No. 14-1210

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PHL VARIABLE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

BANK OF UTAH, AS SECURITIES INTERMEDIARY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES COURT
FOR THE DISTRICT COURT OF MINNESOTA
CASE NO. 12-CV-1256, JUDGE ANN D. MONTGOMERY

***AMICUS CURIAE* BRIEF OF INSTITUTIONAL LONGEVITY MARKETS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT AND URGING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Institutional Longevity Markets Association is not a publicly traded corporation. There are no parent corporations or other publicly held corporations that own 10% or more of *amicus*.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Institutional Longevity Markets Association ("ILMA") is a not-for-profit trade association in the longevity and mortality marketplace that focuses on the secondary and tertiary markets for life insurance. Since its formation in 2007, ILMA helps to develop and promulgate "best practices" for the various life insurance companies, life settlement providers, brokers, banks, premium finance lenders and other participants in the life settlement and premium finance industries. ILMA also seeks to raise awareness among consumers that life insurance is a valuable asset, expand consumer choice in life insurance, and support the responsible growth and regulation of the life settlement industry.

Historically, when life insurance policyholders no longer needed or could no longer afford their policies, they had only two unfortunate choices: surrender the policy back to the insurer for the cash surrender value, which often was very small, or allow the policy to lapse.[2] Today, policyholders have the option of selling their unwanted life insurance policies to third parties in transactions known as "life settlements." The market for life settlements creates competition among

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[1] Pursuant to Fed. R. App. Proc. 29(c)(5), *amicus* states that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

[2] *See* Neil A. Doherty and Hal J. Singer, "The benefits of a secondary market for life insurance policies," *Real Prop., Probate and Trust Journal*, Vol. 38 (2003).

prospective purchasers of life insurance policies, and provide insureds with a fair market value for their policies that typically far exceeds what they could otherwise collect from insurers.[3] A recent study published by the London Business School, which used a dataset of 9,002 policies insuring 7,164 individuals with an aggregate net death benefit of $24.14 billion purchased as life settlements from their original owners between 2001 and 2011 across 50 different U.S. states, found that policy owners in the sample received, on average, four times more by selling their policies in the secondary market than they would have received had they surrendered those life insurance policies to the issuing insurance companies.[4] And there is evidence that this market value can be up to ten times more than what the policy holder would receive from the insurance company.[5]

The life settlement industry is substantial in size and continues to grow. According to Conning & Company, a global third-party asset insurance manager, as of the end of 2011, the aggregate face amount of outstanding life insurance

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[3] *See* U.S. Gov't Accountability Office, Report to the Special Comm. on Aging, U.S. Senate, *Life Insurance Settlements* (July 2010), *available at* www.gao.gov/new.items/d10775.pdf.

[4] Afonso V. Januário and Narayan Y. Naik, *Empirical Investigation of Life Settlements: The Secondary Market for Life Insurance Policies* (June 2013), http://www.coventry.com/assets/Marketing_Tools_Pdfs/LifeSettlementsStudy_LBS.pdf, at 3.

[5] *Recent Innovations in Securitization: Hr'g Before the Subcomm. on Capital Mkts., Ins. & Gov't Sponsored Enters. of the H. Comm. On Fin. Servs.*, 111th Cong. 17 (Sept. 24, 2009) (Statement of Kurt Gearhart, Global Head of Regulatory and Execution Risk, Credit Suisse).

policies in the hands of life settlement investors was approximately $35 billion.[6] With the recent improvement of the economy and a return of capital to the life settlement market, due, in part, to greater clarity surrounding the regulation of life settlements and legal decisions affecting life settlement investors, the life settlement market is projected to grow to $100 billion to $160 billion in face amount of life insurance.[7]

In light of the past and projected growth of the life settlement market, the role of ILMA is one of continually increasing prominence and importance. ILMA works with legislators and regulators to design consumer-oriented regulation of the life settlement industry and promote clear rules of conduct that foster predictability and transparency in the marketplace. These efforts benefit both investors, who, in good faith, purchase policies that are traded in the marketplace, and consumers, who wish to realize the market value of their policies, not just the cash surrender value. Because of its active involvement in the legislative and regulatory processes relating to the life settlement industry, ILMA is uniquely positioned to identify and discuss law and policy considerations that may not otherwise be brought to the

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[6] Press Release, Conning & Company, Life Settlements: *Weak Investor Supply Despite Growing Consumer Demand* (November 15, 2012), *available at* http://www.conning.com/pressrelease-detail.aspx?id=7630.

[7] *See* Darwin Bayston, *Life Settlement Market – Lack of Policies, Lack of Capital or "Something Else"?* (August 2013), *available at* http://blog.lisainstitute.org/2013/08/20/life-settlement-market-lack-of-policies-lack-of-capital-or-something-else/.

attention of the Court by the parties, but which will likely have a significant impact on the protection of both investors and policy owners who are governed by Minnesota law.

INTRODUCTION

Appellee PHL Variable Insurance Company ("PHL") seeks to evade its contractual obligation to pay the death benefits due on a $5 million life insurance policy insuring the life of William Close (the "Policy") and to retain all of the premiums paid by the policy owners without paying out any proceeds. With the knowledge of PHL, all of the premiums due on the Policy were paid with proceeds from a premium finance loan documented in a Term Financing Agreement (the "Financing Agreement") between the policy holder, a trust created by Mr. Close entitled the William Close Irrevocable Trust (the "Trust") and a premium finance lender. After collecting premiums for many years and after Mr. Close died, PHL moved for summary judgment seeking a declaration that: (i) the Policy was void *ab initio* because it lacked an insurable interest from inception and because it was not obtained in good faith, and (ii) that PHL could retain all of the premiums it collected. In its Memorandum Opinion and Order dated November 27, 2013 ("the Opinion"), the District Court partially granted PHL's motion and denied Appellant's cross-motion for summary judgment on its breach of contract claim.

The District Court correctly identified *Sun Life Assurance Co. of Can. v. Paulson Sun Life,* No. 07-3877, 2008 WL 451054 at *2 (D. Minn. Feb. 15, 2008) (*Paulson I*) as the proper articulation of Minnesota law. Starting from the indisputable basis that a life insurance policy issued with the requisite insurable interest is freely transferrable, the *Paulson I* Court held that "the Minnesota Supreme Court would consider a life insurance policy void as against public policy if the policy was 'procured under a scheme, purpose, or agreement to transfer or assign the policy to a person without an insurable interest in order to evade the law against wagering contracts.'" *Paulson I* at *2. To establish the existence of such a scheme, purpose, or agreement, the *Paulson I* Court required evidence of "the mutual intent of the insured and the third party to avoid the prohibition on wagering contracts," and held that "the most important factor in determining the parties' intent is 'whether or not the assignment [from the insured to the third party] was done in pursuance of a preconceived agreement.'" *Id.*

While the District Court purports to apply the *Paulson I* standard to the facts of the instant case, its Opinion reveals otherwise. *Paulson I* requires evidence of a "preconceived agreement" between the person who obtains the policy and the eventual transferee, to transfer the policy from the former to the latter. Yet, the District Court never even reviewed the language of the contract between the Trust and the premium finance lender – *i.e.*, the Financing Agreement – to establish the

mutual intent of the parties. The Financing Agreement, after all, is the only evidence of any agreement between Mr. Close and/or the Trust and the premium finance lender. And the Finance Agreement in no way constituted "an assignment [of the Policy]…done in pursuance of a preconceived agreement," such that the Policy was, in substance, an illegal wagering contract.

Notwithstanding the existence of the Financing Agreement, which the District Court does not find ambiguous,[8] and the most basic tenets of contract law that prohibit consideration of evidence outside of the four corners of an unambiguous contract, the District Court elected to solely analyze five circumstantial factors to determine what the Trust and the premium finance lender intended at the time the Policy was issued. By using these factors as a proxy for what the parties intended, rather than the language of the Financing Agreement, the District Court impermissibly deviated from *Paulson I's* clear and objective test of ascertaining the parties' mutual intent to form a preconceived agreement to transfer the Policy from one party to the other—and instead applied a far more vague and subjective standard that will allow courts to effectively rewrite agreements

[8] Assuming, *arguendo*, that the District Court did find the language of the Financing Agreement ambiguous, it could then look to parol evidence to ascertain the parties' intent. However, such a fact-based analysis cannot support the District Court's award of summary judgment to the insurer, particularly where so many of those facts are in dispute, as they are here.

between policy holders and third parties to reflect what they believe to have been the intent of the parties.

Allowing the District Court's subjective intent standard to stand will hamper the development of the life settlement marketplace by injecting confusion and uncertainty into previously settled issues and clearly understood standards, and increasing litigation by insurance companies that seek to escape their payment obligations. Adoption of this kind of ambiguous legal standard, which PHL is advocating in courts around the country, inures solely to the benefit of the insurance companies and to the detriment of consumers, as investors will face new hurdles when considering policies to purchase and increased challenges when trying to collect on policies where they have faithfully paid the premiums. The Opinion, if upheld, will reduce the demand for life insurance policies issued in Minnesota. The greatest harm will redound to seniors in Minnesota who may wish to avail themselves of the benefits of the life settlement market to meet end-of-life needs. Accordingly, ILMA submits this brief in support of the reversal of the Opinion, which runs contrary to well-established precedent in Minnesota, and which is likely to have a profound and wide-ranging deleterious effect on thousands of investors and policyholders in the life settlement market if not reversed.

ARGUMENT

I. The District Court Misapplied the Insurable Interest Test set forth in *Paulson I* and *Paulson II*, and Improperly Granted PHL's Motion for Summary Judgment.

A. Precedent compels the application of an objective test to determine whether a life insurance policy is a mere cover for a wagering contract

When faced with the question as to whether a life insurance policy was procured in good faith and not a mere cover for a wagering contract, courts rejected looking at the subjective intent of the insured. *See e.g., Principal Life Ins. Co. v. Lawrence Rucker 2007 Ins. Trust,* 735 F. Supp. 2d 130, 139 at n.59 (D. Del 2010). Rather, the vast majority of courts confronted with this issue have followed the standard set forth in *Paulson I* that a life insurance policy can only be considered a cover for a wagering contract where there was, at inception, "an agreement to transfer or assign the policy to a person without an insurable interest in order to evade the law against wagering contracts." *Paulson I* at 2; *See e.g.*, *Sun Life Assur. Co. of Canada v. Berck*, 719 F. Supp.2d 410, 417 (D. Del. 2010); *Lincoln Nat'l Life Ins. Co. v. Joseph Schlanger 2006 Ins. Trust*, Civ. No. 09-506-GMS, 2010 WL 2898315 at *6 at n.7 (D. Del. Jul. 20, 2010).[9]

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[9] The widespread acceptance of *Paulson* is further evidenced by the Minnesota Insurance Interest Act, which, in 2009, essentially codified *Paulson* by prohibiting policyowners and third parties from entering into agreements regarding acquisition of a policy prior to the issuance of that policy. 2009 Minn. Laws § 60A.0782.

The *Paulson I* standard, as further explained in *Sun Life Assurance Co. of Can. v. Paulson*, No. 07-3877, 2008 WL 5120953 at *4 (D. Minn. Dec. 3, 2008) (*"Paulson II," and together, "Paulson")* is applied via a two-part test. First, the issuing insurance company must prove that, ***at the inception of the policy***, the policy owner had an agreement with a third party who had no insurable interest in the life of the insured to later sell or assign the policy to that same third party. Second, the issuing insurance company must also be able to identify the third party who agreed ***at inception*** to purchase the policy and who did, in fact, purchase such policy. In other words, the agreement must be between the policy holder and the third party to whom the policy holder eventually transfers the policy; any other agreement does not satisfy *Paulson's* requirement. *Paulson II,* 2008 WL 5120953 at *4 (requiring evidence that the purchasers "communicated with [the policyholder]").

The Ninth Circuit recently performed an analysis substantially similar to that in *Paulson*, concluding that an insurable interest is only eviscerated where "an agreement to sell is reached before the policy takes effect," and confirming that "a pre-existing intent to transfer life insurance policies 'does not negate the fact that when the [owner of the policies] acquired the policies, they were supported by an insurable interest." *Hartford Life and Annuity Ins. Co. v. Doris Barnes Family 2008 Irrevocable Trust*, No. 12-55464, 2014 WL 107790 at *1 (9th Cir. Jan. 13,

2014) (affirming judgment of district court denying insurer's motion for summary judgment and granting policy holder's motion for summary judgment on the ground that the policy was not void because it was transferred to a third party).

While *Paulson I* does address the mutual intent of the parties, it makes clear that "[t]he most important factor in determining the parties' intent is 'whether or not the assignment [from the insured to the third party] was done in pursuance of a pre-conceived agreement." *Paulson I* at 2. Where there is such an agreement, courts need not and should not perform the inherently subjective and inevitably messy task of divining the intent of the parties to a complex financial and insurance arrangement.

As the Fourth Circuit Court noted in *First Penn-Pacific Life Ins. Co. v. Evans*, "evaluating insurable interest on the basis of the subjective intent of the insured at the time the policy issues . . .would be unworkable and would inject uncertainty into the secondary market for insurance." 313 Fed. Appx. 633, 636 (4th Cir. 2009). Not only is it unworkable for courts to try to divine a party's intent long after the fact, but it is also impractical for investors to do so. Investors, particularly those in the tertiary market, are far too removed from the insureds and the insureds' agents to investigate the facts needed to ascertain the insureds' subjective intent, and if required to do so, would simply not purchase the policies.

Without an active tertiary market, there is no secondary market, and insureds would not be able to sell unwanted or unneeded policies.

Instead, the party best suited to make a determination as to an insured's intent is the insurance company, which, having direct access to all of the relevant parties prior to policy inception, has both the ability and the opportunity to make all necessary inquiries before the policy is issued. Consequently, insurance companies should not be permitted to ignore red flags during its initial underwriting, collect premiums for years, and then refuse to pay the benefits upon the death of the insured.

In this case, the evidence conclusively shows that before it issued the Policy, PHL had ample opportunity to review Mr. Close's application and investigate all of the purported red flags that it identified only after being called upon to pay the death benefits. Yet, PHL did not do so, either in the pre-issuance period, or in the many subsequent years during which it contentedly collected premiums. As the District Court itself admitted, an insurer is not entitled to summary judgment where evidence shows that it "may have 'turned a blind eye' to facts that, if timely investigated, would have led the insurer to challenge the policy's validity before it was sold to Innocent purchase on secondary market." (A33) (citing *Pruco Life Ins. Co. v. Brasner*, No. 10-8084-CIV, 2012 WL 4364613 at *4 (S.D. Fla. Sept. 21, 2012). Accordingly, PHL's efforts to have the Policy declared void *ab initio* at

this late point in time, which appears to be part of a larger attempt to cause investors holding policies issued by PHL to lapse, must be thwarted in order to prevent PHL from receiving a windfall at the expense of policyholders, bona fide investors, and the overall health and stability of the life settlement markets.

B. The District Court's Application of ***Paulson*** is wholly inconsistent with Minnesota's common law approach to contract interpretation.

The requirement of a preconceived agreement with a specifically identified third party to transfer the policy to that third party as the manifestation of the parties' mutual intent is at the heart of the *Paulson* standard. To the extent that the District Court deviated from this standard by attempting to ascertain the intent of the Trust and the premium finance lender from sources other than the Financing Agreement, it did so in violation of the most basic of contract law principles. Minnesota courts have long "follow[ed] the objective theory of contract formation, under which the parties' outward manifestations are determinative, rather than either party's subjective intent." *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 202 (Minn. 2005). Similarly, with respect to contract interpretation, Minnesota courts seek to give effect to the objective meaning of the written word without considering the subjective intent of the parties. *See W. Nat'l Mut. Ins. Co. v. Minn. Workers' Comp. Insurers Ass'n, Inc.*, No. C5–98–1244, 1999 Minn. App. LEXIS 148, at *5–6 (Minn. Feb. 16, 1999) (stating that the "primary purpose in

construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the entire contract").[10]

Glaringly absent from the District Court's five-factor analysis is the evaluation of the actual agreement between the parties—the Financing Agreement—which, as a written memorialization of the parties' agreement as it existed at inception, is the most direct evidence of what the parties mutually intended at the time the Policy was issued, and is the type of objective review Minnesota law requires. Indeed, not one of the five factors reviewed by the District Court focuses on objective evidence of the intent of the parties, as required by *Paulson*. Instead, the District's Court analysis of these five factors appears contrived, as its test seems to have been specifically tailored to produce the (improper) result that it reached.

The ramifications of this approach extend far beyond an adverse decision for the Bank of Utah. By evaluating the five factors identified in the Opinion under the purported application of the *Paulson* standard, the District Court has improperly elevated the importance of the parties' subjective intent over, and to the

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[10] This practice is hardly limited to Minnesota Courts. *See e.g.*, *Lincoln Nat'l Life v. Gordon R.A. Fishman*, 638 F. Supp.2d 1170, 1178-79 (C.D. Cal. 2009) (declining to "…look behind the terms and other formalities of an insurance agreement(s) and basically re-write it to reflect what was really going on between the various parties thereto insofar as determining the existence (or lack thereof) of an insurable interest to an insurance policy."

exclusion of, the parties' objective intent as evidenced by the Financing Agreement. This injection of subjectivity into what should have otherwise been a straightforward and objective exercise of contract interpretation created a potentially dangerous precedent that, if followed by future courts, will almost certainly increase unpredictability and instability in the marketplace.

Additionally, the District Court's Opinion shifts the burden of inquiring into the subjective intent of the insured to the party least capable of bearing it—the investor(s). Insurance companies, during the initial underwriting, are far better equipped to make determinations regarding the intent of the insured than investors are after the fact. Such burden-shifting will not advance Minnesota's interest in prohibiting the formation of wagering contracts, and instead, will only serve to create market instability, decrease investor demand, and ultimately, harm consumers who wish to, but cannot, sell their policies.

II. The District Court's Five Factor Analysis Does Not Establish that the Policy Holder and the Premium Finance Lender Mutually Intended from the Time of the Policy's Inception to Transfer the Policy to a Third Party Lacking an Insurable Interest.

Even if the District Court's decision to evaluate factors other than the existence and terms of the Financing Agreement were deemed appropriate under *Paulson*, the District Court's selection and analysis of the five factors discussed in its Opinion does not compel a finding that there was a mutual intent to transfer the

Policy to a third party at the time the Policy was issued. As demonstrated below, at most, these factors reflect the unilateral intent of the insured to sell a life insurance policy in the future to some undetermined third party, which is completely lawful; it in no way establishes the existence of a preconceived arrangement at the time a life insurance policy is issued to transfer the policy to the lender, let alone, a particular third party, as required by *Paulson.*

1. Factor 1: An insured's ability to afford premiums and a lack of realistic options to retain the policy

Were this Court, for the sake of argument, to accept as fact that the insured could not have afforded the Policy premiums and would have been required to sell the Policy upon maturity of the loan, it does not necessarily follow that the Policy would have been delivered to the premium finance lender in satisfaction of the loan. At most, this factor merely points to a unilateral intent by the insured to sell a life insurance policy to a third party. A premium finance loan may help the insured acquire the policy and maintain it until such time as it could be sold, but that does not mean that the insured intended to deliver it to the premium finance lender, or that the premium finance lender intended to acquire the policy. In fact, the only reason for an insured to finance a policy that was acquired with an intent to sell it in the secondary market is the insured's desire to earn a profit by selling the policy to a third party for an amount in excess of the amount owed to the

premium finance lender. Relinquishing the policy in satisfaction of the loan provides no such benefit to the insured.

Moreover, financing premiums due on life insurance policies is a well-accepted strategy recognized by financial planners and wealth management advisors.[11] Borrowers may pursue premium finance strategies in order to acquire policies without having to liquidate assets to pay premiums, to avoid adverse gift tax consequences or to buy more insurance protection than they could otherwise afford.[12] PHL itself understood the value of life insurance premium finance as it sought and approved a number of premium finance programs and issued policies knowing that the premiums were to be financed.[13] In fact, in his life insurance application, Mr. Close specifically disclosed that the premiums due on the Policy would be financed with CFC of Delaware, the premium finance lender. (A9)

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[11] *See* Richard L. Harris, "Borrowing to Finance Life Insurance Premiums: What Professionals Need to Know," *Wealth Strategies Journal* (Sep. 14, 2011), *available at* http://www.wealthstrategiesjournal.com/articles/2011/09/borrowing-to-finance-life-insu.html, and Lewis Sarer, "Nothing is Free, Especially Not Life Insurance," *Forbes* (Sep. 17, 2011), *available at* http://www.forbes.com/sites/lewissaret/2011/09/17/nothing-is-for-free-especially-not-life-insurance/.

[12] *See* Credit Strategies to Finance Life Insurance Premiums, BNY Mellon Wealth Management (2012), *available at* http://www.bnymellonwealthmanagement.com/Resources/documents/PerspectivesDocs/Finance_Life_Insurance.pdf.

[13] *See* Florida Office of Insurance Regulation, Secondary Life Insurance Market Report to the Florida Legislature (Dec. 2013), Appx. A at 29.

Unfortunately, at the time Mr. Close sought to sell the Policy, in mid to late 2009, the life settlement market was undergoing a severe contraction due to the global financial crisis. According to Conning & Company, "[d]uring 2009, a significant decrease in investor capital reduced the ability of life-settlement funds to purchase new policies."[14] Likewise, in an article from 2010, David Dorr noted that, "[t]he life settlement market has seen double-digit annual growth for a decade with the only significant slowdown occurring in the last 24 months. In 2008, when the financial crisis hit global markets and credit evaporated, life settlement markets came to a standstill."[15]

From the perspective of the Trust, the timing of this economic crisis could not have been worse, as the life settlement markets dried up just as the maturity date of the loan approached. Unable to sell the Policy to a third party, the Trust had to surrender the Policy to the premium finance lender, lest the lender foreclose on its security interest. In the end, neither the Trust nor Mr. Close received anything from this transaction, and Mr. Close was in no better a position than he had been prior to the inception of the Policy. The District Court seemingly ignores

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[14] Natalie Doss, *U.S. Life-Settlement Market Declines 36% in 2009 Amid `Economic Turmoil'*, (October 28, 2010), *available at* http://www.bloomberg.com/news/2010-10-28/u-s-life-settlement-market-declines-36-in-2009-amid-economic-turmoil-.html.

[15] David Door, *Is the Life Settlement Market Dying (June 2, 2010)*, *available at* http://www.lifehealthpro.com/2010/06/02/is-the-life-settlement-market-dying.

this fact, which deals a damaging, if not fatal, blow to its theory that the Policy was procured by a scheme established at the outset of Mr. Close's dealings with the lender. Indeed, had the Trust been able to sell the Policy to a third party in the secondary market, then, under the District Court's analysis, PHL would have had no basis on which to challenge the validity of the Policy in the first place. At bottom, the inability of Mr. Close to sell the Policy at a time when the industry was experiencing unprecedented contraction does not in any way establish the existence of a pre-conceived agreement between a policy owner and a third party, at the time of issuance of a life insurance policy, to transfer such policy to that third party, and is therefore wholly irrelevant under the *Paulson* standard.

Furthermore, the consideration of this factor would, for purposes of *Paulson,* needlessly call into question the validity of all policies acquired via debt financing. There are many reasons people may want or need to finance the premiums due on a policy, and many consumers would prefer to do so without providing collateral in addition to the financed policy itself. The ability to challenge the validity of premium-financed policies on this basis would open the floodgates to lawsuits brought by insurance companies against policy holders and/or beneficiaries, which would sow the seeds of uncertainty in the life settlement market and result in fewer investor transactions and fewer and poorer options for policy holders.

It also creates a perverse incentive for insurance companies to knowingly issue policies that are premium-financed, as PHL did in this case, with the intent to rescind those policies if the lender exercises its remedies under the loan agreement. This is detrimental to all consumers in the insurance market.

2. Factor 2: The absence of an insured's personal desire to obtain life insurance

This factor, more than any other, demonstrates why the objective intent standard of *Paulson*, the same standard used by Minnesota courts in matters of contract interpretation, is superior to the subjective analysis that the District Court employed. After an insured has passed, it is impossible to ascertain his state of mind at the time the policy was acquired. In the case at hand, it is possible that Mr. Close wanted insurance protection for as long as he could obtain financing for the Policy. However, now that Mr. Close is dead, it is impossible to make a determination with any degree of confidence regarding his intent at that time.

Furthermore, it is also exceedingly difficult for investors acquiring a policy from a party other than the insured to make inquiries as to an insured's intent at the time of policy issuance. Widespread adoption of this factor as part of a *Paulson* analysis is likely to have a chilling effect on the life settlement market, as investors would have to go to great lengths to ascertain an insured's intent prior to purchasing a policy in order to ensure that the policy will not be rendered

subsequently invalid. Such efforts may be prohibitively costly or difficult, and investors will simply seek alternative investment vehicles and not participate in the life settlement industry. Moreover, as noted above, life insurance companies, during the initial underwriting phase, are best-suited to undertake this due diligence. The District Court recounted that PHL had noted “red flags” in Mr. Close’s application, yet found “no evidence that [PHL] performed any further investigation.” (A31-32) This Court should not permit a shift in the burden to investors to do what PHL failed to do, particularly when those investors do not have access to the same information and are in a much weaker position to perform this kind of diligence

Moreover, if Mr. Close applied for life insurance for reasons other than a need or desire for protection, and instead did so solely with the intent to sell the life insurance policy to some as-yet undetermined third party on the secondary market in order to make a profit, that would necessarily foreclose any argument that there was an agreement at inception between Mr. Close and/or the Trust on the one hand, and the eventual owner of the Policy, the premium finance lender, on the other hand, to transfer the Policy to the lender. Accordingly, this factor is not relevant to *Paulson’s* requirement of an agreement between the policy holder and the eventual transferee, and does not support the District Court’s conclusion. In fact, it supports summary judgment in favor of Bank of Utah.

3. Factor 3: Whether the insured was offered incentives such as "quick cash" or "free" insurance

Under *Paulson*, an offer of "free" insurance[16] or a similar incentive does not support the existence of any such pre-arrangement absent an agreement, at inception of the policy, that would actually require the policy to be transferred to a specified third party. More importantly, in this case, there is no evidence that the premium finance lender, the entity that acquired the Policy from the Trust, ever made, or ever directed anyone to make, any offer of "free" insurance or "quick cash" whatsoever. At most, the agents selling the Policy informed Mr. Close that he could profit from a subsequent sale of the Policy, which could only reflect a unilateral intent by Mr. Close to obtain a profit by selling the Policy to an unidentified third party at some point in the future, and which *Paulson* expressly found insufficient to support an insurable interest challenge. Thus, this factor also fails to establish what is required under *Paulson*—that there was a preconceived arrangement, at the time of inception, between the policy owner and a third party to transfer the policy at a later date to that third party.

[16] While offers of "free" insurance may be improper, such pitches, if actually made, are typically made by insurance agents, who act on behalf of the insurance companies, and not premium finance lenders.

4. Factor 4: The length of time the insured held the policy before transferring it

It is well-established under Minnesota law that a life insurance policy issued with the requisite insurable interest may be immediately transferred. Indeed, as the District Court held, "[g]enerally, once a life insurance policy has been validly procured, it may be assigned to a third party that does not have an insurable interest. A19 (citing *Paulson I* at *1). Significantly, "[t]he rule allowing for such assignment is based on the recognition that a life insurance policy is a form of property, and that the value of property is maximized if the owner has the right to freely assign it. (Op. 16) (citing *Rahders, Merrit & Hagler v. People's Bank of Minneapolis*, 130 N.W. 16,17 (Minn. 1911).)

Nevertheless, the District Court identified, as one of the five factors in its *Paulson* analysis, the amount of time that passed between the issuance of the policy and the transfer to a third party. Even after the District Court admitted that there is no temporal restrictions on the transfer of a life insurance policy once it is validly obtained, it nonetheless determined that the timing of the transfer of the Policy was somehow probative of the parties' mutual intent under *Paulson*. The District Court provided no logical nexus between the transfer of the Policy to the premium finance lender when the Policy was 28 months old and its conclusion that the acquisition of the Policy by the lender was part of a scheme. Indeed, many

policy holders seek to sell their policies after the expiration of the contestability period, but this does not mean that there was pre-conceived agreement, at the time of policy issuance, between the policy holder and the third party to assign the life insurance policy to that third party. Again, this factor has no place in the analysis required under the objective intent standard set forth in *Paulson*.

5. Factor 5: Whether the third party investor who acquired the policy was the party funding the premiums

The final factor suggested by the District Court, whether the third party investor who acquired the policy was the party funding the premiums, suffers from the logical fallacy of *petition principia*; it begs the question. It cannot be disputed that life insurance premium financing is permitted under Minnesota law and a premium finance lender may accept the policy being financed as collateral for such loan. Should the borrower not repay the loan, the premium finance lender would foreclose on, and become the owner of, the financed life insurance policy. However, this arrangement does not compel a finding under a *Paulson* analysis that the borrower and the lender had a preconceived agreement, at the time of the issuance of the policy, to cause such policy to be transferred to the premium finance lender. Rather, by using this factor, the District Court assumes the existence of that which it seeks to establish. Accordingly, this factor too is

irrelevant to the analysis required under the objective intent standard set forth in

Paulson.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and remanded with instructions to find that the Policy was validly issued with the requisite insurable interest.

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(b) and 32(a)(7)(B) because it contains 5,755 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(B)(iii).

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Dated: March 28, 2014

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I hereby certify that on March 28, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Dated: March 28, 2014

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