TRANSACTIONS OF SOCIETY OF ACTUARIES
1951 VOL. 3 NO. 5

LEGAL NOTES

B. M. ANDERSON*

CREDITORS GROUP INSURANCE—AVIATION EXCLUSION—WAIVER: *Broidy v. State Mutual Life Assurance Company*, (C.A. 2, Jan. 11, 1951) 186 F. 2d 490. Broidy, an officer in the United States Army Air Force, purchased a home and in connection therewith applied for group life coverage in accordance with a policy issued to the loan association. He appeared in his Army uniform and signed an application form which referred to the suicide exclusion but not to any aviation restrictions. A group certificate was sent to him some weeks later and this certificate did refer to the aviation restrictions contained in the master policy.

The insured died a few months thereafter in an aviation accident, excluded under the terms of the group policy, and the State Mutual denied liability on the basis of the aviation exclusion. The beneficiary sued to have the contract reformed on the basis that at the time the insurance was applied for the agent who represented State Mutual had said that the policy "pays unconditionally and absolutely" and there was nothing in the application form concerning aviation restrictions and no notice of limitation of the agent's authority.

The District Court held that the aviation restriction was applicable and entered judgment for the State Mutual. On appeal, the Court of Appeals held that the contract should be reformed in that the insured was not warned at the time he applied for the contract that the agent lacked authority and that the insurance contained the aviation restrictions. The Court in its opinion stated:

> This was not insurance of the ordinary life form where the course of application followed by later issuance of a policy containing the formal contract is now well known and where the application almost invariably puts the applicant upon explicit notice of intended policy limitations. In fact this appears to be rather a new form of insurance where the application has not yet become standardized in due company form. As we have seen, it did not contain the slightest suggestion of the limitations later most pertinent; nor did it suggest ways in which definite knowledge should be ascertained. The circumstance that, as disclosed, an aviation officer was applying for special insurance to protect his purchase of a home was also most pertinent. Under the authorities cited it would be too harsh a requirement to hold that the insurance company's acceptance of the offer which it had directed and canalized in its own type of application could be limited and made nugatory by the insertion of details not brought home to the applicant.

AVIATION RESTRICTION—REFORMATION OF CONTRACT: *Prudential Insurance Company v. Strickland*, (C.A. 6, Mar. 2, 1951) 187 F. 2d 67. The insured, a reserve aviation officer in the United States Navy, applied to the Prudential for

* B. M. Anderson, not a member of the Society, is a member of the Alabama, Connecticut and United States Supreme Court Bars.

a $7,500 life policy with aviation coverage at an extra premium of $6.75 per month, paying at the time of his application the annual premium plus the extra premium for two months. The Prudential issued the policy as requested except that it issued on the basis of an annual extra premium of $75 instead of the monthly extra. When the agent attempted to deliver the policy it was found unacceptable to the insured and it was reissued without aviation coverage and with an exclusion rider. The insured died in an aviation accident three years later and the beneficiary claimed she was entitled to the face amount and not merely the limited amount provided for under the aviation rider.

The beneficiary sued for the full amount and the Prudential asked that the policy be reformed because "by oversight and through mutual mistake the insured and the appellant's representative failed to revise the original application so as to expressly conform to the revised policy delivered to and accepted by the insured." The district judge ruled that oral testimony was not admissible to show any agreement between the insured and the insurance company contrary to the written application and that the issue which the jury should determine was whether the insured ratified the inclusion in the policy of the aviation restriction. The jury found against the company on this point and judgment was entered for the beneficiary for the full amount.

On appeal, the Court of Appeals reversed, holding that since the action was one to reform the policy to express the intent of the parties, this oral testimony should have been admitted. The Court also held that the incontestable clause did not serve as a bar in the equitable action to reform the contract.

DIVIDEND OPTION—ASSIGNMENT OF DIVIDENDS UNDER POLICY LOAN AGREEMENT: *State Mutual Life Assurance Company v. Fleischer*, (C.A. 8, Jan. 24, 1951) 186 F. 2d 358. The life policy contained the usual dividend options and the insured elected to have his dividends left on deposit at interest. He borrowed on his policy from the company, executing a "policy loan certificate," under the terms of which he assigned the policy together with all dividends and dividend accumulations to the company. The policy provided for automatic extended insurance on default in payment of premiums and also provided:

> If any premium remains unpaid at the end of the grace period, dividend accumulations shall be applied to the payment of an annual premium, if sufficient, otherwise to such semi-annual or quarterly portion of the annual premium as the dividend accumulations will permit.

The policy lapsed for nonpayment of an annual premium and was placed on extended insurance. If the dividend on account of the year ending with the date of lapse had been applied to reduce the debt (and therefore to increase the period of extended insurance), the insurance would have continued beyond the date of the insured's death. However, if, as the company claimed, this dividend was, under the circumstances, payable in cash, the extended insurance expired before the date of the insured's death.

The beneficiary claimed that the insurance was in force at the date of the in-

sured's death, but the company claimed its liability had been terminated by payment of the amount of dividend to the beneficiary by its check, which she cashed. The trial court agreed with the beneficiary and, on appeal, the Court of Appeals affirmed, stating:

> We are of the view that dividends assigned to the insurance company as security for a loan should be applied in payment of the loan, at least where to do so will prevent the forfeiture or cancellation of the policy unless the policy specifically provides otherwise. If, however, defendant under the circumstances here disclosed was not required to apply the dividend apportioned to this policy in reduction of the loan, the plaintiff was entitled to have it applied on a quarterly portion of the annual premium and thereby increase the net cash value so as to carry the policy beyond the day of death.

The Court of Appeals also held that the beneficiary was not estopped, by her action in cashing the check, from claiming that the company should have applied the dividend toward the indebtedness.

INCONTESTABLE CLAUSE—MISSTATEMENT OF AGE: *New York Life Insurance Company v. Hollender*, (California District Court of Appeals, Dec. 19, 1950) 225 P. 2d 581. The $5,000 life policy provided that it should be incontestable after two years from date of issue and also provided in another section for an adjustment in the amount payable if the insured misstated his age. The insured in his application for the policy, which also contained disability income benefits, stated that he was born April 27, 1886 and the New York Life claimed that he was born two years earlier.

The New York Life commenced this action, seeking to have the policy reformed by changing the face amount from $5,000 to $4,632, with an appropriate reduction in premium, apparently because under the New York Life's contention the disability provision had expired because the insured was then beyond age 60.

The trial court dismissed the action on the basis that the incontestable clause prevented the company from adjusting the benefits on account of misstatement of age.

The California Court of Appeals held that the insurer, in attempting to adjust the face amount and premiums payable in accordance with the terms of the policy, was not contesting the policy. The Court in its opinion stated:

> We are of the opinion that the decisions in the foregoing cases correctly declare the law applicable to defendant's contention, and that the holding that the incontestable clause in a policy of insurance is not inconsistent with and does not vitiate an age adjustment clause contained in the same policy is correct.

This case is in accord with the majority view.

MILITARY SERVICE—TERMINATION OF DISABILITY PROVISIONS: *Equitable Life Insurance Company of Iowa v. Verploeg*, (Colorado Supreme Court, Jan. 29, 1951) 227 P. 2d 333. The three life policies issued to Dr. Verploeg contained disability income provisions which provided for the termination of such provisions "in the event that the insured shall engage in military or naval service in time of

war" with a further provision for refund of premiums. Dr. Verploeg entered the Medical Corps of the United States Army in 1942. When the Equitable learned of this fact in 1945 it refunded the disability premiums for the period after such entry. Dr. Verploeg kept the check for more than four months and then cashed it.

Upon return to civilian life Dr. Verploeg demanded that his disability benefits be reinstated and the Equitable refused to do this. His claim was that he did not "engage" in military or naval service merely because he entered the service. The Equitable commenced a declaratory judgment action, seeking a judgment to the effect that the disability benefits had terminated, but the trial court held against the Equitable. On appeal to the Supreme Court of Colorado, that Court reversed, holding that the insured did "engage" in military or naval service although he was not in combat and, in addition, that the insured in cashing the check after holding it for more than four months recognized that the disability provisions were no longer effective.

DOUBLE INDEMNITY—AVIATION EXCLUSION: *Sun Life Assurance Company v. Kiester*, (Georgia Court of Appeals, Dec. 19, 1950) 62 S.E. 2d 660. The double indemnity provision of the policy excluded "death resulting from participation, either as a passenger or otherwise, in aviation or aeronautics." The insured met his death while traveling under orders as a passenger in a transport operated by the United States Navy. The company paid the single indemnity benefit but denied liability for double indemnity, relying on the aviation exclusion. The beneficiary sued for the additional benefit and the trial court agreed with her contention that the insured's death did not result from participating in aviation or aeronautics.

On appeal, the Georgia Court of Appeals reviewed many of the authorities, reaching the conclusion that the insured was not "participating" in aviation or aeronautics and that the reference to "passenger or otherwise" did not serve to make the restriction operative. The Court pointed out that in many of the earlier cases the courts had regarded the language "participating" in aviation as somewhat more restrictive than "engaging," but that in recent cases this technical distinction had been abandoned. The Court also stated that "the trend of modern decision has followed the increase in volume and safety of air travel with the result that courts generally have in recent years been inclined to give a stricter construction to aviation exclusion clauses."

These double indemnity aviation exclusion provisions drafted many years ago now give much trouble. The courts are reluctant to relieve the company of liability when the language is not entirely clear.

BINDING RECEIPT—DISAPPROVAL BY INSURANCE COMMISSIONER: *Metropolitan Life Insurance Company v. Sullivan*, (Kansas Supreme Court, Nov. 10, 1950) 170 Kan. 64, 223 P. 2d 713. The Commissioner of Insurance of Kansas disapproved the life application form of the Metropolitan because this form had

attached to it a premium receipt which provided for a "not taken charge," which the Commissioner did not think was proper. The basis of approval by the Commissioner was a Kansas statute providing in part:

> No contract of insurance or indemnity shall be issued or delivered in this state until the form of the same has been filed with the commissioner of insurance, nor if the commissioner of insurance give written notice within thirty days of such filing, to the company proposing to issue such contract, showing wherein the form of such contract does not comply with the requirements of the laws of this state.

The Metropolitan claimed that the above statute did not give to the Commissioner authority in connection with the contents of a premium receipt and brought an original action in the Kansas Supreme Court to require the Commissioner to withdraw his disapproval. The Court held that the statute gave authority and jurisdiction to the Commissioner over "contracts of insurance or indemnity" and not over a premium receipt, which did not become part of the contract.

ASSIGNMENT OF POLICY AS COLLATERAL—RIGHTS OF BENEFICIARY: *Schum v. Lawrenceburg National Bank*, (Kentucky Court of Appeals, Dec. 15, 1950) 234 S.W. 2d 962. The insured, Michael A. Schum, assigned his two life policies to the bank as additional collateral for a loan. His father, Mike Schum, the revocable beneficiary, joined in the assignment. The loan was secured primarily by chattel mortgage on several automobiles and trucks. The insured died with the loan largely unpaid and the insurance company admitted liability for the proceeds of the policies, aggregating $24,416.03. The bank sold some of the equipment just prior to the insured's death and other equipment shortly thereafter.

The widow claimed that the debt to the bank should be satisfied out of the insurance proceeds and the father, who was the named beneficiary, claimed that the other collateral should be resorted to first. He brought this action seeking a declaration of rights. The trial court decided in favor of the widow, holding that the proceeds of the equipment sold should be paid over to the estate and the remaining equipment transferred to the estate, and that the debt should be satisfied out of the insurance proceeds.

On appeal to the Kentucky Court of Appeals, that Court reversed, holding that since there was nothing in the mortgages or in the assignments indicating an intent that the proceeds of the policies should first be resorted to for the payment of the debt, the debt should be satisfied out of other collateral to the extent that such other collateral was adequate.

This case is in accord with the general rule that the beneficiary is entitled to be subrogated to the claim of the assignee when policy proceeds are used to pay a debt unless there is an expressed intention to the contrary. The situation is, of course, different in the case of a policy loan. Where a policy loan is involved, the beneficiary receives only the net proceeds and has no claim against the insured's estate on account of the debt to the insurance company which was deducted form the policy proceeds.

KILLING OF INSURED BY BENEFICIARY—RIGHT TO PROCEEDS: *Gholson v. Smith*, (Mississippi Supreme Court, Nov. 20, 1950) 48 So. 2d 603. The insured attacked his wife, the named beneficiary under his policy. She ran from the house to the home of a neighbor, procured a gun, returned and shot him. She was acquitted by a jury in criminal proceedings.

The insured's mother, the sole heir except for the widow, claimed the proceeds, as did the widow. There was no Mississippi statute relating specifically to insurance proceeds, but there was a statute forbidding inheritance by one who shall "wilfully cause or procure the death of another." The trial court awarded the policy proceeds to the named beneficiary, but on appeal, the Supreme Court of Mississippi held that under the uncontradicted testimony the act of killing was "a deliberate homicide committed when appellee was in no immediate danger, real or apparent, of death or great bodily harm" and that under the circumstances the beneficiary should not on public policy grounds be entitled to receive the proceeds.

CHANGE OF BENEFICIARY—EFFECTIVE DATE: *Persons v. Prudential Insurance Company of America*, (Missouri Supreme Court, Nov. 13, 1950) 233 S.W. 2d 729. The insured sent in to the Prudential his $12,000 life policy with a request for reduced paid-up insurance and also a request dated June 7 that the beneficiary be changed from his mother to his wife. The insured died on June 16 and on June 18 the Prudential endorsed the policy as paid-up as of June 20, the anniversary date, and also endorsed the change of beneficiary on the policy. After receiving notice of the insured's death, the Prudential reversed the paid-up endorsement, admitting liability for the full amount.

The original beneficiary, the mother, claimed that the change of beneficiary was not to be effective until the anniversary date, June 20, and that she was entitled to the proceeds in that there had not been strict compliance with the method described in the policy for a change of beneficiary. The District Court, and on appeal the Court of Appeals, held that the change took effect prior to the insured's death, the Court of Appeals stating:

> On the face of the documents, it was Mr. Persons' intention that the change of beneficiary take place immediately and was not to be suspended until the policy was converted. Even if the simultaneous delivery of the two forms to the St. Louis office was a circumstance tending to show that his intention was otherwise, the terms of the requests were clear and unambiguous and cannot, under the parol evidence rule, be varied.

CHANGE OF BENEFICIARY BY GUARDIAN: *Lindsey v. Johnson*, (Ohio Supreme Court, Jan. 31, 1951) 96 N.E. 2d 595. The insured effected a change in benefit, naming as beneficiaries Georgia Lindsey and Julia Sadler, acquaintances with whom she resided. The insured thereafter became incompetent and her brother was appointed as guardian of her person and of her estate. He secured possession of the policy (his first demand for possession prior to his appointment as guardian having been refused) and he then effected a change of beneficiary making the policy payable to the insured's estate. The insurance proceeds were, on the death

of the insured shortly thereafter, paid to the brother as administrator of the insured's estate. Lindsey and Sadler intervened in the probate proceedings, claiming that the policy proceeds belonged to them and not to the estate. The Probate Court agreed with them, but on appeal to the Court of Appeals, that Court reversed.

On further appeal to the Ohio Supreme Court, it was held that the attempted change in beneficiary by the guardian was ineffective and that the policy proceeds belonged to Lindsey and Sadler. The Court stated:

> The authoritative statements of text writers and court decisions are generally that a guardian of an incompetent is unauthorized, without court authority, to change the beneficiary in an insurance policy of his ward, even though such change purports to make the executor, administrator or assignee of the ward the beneficiary.
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> The claim that Johnson had authority as agent of the decedent, before the adjudication of her incompetency, to change the beneficiary of the policy and that such authority survived the adjudication so that such change could be subsequently made under common-law rules of agency is untenable.

The courts are reluctant to permit the guardian of an incompetent to effect a change of beneficiary, with or without a court order.

REPORT TO INSURANCE COMMISSIONER—PRIVILEGED COMMUNICATION: *Johnson v. Independent Life and Accident Insurance Company*, (D.C. South Carolina, Jan. 6, 1951) 94 F. Supp. 959. The insurance company terminated the contract of its agent, Johnson, and as required by law, reported this fact to the South Carolina Insurance Commissioner. In this report the company stated that the reason for his leaving was the agent's "continuous drinking" and that he was short "about $25" in his account.

The agent sued the company for libel on the basis of these statements, which he claimed were not true. The company moved for summary judgment on the basis that this communication to the Insurance Commissioner, required by the South Carolina statute, was entitled to an absolute privilege and not merely a qualified privilege and that the communication could not serve as a basis for a libel action. The court agreed with the company, stating:

> An insurance company must be free to disclose to the Insurance Department all information at its disposal which may relate to the character or fitness of an agent. To do so, the company must be assured that its good faith and motive in obeying the statutory mandate will not have to be justified in a suit for defamation in a court of law. Otherwise, its communications to the Department would have to be so vague and circumspect, and so devoid of any matter which might be construed defamatory, that the purpose of the statute would be defeated to the public detriment.