To be Argued by:
DAWN B. WILLIAMS
(Time Requested: 30 Minutes)

CTQ-2022-00004

Court of Appeals

of the

State of New York

HERMAN BRETTLER, Trustee of the Zupnick Family Trust 2008 A,

Plaintiff-Appellant,

– against –

ALLIANZ LIFE INSURANCE COMPANY OF NORTH AMERICA,

Defendant-Respondent.

QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT IN DOCKET NO. 19-87

BRIEF FOR DEFENDANT-RESPONDENT

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Date Completed: May 26, 2023

Corporate Disclosure Statement

Allianz Life Insurance Company of North America ("Allianz Life") is a Minnesota domestic insurance company, and part of the Allianz Group holding company organization.

Allianz Life, is a wholly owned subsidiary of Allianz of America, Inc. ("AZOA"), a Delaware corporation. AZOA is a wholly owned subsidiary of Allianz Europe, B.V., a private limited liability company registered in the Netherlands, which is a wholly owned subsidiary of Allianz Societas Europaea (Allianz SE), incorporated in Munich, Germany, the ultimate controlling entity for the Allianz Group.

Dated: May 30, 2023
New York, New York

Respectfully submitted,

By:_____
FAEGRE DRINKER BIDDLE & REATH LLP

Attorney for Defendant-Respondent Allianz Life Insurance Company of North America

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ISSUE FOR REVIEW

Where a life insurance policy provides that "assignment will be effective upon Notice" in writing to the insurer, does the failure to provide such written notice void the assignment so that the purported assignee does not have contractual standing to bring a claim under the Policy?[1] A-24; A-26.[2]

PRELIMINARY STATEMENT

The Policy provides that "You may assign or transfer all or specific ownership rights of this policy. An assignment will be effective upon Notice," defined as Allianz Life's "receipt" of a "written request." A-83, A-93.

There is no dispute that Allianz Life was never provided any notice that the ownership of the Policy was purportedly transferred from the previous owner to the Trust prior to the filing of the Complaint. Under the straightforward Policy provisions, then, the Trust cannot sue to enforce the Policy.

Faced with that obvious conclusion, the Trust seeks to invalidate the assignment clause. It contends that the assignment provision of the Policy should

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[1] The standing issue in this case is one of contractual standing, not constitutional standing. *See* A-260-263. The "Policy" is the life insurance policy issued by Allianz Life, found at A-61—A-96. "The Trust" refers to Appellant Herman Brettler, as trustee of the Zupnick Family Trust 2008A.

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

not be enforced because the challenged clause is a restraint on assignment. To the contrary, the Policy here is freely assignable – Allianz Life does not challenge the validity of the assignment as between the Trust and the prior owner. However, *to sue on the Policy* as the Trust seeks to do here, Allianz Life must have first been notified of the change in ownership in writing. Indeed, other courts to consider similar provisions have consistently found that notice must be provided to the insurer before the party claiming rights under an insurance policy can sue on it.

Because only the owner of a life insurance policy may enforce or exercise rights with respect to that policy while the insured is alive, the Trust did not have contractual standing to sue Allianz Life.

FACTUAL AND PROCEDURAL BACKGROUND

The Trust spends much of the Fact section of its initial brief ("Trust's Brief") focusing on conduct of Allianz Life that has nothing to do with either the ownership of the Policy or contractual standing.[3] At the same time, the Trust fails to provide this Court some of the information most relevant to the certified question, including: (1) the provisions of the Policy; and (2) the full procedural context. This critical information follows.

[3] For example, the terms of the grace notice, the attempted payment of premium by a check that was dishonored, and the lapse of the Policy, are not relevant to whether the Trust has standing to sue Allianz Life for declaratory relief.

I. The Ownership of the Policy and Its Pertinent Provisions

The Trust filed this lawsuit against Allianz Life in the Supreme Court of the State of New York, County of Kings, on September 19, 2016, and Allianz Life removed it to federal court. A-28. The Trust is the sole plaintiff. A-39. Miryam Muschel ("Muschel"), the person that owned the Policy according to Allianz Life's records at the time the Complaint was filed, has never been a party to this case.

The Trust sued Allianz Life seeking a declaration, which only the owner of the Policy could obtain, that the Policy was in full force and effect. A-44. The insured, Dora Zupnick, was alive when the Complaint was filed (A-43 ¶ 54), though she has subsequently passed away. Trust's Brief at 2.

A. The Policy Provisions Concerning Ownership

The key Policy provision is found in a section titled "Assignment of this Policy," which appears on page 14 of the Policy. That section 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-93 (emphasis added).

This assignment provision contains a number of capitalized words that are defined in the Policy. "Notice" is defined as "Our receipt of a . . . written request." A-83. "We" and "Our" are defined in the Policy as "Allianz Life Insurance

Company of North America." A-83. "You" is defined in the Policy as "The owner of this policy named in the application, unless later changed. …" A-83.

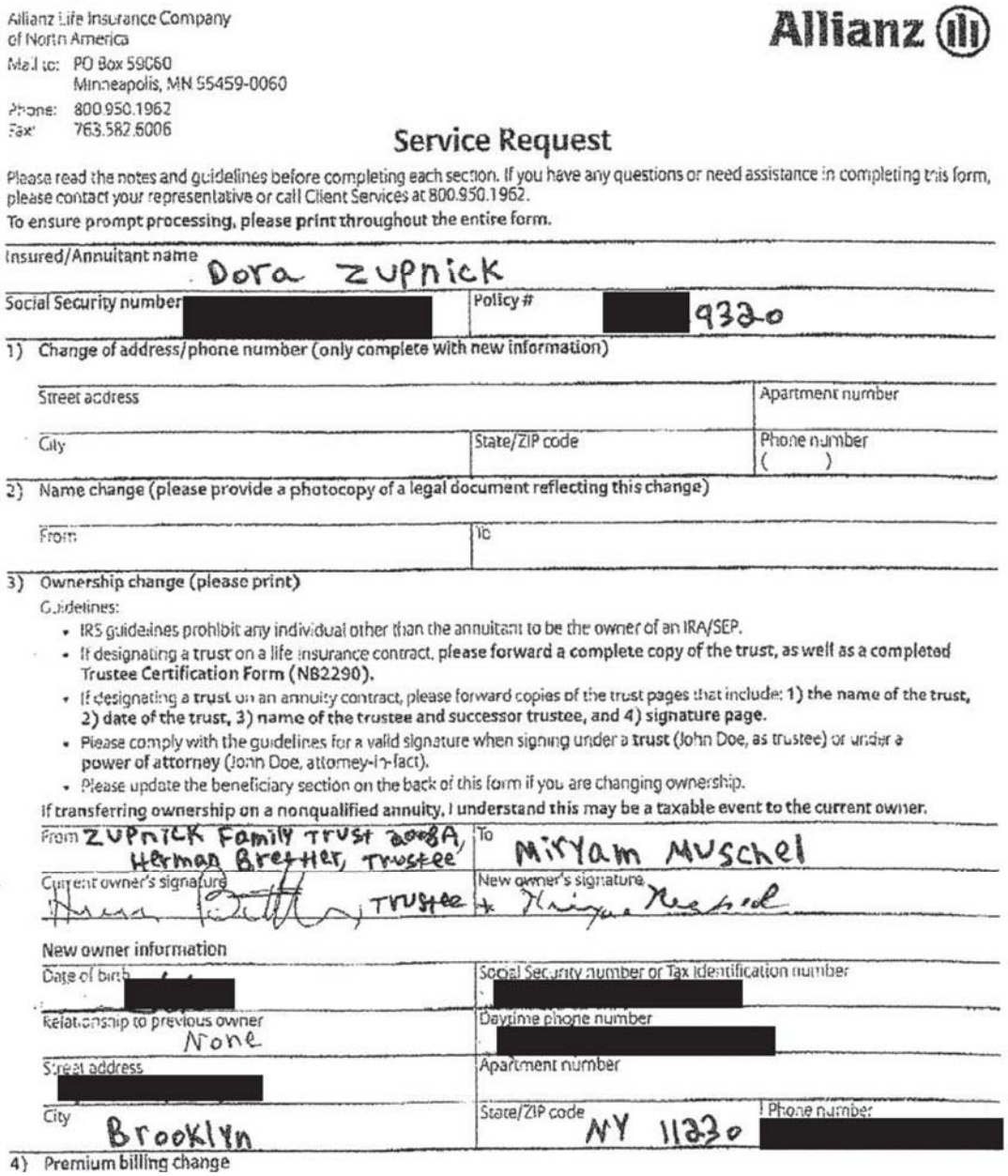
The Owner is "solely entitled to exercise all rights of this policy until the death of the Insured." A-83. While Ms. Zupnick died during the appeal to the Second Circuit, (1) standing is determined at the time the lawsuit is brought, and (2) the Trust is not the beneficiary; therefore, only the question of ownership is before this Court. *Baur v. Veneman*, 352 F.3d 625, 637 n.11 (2nd Cir. 2003); *see* A-14.

The Trust repeatedly refers to the Policy as requiring that Allianz Life "record" a change of ownership, stating at one point in its initial brief that Allianz Life "would not record" the purported ownership change from Muschel to the Trust. *See e.g.*, Trust's Brief at 8 ("the change of ownership must be recorded with the insurer"), 10 ("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 Life refused to record or for any reason failed to record any change of ownership of which it was made aware – because Allianz Life admittedly was not notified of such a change prior to the Trust filing this lawsuit. Allianz Life could not "record" an assignment of which it was not made aware.

B. The Ownership of the Policy

The Trust was the applicant for and original owner of the Policy. A-39, A-72 – A-76. By means of an Allianz Life Service Request form, the Trust notified

Allianz Life, on or about April 27, 2012, that the ownership of the Policy should be changed from the Trust to Miryam Muschel, individually. A-59.



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.

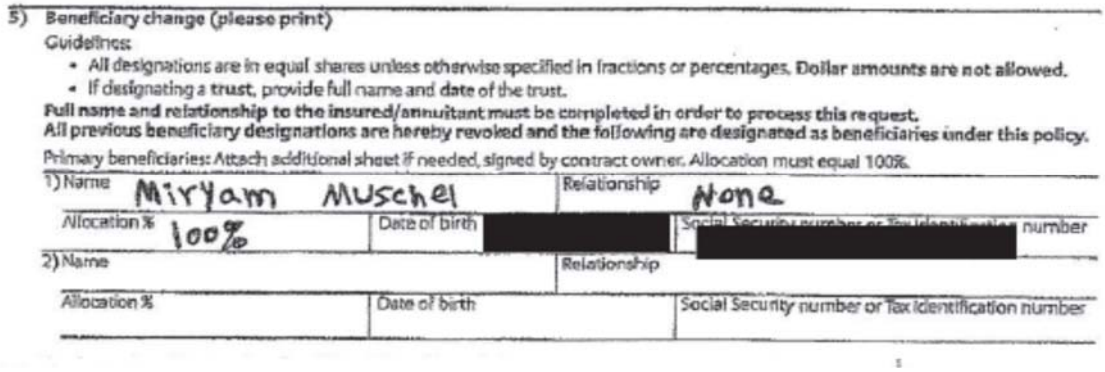
From: Zupnick Family Trust 2008A, Herman Brettler, Trustee	To: Miryam Muschel
Current owner's signature: [signature], Trustee	New owner's signature: [signature]

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-60.



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.

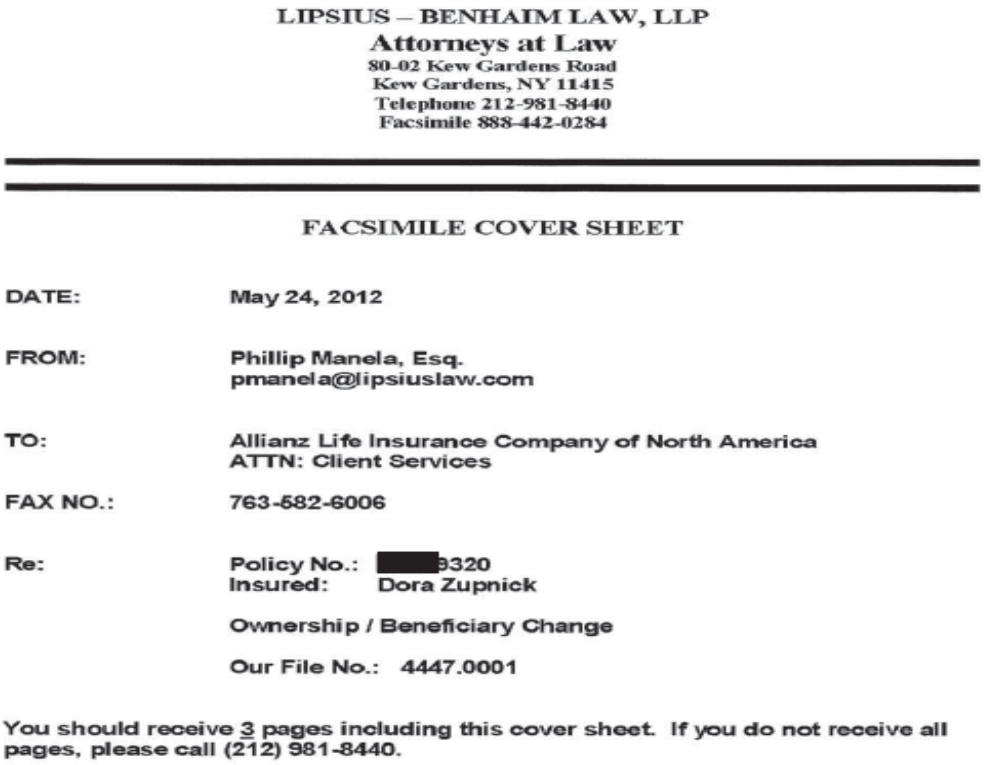
Full name and relationship to the insured/annuitant must be completed in order to process this request.
All previous beneficiary designations are hereby revoked and the following are designated as beneficiaries under this policy.

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-60.

This Service Request was submitted to Allianz Life by the Lipsius – Benhaim Law firm, which also represents the Trust in this action. A-58; A-27; Trust's Brief Cover Page.



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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.

The Policy lapsed for failure to pay premiums on June 8, 2013. The Trust subsequently filed this lawsuit in September 2016. Allianz Life was not notified of any change in the ownership of the Policy between the change of owner in 2012 (reproduced above) and the filing of this lawsuit. A-255; A-9 ("It is undisputed . . . that Allianz was not notified of any assignment from Muschel back to the Zupnick Trust until the filing of the complaint.").

II. The Relevant Proceedings

A. The Proceedings in the District Court

Allianz Life moved to dismiss in the District Court based on, *inter alia*, the Trust's lack of contractual standing to sue Allianz Life to enforce rights afforded by the Policy. A-191 – A-194, A-256. The District Court did not hold a hearing, and the briefing on the motion was completed in 2017. A-30 (Docket Entry 23).

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-30. In response, the Trust submitted a letter from its counsel, which acknowledged 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-255 (emphasis added).

In the Order granting Allianz Life's motion to dismiss, the District Court concluded that 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-264 (Order at 9). The dismissal, therefore, was based upon the Trust's lack of "contractual standing" to sue to enforce the Policy. A-264.

B. The Proceedings Before the Second Circuit

The Trust appealed the District Court's order to the Second Circuit in 2019, where it was fully briefed and argument held before Judges Hall, Lohier, and Pooler. After considering the record, that Court remanded to the District Court to determine if there were any additional grounds on which dismissal could be granted. RA-1-RA-2. The District Court found that "dismissal under Rule 12(b)(6) is warranted, but only on the grounds identified in the December 2018 order." RA-2.[4] As a result, the appeal to the Second Circuit was reinstituted, and that Court ultimately certified the following question to this Court:

[4] The Trust grossly misstates the holding of that Court, claiming that the "District Court ruled" that "Brettler would be entitled to an order restoring the policy and negating Allianz's termination." Trust's Brief at 8. To the contrary, the District Court merely found that dismissal at the pleading stage was inappropriate for reasons other than a lack of contractual standing – it did not address the merits of the case, as this case has not advanced past the pleadings.

> Where a life insurance policy provides that "assignment will be effective upon Notice" in writing to the insurer, does the failure to provide such written notice void the assignment so that the purported assignee does not have contractual standing to bring a claim under the Policy?

A-24.

In reaching the conclusion that the answer to that question was unsettled in New York, the Second Circuit first reviewed cases involving contract clauses prohibiting assignment without the consent of the parties to the contract. A-16. It found that because the Policy "gave Allianz no choice but to record the assignment upon written notice, case law considering the legal effect of consent to assignment provisions is not controlling." A-17.

That Court also found that the general rules concerning restraint on assignment provisions did not resolve this case:

> The Zupnick Policy provision at issue reasonably can be read *not as an anti-assignment provision*, but instead as a mutually agreed-upon provision setting out how assignments are to be made. While it is true that New York courts respect the freedom of assignment, ***they balance this freedom with the freedom of contract***.

A-20-21 (emphasis added).

GOVERNING LEGAL PRINCIPLES

I. Only the Owner of the Policy May Maintain an Action on the Policy

The Complaint seeks a declaration that the Policy is in force and seeks to enforce the terms of the Policy. A-44. 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.*, 901 N.Y.S.2d 76, 82 (2d Dep't 2010); *see also Berardino v. Ochlan*, 770 N.Y.S.2d 75, 77 (2d Dep't 2003) ("because he is not an owner of the policy, he would not have standing to sue."); *Heslin v. Metro. Life Ins. Co.*, 733 N.Y.S.2d 753, 754 n.1 (3d Dep't 2001) (plaintiffs "do not have standing to commence this action as none purchased any of the subject policies."). The Policy is consistent with this undisputed principle of New York law, providing that the "Owner" is "solely entitled to exercise all rights of this policy until the death of the Insured." A-83.[5]

The Trust's contractual standing to sue to enforce the Policy is determined as of the date it filed the Complaint in this action, and it is not altered by subsequent facts. *Baur v. Veneman*, 352 F.3d 625, 637 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 Terms and Plain Meaning, to Give Effect to All of the Provisions of the Policy

Insurance policies are interpreted according to general rules of contract interpretation. *In re Estates of Covert*, 97 N.Y.2d 68, 76 (2001). It is well-settled that "[w]here the provisions of [an insurance] policy 'are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from

[5] Appellant does not claim to be able to enforce the Policy as a third party beneficiary. *See* A-14 ("There is no allegation here of an intent under the policy to permit third-party enforcement of the Zupnick Policy, so that is not at issue in this case.").

rewriting the agreement.'" *United States Fid & Guar. Co. v. Annunziata*, 67 N.Y.2d 229, 232 (1986); *Vigilant Ins. Co. v. Bear Stearns Cos.,* 10 N.Y.3d 170, 177 (2008) ("unambiguous provisions of an insurance contract must be given their plain and ordinary meaning"). Any interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless is disfavored and will be avoided if at all possible. *County of Columbia v. Cont'l Ins. Co.*, 83 N.Y.2d 618, 619 (1994) ("An insurance contract should not be read so that some provisions are rendered meaningless.").

In interpreting insurance contracts, the intent of the parties, as expressed in the language of the policy, must control. *Hartford Ins. Co. of Midwest v. Halt*, 646 N.Y.S.2d 589, 594 (4th Dep't 1996); *see also Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 671 N.Y.S.2d 66, 69 (1st Dep't 1998) ("[a]n insurance contract is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy").

ARGUMENT

I. Because Allianz Life was Not Notified of the Purported Change of Ownership Per the Policy's Terms, the Trust Lacks Contractual Standing to Sue

The Policy's assignment provision is 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-93 (emphasis added). "Notice" is defined by the Policy to be Allianz Life's receipt of a "written request." A-83.

The Policy provision is unambiguous and written in plain language. Consistent with the well-established principles of policy interpretation, this provision should be implemented according to its plain meaning to give effect to the intention of the parties to the Policy with respect to how the owner of the Policy may assign or change the ownership of it. *Vigilant Ins. Co.*, 10 N.Y.3d at 177 ("unambiguous provisions of an insurance contract must be given their plain and ordinary meaning"). Not to do so would read this provision completely out of the Policy, in violation of the principles of insurance policy interpretation. *County of Columbia*, 83 N.Y.2d at 628 ("An insurance contract should not be read so that some provisions are rendered meaningless.").

There is no dispute that the terms of the Policy were not followed. Although notice was provided to Allianz Life of the transfer of ownership from the Trust to Muschel in 2012, the Trust has admitted, on the record, that no notice was provided to Allianz Life of a change of ownership from Muschel back to the Trust prior to the filing of the Complaint. A-255 ("Plaintiff did not notify Allianz Life 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.").

Thus, if the clause is enforceable, the Trust lacks standing. This was the exact factual scenario presented in *Jakobovits v. Allianz Life Insurance Co. of N. A.*, 2017 WL 3049538 at *4 (S.D.N.Y. July 18, 2017), in which a New York federal court found that two plaintiffs lacked standing to sue Allianz Life because Allianz Life was never provided notice of a change of ownership to the plaintiffs prior to the institution of the lawsuit.

The notice requirement of the Policy provides guidance to Allianz Life as to who is entitled to exercise Policy rights, and protects not only Allianz Life but also the current and prior owners. Because the owner is "solely entitled to exercise all rights of this policy until the death of the Insured," it is imperative to both the owner and Allianz Life that Allianz Life knows the current and correct owner. A-83. The owner's rights include, *inter alia*, the ability to take a loan, to change the beneficiary, to surrender the policy, to receive notices of impending lapse, to change the death benefit, and to alter the premiums. A-61—A-96.

It is not hard to envision the potential havoc that could be wreaked on contractual relationships if the true owners of policies are not known to the insurer, which can be avoided simply by enforcing the unambiguous language of the Policy. For example, Muschel could obtain a loan from Allianz Life without the Trust

knowing. The Trust might thereafter have a cause of action against *Muschel* to recover the borrowed funds, based upon their agreement, but would not have a *contractual right to sue Allianz Life* for the payment of those funds, because it was not a party to the Policy. That is precisely the situation we have in this case: the Trust – a stranger, from Allianz Life's perspective – to the Policy has now sued to enforce it based on a purported sale of which Allianz Life was never made aware.

If the Court adopts the position advocated by Allianz Life, that notice must be provided to the insurer before the new owner has a contractual right to sue it under the Policy, its ruling will be consistent with other courts to address the issue. Insurance policies often contain clauses that require written notice of an assignment or a change of beneficiary or owner to be given to the insurer. *See, e.g.*, *Fidelity and Deposit Co. of Maryland v. Moore*, 177 Va. 341 (1941); *Gray v. Penn Mutual Life Ins. Co. of Phila*., 5 Ill. App. 2d 541 (1955). In construing those provisions, other courts have consistently recognized their validity and have found that the failure to give notice to the insurer will render the change ineffective as between the new owner and the insurer.

For example, the Fifth Circuit in 2016 construed a similar provision and found that the failure to give notice rendered the assignment unenforceable against the insurer. *Banco Popular, N. Am. v. Kanning*, 638 F. App'x 328, 337-39 (5th Cir. 2016); *cf. Equitable Life Ins. Co. of Iowa v. Mitchell*, 248 Ill. App. 401, 404 (1927)

("It has been repeatedly held that provisions of a life insurance policy requiring notice of an assignment to be given to the company are for the benefit of the company and it alone may complain or object because of a failure to comply with the terms of the policy. The rule seems to be universal.").

Similarly, in *Farb v. Fed'l Kemper Life Assurance Co.*, No. JFM-01-0007, 2003 WL 21820714, at *3 (D. Md. July 21, 2003), a life insurance policy provided that the policy could be assigned if a copy of the assignment was filed with the insurer, and an assignment would not be binding on the insurer until received in writing. The court found the policy had not been properly assigned, in part, because no alleged assignment was ever filed with the insurer. *Id.; see also Quilling v. Trade Partners, Inc.*, No. 1:03-cv-236, 2011 WL 3585242, at *6 (W.D. Mich. Mar. 22, 2011), *report and recommendation adopted by* 2011 WL 3585398 (W.D. Mich. Aug. 16, 2011) (finding there was not a valid assignment where assignment form was not completed as required by terms of policy).

II. The Policy Provision is Enforceable

Faced with the inevitable outcome that it lacks standing to sue under the Policy, the undisputed facts, and longstanding canons of policy interpretation, the Trust argues that the Policy provision is unenforceable as an unfavored restraint on assignment, known as an "anti-assignment" provision. But the Policy does not

invalidate or encumber the assignment, and Allianz Life is not taking a position on the validity of the assignment in this appeal.

The Second Circuit, in certifying the question to this Court, considered whether the challenged provision is an "anti-assignment" clause. A-18 – A-20. It reasoned:

> The Zupnick Policy provision at issue reasonably can be read not as an anti-assignment provision, but instead as a mutually agreed-upon provision setting out how assignments are to be made. While it is true that New York courts respect the freedom of assignment, they balance this freedom with the freedom of contract.

A-20. This Court should similarly find that the cases addressing anti-assignment provisions do not govern the outcome of this case.

As the Trust admits, the Policy does not include an "anti-assignment" provision: "This can hardly be understood as a prohibition against assignment." Trust's Brief at 13. By its express terms, the Policy is freely assignable. Indeed, the only contractual condition on the assignment or change of ownership of the Policy is that Allianz Life be notified in writing of any such changes.

The Policy further provides that "[w]e will record your assignment." A-93. Once notified in writing of an assignment, Allianz Life does not have discretion to reject a change of owner that it receives from the owner of the Policy. There is no evidence in the record that Allianz Life ever failed to record any change of ownership provided to it. To the contrary, when provided with the change of

ownership in 2012, Allianz Life recorded it and recognized the new owner, Muschel, going forward. *See* supra p. 5-7; RA-2, A-9.

A court considering this exact assignment provision of an Allianz Life insurance policy found that it was not an anti-assignment provision under New York law:

> ***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., No. 15-cv-9977, 2017 WL 3049538 at *4 (S.D.N.Y. July 18, 2017) (emphasis added); *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) (finding different policy language not to require notice to the insurer for the assignment to be binding on the insurer).

Unlike anti-assignment clauses, the assignment provision of the Policy does not purport to prevent or invalidate an assignment of which Allianz Life is not notified, nor does it require Allianz Life's consent. 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 simply that unless Allianz Life is notified of the assignment, the assignment is not effective with respect to and does not affect *Allianz Life*. Muschel, as the owner of the Policy, was free to assign or sell her rights with respect to the Policy to the Trust. She could enter into a contract for sale or assignment that was valid and binding *as between herself and the other party*.

In support of its argument that a written notice requirement in an assignment provision does not impact the assignee's standing to sue the insurer, the Trust cites *Reliable Loan & Inv. Co. v. Delgus Co.*, 227 N.Y.S. 425 (1st App. Div. 1928). That case, a four-paragraph opinion from the First Department written in 1928, contained a single line stating that "[t]he covenant requiring notice in writing does not make the assignment void, but only makes the assignor liable for damages, if any." *Id*. at 426. But Allianz Life is not seeking to invalidate the assignment, it merely seeks to enforce the notice provision. Moreover, the Second Circuit did not find that case persuasive because it does not involve an insurance policy, no other court has relied on it in construing a written notice of assignment requirement, and the *Reliable Loan* court listed three alternative bases for its opinion, only one of which is cited by the Trust. A-18 – A-19, n.4. One of the other grounds for enforcing the assignment was that the defendant waived its ability to enforce the assignment clause. *Reliable Loan*, 227 N.Y.S. at 427 (defendant, "having acquiesced in the assignments to [assignee 1]

and [assignee 2], is in no position to question the validity of the subsequent assignment" and "waived this clause"). The third ground, and one which distinguishes that case from this one, was that the clause requiring notice of assignment in writing to the defendant only applied to the initial seller – not to any subsequent assignees of the seller, which was the plaintiff's position. *Id*. Because there is no clear holding of that court – and no reasoned basis for the single line for which the Trust cites it – it does not support the Trust's position.

III. The Trust's Authorities Are Inapposite Because They Address Prohibitions on Assignment

In its initial brief, the Trust cites to cases addressing prohibitions on assignment to either a specific group of people (*Grigsby* and *Carton*) or blanket prohibitions (*Pro Cardiaco* and *Allhusen*). But the Policy does not prohibit assignments, and this case is not about (nor is Allianz Life currently challenging) the validity of the assignment between Muschel and the Trust. The issue here is what is required for Allianz Life to recognize a new owner of an assumed valid assignment of a life policy, rendering the Trust's authorities inapplicable.

A. The Trust's Authorities Regarding Assignments to Individuals With No Insurable Interest are Inapplicable

The Trust discusses *Grigsby* and *Carton*, which both considered assignments to individuals lacking an insurable interest in the insured. *Grigsby v. Russell*, 222 U.S. 149 (1911); *Carton v. B & B Equities Grp., LLC*, 827 F. Supp. 2d 1235 (D.

Nev. 2011). Neither case addresses the validity of a contractual assignment provision, or any similar policy clause, and they do not support the Trust's position.

Grigsby was an appeal of a Tennessee federal court case, does not apply New York law, and considered whether a life insurance policy could generally be assigned to someone who did not have an insurable interest in the life of the insured. 222 U.S. at 154-56. There was not an assignment clause at issue, but instead "the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place." *Id*. at 154. The Supreme Court held the broad prohibition invalid. Here, the focus is on the language of the Policy – not general public policy – which does not prohibit assignment at all, and particularly not to a group of people.

Carton, which applies Nevada and California law, is similarly attenuated. 827 F. Supp. 2d 1235. In *Carton*, investors had taken a collateral assignment of life insurance policies and paid premiums without knowledge that the policies were stranger-originated life insurance (STOLI). *Id.* at 1239-40. The District Court agreed that the policies were STOLI and therefore void *ab initio*. *Id.* at 1245. Consequently, the investors lacked standing to sue based upon the collateral assignment, since, as a matter of law, they could not sue on an assignment of a policy that never existed. *Id.* The District Court held that the investors did have standing to sue for recovery

of the premiums, however, based on equitable principles. *Id.* The standing issues in *Carton* are fundamentally different than the standing issue in this case: there is no question regarding the validity of the policy at inception, and the Trust is not claiming it has contractual standing based on equitable principles.

Since *Carton* does not directly support its position in this case, the Trust manufactures an "implicit" holding that is based upon a factual scenario that is not present in *Carton*. The Trust posits that "**if the policies were not void *ab initio***, the *Grigsby* standard would allow the Cartons to have 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 speculation has no basis in the language of the *Carton* opinion, and is never mentioned in that opinion. To the contrary, the standing discussion in *Carton* is based upon the premise that the policies were void *ab initio*, and to speculate how the court would have ruled had the policies not been void finds no 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.

B. The Trust's Authorities Regarding Anti-Assignment Clauses are Inapplicable

Finally, the Trust cites two 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. Trust's Brief at 11-13. Because the Policy does not contain an anti-assignment clause, these cases do not further the Trust's position.

Unlike the Policy language, anti-assignment provisions render an assignment void or otherwise encumber the assignment. For example, this Court considered the viability of an anti-assignment provision in *Allhusen v. Caristo Constr. Corp.*, where the provision stated: "The assignment by the second party of this contract or any interest therein, or of any money due or to become due by reason of the terms hereof without the written consent of the first party ***shall be void***." 303 N.Y. 446, 449 (1952) (emphasis added). Other clauses considered by New York courts "contain express provisions that ***any assignment shall be void or invalid*** if not made in a certain specified way." *University Mews Assocs. V. Jeanmarie*, 471 N.Y.S.2d 457, 461 (N.Y. Sup. Ct. 1983) (emphasis added).

Allhusen, the first authority cited by the Trust, indicates that this Court will honor parties' freedom to contract in the face of clear contract language. In that case, this Court upheld a contract prohibiting assignment because the language doing so was clear, in part out of respect for "the concept of freedom to contract." 303 N.Y. at 452. To find support in this case, as it did with *Carton*, the Trust again fabricates a scenario not before the *Allhusen* court. The Trust concludes, without any supporting citations, 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," are invalid. But no other restrictions were before the Court in *Allhusen*. The Trust's

argument with respect to *Allhusen* is based solely its prediction of how the *Allhusen* court would have reacted to a different fact situation than the one presented to it. Such unfounded speculation does not provide any guidance for this court.

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 12), a medical benefits policy provided that the insured could direct the insurer to pay benefits directly to a hospital, but that payments for care provided by a foreign hospital would be paid only to the insured. Care was provided in Brazil. The insurer paid the policy benefits to the deceased insured's son, notwithstanding that it also had in its possession an affidavit signed by the son directing it to pay the hospital directly from the policy proceeds. The court held that despite the policy provision, the insurer was liable for any money paid to the son to which the foreign hospital was entitled because it was "on notice of the assignment." *Id.* at 138. Here, unlike in *Pro Cardiaco*, Allianz Life was not on notice of a purported assignment back to the Trust.

CONCLUSION

The Policy is clear and should be enforced, and is not an anti-assignment clause. Because no notice of the transfer of ownership to the Trust was provided to Allianz Life, it lacks contractual standing to sue on the Policy.

Therefore, Allianz Life requests that the Court answer the certified question as follows: where a life insurance policy provides that "assignment will be effective

upon Notice" in writing to the insurer, the purported assignee does not have contractual standing to bring a claim under the Policy if no notice of its ownership was provided to the insurer.

Dated: May 30, 2023
New York, New York

Respectfully submitted,

By:_____
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Attorney for Defendant-Respondent Allianz Life Insurance Company of North America

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: May 30, 2023
New York, New York

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STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On May 30, 2023

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Sworn to before me on May 30, 2023

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

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