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The Assignment of Insurance Policies

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ASSIGNMENTS OF LIFE INSURANCE POLICIES

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A POLICY of life insurance is a contract to pay money upon the happening of an event. It is a chose in action and the general principles of law relating to assignments of choses in action are applicable. It is everywhere assignable except as restricted by law, by the provisions of the policy, or by collateral agreement.

The contract of life insurance has its own characteristics. A distinguishing characteristic is that it must involve an actual "insurance risk."[1] Its purpose is to relieve one or more from loss that may result from the untimely death of the insured. It, therefore, has its beneficiaries who are the persons to be protected, and in its most frequent form is a contract between the insurer and insured for the benefit of persons not parties to it.

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[1] Helvering, Commissioner, v. Edith LeGierse, 312 U.S. 531, 85 L.Ed. 996, 61 S.Ct. 646 (1941).

If it were not for this feature of protection from loss resulting from insured's death, the contract would be a wager based upon the length of another's life, with no other incentive on the part of the beneficiary than to win the wager, and everywhere contrary to public policy. Therefore, every policy of life insurance must be based upon an insurable interest in the life of the insured.

Naturally the power to appoint beneficiaries is vested in the insured by the form of the policy, either subject to revocation and change or not as may be provided. The policy vests various other powers in the insured, such as to borrow the reserve upon or surrender the policy for its cash surrender value, to determine how dividends upon the policy shall be paid or applied, to determine whether the proceeds shall be paid in cash at maturity or in installments under specified methods of settlement offered to insured and to the beneficiary if the power has not been exercised by insured. Any or all of these powers may be waived or may be vested in the beneficiary who takes out the policy or the beneficiary appointed by, or the transferee of, the insured.

These and other characteristic features or provisions of the policy must be considered in applying general principles of law in respect to the assignment of choses in action. The problems presented to the insurer by assignments of policies generally involve some of these characteristics or special provisions of the contract and this paper is directed particularly to such problems.

Restrictions

In a few of the states no assignment of a policy to one having no insurable interest in the life of the insured is permitted or valid. In some of these states the insured may not designate as beneficiary or assign the policy to one not having an insurable interest in his life even though he continues to control the policy and to pay premiums upon it.[2] In other states a transfer of a policy to those having no insurable interest in insured's life is not invalid where the insured continues to pay the premiums upon it.[3]

But in most of the states it is considered that as the insured has an insurable interest in his own life, he may transfer a policy taken out by him in good faith upon his life, to anyone he chooses either with or without an insurable interest; and that continuity of insur-

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[2] Griffin v. McCoach et al., 123 F.(2d) 550 (C.C.A. 5th, 1941); National Life and Accident Insurance Co. v. French, 144 S.W. (2d) 653, (Texas 1940); Newton v. Hick's Adm'r. 282 Ky. 226, 138 S.W. (2d) 329 (1940).

[3] Weresozinski v. Prudential Ins. Co., 339 Pa. 83, 14 A. (2d) 279 (1940); Penn Mutual Life Insurance Co. v. Slade et al., 47 Fed. Supp. 219 (D.C. Ky., 1942); Allen v. Aetna Life Insurance Co., 228 Mo. App. 18, 62 S.W. (2d) 916 (1933).

able interest is not necessary, and, therefore, in all cases where the policy when issued is based upon an insurable interest in the life of the insured, it may thereafter be transferred to anyone even though the assignee has no insurable interest in the life of the insured.[4] However, if the policy is taken out by the insured pursuant to an agreement or understanding that it is to be assigned to one having no insurable interest, it will be considered not taken out by him in good faith and not supported by the insurable interest insured has in his own life, and as a mere attempt to evade the requirement of insurable interest and a wager upon the life of the insured and, therefore, invalid.[5]

There are few attempts of those having no insurable interest to acquire such invalid insurance. Frequently, however, policies are applied for which cannot be issued because of lack of insurable interest. For instance, a corporation may desire to acquire policies on the lives of stockholders to aid in the purchase of their stock in case of their death and proposes that each stockholder shall take out insurance upon his own life and assign it to the corporation. As to the stockholders who are not actually engaged in the business of the corporation and deemed essential to its success, the corporation has no insurable interest in their lives and cannot in that manner secure and hold such policies.

There are instances of regulatory laws which in some of the states restrict the transfer of life insurance policies. The purpose of some of them is to make more secure to married women or wives of parties insured the right to enjoy the benefits of life insurance policies. It is not within the scope of this paper to consider such regulatory laws. Such laws of the various states must ever be borne in mind, but they present no serious difficulties to the insurer in determining the rights of the insured and of the beneficiaries.

Arizona, California, Louisiana, Nevada, New Mexico, Texas and Washington have community property laws under which property acquired during coverture with earnings of either spouse or other community property funds, including policies of life insurance, is community property; the same is true optionally in Oklahoma. The community resembles a partnership of which the husband is the manager. Each spouse has a vested interest in the community property. The husband as manager of the community proper may transfer or assign it for a valuable consideration, but is precluded from giving it away. Therefore, his designation of beneficiaries under or

[4] Grigsby v. Russell, 222 U.S. 149, 56 L.Ed. 133. 32 S.Ct. 58 (1911).

[5] Wagner v. National Engraving Co., 307 Ill. App. 509, 30 N.E. (2d) 750 (1940); Banker's Reserve Life Co. v. Matthews, 39 F. (2d) 528, (E.D.S.C. 1941); Home Life Insurance Co. v. Masterson, 180 Ark. 170, 21 S.W. (2d) 414, (1929).

assignment of community property policies as a gift and not as a sale for full value is subject to the community property interest of the wife unless she expressly waives or joins in the transfer of her interest. Upon dissolution of the community by death of either spouse, the community property interest of the wife descends to her children in some of the states and is subject to testamentary disposition, I believe, in all of them at the present time. If the community is dissolved by divorce, it is made the duty of the court to divide the community property between the spouses, and in the absence of such division by the decree, the divorced husband and wife become owners in common of all property that was community property, including life insurance policies, and the interest of either is assignable. The result is that the insured may not assign or otherwise dispose of the policy on his life without the concurrence of others interested in the policy—perhaps his children or his divorced wife or those who have succeeded them in interest. He may assign his half interest in such a policy.

This law presents difficult questions, for the insurer must make inquiry concerning various questions, such as whether the policy was in fact community property or whether by waiver or assignment it has become the separate property of either husband or wife. And where the policy has become owned in common upon dissolution of the community, serious questions arise under the circumstances, as to the rights of the parties where one of the owners has voluntarily or pursuant to some understanding paid the premiums upon the policy.

Perhaps I may refer to the restriction upon the power of the insured to make a gift *inter vivos* of a life insurance policy, by the 1942 amendment of Sec. 811(g) of the Internal Revenue Code respecting liability of the proceeds of life insurance, to the estate tax. This law if valid prescribes that if the insured pays premiums upon the policy, he can never escape liability of his estate to the estate tax even though he makes an absolute assignment of the policy. It is the effect of this law that in proportion to the premiums paid by him his estate will be liable to an estate tax, even though he had no incidents of ownership at the time of his death. It is considered also that even if the wife or someone else takes out the policy and there has been no transfer of it by the insured, still the insured's estate will be subject to the estate tax in proportion to the premiums paid by him. This law must be based upon the assumption that a life insurance policy because its benefits are payable upon insured's death, is comparable to a testamentary disposition or that the gift takes effect only upon and by reason of the death of the insured. This assumption is inconsistent with the fact. An assignment of a life insurance policy by the insured is immediately effective. The beneficiaries are appointees of the assignee and not of the insured. There is no transfer that becomes effective upon death. There is no gift that is not effective immediately upon the assignment. The fact that payment becomes due on the event of death is not characteristic solely of life insurance policies and that fact has nothing whatever to do with the question of title to the contracts. The benefits of a policy are not received by the beneficiary because of the death of the insured, but because the beneficiary has owned all such benefits from the time of the gift of the policy. It is inconsistent with the law which has always recognized gifts *inter vivos* of life insurance policies as perhaps the most common of such gifts. The decisions of the highest courts unanimously hold that such a gift is effective at the time it is made and that from such time the donee is the owner of the policy entitled to all of its benefits and vested with all its powers, and consequently there is no possible basis for considering that there is a transfer of benefits from the insured at or in consequence of his death. This law, it is believed, is unconstitutional as a violation of rights protected by the 5th Amendment, because it is an absurd, arbitrary and whimsical discrimination against a single form of property and the owner thereof.

Restrictions upon the power to assign are frequently found in policy contracts.[6] A very common one, though generally introduced into the contract by an endorsement when the policy is transferred by the insured, is that there shall be no assignment of the policy to one who does not have an insurable interest in the life of the insured. Sometimes there is in the policy an absolute prohibition of any assignment of it. It is interesting to note that such a provision has been held inoperative where the regulatory law declares that life insurance policies shall be assignable.[7] Frequently policies require that assignments shall be made in a prescribed form or manner or only with the consent of the insured or upon notice to it, or that the insurer shall not be bound by any assignment unless it is in writing and filed with the insurer. Such provisions, however, are generally considered solely for the protection of the insurer and not to restrict the legal rights of the policyholders to assign in any manner that the law permits. It is held, therefore, that such provisions may be and frequently are waived by the insurer or that the informal assignment is valid as between the parties and binds the

[6] Immel v. Traveller's Insurance Co., 373 Ill. 256, 26 N.E. (2d) 114 (1940).
[7] Cook v. Cook, 111 P. (2d) 322 (Cal. 1941).

insurer if it has actual or constructive notice of it. Where the policy expressly prohibits assignment of it, an assignment may be considered valid as an equitable assignment.[8]

Such restrictions upon the right to assign the policy do not apply to the matter of assignment of the proceeds after the maturity of the policy, but the policy may include restrictions upon the rights of beneficiaries to assign their interests in the proceeds. Where the insured selects a settlement under which the insurer holds the proceeds and pays them in installments according to the settlement, it is a common practice in accordance with a very common desire of the insured to include a provision which precludes the beneficiaries from either voluntarily or involuntarily alienating the installments to which they are entitled. The right of an insured to deprive the beneficiary of any power to assign the benefits is recognized everywhere and the restriction against voluntary alienation is everywhere valid. But it has been considered in some states that to prevent involuntary alienation or to preclude creditors of the beneficiary from reaching installments to which the beneficiary is entitled, is contrary to public policy. In many of the states there are enactments which expressly permit provisions to be inserted that prevent assignments by the beneficiary and his creditors from reaching the installments to which he is entitled. These statutes, of course, express the public policy of the state. It is considered that one should have the right to dispose of his property under such conditions as he chooses. In the states where there is no express authorization for such provision, the insurer is frequently asked to include it. If the spendthrift trust is in any such state not contrary to public policy, it may be considered perhaps that the inclusion of such a provision is valid. It has been so held at least in one case.[9] Therefore, it is a practice of insurers to include such a provision conditioned upon its not being contrary to law. But such a restriction was not enforced where the spendthrift trust had not been held valid.[10]

Forms of Assignment

Conventional forms of written assignments are generally not necessary. Policies may be assigned absolutely or as security by parol.[11] The written assignment may be so informal that it is un-

[8] Klebba v. Struempf, 224 Mo. App. 193, 23 S.W. (2d) 208 (1930).
[9] Michaelson v. Sokolove et al., 169 Md. 529, 182 A. 458 (1936).
[10] Chelsea-Wheeler Coal Co. v. Marvin et al., 131 N.J. Eq., 76, 24 A. (2d) 403 (1942).
[11] Sundstrom v. Sundstrom, 129 P. (2d) 783 (Wash. 1942); Union Mutual Life Insurance Co. v. Broderick et al., 196 Cal. 497, 238 P. 1034 (1925); Opitz v. Karl 118 Wis. 527, 95 N.W. 948, 62 L.R.A. 982 (1903); Phillips v. Phillips, 226 S.W. 447 (Tex. Civil App. 1920); Continental Life Insurance Co. v. Sailor, 47 F. (2d) 911 (D.C.S.D. Cal. 1930).

certain whether an assignment or a change of beneficiary is intended. Sometimes it is held that the instrument is operative as a request for the change of beneficiary, although it is not valid as an assignment, and on the contrary it has been held that an informal instrument intended to effect a change of beneficiary, but not valid in view of the prescribed method for changing the beneficiary, is effective as an assignment. It may not be effective as either. This, however, is purely a matter of construction of the instrument. To be valid the assignment must be made in accordance with the requirements of the law. To be valid as a change of beneficiary, it must comply with the method prescribed in the policy for changing the beneficiary. It must be borne in mind that the right to designate or change the beneficiary is the right to exercise a contract power to appoint, reserved to the policyholder by the provisions of the policy, and it, therefore, must be exercised in accordance with the method prescribed by the policy for effecting the change.[12] The right to exercise such power is unilateral. An assignment, however, is a right secured by law and governed by the principles of law in respect to assignments. It involves two parties—the assignor and the assignee. It requires delivery and a meeting of the minds, but in the case of written assignments, the delivery of the policy is not necessary provided the instrument of assignment is actually or constructively delivered. The delivery may be made to a third party, as, for instance, filed with the insurer for the benefit of the assignee, and in such case it may constitute a valid delivery even though unknown to the assignee, for it may be presumed that as it is beneficial to him he has accepted the act of delivery.[13] However, in the case of parol assignments either intended to transfer the policy or to create a pledge of it, there must be a delivery of the policy itself.[14] But more than delivery is necessary to establish a parol or equitable assignment.[15]

There may be assignments by contract. The appointment of a beneficiary even though no power to change is reserved is not an assignment. The insured under most forms of policies still has interests in them. The forms generally terminate the vested rights of the beneficiary in case of death in the lifetime of the insured. But where insured vests in the beneficiary the right to exercise all pow-

[12] Mutual Benefit Life Insurance Co. v. Clark, 81 Cal. App. 546, 254 P. 306 (1927).

[13] Mutual Life Insurance Co. v. Wright, 153 Wis. 252, 140 N.W. 1078 (1913).

[14] In re Bickford's Estate, 38 N.Y.S. (2d) 785, 265 App. Div. 266 (1942); Ratsch v. Rengel, 23 A. (2d) 680 (Md. 1942).

[15] Blount v. Metropolitan Life Insurance Co., 192 Ga. 325, 15 S.E. (2d) 413 (1941); Mutual Benefit Life Insurance Co., v. Clark, supra; Loewenstine v. Loewenstine, 42 N.E. (2d) 1007 (Ohio 1942); Joseph v. New York Life Insurance Co., 308 Pa. 460, 162 A. 441 (1932).

ers and privileges under it and the right to control the disposition of the proceeds in case the beneficiary dies in the lifetime of the insured, or, in other words, where all incidents of ownership are vested in the beneficiary, it is considered equivalent to an assignment of the policy and it is commonly referred to, sometimes in the decisions of courts, as an assignment.

Equitable assignments of life insurance policies seem to be liberally recognized by the courts. The illustrative case and that which most commonly presents problems to the insurer is that of an equitable assignment resulting from the property settlement agreement in anticipation of divorce and the divorce decree. If either or both require the insured to transfer policies upon his life to or for the benefit of the divorced wife or their children by endorsement of the policies, making them irrevocable beneficiaries, or by an instrument of assignment, and neither of these things is done, the courts hold that the agreement and the decree or either of them create an equitable assignment of the policy which not only binds the insured and his beneficiary, but also the insurer if it has actual or constructive notice of the equitable assignment.[16]

Difficult problems often confront the insurer not only when it appears that there has been an equitable assignment and it has permitted endorsements on request of the insured inconsistent with it, but where endorsements intended to conform with the requirements of the agreement or decree are not in harmony with it. Often the endorsements may agree with the requirements of the decree, but still fail to conform with its intent and purpose. For instance, the decree may specifically require him to name his wife or children as irrevocable beneficiaries when it was the intended requirement of the agreement merely to make them irrevocable beneficiaries during the minority of the children. This results from carelessness in preparing either the agreement or the decree. Insured has the right to designate his children as irrevocable beneficiaries of the policies on his life even though he is not required to do so by the decree. In such case they will have vested interests not only during minority, but interests which the insured will have no power to revoke at any time. Therefore, care must be taken by the insurer and by the attorneys representing the parties that the assignment or endorsement exactly complies with the requirements of the decree and the

[16] Chilwell v. Chilwell et al., 40 Cal. App. (2d) 550, 105 P. (2d) 122 (1940); Chrysler Corp. v. Disich, 295 Mich. 261, 294 N.W. 673 (1940); Kalschinski v. Ill. Bankers' Life Association Co. et al., 311 Ill. App. 181, 35 N.E. (2d) 705 1941); Mutual Life Insurance Co. v. Franck et al., 9 Cal. App. (2d) 528, 50 P. (2) 480 (1935); Equitable Life Assurance Society v. Wilkins, 44 F. Supp. 594 (D.C.N.Y. 1940); Travellers' Insurance Co. v. Gibs et al., 106 Vt. 155, 170 A, 917 (1934).

attorneys for the parties must be careful that both the endorsement and the property settlement agreement or decree are in accord with the intention of the parties and of the court.

Rights and Interests

A policy designating insured's executors, administrators or assigns or his heirs as beneficiaries is always assignable by insured unless assignment is restricted by law or contract.[16a] Likewise a policy taken out by the beneficiary who is vested with powers to control the policy is assignable by the beneficiary alone. Where the insured reserves no power to change the beneficiary or waives such power, he cannot by assignment or in any other way affect the vested rights and interests of the irrevocable beneficiary. A few decisions seemingly to the contrary are based upon a construction of the contract to expressly give the insured the right to assign, to which the rights of the irrevocable beneficiary are subject. The only real exception to the rule is that recognized in Wisconsin based upon an ancient error to the effect that if the insured takes out a policy designating an irrevocable beneficiary, he may destroy the vested interests of the beneficiary by assignment or otherwise where he has continued to hold the policy and pay the premiums upon it.[17] This, of course, is inconsistent with the well-established rule that the parties to a contract entered into for the benefit of a third party cannot destroy or revoke the interests of the third party without his consent. This erroneous rule, though repeatedly and consistently followed in the Wisconsin decisions, has presented serious questions arising in other states to which the insured while holding the policy has removed. Thus an insured after removing to Iowa attempted to revoke the designation and assign the policy to others than members of his family who were designated irrevocable beneficiaries. They, as well as the assignee, claimed the proceeds. Insurer was uncertain whether the Iowa court would apply the rule of that state which was in accord with the decisions of this state in respect to contracts entered into for the benefit of third parties, and hold that insured had no power to divest the interests of the beneficiaries, or whether it would follow the erroneous and inconsistent Wisconsin rule. The interested parties compromised before an action of interpleader was begun.

Even if the beneficiary is irrevocably designated, the insured usually has rights and interests such as the reversionary right to

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[16a] Anderson v. Groesbeck, 55 P. 1086, 26 Colo. 3 (1899).
[17] Slocum v. Northwestern National Life Insurance Co., 135 Wis. 288, 115 N.W. 796 (1908).

the benefits of the policy and to control the payment of its proceeds in case the beneficiary dies in his lifetime, or perhaps the right to designate contingent beneficiaries and select an optional method of settlement, which rights and interests are assignable by him.

The absolute assignment will vest in the assignee the right to exercise all powers and privileges vested in the assignor unless by the terms of the policy they are expressly personal or their exercise is expressly limited.[18]

The interests of the irrevocable beneficiary are vested and assignable unless assignment is restricted. For instance, the irrevocable beneficiary may be precluded from assigning her vested interest during the lifetime of the insured separately from the insured or without his consent. When she joins the insured in an absolute assignment of a policy on his life, every interest in the policy will be vested in the assignee. The assignee, of course, would have the right to substitute any other beneficiary and as a matter of practice should do so. Even though the beneficiary may be stopped by the assignment from claiming the proceeds, the assignment in itself would not effect a change of beneficiary.[19] Sometimes absolute assignments are given for the purpose merely of vesting all powers in the assignee, but with no intention or purpose of substituting beneficiaries or contingent beneficiaries for those named in the policy. The circumstances may present a problem and, therefore, in such case it is advisable that the assignment express its purpose to transfer the policy subject to the beneficiary designations and expressly confer the power to revoke and change them upon the assignee. Perhaps this is more important in the case of the revocable beneficiary who has no vested or assignable interest. It has been held that though the revocable beneficiary joined insured in such an assignment and the assignee failed to revoke the designation, the beneficiary and not the assignee was entitled to the insurance proceeds.[20] More of the decisions are to the contrary.

In case of the collateral assignment of a policy in which a revocable beneficiary is designated, for purposes of security, the beneficiary should be changed and redesignated subject to the assignment. A few years ago the weight of authority seemed to be that insured alone could not pledge a policy and that the lien of the assignee would be subject to the rights of the beneficiary upon

[18] Thompson's Ex'rx v. Thompson, 190 Ky. 3, 226 S.W. 350 (1920).

[19] Allen v Home National Bank, 120 Conn. 306, 180 A. 498 (1935); In re Hayes' Will, 252 N.Y. 148, 169 N.E. 120 (1929); Davis v. Acacia Mutual Life Ins. Co., 177 S.C. 321, 181 S.E. 12 (1935); Resneck v. Mutual Life Ins. Co., 286 Mass. 305 190 N.W. 603 (1934).

[20] Mahoney v. Eaton, 205 N.Y.S. 707, affirmed 208 N.Y.S. 898, 212 App. Div. 867 (1925).

maturity of the policy.[21] On the other hand, a constantly increasing number of cases hold that the insured may assign a policy without the consent or concurrence of the revocable beneficiary and that the effect of his assignment is to subordinate the rights of the revocable beneficiary to the lien of the assignee.[22] These decisions are based upon the theory that as the beneficiary has no vested interests or rights, the insured should not be required to revoke the designation and then reinstate it subject to the assignment. Some cases are based upon the erroneous assumption that the policy gives the insured the right to subordinate the interests of the beneficiary by his pledge of the policy.[23] Where the policy is construed to give the insured that right, the assignee of an absolute assignment may have interests superior to those of the revocable beneficiary.[24] Of course, in those states where the law has not been definitely settled one way or the other, the insured should be required to revoke the beneficiary before assigning the policy. Where the revocable beneficiary joins the insured in an assignment of the policy, particularly where it is for the purpose of security, it may well be considered that she intended to subordinate her rights as revocable beneficiary to those of the assignee.

The purpose and effect of an assignment is always subject to proof. An assignment even though absolute in form or which is absolute by reason of its vesting powers of ownership in the assignee, when given merely for the purpose of security, creates a pledge of the policy or a mere lien upon it, and no matter what the form or conditions of the assignment may be, the relationship between the assignor and the assignee is that merely of pledgor and pledgee.[25] The rights and duties of the parties as such conferred upon them by the common law or public policy or by statute, must be recognized by the insurer. Of course, if the insurer has neither actual nor constructive notice and in good faith is led to believe that the assignment is absolute in fact as well as in form, it will not be liable for conversion of the policy where it accepts the acts of the assignee as owner.[26] But if insurer is chargeable with notice

[21] Anderson v. Broad St. National Bank, 90 N.J. Eq. 78, 105 A. 599, affirmed 109 A. 205 (1920); Barran v. Liberty National Bank, 131 S.C. 441, 128 S.E. 414 (1925); Schoenholz v. New York Life Insurance Co., 234 N.Y. 24, 136 N.E. 227 (1922).

[22] Farracy v. Perry, 12 S.W. (2d) 651 (Texas 1929); Bank of Belzoni v. Hodges et al., 132 Miss. 238, 96 So. 97 (1923); First National Bank v. Security Mutual Life Insurance Co., 283 Mo. 336, 222 S.W. 832 (1920).

[23] Potter v. Northwestern Mutual Life Insurance Company, 276 Ia. 799, 247 N.W. 669 (1933).

[24] St. Louis Trust Co. v. Dudley, 162 S.W. (2d) 290 (Mo. 1942).

[25] Olson et ux. v. National Grocery Co. et al., 130 P. (2d) 78 (Wash. 1942); Allen v. Home National Bank, 120 Conn. 306, 180 A. 498 (1935).

[26] New York Life Insurance Co. v. Rees, 19 F. (2d) 781 (C.C.A. 8th 1926); Wheeler v. Pereles et al., 40 Wis. 424 (1876).

of the character of the assignment, it as well as the assignee, may be liable for conversion of the policy. The insurer is surrounded with danger, for it may have in its files information which should prompt inquiry concerning the effect of the assignment. The purpose may be suggested by the assignment itself, by correspondence between the parties interested, or by the fact that insured continues to pay premiums upon the policy. It was held in one case that an assignment to a national bank should be presumed given for collateral security while in another case that fact alone was held insufficient.

The use of an absolute assignment by banks to evidence a mere pledge of policies is common. It is thought that the absolute assignment increases the rights and powers of the assignees, but legally it does not change the powers of the assignee from those of a mere pledgee. On the other hand, it often proves less desirable, for it does not identify the indebtedness secured or provide for indebtedness subsequently created. It fails to provide any remedy for default and in some states this may require foreclosure by action rather than in accordance with the rules of the common law.

It is sometimes considered that these dangers in the use of the absolute assignment form are avoided by an assignment which though stated to be given for purposes of security purports to vest in the assignee powers of ownership such as the right at any time without notice to surrender the policy for its cash surrender value. Insurer will not permit the exercise of such a power, for the exercise of it would clearly be a conversion of the policy. It is inconsistent with the legal rights and interests respectively of a pledgor and a pledgee. Such a provision is invalid under the common law and the statutes of no state permit it. Any provision in a collateral assignment that purports to give the assignee the right to appropriate the property pledged, without notice and irrespective of default is invalid. As a remedy for default the right to surrender the policy may be given the pledgee in lieu of the common law right to sell it where that right has not been changed by statute. But if the power to surrender is given, it should be exercised only upon notice to the pledgor affording a reasonable opportunity to redeem and comparable to the notice of sale required by the common law. The right to surrender a policy for the reserve or its cash surrender value is not the same as the sale of it and, therefore, the power to surrender as a remedy for default must be expressly provided in the assignment. It has been held that the power to surrender as a remedy for default must be exercised strictly in accordance with the power given. For instance, where power to surrender upon default is given, it may be considered waived and lost unless exercised promptly upon default.[27]

Problems arise in determining the rights of pledgees in respect to the payment of policies. Pledgees often claim the right, and sometimes their forms of assignment include the right, to receive the entire proceeds even though the secured indebtedness is less. They often claim that where several policies are assigned, they have the right to select the policy the proceeds of which shall be applied to the indebtedness. This claim is made sometimes for the very purpose of favoring the beneficiaries of one assigned policy to the prejudice of those of another. For instance, the pledgee cooperating with the beneficiary entitled to receive the proceeds in a single sum will insist upon the payment of its entire indebtedness from other policies payable to other beneficiaries, perhaps infants, under a settlement requiring the insurer to hold the proceeds for their benefit. Of course, if the indebtedness exceeds the proceeds of all policies pledged to secure the indebtedness, the pledgee is entitled to receive the entire proceeds. Even where there is other collateral not available for immediate application to the indebtedness, the pledgee is entitled to satisfy its indebtedness from the funds available and is not required to await an opportunity of applying the proceeds of other collateral. Therefore, the insurer is entitled to proofs of the interest of the pledgee.

It must be recognized that in respect to some forms of collateral in the nature of choses in action, the pledgee is entitled to receive and does receive the full amounts paid upon such collateral. This right is based upon convenience and not upon any absolute right of the assignee to receive payments in excess of its indebtedness. Its absolute right is merely to recover the secured indebtedness. A life insurance policy generally designates beneficiaries. It sometimes provides, at the election of insured, that the proceeds shall be held by insurer and paid to the benefiiciaries in installments. The power to elect such a settlement, if not exercised by the insured, may be exercised by the beneficiary. Surely, the pledgee should not be permitted uselessly to prevent the exercise of such rights. The insurer should not surrender its duty to make payment in accordance with the policy upon the assumption that the pledgee will distribute the proceeds in excess of the indebtedness in accordance with the policy. Of course, it cannot do so where such a settlement has been selected.

[27] Toplitz et al., v. Bauer et al., 161 N.Y. 325, 55 N.E. 1059 (1899) ; Stevens et al. v. Mutual Life Insurance Co., 183 App. Div. 629, 171 N.Y.S. 296 (1918).

Where insured has assigned different policies, perhaps in different companies, and providing for payment to different beneficiaries or in different shares, the pledgee has no power to select the proceeds of particular policies for application to the indebtedness. Immediately upon death the various beneficiaries in such case have vested rights to the proceeds of the respective policies, subject only to the required payment to the assignee. If there are various funds owned by different beneficiaries immediately available for payment of the indebtedness, the pledgee may be required to accept in accordance with the rule in equity for marshalling of assets, or a beneficiary may be subrogated to remedies of the pledgee against others.[28] It is the duty of the insurer to protect beneficiaries of its policies and their rights under the several policy contracts and to insist that the proceeds be applied in accordance with equitable principles, performing as far as possible its contract with the insured.

Similar problems arise in the case of parol and equitable assignments. Regardless of insurer's efforts to relieve itself from liability unless written assignments are filed with it, it will be held responsible to those entitled to the benefits of the policies under such assignments if it has actual or constructive notice of them.[29] The insurer may have notice that there has been a divorce between the insured and beneficiary and a change of beneficiary is asked which apparently is made pursuant to some property settlement agreement or decree of divorce. The insurer who does not examine such an agreement and decree and endorse its policies accordingly, may find itself liable, after payment of its policies to the beneficiaries, to others who are held equitable assignees. It must exercise care not only to determine the rights of such equitable assignees, but to require its policy provisions in respect to payment to accord with the requirements of such agreements and decree. It is confronted with the same difficulties in respect to other contracts that amount to equitable assignments or at least restrictions upon the power of insured to assign policies on his life.[30] To illustrate, the insured may designate trustees of an express trust as beneficiaries of his policies expressly reserving the right to revoke their designation. A valid trust may expressly provide that the insured may recall the policies he has thus placed in trust and the power can be exercised.[31]

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[28] Ex parte Boddie, 21 S.E. (2d) 4 (S.C. 1942); Mutual Life Insurance Co. v. Illinois National Bank et al., 34 Fed. Supp. 206 (Mich. 1940).

[29] Bennett v. Union Central Life Insurance Co. et al., 220 Ia. 927, 263 N.W. 25 (1935); New York Life Insurance Co. v. Rees, 19 F. (2d) 781 (Okla. 1927).

[30] Mass. Linotyping Corp. v. Fielding, 43 N.E. (2d) 521 (Mass. 1942).

[31] Gurnett v. Mutual Life Insurance Co., 356 Ill. 612, 191 N.E. 250 (1934); In re Soper's Estate, 196 Minn. 60, 264 N.W. 427 (1935); Sussman v. New York Life Insurance Co., 32 Fed. Supp. 88 (D.C. Pa. 1940).

Insured may exercise such power even though the trust agreement has no such provision and is irrevocable. On the other hand, the trust agreement may amount to an actual or equitable assignment of the policies.[32] In some cases the trust agreement employs conventional terms of assignment. In other cases it may effectively provide that the rights of the trustee under the policies may not be revoked, or it may otherwise prevent insured from exercising the power to revoke the designation. In such cases, it may be considered that the power is held by insured only in trust.[33] The trust agreement must be examined before insured is permitted to revoke the designation of trustees as beneficiaries, for the insurer may be considered to have constructive notice of such equitable assignment or limitation upon the powers of the insured.

[32] St. Louis Union Trust Co. v. Dudley, 162 S.W. (2d) 290 (Mo. 1942).
[33] Williamson v. Williamson Paint Mfg. Co., 169 S.E. 408, 113 W. Va. 744 (1933).