d 904, 912 n.4, 916 (Md. 1984) (holding plaintiff entitled to enforce notes in her own name as the transferee of notes endorsed to her). As transferee of the rescission check, Answer Care held an absolute right to enforce payment of the check.

Once Evans accepted the rescission check and transferred the right to payment on the check to Answer Care, Evans, as a matter of law, consented to a mutual rescission of the Policy. *See, e.g., Kincaid*, 66 F.2d at 270; *Peterson v. N.Y. Life Ins. Co.*, 240 N.W. 659, 660 (Minn. 1932) (“Nothing could be plainer than that, if plaintiff accepted the return of the premiums, he consented to and effectuated a rescission by consent.”); *Warren*, 58 P.2d at 1179, 1181. It is undisputed that Evans was the owner of the Policy. JA 970, 29 (Answer ¶ 7)

(admitting Evans was the owner of the Policy). Indeed, Evans alone had the right to accept the rescission check and effectuate a mutual rescission of the Policy.

Although the district court found that Evans endorsed the rescission check to Answer Care, the district court erroneously concluded the rescission was ineffective because Answer Care, as “beneficial owner,” never “manifested an intention to accept the refund” and “disputed First Penn’s attempt to rescind the Policy.” JA 971-72 (note 5). Answer Care had no legally cognizable interest in the Policy and, therefore, Answer Care’s consent to rescission was irrelevant. Whether Answer Care approved of the rescission of the Policy is of no consequence.

Answer Care had absolutely no contractual rights under the Policy and, therefore, had no right to reject Evans’s acceptance of rescission of the Policy. Indeed, the policy owner retains the right to effect any change with respect to a life insurance policy. *See, e.g., State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 (5th Cir. 1990) (holding change of beneficiary form signed by insured prior to his death was ineffective because power to change beneficiaries was limited to policy owner); *Prudential Ins. Co. of Am. v. Stephens*, 498 F. Supp. 155, 157 (E.D. Va. 1980) (finding change of beneficiary submitted by insured properly rejected because insured was not policy owner and, therefore, lacked legal authority to change beneficiary); *Fidelity Bankers Life Ins. Co. v. Dortch*, 348 S.E.2d 794, 797

(N.C. 1986) (holding insured's intent to change beneficiary on policy was entirely ineffectual after he transferred ownership of policy to trustee bank). Accordingly, Evans alone held the right to accept the rescission check and to effectuate rescission of the Policy. If Answer Care contends Evans should not have accepted the rescission check, then that dispute is with Evans, not with First Penn.

The district court's conclusion that the Policy could not be rescinded without the consent of a "beneficial owner" also raises serious public policy concerns. As a business, the insurance industry cannot function if non-contracting parties have the ability to alter transactions between the contracting parties, namely the insurer and the policy owner. Not only was Answer Care not the owner of the Policy, but at the time of rescission, First Penn had no knowledge that Answer Care claimed any interest in the Policy.⁶ The district court's decision, however, has given Answer Care legal rights foreign to the law of contracts and has allowed a contractual stranger to alter the legal consequences of the Policy owner's actions.

Indeed, the effect of imputing ownership rights to a "beneficial owner" or to some other undisclosed party would cripple the fair, efficient, and predictable administration of insurance contracts. Although here the transaction was a mutual rescission, inevitably myriad disputes will arise with respect to payment of proceeds, changes of beneficiaries, or changes to contract terms. To protect

⁶ In his communications with First Penn, Evans asserted his ownership rights under the Policy and he made no mention of Answer Care. JA 330, 380-81, 384, 387.

against such uncertainty and to preserve the sanctity of contracts, courts have invariably rejected attempts by non-owners to interfere with the contractual rights of the policy owner. *See, e.g., Mercantile Nat. Bank at Dallas v. Franklin Life Ins. Co.*, 248 F.2d 57, 59 (5th Cir. 1957) (rejecting beneficiary's claim to policy proceeds where owner/insured properly exercised contractual right to surrender policy and obtain cash value prior to her death); *see also Gutterman*, 896 F.2d at 119; *Prudential*, 498 F. Supp. at 157; *Fidelity Bankers*, 348 S.E.2d at 797.

For all these reasons, the district court's judgment in favor of Evans and Invotex should be vacated and the case remanded with instructions to enter judgment in favor of First Penn as a matter of law.

B. The District Court Erred As A Matter Of Law By Concluding That Moore's Fraudulent Scheme Was Insufficient To Render The Policy Void For Lack Of Insurable Interest

The district court erred in its interpretation and application of Arizona law on insurable interest because the law required Moore to act in "good faith" in procuring the Policy.⁷ Moore breached his duty of good faith by engaging in a fraudulent scheme to viaticate the Policy as found by the district court. JA 966

⁷ Maryland subscribes to the principle of *lex loci contractus*, which requires that the construction and validity of a contract be determined by the law of the place where the contract is made. *See Am. Motorists Ins. Co. v. ARTA Group, Inc.*, 659 A.2d 1295, 1300-01 (Md. 1995). Arizona law governs the insurable interest issue because the Policy was purchased and delivered in Arizona, and the first premium was paid by automatic withdrawal from a checking account in Arizona.

("[T]here is no genuine dispute of material fact as to the nature and character of the scheme to defraud which resulted in the issuance and delivery of the subject policy of insurance, nor as to the specifics of fraud practiced upon First Penn."); JA 974.

Moreover, both before and at the time of issuance of the Policy on February 5, 1998, Moore was working with others to evade the insurable interest requirement and viaticate the Policy. In fact, Moore viaticated the Policy in the ordinary course of his fraudulent scheme, and the mere fact that the viatical transaction did not occur contemporaneously with the issuance of the Policy does not create an insurable interest.

1. Moore's Fraudulent Scheme Establishes, As A Matter Of Law, He Did Not Procure The Policy In Good Faith And No Insurable Interest Existed

It is well settled that, where an insurance policy is purchased by a person without an insurable interest in the life being insured, the policy is void *ab initio*. See *Paul Revere Life Ins. Co. v. Fima*, 105 F.3d 490, 492 (9th Cir. 1997); *Carter v. Continental Life Ins. Co., Inc.*, 115 F.2d 947, 948 (D.C. Cir. 1940) (per curiam); *Obartuch v. Sec. Mut. Life Ins. Co.*, 114 F.2d 873, 878 (7th Cir. 1940); *Aetna Life Ins. Co. v. Hooker*, 62 F.2d 805, 805-06 (6th Cir. 1933); *Beard v. Am. Agency Life Ins. Co.*, 550 A.2d 677, 688 (Md. 1988). An insurable interest is 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.” Ariz. Rev. Stat. Ann. § 20-1104(C)(2); *see also Grigsby v. Russell*, 222 U.S. 149, 154 (1911) (recognizing policy insuring life in which policy owner has no interest contravenes public policy because it creates an interest in ending the life of the insured).

Where a policy owner lacks an insurable interest in the life of the insured, the policy “would constitute what is termed a wager policy.” *Warnock v. Davis*, 104 U.S. 775, 779 (1877). Wager policies contravene public policy because they are “speculative contracts upon human life” and create a direct interest in the early termination of the life of the insured. *See id.* at 779, 782.

Generally, if an insurable interest exists at the time the policy is purchased, then the insured may later assign the policy to someone without an insurable interest. *See, e.g., Grigsby*, 222 U.S. at 155. Although, Arizona law ordinarily recognizes an insurable interest in one’s own life, *see* Ariz. Rev. Stat. Ann. § 20-1104, the law does not permit a deliberate attempt to evade the insurable interest requirement. *See, e.g., McKee v. Penick (In re Al Zuni Trading Inc.)*, 947 F.2d 1403, 1405 (9th Cir. 1991) (analyzing good faith argument under Arizona law). Indeed, “the rule is that ‘any person has a right to procure an insurance [policy] on his own life and to assign it to another provided it be not done by way of cover for a wager policy.’” *Bankers’ Reserve Life Co. v. Matthews*, 39 F.2d 528, 529 (8th

Cir. 1930) (citation omitted). Whether a policy was procured and assigned as a “cover for a wager policy” ordinarily turns on whether the policy was procured in good faith.

Indeed, courts that have considered the issue of insurable interest focus on the necessity of good faith in procuring the policy. In *Connecticut Mutual Life Insurance Co. v. Schaefer*, 94 U.S. 457 (1877), the Supreme Court held that, where life insurance is properly obtained by one with an insurable interest in the life of the insured, the policy does not later become invalid because the insurable interest ceases to exist. 94 U.S. at 463. The Supreme Court, however, focused on the purpose of obtaining the policy. “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 in which the insured has no interest.” *Id.* at 460. In *Schaefer*, the Court concluded the policy was valid because it was procured in good faith by a husband and wife and each had an insurable interest in the life of the other at the inception of the policy. *See id.* at 460-61, 463. The Court further stated that “a colorable or merely temporary interest would present circumstances from which *want of good faith and intent to evade* the rule might be inferred.” *Id.* at 461 (emphasis added).

In *Grigsby v. Russell*, 222 U.S. 149, the Supreme Court further addressed the good faith requirement in analyzing an insurable interest. The insured in *Grigsby* obtained a policy on his life and paid two premiums before needing money for

surgery. *See id.* at 154. The insured sold his policy to a physician for \$100. *See id.* The Court held the assignment of the policy was valid, noting the difference between instances when a person with an insurable interest helps to procure an illegal wagering contract and those cases where “an honest contract is sold in good faith.” *See id.* at 156.

In *Bankers’ Reserve Life Co. v. Matthews*, 39 F.2d 528, the Eighth Circuit summarized the Supreme Court authorities on insurable interest as follows:

In short, the test is the good faith in taking out the policy for the benefit of one having an insurable interest. The crux is whether the policy was a wagering contract at the time it became effective as a contract. If, at that time, such assignment was contemplated by the insured, it is a wagering contract, otherwise it is not.

Id. at 529. Thus, for purposes of determining an insurable interest when a person procures a policy on his own life, the question is whether the insured contemplated an assignment to an individual or entity without an insurable interest at the inception of the policy. *See id.*

Arizona has embraced the connection between good faith and insurable interest as well. In *Gristy v. Hudgens*, 203 P. 569, 572 (Ariz. 1922), the Supreme Court of Arizona recognized that a contract obtained on one’s own life will not be deemed void for lack of insurable interest “when it appears that the person whose life is insured was *acting for himself and in good faith* paid the premiums for the

purpose of promoting the interest and welfare of the beneficiary....” *See id.* (emphasis added).

The Ninth Circuit, applying Arizona law, also acknowledged the Supreme Court’s focus on good faith in the insurable interest analysis. *See McKee*, 947 F.2d at 1405. The court held that a corporation was entitled to the proceeds of a policy on the life of a corporate officer, in part, because there was no evidence suggesting the procurement of the policy lacked good faith. *See id.*

Moore unquestionably was not acting in good faith at the time the Policy was issued on February 5, 1998. The district court found, as an undisputed fact, that Moore intended to sell his life insurance policies to viatical companies at the time he applied for the policies. JA 974 (“I agree that the evidence shows indisputably that Moore planned to sell all or most of his life insurance policies at the time he applied for them...”). Indeed, the evidence of Moore’s lack of good faith is overwhelming.

Moore’s lack of good faith is evidenced by the fact that he was working toward viaticating the Policy even before he applied for the Policy by obtaining the physician’s letter of competency and requesting Dr. Hovan to certify falsely that Moore had a terminal illness. JA 966-67. Moore further failed to act in good faith by submitting altered medical records to First Penn (JA 968), which otherwise would have revealed his intent to viaticate the Policy. Moore was not acting in

good faith by meeting with a viatical broker about selling some or all of the policies before issuance of the Policy. JA 969-70. Moore continued to act without good faith when he requested reissuance of the Policy as a 20-year term policy because he had learned 20-year term policies were more attractive to viatical settlement companies. *See id.* Moore failed to act in good faith by identifying his sister as the beneficiary on the First Penn application when, as with all the other policies, his sister was never the intended beneficiary.

Although, generally speaking, a person may designate whomever they wish as a life insurance beneficiary, this rule is tempered by the inherent contractual obligation of good faith. Stated differently, if the beneficiary designation was not made in good faith, but simply a ruse to evade the insurable interest requirement and viaticate the policy, then the designation is evidence of a lack of good faith and demonstrates a lack of insurable interest.

At the time of issuance of the Policy, Moore was not acting in “good faith” and had no intention of obtaining the Policy on his own life for the benefit of his sister. Rather, Moore’s scheme was a cover for a wager contract because he obtained the Policy for the sole purpose of assigning it to a viatical company as a wager on his life. For all of these reasons, the district court erred by finding that the Policy had an insurable interest at its inception.

2. Arizona Law Does Not Require Proof That Moore Was Colluding With A Third Party In Order To Find A Lack Of Insurable Interest

The district court observed that “the evidence shows indisputably that Moore planned to sell all or most of his life insurance policies at the time he applied for them, but the scheme did not involve other parties working together with him to procure policies and immediately effect their assignment.” JA 974. The “involvement of others” is not a prerequisite to showing a lack of insurable interest. Rather, the involvement of others in a viatical scheme is simply additional evidence of a lack of good faith. Indeed, the district court’s conclusion that a lack of insurable interest requires the participation of another in the scheme to evade the insurable interest statute elevates form over substance and would allow a fraudulent wrongdoer, such as Moore, to subvert the insurable interest requirement by simply acting alone or by hiding the involvement of others until the policy is issued.

A fraudulent wrongdoer, such as Moore, does not need the commitment of a buyer to effectuate his scheme because, in the age of viatical settlement companies, a ready market for life insurance policies already exists. *See, e.g.*, JA 466 (advertisement for viatical services company). One with no legitimate interest in protecting his dependents or otherwise managing risk may obtain a life insurance policy for the sole purpose of making a quick profit by selling it to entities waiting

to wager on human life. Such a transaction would end-run the insurable interest statute and should not be countenanced.

3. Moore Was Involved With Others Before Issuance Of The Policy And Transferred The Policy In The Ordinary Course Of His Fraudulent Scheme

Even if participation by third parties in the scheme to evade the insurable interest requirement was a prerequisite to finding a lack of insurable interest, the district court erred by not recognizing Moore's involvement with others before the Policy issue date of February 5, 1998. The court in *McKee* makes clear that insurable interest is determined "at the time [the] policy was issued." 947 F.2d at 1405. The question, therefore, is whether Moore was involved with others in the process of viaticating the Policy on or before February 5, 1998, such that no insurable interest existed at the inception of the Policy.

Assuming the "involvement of others" requirement imposed by the district court was intended to require evidence of objective manifestation of intention to viaticate, as opposed to supposition about subjective intentions, Moore's involvement of Dr. Hovan in the viatication process should be sufficient to meet this requirement. Moore, employing a widely available viatical settlement industry form, sought a certification from Dr. Hovan that he suffered from a terminal illness. JA 86, 150, 966-67. Moore sought this certification from Dr. Hovan before applying for the Policy. JA 967. Although Dr. Hovan refused to provide

the certification in the manner Moore requested (JA 150), Moore's involvement of Dr. Hovan in his scheme to viaticate is compelling objective evidence that Moore always intended to viaticate the Policy and no insurable interest existed at the time the Policy was issued. Thus, even if the involvement of others is part of the evidentiary predicate of proving a lack of insurable interest, Moore's attempt to recruit Dr. Hovan to falsely certify a terminal illness before Moore applied for the Policy is more than sufficient to meet this requirement.

Moreover, by February 5, 1998, Moore had met with a viatical broker at least twice. JA 969-70. By that date, Moore had agreed in writing to viaticate two policies. *See id.* In addition, Moore had learned through working with the viatical broker that viatical companies preferred 20-year term policies. *See id.* After learning this fact, Moore requested reissuance of the Policy with a 20-year term. JA 970. The undisputed facts, therefore, establish that Moore was working with others toward viaticating the Policy before February 5, 1998, and clearly contemplated viaticating the Policy at that time. Accordingly, Moore lacked an insurable interest in the Policy on the date of issuance and, therefore, the Policy was void *ab initio*.

First Penn further submits the district court construed the notion of "immediate" assignment in a manner inconsistent with Arizona law. JA 974. An "immediate" viatication/assignment is not required to find a lack of insurable

interest. *See, e.g., McKee*, 947 F.2d at 1405. Rather, Arizona law looks to whether the policy was taken out in good faith. *See id.; Gristy*, 203 P. at 572. “[A] colorable or temporary interest” in a life insurance policy “would present circumstances from which want of good faith and an intent to evade the rule might be inferred.” *Schaefer*, 94 U.S. at 461.

In this regard, Moore’s colorable or temporary interest in the Policy is compelling evidence of a lack of good faith. Moreover, it unquestionably is true, again based on Arizona law, that some delay in the viatical transaction cannot create an insurable interest. Indeed, as in this case, where the insured engages in a scheme to viaticate a life insurance policy, takes steps toward viaticating the life insurance before issuance, and viaticates the policy shortly after issuance as part of that scheme, then an insurable interest is lacking because the interest in the policy was only colorable or temporary. *See Schaefer*, 94 U.S. at 461; *see also McKee*, 947 F.2d at 1405. Moore’s colorable or temporary interest in the Policy evidences a lack of good faith and is not evidence of a valid insurable interest.

There is no question the Policy could not have been issued directly to Kelco or to Answer Care, yet the district court’s conclusion would allow viatical companies to subvert the insurable interest requirement by the expedient of temporarily delaying viatication. The insurable interest analysis should not turn on

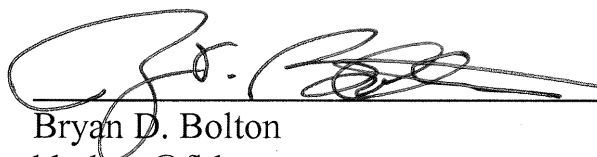
timing, but rather on a demonstrable intent to viaticate coupled with affirmative acts undertaken to achieve that goal.

To whatever extent the district court relied on cases considering the timing of an assignment on insurable interest, those cases likely were decided before the advent of the viatical settlement industry. It makes little sense to allow the viatical settlement industry to exploit cases from bygone eras designed to address situations and concerns not present in this action. To the contrary, as this Court recently explained, the viatical settlement industry has changed dramatically in recent years, it falls within the ambit of the business of insurance, and it should be assessed through the prism of its impact on the insurance industry and on insurers' risk practices. *See Life Partners, Inc. v. Morrison*, 484 F.3d 284, 288, 293-94 (4th Cir. 2007). Here, Moore purchased the Policy as part of a fraudulent scheme to viaticate, Moore took steps to effectuate that scheme before the Policy issued, and Moore promptly carried his scheme to fruition. Accordingly, no insurable interest existed at the inception of the Policy, regardless of Moore's interest in his own life and regardless of the precise timing of the viatical transaction. *See McKee*, 947 F.2d at 1405; *Gristy*, 203 P. at 572.

VIII. CONCLUSION

For the foregoing reasons, First Penn-Pacific Life Insurance Company respectfully requests that this Court vacate the district court's June 21, 2007, order granting the cross-motion for summary judgment and denying First Penn's motion for summary judgment, and direct the entry of a judgment in favor of First Penn based on its motion for summary judgment.

Respectfully submitted,



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Dated: December 31, 2007

20044.001: 110958

**STATEMENT PURSUANT TO FED. R. APP. P. 34
AND LOCAL RULE 34(a) REQUESTING ORAL ARGUMENT**

Oral argument should be heard in this appeal because this case presents issues of first impression and involves important public policy considerations, including the following: (i) whether an undisclosed “beneficial owner” of a life insurance policy can alter the legal consequences of transactions between the policy owner and insurer; and (ii) whether an insurable interest exists when the insured engages in a fraudulent scheme to evade the insurable interest requirement and viaticate the life insurance policy. First Penn-Pacific Life Insurance Company respectfully submits the decisional process with respect to these issues would significantly benefit from oral argument.

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 07-2020

Caption: First Penn-Pacific Life Insurance Company v. Evans et al.

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 31st day of December, 2007, two copies of the foregoing Brief of Appellant First Penn-Pacific Life Insurance Company (“Appellant’s Brief”) and one copy of the Joint Appendix were sent by first class mail, postage prepaid, to:

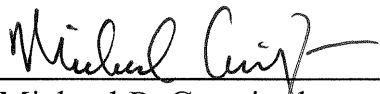
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On the same date, an electronic copy of Appellant’s Brief was sent to the above counsel by email.

Additionally, on the same date, eight copies of Appellant’s Brief and six copies of the Joint Appendix were sent by Federal Express overnight delivery to:

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Michael P. Cunningham