No. 24-6801

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERITAS LIFE INSURANCE CORP.,
Plaintiff-Appellant,

v.

WILMINGTON TRUST, NATIONAL ASSOCIATION,
as Securities Intermediary,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:24-cv-02437-SVW-RAO
Honorable Stephen V. Wilson, District Judge

BRIEF OF AMICUS CURIAE LIFE INSURANCE CONSUMER ADVOCACY CENTER IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

I. STATEMENT OF INTEREST

The Life Insurance Consumer Advocacy Center ("LICAC") submits this brief in support of Defendant-Appellee Wilmington Trust, National Association as securities intermediary ("Securities Intermediary") and affirmance of the district court judgment. All parties have consented to this filing, including Plaintiff-Appellant Ameritas Life Insurance Corporation ("Ameritas").

LICAC asks this Court to affirm the district court's judgment dismissing Ameritas's lawsuit, which seeks to strip consumers of valuable rights they have bought and paid for, in violation of clear law establishing that a converted policy is a continuation of the original policy, which was purchased by a person Ameritas concedes had an insurable interest.

LICAC is a non-profit social welfare organization based in California and focused on protecting California life insurance consumers. Its mission is to alert the public, including consumers and policymakers, about the potential risks and benefits of certain types of life insurance products and to advocate for reasonable and essential consumer protections for these types of products.

LICAC has a strong interest in advocating consumer protections for California life insurance consumers. LICAC participates actively in the California legislative process, including by sponsoring, supporting, or opposing legislation affecting life insurance consumers. LICAC provides testimony in legislative committee hearings, meets with legislators and legislative staff, and provides written comments on legislation. LICAC meets with and provides comments and input to the California Department of Insurance concerning potential legislation and administrative regulations. In some cases, LICAC advocates directly for individual consumers with insurers or the Department of Insurance. LICAC also works to assist courts in correctly applying California law by submitting amicus letters and briefs.

No party's counsel authored this brief in whole or in part, and no person, other than LICAC and its officers and counsel, contributed money that was intended to fund preparing or submitting this brief.

II. SUMMARY OF ARGUMENT

Consumers benefit from the ability to sell their policies to life settlement companies instead of simply allowing them to lapse. Lapse results in a windfall for the insurer because the insurer has collected premiums for many years but avoids paying a death benefit because the insured typically has neither the sophistication nor the resources to maintain the policy, even when that is the economically rational thing to do. Life settlement companies provide options allowing consumers to maximize the value of the policies they have purchased and paid for over many years. Where the policies provide the right to transfer the policy and to exercise a conversion privilege, as the policy at issue does here, the policies should not be stripped of their value by a rule that imposes an insurable interest requirement that serves no purpose other than to restrict the consumers' options.

Common sense and established law establish that a converted policy such as the one in this case is merely a continuation of the original policy. Ameritas's predecessor (referred to for convenience as "Ameritas") had no discretion about whether to issue the converted policy. The insurance transaction – Ameritas's undertaking to pay a $3.7 million death benefit upon Mr. Moghadam's death – was undertaken with the issuance of the original policy. The risk that Ameritas undertook many years ago included a conversion privilege. The converted policy creates no new insurance, and Ameritas's arguments to the contrary seek to elevate form over substance.

The converted policy is not Stranger-Originated Life Insurance ("STOLI"), and none of the abuses that motivated legislatures to ban STOLI are present here. Ameritas and its ally, the American Council of Life Insurers ("ACLI"), should seek legislative action if they wish to expand the proscriptions of California's existing laws governing STOLI.

III. ARGUMENT

A. Imposing an insurable interest requirement on a converted policy strips consumers of valuable rights purchased in the original insurance contract.

Ameritas and ACLI seek to paint this case as a dispute between the life insurance industry and the life settlement industry. They largely ignore the interests of consumers, who own the policies sold in life settlement transactions and should be permitted to maximize the value of their policies, just as they could for any other property they own.

As the United States Supreme Court recognized long ago, "life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property." *Grigsby v. Russell,* 222 U.S. 149, 156 (1911). Those characteristics include the right to sell one's property on terms that maximize its value. The *Grigsby* court recognized that "[t]o deny the right to sell except to persons having [an insurable] interest is to diminish appreciably the value of the contract in the owner's hands." The Court rejected the argument that the buyer must have an insurable interest at the time the policy was sold and upheld a consumer's sale of his life insurance policy to a third person after the consumer ran into difficulty continuing to pay the premiums on the policy.

Mr. Moghadam purchased his policy approximately 20 years ago and faithfully paid the premiums necessary to keep the policy in force. One of the benefits that he paid for in the policy was a conversion privilege – the right to convert the policy from a term policy to a "permanent" policy, albeit at a substantially increased premium. As Securities Intermediary points out, Ameritas's marketing materials highlight "conversion opportunities" from term policies (ER-145) and describe "the conversion privilege" as "[o]ne of the most important features to look for in a term insurance policy." (ER-147; Appellee Answering Br. at 8.) Besides a conversion privilege, the policy Mr. Moghadam bought also contains an explicit "right to assign the policy" and an explicit "right to change the owner or beneficiary."

When confronted with the fact that upon expiration of the initial twenty-year term, premiums on the policy would increase over tenfold and would continue to get higher every year, Mr. Moghadam sought to maximize the value of his policy by selling it. He could alternatively have let the policy lapse ***with no value***, but because the conversion privilege is a valuable right, he was able to extract the value from his policy that otherwise would have gone to the insurer upon the lapse of the policy.

Ameritas and ACLI seek to impose a rule that would greatly reduce the policy's value to prospective buyers, thereby reducing the policy's value to policyowners such as Mr. Moghadam, as the *Grigsby* court recognized.[1]

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[1] Mr. Moghadam could conceivably have converted his policy before selling it. Whether Ameritas or ACLI would contend that such a transaction would also be invalid is a question that is not before the Court and is of no moment. For

ACLI asserts that the district court's ruling will result in a "windfall for institutional investors in the life settlement industry" (ACLI *Amicus* Br. at 5), but in truth it is the insurance industry that seeks a windfall. The dirty little secret of the life insurance industry is that the vast majority of life insurance policies lapse with no value to the policyholder and that insurers count on that fact in designing their policies. A recent study of the life insurance industry, Gottlieb & Smetters, *Lapse-Based Insurance*, 111(8) American Economic Review (2021) 2377, finds that nearly 88% of universal life policies terminate without payment of a death claim *and that term policies lapse at an even higher annual rate.* *Id*. at 2381. Even for term policies sold to seniors at age 65, the likelihood that the policy will terminate without any death claim ever being paid is approximately 74%. *Id*. Gottlieb and Smetters demonstrate that "life insurance companies make positive earnings on clients who lapse their policies and negative earnings on those who keep their policies." *Id*. at 2379.

Despite marketing the conversion privilege as a valuable right, insurers know that few consumers have the sophistication or resources to exercise the conversion privilege and maintain the policy in force until the death of the insured.

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whatever reason, Mr. Moghadam chose to sell the policy before exercising the conversion privilege, as was his right. The rule advanced by Ameritas and ACLI seeks to prevent conversion of the policy after sale, which would frustrate the ability of Mr. Moghadam and other consumers to maximize the value of their policies as they think best.

As was the case here, the premiums necessary to keep a term policy in effect typically increase by a staggering amount upon the termination of the original term. Most consumers will simply let the policy lapse rather than pay the greatly increased premiums. Policies that lapse will never pay a death claim, and life insurers count on high lapse rates to bolster their bottom lines. *Id.* at 2383-85.

What the life insurance industry is really upset about is that the life settlement industry came along with the sophistication and resources necessary to enable consumers to extract value from their policies rather than simply letting them lapse.[2] The life insurer is deprived of the windfall that results from the policy's lapse before a death benefit is paid. But the consumer benefits, as the consumer and the life settlement company strike a bargain to share the value realized by keeping the policy in force.

Consumers always benefit from competition, which is what the life settlement industry represents to life insurers. Without life settlement providers, the life insurer has monopoly power over the policy owner. That power is enhanced by the fact that consumers rarely have the knowledge or resources to

[2] ACLI complains that at the time of conversion a life settlement company "has the advantage of access to information on the *current* health and projected longevity of the insured." That is true, but the insured also has this information. The insurers prefer that the insureds remain in the dark about the value of exercising the conversion privilege and are upset simply because the life settlement industry enables consumers to realize the value of their policies.

maintain the policy even when that is the economically rational thing to do. Monopolists always object to efforts by competitors to challenge their positions. However, competition is good for consumers, and monopolists' complaints about competition should be ignored.

ACLI argues that allowing policies such as Mr. Moghadam's to be converted "would potentially expose insurers to many millions of dollars of additional risk they could not have anticipated when they wrote and priced these policies decades earlier." (ACLI *Amicus* Br. at 5.) It may be true that many or even most insurers set premiums with aggressive assumptions about their windfalls from lapsation. Their profits will now be reduced if the life settlement industry is permitted to help some consumers avoid forfeiting the value of their policies through lapsation. That is not a reason to strip consumers of the value their policies can bring through life settlement.

Life insurers are in the risk business. If they base their pricing on lapse assumptions that have proven to be overly aggressive, they must bear the cost of the risks they undertook. Life insurers can adjust their pricing to reflect the reality of life settlements, and many may have already done so. There is nothing wrong with that. However, it would be inappropriate to grant the life insurance industry a windfall by ruling that a policy sold to a life settlement company cannot be converted, despite the clear terms of the policy stating that ownership may be transferred and that the conversion privilege may be exercised. Such a ruling would diminish the value of policies currently held by millions of consumers merely to protect the profits of life insurers.

B. Ameritas and ACLI elevate form over substance in insisting that the owner of a policy must have an insurable interest at the time the policy is converted.

ACLI argues that "Wilmington Trust cannot take out *new* insurance on Mr. Moghadam's life." (ACLI *Amicus* Br. at 13.) Similarly, Ameritas argues that the converted policy "arguably" fails the requirements of Insurance Code subsections 10110.1(f) and (g) that an insurable interest exist "at the time the contract of life or disability insurance becomes effective" and "at the time of the application" for the policy. (Appellant Opening Br. at 22-27.) These arguments fail because there is no "new" insurance; the converted policy is merely a continuation of the original policy.

This is true both as a matter of common sense and settled law. To say that the insurable interest requirement must be met when the converted policy is applied for and issued simply because a new contract is issued with a new policy number and a new effective date is to exalt form over substance: ***no new insurance is created***. Indeed, if the insured or the life settlement company sought to increase the amount of insurance, and thus the insurer's risk, the new insurance would be subject to acceptance by the insurer based upon new underwriting and evidence of insurability. That no new insurance is created is confirmed by the fact that the suicide exclusion and incontestability provisions of the converted policy run from the date of the original policy. (ER-114.)

Settled law confirms that a converted policy such as Mr. Moghadam's is merely a continuation of the original policy, as the district court correctly found. (ER-12–13.) Neither Ameritas nor ACLI explains why the point made by the United States Supreme Court in *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389, 399 (1924) – that the converted policy "was issued in pursuance of, and was dependent for its existence and its terms upon, the express provisions of the contract contained in the first one" – is any less true in this case than it was in *Aetna*. That *Aetna* involved a choice of law issue is irrelevant. Ameritas and ACLI similarly fail to deal with lower court authorities relied on by the district court – *Burr v. Equitable Life Ins. Co. of Iowa*, 84 F.2d 781 (9th Cir. 1936) and *Goldwater v. Jackson Nat. Life Ins. Co.*, 555 F. Supp. 1022 (N.D. Cal. 1983). All these cases, and others cited by Securities Intermediary (*see* Appellee Answering Br. at 30-34), stand for the commonsense proposition that a converted policy is a continuation of the original policy.

Ameritas had no discretion to refuse to issue the converted policy. For this reason, the "application" for the converted policy was an "application" in name only, and the policy did not represent new insurance because no new risk was created. As the Supreme Court noted in *Aetna*, "upon the simple application of the insured, the new policy must issue." 266 U.S. at 399.

The rule that an insurable interest must exist focuses on the conditions at the time the insured risk is created. That is the substance of the insurance transaction. Ameritas and ACLI rely on form and not substance in arguing that an insurable interest must exist at the time the converted policy is applied for or issued. But California law, like that of most other states, is clear that "the law respects form less than substance." California Civil Code Section 3528.

C. The converted policy is not Stranger-Originated Life Insurance, and the problems associated with Stranger-Originated Life Insurance are not present in this case.

Ameritas argues that the converted policy was void because it constituted stranger-originated life insurance ("STOLI") issued in violation of California Insurance Code Section 10113, *et seq*. (Appellant Opening Br. at 45-48.) Section 10113.1(w) defines STOLI:

> "Stranger-originated life insurance" or "STOLI" is an act, practice, or arrangement to initiate the issuance of a life insurance policy in this state for the benefit of a third-party investor who, at the time of policy origination, has no insurable interest, under the laws of this state, in the life of the insured. STOLI practices include, but are not limited to, cases in which life insurance is purchased with resources or guarantees from or through a person or entity, that, at the time of policy inception, could not lawfully initiate the policy himself, herself, or itself, and where, at the time of inception, there is an arrangement or agreement, to directly or indirectly transfer the ownership of the policy or the policy benefits to a third party.

Ameritas's argument fails because, as demonstrated in Part III.B, above, the new policy is a continuation of the original policy. It is nonetheless useful to note the nomenclature used to define STOLI: STOLI is "stranger originated." It is characterized by a stranger's involvement in the creation of the insurance, i.e., the making of the "bet" (to use the loaded term Ameritas prefers) that characterizes every policy of insurance ever issued to cover any risk. Here the "bet" was not made or arranged by a stranger but by Mr. Moghadam, who unquestionably had an insurable interest in the insurance, which by its terms was both transferrable and convertible.

That Ameritas's argument is unprincipled and wrong is made plain by its argument that it was "perfectly legal" for Securities Intermediary (or, rather, Securities Intermediary's customer, the beneficial owner of the policy) to buy the original policy because it was "a term-life policy with a premium structure that made no sense from a wagering perspective." (Appellant Opening Br. at 47.) Put differently, Ameritas argues that it was "perfectly legal" for the policy's beneficial owner to make a "bet" on a human life so long as it was a bad bet. Securities Intermediary's customer, a licensed life settlement provider, purchased a pre-existing insurance policy (or "bet") that had a conversion right marketed by Ameritas as a benefit to the policyowner, who bought and paid for that privilege, as well as the right to transfer it.

ACLI points out some of the abuses that motivated states such as California to pass laws prohibiting STOLI:

> The insured were often lured with the promise of "free insurance," with investors lending them money to pay the premiums, and were sometimes encouraged by investors to inflate their assets to support issuing larger policies that would be more valuable as investments. [Citation omitted] The insured were generally not alerted to many of the negative consequences that might follow from involvement in these schemes, including tax consequences for the benefits they received and limitations on their ability to purchase insurance in addition to the policies they had procured for investors.

(ACLI *Amicus* Br. at 11.) Notably, ACLI makes no argument that any of these abuses characterize a true life settlement, let alone that any of these abuses occurred in this case.

If Ameritas and its insurance industry allies believe that life settlement transactions like the one here are against public policy, they should request the Legislature to expand the proscriptions of Section 10113. That may prove challenging because the Legislature will see the effort for what it is – an effort to maintain monopoly power over the future of life insurance policies bought by consumers and maintained faithfully for many years. Consumers benefit from the ability to sell their policies to life settlement providers. Let the insurance industry make its argument to the Legislature, and let the legislative process determine the public good.

IV. CONCLUSION

This Court should affirm the district court's decision and vindicate the right of policy owners to extract the full value of their policies by selling those policies to life settlement companies, who serve a useful function by providing consumers with options to either allowing their policies to lapse or keeping the policies in force at great expense.

Dated: May 28, 2025,

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By: /s/Brian P. Brosnahan
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