

Insurable Interests: Après Chawla, le Deluge?

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Life insurance is a key element of many estate plans. Estate planning practitioners routinely help their clients identify when the additional cash provided by life insurance will be useful in meeting their financial, business, and estate planning needs. Practitioners then help their clients decide how much insurance will be needed, when it will be needed, and what type of life insurance policy best meets these needs. They also help clients identify situations in which the benefits of the policy would best meet the clients' needs if they were made available to someone other than the insured or his or her estate. Quite often, the client's needs are best served by having the policy held in an irrevocable trust, partnership, or limited liability company.

The insurable interest rules are important whenever a life insurance policy is owned by someone other than the insured or payable to someone other than the personal representative of the insured's estate. A life insurance policy is void ab initio if the person to whom the policy is issued or to whom the benefits are paid (or both, depending upon the controlling state law), lacks an insurable interest in the life of the insured. An insurance company may, if the requisite insurable interest does not exist, decline to pay the death benefit, and merely return to the owner of the policy or the insured's estate the premiums paid, plus statutory interest. If the insurance company does pay the death benefit, under some state laws, the applicable state court or insured's estate or members of the insured's family may force the recipient to disgorge the payment. Other results that may arise from a lack of an insurable interest are inclusion of the death benefit in the insured's taxable estate and the treatment of the death benefit as taxable income to the recipient.

Estate planning practitioners must, therefore, understand the insurable interest rules in effect in those states in which their clients resided when the policy was delivered, as well as those states whose law may otherwise control the clients' life insurance policies. Practitioners must identify those situations in which an insurable interest may not exist, and determine how best to assure that the expected and promised death benefits will, in fact, be paid.

This issue has been largely ignored by estate planners, until the rather dramatic decision of the U.S. District Court for the Eastern District of Virginia, in *Chawla ex rel Giesinger v. Transamerica Occidental Life Insurance Co.*^[1] Now, however, estate planning practitioners must face this complex issue, with respect to both new and existing irrevocable life insurance trusts and other arrangements in which someone other than the insured becomes the owner and beneficiary of a life insurance policy.

I. History of the Insurable Interest Rule: One Person's Gaming is Another's Risk Management

The requirement that a life insurance policy be issued to the insured or to a third party who has an insurable interest in the life of the insured, derives from an 18th-century attempt by the English to restrain the popular practice of buying life insurance on the life of persons accused of capital crimes and elderly celebrities. This was considered tasteless, contrary to public morality, and quite possibly dangerous for the insureds, and it was first prohibited in England by the Life Assurance Act of 1774. This act, which remains in effect in England today, states in rather quaint legalese:

From and after the passing of this Act no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person, or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.[2]

The insurable interest rule first laid down by Parliament in 1774 has been adopted in some form in every state of the United States (and the District of Columbia), either by statute[3] or by case law.[4] The Supreme Court recognized the universality of this rule in its 1881 opinion in *Warnock v. Davis*,[5] in which the insured, a 27-year old Kentucky tanner named Henry L. Crosser, bought a \$5,000 policy of insurance on his own life from the Protection Life Insurance Company of Chicago, Illinois.

The insured then entered into an agreement with a group of investors, under which the investors would pay all fees and assessments payable to the insurer (i.e., the premiums), in exchange for which they would receive nine-tenths of the death benefits.

The insured assigned the policy to the investors, who then paid all of the fees and assessments. At the insured's death, the investors collected nine-tenths of the death benefits from the insurer.

The administrator of the insured's estate, however, sued the insurer to recover the amounts paid to the investors. There was no claim of fraud; the administrator merely argued that the investors lacked an insurable interest in the policy. The trial court found for the administrator, and the Supreme Court affirmed.

The Court stated of the insurable interest rule:

[I]n all cases there must be a reasonable ground, founded upon the relationship of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency

to create a desire for the event. They are therefore, independently of any statute on the subject, condemned, as being against public policy.[6]

The Court noted, however, that the insured bought the policy himself, and that he had an unlimited insurable interest in his own life. The question, therefore, was whether the insured's assignee also needed to have an insurable interest in order for the policy to be valid and the investors to be entitled to receive and retain the death benefits. The Court held that the assignment failed, under the same insurable interest principles that applied to the original purchase of the policy. The Court stated:

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion, merely, of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.[7]

In light of the long and sometimes colorful history of the insurable interest rule, how, one may reasonably ask, has it been so little considered by estate planners for so very long? More importantly, now that the courts have begun to consider the insurable interest rule in an estate planning context, when will it create problems for estate planners? To answer these questions, one must closely examine such issues as when an insurable interest is required, what happens if there is no insurable interest, what persons (both individuals and entities) have an insurable interest in an insured's life, and what can an estate planner do to minimize the potential problems raised by the application of this doctrine to irrevocable life insurance trusts. That is what this article proposes to undertake.

II. When Must an Insurable Interest Exist

In every state statute that describes, with any particularity, the requirement for an insurable interest, the statute requires that the insurable interest must exist "at the time of the making of the contract." [8] The states that do not have such explicit insurable interest statutes oftentimes have a statutory reference or case law that requires an insurable interest "when the policy is effected," which would indicate the same time frame.[9] Couch on Insurance and other authors (the authors of this article included), have at times indicated that certain states require that an insurable interest exist at the time the death benefit is paid, but a review of all of the relevant state statutes and an admittedly less than exhaustive review of the available case law, reveals no indication of such a requirement. These statements may have been based on the type of statutes and cases that require those who receive the benefit of the policy (the beneficiaries) to have an insurable interest in the insured. All of the statutes that impose this requirement,

however, do so only at the time of the making of the contract or when the policy is effected. Many of these statutes also specifically state that a later change of beneficiary or assignment of the policy to a person who does not have an insurable interest will not cause the policy to fail.[10]

A policy will be deemed void as a wagering contract as a result of its lack of an insurable interest if the change of beneficiary is a part of a plan that, along with an assignment of the policy, is designed to permit wagering on the insured's life, even with the insured's consent, such as described in *Warnock v. Davis*, discussed above, or in a recent opinion of the Office of General Counsel of the New York Insurance Department,[11] or in the recent announcements made by the Louisiana and Utah Commissioners of Insurance.[12] These decisions apply a form of step-transaction theory to deem the policy void.

The New York Insurance Department General Counsel's opinion serves as a warning in its review and determination by a governmental organization of the existence, or lack thereof, of an insurable interest in such situations. In the transaction that was the subject of the opinion (which is often referred to as a type of "investor owned life insurance") a bank proposed to lend money to an individual to purchase life insurance policies on the individual's life and to pay the premiums for two years. The loan would be a full recourse loan that would be secured by the policy. Interest would be deferred until the end of the two-year period and the interest rate would be at market rate or higher. The insured had an option to put the policy to a third party investor at the end of the two-year period, for an amount that would cover the repayment amount on the loan, including interest. At the end of the two-year period, the insured could either (i) pay back the loan and keep the policy, or (ii) put the policy to the investor. In addition, a third party would, for a fee paid by the investor, guarantee the investor's obligations under the put.

The opinion of the Office of General Counsel did not focus on the provision of the New York insurable interest statute that permits any person to procure insurance on his or her own life, but rather on the second part of the insurable interest statute (designed to prevent wagering policies), that requires an insurable interest for third parties procuring insurance on another person's life. The opinion letter stated that:

[W]hile it is true that [New York law] expressly allows an individual to procure and immediately transfer or assign to another a policy on his own life...it is the Department's view that the transaction presented involves the procurement of insurance solely as a speculative investment for the ultimate benefit of a disinterested third party. Such activity ... is contrary to the long established public policy against "gaming" through life insurance policies.[13]

Even if an insurable interest exists when the policy is purchased, it should be noted that courts generally hold that no policy may be taken out on an insured's life without the insured's knowledge and consent, even if the person procuring the policy has an insurable interest. There are exceptions to this rule in certain states for policies

acquired by the insured's spouse and for policies on an insured who is under a legal disability, such as age or mental incompetence.[14]

III. Consequences of the Absence of an Insurable Interest

A. Denial of Death Benefits

The general rule in the United States is that an insurance policy is void in the absence of an insurable interest at the time the contract was entered into. Some state statutes, but not all of them, state that the insurer's only obligation under a void policy is to repay the premiums paid and interest, sometimes at a statutory rate.[15] In the absence of such a statute, the questions that must be asked, therefore, are: (1) what happens if an insurer pays out the death benefit on a void policy, and (2) can an insurance company be forced to pay out the policy proceeds on a void policy?

B. Payment of Death Benefits to Other than the Named Beneficiary

Fully one-half of the states (twenty-five) have insurable interest statutes that explicitly state:

[I]f a beneficiary, assignee, or other payee under a contract made in violation of [the insurable interest rules] receives from the insurers any benefits from the contract upon the death ... of the person insured, ... the executor or administrator of the person insured may maintain an action to recover the benefits from the person receiving them.[16]

Utah's and Wisconsin's insurable interest statutes provide that if no insurable interest exists, a court can order the proceeds to be paid to someone who is "equitably entitled" to them, including holding the proceeds in a constructive trust for the equitable distributees.[17] In a recent Texas case, *Stillwagoner v. Travelers Insurance Co.*,[18] the court held that an insurer could not raise the beneficiary's lack of an insurable interest as a defense to payment, but that the beneficiary only holds the proceeds for the benefit of those entitled by law to receive them.

The majority view in the United States is that the insured's estate or the insured's family (either by specific statutory authority or as the presumed equitable distributees) have claims to any proceeds paid out on policies that lack an insurable interest. Thus, even if the insurer ignores the lack of an insurable interest in a policy and pays the death benefit, those persons who are not designated as the beneficiaries of the policy but who have claims to the insured's estate, and the insured's estate itself, may raise the issue of the lack of an insurable interest.

This majority rule is most troubling from an estate tax perspective, because the mere existence of an insured's estate's claim may result in the inclusion of the policy proceeds in the insured's estate for estate tax purposes, even if the insured's

executor declines to pursue the claim. The value of the claim would be includable in the insured's taxable estate under Section 2033,[19] unless the executor could successfully argue that the claim arose after the insured's death. Alternatively, the proceeds could arguably be included in the insured's gross estate under Section 2042(1), because the existence of the claim by the estate causes the insurance benefits to be "receivable by the executor," even if the claim is not pursued, or under Section 2042(2), because the insured's ability to change the beneficiaries of the insurance by changing the terms of his or her will constitutes an incident of ownership. However, the executor may be able to argue that since the policy was void, the amounts received were not payable under an insurance contract.

C. Payment of Death Benefits to Named Beneficiary

An insurer may be required to pay the contracted-for death benefit to the designated beneficiary, even in the absence of an insurable interest, under the doctrines of estoppel and waiver. Most states that have considered the issue preclude the use of these doctrines to compel an insurer to pay the promised death benefits, where no insurable interest exists. In some states, however, the doctrines of estoppel and waiver can preclude the insurer from asserting the trust's lack of an insurable interest as a defense to a claim for the proceeds. Whether a practitioner can find solace in the application of these doctrines, however, depends on the state whose law applies to the trust and the insurance contract, and the actions that have been taken or representations that have been made by the insurer, directly or through its agent.

The U.S. Supreme Court defined the doctrine of equitable estoppel (also sometimes known as estoppel in pais) under the principle that:

where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage.[20]

Thus, an insurer could be estopped to refuse to pay life insurance death benefits, even absent an insurable interest, if the insurer's actions and representations have been inconsistent with this position, and if the trustee or other policy owner or beneficiary has relied to its detriment on those actions and representations.

The doctrine of waiver, while related to and often confused with the doctrine of equitable estoppel, is a separate legal principle that applies in situations that may be quite different from those of equitable estoppel. The doctrine of waiver prevents one from asserting a legal right, after one has made a deliberate and intentional relinquishment of that known right.[21] One does not need to know that a legal right exists in order to be estopped from asserting that right; one does need to know that it exists to waive it.[22]

Courts in at least twelve states have held that neither the doctrine of equitable estoppel nor the doctrine of waiver can prevent an insurance company from refusing to pay a benefit to one who obtained the policy without an insurable interest. These courts generally view a policy issued to one who lacks an insurable interest as void ab initio as a gambling contract, and hold that a void policy cannot be validated by estoppel or waiver. In essence, these courts prefer the public policy that requires an insurable interest, over the policies upon which are based the equitable theories of estoppel and waiver.[23]

Not all courts prefer the doctrine of insurable interest over the doctrines of equitable estoppel and waiver, however. Courts in at least eight states have held that the acts of the insurer or its agents can cause it to be estopped from asserting or to have waived any claim that the policy was issued without the requisite insurable interest.[24] In three of these states, however, the law is not entirely clear, because other courts have held that no such defenses may be asserted.[25]

One should also consider the substantial line of cases involving the application of the doctrines of estoppel and waiver to life insurance policies issued by fraternal or similar mutual benefit associations. These suits involve beneficiaries who are not within the class of persons permitted by state statutes to receive benefits under such policies. In effect, these state statutes create a separate, and usually more limited, insurable interest rule for policies issued by such associations.

The cases involving fraternal or other mutual benefit associations should be divided between those which involve violations of statutory insurable interest requirements and those that involve violations of insurable interest requirements set forth solely in the association's charter or by-laws.

The latter group of cases should largely be ignored as precedents for commercially-issued policies, because, as one court explained:

[w]e must brush aside those cases involving fraternal or benefit insurance where the policies are integrated with and made subject to existing by-laws or constitutions, and are thereby limited to a particular class of beneficiaries. Such limitations take into account the theory and purpose of such associations, as expressed in their own constitutions.[26]

Simply put, an association can certainly waive the provisions of its own charter and by-laws more easily than it can waive a state statute.

Courts in fourteen states have held that the acts of a fraternal or similar mutual benefit association or its agents cannot cause it to be estopped from asserting or to have waived any claim that the policy was issued without the requisite insurable interest required by state laws governing such associations.[27] These courts have generally taken the position that such statutes are designed to regulate the conduct of such associations and, therefore, cannot be waived by the associations themselves.

On the other hand, courts in six states have held that the acts of a fraternal or similar mutual benefit association or its agents may cause it to be estopped from asserting or to have waived any claim that the policy was issued without the requisite insurable interest required by state laws governing such associations.[28] Like the cases involving commercially-issued life insurance policies, these courts simply will not permit the association to take advantage of prior actions or statements that indicated to the policy-owner or beneficiary that the policy was validly issued.

Considering both the cases involving general insurable interest statutes and those involving statutes regulating fraternal and similar mutual benefit associations, there are at least four states whose courts clearly will, in proper cases, permit assertion of the doctrines of waiver or estoppel in insurable interest cases,[29] at least seventeen states whose courts clearly will not permit the assertion of these doctrines in insurable interest cases,[30] and at least seven states whose courts have produced inconsistent opinions on this issue.[31] Twenty-two states and the District of Columbia appear to have no law directly on point. Thus, while a majority of the states that have considered this issue have refused to allow an insurance policy that was issued without the requisite insurable interest to be validated by the doctrines of equitable estoppel or waiver, a substantial majority of states either permit the assertion of such equitable principles in insurable interest cases or have no clear rule on this issue.

Interestingly, the cases that have allowed estoppel require only that the insurer or its agent continue to accept premiums after they have become aware of the questionable insurable interest.[32] A good illustration of this principle is *Security Benefit Association v. Verdery*,[33] in which Xenia A. Verdery was named beneficiary of a \$3,000 life insurance policy (benefit certificate) issued by a fraternal organization, insuring the life of Max H. Zimmerman, Ms. Verdery's husband. Five years after the policy was issued, however, Mr. Zimmerman disappeared, and seven years later, Ms. Verdery secured a divorce from him on the ground of desertion. (She later married Mr. Verdery, and took his last name as her own.)

Ms. Verdery then claimed the death benefit under Mr. Zimmerman's life insurance policy, arguing that, notwithstanding her divorce and her marriage to another, she remained the proper beneficiary under the policy. State law (Colorado) stated that only blood relations and spouses had an insurable interest in a policy issued by a fraternal organization.[34] In discussing whether the insurable interest rule for policies issued by fraternal organizations precluded Ms. Verdery from receiving the death benefit, the Supreme Court of Colorado stated:

[t]hese questions, under the facts disclosed, need not be determined, since it appears that plaintiff continued, for more than seven years after the disappearance of Zimmerman, to pay the premiums upon the certificate in question, which were accepted by the Association with full knowledge that Zimmerman had disappeared, that plaintiff had been divorced, was remarried and was paying such premiums as the beneficiary designated in the certificate.

Plaintiff paid such premiums both before and after her divorce from the insured; under such circumstances the Association ought not to be heard to dispute her right of recovery.[35]

D. Income Taxation of Death Benefits

One possible result of a determination that an irrevocable trust lacks an insurable interest in the insured on whose life it owns a policy of insurance exists, is that the proceeds, if paid by the insurer, will be denied favorable income tax treatment. Section 101(a) states that “gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured.” This exemption, however, is limited to amounts paid “under a life insurance contract,” and courts have held that amounts paid with respect to a policy that was void because of the absence of the requisite insurable interest, are not payments “under a life insurance contract” and are, therefore, taxable income.

Perhaps the most significant case on point is *Atlantic Oil Co. v. Patterson*,[36] in which the Fifth Circuit denied the income tax exclusion for death benefits paid to a taxpayer who lacked the insurable interest required by state law. The taxpayer routinely bought accident insurance on each of its truck drivers, with the death benefits to be paid to the taxpayer and certain health benefits to be paid to the employee. The taxpayer chose the insurer and paid the premiums; the employee merely signed the application.

In 1957, Webster, one of the taxpayer’s truck drivers, was killed. The taxpayer applied for and received the \$28,750 proceeds on the policy on Webster’s life, which it excluded from its gross income. The IRS disallowed the exclusion, and the taxpayer paid the tax and sued for a refund.

In a trial before a jury, the U.S. District Court for the Northern District of Alabama charged the jury that: (a) the taxpayer had no insurable interest in the driver’s life that would permit it to take out a valid insurance policy on that life; (b) if the driver himself voluntarily took out the policy of insurance, it was valid, and that the driver had a “perfect right to name the taxpayer as beneficiary of the death benefits”; and (c) if this action on the part of the driver was the result of “compulsion or some coercion, economic or otherwise,” then the jury should find that the taxpayer had really taken out the policy, that the policy was therefore void as a wagering contract, and that therefore the funds were not proceeds excludable from the taxpayer’s income.[37] The jury found in favor of the government, and the taxpayer appealed.

The Court of Appeals for the Fifth Circuit stated that “the evidence at the very least showed that unless the employee, Webster, agreed to take out the policy on behalf of the company, he would not be employed.”[38] Thus, it affirmed the jury determination that the death benefits were not proceeds of a valid insurance policy excludable from taxpayer’s income.

Practitioners should keep the tax issue in mind, because even if the insurer neglects to raise the question of insurable interest, the Internal Revenue Service (the “IRS”) can do so on its own accord. Such an action by the IRS, furthermore, could encourage the insurer to reconsider its position, and create at least two levels of problems for the practitioner.

IV. Who has an Insurable Interest?

Twenty-eight states have statutes that describe, with reasonable detail, those persons or entities who have an insurable interest in the insured.[39] These state statutes provide an exclusive list of those with an insurable interest and case law cannot expand on that list. Another eleven states[40] list in their statutes certain persons or entities (sometimes only one type of entity) who are considered to have an insurable interest in the insured, but these lists are not exclusive.[41] Other groups of persons or entities not expressly mentioned in the statute can have an insurable interest in the insured, but the existence of such can only be determined under that state’s case law. The remainder of the states (and the District of Columbia) have no statutory insurable interest rule or have a statute that states only that an insurable interest is required. In these jurisdictions, case law is the only means of determining who is considered to have an insurable interest.

Case law is the only means of determining if a particular person fits within the definition set forth in the statute, even in a state that has an insurable interest statute that is an exclusive list of those with an insurable interest in the insured.

A. The Insured

The insured is always permitted to purchase insurance on his or her own life and designate anyone as the beneficiary of the policy, either under the applicable insurable interest statute or by case law. Most state statutes, if they address an individual having an insurable interest in his or her life, usually contain language which is similar to the language that appears in the Alaska insurable interest statute, which states, in part:

[A]n individual has an unlimited insurable interest in his or her own life...and may lawfully take out a policy of insurance on his or her own life...and have the same made payable to whomsoever he or she pleases, regardless of whether the beneficiary so designated has an insurable interest.[42]

Admittedly many state statutes do not state the rule as broadly as the Alaska statute, but the results are the same. Therefore, in *Chawla*, discussed in detail below, if the insured had purchased the policy on his life and named his friend as a beneficiary, or named himself as the beneficiary and subsequently transferred the policy to his friend or to a trust for her benefit, the insurer’s argument that the trust lacked an insurable interest would not have been successful.

Practitioners who decide to have the insured initially purchase the policy with the intention of transferring the policy immediately to someone or some entity who does not have an insurable interest, should not feel so sanguine about this plan. As discussed above, the Utah and New York Departments of Insurance held that such a prearranged plan violated the state's insurable interest statute based on the intent of the parties. Furthermore, the opinion of the Supreme Court in *Warnock v. Davis*, cited herein, held that such a prearranged plan would violate the policy behind the insurable interest rule, since it can be presumed by the immediate transfer that the new owner intended to wager on the insured's life.

B. Other Persons (Generally)

For all other persons who wish to purchase insurance on another person's life, the statutes and case law generally provide that:

a person may not procure or cause to be procured an insurance contract upon the life... of another person unless the benefits of the contract are payable to the individual insured, the personal representative of the individual insured or to a person having, at the time the contract was made, an insurable interest in the insured.[43]

The most common definitions found in state statutes of those with an insurable interest are:

1. A person related closely by blood or by law, who has an insurable interest as a result of the substantial interest in the insured's continued life, engendered by love and affection.
2. Other persons who have a lawful and substantial economic interest the life of the insured, as distinguished from an interest that would arise only by, or would be enhanced in value by, the death of the insured.

Other state statutes may also consider other persons or entities to have an insurable interest in the insured under certain circumstances. For example, certain charities may be deemed to have an insurable interest in their donors, employers or employee trusts in certain employees, and business entities in their owners.

It is case law, however, that establishes who is "closely related" to the insured and who has a "lawful and substantial economic interest" in the insured's continued life.

C. Other Persons Who Always Have an Insurable Interest

The insured's family members may or may not have an insurable interest in the insured based on the degree of consanguinity to the insured, but two relationships are considered so close to the insured that an insurable interest is always found. These are the insured's spouse and dependent children.

1. Spouses

The insurable interest of a person in his or her spouse is universally recognized in U.S. cases. The love and affection that spouses are deemed to hold for one another are deemed to protect the insured from the gamble his or her spouse is taking on the insured's life by owning the policy. This is the law in England as well, and it is interesting that the theory developed at a time when marriages of convenience among the upper classes (who were the legislators of the time) for pure financial and political gain were arguably more prevalent than they are today.

Spouses also have another basis for claiming an insurable interest in their insured spouses. Spouses have substantial financial obligations toward each other, so that a spouse always has a lawful and substantial economic interest in the insured-spouse's continued life.

Courts might apply the same underlying theory when considering this issue in regard to a same-sex marriage or civil union, if recognized under the applicable state law. The court could hold that the love and affection of the spouse or partners and the financial obligations each has toward the other under the provisions of the recognized same-sex marriage or civil union creates an insurable interest. When considering this theory, one author notes that it would "apply to marriages performed in Massachusetts after May, 2004, unless Massachusetts subsequently passes a constitutional amendment prohibiting such marriages, similar to Hawaii, Alaska, Nevada and Oklahoma."^[44] The author cites a recent Massachusetts case that held that "limiting the benefits of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."^[45]

This theory may also permit those who enter into a relationship referred to as a "domestic partnership" to take the position that each partner has an insurable interest in the other, based on love and affection and the financial obligations toward each partner set forth under the provisions of the applicable domestic partner statute. Several states have enacted statutes authorizing the domestic partner status.^[46] Under these domestic partnership acts, however, not all of the benefits of an opposite-sex marriage are conferred on the partners and in none of the acts is the concept of an insurable interest mentioned.

A same-sex couple that is married in a foreign country which recognizes a civil union^[47] may be considered to have insurable interests in each other, if the marriage were to be recognized in the United States.

2. Dependent Children

Dependent children have the same basis for holding an insurable interest in their parents as spouses have for each other, namely, the love and affection that children hold for their parents which protects their parents from the child wagering on a parent's life, and, as a dependent, the child has expectations of support and maintenance under the law which means the dependent child has a lawful and substantial economic interest in the continued life of the insured. No U.S. case has held that a dependent child lacks an insurable interest in the life of the child's parents.^[48]

D. Other Persons Who Sometimes Have an Insurable Interest—Other Family Members

1. Adult Children

Adult children have the closeness to their parents that permits an insurable interest due to love and affection, but they do not have the financial expectations that result in a lawful and substantial economic interest in the continued life of the insured that a spouse or dependent child holds. The relationship between a child and his or her parent, regardless of the child's age, however, is such that throughout the United States, courts rarely will deny that an adult child has an insurable interest in his or her parents.^[49] Nonetheless, the ties between adult children and their parents are not as strong as those of dependent children, and practitioners should not necessarily assume that an insurable interest will be found between an adult child and his or her parents.

2. Parents

As is the case with children and spouses, courts have uniformly recognized that parents have an insurable interest in their children, not on the basis of financial claims but purely on the basis of love and affection. This is a similar position to the position of adult children who have an insurable interest in their parents. Again, however, the ties between parents and their insured children are not as strong as those of an insured and a spouse or dependent child, and practitioners should not necessarily assume that an insurable interest will be found between a parent and an insured child.

3. Former Spouses

An insurable interest in a divorced spouse may be called into question in two situations. First, it may be questioned where the insurance was obtained while the couple was married, and most courts have held that pursuant to the statutory requirement that an insurable interest exist only at the time of the making of the contract, the loss of such interest afterwards does not invalidate the contract and a subsequent divorce does not render the policy void, unless the rights were terminated pursuant to a settlement agreement or statute.[50]

Second, the insurable interest issue may arise when a policy is obtained by a spouse who is already divorced (or about to be divorced and engaged in planning for the divorce.) In this case, the ex-spouse could only be considered to hold an insurable interest in the insured if the insured owed the ex-spouse certain amounts under the separation agreement and therefore the ex-spouse has a lawful and substantial economic interest in the continued life of the insured. In such cases, however, the ex-spouse is considered a creditor, and creditors, although deemed to have an insurable interest in the debtor-insured, are treated differently than many other persons or entities with an insurable interest in the insured, as discussed below. As a creditor, the ex-spouse is only entitled to that much of the death benefit equal to the amount owed to him or her.[51]

4. Persons Engaged to be Married

The more distant the relationship between the parties, the more the parties must rely upon an economic interest in the continued life of the insured, as discussed below, to create an insurable interest. Persons engaged to be married may have a real economic incentive for the insured's continued life, based on a prenuptial agreement or even spousal rights will that arise under state law upon marriage.[52] A marriage is a speculative event, but it buttresses the argument that the fiancée or fiancé had an insurable interest in the insured, if the policy was purchased immediately before the marriage or after the wedding invitations were sent, the prenuptial agreement signed and the nonrefundable deposit made on the reception location. It is harder to argue that there is an insurable interest when a policy is purchased at a time when the date for the marriage had not been set or there are no plans to actually get married for several years after the purchase. Also, if the marriage did not take place and the fiancée or fiancé would have been liable for a breach of promise to marry, the engaged persons had an economic interest in the continued life of each other, in order to avoid these damages.[53]

5. Siblings and More Distant Relations

The U.S. law on whether a sibling or more distant relative has an insurable interest in the insured is particularly inconsistent. Generally, the case law that addresses the insurable interest of siblings can be divided into three general groups of

cases: (i) those that hold that siblings, in light of the relationship alone, are closely related to the insured and therefore have an insurable interest in the insured;[54] (ii) those that hold that siblings, although not having an insurable interest by virtue of the relationship alone, have an insurable interest in light of the relationship and another interest the sibling had in the insured (such as an interest as a dependent, creditor or business partner, but a sibling's insurable interest would be considered more expansive than a mere creditor or business partner who was not related to the insured);[55] and (iii) those that hold that siblings do not have an insurable interest in the insured, unless one is established under other criteria.[56]

The reasoning behind the decisions that find an insurable interest in a sibling, in part or in whole because of the relationship of siblings, is the same as the rationale that finds an insurable interest between a parent and child, namely that as a result of the love and affection between the parties the policy was not a wager policy. That different courts view the extent of love and affection inherent in the relationship of siblings differently is not surprising, and may reflect the personal experiences of the judges with their own families and with the families who have appeared before them in other contexts.

Courts do not generally view a stepchild as automatically holding an insurable interest in his or her stepparent. Courts generally require special circumstances to find an insurable interest, such as the child being financially dependent on the insured or the relationship being closer to a parent/child relationship.[57] Interestingly, a Georgia court interpreting the Federal Employees' Group Life Insurance Act[58] determined that a stepdaughter had an insurable interest in her stepfather, but in order to arrive at that decision, the court had to adopt an "equitable adoption" concept to satisfy the insurable interest rules.[59] The decision was predicated on the special circumstances of the case since the stepdaughter's grandparents had given up custody rights to her and the stepfather had promised to raise the child and adopt her, although it had not been done by the time of his death.[60]

E. Other Persons With Conditional or Limited Insurable Interests—Pecuniary Relations

The basis for finding that a relationship between non-family members gives rise to an insurable interest that will allow such persons to obtain life insurance on the insured's life, is generally that these persons have a "lawful and substantial economic interest in the continuation of the life, health or bodily safety" of the insured; their interest cannot be enhanced in value by the death of the insured. One of the major treatises on insurance law states, on this point:

[I]t has been held to be immaterial that the [pecuniary] benefit to be derived from the insured's continued existence is not capable of precise pecuniary valuation, or that it is indirect, although there is also authority to the contrary on the latter point. There is some authority that insurable interest can be based on a

moral obligation. But other courts have held that a claim unenforceable in law or equity will not give rise to an insurable interest. Under the latter view, a voluntary contribution to the insured's support does not create an insurable interest. It is also the case that an insurable interest cannot be grounded on a mere personal interest in the life of the insured.[61]

Most courts seem to look for a financial relationship between the owner of the policy and the insured, in such cases, and find an insurable interest if the owner of the policy has: (i) a direct[62] and actual financial expectancy;[63] (ii) which expectancy would be adversely and directly affected by the insured's death;[64] and (iii) which owner will not be enriched upon the insured's death.[65] As one court stated: "[Y]ou may make yourself whole but you shall not have a greater direct pecuniary interest in [the insured's] death than you may have in his life." [66]

1. Creditors

The prevailing view recognizes that creditors have a lawful and substantial economic interest in the continued life of the insured (and, thus, an insurable interest), because they will financially benefit from the insured's continued life—the insured's debt will be paid. This insurable interest, however, is limited in extent, and creditors are only entitled to that much of the death benefit that is equal to the amount of the debt owed to them.[67] They have no insurable interest in excess of the amount of the debt.[68] A substantial number of courts, however, have held that the entitlement of a creditor to excess insurance proceeds can, in appropriate cases, be varied by a clear demonstration of a contrary intent of the parties.[69]

2. Partners and Co-Venturers

Courts that have addressed the issue of whether partners have an insurable interest in each other, have focused on two points: (i) did one partner advance funds for the benefit of the other partner (such as advancing the money to meet a partner's obligation to make a capital contribution) thereby making the partner advancing such sums the creditor of the other partner,[70] and (ii) did the partnership rely on the decedent's partner's expertise for partnership affairs, thereby creating a business relationship or a type of key employee relationship.[71] The partners or the partnership will have an insurable interest in a partner's life if either of these questions is answered in the affirmative. The mere existence of the partnership is not enough, however, to establish an insurable interest in a partner either by the other partners or the partnership.[72]

3. Employers

Until recently, many companies took out life insurance on their employees that was payable to the company. It was a relatively inexpensive means of providing a cash flow for company needs, including funding retirement obligations and other employee benefits. Companies were considered to have an insurable interest in their employees under the theory that they have a substantial economic interest in the continued life of an employee, as a result of the human resource investment a company makes in each employee.

Several recent cases, however, have held that an employer has no pecuniary interest in an employee for regular human resources costs incurred on each employee; rather, the company must show that expenses incurred were unique to that employee's position and the death of the employee would result in a loss to the company of its investment in that employee and the need to incur such costs again, in order to replace that employee.[73]

F. Other Persons Who Have a Pecuniary Interest

"Close" relationships that are not business relationships must rely for an insurable interest on a pecuniary interest. Such relationships include distant relatives of the insured, such as unmarried partners of the insured, grandparents, grandchildren, in-laws, cousins, nieces, nephews, aunts, and uncles. It would also include persons who have moral claims, but not legal claims, on the insured. These persons have no insurable interest, absent an explicit pecuniary interest in the insured's continued long-life.[74]

The question here is whether two unrelated people who are financially dependent upon each other (or the one who is financially dependent upon the other) have an insurable interest in each other's lives? The answer is, maybe. An insurable interest is created where parties enter into an enforceable contract before the policy was acquired providing for certain financial obligations on the part of the insured, if the financial obligations amount to a substantial economic interest in the party who is paying the obligations and those obligations will end at the party's death. The amount of insurance must be carefully considered, in light of the current case law and statutory language which finds no insurable interest based on a pecuniary interest if the financial position of the owner of the policy will be enhanced by the insured's death.[75]

V. Trusts and Trustees

There is a surprising dearth of case and statutory law concerning how one determines whether a trustee has an insurable interest in the life of the trust's grantor or beneficiaries. This issue generally turns on whether one views the trust as a separate legal entity that must have its own basis for an insurable interest (the "entity view"), or as an aggregation of its beneficiaries whose insurable interests provide a sufficient interest

for the trustee (the “aggregate view”). Adoption of the entity view means that a trust will only rarely have an insurable interest in the life of the grantor or beneficiary, unless there is between the trust and the insured a special business or investment relationship, such as where they were partners or the insured owes money to the trust.

Adoption of the aggregate view, however, means that most trusts will have an insurable interest in the life of the grantor or beneficiaries, if the trust beneficiaries have an insurable interest. As most gifts in trust are made for the primary benefit of close family members, most irrevocable life insurance trusts would have an insurable interest in the life of the grantor or beneficiaries, under the aggregate view. The aggregate view, however, would still not permit the valid acquisition of a life insurance policy by a trust (or, in some states, designation of the trust as beneficiary of a valid life insurance policy), if the trust beneficiaries are all persons who lack an insurable interest in the life of the insured. Thus, even under the aggregate view, a trust could not be used as a device to convey the economic benefits of a life insurance policy to a group of persons all of whom lacked an insurable interest in the life of the insured.

Furthermore, the aggregate view would raise issues for trusts where some but not all beneficiaries have an insurable interest, unless the statute or case law clearly addressed that issue. The only state statute that takes the aggregate position for a trust is the statute recently enacted in Maryland and it allows such a trust to be considered to have an insurable interest if the death benefit is payable primarily for the benefit of trust beneficiaries with insurable interests. It does not, however, define the term “primarily.”

In other states that accept the aggregate theory either under new statutes or case law, it has to be made clear whether or not the existence of one or more beneficiaries without an insurable interest will invalidate the insurable interest of the trust. Also, what if the trust is a pot trust with a spray provision and one or more permissible members of the class of beneficiaries is not a person with an insurable interest, or what if the beneficiaries are not ascertainable due to powers of appointment held by non-beneficiaries?

A. Case Law

Much attention has been paid to the most recent insurable interest case involving a trust, *Chawla ex rel Giesinger v. Transamerica Occidental Life Insurance Co.*,^[76] because the district court clearly adopted the entity view, and because of the very interesting facts. The insured, Harald Geisinger, met Vera Chawla in connection with a real estate sale and they became close friends until the insured’s death. During their friendship, they engaged in several joint real-estate ventures, and the insured intermittently lived at the home of Ms. Chawla and her husband, a medical doctor.

Ms. Chawla applied to Transamerica Occidental Life Insurance Co. (“Transamerica”) for a \$1 million policy on the life of the insured, under which she would own the policy and be its sole beneficiary. Transamerica had previously issued

three insurance policies on the insured's life, but this time it rejected the application, because it concluded that Ms. Chawla lacked an insurable interest in the insured's life.[77]

The insured executed a new application, naming as the owner and beneficiary an irrevocable trust that he had previously created and for which he and Ms. Chawla were joint trustees. The trust owned the insured's residence, and the insured had reserved the lifetime right to occupy the residence and the right to all of the trust's net income.[78] At the insured's death, the trust instrument directed that the trust assets would be distributed solely to Ms. Chawla. The trust agreement stated that the trust was subject to the laws of the District of Columbia and beyond the general and broad powers provided in the agreement, it did not specifically provide for the ownership of a life insurance policy on any beneficiary.[79]

Transamerica issued the policy to the trust, naming it as both owner and beneficiary. During the following year, the trustees applied for and were granted an increase in the policy coverage to \$2.45 million. A new policy application was filed with the request for an increase in coverage.

On both the original application and the request to increase the coverage, the insured made numerous omissions and misrepresentations about his health and medical history. He neglected to note, among other things, that within the past five years he had undergone brain surgery in Austria for the partial removal of a tumor, he had suffered a series of neurological problems, for which he had been treated with several spinal taps, he had developed motor dysfunction in his right hand, for which he had received radiation therapy, he had undergone additional surgery in the United States, including the insertion of a shunt in his head to drain excess fluid from his brain, and he had a serious drinking problem and had been hospitalized repeatedly for alcohol abuse and related problems, including "episodes of unconsciousness" and "suspected psycho motor seizures." [80]

The insured died of heart failure nearly a year after the policy limit was increased, and Ms. Chawla, as trustee, filed a claim for the death benefits. Transamerica, as a matter of practice, since the insured had died within two years of the policy application, investigated the insured's health problems and rescinded the policy on the ground that the insured had failed to make full disclosure in his applications. The company refunded to the trust over \$47,000, representing the premiums that had been paid. There were other policies naming Vera Chawla as the beneficiary which were applied for outside of the two year window, which Transamerica paid.

The trustee filed suit in the U.S. District Court for the Eastern District of Virginia, alleging that Transamerica's rescission was unlawful. The district court held first that the substantive law of Maryland applied to the case, because that was the forum state governing the policy. The suit was filed in Virginia, but Virginia choice of law principles apply the substantive law of the state where the contract was made.[81]

The court cited two key facts as determinative that the contract was made in Maryland. First, both the original policy and the documents increasing the death benefit were delivered to Ms. Chawla at her residence in Maryland. Second, the premiums were paid in Maryland, and the policy stated that it was not effective and binding until the first premium was paid. Therefore, the court held that the contract was governed by Maryland law.

The district court then held that the contract was void on two grounds. First, the court held that the insured had made material misrepresentations in his application. Maryland law states that a “material misrepresentation in the form of an incorrect statement in an application invalidates a policy issued on the basis of such application.”[82] The court concluded both that misrepresentations regarding the insured’s health had been made, and that they were “fraudulent or material to the acceptance of the risk or to the hazard that the insurer assumes.”[83]

Second, the court held that, as a matter of law, the insurance policy was void because the trust “maintained no insurable interest in the life of the decedent.”[84] The Maryland Insurance Code states that a life insurance policy procured by a person on the life of another is valid only if the benefits are payable to the insured, the personal representative of the insured’s estate, or to “a person with an insurable interest in the individual insured at the time the insurance contract was made” (emphasis supplied).[85] The court then noted that the Maryland Insurance Code defines a “person” as “an individual, receiver, trustee, guardian, personal representative, fiduciary, representative of any kind, partnership, firm, association, corporation or entity.”[86] The trustee was a person and, therefore, was required to have an insurable interest in the insured, or the policy would be void ab initio.

The Maryland Insurance Code also states that an insurable interest in personal insurance includes only certain economic and family relationships,[87] and that:
[a] lawful and substantial economic interest in the continuation of the life, health, or bodily safety of the individual is an insurable interest but an interest that arises only by, or would be enhanced in value by, the death, disablement, or injury of the individual is not an insurable interest.[88]

The district court held that the trust had no discernable economic or family interest in the continued life of the insured.[89] Therefore, the policy was void and the insurer needed only to return the premiums paid, plus statutory interest.

Finally, Ms. Chawla argued that Transamerica should be estopped from raising the insurable interest defense, because it knew that the policy was held by a trust and that Ms. Chawla was the remainder beneficiary of the trust. Knowing this, the insurer had continued to accept premiums, leading the trustees to believe that it would pay the death benefit. The court, however, disagreed.

The district court cited Maryland case law to the effect that public interest, as protected by the insurable interest doctrine, is “of paramount important and overrides the equitable doctrines of waiver and estoppel.”[90] The court stated that:

[t]his is true even where that third party deliberately includes misleading or false information in the application. *Id.*; *Serdenes v. Aetna Life Ins. Co.*, 21 Md.App. 453, 319 A.2d 858, 863 (Md.App.1974); see also *Shepard v. Keystone Ins. Co.*, 743 F.Supp. 429, 432-33 (D.Md.1990). “It is immaterial that it is the agent who inserts the false statements about material matters in an application for insurance, because if the insured has the means to ascertain that the application contains false representations, he is charged with the misrepresentations just as if he had actual knowledge of them and was a participant therein.” *Parker v. Prudential Ins. Co. of America*, 900 F.2d 772, 774 (4th Cir. 1990).[91]

On appeal, the Fourth Circuit affirmed the district court’s holding that the insured had made material misrepresentations on his application, though it recognized that the insured may have made sufficient disclosures, either intentionally or by the existence of surgical scars that were obvious to the examining physician, to render some of the misrepresentations immaterial. The policy was void because of sufficient undisclosed misrepresentations were clearly material.[92] The court also affirmed the district court’s conclusion that Transamerica could not be estopped to raise the claim that there was no insurable interest.[93]

The Fourth Circuit, however, vacated the holding of the district court that the trust lacked an insurable interest in the insured. The court noted that this was an issue of some importance, and that the district court’s “reasoning on this point is susceptible to being interpreted as concluding that, under Maryland law, a trust can never possess an insurable interest in a person’s life.”[94] The court stated:

Because the district court correctly awarded summary judgment to Transamerica on the misrepresentation issue, its alternative ruling appears to have unnecessarily addressed an important and novel question of Maryland law. And, as a general proposition, courts should avoid deciding more than is necessary to resolve a specific case. This important aspect of the doctrine of judicial restraint has particular application when a federal court is seemingly faced with a state-law issue of first impression. *Cf. Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968) (observing that, in certain circumstances, federal courts should abstain from ruling on “novel” state-law issue of “vital concern”). In these circumstances, we vacate as unnecessary the district court’s alternative ruling that the Trust lacked any insurable interest in Giesinger’s life.”[95]

The Fourth Circuit, however, did not question or criticize the legal analysis of the Chawla district court; it merely held that the court need not have undertaken that analysis at all. Many practitioners had hoped that the Fourth Circuit would reverse the district court and hold that a trust had an insurable interest in the life of

an insured, because the beneficiaries of the trust on the date the policy was purchased by the trust had insurable interests.

Merely vacating the district court's insurable interest holding provides no relief to practitioners who have a file cabinet full of irrevocable life insurance trusts, each of which initially purchased the policies it holds on the life of the insured grantor. An insurer contending that a trustee lacks an insurable interest can still cite the district court opinion in *Chawla* as the legal analysis of one federal judge.

As will be noted below, however, *Chawla* is not the only case to address the question of when a trustee has an insurable interest in the life of the grantor, but the body of law on this important issue is surprisingly emaciated. The oldest case to address this issue, albeit in dissent and with questionable analysis, was *Staples v. Murray*,^[96] which involved a policy of war risk insurance issued to a soldier going to fight in World War I.

In *Staples v. Murray*, Clyde Murray enlisted in the U.S. Army to fight in World War I, around which time he bought a \$10,000 war risk life insurance policy on his own life. Mr. Murray named his brother, Lloyd, as the beneficiary of the policy and requested that he "see that one-half of his insurance amounting to five thousand (\$5,000) dollars, be used to educate and to promote the best interests of Harold B. Staples, acting jointly with [the insured's wife] in executing this duty."^[97] The brother promised to do as requested.

At some time after the insured returned from war, he wrote a letter attempting to revoke the provisions he had made in favor of his son and wife. At the insured's death, his wife, on behalf of the insured's son, sued the insured's brother, seeking to impose a trust upon one-half of the fund. The trial court held for the brother, that no trust had been created, and the Kansas Supreme Court affirmed.

Justice Johnston, however, dissented, finding that a trust had been validly created. Justice Johnson then stated:

It is said that the child had no insurable interest in the life of the trustor and could not have been legally named as a beneficiary in the policy, but that is not material, since a legal beneficiary was named, and since it was competent for the trustor to prescribe that the trustee should pay the fund or a part of it to one not related to him. A trust in the proceeds of a life insurance policy may be declared and the designated beneficiary required to apply or pay over to a third person, a stranger. *Northwestern Masonic Aid Ass'n v. Jones*, 154 A. 99, 26 A. 253, 35 Am. St. Rep. 810; 39 Cyc. 73, and cases cited. [emphasis supplied.]

This would have been a very important declaration of the ability of a trustee to hold a policy of insurance on the life of the grantor, without regard to the existence of an independent insurable interest or even beneficiaries who had an insurable

interest, but for two problems. First, it is a statement in dissent, which lacks significant value as precedent.

Second, Justice Johnston relies entirely for authority on *Northwestern Masonic Aid*, which involved a policy owned by the insured and the designated beneficiary of which was the insured's estate. The insured's executor, in that case, was directed to divide the proceeds between the insured's wife and certain brothers and sisters. Nothing in *Northwestern Masonic Aid* discussed the insurable interests of trustees, or even suggested that a trust had been created. The word "trust" does not appear in that opinion. Thus, the statement of Justice Johnson in *Staples v. Murray*, while interesting, has little analytical value.

The first clear discussions of this issue came from the courts of Missouri, beginning with *Butterworth v. Mississippi Valley Trust Co.*[98] In *Butterworth*, the insured, Asa C. Butterworth, assigned an insurance policy on his own life, to a business associate, G. Locke Tarlton. The insured had a long and involved history of business dealings with Mr. Tarlton, and they were partners in a great many operations. The assignment stated that it was an "Assignment-Absolute" made on a printed form provided by the insurer and it stated that the insured transferred all interest that he had in the policy, which he had owned for at least five years. A year later, Mr. Tarlton assigned the policy to himself and a trust company, as co-trustees of the Tarlton Trust, an irrevocable trust that Mr. Tarlton had created.[99]

The administratrix of the insured's estate and the trustees of a trust that he had created (the Butterworth Trust) sued the trustees of the Tarlton Trust, alleging that the assignment to Mr. Tarlton was only a collateral assignment and, as such, was limited to the insured's debt obligations to Mr. Tarlton, and that Mr. Tarlton had no insurable interest in the insured's life, beyond the amount of that debt. The plaintiffs also argued that the assignment by Mr. Tarlton to his trust was invalid, because the trust itself lacked an insurable interest in the insured's life.

The trial court held in favor of the defendants, and the Missouri Supreme Court affirmed. The Missouri Supreme Court first noted that the parties did not dispute the fact that Mr. Tarlton had personally an insurable interest in the life of the insured, based both on their status as partners and on Mr. Tarlton's status as a creditor of the insured.[100]

The court then stated that the insured's assignment was not a limited, collateral assignment as security for a debt, but rather an absolute assignment of the insured's entire interest in the policy. The insured had retained no interest in the policy after the assignment. Therefore, the plaintiffs had no claim against Mr. Tarlton with respect to the insurance policy.

The court next rejected the argument that an assignee of a life insurance policy must have an insurable interest. The court stated that the trend in case law at that time was that the assignee need not have an insurable interest in the life of the insured, if

the policy was originally issued to one who had an insurable interest. The court stated that: “[w]e unequivocally approve that rule.”[101]

The court then noted regarding Mr. Tarlton’s assignment to his trust:

He [Mr. Tarlton] had that insurable interest in Butterworth when he (Tarlton) assigned it [to his trust]. Nothing at all appears in this record to indicate that the arrangement between Butterworth and Tarlton or Tarlton Trust, or any of them, was a wagering contract. The wager life insurance contract rule, which plaintiffs assert has here been violated, applies where a policy has been taken out by, and the premiums paid by, a person who has no insurable interest in the life of the insured, or when it has been assigned for speculative purposes, as in *Hoffman v. Hoke*, 122 Pa. 377, 15 A. 437, 1 L.R.A. 229. It is not claimed that the parties to the assignment of February 10, 1936, had any design or intention to circumvent the law. It is merely asserted that Tarlton Trust had no insurable interest. The bona fides of that assignment is not questioned. The wager life insurance contract rule does not apply to facts such as are presented here where the original contract was made in good faith by the insured with the insurer, and in which the beneficiary took no part at all. In the instant case the good faith of all parties appears throughout the entire transaction, from the issuance of the policy in the first instance in 1930, and that good faith continued throughout Butterworth’s life.

* * * *

The assignment by Tarlton in 1936, upon the insurer’s printed form, was made by Tarlton after consultation with and advice of his counsel, and in the office and presence of a Vice-President of the Trust Company. It was signed, sworn to, acknowledged and witnessed. The assignment to Tarlton Trust was an open above-board transaction and bears every ear-mark of good faith. It appears that Tarlton merely transferred the legal title to a chose in action to his alter ego, his trustees, so that this asset to which he had unquestioned and unquestionable title could be administered as a part of his estate plan. The transaction was wholly free from speculative purposes.[102]

The Missouri Supreme Court held that the Tarlton Trust, therefore, did not need an insurable interest in the insured’s life. The court also viewed the trust as the grantor’s “alter ego,” and it appears to have invested the trust with the grantor’s insurable interest. This language suggests that the court adopted the aggregate view of trusts, though it looked at the insurable interest of the grantor, rather than that of the beneficiaries.

The Missouri Supreme Court faced the question of a trustee’s insurable interest again only one year later, in *Mickelberry’s Food Products Co. v. Haeussermann*,[103] which arose out of Mickelberry’s Food Products Co.’s (“Mickelberry’s”) purchase of all of the capital stock of Laclede Packing Company

("Laclede"). In 1937, Fred G. Haeussermann and Adolf G. Ackerman created two irrevocable trusts, which were identical and reciprocal; one trust owned a policy of insurance on Mr. Ackerman's life, with Mr. Haeussermann as the trustee, while the other trust owned a policy of insurance on Mr. Haeussermann's life, with Mr. Ackerman as the trustee.

The trust instruments stated that: (a) the trusts were created by all of the common stockholders of Laclede; (b) the trusts would own insurance on the life of the two key officers, Mr. Ackerman (the President of the corporation) and Mr. Haeussermann (the Secretary of the corporation); (c) the stockholders would advance to the trustees the amounts required to pay the premiums on those policies, and to provide other benefits for the beneficiaries; (d) the proceeds would, at the death of each insured, be used to retire the corporation's outstanding bonds, and then to buy the corporation's shares from the estate of the deceased key stockholder; and (e) the stocks and bonds so acquired would be held for the benefit of the trust beneficiaries, in proportion to their respective interests.

The trustees were authorized to borrow against the cash value of the insurance to pay premiums and to charge such loans proportionately against interest of each beneficiary in the cash value of the policies upon distribution. The trust instrument further stated that any beneficiary could withdraw from the trust agreement at any time, by selling his or her interest to another beneficiary. If no stock or bonds were available for sale to the trust at the death of the insured, the trustee was directed to distribute the insurance proceeds outright to the stockholders of record on the date of the insured's death. The trust instruments then stated:

In the event that the majority of the beneficiaries of this trust, who are the common stockholders of Laclede Packing Company should at any time desire to liquidate this trust they may do so and hereby reserve the right to so do by serving written notice of their desire on the Trustee hereof, whereupon the Trustee shall...notify the various insurance companies...to cancel said policies and...he shall make a pro rata distribution free from trust of all such amounts recovered to the stockholders of record of Laclede Packing Company as of the date of the service of notice to terminate this trust...[104]

Eight years later, Mickelberry's offered to buy all of the outstanding stock of Laclede, and Laclede accepted the offer. Before settlement on the sale, the attorney for Mr. Haeussermann and other stockholders wrote to inform Mickelberry's attorney of the existence of the life insurance trusts. Ultimately, Mickelberry's bought the common stock of Laclede.

Thereafter, Mickelberry's wrote Messrs. Haeussermann and Ackerman, both individually and as trustees, stating that, as Mickelberry's owned all of the stock of Laclede, the insurance policies should be surrendered and the cash surrender values received by the trustees should be distributed, as the trust instruments stated, "to the stockholders of record of Laclede Packing Company as of the date of the service of the notice to terminate this trust." [105] The trustees declined to do so, and Mickelberry's

brought suit, contending that the purchase of the corporation's stock gave Mickelberry's the equitable right to the trust's beneficial ownership.

The trial court held for Mickelberry's, stating in part that:

As pointed out by the defendants the plaintiffs never had, nor did they acquire, any insurable interest in the lives of the insured. The sale of the stock to plaintiffs did not keep the insurance trusts nor the policies alive as to them.

* * *

Consequently the plaintiffs could acquire no right to continue the insurance trusts, since under the terms of the contract the insured's interests in the company were ended, and therefore, plaintiff had no insurable interest in the continuation of the policies, as pointed out in the above authorities... . [106]

The Missouri Supreme Court reversed and remanded, finding that the trust was created for the benefit of those stockholders who existed when the insureds died, and that the change in stock ownership thereby changed the beneficiaries of the trust. On the insurable interest issue, the court stated: “[i]t must be conceded that when the policies were issued the stockholders of Laclede had an insurable interest in the lives of both insureds.”[107]

This analysis, while dictum, clearly demonstrates the court's belief in the aggregate view of trust, for insurable interest purposes. The court clearly believed that the stockholders' insurable interests in the two insureds provided the trust with an insurable interest. Had the district court in Chawla adopted the analysis favored by the Missouri Supreme Court, the trust in that case would certainly have been held to have an insurable interest in its grantor and principal current beneficiary.

The U.S. Bankruptcy Court for Massachusetts also adopted the aggregate view when it considered this issue in *In re LeBlanc*,[108] in which it held that a trust for the benefit of those of the insured's nieces and nephews lacked an insurable interest, because the nieces and nephews lacked an insurable interest. The insured, Thomas F. LeBlanc, filed a petition in bankruptcy and sought to claim a state exemption for a \$38,000 whole life insurance policy that was owned by a trust that the insured had earlier created.

The policy was payable at the insured's death to an inter vivos trust, the beneficiaries of which were the insured's “children, if any survive him, otherwise his nieces and nephews.”[109] The insured was then unmarried and he had no children; he did have nieces and nephews.

The insured sought to claim the benefit of a state law exemption from the claims of creditors for any life insurance policy:

[i]f a policy of life or endowment insurance is effected by any person on his own life or another life, in favor of a person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, shall be entitled to its proceeds against the creditors and representatives of the person effecting the same....[110]

The court held that the policy on Mr. LeBlanc's life was not taken out by a person "in favor of a person other than himself having an insurable interest therein," as required by the statute. The court stated that:

[t]he present policy, through a trust, is "in favor" of the Debtor's children and, if no children survive him, in favor of the Debtor's nieces and nephews. The Debtor presently has no children. So his nieces and nephews would receive beneficial interests in the proceeds if he died now. The policy is therefore at present "in favor" of the nieces and nephews. By the weight of authority, a niece or nephew does not ordinarily have an insurable interest in the life of an uncle.[111]

This is one of the clearest adoptions of the aggregate view of trusts with respect to their insurable interest. The trustee lost the case, but only because the individual beneficiaries had no insurable interest. Had the insured had one or more children to be the current beneficiaries of the trust, the trust would certainly have been deemed to have an insurable interest in the life of the insured.

After *Chawla*, the clearest rejection of the aggregate view was *Caso v. First Colony Life Insurance Company*,[112] in which a California Court of Appeals held that an insurer did not have to pay a death benefit to a business trust that owned a policy on his life, because the trust lacked an insurable interest when the policy was issued. The case involved four physicians, who created the Pacific Park Medical Trust to hold title to a medical building and to distribute the profits to them in specific proportions. The trust was a passive real estate trust, which was to hold title to the building, but not to manage or operate it, or act in any way that could be deemed to create a partnership or joint venture among the beneficiaries.

The physicians thereafter entered into a buy-sell agreement that stated that the trust would buy the interests of any shareholder who desired to sell his or her interest, or who died. To finance the purchases at death, the trust bought life insurance on the life of each of the four physicians. It bought a \$600,000 policy on the life of Marc Braunstein, one of the partners.

Seven years later, the three remaining beneficiaries of the trust believed the building had increased substantially in value and decided to increase their respective life insurance coverage. The insured (Mr. Braunstein) applied to First Colony for a \$1 million policy and listed the trust as the proposed owner of the policy and his wife as the sole beneficiary. The insured indicated that the policy was being bought for both "Estate

Planning” and “Buy-Sell” purposes, and he represented that business insurance was applied for or in force on other key members of the insured’s business.[113]

First Colony issued its policy, designating the insured as the owner and his wife as the beneficiary. The insured died later that year, and the insurer paid the death benefit to the insured’s wife. The other partners sued asking for a declaratory judgment that the policy was owned by the trust, and that the death benefits should be payable to the trust. The trust collected on the \$600,000 policy on the insured, determined that the medical building had not increased in value after all, and sent the insured’s wife a check for \$483,000, representing the value of the insured’s interest in the trust.

The insurer brought a motion in limine to establish that the trust’s insurable interest in the insured’s life was limited to the amount it needed to buy his interest in the trust. The trial judge held that the only insurable interest possessed by the trust was the amount it needed to buy the insured’s net beneficial share, and that this did not exceed the \$600,000 policy it already held. Therefore, the trust had no insurable interest in the First Colony policy.

The court noted that the California Insurance Code defines an insurable interest in a life insurance policy as “an interest based upon a reasonable expectation of pecuniary advantage through the continued life ... of another person and consequent loss by reason of that person’s death ...”[114] and that an insurance policy is void unless the insurable interest exists at “the time the contract of life ... insurance becomes effective,”[115] whether it exists on the date of death.

The court noted that the trust was a passive trust that did not involve a joint enterprise, and that the physicians did not share revenues or expenses of their medical practices, and they were not partners. Thus, there was no insurable interest based on an expectation of financial gain had the insured lived.

The trust also argued that it should not be subject to the rule that a creditor’s insurable interest in the life of his debtor is limited to the amount of the debt, because it was not the insured’s creditor. The court did not disagree with the inapplicability of that principle, but noted that “the principle that a stranger’s insurable interest goes no further than his financial interest in the insured is equally applicable here.”[116]

The court in *Caso* looked solely at whether the trust had its own insurable interest in the life of one of its grantor/beneficiaries, adopting the entity view of a trust’s insurable interest. An insured always has an insurable interest in his or her own life, so the trust would clearly have had at least a partial insurable interest in the policy, had the aggregate view been adopted.

The case law is, therefore, divided almost evenly; the Supreme Court of Missouri and the Bankruptcy Court for Massachusetts have espoused the aggregate view, and a California Court of Appeals and the U.S. District Court for the Eastern District of

Virginia have adopted the entity view. Only three courts and four cases, and most practitioners have very little sign of how their own courts will view a trust with respect to determining its insurable interest in a policy on the life of an insured grantor or beneficiary.[117]

B. State Statutes

To date, Delaware, Georgia, Maine, Maryland, South Dakota, Virginia and Washington have enacted statutes that address directly the insurable interest of a trust that owns or is the beneficiary of a life insurance policy. These state laws appear to provide most irrevocable life insurance trusts with a reasonable basis for establishing an insurable interest, but many of these statutes are far from clear, and the protection they afford is far from absolute.

Interestingly, the basic insurable interest requirement is nearly identical in all of these states. Statutes in each state declare a life insurance policy to be void if it is issued to someone other than the insured, unless the death benefits are, when the policy is procured, payable to the insured, the personal representative of the insured's estate, or to someone who at that time, has an insurable interest in the life of the insured.[118] The six states, however, take different approaches to determining how one ascertains when a trustee has an insurable interest.

1. Delaware

The Delaware Insurance Code states:

[t]he trustee of a trust established by an individual has an insurable interest in the life of that individual and the same insurable interest in the life of any other individual as does any person who is treated as the owner of such trust for federal income tax purposes. The trustee of a trust has the same insurable interest in the life of any individual as does any person with respect to proceeds of insurance on the life of such individual (or any portion of such proceeds) that are allocable to such person's interest in such trust. If multiple beneficiaries of a trust have an insurable interest in the life of the same individual, the trustee of such trust has the same aggregate insurable interest in such life as such beneficiaries with respect to proceeds of insurance on the life of such individual (or any portion of such proceeds) that are allocable in the aggregate to such beneficiaries' interest in the trust;[119]

The first sentence of the Code section is ambiguous. It may mean a trust always has an insurable interest in its settlor. Alternatively, the section may mean that a trust is deemed to have whatever insurable interest is held by: (a) any person deemed to own the trust for federal income tax purposes, under the grantor trust rules of Sections 671-679; or (b) any beneficiary or beneficiaries (in the aggregate), to the extent

of the insurance proceeds allocable to the trust interest of that beneficiary or beneficiaries.[120]

a. Insurable Interest Derived From the Deemed Owner Under the Grantor Trust Rules

The Delaware Insurance Code imputes to the trust the insurable interest of “any person who is treated as the owner of such trust for federal income tax purposes.” An individual may be deemed to own an irrevocable trust under the grantor trust rules in a great many situations and because of a great many powers and interests, but this basis for creating an insurable interest may only rarely be available to the trustees of most irrevocable life insurance trusts.

The Delaware reference to “the owner of such trust” (emphasis supplied) suggests that the trust will benefit from the individual deemed owner’s insurable interest, only if that individual is deemed to own the entire trust. The statute rather pointedly does not refer to ownership of all or a portion of the trust, and seems to apply only where the individual is deemed to own the entire trust. Total ownership of an irrevocable life insurance trust rarely exists, without substantial advance planning.

There are several ways in which a grantor can own all of an irrevocable life insurance trust without jeopardizing the desired estate tax treatment. These include: (a) a nonadverse trustee’s authority to pay from both income and principal, premiums on one or more policies of insurance on the life of the grantor or the grantor’s spouse, or both;[121] (b) a nonadverse trustee’s authority to make discretionary distributions of income and principal to the grantor’s spouse;[122] or (c) a nonadverse trustee’s authority to allocate income and principal among a group or class of beneficiaries, not subject to an ascertainable standard, coupled with a power in the trustee or another nonadverse person “to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children.”[123]

The most common basis for the grantor to be deemed to own a life insurance trust, however, is under Internal Revenue Code Section 677(a)(3),[124] which deems a grantor to own any portion of a trust, the income from which, without an adverse party’s consent, is or may be applied to pay premiums on policies of insurance on the lives of the grantor, the grantor’s spouse, or both. This section appears to make each grantor the owner of an irrevocable life insurance trust that holds a policy on the grantor or the grantor’s spouse, but determining the portion of the trust that the grantor actually owns is somewhat more complicated.

Even if an irrevocable trust uses such powers to create a trust that appears initially to be owned wholly by the grantor for federal income tax purposes, the grantor’s ownership may be reduced by the existence of a Crummey

withdrawal power in one or more beneficiaries. Section 678(a) states that person who is not the grantor of a trust is deemed to own all or part of a trust if that person holds one or more specified powers to control the trust or trust portion, including: (a) the right to withdraw trust corpus or income; (b) a grantor trust-type power (described in Sections 671 through 677) remaining after the holder has partially released or modified a power to withdraw income or corpus; or (c) the actual use of trust income to discharge the holder's legal support obligation.

Section 678(b) states that, if the grantor holds a trust power that causes the grantor to own the trust income under Sections 673 through 677, and the beneficiary holds a Section 678 power over the same trust income, the beneficiary's power is disregarded and the grantor is taxed as the owner of the trust income. Thus, for example, if a trustee has the power to allocate trust income among a class of beneficiaries, one of whom is the trustee and another is the grantor, the grantor owns all of the trust income under Section 677 and the trustee owns none of it under Section 678.

Section 678 does not address the problem of dual powers over trust principal that do not affect the payment of current income. If the grantor holds a grantor trust power over the same principal to which a beneficiary's Section 678 power relates, it could be argued that the grantor and the beneficiary share the ownership of the trust proportionately, each deemed to own an allocable share of the trust items of income, deduction, gain, and loss allocated correctly to the trust principal. Under the Delaware Insurance Code, however, this could arguably defeat the trust's ability to claim an insurable interest through the grantor's interest in the insured's life.[125]

It is interesting to note that, while the facts of Chawla do not provide full detail of the terms of the trust in that case, it appears that, had this Delaware rule applied in Chawla, the trust would likely not have had an insurable interest in the life of the insured. The insured was the grantor and retained a right to use the trust assets and to receive distributions of trust income, but there is no indication that the insured retained any power to invade principal or to control the disposition of the principal portion of the trust. Therefore, the insured could have been the deemed owner of only the income portion of the trust, and not the entire trust.

b. Trust's Insurable Interest Derived From the Beneficiaries

The Delaware Insurance Code states that the trustee of a trust has the same insurable interest in the life of any person as does any trust beneficiary (or multiple beneficiaries, in the aggregate) "with respect to proceeds of insurance on the life of such individual (or any portion of such proceeds) that are allocable to such person's interest in such trust." The Delaware law does not define "proceeds," but that term commonly refers to a policy's death benefits, as opposed to its cash values that may be available for current withdrawal. A trust for the lifetime benefit of the insured, with provision for the disposition of the proceeds at the insured's death, would not, therefore, be deemed to have an insurable interest in the insured merely because of the insured's

status as a beneficiary, because the proceeds could never be allocable to the insured's beneficial interest in the trust.[126]

The Delaware statute states that an insurable interest exists in "individuals related closely by blood or by law, a substantial interest engendered by love and affection." It also states that such an interest is held by those who have:

a lawful and substantial economic interest in having the life, health or bodily safety of the individual insured continue, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the individual insured.[127]

No Delaware court has interpreted the phrases "related closely by blood or by law" or "lawful and substantial economic interest," in the context of a life insurance policy. Therefore, while the insured's spouse and child can be presumed to have an insurable interest in the insured's life, one does not know whether the insured's grandchildren and more remote descendants, and the spouses of the insured's children, grandchildren, and more remote descendants, will have an insurable interest in the insured's life.

An irrevocable life insurance trust, particularly one held for an especially long term, will often be held for the joint benefit of the grantor's spouse, children, grandchildren and more remote descendants, and sometimes also for the benefit of the spouses of those persons.[128] Delaware law gives such a trust an insurable interest to the extent of the aggregate interest of the grantor's spouse and children, but it might not create an insurable interest to the extent of the aggregate interest of the other beneficiaries.

It may also be impossible to determine the proportionate aggregate interests in the trust of various beneficiaries, if the trust authorizes the trustee to distribute income and principal among this class of beneficiaries in the trustee's discretion. Thus, this provision of the Delaware Insurance Code may afford only limited comfort to a trustee seeking an insurable interest in the life of the insured grantor.

2. Georgia

In 2006, the Georgia legislature amended its insurable interest statute to address the problems raised in *Chawla*.[129] The Georgia Code now states:

(c) The trustee of a trust established by an individual settlor has an insurable interest in the life of that individual settlor and has the same insurable interest in the life of any other individual as does such individual settlor. The trustee of a trust has the same insurable interest in the life of any other individual as does any beneficiary of the trust with respect to proceeds of insurance on the life of such individual or any portion of such proceeds that are allocable to such

beneficiary's interest in such trust. If multiple beneficiaries of a trust have an insurable interest in the life of the same individual, the trustee of such trust has the same aggregate insurable interest in such individual's life as such beneficiaries with respect to proceeds of insurance on the life of such individual or any portion of such proceeds that is allocable in the aggregate to such beneficiaries' interest in the trust.[130]

This statute provides all trustees of insurance trusts with an insurable interest in the life of the grantor and the grantor's close family members or other persons in whom the grantor has an insurable interest. It also provides the trustee with an insurable interest in the life of each beneficiary, to the extent that the proceeds of the policy will be allocated to that beneficiary's "interest in such trust."

The reference to the "proceeds" payable to a beneficiary's "interest in such trust" produces problems similar to those created by the Delaware statute. A trust for the lifetime benefit of the insured, with provision for the disposition of the proceeds at the insured's death, might not be deemed to have an insurable interest in the insured merely because of the insured's status as a beneficiary, because the proceeds could never be allocable to the insured's beneficial interest in the trust.

3. Maine

The State of Maine requires that the benefits of a life insurance policy procured by someone other than the insured must be payable to the insured, the insured's personal representatives, or to someone who has, at the time the contract is made, an insurable interest in the life of the insured.[131] The Maine statute, however, expressly states that:

E. Any revocable or irrevocable trust has an insurable interest, provided any settler or any beneficiary of the trust has an insurable interest as provided in paragraph A, B, C, or D. A partnership has an insurable interest provided any partner has an insurable interest."[132]

The Maine statute may be the clearest and easiest of the statutes under which to qualify a trust as holding an insurable interest. This requirement, of course, does not address the problem of trusts that hold second-to-die policies insuring the lives of the grantor and the grantor's spouse, though that situation will usually be covered by the exception for policies insuring the life of someone in whom any beneficiary of the trust has an insurable interest.

The Maine statutory reference to "any beneficiary of the trust" appears to permit the trust to own a policy insuring the life of someone who is a beneficiary of the trust, even if the proceeds will ultimately benefit persons who have no insurable interest in the life of the insured. This makes the Maine statute broader than the

Georgia statute, which looks to the “interest in the trust” of the insured beneficiary, to determine the trustee’s insurable interest.

4. Maryland

In 2006, the Maryland Legislature reacted with relative speed (in legislative terms) to the decision of the District Court in *Chawla*, and changed the Maryland Insurance Code to state, in applicable part:

(6) The trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy owned by the trust or the trustee of a trust if, on the date on which the policy is issued:

(I) the insured is:

1. The grantor of the trust;
2. An individual related closely by blood or law to the grantor; or
3. An individual in whom the grantor otherwise has an insurable interest; and

(II) the life insurance proceeds are primarily for the benefit of trust beneficiaries having an insurable interest in the life of the insured.[133]

The Maryland statute appears to create a two-pronged test for determining when a trustee has an insurable interest in the life of the insured grantor. First, the insured must be the trust’s grantor or someone in whom the grantor has an insurable interest, because the grantor and the individual are “related closely by blood or law” or otherwise has an insurable interest. Second, the trust must also hold the proceeds primarily for the benefit of trust beneficiaries who have an insurable interest in the life of the grantor. This statute is likely to provide better relief from insurable interest problems than its Delaware counterpart, but it still leaves something to be desired in terms of scope and clarity.

The requirement in the Maryland statute, like that in the Delaware statute, that the proceeds be held primarily for the benefit of trust beneficiaries who have an insurable interest in the life of the grantor, may seriously limit the usefulness of this new rule. As noted, many irrevocable life insurance trusts hold the proceeds for the benefit of a broad class of beneficiaries, some of whom may not have an insurable interest in the life of the grantor. There is no Maryland case law addressing whether such family members as grandchildren and more remote descendants, and the spouses of one’s children, grandchildren, and more remote descendants, have an insurable interest in the

grantor's life. Therefore, a trustee may have difficulty determining what fractional share of the entire class of beneficiaries for whom the proceeds are held will have an insurable interest.

The Maryland law, unlike the Delaware statute, however, appears to adopt an all-or-nothing approach, requiring that the proceeds be held "primarily" for the benefit of beneficiaries who have an insurable interest in the insured's life. The Delaware statute gives the trustee an insurable interest based on the aggregate share of the trust that benefits persons who have an insurable interest. The Maryland law seems to give the trustee a full insurable interest in the policy, if the proceeds are held "primarily" for the benefit of beneficiaries who have an insurable interest.

Even under this rule, however, an irrevocable life insurance trust that gives broad discretion to the trustee to pay income and principal to and among a broad class of beneficiaries, including some who have an insurable interest in the grantor's life (the grantor's spouse and children, for example) and some who do not have any such interest (the spouses of the grantor's children, grandchildren, and more remote descendants, for example), may not have an insurable interest in the grantor, because the trustee cannot show that the insurance proceeds are held primarily for the benefit of those beneficiaries who have an insurable interest. Practitioners in Maryland will likely want to limit in some manner the trustee's allocations of life insurance proceeds to beneficiaries who lack an insurable interest.[134]

5. Virginia

The Virginia law also states that a trustee's required "lawful and substantial economic interest" in the insured is deemed to exist in:

(i) the individual insured who established the trust, (ii) each individual in whose life the owner of the trust for federal income tax purposes has an insurable interest, and (iii) each individual in whose life a beneficiary of the trust has an insurable interest.[135]

The Virginia statutory reference to the owner of "the trust" for federal income tax purposes raises the same problems about grantors who own only a portion of the trust that are discussed above with respect to the Delaware statute. In two other substantial respects, however, the Virginia statute is far superior to both the Maryland and Delaware laws.

First, the Virginia statute, like the Maine statute, automatically gives a trustee an insurable interest in the life of the grantor who established the trust, without regard to any other factors. This will provide relief to most irrevocable life insurance trusts that own policies of insurance on the life of the grantor. It does not, however, address the problem of trusts that hold second-to-die policies insuring the lives of the grantor and the grantor's spouse, though that situation will usually be covered by

the third exception for “each individual in whose life a beneficiary of the trust has an insurable interest.”

Second, the Virginia statute gives the trustee an insurable interest in the life of each individual “in whose life a beneficiary of the trust has an insurable interest.” It does not limit the beneficiaries, for this purpose, to those who will share in the proceeds of the life insurance policy, nor does it require that any particular percentage of the beneficiaries be persons who have an insurable interest. Rather, the trustee has a full insurable interest in any policy owned by the trust and insuring the life of anyone in whom any of the beneficiaries has an insurable interest. This appears to be the broadest relief afforded by any of the state statutes on the insurable interests of trusts.[136]

6. South Dakota

In 2006, the South Dakota legislature responded to concerns about the possible application of Chawla by amending its statute defining an insurable interest, to add a specific section addressing when a trust has an insurable interest. The South Dakota law states that:

(6) The trustee of a trust established by an individual settlor has an insurable interest in the life of that individual settlor, and has the same insurable interest in the life of any other individual as does such individual settlor. However, the settlor must be the insured or have an insurable interest as required by subdivisions (1) to (5), inclusive, of this section. The trustee of a trust has the same insurable interest in the life of any other individual as does any beneficiary of the trust with respect to proceeds of insurance on the life of such individual or any portion of such proceeds that are allocable to such beneficiary’s interest in such trust. If multiple beneficiaries of a trust have an insurable interest in the life of the same individual, the trustee of such trust has the same aggregate insurable interest in such individual’s life as such beneficiaries with respect to proceeds of insurance on the life of such individual or any portion of such proceeds that are allocable in the aggregate to such beneficiaries’ interest in the trust. A trustee of a business trust has the same insurable interest in the life of any individual as does any beneficial owner in any individual or any beneficial owners in the aggregate in any individual.[137]

The South Dakota statute, like the Virginia and Maine statutes, now automatically gives a trustee an insurable interest in the life of the grantor who established the trust. Unlike the Virginia and Maine statutes, the South Dakota statute also automatically gives the trustee an insurable interest in the life of anyone in whom the grantor has an insurable interest, without regard to any other factors. This will provide relief to virtually all irrevocable life insurance trusts that own policies of insurance on the life of the grantor or the joint lives of the grantor and the grantor’s spouse.

The South Dakota statute also gives the trustee the “same insurable interest in the life of any other individual as does any beneficiary of the trust with respect to proceeds of insurance on the life of such individual or any portion of such proceeds that are allocable to such beneficiary’s interest in such trust.” This provision is more like the Delaware or Maryland statutes than the Virginia and Maine statutes. It refers only to beneficiaries who will share in the enjoyment of the life insurance death benefits, and so ignores beneficiaries whose interests exist only during the insured’s lifetime. It also limits the trust’s insurable interest to that aggregate portion of the death benefits that will benefit trust beneficiaries who have an insurable interest. This may not provide relief for a trustee who holds a broad discretionary power to allocate the enjoyment of the proceeds among a class of beneficiaries that includes persons who do and persons who do not have an insurable interest in the life of the insured.

The South Dakota statute, unlike the Virginia and Maine statutes, expressly applies to both traditional trusts and business trusts.[138]

7. Washington

The Washington law of insurable interests provides simply that:

(c) A guardian, trustee, or other fiduciary has an insurable interest in the life of any person for whose benefit the fiduciary holds property, and in the life of any other individual in whose life the person has an insurable interest.[139]

This simple statute, like the Maine statute, appears to impute to the trustee the insurable interest held by any of the trust beneficiaries, regardless of whether that beneficiary will benefit from the proceeds of the life insurance policy held by the trust. This certainly gives the trustee an insurable interest in the life of each beneficiary personally, but it does not necessarily give the trustee an insurable interest in the life of the grantor.[140]

VI. Planning to Avoid a Trust’s Insurable Interest Problems

One cannot fault an estate planner or trustee from failing to focus on the question of a trust’s insurable interest before Chawla forced our notice of this issue. Prior to that decision, the issue was not discussed in the general literature. Even the preeminent multi-volume treatise on insurance law did not discuss the question of when a trust has an insurable interest in the life of the insured grantor or beneficiaries.[141] Now that the issue has been widely discussed, however, the risk that a trust may not have an insurable interest must be addressed; the chance that the insurer will not pay the promised death benefit, or that the IRS will treat the death benefits as taxable income, cannot be ignored by a competent practitioner.

A. Choice of Favorable State Law

Perhaps the simplest approach to avoid the insurable interest problem is to create the trust and to have the life insurance policy acquired in a state whose statutes would assure that the trustee has an insurable interest. As discussed above, seven states have statutes on this topic, but the easiest qualification appears to be possible in Georgia, Maine, Virginia and South Dakota.

Assuring that the law of one of these states shall apply involves a determination of the law applicable to constructions of the life insurance contract, rather than the law that generally governs interpretations of the trust instrument.[142] Whenever possible, it is best to have the policy of insurance designate specifically the state whose law will control. This will generally control, at least as between the insurer and the beneficiaries, and will greatly facilitate planning to assure that the trustee has an insurable interest.[143] Some state statutes, however, dictate that a policy issued in that state for the benefit of a resident of that state will be controlled by the laws of the state in which it was issued, notwithstanding contrary policy provisions.[144] In such states, practitioners must pay special attention to the contacts that the policy has to the state, to assure that they do not inadvertently abandon the application of the law of the state that has a favorable rule on insurable interests.

The general rule is that a policy of insurance is construed, and its validity determined, under the law of the place where the contract was made, absent an express provision in the contract to the contrary.[145] An insurance contract is usually deemed made where the final act necessary to complete the binding contract occurs. Typically, this is the place where the contract is signed by the later of the parties to sign or the place where the first premium check was paid.[146]

Therefore, a practitioner who wishes to have the insurable interest of a trust in a policy of life insurance determined under the law of a specific state, should attempt to: (a) have the contract select that state's law as controlling; (b) have the policy purchased by a trustee who is located in that state; (c) have the policy delivered to the trustee at its location in that state; and (d) have the trustee pay the premiums from its location in that state.

A trustee who already owns a policy the insurable interest in which would be determined under the law of another state whose laws are less favorable than Georgia, Maine, Virginia or South Dakota (which is virtually all other states), should consider moving the trust's situs to one of those states, and then exchanging the policy for another policy on the life of the same insured, in a tax-free exchange under Section 1035. The trustee's insurable interest in the policy received in such an exchange should arguably be tested under the law of the state in which the trust was located, the new policy delivered, and the premiums on the new policy paid.

B. Insured Procures and Assigns Insurance Policy

A very simple approach to avoiding the insurable interest problem with respect to a trustee's life insurance policies is for the insured to purchase the policy, and then to assign it to the trustee. This approach, however, is far from risk-free, on several grounds.

First, the insured's initial ownership of the life insurance policy means that the proceeds will be included in the insured's gross estate under Section 2035(a), if the insured dies within three years of the transfer of the policy to the trustee. The risk of this can be reduced by an insurance rider that is commonly available at little or no additional cost, that doubles the proceeds if the insured dies within three years of having obtained the policy.

Second, this approach may not protect against a failure of insurable interest. State law usually states that an insurable interest is required when the policy is procured, and that the insured, having procured the policy, is free to assign it to one who has no insurable interest.^[147] Courts will, however, declare void a life insurance policy that is obtained by the insured solely for the purpose of assigning it to the party who lacks an insurable interest, on the grounds that the policy is actually being "procured" by the person lacking an insurable interest.

Courts will generally look at all of the relevant facts to determine whether the insured or the beneficiary/assignee actually procured the insurance policy. Among the most important facts considered in determining whether the arrangement was merely a disguise for a wagering contract, are (a) the length of time between the purchase and assignment of the policy, with longer times tending to show that the insured actually procured the policy;^[148] (b) the payment of all or most of the premiums by the insured, which tends to show that the insured, rather than the assignee, procured the policy;^[149] (c) consideration paid by the assignee, with adequate consideration tending to demonstrate that the insured actually procured the policy;^[150] and (d) policy provisions making benefits payable to the insured, the designated beneficiary, or the insured's "assigns," which tends to support the validity of the assignment.^[151] The typical assignment of a policy to an irrevocable life insurance should typically exhibit the first, second, and fourth of these favorable factors, though not the third. In most states, this will suffice, but the practitioner must carefully scrutinize the cases in the state whose law will apply to the policy, to determine whether a particular assignment will be valid for this purpose.

C. Build Case for Equitable Estoppel

Trustees of irrevocable trusts who hold life insurance policies that may be void because of the lack of an insurable interest, should consider seeking express representations from the insurance company or its agent, that either an insurable interest exists or that they will not raise this claim. Such representations may later form a basis

for a defense of waiver or equitable estoppel, if the insurer later declines to pay the promised death benefit.

Both anecdotal evidence and knowledge of human and corporate nature, however, suggest that insurers and their agents are likely to respond to such requests negatively, and possibly with thinly-veiled hostility. Thus, while one should certainly request such representations, one should not rely solely on this tactic.

Actually, the insurer's continued acceptance of premiums, after receiving this notice of the relevant facts (all of which the agent was likely already aware), should provide adequate factual basis for a claim of estoppel or waiver. Of course, in most of the states whose courts have considered this issue, that claim would be rejected, in deference to the public policy against gaming contracts on an individual's life. This should, however, provide a good basis for such claims in the majority of states, in which either there is no relevant statutory or case law, or the case law is ambiguous.

VII. Public Policy and the Proper Legislative Response

The public policy behind the requirement for an insurable interest dates back to the 18th century and arises from an aversion, not just to gambling, *per se*, but to gambling on a person's life. The courts then, as they do now, point out that, aside from the possible morality of such a gamble, it is dangerous for the individual insured.

Wagering on the life of an individual is, however, a victimless crime, as long as the insured understands the risk involved and consents to it. This leads many to conclude that, if the insured has given his or her informed consent, state governments are merely being moralistic and paternalistic in enacting legislation that prohibits a willing insured who is under no legal disability and a third party who lacks an insurable interest from entering an arrangement whereby the insured, with or without consideration, permits the third party to acquire a policy of insurance on the insured's life.

This argument is more convincing when the policy is held by an insurance trust or other similar vehicle that has been created by the insured. Such a trust or other entity is not created simply to profit from the insured's death, but to ensure that the use of the life insurance proceeds for the benefit of the objects of the insured's bounty, often in a particularly tax efficient manner. These types of transactions do not give rise to the concerns expressed about the transaction where the insured is essentially selling his or her insurability.

However, if a trust, partnership or LLC is permitted to acquire insurance on an insured's life, then those who are merely making a financial investment that will "mature" upon the insured's death, can claim they are simply another type of third party owner of insurance on the insured's life. The legislative decision to permit third party owners who lack an insurable interest in the insured's life to hold insurance on that life is not, therefore, entirely inconsequential.

The consequences of permitting such arrangements can be easily illustrated by example. A practitioner whose client sold his insurability recently told one of the authors that every quarter the practitioner gets a call from the entity who bought the policy asking (albeit on an anonymous basis) about the client's health. This inquiry brings home what is really happening in these transactions and what must happen before such an investor can see a return on his or her investment. Proposing the commoditization of such life insurance policies, by forming a kind of insurance policy pool and selling interests in the pool to investors, begs an important social and political question: as a society, do we want to allow people to profit from another person's death, even with the consent of that deceased person?

It is unfortunate that the concern about these transactions has required a solution that, at least in Maryland, causes a problem for many types of transactions that are not really the focus of this concern. The insurable interest rule is likely to continue causing problems as it is reviewed by other courts, probably with mixed results. The enhanced awareness of this issue created by the decision in *Chawla*, and by articles such as this one, can only increase the litigation over the existence of an insurable interest in trusts, partnerships, and similar entities.

An intelligent and cohesive solution to this issue requires a recognition that legislatures do legislate on public policy grounds, and that they often seek to prevent even victimless crimes.^[152] If our society does not want to allow people to profit from another person's death, even with the consent of that deceased person, we should look for a two-pronged approach.

First, the transfer-for-value rules under Section 101(a) should specifically cover instances in which the insured sells his or her insurability to a third party investor directly or indirectly. A step-transaction theory similar to that applied by the U.S. Supreme Court in *Warnock v. Davis* and the Utah, Louisiana and New York Commissioners of Insurance should be used to apply the transfer-for-value rules to transactions in which the insured initially buys the policy and thereafter assigns it to the investors. In addition to converting tax-free death benefit into ordinary taxable income an excise tax should be imposed upon the income produced by such investments. An excise tax would further undermine the profitability of such transactions.

Second, there should be promulgated (and, hopefully, adopted widely) a uniform statute permitting trusts and other entities to hold insurance on the insured's life, as long as the insured certifies that the beneficiaries are the natural objects of his or her bounty and that the insured has received and will receive no consideration, directly or indirectly, for this consent and certification.

Such language would assure that even trustees who fail to meet the insurable interest requirements will continue to be the permissible beneficiaries of the insured's policy for no other reason than they are the persons the insured wants to benefit. For others who are simply making an investment, the real solution to this problem is to make

the transaction a bad investment, and the Tax Code is a better vehicle for achieving this than any state legislature.

[1] Chawla, *ex rel* Giesinger v. Transamerica Occidental Life Insurance Co., 2005 WL 405405 (E.D. Va. 2005), *aff'd* in part, *vac'd* in part, 440 F.3d 639, 2006 WL 538993 (4th Cir. 2006); see also Mancini, "The Chawla Case, Insurance Trusts and the Insurable Interest Rule: 'Houston, We Have a Problem,'" 31 ACTEC J. 125 (Fall, 2005).

[2] Life Assurance Act 1774 ch. 48, § 1, 12 Geo. 3, ch. 48, § 1 (Eng.); see also Hazen, "Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance," 24 Ann. Rev. Banking & Fin. L. 375 (2005); and Oldham, "Judicial Activism in Eighteenth-Century English Common Law in the Time of the Founders: The More Things Change, the More They Stay the Same," 8 Green Bag 2d 269 (Spring, 2005), both of which place the 1774 Act in an interesting moral and political context. Oldham, for example, notes that the 1774 Act was an extension of a 1746 Act that required an insurable interest for marine insurance.

The 1774 life insurance statute was adapted from a more lengthy 1746 statute entitled, "An Act to regulate Insurance on Ships belonging to the Subjects of Great Britain, and the Merchandizes or Effects laden thereon." 19 George II, c. 37. Although there were some exceptions, the earlier statute basically invalidated insurance contracts on ships or cargo that provided for payment in case of loss, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering." In the prefatory language, these contracts were described as "a mischievous kind of gaming or wagering, under the pretence of assuring the risque on shipping." Thus it was unsurprising to see the expression "or by way of gaming or wagering" repeated in the 1774 life insurance statute. The 1746 statute applied only to insurance contracts on ships and cargo, and it was at first supposed that the 1774 statute was comparably addressed only to insurance contracts on lives. The 1774 statute, however, had a potent internal expansion joint—the expression "or on any other event or events whatsoever."

8 Green Bag 2d 269, 276 n.26. See also histories of the insurable interest issue, in Henke, "Corporate-Owned Life Insurance Meets the Texas Insurable Interest Requirement: a Train Wreck in Progress," 55 Baylor L. Rev. 51 (Winter, 2003); Leimberg & Gibbons, "COLI, BOLI, TOLI and 'Insurable Interests,'" 28 Est. Plan. 333 (2001); Kreitner, "Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk," 100 Colum. L. Rev. 1096, 1116-1127 (2000); Rush, "Corporate-Owned Life Insurance (A/k/a 'Dead Peasant' or 'Dead Janitor' Policies): Has Texas Buried the Insurable Interest Requirement?" 41 Houston L. Rev. 35 (2004); Swan, "The Law and Economics of Company-Owned Life Insurance (Coli): Winn-Dixie Stores, Inc. v. Commissioner of Internal Revenue," 27 S. Ill. U.L.J. 357, 380-382 (Winter, 2003); Swisher, "The Insurable Interest Requirement for Life Insurance: a Critical Reassessment," 53 Drake L. Rev. 477 (Winter, 2005).

[3] See Ala. Code § 27-14-3(f); Alaska Stat. § 21.42.020(a); Ariz. Rev. Stat. § 20-1104(A); Ark. Code § 23-79-103(a); Cal. Ins. Code

§ 10110.1; Colo. Code Rev. Stat. Ann. § 10-7-115; 18 Del. Code § 2704(a); D.C. Code § 31-4716; Ga. Code § 33-24-3(e); Haw. Rev. Stat. § 431:10-204; Idaho Code § 41-1804(1); 215 Ill. Comp. Stat. 5/224; Kan. Stat. § 40-450(a); Ky. Rev. Stat. § 304.14-

040(2); La. Rev. Stat. § 22:613(A); Me. Rev. Stat. § 2404(1); Md. Insurance Code § 12-201(a); Mich. Comp. Laws § 500.2207(1); Minn. Stat. 61A-074; Miss. Code § 83-5-251(1); Mont. Code § 33-15-201(1); Neb. Rev. Stat. § 44-704; Nev. Rev. Stat. § 687B.040(1); N.J. Stat. Ann. §§ 17:35-11 and 17B:29-1.1; N.M. Stat. § 59A-18-4(A); N.Y. Ins. Law § 3205(b); N.D. Cent. Code § 26.1-29-09.1(1); 36 Okla. Stat. § 3604(A)(1); Or. Rev. Stat. § 743.024(1); 40 Pa. Stat. § 512; R.I. Gen. Laws § 27-4-27(a); S.D. Codified Laws § 58-10-3; Tenn. Code § 56-7-101(a); Utah Code § 31A-21-104(1); Va. Code § 38.2-301; Wash. Rev. Code § 48.18.030(1); W. Va. Code, § 33-6-2(a); Wisc. Stat. § 631.07(1); Wyo. Stat. § 26-15-102(a).

[4] See *Mullenax Nat'l Reserve Life Ins. Co.*, 29 Colo. App. 418, 485 P.2d 137 (1971); *Goodrich v. Treat*, 3 Colo. 408, 1877 WL 418 (1877); *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244, 1854 WL 812 (Cn. S. Ct. Errors 1854); *Knott v. State ex rel. Guaranty Income Life Ins. Co.*, 136 Fla. 184, 186 So. 788, 121 A.L.R. 715 (1939); *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35, 39, 1875 WL 8703 (1875); *Amick v. Butler*, 111 Ind. 578, 12 N.E. 518 (1887); *Reilly v. Penn Mut. Life Ins. Co.*, 201 Iowa 555, 207 N.W. 583 (1926); *Lord v. Dall*, 12 Mass. 115, 1815 WL 889, 7 Am. Dec. 38 (Mass. S. Jud. Ct. 1815); *Rahders, Merritt & Hagler v. People's Bank*, 113 Minn. 496, 130 N.W. 16 (1911); *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 1877 WL 9218 (1877); *Prudential Ins. Co. of America v. Corriveau*, 168 A. 569 (N.H. 1933); *Burbage v. Windley's Ex'rs*, 108 N.C. 357, 12 S.E. 839 (1891); *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 1876 WL 19550 (1876) (Ohio law); *Henderson v. Life Ins. Co. of Va.*, 176 S.C. 100, 179 S.E. 680 (1935); *Price v. Supreme Lodge, Knights of Honor*, 68 Tex. 361, 4 S.W. 633 (1887); *Currier v. Continental Life Ins. Co.*, 57 Vt. 496, 1884 WL 6646 (1885).

[5] *Warnock v. Davis*, 104 U.S. 775 (1881).

[6] 104 U.S. at 779.

[7] 104 U.S. at 779-780. The question of the need for an assignee to have an insurable interest, however, is less clear than the Court would have had us believe. See *Dreschler*, “Validity of assignment of life insurance policy to one who has no insurable interest in insured,” 30 A.L.R.2d 1310.

Warnock was actually not the Supreme Court's first examination of the issues raised by insurable interests in life insurance. First, in *Aetna Life Ins. Co. v. France*, 94 U.S. 561 (1876), the Court sustained against an insurable interest challenge, a policy procured by the insured on his own life, but made payable to his sister, who financed several of the premiums by loans to the insured. Next, in *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457 (1876), the Court held that a second-to-die policy on life of married couple was valid because both insureds had an insurable interest, and subsequent divorce and continued premium payment by the wife did not preclude right to death benefits. The Court's first consideration of the insurable interest question with respect to casualty insurance was quite a bit earlier, in *Sansom v. Ball*, 4 U.S. 459, 4 Dall. 459 (1806).

[8] See Ala. Code 1975 § 27-14-3(f); Alaska Stat. § 21.42.020(a); Ariz. Rev. Stat. § 20-1104(A); Ark. Code § 23-79-103(a); Cal. Ins. Code § 10110.1; Colo. Code Rev. Stat. Ann. § 10-7-115; 18 Del. Code § 2704(a); D.C. Code § 31-4716; Ga. Code § 33-24-3(e); Haw. Rev. Stat. § 431:10-204; Idaho Code § 41-1804(1); 215 Ill. Comp. Stat. 5/224; Kan. Stat. § 40-450(a); Ky. Rev. Stat. § 304.14-040(2); La. Rev. Stat. § 22:613(A); Me. Rev. Stat. § 2404(1); Md. Insurance Code § 12-201(a); Minn. Stat. 61A-074; Miss. Code § 83-

5-251(1); Mont. Code § 33-15-201(1); Neb. Rev. Stat. § 44-704; Nev. Rev. Stat. § 687B.040(1); N.J. Stat. Ann. § 17:35-11 and 17B:29-1.1; N.M. Stat. § 59A-18-4(A); N.Y. Ins. Law § 3205(b); N.D. Cent. Code § 26.1-29-09.1(1); 36 Okla. Stat. § 3604(A)(1); Or. Rev. Stat. § 743.024(1); 40 Pa. Stat. § 512; R.I. Gen. Laws § 27-4-27(a); S.D. Codified Laws § 58-10-3; Utah Code § 31A-21-104(1); Va. Code § 38.2-301; Wash. Rev. Code § 48.18.030(1); W. Va. Code, § 33-6-2(a); Wisc. Stat. § 631.07(1); Wyo. Stat. § 26-15-102(a).

[9] Fla. F.S.A. § 627.404; Mass. M.G.L.A. 175 § 2; *Agricultural Ins. Co. v. Montague*, 38 Mich. 548 (1878), 31 Am. Rep. 326; D.C. Code § 31-4716.

[10] See, e.g., Ala. Code 1975 § 27-14-3(e); Cal. Ins. Code § 10110.1(d); Ga. Code § 33-24-3(d); N.Y. Ins. Law § 3205(b)(i); N.D. Cent. Code § 26.1-33-33; 40 Pa. Stat. § 512; Va. Code § 38.2-3111. But see, e.g., Mo. Stat. § 377.0802.

[11] December 19, 2005, State of New York Insurance Department.

[12] Bulletin No. 06-05, “Investor Initiated Life Insurance,” James J. Donelon, Commissioner of Insurance, Louisiana Department of Insurance (September 5, 2006); Bulletin 2006-03, D. Kent Michie, Utah Insurance Commissioner (July 10, 2006).

[13] *Id.* at 3.

[14] See, e.g., Haw. Rev. Stat. § 431:10-206; Mass. Gen. Laws Ann. ch. 175, § 123; N.Y. Ins. Law § 3205(c); *Cableton v. Gulf Life Ins. Co.*, 12 Ark. App. 257, 674 S.W.2d 951 (1984); *Watson v. Mass. Mut. Life Ins. Co.*, 140 F.2d 673, 676 (D.C. Cir. 1943); *Morgan v. Am. Sec. Ins. Co.*, 522 So. 2d 454 (Fla. Dist. Ct. App. 1988); *Wood v. New York Life Ins. Co.*, 255 Ga. 300, 336 S.E.2d 806 (1985); *Bajwa v. Metropolitan Life Ins. Co.*, 208 Ill. 2d 414, 281 Ill. Dec. 554, 804 N.E.2d 519 (2004); *Shellman v. Independence Life & Accident Ins. Co.*, 523 S.W.2d 221 (Ky. 1975); *Taylor v. Unity Indus. Ins. Co.*, 147 So. 91, 92 (La. Ct. App. 1933); *Hopkins v. Hopkins*, 614 A.2d 96 (Md. 1992); *Byrne v. Prudential Ins. Co. of America*, 88 S.W.2d 344, 346 (Mo. 1935); *Wren v. N.Y. Life Ins. Co.*, 493 F.2d 839 (5th Cir. 1974) (based on state statute); *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 406 S.E.2d 848 (1991); *Hilfiger v. Transamerica Occidental Life Ins. Co.*, 505 S.E.2d 190 (Va. 1998). Some courts have carved out an exception allowing a spouse to take out a policy of insurance on the life of the other spouse without the insured’s consent. See *Cook v. Bankers Life & Cas. Co.*, 406 S.E.2d 848 (N.C. 1991); *Ellison v. Straw*, 92 N.W. 1094, 1097 (Wis. 1902) (based on state statute). For a good example of why this rule is in place, see *Ramey v. Carolina Life Ins. Co.*, 135 S.E.2d 362 (S.C. 1964), in which the insured’s wife bought a life insurance policy on his life without his knowledge and consent, and then poisoned him with arsenic. The husband survived, and sued the life insurance company, alleging that the insurer knew of his lack of knowledge and consent at the time his wife procured the life insurance policy. The South Carolina Supreme Court affirmed a judgment in favor of the plaintiff husband. See also Evans, “Tort Liability of Insurer Issuing Life Policy Without Consent of Insured or to Beneficiary Without Insurable Interest,” 9 A.L.R.3d 1172 (1966).

It is not clear why this issue was not raised in the cases that challenged the insurable interest of large employers to purchase policies on the lives of their rank-and-file employees, as these contracts were purchased without notice to the employees. See, e.g., *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400 (5th Cir. 2004); *Tillman ex rel. Estate of Tillman v. Camelot Music, Inc.*, 408 F.3d 1300 (10th Cir. 2005).

[15] See, e.g., Ala. Code 1975 § 27-14-3(f).

[16] Alaska, Arizona, Arkansas, Delaware, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Washington, West Virginia and Wyoming.

[17] Utah Code § 31A-21-104 and Wisc. Stat. § 631.07.

[18] 979 S.W.2d 354 (1998).

[19] All references to “Section” are to the Internal Revenue Code of 1986, as amended, unless otherwise expressly indicated.

[20] *Union Mutual Ins. Co. v. Wilkinson*, 80 U.S. 222 (1871); see also *Henshaw v. Bissell*, 85 U.S. 255 (1873); *Kirk v. Hamilton*, 102 U.S. 68 (1880). As Lord Coke has stated, “[i]t is called an estoppel or conclusion, because a man’s own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.” 2 Coke, Littleton 352a. See also, generally, 28 Am. Jur. 2d §§ 27-42.

[21] See, e.g., *Brooklyn Sav. Bank v. O’Neill*, 324 U.S. 697 (1945); *Mills v. Bank of United States*, 24 U.S. 431 (1826).

[22] See also, generally, 28 Am. Jur. 2d § 36.

[23] *Bell v. National Life & Accident Ins. Co.*, 41 Ala. App. 94, 123 So. 2d 598 (1960); *Cotton v. Mutual Aid Union*, 132 Ark. 458, 201 S.W. 1244 (1918); *Meerdink v. American Ins. Co.*, 137 Fla. 587, 188 So. 764 (1939); *Dresen v. Metropolitan Life Ins. Co.*, 195 Ill. App. 292 (1915); *Patterson v. Durand Farmers Mut. Fire Ins. Co.*, 24 N.E.2d 740 (Ill. App. 2d Dist. 1940) (property insurance); *Barton v. Mercantile Ins. Co. of America*, 127 Kan. 271, 273 P. 408 (1921) (property insurance); *Bromley’s Administrator v. Washington Life Ins. Co.*, 122 Ky. 402, 92 S.W. 17 (1906); *Rubenstein v. Mutual Life Ins. Co.*, 584 F. Supp. 272 (E.D. La. 1984); *Beard v. American Agency Life Ins. Co.*, 314 Md. 235, 550 A.2d 677 (1988); *Sun Life Assurance Co. v. Allen*, 270 Mich. 272, 259 N.W. 281 (1935); *National Life & Accident Ins. Co. v. Ball*, 157 Miss. 163, 127 So. 268 (1931); *Aetna Cas. & Sur. Co. v. Davidson*, 715 F. Supp. 775 (S.D. Miss. 1989) (property insurance); *Williams v. People’s Life and Accident Ins. Co.*, 224 Mo. App. 1229, 35 S.W.2d 922 (1931); *Woods v. Washington Fidelity Nat’l Ins. Co.*, 113 S.W. 2d 121 (Mo. Ct. App. 1938); *Hack v. Metz*, 173 S.C. 413, 176 S.E. 314 (1934); *Elmore v. Life Ins. Co.*, 187 S.C. 504, 198 S.E. 5 (1938); see also Carter, “Estoppel of, or waiver by, issuer of life insurance policy to assert defense of lack of insurable interest,” 86 A.L.R.4th 828.

[24] *Jenkins v. Hill*, 35 Cal. App. 2d 521, 96 P.2d 168 (Cal. App. 1st Dist. 1939); *Clerments v. Terrell*, 167 Ga. 237, 145 S.E.78 (1928); *Speroni v. Speroni*, 406 Ill. 28, 92 N.E.2d 63 (1950); *Van Zandt v. Morris*, 17 So. 2d 435 (Miss. 1944); *Wall v. Metropolitan Life Ins. Co.*, 239 A.D. 560, 268 N.Y.S. 129 (2d Dep’t 1933); *St. Paul’s Roman Catholic Church v. Westchester Fire Ins. Co.*, 65 Misc. 2d 975, 319 N.Y.S.2d 239 (Sup. Ct. 1971); *Baker v. Fidelity Mut. Life Ins. Co.*, 18 Ohio Dec. 426 (Ohio Comm. Pl. 1907); *United Family Life Ins. Co. v. Brogan*, 2002 WL 32997138 (Ohio Comm. Pl. 2002); *Griswold v. Prudential Ins. Co.*, 47 Pa. D.C. 125 (1943); *Foster v. Preferred Accident Ins. Co.*, 125 F. 536 (C.C. Pa. 1903); *Kelly v. Prudential Ins. Co. of America*, 334 Pa. 143, 6 A.2d 55 (1939); *Ellison v. Independent Life & Accident Ins. Co.*, 58 S.E.2d 890 (S.C. 1950); *Rogers v. Atlantic Life Ins. Co.*, 135 S.C. 89, 133 S.E. 215 (1926) (dicta); see also *Evans v. Independent Nat. Life Ins. Co.*, 148 So. 264 (La. Ct.

App. 1933) (estoppel not proven against insurer, but based on lack of evidence, rather than legal preclusion).

[25] Compare *Dresen v. Metropolitan Life Ins. Co.*, 195 Ill. App. 292 (1915) and *Patterson v. Durand Farmers Mut. Fire Ins. Co.*, 24 N.E.2d 740 (Ill. App. 2d Dist. 1940) (property insurance), with *Speroni v. Speroni*, 406 Ill. 28, 92 N.E.2d 63 (1950); compare *National Life & Accident Ins. Co. v. Ball*, 157 Miss. 163, 127 So. 268 (1931) with *Van Zandt v. Morris*, 17 So. 2d 435 (Miss. 1944); compare *Hack v. Metz*, 173 S.C. 413, 176 S.E. 314 (1934) and *Elmore v. Life Ins. Co.*, 187 S.C. 504, 198 S.E. 5 (1938) with *Ellison v. Independent Life & Accident Ins. Co.*, 58 S.E.2d 890 (S.C. 1950) and *Rogers v. Atlantic Life Ins. Co.*, 135 S.C. 89, 133 S.E. 215 (1926) (dicta).

[26] *Van Zandt v. Morris*, 196 Miss. 374, 17 So. 2d 435 (1944). Courts in nineteen states have applied the doctrines of waiver or estoppel against a mutual benefit association that issued a policy of insurance to someone whose interest in the life of the insured did not comply with the association's charter or by-laws. See *Security Benefit Ass'n v. Verdery*, 71 Colo. 150, 204 P. 895 (1922); *Electrical Workers Benefit Ass'n v. Derrickson*, 26 Del. Ch. 65, 21 A.2d 721 (1941); *Jones v. Sovereign Camp, W. W.*, 35 F.2d 345 (5th C.A. 1929) (applying Georgia law); *Shinholser v. Henry*, 151 Ga. 237, 106 S.E. 719 (1921); *District Grand Lodge No. 18 v. Gardner*, 27 Ga. App. 145, 107 S.E. 774 (1921); *Johnson v. Knights of Pythias*, 14 Ga. App. 61, 80 S.E. 213 (1913); *District Grand Lodge No. 18 v. Gardner*, 27 Ga. App. 145, 107 S.E. 774 (1921); *Farrenkoph v. Holm*, 237 Ill. 94, 86 N.E. 702 (1908); *In re Estate of Stephan*, 178 Ill. App. 227 (1st Dist. 1913); *Bush v. Modern Woodmen of America*, 182 Iowa 515, 152 N.W. 31 (1915), supplemental opinion, reh. overruled, 182 Iowa 540, 162 N.W. 59 (1915); *Lindsey v. Western Mutual Aid Soc.*, 84 Iowa 734, 50 N.W. 29 (1891); *Grand Lodge, A. O. U. W. v. Conner*, 116 Me. 224, 100 A. 1022 (1917); *Meinhardt v. Meinhardt*, 117 Md. 426, 83 A. 715 (1912); *Clayton v. Supreme Conclave, Improved Order of Heptasophs*, 130 Md. 31, 99 A. 949 (1917); *Fischer v. Malchow*, 93 Minn. 396, 101 N.W. 602 (1904); *Meyer v. Grand Lodge, O. S. H.*, 108 Minn. 25, 121 N.W. 235 (1908); *Logan v. Modern Woodmen of America*, 137 Minn. 221, 163 N.W. 292 (1917); *Peterson v. National Council, K.L.S.*, 189 Mo. App. 662, 175 S.W. 284 (1915); *Styles v. Byrne*, 89 Mont. 243, 296 P. 577 (1931); *Nitsche v. Security Benefit Ass'n*, 78 Mont. 532, 255 P. 1052 (1927); *Mizanin v. Mihue*, 137 Pa. Super. 269, 8 A.2d 543 (1939); *Stasevicius v. Slauzis*, 144 Pa. Super. 421, 19 A.2d 569 (1941); *Kopachuk v. Providence Ass'n of Ukrainian Catholics*, 153 Pa. Super. 606, 35 A.2d 96 (1943); *Supreme Council of Royal Arcanum v. Churlo*, 263 F. 755 (D.N.Y. 1920) (applying Massachusetts and New York law); *Sovereign Camp, W.O.W. v. Muth*, 91 N.J. Eq. 460, 109 A. 853 (1920); *Howard v. Commonwealth Beneficial Ass'n*, 98 N.J.L. 267, 118 A. 449 (1922); *Coulson v. Flynn*, 181 N.Y. 62, 73 N.E. 507 (1905); *Stronge v. Supreme Lodge, K. P.*, 189 N.Y. 346, 82 N.E. 433 (1901); *Tolson v. National Provident Union*, 60 Misc. 460, 113 N.Y.S. 534, aff'd, 130 App. Div. 884, 114 N.Y.S. 1149, aff'd, 198 N.Y. 535, 92 N.E. 1104 (1908); *Taylor v. Hair*, 112 F. 913 (C.C. Or. 1901) (applying Oregon law); *Rhodes v. Equitable Life Assurance Soc.*, 109 Or. 586, 220 P. 736 (1923); *Cole v. Kazim Temple Ben. Ass'n*, 155 Va. 55, 154 S.E. 556 (1930); *Teed v. Brotherhood of American Yeomen*, 111 Wash. 367, 190 P. 1005 (1920); *Pleasants v. Locomotive Engineers Mut. Life & Accident Ins. Ass'n*, 70 W. Va. 389, 73 S.E. 976 (1912).

[27] *Jones v. Sovereign Camp, W.W.*, 35 F.2d 345 (5th C.A. 1929) (applying Georgia law); *Bennett v. Modern Woodmen of America*, 52 Cal. App. 581, 199 P. 343 (1921) (applying Illinois law); *Bush v. Modern Woodmen of America*, 182 Iowa 515, 152 N.W. 31 (1915), supplemental opinion, reh. overruled, 182 Iowa 540, 162 N.W. 59 (1915); *Modern Woodmen of America v. Comeaux*, 79 Kan. 493, 101 P. 1 (1909); *Modern Bhd. of America v. Quady*, 175 Minn. 462, 221 N.W. 721 (1928); *United Mutual Life Ins. Co. v. Ward*, 201 Minn. 70, 275 N.W. 422 (1937); *Styles v. Byrne*, 89 Mont. 243, 296 P. 577 (1931); *Gregory v. Sovereign Camp of W.O.W.*, 104 S.C. 471, 89 S.E. 391 (1915) (applying Nebraska law); *Meyer v. Meyer*, 79 F.2d 55 (8th C.A. 1935) (applying Ohio law); *Minton v. Minton*, 170 Okla. 274, 39 P.2d 538 (1934); *Rhodes v. Equitable Life Assurance Soc.*, 109 Or. 586, 220 P. 736 (1923); *Mizanin v. Mihue*, 137 Pa. Super. 269, 8 A.2d 543 (1939); *Kopachuk v. Providence Ass'n of Ukrainian Catholics*, 153 Pa. Super. 606, 35 A. 2d 96 (1943); *Phelps v. Life Benefit Inc.*, 67 S.D. 276, 291 N.W. 919 (1940); *Ginsberg v. Butler*, 217 Cal. 467, 19 P.2d 790 (1933) (applying Tennessee law); *Grand Lodge C.K.P. v. Brown*, 56 S.W. 2d 277 (Tex. Civ. App. 1932).

[28] *Security Benefit Ass'n v. Verdery*, 71 Colo. 150, 204 P. 895 (1922); *Farrenkoph v. Holm*, 237 Ill. 94, 86 N.E. 702 (1908); *Anderson v. Royal League*, 130 Minn. 416, 153 N.W. 853 (1915) (applying Illinois law); *Peterson v. National Council, K.L.S.*, 189 Mo. App. 662, 175 S.W. 284 (1915); *Nitsche v. Security Benefit Ass'n*, 78 Mont. 532, 255 P. 1052 (1927); *Teed v. Brotherhood of American Yeomen*, 111 Wash. 367, 190 P. 1005 (1920).

[29] California, Colorado, New York, and Washington.

[30] Alabama, Arkansas, Florida, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, Oklahoma, Oregon, South Dakota, Tennessee, and Texas.

[31] Georgia, Illinois, Minnesota, Mississippi, Ohio, Pennsylvania, and South Carolina.

[32] *Security Benefit Ass'n v. Verdery*, 71 Colo. 150, 204 P. 895 (1922); *Clerments v. Terrell*, 167 Ga. 237, 145 S.E.78 (1928); *Farrenkoph v. Holm*, 237 Ill. 94, 86 N.E. 702 (1908); *Anderson v. Royal League*, 130 Minn. 416, 153 N.W. 853 (1915) (applying Illinois law); *Van Zandt v. Morris*, 17 So. 2d 435 (Miss. 1944); *Peterson v. National Council, K.L.S.*, 189 Mo. App. 662, 175 S.W. 284 (1915); *Nitsche v. Security Benefit Ass'n*, 78 Mont. 532, 255 P. 1052 (1927); *Baker v. Fidelity Mut. Life Ins. Co.*, 18 Ohio Dec. 426 (Ohio Comm. Pl. 1907); *United Family Life Ins. Co. v. Brogan*, 2002 WL 32997138 (Ohio Comm. Pl. 2002); *Griswold v. Prudential Ins. Co.*, 47 Pa. D. & C. 125 (1943); *Foster v. Preferred Accident Ins. Co.*, 125 F. 536 (C.C. Pa. 1903); *Kelly v. Prudential Ins. Co. of America*, 334 Pa. 143, 6 A.2d 55 (1939); *Ellison v. Independent Life & Accident Ins. Co.*, 58 S.E.2d 890 (S.C. 1950); *Rogers v. Atlantic Life Ins. Co.*, 135 S.C. 89, 133 S.E. 215 (1926) (dicta); *Henry v. Lincoln Income Life Ins. Co.*, 405 S.W.2d 167 (Tex. Civ. App. Ft. Worth 1966); *American Casualty & Life. Co. v. Chambers*, 172 S.W.2d 122 (Tex. Civ. App. Ft. Worth 1943); *Teed v. Brotherhood of American Yeomen*, 111 Wash. 367, 190 P. 1005 (1920).

[33] *Security Benefit Ass'n v. Verdery*, 71 Colo. 150, 204 P. 895 (1922).

[34] Section 6, Chapter 139, Colorado Session Laws, 1911, entitled "Fraternal Benefit Societies;" see also Colo. Rev. Stat. § 7-40-102.

[35] 71 Colo. 150 at 152, 204 P. 895 at 896.

[36] *Atlantic Oil Co. v. Patterson*, 331 F.2d 516 (5th Cir. 1964); see also *Harrison v. Comm’r*, 59 T.C. 578, 585 (1973) (“It is true that when one takes out a life insurance policy on the life of another with no insurable interest in that life, the policy is not a life insurance contract within the generally accepted meaning of that phrase but a wagering agreement and the proceeds thereof are not excluded under section 101(a).”) Also, see *Ducros v. Comm’r*, 272 F.2d 49 (6th Cir. 1959), rev’g 30 T.C. 1337 (1958) (insurance proceeds were tax-exempt despite lack of insurable interest in beneficiary, when state law required only insurable interest in owner); and Rev. Rul. 61-134, 1961-2 C.B. 250 (IRS will not follow *Ducros*.)

[37] *Atlantic Oil Co. v. Patterson*, 1963 WL 12513, 11 A.F.T.R.2d 1506, 63-1 USTC ¶ 9445 (N.D. Ala. 1963), aff’d, 331 F.2d 516 (5th Cir. 1964).

[38] 331 F.2d at 517.

[39] Alabama, Alaska, Arizona, Arkansas, California, Delaware, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Virginia, Washington, West Virginia and Wyoming.

[40] Colorado, Florida, Iowa, Kansas, Minnesota, Nebraska, New Hampshire, Pennsylvania, Ohio, Oregon and Vermont.

[41] See, e.g., Kan. Stat. § 40-452(e); Minn. Stat. § 61A-074 subd. 2; and 8 Vt. Stat. § 3711(e).

[42] Alaska Stat. § 21.42.020(a).

[43] See footnote 39, states with statutes listing persons and entities with insurable interests.

[44] Swisher, “The Insurable Interest Requirement for Life Insurance: A Critical Reassessment,” 53 *Drake L. Rev.* 477 (Winter, 2005).

[45] *Id.*, citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

[46] New York, California, District of Columbia, Hawaii, Maine, New Jersey and Alaska.

[47] Netherlands, Belgium, Canada, and Spain, for example, are some of the countries that recognize civil unions. See also Harris, “Same-Sex Unions Around The World--Marriage, Civil Unions, Registered Partnerships—What Are the Differences and Why Do They Matter?” 19 *Prob. & Prop.* 31 (Oct. 2005).

[48] See also *Grand Lodge Colored K.P. v. Watson*, 145 S.W.2d 601 (Tex. Civ. App. Waco, 1940) (parent has insurable interest in child, even though child is illegitimate).

[49] See, however, *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35 (1875) and *Gray v. North Am. Mut. Union*, 249 Ill. App. 74 (3rd Dist. 1928) (child does not have inherent insurable interest in life of parent).

[50] *Jenkins v. Jenkins*, 112 Cal. App. 402, 297 P. 56 (1931); *Edgington v. Equitable Life Assurance Soc.*, 236 Iowa 903, 20 N.W.2d 411 (1945); *Ficke v. Prudential Ins. Co.*, 305 Ky. 171, 202 S.W.2d 429 (1960); *Griswold v. Prudential Ins. Co.*, 47 Pa. D. & C. 125 (1943) citing *Kelly v. Prudential Ins. Co. of America*, 334 Pa. 143, 6 A.2d 55 (1939).

[51] Compare, *Wooten v. Wooten*, 364 S.C. 532, 615 S.E.2d 98 (2005) (former spouse receiving alimony has an insurable interest), and *Browning v. Browning*, 366 S.C. 255, 621 S.E. 389 (Ct. App. 2005) (no insurable interest once support obligation has been extinguished); see also *Robbins v. Jackson Nat’l Life Ins. Co.*, 802 So. 2d 476 (Fla. App. 2d Dist. 2001) (former wife had insurable interest in life of former husband, because of

orders and mediation agreement in dissolution action securing husband's child support obligation by such policies); *In re Mount*, 50 B.R. 305 (Bankr. D. N.H. 1985) (ex-wife had insurable interest in life of ex-husband who had custody of and was supporting minor child with a modest cash contribution from the ex-wife). Also see cases cited at *Wax*, "Property settlement agreement as affecting divorced spouse's right to recover as named beneficiary under former spouse's life insurance policy," 31 A.L.R.4th 59; *Michalik*, "Divorce: provision in decree that one party obtain or maintain life insurance for benefit of other party or child," 59 A.L.R.3d 9; and *Madara*, "Divorce of insured and beneficiary as affecting the latter's right in life insurance," 175 A.L.R. 1220.

[52] See, e.g., *Miller v. Gulf Life Ins. Co.*, 12 So. 2d 127 (Fla. 1943); *Clements v. Terrell*, 145 S.E. 78 (Ga. 1928); *Harden v. Harden*, 230 S.W. 307 (Ky. 1921); *In re Caron*, 305 B.R. 614 (Bankr. D. Mass. 2004); *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 213 (1873); *Wilson v. Behr*, 57 Ohio App. 117, 12 N.E.2d 300 (1st Dist. Hamilton County, 1936); *Northern Life Ins. Co. v. Burkholder*, 283 P. 739 (Or. 1930); *Taylor v. Travelers' Ins. Co.*, 15 Tex. Civ. App. 254, 39 S.W. 185 (1897); *Scherer v. Wahlstrom*, 318 S.W.2d 456 (Tex. Civ. App. Fort Worth 1958); *Green v. Southwestern Voluntary Ass'n*, 20 S.E.2d 694 (Va. 1942); *Opitz v. Karel*, 118 Wis. 527, 95 N.W. 948 (1903) (all holding that engaged persons have an insurable interest in each other's lives); and also see *J.T.W.*, "Insurance: Insurable Interest of Fiance or Fiancee," 17 A.L.R. 580 (1922).

[53] Although many states have eliminated the common law action for breach of promise of marriage, it still exists in nearly half of the states, and in those in which it has been statutorily stricken down, some other suits for damages have taken its place. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (oral contract between couple who lived together without marriage that they would combine their efforts and earnings and share equally all property accumulated was not unenforceable under statute which provides that no cause of action arises for breach of a promise of marriage); *DeFina v. Scott*, 755 N.Y.S.2d 587 (N.Y. Sup. 2003) (post-engagement agreement for division of engagement gifts is not one in contemplation of matrimony and not subject to the statutory bar on actions for breach of contract to marry). Also, see *Kobar*, "Heartbalm Statutes and Deceit Actions," 83 Mich. L. Rev. 1770 (June, 1985); *Williams*, "What to Do When There's No 'I Do': A Model for Awarding Damages Under Promissory Estoppel," 70 Wash. L. Rev. 1019 (Oct. 1995); Note: "Breach of Marriage Promise—Statute Outlawing Breach-of-Promise Suits Does Not Bar Action Based on Fraudulent Promise to Marry," 70 Harv. L. Rev. 1098 (1957).

[54] See *Dreschler*, "Insurable Interest in Brother or Sister in Life of Sibling," 60 A.L.R.3d 98, citing *Mutual Sav. Life Ins. Co. v. Noah*, 291 Ala. 444, 282 So. 2d 271 (1973); *Century Life Ins. v. Custer*, 178 Ark. 304, 10 S.W.2d 882 (1928); *Hodge v. Globe Mut. Life Ins. Co.*, 274 Ill. App. 31 (1934); *Rettenmaier v. Rettenmaier*, 255 Iowa 952, 124 N.W.2d 453 (1963); *Webb v. Imperial Life Ins. Co.*, 216 N.C. 10, 3 S.E.2d 428 (1939); *Rogers v. Atlantic Life Ins. Co.*, 135 S.C. 89, 133 S.E. 215 (1926); *Equitable Life Assurance Soc'y v. Hazlewood*, 75 Tex. 338, 12 S.W. 621 (1889) (these cases all involved a sibling taking a policy on his or her sibling and naming himself or herself as beneficiary).

[55] See *Dreschler*, "Insurable Interest in Brother or Sister in Life of Sibling," 60 A.L.R.3d 98, citing dictum in *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100 (1972);

dictum in *Rombach v. Piedmont & Larlington Life Ins. Co.*, 36 La. Ann. 233 (1883); *Lord v. Dall*, 12 Mass. 115 (1815); *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N.Y. 480 (1878), where court ruled that in light of the relationship, the sibling was not limited to receiving only that amount of the death benefit the sibling if solely a creditor would have received (which would have been equal to the debt), but instead was entitled to receive the entire death benefit.

[56] See *Dreschler*, “Insurable Interest in Brother or Sister in Life of Sibling”, 60 A.L.R.3d 98, citing *Lewis v. Phoenix Mut. Life Ins. Co.*; *Rombach, Peckham v. Grindlay*, 17 Abb NC 18 (1885); *Newmore v. Western & S.L. Ins. Co.*, 28 Ohio C.C. 669, 8 Ohio C.C. (n.s.) 308 (1906); see also *United Ins. Co. of America v. Hadden*, 190 S.E.2d 638 (Ga. App. 1972).

[57] *United Brethren Mut. Aid Soc’y v. McDonald*, 122 Pa. 324, 15 A. 439 (1888) (dictum in decision holding a stepchild did not have an insurable interest in stepparent because no financial dependence or other special circumstances could be shown).

[58] 5 U.S.C.A. §§ 2091-2103.

[59] *Foster v. Cheek*, 212 Ga. 821, 96 S.E.2d 545 (1957).

[60] See also *Volunteer State Life Ins. Co. v. Pioneer Bank*, 327 S.W.2d 59 (Tenn. App. 1959) (individual has insurable interest in child that individual was going to adopt, even though adoption was never completed).

[61] *Lee R. Russ*, *Couch on Insurance* § 41:17 (3d ed. 2004).

[62] *Ritter v. Smith*, 70 Md. 261 (Md. Ct. App. Feb. 21, 1889).

[63] *Hopkins v. Hopkins*, 328 Md. 263, 268 (Md. Ct. App. Oct. 26, 1992) (actual expectancy found as a result of a claim to court-ordered alimony award; “it is a claim based on monetary expectation”); *L. Neal Beard v. American Agency Life Ins. Co.*, 314 Md. 235 (Md. Ct. App. Dec. 1, 1988).

[64] *Beard v. American Agency Life Ins. Co.*, 314 Md. 235 (1988) (Tenant had no insurable interest in landlord because there was no curtailment of expectancy upon landlord’s death when lease provisions were enforceable against insured’s successors and assigns. The court cited examples of when such a curtailment exists, i.e., a tenant leased property from an owner of a life estate in the property or a person was an assignee of the interest of a trust income beneficiary.)

[65] *Id.*

[66] *Ritter v. Smith*, 70 Md. 261 (Ct. App. 1889).

[67] See *Danne*, “Right of Creditor Beneficiary or Assignee of Insurance Policy on Life of Debtor to Excess Proceeds over Amount of Debt,” 6 A.L.R.6th 391 citing *Estate of Bean v. Hazel*, 972 S.W.2d 290 (Mo. 1998) (the limitation on the amount a creditor can recover is imposed even when the insured applied for the policy and named the creditor as the beneficiary). The annotation goes on to explain that if it can be established that the parties intended otherwise, then this presumption can be overcome.

[68] *Crotty v. Union Mut. Life Ins. Co.*, 144 U.S. 621 (1892); *Central Nat’l Bank v. Hume*, 128 U.S. 195 (1888) (recognizing rule, without applying it); *Warnock v. Davis*, 104 U.S. 775 (1881); *Page v. Burnstine*, 102 U.S. 664 (1880); *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457 (1876); *Cammack v. Lewis*, 82 U.S. 643 (1872); *Finnie v. Walker*, 257 F. 698 (C.C.A. 2d 1919); *J.M. Radford Grocery Co. v. Powell*, 228 F. 1 (C.C.A. 5th 1915); *Jordan v. Roden*, 292 F. 573 (C.C.A. 6th 1923); *Dakota Life Ins. Co. v. Midland Nat’l Bank*, 18 F.2d 903 (C.C.A. 8th 1927), *rev’d on other grounds*, 277 U.S.

346 (1928) and vac'd on other grounds, 28 F.2d 1009 (C.C.A. 8th 1928); *Zolintakis v. Orfanos*, 119 F.2d 571 (C.C.A. 10th 1941); *Mutual Life Ins. Co. v. Illinois Nat'l Bank*, 34 F. Supp. 206 (E.D. Mich. 1940), decree aff'd without opinion by, 126 F.2d 469 (C.C.A. 6th 1942); *Aetna Life Ins. Co. v. Mason*, 30 F.2d 715 (D.N.J. 1929); *Eichelberger v. Mutual Life Ins. Co.*, 59 F. Supp. 852 (E.D. Va. 1944), judgment aff'd per curiam, 148 F.2d 634 (C.C.A. 4th 1944); *McCullar v. Universal Underwriters Life Ins. Co.*, 687 So. 2d 156 (Ala. 1996); *General Motors Acceptance Corp. v. Kendrick*, 274 Ala. 566, 150 So. 2d 185 (1962); *Home Life Ins. Co. v. Masterson*, 180 Ark. 170, 21 S.W.2d 414 (1929); *Gonsalves v. Sunset Life Ins. Co.*, 215 F.3d 1333 (9th Cir. 2000); *Jimenez v. Protective Life Ins. Co.*, 8 Cal. App. 4th 528, 10 Cal. Rptr. 2d 326 (4th Dist. 1992); *Harrison v. Comm'r*, 59 T.C. 578, 1973 WL 2532 (1973), recommendation regarding acquiescence, 1973 WL 35073 (I.R.S. AOD 1973) and acq., 1973-2 C.B. 1 (applying Colorado law); *National City Bank v. Strong Bros. Enter., Inc.*, 651 P.2d 451 (Colo. Ct. App. 1982); *Allen v. Home Nat'l Bank*, 120 Conn. 306, 180 A. 498 (1935); *Wages v. Wages*, 202 Ga. 155, 42 S.E.2d 481 (1947); *Vulcan Life & Acc. Ins. Co. v. United Banking Co.*, 118 Ga. App. 36, 162 S.E.2d 798 (1968); *Benes v. Bankers' Life Ins. Co.*, 282 Ill. 236, 118 N.E. 443 (1917); *Amick v. Butler*, 111 Ind. 578, 12 N.E. 518 (1887); *Matter of Estate of Devine*, 628 N.E.2d 1227 (Ind. Ct. App. 4th Dist. 1994); *Rettenmaier v. Rettenmaier*, 255 Iowa 952, 124 N.W.2d 453 (1963) (recognizing rule without applying it); *Schum v. Lawrenceburg Nat'l Bank*, 314 Ky. 297, 234 S.W.2d 962 (1950); *Shaw v. M. Livingston & Co.*, 293 Ky. 575, 169 S.W.2d 612 (1943); *Travia v. Metropolitan Life Ins. Co.*, 186 La. 934, 173 So. 721 (1937); *Reed v. Peninsular Life Ins. Co.*, 367 So. 2d 89 (La. Ct. App. 4th Cir. 1979) (implied recognition); *Urquhart v. Alexander & Alexander, Inc.*, 218 Md. 405, 147 A.2d 213 (1958) (recognizing rule without applying it); *Hayward v. Campbell*, 174 Md. 540, 199 A. 530 (1938); *Weatherbee v. New York Life Ins. Co.*, 182 Mass. 342, 65 N.E. 383 (1902); *Balcer v. Peters*, 37 Mich. App. 492, 195 N.W.2d 83 (1972); *Secor v. Pioneer Foundry Co.*, 20 Mich. App. 30, 173 N.W.2d 780 (1969) (recognizing rule without applying it); *Estate of Bean v. Hazel*, 972 S.W.2d 290 (Mo. 1998); *Albracht v. Prudential Ins. Co. of America*, 201 Neb. 249, 267 N.W.2d 511 (1978) (implied recognition); *Middlesex County Welfare Bd. v. Motolinsky*, 134 N.J. Eq. 323, 35 A.2d 463 (Ch. 1944) (implied recognition); *Charlotte Nat'l Bank v. Mutual Ben. Life Ins. Co.*, 210 N.C. 140, 185 S.E. 648 (1936) (implied recognition); *Newsome v. Prudential Ins. Co. of America*, 4 N.C. App. 161, 166 S.E.2d 487 (1969); *Katz v. Ohio Nat'l Bank*, 127 Ohio St. 531, 191 N.E. 782 (1934) (recognizing rule without applying it); *Russell v. Massachusetts Mut. Life Ins. Co.*, 29 Ohio App. 226, 6 Ohio L. Abs. 708, 163 N.E. 215 (6th Dist. Erie County 1927) (implied recognition); *Prudential Ins. Co. of America v. Glass*, 1998 Okla. 52, 959 P.2d 586 (1998); *Duty v. First State Bank of Oregon*, 71 Or. App. 611, 693 P.2d 1308 (1985); *Haberfeld v. Mayer*, 256 Pa. 151, 100 A. 587 (1917); *Clark v. Allen*, 11 R.I. 439, 1877 WL 4932 (1877) (implied recognition); *Llewelyn v. Dobson Bros.*, 274 S.C. 177, 262 S.E.2d 726 (1980); *Froiland v. Tritle*, 484 N.W.2d 310 (S.D. 1992); *Kincaid v. Alderson*, 209 Tenn. 597, 354 S.W.2d 775 (1962) (recognizing rule without applying it); *Central State Bank v. Edwards*, 21 Tenn. App. 418, 111 S.W.2d 873 (1937); *Peoples Life Ins. Co. v. Whiteside*, 94 F.2d 409 (C.C.A. 5th Cir. 1938) (applying Texas law); *McAllen State Bank v. Texas Bank & Trust Co.*, 433 S.W.2d 167 (Tex. 1968); *Stillwagoner v. Travelers Ins. Co.*, 979 S.W.2d 354 (Tex. App. Tyler 1998); *Jones v. New York Life Ins. Co.*, 15

Utah 522, 50 P. 620 (1897); *Coon v. Swan*, 30 Vt. 6, 1856 WL 4219 (1856); *White v. Pacific Mut. Life Ins. Co.*, 150 Va. 849, 143 S.E. 340 (1928) (implied recognition); *First Nat'l Bank v. Speece*, 99 Va. 194, 37 S.E. 843 (1901); *Leuning v. Hill*, 79 Wash. 2d 396, 486 P.2d 87 (1971) (recognizing rule without applying it); *Albrent v. Spencer*, 3 Wis. 2d 273, 88 N.W.2d 333 (1958); *Albrent v. Spencer*, 275 Wis. 127, 81 N.W.2d 555 (1957); see also Danne, "Right of Creditor Beneficiary or Assignee of Insurance Policy on Life of Debtor to Excess Proceeds over Amount of Debt," 6 A.L.R.6th 391.

[69] See *Grigsby v. Russell*, 222 U.S. 149 (1911); *Page v. Burnstine*, 102 U.S. 664 (1880); *Fehr v. Cawthon*, 293 F. 152 (C.C.A. 6th 1923); *Kentucky Life & Acc. Ins. Co. v. Hamilton*, 63 F. 93 (C.C.A. 6th 1894); *Zolintakis v. Orfanos*, 119 F.2d 571 (C.C.A. 10th 1941); *Mutual Life Ins. Co. v. Illinois Nat'l Bank*, 34 F. Supp. 206 (E.D. Mich. 1940), decree aff'd without opinion by, 126 F.2d 469 (C.C.A. 6th 1942); *Aetna Life Ins. Co. v. Mason*, 30 F.2d 715 (D.N.J. 1929); *Graves v. Norred*, 510 So. 2d 816 (Ala. 1987); *Home Life Ins. Co. v. Masterson*, 180 Ark. 170, 21 S.W.2d 414 (1929); *Forster v. Franklin Life Ins. Co.*, 135 Colo. 383, 311 P.2d 700 (1957); *Wages v. Wages*, 202 Ga. 155, 42 S.E.2d 481 (1947); *American Cas. Co. v. Rose*, 340 F.2d 469 (10th Cir. 1964) (Illinois law); *Amick v. Butler*, 111 Ind. 578, 12 N.E. 518 (1887); *Rettenmaier v. Rettenmaier*, 255 Iowa 952, 124 N.W.2d 453 (1963); *Mercer Nat'l Bank v. White's Ex'r*, 236 Ky. 128, 32 S.W.2d 734 (1930); *Travia v. Metropolitan Life Ins. Co.*, 186 La. 934, 173 So. 721 (1937); *Urquhart v. Alexander & Alexander, Inc.*, 218 Md. 405, 147 A.2d 213 (1958); *Tateum v. Ross*, 150 Mass. 440, 23 N.E. 230 (1890); *Secor v. Pioneer Foundry Co.*, 20 Mich. App. 30, 173 N.W.2d 780 (1969); *Prudential Ins. Co. of America v. Glass*, 1998 Okla. 52, 959 P.2d 586 (1998); *Haberfeld v. Mayer*, 256 Pa. 151, 100 A. 587 (1917); *Llewelyn v. Dobson Bros.*, 274 S.C. 177, 262 S.E.2d 726 (1980); *Hackney v. Sharp*, 178 Tenn. 310, 157 S.W.2d 827, 138 A.L.R. 1354 (1942); *Dunn v. Second Nat'l Bank*, 131 Tex. 198, 113 S.W.2d 165, 115 A.L.R. 730 (Comm'n App. 1938); *Jones v. New York Life Ins. Co.*, 15 Utah 522, 50 P. 620 (1897).

[70] *Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U.S. 498 (1883); see also Cooper, "Insurable interest of partner or partnership in life of partner," 70 A.L.R.2d 577; Tinio, "Insurance on life of partner as partnership asset," 56 A.L.R.3d 892; and Monaghan, "Relative rights of surviving partner and the estate of the deceased partner in proceeds of life insurance acquired pursuant to partnership agreement," 83 A.L.R.2d 1347.

[71] *Brammer v. Wilder*, 122 Tex. 247, 57 S.W.2d 571 (1933); *Rush v. Howkins*, 135 Ga. 128, 68 S.E. 1035 (1910); *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244 (1854).

[72] *Lakin v. Postal Life & Casualty Ins. Co.*, 316 S.W.2d 542 (Mo. 1958).

[73] *Tillman v. Camelot Music, Inc.*, 408 F.3d 1300 (10th Cir. 2005); *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400 (5th Cir. 2004); see Trujillo, Note, "An Employer's Insurable Interest in Rank and File Employees: *Tillman v. Camelot Music, Inc.*," 59 Tax Lawyer No. 2 (2005), for a discussion of the COLI cases; see also H. Zaritsky & S. Leimberg, *Tax Planning With Life Insurance*, ¶¶ 1.14[7][a], 2.09[3][b][ii] (Warren, Gorham & Lamont/RIA 2d ed. 2005).

[74] See *Rubenstein v. Mut. Life Ins. Co.*, 584 F. Supp. 272 (E.D. La. 1984); *Willingham v. United Ins. Co. of America*, 628 So. 2d 328 (Ala. 1993) (foster parent has no insurable interest in foster child); *Reed v. Smith*, 120 S.W.2d 302 (Tex. Civ. App. Eastland 1938) (step-parent has insurable interest in step-child, where there is evidence of

close family relationship); also see discussions in Vento, “Insurable Interest of foster child or stepchild in life of foster or step parent, or vice versa,” 35 A.L.R.5th 781; Renner, “Immoral relations between insured and beneficiary as affecting liability of insurer or rights in respect of proceeds of policy,” 173 A.L.R. 716.

[75] See *Liberty Nat'l Life Ins. Co. v. Weldon*, 100 So. 2d 696, 704 (Ala. 1957) (insured's aunt must establish a “reasonable expectation of possible profit or advantage to her from the continued life of [the niece]” in order to establish an insurable interest); *People's First Nat'l Bank & Trust Co. v. Christ*, 65 A.2d 393, 395 (Pa. 1949) (relationship as aunt or uncle does not create insurable interest in life of nephew); *Brockton v. S. Life & Health Ins. Co.*, 556 So. 2d 1138 (Fla. Dist. Ct. App. 1989) (aunt had insurable interest in life of niece with whom she had a lifelong familial relationship, which included lending money to one another, even though they were somewhat estranged at niece's death); *Goodwin v. Fed. Mut. Ins. Co.*, 180 So. 662, 664-65 (La. Ct. App. 1938) (cousins have no inherent insurable interest); *Covington v. Covington*, 271 S.W.2d 849, 850 (Tex. Civ. App. 1954) (same); *Chandler v. Mut. Life & Indus. Ass'n*, 61 S.E. 1036 (Ga. 1908) (no inherent insurable interest in one's brother-in-law); *King v. Cram*, 69 N.E. 1049, 1051 (Mass. 1904) (sister-in-law who was a member of insured's household, and to whom insured owed money for services, was a proper assignee of the policy, but she had no insurable interest); *Holmes v. Nationwide Mut. Ins. Co.*, 244 N.Y.S.2d 148, 149 (Sup. Ct. 1963) (whether brother-in-law coupled with economic interest from loan creates an insurable interest is an issue of material fact).

[76] *Chawla, ex rel Giesinger v. Transamerica Occidental Life Ins. Co.*, 2005 WL 405405 (E.D. Va. 2005), *aff'd in part, vac'd in part*, 440 F.3d 639, 2006 WL 538993 (4th Cir. 2006).

[77] The business relationship between the insured and Ms. Chawla might actually have been sufficient to create an insurable interest, though the two judicial opinions did not provide sufficient facts from which to make this judgment. See, e.g., *Graves v. Norred*, 510 So. 2d 816 (Ala. 1987); and *Ridley v. VanderBoegh*, 511 P.2d 273 (Idaho 1973) (both holding that a partner has an insurable interest in the life of other partners in the same partnership, to the extent that there is a reasonable expectation of gain from the continued life of the insured partner).

[78] Unfortunately, as will be discussed later, neither the Fourth Circuit nor the district court provided substantial detail regarding the terms of the trust. This makes it difficult to determine what the result would have been had the trust been created in one of the states with favorable legislation regarding the insurable interest of a trust.

[79] This lack of authority was noted by the district court, but it did not appear to affect the reasoning behind the court's decision.

[80] One of the more interesting bits of testimony at trial was referred to by the Fourth Circuit:

In examining Giesinger, [Dr.] Parmelee noticed a four-to-five-inch surgical scar on Giesinger's abdomen, and he inquired whether Giesinger had undergone a cholecystectomy (gall bladder removal). Giesinger responded “no” and advised Parmelee that he had no recollection of where the scar came from. Dr. Parmelee later testified that, “Normally, when a patient denied such knowledge, he would suspect the patient of lying.” J.A. 379-80. He also testified, however, that he did not recall

Giesinger “in any way,” and had no recollection of his impression of Giesinger’s honesty. J.A. 1197. Dr. Jack Shalley, a Transamerica vice-president, conceded that, based on Parmelee’s report, “[w]ith perfect 20/20 hindsight we probably should have inquired more fully,” but observed that “it is still an underwriting decision whether or not to pursue that.”

440 F.3d at 643.

[81] Virginia law provides that “a contract is made when the last act to complete it is performed and in the context of an insurance policy, the last act is delivery to the insured.” *Seabulk Offshore Ltd. v. Amer. Home Assur. Co.*, 377 F.3d 408, 418-19 (4th Cir. 2004).

[82] 2005 WL 405405 at ¶3, citing *Hofmann v. John Hancock Mutual Life Ins. Co.*, 400 F. Supp. 827, 829 (D. Md. 1975) (citing *Mutual Life Ins. Co. v. Hilton-Green*, 241 U.S. 613 (1916)); *Fitzgerald v. Franklin Life Ins. Co.*, 465 F. Supp. 527, 534 (D. Md. 1979).

[83] See Md. Ins. Code § 12-207(b)(1).

[84] 2005 WL 405405 at ¶6.

[85] Md. Ins. Code § 12-201.

[86] Md. Ins. Code § 12-101(d).

[87] Specifically, the Maryland Insurance Code states that: (i) For individuals related closely by blood or law, a substantial interest engendered by love and affection is an insurable interest; and (ii) For the prospective parent of a prospective adoptive child, an insurable interest exists in the life of the child as of the date of the earlier of a placement for adoption (if the statutorily required consents have been given or if a decree awarding guardianship has been granted), or an interlocutory or final decree of adoption. Md. Ins. Code § 12-201(b)(1), 12-201(b)(2).

[88] Md. Ins. Code § 12-201(b)(1).

[89] The Court’s analysis of Maryland’s insurable interest statute and how it applied to trusts appears to have been taken almost verbatim from Transamerica’s pleadings.

[90] 2005 WL 405405, at ¶5.

[91] 2005 WL 405405, at ¶5.

[92] 440 F.3d 639, 645-648.

[93] 440 F.3d 639, 646-648.

[94] 440 F.3d 648. The League of Life and Health Insurers of Maryland, in their amici curiae brief, had apparently emphasized that “such a ruling could significantly impact Maryland law and how life insurance companies transact business in Maryland.” *Id.*

[95] 440 F.3d at 648.

[96] *Staples v. Murray*, 124 Kan. 730, 262 P. 558 (1928).

[97] 124 Kan. 730, 262 P. 558.

[98] *Butterworth v. Mississippi Valley Trust Co.*, 362 Mo. 133, 240 S.W.2d 676 (1951).

[99] The opinion does not discuss the terms of the trust, other than to state that “[d]efendants Betty Jane Williams (nee Betty Jane Tarlton) and Leota M. Tarlton are the principal beneficiaries of the Tarlton Trust.” 362 Mo. at 137, 240 S.W.2d at 678.

[100] The court stated:

Plaintiffs admitted during the trial, and the facts above fully support such admission, that Tarlton had an insurable interest in the life of Mr. Butterworth at the date the policy was converted and when it was assigned to Tarlton. It is uniformly held that a creditor has an insurable interest in the life of his debtor. 44 C.J.S., Insurance, § 208, p. 909, Dieterle v. Standard Life Insurance Company, Mo.App., 119 S.W.2d 440, Long v. Montgomery, Mo.App., 22 S.W.2d 206. Any pecuniary interest in the continued life of another is an insurable interest. Baker v. Keet-Rountree Dry Goods Company, 318 Mo. 969, 2 S.W.2d 733, 3 S.W.2d 1003. The facts of this case show that Tarlton, from about 1925 until Tarlton's death in 1943, had an insurable interest in Butterworth's life for another reason as well. The business relationships of the two men were interlocked and intertwined and this record shows that for their mutual prosperity, they were mutually dependent upon each other. We will neither labor nor restate the facts set out above. Those facts speak for themselves. The business relationships of the two, their dependency upon each other, gave Tarlton a full insurable interest in the life of Butterworth. Generally, any reasonable expectation of pecuniary benefit to one person from the continued life of another creates an insurable interest. Baker v. Keet-Rountree Dry Goods Company, supra, Alexander v. Griffith Brokerage Company, 228 Mo.App. 773, 73 S.W.2d 418, and cases cited, Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U.S. 457, 460, 24 L.Ed. 251, 44 C.J.S., Insurance, § 203, page 903. Authorities could be multiplied. There can be no possible question that Tarlton had an insurable interest in Butterworth's life when policy number 524,437 was issued, when it was thereafter assigned to Tarlton, and thereafter so long as Tarlton lived.

362 Mo. at 139-140, 240 S.W.2d at 680.

[101] 240 S.W.2d at 683.

[102] 240 S.W.2d at 682.

[103] Mickelberry's Food Prod. Co. v. Haeussermann, 247 S.W.2d 731 (Sup. Ct. Mo. 1952).

[104] 247 S.W.2d at 734.

[105] 247 S.W.2d at 737.

[106] See 247 S.W.2d at 737.

[107] 247 S.W.2d at 738.

[108] In re LeBlanc, 217 B.R. 675 (Bankr. D. Mass. 1998).

[109] 217 B.R. at 367.

[110] Mass. Gen. Laws, ch. 175, §125 (Law. Co-op. 1987). The court noted that one could view the state exemption as protecting only life insurance death benefits, and not the cash surrender value of the policy. See In re Monahan, 171 B.R. 710, 717-719 (Bankr. D.N.H. 1994). The Supreme Judicial Court of Massachusetts, however, had already adopted a contrary view. Rosenberg v. Robbins, 289 Mass. 402, 194 N.E. 291 (1935).

[111] 217 B.R. at 369.

[112] Caso v. First Colony Life Ins. Co., 2003 WL 21019625 (Cal. App. 4th Dist. 2003).

[113] Interestingly, the insured was the only one of the three partners who actually bought insurance. One partner (Richard Caso) was turned down for medical reasons and another partner (Himmat Dajee) never applied, because he thought that his own health

problems would result in either a rejection of his application of an exorbitant premium. 2003 WL 21019625 at ¶2.

[114] Cal. Ins. Code § 10110.1(a).

[115] Cal. Ins. Code §§ 10110.1(d), 10110.1(e).

[116] 2003 WL 21019625 at ¶5.

[117] Two federal courts, applying Texas law, obliquely addressed the question of how the insurable interest of a trust is determined, in cases involving the establishment of corporate-owned life insurance arrangements on rank-and-file employees. The courts in *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 794 (S.D. Tex. 2002), *aff'd*, 354 F.3d 400 (5th Cir. 2004) held that Wal-Mart, Inc. had no insurable interest in the lives of its rank-and-file employees. Wal-Mart entered into an arrangement under which it bought, through a trust it created and controlled, life insurance policies on thousands of its rank-and-file employees. The district court held that Wal-Mart had no insurable interest in the lives of its rank-and-file employees, without ever discussing whether the trust required its own separate insurable interest. The district court did note, however that:

[t]he Trust was named the beneficiary and owner of all these policies. The Wal-Mart Trust was established for the sole benefit of Wal-Mart and Wal-Mart completely controlled the Trust's affairs.

In a footnote, the court further stated:

It is noted that Wal-Mart, the company, is not named beneficiary of the COLI policies; rather it is the Trust that holds that designation with Wal-Mart as beneficiary of the Trust. For the purposes of the motions addressed here, the Court will ignore this distinction.

220 F. Supp. 2d 794 at note 19. Both of these quotes suggest that the district court viewed the trust as Wal-Mart's alter ego, though it is unclear whether this principle would extend to trusts that were not subject to the grantor's plenary control. This precedent, therefore, is far from useful.

[118] 18 Del. Code § 2704(a); Ga. Code § 33-24-3; Md. Ins. Code § 12-201(a); Va. Code § 38.2-301(A); S.D. Codified Laws § 5 8-10-3; and Wash. Rev. Code § 48.18.030(1).

[119] 18 Del. Code § 2704(c)(5).

[120] The current Delaware insurable interest rule for trusts was enacted in 1998. 71 Del. Laws, c. 239, § 2. The provision it re-placed, which appears to have been enacted in 1994, stated, in applicable part, that:

[t]he trustee of a trust established by an individual has an insurable interest in the life of that individual and the same insurable interest in the life of any other person as does the individual. . . .

69 Del. Laws, c. 462, §§ 1-3.

[121] Section 677(a)(3). The literal wording of the Code would appear to render the grantor the owner of the entire trust. Several early cases stated that the grantor owns only

the amount of trust income used to pay the premiums, rather than owning all trust income that could have been so used. *Weil v. Comm'r*, 3 T.C. 579 (1944), acq. 1944 C.B. 29 (grantor taxed only to extent of income used); *Iversen v. Comm'r*, 3 T.C. 756 (1944) (same); *Rand v. Comm'r*, 40 B.T.A. 233 (1939), acq. 1939-2 C.B. 30, aff'd, 116 F.2d 929 (8th Cir. 1940), cert. denied, 313 U.S. 594 (1941) (same). Other early cases also stated that if the trust used principal, loan proceeds, or other sources of funds to pay the premiums, trust income has not been used to pay premiums and the grantor has nothing on which to be taxed. Compare *Chandler v. Comm'r*, 41 B.T.A. 165 (1940), aff'd without discussion on this point, 119 F.2d 623 (3d Cir. 1941) (grantor not taxable when trustee used nontaxable insurance dividends and principal contributions to pay premiums) with *Rieck v. Comm'r*, 118 F.2d 110 (3d Cir. 1941) (grantor taxed when beneficiaries lent money to trust to pay premiums, and trustee then distributed trust income to beneficiaries).

Also, the Tax Court has held that the literal wording of the Code may not be enough, and that the mere possibility that the trust could buy insurance policies and pay the premiums is not enough to create a grantor trust. *Corning v. Comm'r*, 104 F.2d 329 (6th Cir. 1939) (trust owned no policies, so grantor not taxed on any income). These cases predate the 1954 and 1969 changes in Section 677 and the current "portion" regulations under Section 671, but one might view them as consistent with the present concept of ownership of a "portion" of a trust, and with the regulations under Section 677 regarding ownership only of the trust income. Nonetheless, one must note that these were interpretations of statutory language that differs from the current, and it may be argued convincingly that a more expansive reading of the phrase "may be applied to the payment of premiums" results from the 1954 recodification and rewriting, and that a trust is a grantor trust if it allows the trustee to buy life insurance on the life of the grantor or the grantor's spouse, even if no policy is held currently. See *Gopman*, "The Income Tax Consequences of an Irrevocable Life Insurance Trust," 22 *Tax Mngm't Est., Gifts, and Tr. J.* at 215 (Sept. 11, 1997).

See also PLR 8839008, in which the grantors created two irrevocable trusts for their children's benefit. Each instrument stated that trust income "shall not be applied toward the payment of insurance premiums for policies on the life of any contributor to Trust." Five years after creating the trusts, the trustees bought a survivorship policy on the grantors' lives, paying the premiums with a single 1987 payment. The IRS ruled that the premium payment in 1987 caused the trust to be a grantor trust for that year, to the extent of the income actually so used (all of it). The IRS noted that Section 677(a)(3) speaks in terms of the grantor owning any trust income paid or applied to the payment of life insurance premiums. The violation of the trust instrument meant that the trustees were using trust principal to pay the premiums, for trust accounting purposes, but for tax purposes they were still using trust income. Thus, the IRS held that the trusts were grantor trusts, despite the lack of trustee authority to make the payments.

[122] Section 677(a)(1).

[123] Sections 674(b), 674(c).

[124] On the grantor trust rules generally, see, e.g., *Danforth, Lane & Zaritsky*, *Federal Income Taxation of Estates and Trusts*, chs. 7-13 (Warren, Gorham & Lamont/RIA

Group, 3rd ed.); Ferguson, Freeland & Ascher, *Federal Income Taxation of Estates, Trusts & Beneficiaries*, ch. 10 (Aspen, 3d ed.); and T.M. 858-2nd, Zaritsky, *Grantor Trusts: Sections 671-679*.

[125] See also Danforth, Lane & Zaritsky, *Federal Income Taxation of Estates and Trusts* at § 12.05 (Warren, Gorham & Lamont/RIA Group, 3rd ed.).

[126] The trust in Chawla would not have had an insurable interest in the life of the insured under this rule, because the insured was the only trust beneficiary who had an insurable interest in his life.

[127] 18 Del. Code §§ 2704(c)(1), 2704(c)(2).

[128] This would seem particularly likely in a state like Delaware, that has repealed its rule against perpetuities, and encourages the creation of perpetual trusts. See Blanton & Balakrishna, "Dynasty Trusts and Life Insurance: New Opportunities for Leverage," 30 *Est. Plan.* 407 (Aug. 2003); McCaffery, Yoshitake & Davidson, "The Advantages of Creating Out-of-State Trusts," 28 *L.A. Law.* 19 (Sept. 2005); Nenko, "Dynasty Trusts From the Client's Perspective," 33 *U. Miami Est. Plan. Inst.* ch. 13 (1999). See also an interesting commentary on the trend of states to change property law to attract trust business, in Orth, "'The Race to the Bottom': Competition in the Law of Property," 9 *Green Bag* 47 (Autumn, 2005).

[129] 2006 Ga. Act 834 (H.B. 1484).

[130] Ga. Code § 33-24-3(c).

[131] 24-A Me. Rev. Stat. § 2404(1).

[132] 24-A Me. Rev. Stat. § 2402(3)(E) added by Laws 1991, c.548.

[133] Md. Ins. Code §12-201(b)(6), enacted by Maryland House Bill No. 271, Maryland 421st Session of the General Assembly (2006). Section 3 of the enactment states: "[t]hat this Act shall take effect June 1, 2006." It is not clear how this will apply to insurance policies already owned by a trust on that date, because Maryland law tests an insurable interest on the date the policy is acquired, and the 2006 statutory amendment contains no statement suggesting an intention that it be retroactively applied. On the presumption against retroactivity, see *State v. Norwood*, 12 Md. 195, 206 (1858) ("It is true, as a general rule, that when the interpretation of a statute is doubtful, in respect to pre-existing contracts, it will be construed as operating prospectively. But when the language of the statute clearly indicates an intention that it shall have a retroactive effect, it must be so applied.")

[134] Thus, like the Delaware statute, the Maryland statute would not appear to create an insurable interest in the trust in Chawla, because although the grantor was the insured, the proceeds would not be held primarily for the benefit of beneficiaries who had an insurable interest in the grantor's life.

[135] Va. Code § 38.2-301(B)(5). The statute expressly does not apply to domestic or foreign business trusts. This provision was added by Acts 2005, ch. 698, and is effective July 1, 2005. Because the law tests an insurable interest when the policy is procured, however, this statute may not apply to policies already owned by a trustee on July 1, 2005.

[136] The Virginia statute would certainly have created an insurable interest in the trust in Chawla, because the grantor of the trust was the insured. It also would have

created an insurable interest in that trust because one of the beneficiaries was the insured, who had an insurable interest in his own life.

[137] This was added by 2006 South Dakota Laws Ch. 251 (SB 69). The Act states that it is “effective retroactively to November 2, 1889.”

[138] The South Dakota statute would have created an insurable interest in the trust in Chawla, because the grantor of the trust was the insured. It also would not have created an insurable interest in that trust merely because one of the beneficiaries was the insured, because the insured would not share in the benefit of the proceeds of the policy, and the beneficiary who would receive that benefit had no insurable interest in the insured’s life.

[139] Wash. Rev. Code § 48.18.030(3)(c).

[140] The trust in Chawla would have had an insurable interest under the Washington statute, because the insured was one of the trust beneficiaries. The Washington statute appears not to deprive the trustee of this interest, even though the insured would not be a beneficiary when the trust received the policy death benefits.

[141] See L. Russ & T. Segalla, *Couch on Insurance* (3d ed.), which discusses the insurable interest rule at §§ 36.77 to 36.88.

[142] Nonetheless, one may wish to have the trust instrument construed under the law of the same state as that governing the life insurance policy, for consistency, if for no other reason. On how to determine the controlling state law, see Engelhardt & Hayes, “Choice of Situs for Itinerant Trustees and Peripatetic Beneficiaries,” SL003 ALI-ABA Course of Study 395 (July 21-22, 2005); McCaffery, Yoshitake & Davidson, “The Advantages of Creating Out-of-State Trusts,” 28 L.A. Law. 19 (Sept. 2005); Nenno, “Dynasty Trusts From the Client’s Perspective,” 33 U. Miami Est. Plan. Inst. ch. 13 (1999).

[143] See, e.g., *Boisvert v. Boisvert*, 94 N.H. 357, 53 A.2d 515 (1947), overruled on other grounds, *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963); *Reger v. National Ass’n of Bedding Mfrs. Group Ins. Trust Fund*, 372 N.Y.S.2d 97 (N.Y. Sup. 1975); see also, L. Russ & T. Segalla, *Couch on Insurance* § 24.21 (3d ed.).

[144] See, e.g., Tex. Ins. Code § 21.42 (Texas law will govern any contract of insurance payable to any citizen or inhabitant of the state by an insurer doing business in Texas, if contracts are made in course of the company’s Texas business); S.D. Cent. Code § 53-1-4 (insurance contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place where it is made); see also statutes and cases discussed in L. Russ & T. Segalla, *Couch on Insurance* § 24.20 (3d ed.).

[145] See, e.g., *J.C. Penney Life Ins. Co. v. Piloni*, 393 F.3d 396 (3rd Cir. 2004) (Pennsylvania law); *Hicks v. American Heritage Life Ins. Co.*, 332 F. Supp. 2d 1193 (W.D. Ark. 2004); *Gray v. Penn. Mutual Life Ins. Co.*, 126 N.E.2d 409 (Ill. App. 1955); *Bjork v. Dairyland Ins. Co.*, 174 N.W.2d 379 (Iowa 1970); *Cooper v. Berkshire Life Ins. Co.*, 810 A.2d 1045 (Md. Spec. App. 2002); *Jacobus v. Massachusetts Mut. Life Ins. Co.*, 91 F. Supp. 674 (W.D.N.Y. 1950); *Fortune Ins. Co. v. Owens*, 512 S.E.2d 487 (N.C. App. 1999); *Ofield v. National Ben. Life Ins. Co.*, 293 S.W. 271 (Tx. Ct. App. 1927); see also L. Russ & T. Segalla, *Couch on Insurance* § 24.4 (3d ed.).

[146] See, e.g., *J.C. Penney Life Ins. Co. v. Piloni*, 393 F.3d 396 (3rd Cir. 2004) (Pennsylvania law; last act is usually delivery of policy to the insured and payment of premium by the insured); *In re New England Mut. Life Ins. Co. Sales Practices*

Litigation, 236 F. Supp. 2d 69 (D. Mass. 2002) (same); *Cooper v. Berkshire Life Ins. Co.*, 810 A.2d 1045 (Md. Spec. App. 2002) (same); *Roy v. Northwestern Nat'l Life Ins. Co.*, 974 F. Supp. 508 (D. Md. 1997) (same); *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 714 (S.D. Tex. 2002) (contract stated that premiums must be paid at insurer's home office, rendering that the place of the contract); *Twin City Fire Ins. Co. v. Colonial Life & Acc. Ins. Co.*, 124 F. Supp. 2d 1243 (M.D. Ala. 2000) (contract is made where last act occurs, which is receipt and acceptance of insurance policy); *American Family Life Assur. Co. v. U.S. Fire Co.*, 885 F.2d 826 (11th Cir. 1989) (Georgia law; contract is made where policy is delivered); *Wilmington Trust Co. v. Mutual Life Ins. Co.*, 177 F.2d 404 (3rd Cir. 1949) (Delaware law; same); *Lazar v. Metropolitan Life Ins. Co.*, 290 F. Supp. 179 (D. Conn. 1968) (policy negotiated and delivered in Connecticut governed by Connecticut law); see also L. Russ & T. Segalla, *Couch on Insurance* § 24.20 (3d ed.).

[147] See, e.g., *Aetna Life Ins. Co. v. Patton*, 176 F. Supp. 368 (S.D. Ill. 1959); *Mickelberry's Foods Products Co. v. Haeussermann*, 247 S.W.2d 731 (Mo. 1952); *Finnie v. Walker*, 257 F. 698 (2nd Cir. 1919) (N.Y. law); *Garrison v. Garrison*, 151 N.Y.S.2d 341 (App. Div. 1951); *Hota v. Camaj*, 750 N.Y.S.2d 119 (App. Div. 2002); *Thompson v. Pilot Life Ins. Co.*, 67 S.E.2d 444 (N.C. 1951); *Chapman v. Scott*, 109 S.E.2d 1 (S.C. 1959); *Grigsby v. Russell*, 222 U.S. 149 (1911) (Tennessee law); *In re Butcher*, 72 B.R. 240 (Bankr. E.D. Tenn. 1987); *Albrent v. Spencer*, 81 N.W.2d 555 (Wis. 1957); see also Dreschler, "Validity of assignment of life insurance policy to one who has no insurable interest in insured," 30 A.L.R.2d 1310; L. Russ & T. Segalla, *Couch on Insurance* § 36.88 (3d ed.).

There appear to be at least three states, Kansas, Kentucky, and Texas, in which a contract purchased by the insured and then assigned to one who lacks an insurable interest is void, without regard to good faith, the intentions of the parties or who pays the premiums. See *Thomas v. Connecticut Mutual Life Ins. Co.*, 124 Kan. 159, 257 P. 727 (1927); *Hess's Administrator v. Segenfelder*, 127 Ky. 348, 105 S.W. 476 (1907); *Newton v. Hicks' Adm'r*, 282 Ky. 226, 138 S.W.2d 329 (1940); *Shaw v. M. Livingston & Co.*, 293 Ky. 575, 169 S.W.2d 612 (1943); *Griffin v. McCoach*, 123 F.2d 550 (5th Cir. 1951) (Texas law), cert. den., 316 U.S. 683 (1952), reh. den., 316 U.S. 713 (1942); *Moody v. Empire Life Ins. Co. of America*, 570 S.W.2d 450 (Tex. App. 1978); see also Dreschler, "Validity of assignment of life insurance policy to one who has no insurable interest in insured," 30 A.L.R.2d 1310, and L. Russ & T. Segalla, *Couch on Insurance* §§ 36.79 to 36.80 (3d ed.).

[148] See, e.g., *Page v. Metropolitan Life Ins. Co.*, 98 Ark. 340, 135 S.W. 911 (1911) (assignment one year after acquisition of policy suggests gambling transaction); *Bankers Reserve Life Co. v. Matthews*, 39 F.2d 528 (8th Cir. 1930) (Arkansas law) (jury could validly conclude that assignment one month after acquisition was not a wagering activity); *Rylander v. Allen*, 125 Ga. 206, 53 S.E. 1032 (1906) (assignment only a few months after acquisition did not show that policy was void as wagering); *Oleska v. Kotur*, 113 Ind. App. 428, 48 N.E.2d 88 (1943) (assignment a few weeks after issuance did not prove that the policy was invalid as wagering); *Rahders, Merritt & Hagler v. People's Bank*, 113 Minn. 496, 130 N.W. 16 (1911) (seven years between purchase and assignment indicated that insured procured policy); *Carnes v. Franklin Life Ins. Co.*, 81 F.2d 800 (5th Cir. 1936) (Mississippi law) (15 years between purchase and assignment of

policy indicated that insured procured policy); *Butterworth v. Mississippi Valley Trust Co.*, 362 Mo. 133, 240 S.W.2d 676 (1951) (assignment six weeks after insured acquired the policy, and second assignment one year later, suggested that transaction was wagering); *Steinback v. Diepenbrock*, 158 N.Y. 24, 52 N.E. 662 (1899) (five years of ownership and paying premiums before assignment indicated that insured owned policy); *Travelers Life Ins. Co. v. Reiziz*, 13 F. Supp. 819 (E.D.N.Y. 1935) (assignment shortly after purchase of policy did not establish that assignee actually procured policy); *Lyman v. Jacobsen*, 128 Or. 567, 275 P. 612 (1929) (two years between insured's acquisition of policy and assignment sufficient to indicate that insured procured policy). Even where the period of assignment is less than one week, however, a court may find that the assignee had nothing to do with procuring the contract and that it is not invalid. See *Lawrence v. Travelers' Ins. Co.*, 6 F. Supp. 428 (E.D. Pa. 1934) (assignment six days after acquiring policy is not invalid); *Fitzgerald v. Rawlings*, 114 Md. 470, 79 A. 915 (1911) (assignment five days after acquiring policy is not invalid).

[149] As examples of cases stressing the insured's payment of premiums as indicative of the fact that the insured actually procured the policy, see *Warburton v. John Hancock Mutual Life Ins. Co.*, 30 Del. Co. 279 (Pa. Comm. Pl. 1941); *Amick v. Butler*, 111 Ind. 578, 12 N.E. 518 (1887); *Milner v. Bowman*, 119 Ind. 448, 21 N.E. 1094 (1889); *Davis v. Brown*, 159 Ind. 644, 65 N.E. 908 (1903); *King v. Cram*, 185 Mass. 103, 69 N.E. 1049 (1904); *McFarland v. Creath*, 35 Mo. App. 112 (1889); *Valton v. National Fund Life Assur. Co.*, 20 N.Y. 32 (1859); *Exkel v. Renner*, 41 Ohio St. 232 (1884); *Lawrence v. Travelers' Ins. Co.*, 6 F. Supp. 428 (E.D. Pa. 1934); *Clark's Adm'r v. Allen*, 11 R.I. 439 (1877); *Harrison v. Northwestern Mut. Life Ins. Co.*, 78 Vt. 473, 63 A. 321 (1906). For examples of cases stressing the assignee's payment of premiums as indicative of the fact that the assignee, rather than the insured, actually procured the policy, see *Prudential Ins. Co. v. Williams*, 113 Ark. 373, 168 S.W. 1114 (1914); *Cisna v. Sheibley*, 88 Ill. App. 385 (1900); *Grey v. Penn Mut. Life Ins. Co.*, 126 N.E.2d 409 (Ill. App. 1955); *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116 (1872); *Franklin Life Ins. Co. v. Shefton*, 53 Ind. 380 (1876); *Davis v. Brown*, 159 Ind. 644, 65 N.E. 908 (1903); *Webber v. Western and Southern Life Ins. Co.*, 220 S.W.2d 584 (Ky. 1949); *Prudential Ins. Co. v. Liersch*, 122 Mich. 436, 81 N.W. 258 (1899); *Locke v. Bowman*, 168 Mo. App. 121, 151 S.W. 468 (1912); *Schneider v. Kohler*, 201 S.W.2d 499 (Mo. App. 1947); *Hinton v. Mutual Reserve Fund Life Assoc.*, 135 N.C. 314, 47 S.E. 474 (1904); *Werenzinski v. Prudential Ins. Co. of America*, 14 A.2d 279 (Pa. 1940); *Aetna Life Ins. Co. v. Hooker*, 62 F.2d 805 (6th Cir. 1933) (Tennessee law).

But see the following cases in which the assignee paid all or most of the premiums, and the assignment was still held valid: *Bankers Reserve Life Co. v. Matthews*, 39 F.2d 528 (8th Cir. 1930) (Arkansas law); *Ancient Order, U.W. v. Brown*, 112 Ga. 545, 37 S.E. 890 (Ga. 1901); *Bray v. Malcolm*, 194 Ga. 593, 22 S.E.2d 126 (1942); *Johnson v. Van Epps*, 14 Ill. App. 201, aff'd, 110 Ill. 551 (1884); *Oleska v. Kotur*, 113 Ind. App. 428, 48 N.E.2d 88 (1943); *Rittler v. Smith*, 70 Md. 261, 16 A. 890 (1889); *Clogg v. McDaniel*, 89 Md. 416, 43 A. 795 (1899); *Prudential Ins. Co. v. Liersch*, 122 Mich. 436, 81 N.W. 258 (1899); *Strode v. Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S.W. 379 (1903); *Chamberlain v. Butler*, 61 Neb. 730, 86 N.W. 481 (1901); *Mechanics Nat'l Bank v. Comins*, 72 N.H. 12, 55 A. 191 (1903); *Prudential Ins. Co. v. Corriveau*, 86 N.H. 326,

168 A. 569 (1933); Meyers v. Schumann, 54 N.J. Eq. 414, 34 A. 1066 (1896); Steinback v. Diepenbrock, 158 N.Y. 24, 52 N.E. 662 (1899); Johnson v. Mutual Benefit Life Ins. Co., 157 N.C. 106, 72 S.E. 847 (1911); Keckley v. Coshoccon Glass Co., 86 Ohio St. 213, 99 N.E. 299 (1912); Lyman v. Jacobson, 128 Or. 567, 275 P. 612 (1929).

[150] For examples of cases holding that the assignment was valid, at least partially because the assignee paid full and adequate consideration for the policy, see Bankers Reserve Life Co. v. Matthews, 39 F.2d 528 (8th Cir. 1930) (Arkansas law); Fitzpatrick v. Hartford Life & Annuity Ins. Co., 56 Conn. 116, 13 A. 673, 17 A. 411 (1888); Bray v. Malcolm, 194 Ga. 593, 22 S.E.2d 126 (1942); Hawley v. Aetna Life Ins. Co., 291 Ill. 28, 125 N.E. 707 (1919); Nye v. Grand Lodge, A.O.U.W., 9 Ind. App. 131, 36 N.E. 429 (1893); Aetna Life Ins. Co. v. Kimball, 119 Me. 571, 112 A. 708 (1921); Lee v. Equitable Life Assurance Soc'y, 195 Mo. App. 40, 189 S.W. 1195 (1916); Chamberlain v. Butler, 61 Neb. 730, 86 N.W. 481 (1901); Givens v. Veeder, 9 N.M. 256, 50 P. 316 (1897); Steinback v. Diepenbrock, 158 N.Y. 24, 52 N.E. 662 (1899); Johnson v. Mutual Benefit Life Ins. Co., 157 N.C. 106, 72 S.E. 847 (1911); Brett v. Warnick, 40 Or. 511, 75 P. 1061 (1904); Strike v. Wisconsin Odd Fellows Mutual Life Ins. Co., 95 Wisc. 583, 70 N.W. 819 (1897). For examples of cases holding that assignments were invalid, at least partially because the assignee paid inadequate consideration for the policy, see also Franklin Life Ins. Co. v. Hazzard, 41 Ind. 116 (1872); Hays v. Lapeyre, 48 La. Ann. 749, 19 So. 821 (1896); Heusner v. Mutual Life Ins. Co., 47 Mo. App. 336 (1891); Mutual Life Ins. Co. v. Richards, 99 Mo. App. 88, 72 S.W. 487 (1903); Finnie v. Walker, 257 F. 698 (2d Cir. 1919) (New York law).

[151] See Matlock v. Bledsoe, 77 Ark. 60, 90 S.W. 848 (1905); Rylander v. Allen, 125 Ga. 206, 53 S.E. 1032 (1906); King v. Cram, 185 Mass. 103, 69 N.E. 1049 (1904); Brockway v. Mutual Benefit Life Ins. Co., 9 F. 249 (Cir. Ct. 2nd 1881) (Pennsylvania law).

[152] One victimless crime that has been legislatively addressed, for example, is the law against polygamy. So long as the spouses were of age and capable of making a decision to marry someone who is married already, with full knowledge of the prior marriages, it can be argued that there is no victim in this crime. It is against the public mores of the country, however, and has been outlawed. This is uncomfortably close to the instance where an insured knows of the risks of selling his or her insurability and decides to go ahead.