

Delaware Federal Court Issues Important Post-Price Dawe Opinion

In a memorandum opinion issued in *Principal Life Insurance Company v. Lawrence Rucker 2007 Insurance Trust* on June 26, 2012, a federal district court applied the Delaware Supreme Court's holding in *PHL Variable Life Insurance Co. v. Price Dawe 2006 Insurance Trust* ("Price Dawe") to reverse an earlier order voiding a policy for lack of insurable interest. The *Rucker* opinion, which concerned a beneficial interest transfer transaction, recognizes that under *Price Dawe*, a policy is not void either because the insured intended to sell it on the secondary market or because the insured obtained the policy through premium financing. Ultimately, in undoing the prior order granting summary judgment in favor of the insurer, the court found that there was conflicting evidence surrounding the procurement of the policy that would have to be resolved by a jury.

The implications of *Rucker* are, for the most part, positive for investors. Most importantly, the case interprets *Price Dawe* as permitting insureds to use premium financing to procure policies without violating insurable Delaware's interest laws. This is significant because the *Price Dawe* opinion contains broad and ambiguous language possibly putting the validity of premium financed policies in question. Specifically, the Delaware Supreme Court noted that "if a third party funds the premium payments by providing the insured with the financial means to purchase the policy then the insured does not procure or affect the policy." While that language might have been construed to cover premium finance transactions, the *Rucker* court held that under *Price Dawe*, "an insured's ability to procure a policy is not limited to paying the premiums with his own funds; borrowing money with an obligation to repay would also qualify as an insured procuring a policy." *Rucker* is, of course, a trial court opinion with limited precedential value; but its express limitation of *Price Dawe*'s sweeping language is nevertheless important. On a less positive note, the *Rucker* court's decision highlights the fact-intensive nature of the inquiry needed to ascertain the existence of an insurable interest. This may prevent investors from quickly (and cheaply) prosecuting or defending suits to enforce their contract rights.

Rucker involved an alleged STOLI arrangement in which the insured applied for a life insurance policy on his own life with the intent to sell the policy on the secondary market. The insurer issued the policy to a trust formed by the insured to hold the policy. Soon after the policy was issued, the beneficial interest in that trust was transferred to a third-party investor. The insured paid the initial premiums on the policy with funds borrowed from the insurance agent who sold the policy, although there was no formal loan agreement. After the beneficial interest transfer was concluded, the insured repaid the loan.

Before the Delaware Supreme Court issued its decision in *Price Dawe*, the *Rucker* court granted summary judgment in the insurer's favor, holding that the insured's intent to transfer the policy and his agreement with the insurance agent to arrange for the sale established a lack of insurable interest. Following the decision in *Price Dawe*, the court invited the parties to supplement their earlier briefing to address the impact of *Price Dawe* on the court's prior order.

Contact a Team Member

Stephen G. Foresta
Partner
New York
(212) 506-3744
sforesta@orrick.com

Khai LeQuang
Partner
Orange County
(949) 567-6700
klequang@orrick.com

In its June 26, 2012 opinion, the *Rucker* court reversed its prior order and found that there were genuine disputed factual issues that precluded judgment as a matter of law. In particular, the court refused to rule in the insurer's favor in the absence of uncontroverted evidence that an investor, or a person acting on an investor's behalf, funded the insured's trust and paid the premiums on the policy. The court distinguished *Price Dawe* (where the investor allegedly paid the premiums) on this ground and concluded that "a reasonable jury could find [that] Rucker procured the Policy himself and paid the premium by obtaining a loan from [the insurance agent]."

For the same reason, the court refused to conclude that an investor used the insured as a means to procure the policy, *i.e.*, as a "mere cover for a wager," despite evidence of (i) misrepresentations in the policy application, (ii) the insured's intent to transfer the policy, and (iii) the insured's complete lack of knowledge regarding the formation and purpose of the trust used to procure and transfer the beneficial interest in the policy. The *Rucker* court explained that under *Price Dawe*, "for a policy to constitute a wager voiding any insurable interest, both an intent to immediately transfer the policy to a third party and a financial inducement by a third party to procure a life insurance contract on the insured are required." In the absence of conclusive evidence, the court left it to a jury to decide whether an investor used the insured as an "instrumentality" to procure the policy by providing a financial inducement. Finally, the *Rucker* court concluded that the evidence concerning the creation of the trust—specifically, whether the trust was created and funded by the insured, rather than by the investor—was inconclusive and would also have to be decided by a jury.