19-87

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

HERMAN BRETTLER, TRUSTEE OF THE ZUPNICK FAMILY TRUST 2008 A,

Plaintiff-Appellant,

-against-

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF

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INTRODUCTION

Allianz Life Insurance Company of North America ("Allianz"), in its Appellee's brief, abandoned the many arguments it presented in its motion to dismiss under F.R.C.P. 12(b)(1) and F.R.C.P. 12(b)(2) in order to assert a reason under F.R.C.P. 12(b)(6)[1] which tramples upon the owner's statutory and common law right to freely assign the Policy: the Policy requires notice of assignment in order for the assignment to be valid. Allianz thus violated the owner's common law rights as expressed by the United States Supreme Court in *Grigsby* and ratified by the New York Court of Appeals in *Kramer*. Allianz's policy provision also violated Insurance Law § 3205(b)(1) which statutorily mandates that all life insurance policies be freely assignable by the owners of such policies and also violated New York Insurance Law § 3203 which contains the standard requirements in individual life insurance policy and omits any provision permitting Allianz's notice requirement. Allianz's impermissible and legally unsupported "notice requirement" is nothing more than a subterfuge by which it seeks to avoid suit by anyone because if Allianz's provision is enforceable, no one, not Ms. Muschel and not the Trust, could have brought suit against Allianz.

[1] Allianz's Notice of Motion did not identify Rule 12(b)(6) as the basis for its motion, in violation of Local Civil Rule of the United States District Courts for the Southern and Eastern Districts of New York ("Local Civil Rule") 7.1(a)(1) and (b), reason alone the motion should have been denied.

Even more, Allianz is wrong that it never received notice of the assignment. By the filing of this suit, and the allegations to such effect contained therein, Allianz received notice that the Zupnick Family Trust 2008A ("Trust") and not Ms. Muschel was the owner of the policy. Additionally, on May 5, 2017, an Allianz form, duly executed by Ms. Muschel as prior owner and the Trust as the current owner, notifying Allianz of the assignment was submitted in this action and filed electronically and therefore received by Allianz [A144-A150]. Allianz's non-enforceable, illegal notice requirement was met.

ARGUMENT

A. Allianz Cannot Curtail a Policyowner's Right to Assign

Allianz's notice provision imposes an undue burden on the policyowner's property interest in the policy and decisions upholding restrictions on assignments cited by Allianz are inapplicable because they do not involve life insurance policies but rather property and casualty insurance. In *Globecon Grp., LLC v. Hartford Fire Ins. Co*., 434 F.3d 165, 167 (2nd Cir. 2006), The Globecon Group, Inc. sold its entire business to The Globecon Group LLC and attempted to assign its property and casualty insurance policy to the purchaser together with the rest of the business. Naturally, as the assignment would cause Hartford to insure an entirely new insured entity, Hartford's policy contained a no-transfer provision. The Court upheld the clause finding that New York law upholds assignment restrictions on liability

policies. Each decision cited by Allianz involved liability policies (pages 23-24 of Appellee's Brief).

In fact, in one decision cited by Allianz, *Travelers Indem. Co. v. Israel*, 354 F.2d 488, 490 (2d Cir. 1965), the Court identified the reason why insurers insist on such clauses: "the fear of increased hazard." Said differently, an insurance company has every right to insist upon knowing the identity and scope of the risk it is insuring. But life insurance policies are different for two reasons. First, the insured risk remains exactly the same no matter how many times a life insurance policy is assigned and to whomever it is assigned. From the insurer's perspective, nothing changes; the insured life is always the same person. Second, as the Supreme Court of the United States recognized in *Grigsby* over one hundred years ago, "life insurance has become in our days one of the best recognized forms of investment." *Grigsby v. Russell*, 222 U.S. 149, 156, 32 S. Ct. 58, 59, 56 L. Ed. 133 (1911). This is even truer today when life insurance products have become even more investment-like in their performance and where a vigorous secondary market exists for the free trade of life insurance products. Curtailing the assignability of life insurance products wrongfully divests a policyowner of valuable property – something the *Grigsby* court would not tolerate in 1911 and which this Court should not tolerate today. To the extent Allianz is arguing that *Grigsby* is not consistent with New York law, New York's Court of Appeals disagrees. "When *Grigsby* was decided, New

York common law had anticipated the federal common law, adopting [] the rule of *Grigsby*—that life insurance policies are, in general, freely assignable…" *Kramer v. Phoenix Life Ins. Co*., 15 N.Y.3d 539, 556, 940 N.E.2d 535, 544 (2010).

The statutory structure of New York's insurance laws also prohibits Allianz's attempt to insist on notice of assignment. First of all, New York Insurance Law § 3205(b)(1) expressly mandates that "[n]othing herein shall be deemed to prohibit the immediate transfer or assignment of a contract…" Moreover, there can be no greater proof that the New York Legislature forbids the very restriction on assignments that Allianz seeks now to impose than by contrasting the standard provisions required by the New York Legislature for individual life policies with the standard provisions required for group life policies. The standard requirements for individual life policies, including the Policy at issue here, are contained in New York Insurance Law § 3203 while the standard provisions for group life insurance policies are contained in New York Insurance Law § 3220. Insurance Law § 3220, titled, "Group life insurance policies; standard provisions" specifically contains a subsection allowing insurance companies to impose restrictions on assignments and provides, in 3220(c)(1), in relevant part, "the insurer and the group policyholder may prohibit or restrict such assignment by appropriate policy provisions except as otherwise

provided in paragraph three of this subsection."[2] The absence of any similar language in the standard provisions required for individual policies, New York Insurance Law § 3203, screams that an insurer may not, by policy provision, impose restrictions, including notice restrictions, on assignment of individual policies.

This implication is not only logical but such construction of New York statutes is New York law. It has long been the law in New York that statutes which relate to same subject matter or which have a common general purpose must be construed with reference to contemporaneous and even subsequently enacted statutes in *pari materia*. *United States v. A.J. Woodruff & Co*., 175 F. 776, 776–77 (2nd Cir. 1909). Following the same doctrine, the legislature's failure to include a provision in one statute, "when it had…included such a provision in a statute within the same statutory scheme, should be construed as indicating that the exclusion was intentional." *Corrigan v. New York State Office of Children & Family Servs*., 28 N.Y.3d 636, 639, 71 N.E.3d 537, 539 (2017). Thus, in *Corrigan*, the exclusion of any provision allowing for an early expungement of child abuse investigations in New York Social Services Law § 427–a was held by the New York Court of appeals to be intentional when another statute addressing child abuse contained such a provision. New York highest court found that such early expungement was not

[2] Pursuant to paragraph three, an insurer may not impose restrictions if those restrictions would discriminate between assignment for sale and assignment for consideration.

permitted under the silent statute. See, also, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862, 198 L. Ed. 2d 290 (2017) ("in any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant; and here that silence is telling."); *Smith v. People*, 47 N.Y. 330, 339–41 (1872) ("The same legislature that passed the act of April, 1870, also passed a law in May of the same year, less than a month after the passage of the first act [Laws of 1870, chap. 554], clearly recognizing the authority of a single judge to hold the Court of Sessions alone, and to the exclusion of the judges of the Common Pleas, and all others, which authority did not exist.")

The same is true here. When legislating the standard terms of a group life insurance policy, the New York legislature specifically included a provision permitting insurers to contractually impose restrictions on assignments but when legislating the standard terms for individual life insurance policies, no such permission was given. Allianz's attempt to impose a notice restriction on the assignment of its policies in therefore not only in violation of the Supreme Court's ruling in *Grigsby* forbidding an insurer from interfering with the assignment of life insurance policies but also a violation of New York's insurance statutory scheme.

Here, Allianz's notice requirement is illegal and therefore void and unenforceable. The Legislature has expressly determined that an illegal insurance clause is unenforceable by the insurer. Specifically, Section 3103(a) of the Insurance Law states:

> Except as otherwise specifically provided in this chapter, any policy of insurance or contract of annuity delivered or issued for delivery in this state in violation of any of the provisions of this chapter shall be valid and binding upon the insurer issuing the same, but in all respects in which its provisions are in violation of the requirements or prohibitions of this chapter it shall be enforceable as if it conformed with such requirements or prohibitions.

Nor is there any "common sense and practical" reason to require notice of assignment as Allianz claims on page 16 of its brief. Allianz can never be exposed to multiple claims for the death benefit because the death benefit is paid to the beneficiary, not the policy owner, and the policy contains an explicit term requiring notice of change of beneficiary. The policy provides [A-55]:

Who Receives the Death Benefit	The Death Benefit will be paid to the Beneficiary when the Insured dies prior to Termination. The Beneficiary is the person or entity named in the application unless changed.
Protection of the Death Benefit	To the extent permitted by law, the Death Benefit will not be subject to the claims of the Beneficiary's creditors.
If the Beneficiary Dies	If any Beneficiary dies before the Insured, that Beneficiary's interest in the Death Benefit will end. If any Beneficiary dies at the same time as the Insured, or within 120 hours after the Insured, that Beneficiary's interest in the Death Benefit will end as if the Beneficiary predeceased the Insured. If the interest of all named Beneficiaries has ended when the Insured dies, we will pay the Death Benefit to you. If you are not living at that time, we will pay the Death Benefit to any surviving owner or to your estate.
Change of Beneficiary	You may change the named Beneficiary by sending Notice. The change will not be effective until we record it at our home office. Even if the Insured is not living when we record the change, the change will take effect retroactively as of the date it was signed. Any benefits we pay before we record the change will not be affected. An irrevocable Beneficiary must give written consent before we will change the Beneficiary.

An assignment of a policy only changes the owner, not the beneficiary, and while both common law and New York's statutory scheme prohibit an insurer from imposing requirements, including notice requirements, for assignments, there is no restriction or prohibition upon an insurer's insistence on notice for a change in beneficiary. In the event an insurer receives a change of beneficiary from an assignee unknown to the insurer, the insurer always has the option of bringing a declaratory judgment action or an interpleader action to determine its obligations before paying

anyone anything. In any event, that cannot occur in this instance as Allianz received a duly executed change of beneficiary form (and a duly executed change of ownership form) changing the owner and beneficiary of the Policy back from Ms. Muschel to the Trust on May 5, 2017 [A144-A150]. The only possible objective Allianz has in enforcing the notice requirement of the assignment is to make itself lawsuit-proof as according to Allianz's worldview, the Trust cannot bring suit because notice was not given and Ms. Muschel cannot bring suit because she assigned the Policy to the Trust. Such a ruse should not be tolerated or permitted by this Court.

B. Allianz Received Notice of Assignment by Way of this Action

The reason Allianz was not notified of the assignment back to Trust before the commencement of this suit is simple: it was common knowledge that Allianz rejected such assignments whenever Allianz unilaterally decides that a policy lapsed – just as it did in *Jakobovits v. Allianz Life Ins. Co. of N. Am.,* No. 15CV9977, 2017 WL 3049538, at *5 (S.D.N.Y. July 18, 2017):

When GSCF notified Allianz one year later of its assignment of the policies to JMA, however, Allianz refused to recognize the change in ownership because "[o]ur records reflect that the policies have lapsed, therefore, we cannot honor the ownership change requests." (Healy Decl., Ex. 143 at 1.) The terms of the policy do not require that the policy be in effect prior to assignment, and thus Allianz's

wrongful refusal to recognize the assignment cannot destroy plaintiff's standing in this matter. Plaintiff's failure to notice (and Allianz's failure to record) the subsequent assignments of the Oberlander policies to LITE by JMA does not compel summary judgment on these claims, as Allianz's communications with JMA and GSFC in March 2011 suggested that any future notice would not be accepted.

In any event, the very filing of this lawsuit was notice to Allianz that the policy was assigned. More than that, on May 5, 2017, Mr. Brettler filed, in this action (District Court Document Entry 20) an affirmation notifying Allianz of the assignment, which included a complete copy of the assignment and sale agreements (A69-143) and a completed and signed Allianz assignment form (A144-A150), signed by Ms. Muschel and Mr. Brettler changing both the owner and the beneficiary from Ms. Muschel back to the Trust. Notice was given.

While we cannot find any Court which considered the sufficiency of a complaint as it relates to notice of an assignment of a life insurance policy, courts have recognized that a complaint can serve as valid notice in other arenas. In *Feinberg v. Bd. of Educ.*, 433 N.Y.S.2d 39 (2d Dept. 1980), at issue was notice required within three months of employment termination under the Education Law necessary for any right to reinstatement. The court ruled that the verified petition, "served less than three months after the effective date of the termination of... employment, constituted a notice of claim sufficient to comply with that section."

Id., citing *Quintero v Long Is. R. R*., 31 A.D.2d 844, 844 (2d Dept 1969). *Quintero* held that under 1296 of the Public Authorities Law and section 50-e, requiring notice to a municipality of an accident, service of the summons and complaint served within the statute's time requirements, was sufficient notice. *Quintero*, 31 A.d.2d at 844; See also, *Tannuzzio v. O'Brien*, 104 Misc. 2d 90, 91, 427 N.Y.S.2d 544, 545 (Sup. Ct. 1980) ("A summons and complaint may constitute a notice under General Municipal Law s 50-e.")

In the following breach of warranty cases in which plaintiffs who had sustained personal injuries as a result of using a product purchased from, or manufactured by, the defendant brought suit to recover for such injuries and claimed that the filing of suit satisfied the notice requirements of UCC § 2–607(3)(a), the courts agreed that commencing suit gave sufficient notice to satisfy the statute. *Palmer v. A.H. Robins Co., Inc*., 684 P.2d 187, 38 U.C.C. Rep. Serv. 1150 (Colo. 1984); *Goldstein v. G. D. Searle & Co*., 62 Ill. App. 3d 344, 19 Ill. Dec. 208, 378 N.E.2d 1083 (1st Dist. 1978); *Graham by Graham v. Wyeth Laboratories, a Div. of American Home Products Corp*., 666 F. Supp. 1483 (D. Kan. 1987); *Maybank v. S. S. Kresge Co*., 302 N.C. 129, 273 S.E.2d 681 (1981).

Since Allianz received notice of the assignment by means of this lawsuit and the executed Allianz assignment form, the illegal notice requirement has been complied with.

CONCLUSION

For all of the foregoing reasons, the Trust respectfully requests that the Order appealed from and the final judgment of the District Court be reversed.

Dated: Kew Gardens, New York
May 2, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief complied with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains approximately 2,501 words, excluding the parties of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complied with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Ed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, font-size 14.

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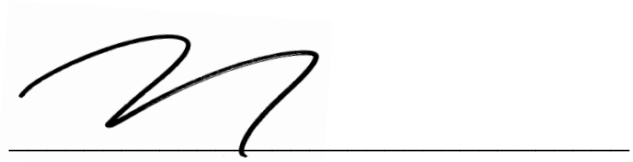
CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on May 3, 2019.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.



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