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LEGAL NOTES

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REVOCABLE BENEFICIARY—FEDERAL TAX LIABILITY: *United States v. Burgo*, (C.A. 3, May 23, 1949) 175 F. 2d 196. The United States commenced an action against the insured, Joseph Burgo, and also against his wife Rose and two life insurance companies, seeking to satisfy, in part, its claim for unpaid income taxes out of the cash values of five life insurance policies naming Rose as beneficiary but reserving to the insured the right to change the beneficiary without her consent. The District Court dismissed the suit as to all parties, including the insured, who did not dispute his tax liability; and the Government appealed.

On this appeal, the Court of Appeals for the Third Circuit held that although the exemption statute did not apply against the claims of the United States for Federal taxes, yet the Government could not reach the cash value in this manner because under the New Jersey law, which applied, even a revocable beneficiary has a "vested interest" in a life insurance policy. The decision of the District Court was reversed, however, so that judgment might be entered against the insured for the amount admittedly due from him.

The New Jersey view that the revocable beneficiary has a vested interest in a life insurance policy is distinctly the minority view. In most states the interest of such a beneficiary is referred to as a "mere expectancy," and could be reached by the Government to satisfy a tax claim in spite of any state exemption statute.

AVIATION EXCLUSION RIDER—INCONTESTABLE CLAUSE: *Wilmington Trust Company v. Mutual Life Insurance Company*, (C.A. 3, September 21, 1949) 177 F. 2d 404. The $100,000 life insurance policy issued in 1935 to Richard C. duPont provided reduced indemnity in the event of the insured's death "as a result of operating or riding in any kind of aircraft, whether as a passenger or otherwise. . . ." There was a further provision that "This Policy is free from restrictions as to occupation" but there was no mention of military service in the policy.

In 1943 duPont became "Special Civilian Assistant" in the Army Air Corps and was killed a few months later in a glider accident. The Mutual Life admitted liability for the reduced indemnity provided in the event of death as a result of operating or riding in any kind of aircraft, but the executor of duPont's estate sued for the face amount. The executor claimed, first, that the Mutual Life was

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liable for the face amount because the policy at the time of the insured's death was incontestable; second, that duPont was killed while engaging in occupational flying and therefore the policy provision stating that it was free from restrictions as to occupation applied; and third, that the aviation rider did not apply because it was not intended by the parties to extend to military flights in time of war.

The District Court and, on appeal, the Court of Appeals for the Third Circuit held that the liability of the Mutual Life was for the reduced amount by reason of the insured's death in the aviation accident. The Court reviewed cases from New York and from other jurisdictions in the absence of authoritative Delaware decisions and held that the incontestable clause did not serve to increase the coverage of the policy so as to force the Mutual Life to pay the full amount after the policy became incontestable, that the provision as to occupation and the aviation rider were not in conflict, and that the aviation rider was applicable even though the insured was in military or naval service.

This decision is sound and is in accord with the cases in most other jurisdictions.

BINDING RECEIPT—DEATH BEFORE ISSUANCE OF POLICY: *Reese v. American National Insurance Company*, (C.A. 5, July 14, 1949) 175 F. 2d 793. Johnny Reese applied for a $10,000 life policy, paying a binding premium and receiving a binding receipt under the terms of which the insurance would become effective from the date of the payment, provided the policy was "issued" as applied for. The policy was prepared at the home office and sent to the agent with instructions to hold the policy pending investigation as to the habits, financial ability, mode of living, etc., of the applicant. The unfavorable report as to reckless driving, fast living, drinking and automobile accidents was received by the company five days before the applicant was killed by the Town Marshal. The report had not been considered at the home office.

The United States District Court and, on appeal, the Court of Appeals for the Fifth Circuit held that under the terms of the binding receipt there was no insurance until the policy was issued; and no policy had been issued. The District Court's opinion, approved by the Court of Appeals, pointed out that the applicant received little in return for the payment of the binding premium but that the contract was clear in its terms that there was no insurance prior to the "issuance" of the policy. The judgment in favor of the company was affirmed.

The court here interpreted the contract as written. Some courts, however, are reluctant to so construe a binding receipt that the insured receives little in return for the binding premium. See *TASA* XLVIII, 117–8, 129.

ACCIDENT INSURANCE—DISEASE: *Preston v. Aetna Life Insurance Company*, (C.A. 7, April 14, 1949) 174 F. 2d 10. The accident policy issued by Aetna Life to Preston excluded loss "caused directly, wholly or partly, . . . (2) by disease in any form . . ." Preston, who has suffered for some years from a circulatory ailment, struck his foot against the desk. Thereafter an ulcer developed which

failed to heal and his leg was amputated after gangrene had set in. The medical testimony was to the effect that had the circulation in his foot been perfectly normal the injury would have healed rapidly. The Aetna refused to pay the indemnity provided for the loss of a leg, and Preston sued.

The United States District Court held that under the evidence the injury was due to the combined effect of accidental injury and the preexisting disease and that recovery should not be permitted.

On appeal to the Court of Appeals for the Seventh Circuit, that court reviewed Illinois cases bearing on the question and found that, while the Illinois Supreme Court had not passed on the question, there were conflicting holdings by two Illinois Appellate Courts. Under the circumstances the Court of Appeals held that it was free to follow what it regarded as the majority rule and to hold that under such circumstances the insurer might be liable in spite of the policy provision quoted above.

The United States Supreme Court denied certiorari under date of October 10, 1949.

RESCISSION ACTION—RIGHT TO JURY TRIAL: *Connecticut General Life Insurance Company v. Candimat Company*, (D. C. Maryland, March 10, 1949) 83 F. Supp. 1. Connecticut General issued its two $25,000 life policies under date of August 6, 1948, which contained 2-year incontestable clauses. On October 19, 1948, while the insured, Marino, President of the Candimat Company, was still living, Connecticut General commenced an action in the United States District Court in Maryland, seeking to have the contracts cancelled on the basis of misrepresentation as to material facts.

The defendant demanded a jury trial and Connecticut General moved to strike out the designation of the case as a jury case so that the case would be tried to the court and not to a jury.

The United States District Court held that the relief sought was equitable in nature and that the defendant was not entitled to a jury trial under the Constitution or statutes of the United States. The court pointed out that it is well established both by Federal and Maryland law that where there is no adequate remedy at law there is no right to a jury trial by common law or by statute and that the situation was not changed by the fact that a declaratory judgment was also sought. The court therefore ordered the case docketed as a nonjury action.

From a practical standpoint the insurer usually desires to have its cases tried to the court rather than a jury for obvious reasons.

MILITARY EXCLUSION—WAIVER BY INSURER: *Metropolitan Life Insurance Company v. Stagg*, (Arkansas Supreme Court, June 6, 1949) 221 S.W. 2d 29. The life policy excluded death resulting from an act of war while the insured was in the armed services outside continental United States. The insured was killed in action in Belgium January 15, 1945, while in the armed services and the Metropolitan claimed that its liability under the circumstances was for the reduced amount as provided under the war clause. The beneficiary claimed that the

Metropolitan waived the war restrictions by continuing to collect premiums with the knowledge that the insured was in the armed services outside the continental United States.

The trial court held that the Metropolitan waived or was estopped to take advantage of the war restriction, but on appeal, the Supreme Court of Arkansas held that the doctrine of waiver and estoppel, even if established, could not operate to extend the coverage of the policy so as to cover a risk which by the terms of the policy was excluded. The court further held that the war restriction was not against public policy as claimed by the beneficiary, and that in spite of the war restriction the insured did have some benefits, so that the premiums were not paid without consideration.

The Supreme Court of Arkansas in this case adhered to the majority view that primary liability cannot be imposed through waiver or estoppel.

INSURABLE INTEREST—KENTUCKY RULE: *Webber v. Western & Southern Life Insurance Company*, (Kentucky Court of Appeals, May 13, 1949) 310 Ky. 280, 220 S.W. 2d 584. The insured took out two industrial policies in 1939 and 1941 and thereafter named as beneficiary a person without insurable interest, who thereafter paid all premiums. The insurance company admitted liability after the insured's death and paid the proceeds into court. The administrator of the insured's estate claimed the policy proceeds on the basis that the beneficiary did not have an insurable interest as required under the Kentucky decisions and that he was entitled to the proceeds. The beneficiary claimed that even though she had no insurable interest she was entitled to the proceeds by reason of a Kentucky statute relating to the right of a married woman to the proceeds of life insurance policies. The court held that this statute related to married women whose husbands are insured and not married women generally and that the statute had no application to the case. The policy proceeds accordingly were awarded to the administrator.

In most other states the insured is free to name as beneficiary or to assign his life insurance policy to a person without insurable interest.

FEDERAL ESTATE TAX—INSURER'S LIABILITY UNDER NEW YORK LAW: *In re Zahn's Estate*, (New York Court of Appeals, July 19, 1949) 87 N.E. 2d 558 (see Digest of Appellate Division's Opinion in *TASA* XLIX, 105–6). The Equitable Society paid the proceeds of its $50,000 life policy to the named beneficiary, Ada E. Zahn, in July, 1937, shortly after the insured's death. The executors of the insured's estate commenced this action in 1945, seeking reimbursement from Ada E. Zahn, who had died destitute in 1940, and from the Equitable Society for a share of the Federal Estate Tax which had been imposed on account of the insurance proceeds.

The claim of the executors was based on Section 124 of the New York Decedent Estate Law, which permitted recovery of a proportionate share of estate taxes from "whomever is in possession" of the taxable property or from the

"persons interested in the estate." The executors also claimed that the Equitable was "such beneficiary" under the terms of the Federal Estate Tax, permitting recovery of a portion of the total tax paid. Surrogate Delehanty held that the Equitable Society was liable for a portion of the tax, but on appeal the Appellate Division reversed the judgment, holding that the Equitable Society was not a person interested in the estate or a person in possession of taxable property and that liability was not imposed under the Federal Estate Tax Law. In its opinion the Court of Appeals stated:

> There may be good reasons for making the insurance company responsible for the tax. There are equally good, if not more impelling, reasons why such a course would be undesirable. In view of the uncertainty of the amount of the tax until the entire gross estate is ascertained, a lapse of several years could ensue before payment might be made under a policy. The instant case furnishes a good example of the difficulties which might be encountered. Liability should be imposed, if at all, only upon clear and unmistakable statutory language to that effect.

INCONTESTABLE CLAUSE—COMPUTATION OF PERIOD: *Metropolitan Life Insurance Company v. Schmidt*, (New York Court of Appeals, July 19, 1949) 87 N.E. 2d 442. The Metropolitan issued its life policy under date of March 24, 1945, and on Monday, March 24, 1947, it commenced an action against Schmidt for rescission, claiming material misrepresentations. Schmidt claimed that the policy was incontestable on March 24, 1947, on the basis that the date of issue should be counted in computing the 2-year contestable period. The Metropolitan claimed that the issue date should not be included and that the action was timely brought, especially since March 23, 1947 fell on Sunday and the action was commenced the next day.

The New York Court of Appeals, affirming the action of the Appellate Division which affirmed the trial court's judgment, held that the action was timely brought. The Court of Appeals pointed out that the incontestable clause, in accordance with the New York statute, provided that the policy should be incontestable after it had been in force during the insured's lifetime for a period of 2 years "from" its date of issue, that a New York statute provided that under such circumstances the initial day should be excluded, and that it was not necessary for the court to pass on the question of whether if the last day for contesting fell on Sunday the action could properly be commenced on the following Monday.

KILLING OF INSURED BY BENEFICIARY: *Greer v. Franklin Life Insurance Company*, (Texas Supreme Court, June 22, 1949) 221 S.W. 2d 857. The named beneficiary killed the insured, her husband, by chopping his head and by stabbing him in the abdomen in a fit of anger after he had made a "vulgar, vile and indecent threat" to do her serious bodily harm, a crime in Texas. The Franklin Life admitted liability under its life policy for the face amount but denied that it was liable for double indemnity by reason of the policy exclusion of death re-

sulting from any violation of the law by the insured. A Texas statute provides that "the nearest relative of insured" shall receive the proceeds where the beneficiary "willfully" brings about the death of the insured.

The nearest relatives of the insured brought this action against Franklin Life and against the named beneficiary, claiming that they and not the beneficiary were entitled to the policy proceeds; and the Franklin Life interpleaded.

The trial court held that the beneficiary did not "willfully" bring about the insured's death within the meaning of the Texas statute and that the named beneficiary should receive the regular life benefits plus attorney's fees, penalties, and interest, but that the insurer was not liable for double indemnity benefits because the insured died as a result of a violation of the law. The Franklin Life was awarded an allowance for attorney's fees.

On appeal, the Texas Court of Civil Appeals affirmed the judgment of the trial court. On further appeal, the Texas Supreme Court reversed, holding that the killing was "willful" within the meaning of the statute and that the beneficiary was not entitled to the regular life benefits but, rather, the nearest relatives. The Texas Supreme Court also held, as did the courts below, that the Franklin Life was not liable for double indemnity benefits. On this point the Texas Supreme Court held that the Texas statute prohibiting "a provision for any mode of settlement at maturity of less value than the amounts insured on the face of the policy" did not apply to double indemnity benefits. The court also held that the Franklin Life was not liable for attorney's fees, penalties, or interest under the Texas law.

In holding that the nearest relatives rather than the beneficiary should receive the policy proceeds, the Texas Supreme Court said that the statute should not be treated as a criminal or even a civil penalty statute, that it did not violate the Texas constitutional provision forbidding "corruption of blood or forfeiture of estate" as a result of a criminal conviction, and that where the beneficiary intends to kill the insured and the killing is illegal the beneficiary loses her right under the policy even though the killing is done under the immediate influence of sudden and violent passion from an adequate cause. In most states by statute or judicial decision the beneficiary who feloniously and unlawfully kills the insured is denied the policy proceeds. The Texas statute was enacted after the Texas court had held that, while the beneficiary could not receive the proceeds in her capacity as such, she was entitled indirectly to receive the proceeds by inheritance.