19-87

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

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

BRIEF OF DEFENDANT-APPELLEE

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(202) 842-8800

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Allianz Life Insurance Company of North America states that Appellee, Allianz Life Insurance Company of North America, Inc. ("Allianz"), is a wholly owned subsidiary of Allianz of America, Inc., which, in turn, is owned by Allianz Europe B.V. None are publicly owned companies. Allianz Europe B.V. is a wholly owned subsidiary of Allianz SE, which is a publicly held corporation.

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ISSUE FOR REVIEW

Whether a party has contractual standing to sue to enforce a life insurance policy without obtaining ownership of the policy in compliance with the express contractual provisions governing the assignment or change of ownership of the policy.[1]

STATEMENT OF THE CASE

I. Description Of The Case Below[2]

This case concerns the disputed lapse of a life insurance policy with a death benefit of $8 million. Allianz declared the policy lapsed due to the failure to pay premium, and the Complaint in this case challenged the propriety of the lapse. This case commenced as a single count Complaint filed in New York state court, with the relief sought being a declaration that the insurance policy at issue "is in full force and effect, plus attorneys' fees …." A-7 and 12. Allianz removed the case to federal court. A-14. Allianz moved to dismiss on several grounds, and the District Court,

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[1] The standing issue in this case is one of contractual standing, not constitutional standing. The District Court considered whether one aspect of Allianz's motion to dismiss was subject to Fed. R. Civ. Pro. 12(b)(1), but it granted the motion to dismiss based on its assessment of whether the Trust could state a claim pursuant to Rule 12(b)(6). *See* A-225-228.

[2] Local Rule 28.1(b) requires that certain information about the case "must" be provided at the beginning of the statement of the case of an appellant's brief. Appellant's initial brief here does not comply with this local rule, in that none of the required information is stated at the beginning of the brief's statement of the case. For the benefit of the Court, Allianz is providing the information required by Local Rule 28.1(b) at the beginning of the Statement of the Case section of this brief.

Judge Eric N. Vitaliano, granted the motion to dismiss based upon Fed. R. Civ. Pro. 12(b)(6). A-228-230. The District Court's ruling is not reported on Westlaw.

II. The Facts Relevant To This Appeal

Although Appellant, Herman Brettler, as trustee of the Zupnick Family Trust 2008A ("the Trust"), presents the issues for review as focusing on a change of ownership of the policy at issue in this case ("the Policy") and contractual standing to sue with respect to the Policy, it spends much of the Fact section of its initial brief ("Trust's Brief") focusing instead on conduct of Allianz that has nothing to do with either the ownership of the Policy or contractual standing.[3] At the same time, the Trust has failed to provide this Court some of the information most relevant to this appeal, including: (1) the provision of the Policy on which Allianz's standing argument and the challenged District Court's ruling are based; and (2) the full procedural context in which the standing issue presented in this appeal was considered and decided by the District Court. This critical information follows.

[3] For example, the terms of the grace notice sent by Allianz, Appellant's payment of premium by a check that was dishonored by its bank, and the lapse of the Policy, are not relevant to the issue of whether Appellant has standing to sue for declaratory relief with respect to the Policy.

A. The Ownership of the Policy and Its Pertinent Provisions

The Trust filed this lawsuit against Allianz in New York state court on September 19, 2016, and Allianz removed it to federal court. A-234.[4] The Trust is the sole plaintiff. A-7. Miryam Muschel ("Muschel"), the person Allianz believed to be the owner when this lawsuit was filed, has never been named as a party to this case.

The Trust sued Allianz over a dispute concerning the payment of premium and whether the Policy was still in force. The Trust sought a declaration, which only the owner of the Policy could obtain, that the Policy was in full force and effect. A-25. The Complaint alleges that the insured under the Policy, Dora Zupnick, was alive when the Complaint was filed (A-24, ¶54), and the Trust's initial brief in this appeal states that she "is still living, and, naturally, this is not an action to recover benefits under the policy." Trust's Brief at 2.

1. The Policy provisions concerning ownership

There are only a few provisions of the Policy concerning ownership of the Policy and the rights of ownership that are relevant to this appeal. Allianz's argument -- that the Trust lacks contractual standing to file this lawsuit -- is based

[4] References to the record are to the Appendix filed by Appellant with Appellant's initial brief, noted "A-[page number]."

upon a Policy provision titled "Assignment of this Policy," which appears on page 14 of the Policy. That provision provides in full:

> You may assign or transfer all or specific ownership rights of this policy. ***An assignment will be effective upon Notice***. We will record your assignment. We will not be responsible for its validity or effect, nor will we be liable for actions taken on payments made before we receive and record the assignment.

A-64 (emphasis added).

This assignment provision contains a number of capitalized words that are defined in the Policy. "Notice" is defined in the Policy as "Our receipt of a satisfactory written request." A-54. "We" is defined in the Policy as "Allianz Life Insurance Company of North America. The terms We, Our, Us or the Company may not be capitalized throughout this policy." A-54. "You" is defined in the Policy as "The owner of this policy named in the application, unless later changed. …" A-54.

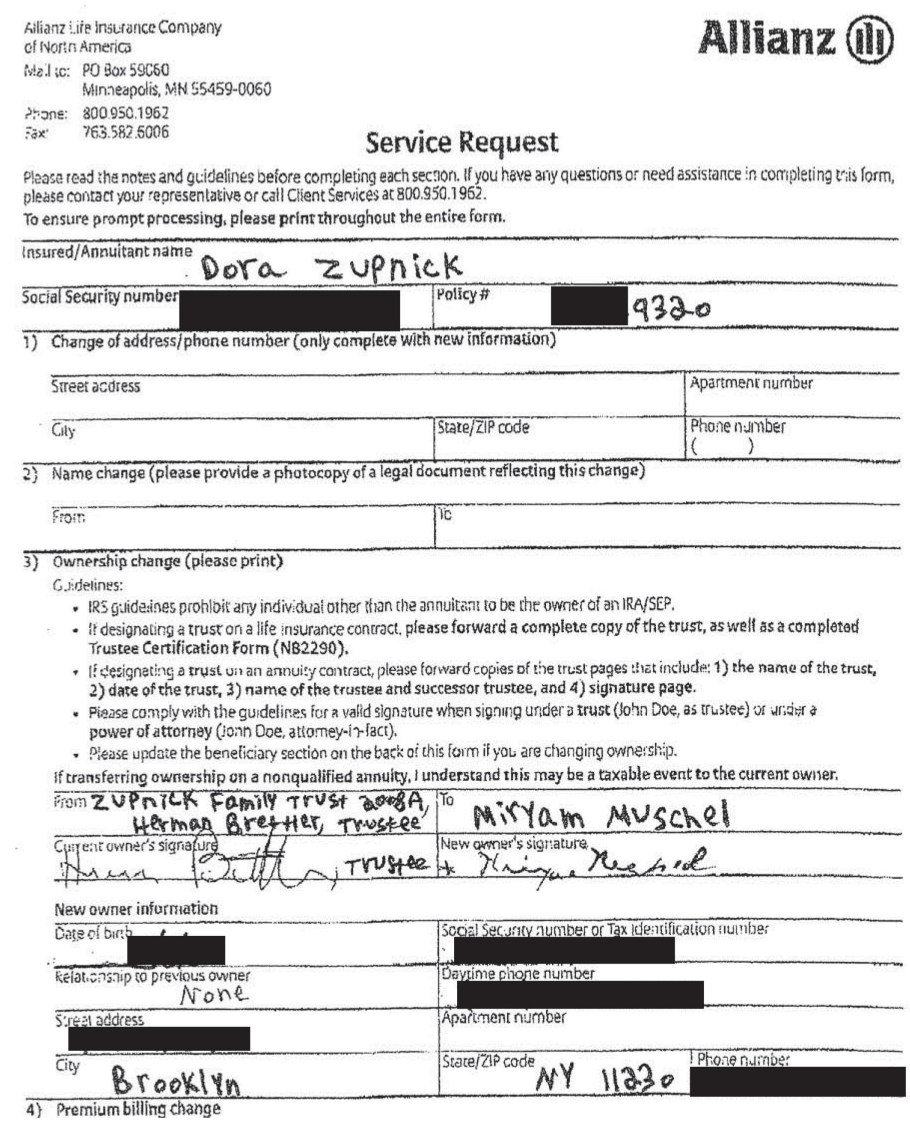
The Policy also provides that the owner of the Policy is "solely entitled to exercise all rights of this policy until the death of the Insured." A-54 (part of the Policy's definition of "You and Your").

The Trust repeatedly refers to the Policy as requiring that Allianz "record" a change of ownership, stating at one point in its initial brief that Allianz "would not record" the purported ownership change from Muschel to the Trust. *See e.g.*, Trust's Brief at 6 ("the change of ownership must be recorded with the insurer"), 7 ("the

failure by the plaintiff to record the ownership change"), 9 ("Allianz would not record the sale in its own records"). However, the Trust does not (and cannot) cite to any portion of the record to support the proposition that Allianz refused to record or for any reason failed to record any change of ownership of which it was made aware -- because Allianz admittedly was not notified of such a change prior to the Trust filing this lawsuit. Obviously, Allianz could not "record" an assignment of which it was not made aware.

2. The ownership of the Policy

The Trust was the applicant for the Policy, and the original owner of the Policy. A-7, A-43 - A-47. By means of an Allianz Service Request form, the Trust notified Allianz, on or about April 27, 2012, that the ownership of the Policy should be changed from the Trust to Miryam Muschel, individually. A-31.



Allianz Life Insurance Company
of North America
Mail to: PO Box 59060
Minneapolis, MN 55459-0060
Phone: 800.950.1962
Fax: 763.582.6006

Allianz

Service Request

Please read the notes and guidelines before completing each section. If you have any questions or need assistance in completing this form, please contact your representative or call Client Services at 800.950.1962.

To ensure prompt processing, please print throughout the entire form.

Insured/Annuitant name: Dora Zupnick

Social Security number: [redacted] Policy #: [redacted]9320

1) Change of address/phone number (only complete with new information)

Street address | Apartment number

City | State/ZIP code | Phone number ( )

2) Name change (please provide a photocopy of a legal document reflecting this change)

From | To

3) Ownership change (please print)

Guidelines:

- IRS guidelines prohibit any individual other than the annuitant to be the owner of an IRA/SEP.
- If designating a trust on a life insurance contract, please forward a complete copy of the trust, as well as a completed Trustee Certification Form (NB2290).
- If designating a trust on an annuity contract, please forward copies of the trust pages that include: 1) the name of the trust, 2) date of the trust, 3) name of the trustee and successor trustee, and 4) signature page.
- Please comply with the guidelines for a valid signature when signing under a trust (John Doe, as trustee) or under a power of attorney (John Doe, attorney-in-fact).
- Please update the beneficiary section on the back of this form if you are changing ownership.

If transferring ownership on a nonqualified annuity, I understand this may be a taxable event to the current owner.

From: Zupnick Family Trust 2008A, Herman Brettler, Trustee | To: Miryam Muschel

Current owner's signature: [signature], Trustee | New owner's signature: [signature]

New owner information

Date of birth: [redacted] | Social Security number or Tax Identification number: [redacted]

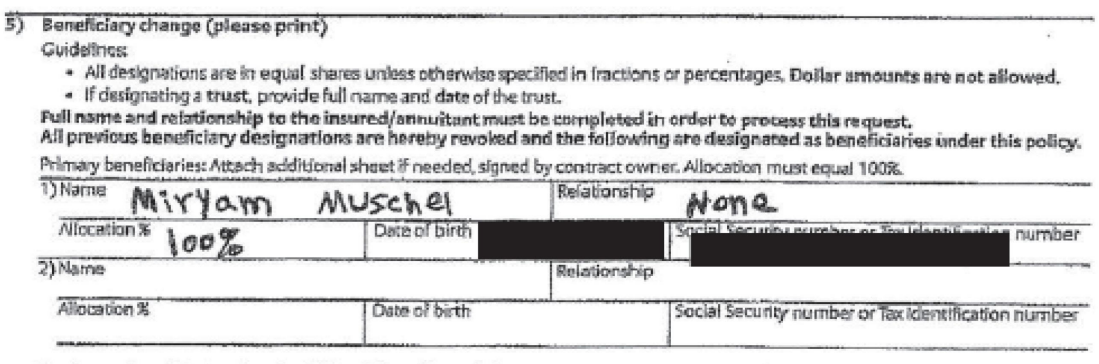
Relationship to previous owner: None | Daytime phone number: [redacted]

Street address: [redacted] | Apartment number

City: Brooklyn | State/ZIP code: NY 11230 | Phone number: [redacted]

4) Premium billing change

The Service Request also changed the beneficiary of the Policy to Miryam Muschel, individually. A-32.



5) Beneficiary change (please print)

Guidelines:

- All designations are in equal shares unless otherwise specified in fractions or percentages. Dollar amounts are not allowed.
- If designating a trust, provide full name and date of the trust.

Full name and relationship to the insured/annuitant must be completed in order to process this request.
All previous beneficiary designations are hereby revoked and the following are designated as beneficiaries under this policy.

Primary beneficiaries: Attach additional sheet if needed, signed by contract owner. Allocation must equal 100%.

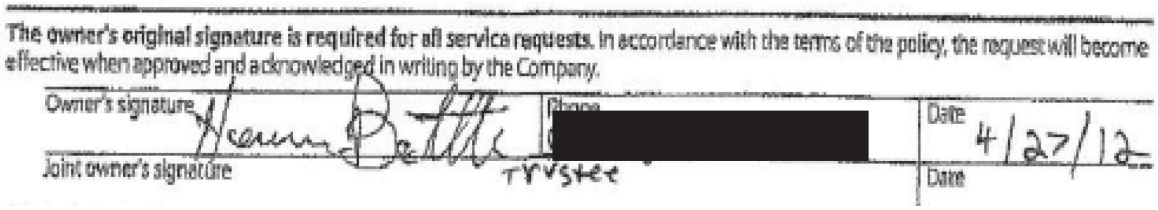
1) Name: Miryam Muschel | Relationship: None

Allocation %: 100% | Date of birth: [redacted] | Social Security number or Tax Identification number: [redacted]

2) Name | Relationship

Allocation % | Date of birth | Social Security number or Tax Identification number

Mr. Brettler signed this Service Request as the trustee of the Trust. A-32.


The owner's original signature is required for all service requests. In accordance with the terms of the policy, the request will become effective when approved and acknowledged in writing by the Company.

Owner's signature Henry Brettler Trustee Phone [redacted] Date 4/27/12

Joint owner's signature Date

This Service Request was submitted to Allianz by an attorney at a law firm that apparently was representing the Trust at the time. A-30.

LIPSIUS – BENHAIM LAW, LLP
Attorneys at Law
80-02 Kew Gardens Road
Kew Gardens, NY 11415
Telephone 212-981-8440
Facsimile 888-442-0284

FACSIMILE COVER SHEET

DATE:	May 24, 2012
FROM:	Phillip Manela, Esq. pmanela@lipsiuslaw.com
TO:	Allianz Life Insurance Company of North America ATTN: Client Services
FAX NO.:	763-582-6006
Re:	Policy No.: [redacted]9320 Insured: Dora Zupnick Ownership / Beneficiary Change Our File No.: 4447.0001

You should receive 3 pages including this cover sheet. If you do not receive all pages, please call (212) 981-8440.

Counsel of record for the Trust in this action in both the District Court and this appeal are members in the same law firm. A-233; Trust's Brief cover page.

Allianz was not notified of any change in the ownership of the Policy between the change of owner noticed in 2012 and the filing of this lawsuit. A-220.

B. The Relevant Proceedings in the District Court

Allianz moved to dismiss in the District Court based on, *inter alia*, the Trust's lack of contractual standing to sue Allianz for rights with respect to the Policy. A-160 – A-164, A-222. In addition to memoranda of law, both parties submitted declarations either in support of, or in opposition to, the motion to dismiss. A-28 – A-68, A-69 – A-150, A-151 – A-182. The District Court found that it was appropriate to consider the declarations in deciding the motion to dismiss, since they presented "documents either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied on in bringing suit …," a decision to which neither party objected. A-227 (citations omitted). The District Court did not hold a hearing on the motion to dismiss. The scheduled briefing on the motion was completed when Allianz filed its reply memorandum on May 5, 2017. A-236 (Docket entry 23). Notices of Supplemental Authority were filed by Allianz on July 20, 2017 and February 16, 2018. A-236 (Docket entries 24 and 25).

On October 10, 2018, the District Court issued an ECF text-only Order to Show Cause, which stated in full:

> ORDER TO SHOW CAUSE. Plaintiff is directed to submit admissible proof, on or before October 24, 2018, as to whether notice was given to defendant of the purported transfer of policy

> ownership from Miryam Muschel to the Zupnick Family Trust 2008A.

A-236.

The Trust did not submit any "admissible evidence" in response to the Order to Show Cause, instead submitting a letter of counsel, which in part stated that "***Plaintiff [the Trust] did not notify Allianz that the policy was transferred back*** from Miryam Muschel to the Zupnick Family Trust 2008A ("the Trust") ***until the filing of the complaint in this matter***." A-220 (emphasis added).

Unlike 2012, when the ownership and beneficiary designation for the Policy were changed to Muschel based upon a written notification provided to Allianz, the Trust admitted in its counsel's letter to the District Court that no one submitted written notification in any form to Allianz of a change of ownership from Muschel back to the Trust prior to the filing of the Complaint in this action. Furthermore, there is no evidence in the record that anyone notified Allianz of a change of owner to the Trust in any manner, at any time prior to the filing of the Complaint in this case.

In the Order granting in part Allianz's motion to dismiss, the District Court concluded that both Muschel and the Trust "failed to provide actual, much less contractually adequate, notice. Therefore, as of the commencement of this action, the Trust did not own the policy and lacked the right to sue under New York law. … Plaintiff's response to the Court's order to show cause is fatal, and the complaint

must be dismissed." A-229 – Order at 9. "Therefore, as of the commencement of this action, the Trust did not own the policy and lacked a right to sue under New York law." *Id.* The District Court consequently granted Allianz's motion to dismiss based upon the Trust's lack of "contractual standing" to sue to enforce the Policy. A-229.

SUMMARY OF THE ARGUMENT

The District Court correctly dismissed this case based upon its finding that the Trust was not the owner of the Policy, and the well-established legal principle that only the owner of the Policy may sue to enforce or exercise rights with respect to the Policy, a conclusion reinforced by the Policy's provision that only the owner of the Policy has rights under the terms of the Policy.

The Policy here is freely assignable, and provides that all one has to do to assign or change the ownership of the Policy to be effective and binding on Allianz is to inform Allianz of such a change in writing. No particular form of written notice is required. Such a common sense provision is prudent and innocuous.

It is undisputed that Allianz was notified in writing in 2012 that the Trust had sold or transferred the policy to Muschel; that Allianz implemented that change of ownership; and that Allianz was not notified of any further change of ownership prior to the filing of the Complaint four years later. Allianz's understanding at the time that the Complaint was filed was that Muschel was the owner of the Policy.

Insurance policies are interpreted in the same manner as other contracts. Words and phrases used should be given their plain meaning, a policy should be construed so as to give full meaning and effect to all of its provisions, and an interpretation that renders a provision superfluous or meaningless should be avoided. Courts are not free to re-write insurance policies. The application of these principles of interpretation to the Policy compels the conclusion reached by the District Court that the Trust was not the Policy's owner and lacks standing to sue.

Citing no authorities for the proposition that the well-settled principles of interpretation do not apply here, the Trust contends that the assignment provision of the Policy should not be enforced for other reasons. But all of the authorities cited by the Trust in support of this approach are distinguishable, either because they are based upon public policy reasons that invalidate certain constraints on the assignment of insurance policies, none of which are applicable here, or because they address contract provisions that are substantially different and far more restrictive than the assignment provision here.

This Court has upheld the validity of assignment provisions that require the affirmative consent of the insurer for any assignment, a provision far more restrictive than the simple notice provision here, demonstrating that the Trust's legally unsupported argument that "any restriction" on the assignment of the Policy fails.

The assignment provision of the Policy is explicit and clear, and the Trust has provided no persuasive reason why the simple notice requirement of the Policy should not be enforced. Not to affirm the ruling of the District Court, and enforce the clear Policy provision, would inappropriately erase a clear provision from the Policy. The Trust was not the owner of the Policy when this lawsuit was filed, and the District Court therefore correctly dismissed this lawsuit.

ARGUMENT

The basic issue here is what are the consequences, if any, of the admitted failure of anyone providing written notice to Allianz, as required by the clear terms of the Policy, that the ownership of the Policy was transferred from Muschel to the Trust at some time between May 24, 2012 and the filing of the Complaint in this action. The Trust contends that there are no consequences whatsoever of such failure, and that the ownership of the Policy nevertheless was changed despite the admitted non-compliance with the Policy's assignment provision. Allianz contends that the simple and clear provisions of the Policy should be followed, and that at the time that the Complaint in this lawsuit was filed, Muschel was "solely entitled to exercise all rights of this policy until the death of the Insured." A-54.

I. Only The Owner Of The Policy May Maintain An Action On The Policy

The Complaint in this action seeks a declaration that the Policy is in force and to enforce the terms of the Policy. A-25. New York law dictates that such a claim

may be pursued only by the owner of an insurance policy. "Only the policy owner has standing to sue based on an insurance policy." *Pike v. N.Y. Life Ins. Co.*, 72 A.D.3d 1043, 1049 (2d Dep't 2010), quoted in *Rosano v. Freedom Boat Corp.*, 2015 WL 4162754 at *4 (E.D.N.Y. July 8, 2015). The Policy is consistent with and reinforces this undisputed principle of New York law, providing that the owner of the Policy is "solely entitled to exercise all rights of this policy until the death of the Insured." A-54 (part of the Policy's definition of You and Your).[5] The Trust seeks to have the District Court confirm its rights as the owner of an in-force policy, pending the death of Dora Zupnick.

Once an individual or entity assigns its rights in a policy, it no longer has standing to bring an action based on that policy. *See Gupta v. Nat'l Life Ins. Co.*, No. 04-cv-0252, 2006 WL 2000118, at *3 (W.D.N.Y. 2006) (granting summary judgment for defendant on claims seeking additional benefits under insurance policies, as the Trust had previously assigned its rights in the policies and thus had no standing to sue).

[5] Appellant does not claim to be able to enforce the Policy as a third party beneficiary of the Policy, and has not alleged facts demonstrating that it is a third party beneficiary of the Policy. Moreover, the policy provision quoted above clearly demonstrates that there was no intention that anyone but the owner of the Policy have any rights under the Policy. *See Rosano*, 2015 WL 4162754, at *4.

The Trust's contractual standing to sue to enforce the Policy is determined as of the date it filed the Complaint in this action. *Baur v. Veneman*, 352 F.3d 625, n. 11 (2nd Cir. 2003); *Hargrave v. Vermont*, 340 F.3d 27, 34 n. 7 (2nd Cir. 2003).

II. Insurance Policies Are Enforced According To Their Clear Terms And Plain Meaning, To Give Effect To All Of The Provisions Of The Policy And The Intention Of The Parties To The Policy

The Trust has not cited any authorities that support the proposition that the relatively innocuous notice provision here, which is in clear language, should not be enforced. None of the Trust's authorities support the proposition that the well-established rules of policy interpretation do not apply to the assignment provision of the Policy. The Trust has cited to no exception to the applicability of the principles of policy interpretation to the fact situation here.

Insurance policies are interpreted according to general rules of contract interpretation. *Olin Corp. v. American Home Assurance Co.*, 704 F.3d 89, 99 (2d. Cir. 2012); *In re Prudential Lines Inc.*, 158 F.3d 65, 77 (2d. Cir. 1998). Words and phrases in a contract should be given their plain meaning, and the contract should be construed so as to give full meaning and effect to all of its provisions. Any interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless is not preferred and will be avoided if possible. *Olin Corp.*, 704 F.3d at 99; *Horowitz v. American Int'l Group, Inc.*, 498 F. App'x. 51, 53 (2d. Cir. 2012); *In re Prudential Lines*; *Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*,

10 N.Y.3d 170, 177 (2008) ("unambiguous provisions of an insurance contract must be given their plain and ordinary meaning"); *County of Columbia v. Cont'l Ins. Co.*, 83 N.Y.2d 618, 628 (1994) ("An insurance contract should not be read so that some provisions are rendered meaningless.").

"[A]n insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract." *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42 (2d. Cir. 2006) (citation and internal quotation marks omitted); *see also Goldberger v. Paul Revere Life Ins. Co.*, 165 F.3d 180, 182 (2d. Cir. 1999) ("In New York State, an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract.") (citation and internal quotation marks omitted).

If the words of an insurance policy are clear and unambiguous, they must be accorded their plain and ordinary meaning and the policy enforced as written; a court is not free to modify the terms of an insurance policy by judicial construction. *Parks Real Estate Purchasing Grp.,* 472 F.3d at 42*; Keren Habinyon Hachudosh D'Rabeinu Yoel of Satmar BP v. Philadelphia Indem. Ins. Co.*, 462 F. App'x. 70, 71-72 (2d. Cir. 2012); *Horowitz*, 498 F. App'x. at 53.

III. The Policy Clearly Provides How The Ownership Of The Policy May Be Changed, For The Benefit Of All Parties

A. The Assignment Provision of the Policy is Clear and Unambiguous

By its express terms, the Policy is freely assignable. The only contractual condition on the assignment or change of ownership of the Policy is that Allianz be notified in writing of any such changes. This is a simple and easy task, and helps ensure that Allianz is aware of and implements the intention of the current owner of the Policy.

The Policy's assignment provision is clear and explicit:

> You may assign or transfer all or specific ownership rights of this policy. ***An assignment will be effective upon Notice.*** We will record your assignment.

A-64 (emphasis added).

"Notice" is defined by the Policy to be Allianz's receipt of "a satisfactory written request." A-54.

These provisions are simple, clear, unambiguous, and written in plain language, expressly permitting assignments and ownership changes but simply requiring that the owner of the Policy notify Allianz in writing of any ownership change or assignment in order to effect and bind Allianz. This is a common sense and practical provision. Since the owner is "solely entitled to exercise all rights of this policy until the death of the Insured" (A-54) it is very important that Allianz know who the owner of the Policy is at all times.

B. The Assignment Provision does not Prohibit Assignments, and Promotes Clarity in Policy Relationships

Unlike some of the contractual provisions mentioned in the Trust's initial Brief, the assignment provision of the Policy does not purport to prevent or invalidate an assignment of which Allianz is not notified. The owner of the Policy is free to deal with its property rights in the Policy as it sees fit. The import of the notice provision is that unless Allianz is notified of the assignment, the assignment is not effective with respect to and does not affect Allianz.

For example, Muschel, as the owner of the Policy, was free to assign or sell her rights with respect to the Policy to the Trust. They could enter into a contract for sale or assignment that was valid and binding as between them. But if Allianz is not notified of such an assignment, the insured passes away, and Muschel submitted a proper claim to Allianz under the Policy for the death benefit, Allianz would be contractually bound, by the terms of the Policy, to pay the $8 million death benefit to Muschel. If Muschel kept the Trust in the dark, she might be able to obtain the payment of the death benefit from Allianz without the Trust knowing. The Trust might have a cause of action against Muschel to recover the death benefit, based upon their contract, but would not have a contractual right to sue Allianz for the payment of the death benefit, because it was not a party to the Policy.

The notice sentence of the assignment provision is intended to facilitate clear guidance to Allianz as to who is entitled to exercise the rights of the Policy as its

owner. The recipient of an assignment, for example here the Trust, could avoid the potential dangers of the hypothetical scenario mentioned above simply by notifying Allianz that it had become the owner of the Policy, a simple, unilateral, unburdensome act. The Trust and its counsel provided such a notice in 2012, but inexplicably, through no fault of Allianz, failed to provide notice of the later purported transfer back to the Trust.

The assignment provision provides that "[w]e will record your assignment." A-64. Once notified in writing of an assignment, Allianz does not have discretion under the assignment provision of the Policy to reject a notification of change of owner that it receives from the owner of the Policy. There is no evidence in the record that Allianz ever failed to record any change of ownership provided to it, including with respect to the Policy.

The assignment provision of the Policy is set forth in clear words: written notice to Allianz is required for anyone to have the rights of the owner of the Policy. Consistent with the well-established principles of policy interpretation, this provision should be implemented according to its plain meaning to give effect to the clear intention of the parties to the Policy with respect to how the owner of the Policy may assign or change the ownership of the Policy. Not to do so would inappropriately and unnecessarily read this clear provision completely out of the

Policy, in violation of multiple undisputed principles of insurance policy interpretation.

IV. The Trust Admits That The Purported Change Of Ownership From Muschel To The Trust Failed To Comply With The Requirements Of The Policy

As demonstrated above, the Policy expressly and clearly provides that the ownership of the policy can be changed at any time, but that a change of ownership is not effective unless and until Allianz is notified of the change in writing. A-64; *see supra* at 3. Although the Trust complied with the provisions of the Policy in conveying ownership of the Policy from the Trust to Muschel in 2012, a later transfer from Muschel to the Trust was not made in compliance with the Policy provisions. The Trust has admitted, on the record, that it did not notify Allianz at all, in writing or otherwise, of a change of ownership from Muschel to the Trust prior to the filing of the Complaint in this action. A-220. The Trust has offered no excuse or explanation as to why Allianz was not notified of such an ownership change.

The Complaint includes the conclusory allegation that "[t]he Trust is the owner of the Policy." Complaint, ¶5, App. 41. Allianz moved to dismiss, arguing in part that the Trust did not have standing to sue on the Policy because it was not the owner of the Policy. *See* A-235 (Docket entry 16-18). In support of this motion Allianz submitted a declaration (A-28) attaching a Policy Service Request submitted

to Allianz, dated April 27, 2012, notifying Allianz of a transfer of the ownership of the Policy from the Trust to Miryam Muschel. A-30 – A-32.

The 2012 submission complied with the requirements of the Policy to change the ownership of the Policy from the Trust to Muschel, as it notified Allianz, in writing, of a change of ownership. As it was contractually bound to do, Allianz honored and implemented this noticed change of Policy ownership. The 2012 Service Request also provided written notice of the change of the beneficiary of the Policy to name Muschel the sole beneficiary of the Policy. A-32. The Trust admits that "[i]n April 2012, the Policy was sold and transferred to Miryam Muschel, who became the new owner of the Policy." Trust's Brief at 2.

The record reflects that the 2012 change of ownership and beneficiary were submitted to Allianz by the Trust's counsel, which also is counsel of record for the Trust in this case. *See* A-30; A-233; Trust's Brief cover page. Clearly, both the Trust and its counsel knew, in 2012, that to change the ownership of the Policy consistent with the provisions of the Policy, Allianz had to be given written notice of such a change, and they did so.

On October 10, 2018, the District Court issued an ECF text-only Order to Show Cause, which stated in full:

> ORDER TO SHOW CAUSE. Plaintiff is directed to submit admissible proof, on or before October 24, 2018, as to whether notice was given to defendant of the purported transfer of policy

> ownership from Miryam Muschel to the Zupnick Family Trust 2008A.

A-236.

In response to the Order to Show Cause, instead of complying with the Order to Show Cause by submitting such admissible evidence, the Trust submitted only an unsworn letter of counsel, which affirmatively stated that "Plaintiff did not notify Allianz that the policy was transferred back from Miryam Muschel to the Zupnick Family Trust 2008A ("the Trust") until the filing of the complaint in this matter." A-220.

The Trust has admitted that Allianz was not notified of a change of ownership of the Policy from Muschel to the Trust, as expressly required by a clear provision of the Policy, prior to the filing of the Complaint in this action. A-220. Therefore, pursuant to the admitted and clear provisions of the Policy, which both the Trust and its counsel clearly understood at the time, the Trust was not the owner of the Policy when the Complaint in this action was filed, the Trust does not have standing to bring this action, and the dismissal of this case by the District Court was appropriate.

V. The District Court's Decision Is Consistent With Applicable Law

The few authorities cited by the Trust are distinguishable on multiple grounds. The two principal authorities cited by the Trust apply the laws of other states and are based upon public policies that are irrelevant here. The Trust's Brief admits that the Policy provision at issue here is not an anti-assignment provision, and it is even less

restrictive than the no-transfer clause provisions that have been upheld and enforced by this Court. Finally, the authorities cited by the Trust consider policy provisions that are not remotely similar to the assignment provision here, and are inapplicable.

More importantly, this Court has enforced an insurance policy provision requiring the consent of the insurer for any policy ownership change to be effective. Such a provision is far more restrictive of the ability of a policy owner to change the ownership of an insurance policy than the simple notice provision here. There is no legal or logical reason that a requirement that the insurer consent to an assignment is valid and enforceable, while a provision requiring simply that the insurer be notified in writing of a change in ownership is invalid and not enforceable.

The Policy provision here is simple, stated in plain language, and is found in the short, four sentence assignment provision of the Policy. Not to enforce this notice provision would impermissibly re-write the Policy, and read that clear provision out of the Policy entirely. Such a result would be contrary to well-established legal principles of insurance policy interpretation that the Trust has not distinguished, rebutted, or contradicted.

A. Policy Interpretation Principles are Applicable to Policy Assignment Provisions

The Trust has not cited any authority for the proposition that the well-established principles of insurance policy interpretation do not apply to provisions concerning the assignment of the Policy or to the change of ownership of the Policy.

Having failed to find an exception to the applicability of the principles of policy interpretation to the specific type of policy provision at issue here, such principles of policy interpretation apply. The assignment provision here is explicit, clear, and in plain language. It must be enforced according to the plain meaning of its wording, and not read out of the Policy completely, as the Trust advocates. To sustain the Trust's position would violate multiple principles of policy interpretation.

B. More Restrictive Policy Provisions Requiring the Insurer's Consent to any Assignment of a Policy Have Been Upheld

This Court, and other courts applying New York law, have upheld policy assignment provisions that are much more "restrictive" than the one present here. *Globecon Group, LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165, 170 (2d. Cir. 2006) considered a "no-transfer clause," which in *Globecon Group* provided "that the 'rights and duties [of the insured] under th[e] policy may not be transferred without [Hartford's] written consent except in the case of death of an individual Named insured.'" *Id.* At 168 (quoting from the policy). The District Court had granted Hartford Fire Insurance summary judgment "based on the no-transfer provision in its policy …." *Id.* at 170. This Court held that

> New York follows the majority rule that such a provision is valid with respect to transfers that were made prior to, but not after, the insured-against loss has occurred.

Id.; accord, Travelers Indem. Co. v. Israel, 354 F.2d 488, 490 (2d. Cir. 1965) (policy provision required the written consent of the insurer for assignment; the court stated

that given that policy provision, the assignment prior to loss is ineffective without the consent of the insurer); *Luvata Buffalo, Inc. v. Lombard General Ins. Co. of Canada*, No. 08-cv-00034, 2010 WL 826583 at *9 (W.D.N.Y. Mar. 4, 2010) (stating that assignment prior to loss is ineffective without the consent of the insurer); *SR Inter. Bus. Ins. Co., Ltd. v. World Trade Ctr. Properties, LLC*, 375 F. Supp. 2d 238, 245-46 (S.D.N.Y. 2005) (*id.*, citing *Travelers Indemnity*, 354 F.2d at 490).

The insured under the Policy here, Dora Zupnick, was alive when the purported change of ownership from Muschel to the Trust occurred, when this lawsuit was filed, and even as of the filing of the Trust's Brief. Trust's Brief at 2. The assignment provision here is much less "restrictive" than the consent provisions that have been upheld, which require the affirmative act of consent by the insurer for any assignment of a policy. Here, the Policy owner need not ask for Allianz's consent to an assignment, and no affirmative action by Allianz is required for the assignment of the Policy. The only action needed under the Policy is an action by the owner of the Policy, i.e., the owner of the Policy must notify Allianz, in writing, of any assignment.

Despite this clear case law, the Trust argues, without citing any legal authorities whatsoever in support, that "***any*** restriction, no matter how worded, is invalid – including the restriction that Allianz must be notified." Trust's Brief at 12 (emphasis added). The Trust cites no legal authorities or public policy that supports

such a broad, controlling position that would invalidate a modest policy provision such as a notification provision, when the authorities that do exist have upheld more restrictive assignment provisions.

C. The Trust's Authorities, Which Invalidated the Prohibition of Assignment to a Class of Persons, are Inapplicable

Having admitted that the purported ownership transfer from Muschel to the Trust failed to comply with the assignment provision of the Policy, the Trust must find another way to avoid the inevitable conclusion reached by the District Court that the Trust was not the owner of the Policy and therefore lacked standing to sue Allianz. The two principal authorities cited by the Trust in support of its position, *Grigsby v. Russell*, 222 U.S. 149 (1911) and *Carton v. B & B Equities Grp., LLC*, 827 F. Supp. 2d 235 (D. Nev. 2011), do not support the Trust's position in this appeal.

Neither *Grigsby* nor *Carton* even mention, much less apply, New York law, they were appealed from courts in Nevada and Tennessee, they fail to consider the "no-transfer clause" principles cited above from this Court and the Court below, and they are based upon a specific, long-standing public policy to restrict or prohibit the assignment of policies to persons who do not have an insurable interest in the life of the insured, a concept referred to as the insurable interest or STOLI doctrines.[6] As

[6] The acronym STOLI stands for either stranger originated or stranger owned life insurance.

explained in those opinions, public policy has long disfavored STOLI, and some state laws prohibit certain policy assignments in STOLI situations, based in part on a public policy concern that such ownership promotes speculation or monetary wagers on the lives of unrelated persons. For some, large life insurance policies became a separate class of investments, and some states have enacted laws to regulate such investment activities.

Allianz's motion to dismiss was not based upon the insurable interest or STOLI doctrines. Rather, as the Order appealed from demonstrates, the motion was granted solely based upon the contention that the Trust could not state a claim because it was not the owner of the Policy. A-228-229.

The assignment provision in the Policy here does not prohibit the assignment of the Policy completely, does not prohibit the assignment of the Policy to a category of persons, and does not prohibit the assignment of the Policy to any identifiable individual. Rather, the assignment provision here permits the assignment of the Policy to whomever the owner of the Policy wishes to assign or sell the Policy to, and only requires that the owner notify Allianz, in writing, of the change in order to make the assignment binding on Allianz.

None of the authorities cited by the Trust prohibit such a requirement for the assignment of the Policy, which, compared to the provisions in the cases cited by the

Trust, is innocuous and does not provide any significant practical restriction on the ability of the owner to assign or change the owner of the Policy.

D. *Grigsby* Involved a Blanket Prohibition on Transfer that is not Present Here.

Grigsby was appealed from a court sitting in Tennessee, does not mention New York law or the no-transfer clause principles, and involved a policy that prohibited assignments to anyone who did not have an insurable interest in the life of the insured. The policy was owned by the insured and later assigned to an investor for consideration because the insured needed to raise money for a medical procedure. The issue addressed by the Supreme Court was whether the assignment by the owner to a stranger was valid, because of the insurable interest doctrine and the policy provision. This opinion was issued in 1911, when it was not nearly as common as it is today for an investor who is a stranger to the insured to purchase a life insurance policy as an investment. The Court simply held that life insurance policies may be assigned or sold to persons who do not have an insurable interest in the life of the insured, holding invalid the policy provision that prohibited the sale of the policy to anyone in that category under any circumstances. 222 U.S. at 156.

The Court also noted that the traditional prohibition on using a life insurance policy to wager on when someone may die was not applicable in the situation before it, because the insured had passed away and the insurer had placed the death proceeds in an account controlled by the court. *Id.* at 155. There is no insurable interest issue

in this case, and the assignment provision here is fundamentally different than that in *Grigsby*. Therefore, *Grigsby* is inapplicable.

E. *Grigsby* Does Not Stand for the Propositions for Which it is Cited

The Trust misrepresents the scope of the holding in *Grigsby* when it first mentions the case, quoting parenthetically from *Grigsby* that "To deny the right to sell … is to diminish appreciably the value of the contract in the owner's hands." Trust's Brief at 9. What is omitted from the *Grigsby* opinion due to the ellipsis is important. The full sentence from the Grigsby opinion reads: "To deny the right to sell ***except to persons having such an interest*** [i.e., an insurable interest in the life of the insured] is to diminish appreciably the value of the contract in the owner's hands." 222 U.S. at 156 (emphasis added to highlight the text that was missing from the Trust's quotation).

The Trust cites *Grigsby* for the proposition that an insurer cannot prohibit or condition the right of the owner of a life insurance policy to sell that policy at all, because doing so diminishes the value of the policy to its owner. Trust's Brief at 10. However, the holding of *Grigsby* addresses only the prohibition of the sale of a policy to someone who does not have an insurable interest in the life of the insured. While prohibiting the sale of a policy to an entire category of prospective buyers might "diminish appreciably the value of the contract," as the Court stated in *Grigsby*, simply requiring that the owner of the Policy notify Allianz in writing of a

change of ownership does not diminish the value of the Policy at all, is not impermissible under *Grigsby*, and is consistent with New York law, including rulings of this Court, allowing for certain restrictions on assignment, such as the requirement for the consent of the insurer.

The Trust then continues with a misstatement of the fact record in this case, stating that "[t]he fact that Allianz ***would not record*** the sale in its own records should not be of any consequence." Trust's Brief at 9 (emphasis added). This purported statement of "fact" is not accompanied by a citation to the record of this case, and misstates the record. There is nothing in the record of this case that supports or even implies that Allianz ever refused or omitted to record any sale or transfer of the Policy of which it was made aware.

To the contrary, Allianz recognized and recorded the transfer of ownership from the Trust to Muschel in 2012, when it was notified of that event, but Allianz could not record, or refuse to record, a later purported transfer of ownership from Muschel to the Trust, because, as the Trust admits, no one told Allianz of that purported change of ownership.

The implication in the statement in the Trust's Brief that Allianz "would not" have recorded the ownership change from Muschel to the Trust had it complied with the assignment provision of the Policy also is contrary to Allianz's undisputed

conduct in 2012, when it recognized and recorded the change of ownership from the Trust to Muschel when notified of the change.

F. The Basis for the Standing Holding in *Carton* is Dissimilar to that Here, and is Inapplicable.

Carton has nothing to do with a change of ownership of the policy at issue in that case, and applies Nevada and California law without mentioning New York law or any no-transfer clause opinions. In *Carton*, investors in life insurance policies had taken a collateral assignment of the policy and paid premiums without knowledge that the policy was STOLI and hence void *ab initio* as against public policy. Those collateral assignees sued the insurer, seeking to have the policy declared void *ab initio* as STOLI, and to have the premiums that they had paid to the insurer for the policy returned to them. This was a strategy by the investors to try to avoid losing both the benefits of the policy and the premiums that they had paid for that policy.

The District Court agreed that the policy was STOLI, and held that the policy was void *ab initio* as against public policy. However, with respect to standing, the court found that since the policy was void *ab initio*, the investors could not have standing to sue on the policy based upon the collateral assignment, since, as a matter of law, they could not sue on a collateral assignment of a policy that never existed. The District Court, however, found that the investors had standing to claim the recovery of the premium paid on the void policy based upon equitable principles. Neither of these standing holdings support the Trust's position here.

Carton bears no similarity whatsoever to this case other than that both cases deal with a standing issue. But the bases for the standing issue in the two cases are fundamentally different. The standing issue here is based on whether the Trust was the owner of the Policy when this lawsuit was filed, based upon its admitted failure to comply with the provision of the Policy governing changes of ownership, while the standing issue in *Carton* is based upon the dissimilar issue of whether standing can be conferred by an assignment of a policy that has been declared to be void *ab initio*. The alternative standing holding in *Carton* based upon the fact that the insurers "continue to hold premium payments provided by the Cartons for policies which were never valid …"[7] does not assist the Trust because the Trust does not seek a declaration that the Policy at issue here is void *ab initio* and a return of the premium paid. To the contrary, the Trust here sued to have the Policy declared to be in force.

G. There is no "Implicit" Holding of *Carton* Upon Which the Trust May Rely.

Since *Carton* does not directly support its position in this case, the Trust manufactures an "implicit" holding in *Carton* that is based upon a factual scenario that is not mentioned in the *Carton* opinion. The Trust posits that "**if the policies were not void *ab initio***, the *Grigsby* standard would allow the Cartons to have

[7] *Carton*, 827 F. Supp. 2d at 1245.

standing to bring suit against the insurers even though the assignment was not recorded with the insurers." Trust's Brief at 11 (emphasis added). This is speculation and wishful thinking, and has no basis whatsoever in the language of the *Carton* opinion. The hypothetical fact situation suggested by the Trust is not even mentioned in the *Carton* opinion, much less did that court express a view on the hypothetical fact situation posited by the Trust. To the contrary, the entire standing discussion in *Carton* is based upon the premise that the policy was void *ab initio*, and to speculate how the court would have ruled had the policy not been void is useless speculation, without any basis in the *Carton* opinion. It certainly is not the basis for finding an "implicit" alternative holding in that case that is persuasive authority here, particularly where the plaintiffs in *Carton* were seeking a refund of premium paid for a void policy based on equitable principles, where here the Trust desires that the Policy remain in full effect.

Neither *Grigsby* nor *Carton* address whether an insurer may require that the owner of a policy simply notify it of any change of ownership, or any remotely similar policy provision, and they are not helpful here.

H. The Trust's Authorities that Invalidated All Assignments are Inapplicable

1. The assignment provision here is not an "anti-assignment provision"

Finally, the Trust cites three opinions which address the validity and effect of contractual provisions that purport to deny the owner of a policy the right to make any assignment of a contract, to anyone, under any circumstances. Trust's Brief at 11-12. While such provisions, called "anti-assignment provisions," are disfavored, the inapplicability of these authorities is aptly demonstrated by the Trust's own admission that the assignment provision of the Policy here is not an anti-assignment provision. "Here, it can hardly be said that the restriction imposed by Allianz is an explicit bar on assignments." Trust's Brief at 12. Despite affirmatively stating that the assignment provision in the Policy at issue here is not the type of blanket anti-assignment provision considered in its cited authorities, the Trust's Brief inexplicably nevertheless seeks to apply principles from the anti-assignment policy provision cases to the admittedly fundamentally different Policy provision at issue.

In addition to the Trust's admission that the assignment provision here is not an anti-assignment provision, a court in a different case considering this exact assignment provision of an Allianz life insurance policy found that it was not an anti-assignment provision, since it freely permits assignments, requiring Allianz to record any written assignment provided to it.

> The assignment clause in the Allianz policies is, however, not an anti-assignment provision at all. It does not purport to void any invalid assignments or require Allianz's consent for an assignment to be effective; rather, it permits the policy owner to freely "assign or transfer all or specific ownership rights of this policy," and provides that any assignment "will be effective upon Notice." [record citation omitted]. The provision affirmatively requires Allianz to record each noticed assignment—"[w]e will record your assignment"—and disclaims any responsibility for the "validity and effect" thereof, as well as any liability "for actions taken on payments made before we receive and record the assignment." [record citation omitted].

Jakobovits v. Allianz Life Insurance Co. of N. A., 2017 WL 3049538 at *4 (S.D.N.Y. July 18, 2017).

As Judge Pauley recognized in *Jakobovits*, Allianz's assignment provision is "not an anti-assignment provision at all." Rather, the provision at issue in that case, which is identical to the one in the Policy here, provides that the Policy is freely assignable, and does not provide Allianz the discretion to refuse to recognize any valid assignments. To the contrary, it expressly provides that Allianz "will record your assignment," and merely provides that Allianz must be notified, in writing, of any assignments. *Jakobovits*, 2017 WL 3049538 at *4; *but see Jakobovits v. PHL Variable Life Ins. Co.*, No. 17-cv-3527, 2018 WL 2291311, at *4 (E.D. N.Y. May 18, 2018). However, if it is not made aware of the existence of an assignment, Allianz cannot record such an assignment.

2. The "anti-assignment provision" opinions cited by the Trust are inapplicable

In *Pro Cardiaco Pronto Socorro Cardiologica S.A. v. Trussell*, 863 F. Supp. 135 (S.D.N.Y. 1994) (cited in Trust's Brief at 11), a medical benefits policy provided that the insured could direct Prudential, the insurer, to pay benefits directly to a hospital providing covered care, but that payments for care provided by a foreign hospital would be paid only to the insured. Care in this instance was provided by a hospital in Brazil. Prudential paid the policy benefits to the deceased insured's son, notwithstanding that Prudential also had, in its possession, an affidavit signed by the son directing Prudential to pay the hospital directly from the policy proceeds. The court held that despite the policy provision, "once put on notice of the assignment, defendant [Prudential] was liable for any money paid to Earl Trussell [the son] to which Pro Cardiaco [the foreign hospital] was entitled." *Id.* at 138. Here, unlike in *Pro Cardiaco*, Allianz was not on notice of a purported assignment back to the Trust at the time standing is determined, and the Trust therefore did not have standing to sue Allianz to enforce or assert rights under the Policy.

In *Allhusen v. Caristo Constr. Corp.*, 303 N.Y. 446, 103 N.E.2d 891 (1952) (cited in Trust's Brief at 12), the New York Court of Appeals upheld a contract prohibiting assignment because the language doing so was clear, in part out of respect for "the concept of freedom to contract." *Id.* at 452. This was a much more draconian provision than the one present here, which does not prohibit assignments.

The Trust concludes, without any supporting citations to authorities, that since the fact situation in *Allhusen* involved "only" the assignment of money due under a contract, it necessarily stands for the proposition that any restriction on assignment in any other context, "no matter how worded," none of which were before the court in *Allhusen*, are invalid.

This leap in analysis is completely unsupported and speculative, and is not based upon any discussion in the *Allhusen* opinion. The Trust's argument with respect to *Allhusen* is based solely on trying to predict how the *Allhusen* court would have reacted to a different fact situation than the one presented to it. Such unfounded speculation cannot provide any guidance for this court, especially since the Trust can cite to no opinion issued by the New York Court of Appeals in the subsequent 67 years that is closer factually to the situation present here.

Finally, in *Belge v. Aetna Cas. & Sur. Co.*, 39 A.D.2d 295 (N.Y. Sup. Ct., App. Div. 1972) (cited in Trust's Brief at 12), plaintiff sought to collect the proceeds of a fire insurance policy after a fire. Plaintiff had taken the rights to the insured real property by assignment, despite the fact that the contract by which the purported assignor, Mr. Damon and his wife, purchased the property prohibited the assignment of the property without the written consent of T. D. J. Builders, Inc. ("Builders"), which had sold the property to the Damons. Builders had been asked to consent to the transfer from the Damons, but had refused to consent. However, the court found

that Builders had waived the no-assignment provision of the contract, and that "[u]nder such circumstances, there is no way in which defendant [Aetna] could gain status to object to the validity of the assignment and thus avoid liability under its policy." *Id.* at 298. Given the finding of waiver, the court did not need to address the enforceability of the no sale provision which, unlike the assignment provision in the Policy here, was a complete restriction on assignment, a true anti-assignment provision. The Trust has not contended that Allianz waived the notification provision of the assignment provision of the Policy here, rendering *Belge* distinguishable. In any event, even without the waiver argument, *Belge* is not applicable here, since such a consent to assignment provision has been upheld by this Court in the specific context of the assignment of insurance policies. *See Globecon Group* and the other authorities cited at pages 20-22, *supra*.

CONCLUSION

For the foregoing reasons, Allianz requests that the Order appealed from and the final judgment of the District Court be affirmed.

Dated: April 19, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because this brief contains approximately 8,727 words, excluding the parts of the brief exempted from this calculation by Fed. R. App. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. 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 April 19, 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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