

THE INSURABLE INTEREST REQUIREMENT FOR LIFE INSURANCE: A CRITICAL REASSESSMENT

*Peter Nash Swisher**

[I]n all [life insurance] cases there must be reasonable ground, founded upon the relations 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.

— *Warnock v. Davis*, 104 U.S. 775, 779 (1881).

TABLE OF CONTENTS

I. Introduction.....	478
II. The Insurable Interest Requirement in Life Insurance: A General Overview.....	481
III. Who Has an Insurable Interest in Life Insurance?	484
A. The Insurable Interest in One's Own Life and Related Beneficiary Issues.....	485
B. The Insurable Interest Requirement in the Life of Another. 497	
1. The Close Family "Love and Affection" Insurable Interest.....	498
a. The "Love and Affection" Insurable Interest in a Spouse's Life	499
b. The "Love and Affection" Insurable Interest	

* Professor of Law, University of Richmond Law School; B.A., Amherst College, 1966; M.A., Stanford University, 1967; J.D., University of California, Hastings College of Law, 1973.

Between Parent and Child.....	503
c. The Insurable Interest Requirement in Other Family Members.....	504
d. Nontraditional Families and the De Facto “Spouse” ..	506
2. A “Lawful and Substantial Economic Interest” Requirement in the Continued Life, Health, and Bodily Safety of the Person Insured.....	510
a. The Insurable Interest Requirement in a Business Partner	511
b. A Business Entity’s Insurable Interest in Its “Key” Employees	514
c. A Creditor’s Insurable Interest in the Life of a Debtor.....	518
d. Other “Substantial Economic Interests” in the Life of Another.....	521
IV. When an Insurable Interest in the Life of Another Must Exist ..	522
V. Who May Challenge the Lack of an Insurable Interest?	532
VI. Is an Insurer Barred by Waiver or Estoppel Defenses from Challenging the Lack of an Insurable Interest?	537
VII. Conclusion	541

I. INTRODUCTION

Life insurance generally includes all policies of insurance in which the insurer’s payment is contingent upon the death of a specified individual.¹ There are various types of life insurance coverages, including whole life insurance, variable life insurance, universal life insurance, joint life insurance, term life insurance, credit life insurance, industrial life insurance, and endowment life insurance.² Life insurance has long been validated by most American courts from a legal, economic, and social perspective as a well-recognized investment device to shift and distribute the risk of loss from an untimely or premature death.³ Consequently,

1. *See, e.g.*, *Bowles v. Mut. Benefit Health & Accident Ass’n*, 99 F.2d 44, 48 (4th Cir. 1938) (quoting *Mut. Reserve Life Ins. Co. v. Dobler*, 137 F. 550, 553 (9th Cir. 1905)).

2. *See generally* ROBERT E. KEETON & ALAN J. WIDISS, INSURANCE LAW § 1.5(c) (1988) (outlining various categories of life insurance).

3. *See, e.g.*, *Helverig v. Le Gierse*, 312 U.S. 531, 539 (1941).

recent advertisements sponsored by the American Life and Health Insurance Foundation in a number of prominent periodicals continue to stress that life insurance constitutes a sound financial investment for many Americans today.⁴

However, in order to secure insurance on the life of another, an *insurable interest* in that life is required in order to prevent wagering contracts, and to prevent the unwelcome possibility of homicide.⁵ Accordingly, almost all American jurisdictions today, by legislative statute or judicial case law, now require that an insurable interest exist for life insurance,⁶ or the life insurance policy in question will be declared null and void based upon public policy grounds.⁷

Both judicial case law and state insurance statutes broadly define this insurable interest requirement to include a ““love and affection”” insurable interest for persons ““closely related by blood or law,”” and, “in the case of other persons, a lawful and substantial economic interest in the continued life, health, or bodily safety of the person insured . . .”⁸ However, this

4. For example, *Newsweek* recently printed an advertisement which stated:

Life Insurance Isn't for the People Who Die. It's for the People Who Live.

...

...

So talk to a life insurance agent or other financial advisor and find out how to create a plan that takes care of the people you love and the things you care about. *Because, without insurance, a financial plan is just a savings and investment program that dies with you.*

Life Insurance Isn't for the People Who Die. It's for the People Who Live, NEWSWEEK, Sept. 6, 2004, at 5.

5. See, e.g., *Hopkins v. Hopkins*, 614 A.2d 96, 98 (Md. 1992) (holding that the primary purpose of the prohibition of insuring another person's life without an insurable interest “is to prevent wagering on the life of another, although . . . prevention of murder is another rationale”); see also *Rubenstein v. Mut. Life Ins. Co. of N.Y.*, 584 F. Supp. 272, 279 (E.D. La. 1984) (noting similar purposes); Ferdinand S. Tinio, Annotation, *Killing of Insured by Beneficiary as Affecting Life Insurance or Its Proceeds*, 27 A.L.R.3d 794 (1969 & Supp. 2004) (collecting cases discussing issues surrounding life insurance policies when the insured was killed by the primary beneficiary).

6. See *infra* notes 14-18 and accompanying text.

7. See *infra* note 16.

8. ROBERT H. JERRY, II, *UNDERSTANDING INSURANCE LAW* § 40, at 292-93 (3d ed. 2002) (footnote omitted); see also *Warnock v. Davis*, 104 U.S. 775, 779 (1881)

generalized definition of an insurable interest in the life of another, being written in such overly broad language, leaves considerable room for judicial and scholarly interpretation, and as Professor Edwin Patterson lamented in his influential 1918 *Columbia Law Review* article on the insurable interest in life insurance, “there exists great diversity of judicial opinion. Nor are the text writers agreed. Since life insurance is an every day commercial transaction, a rule of certainty is highly desirable.”⁹ Unfortunately, nearly a century later, and despite a significant amount of textual material on this elusive subject,¹⁰ Professor Patterson’s appeal for uniformity and predictability in this largely neglected area of insurance law still rings true.

The purpose of this Article is to critically reassess the insurable interest requirement in life insurance coverage disputes in light of the present needs of contemporary American society, including analysis of: (1) legal interpretations and underlying public policy rationales supporting such an insurable interest; (2) who is legally entitled to an insurable interest in the life of another; (3) when an insurable interest must exist; (4) when an insurable interest is—or should be—extinguished; (5) who may challenge the lack of an insurable interest; (6) whether an insurable interest in life insurance is subject to waiver or estoppel defenses; and (7) whether or not an applicant for life insurance should be informed of this insurable interest requirement. The Author will also present a number of recommendations impacting present-day life insurance law and practice, and further advocate for a number of long-needed changes in business-related life insurance, including the requirement that an insurable interest in another’s life be present *both* at the time of the policy inception *and* at the time of his or her

(requiring that an insurable interest in one’s life be founded on the reasonable “relations of the parties to each other, either pecuniary or of blood or affinity”).

9. Edwin Patterson, *Insurable Interest in Life*, 18 COLUM. L. REV. 381, 381-82 (1918) (footnote omitted).

10. See, e.g., 2 JOHN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE §§ 761-766, 771-821, 831-838, 851-872 (2d ed. 1966 & Supp. 2004); JERRY, *supra* note 8, §§ 40-47; KEETON & WIDISS, *supra* note 2, § 3.5; WILLIAM F. MEYER, LIFE AND HEALTH INSURANCE LAW §§ 4:1-4:6 (1972 & Supp. 2004); EDWIN PATTERSON, ESSENTIALS OF INSURANCE LAW 162-66 (Ralph H. Blanchard ed., McGraw-Hill Book Co., 2d ed. 1957) (1935); GEORGE RICHARDS, RICHARDS ON THE LAW OF INSURANCE §§ 34-37 (Rowland H. Long ed., 4th ed. 1932); 3 LEE R. RUSS & THOMAS F. SEGALLA, 3 COUCH ON INSURANCE §§ 36:77-36:92, 41:17-41:24, 43:1-43:29 (3d ed. 1997 & Supp. 2004) [hereinafter COUCH ON INSURANCE]; JEFFREY W. STEMPER, LAW OF INSURANCE CONTRACT DISPUTES § 1.04 (2d ed. 1999); WILLIAM R. VANCE & BUIST M. ANDERSON, HANDBOOK OF THE LAW OF INSURANCE §§ 31-34 (3d ed. 1951); see also 44 AM. JUR. 2D *Insurance* §§ 978-1003 (2003).

death.

II. THE INSURABLE INTEREST REQUIREMENT IN LIFE INSURANCE: A GENERAL OVERVIEW

Prior to the end of the eighteenth century, English courts permitted and enforced various gaming or wagering contracts made by persons who had absolutely no insurable interest in the life of another person:

In life insurance, [wagering or] “gaming” practices developed in the eighteenth century. Popular accounts of the period describe the practice of purchasing insurance on the lives of those being tried for capital crimes. These policies constituted naked wagers on whether the accused would ultimately be convicted and executed for the alleged offense. A related practice was the purchase of insurance on the lives of famous, elderly persons; the premium would be a function of what was known about the person’s health, including any recent illnesses. Insuring a life in which one has no interest creates a temptation to bring the insured’s life to an early end, but the greater concern in eighteenth-century England was the practice of wagering.¹¹

Consequently, in order to put an end to life insurance contracts that had no insurable interest in the life of the insured—and which had become a cover for a multitude of wagering and gaming contracts—the British Parliament in 1774 passed a statute holding that any life insurance contract without an insurable interest in the life of the insured would henceforth be null and void.¹² Unfortunately, Parliament left to the courts the daunting

11. JERRY, *supra* note 8, § 40, at 292.

12. Life Assurance Act, 1774, 12 Geo. 3, c. 48, § 1 (Eng.). The Act provided in relevant part:

Whereas it hath been found by Experience, that the making Insurances on Lives, or other Events, wherein the Assured shall have no Interest, hath introduced a mischievous Kind of Gaming: For Remedy whereof, be it enacted by the King’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That 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 . . . 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 that every Assurance made, contrary to the true Intent and Meaning hereof, shall be null and void, to all Intents and Purposes whatsoever.

task of how to interpret and enforce this archaic, poorly drafted, and ambiguous statute.¹³

During the nineteenth century and early twentieth century, most American courts likewise recognized the insurable interest requirement for life insurance policies, purportedly based upon early English common law precedent.¹⁴ For example, in *Connecticut Mutual Life Insurance Co. v. Schaefer*,¹⁵ Justice Bradley declared:

It is generally agreed that mere wager policies—that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction—are void, as against public policy. This was the law of England prior to the Revolution of 1688. But after that period, a course of decisions grew up sustaining wager policies. The legislature finally interposed, and prohibited such insurance: first, with regard to marine risks, by statute of 19 Geo. II, c. 37; and next, with regard to lives, by the statute of 14 Geo. III, c. 48. In this country, statutes to the same effect have been passed in some of the States; but where they have not been, in most cases either the English statutes have been considered as operative, or the older common law has been followed.¹⁶

In the United States, the insurable interest doctrine for life insurance was first adopted by a majority of state courts,¹⁷ and was subsequently

Id.

13. *See id.* (failing to provide enforcement provisions).

14. *See, e.g.*, MEYER, *supra* note 10, § 4.1, at 86-88 (tracing the roots and formation of the insurable interest requirement); VANCE & ANDERSON, *supra* note 10, § 31, at 184-87 & nn.1-17 (same).

15. Conn. Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457 (1876).

16. *Id.* at 460.

17. *E.g.*, Commonwealth Life Ins. Co. v. George, 28 So. 2d 910, 912 (Ala. 1947); Home Life Ins. Co. of N.Y. v. Masterson, 21 S.W.2d 414, 416 (Ark. 1929); Boyer v. United States Fid. & Guar. Co., 274 P. 57, 60 (Cal. 1929); Knott v. State *ex rel.* Guar. Income Life Ins. Co., 186 So. 788, 789-90 (Fla. 1939); Wilson v. Progressive Life Ins. Co., 7 S.E.2d 44, 44-45 (Ga. Ct. App. 1940) (citations omitted); Colgrove v. Lowe, 175 N.E. 569, 571 (Ill. 1931); Newton v. Hicks' Adm'r, 138 S.W.2d 329, 331 (Ky. Ct. App. 1940); Nat'l Life & Accident Ins. Co. v. Ball, 127 So. 268, 268 (Miss. 1930); Lowe v. Rennert, 869 S.W.2d 199, 202 (Mo. Ct. App. 1993) (quotations omitted); Katona v. Colonial Life Ins. Co. of Am., 173 A. 99, 100 (N.J.C.P. 1934); Walker v. Walbridge, 271 N.Y.S. 473, 480 (N.Y. Sup. Ct. 1934); Werenzinski v. Prudential Ins. Co. of Am., 14 A.2d 279, 280-81 (Pa. 1940); Foster v. United Ins. Co. of Am., 158 S.E.2d 201, 203 (S.C. 1967); Washington v. Atlanta Life Ins. Co., 136 S.W.2d 493, 494 (Tenn. 1940); Green v. Southwestern Voluntary Ass'n, 20 S.E.2d 694, 696 (Va. 1942); *see also* MEYER, *supra* note 10, § 4.1, at 87-88 ("Today an insurable interest at the inception of the life contract

adopted by a majority of the state legislatures, where insurable interest statutes for life insurance were enacted within comprehensive state insurance codes.¹⁸

Although the language in numerous judicial opinions and state statutes as to what constitutes a valid insurable interest in the life of another varies from state to state, there is a general consensus that an insurable interest in a life may be founded on one of two broad categories: (1) a love and affection insurable interest for persons closely related by blood or affinity; and (2) for all “other persons, a lawful and substantial economic interest in the continued life, health and bodily safety of the person insured.”¹⁹ This second insurable interest category—that a non-

appears to be required in every state, with the possible exception of New Jersey.”) (footnote omitted); VANCE & ANDERSON, *supra* note 10, § 31, at 184 (“The courts of the American states . . . have generally held irrespective of statutes, that wager policies are contrary to public policy, and void.”); *id* at nn.2-3 (collecting state court decisions adopting the insurable interest doctrine); Carl H. Fulda, *Insurable Interest in Life, New Jersey View*, 1 RUTGERS L. REV. 29, 53-54 (1947) (urging New Jersey to remove ambiguity resulting from certain judicial opinions by adopting a clear statutory definition of “insurable interest” that adheres to the insurable interest doctrine followed by most states).

18. *See, e.g.*, ARIZ. REV. STAT. ANN. § 20-1104A (West 2002) (“[N]o person shall procure or cause to be procured any insurance contract upon the life or body of another individual unless the benefits under such contract are payable . . . to a person having . . . an insurable interest in the individual insured.”); DEL. CODE ANN. tit. 18, § 2704(a) (1998) (“[N]o person shall procure or cause to be procured any insurance contract upon the life or body of another individual unless the benefits under such contract are payable . . . to a person having, at the time when such contract was made, an insurable interest in the individual insured.”); N.Y. INS. LAW § 3205 (McKinney 2000); PA. STAT. ANN. tit. 40, § 512 (West 1999) (“[N]o person shall cause to be insured the life of another, unless the beneficiary named . . . has an insurable interest in the life of the insured.”); VA. CODE ANN. § 38.2-301(A) (Michie 2002) (“No person shall knowingly procure or cause to be procured any insurance contract upon another individual unless the benefits under the contract are payable to . . . a person having an insurable interest in the insured at the time when the contract was made.”).

19. *JERRY*, *supra* note 8, § 40, at 292; *see, e.g.*, N.Y. INS. LAW § 3205(a)(1)(A)-(B). For example, section 3205(a)(1) of the New York Insurance Code defines the insurable interest requirement for life insurance as follows: (1) The term “insurable interest” means:

- (A) in the case of persons closely related by blood or by law, a substantial interest engendered by love and affection;
- (B) in the case of other persons, a lawful and substantial economic interest in the continued life, health or bodily safety of the person insured

Id.; *see also* 3 COUCH ON INSURANCE, *supra* note 10, §§ 41:17-18, at 34-37 (discussing

family member must have a “lawful and substantial economic interest” in the continued life of another—is analogous to the lawful and substantial economic interest insurable interest requirement found in property insurance.²⁰

But how should a court identify and interpret this love and affection insurable interest requirement regarding family members? And how should a court interpret the lawful and substantial economic interest requirement for all other persons? Again, these two insurable interest categories, based upon generalized judicial definitions and overly broad statutory language, still leave considerable room for judicial interpretation and conflicting judicial opinions. As Justice Bradley aptly observed in *Schaefer*, “precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been the subject of much discussion.”²¹ The following sections will discuss and critique these insurable interest requirements in greater detail.

III. WHO HAS AN INSURABLE INTEREST IN LIFE INSURANCE?

The insurable interest in life insurance is often interpreted by dividing life insurance transactions into two general groups, based upon “whether (1) the policy is taken out by an insured on his or her own life or (2) the

the insurable interest categories of blood/affinity and pecuniary); KEETON & WIDISS, *supra* note 2, § 3.5(c), at 181-84 (same); MEYER, *supra* note 10, § 4.2, at 89 (same).

20. *E.g.*, N.Y. INS. LAW § 3401. Section 3401 of the New York Insurance Code defines the insurable interest requirement for property insurance as follows:

No contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. In this article, “insurable interest” shall include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction, or pecuniary damage.

Id. A similar Virginia law states as follows:

A. No insurance contract on property or on any interest therein or arising therefrom shall be enforceable except for the benefit of persons having an insurable interest in the property insured.

B. As used in this section, “*insurable interest*” means any lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage.

VA. CODE ANN. § 38.2-303.

21. Conn. Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457, 460 (1876).

policy is purchased by someone on the life of another person.”²²

A. *The Insurable Interest in One’s Own Life and Related Beneficiary Issues*

It is often stated that every person has an unlimited insurable interest in his or her own life.²³ This does not necessarily mean, however, that one must have a substantial economic interest in one’s own life, or that one must necessarily suffer an economic loss as a result of one’s own death.²⁴ Accordingly, this concept of an insurable interest in one’s own life is difficult to reconcile with the insurance principle of indemnity, since indemnification usually implies the existence of a quantifiable pecuniary or economic interest.²⁵ Thus, Professors Keeton and Widiss have called this type of an insurable interest in one’s own life “a legal fiction,” and “a way of articulating [the] proposition . . . [that] every person . . . may validly contract for insurance on his or her own life,” and for any amount that a life insurance company “is willing to issue because it is impossible to assess the value of life in economic terms.”²⁶ Professor Jerry argues, on the other hand, that “[w]hen one takes out insurance on one’s own life, society’s concerns that the insured is wagering on [his] own death[,] or is inclined to self-destruct for the purpose of bestowing a financial benefit on others[, is] minimal.”²⁷ Whatever underlying rationale may exist for a person having

22. KEETON & WIDISS, *supra* note 2, § 3.5(a), at 179.

23. See, e.g., *Warnock v. Davis*, 104 U.S. 775, 779 (1881) (defining this insurable interest as “a reasonable expectation of advantage or benefit from the continuance of . . . life”); *see also Mut. Sav. Life Ins. Co. v. Noah*, 282 So. 2d 271, 273 (Ala. 1973) (noting that “a person has an unlimited insurable interest in his own life”); *Miller v. Travelers’ Ins. Co.*, 144 N.E. 554, 554 (Ind. App. 1924) (discussing similar qualities of such an interest at common law); *Hoffman v. Fed. Reserve Life Ins. Co.*, 255 P. 980, 981 (Kan. 1927) (stating that an “insured has an unlimited insurable interest in his own life”); *Pierce v. Metro. Life Ins. Co.*, 187 N.E. 77, 78 (Ohio Ct. App. 1933) (finding unlimited insurable interest); *Pittsburgh Underwriters v. Mut. Life Ins. Co. of N.Y.*, 27 A.2d 278, 280 (Pa. Super. Ct. 1942) (“It is elementary that everyone has an unlimited insurable interest in his own life.”) (quoting *Haberfeld v. Mayer*, 100 A. 587, 588 (Pa. 1917)); *Ellison v. Indep. Life & Accident Ins. Co.*, 58 S.E.2d 890, 892 (S.C. 1950) (same); *Peeler v. Doster*, 627 S.W.2d 936, 940 (Tenn. 1982) (same); VANCE & ANDERSON, *supra* note 10, § 31, at 188 (same).

24. See VA. CODE ANN. § 38.2-303(B) (defining an insurable interest as a “substantial economic interest in the safety or preservation of the subject of insurance”).

25. See *infra* note 216 and accompanying text.

26. KEETON & WIDISS, *supra* note 2, § 3.5(b)(1), at 180.

27. JERRY, *supra* note 8, § 43, at 311. Additionally, most life insurance policies also include a restrictive provision relating to premature suicide by the insured. *See, e.g.*, EMERIC FISCHER & PETER SWISHER, PRINCIPLES OF INSURANCE LAW app. C-

an insurable interest in his or her own life, however, most American courts and commentators have generally recognized and validated this important legal doctrine.²⁸

It is also widely recognized by most courts and commentators that a person who takes out insurance on his or her own life has the power to designate any beneficiary he or she desires, and it is *not* necessary that the named beneficiary have an insurable interest in the life of the insured.²⁹

6 (2d ed. 1994) (setting out the “Council Life Insurance” sample policy). The policy addressed suicide of the insured as follows:

1.3 Suicide

If within two years from the [d]ate of Issue the Insured dies by suicide, the amount payable by the [Life Insurance] Company shall be limited to the premiums paid.

Id.

28. *See generally* 3 COUCH ON INSURANCE, *supra* note 10, § 41:19, at 37 (noting that the insurable interest rule is “the prevailing, although not the universal rule”).

29. *See, e.g.*, Am. Cas. Co. v. Rose, 340 F.2d 469, 471 (10th Cir. 1964) (holding that the plaintiff “had an insurable interest in his own life . . . [and] was free to . . . name anyone he saw fit as beneficiary, regardless of whether the beneficiary had an insurable interest in the insured”); Rountree v. Frazee, 209 So. 2d 424, 426 (Ala. 1968) (holding that an insurable interest is not necessary to be an eligible beneficiary); Dodson v. Dodson, 825 S.W.2d 608, 611 (Ark. Ct. App. 1992) (same); Comegys v. Nat'l Union Assurance Soc'y, 39 P.2d 861, 863 (Cal. Dist. Ct. App. 1935) (same); Allen v. Hartford Life Ins. Co., 45 A. 955, 955 (Conn. 1900) (same); United Ins. Co. of Am. v. Hadden, 190 S.E.2d 638, 639 (Ga. Ct. App. 1972) (same) (citations omitted); Hoffman v. Fed. Reserve Life Ins. Co., 255 P. 980, 981 (Kan. 1927) (same) (quotation omitted); Strachan v. Prudential Ins. Co., 73 N.E.2d 840, 843 (Mass. 1947) (same); Corder v. Prudential Ins. Co. of Am., 248 N.Y.S.2d 265, 266 (N.Y. Sup. Ct. 1964) (same); Peoples First Nat'l Bank & Trust Co. v. Christ, 65 A.2d 393, 395 (Pa. 1949); Warren v. Pilgrim Health & Life Ins. Co., 60 S.E.2d 891, 893 (S.C. 1950); Woodfin v. Neal, 65 S.W.2d 212, 214 (Tenn. Ct. App. 1933) (same); Smith v. Coleman, 35 S.E.2d 107, 111 (Va. 1945) (same) (quotation omitted). *See generally* 3 COUCH ON INSURANCE, *supra* note 10, § 41:19, at 37 (noting the insured's freedom to designate any beneficiary); JERRY, *supra* note 8, § 43, at 311-12 (same); KEETON & WIDISS, *supra* note 2, § 3.5 (b)(1), at 180 (same).

Accordingly, if an insured is able to name his or her own beneficiary, regardless of any existing insurable interest, then a life insurance “policy payable to ‘Mary Smith, wife’ or ‘John Jones, husband’ would give [life insurance] benefits to those persons named regardless of the fact that they may never have been graced by the sacred bonds which the description would imply.” 3 APPLEMAN & APPLEMAN, *supra* note 10, § 802, at 238-40. This is because the word “wife” or “husband” following one’s name is generally held to be merely a personal description—*descriptio personae*—or surplusage. *Id.* at 238. However, if the beneficiary is identified only as

The logical rationale for this general rule is that an insured would not designate a person as his or her beneficiary who is likely to murder him or her.³⁰ But unfortunately this does happen, and murder committed by a life insurance beneficiary, sadly, is not uncommon.³¹

“wife” or “husband,” then the beneficiary generally must be the legal spouse of the insured. *Id.* at 239-43.

Earlier case law in Texas and a former Texas statute apparently required that a beneficiary have an economic interest in the insured, or be related to the insured by a close degree of kinship. *See, e.g.*, Wilke v. Finn, 39 S.W.2d 836, 839 (Tex. Comm'n App. 1931) (finding no insurable interest in a beneficiary who lacked blood ties, marriage ties, and any economic interest in the insured's continued life); 3 COUCH ON INSURANCE, *supra* note 10, § 41:20, at 38-39 & nn.62-63 (discussing the minority view). *But see* Henry v. Lincoln Income Life Ins. Co., 405 S.W.2d 167, 169 (Tex. Civ. App. 1966) (“It is not against public policy for a person with no insurable interest to be named beneficiary.”) (citations omitted).

Additionally, the insured, in a majority of jurisdictions, has the legal right to *assign* his or her life insurance policy to another who has no insurable interest in the insured, as a chose in action (for example, as security for a debt), and the assignee's rights generally will prevail over the beneficiary's rights. *See, e.g.*, Grigsby v. Russell, 222 U.S. 149, 155 (1911) (noting that in such circumstances, “it is assumed that the objection to the insurance as a wager is out of the case”); *id.* at 157 (holding that the assignee, and not the administrators of the deceased's estate, was entitled to the life insurance proceeds at issue). But if a life insurance policy is taken out by the insured with a *pre-conceived intent* to assign it to another who lacked an insurable interest in the insured, then it will be void as against public policy for creating an illegal wagering contract. *Warnock v. Davis*, 104 U.S. 775, 778-79 (1887); *see also* VA. CODE ANN. § 38.2-3111 (stating that “[n]o life insurance policy shall be taken out by the insured or by a person having an insurable interest in the insured's life for the mere purpose of assignment,” and that “a policy may be assigned whether or not the assignee has an insurable interest in the life of the insured unless the policy provides otherwise”). There is, however, a minority “New Jersey rule” holding that a beneficiary's claim to life insurance proceeds is superior to any claim of an assignee. *See, e.g.*, *Sullivan v. Maroney*, 78 A. 150, 151 (N.J. 1910) (“[A]s a general rule[,] the interest of a beneficiary is vested and cannot be divested by an assignment of the policy by the assured.”). But this minority rule “is difficult to reconcile with the virtually undisputed proposition that one may validly obtain insurance on one's own life and designate any beneficiary one wishes.” KEETON & WIDISS, *supra* note 2, § 3.5(d), at 186-87; *see also* C.T. Dreschler, Annotation, *Validity of Assignment of Life Insurance Policy to One Who Has No Insurable Interest in Insured*, 30 A.L.R.2d 1310, 1315-18 (1953) (discussing the majority and minority rules); JERRY, *supra* note 8, § 52B[d][1] (same).

30. *See JERRY, supra* note 8, § 43 at 311 (“The person who takes out insurance on her own life has the power to designate any beneficiary; it is presumed that the person will not designate a beneficiary likely to murder the insured.”).

31. *E.g.*, *Wilson v. Wilson*, 144 Cal. Rptr. 180, 181 (Cal. Ct. App. 1978); *State Farm Life Ins. Co. v. Davidson*, 495 N.E.2d 520, 520 (Ill. App. Ct. 1986); *Ford v. Ford*, 512 A.2d 389, 390 (Md. 1986); *Dill v. S. Farm Bureau Life Ins. Co.*, 797 So. 2d 858, 859 (Miss. 2001); *Wunsch v. Sun Life Assurance Co. of Can.*, 92 S.W.3d 146, 155 (Mo. Ct.

Accordingly, it is generally held that a beneficiary who intentionally kills the insured cannot, and should not, recover the life insurance policy benefits, and the life insurance proceeds should be paid instead to the innocent contingent beneficiary or to the estate of the deceased.³² This desirable legal result—that a beneficiary who unlawfully kills the insured is barred from receiving the proceeds of a life insurance policy—is based on the underlying rationale that it is contrary to state public policy, either under the common law³³ or under a particular state’s “slayer statute,”³⁴ to

App. 2002); *In re Barrett*, 637 N.Y.S.2d 751, 752 (N.Y. App. Div. 1996). Sadly, these are not isolated cases. For a depressingly long list of judicial opinions covering more than forty states, see F. S. Tinio, Annotation, *Killing of Insured by Beneficiary as Affecting Life Insurance or its Proceeds*, 27 A.L.R.3d 794 (1969 & Supp. 2004); *see also* G. Van Ingen, Annotation, *Admissibility in Homicide Prosecution for Purpose of Showing Motive of Evidence as to Insurance Policies on Life of Deceased Naming Accused as Beneficiary*, 28 A.L.R.2d 857 (1953).

32. *See, e.g.*, *Cockrell v. Life Ins. Co. of Ga.*, 692 F.2d 1164, 1170 (8th Cir. 1982) (holding that under Arkansas law, a beneficiary who intentionally and unlawfully kills the insured cannot recover the insurance proceeds, and such proceeds become an asset of the estate of the insured); *Brown v. Life Ins. Co. of Va.*, 249 So. 2d 79, 81 (Fla. Dist. Ct. App. 1971) (applying rule that contingent beneficiaries, rather than the insured’s estate, would be entitled to the proceeds of a life insurance policy when the insured was killed by the principal beneficiary) (citing *Life Ins. Co. of Va. v. Cashatt*, 206 F. Supp. 410 (E.D. Va. 1962)); *Lee v. Aylward*, 790 S.W.2d 462, 462-63 (Mo. 1990) (en banc) (holding that when a beneficiary wrongfully kills the insured, the proceeds become payable to the contingent beneficiary).

33. *See, e.g.*, *Aetna Life Ins. Co. v. Primofiore*, 145 Cal. Rptr. 922, 926 (Cal. Ct. App. 1978) (stating that public policy requires that an individual not benefit from the unlawful killing of another); *State Farm Life Ins. Co. v. Smith*, 363 N.E.2d 785, 786 (Ill. 1977) (same); *Harper v. Prudential Ins. Co. of Am.*, 662 P.2d 1264, 1269 (Kan. 1983) (same); *Jones v. All Am. Life Ins. Co.*, 316 S.E.2d 122, 125 (N.C. Ct. App. 1984) (same), *aff’d*, 325 S.E.2d 237 (N.C. 1985).

34. *See, e.g.*, *Lunsford v. W. States Life Ins.*, 908 P.2d 79, 83 (Colo. 1995) (en banc) (analyzing Colorado “slayer statute,” which precludes a beneficiary of an insurance policy from collecting the proceeds when the beneficiary kills the insured); *In re Hamilton*, 446 So. 2d 463, 464 (La. Ct. App. 1984) (applying similar state law to find criminally responsible beneficiary guilty); *Wunsch v. Sun Life Assurance Co. of Can.*, 92 S.W.3d 146, 154 (Mo. Ct. App. 2002) (discussing state “slayer law”); *Bennett v. Allstate Ins. Co.*, 722 A.2d 115, 117 (N.J. Super. Ct. App. Div. 1998) (same); *see also* *State Mut. Life Assurance Co. of Am. v. Hampton*, 696 P.2d 1027, 1032, 1033 (Okla. 1985) (holding that although the state’s slayer statute bars a beneficiary from recovery who has been convicted of the insured’s murder or first degree manslaughter, “the statute does not preclude the judicial application of the common-law rule in cases where the beneficiary . . . has not been convicted of the crime;” accordingly, “a beneficiary’s acquittal [on charges of killing the insured] does not per se entitle that beneficiary to recover the proceeds of a decedent’s [life] insurance policy”); *Harper v. Prudential Ins. Co.*, 662 P.2d 1264, 1271 (Kan. 1983) (adopting the common law rule

permit a person who has unlawfully killed another to benefit from his or her wrongdoing.³⁵ It should be noted, however, that in the absence of a criminal conviction, a beneficiary may still be precluded from recovering the proceeds of a life insurance policy whenever the homicide was intentional and unjustified.³⁶ Thus, even if the statutory requirements of a state's "slayer statute" have not been met, and even if a beneficiary has never been charged with a crime (or has subsequently been acquitted of a crime), a life insurance company may still demonstrate in a separate civil action, by a preponderance of the evidence, that the beneficiary should *not* be entitled to the life insurance proceeds.³⁷ However, generally a

"bar[ring] the beneficiary of a life insurance policy who feloniously kills the insured from recovering under the policy whether convicted or not"); *Huff v. Union Fid. Life Ins. Co.*, 470 N.E.2d 236, 238-39 (Ohio Ct. App. 1984) (same).

35. *See, e.g.*, *Brown v. Life Ins. Co. of Va.*, 249 So. 2d at 80-81 (holding that the law will not permit a wrongdoer to profit from his or her own wrong); *United Farm Bureau Family Life Ins. Co. v. Fultz*, 375 N.E.2d 601, 607-08 (Ind. Ct. App. 1978) (same). An assignee of a beneficiary who murders the insured also stands in no better position than a beneficiary wrongdoer. *See, e.g.*, *Equitable Life Assurance Soc'y v. Weightman*, 160 P. 629, 632 (Okla. 1916) (finding it "unquestionably the law that the assignee takes no greater interest than the assignor has") (citations omitted); *Johnson v. Metro. Life Ins. Co.*, 100 S.E. 865, 866 (W. Va. 1919) (stating that the assignees of a beneficiary cannot "stand on any higher ground than the beneficiary herself"). *But see* *Tippens v. Metro. Life Ins. Co.*, 99 F.2d 671, 675 (5th Cir. 1938) (finding that where a beneficiary caused the death of the insured *without* felonious intent, that beneficiary can still recover on the insurance policy).

36. *E.g.*, *State Farm Life Ins. Co. v. Smith*, 363 N.E.2d 785, 786 (Ill. 1977).

37. *See, e.g.*, *Bernstein v. Rosenthal*, 671 P.2d 979, 980-81 (Colo. Ct. App. 1983) (holding that evidence of a coroner's report and death certificate sustained a finding that the beneficiary had killed the insured and was therefore prevented from taking under the policy, even though there had been no criminal conviction); *Harper v. Prudential Ins. Co. of Am.*, 662 P.2d at 1271 (holding that the absence of a criminal conviction under a state slayer's statute would not preclude judicial application of the common law rule barring the beneficiary from recovering the insurance proceeds); *Peoples Sec. Life Ins. Co. v. Arrington*, 412 S.E.2d 705, 707-08 (Va. 1992) (holding that even though a wife did not fall under the state slayer's statute, nor was she ever convicted of a crime, the life insurance company was not precluded from attempting to prove that the wife should not be entitled to recover as the husband's beneficiary because she allegedly "'procured, participated in, or otherwise directed' her husband's death"); *see also Aetna Life Ins. Co. v. McDuffie*, 273 F.2d 609, 610 (6th Cir. 1960) (affirming district court's decision that wife could not recover proceeds of life insurance policy because she intentionally and feloniously killed her husband, despite being acquitted of similar criminal charges); *Hamilton v. Liberty Nat'l Life Ins. Co.*, 207 So. 2d 472, 475 (Fla. Dist. Ct. App. 1968) (holding that wife was barred from recovering any insurance proceeds even though she was acquitted in criminal court); *Huff v. Union Fid. Life Ins. Co.*, 470 N.E.2d 236, 238-39 (Ohio Ct. App. 1984) (holding that a killing justified by defense of oneself or defense of another does not preclude a

beneficiary will not be barred from recovering life insurance proceeds if a beneficiary's negligence caused the insured's unintended death³⁸ or if a beneficiary acted in justifiable self-defense.³⁹

Some courts have recognized a controversial exception to the general rule that a life insurer must still pay the contingent beneficiary or the insured's estate whenever a primary beneficiary wrongfully kills the insured.⁴⁰ This is called the "innocent instrumentality" exception:

beneficiary from recovering insurance benefits resulting from that death); *State Farm Mut. Ins. Co. of Am. v. Hampton*, 696 P.2d at 1032, 1033 (holding that murder/manslaughter conviction is not necessary to preclude a beneficiary's recovery of life insurance proceeds; nor does acquittal automatically entitle beneficiary to those proceeds).

38. *See, e.g.*, *Commercial Travelers Mut. Accident Ass'n v. Witte*, 406 S.W.2d 145, 149 (Ky. 1966) (holding that an unintentional homicide, even if unlawfully caused by negligence or gross negligence, would still allow a beneficiary to recover the insurance proceeds); *Ford v. Ford*, 512 A.2d 389, 392-93 (Md. 1986) (same); *Gorley v. Parizek*, 475 N.W.2d 558, 561-62 (N.D. 1991) (same).

39. *See, e.g.*, *Franklin Life Ins. Co. v. Strickland*, 376 F. Supp. 280, 282-83 (N.D. Miss. 1974) (holding that even though the beneficiary pleaded guilty to voluntary manslaughter, she was still entitled to a civil trial to determine the weight and effect to be accorded to her guilty plea and conviction, and would be entitled to recover the proceeds of the life insurance policy if she could establish that the homicide was committed either accidentally or by way of self-defense); *Calaway v. S. Farm Bureau Life Ins. Co.*, 619 S.W.2d 301, 302-03 (Ark. Ct. App. 1981) (holding that the wife had acted in justifiable self-defense and was therefore still entitled to proceeds as the beneficiary); *Provident Life & Accident Ins. Co. v. Carter*, 345 So. 2d 1245, 1246 (La. Ct. App. 1977) (same).

40. *See, e.g.*, *Fed. Kemper Life Assurance Co. v. Eichwedel*, 639 N.E.2d 246, 251 (Ill. App. Ct. 1994) (stating that "where the beneficiary procures a life insurance policy on the life of the insured while harboring the intent to murder the insured, the life insurance policy was obtained through fraudulent means and the policy is void"); *Colyer's Admin. v. N.Y. Life Ins. Co.*, 188 S.W.2d 313, 314 (Ky. 1945) (holding that the beneficiary had a predetermination to kill the insured before the policy was issued and that, consequently, the policy was void and there could be no recovery by the beneficiary or the estate of the insured); *Flood v. Fid. & Guar. Life Ins. Co.*, 394 So. 2d 1311, 1313 (La. Ct. App. 1981) (same); *Henderson v. Life Ins. Co. of Va.*, 179 S.E. 680, 684 (S.C. 1935) (holding that because the policies were procured with the intent to murder the insured, they were "void at their inception" on grounds of public policy). *But see Howard v. Jessup*, 519 P.2d 913, 915 (Okla. 1973) (overruling *Aetna Life Insurance Co. v. Strauch* on the grounds "that in order for a declaration . . . to be admissible, it must be against pecuniary or proprietary interest of the declarant, and not merely against his personal interest") (citing *Aetna Life Ins. Co. v. Strauch*, 67 P.2d 452, 454-56 (Okla. 1937) (holding that the beneficiary is precluded from recovering on the policy because he participated in his wife's murder, but that the estate of the insured would only be precluded if the insured acted as an "instrumentality" in the preconceived murder scheme, which would render the policy void)). *Aetna* originally

An exception to the rule that the liability of the insurer is not affected by the beneficiary's unlawfully killing the insured may arise when the beneficiary is also guilty of fraud with respect to the insurer. For example, if it is established that the beneficiary conceived the idea of murdering the insured prior to the time the insurance was procured, and with that thought in mind the beneficiary himself or herself procured the policy, either in person or acting through the insured as an innocent instrumentality so that the policy was, in actual effect, at its inception, a contract between the beneficiary and the insurance company, as distinguished from a contract between the innocent insured and the company, the insurance company may defeat liability on the ground of fraud. Under this principle, recovery is barred even by the estate of the insured.⁴¹

A major problem for courts applying this innocent instrumentality rule, however, is attempting to determine, based upon the facts of each particular case, whether the beneficiary had fraudulently procured the policy through the insured as an innocent instrumentality, or whether the insured freely procured life insurance coverage for his own purposes, separate and apart from the primary beneficiary's evil motive and design.⁴²

In *New England Mutual Life Insurance Co. v. Null*,⁴³ Victor Null contracted for life insurance on his own life because his new business partners, Ronald and James Calvert, asserted that they required this insurance as security for their investment in Null's inventions.⁴⁴ Unbeknownst to Null, however, the Calverts actually desired Null's life

reasoned as follows:

The mere fact that the beneficiary or some other party entertains a secret intent to murder one who is procuring insurance does not relieve the company from liability upon the subsequent commission of the unlawful homicide if the expected murderer does not participate in procuring the insurance in such a manner as to become, in effect, the party who contracts with the Insurance Company.

Aetna Life Ins. Co. v. Strauch, 67 P.2d at 453.

41. 4 COUCH ON INSURANCE, *supra* note 10, § 62:5, at 7-8 (footnotes omitted); *accord* *Chute v. Old Am. Ins. Co.*, 629 P.2d 734, 741-42 (Kan. Ct. App. 1981) (barring recovery, relieving insurer of all liability).

42. *E.g., New Eng. Mut. Life Ins. Co. v. Null*, 554 F.2d 896, 902 (8th Cir. 1977), *remanded to* 459 F. Supp. 979 (E.D. Mo. 1978), *aff'd*, 605 F.2d 421 (8th Cir. 1979).

43. *Id.*

44. *Id.* at 897-902; *see also* *New Eng. Mut. Life Ins. Co. v. Null*, 605 F.2d at 422.

insurance as part of a plan to obtain substantial proceeds through Null's murder.⁴⁵ Null was found dead, having been shot multiple times.⁴⁶ Although the murderer was never apprehended, the Calverts were convicted of mail fraud, wire fraud, and conspiracy to defraud insurance companies.⁴⁷ Using the Calverts' criminal convictions as evidence that the New England Mutual Life Insurance Company was defrauded by these beneficiaries, the federal district court initially granted the insurer summary judgment under the innocent instrumentality rule.⁴⁸ However, the Eighth Circuit Court of Appeals reversed and remanded for trial, holding "that a judgment in a criminal case cannot be used to establish the truth of the facts" in a subsequent civil action brought by the administratrix for Mr. Null's estate.⁴⁹ The case was then remanded back to the trial court on the issue of "whether [Mr.] Null executed the application and procured the insurance for his own purposes and thus became the contracting party with the insurer, or instead merely served as an innocent instrumentality in the evil scheming of Ronald Calvert."⁵⁰ On remand and appeal, the Eighth Circuit ultimately held that the innocent instrumentality rule did apply in this particular case.⁵¹

The Eighth Circuit was troubled, however, by Mrs. Null's argument that the insurance agent for New England Mutual Life allegedly knew about, and arguably may have aided the Calverts' illegal enterprise:

We have been unable, however, to find a decision in any state, including Missouri, which has permitted the estate of the insured to recover on the policy itself from an insurer which has negligently issued a policy. In *Lakin v. Postal Life and Casualty Insurance Co.*, the Missouri court held a life insurance policy obtained under somewhat similar circumstances void for want of an insurable interest. Although the argument the appellant makes here was not raised in *Lakin*, its facts support an inference that the agent solicited the policy with knowledge of the owner-beneficiary's true relationship with the insured We find no indication in that opinion, or in any other case, that the Missouri court would permit the estate of the insured to

45. New Eng. Mut. Life Ins. Co. v. Null, 605 F.2d at 423.

46. New Eng. Mut. Life Ins. Co. v. Null, 554 F.2d at 898 n.1.

47. United States v. Calvert, 523 F.2d 895, 899-900 (8th Cir. 1975).

48. New Eng. Mut. Life Ins. Co. v. Calvert, 410 F. Supp. 937, 941 (E.D. Mo. 1976).

49. New Eng. Mut. Life Ins. Co. v. Null, 554 F.2d at 901.

50. *Id.* at 902.

51. New Eng. Mut. Life Ins. Co. v. Null, 605 F.2d at 422 (affirming the notion that the victim was an innocent instrumentality of another's scheme).

recover on the policy itself. In view of the fact that no Missouri decision is precisely on point, we would be prepared to distinguish *Lakin* if persuasive authority for a recovery by the estate on the policy could be discovered elsewhere.⁵²

So resulted an interpretive conundrum in which the Eighth Circuit could find no persuasive authority.⁵³ What happens when a life insurance agent becomes aware of the beneficiary's murderous intent, but does nothing? Or worse, what happens when the beneficiary conspires with a life insurance agent to murder the insured and divide the life insurance proceeds between them?⁵⁴ On one hand, the life insurance company might argue that the innocent instrumentality rule should apply in this situation as well. But there is also another well-recognized and countervailing insurance law principle—that an insurer is generally bound by the acts of its agent in procuring an insurance application whenever the agent is acting within the scope of his or her actual or apparent authority, even though the agent may act negligently, fraudulently, or dishonestly, unless the insured participates in such fraud.⁵⁵

52. *New Eng. Mut. Life Ins. Co. v. Null*, 605 F.2d at 424 (citing *Lakin v. Postal Life & Cas. Ins. Co.*, 316 S.W.2d 542, 551 (Mo. 1958)). For an excellent discussion of the *Lakin* case, see Robert H. Jerry, II, *May Harvey Rest in Peace: Lakin v. Postal Life and Casualty Company*, 2 NEV. L.J. 292 (2002).

53. See *New Eng. Mut. Life Ins. Co. v. Null*, 605 F.2d at 424 (lamenting that no authority could be found to distinguish the holding in *Lakin*).

54. This latter scenario, unfortunately, is not a hypothetical. A number of years ago I was asked to serve as a consultant and expert witness in a Tennessee life insurance coverage dispute, where the insurance agent and the beneficiary colluded to kill the insured and divide up his million dollar life insurance policy, with double indemnity for "accidental death." It was a particularly brutal murder, and the insurance agent, the hit man, and beneficiary are all currently on death row in a Tennessee state prison.

55. See, e.g., *Ins. Co. v. Mahone*, 88 U.S. 152, 156 (1874) (determining that the acts and declarations of the insurance agent could be properly considered to be the acts and declarations of the insurer); *Life & Cas. Co. v. Crowe*, 164 So. 83, 85-86 (Ala. 1935) (ruling that when an agent of an insurer solicited an application and had the authority to do so, the insured can rightfully assume that the agent "correctly wrote into the application the information imparted to him, and [thus] no duty rested" on the insured to investigate the policy further); *Hart v. Prudential Ins. Co.*, 117 P.2d 930, 931-32 (Cal. Dist. Ct. App. 1941) (holding that when an agent incorrectly entered information about the health of the insured and insured relied upon agent's assertions that her answers were correctly reported after she did not receive a copy of the application, the insurer will be estopped from claiming false answers as a defense in an action against the policy); *N.Y. Life Ins. Co. v. Fukushima*, 220 P. 994, 995-96 (Colo. 1923) (holding that when the insurer transcribed the insured's answers on the application for insurance, the insurer was estopped from relying on the falsity of the answers because the acts of the

Since the *Null* decision, two other courts have also attempted to address this interpretive conundrum.⁵⁶ In *Life Insurance Co. of Georgia v. Lopez*,⁵⁷ the plaintiff Jim Lopez alleged that his wife had obtained a life insurance policy on his life with a face value of \$260,000 and an annual premium of \$7,464, although Lopez's total family income did not exceed \$9,000 per year.⁵⁸ Lopez also "alleged that he was not aware that his wife was purchasing life insurance" on his life, claiming that he had been tricked into consenting to and signing the life insurance authorization forms, "believing [that] his wife was purchasing a health insurance policy" instead.⁵⁹ Lopez's complaint further alleged that "in early 1977, [he] overheard his wife and her brother plotting to kill him."⁶⁰ Lopez immediately called his life insurance agent and informed him of this conspiracy, "but the insurance company made no inquiry into the matter. In May 1977 Lopez's wife and brother-in-law abducted him . . . and were attempting to drown him when a deputy sheriff happened upon the scene and rescued" Lopez.⁶¹ Lopez's complaint against Life Insurance of Georgia consequently charged the company with negligence in its failure to discover the disproportionate amount of life insurance "coverage to the family's financial circumstances and negligence in failing to investigate the conspiracy to murder Lopez after receiving actual notice" from him.⁶² The Florida Supreme Court found that Lopez did indeed have a cause of action

agent led the insured to believe that he had done all that was necessary on his part and as a result the policy would be valid); *Harris v. Guar. Income Life Ins. Co.*, 75 So. 2d 227, 229 (La. 1954) (finding that the acts of the agent bind the insurer but not the insured); *Lampke v. Metro. Life Ins. Co.*, 18 N.E.2d 14, 17 (N.Y. 1938) (holding that the "knowledge of the agent . . . constitutes the knowledge on the part of the [insurance] company"); *Lindstrom v. Nat'l Life Ins. Co.*, 165 P. 675, 677 (Or. 1917) (holding that when an agent issues a policy on which the agent knowingly disclosed false information contrary to the information given by the insured, the insurance company is liable for the deceit of its agent); *Klieger v. Metro. Life Ins. Co.*, 192 N.W. 1003, 1004 (Wis. 1923) (holding that when the applicant provides correct information to the agent and the agent makes mistakes in filling out the application, the insurer is bound by the mistakes of the agent); *see also* 4 COUCH ON INSURANCE, *supra* note 10, § 51:1, at 4-5 (noting that "the weight of authority supports the rule that an insurance agent in procuring an application for insurance and in reducing it to writing, acts as the agent of the insurer").

56. See *Overstreet v. Ky. Cent. Life Ins. Co.*, 950 F.2d 931 (4th Cir. 1991); *Life Ins. Co. of Ga. v. Lopez*, 443 So. 2d 947 (Fla. 1984).

57. *Life Ins. Co. of Ga. v. Lopez*, 443 So. 2d 947.

58. *Id.* at 948.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

under Florida law, and held that “an insurer issuing [a life] insurance policy can be liable in tort to the insured where the policy beneficiary attempts to murder the insured in order to collect the policy benefits and where the insurer had actual notice of the policy beneficiary’s murderous intent.”⁶³ The court stated that although “[i]nsurance companies cannot in the usual course of business dealings be held to be guarantors of their customers’ good intentions,” nevertheless “[n]either can they be relieved of a duty to investigate when a beneficiary’s criminal motive in purchasing the policy is made known.”⁶⁴ The *Lopez* court continued:

Such an aggregation of suspicious circumstances must surely impose on the insurance company a duty to eliminate any motive for effecting the insured’s death, if not by withdrawing the coverage as void for reasons of public policy, then at least by warning the beneficiary that no proceeds would be payable if she in fact murdered the insured.⁶⁵

But what did the court mean when it stated that the beneficiary should be warned “that no proceeds would be payable if she in fact murdered” her husband?⁶⁶ Did the court mean that no proceeds would be payable to the beneficiary wrongdoer? Or that no proceeds would be payable to the primary beneficiary, the contingent beneficiary, or to the decedent’s estate in the event of Lopez’s murder? Justice Boyd dissented in this opinion, arguing that the Florida Supreme Court had “create[d] a new cause of action not previously recognized under the law of Florida.”⁶⁷ But Justice Boyd also aptly observed the following:

The majority opinion emphasizes the fact that if Lopez’ wife had succeeded in killing him, the insurance company could have refused to pay her the policy benefits on the ground that she had murdered the insured. However, unless the policy were found to be void ab initio due to Mrs. Lopez’ fraudulent intent at the time she applied for and was issued the policy, the insurer would not be relieved of the duty of paying the death benefits, but would be obliged to pay them to contingent beneficiaries or the estate of the insured.⁶⁸

Another relevant judicial opinion, *Overstreet v. Kentucky Central Life*

63. *Id.* (emphasis omitted).

64. *Id.* at 949.

65. *Id.*

66. *See id.*

67. *Id.* (Boyd, J., dissenting).

68. *Id.* at 951 (citing *New Eng. Mut. Life Ins. Co. v. Null*, 554 F.2d 896 (8th Cir. 1977); *Carter v. Carter*, 88 So. 2d 153 (Fla. 1956)).

Insurance Co.,⁶⁹ addressed an insurance agent's collusion with the beneficiary, rather than the insurer's mere negligence, in causing the death of the insured.⁷⁰ On the fourteenth of September, 1983, David Fisher met with one Kenneth Tietsort, a life insurance agent who represented Kentucky Central Life Insurance Company, in order "to procure insurance on the life of David Wilkey, Fisher's 18-year-old employee."⁷¹ Fisher applied for a \$50,000 insurance policy on Wilkey's life, with a double indemnity provision for accidental death.⁷² "Tietsort, in violation of company policy, accepted the application even though he knew Fisher had no insurable interest in Wilkey's life."⁷³ Tietsort also falsely stated "that he had witnessed Wilkey's signature on the [life insurance] application [form], that he had known Wilkey for a month, and that Fisher was Wilkey's guardian."⁷⁴ When "Kentucky Central disapproved the application because of Fisher's lack of an insurable interest," Tietsort "suggested to Fisher that Wilkey's estate could be named as beneficiary for purposes of approval," and Fisher could be later designated the beneficiary after the policy was approved by Kentucky Central.⁷⁵ "On November 21, Fisher lured Wilkey to rural Bedford County, Virginia, on the pretext of a hunting trip, where Robert Mulligan, another employee of Fisher's shot him in the back, killing him. The death was reported as a hunting accident."⁷⁶ In 1986, the FBI discovered that Fisher had revealed his role in Wilkey's death to an informant.⁷⁷ The FBI then obtained the Kentucky Central insurance file on Wilkey.⁷⁸ In 1987, Fisher was convicted and sentenced to death for the murder of David Wilkey.⁷⁹

A major issue for the Fourth Circuit Court of Appeals in this case, therefore, was how the wrongful conduct of the life insurance agent, Tietsort, in allegedly assisting the beneficiary Fisher in his nefarious murder scheme, impacted the liability of the Kentucky Central Life Insurance Company.⁸⁰ The Fourth Circuit concluded that the wrongful acts

69. Overstreet v. Ky. Cent. Life Ins. Co., 950 F.2d 931 (4th Cir. 1991).

70. *Id.* at 938-41.

71. *Id.* at 936.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 937.

77. *Id.*

78. *Id.*

79. *Id.*; see also Fisher v. Commonwealth, 374 S.E.2d 46, 55 (Va. 1988).

80. Overstreet v. Ky. Cent. Life Ins. Co., 950 F.2d at 938-39.

of the agent, Tietsort, may well have estopped the insurer from arguing that the policy was void:

The third reason why the policy cannot be held void as a matter of law rests on a well-established principle of North Carolina law. An insurer may be estopped from pleading fraud or falsity in the making of an insurance contract “where such fraud or negligence was on the part of the insurer’s agent.” Conflicting statements concerning the extent of such [agent] misconduct create a jury issue that must survive a motion for summary judgment.⁸¹

The district court’s summary judgment in favor of the insurer and against the decedent’s estate was therefore reversed, and the case was remanded for trial.⁸²

The *Lopez* and *Overstreet* cases and subsequent legal precedent inconsistent with the *Null* court’s reasoning provide persuasive and compelling legal precedent for holding that a life insurance company *should* be liable for the death of an insured whenever its agents negligently fail to respond to a beneficiary’s murderous intent, or worse, whenever an agent aids or colludes with a beneficiary to cause the death of an insured.⁸³ Under such circumstances, the proceeds should then go to the innocent contingent beneficiary or to the estate of the insured, including any state wrongful death benefits, if the estate administrator is a statutory beneficiary as well.⁸⁴

B. *The Insurable Interest Requirement in the Life of Another*

Although the language found in state judicial opinions and state statutes as to what constitutes a valid insurable interest in the life of another varies from state to state,⁸⁵ there is nevertheless a general consensus that an insurable interest in the life of another may be founded on one of two broad categories: (1) a family “love and affection” insurable interest for persons closely related by blood or affinity; and (2) for all other

81. *Id.* at 943 (citing *Mathis v. Minn. Mut. Life Ins. Co.*, 302 F. Supp. 993, 1004 (M.D.N.C. 1969).

82. *Id.* at 934, 944.

83. *Id.* at 936; *Life Ins. Co. of Ga. v. Lopez*, 443 So. 2d 947, 949 (Fla. 1984).

84. See, e.g., *Overstreet v. Ky. Cent. Life Ins. Co.*, 950 F.2d at 940 (“When a beneficiary is barred from receiving proceeds by reason of involvement in the death of the insured, the proceeds by common law became payable to the administrator of the insured’s estate unless the policy provides otherwise.”) (citations omitted).

85. JERRY, *supra* note 8, § 40, at 292-93.

persons, a “lawful and substantial economic interest” in the continued life, health, and bodily safety of the person insured.⁸⁶

1. *The Close Family “Love and Affection” Insurable Interest*

A family love and affection insurable interest in the life of another, based upon a close family relationship, may be created either by consanguinity or affinity.⁸⁷ It is predicated on the assumption that such love and affection normally exists between close family members, and that this familial love and affection will normally provide adequate social and legal safeguards against premeditated homicide by another family member to procure substantial life insurance proceeds from an untimely or premature death.⁸⁸ Professors Keeton and Widiss opine that “[a] rigorous adherence to the principle of indemnity in relation to life insurance . . . would still require a showing of a factual expectancy of economic gain from the continued life of the insured person” (or conversely, the showing of economic loss from the untimely death of the insured) and, therefore, a love and affection insurable interest in a family member’s life is arguably a “legal fiction.”⁸⁹ This is not entirely true, however, since nuclear family members often provide substantial economic and noneconomic contributions to the well-being of the family and to other family members, in addition to love and affection.

Moreover, a number of judicial decisions have not based this love and affection insurable interest *solely* upon a close familial relationship, but have also recognized that had the deceased family member continued to live, other family members might have expected to receive some pecuniary benefit or economic gain as well.⁹⁰ Other courts, apparently a minority,

86. See JERRY, *supra* note 8 and accompanying text; VANCE & ANDERSON, *supra* note 10, §§ 31-34.

87. 3 COUCH ON INSURANCE, *supra* note 10, §§ 41:17-41:18, at 33-37; JERRY, *supra* note 8, § 43, at 312-13; KEETON & WIDISS, *supra* note 2, § 3.5(c)(2), at 181; 44 AM. JUR. 2D *Insurance*, *supra* note 10, § 980.

88. 3 COUCH ON INSURANCE, *supra* note 10, § 41:18, at 36; JERRY, *supra* note 8, § 43, at 312; KEETON & WIDISS, *supra* note 2, § 3.5(c)(2), at 181; 44 AM. JUR. 2D *Insurance*, *supra* note 10, § 980.

89. See KEETON & WIDISS, *supra* note 2, § 3.5(c)(3), at 183.

90. See, e.g., *Warnock v. Davis*, 104 U.S. 775, 779 (1882) (acknowledging that the “expectation of advantage or benefit from the continuance of [the insured’s] life” extends beyond close familial ties); *Prudential Ins. Co. of Am. v. Hunn*, 52 N.E. 772, 773 (Ind. App. 1899) (noting that the insurable interest decision must be based not only on a close familial relationship, but also expected pecuniary gain); *Ryan v. Metro. Life Ins. Co.*, 93 S.W. 347, 348 (Mo. Ct. App. 1906) (same); *Keystone Mut. Benefit Ass’n v. Norris*, 8 A. 638, 640 (Pa. 1887) (same). This apparently is still the majority view. 3

have recognized this love and affection insurable interest based solely upon a close family relationship, without any concomitant pecuniary benefit or economic gain.⁹¹ So although this love and affection insurable interest in the life of another family member may not always constitute “pure” indemnity insurance—like property insurance—it nevertheless continues to be recognized in the overwhelming majority of jurisdictions today as a necessary and viable doctrinal test that realistically “attempts to identify those situations where courts are concerned that [an] insurance contract [might] create incentives for wagering[,] or the intentional destruction of property” or the life of another person.⁹²

The closer a familial relationship is, the more likely an insurable interest in another family member will exist. Accordingly, an individual would normally have a love and affection insurable interest in all the members of his or her nuclear family, including the life of a spouse and the life of a minor child.⁹³ Most courts, however, have held that other more distant familial relationships, such as a relationship between an uncle and niece or a son-in-law and mother-in-law, would be too remote to support such a love and affection insurable interest unless there also existed a concomitant pecuniary or economic interest in the continuing life of the extended family member.⁹⁴ The following section analyzes these various love and affection insurable interests in the life of another family member.

a. *The “Love and Affection” Insurable Interest in a Spouse’s Life*

Under the modern majority view, each spouse in a life insurance contract is considered to have a love and affection insurable interest in the

COUCH ON INSURANCE, *supra* note 10, § 41:18, at 36.

91. *Ins. Co. v. Bailey*, 80 U.S. 616, 619 (1871); *Fitzgerald v. Hartford Life & Annuity Ins. Co.*, 13 A. 673, 674 (Conn. 1888); *Slade v. Life & Cas. Ins. Co. of Tenn.*, 162 S.E. 734, 735-36 (N.C. 1932); *Drane v. Jefferson Standard Life Ins. Co.*, 146 S.W.2d 526, 529 (Tex. Civ. App. 1940), *modified*, 161 S.W.2d 1057 (Tex. 1942); *see also* 3 COUCH ON INSURANCE, *supra* note 10, § 41:18, at 36 (noting that “some courts have based a finding of insurable interest solely on the basis of relationship”).

92. *JERRY*, *supra* note 8, § 41, 295-96.

93. *Id.*; *see also* 2 APPLEMAN & APPLEMAN, *supra* note 10, § 791, at 201 (discussing insurable interest connection between parent and child); *id.* § 802, at 235-37 (discussing same connection between spouses); 3 COUCH ON INSURANCE, *supra* note 10, § 41:18, at 36 (noting same connection between close blood relationships).

94. 44 AM. JUR. 2D *Insurance*, *supra* note 10, §§ 988-989; *see also* 3 COUCH ON INSURANCE, *supra* note 10, § 41:18, at 36 n.50 (noting that “beneficiaries have no insurable interest where the insured is . . . related . . . only remotely by affinity to them”).

life of the other spouse.⁹⁵ The courts are split, however, on whether a spouse is allowed to take out a life insurance policy on the life of the other spouse without the other spouse's knowledge and consent.⁹⁶ Although case law and statutory authority in some jurisdictions does not require the knowledge or consent of a spouse for the other spouse to procure life insurance coverage on the life of the insured,⁹⁷ the better-reasoned approach, used by a majority of states, is to *require* the knowledge and consent of the insured spouse or other adult based upon public policy grounds, and as a further safeguard against illegal wagering contracts.⁹⁸

For example, in *Ramey v. Carolina Life Insurance Co.*,⁹⁹ a wife procured a life insurance policy on the life of her husband without his

95. *E.g.*, Jennings v. Jennings, 33 So. 2d 251, 253 (Ala. 1948); Tromp v. Nat'l Reserve Life Ins. Co., 53 P.2d 831, 833 (Kan. 1936); Goodwin v. Fed. Mut. Ins. Co., 180 So. 662, 664 (La. Ct. App. 1938); Marquet v. Aetna Life Ins. Co., 159 S.W. 733, 735 (Tenn. 1913); Crismond's Adm'x v. Jones, 83 S.E. 1045, 1046 (Va. 1915); *see also* Meehan v. Transamerica Occidental Life Ins. Co., 499 N.E.2d 602, 604 (Ill. App. Ct. 1986) (noting that “[a] dissolution of marriage does not terminate the insurable interest of a spouse on the life of the former spouse”); Hopkins v. Hopkins, 614 A.2d 96, 99 (Md. 1992) (same). *See generally* 2 APPLEMAN & APPLEMAN, *supra* note 10, § 802 (noting spousal insurable interest to be the modern rule). Arguably, this spousal love and affection insurable interest would also apply to same-sex marriages performed in Massachusetts after May 2004, unless Massachusetts subsequently passes a constitutional amendment prohibiting such marriages, similar to Hawaii, Alaska, Nevada, and Oklahoma. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003) (finding 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”).

96. *Compare* Cook v. Bankers Life & Cas. Co., 406 S.E.2d 848, 851 (N.C. 1991) (holding married persons can insure the life of their spouse without consent), *with* Ramey v. Carolina Life Ins. Co., 135 S.E.2d 362, 365 (S.C. 1964) (concluding such policies are void as against public policy).

97. *See, e.g.*, Ellison v. Straw, 92 N.W. 1094, 1097 (Wis. 1902) (holding that state statute at issue allowed spouse to take out life insurance policy without other spouse's consent).

98. *E.g.*, Wren v. N.Y. Life Ins. Co., 493 F.2d 839, 841 (5th Cir. 1974); Watson v. Mass. Mut. Life Ins. Co., 140 F.2d 673, 676 (D.C. Cir. 1943); Cableton v. Gulf Life Ins. Co., 674 S.W.2d 951, 952 (Ark. Ct. App. 1984); Taylor v. Unity Indus. Ins. Co., 147 So. 91, 92 (La. Ct. App. 1933); Byrne v. Prudential Ins. Co. of Am., 88 S.W.2d 344, 346 (Mo. 1935); Ramey v. Carolina Life Ins. Co., 135 S.E.2d at 365. This right to give consent also encompasses the right to refuse consent. Hopkins v. Hopkins, 614 A.2d at 101; *see also* KEETON & WIDISS, *supra* note 2, § 3.5(c)(4), at 184-85 (discussing the rationale behind the consent requirement); VANCE & ANDERSON, *supra* note 10, § 34, at 207-08 (same).

99. *Ramey v. Carolina Life Ins. Co.*, 135 S.E.2d 362.

knowledge and consent, and then she poisoned him with arsenic.¹⁰⁰ The husband suffered serious injuries and subsequently 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.¹⁰¹ The South Carolina Supreme Court affirmed a judgment in favor of the plaintiff husband based upon the following:

It is a general rule that a policy of life insurance taken out without the knowledge or consent of the insured person is against public policy and unenforceable. A wife, for example, cannot be permitted to obtain insurance on the life of her husband without his knowledge and consent; *such a practice, it has been deemed, might be a fruitful source of crime.*¹⁰²

Likewise, when this knowledge and consent requirement by the insured is mandated by state statute,¹⁰³ courts will generally strictly interpret and rigorously apply this statutory requirement in order to prevent possible wagering contracts on the life of another.¹⁰⁴

But query: If a love and affection insurable interest generally exists between the spouses based upon their marriage, what happens in the event of divorce? If a spouse has not yet procured life insurance on the life of the other spouse at the time of the divorce, an absolute divorce generally will terminate any love and affection insurable interest of an ex-spouse in the

100. *Id.* at 363.

101. *Id.*

102. *Id.* at 365 (citing 29 AM. JUR. 2D *Insurance*, *supra* note 10, § 231) (emphasis added by *Ramey* court); *see also* J. Evans, Annotation, *Tort Liability of Insurer Issuing Life Policy Without Consent of Insured or to Beneficiary Without Insurable Interest*, 9 A.L.R.3d 1172 (1966).

103. *See, e.g.*, HAW. REV. STAT. § 431:10-206 (2003) (stating that “[n]o life or disability insurance contract upon an individual shall be made or effectuated unless at the time of the making of the contract the individual insured . . . consents to the insurance in writing”); MASS. GEN. LAWS ANN. ch. 175, § 123 (West 1998) (stating that “[n]o life company shall issue any policy of life or endowment insurance in this commonwealth except upon a written application therefor signed or assented to in writing by the person to be insured”); N.Y. INS. LAW § 3205(c) (McKinney 2000) (stating that “[n]o contract of insurance upon the person . . . shall be made or effectuated unless at or before the making of such contract the person insured . . . applies for or consents in writing to the making of the contract”).

104. *See, e.g.*, *Wren v. N.Y. Life Ins. Co.*, 493 F.2d 839, 841 (5th Cir. 1974) (requiring a strict interpretation of § 56-2407 of the Georgia Code, which requires the consent of the insured in writing and, as such, precludes an alleged consent of the husband made to the insurance agent over the telephone).

life of his or her former spouse.¹⁰⁵ However, if there is a valid economic interest in the life of a former spouse, such as a child support obligation¹⁰⁶ or alimony or spousal support obligations, then the courts generally *will* allow a former spouse who is able to demonstrate a valid economic interest in the life of an obligor ex-spouse to purchase life insurance on the ex-spouse's life.¹⁰⁷

What happens to a spouse's love and affection insurable interest upon divorce, when a spouse already has a *preexisting* life insurance policy on the life of the other spouse at the time of divorce? A majority of courts today apparently follow a poorly reasoned and largely unsubstantiated insurable interest doctrine holding that an insurable interest in the life of another must exist *only* at the time of the inception of the life insurance policy, and need *not* exist at the time of the insured's death.¹⁰⁸ This controversial insurable interest doctrine will be more fully analyzed and criticized within

105. *E.g.*, Wren v. N.Y. Life Ins. Co., 493 F.2d at 841; Morgan v. Am. Sec. Ins. Co., 522 So. 2d 454, 456 (Fla. Dist. Ct. App. 1988); Shellman v. Independence Life & Accident Ins. Co., 523 S.W.2d 221, 222 (Ky. 1975); Hopkins v. Hopkins, 614 A.2d 96, 99 (Md. 1992) (citation omitted).

106. *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Timbo, 67 F. Supp. 2d 413, 418 (D.N.J. 1999) (noting that courts will "recognize an equitable assignment where the insurance proceeds secure a child support obligation"); Robbins v. Jackson Nat'l Life Ins. Co., 802 So. 2d 476, 477 (Fla. Dist. Ct. App. 2001) (finding an insurable interest in ex-spouse's life by virtue of child support obligations); Fox v. Burden, 603 N.W.2d 916, 926 (S.D. 1999) (same; remanding case to determine amount of proceeds).

107. *E.g.*, Lynch v. Bogenrief, 237 N.W.2d 793, 797 (Iowa 1976); Hopkins v. Hopkins, 614 A.2d at 98; Meerwarth v. Meerwarth, 366 A.2d 979, 980 (N.J. 1976); Shealy v. Shealy, 313 S.E.2d 48, 50 (S.C. Ct. App. 1984).

108. *See, e.g.*, Conn. Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457, 462-63 (1876) (holding that a wife's insurable interest in the life of her husband existed at the time the policy was issued, and any subsequent termination of this insurable interest before the policy matured would *not* affect its validity); *see also* Maddux v. Phila. Life Ins. Co., 77 F. Supp. 2d 1123, 1128 (S.D. Cal. 1999) (noting that under Kansas law, a beneficiary's rights vest at the inception of the policy, and "are not affected by divorce"); Jenkins v. Jenkins, 297 P. 56, 57 (Cal. Dist. Ct. App. 1931) ("The general rule is that a policy of life insurance or a designation of beneficiary is valid in its inception, remains so, although the insurable interest or the relationship of the beneficiary has ceased."); Christensen v. Sabad, 773 P.2d 538, 541 (Colo. 1989) (holding that use of the term "wife" in policy did not require beneficiary to remain decedent's wife at decedent's death for insurable interest doctrine to apply); Wolf v. Wolf, 259 N.E.2d 93, 94 (Ind. App. 1970) (explaining that the mere fact of the named beneficiary's divorce does not affect that person's rights to ex-spouse's life insurance proceeds); Life Ins. Co. of N. Am. v. Jackson, 475 A.2d 1150, 1151 (Me. 1984) (same); Land v. W. Coast Life Ins. Co., 270 P.2d 154, 156 (Or. 1954) (same).

a subsequent section of this Article.¹⁰⁹

b. *The “Love and Affection” Insurable Interest Between Parent and Child*

It is generally recognized that the love and affection insurable interest between spouses applies with equal force to a love and affection insurable interest between parent and child regarding life insurance:

The better [reasoned] rule long has been that a parent has an insurable interest in the life of a child, and the child in the life of the parent. The reason for the rule requiring insurable interest, it must be remembered, was to avoid the danger of a beneficiary terminating the insured’s life abruptly for financial gain. Where the family ties are so close as those between parent and child this danger would be obviated where such persons are normal, and bound by ties of love and affection.¹¹⁰

Thus, a parent generally has a love and affection insurable interest in the life of his or her child, and the child has a reciprocal love and affection insurable interest in the life of a parent,¹¹¹ including an adult child who is not economically dependent on the parent.¹¹² However, in the absence of special economic circumstances, such as economic dependency or financial responsibility, a foster parent generally lacks an insurable interest in the life of a foster child,¹¹³ and a foster child or stepchild may have an insurable

109. See discussion *infra* Part IV.

110. 2 APPLEMAN & APPLEMAN, *supra* note 10, § 791, at 201. Apparently, there is also a minority “Illinois approach” requiring a child desiring to insure the life of a parent to show some additional pecuniary economic interest. See *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35, 45 (1875).

111. See, e.g., *Mut. Sav. Life Ins. Co. v. Noah*, 282 So. 2d 271, 274 (Ala. 1973) (“It is generally held that a parent, because of the close ties of blood, has an insurable interest in the life of a child, and vice versa.”); *Goodwin v. Fed. Mut. Ins. Co.*, 180 So. 662, 664 (La. Ct. App. 1938) (same); *Dixon v. W. Union Assurance Co.*, 164 S.E.2d 214, 218 (S.C. 1968) (same); *N. River Ins. Co. v. Fisher*, 481 S.W.2d 443, 445 (Tex. Civ. App. 1972) (same); *Crismond’s Adm’x v. Jones*, 83 S.E. 1045, 1046 (Va. 1915) (same).

112. See, e.g., *Woods v. Woods’ Adm’r*, 113 S.W. 79, 81-82 (Ky. 1908) (noting that the English doctrine, which dictates that adult children do not have an insurable interest in the lives of their parents, “is not based upon sound reasoning” and holding that an adult son could recover based on “natural affection” inherent in the mother-son relationship); *Golden State Mut. Life Ins. Co. v. White*, 374 S.W.2d 901, 905 (Tex. Civ. App. 1964) (“[T]here is nothing illegal about a[n adult] daughter taking out a policy of insurance covering the life of her mother . . . and becoming the beneficiary therein.”).

113. See, e.g., *Willingham v. United Ins. Co. of Am.*, 628 So. 2d 328, 330-31

interest in a foster parent, stepparent, or another person acting *in loco parentis* only if the child is able to demonstrate financial dependency or an economic expectation of some pecuniary aid from the foster parent or stepparent.¹¹⁴

In order to avoid potential wagering contracts between family members, a number of states also require the consent and knowledge of the insured to any life insurance policy procured by a parent or child, except for a child of tender years.¹¹⁵

c. *The Insurable Interest Requirement in Other Family Members*

Although a number of courts have recognized a sibling relationship to be based solely on a nuclear family love and affection insurable interest in the absence of any economic dependency,¹¹⁶ most other family relationships have required a concomitant economic dependency or pecuniary interest in the prolonged life of the insured to establish a valid insurable interest in the life of an extended family member.¹¹⁷ For

(Ala. 1993) (holding that foster parents did not have an insurable interest in the lives of their foster children as set out in the Alabama Code); Carol Schultz Vento, Annotation, *Insurable Interest of Foster Child or Stepchild in Life of Foster or Step Parent, or Vice Versa*, 35 A.L.R.5th 781, 785 (1996) ("The mere existence of a foster . . . relationship has not been sufficient to create an insurable interest.").

114. *E.g.*, Nat'l Life & Accident Ins. Co. v. Parker, 19 S.E.2d 409, 422 (Ga. Ct. App. 1942); *see also* Vento, *supra* note 113, at 781 (noting that, in the case of foster or stepchildren, "courts have found an insurable interest because of special circumstances surrounding the relationship, such as financial responsibility, dependency, or expectation or benefit").

115. *E.g.*, Indep. Life & Accident Ins. Co. v. McKenzie, 503 So. 2d 376, 377 (Fla. Dist. Ct. App. 1987); Time Ins. Co. v. Lamar, 393 S.E.2d 734, 735 (Ga. Ct. App. 1990); Metro. Life Ins. Co. v. Blesch, 58 S.W. 436, 437 (Ky. 1900). *But see* Dixon v. W. Union Assurance Co., 164 S.E.2d at 219 (holding that, even though a policy was issued on the life of the son without his knowledge and consent, the life insurance policy was not void as against public policy, because the son's overseas military assignment would not have put the son's life in danger at the hands of his parents).

116. *E.g.*, Mut. Sav. Life Ins. Co. v. Noah, 282 So. 2d at 276; United Ins. Co. of Am. v. Hadden, 190 S.E.2d 638, 640 (Ga. Ct. App. 1972); Penn v. Lighthouse Life Ins. Co., 392 So. 2d 181, 182 (La. Ct. App. 1980); Webb v. Imperial Life Ins. Co., 3 S.E.2d 428, 429-30 (N.C. 1939). *See generally* Carl T. Drechsler, Annotation, *Insurable Interest of Brother or Sister in Life of Sibling*, 60 A.L.R.3d 98 (1974).

117. *See, e.g.*, Liberty Nat'l Life Ins. Co. v. Weldon, 100 So. 2d 696, 704 (Ala. 1957) (holding that for aunt to have an insurable interest in the life of her niece, aunt needed to show a "reasonable expectation of possible profit or advantage to her from the continued life of [the niece]"); People's First Nat'l Bank & Trust Co. v. Christ, 65 A.2d 393, 395 (Pa. 1949) (demanding more than a mere familial relationship for aunt or uncle to procure an insurable interest in the life of a nephew).

example, most courts have held that extended family relationships existing between an aunt or uncle and a niece or nephew are too remote, in the absence of a demonstrated economic or pecuniary interest, to establish a valid insurable interest.¹¹⁸

In the case of *Liberty National Life Insurance Co. v. Weldon*,¹¹⁹ an aunt-in-law took out three life insurance policies on her two-and-a-half year old niece, Shirley Weldon, and then murdered the young girl by putting arsenic in Shirley's soft drink in order to collect the life insurance benefits.¹²⁰ A wrongful death action was brought against the three insurers by Shirley's parents, who successfully argued that the insurance companies had been negligent in issuing life insurance policies on Shirley's life in favor of her aunt-in-law who had no valid insurable interest in the child's life.¹²¹ The Alabama Supreme Court held that the relationship of an aunt or aunt-in-law, standing alone, was not sufficient to sustain an insurable interest in the life of a niece or nephew, and therefore, the three insurance policies on the life of little Shirley Weldon were illegal and void as against state public policy.¹²²

Likewise, a father-in-law and daughter-in-law, or a brother-in-law and sister-in-law relationship, standing alone, would also be insufficient to support a valid insurable interest.¹²³ However, if an economic interest combines with an extended family relationship, then it is more likely that a

118. See cases cited *supra* note 117. There *would* be an insurable interest, however, if there existed some additional economic or pecuniary interest, such as where one party was indebted to the other. See *Brockton v. S. Life & Health Ins. Co.*, 556 So. 2d 1138, 1139 (Fla. Dist. Ct. App. 1989).

An insurable interest in first or second cousins must also be supported by an additional economic interest such as a creditor-debtor relationship, or economic dependency. *E.g.*, *Goodwin v. Fed. Mut. Ins. Co.*, 180 So. 662, 664-65 (La. Ct. App. 1938); *Covington v. Covington*, 271 S.W.2d 849, 850 (Tex. Civ. App. 1954). Likewise, the vast majority of states hold that uncles, aunts, nephews, and nieces must also have a similar economic interest in the life of the insured, in addition to love and affection. *See, e.g.*, *Mut. Sav. Life Ins. Co. v. Noah*, 282 So. 2d at 274 (outlining the familial relationships that do and do not create an insurable interest based upon familial connection alone). *See generally COUCH ON INSURANCE*, *supra* note 10, §§ 43:9-43:10, at 10-13 & nn.49-62 (outlining same for extended family relationships and collecting cases).

119. *Liberty Nat'l Life Ins. Co. v. Weldon*, 100 So. 2d 696 (Ala. 1957).

120. *Id.* at 700, 703-04.

121. *Id.* at 701.

122. *Id.* at 704-07.

123. *E.g.*, *Chandler v. Mut. Life & Indus. Ass'n of Ga.*, 61 S.E. 1036, 1038 (Ga. 1908); *King v. Cram*, 69 N.E. 1049, 1051 (Mass. 1904).

court *will* find that this insurable interest requirement in the life of another has been satisfied.¹²⁴

d. *Nontraditional Families and the De Facto “Spouse”*

The cases discussed in this section demonstrate that the courts have grappled with an insurable interest conundrum involving parties who have lived together as though married, but in fact were *not* legally married—because one of the parties was still validly married to another spouse, because the parties did not choose to marry one another, or because by law, were unable to marry.¹²⁵ Therefore, the underlying legal question is whether a de facto spouse in such a nontraditional family relationship can have a valid insurable interest in the life of the other de facto spouse.¹²⁶ Consider the following factual situation in *Rakestraw v. City of Cincinnati*.¹²⁷

Lonnie Rakestraw worked for the Department of Highways for the city of Cincinnati, Ohio.¹²⁸ For many years he had been a contributing member to a retirement plan maintained by the city that mandated that any designated beneficiary in this plan must be one who had a lawful insurable interest in the life of the employee.¹²⁹ A number of years prior to his death, Lonnie deserted his wife, Lizzie Rakestraw, and began living with Octavia Foster.¹³⁰ Lonnie named Octavia as the designated beneficiary of his retirement plan.¹³¹ Octavia knew of the existence of Lonnie's legal marriage to Lizzie, and did not claim she thought Lonnie and Lizzie were divorced.¹³² Therefore, Octavia could not “claim the existence of a putative marriage . . . or a common-law marriage” with Lonnie under Ohio law.¹³³ Octavia's sole claim to Lonnie's death benefits under his retirement plan

124. *See, e.g.*, *Holmes v. Nationwide Mut. Ins. Co.*, 244 N.Y.S.2d 148, 149 (Sup. Ct. 1963) (finding a genuine issue of material fact regarding a brother-in-law relationship with a concomitant economic interest founded on a loan between the parties).

125. *E.g.*, *Rakestraw v. City of Cincinnati*, 44 N.E.2d 278, 279, 281 (Ohio Ct. App. 1942).

126. *See id.* at 279-80 (posing similar question).

127. *Rakestraw v. City of Cincinnati*, 44 N.E.2d 278 (Ohio Ct. App. 1942).

128. *Id.* at 279.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

was that she possessed an insurable interest in Lonnie's life as Lonnie's de facto wife, that Lonnie had supported her economically, and that Octavia had love and affection toward Lonnie.¹³⁴ *Query:* Under this particular fact situation, does Octavia Foster have a legally valid insurable interest in Lonnie Rakestraw's life?¹³⁵

The Ohio Court of Appeals held that Octavia Foster did in fact have a valid insurable interest in the life of Lonnie Rakestraw, based not only on her love and affection for Lonnie, but primarily and substantially based upon her *economic dependency* on Lonnie, to the detriment of Lonnie's legal wife, Lizzie Rakestraw.¹³⁶ Thus, one who is dependent on another for economic support generally *does* have an insurable interest in that person's life, even though there may be no legal right and no legal basis for such economic support, as long as there is a reasonable ground to believe that this economic support will continue in the future,¹³⁷ and even though the de facto spouse is not legally married to the insured.¹³⁸

Another largely unresolved insurable interest issue involves unmarried cohabitants who have entered into a "civil union" or a "domestic partnership" relationship that is currently recognized as an alternative legal status to marriage in a growing number of American

134. *Id.* at 280-82.

135. *See id.* at 279.

136. *Id.* at 281-82.

137. *See, e.g.*, *Berdan v. Milwaukee Mut. Life Ins. Co.*, 99 N.W. 411, 414 (Mich. 1904) (holding that a child the insured named as nephew and beneficiary, while not actually related to the insured, had an insurable interest in the insured's life based on his dependence on the insured); *Rakestraw v. City of Cincinnati*, 44 N.E.2d at 279, 281-82 (holding that while live-in girlfriend could not claim existence of putative or common law marriage with deceased, she nevertheless procured a valid insurable interest by virtue of love and affection and economic dependency); *Drane v. Jefferson Standard Life Ins. Co.*, 161 S.W.2d 1057, 1059-60 (Tex. Comm'n App. 1942) (holding that a godchild had an insurable interest in his godmother based on the fact that she had known him since birth, provided clothes and a home to reside in when his mother was sick, frequently visited him, and took him on trips).

138. *See 2 APPLEMAN & APPLEMAN, supra* note 10, § 803, at 243 ("[M]ost courts . . . are prone to permit a woman living with a man as his wife, without the benefit of a legal ceremony, or even his regular mistress, to be designated as a beneficiary and to recover the [life insurance] policy benefits."); *see also Strachan v. Prudential Ins. Co. of Am.*, 73 N.E.2d 840, 843 (Mass. 1947) (holding that the insured could designate as beneficiary woman not his lawful wife); *Northeastern Life Ins. Co. of N.Y. v. Leach*, 213 N.Y.S.2d 357, 361 (Sup. Ct. 1961) (same); *Hendricks v. Prudential Ins. Co. of Am.*, 27 A.2d 261, 261-62 (Pa. Super. Ct. 1942) (same); 3 COUCH ON INSURANCE, *supra* note 10, § 43:23, at 27 (discussing same principle).

states.¹³⁹ Briefly, under civil union or domestic partnership legislation, domestic partners within a state-recognized civil union would be eligible for numerous state benefits normally given only to married couples, including the right to: (1) transfer property; (2) make medical decisions for one another; (3) inherit estates; (4) become statutory beneficiaries in various health and retirements plans; (5) qualify as statutory beneficiaries in state wrongful death actions involving the other partner; and (6) accept the joint debts of the other party.¹⁴⁰

Query: What insurable interest requirement should apply to such domestic partnerships? If the state civil union or domestic partnership legislation specifically mentions insurance benefits, then arguably only a love and affection insurable interest would be necessary, similar to a love and affection insurable interest requirement for traditional spouses.¹⁴¹ But if such a civil union or domestic partnership statute is silent regarding insurance benefits, then an additional pecuniary interest or economic dependency arguably would be necessary to establish a required insurable interest.¹⁴² Ideally, *both* a love and affection insurable interest *and* a pecuniary or economic interest in the life of the insured may coexist.¹⁴³

Finally, does a fiancée have an insurable interest in her fiancé, and vice versa? Although some courts have recognized a love and affection insurable interest of a fiancée in the life of her fiancé,¹⁴⁴ a fiancée is *not*

139. See, e.g., CAL. FAM. CODE § 297 (West 2004) (defining domestic partnership); D.C. CODE ANN. §§ 701-710 (2004) (defining establishment and termination of, and benefits conferred by, domestic partnerships); HAW. REV. STAT. ANN. §§ 572-1, 572-1.5, 572C-1 (Michie Supp. 2003) (defining marriage as a contract between a man and a woman, but providing certain reciprocal benefits and rights to those individuals who are legally prohibited from marrying in the state); N.J. STAT. ANN. § 26:8A-6 (West Supp. 2004) (outlining the obligations of individuals in domestic partnerships); VT. STAT. ANN. tit. 15, § 1201-1206 (2003) (defining a civil union, summarizing requisites for entering into a civil union, outlining benefits conferred, and laying out guidelines for modification and dissolution).

140. JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 2.02[C], at 30 (2d ed. 2001). Some states require the parties to dissolve their civil union in a court proceeding analogous to divorce. *Id.* (citation omitted); see also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.01 (2001) (proposing state legislative guidelines for the dissolution of a domestic partnership).

141. See *supra* Part III.B.1.a.

142. See *supra* notes 93-94 and accompanying text.

143. See *supra* note 90 and accompanying text.

144. E.g., Miller v. Gulf Life Ins. Co., 12 So. 2d 127, 130 (Fla. 1943); Clements v. Terrell, 145 S.E. 78, 81-82 (Ga. 1928) (citations omitted); Harden v. Harden, 230 S.W. 307, 309 (Ky. 1921) (citations omitted); N. Life Ins. Co. v. Burkholder, 283 P. 739, 743 (Or. 1930); Green v. Southwestern Voluntary Ass'n, 20 S.E.2d 694, 696-97 (Va.

usually considered to be economically dependent on the insured if a life insurance policy expressly requires such economic dependency for its beneficiaries.¹⁴⁵ For example, in an early landmark case of *Chisolm v. National Capitol Life Insurance Co.*,¹⁴⁶ Miss Chisolm, who was engaged to Mr. Clark, became concerned about the possibility of her fiancé's untimely death, and obtained an insurance policy on his life, paying all the premiums herself.¹⁴⁷ Subsequently, Mr. Clark died before their marriage was ever solemnized.¹⁴⁸ The Supreme Court of Missouri held that Miss Chisolm could recover the life insurance proceeds, and this would not constitute a wagering contract because

a valid contract of marriage was subsisting between them. Had [the fiancé] lived and violated the [marriage] contract[,] she would have had [a breach of promise to marry] action for damages. Had [he lived] then as his wife, she would have been entitled to support. . . . Had the defendant [life insurance company] been as willing to observe and fulfill its obligations as it was to receive premiums, then this case would have never occupied the time of the courts.¹⁴⁹

There are two major problems with this underlying rationale, however, in light of contemporary American family law and insurance law remedies. First, in the vast majority of American states today, breach of promise to marry actions have been abolished,¹⁵⁰ thus a jilted fiancé would *not* have any factual expectancy to such future damages. Second, a factual expectancy to spousal support, although traditionally given to a needy wife, may now be awarded to a needy husband as well,¹⁵¹ and on divorce, only a

1942); J.T.W., Annotation, *Insurance: Insurable Interest of Fiance or Fiancee*, 17 A.L.R. 580, 580-81 (1922) (noting cases that have found "that one has an insurable interest in the life of another whom one is engaged to marry").

145. *E.g.*, *Jones v. Sovereign Camp, Woodmen of the World*, 35 F.2d 345, 346 (5th Cir. 1929); *Alexander v. Parker*, 33 N.E. 183, 184-85 (Ill. 1893); *McCarthy v. Supreme Lodge, New Eng. Order of Prot.*, 26 N.E. 866, 867 (Mass. 1891).

146. *Chisolm v. Nat'l Capitol Life Ins. Co.*, 52 Mo. 213 (1873).

147. *Id.* at 214.

148. *Id.*

149. *Id.* at 217.

150. GREGORY ET AL., *supra* note 140, § 4.02[A], at 94.

151. *See, e.g., Orr v. Orr*, 440 U.S. 268, 278-83 (1979) (holding that divorce statutes which authorized support payments only to needy wives, and not needy husbands, constituted gender-based discrimination which violated the Equal Protection Clause of the Fourteenth Amendment). The *Orr* Court held "that the 'old notion[]' that 'generally it is the man's primary responsibility to provide a home and its essentials'" could "no longer justify a statute that discriminates[d] on the basis of gender." *Id.* at 279-80 (quoting *Stanton v. Stanton*, 421 U.S. 7, 10 (1975) (alteration by

very small percentage of divorced women today are awarded any spousal support at all.¹⁵² Accordingly, in order to avoid the possibility of illegal wagering contracts and questionable archaic doctrines of economic dependency for fiancés and fiancées, the better-reasoned view today would be to require present proof of economic dependency or some other valid pecuniary interest on the part of the fiancé or fiancée in the life of the other.¹⁵³

2. *A “Lawful and Substantial Economic Interest” Requirement in the Continued Life, Health, and Bodily Safety of the Person Insured*

If no close familial love and affection insurable interest in the life of another family member exists,¹⁵⁴ then a person insuring the life of another generally must have “a lawful and substantial economic interest in the continued life, health, and bodily safety of the person insured” in order to prevent illegal wagering contracts.¹⁵⁵ This substantial economic interest

Orr Court)); *see id.* at 280 (“No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”) (quoting *Stanton v. Stanton*, 421 U.S. at 14-15).

Likewise, the common law “doctrine of necessaries” that provides support to a needy spouse during marriage is also gender-neutral in the vast majority of states, and the spouse with the ability gives support to the spouse and children in need. *See generally* GREGORY ET AL., *supra* note 140, § 3.10, at 80-81 (discussing the expansion of the doctrine of necessity to both spouses and collecting cases).

152. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, CHILD SUPPORT AND ALIMONY, Tables G & I (1987), *quoted in* GREGORY ET AL., *supra* note 140, § 9.01, at 289-90 (finding that in practice, only 14.6% of divorced women are awarded with spousal support today, and even fewer, 10.7%, actually receive it).

153. A fiancée or fiancé might argue by analogy for the recognition of a “factual expectancy” insurable interest requirement, as recognized by some states in a property insurance context. *See, e.g.*, Nat’l Filtering Oil Co. v. Citizens’ Ins. Co. of Mo., 13 N.E. 337, 339 (N.Y. 1887) (finding an insurable interest in the property context when the potential beneficiary is “so much dependent for value upon the continued existence of it alone as that a loss of property will cause pecuniary damage to the holder of the right against it”); *see also* KEETON & WIDISS, *supra* note 2, § 3.4(a)(5), at 168-72 (discussing the factual expectancy insurable interest requirement). But legal counsel would probably have to further demonstrate what that pecuniary or economic benefit was, or might be.

154. *See supra* Part III.B.1 (defining and discussing familial love and affection insurable interest).

155. JERRY, *supra* note 8, § 40, at 292-93; *see also* Rubenstein v. Mut. Life Ins. Co. of N.Y., 584 F. Supp. 272, 278 (E.D. La. 1984) (“A beneficiary who is not related by blood or marriage to the insured does not have an insurable interest unless he has a reasonable expectation of pecuniary gain from the continued life of the insured, or [a]

insurable interest requirement in the life of another is generally found in certain business relationships, including: (1) an economic interest of “one [business] partner in the life of another”; (2) an economic interest “of a business entity in the life of [its] ‘key’ employee[s]”; and (3) a creditor’s economic insurable interest in the life of his or her debtor, at least up to the amount of the debt.¹⁵⁶

a. *The Insurable Interest Requirement in a Business Partner*

A business partner generally has an insurable interest in the life of another member of the partnership where the insuring partner has an economic interest and a “reasonable expectation of pecuniary benefit from the continuation of the insured [partner’s] life,” and where the insuring partner would suffer economic loss from the untimely or premature death of the insured.¹⁵⁷ Likewise, a partnership would have an insurable interest in the life of its partners and may be named as a beneficiary in a life insurance policy.¹⁵⁸ The corollary to this general rule, however, is that the *absence* of any reasonable expectation of pecuniary gain in the continued life of a copartner would negate and defeat any legal claim of a valid insurable interest in the life of a copartner.¹⁵⁹ Thus, a valid insurable interest does not necessarily arise by virtue of the partnership relationship alone,¹⁶⁰ and various courts have emphasized that it is not the existence of the partnership *per se* that provides the basis for a partner’s economic insurable interest in the life of another partner, but rather that partner’s

reasonable expectation of sustaining loss from his death.”) (citations omitted); *supra* notes 8, 19, 94 and accompanying text.

156. JERRY, *supra* note 8, § 43, at 313-14 (discussing commercial situations in which one member of a business may legally procure insurance on the life of another); KEETON & WIDISS, *supra* note 2, § 3.5(c)(3), at 183 (same); VANCE & ANDERSON, *supra* note 10, § 31, at 197-98 (same).

157. *Graves v. Norred*, 510 So. 2d 816, 818 (Ala. 1987); *see also* *Ridley v. VanderBoegh*, 511 P.2d 273, 279-80 (Idaho 1973) (holding, on similar grounds, that a partner had an insurable interest in life of another partner).

158. *E.g., Gerstel v. Arens*, 196 So. 616, 619 (Fla. 1940); *Quinn v. Leidinger*, 152 A. 249, 251 (N.J. Ch. 1930), *aff’d*, 160 A. 537 (N.J. 1932); *Brammer v. Wilder*, 57 S.W.2d 571, 574-75 (Tex. Comm’n App. 1933); *see also* Ferdinand S. Tinio, Annotation, *Insurance of Life on Partner as Partnership Asset*, 56 A.L.R.3d 892 (1974).

159. *See, e.g., Lakin v. Postal Life & Cas. Ins. Co.*, 316 S.W.2d 542, 551-52 (Mo. 1958) (finding no such insurable interest in a case involving a murder-for-profit scheme of one partner on the life of another partner). For a comprehensive discussion of this influential case, see generally Jerry, *supra* note 52.

160. *Lakin v. Postal Life & Cas. Ins. Co.*, 316 S.W.2d at 550 (citation omitted).

reasonable expectation of an economic or pecuniary interest in the continuation of the other partner's life.¹⁶¹

Litigation frequently occurs involving the rights of a surviving partner and the estate of the deceased partner for life insurance proceeds obtained during the existence of the purported partnership.¹⁶² For example, in the case of *Peeler v. Doster*¹⁶³ a legal controversy arose between Joy Peeler, widow of the insured Robert Peeler, and David Doster, the alleged partner of Robert Peeler, regarding the disposition of the proceeds of two life insurance policies on Robert Peeler's life.¹⁶⁴ On February 7, 1978, Doster and Peeler "made separate applications to the Woodmen of the World Life Insurance Society for life insurance policies" on their own lives, naming "United Sand and Gravel, partnership business" as primary beneficiary.¹⁶⁵ Four months later, "Peeler and Doster again made separate applications for life insurance, this time [with] Pioneer American Assurance Society."¹⁶⁶ In the Pioneer American policy, "Peeler named himself as the insured and 'David Doster—Partner' as the primary beneficiary."¹⁶⁷ Due to an inability to raise the required capital for their proposed partnership, the partnership plan for United Sand and Gravel had to be abandoned five months later.¹⁶⁸ A year later, on March 15, 1979, Robert Peeler died from injuries sustained

161. See *id.*; see, e.g., *Graves v. Norred*, 510 So. 2d at 818 (stating that a partner's insurable interest exists in the "expectation of pecuniary benefit from the continuance of the insured's life"); *Atkins v. Cotter*, 224 S.W. 624, 626 (Ark. 1920) (holding that dissolution of the partnership did not preclude recovery of the insurance proceeds by the surviving partner); *Block v. Mylsh*, 41 A.2d 731, 735 (Pa. 1945) (stating that to have an insurable interest in a partner "there must be a reasonable ground . . . to expect some [pecuniary] benefit or advantage from the continuance of the life of the assured") (internal quotation omitted); *Smith v. Schoellkopf*, 68 S.W.2d 346, 350 (Tex. Civ. App. 1934) (finding that when one partner was indebted to another, an insurable interest "survived the dissolution of the partnership to the extent at least of the indebtedness"); see also 3 COUCH ON INSURANCE, *supra* note 10, § 43:12, at 14 (discussing the requirement, in the partnership context, of a "reasonable expectation of pecuniary benefit from the continuance of the insured['s life]").

162. See generally J.R. Mohaghan, Annotation, *Relevant Rights of Surviving Partner and Estate of the Deceased Partner in Proceeds of Life Insurance Acquired Pursuant to Partnership Agreement*, 83 A.L.R.2d 1347 (1962 & Supp. 2002) (collecting cases).

163. *Peeler v. Doster*, 627 S.W.2d 936 (Tenn. 1982).

164. *Id.* at 937.

165. *Id.* at 937-38.

166. *Id.* at 938.

167. *Id.*

168. *Id.*

in an automobile accident.¹⁶⁹ *Query:* Which beneficiary should receive the proceeds of Peeler's two life insurance policies?

The Tennessee Supreme Court held that, in regards to the Woodmen of the World policy, “[a] never-existent partnership cannot own property” and accordingly, “[s]ince the evidence establishes that the named beneficiary never existed, we think it plain that the alternate beneficiary [Peeler's estate] is entitled to the proceeds of the policy.”¹⁷⁰ With the Pioneer American policy, however, the court explained that “an individual [such as Peeler] has an unlimited insurable interest in his own life and he may take out a policy on his own life, and make it payable to whom he will; and the beneficiary need not have an insurable interest.”¹⁷¹ The court also followed the general rule that

[w]henever the name of a particular individual . . . is designated as the primary beneficiary of an insurance contract . . . followed by an incorrect description of [that person's] status or relationship of the named individual to the insured [(such as “wife,” “husband,” or “partner”)] . . . the incorrect status or relationship . . . is generally held to be descriptive only, and the misdescription does not prevent the person named as beneficiary from receiving the proceeds under the policy.¹⁷²

Thus, David Doster was entitled to the proceeds of Robert Peeler's Pioneer American life insurance policy under the facts of this case, even though Doster was not, in fact, the business partner of Robert Peeler at the time of Peeler's death.¹⁷³

It has also been held by a majority of courts in other states that the subsequent dissolution of a partnership, and the cessation of a partnership's economic interest in the life of a former partner, generally will *not* invalidate a prior policy taken out by one partner on the life of another.¹⁷⁴ However, as will be discussed later in this Article, these ill-

169. *Id.*

170. *Id.* at 941.

171. *Id.* at 940 (citations omitted).

172. *Id.* at 939 (internal quotation omitted); *see supra* note 29.

173. Peeler v. Doster, 627 S.W.2d at 938.

174. *See, e.g.*, Graves v. Norred, 510 So. 2d 816, 818 (Ala. 1987) (“It is not the mere existence of the partnership which provides the basis for the insurable interest. It is the insuring partner's ‘reasonable expectation of pecuniary benefit from the continuance of the insured's life.’ This interest continues even if the partnership is discontinued prior to the death of one of the partners.”) (quoting 43 AM. JUR. 2D *Insurance* § 989 (1982)); Atkins v. Cotter, 224 S.W. 624, 626 (Ark. 1920) (holding that

reasoned and unsubstantiated judicial decisions only encourage the unwelcome possibility of pernicious wagering contracts and the untimely death of former partners, and accordingly, should be rejected by modern courts based upon sound public policy grounds.¹⁷⁵

b. *A Business Entity's Insurable Interest in Its "Key" Employees*

The relationship of an employer and an employee is *not* sufficient in itself to give an employer a valid insurable interest in the life of such an employee.¹⁷⁶ Rather, an employer must have a reasonable expectation of a *substantial* pecuniary gain through the continued life of that employee, or a *substantial* pecuniary loss in case of the employee's death, to sustain a valid and enforceable insurable interest in such a "key man" or "key woman" employee.¹⁷⁷ Thus, an employer has an insurable interest *only* "in the lives of its employees who are crucial to the operation of the employer's business" enterprise,¹⁷⁸ and accordingly, a corporation would have an insurable interest in the life of its key corporate officers, directors, or managers, whose death would have a *substantial* negative economic effect on the overall business enterprise.¹⁷⁹

the former partners took out the policy while still partners and thus, each had an insurable interest in the life of the other that did not terminate upon the partnership's dissolution) (citations omitted); Ryan v. Andrewski, 242 P.2d 448, 452 (Okla. 1952) ("[W]here the insurable interest exists when the policy is issued . . . it is not defeated by the cessation of the insurable interest unless the terms of the policy so provide.") (quoting Sinclair Ref. Co. v. Long, 32 P.2d 464, 472 (Kan. 1934)); Smith v. Schoellkopf, 68 S.W.2d 346, 350 (Tex. Civ. App. 1934) (holding that the insurable interest survived the partnership dissolution to the extent of the share of partnership losses owed by the insured).

175. See *infra* Part IV.

176. E.g., Rubenstein v. Mut. Life Ins. Co. of N.Y., 584 F. Supp. 272, 278 (E.D. La. 1984) (citations omitted); Bauer v. Bates Lumber Co., 503 P.2d 1169, 1171 (N.M. Ct. App. 1972).

177. E.g., Turner v. Davidson, 4 S.E.2d 814, 815 (Ga. 1939); Gerard v. Metro. Life Ins. Co., 149 So. 793, 793 (Miss. 1933); Am. Trust Co. v. Life Ins. Co., 92 S.E. 706, 708-09 (N.C. 1917) (citations omitted); see also J.T.W., Annotation, *Insurable Interest of Employer in Life of Employee*, 125 A.L.R. 408 (1940).

178. 3 COUCH ON INSURANCE, *supra* note 10, § 43:13, at 16; see, e.g., Wagner v. G. Gaudig & Blum Corp., 228 N.Y.S. 139, 144 (App. Div. 1928) (finding insurable interest in assistant general manager).

179. See, e.g., United States v. Supplee-Biddle Hardware Co., 265 U.S. 189, 195 (1924) (company president); Chapman v. Lipscomb-Ellis Co., 22 S.E.2d 393, 398-99 (Ga. 1942) (corporate officer and shareholder); Keckley v. Coshocton Glass Co., 99 N.E. 299, 300-01 (Ohio 1912) (corporate director); Mut. Life Ins. Co. of N.Y. v. Bd., Armstrong & Co., 80 S.E. 565, 567 (Va. 1914) (company president and general manager); see also J.T.W., Annotation, *Insurance on Life of Officer for Benefit of*

This insurable interest requirement—that a business employee must be a key employee, such that the business would suffer *substantial* economic loss on the untimely death of such a crucial employee—is based upon a sound and eminently justifiable public policy rationale of discouraging wagering contracts on the lives of average “noncrucial” employees, as illustrated in the unfortunate case of *Rubenstein v. Mutual Life Insurance Co. of New York*.¹⁸⁰

The facts of the *Rubenstein* case were as follows: Alan (“Mike”) Rubenstein, a former taxi cab driver in New Orleans, decided after attending a business seminar to develop a *TV Journal* that would be circulated throughout St. Tammany Parish free of charge, with revenues derived from paid advertisements contained within the publication.¹⁸¹ Rubenstein placed a notice through the Louisiana Unemployment Commission, seeking assistance in developing this publication, and Harold J. Connor, Jr. responded to it.¹⁸² Shortly thereafter the two men entered into a business arrangement where Connor agreed to pay Rubenstein \$1,000 a month, purportedly for a “franchise,” even though *TV Journal* was grossly undercapitalized and had no reasonable prospect of success.¹⁸³ On that same day, the two men met with a Mutual of New York life insurance agent who, incredibly, recommended that Rubenstein purchase a \$240,000 credit life insurance policy to “secure” Connor’s “debt” to Rubenstein even though at the time Rubenstein applied for the policy, Connor was not indebted to Rubenstein.¹⁸⁴ Moreover, the policy was approved even though no magazine had ever been published, no advertisements had ever been sold, and despite the fact that Rubenstein had misrepresented Connor’s annual income to be \$26,000 a year, when in fact Connor would receive approximately \$7,800 a year.¹⁸⁵

Three months later, Rubenstein invited Connor to go deer hunting with Rubenstein’s stepsons Daryll and David Perry and their first cousin David Kenny, his brother Larry, and Michael Fournier, a convicted felon, who had been released from prison on parole.¹⁸⁶ When the parties arrived

Private Corporation, 143 A.L.R. 293 (1943).

180. *Rubenstein v. Mut. Life Ins. Co. of N.Y.*, 584 F. Supp. 272 (E.D. La. 1984).

181. *Id.* at 274.

182. *Id.*

183. *Id.*

184. *Id.* at 274-75.

185. *Id.* at 275.

186. *Id.* at 277. Rubenstein claimed that he had not invited Larry Rubenstein and Michael Fournier to go hunting, but that they just showed up without prior notice.

at their hunting location, Rubenstein distributed firearms, ammunition, and orange-colored hunting vests to every member of the hunting party, even though Fournier, as a convicted felon, was prohibited by state law from possessing a firearm.¹⁸⁷ Fournier, who was standing no more than ten feet behind Connor, discharged his 12 gauge shotgun into Connor's back.¹⁸⁸ "The pellets struck Connor . . . slightly above the waist, and traveled . . . in a lateral path through his body," killing him.¹⁸⁹ Fournier claimed that the gun had accidentally discharged when he tripped and that the butt of the gun hit the ground.¹⁹⁰ However, the trial court judge noted that in such a situation the shotgun pellets would have struck Connor at an angle, rather than causing lateral wounds,¹⁹¹ and therefore the evidence led "to the distasteful conclusion that Harold J. Connor, Jr. was killed under highly suspicious circumstances, circumstances that suggest something far more sinister than a mere 'accident.'"¹⁹² Fournier's probation was revoked after the shooting, resulting in his reincarceration,¹⁹³ but Rubenstein, still claiming that the shooting was accidental,¹⁹⁴ brought suit against Mutual Life Insurance Company of New York to collect the life insurance proceeds resulting from Connor's untimely death.¹⁹⁵

The trial court judge correctly held that Rubenstein lacked any valid insurable interest in the life of Connor, and therefore, Rubenstein could not recover on this life insurance policy.¹⁹⁶ First, the court distinguished between a key man insurable interest and a "creditor-debtor" insurable interest:

Credit life insurance is to be distinguished from a "key man" business insurance policy. With the former, the insurer risks that the debtor insured will die before he can repay the creditor-beneficiary an existing debt. Under the latter, the insurer risks the death of someone whose loss would be highly detrimental to the business.¹⁹⁷

Id.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *See id.* (noting testimony of forensic scientist and pathologist).

192. *Id.* at 278.

193. *Id.* at 277 n.3.

194. *Id.* at 277.

195. *Id.* at 274.

196. *Id.* at 279.

197. *Id.* at 274 n.1.

At the date of the life insurance application, the judge noted, Connor had done very little work in regard to the *TV Journal* business.¹⁹⁸ He had no previous experience publishing periodicals or selling advertisements, and no advertisements had been sold for *TV Journal*.¹⁹⁹ Connor's only previous sales experience was during an unsuccessful two month period as a furniture salesman.²⁰⁰ So clearly, Connor was *not* a key man employee of Rubenstein.²⁰¹ And neither did Rubenstein have a valid creditor-debtor insurable interest in Connor's life:

Where the beneficiary's insurable interest is a debt allegedly owed by the insured . . . the amount of the life insurance at the time the policy was written and at the time of the insured's death must be proportionate to the debt actually owed by the insured; if the value of the life insurance is grossly disproportionate to the amount actually owed, the beneficiary lacks an insurable interest, and the policy is null and void.²⁰²

Query: What ultimately happened to Alan "Mike" Rubenstein and his avaricious quest for life insurance proceeds involving highly suspicious deaths of other people? According to Professor Robert Jerry:

One might have hoped that Rubenstein's interest in making money through the purchase of insurance on the lives of others might have waned after his unsuccessful effort to recover on the policy on Conner's life. Tragically, this was not to be the case. Darrell Percy, Rubenstein's step-son, would later enter adulthood and marry a woman named Evelyn Ann, with whom he would have a daughter, Krystal Ryan, in 1989. In 1991, Rubenstein purchased a \$250,000 insurance policy on the life of Krystal, his then two-year-old step-granddaughter, and named his wife, Doris, as the beneficiary.

According to media reports and the contents of court records, in the fall of 1993, Rubenstein took his step-son Darrell, his daughter-in-law Evelyn, and his step-granddaughter Krystal to a cabin he owned in Mississippi, supposedly to give them a place to work through marital difficulties. Rubenstein made at least two trips to the cabin before

198. *Id.* at 274-75.

199. *Id.* at 275-76.

200. *Id.* at 275.

201. See *id.* at 274 n.1 (stating the insurance agent correctly concluded that Connor was not a key man employee).

202. *Id.* at 278 (citations omitted).

Thanksgiving 1993. After Doris did not hear from her son, Rubenstein drove to the cabin on December 16th to look for them and reported discovering their three bodies, all murdered. Although the precise time of their deaths is subject to some dispute, Darrell and Evelyn had been stabbed, and Krystal had been strangled. Later, Rubenstein would testify that he collected the insurance proceeds and “blew” the money. After a lengthy investigation, Mississippi authorities charged Rubenstein in September 1998 with the three murders, but a trial in June 1999 ended in a hung jury, with jurors voting eleven to one to convict him of capital murder. Rubenstein was tried again, and in February 2000 he was convicted of three counts of first-degree murder and sentenced to death. Rubenstein now awaits execution in Mississippi; his conviction and sentence are on appeal. In September 2000, Darrell’s father brought a \$15 million lawsuit against Rubenstein, his wife, and the New York Life Insurance Company, which sold the policy on Krystal’s life. Among the allegations in the suit is the claim that Doris knew that her husband had murdered Connor in 1979 in an attempt to collect insurance proceeds and did nothing to thwart Rubenstein’s scheme with respect to Krystal.²⁰³

Undeniably, then, “[b]ecause an insurable interest is required by law in order to protect the safety of the public by preventing anyone from acquiring a greater interest in another person’s death than in this [sic] continued life, the parties cannot, even by solemn contract, create insurance without an insurable interest.”²⁰⁴

c. *A Creditor’s Insurable Interest in the Life of a Debtor*

It is generally recognized that a creditor has a valid insurable interest in the life of his or her debtor and may be designated as the beneficiary of an insurance policy on the debtor’s life, and is thereby entitled to the insurance proceeds,²⁰⁵ at least up to the amount of the debt.²⁰⁶ Where the

203. Jerry, *supra* note 52, at 296-97. Darrell’s father undoubtedly sued the insurer based on its alleged negligence in issuing life insurance to Rubenstein, who may have lacked a valid insurable interest in the life of his step-granddaughter, Krystal. *See supra* notes 116-120 and accompanying text. *See generally* Francis M. Dougherty, Annotation, *Insurer’s Tort Liability for Wrongful or Negligent Issuance of Life Policy*, 37 A.L.R.4th 972 (1985) (discussing circumstances in which insurers can be held liable for negligently issuing a life insurance policy).

204. Rubenstein v. Mut. Life Ins. Co. of N.Y., 584 F. Supp. at 279.

205. *See, e.g.*, Crotty v. Union Mut. Life Ins. Co., 144 U.S. 621, 623-24 (1891) (holding that an insurable interest existed by virtue of insured’s promise to pay “creditor, if living”) (citation omitted); Bank Credit Life Ins. Co. v. Pine Bluff Nat’l

courts are divided, however, concerns the amount of a life insurance policy that the creditor is legally entitled to, especially if that amount exceeds the amount of the debt.²⁰⁷ For example, taking out a life insurance policy on a debtor's life for an amount that is severely disproportionate to the debt would clearly constitute a wagering contract, and accordingly, would be null and void.²⁰⁸ But as Professors Vance and Anderson caution:

Bank, 448 S.W.2d 333, 334-35 (Ark. 1969) (holding that an insurable interest existed where a debtor designated a creditor bank primary beneficiary of a “[life] insurance policy written in order to pay th[e] indebtedness”); *see also* Goodwin v. Fed. Mut. Ins. Co., 180 So. 662, 664 (La. Ct. App. 1938) (noting the general rule of debtor-creditor insurable interests); Butterworth v. Miss. Valley Trust Co., 240 S.W.2d 676, 680 (Mo. 1951) (same); Cosentino v. William Penn Life Ins. Co. of N.Y., 636 N.Y.S.2d 943, 944 (App. Div. 1996) (same) (citations omitted); Hatley v. Johnson, 143 S.E.2d 260, 267 (N.C. 1965) (same); Leuning v. Hill, 486 P.2d 87, 90 (Wash. 1971) (same) (citation omitted). *See generally* 2 APPLEMAN & APPLEMAN, *supra* note 10, §§ 851-859 (describing insurable interests of creditors and assignees); 3 COUCH ON INSURANCE, *supra* note 10, §§ 43:19-43:22 (examining insurable interests of creditors).

206. *See, e.g.*, Jimenez v. Protective Life Ins. Co., 10 Cal. Rptr. 2d 326, 334 (Ct. App. 1992) (holding that a creditor's insurable interest in the life of the debtor is limited to the amount of debt, plus premiums paid, plus interest); *see also* Pittsburgh Underwriters v. Mut. Life Ins. Co. of N.Y., 27 A.2d 278, 280 (Pa. Super. Ct. 1942) (holding that “[a] creditor may lawfully take out policy on the life of his debtor . . . to cover the debt”); Dunn v. Second Nat'l Bank, 113 S.W.2d 165, 169-70 (Tex. Comm'n App. 1938) (holding creditor can hold proceeds in excess of debt); First Nat'l Bank v. Speece, 37 S.E. 843, 844 (Va. 1901) (holding that “the interest of the holder of such a [life insurance] policy will be limited to the amount of such liability at the time of the death of the insured”). This is largely based on the underlying rationale employed by a number of courts that creditor-debtor life insurance policies are generally characterized as *indemnity* insurance. *See, e.g.*, Conn. Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457, 462-63 (1877) (holding that “where a creditor insures the life of his debtor” the insurance is affected only by indemnity); Pittsburgh Underwriters v. Mut. Life Ins. Co., 27 A.2d at 280 (describing the life insurance policy as “an indemnifying contract against the contingency that [the debtor] would die before satisfaction of the debt”).

207. *See, e.g.*, Rubenstein v. Mut. Life Ins. Co. of N.Y., 584 F. Supp. at 278 (holding a creditor beneficiary lacks an insurable interest in an amount grossly excessive to the debt); Cooper v. Schaeffer, 11 A. 548, 549 (Pa. 1887) (holding that a life insurance policy taken out by a creditor on the life of a debtor for \$3,000 when the debt was only \$100 constituted a wagering contract, and was null and void).

208. *See* cases cited *supra* note 207. *But see* Watson v. Mass. Mut. Life Ins. Co., 140 F.2d 673, 675-76 (D.C. Cir. 1943) (rejecting the wagering contract rationale as explicative of past precedent, thereby holding such rationale insufficient to invalidate a life insurance policy on debtor's life); Morrow v. Nat'l Life Ass'n, 168 S.W. 881, 883 (Mo. Ct. App. 1914) (finding absence of a wagering contract where beneficiary is a creditor, but holding that beneficiary's interest is only enforceable to the extent of the debt). Professors Vance and Anderson have noted as follows:

It is well settled that a creditor has an insurable interest in the life of his

The courts have generally not attempted to lay down any precise or arbitrary rule fixing the proportion of valid insurance to the debt intended to be secured, but have contented themselves with stating broadly that when the disproportion between the insurance and the debt is so great as to show the transaction to be really a wager, and not a bona fide effort to secure a debt, the policy shall be void. In effect, each case has been decided on its own facts, and the proportionate amounts of debt and insurance are merely evidential of the good or bad faith of the creditor procuring insurance.²⁰⁹

Indeed, if a *debtor* takes out a life insurance policy on his *own* life, and names the creditor as beneficiary, a number of courts have reasoned that the creditor would be entitled to the *entire* policy proceeds, even though it may be in *excess* of the debt, if that was the manifest intent of the parties.²¹⁰ However, if a life insurance policy is taken out by the *creditor* on

debtor, but it is difficult to ascertain from the authorities just what is the nature of that interest, and what is the principle on which is to be determined the proportion which the amount of insurance procured shall bear to the amount of debt. It is clear that insurance limited to the exact amount of debt will fail to indemnify the creditor, in case the debtor dies before the debt is paid, by an amount equal to the sum of all premiums paid, with interest thereon. On the other hand, it is equally clear that to allow the creditor to procure insurance greatly exceeding the amount of the debt might be to tempt him to bring the debtor's life to an unnatural end, and thus contravene the principle of public policy which has been seen to lie at the very basis of the doctrine of insurable interest. And that this fear of inducing crime is not an idle one is apparent from the experience of insurance companies, as sometimes reflected in the reported cases.

VANCE & ANDERSON, *supra* note 10, § 32, at 200 (footnotes omitted).

209. VANCE & ANDERSON, *supra* note 10, § 32, at 201 (footnote omitted).

210. See, e.g., Am. Cas. Co. v. Rose, 340 F.2d 469, 471 (10th Cir. 1964) (holding that "a debtor-creditor relationship between the insured and the beneficiary" does not prohibit the beneficiary from receiving the entire proceeds of the policy absent a contrary intent of the insured); Zolintakis v. Orfanos, 119 F.2d 571, 575-77 (10th Cir. 1941) (holding a beneficiary of an insurance policy is entitled to full recovery on the policy, unless the insured manifested a contrary intent); Forster v. Franklin Life Ins. Co., 311 P.2d 700, 704 (Colo. 1957) (en banc) (holding that a creditor was allowed the full amount of the policy because the insured never specified that the creditor was only allowed an amount of benefits that would cover the debt owed to the creditor by the insured). An underlying rationale supporting this rule is that a debtor who takes out a life insurance policy on his own life, naming the creditor as beneficiary, "is free to designate anyone as a beneficiary," whether or not that person has an insurable interest in the debtor-insured. KEETON & WIDISS, *supra* note 2, § 4.11(f)(1), at 441; see *supra* note 23 and accompanying text. However, this general rule would *not* apply when the *creditor*, rather than the debtor, obtained an insurance policy on the life of the debtor. See *supra* notes 205-06 and accompanying text.

the life of a debtor, naming the creditor as beneficiary, then the better-reasoned approach, in order to avoid the very real possibility of illegal wagering contracts in a creditor-debtor context, would be to limit the creditor's amount of recovery to the actual amount of debt, plus premium payments, plus interest, and hold the remainder of the life insurance proceeds in constructive trust for the estate of the debtor.²¹¹ As Professors Keeton and Widiss aptly observe:

The fact that a creditor obtains a life insurance policy does not, of course, necessarily prove that the debtor and his or her estate have no legal interest in the insurance. For example, even though the creditor appears to have arranged for the insurance and paid the premium(s), it is quite possible for such a policy to include a beneficiary clause that designates the estate of the debtor (the person whose life is insured) as the contingent beneficiary. In such a case, even though the creditor is designated as primary beneficiary, the debtor is not a stranger to the contract, and equitable principles might be appropriately applied to give the debtor's estate a right to that part of the proceeds in excess of the debt. Even in the absence of such arrangements in regard to the designation of a contingent beneficiary, in general it would seem that a case can be made in many situations that the debtor's estate should be accorded an equitable interest in any life insurance which exceeds the debt, at least whenever there is some evidence of an understanding that the insurance is obtained exclusively to secure the debt.²¹²

d. *Other "Substantial Economic Interests" in the Life of Another*

There are other business and commercial interests based upon certain contractual obligations between the parties where the death of one individual arguably would cause a substantial economic loss to another in preventing the fulfillment of a specified contractual obligation.²¹³ However, the inability of a party to quantify this alleged economic benefit

211. See *Albrent v. Spencer*, 81 N.W.2d 555, 562 (Wis. 1957) (enforcing a constructive trust where the policy amount exceeded the amount of debt).

212. KEETON & WIDISS, *supra* note 2, § 4.11(f)(2), at 442-43.

213. See, e.g., *Beard v. Am. Agency Life Ins. Co.*, 550 A.2d 677, 681-83 (Md. 1988) (involving a contractual option for the purchase or sale of property); *Theatre Guild Prods. Inc. v. Ins. Corp. of Ir.*, 267 N.Y.S.2d 297, 299-300 (App. Div. 1966), *aff'd*, 278 N.Y.S.2d 625 (N.Y. 1966) (holding that a producer of a play has an insurable interest in the play's star actress covering her illness, death, or disability, and indemnifying the producer against financial loss resulting from the actress's inability to perform).

or loss may defeat that party's insurable interest claim in the life of another, even though the parties were in fact involved in a substantial business relationship.²¹⁴

Thus, any insurable interest in the life of another that is not related to a spousal or a parent/child love and affection insurable interest in the insured *must* be supported by a concomitant lawful and substantial economic interest in the continued life and health of the person insured, or that life insurance contract will be declared to be null and void because it constitutes an illegal wagering contract.²¹⁵

IV. WHEN AN INSURABLE INTEREST IN THE LIFE OF ANOTHER MUST EXIST

Most courts and commentators readily agree that because *property insurance* generally is characterized as *indemnity* insurance,²¹⁶ if there is no insurable interest in the property *at the time of loss*, then there would be no loss, due to the lack of a valid insurable interest in the property.²¹⁷

214. *See, e.g.*, Hershberger v. Young, 59 S.W.3d 614, 624 (Mo. Ct. App. 2001) (finding no insurable interest because the plaintiffs did not qualify as business associates with the deceased).

215. *See, e.g., id.*

216. KEETON & WIDISS, *supra* note 2, § 3.1(a), at 135. Under the insurance doctrine of indemnity, an insured may recover *only* the amount of his or her actual loss, and nothing more. According to Professors Keeton and Widiss:

Almost all types of insurance are designed to provide no more than reimbursement for an insured. Moreover, it is now a generally accepted fundamental tenet of insurance law that opportunities for net gain to an insured through the receipt of insurance proceeds exceeding a loss should be regarded as inimical to the public interest. . . . The concept that insurance contracts shall confer a benefit no greater in value than the loss suffered by an insured is usually referred to as the "principle of indemnity."

Id.

217. Generally, a person has an insurable interest in property if he or she would derive an economic benefit from its continued existence, or would suffer loss or liability from its destruction. *See generally* KEETON & WIDISS, *supra* note 2, § 3.4(a)(1)-(2) (discussing insurable interest requirement in the context of property); VANCE & ANDERSON, *supra* note 10, § 29 (same). In order for insurance on property to be valid, an insurable interest in the property must exist *at the time of the loss*. *E.g.*, *Dairyland Ins. Co. v. Hawkins*, 292 F. Supp. 947, 951 (S.D. Iowa 1968); *Ins. Co. of N. Am. v. Seaboard Homes, Inc.*, 273 N.Y.S.2d 470, 472 (Sup. Ct. 1965) (citation omitted); *Stauder v. Associated Gen. Fire Ins. Co.*, 151 N.E.2d 583, 585 (Ohio Ct. App. 1957); *see also* *JERRY*, *supra* note 8, § 44[a] ("In property insurance, most courts adhere to the rule that the insurable interest must only exist at the time of loss . . ."); KEETON &

Likewise, a strong and compelling public policy argument can also be made that various kinds of *life insurance* policies—including a “love and affection” insurable interest for close family members with a concomitant pecuniary benefit,²¹⁸ and a pecuniary interest or economic dependency for other family members,²¹⁹ and more particularly involving creditor-debtor life insurance policies,²²⁰ partnership life insurance policies,²²¹ key employee life insurance policies,²²² and other life insurance policies based upon an underlying business relationship²²³—may be characterized in the nature of *indemnity insurance* as well as a *contractual investment* in the life of another.²²⁴ Therefore, an insurable interest in the life of another arguably

WIDISS, *supra* note 2, § 3.3(b)(2), at 154 (same); VANCE & ANDERSON, *supra* note 10, § 30, at 180 (same); William T. Vukowich, *Insurable Interest: When It Must Exist in Property and Life Insurance*, 7 WILLAMETTE L.J. 1, 12 (1971) (“To allow recovery when the policy owner has no interest [in the property insured] would be to sanction wagering, which the law will not do. Consequently, the policy owner must prove an insurable interest [in the property] *at the time of loss* to recover on a property insurance contract.”) (footnote omitted) (emphasis added).

A minority of courts, purportedly following Lord Hardwicke’s dictum in *Sandlers Co. v. Badcock*, 26 Eng. Rep. 733 (Ch. 1743), require an insurable interest in property *both* at the moment of insuring *and* the time of loss. *E.g.*, *Powell v. Ins. Co. of N. Am.* 330 S.E.2d 550, 552 (S.C. 1985); *Kingston v. Great S.W. Fire Ins. Co.*, 578 P.2d 1278, 1279 (Utah 1978). But as Professor Jerry correctly observes, “[m]any American cases have repeated [Lord Hardwicke’s] old dictum without realizing that the policies of the indemnity principle that underlies [this] insurable interest doctrine are satisfied if the interest exists only at the time of loss.” *JERRY, supra* note 8, § 44[a], at 316; *see also Patterson, supra* note 10, § 29, at 130-33 (criticizing Lord Hardwicke’s “wholly unnecessary” dictum regarding an incipient insurable interest requirement).

218. *See supra* Part III.B.1 (outlining the “love and affection” insurable interest relationship). A majority of courts recognize that this love and affection insurable interest is not based solely on a close familial relationship, but also on a pecuniary benefit in the continued life of the insured. *See supra* notes 90-91 and accompanying text.

219. *See supra* Part III.B.1.c (outlining coverage for extended family members). With most extended family members, a pecuniary interest or economic dependency in the life of the insured is generally required. *Rakestraw v. City of Cincinnati*, 44 N.E.2d 278, 281 (Ohio Ct. App. 1942).

220. *See supra* Part III.B.2.c (discussing the creditor-debtor relationship).

221. *See supra* Part III.B.2.a (explaining the requirement of an insurable interest in a business partner).

222. *See supra* Part III.B.2.b (defining an employer’s interest in key employees).

223. *See supra* Part III.B.2.d (listing the requirements for insurable interest in the life of another who is not a spouse, parent, or child).

224. *See, e.g., Chapman v. Lipscomb-Ellis Co.*, 22 S.E.2d 393, 396 (Ga. 1942) (characterizing life insurance based on an underlying business relationship as basically

should exist at the inception of the life insurance policy *and* at the time of the insured's death to avoid the unwelcome—but very real—possibility of pernicious wagering contracts on the life of the insured. Surprisingly, however, based on a number of dubious assumptions and largely unquestioned legal precedent, the general rule today, followed by a majority of American courts, is that an insurable interest for *all* types of life insurance must exist *only* at the time the life insurance contract was made, and the lack of any insurable interest at the time of the insured's death is irrelevant and immaterial in the absence of a contractual provision or a state statute to the contrary.²²⁵

There have been three major—though largely unpersuasive—arguments presented in support of this controversial doctrine, purportedly explaining why this particular legal doctrine does *not* require an insurable interest to exist at the time of the insured's death.

First, life insurance is often acquired for the benefit of relatives and spouses, and the existence of many familial relationships arguably “does not change with the passage of time.”²²⁶ But an absolute divorce generally *terminates* this love and affection insurable interest between ex-spouses absent other valid economic interests such as spousal support and child

constituting indemnity insurance); *Wagner v. Nat'l Engraving Co.*, 30 N.E.2d 750, 751-52 (Ill. App. Ct. 1940) (same); *Lakin v. Postal Life & Cas. Ins. Co.*, 316 S.W.2d 542, 550 (Mo. 1958) (same); *see also supra* notes 18-19 and accompanying text. *But see Keckley v. Coshocton Glass Co.*, 99 N.E. 299, 300-01 (Ohio 1912) (rejecting the contention that life insurance policies based on an underlying business relationship may be characterized as indemnity insurance); *Wurzburg v. N.Y. Life Ins. Co.*, 203 S.W. 332, 334 (Tenn. 1918) (rejecting the indemnity insurance characterization) (citing *Keckley v. Coshocton Glass Co.*, 99 N.E. at 300-01).

225. *See, e.g., Conn. Mut. Life Ins. Co. v. Shaefer*, 94 U.S. 457, 461 (1876) (“[A life insurance] policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself.”); *Speroni v. Speroni*, 92 N.E.2d 63, 66 (Ill. 1950); *Shellman v. Independence Life & Accident Ins. Co.*, 523 S.W.2d 221, 222 (Ky. 1975) (same) (quoting *Ficke v. Prudential Ins. Co. of Am.*, 202 S.W.2d 429, 431 (Ky. 1947)); *Secor v. Pioneer Foundry Co.*, 173 N.W.2d 780, 782 (Mich. Ct. App. 1969) (same). *See generally JERRY, supra* note 8, § 44[b] (noting the general rule that an insurance contract is enforceable as long as the insurable interest exists when the life insurance policy is purchased); *KEETON & WIDISS, supra* note 2, § 3.3(b)(1) (same); *VANCE & ANDERSON, supra* note 10, § 31 (same).

226. *KEETON & WIDISS, supra* note 2, § 3.3(b)(1), at 151; *see also JERRY, supra* note 8, § 44[b], at 318 (“If the insurable interest at the time of contracting is based on a family relationship established by blood, such an interest will not disappear by the time of the insured's death.”).

support obligations.²²⁷ What then prevents an embittered ex-spouse, who is the primary beneficiary in a pre-existing life insurance policy, from taking the life of a former spouse in order to recover the insurance proceeds? Is there not an underlying wagering contract issue here?²²⁸

Second, substantial amounts of life insurance have arguably been marketed as investment contracts, rather than as contracts of indemnity, and the “rule that only requires an insurable interest for life insurance at the inception of the contractual arrangement [arguably] facilitates the liquidity of such investments.”²²⁹ Yet, various forms of life insurance—including partnership life insurance policies,²³⁰ key employee life insurance policies,²³¹ creditor-debtor life insurance policies,²³² and other business-related life insurance policies²³³—also possess important indemnity aspects as well. As Professor Vukowich observes:

In summary, life insurance is more of an investment contract while property insurance is more of an indemnity contract. However, each type of insurance has characteristics of both indemnity and investment. These differences will be variably attenuated when different types of insurance are considered. For example, when a creditor procures a life insurance policy on his debtor’s life in order to secure payment of a debt [and arguably involving most other business-related life insurance policies as well], the transaction is more like one of indemnity than when a husband procures a policy on the life of his wife.²³⁴

227. *See supra* notes 105-07 and accompanying text. A love and affection insurable interest between parent and child, however, arguably would not change with the passage of time or be impacted by the parents’ divorce.

228. Professor Vukowich has noted that:

[t]he rule requiring an insurable interest both at the inception of the policy and at death would probably provide a greater deterrence against homicide. An ex-creditor and an ex-spouse receive no advantage by the continued life of the ex-debtor and ex-spouse; on the contrary, they would profit by their early deaths. Considering that there is substantial evidence that insurance often provides a motive for homicide, even in cases where the policy owner has an insurable interest, such a rule would possibly be desirable.

Vukowich, *supra* note 217, at 38 (footnote omitted).

229. KEETON & WIDISS, *supra* note 2, § 3.3(b)(1), at 152; *see also* Vukowich, *supra* note 217, at 23 (discussing the characteristics of life insurance contracts).

230. *See supra* Part III.B.2.a.

231. *See supra* Part III.B.2.b.

232. *See supra* Part III.B.2.c.

233. *See supra* Part III.B.2.d.

234. Vukowich, *supra* note 217, at 23 (footnote omitted).

Third, there is “a strong sense of protecting the integrity of the life insurance transaction in terms of both preserving the contractual freedom of the parties and assuring the stability of the contractual commitment.”²³⁵ However, a court generally does have the right, and the obligation, to review an insurance contract to determine whether or not such a contract is unconscionable or violates state public policy, including whether or not it constitutes an illegal wagering contract.²³⁶

Nevertheless, these three arguments, purportedly justifying an insurable interest in the life of another based *only* upon the existence of a valid insurable interest at the time of the policy inception and *not* at the time of the insured’s death, remain largely unquestioned by many courts and commentators.²³⁷

Moreover, Professor Edwin Patterson’s observations on how this insurable interest doctrine actually became current law presents a much more sobering insight into this troublesome and controversial legal doctrine.²³⁸ First, Professor Patterson writes that originally the courts *did* require that an insurable interest in the life of another must exist *both* at the inception of the life insurance contract *and* at the time of the insured’s death, or the life insurance policy would be unenforceable as soon as the insurable interest was extinguished.²³⁹ However, “[t]he insurers did not take advantage of this ruling; they continued to pay the full amount of the policy, although the [insurable] interest had become extinguished.”²⁴⁰ In short, life insurance “[c]ustom conquered the law,”²⁴¹ and the underlying reason for not requiring an insurable interest at the time of the insured’s death was actually founded on a life insurance marketing scheme!²⁴² This

235. KEETON & WIDISS, *supra* note 2, § 3.3(b)(1), at 152.

236. See *supra* notes 14-16 and accompanying text; see also RESTATEMENT (SECOND) OF CONTRACTS, § 208 (1981) (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract . . .”); *infra* notes 287-88 and accompanying text.

237. See, e.g., KEETON & WIDISS, *supra* note 2, § 3.3(b)(1), at 151 (stating that it is a common viewpoint that the insurance contract is enforceable regardless of whether the insurable interest exists at the time of death).

238. See PATTERSON, *supra* note 10, § 36, at 162-66 (explaining that insurance custom, rather than the courts, led to the current state of the law regarding when one must have an insurable interest).

239. *Id.* at 163-64 (citing *Godsall v. Boldero*, 9 East 72 (1807) (holding that where a creditor of William Pitt insured Pitt’s life, he was denied any claim to the insurance proceeds on Pitt’s death, since the debt had been paid)).

240. *Id.* at 163.

241. *Id.*

242. *See id.*

fact alone should give little comfort to the various courts and commentators who have attempted to justify this questionable legal doctrine over the past many years. Also, if past courts and legislatures were reticent about invalidating prior life insurance marketing schemes that lacked a valid insurable interest requirement in the life of another,²⁴³ now would be an appropriate time for our state courts and legislatures to reexamine, and hopefully reject, this questionable insurable interest doctrine.

There are other compelling reasons to require a valid insurable interest in the life of another to exist at the time of the insured's death, in addition to creditor-debtor life insurance coverage disputes. Another prime example involves the insurable interest requirement for key employee life insurance policies.²⁴⁴ On one hand, the courts have been very clear in demanding that an employer must have a reasonable expectation of a *substantial* pecuniary gain through the continued life of its key employee, and must suffer a *substantial* economic loss from the death of such a crucial key employee.²⁴⁵ Yet, on the other hand, many of these same courts have allowed corporations and other business entities to recover the insurance proceeds on a policy it took out on the life of a former corporate officer, director, or manager, even though that individual had retired from the company, or was no longer employed in the business.²⁴⁶ This legal oxymoron can only encourage illegal wagering contracts.

For example, in the case of *Trent v. Parker*,²⁴⁷ Dean Trent, a former officer and shareholder of East Lawn Memorial Park, Inc., brought a legal action to cancel two insurance policies, including one key man policy on his life owned by the East Lawn corporation and totaling approximately \$350,000.²⁴⁸ J.T. Parker, who "purchased a fifty percent interest in East

243. *See supra* note 16 and accompanying text.

244. *See supra* Part III.B.2.b.

245. *See supra* Part III.B.2.b.

246. *See, e.g.*, *Chapman v. Lipscomb-Ellis Co.*, 22 S.E.2d 393, 398 (Ga. 1942) (holding that an insurable interest is required at the inception of the policy and the termination of employment or severance of the employee's connection with the employer does not make it a wagering contract or terminate the employer's rights to the proceeds); *Trent v. Parker*, 591 S.W.2d 769, 770 (Tenn. Ct. App. 1979) (holding, in the employment context, that "[t]he subsequent cessation of an insurable interest does not invalidate an insurance policy which was valid when purchased") (citations omitted); 3 COUCH ON INSURANCE, *supra* note 10, § 43:16, at 20 & nn.15-16 (same; collecting cases).

247. *Trent v. Parker*, 591 S.W.2d 769 (Tenn. Ct. App. 1979).

248. *Id.* at 770.

Lawn" (and also owned an insurance agency), convinced Trent that the corporation should have sufficient life insurance "to pay off certain notes in the event of [the] death of either shareholder."²⁴⁹ "In all, the corporation purchased \$950,000 worth of life insurance from [J.T.] Parker."²⁵⁰ "At the time the insurance was purchased, Trent served as chief executive officer of the corporation and as its active manager."²⁵¹ Subsequently, Trent sold his entire interest in the corporation to Evelyn Parker and dissolved all of his connections with East Lawn.²⁵² This sale was allegedly caused by the disagreement between Parker and Trent over the amount of [life] insurance owned by East Lawn."²⁵³

Although the trial court concluded "that East Lawn no longer had an insurable interest" in the life of Dean Trent, the Tennessee Court of Appeals reversed the trial court's decision and dismissed Trent's complaint, concluding without discussion that a "subsequent cessation of an insurable interest does not invalidate [a life] insurance policy which was valid when purchased."²⁵⁴

But query: Doesn't Mr. Trent have a legitimate concern here? If he is now in litigation with East Lawn Memorial Park and is no longer a key man in the corporation, what would prevent a wagering contract situation where his former business associate has everything to gain, and nothing to lose, if Dean Trent should suddenly die as a result of a mysterious and unfortunate "accident"?²⁵⁵

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* (citations omitted).

255. This is more than a hypothetical issue. After we discussed the *Trent* case in my Insurance Law class at the University of Richmond a number of years ago, one of my law students told me of a similar situation involving his father who had a bitter argument with his business partner and left the business. There were similar key man life insurance policies on his father's life owned by the business that a court, applying the same doctrine as the *Trent* court, refused to cancel. Subsequently, my student's father was almost killed in two separate near-miss automobile hit-and-run incidents and the family had to relocate to another city to ensure his father's safety. No evidence ever linked these two incidents to his father's business partner, but his father's life remained in jeopardy. *See also* JERRY, *supra* note 8, § 47[b], at 328 (criticizing the court's approach with respect to these facts).

Under the rule that a life insurance policy is valid if an insurable interest exists at the time of the policy issuance, the insurance policy is still enforceable. *Id.* Yet the insured may have a legitimate fear that (he or she) will suffer a premature

Fortunately, a number of other courts have rejected this arbitrary and illogical insurable interest approach and have held instead that an insurable interest in the life of a key employee does *not* survive the termination of the business relationship.²⁵⁶

Is there any viable way to resolve this troubling doctrinal conundrum? Professor William Vukowich presents one proposal to accommodate these goals, based upon a prior recommendation made by Professor Patterson: "In addition to requiring an insurable interest [in the life of another] at the inception of the policy, (1) a policy owner must [also] have an insurable interest at the time of the insured's death; and (2) a policy owner may recover the cash surrender value of [the life insurance] policy as of the date of the termination of his insurable interest plus any premiums paid after that date."²⁵⁷

Professor Vukowich concludes, however, that there are several

"accidental" death if the company should later have financial difficulties and need a quick source of cash. *Id.* In *Nachtsheim v. Wartnick*, Robert Nachtsheim worked in sales for the Midwest Florist Supply Company from 1959 to 1972. *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 884 (Minn. Ct. App. 1987), *overruled on other grounds*, *Powell v. Anderson*, 660 N.W.2d 107 (Minn. 2003). Wartnick, an officer of Midwest, purchased a \$100,000 key man insurance policy from the Prudential Life Insurance Company, naming Midwest as the beneficiary. *Id.* In August of 1972, Nachtsheim, after a violent argument with Wartnick, left Midwest and joined a competing florist business. *Id.* A year later, Nachtsheim was shot and killed shortly after arriving at work, apparently by someone he knew. *Id.* The Minnesota Court of Appeals affirmed a wrongful death verdict brought by Nachtsheim's wife against Wartnick and the Prudential Life Insurance Company, and allowed the testimony of "an insurance expert who testified, in effect, that [Wartnick's key man] life insurance policy made no business sense except to the extent [that] Midwest would profit from the insured's death." *Id.* at 889.

256. See, e.g., *Manhattan Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 298 S.E.2d 190, 192 (N.C. Ct. App. 1982) (holding the policy void due to the lack of a business relationship); *McBride v. Clayton*, 166 S.W.2d 125, 129-30 (Tex. Comm'n App. 1942) (finding a dissolution of a corporation terminates the business relationship and voids the policy); *Stillwagoner v. Travelers Ins. Co.*, 979 S.W.2d 354, 359 (Tex. App. 1998) (holding "that insurable interest does not survive the relationship that created it, and if the relationship has been terminated or the business entity no longer exists, the proceeds go to the insured's estate") (citation omitted).

257. Vukowich, *supra* note 217, at 36; see also PATTERTON, *supra* note 10, at 164 ("If the question were to be decided today, without regard to precedent, a just solution would be to allow the insured, whose interest has become extinguished, only the cash-surrender value (if any) of that date, together with premiums paid thereafter in mistaken reliance on the contract."); Patterson, *supra* note 9, at 414-15 (discussing the "cash surrender value" option).

disadvantages to this proposal.²⁵⁸ First, he notes that cash surrender values of life insurance policies normally are lower than the true value of the policy in order to discourage surrendering life insurance policies; the policy owner therefore would “receive less than the fair amount of his investment.”²⁵⁹ It is correct that the policy owner would receive less than the true value, however, if the policy owner no longer retains a valid insurable interest in the life of the insured at the time of death, why *should* he be entitled to the full amount of the policy? The “cash surrender value” proposal made by Professor Patterson was meant to be a type of compromise award to someone who originally had a valid insurable interest in the life of another, but that insurable interest no longer existed at the time of the insured’s death.²⁶⁰

The second problem, according to Vukowich, is that insurance companies arguably “would have greater difficulty administering their insurance programs” because “insurers would have an added burden of investigating policy owners’ interests at the time of death.”²⁶¹ Again, I must respectfully disagree. On the death of an insured, life insurance companies normally require that a beneficiary provide adequate proof of the insured’s death, normally through a certified death certificate, in addition to proof that the claimant is the rightful beneficiary.²⁶² It would not be unduly burdensome for an insurer to also ascertain on the death of the insured: (1) the familial status of the beneficiary; (2) if a creditor-debtor policy, the amount of the debt and whether the debt had been paid; and (3) if a partnership or key employee policy, whether the insured was still actively employed in the business enterprise. This additional information might also protect the insurer from possible liability for negligently insuring a person who lacked a valid insurable interest.²⁶³

Finally, Vukowich states this proposal arguably “would deny the policy owner, who loses his insurable interest, the right to continue this

258. Vukowich, *supra* note 217, at 36.

259. *Id.*

260. Patterson, *supra* note 9, at 414-15.

261. Vukowich, *supra* note 217, at 36, 37. Professor Vukowich later admitted that “[t]his might not in fact be such a grave burden on an insurer, however.” *Id.* at 37 n.159.

262. See, e.g., *Estate of Mohamed v. Monumental Life Ins. Co.*, 138 F. Supp. 2d 709, 713-14 (E.D. Va. 2001) (requiring adequate proof of the insured’s death, and proof that the insured’s wife was the bona fide beneficiary).

263. See, e.g., *Dougherty, supra* note 203, at 973 (discussing reasonable duty imposed on insurers to obtain certain information in order to prevent issuance of a void life insurance policy).

form of investment.”²⁶⁴ I agree. But why *should* a policy owner, who no longer possesses a valid insurable interest in the life of another, have any right to continue with this form of an investment? Wouldn’t this condone and justify illegal wagering contracts in the life of another?

Accordingly, more American courts need to recognize and validate these important *business-related exceptions* to the general doctrine that a policy holder need not possess any insurable interest in the life of another at the time of the insured’s death. Creditor-debtor life insurance is clearly one important exception to this general rule,²⁶⁵ and key employee life insurance is arguably another equally important exception.²⁶⁶ Indeed, although some courts²⁶⁷ and commentators²⁶⁸ continue to characterize the insurable interest requirement in another person’s life in terms analogous to an *investment contract*, the better-reasoned approach would be to treat all *business-related* life insurance policies—including business partnerships, key employees, creditor-debtor relationships, and other commercial interests with a substantial economic interest in the life of another—as *contracts of indemnity* that require a valid insurable interest *both* at the time of the policy inception and *also* at the time of the insured’s death.²⁶⁹ And if these business-related exceptions to the general rule one day convince a majority of American courts and commentators that *any* insurable interest in the life of another must exist *both* at the time of the policy inception *and* at the time of the insured’s death, then so much the better to achieve this much-needed reform in American life insurance law. As Professors Keeton and Widiss likewise conclude:

The appropriateness of continuing to apply the rule that an insurable interest is only required at the inception for life insurance coverages acquired in business situations is particularly open to question when it is evident that the commercial reason for the coverage has ceased and that no other relationship, familial or economic, exists at the time of

264. Vukowich, *supra* note 217, at 37.

265. See *supra* Part III.B.2.c.

266. See *supra* Part III.B.2.b.

267. See, e.g., *Sinclair Ref. Co. v. Long*, 32 P.2d 464, 472 (Kan. 1934) (arguing that a key man life insurance policy is not a contract of indemnity, but rather an investment contract). However, Professor Vukowich cautions that this case “represents an extreme example of the business uses of key man life insurance.” Vukowich, *supra* note 217, at 27 n.114.

268. See, e.g., *JERRY*, *supra* note 8, § 44[b], at 317-18 (supporting the current doctrine); *VANCE & ANDERSON*, *supra* note 10, § 31, at 186-87 (same).

269. Business-related extended familial relationships arguably would also fit within this business-related exception to the general rule.

death.²⁷⁰

V. WHO MAY CHALLENGE THE LACK OF AN INSURABLE INTEREST?

Another controversial and unsubstantiated legal doctrine that has remained largely unquestioned by most courts and commentators concerns who has legal standing to challenge the lack of an insurable interest in the life of another. The general rule, followed by a majority of courts today, is that *only the insurer* has standing to raise the absence of an insurable interest.²⁷¹ This questionable rule is apparently largely derived from a privity of contract argument—that only a party to the contract, and no one else, should have standing to raise an issue that might possibly void that contract.²⁷² But as Professor Jerry observes, this rule “is somewhat perplexing, given that the insurable interest doctrine evolved to protect the public from wagering contracts and incentives to the destruction of property or lives, [and] not to protect the interests of insurers.”²⁷³

270. KEETON & WIDISS, *supra* note 2, § 3.3(b)(1), at 152.

271. *See, e.g.*, Wheeler v. Ins. Co., 101 U.S. 439, 441 (1879) (stating that the lack of an insurable interest argument can only be used by the insurance company); Clements v. Terrell, 145 S.E. 78, 82 (Ga. 1928) (same); Secor v. Pioneer Foundry Co., 173 N.W.2d 780, 782 (Mich. Ct. App. 1969) (holding that only the insurer “had standing to complain of any lack of insurable interest”); Cundiff v. Cain, 707 So. 2d 187, 190 (Miss. 1998) (stating that “[m]ost authorities provide . . . that only the insurance company . . . can raise the issue of insurable interest,” but finding that the decedent’s estate could raise the issue when alleging fraud or deception under Mississippi law); Poland v. Fisher’s Estate, 329 S.W.2d 768, 770-71 (Mo. 1959) (stating that “[g]enerally speaking, lack of insurable interest may be pleaded by the insurer and no one else”); Ryan v. Tickle, 316 N.W.2d 580, 582 (Neb. 1982) (same); Ryan v. Andrewski, 242 P.2d 448, 452 (Okla. 1952) (same) (internal quotation omitted); *see also* KEETON & WIDISS, *supra* note 2, § 3.3(c)(1), at 156 (same); VANCE & ANDERSON, *supra* note 10, § 31, at 199 (same). *See generally* John Dwight Ingram, *Insurable Interest: Who Can Question It? Do Waiver and Estoppel Apply?*, 52 INS. COUNS. J. 647, 647 (1985) (“In the United States, it has generally been required that the owner of an insurance policy have an insurable interest in the property or life insured.”); K.A. Drechsler, Annotation, *Life Insurance: Right to Raise Question of Lack of Insurable Interest*, 175 A.L.R. 1276, 1276 (1948) (“The general rule in this country is to the effect that an insurable interest is necessary to the validity of an insurance contract upon life, and that if no insurable interest exists, the contract is void.”).

272. *E.g.*, Hicks’ Estate v. Cary, 52 N.W.2d 351, 354 (Mich. 1959); *see also* Ingram, *supra* note 272, at 650 (arguing that any other third-party claim could lead to “the undesirable result of putting the insurance proceeds in the hands of one who has not paid any premiums and who is not even a party to the contract”).

273. JERRY, *supra* note 8, § 47[b], at 328; *see also* KEETON & WIDISS, *supra* note 2, § 3.3(c)(1), at 156 (“If an insurer is the only party that has standing to question whether an insurable interest exists, the public interest may be poorly served.”).

One unfortunate illustration of this controversial doctrine is found in the case of *Secor v. Pioneer Foundry Co.*²⁷⁴ In this particular case, Pioneer Foundry employed Jack Secor for a period of nine years, from 1954 to 1963.²⁷⁵ In March of 1960, Pioneer Foundry acquired a \$50,000 key employee policy on Secor's life.²⁷⁶ Pioneer Foundry was the applicant, the owner, and the beneficiary of this life insurance policy, and paid all the premiums on the policy.²⁷⁷ Secor's employment relationship with Pioneer Foundry terminated in July of 1963, and Secor subsequently died in April of 1964.²⁷⁸ Secor's widow argued "that after the termination of Secor's employment[,] Pioneer Foundry lost whatever insurable interest it had in Secor's life[,] and that a constructive trust should be impressed on the proceeds in favor of Secor's widow and estate."²⁷⁹ Although other courts have been receptive to this logical and legally sound argument,²⁸⁰ the Michigan Court of Appeals was not persuaded in this particular case, and held that only the insurer may assert that the beneficiary of a life insurance policy does not have a valid insurable interest.²⁸¹ The court further noted:

We can understand plaintiff's feeling that it is unseemly for Pioneer Foundry to continue to own insurance on Secor's life after the termination of his employment and that since the plaintiff, not Pioneer Foundry, suffered a financial as well as a personal loss upon Secor's death[,] the plaintiff has a greater moral right to the proceeds or at least to so much of the proceeds as exceeds the cost of insurance. It has been suggested that upon the termination of employment an employer owning insurance should give the employee an opportunity to purchase it. Many employers, no doubt, are just as anxious to sell as the employee is to purchase the policy. We are not aware, however, of any principle of law, apart from an obligation assumed under a contract, which obliges an employer owning a policy on the life of an employee to offer to sell the policy to the employee upon termination of his employment. Having in mind the regularity with which insurance is now being purchased by businesses on the lives of employees, this might be an appropriate subject for legislation.²⁸²

274. *Secor v. Pioneer Foundry Co.*, 173 N.W.2d 780.

275. *Id.* at 781.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *See supra* note 257 and accompanying text.

281. *Secor v. Pioneer Foundry Co.*, 173 N.W.2d at 782.

282. *Id.* at 784 (footnote omitted).

However, this largely unchallenged majority rule is based on a number of unsubstantiated and erroneous assumptions. First, a life insurance company is *not* the *only* party to such a transaction, so why should *other* interested parties be legally prohibited from challenging the lack of an insurable interest as well? Life insurance contracts *also* affect the named insured, the policy owner (when the policy is on the life of another), any contingent or secondary beneficiary, and any other equitable third-party beneficiary, such as the estate of the insured.

As Professor Jerry justifiably argues, “[i]t is nonsensical to apply the rule so rigidly as to prevent a named insured from canceling the contract upon discovering that someone without obtaining an insurable interest has taken out a policy on the insured’s life without the insured’s consent” because it is *the insured’s life* that “may be at risk due to the arrangement.”²⁸³ The named insured, while alive, even if he or she were *not* the policy owner, should be able to unilaterally invalidate a life insurance policy issued to someone who lacked a valid insurable interest in the life of the insured.²⁸⁴ Moreover, a life insurance company should be liable in tort for failing to properly investigate when a named insured reveals a beneficiary’s alleged evil motives in taking out the policy.²⁸⁵ A *fortiori* this same argument should also apply to key employee life insurance policies, when an employer no longer has a valid insurable interest in the life of a former employee, and to other business-related life insurance contracts as well.

Likewise, any contingent beneficiaries and other third-party beneficiaries, such as the estate of the deceased insured, should *also* have standing to challenge the lack of an insurable interest in the life of the insured when appropriate. As Professors Keeton and Widiss persuasively

283. JERRY, *supra* note 8, § 47[b], at 328. One source has noted:

Since the insured may be in danger of being murdered if his life is insured against his will by one not having an insurable interest in his life, it is only proper that he should be able to cancel such a contract where he had never consented to it. Similarly, it is only just that he or his estate should be able to collect from the insurer for any damages resulting from the murderous intent of such a beneficiary.

2 APPLEMAN & APPLEMAN, *supra* note 8, § 766, at 133-34.

284. JERRY, *supra* note 8, § 47[b], at 327-28.

285. *Id.* § 47[d], at 330-33; see *Life Ins. Co. of Ga. v. Lopez*, 443 So. 2d 947, 949 (Fla. 1983) (allowing a negligence action where insurance company had actual notice of beneficiary’s murderous intention); *supra* notes 57-68 and accompanying text (discussing the *Lopez* case).

argue:

[The judicial] decisions that deny anyone other than the insurer standing to question whether the requisite insurable interest exists do not represent the most desirable approach on this matter.

The objectives of the insurable interest doctrine would almost certainly be more broadly implemented if persons who suffer a loss as a result of the occurrence of an insured event were permitted to raise the [insurable interest] doctrine as a means of recovering the insurance proceeds. In other words, a persuasive case can be made that rather than paying insurance proceeds to someone who does not have an insurable interest because an insurer chooses not to raise the question, it would be preferable to allow other persons both to have standing on this issue (even though such persons were not named as insureds or beneficiaries of the insurance contract) *and* to distribute the insurance to such persons—to the extent of their interests—if they prevail in the resolution of the insurable interest questions. This approach would serve the societal interest in assuring that insurance contracts provide benefits to those who sustain losses.²⁸⁶

The key issue here is *not* whether an insured and an insurer have a legal right to freely contract with one another to the exclusion of all others, but rather it is whether “the insurable interest doctrine is sufficiently important to warrant an impairment of the insured’s and the insurer’s freedom of contract on the basis of an overriding public interest.”²⁸⁷ The overriding public policy interest is the prevention of wagering contracts in the life of another.²⁸⁸ Moreover, if business-related life insurance policies are generally *indemnity* contracts rather than *investment* contracts,²⁸⁹ then *only* a party who has *actually* suffered loss should be indemnified for such a loss. Again, one equitable remedy would be to compensate the policy owner for the time he or she actually had an insurable interest in the life of another by allowing the policy owner to recover the policy’s cash surrender value as of the date of the termination of his or her insurable interest, plus any premiums paid after that date,²⁹⁰ and award the remainder of the policy

286. KEETON & WIDISS, *supra* note 2, § 3.3(c)(1), at 157-58 (footnotes omitted).

287. *Id.* at 157 n.8.

288. *See id.* § 3.1(c), at 157-58 (discussing the historic hostility toward wagering contracts as an influence on the development of the insurable interest doctrine).

289. *See supra* note 229 and accompanying text.

290. *See supra* notes 258-61 and accompanying text.

proceeds to the contingent beneficiary or to the estate of the insured as the party who had actually suffered loss at the time of the insured's death.

A minority of courts have rejected this ill-conceived doctrine that only the insurer has standing to raise the absence of an insurable interest, and instead have allowed *other* interested parties to question the lack of an insurable interest, in addition to the insurer.²⁹¹ For example, the Supreme Court of Virginia justified its minority approach in the case of *Tate v. Commercial Building Ass'n*²⁹² in this manner:

To allow any one to retain the proceeds of a policy of [life] insurance, if the insurance company chose voluntarily to pay it, which was effected for his benefit upon the life of another, in which life he had no insurable interest, whether the policy was issued upon the life of the insured directly for such beneficiary, or for the benefit of the insured and then assigned by him to the beneficiary, would encourage speculation upon the chances of human life, with a direct interest in its early termination, contrary to the public interest, and in contravention of the policy of law.²⁹³

Thus, like the doctrine of when an insurable interest in the life of another must exist,²⁹⁴ the minority approach to the doctrine of who may challenge the lack of an insurable interest also encompasses an eminently sound, much fairer, and better-reasoned judicial approach that more American courts should be willing to legally embrace and adopt in their respective jurisdictions. True, both of these largely unexamined insurable interest doctrines continue to constitute existing legal precedent in a majority of American states.²⁹⁵ But as Justice Benjamin Cardozo warns us:

One of the most fundamental social interests is that the law shall be uniform and impartial. . . . Therefore in the main there shall be adherence to precedent. . . . But symmetrical development may be bought at too high a price. Uniformity ceases to be good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest

291. See, e.g., *Butterworth v. Miss. Valley Trust Co.*, 240 S.W.2d 676, 684 (Mo. 1951) (trustee); *Allgood v. Wilmington Sav. & Trust Co.*, 88 S.E.2d 825, 828-29 (N.C. 1955) (potential beneficiary); *Smith v. Coleman*, 32 S.E.2d 704, 707 (Va. 1945) (any interested party), *set aside on other grounds by* 35 S.E.2d 107 (Va. 1945).

292. *Tate v. Commercial Bldg. Ass'n*, 33 S.E. 382 (Va. 1899).

293. *Id.* at 384.

294. See *supra* Part IV.

295. See KEETON & WIDISS, *supra* note 2, §§ 3.3(b)(1)-(c).

served by equity and fairness or other elements of social welfare.²⁹⁶

Accordingly, it is now time to summarily reject these two unexamined, illogical, and unsubstantiated insurable interest doctrines, and judicially embrace the better-reasoned, legally sound, and eminently fairer minority approaches.

VI. IS AN INSURER BARRED BY WAIVER OR ESTOPPEL DEFENSES FROM CHALLENGING THE LACK OF AN INSURABLE INTEREST?

Due to the crucial underlying public policy importance of an insurable interest requirement in the life of another in order to prevent wagering contracts, and in order to prevent the unwelcome, but very real, possibility of homicide,²⁹⁷ the vast majority of American courts²⁹⁸ and commentators²⁹⁹ have held that the insurable interest requirement on the life of another is *not* subject to the defenses of waiver or estoppel.³⁰⁰ For example, in *Colver v. Central States Fire Insurance Co.*,³⁰¹ the Kansas Supreme Court explained that

296. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-13 (1921).

297. *See supra* notes 5, 11-16 and accompanying text.

298. *E.g.*, *Rubenstein v. Mut. Life Ins. Co. of N.Y.*, 584 F. Supp. 272, 279 (E.D. La. 1984); *Beard v. Am. Agency Life Ins. Co.*, 550 A.2d 677, 687-88 (Md. 1988); *Sun Life Assurance Co. v. Allen*, 259 N.W. 281, 284-86 (Mich. 1935); *Nat'l Life & Accident Ins. Co. v. Ball*, 127 So. 268, 268 (Miss. 1930); *Elmore v. Life Ins. Co. of Va.*, 198 S.E. 5, 7 (S.C. 1938); *Washington v. Atlanta Life Ins. Co.*, 136 S.W.2d 493, 493-94 (Tenn. 1940); *see also* *Ingram, supra* note 271, at 650 (“A substantial number of decisions have held that the insurable interest requirement is not subject to the counter-defenses of waiver or estoppel.”).

299. *See, e.g., Jerry, supra* note 8, § 45, at 320 (stating that “[m]ost courts . . . have held that the insurer cannot waive or be estopped to assert the insurable interest requirement”); *KEETON & WIDISS, supra* note 2, § 3.3(c)(2), at 158 (stating that “[t]here is significant support in judicial opinions for th[is] proposition”); *VANCE & ANDERSON, supra* note 10, § 31, at 199-200, 508-10 (stating that “[s]ince the insurable interest requirement is based on public policy[,] most courts hold that waiver or estoppel will not serve to bar this defense”); *see also* *Ingram, supra* note 272, 650-51; *Phoebe Carter, Annotation, Estoppel of, or Waiver by, Issuer of Life Insurance Policy to Assert Defense of Lack of Insurable Interest*, 86 A.L.R.4th 828 (1991).

300. Waiver generally is defined as the “intentional relinquishment of a known right,” normally by the insurer, and sounds in contract, whereas estoppel involves the reliance of a party, normally the insured, on the misleading representation or behavior of another, normally the insurer or its agent, and sounds in tort. *FISCHER & SWISHER, supra* note 27, § 4.01[A], at 363.

301. *Colver v. Cent. States Fire Ins. Co.*, 287 P. 266 (Kan. 1930).

a salutary public policy will not give judicial recognition to a contract of insurance on the life or property of another person issued in behalf of one who has no insurable interest therein. Such insurance is regarded as a mere wagering contract which the courts will not enforce. Consequently the doctrine of estoppel [or waiver] invoked by plaintiff cannot be applied here nor does it vitiate the defense set up against this action.³⁰²

The underlying rationale for this particular insurable interest doctrine was further explained by the Maryland Court of Appeals in the case of *Beard v. American Agency Life Insurance Co.*:³⁰³

“Waiver” is the voluntary, intentional relinquishment of a known right. Such waiver may result either from affirmative acts of the insurer or its authorized representatives, or its nonaction with knowledge of the facts. . . .

. . .

“Estoppel”, on the other hand . . . necessarily implies prejudicial reliance of the insured upon some act, conduct, or nonaction of the insurer

Generally, waiver applies in cases where particular terms, conditions, limitations, or other provisions of the insurance contract are at issue. In contrast, estoppel is an equitable doctrine which is applied when the insurer is accused of fraud or misrepresentation. As these definitions indicate, when either waiver or estoppel is applied, the courts proceed on the theory that there is a presumptively valid contract between the parties which is objectionable due to some defect in the bargaining process or in the contract itself. With respect to the defense of insurable interest, however, waiver and estoppel do not apply because there is no presumptively valid contract upon which these two doctrines can operate as an insurance contract, without an insurable interest, [because such a contract] is against public policy and void ab initio.³⁰⁴

As with other insurable interest doctrines, there is a minority view that an insurer *may* waive, or be estopped from asserting, the lack of an

302. *Id.* at 268 (citations omitted); *see also* Nat'l Life & Accident Ins. Co. v. Ball, 127 So. 268, 268 (Miss. 1930) (holding that such a contract is void as against public policy and is therefore unenforceable by the courts).

303. *Beard v. Am. Agency Life Ins. Co.*, 550 A.2d 677 (Md. 1988).

304. *Id.* at 688 (internal quotation and citations omitted).

insurable interest in the life of another.³⁰⁵ However, these courts have made their decision without further discussion, or have based their waiver or estoppel argument on the insurer's retention of unearned premiums, rather than on an underlying (and necessary) insurable interest argument.³⁰⁶

Although this Author is in agreement with the prevailing majority rule (based upon the crucial underlying importance of an insurable interest requirement in the life of another³⁰⁷), some troubling questions nevertheless exist within this general doctrine. Is it fair, on one hand, for a life insurance company or its agent to insure the life of another and accept multiple premium payments over the years, knowing that the policy owner does *not* have a valid insurable interest in the life of the insured? Yet, on the other hand, without a bona fide insurable interest, is not such a policy a wagering contract, pure and simple, which is void at its inception, regardless of the parties' good faith? How might we resolve this doctrinal conundrum?

Some courts have carved out an exception to the general rule that an insurer cannot waive, or be estopped to assert the insurable interest doctrine whenever the insurer or its agent writing the policy knew that the person obtaining insurance lacked an insurable interest in the insured person or property, but wrote the policy anyway.³⁰⁸ In the alternative, a life

305. See, e.g., *Clements v. Terrell*, 145 S.E. 78, 80-81 (Ga. 1928) (holding that an insured may make a policy payable to whomever they choose regardless of whether the payee has an interest in the life of the insured); *Kelly v. Prudential Life Ins. Co. of Am.*, 6 A.2d 55, 59 (Pa. 1939) (applying the rule that if the party to whom the policies were issued had an insurable interest it is not necessary for the beneficiary to prove an insurable interest when the policies mature).

306. See cases cited *supra* note 305.

307. Professor Ingram has noted that

[t]he argument is often made that if the [insurance] company knew all the facts concerning lack of an insurable interest and still issued the policy, the issuance of the policy constitutes a waiver [or estoppel] of any objection to [the] lack of [an] insurable interest. Many courts, however, find that such a doctrine is at odds with basic insurance principles, which require that a person have an insurable interest before he can insure. No matter how willing the parties may be to enter into such a contract, the law forbids it. The contract is void as against public policy, and therefore nonenforceable by the courts.

Ingram, *supra* note 271, at 651 (internal quotation omitted).

308. See, e.g., *McGehee v. Farmers Ins. Co.*, 734 F.2d 1422, 1424-25 (10th Cir. 1984) (estopping fire insurance company from arguing that named insureds lacked insurable interest when insurance agent wrote policy despite knowing that persons purchasing insurance lacked such interest); *Nat'l Sec. Fire & Cas. Co. v. Hester*, 298 So.

insurance company still has the duty to use reasonable care *not* to issue a life insurance policy to a beneficiary who has no insurable interest in the life of the insured, and the life insurance company therefore may still be held liable in tort for a breach of that duty of due care, up to or in excess of the amount of the policy.³⁰⁹

A final question is most curious in light of the underlying public policy rationale supporting an insurable interest in the life of another: Why is this insurable interest requirement not expressly identified and fully explained in present-day life insurance applications and policies? If the lack of an insurable interest in the life of another renders a life insurance policy void *ab initio* in spite of the good faith contractual intent of the parties, shouldn't the "common man or woman in the marketplace" be put on notice of this crucial insurable interest requirement?

The salutary benefits of identifying and explaining this insurable interest requirement in life insurance applications and policies are three-fold. First, it would validate the life insurance transaction on public policy grounds, as well as contractually. Second, it may help to educate prospective beneficiaries such as Ronald and James Calvert,³¹⁰ Shirley Weldon's aunt-in-law,³¹¹ and Alan "Mike" Rubenstein³¹² that they *do* need

2d 236, 243-44 (Ala. 1974) (barring insurer, under a similar rationale, from arguing lack of an insurable interest); *Rogers v. Atl. Life Ins. Co.*, 133 S.E. 215, 220 (S.C. 1926) (same); *Republic Ins. Co. v. Silvertown Elevators, Inc.*, 493 S.W.2d 748 (Tex. 1973) (same). Professor Jerry noted that:

[These cases] and others like [them] are good candidates for recognizing an exception to the general rule that the insurer cannot waive or be estopped to assert the insurable interest doctrine, but not all cases follow this approach, even when the agent disregards information showing lack of an insurable interest.

JERRY, *supra* note 8, § 45, at 321. *But see* *Vance v. Wiley T. Booth Inc.*, 436 S.E.2d 256, 257-58 (N.C. Ct. App. 1993) (refusing to apply estoppel doctrine despite real estate agent's knowledge, after a transfer of title, that insured lacked insurable interest).

309. *See, e.g., Liberty Nat'l Life Ins. Co. v. Weldon*, 100 So. 2d 696, 708 (Ala. 1957) (holding that a life insurance company has "the duty to use reasonable care not to issue a policy of life insurance in favor of a beneficiary who has no interest in the continuation of the life of the insured"). *But see* *Burton v. John Hancock Mut. Life Ins. Co.*, 298 S.E.2d 575, 577 (Ga. Ct. App. 1982) (determining that Georgia law does not recognize "a cause of action for wrongful death based on an insurance company's alleged breach of a duty to exercise reasonable care in the issuance of a life [insurance] policy").

310. *See supra* notes 43-52 and accompanying text.

311. *See supra* notes 119-22 and accompanying text.

312. *See supra* notes 180-203 and accompanying text.

a valid insurable interest in the life of another, and hopefully thwart their nefarious evil designs of murdering innocent insureds for life insurance proceeds. And third, it would likewise assist life insurance companies and their soliciting agents to *not* write life insurance policies for a beneficiary who clearly lacks a valid insurable interest in the life of another, and thereby protect the insurer from additional tort liability. Perhaps the American Council of Life Insurance or the Insurance Services Office might draft a sample insurable interest provision for life insurance applications and policies. Perhaps various state legislatures, state insurance commissioners, or state courts will mandate that all life insurance policies within a particular state contain such an insurable interest provision based upon sound underlying public policy reasons. Given the crucial importance of an insurable interest in the life of another, all interested parties involved in life insurance transactions clearly *should* be put on notice of this insurable interest requirement for life insurance.

“In conclusion, it may be said that the doctrine of insurable interest in life insurance, as applied by American courts, is not a single rule, but is a complex of rules of public policy designed to avert a number of harmful social and economic tendencies,” and the application of these interrelated insurable interest rules in the context of life insurance coverage disputes “may well vary with the changing state of society itself.”³¹³

VII. CONCLUSION

The insurable interest requirement for life insurance is based upon a sound underlying public policy rationale that requires a beneficiary to have a valid insurable interest in the life of another in order to prevent a “wagering contract” which could induce the beneficiary to take the life of the insured.³¹⁴ Accordingly, almost all American jurisdictions today require that a valid insurable interest in the life of another exist,³¹⁵ or the life insurance policy in question will be declared null and void based upon public policy grounds.³¹⁶

It is generally recognized that every person has an unlimited insurable interest in his or her own life,³¹⁷ and a person who takes out insurance on his or her own life normally has the power to designate any beneficiary he

313. Patterson, *supra* note 9, at 421.

314. *See supra* note 5.

315. *See supra* notes 14-18 and accompanying text.

316. *See supra* note 16 and accompanying text.

317. *See supra* note 23 and accompanying text.

or she desires, whether or not that beneficiary has an insurable interest in the life of the insured.³¹⁸ However, a beneficiary who intentionally kills the insured cannot, and should not, recover life insurance policy benefits, and these proceeds will be paid instead to the innocent contingent beneficiary or to the estate of the deceased.³¹⁹ A number of courts are still grappling, however, with the application of the “innocent instrumentality” exception to this general rule.³²⁰

An insurable interest in the life of another has been founded on one of two broad categories: (1) a family love and affection insurable interest for persons “closely related by blood [or affinity]”; and (2) for all other persons, “a lawful and substantial economic interest in the continued life, health, and bodily safety of the person insured.”³²¹ A nuclear family love and affection insurable interest between spouses, and between parent and child, generally does not require an additional economic interest,³²² but other extended family members, as well as *de facto* and nontraditional family members, normally *do* require a separate pecuniary interest or economic dependency in the life of the insured to constitute a valid insurable interest in the life of another.³²³

For *business-related* life insurance policies, however, including insurance on the life of a business partner, a key employee, or a creditor-debtor relationship, a substantial economic interest in the continued life and well-being of the insured *is* required by law in order to avoid illegal wagering contracts.³²⁴ These business-related life insurance policies constitute contracts of *indemnity*, similar to property insurance policies, rather than *investment* contracts, such as insurance policies taken out on the life of a spouse or a child.³²⁵

Nevertheless, a majority of American courts continue to characterize *all* life insurance policies primarily as investment contracts, rather than recognizing the fact that most business-related life insurance policies are in reality contracts of indemnity.³²⁶ Consequently, a majority of American courts today hold that an insurable interest requirement for all types of life

318. *See supra* note 29 and accompanying text.

319. *See supra* note 32 and accompanying text.

320. *See supra* notes 40-84 and accompanying text.

321. JERRY, *supra* note 8, § 40, at 292-93.

322. *See supra* Part III.B.1.

323. *See supra* Part III.B.1.d.

324. *See supra* Part III.B.2.

325. *See supra* notes 224-36 and accompanying text.

326. Vukowich, *supra* note 217, at 23.

insurance must exist *only* at the time the life insurance contract is made, and *not* at the time of the insured's death.³²⁷ This Author, however, argues that more American courts should adopt the better-reasoned view that *business-related* life insurance policies, by their very nature, should be recognized as an important exception to this largely unchallenged and unsubstantiated general rule.

Another controversial insurable interest doctrine concerns who has legal standing to challenge the lack of an insurable interest in the life of another. Although the general rule, followed by most courts today, is that *only the insurer* has legal standing to raise the absence of an insurable interest,³²⁸ this Author once again argues that more American courts should adopt the better-reasoned minority view that other interested parties, such as contingent or third-party beneficiaries that have *actually* suffered loss, should *also* have legal standing to challenge the lack of an insurable interest in the life of another. The key issue here is not whether the insured and insurer have a legal right to freely contract with one another to the exclusion of all other parties, but whether the insurable interest doctrine is sufficiently important to override the insured's and insurer's freedom to contract, based upon underlying public policy reasons.

Finally, based upon the crucial underlying importance of the insurable interest requirement, this Author strongly supports the majority view that an insurable interest in the life of another is *not* subject to the defenses of waiver or estoppel, but with an important caveat that an exception to this general rule may be appropriate whenever the insurer or its agents writing the policy knew that the person obtaining insurance lacked an insurable interest in the insured person or property, but wrote the policy anyway. In the alternative, a life insurance company may also be liable in tort for negligently procuring insurance for someone who lacked a bona fide insurable interest in the life of another.

327. *See supra* note 237 and accompanying text.

328. *See supra* note 271 and accompanying text.