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LEGAL NOTES

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INCONTESTABLE CLAUSE—EFFECT OF DEATH WITHIN PERIOD: *Prudential Insurance Company v. Ruby*, (Supreme Court of Arkansas, December 17, 1951) 244 S.W. 2d 491. The insured died within the two-year contestable period and the Prudential shortly thereafter tendered the premiums received on account of the life policy, disclaiming liability on the basis of misrepresentation and fraud. More than three years after the date of issuing the policy in Utah the beneficiary, who had refused the tender, sued in Arkansas.

The Prudential, in defending the suit, alleged the fraud and misrepresentation, but the trial court refused to permit evidence in support of this defense although the policy provided for incontestability "after it has been in force during the lifetime of the insured for two years from date of issue hereof." The Arkansas Supreme Court, in the absence of controlling Utah decision in point, applied the general rule and held that with an incontestable clause of this type the policy could never become incontestable where the insured died within the period fixed.

PREMIUM TAX—ANNUITY CONSIDERATIONS: *Corporation Commission v. Equitable Life Assurance Society*, (Arizona Supreme Court, December 31, 1951) 239 P. 2d 360. The tax authorities of Arizona claimed that the premium tax statute, which imposed a tax of 2 percent on "all premiums received on policies and contracts of insurance covering property or other risks within this state . . . ," taxed annuity considerations. The life insurance companies, including the Equitable Society, denied this contention and commenced an action to construe this statute. The lower court held that annuity considerations were not taxed under the statute and, on appeal, the Supreme Court of Arizona affirmed.

In holding that the statute did not impose a tax on annuity considerations, the Court reviewed other Arizona statutes and decisions in other states, pointing out that they all indicated a distinction between insurance, involving the assumption of a risk, and annuities, not involving such an assumption. The Court also reviewed decisions construing the premium tax statutes of other states and found that where annuity considerations had been held taxable the statute had imposed a tax upon "business of insurance," "business done," or "premiums" with no reference to the element of risk.

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MURDER OF INSURED BY BENEFICIARY—RIGHTS OF CONTINGENT BENEFICIARY: *Beck v. West Coast Life Insurance Company*, (California Supreme Court, March 21, 1952) 241 P. 2d 544. Downey, the named beneficiary, killed his wife, the insured, in Colorado and he was there convicted of the crime and sentenced to prison for life. The policy was made payable to Downey, if living, otherwise to Knoll. The policy proceeds were claimed by Beck, administrator of the insured's estate, and also by Knoll, the contingent beneficiary. The company claimed that it did not owe anyone, but this claim was denied. The lower court awarded the proceeds to Knoll, the contingent beneficiary, and on appeal to the California Supreme Court, this judgment was affirmed, two Justices dissenting. In affirming the judgment, the Court stated:

> The insured has clearly indicated her intent that any interest her estate might have in the proceeds of the policy should be subordinate to the interest of the alternative beneficiary. This intent is recognized by a holding that the alternative beneficiary may recover the proceeds. A holding that the estate of the insured is entitled to the proceeds would not only defeat this intent, but would also enable the murderer to deprive the alternative beneficiary of her opportunity to take in preference to the estate by foreclosing the possibility that the murderer might predecease the insured. The rule that prevents his profiting by his own wrong should not be invoked in such a way as to prejudice the rights of the alternative beneficiary.

In a somewhat similar contest involving the same murder the United States Court of Appeals for the 9th Circuit, which includes California, reached a contrary conclusion, awarding the proceeds to the insured's estate. The policy in that case, *Beck v. Downey*, U.S. Court of Appeals, 9th Circuit, August 6, 1951, 191 F. 150, was purchased in Iowa from an Indiana corporation while the insured and her husband were living in California, and, as indicated above, the murder occurred in Colorado. The Federal case was carried up to the United States Supreme Court for review and on March 31, 1952, the judgment was vacated and the case remanded to the United States Court of Appeals "for further consideration in the light of Beck v. West Coast Life Ins. Co. . . ."

DOUBLE INDEMNITY—RIGHT TO AUTOPSY—DEMAND WITHIN REASONABLE TIME: *Reardon v. Mutual Life Insurance Company*, (Connecticut Supreme Court of Errors, January 29, 1952) 138 Conn. 510, 86 A. 2d 570. The insured sustained a severe injury to his knee on April 3rd which required an open surgical operation. He appeared to be making a normal recovery until June 13th, when the knee began to swell, and he died on June 15th. Before noon on the date of death the agent authorized to represent Mutual Life for the purpose, among other things, of "servicing such insurance and annuities" was notified of the general circumstances of the insured's death. Two days later the agent visited at the insured's home, inquired as to the cause of death and was then told again about the accident. The Worcester office of the Mutual Life was notified of the insured's death on June 17th. Funeral services for the insured were held the next day with interment that afternoon. No request for an autopsy was made prior to interment.

Three weeks after interment the Mutual Life demanded an autopsy and this was refused. The policy provided that the company should have the right and opportunity to make an autopsy unless prohibited by law, and the policy also limited the power of agents to bind the company by acquiring information.

The Mutual Life defended on the basis that the autopsy demand had been timely made and was improperly refused. The trial court and, on appeal, the Supreme Court of Errors, held that while the autopsy provision was valid, yet under controlling decisions the demand for the autopsy had to be made within a reasonable time and under the circumstances the demand was not so made. The Court further held that the company was charged with and bound by the knowledge acquired by its agent acting within the scope of his authority, in spite of the policy language as to limitation of authority.

The Court in its opinion repudiated dictum found in a prior opinion which had indicated that in Connecticut the time in which an insurer may demand an autopsy should be limited in all cases by the time of burial. This now places Connecticut in line with the distinctly majority view, which is that if the insurer does not learn of the probable accidental death claim prior to interment, the body may under normal circumstances be disinterred if the demand is made within a reasonable time.

INSURANCE COMMISSIONER—LIMITATIONS OF AUTHORITY—REVOCATION OF COMPANY'S LICENSE TO DO BUSINESS: *Bankers Life and Casualty Company v. Cravey*, (Georgia Supreme Court, January 29, 1952) 69 S.E. 2d 87. The company was first licensed to do business in Georgia in 1947 and its annual license was up for renewal on July 1, 1951. In conformity with the statutory requirements it filed its 1950 Annual Statement with Cravey, Insurance Commissioner of Georgia, and on February 1, 1951, paid the license fee of $300. On June 18th the Commissioner requested further information from the company regarding its "Employees Welfare Account," none of the assets of which were included in the Annual Statement. Among the documents requested were copies of the Welfare Plan, of a trust agreement, of the minutes of the Directors' meeting at which the Plan was approved, and of a transcript of the Account from its inception to date. On June 26th the company wrote the Commissioner requesting certain information which was peculiarly within his ability to furnish. On June 29th the Commissioner wired the company that until the documents requested were furnished he would not renew its license to do business in Georgia. The company thereupon sued the Commissioner to compel him to renew its license, and the trial court, on demurrer, dismissed the petition.

On appeal, the Georgia Supreme Court found that all of the records requested were either irrelevant, nonexistent, or already within the Commissioner's possession. It also found that since the assets of the Welfare Account were not included in the Annual Statement, that Account was a matter within the field of management and beyond governmental regulation. In this connection it said:

> Regulation does not mean management. This court in *Southern Bell Tel. & Tel. Co.* v. *Georgia Public Service Comm.* . . . undertook to draw and define the line between per-

missible regulation and unauthorized management of private business. Upon holding that line inviolate rests the fate of the liberty secured by the Constitution. Once regulation is allowed to become management by government, we are plunged down the broad road to a socialistic state and the end of individual liberties.

With regard to the Commissioner's statutory authority to issue, renew and revoke licenses, the Court said further:

The law does not confer upon the individual who happens to be Insurance Commissioner unlimited power to entertain dissatisfaction or opinions arbitrarily and capriciously as a basis for refusal to renew the license. Ours is a government by law and not by men. By referring to information that the Commissioner shall require, the law contemplates that he must require it in the manner prescribed by law, and it is made his duty to adopt that procedure when necessary to require information which he desires as a basis upon which to act in issuing or refusing to issue a renewal of the license.

EFFECTIVE DATE OF POLICY—DATE FOR PAYMENT OF RENEWAL PREMIUMS: *Lentin v. Continental Assurance Company*, (Illinois Supreme Court, March 20, 1952) 105 N.E. 2d 735. The insured applied for a life policy and a noncancelable health and accident policy on December 4, 1945. The policies, which were executed December 17, 1945, contained statements that the effective or anniversary date was December 12, 1945. The health and accident policy provided that "it takes effect on the 12th day of December, 1945, and continues in effect until the 12th day of December, 1946; and until the Insured becomes 60 years of age he shall have the right to renew this policy for further consecutive periods by the payment in advance of the Annual renewal premium of $215.16." There was a further provision for a 31-day grace period and for reinstatement upon production of satisfactory evidence of insurability after lapse.

The application for the health and accident policy provided that it should not take effect until the policy was delivered and the first premium paid while the insured was in good health. The insured paid the first premium to the broker on January 2, 1946 and this premium was paid to the company's general agent on January 4, 1946. On January 6 the insured signed an application for supplemental benefits as to the health and accident policy and was advised by the general agent that these benefits were then in force. He paid the second and third annual premiums within the grace period dating from December 12. The December 12, 1948 annual premium was not paid within the grace period thereafter and when tendered late, the company refused to accept it without satisfactory evidence of insurability. This the insured refused to submit and he commenced this action for declaratory judgment, claiming that he was not required to pay annual premiums until the anniversary of the effective date of the policy, which was January 6th, when the amendment to the application was signed after the January 2nd first premium payment.

The trial court agreed with the insured that the premium payments were timely if paid within the grace period dating from January 6 (the date the amendment was signed) and that the December 12th effective date of the policy was not binding. The intermediate Appellate Court, one Justice dissenting, up-

held the trial court; and on further appeal, the Supreme Court of Illinois affirmed. In its opinion the Supreme Court of Illinois reviewed conflicting decisions from other jurisdictions but held that the effective date provided in the policy was not controlling under the circumstances but that the insured was entitled to one year's protection for one year's premium. The Supreme Court was of the opinion that the effective date from which renewal premiums should be computed was January 4, which was the date "all the terms agreed upon by the parties were fulfilled." In its opinion the Court stated:

> It is only by such a construction that the insured receives exactly what he contracted for, and what the company bound itself to provide, namely, insurance coverage for one year. To hold that the date inserted by the company controls would be to hold that the contract, which was not binding on the company until the conditions of delivery and payment of premium were fulfilled, was binding and enforcible against the insured during the same interim period.

The Illinois Supreme Court (in this case which involved the health and accident policy and not the life policy) has elected to follow the distinctly minority view on this point, which in recent years has been rather discredited.

GROUP INSURANCE—BANK DEPOSITORS: *Mutual Bank & Trust Company v. Shaffner*, (Missouri Supreme Court, April 14, 1952) 248 S.W. 2d 585. The bank and the life insurance company commenced action for a declaratory judgment against the State Finance Commissioner and the State Superintendent of Insurance after these two state officials claimed that an arrangement proposed was in conflict with Missouri law. The bank and the insurance company had agreed to an arrangement by which the insurance company was to insure the lives of certain depositors on a group basis under a plan by which the amount of insurance would decrease as the amount to the credit of the depositor increased. The insurance applied to all purchasers of insured life savings certificates between the ages of 1 and 50 and was in an amount not exceeding $2,000 subject to a statement of good health on the part of the depositor. Under the arrangement the insurance would cease if deposits were not made as agreed. The depositor did agree to "purchase" the certificate. Upon default in the monthly payments the special account of the type insured was transferred to another type of deposit and a deduction of 1 percent of the certificate's maturity value was made.

The lower court held that the plan was not a proper one under Missouri law but, on appeal, the Supreme Court of Missouri reversed, holding that the plan was legal and valid, that both the bank and the insurer were authorized to put it into effect and that the group life insurance policy proposed to be issued was legal and valid.

There is a difference of opinion among the State Insurance Commissioners as to the validity of the arrangement outlined. The general view is that a policy of this type is not a group creditors' policy because there is no enforceable debt, and the plan is one which has not met with favor with life insurance agency organizations.

KILLING OF INSURED BY BENEFICIARY—RIGHTS OF CONTINGENT BENEFICIARY: *Bullock v. Expressmen's Mutual Life Insurance Company*, (North Carolina Supreme Court, October 10, 1951) 234 N.C. 254, 67 S.E. 2d 71. The insured, Bullock, was killed by his wife, who was thereafter sentenced to State's Prison after conviction of manslaughter. The policy was made payable to the wife, "if living, or if not living to Rudolph Pink Bullock, son of the insured."

Rudolph Pink Bullock, as contingent beneficiary, claimed the proceeds, as did the administrator of the insured's estate. The wife, who was serving the prison term for the killing, was made a party to the action but did not claim the proceeds and under North Carolina law had no valid claim.

The insurance company paid the money into court in the action brought by the administrator. The trial court held that the contingent beneficiary was entitled to the proceeds, but, on appeal to the North Carolina Supreme Court, this judgment was reversed and the proceeds awarded to the insured's administrator, the Court stating:

> We think the language of the policy must control. Rudolph Pink Bullock's interest in the policy of insurance on the life of Willie P. Bullock was made by its terms contingent upon the death of Maydie Taylor Bullock during the lifetime of the insured. That event did not happen, and the net proceeds of the insurance should thereupon be paid to the administrator of the estate of Willie P. Bullock, who took out the policy and paid the premiums thereon, that it may be used to pay his debts and for distribution to his next of kin.

AVIATION EXCLUSION—CONFLICT WITH INCONTESTABLE STATUTE: *Jordan v. Western States Life Insurance Company*, (North Dakota Supreme Court, June 4, 1952) 53 N.W. 2d 860. The $20,000 life policy issued in 1945 had attached an aviation rider providing a reduced benefit in the event the insured died in a noncommercial aviation accident. The incontestable clause of the policy excepted from its operation those parts of the policy relating to aviation hazards. The Insurance Commissioner of North Dakota had approved the exclusion rider form after receiving in 1939 an Attorney General's opinion to the effect that there was no conflict between such an exclusion rider and the incontestable statute of the state.

The several standard forms of statutory life policies provided for by North Dakota law specified that certain risks could be excepted from the coverage of the policy but, except in the case of restrictions relating to military or naval service in time of war, these restrictions could be continued only for the two-year contestable period. The incontestable statute applicable to the policy in question, which was not on a statutory standard form, provided for incontestability after two years "except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military service in time of war."

The insured died in 1949 as a result of a noncommercial airplane accident and the insurance company admitted liability only for the limited amount as provided for under such circumstances by the aviation rider. The beneficiary re-

fused to accept this amount, claiming the aviation rider was in conflict with the statutory incontestable provision and hence invalid since the insured died after the policy became incontestable.

The trial court agreed with the company that the rider was valid and that its liability was limited as provided. On appeal, however, the Supreme Court of North Dakota held, after considering apparently conflicting cases from other jurisdictions, that the North Dakota statute should be construed as requiring the company to assume the hazard of death in an aviation accident after the incontestable period expired. The decision is based largely on the rather peculiar provisions of the North Dakota law and particularly the fact that under the statutory standard life policy it was quite clear that aviation restrictions could apply only during the contestable period.

This case appears to be in conflict with the majority view that the incontestable clause is not a "mandate of coverage," but the North Dakota court, after considering the many cases from other jurisdictions, rests its decision, as indicated, on the rather peculiar statutory language of North Dakota.

CREDITORS' RIGHTS—ENDOWMENT CONTRACT—EXEMPTION STATUTE: *Fox v. Swartz*, (Supreme Court of Minnesota, January 4, 1952) 51 N.W. 2d 80. The assignee of a judgment creditor of the insured attempted to levy execution on the cash value of an endowment contract and also accrued dividends and interest thereon. The insured moved for an order vacating the levy on the ground that the endowment contract and the dividends and interest were exempt under the Minnesota statutes. The beneficiary under the endowment contract was the insured's wife, if surviving, otherwise his son, and the Minnesota statutes exempted life insurance and its proceeds from claims of creditors.

The trial court and, on appeal, the Minnesota Supreme Court held that the endowment contract was a "life insurance" policy within the meaning of the Minnesota exemption statute and that the dividends plus interest represented "proceeds" within the meaning of such statute. The court also held that the statute so construed was not unreasonable and was constitutional, especially since premiums paid in fraud of creditors were by the terms of the statute made available to the creditors.

While there is a difference of opinion on the point, the majority view is that endowments are treated just the same as other life insurance contracts so far as creditors' exemption statutes are concerned.

SETTLEMENT OPTION—TESTAMENTARY DISPOSITION: *Hall v. Mutual Life Insurance Company*, (New York Supreme Court, January 7, 1952) 109 N.Y.S. 2d 646. The policy issued by Mutual Life to her father became payable on his death in a lump sum to Barbara Corliss Hall. She entered into a "Supplementary Contract" with Mutual Life, under the terms of which the policy proceeds were left on deposit with Mutual Life at interest. She reserved the right to surrender the contract in its entirety or to make partial withdrawal at any time and without the consent of her then husband, Hall, whom she named to receive the pro-

ceeds if living at her death. The agreement was not strictly in accordance with a policy option in that interest was payable to her quarterly instead of annually.

Barbara Corliss Hall was divorced from Hall and remarried, on her death being known as Barbara Corliss Graves. The Supplementary Contract remained in force and payable to her ex-husband, Hall.

On Mrs. Graves' death Hall claimed the proceeds under the terms of the Supplementary Contract. Her executors claimed that the Supplementary Contract was in legal effect an attempted testamentary disposition in violation of the New York Statute of Wills and therefore void and that they, as executors, were entitled to the proceeds. The executors claimed that the Supplementary Contract was not insurance but represented a new contract with the insurance company and that in legal effect the transaction was the same as where one person deposited money in a bank and directed the bank to pay the money to another at death—an arrangement clearly invalid.

The New York Supreme Court (a trial court) held that the arrangement was in conflict with the New York Statute of Wills, especially since the Supplementary Contract was not issued strictly in accordance with a settlement option of the policy. The court pointed out that Mrs. Graves retained control over the proceeds up to the time of her death and also that the New York Legislature had shortly before failed to enact legislation which would have removed such payments from the category of testamentary dispositions. The court also rejected economic and social arguments as to the desirability of an arrangement permitting a beneficiary to enter into a contract under the terms of which the proceeds are passed on to another at her death.

This decision is by the trial court and appeal has been taken to an intermediate court, the Appellate Division. The case may later go by further appeal to the New York Court of Appeals, which is the highest court in that state.

The arrangement held in this case to be testamentary is of a type customarily permitted by many companies. Other companies have refused to permit such an arrangement because of fear that the arrangement would be held to be in conflict with the Statute of Wills. The 1952 New York Legislature enacted remedial legislation.

AVIATION EXCLUSION—AERONAUTIC FLIGHT: *Aetna Life Insurance Company v. Reed*, (Texas Civil Appeals, January 23, 1952) 246 S.W. 2d 311. The double indemnity clause of the life policy excluded death resulting from "an aeronautic flight." The insured was killed in the crash of a private plane operated by a business associate. The insured was not an airplane pilot and had never undertaken to fly a plane or to learn to fly a plane.

The Aetna Life claimed that the insured died as a result of an aeronautic flight and refused to pay the $25,000 double indemnity benefit. The Court of Civil Appeals, one Justice dissenting, affirmed the judgment against the company, stating:

> At best we think the interpretation of the exception before us presents a question of doubt as to whether or not the words "aeronautic flight" there used must be given the

meaning requiring the insured to have been engaged in the actual operation of the plane, or whether his presence in the plane brought him within the terms of the exception. To say that there is doubt as to which interpretation should be applied admits that either is subject to challenge and forces the conclusions that the exception is ambiguous and requires that it be interpreted against the insurance company and favorable to the insured.

Increasingly the aviation exclusion clauses are being construed against the companies. They cannot meet these decisions by improved language where, as here, the policy was issued many years ago.