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DOES LACK OF AN INSURABLE INTEREST PRECLUDE AN INSURANCE AGENT FROM TAKING AN ABSOLUTE ASSIGNMENT OF HIS CLIENT'S LIFE POLICY?

*Johnny C. Parker**

I. INTRODUCTION

To understand any concept it helps to know the purposes it serves and the objectives it seeks to achieve. The maxim that one "must have an insurable interest in the life or property insured" has haunted insurance law for centuries.[1] This doctrine conditions both the validity and enforceability of insurance contracts upon the existence of an insurable interest in the person who purchases the policy.[2] The considerations which

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1. The origins of the insurable interest doctrine can be traced to a 1746 Act of Parliament which declared:

> [N]o assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship, or ships belonging to his majesty, or any of his subjects, or on any goods, merchandise, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer; and that every such assurance shall be null and void to all intent and purposes . . . .

19 Geo. 2, ch. 37, 511 (1746).

Three decades later, another Act of Parliament "for regulating insurance upon lives, and for prohibiting all such insurances, except in cases where the person insuring shall have an interest in the life or death of the person insured" was enacted. 14 Geo. 3, ch. 48, 398 (1774).

Early English courts interpreting the Statute of George II made significant contributions to the development of the insurable interest doctrine. *See* LeCras v. Hughes, 99 Eng. Rep. 549 (K.B. 1782) (interpreting the type of interest necessary to satisfy the insurable interest requirement); Lucena v. Craufurd, 127 Eng. Rep. 630 (H.L. 1805), *on app.* 127 Eng. Rep. 858 (H.L. 1808) (suggesting at least three distinct tests for determining whether an insurable interest exists: (1) a factual expectation test; (2) a legal or equitable interest test; and (3) an intermediate test.).

Early American courts adopted the insurable interest doctrine without modification or change. *See, e.g.,* Ruse v. Mutual Benefit Life Ins., 23 N.Y. 516 (1861); Connecticut Mut. Life Ins. v. Schaefer, 94 U.S. 457 (1876).

2. Legal scholars have been plagued by the problem of articulating an all-encom-

underlie the insurable interest requirement are generally expressed in terms of public policy: (1) against allowing wagering contracts; (2) against fostering temptation to destroy the insured property or life in an effort to profit from it; and (3) favoring limitations upon the sweep of indemnity contracts.[3] These considerations also serve the interest of the insurer in several ways. First, they eliminate the risk of moral hazard by conditioning the validity and enforceability of the contract upon the existence of a valid interest in the subject matter of the policy. Second, they legitimate the desire of the insurer to provide insurance only for the benefit of individuals who have an interest in the subject of the contract, thus lessening the likelihood of adverse selection. The force of these policy objectives is reflected in the rule that only the insurer may raise lack of an insurable interest as a defense.[4]

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passing concise definition of the term "insurance." Nevertheless, a contract of insurance is an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do an act valuable to the insured upon the destruction, loss, or injury of something in which the other party has an interest.

"Insurable interest defines a minimum kind of connection which the purchaser of insurance must have with the subject of the risk in order for the transaction to be valid. Thus, it is a threshold requirement. If it is there, the insurance contract is valid; if not, invalid." Banks McDowell, *Insurable Interest In Property Revisited*, 17 CAP. U. L. REV. 165, 171 (1988). *See also*, 44 C.J.S. *Insurance* § 218 (1993); 3 GEORGE COUCH, COUCH ON INSURANCE 3D § 24:1 (Rev. ed. 1995).

3. *See* EDWIN W. PATTERSON, ESSENTIALS OF INSURANCE LAW 110-11, 156-58 (2d ed. 1957); Bertram Harnett & John V. Thornton, *Insurable Interest In Property: A Socio-Economic Reevaluation of a Legal Concept*, 48 COLUM. L. REV. 1162 (1948); William T. Vukowich, *Insurable Interest: When It Must Exist In Property And Life Insurance*, 7 WILLAMETTE L. REV. 1 (1971).

4. *See* Toler v. Baldwin County Sav. & Loan Ass'n, 239 So.2d 751 (Ala. 1970); Gristy v. Hudgens, 203 P. 569 (Ariz. 1922); Mullenax v. National Reserve Life Ins., 485 P.2d 137 (Colo. Ct. App. 1971); Whitaker v. Ranow, 327 S.E.2d 855 (Ga. Ct. App. 1985); Matthews v. Matthews, 186 P.2d 233 (Kan. 1947); Secor v. Pioneer Foundry Co., 173 N.W.2d 780 (Mich. Ct. App. 1969); Poland v. Estate of Fisher, 329 S.W.2d 768 (Mo. 1959); Feely v. Lacy, 322 P.2d 1104 (Mont. 1958); Ryan v. Tickle, 316 N.W.2d 580 (Neb. 1982); Girdner v. Girdner, 337 P.2d 741 (Okla. 1959); Trent v. Parker, 591 S.W.2d 769 (Tenn. Ct. App. 1979); Commonwealth Ins. v. Lacy, 214 S.W.2d 899 (Tex. App. 1948); *see also* 3 GEORGE COUCH, COUCH ON INSURANCE 3D § 24:6, at 22 (Rev. ed. 1995); 2 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 765, at 130 (West 1966) (1941); WILLIAM R. VANCE, VANCE ON INSURANCE § 31, at 199 (3d ed. 1951).

For a discussion of the continued validity of this rule in the context of life insurance see *infra* notes 21-23 and accompanying text.

A. *Property and Life Insurance Contracts*

In the United States the insurable interest requirement began as a judicially imposed doctrine.[5] Decisional law, however, has given way to statutory law in a significant number of jurisdictions. Consequently, insurable interest is universally defined in a manner that reflects the aforementioned policy objectives as they pertain to specific types of insurance contracts. For example, the goal of property insurance is to indemnify the insured for loss suffered as a result of the impairment of an interest in the subject of the contract. If the insured lacks an insurable interest in the property, she cannot suffer the type of loss necessary to invoke the principle of indemnification.[6] Consequently, in the context of property insurance, insurable interest is uniformly defined as "any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment."[7] This definition reflects the principle of indem-

5. *See supra* note 1.

6. > [I]nsurance is aimed at reimbursement, but not more. The principle that insurance contracts shall be interpreted and enforced consistently with this objective of conferring a benefit no greater in value than the loss suffered will be referred to in this book as the principle of indemnification. This principle does not imply, in converse, that the benefit must be less than loss. That is, partial reimbursement of a loss is not offensive to the principle of indemnity . . . Any opportunity for net gain to an insured through the receipt of insurance proceeds is inconsistent with the principle of indemnity.

ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW 88 (1971).

7. *See* ALA. CODE § 27-14-4 (1986); ALASKA STAT. § 21.42.030 (Michie 1993); ARIZ. REV. STAT. § 20-1105 (1990); ARK. CODE ANN. § 23-79-104 (Michie 1992); DEL. CODE ANN. tit. 18, § 2706 (1989); FLA. STAT. ANN. § 627.405 (West 1996); GA. CODE ANN. § 33-24-4 (1996); HAW. REV. STAT. § 431:10E-101 (1993); IDAHO CODE § 41-1806 (1991 & Supp. 1996); KY. REV. STAT. ANN. § 304.14-060 (Michie 1996); LA. REV. STAT. ANN. § 22:614 (West 1996); ME. REV. STAT. ANN. tit. 24-A, § 2406 (West 1990); MD. CODE ANN., INS. § 12-301 (1995); MONT. CODE ANN. § 33-15-205 (1995); NEV. REV. STAT. ANN. § 687B.060 (Michie 1992); N.M. STAT. ANN. § 59A-18-6 (Michie 1995); N.Y. INS. LAW § 3401 (Consol. 1985); N.D. CENT. CODE § 26.1-29-04 (1995); OKLA. STAT. tit. 36, § 3605 (1990 & Supp. 1997); S.D. CODIFIED LAWS § 58-10-8 (Michie 1996); UTAH CODE ANN. § 31A-21-104(2)(b) (1994 & Supp. 1996); VA. CODE ANN. § 38.2-303 (Michie 1994); WASH. REV. CODE ANN. § 48.18.040 (West 1984 & Supp. 1997); W. VA. CODE § 33-6-3 (1996); WYO. STAT. ANN. § 26-15-104 (Michie 1991); P.R. LAWS ANN. tit. 26, § 1105 (1976).

nification by limiting the insurer's indemnification duty to the extent of the insured's interest in the property.[8]

In contrast, life insurance is viewed as an investment contract.[9] This view is based upon the proposition that the amount of the policy is rarely tied to a measurable loss. Rather, life insurance is a contract in which the insurer, for a certain sum of money or premium proportioned to the age, health, livelihood and other circumstances of the person whose life is insured, engages that if such person shall die within the policy period the insurer shall pay the sum specified in the policy, according to the terms thereof, to the person in whose favor the policy is granted. Furthermore, life insurance, unlike its property counterpart, provides protection against an occurrence that is certain to occur. In property insurance there is no such certainty, only a possibility that the insured risk will result in loss.

Every individual has an unlimited insurable interest in his or her own life, health and bodily safety and may take out a policy of insurance on his or her own life, health or safety. Insurable interest, in this context, is further defined to include an individual's interest in others as follows: (1) in the case of individuals related by blood or by law, a substantial interest engendered by love and affection; and (2) in the case of other persons, a lawful and substantial economic interest in having the life, health, or bodily safety of the insured individual continued, as distinguished from an interest in value by the death, disability, or injury of the insured individual.[10]

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8. *See supra* notes 6 & 7. In this respect the insurable interest requirement acts as a measure of damages. *See* McDowell, *supra* note 2, at 175-78.

9. Life and property insurance do share similarities. Each type of insurance has characteristics of both indemnity and investment. *See* ROBERT E. KEETON, BASIC INSURANCE LAW 107-08 (1960); PATTERSON, *supra* note 3, at 154-56; GEORGE RICHARDS, LAW OF INSURANCE § 24, at 27-28 (3d ed. 1925); *see also* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 3.1(e), at 141 (student ed. 1988).

10. *See* ALA. CODE § 27-14-3(a) (1996); ALASKA STAT. § 21.42.020(d) (Michie 1993); ARIZ. REV. STAT. § 20-1104(C) (1990); ARK. CODE ANN. § 23-79-103(c)(1) (Michie 1992 & Supp. 1995); CAL. INS. CODE § 10110 (West 1993 & Supp. 1996); DEL. CODE ANN. tit. 18, § 2704(c)(1)-(2) (1989); GA. CODE ANN. § 33-24-3(a) (1996); HAW. REV. STAT. § 431:10-202(a)(1)-(2) (1993); IDAHO CODE § 41-1804(3)(a)-(b) (1991); KY. REV. STAT. ANN. § 304.14-040(4)(a)-(b) (Michie 1996); LA. REV. STAT. ANN. § 22:613(C)(1)-(2) (West 1995 & Supp. 1996); ME. REV. STAT. ANN. tit. 24-A, § 2404(3)(A)-(B) (West 1990); MD. CODE ANN., INS. § 12-201(b)(2)-(3) (1995); MISS. CODE ANN. § 83-5-251 (Supp. 1996);

The issue of whether an insurable interest exists is not determined in a vacuum. Rather, this question represents only half of an intensely policy oriented equation. The other half of the equation is represented by the question, "when must the insurable interest exist: at the time of loss, time of claim, or inception of the policy?"

The theoretical distinctions between property and life insurance have been instrumental in the development of the responses to the latter question. In the context of property insurance it is universally agreed that an insurable interest must exist at the time the loss occurred.[11] This view is consistent with both the principle of indemnity and the prohibition against wagering contracts. A majority of jurisdictions require an insurable interest to exist at the time of loss, as well as at the time the contract is purchased.[12] In the context of life insurance, however, it is universally agreed that the interest need exist only at the time of the inception of the policy.[13] Consequently, the insur-

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MONT. CODE ANN. § 33-15-201 (1995); NEV. REV. STAT. ANN. § 687B.0403(a)-(b) (Michie 1992); N.M. STAT. ANN. § 59A-18-4 (C)(1)-(2) (Michie 1995); N.Y. INS. LAW § 3205(a)(1)(A)-(B) (Consol. 1985); N.D. CENT. CODE § 26.1-29-09.1(3)(a)-(b) (1995); OKLA. STAT. tit. 36, § 3604(C)(1)-(2) (1990 & Supp. 1997); PA. STAT. ANN. tit. 40, § 512 (West 1992 & Supp. 1996); R.I. GEN. LAWS § 27-4-27(C)(1)-(2) (Michie 1994); S.D. CODIFIED LAWS § 58-10-4 (Michie 1996); UTAH CODE ANN. § 31A-21-104(2)(a) (1994 & Supp. 1996); WASH. REV. CODE ANN. § 48.18.030 (West 1994 & Supp. 1997); W. VA. CODE § 33-6-2(C)(1)-(2) (1995); WYO. STAT. ANN. § 26-15-102(C)(i)-(ii) (Michie 1991 & Supp. 1996).

11. *See* 4 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 2122, at 31 (Rev. ed. 1969). This view has been severely criticized. *See* 44 C.J.S. *Insurance* § 220 (1993); KEETON & WIDISS, *supra* note 9, § 3.3(b)(2), at 153-54. For a detailed discussion of this issue, see Vukowich, *supra* note 3.

12. *See supra* note 11.

13. *See* ALA. CODE § 27-14-3(e) (1996); ALASKA STAT. § 21.40.020(a) (Michie 1993); ARIZ. REV. STAT. § 20.1104(A) (1990); ARK. CODE ANN. § 23-79-103(a) (Michie 1992 & Supp. 1995); CAL. INS. CODE § 10110.1(d) (West 1993 & Supp. 1996); DEL. CODE ANN. tit. 18, § 2704(a) (1989); GA. CODE ANN. § 33-24-3(d) (1996); HAW. REV. STAT. § 431:10-204(b) (1993); IDAHO CODE § 41-1804(1) (1991); IND. CODE ANN. § 27-1-12-17.1(e) (Michie 1994 & Supp. 1996); KAN. STAT. ANN. § 40-453(a) (1993); LA. REV. STAT. ANN. § 22:613(A) (West 1995); ME. REV. STAT. ANN. tit. 24, § 2404(1) (West 1996); MD. CODE ANN., INS. § 12-201(a)(2)(iii) (1995); MO. ANN. STAT. § 376.531(6) (West Cum. Supp. 1996); OKLA. STAT. tit. 36, § 3604(A) (1990 & Supp. 1997); Crabb v. Calvert Fire Ins., 255 S.W.2d 990 (Ky. Ct. App. 1953); Siegrist v. Schmoltz, 6 A. 47 (Pa. 1886); Cheeves v. Anders, 28 S.W. 274 (Tex. 1894). *See also* Ryan v. Andrewski, 242 P.2d 448 (Okla. 1952):

> [A life insurance policy] is not a mere contract of indemnity but it is a contract to pay to beneficiary a certain sum in event of death of the insured, [and] where [an] insurable interest exists when the policy is

able interest rules are primarily concerned with the initial issuance of a life policy and less with subsequent events.[14]

A majority of jurisdictions statutorily recognize the right of any individual of competent legal capacity to procure an insurance contract upon his own life for the benefit of anyone.[15] However, no person may procure an insurance contract upon the life of another individual unless the benefits under the policy are payable to the insured, his personal representative, or a person having, at the time the contract is made, an insurable interest in the life of the individual insured.[16]

Legislatures throughout the country have also codified the common-law rule which prohibits the making of a life insurance contract upon the life of another unless the insured applies for the policy or consents thereto in writing.[17] The sole exception

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> issued and a valid contract of insurance is then effected, it is not defeated by a cessation of the insurable interest unless the terms of the policy so provide.

Id. at 452. *See also* 43 AM. JUR. 2D *Insurance* § 977 (1982); 44 C.J.S. *Insurance* §§ 220, 235 (1993).

14. For example, one court observed that:

> [T]he almost universal rule of law in this country is that if the insurable interest requirement is satisfied at the time the policy is issued, the proceeds of the policy must be paid upon the death of the life insured without regard to whether the beneficiary has an insurable interest at the time of death.

In re Al Zuni Trading Inc., 947 F.2d 1403, 1405 (9th Cir. 1991) (quoting Secor v. Pioneer Foundry Co., 173 N.W.2d 780, 782 (Mich. 1970)).

15. *See* ALA. CODE § 27-14-3(b) (1996); ALASKA STAT. § 21.42.020(a)-(b) (Michie 1993); ARIZ. REV. STAT. ANN. § 20-1104(A)-(B) (West 1995); ARK. CODE ANN. § 23-79-103(a) (Michie 1992 & Supp. 1995); DEL. CODE ANN. tit. 18, § 2704(a)-(b) (1989); HAW. REV. STAT. § 431:10-204(a)-(c) (1993); IDAHO CODE § 41-1804(1)-(2) (1991); KAN. STAT. ANN. § 40-450(a),(c) (1993 & Supp. 1996); LA. REV. STAT. ANN. § 22:613 (A)-(B) (West 1995); ME. REV. STAT. ANN. tit. 24-A, § 2404(1)-(2) (West 1990); MD. CODE ANN., INS. § 12-201(a)(1) (ii)-(iii), (d) (1995); MISS. CODE ANN. § 83-5-251(1)-(2) (Supp. 1996); MONT. CODE ANN. § 33-15-201(1)-(2) (1995); NEB. REV. STAT. § 44-704(1) (1993 & Supp. 1995); NEV. REV. STAT. ANN. § 687B.040(1) (Michie 1992); N.J. STAT. ANN. § 17B:24-1.1(a)(1) (West 1996); N.M. STAT. ANN. § 59A-18-4(A)-(B) (Michie 1995); N.Y. INS. LAW § 3205(b)(1)-(3) (Consol. 1985); N.D. CENT. CODE § 26.1-29-09.1(1)-(2) (1995); OKLA. STAT. tit. 36, § 3604(A)-(B) (1990 & Supp. 1997); OR. REV. STAT. § 743.024(1),(2) (1989); PA. STAT. ANN. tit. 40, § 512 (West 1992 & Supp. 1996); R.I. GEN. LAWS § 27-4-27(a)-(b) (Michie 1994); S.D. CODIFIED LAWS § 58-10-3 (Michie 1996); TEX. INS. CODE ANN. art. 3.49-1(1) (West 1981 & Supp. 1997); UTAH CODE ANN. § 31A-21-104 (1994 & Supp. 1996); VA. CODE ANN. § 38.2-301A (Michie 1994); WASH. REV. CODE § 48.18.030(1)-(2) (1984 & Supp. 1997); W. VA. CODE § 33-6-2(a)-(b) (1996); WYO. STAT. ANN. § 26-15-102(a)-(b) (Michie 1991 & Supp. 1996).

16. *See supra* note 15.

17. *See* ALA. CODE. § 27-14-6(a) (1996); ALASKA STAT. § 21.42.090 (Michie 1993);

to this prohibition is where the policy is being contracted for by a person having an insurable interest in the insured.[18] When someone other than a person having an insurable interest procures a policy on the life of another without his consent or knowledge, courts have traditionally relied upon two theories to render the policy unenforceable: (1) the policy is a wagering contract, or; (2) such a policy presents an opportunity for crime.[19]

The argument that the insurable interest rules are primarily concerned with the issuance phase of the process is further supported by statutes which recognize that:

> [i]f the beneficiary, assignee, or other payee under any contract in violation . . . [of the prohibition against procuring insurance on the life of an individual when the benefits are not payable to the individual insured, his personal representative, or an individual with an individual insurable interest] receives from the insurer any benefits thereunder accruing upon the death, disablement or injury of the individual insured, the individual insured or his executor or administrator, as the case may be, may maintain an action to recover the benefits from the person so receiving them.[20]

ARIZ. REV. STAT. ANN. § 20-1107 (West 1990); ARK. CODE ANN. § 23-79-105 (Michie 1992 & Supp. 1995); GA. CODE ANN. § 33-24-6(a)(1)-(4) (1996); HAW. REV. STAT. § 431:10-206(1)-(2) (1993); IDAHO CODE § 41-1808(1)-(3) (1991); LA. REV. STAT. ANN. § 22:616 (1)-(2) (West 1995); ME. REV. STAT. ANN. tit. 24-A, § 2408(1)(A)-(C) (West 1990); MD. CODE ANN., INS. § 12-202(2)(ii)(b)(1)-(3) (1995); MISS. CODE ANN. § 83-5-253 (1995); MO. REV. STAT. § 376.531(1)-(2) (1995); MONT. CODE ANN. § 33-15-401(1)-(3) (1995); NEB. REV. STAT. § 44-704(1) (1993 & Supp. 1995); NEV. REV. STAT. ANN. § 687B.080 (Michie 1992 & Supp. 1995); N.M. STAT. ANN. § 59A-18-8(A)-(C) (Michie 1995); OKLA. STAT. tit. 36, § 3607(1)-(2) (1996); OR. REV. STAT. § 743.027(1)-(4) (1995); S.D. CODIFIED LAWS § 58-10-6(1)-(3) (Michie 1995); VA. CODE ANN. § 38.2-302 (Michie 1994); WASH. REV. CODE ANN. § 48.18.060 (West 1984); W. VA. CODE § 33-6-5 (1996); WYO. STAT. ANN. § 26-15-106 (Michie 1995); P.R. LAWS ANN. tit. 26, § 1107(a)-(b) (1995); *see also* Jackson Nat'l Life Ins. v. Receconi, 827 P.2d 118 (N.M. 1992); BERTRAM HARNETT & IRVING I. LESNICK, THE LAW OF LIFE & HEALTH INSURANCE § 3.04(1)(a) (1991) (citing 28 jurisdictions with statutes to this effect).

18. *See supra* note 17.

19. *See generally* 29 AM. JUR. *Insurance* §§ 231, 433-34 (1960); 3 GEORGE COUCH, COUCH ON INSURANCE 2D § 24:118 (2d ed. 1960).

20. ARK. CODE ANN. § 23-79-103(b) (Michie 1992 & Supp. 1995); *see supra* note 15; *see also, e.g.*, UTAH CODE ANN. § 31A-21-104(5) (1994 & Supp. 1996), which provides:

> An insurance policy is not invalid because the policyholder lacks insurable interest or because consent has not been given, but a court with appropriate jurisdiction may order the proceeds to be paid to some per-

While statutes of this nature recognize that life policies so procured violate public policy, they further the needs of society and the ends of justice in two significant respects. First, these statutes create a limited exception to the common-law rule that only the insurer may assert lack of an insurable interest as a defense. This exception applies only where the insurer has waived his right to assert the defense by paying the proceeds to the beneficiary/assignee, and where the life insurance contract was procured in violation of public policy. Second, this exception allows the complaining party to recover the proceeds from the receiving party—a much more effective remedy than merely voiding the policy.[21] This exception, much like the rule, is in-

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son who is equitably entitled to them, other than the one to whom the policy is designated to be payable, or it may create a constructive trust in the proceeds or a part of them on behalf of such a person, subject to all valid terms and conditions of the policy other than those relating to insurable interest or consent.

21. The policy objectives for requiring an insurable interest in life insurance policies are to prevent the use of insurance as a wagering contract and to discourage crime. These objectives are not fully achieved when only the insurer can raise the defense of lack of insurable interest because the rule does not penalize the insurer for failing to inquire into the existence of an insurable interest at the application phase. Rather, it allows insurers to sit on their hands and assert the defense for their own benefit once the issue is raised following the death of the insured.

The rule only discourages beneficiaries who lack an insurable interest from procuring a life policy; it does not have the effect of discouraging insurance companies from negligently issuing policies in contravention of public policy. Consequently, an individual who procures an insurance policy on the life of another in whom she lacks an insurable interest may be encouraged by the even odds that the insurer may not raise the defense and pay the proceeds.

It should be noted however, that several jurisdictions have added bite to the rule by recognizing tort actions against insurers who issue policies to individuals who lack insurable interests in the named insured. *See* Liberty Nat'l Life Ins. v. Weldon, 100 So.2d 696 (Ala. 1957); Burton v. John Hancock Mut. Life Ins., 298 S.E.2d 575 (Ga. 1982) (holding an insurer not liable unless issuance of policy to individual without an insurable interest increased risk of harm and is prohibited by statute); Ramey v. Carolina Life Ins., 135 S.E.2d 362 (S.C. 1964); Bacon v. Federal Kemper Life Assurance, 512 N.E.2d 941, 941 (Mass. 1987) ("[t]he only duty the law imposes on an insurer to protect its [insured] is that the company take reasonable steps to determine whether the insured has consented to the policy or the change of beneficiary"). *See also* Comment, *Tort Liability of Insurance Company—Rules of Insurable Interest and Consent*, 17 S.C. L. REV. 454 (1965); Annotation, *Tort Liability of Insurer Issuing Life Policy Without Consent of Insured or To Beneficiary Without Insurable Interest*, 9 A.L.R. 3D 1172 (1966).

There are no decisions allowing the estate of the insured to recover on the policy from the insurer which has negligently issued a policy. The rationale for not tended to discourage individuals from procuring insurance contracts on lives in which they lack insurable interests, and does not discourage insurance companies from unknowingly issuing policies in contravention of public policy.[22] This is due to the fact that the exception arises only in those instances where the insurer has decided to pay the proceeds of the policy, rather than asserting the defense of a lack of insurable interest. Thus, the insurer, in such a case, loses nothing more than that which it has already consented to pay. Likewise, the insurable interest doctrine does not impose upon insurers any obligation for which they are legally accountable.[23] Therefore, in the absence of an insurable interest, the insurer may choose to void the policy *ab initio* and retain the death benefits from both the insured's estate or representative and the named beneficiary.

The public policy against using life insurance policies as contracts of wager is so deeply ingrained into the fabric of insurance law that some courts have expressed a willingness to ignore the rule that one has an unlimited insurable interest in one's own life. Ordinarily this occurs when the policy, though procured or consented to by the insured, is taken out pursuant to a scheme to circumvent the law against wagering contracts. Thus, despite the fact that the insured procured the policy, it may still be unenforceable in the absence of good faith, or in the presence of fraud, collusion, or an intent to enter into a contract of wager.[24]

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allowing the estate to recover from the insurer is that the policy was void *ab initio* when it is shown that the beneficiary lacked an insurable interest at the time the policy was procured. *See* Mutual Life Ins. v. Armstrong, 117 U.S. 591 (1886); New England Mut. Life Ins. v. Null, 605 F.2d 421 (8th Cir. 1979); Colyer v. New York Life Ins., 188 S.W.2d 313 (Ky. 1945); Aetna Life Ins. v. Strauch, 67 P.2d 452 (Okla. 1937).

22. *See supra* note 21.

23. *See supra* note 21.

24. *See* Bankers' Reserve Life Co. v. Matthews, 39 F.2d 528 (8th. Cir. 1930); Penn Mut. Life Ins. v. Slade, 47 F. Supp. 219 (E.D. Ky. 1942); Quinton v. Millican, 26 S.E.2d 435 (Ga. 1943); Clements v. Terrell, 145 S.E. 78 (Ga. 1928); Hoffman v. Federal Reserve Life Ins., 255 P. 980 (Kan. 1927); Davis v. Gulf States Ins., 151 So. 167 (Miss. 1933); Deal v. Hainley, 116 S.W. 1 (Mo. Ct. App. 1909); Guardian Nat'l Life Ins. v. Eddens, 13 N.W.2d 418 (Neb. 1944); Pierce v. Metropolitan Life Ins., 187 N.E. 77 (Ohio 1933); Elmore v. Life Ins., 198 S.E. 5 (S.C. 1938); Roberts v. Nation Benefit Life Ins., 148 S.E. 179 (S.C. 1929).

B. *The Problem*

In 1969, Beauty Craft Tile of the Southwest, Inc. purchased life insurance policies on the lives of its "key" people and paid the premiums. Each policy provided for $100,000 in death benefits. The soliciting insurance agent, in the sale of these policies, was Frank Berry. In 1985, Beauty Craft was sold to a California company. Beauty Craft, in contemplation of the sale, decided to assign to all "key" persons the life policies it had procured in 1969. Each insured, following the assignment, was responsible for paying the premiums due on their respective policy. Among the "key" employees receiving a life insurance policy was the company accountant, Jerry Johnson. Mr. Johnson designated his wife, Mary, as primary beneficiary in the policy.

In late 1992, Mr. Johnson was diagnosed with metastic liver cancer and underwent surgery. Thereafter, he was treated with chemotherapy. In early 1994, Mr. Johnson received notice that a $1,652 premium plus $1,914.55 interest on a policy loan was due on the policy. This amount, $3,566.55, was reduced by $2,949.16 in current year premium loan, for a minimum payment due of $617.39. Mr. Johnson, following receipt of the notice, contacted Mr. Berry and informed him that he wanted to surrender the life policy that had been taken out on his life and assigned to him by Beauty Craft. Mr. Johnson's decision to surrender the policy was the result of illness-induced financial circumstances which impaired his ability to pay the premiums.

Concerned, Mr. Berry informed Mr. Johnson that the amount stated in the notice might not necessarily be the amount required to keep the policy in effect another year. Mr. Berry contacted the insurance company and allegedly informed Mr. Johnson that a significantly lesser amount would keep the policy in effect. Mr. Berry also told Mr. Johnson that there would be tax consequences as a result of the surrender of the policy. However, it is disputed whether Mr. Johnson actually understood that $81.00 would have continued the policy for an additional year. This amount, following the absolute assignment,[25] was ulti-

25. "An absolute assignment of a life insurance policy is the irrevocable transfer by the policyowner of all of the policyowner's rights in the policy. Ordinarily, an

mately paid by Frank Berry from a loan on the policy.

Thereafter, the facts leading up to the assignment of Mr. Johnson's life policy to Mr. Berry are in dispute. However, it is clear that on February 3, 1994, Jerry Johnson executed an absolute assignment of his life policy to Frank Berry, the selling and servicing agent on the policy. The assignment was pursuant to the assignment provision of the policy. Mr. Johnson sold the policy to Mr. Berry for $3,000. At the time of the assignment the death benefit payable on the policy was $100,000, less approximately $23,000, which resulted from a loan taken out on the policy by Mr. Johnson. Mr. Johnson would have received approximately $2,900 had he surrendered the policy.

Prior to February 3, the day of the execution of the absolute assignment, Mr. Berry consulted an attorney about the legality of the proposed transaction between him and Mr. Johnson. Pursuant to the attorney's advice, Mr. Berry prepared an agreement-between-parties contract. This document, which was signed by both parties and executed simultaneously with the absolute assignment, provided that Mr. Berry had: (1) explained all options available to Mr. Johnson, including the absolute assignment; (2) explained the premium payments and amount due; (3) encouraged Mr. Johnson to consult with and offer the policy to family members; and (4) offered to give Mr. Johnson the money necessary to keep the policy in force for another year. Both the absolute assignment form and the agreement-between-parties contract were witnessed and notarized by a manager of the insurance company for which Mr. Berry worked. By late 1994, Mr. Johnson's medical condition had worsened to the point that he was reduced to taking morphine to ease the pain. In late December 1994, he gave Leslie Price, his step-daughter, his power of attorney, which expired on his death. At this time, Mrs. Johnson had severe Parkinson's disease.

In January of 1995, Leslie Price, seeking return of the policy, filed a complaint with the State Insurance Commission concern-

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absolute assignment is made in order to give the policy away or to sell it." MURIEL L. CRAWFORD & WILLIAM T. BEADLES, LAW AND THE LIFE INSURANCE CONTRACT 356 (6th ed. 1989). Absolute assignments are also sometimes used to secure a loan. *See id.* at 360.

ing the assignment of the policy to Mr. Berry. The Insurance Commission concluded that a question of fact and law was at issue and only a court with adequate jurisdiction could resolve the matter. Mr. Johnson died on April 20, 1995. He was preceded in death by the agent Mr. Berry, who died April 7, 1995. The estates of both the assignor and assignee made claims to the death benefits, but only the estate of Jerry Johnson filed an action against the insurance company. This complaint asserted, among other causes, a claim for improper assignment against the insurance company. This allegation was based upon the insurance company's acceptance of the assignment pursuant to the policy terms. Mr. Johnson's estate also asserted that the insurance company was liable for Mr. Berry's breach of the fiduciary obligation of good faith and fair dealing in the assignment transaction.

Among the disputed facts were: (1) whether Mr. Berry ever informed Mr. Johnson of the insurance company's accelerated benefit rider;[26] (2) whether Mr. Berry had a duty to inform Mr. Johnson of the existence of viatical settlement companies, collateral assignments, or other alternatives to an absolute assignment; and (3) whether Mr. Berry had offered to loan Mr. Johnson the money necessary to keep the policy in force for another year.

Following Mr. Berry's death, the insurance company, aware of the conflicting claims to the proceeds, filed a motion and brief for entitlement to interpleader and for discharge. The estate of Mr. Johnson filed an objection to the discharge of the insurance company. The court, noting that a party seeking interpleader must be free from blame in causing the controversy, granted the request for interpleader but denied the insurance company's prayer for discharge.[27]

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26. This rider would have entitled Mr. Johnson to receive at least 75% of the face value of the policy if he were terminally ill and medically qualified. "Medically qualified" was defined in the accelerated benefit riders as terminally ill with a prognosis of death within twelve (12) months.

27. The facts of this problem were derived from a case in which I was retained as an expert witness for the insurance company. The insurance company, which did nothing other than accept the assignment according to the terms established in its policy, was extremely embarrassed by the action filed. Consequently, I have purposely refrained from using the company's name in the problem. The names of the litigants have also been changed.

This article will examine the insurable interest requirement in the limited context of life insurance. Specifically, it examines two issues of first impression. First, it explores whether the insurable interest doctrine precludes insurance agents from taking assignments of the life policies of their clients in whom they lack insurable interests. Thereafter, it addresses the question of whether insurance companies should be held legally accountable for such conduct on the part of their agents.

Part I examined the development of the insurable interest doctrine. It defined the contours of the doctrine by articulating the purpose it serves and the objective it intends to achieve. Subsection A discussed the development, rationale and application of the requirement in the context of property and life insurance contracts. Subsection B provided a factual context from which to examine the primary thesis. These facts were taken from a filed action, which was ultimately settled, involving the propriety of a life insurance agent taking assignment of an insured's life policy.

Part II discusses the validity of assignments to individuals who lack insurable interests in the lives of insureds. Subsection A examines the decisional law with regards to this issue. Subsection B discusses the legislative response to this issue. Subsection C discusses the validity and judicial construction of disclaimers of liability for determining the validity of assignment provisions.

Part III examines the thesis from the perspective of agency law. Subsections A and B discuss the common-law definitions and distinctions between "general insurance agents," "solicitors" and "insurance brokers." Subsection C explores statutory definitions and distinctions. This subsection also addresses how courts view statutes defining the terms "general insurance agent," "solicitor" and "insurance broker." Subsection D discusses the unique concept of dual agency. Subsection E integrates the agency concept of "fiduciary duty" into the primary thesis. This subsection examines various theories, other than agency law principles, that might support recognition of a fiduciary relationship between insurance agents and insureds in an absolute assignment transaction.

Part IV discusses the law of bad faith litigation in the context of the problem. This section ultimately concludes that the problems inherent in assignment transactions are not a part of the claims-making process with which bad-faith is concerned. Part V concludes that policy considerations disfavor assignments to insurance agents who lack insurable interests in the lives insured.

II. VALIDITY OF ASSIGNMENTS TO INDIVIDUALS WITHOUT INSURABLE INTEREST

A. *Case Law*

St. John v. American Mutual Life Insurance Co.[28] is one of the earliest American opinions which addresses the issue of the legality of an assignment of a life policy to an individual who lacked an insurable interest in the insured. The insured executed to the plaintiff two life policies having combined death benefits of $4,000 for: (1) a consideration of $300; (2) continued payment of premiums by plaintiff; and (3) a promise to pay insured's wife $1,500 upon insured's death. Judge Crippin, writing for the court, observed that an absolute sale, assignment, and transfer of a life policy, valid at its inception, to one having no insurable interest, was valid and entitled the assignee to the proceeds of the policy upon the death of the insured.[29] This holding was clearly influenced by the fact that the defendant's policy provided for assignments and notice thereof, as well as the existence of good faith in the execution of the assignment.[30] Of equal significance was the fact "that without the right to assign, insurances on lives lose half their usefulness."[31]

The rationale articulated in *St. John* significantly influenced the development of what has become known as the majority view on the subject.[32] According to this view, an assignment of

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28. 13 N.Y. 31 (1855).
29. *See id.* at 40.
30. *See id.* at 39-41.
31. *Id.* at 39.
32. The majority of early common-law courts and legal scholars rejected the logic offered for requiring insurable interests for assignees, but did not reject beneficiaries

a life policy by the insured or beneficiary to an individual who lacks an insurable interest in the life of the insured is not void per se and will be upheld if the assignment was made in good faith and not merely intended to evade the law against wagering contracts.[33]

Two rationales have been advanced in favor of the majority rule that an assignment of a life policy to a person lacking an

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and discarded assignment restrictions as meaningless formalities. *See* KEETON & WIDISS, *supra* note 9, § 3.5(d), at 186.

Alabama, Kansas, Kentucky, Texas and Virginia initially adhered to what is commonly referred to as the minority view. According to this view, the assignment of a life policy by the insured or the beneficiary to one lacking an insurable interest is void as a matter of law.

A number of rationales have been advanced for this view. For example, there is no distinction between the assignment of a policy to a person without an insurable interest, and the procurement of a policy by such a person in the first instance. Likewise, it has been suggested that such contracts constitute a wagering contract. Finally, it has been stated that an assignment to a person who lacks an insurable interest in the life of the insured affords the temptation to commit murder. *See, e.g.*, Helmetag v. Miller, 76 Ala. 183 (1884); Metropolitan Life Ins. v. Elison, 83 P. 410 (Kan. 1905); Bayse v. Adams, 81 Ky. 368 (1883); Price v. Supreme Lodge, 4 S.W. 633 (Tex. 1887); Roller v. Moore, 10 S.E. 241 (Va. 1889).

The above jurisdictions have repudiated the minority view and currently adhere to the majority rule. *See, e.g.*, ALA. CODE § 27-14-21(a)-(b) (1986); KY. REV. STAT. ANN. § 304.14-250(1) (Michie 1996); TEX. INS. CODE ANN. art. 3.49-1(2) (West 1981 & Supp. 1997).

33. *See* Grigsby v. Russell, 222 U.S. 149 (1911); Watson v. Massachusetts Mut. Life Ins., 140 F.2d 673 (D.C. Cir. 1943), *cert. denied*, 322 U.S. 746 (1944); Robinson v. Exchange Nat'l Bank, 28 F.Supp. 244 (N.D. Okla. 1939), *modified on reh'g on other grounds*, 31 F. Supp. 350 (1940); Brown v. New York Life Ins., 22 F.Supp. 82 (W.D.S.C.), *rev'd on other grounds*, 99 F.2d 199 (4th Cir. 1938), *cert. denied*, 306 U.S. 638 (1939); Matlock v. Bledsoe, 90 S.W. 848 (Ark. 1905); Curtiss v. Aetna Life Ins., 27 P. 211 (Cal. 1891); Lewis v. Reed, 192 P. 335 (Cal. Dist. Ct. App. 1920); Sheets v. Sheets, 36 P. 310 (Colo. Ct. App. 1894); Bowen v. National Life Ass'n, 27 A. 1059 (Conn. 1893); Bray v. Malcolm, 22 S.E.2d 126 (Ga. 1942); Wohlberg v. Merchants Reserve Life Ins., 209 Ill. App. 176 (1917); Elliot v. Metropolitan Life Ins., 64 N.E.2d 911 (Ind. App. 1946); Anderson v. Aetna Life Ins., 188 N.W. 883 (Iowa 1922); Aetna Life Ins. v. Kimball, 112 A. 708 (Me. 1921); First Nat'l Bank v. Liberty Trust Co., 134 A. 210 (Md. 1926); Potvin v. Prudential Ins., 114 N.E. 292 (Mass. 1916); Prudential Ins. v. Liersch, 81 N.W. 258 (Mich. 1899); Peel v. Reibel, 286 N.W. 345 (Minn. 1939); Grant v. Independent Order of Sons & Daughters of Jacob, 52 So. 698 (Miss. 1910); Butterworth v. Mississippi Valley Trust Co., 240 S.W.2d 676 (Mo. 1951); Chamberlain v. Butler, 86 N.W. 481 (Neb. 1901); Prudential Ins. v. Corriveau, 168 A. 569 (N.H. 1933); Givens v. Veeder 50 P. 316 (N.M. 1897); Thompson v. Pilot Life Ins., 67 S.E.2d 444 (N.C. 1951); Hardy v. Aetna Life Ins., 67 S.E. 767 (N.C. 1910); Keckley v. Coshocton Glass Co., 99 N.E. 299 (Ohio. 1912); Lyman v. Jacobsen, 275 P. 612 (Or. 1929); Connecticut Mut. Life Ins. v. Tucker, 61 A. 142 (R.I. 1905); Hammers v. Prudential Life Ins., 216 S.W.2d 703 (Tenn. 1948); Harrison v. Northwestern Mut. Life Ins., 63 A. 321 (Vt. 1906); Opitz v. Karel, 95 N.W. 948 (Wis. 1903).

insurable interest in the life of the insured, if not tainted, is valid. The first is commercial in nature and grounded in the capitalistic philosophy which dominated the country's young industrial economy at the turn of the twentieth century. According to this rationale, life insurance policies are investment contracts of great commercial value. Consequently, the law should not restrict the free transferability thereof by limiting the class of purchasers to those having an insurable interest in the life of the insured. To do otherwise would impair the value and utility of the policy as an article of property and prevent the free sale of policies on the open market at the most advantageous terms.[34]

The second rationale is purely legal in nature. It is premised upon the notion that a life insurance contract is a chose in action and should therefore be assignable absolutely or by way of security as with any other chose.[35] Thus, it was observed by Judge Crippen in *St. John* that:

> I am not aware of any principle of law that distinguishes contracts of insurance upon lives, from other ordinary contracts, or that takes them out of the operation of the same legal rules which are applied to and govern such contracts. Policies of insurance are choses in actions; they are governed by the same principles applicable to other agreements involving pecuniary obligations.[36]

As noted earlier, the view that an assignment of a life policy to an individual lacking an insurable interest in the life of the insured is not void as a matter of law does not necessarily mean that all such assignments are per se valid. Rather, this

34. *See, e.g.,* Grisby v. Russell, 222 U.S. 149 (1911); Bowen v. National Life Ass'n, 27 A. 1059 (Conn. 1893); Hawley v. Aetna Life Ins., 125 N.E. 707 (Ill. 1919); Mutual Life Ins. v. Allen, 138 Mass. 24 (1884); Rahders v. People's Bank, 130 N.W. 16 (Minn. 1911); Murphy v. Red, 1 So. 761 (Miss. 1887); St. John v. American Mut. Life Ins., 13 N.Y. 31 (1855); Clark v. Allen, 11 R.I. 439 (1877).

35. *See, e.g.,* Page v. Metropolitan Life Ins., 135 S.W. 911 (Ark. 1911); Sheets v. Sheets, 36 P. 310 (Colo. Ct. App. 1894); Fitzgerald v. Hartford Life & Annuity Ins., 13 A. 673 (Conn. 1888); Steele v. Gatlin, 42 S.E. 253 (Ga. 1902); U.S. Life Ins. v. Ludwig, 103 Ill. 305 (1882); Farmers' & Traders' Bank v. Johnson, 91 N.W. 1074 (Iowa 1902); Stuart v. Sutcliffe, 14 So. 912 (La. 1894); Fitzgerald v. Rawlings Implement Co., 79 A. 915 (Md. 1911); Peel v. Reibel, 286 N.W. 345 (Minn. 1939); Murphy v. Red, 1 So. 761 (Miss. 1887); Chamberlain v. Butler, 86 N.W. 481 (Neb. 1901).

36. *St. John,* 13 N.Y. at 39.

rule creates a prima facie case in favor of the validity of the assignment. The presumption in favor of validity is conditioned upon the transaction having been in good faith and the absence of an intent to circumvent the law with regards to wagering contracts.[37] Consequently, assignments tainted with either of these defects are treated as void *ab initio*.[38] Thus, in instances where a person lacking an insurable interest procures a policy on the life of another without consent, or where an insured makes an invalid assignment to an individual similarly situated, the insurable interest doctrine penalizes the parties by voiding the contract.

The standard for determining whether the presumption of validity has been successfully rebutted is the "intentions of the parties" test.[39] Pursuant to this standard, courts examine a number of factors in the quest to determine whether the assignment was a subterfuge for a wagering contract.[40] However, no

37. *See, e.g.*, Grigsby v. Russell, 222 U.S. 149 (1911); Finnie v. Walker, 257 F. 698 (2nd Cir. 1919); Lawrence v. Travelers' Ins., 6 F.Supp. 428 (D. Pa. 1934); Volunteer State Life Ins. v. Buchannan, 73 S.E. 602 (Ga. Ct. App. 1912); Oleskar v. Kotur, 48 N.E.2d 88 (Ind. App. 1943); Fitzgerald v. Rawlings Implement Co., 79 A. 915 (Md. 1911); Bowers v. Missouri Mut. Ass'n, 62 S.W.2d 1058 (Mo. 1933); Stein v. Diepenbrock, 52 N.E. 662 (N.Y. 1899).

38. *See supra* note 37.

39. *See supra* note 37.

40. No one factor alone is determinative of the issue of the validity of the assignment. Specific factors which are used to determine the parties intentions include:

(1) The policy is taken out by the insured for the purpose of assignment. This factor counsels against the validity of the assignments. However, courts have accorded this factor alone varying degrees of weight. *See, e.g.*, Homes Life Ins. v. Masterson, 21 S.W.2d 414 (Ark. 1929); Quillian v. Johnson, 49 S.E. 801 (Ga. 1905); Cisna v. Sheibley, 88 Ill. App. 385 (1900); Bromley v. Washington Life Ins., 92 S.W. 17 (Ky. 1906); Tripp v. Jordan, 164 S.W. 158 (Mo. Ct. App. 1914); Brett v. Warnick, 75 P. 1061 (Or. 1904).

(2) The length of time between the issuance of the policy and its assignment. The opinions addressing this factor do not express a generally agreed-upon length of time between issuance and assignment. Consequently, the cases do not reflect a consistent pattern. *See, e.g.*, Fitzgerald v. Hartford Life & Annuity Ins., 13 A. 673 (Conn. 1888); Rylander v. Allen, 53 S.E. 1032 (Ga. 1906); Oleska v. Kotur, 48 N.E.2d 88 (Ind. App. 1943); Mutual Life Ins. v. Allen, 138 Mass. 24 (1884).

(3) Payment of premiums by the insured rather than the assignee. This factor favors the validity of the assignment. *See, e.g.*, Amick v. Butler, 12 N.E. 518 (Ind. 1887); King v. Cram, 69 N.E. 1049 (Mass. 1904); Harrison v. Northwestern Mut. Life Ins., 63 A. 321 (Vt. 1906).

(4) The adequacy of the consideration for the assignment. *See, e.g.*, Bankers' Reserve Life Co. v. Matthews, 39 F.2d 528 (8th Cir. 1930); Bray v. Malcolm, 22 S.E.2d 126 (Ga. 1942); Hawley v. Aetna Life Ins., 125 N.E. 707 (Ill. 1919); Aetna Life

single factor alone has been identified as controlling on the issue. Each factor must be considered in combination with the underlying facts and circumstances of the case.[41]

B. *Legislative Response*

Many jurisdictions have enacted statutes addressing the assignability of life insurance policies.[42] The majority of these statutes are virtually identical in language and provide that a policy may be assignable or nonassignable as provided by its terms.[43]

Statutes of this nature continue the prima facie rule of validity in favor of assignments that result from and comply with policy terms and procedures. Therefore, the validity of assignments to third parties who lack an insurable interest in the life of the insured remains a viable legal issue to which the common-law analysis remains applicable.

Some state statutes however, contain clear and concise language on this point which eliminates all doubt regarding this issue.[44] For example, the North Dakota assignment statute

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Ins. v. Kimball, 112 A. 708 (Me. 1921); Lee v. Equitable Life Ass'n, 189 S.W. 1185 (Mo. Ct. App. 1916); Chamberlain v. Butler, 86 N.W. 481 (Neb. 1901); St. John v. American Mut. Life Ins., 13 N.Y. 31 (1855); Johnson v. Mutual Benefit Life Ins., 72 S.E. 847 (N.C. 1911).

(5) The absence of statutory restrictions. *See, e.g.*, Prudential Ins. v. Liersch, 81 N.W. 258 (Mich. 1899); Keckley v. Coshocton Glass Co., 99 N.E. 299 (Ohio 1912).

(6) The existence of a policy provision regarding assignment. *See, e.g.*, Matlock v. Bledsoe 90 S.W. 848 (Ark. 1905); Rylander v. Allen, 53 S.E. 1032 (Ga. 1906); King v. Cram, 69 N.E. 1049 (Mass. 1904); St. John v. American Mut. Life Ins., 13 N.Y. 31 (1855).

For a detailed discussion of the factors see 30 A.L.R. 2D 1310 (1953).

41. *See supra* note 37.

42. *See* ALA. CODE § 27-14-21 (1986); ALASKA STAT. § 21.42.270 (Michie 1993); ARIZ. REV. STAT. ANN. § 20-1122 (West 1990); ARK. CODE ANN. § 23-79-124 (Michie 1992); CAL. INS. CODE § 10130 (West 1993); DEL. CODE ANN. tit. 18, § 2720 (1989); GA. CODE ANN. § 33-24-17 (1995); HAW. REV. STAT. § 431:10-228 (1995); IDAHO CODE § 41-1826 (1994); KY. REV. STAT. ANN. § 304.14-250 (1) (Michie 1996); ME. REV. STAT. ANN. tit. 24-A, § 2420 (West 1990); MONT. CODE ANN. § 33-15-414 (1995); N.D. CENT. CODE § 26.1-33-33 (1995); OKLA. STAT. tit. 36, § 3624 (1990 & Supp. 1997); PA. STAT. ANN. tit. 40, § 512 (West 1992 & Supp. 1996); S.D. CODIFIED LAWS § 58-10-6.1 (Michie 1996); TEX. INS. CODE ANN. art. 3.49-1(2) (West 1981 & Supp. 1997); VA. CODE ANN. § 38.2-3111 (Michie 1994 & Supp. 1996); WASH. REV. CODE ANN. § 48.18.360 (West 1984).

43. *See supra* note 42.

44. *See, e.g.*, ALA. CODE § 27-14-21(b) (1986), which provides:

provides that: "[a] life insurance policy may pass by transfer, will, or succession to any person, whether that person has an insurable interest or not . . . ."[45] The statutory law of California goes further and treats an assignment to third persons lacking an insurable interest as per se valid.[46]

Neither the decisional nor statutory law in the majority of jurisdictions expressly prohibits the assignment of a life policy to an insurance agent who lacks an insurable interest in the life of his client. This should not, however, be construed to mean that all such assignments are presumed valid. Nor does the common-law analysis, with its emphasis on good faith and absence of an intent to circumvent policy, provide an appropriate basis for resolving the issue. This is due to the fact that new policy issues arise from an assignment to an insurance agent. For example, in appropriate circumstances the insured—agent relationship may be construed to impose upon an agent a minimum obligation to inform the insured of all the alternatives to absolute assignment offered by his insurance company. The agent's obligation may also include the duty to refrain from self-dealing or situations that create an appearance of impropriety or conflict of interest.[47]

> A policy of life insurance, taken out by the insured himself or by a person having an insurable interest in the life of the insured, in good faith may, unless the policy provides otherwise, be assigned to anyone as any other chose in action without regard to whether the assignee has an insurable interest in the life insured or not.

South Dakota law provides that "[i]f a policy of life insurance has been issued in conformity with this section, no transfer of the policy or any interest thereunder shall be invalid by reason of a lack of insurable interest of the transferee in the life of the insured . . . ." S.D. CODIFIED LAWS ANN. § 58-10-6.1 (1995). Virginia law provides:

> No life insurance policy shall be taken out by the insured or by a person having an insurable interest in the insured's life for the mere purpose of assignment. A policy may be assigned whether or not the assignee has an insurable interest in the life insured unless the policy provides otherwise.

VA. CODE ANN. § 38.2-3111 (Michie 1994).

45. N.D. CENT. CODE § 26.1-33-33 (1995).

46. *See* CAL. INS. CODE § 10130 (West 1993) (stating "[a] life or disability policy may pass by transfer, will or succession to any person, whether or not the transferee has an insurable interest . . . .").

This statute has been construed to mean that assignments are valid, notwithstanding contrary provisions of policy. *See, e.g.*, Cook v. Cook, 111 P.2d 322 (Cal. 1941); Lewis v. Reed, 192 P. 335 (Cal. Dist. Ct. App. 1920).

47. *See infra* Part III.A-E (providing a detailed discussion of fiduciary obligations).

Two jurisdictions, which statutorily recognize an insured's right to assign a life policy, have legislatively resolved the specific issue of whether an insurance agent can take an assignment of a life policy of an insured when the agent lacks an insurable interest. These jurisdictions, Oklahoma[48] and Florida,[49] prohibit the assignment of a policy to an agent who lacks an insurable interest in the life of the insured. The legislative history of these statutes does not reveal a specific legislative intent or purpose; however, the statutory language clearly expresses a public policy orientation that disfavors the practice.[50]

The Oklahoma and Florida statutes, however, fail to identify the party or parties liable for violation of the prohibition contained therein and the measure of damages applicable thereto. Nevertheless, in light of the prohibitive nature of the insurable interest doctrine, the culpable party in all likelihood is the agent rather than the insurance company. Under this scenario, the measure of damages is limited to the proceeds of the policy. This measure provides the complaining party with the benefit of the insured's bargain and prevents the unjust enrichment of the wrongdoer. The logic underlying this approach is consistent with four basic and widely shared propositions: (1) insurers are entitled to rely upon statements, declarations, and representations made by applicants for insurance relative to the insurable interest of the applicant in the insured and incur no liability by virtue of untrue statements, declarations, or representations relied upon in good faith;[51] (2) payment, without notice of an

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48. *See* OKLA. STAT. tit. 36, § 1425(m) (1990 & Supp. 1997). This statute was effective March 2, 1995 and provides: "It shall be unlawful for any insurance agent to receive an ownership interest in any policy, by assignment or otherwise, unless the agent has an insurable interest in the life of the insured."

49. See FLA. STAT. ANN. § 626.798 (West 1996) which provides:

> No life agent shall, with respect to the placement of life insurance coverage with a life insurer covering the life of a person who is not a family member of the agent, handle in his capacity as a life agent the placement of such coverage when the agent placing the coverage receives a commission therefor and is the named beneficiary under the life policy, unless the life agent has an insurable interest in the life of such person.

This statute expressly prohibits the life agent from becoming a beneficiary under a policy in which he lacks an insurable interest in the life of the insured. The spirit of this statute, however, is consistent with the view that life agents may not take assignments of policies in which they lack an insurable interest in the lives insured.

50. *See* OKLA. STAT. tit. 36, § 1425(M) (1990 & Supp. 1997); FLA. STAT. ANN. § 626.798 (West 1996).

51. A number of jurisdictions statutorily provide that:

inconsistent claim, discharges the insurer;[52] (3) insurance companies ordinarily are not obligated to inquire into the details of an assignment transaction;[53] and (4) the insurable interest doctrine does not impose upon insurance companies an obligation for which they are legally accountable.[54] These propositions, considered together, are also significant in that they reflect a legislative and judicial reluctance to impose upon insurance companies an additional obligation (i.e., duty to inquire into the merits of every assignment) that would certainly add to the expense of administering life insurance contracts and the cost of life policies. This remedy is also consistent with the limited exception to the rule that only the insurer can assert lack of an insurable interest as a defense.[55] A different rule should apply where an insurer pays the policy proceeds to the agent/assignee with knowledge of an inconsistent claim to the proceeds. In this limited instance, the insurance company is the culpable party and may be required to pay the policy proceeds to the com-

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> An insurer shall be entitled to rely upon all statements, declarations, and representations made by an applicant for insurance relative to the insurable interest that the applicant has in the insured, and no insurer shall incur liability, except as set forth in the policy, by virtue of any untrue statements, declarations, or representations, so relied upon in good faith by the insurer.

Jurisdictions which have statutes to this effect include: CAL. INS. CODE § 10110.2 (West 1993); DEL. CODE ANN. tit. 18, § 2704(d) (1989); FLA. STAT. ANN. § 627.404(1) (West 1996); GA. CODE ANN. § 33-24-6(c) (1996); IDAHO CODE § 41-1804(4) (1991 & Supp. 1996); KY. REV. STAT. ANN. § 304.14-040(5) (Michie 1996); ME. REV. STAT. ANN. tit. 24-A(4), § 2404 (West 1995 & Supp. 1996); MISS. CODE ANN. § 83-5-251(4) (Supp. 1996); N.J. STAT. ANN. § 17B:24-1.1(d) (West 1996); N.M. STAT. ANN. § 59A-18-4(E) (Michie 1995); OR. REV. STAT. § 743.024(3) (1989); R.I. GEN. LAWS § 27-4-27(e) (Michie 1994); WYO. STAT. ANN. § 26-15-102(d) (Michie 1991 & Supp. 1996).

52. *See* ALASKA STAT. § 21.42.280 (Michie 1993); DEL. CODE ANN. tit. 18, § 2721 (1989); FLA. STAT. ANN. § 627.423 (West 1996); HAW. REV. STAT. § 431:10-230 (1993); IDAHO CODE § 41-1828 (1991); KY. REV. STAT. ANN. § 304.14-260 (Michie 1996); LA. REV. STAT. ANN. § 22:643 (West 1995 & Supp. 1996); ME. REV. STAT. ANN. tit. 24-A, § 2425 (West 1990); MONT. CODE ANN. § 33-15-501 (1995); NEV. REV. STAT. ANN. § 687B.210 (Michie 1992); N.J. STAT. ANN. § 17B:24-5 (West 1996); N.M. STAT. ANN. § 59A-18-26 (Michie 1995); OKLA. STAT. tit. 36, § 3626 (1990); OR. REV. STAT. § 743.041 (1989 & Supp. 1994); VT. STAT. ANN. tit. 8, § 3712 (1996); VA. CODE ANN. § 38.2-321 (Michie 1994 & Supp. 1996); WASH. REV. CODE ANN. § 48.18.370 (West 1984); W. VA. CODE § 33-6-22 (1996); WYO. STAT. ANN. § 26-15-123 (Michie 1991). Assignment statutes also recognize that payment, without notice of inconsistent claims, discharges the insurer. *See supra* note 42.

53. *See* discussion *infra* Part II.C.

54. *See supra* note 21 and accompanying text.

55. *See supra* notes 15 & 20 and accompanying text.

plaining party despite the fact that it has already paid the agent/assignee.

The rationale favoring assignments of life policies to third persons who lack insurable interests in the lives insured is at least as great as the considerations underlying the development of the insurable interest doctrine. Consequently, from a policy perspective, the relevant question is whether the objectives of both concepts can coexist in the limited confines of the life insurance contract. The law has struck a delicate balance wherein harmony is achieved by predicating the validity of assignments of this nature upon the existence of good faith and absence of an intent to circumvent the policies underlying the insurable interest doctrine. Several states have attempted to balance these objectives by prohibiting the assignment of life insurance policies that violated the insurable interest requirement at the inception of the contract.[56] Nevertheless, the better view seems to be that the validity of assignments to life agents, who lack insurable interests in the lives of their insured, should be determined on a case-by-case basis.

C. *Assignment Provisions in the Policy*

An insurance contract governs the rights of the parties and their liabilities to each other. Therefore, the insurer and insured may agree that the policy may or may not be assigned and such a provision is valid.[57] Likewise, an insurance company may lawfully provide that its policies can be assigned only on such terms as are provided therein, and if such terms are not complied with the assignment is invalid as against the company.[58] Statutes which predicate the validity of assignments upon the terms of the policy also customarily provide words to the effect that:

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56. *See* IND. CODE ANN. § 27-8-3-8 (Michie 1994); N.J. STAT. ANN. § 17:35-11 (West 1994).

57. *See* Immel v. Travelers Ins., 26 N.E.2d 114 (Ill. 1940); Mueller v. Northwestern Univ., 63 N.E. 110 (Ill. 1902); *see also* CRAWFORD & BEADLES, *supra* note 25, at 361, 366.

58. *See* 31 C.J.S. *Insurance* § 430 (1923); 2 ROGER W. COOLEY, COOLEY'S BRIEFS ON INSURANCE 1829 (Vernon 1927) (1905); *see also* CRAWFORD & BEADLES, *supra* note 25, at 361-65.

> Any . . . assignment shall entitle the insurer to deal with the assignee as the owner . . . of the policy in accordance with the terms of the policy, until the insurer has received at its home office written notice of the termination of the assignment . . . or written notice by, or on behalf of, some other person claiming some interest in the policy in conflict with the assignment.[59]

Pursuant to statutory language of this nature and a policy provision providing for an assignment, an insurance company's obligation ends upon payment of the proceeds to the assignee prior to notice of an inconsistent claim.[60]

Assignment provisions also commonly provide that in no event will the insurer be responsible for its validity. This language is for the benefit of insurance companies. Its practical effect is to minimize the insurance company's role in the assignment process. In essence, this language clearly expresses the insurer's position that it is not obligated to actively approve or disapprove of any particular assignment or, in the absence of notice of a defect, inquire into the transaction. Rather, the insurer has a passive responsibility to merely accept assignments upon the conditions expressed in the policy.[61] Therefore, where an insurer in good faith makes a payment to an assignee without knowledge of an inconsistent claim or other defect in the assignment, the insurer is discharged from liability to subsequent claimants.[62]

III. AGENCY AND THE FIDUCIARY OBLIGATION ARGUMENT

Insurance is ordinarily marketed through intermediaries. These intermediaries often play an active role in the application, distribution, and claims-adjusting phases of the insurance process. The terms "agent" and "broker" have become the words commonly used by the public when describing insurance compa-

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59. *See supra* note 42.

60. *See, e.g.*, New York Life Ins. v. Federal Nat'l Bank, 151 F.2d 537 (10th Cir. 1945); Pittman v. Maxwell, 332 S.E.2d 683 (Ga. Ct. App. 1985).

61. *See* New York Life Ins. v. Federal Nat'l Bank, 151 F.2d 537 (10th Cir. 1945); *cf.* Strubbe v. Sonnenschein, 299 F.2d 185 (2nd Cir. 1962). *See also* CRAWFORD & BEADLES, *supra* note 25, at 361-65.

62. *See supra* note 61.

ny intermediaries. However, the words "agent" and "broker" are much too generic and imprecise to characterize the status or role of all insurance sales representatives. For example, insurance companies market their product through various forms of intermediaries, including but not limited to: (1) sales representatives who are employed by the company; (2) subsidiary or commonly-owned companies; or (3) through separate companies or persons referred to as independent agents and insurance brokers. Consequently, the relationship between insurance companies and their intermediaries, and the legal consequence thereof, has been the subject of much litigation.

The diverse and unique types of insurance intermediaries have presented courts with the arduous task of distinguishing between the intermediaries with regards to the duties they owe to consumers and insurance companies, respectively. Courts frequently turn to agency law in search of appropriate rules of dispute resolution.[63] "Agency" is "the fiduciary relation which results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."[64] Liability under agency law often depends upon the classification of the intermediary involved in the dispute (e.g., general agent or special agent)[65]

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63. This approach has been the subject of severe criticism.

> The relationships between insurance companies and sales representatives in regard to the authority to contract on behalf of insurers have been established in a multitude of patterns that often cannot be accurately described or characterized by the terms that are generally used to define relationships in agency law. Thus, a fundamental error can result in some instances when a concept from agency law is applied to a disputed insurance transaction as if it were a universally applicable proposition. In general, considerable skepticism should be applied to any assertion that a particular result in an insurance dispute is warranted by the law that governs agency relationships.

KEETON & WIDISS, *supra* note 9, § 2.5(b).

64. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958).

65. "A general agent is an agent authorized to conduct a series of transactions involving a continuity of service." *Id.* § 3(1).

"A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service." *Id.* § 3(2).

The test for determining the type of agent is continuity of the agent's service and not the breadth or extent of his power. Continuity of service is concerned with limitations either in time, purpose, or nature of the agency, which would reasonably require the agent to get fresh authority before he acts or continues to act on behalf of the purported principal.

and the extent of its authority to represent one or the other of the parties to the transaction.[66] "Definitional precision promotes understanding and communication, but does not necessarily assure predictability."[67] Therefore, the term "insurance agent" is often too broad to accurately describe the relationship that exists between intermediaries and insurance companies.[68] Consequently, titles such as "general," "special," and "soliciting"

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66. An agent can bind its principal contractually only to the extent that the agent is authorized to enter into the transaction. "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." *Id.* § 7. This provision contemplates that a principal can bestow actual authority upon the agent. Actual authority can be either expressed or implied. Implied actual authority can be incidental to or inferred from the circumstances; however, it cannot be inconsistent with the authority expressly granted.

The concept of apparent authority is also relied upon by courts to impose liability upon principals for contractual obligations created by agents. "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third person." *Id.* § 8. Apparent authority results from a manifestation being made to the third person and not, as when actual authority is being created, to the agent. *See id.* § 8, cmt. (a). "[A]pparent authority exists only with regards to those who believe and have reason to believe that there is authority . . . ." *Id.*

Estoppel also operates as a form of authority. *See id.* § 8(B). Estoppel is fundamentally an equitable concept that operates by preventing the party against whom it operates from pleading the truth. The elements of estoppel are that: (1) a culpable act of commission or omission by the principal create the appearance of authority in the agent; (2) the third party acts in good faith and with reasonable prudence in reliance upon such appearance of authority; and (3) the third party changes its position to its detriment in reliance upon such appearance of authority. *See id.*

Inherent agency power is treated as a form of authority. This term indicates "the power of an agent which is not derived from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of third persons harmed by or dealing with [an] agent." *Id.* § 8(A).

Ratification, which is not a form of authority, has the same effect as authorization. "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Id.* § 82.

67. HARRY G. HENN, TEACHING MATERIALS ON AGENCY AND PARTNERSHIP AND OTHER UNINCORPORATED BUSINESS ENTERPRISES 3 (2d ed. 1985).

68. An insurance agent is almost uniformly defined as one who has a fixed and permanent relationship with an insurance company which the agent represents. The agent has certain duties and allegiances to that company. An insurance agent is generally called into action, paid by, and controlled by a particular insurance company.

Frank X. Neuner, Jr. & Robert E. Torian, *Basics of Insurance Agents' and Brokers' Liability,* A.B.A. TORT & INS. PRAC. SEC. 11.

agent are often employed to describe intermediaries involved in the marketing of life insurance. These labels describe the various types of legal relationships that exist between intermediaries, insureds, and insurers. Thus, in many instances the label attached to the intermediary determines the outcome of the dispute.

A. *General Agent and Soliciting Agent Defined*

The distinction between a general agent and soliciting agent is often significant in determining the fiduciary obligations owed to an insured. A general agent is ordinarily an individual engaged in the business of representing a specific insurance company within territorial limits identified by the company.[69] General agents are often compensated by way of commission on the amount of insurance marketed.[70] A general agent is authorized to: (1) accept risks; (2) agree upon and settle terms of insurance contracts; (3) issue policies; and (4) renew policies already issued.[71] They are, for all practical purposes, the agent of the company they represent.[72]

A soliciting agent, in contrast, is merely an individual hired to sell insurance, receive applications and forward them to the company or its general agent.[73] A soliciting agent may also be authorized to perform other ministerial functions such as deliv-

69. *See* KEETON & WIDISS, *supra* note 9, at 81; *see also* Lazzara v. Howard A. Esser, Inc., 802 F.2d 260 (7th Cir. 1986).

70. *See supra* note 69.

71. *See* Dodds v. Hanover Ins., 880 S.W.2d 311 (Ark. 1994); Resnick v. Wolf & Cohen, Inc., 49 A.2d 809 (D.C. 1946).

72. *See* Wolfer v. Mutual Life Ins., 641 P.2d 1349, 1357 (Haw. Ct. App. 1982) (Kanbora, J., dissenting) (citing 43 AM. JUR. 2D *Insurance* § 146 (1982)). Though ordinarily viewed as the agent of the company, "[i]t has been noted that 'because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies, the relationship between the insurance agent and a client is often a fiduciary one.'" Winter v. Nationwide Mut. Ins., No. 0049205, 1990 Conn. Super. Ct. LEXIS 331, at *2 (Conn. Super. Ct. May 23, 1990) (quoting Katz v. Frank B. Hall & Co., 3 CSCR 25 (1987)).

This view seems to be applicable only where the agent holds himself out as a consultant and counselor and is acting as a specialist. *See* 16 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 8836, at 64-66 (1981).

73. *See supra* note 71. *See also* Washington Nat'l Ins. v. Employment Sec. Comm'n, 144 P.2d 688 (Ariz. 1944) (holding that a solicitor is one employed by an insurance agent and therefore is a mere middleman).

ering policies and collecting premiums.[74] However, unlike general agents, soliciting agents lack authority to agree upon, change, or waive the agreed-upon terms of policies.[75] Soliciting agents are primarily responsible for inducing third parties to apply for insurance.[76] They are in essence a species of special agents with limited power to bind their principles.[77]

B. *Insurance Broker Defined*

An insurance broker procures insurance and acts as a middleman between the insured and insurer.[78] Brokers solicit insurance from the public under no employment from any particular company.[79] Instead, when a request to procure insurance is secured, brokers either place the order with a company selected by the applicant, or in the absence of a selection by the applicant, with a company of the broker's choice.[80] Brokers are generally treated as the agent of their employer.[81]

The distinction between an insurance agent and broker does not depend upon the title or license; rather it is a question to be determined from the facts of the particular case.[82] Many courts attempt to resolve this issue by applying basic agency principles pursuant to which the authority of the individual is examined. If the insurer's conduct creates either actual or apparent authority for a broker to act on its behalf, the broker becomes the agent of the insurer.[83] Illinois has formulated a

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74. *See supra* note 71.

75. *See supra* note 71.

76. *See, e.g.*, Dixie Life & Accident Ins. v. Hamm, 344 S.W.2d 601 (Ark. 1961); 43 AM. JUR. 2D *Insurance* § 123 (1994).

77. *See, e.g.*, Dixie Life & Accident Ins. v. Hamm, 344 S.W.2d 601 (Ark. 1961); Standard Life & Accident Ins. v. Cornelius, 340 P.2d 478 (Okla. 1959); Harrison v. Travelers Ins., 442 S.W.2d 400 (Tex. App. 1969).

78. *See* American Ins. v. Sederes, 807 F.2d 1402 (7th Cir. 1986); Lazzara v. Howard A. Esser, Inc., 802 F.2d 260 (7th Cir. 1986); Washington Nat'l Ins. v. Employment Sec. Comm'n, 144 P.2d 688 (Ariz. 1944).

79. *See* Washington Nat'l Ins. v. Employment Sec. Comm'n, 144 P.2d 688 (Ariz. 1944).

80. *See id.*

81. *See* Travelers Indem. Co. v. Booker, 657 F. Supp. 280 (D.C. Cir. 1987).

82. *See* Lazzara v. Howard A. Esser, Inc., 802 F.2d 260 (7th Cir. 1986); Curran v. Industrial Comm'n, 752 P.2d 523 (Ariz. App. 1988).

83. *See* APPLEMAN & APPLEMAN, *supra* note 72, § 8731, at 369-70 (1981); 3 LEE R. RUSS, COUCH ON INSURANCE 2D § 25:95, at 450 (Rev. ed. 1984).

four-part test for determining whether an individual is an agent or broker.[84] The relevant criteria under this test are: "(1) who called the intermediary into action; (2) who controls its action; (3) who pays it; and (4) whose interest does it represent."[85]

C. *Statutory Definitions*

A significant number of states have enacted statutes that define and distinguish between agents and brokers.[86] For the most part these statutes merely continue the common-law definitions and distinctions. For example, in some states, statutes provide that any person who solicits an application for insurance upon the life of another shall, in any controversy between the insured or his beneficiary, where the insurer issues any policy upon such application, be regarded as the agent of the insurer and not the agent of the insured.[87] In contrast, brokers, in the absence of some manifestation from the insurance company, are statutorily viewed as the agent of the insured.[88] Despite the existence of statutes, courts rarely refer to them in resolving whether a particular intermediary is an agent or

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84. *See* Lazzara v. Howard A. Esser, Inc., 802 F.2d 260 (7th Cir. 1986).

85. *Id.* at 264.

86. *See* ALA. CODE § 27-8-1 (1986); ARIZ. REV. STAT. ANN. § 20-282 (West 1990 & Supp. 1996); ARK. CODE ANN. § 23-64-102(1), (4) (Michie 1994); CAL. INS. CODE § 32 (West 1993 & Supp. 1996); DEL. CODE ANN. tit. 18, §§ 1702-1703 (1989); FLA. STAT. ANN. § 626.051(1) (West 1996); GA. CODE ANN. § 33-23-1 (1996); IDAHO CODE §§ 41-1021, 41-1023(1) (1991 & Supp. 1996); IND. CODE ANN. § 27-1-15.5-2 (Michie 1994 & Supp. 1996); KY. REV. STAT. ANN. § 304.9-030(2) (Michie 1996); ME. REV. STAT. ANN. tit. 24-A, § 1504 (West 1990); MISS. CODE ANN. § 83-17-101 (1992 & Supp. 1996); NEV. REV. STAT. ANN. § 683A.050 (Michie 1992); N.H. REV. STAT. ANN. § 408:5 (1991); N.J. STAT. ANN. § 17:22A-2(f) (West 1994); N.Y. INS. LAW § 2101(a), (c) (Consol. 1985 & Supp. 1996); OHIO REV. CODE ANN. § 3905.01(1) (Banks-Baldwin 1989 & Supp. 1995); TENN. CODE ANN. § 56-6-132(4) (1994); VA. CODE ANN. § 38.2-1800 (Michie 1994 & Supp. 1996); WASH. REV. CODE ANN. § 48.17.010 (West 1984 & Supp. 1997); W. VA. CODE § 33-1-12 (1996).

87. *See* ARIZ. REV. STAT. ANN. § 20-282 (West 1990 & Supp. 1996); DEL. CODE ANN. tit. 18, § 1702(c) (1984); NEB. REV. STAT. § 44-4004 (1993); N.H. REV. STAT. ANN. § 408:7 (1991); N.M. STAT. ANN. § 59A-18-24 (Michie 1995); N.C. GEN. STAT. § 58-33-20 (1995); N.D. CENT. CODE § 26.1-26-06 to -07 (1995); OHIO REV. CODE ANN. § 3923.141 (Banks-Baldwin 1996); OKLA. STAT. tit. 36, § 1423 (1990 & Supp. 1997); OR. REV. STAT. § 774.165 (1995); S.C. CODE ANN. § 38-43-10 (Law Co-op. 1995); S.D. CODIFIED LAWS § 58-15-47 (Michie 1996); TEX. INS. CODE ANN. arts. 13.04, 21.02 (West 1981 & Supp. 1997); VT. STAT. ANN. tit. 8, § 4792 (1993); VA. CODE ANN § 38.2-1801 (Michie 1994); W. VA. CODE § 33-12-23 (1996).

88. *See, e.g.*, N.D. CENT. CODE § 26.1-26-07 (1995).

broker.[89] Instead, courts continue to rely upon the traditional agency law approach in determining how an insurance intermediary should be classified.[90]

D. *Dual Agency*

Ordinarily an individual is the agent of only one or the other of the parties in any single transaction. This proposition is founded upon the principle that an agent cannot serve two masters. In the context of insurance law, however, courts recognize a limited exception to this rule. This exception is commonly referred to as the dual agency principle.

The dual agency principle recognizes that insurance agents and brokers can, under appropriate circumstances, be the agent of both the insurer and insured in the same transaction.[91] For example, it has been held that the agent may act for both the insurer and insured in collecting premiums, delivering the policy, and procuring insurance.[92] Application of the principle of dual agency, however, is limited to circumstances where the agent's or broker's performance of the obligations in the particular transaction are not inconsistent.[93] Thus, the principle is inapplicable to situations where the interests of the insured and insurer are incompatible or conflict.[94]

89. *See, e.g.*, Boyter v. Blazer Constr. Co., 505 So.2d 854 (La. App. 1987). *But see* Celtic Life Ins. v. Coats, 885 S.W.2d 96 (Tex. 1994).

90. *See, e.g.*, Lien Ho Hsing Steel Enter. Co. v. Weihtag, 738 F.2d 1455 (9th Cir. 1984).

91. *See* Allstate Auto Leasing Co. v. Caldwell, 394 A.2d 748 (Del. Super. Ct. 1978); American Fire Ins. v. King Lumber & Mfg., 77 So. 168 (Fla. 1917); Byrne v. Reardon, 397 S.E.2d 22 (Ga. Ct. App. 1990); Illinois Sec. Ins. v. Burgos, 583 N.E.2d 547 (Ill. 1991).

92. *See* Fraser-Yamor Agency v. County of Del Norte, 137 Cal. Rptr. 118 (Cal. Ct. App. 1977); Anfinsen Plastic Molding Co. v. Konen, 386 N.E.2d 108 (Ill. App. Ct. 1979); Hunt v. Texas, 737 S.W.2d 4 (Tex. App. 1987).

93. *See* Johnson v. North British & Merchants Ins., 63 N.E. 610 (Ohio 1902).

94. *See id.; see also* Merbitz v. Great Nat'l Life Ins., 599 S.W.2d 655 (Tex. App. 1980).

E. *Fiduciary Obligation*

All agents are fiduciaries of their principals. The fiduciary relationship imposes upon an agent the highest obligation of loyalty, good faith, and fair dealing. As a matter of policy, fiduciaries are precluded from taking advantage of their principals. As integrated into the primary thesis, the legal contention from the perspective of the insured or beneficiary is that an agent who takes an absolute assignment of his client's life policy has breached his fiduciary obligation of loyalty and trust. From the perspective of the general agency law approach, the question of to whom the fiduciary obligation is owed turns upon the classification of the actor as agent or broker. Consequently, the strengths and weaknesses of the argument that the insurance intermediary has breached the fiduciary duty to the client will depend upon the facts and circumstances of the individual case.

The breach of fiduciary obligation argument can be asserted from a perspective other than agency law. Courts have long recognized that under appropriate circumstances, fiduciary duties can arise from contract or the reposing of trust.[95] Thus,

> [a] fiduciary relationship may arise in a legal, moral, domestic, or personal context, where there appears "on the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed." Additionally, a confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger.[96]

The relationship which arises out of contract or reposing of trust is often referred to as quasi-fiduciary.[97] In the eyes of the law this relationship imposes upon the agent obligations and responsibilities identical to a true fiduciary relationship.

95. *See* Mark Budnitz, *The Sale of Credit Life Insurance: The Bank As Fiduciary*, 62 N.C. L. REV. 295 (1984).
96. Lowery v. Guaranty Bank & Trust, 592 So.2d 79, 83 (Miss. 1991) (citations omitted).
97. *See id.*

The term "quasi" serves to underscore the fact that courts are reluctant to recognize non-traditional fiduciary relationships and have opted instead to expand fiduciary relationships only where the circumstances of the specific case so demands.

Judicial recognition of a fiduciary relationship premised upon the existence of a confidential relationship is not uncommon. Courts have not, however, articulated a hard and fast definition of confidential relationship, and have not listed those circumstances which give rise to such a relationship.[98] This is, in all probability, due to the fact that the majority of quasi-fiduciary relationships are recognized by courts of equity for the purpose of achieving justice or fairness.[99] Nevertheless, it has been observed that "a confidential relationship exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind."[100] Thus, a confidential relationship is ordinarily recognized where, "by reason of kinship, business association, disparity in age, etc. the transferee is in an especially close relationship to the transferor, and the latter reposes a high degree of trust and confidence in the former."[101] It does not necessarily follow that all or even most informal relationships that involve one or a combination of the previously stated circumstances will be viewed as a fiduciary one. Rather, it has been invariably observed that a fiduciary relationship results from an informal relationship "*only* when *both* parties understand that a special trust or confidence has been reposed."[102]

Whether a confidential relationship exists is a question of

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98. *See, e.g.*, Dunham v. Dunham, 528 A.2d 1123 (Conn. 1987).

> Rather than attempt to define "a fiduciary relationship in precise detail and in such a manner to exclude new situations," we have instead chosen to leave "the bars down for situations in which there is a justifiable trust confided on one side and a resulting superiority and influence on the other."

Id. at 1133 (citation omitted).

99. *See* RESTATEMENT OF THE LAW OF RESTITUTION §§ 1-10 (1937); *see also* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 29 (2d ed. 1948).

100. RESTATEMENT OF THE LAW OF RESTITUTION § 166, cmt. d (1937).

101. Klein v. Shaw, 706 P.2d 1348, 1351 (Idaho Ct. App. 1985).

102. Nichols v. Chicago Title Ins., 669 N.E.2d 323, 333 (Ohio Ct. App. 1995); *see also* Craggett v. Adell Ins., 635 N.E.2d 1326 (Ohio Ct. App. 1993) (noting that a confidential relationship cannot be unilateral—both parties must understand that a special trust or confidence has been reposed).

fact.[103] Upon proof thereof, however, a fiduciary relationship is presumed and the burden of proof shifts to the fiduciary to prove fair dealing.[104] The standard of proof for fair dealing requires proof either by clear and convincing evidence or some other standard greater than a preponderance of the evidence.[105]

Breach of the confidential relationship is quite frequently treated as constructive fraud.[106] The corresponding remedy for the breach is a constructive trust in which the transferee, if the acquisition was in violation of his fiduciary duty, holds the property for the benefit of the transferor.[107] The confidential relationship theory also eliminates the requirement that actual fraud be proven as an inducement for the transfer.[108]

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103. *See* Dunham v. Dunham, 528 A.2d 1123 (Conn. 1987).

104. *See, e.g.*, Hicks v. Clayton, 136 Cal. Rptr. 512, 519-20 (Cal. Ct. App. 1977); Dunham v. Dunham, 528 A.2d 1123, 1134 (Conn. 1978); Nelson v. Walden, 186 So.2d 517, 519 (Fla. App. 1966); *In re* Miller, 568 S.W.2d 246, 251 (Mo. 1978).

105. *See supra* note 104.

106. *See, e.g.*, Molko v. Holy Spirit Ass'n, 762 P.2d 46 (Cal. 1988); Honolulu Fed. Sav. & Loan v. Murphy, 753 P.2d 807 (Haw. Ct. App. 1988); Fix v. Fix, 847 S.W.2d 762 (Mo. 1993); Sutton v. Sandler, 195 N.E.2d 303 (N.Y. App. 1963); Brisson v. Williams, 345 S.E.2d 432 (N.C. Ct. App. 1986); Asleson v. West Branch Land Co., 311 N.W.2d 533 (N.D. 1981); Hatton v. Turner, 622 S.W.2d 450 (Tex. App. 1981); *see also* 89 C.J.S. *Trusts* § 151, at 1051, 1061 (1995).

Constructive fraud is variously defined as fraud which arises by operation of the law from a course of conduct which, if sanctioned by law, would secure an unconscionable, unjust, or inequitable advantage, without regard to the existence or evidence of actual fraud. *See, e.g.*, Brazee v. Morris, 204 P.2d 475 (Ariz. 1949); Morris v. Valley Forge Ins., 805 S.W.2d 948 (Ark. 1991); McDaniel v. Sheperd, 577 N.E.2d 239 (Ind. Ct. App. 1991); Whiteco Properties, Inc. v. Thielbar, 467 N.E.2d 433 (Ind. Ct. App. 1984); Faulkenberry v. Kansas City S.R.R., 602 P.2d 203 (Okla 1979).

107. *See* RESTATEMENT OF THE LAW OF RESTITUTION § 190 (1937).

108. *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 471 (Rev. 2d ed. 1978).

> Occasionally a court has indicated that fraud constitutes an essential element, but where a fiduciary or confidential relationship is found fraud in the transaction is presumed.
>
> It has sometimes been stated that "fraud" is at the bottom of every constructive trust. "Fraud" is, of course, a very ambiguous word. It may mean misrepresentation which would give ground for an action of deceit. It may imply the acquisition of property by some other type of wrongdoing or by any type of inequitable conduct. Certainly it is not true that all constructive trusts are based on "fraud," unless that word is used in its broadest sense to include all conduct which equity treats as unfair, unconscionable and unjust.

Id. at 21-23. *See also* McDaniel v. Shepherd, 577 N.E.2d 239, 242 (Ind. Ct. App. 1991).

The major disadvantage of the breach of fiduciary duty argument is that it limits the complaining party's recourse to an action against the agent. The essence of the argument is that the insurance agent is accountable to the insured for any benefits received as a result of his breach of fiduciary duty. Thus, the insurance company, in the absence of a simultaneous breach of fiduciary duty, is not the primary target of liability. This argument can be further complicated by the existence of an agreement-between-parties contract.

An agreement of this nature, carefully and thoroughly drafted, details not only the terms of the assignment but the circumstances and conditions that gave rise to the transaction. The environment from which an agreement-between-parties contract arises can be as opprobrious as the absolute assignment transaction itself. This environment is often characterized by agents who foresee the possibility of litigation and go to every extreme to protect their legal position in the event this contingency becomes a reality. The insured, often motivated by financial exigency, uninformed and/or misinformed and desirious of a quick resolution of the transaction, is willing to sign anything to get his hands on cash. Thus, it does not require a stretch of the imagination to understand that the contract tends to include those details and facts that support the legal position of its drafter—the assignee/agent.

An agreement-between-parties contract can present evidentiary dilemmas for the representatives of deceased insureds challenging the validity of assignments to insurance agents who lack insurable interests in the lives insured. This agreement is a testament of the terms, conditions, and circumstances under which the insured, who is dead and unable to testify, agreed to the assignment. Consequently, the contract between the parties may be the most credible evidence of fair dealing. The contract, if unambiguous and complete, may also be subject to the parole evidence rule.[109]

109. The parole evidence rule precludes the admission of extrinsic evidence of a prior or contemporaneous agreement that contradicts the terms of a complete and unambiguous written contract. The written contract supersedes all previous understandings and the intent of the parties must be ascertained from the written agreement itself. *See* Valley Bank v. Christensen, 808 P.2d 415, 417 (Idaho 1991). The agreement may not be controverted by speculation or after-the-fact testimony. *See*

IV. BAD FAITH

Inevitably, a challenge to the validity of an absolute assignment to an insurance agent lacking an insurable interest in the life insured will include an allegation of bad faith against both the agent and insurance company.[110] It is this charge that most intimidates and concerns insurers. The intimidation factor, inherent in every allegation of bad faith, results from the extra-contractual nature of this claim. The bad faith claim is an assertion that the insurer breached its implied duty of fair dealing and good faith which arises out of the insurance contract.[111] Pursuant to this duty, the insurer is obligated to exercise reasonable prudence in the claims process. The breach of this implied obligation, by unreasonable denial or delay in

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Wilson v. Massachusetts Indem. & Life Ins., 920 F.2d 1548 (10th Cir. 1990). Courts uniformly recognize that the parol evidence rule is only applicable to those circumstances in which the contract is untainted by fraud, mistake, accident, or erroneous admission. *See* United Pac. Ins. v. Northwestern Nat'l Ins., 185 F.2d 443, 446 (1950).

110. A complete and thorough discussion of bad faith is beyond the scope of this article. For a detailed and comprehensive treatment of the subject, see WILLIAM M. SHERNOFF, ET AL., INSURANCE BAD FAITH LITIGATION (1996).

111. *Compare* Anderson v. Continental Ins., 271 N.W.2d 368, 375-77 (Wis. 1978), *with* Gruenberg v. Aetna Ins., 510 P.2d 1032, 1037-40 (Cal. 1973). In the context of first-party insurance, the two cited decisions are given credit for establishing the two dominant standards for determining bad faith. The majority of jurisdictions are said to follow the view articulated in the *Anderson* decision. *See* PAUL J. SKOK, TRIAL ATTORNEY'S GUIDE TO INSURANCE COVERAGE AND BAD FAITH §§ 7.14-7.15 (1994) (citing *Gruenberg* as the minority view).

In *Anderson*, the Wisconsin Supreme Court identified the contours of bad faith as follows: "[t]o show a claim of bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." 271 N.W.2d at 376. This standard focuses on the intentional nature of the insurer's conduct and requires at least some conscious awareness of the lack of a reasonable basis for the denial of the claim. Conscious awareness however, "may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured." *Id.* at 377.

The *Anderson* standard is more stringent than that articulated by the California Supreme Court in *Gruenberg*. The *Gruenberg* standard revolves around the reasonableness of the insurer's denial of the claim. This fact-intensive standard is answered on the basis of how a reasonable insurer would have acted under the circumstances and facts of the case. This standard does not require the insured to prove that its insurer's conduct was the result of bad motive, subjective intent to cause harm, or conscious awareness that its conduct was unjustified, in order to prove bad faith for purposes of recovering compensatory damages. See *Gruenberg*, 510 P.2d at 1037-40.

paying a claim, constitutes a tort in nearly every jurisdiction.[112]

Ordinarily an agent of the insurer or any third party who is a stranger to the contract may not be held liable for bad faith conduct.[113] The absence of a contractual relationship between the agent and insured nullifies the existence of a fiduciary relationship upon which bad faith is premised.[114] Nevertheless, the agent's conduct may be relevant in determining whether the insurer has breached its duty of good faith and fair dealing. At least one federal court has recognized an exception to the general prohibition against asserting bad faith against agents.[115] This exception is applied when a special relationship exists between the agent and insured, and such relationship arises out of the contractual obligations of the agent to the insurance company.[116] Although the special relationship needed to trigger application of the exception does not ordinarily exist between individual agents and insurers, it is not uncommon where the insurer employs another insurance company or institution as the primary administrator of the insurance plan.[117] Such an administrator, empowered to perform significant functions ordinarily reserved to insurance companies and possessing a pecuniary interest tied to the risks insured, may be treated as the insurer.[118]

Assuming *arguendo* that the complaining party has standing to assert bad faith,[119] the merits of such a claim, in the con-

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112. *See* WILLIAM S. SHERNOFF, ET AL., INSURANCE BAD FAITH LITIGATION, § 1.01, at 1-2 n.3 (1994).

113. *See* Griffin v. Ware, 457 So. 2d 936, 940-41 (Miss. 1984); Allstate Ins. v. Amick, 680 P.2d 362, 364-65 (Okla. 1984) (citing Christion v. American Home Assur. Co., 577 P.2d 899 (Okla. 1978)).

114. *See Amick*, 680 P.2d at 364-65; *Griffin*, 457 So. 2d at 940-41.

115. *See* Wolf v. Prudential Ins., 50 F.3d 793 (10th Cir. 1995).

116. *See id.*; Leuck v. Aetna Life Ins., 342 N.W.2d 699 (Wis. 1984), *rev'd on other grounds sub nom.*, Allis-Chalmers Corp. v. Leuck, 471 U.S. 202 (1985).

117. *See id.*

118. *See Amick*, 680 P.2d at 364-65; *Griffin*, 457 So. 2d at 940-41.

119. An insurer's liability for bad faith does not extend to every individual entitled to the insurance proceeds. Rather, the implied duty of good faith and fair dealing extends only to those persons sharing a contractual or statutory relationship with the insurer. Only individuals in these classes have standing to sue for bad faith. *See, e.g.*, Gruenberg v. Aetna Ins., 510 P.2d 1032 (Cal. 1973); Allstate Ins. v. Amick, 680 P.2d 362 (Okla. 1984); Kranzush v. Badger State Mut. Cas. Co., 307 N.W.2d 256 (Wis. 1981).

text of an assignment transaction, is at best tenuous. This conclusion stems from the fact that courts have not extended the implied duty of good faith and fair dealing beyond the claims process.[120] Upon receiving notice of inconsistent claims, insurance companies, encouraged by the fear of having to pay twice and the existence of extra-contractual remedies such as bad faith, uniformly seek to implead the proceeds of the policy into the registry of a court of competent jurisdiction.[121] Stakeholders are not required by law to wait until claims have been actually made before seeking interpleader. Once aware that conflicting claims may be made, stakeholders such as insurance companies, upon receiving notice of the death of the insured, can seek to implead the proceeds into the registry of the court, rather than await receipt of the competing claims. The act of impleading the proceeds prior to a claim being made is a tactical maneuver aimed at diffusing subsequently filed extra-contractual actions.

Interpleader is analogous to an admission that the proceeds are the subject of conflicting claims and within the possession of the insurer, who is merely holding the funds and not claiming an interest therein.[122] Interpleader imposes upon the court the burden of determining, as between the competing claimants, to whom the proceeds should be paid.[123] It should be noted that interpleader does not automatically operate as a safe harbor. In order to receive a discharge from liability as a result of impleading the proceeds, the insurer must be free from blame in causing the controversy.[124] Discharge is only a certainty where the insurer, upon becoming aware of the inconsistent claims, immediately impleads the proceeds without embroiling itself in the merits of the assignment or claims. The more time that elapses between notice and initiation of the interpleader

120. *See* Watkins v. Life Ins. Co. of Georgia, 456 So. 2d 259 (Ala. 1984). *Cf.* Spindle v. Travelers Ins. Co., 136 Cal. Rptr. 404 (Cal. Ct. App. 1977) (action for bad faith is not limited solely to claims process but may arise out of breach of any provision of the insurance contract).

121. *See* CRAWFORD & BEADLES, *supra* note 25, at 399-402.

122. In order to seek interpleader, the stakeholder must acknowledge his own lack of interest in the proceeds and that the stake is within his control and capable of being delivered to the registry of the court. See 48 C.J.S. *Interpleader* § 2 (1981).

123. *See* CRAWFORD & BEADLES, *supra* note 25.

124. See Farmers Irrigating Ditch & Reservoir Co. v. Kane, 845 F.2d 229, 232 (10th Cir. 1988).

action, the greater the likelihood that culpable conduct of the type that will defeat a prayer for discharge will occur.

V. CONCLUSION

The frequency with which these types of assignments occur is difficult, if not impossible, to predict. Furthermore, research reveals no reported judicial opinions in which this specific issue has been discussed. Likewise, the current state of the law, other than in Oklahoma and Florida, provides little in the way of a definitive response. These considerations, however, should not be interpreted by the insurance industry as factors counseling in favor of inaction. Rather, they must be balanced against the quasi-public nature of the insurance industry[125] and societal obligations that inure therefrom.

The quasi-public nature of the marketing of insurance justifies the extensive judicial and legislative scrutiny applied to the industry. The focus of this scrutiny, for the most part, has been concentrated on transactions in which institutional interests conflict with societal interests. The tension between institutional and societal interests has led to a wave of litigation in which courts as well as legislatures have declared that the public interest outweighs the industry's interest in maximizing profits and gains.[126] This policy declaration is characterized by its expansive nature, which makes it a convenient tool for judicial lawmaking.[127]

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125. *See* LEE R. RUSS & THOMNAS F. SEGOLLA, COUCH ON INSURANCE § 22 (3d ed. 1995); 19 JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 10321 (1982); Matthew O. Trobriner & Joseph R. Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247, 1249 (1967). The public nature of the insurance industry is best described in this quote: "The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements." Egan v. Mutual of Omaha Ins., 620 P.2d 141, 146 (Cal. 1979) (quoting William M. Goodman & Thom Greenfield Seaton, *Foreword: Ripe For Decision, Internal Workings and Current Concerns of the California Supreme Court*, 62 CAL. L. REV. 309, 346-347 (1974)).

126. *See, e.g.*, Egan v. Mutual of Omaha Ins., 620 P.2d 141, 146 (Cal. 1979).

127. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 15 (5th ed. 1984).

Most of our refined modern understanding of legal principles and theories has evolved out of policy declarations. This is especially true of tort law, the discipline in which public policy has had its most profound impact.[128]

The judicial development of insurance law has also been significantly influenced by perceptions about the interests of society in the resolution of private disputes.[129] Judicial perception of societal interests in both areas—tort and insurance law—has altered the playing field once governed exclusively by the insurance contract.[130]

The relevant question, from a pure policy perspective, is not whether an absolute assignment to an insurance agent who lacks an insurable interest in the life insured is per se illegal, but whether it is right. Factors to be considered in resolving this question include: (1) the recognized need for compensation; (2) the moral aspect of defendant's conduct; (3) the convenience of judicial administration; and (4) the need to prevent future harm.[131] Also to be considered is the existence of a feasible alternative for eliminating the risk of injury.

The insurance industry has before it two courses of action: (1) await further litigation, which is all but inevitable; or (2) exercise initiative. Policy considerations counsel strongly in favor of the latter. Initiatives can take either of two forms: (1) develop policy and mandatory procedures to be followed in assignments of this nature; or (2) in the absence of an insurable interest, declare all absolute assignments to agents void. At the risk of sounding cavalier, the first initiative suffers from obvious shortcomings. For example, the development of procedures

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128. *See id.*

129. *See* KEETON & WIDISS, *supra* note 9, § 6.4(a), at 646.

130.
> The advance of torts principles into the traditional realm of contract law is most dramatic in the field of insurance law. The insurance policy has long been viewed as the ultimate contract, entitled to the utmost respect, if not admiration. Carefully drafted by lawyers knowledgeable in insurance law, honed to perfection by years of stare decisis, with almost every paragraph regulated by statute, one can understand the shock the insurance industry must experience as it views its castle walls crumbling, clause by clause.

John C. McCarthy, *Plaintiff's View of Fire Cases*, *in* EXTRACONTRACTUAL DAMAGES 71, 72 (John R. Groves ed., 1983).

131. For a detailed discussion of these factors, see KEETON ET AL., *supra* note 126.

for the handling of such transactions may constitute an undertaking or holding out on the part of the institution, which gives rise to a duty of care in the implementation and oversight phases of assignments. As noted earlier, most life insurance policies contain disclaimers of responsibility for determining the validity of an assignment provision.[132] The development of a contrary policy could lead to the erosion of the law, which currently favors the insurer. This initiative is not cost efficient, in that it requires the development of procedures, additional training of agents, and monitoring of all assignments, while not necessarily eliminating the likelihood of litigation.[133] The better initiative is clearly the second alternative. It is cost efficient and eliminates the likelihood of litigation.

Declaring all absolute assignments to agents void, unlike the development of policy and procedures, strengthens rather than undermines the notion that the insurance industry is a profession. Professional responsibility obligates the industry to adopt standards that reflect its interest in the development and acceptance of moral and social modes of behavior. Moral responsibility is primarily concerned with the right or wrong of industry practice or policy. Resolution of the issue turns not upon the benefits of the practice or policy to the industry, but upon its potential for harm to society. Moral responsibility is distinguishable from social responsibility in that the latter is primarily concerned with direct and measurable contributions to society. Such contributions can take the form of donations to, or sponsorship of, civic activities.

An agent's act of taking an assignment of a client's policy has an obviously deleterious effect on public perceptions of the insurance industry. It provides an opportunity for self-dealing and creates a negative impression of agents. Because these transactions provide no positive benefits to the insured or the insurers, it behooves one to understand why such assignments are not prohibited by the insurance industry.

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132. *See supra* Part II.C.

133. More policy, like more laws, does not guarantee fewer law suits. Quite often new policies and procedures will serve as the basis of the suit. For example, where the policy or procedure has not been followed to the letter by the institution, supervisor, or agent, it will be raised as evidence of breach of contract or obligation of care.