UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-4337

SUN LIFE ASSURANCE COMPANY OF CANADA

v.

WELLS FARGO BANK NA, AS SECURITIES INTERMEDIARY,

Appellant/Cross-Appellee

No. 16-4387

SUN LIFE ASSURANCE COMPANY OF CANADA,

Cross-Appellant/Appellee

v.

WELLS FARGO BANK NA, AS SECURITIES INTERMEDIARY

On Appeal from the United States District Court
for the District of New Jersey
(No. 3-14-cv-05789)
District Judge: Honorable Peter G. Sheridan

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
December 14, 2017

Before: CHAGARES, RESTREPO, FISHER, Circuit Judges.

CERTIFICATION OF QUESTIONS OF LAW

CHAGARES, Circuit Judge:

To the Honorable Justices of the New Jersey Supreme Court:

This matter came before the United States Court of Appeals for the Third Circuit on appeal from an order entered on September 30, 2016, and a cross-appeal from a judgment entered on November 17, 2016, by the United States District Court for the District of New Jersey. The District Court granted summary judgment in favor of the plaintiff, Sun Life Assurance Company of Canada ("Sun Life"), and against the defendant, Wells Fargo Bank, N.A. ("Wells Fargo"). This appeal requires us to determine whether a stranger-originated life insurance ("STOLI") arrangement, in which the holder of a life insurance policy lacks an insurable interest in the life of the insured, violates public policy under New Jersey law and as such is void ab initio. If so, we must then determine whether a later purchaser of the policy, who was not involved in the STOLI arrangement, is entitled to a refund of any premium payments that he or she made. We believe that these are important and unresolved questions of state law, which are appropriate for certification. We respectfully request that the Supreme Court of New Jersey grant this petition.

I. Reasons for Certification[1]

Pursuant to New Jersey Court Rule 2:12A-1, the Supreme Court of New Jersey may answer a question certified to it by our Court "if the answer may be determinative of

[1] We certify the questions for consideration pursuant to the certification procedures outlined in 3d Cir L.A.R. 110.1 (2011), 3d Cir. I.O.P. 10.9 (2015), and N.J. Court Rule 2:12A-1.

an issue in litigation pending in the Third Circuit and there is no controlling appellate decision, constitutional provision, or statute in this State." We have not found any binding legal authority that squarely addresses the questions presented in this case. We believe that the New Jersey Supreme Court is best suited to answer these questions, as they exclusively involve interpreting state law and determining New Jersey public policy.

II. Background

On July 13, 2007, Sun Life issued a $5 million life insurance policy (the "Policy") on the life of Nancy Bergman ("Ms. Bergman"). The sole owner and beneficiary of the Policy at the time it issued was the Nancy Bergman Irrevocable Trust (the "Trust"). The Policy was issued following an application signed by insurance agent David Kohn, Ms. Bergman, and Nachman Bergman ("Nachman") — Ms. Bergman's grandson and the trustee of the Trust. The Policy had an effective date of April 9, 2007. The Policy contained an incontestability clause that prohibited Sun Life from contesting the policy on any grounds except for non-payment of premiums after it had been in force for two years during the life of the insured.

In the course of the application for the Policy, Sun Life received an inspection report that stated that Ms. Bergman had $9.235 million in assets and net worth. Appendix ("App.") 230. However, after an investigation into her assets following Ms. Bergman's death, Sun Life discovered that Ms. Bergman's estate was allegedly valued at between $100,000 and $250,000; her only major asset was a condominium that may have been worth as much as $285,000, and her total assets did not exceed $1 million. App. 224-25. A group of investors unrelated to Ms. Bergman funded the Policy. These

investors deposited money into the Trust's account that was used to pay most, if not all, of the premium payments. App. 238. On August 21, 2007, a little over a month after the Policy was issued, Nachman resigned as trustee and appointed the investors as successor co-trustees. App. 238-39. The terms of the Trust were then amended to provide that the majority of the benefits of the Policy would flow to the investors and permitted the investors to sell the Policy without the consent of either Nachman or Ms. Bergman. App. 240.

In December 2009, the Trust sold the Policy to SLG Life Settlements, LLC, and most of the proceeds of that sale went to the investors. App. 240-41. A company named LTAP later acquired the Policy. Wells Fargo loaned funds to LTAP, which were used to pay premiums on the Policy. Wells Fargo then obtained the Policy as part of a settlement agreement in LTAP's bankruptcy proceedings. Wells Fargo made further premium payments on the Policy.

Bergman died on April 6, 2014. Sun Life declined to pay out the death benefit to Wells Fargo, concluding that the Policy had been fraudulently obtained. Sun Life then brought this action seeking a declaration that the Policy was void ab initio as part of a STOLI arrangement. App. 120. Wells Fargo responded by filing a counterclaim for breach of contract, seeking payment of the full death benefit. App. 129. The District Court partially granted summary judgment in favor of Sun Life, finding that New Jersey law applied and determining that the Policy was void ab initio as an illegal STOLI arrangement. The District Court reasoned that because the Policy was held by investors who lacked an insurable interest in the life of the insured, this would likely violate New Jersey public policy. The District Court also partially granted summary judgment in favor

of Wells Fargo, finding that it was entitled to a partial refund of premium payments it made after acquiring the Policy in the amount of $1,245,529.51.

Wells Fargo filed this appeal. Sun Life filed this cross-appeal of the order requiring it to refund premium payments to Wells Fargo. To adjudicate this claim, we must determine whether a life insurance policy that was transferred to persons who lack an insurable interest in the life of the insured violates New Jersey public policy.

III. Discussion

A. Whether STOLI Contracts Violate New Jersey Law

A STOLI arrangement involves third-parties, who do not have an insurable interest in the life of the insured, procuring or causing to be procured a life insurance policy with the intent of benefiting financially from selling the policy or receiving the death benefit. STOLI policies are typically funded by these third-party investors, who treat the policies as investments. New Jersey law defines insurable interest in the life insurance context as follows:

> (1) An individual has an insurable interest in his own life, health and bodily safety.
> (2) An individual has an insurable interest in the life, health and bodily safety of another individual if he has an expectation of pecuniary advantage through the continued life, health and bodily safety of that individual and consequent loss by reason of his death or disability.
> (3) An individual has an insurable interest in the life, health and bodily safety of another individual to whom he is closely related by blood or by law and in whom he has a substantial interest engendered by love and affection. An individual liable for the support of a child or former wife or husband may procure a policy of insurance on that child or former wife or husband.

N.J. Stat. Ann. § 17B:24-1.1a. New Jersey law also provides that:

> No person shall procure or cause to be procured any insurance contract upon the life, health or bodily safety of another individual unless the benefits under that contract are payable to the individual insured or his personal representative, or to a person having, at the time when that contract was made, an insurable interest in the individual insured.

N.J. Stat. Ann. § 17B:24-1.1b.

The New Jersey Supreme Court has held that "[t]he justification for this rule is the discouragement of illicit uses of insurance, such as wagering, and the destruction of insured property." Miller v. N.J. Ins. Underwriting Ass'n, 414 A.2d 1322, 1324 (N.J. 1980). The United States Supreme Court has emphasized the insurable interest requirement's importance in the life insurance context. See Grigsby v. Russell, 222 U.S. 149, 154 (1911) ("A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end.").

Sun Life contends that the Policy in this case does not satisfy the insurable interest requirement because it was procured by the investors who lacked an insurable interest in the life of Ms. Bergman. Sun Life contends that the Policy is instead a form of illegal wagering on human life that violates New Jersey's anti-wagering laws, which prohibit all forms of gambling unless expressly adopted by a majority of New Jersey voters at election. See, e.g., N.J. Const. of 1947, art. IV, § VII, ¶ 2; N.J. Stat. Ann. §§ 2A:40-1, 2A:40-3; Atlantic City Racing Ass'n v. Att'y Gen., 489 A.2d 165, 171 (N.J. 1985) ("New Jersey's comprehensive policy against all forms of gambling (except where specifically authorized by the people) has been clear and long-standing."). Sun Life thus argues that because the Policy lacks an insurable interest as it is part of a STOLI arrangement, it violates the anti-wagering laws and is "utterly void and of no effect." N.J. Stat. Ann. § 2A:40-3.

The District Court agreed that the STOLI arrangement violates New Jersey's anti-wagering laws, because a policy procured for the benefit of third parties — who fund the premium payments — as an investment, is a form of wagering on human life. The District Court found such wagering here, where, the insurance policy was initially obtained in the name of a party with an insurable interest in the life of the insured, but was then transferred, in line with the parties' intent at the time the policy was procured, to persons who did not have an insurable interest. The District Court reasoned that because the Policy was funded by investors who lacked an insurable interest in Ms. Bergman's life, with the intent of using the Policy as a financial investment at the time it was procured, it was never really procured for the benefit of someone with an insurable interest in Ms. Bergman's life, even though Nachman was nominally the beneficiary at the time it was issued to the Trust.

In reaching this conclusion, the District Court relied on the Supreme Court of Delaware's decision in PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr., ex rel. Christiana Bank & Tr. Co., which considered a similar question regarding the transfer of a life insurance policy as part of a STOLI arrangement. 28 A.3d 1059, 1075 (Del. 2011). That court held that "if an insured procures a policy as a mere cover for a wager, then the insurable interest requirement is not satisfied." Id. The District Court adopted the Delaware Supreme Court's reasoning that permitting parties without an insurable interest to get around that requirement by causing someone with an insurable interest to procure a policy and then transfer that policy would be "an illogical triumph of form over substance that would completely undermine the policy goals behind the insurable interest requirement." Id. at 1071.

In this case, the District Court found that the undisputed facts demonstrated that the Policy was procured with the intent of benefiting the investors in the STOLI arrangement, and not benefiting anyone with an insurable interest in Ms. Bergman's life. Thus, the legal question we must decide is whether New Jersey's insurable interest requirement is satisfied by a life insurance policy that is procured with the intent to benefit persons without an insurable interest, when that policy is initially procured in the name of one who has an insurable interest, but is soon thereafter transferred to those who do not.

Wells Fargo contends that the Policy here satisfied New Jersey's insurable interest requirement because when the Policy was issued, Nachman was designated as the trust beneficiary and he had an insurable interest in Ms. Bergman's life. Wells Fargo contends that this satisfies New Jersey law and that the fact the Policy was transferred to the investors, who made the premium payments soon after it was obtained, is irrelevant. Wells Fargo argues that, instead of following Delaware law, New Jersey law should follow New York law, which expressly permits the immediate transfer of a policy to a third party after it is procured. See Kramer v. Phoenix Life Ins. Co., 940 N.E.2d 535, 552 (N.Y. 2010); New England Mut. Life Ins. Co. v. Caruso, 535 N.E.2d 270, 272-73 (N.Y. 1989). Wells Fargo also argues that the fact that the New Jersey legislature has considered, but not passed, laws explicitly outlawing STOLI transactions is evidence that these types of transactions are permitted under New Jersey law. Wells Fargo Br. 33 n.10 (collecting proposed legislation). Wells Fargo finally argues that even if the Policy represents a STOLI arrangement that violates New Jersey law, it should be rendered voidable rather than void

ab initio under New Jersey law, which would mean that here, due to the presence of the incontestability provision, the Policy should not be rescinded.

No New Jersey state court has considered this issue. Two cases brought in federal district court have considered challenges to STOLI arrangements involving the transfer or potential transfer to persons who lacked an insurable interest. See Lincoln Nat'l Life Ins. Co. v. Schwarz, No. CIV. A. 09-03361 (FLW), 2010 WL 3283550, at *8 (D.N.J. Aug. 18, 2010); Lincoln Nat'l Life Ins. Co. v. Calhoun, 596 F. Supp. 2d 882, 889 (D.N.J. 2009). These decisions can only predict how the New Jersey Supreme Court would rule on the validity of a life insurance policy that is transferred to persons without an insurable interest as part of a STOLI arrangement. Neither of these cases reached our Court. Because these are the only cases to consider the issue, we do not have guidance as to how the appellate courts of New Jersey would rule, let alone the Supreme Court.

This appears to be an instance in which New Jersey law should be interpreted first by an authoritative opinion of the New Jersey Supreme Court. The resolution of the question of whether STOLI arrangements such as this one satisfy New Jersey's insurable interest requirement or violate New Jersey public policy has important ramifications for life insurance litigation in New Jersey. The resolution of this question would dispose of the major issue in this appeal, and depending on the outcome, could dispose of this appeal altogether. It requires a determination of whether STOLI arrangements violate the public policy of New Jersey, and if they do, whether the affected insurance policies are rendered void ab initio. We believe that the New Jersey Supreme Court is a much more appropriate forum to resolve this difficult question of New Jersey public policy.

B. Whether Premium Payments Must Be Reimbursed

If the Policy is declared void ab initio, then the nature of the remedy available to the parties is another unresolved question of New Jersey law. In this situation, Sun Life contends that Wells Fargo is not entitled to a refund of the premium payments that it made on the Policy. Sun Life contends that general principles of New Jersey law prohibit the reimbursement of moneys spent in furtherance of an illegal wagering transaction. See Marx v. Jaffe, 222 A.2d 519, 521 (N.J. Super. Ct. App. Div. 1966) ("It is said to be an established rule that 'the law will not assist either party to an illegal contract. The parties being in pari delicto, it will leave them where it finds them. If the contract be still executory, it will not enforce it, and if already executed, it will not restore the status quo ante.'" (quoting Cameron v. Int'l All. of Theatrical Stage Emps., Local 384, 176 A. 692, 697 (N.J. E. & A. 1935)). As a result, Sun Life contends it is permitted to keep the premium payments. Wells Fargo contends that permitting Sun Life to keep the premium payments would be an unfair windfall, because, as a later innocent purchaser of the Policy, it was not responsible for and did not have knowledge of the STOLI arrangement when it continued to make payments on the Policy. The District Court agreed with Wells Fargo.

No state court in New Jersey has addressed this issue as it applies to life insurance contracts. Other federal courts to consider this issue under the laws of other states, have determined that parties who were not involved in the fraudulent conduct that resulted in the voiding of life insurance policies were entitled to the reimbursement of premiums that they had paid on those policies. See Ohio Nat'l Life Assurance Corp. v. Davis, 803 F.3d

904, 911 (7th Cir. 2015); Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n, 693 F. App'x 838, 840 (11th Cir. 2017).

None of these cases considered New Jersey law, and thus are not precedential nor do they reveal how the New Jersey Supreme Court would rule on this issue under New Jersey law. Thus, we do not have guidance as to how the New Jersey Supreme Court would rule on this question. We believe that the New Jersey Supreme Court is a much more appropriate forum to resolve this difficult question of New Jersey law.

IV. Questions for Consideration[2]

NOW THEREFORE, the following questions of law are certified to the Supreme Court of New Jersey for disposition according to the rules of that Court:

(1) Does a life insurance policy that is procured with the intent to benefit persons without an insurable interest in the life of the insured violate the public policy of New Jersey, and if so, is that policy void ab initio?

(2) If such a policy is void ab initio, is a later purchaser of the policy, who was not involved in the illegal conduct, entitled to a refund of any premium payments that they made on the policy?

We shall retain jurisdiction over the appeal pending resolution of this certification.

[2] We acknowledge, pursuant to N.J. Ct. R. 2:12A-2, that the New Jersey Supreme Court may reformulate these questions.

By the Court,

s/Michael A. Chagares
Circuit Judge

Dated: January 30, 2018

A True Copy:

Patricia S. Dodszuweit, Acting Clerk