

STOLI AND INTENT: THE FEELING'S
MUTUAL, BUT IT'S STARTING NOT TO
MATTER ANYWAY

*Franklin G. Monsour, Jr.**

TABLE OF CONTENTS

I. INTRODUCTION	680
A. A Brief Setup of the Intent Issue	682
B. My Thesis	683
II. HISTORICAL CASES CONCERNING LIFE POLICY ASSIGNMENT	684
A. <i>Grigsby v. Russell</i>	685
1. What is a Wager?	688
2. England's Take on Life Policy Assignment via the Life Assurance Act of 1774	691
3. Temporal Component under U.S. Law	692
4. How All of this Impacts the Question of "Whose Intent?"	695
B. <i>Travelers's</i> Continuation of <i>Grigsby</i>	695
III. <i>FIRST PENN-PACIFIC LIFE V. THE UNILATERAL INTENT STANDARD</i>	699
IV. UNILATERAL INTENT EXPOSED	702
A. <i>Life Product Clearing, LLC v. Angel</i>	702
B. <i>Life Product Clearing</i> as Interpreted by Unilateral Intent Proponents	705
1. <i>Lincoln National Life Insurance Company v. Calhoun</i>	706
2. Insurance Industry Litigators	708
V. THE <i>KRAMER</i> EFFECT	714
VI. NEW YORK'S ANTI-STOLI LEGISLATION	719
A. The Statutory Role of Intent	724
B. The Future of the Unilateral Intent Position	727
VII. CONCLUSION	729

I. INTRODUCTION

A very old legal problem concerning the old insurable interest rule has experienced a resurgence of late. None of this, of course, is as old as many rudimentary legal problems; murder, for example, predates insurance and doubtless helped give rise to it. But the insurable interest rule is old by the standards of insured society, predating Olde England's 1774 Parliament.¹ Things always seem older when you can mention "Olde England." The problem the insurable interest rule sought to cure back then is this: someone taking out an insurance policy on another's life for whom he or she does not have an insurable interest. Insurable interest here essentially means an interest in the insured's life continuing.² The reason this is a problem is rather intuitive, as realizing money on someone's death when you have no interest in the person living, creates a precarious incentive. This problem, and the manner in which it arises, has not changed much over the last few centuries. And yet, we have its resurgence.

For our purposes, it is enough to say that the resurgence of this old problem and the resulting refocus on this old rule is due to the onslaught of the life settlement market. There, insureds sell their life insurance policies for immediate cash value to investors—often through brokers/middlemen who pool multiple life policies

* Counsel, Edwards Angell Palmer & Dodge LLP. J.D. (Benjamin N. Cardozo School of Law); B.A. (Virginia Commonwealth University). I would like to thank my sweet wife, Cynthia, for her support and always apt revisions to my writing. I would also like to thank the journal's Editor-in-Chief, Nicholas Secara, whose professionalism and editing prowess were exemplary and invaluable. Last, but certainly not least, I would like to thank my longtime colleague, Patrick Gennardo, whose understanding and support significantly enabled this project.

¹ See Jana Lee Pruitt, *Wagering on Life . . . And Death: From 18th Century England to 21st Century America*, SR020 A.L.I.-A.B.A. 169 (2009); see also THE ENGLISH LAW COMMISSION & THE SCOTTISH LAW COMMISSION, INSURANCE CONTRACT LAW, ISSUES PAPER 4, INSURABLE INTEREST 5, ¶¶ 2.1-4 (Jan. 14, 2008), available at www.scotlawcom.gov.uk/download_file/view/203/.

² For example, New York's statutory definition of "insurable interest," which is fairly typical, provides:

The term, "insurable interest" means:

(A) in the case of persons closely related by blood or by law, a substantial interest engendered by love and affection;

(B) in the case of other persons, a lawful and substantial economic interest in the continued life, health or bodily safety of the person insured, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the insured.

N.Y. INS. LAW § 3205(a)(1) (2010).

into security-type vehicles.³ The life settlement market is also referred to simply as a secondary market for life insurance. Part and parcel to this market has been the rise of Stranger-Originated Life Insurance (STOLI),⁴ which is essentially the modern form of the old problem that the old insurable interest rule sought to cure. Essentially, the stranger is “strange” in the sense that he has no insurable interest in the life of the insured for whom he owns—or, more precisely, originates ownership of—a life policy.⁵ While life settlements are not illegal, STOLI is; thus, we have a classic example of a growing market providing incentive for an illegal means of feeding that market.⁶

Much has been written about all of this, including rather comprehensive explorations of STOLI’s relation to the life settlement market.⁷ I do not intend to rehash such a comprehensive analysis here. I intend, rather, to focus on a specific context in which STOLI often obtains, namely, when life insurance policies are *assigned* by their insureds to one without an insurable interest; and the issue that arises in this context that currently seems to cause some confusion, namely, what manner of intent is required for a STOLI finding in this assignment context. The reason I have repeatedly used the term “old” or “olde” in referring to the basic STOLI problem, besides the fact that it somehow amuses me, is that I intend to show that guidance on the assignment context and, more importantly, the answer to this question of intent, is contained in the old cases that modern courts and litigators rely on for the very foundation of the insurable interest rule. These cases include, most notably, the United States Supreme Court case of *Grigsby v. Russell*⁸—the case that made

³ See Brian T. Casey & Thomas D. Sherman, *Are Life Settlements a Security?*, 12 J. STRUCTURED FIN. 55 (2007).

⁴ STOLI is also sometimes referred to as Stranger Owned Life Insurance (SOLI) or Investor-Owned Life Insurance (IOLI).

⁵ See Eryn Mathews, *STOLI on the Rocks: Why States Should Eliminate the Abusive Practice of Stranger-Owned Life Insurance*, 14 CONN. INS. L.J. 521 (2008).

⁶ Statement of The American Council of Life Insurers, Testimony of James J. Avery, Jr., FSA, President, Individual Life Insurance, Prudential Financial, and Chairman of the ACLI Life Insurance Comm. Before the Senate Special Comm. on Aging (Apr. 29, 2009), U.S. SENATE SPECIAL COMM. ON AGING, <http://aging.senate.gov/events/hr207ja.pdf>.

⁷ In addition to sources already cited, see Michael Lovendusky, *Illicit Life Insurance Settlements*, in APPLEMAN: CURRENT CRITICAL ISSUES IN INSURANCE LAW (Oct. 2008); and the customer aimed: Assoc. for Advanced Life Underwriting (AALU), National Assoc. of Insurance and Financial Advisors (NAIFA) & American Council of Life Insurers (ACLI), *STOLI: The Problem and the Appropriate State Response*, NAIFA, www.naifa.org/advocacy/stolialert/pdf/STOLI_primer.pdf.

⁸ *Grigsby v. Russell*, 222 U.S. 149 (1911).

assignment of life policies legal in the U.S. In other words, this specific question of intent is itself an old problem with an old answer, and as long as we look to historic precedence as a guide for STOLI, so we should for its requisite intent.

A. *A Brief Setup of the Intent Issue*

Before we get started with the historic analysis, it will be helpful to give a preliminary framing of the assignment context and the specific confusion over intent I intend to address. In modern day STOLI cases, an insured often takes out a policy on his own life and then assigns⁹ it to someone without an insurable interest (*i.e.*, a stranger). This is nothing new; people have been doing this in the U.S. for over a century. In short, the law essentially allows such an assignment under the basic reasoning that the policy is a property asset and, thus, freely transferable.¹⁰ The inconsistency is in the effect this allowance has on the insurable interest rule: while one cannot take out a policy on another without an insurable interest, he can receive the same through assignment. Essentially, wait a little while and the death benefits of a stranger can be yours. Courts have ridden this thin line for the better part of a century, holding that assignment of a policy to someone without an insurable interest is permissible if the insured obtained the policy on his own life in good faith and then later decided to assign it. But the original transaction cannot be for the purpose of, or, rather, a “cloak” for averting the insurable interest rule.¹¹ That is, it cannot be for the purpose of assigning the policy in the first place.

This can all start to sound a bit circular and surely is on some level, but the distinction is fundamentally one of purpose in the assignment and, better still, purpose in obtaining the life policy in the first place. How one tells whether that purpose is a cloak to otherwise avert the insurable interest rule is largely a question of intent. With respect to this question—and the aim of this article—courts, litigants, and commentators have debated over whose intent matters, the insured’s “unilateral intent” or both the insured’s and the assignee’s “mutual intent.”¹²

⁹ Herein, “assign” is used interchangeably with “sell” and “transfer.”

¹⁰ See *Grigsby*, 222 U.S. at 155.

¹¹ Thanks to *Grigsby*, this article is full of cloaks and wagers—just no daggers.

¹² This article does not deal with situations in which the insured is a victim of fraud and thereby unaware of the assignment at issue. Such a complete fraud on the insured is not normally contemplated in the context of STOLI. Accordingly, this article assumes at all

Now, it is important both not to overstate this debate and not to oversimplify it. Most courts agree that mutual intent is the way to go. However, there is a vocal group of litigators and industry professionals who have argued for a unilateral intent standard—not in the “ought to” sense (of how courts ought to rule), but in the “is” sense, *i.e.*, arguing that courts have so held, and should be so interpreted.¹³ But the reasons given for so interpreting these cases are not easy to understand—or at least not easy to understand as being correct. As evidence of how misleading this debate can be, one of the cases that unilateral intent proponents cite for support of their position, *Life Product Clearing, LLC v. Angel*,¹⁴ has been cited by multiple courts as supporting the mutual intent standard.¹⁵

B. My Thesis

In this article I will deconstruct *Grigsby* and one of its prodigy cases, *Travelers Insurance Co. v. Reiziz*,¹⁶ as well as some other cases from the same era, and demonstrate how these cases developed the insurable interest rule in a manner distinct from Olde England—a manner that allowed for intent to matter at all. I will demonstrate that these cases support a mutual intent standard for STOLI. I will then examine modern cases that likewise support a mutual intent standard and how their reasoning comports with the historic cases. Next, I will examine the reasoning of the unilateral intent proponents, including analyzing some of the cases they cite in support of their position, notably the above mentioned *Life Product Clearing*. Finally, this article will conclude by analyzing the recent New York Court of Appeals case, *Kramer v. Phoenix Life Insurance Co.*,¹⁷ and the recent New York anti-STOLI legislation, Article 78 of New York Insurance Law.¹⁸ *Kramer*, somewhat surprisingly, undid much of the

times that the insured is a knowing part of the scheme. As discussed *infra*, the insured's intent is thus always a condition for STOLI, under either a unilateral intent or mutual intent standard.

¹³ See DAVID HUMES, A TREATISE OF HUMAN NATURE, book 3, pt. 1, § 1 (1739), for an unnecessary, but enlightening discussion of the is/ought distinction.

¹⁴ *Life Prod. Clearing, LLC v. Angel*, 530 F. Supp. 2d 646 (S.D.N.Y. 2008).

¹⁵ See, *e.g.*, *First Penn-Pacific Life Ins. Co. v. Evans*, 2009 WL 497394, at *3 n.3 (4th Cir. 2009); *Sun Life Assurance Co. of Canada v. Paulson*, 2008 WL 5120953, at *5 (D. Minn. 2008).

¹⁶ *Travelers Ins. Co. v. Reiziz*, 13 F. Supp. 819, 820 (E.D.N.Y. 1935).

¹⁷ *Kramer v. Phoenix Life Ins. Co.*, 15 N.Y.3d 539, 546-47 (2010).

¹⁸ N.Y. INS. LAW, art. 78 (2010).

common law discussed in this article. But Article 78 trumps *Kramer's* effect going forward and—as do similar statutes in other states—takes many cues from the common law in forming an even stronger defense against STOLI. So strong, the unilateral intent proponents get some of what they want, just not a unilateral intent standard.

II. HISTORICAL CASES CONCERNING LIFE POLICY ASSIGNMENT

Grigsby is the seminal case that gave birth to the American concept of insurable interest and its role in life policy assignment. But let's go back one more step to the 1881 United States Supreme Court case of *Warnock v. Davis*¹⁹—the case *Grigsby* essentially overruled to permit life policy assignment.²⁰ In *Warnock*, an insured applied for a life insurance policy and on the same day entered into an agreement to transfer upon his death nine-tenths of the policy's death benefit to a trust owned by two stranger investors.²¹ In return, the investors agreed to maintain the policy through all payments and fees due and pay the remaining one-tenth of the death benefit to whomever the insured so designated.²² Things went as planned, death and all—except that the administrator of the insured's estate sued the trust for the death benefit.

The Court in *Warnock* found that the same logic that prevents a person from taking out a life insurance policy on someone for whom he has no insurable interest applies to a later assignment of the policy to someone with no such interest. The Court stated:

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it.²³ But it was not

¹⁹ *Warnock v. Davis*, 104 U.S. 775 (1881).

²⁰ The legal context of these issues and the influence of English law go back even farther in the U.S. *See, e.g.*, *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U.S. 457, 460 (1876) (“In this country, statutes to the same effect [as the Life Assurance Act of 1774] have been passed in some of the States; but where they have not been, in most cases either English statutes have been considered as operative, or the older common law has been followed.”).

²¹ *Warnock*, 104 U.S. at 778.

²² *Id.*

²³ These early cases were concerned with the assignment of the entire death benefit and not simply assignment of a portion as credit for a debt, which does not concern the question of whether a life policy is wholly a property item the policyholder is free to price and sell as she sees fit.

assignable to the association [sic] for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.²⁴

Thus, for the Court, the extra step of assignment did not change the logic of the rule: to prevent “wagering” with an interest in the insured’s “early death.”²⁵ The Court was essentially saying that the insurable interest must be maintained throughout the life of the policy, not just at policy inception.

Beyond the previously noted conceptual inconsistency in allowing assignment without an insurable interest, the Court saw an obvious practical problem:

The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money.²⁶

This statement turned out to be quite prescient, as assignment—once legal—became the loophole from which STOLI cases recently blossomed. The Court in *Warnock* saw fit to forestall what it considered an easy evasion of the insurable interest rule. But this didn’t last.

A. Grigsby v. Russell

Almost exactly twenty years later, the United States Supreme Court had a change of heart. In *Grigsby*, an insurance company brought an interpleader action to determine whether a life policy death benefit should be paid to the administrators of the insured’s estate or an assignee of the policy who lacked an insurable interest.²⁷ The case was really a precursor of sorts to viatical settlement cases made popular in the 1980s, as the insured assigned his life policy to a doctor in exchange for a needed operation.²⁸ The Court substantively began its analysis by

²⁴ *Warnock*, 104 U.S. at 778-79.

²⁵ *Id.* at 779.

²⁶ *Id.* at 779-80.

²⁷ *Grigsby*, 222 U.S. at 154.

²⁸ Viatical settlements gained prominence with the advent of AIDS in the 1980s. The growing expense of treating the disease caused patients to sell their life insurance policies

reformulating the concept of insurable interest, with a more historic explanation than in *Warnock*:

The very meaning of an insurable interest is an interest in having the life continue, and so one that is opposed to crime. And what, perhaps, is more important, the existence of such an interest makes a roughly selected class of persons who, by their general relations with the person whose life is insured, are less likely than criminals at large to attempt to compass his death.²⁹

Given this elucidation of the concern for murder (what is often called the “moral hazard” concern),³⁰ the Court went on to depart from its prior decision in *Warwick*: “But when the question arises upon an assignment, it is assumed that the objection to the insurance as a wager is out of the case.”³¹ Thus, as the Court saw it, the primary problem with a “wager” on life policies is that the wager can be made by the world at large, which will necessarily include the “world of the unscrupulous.”³² It is not that an insurable interest will completely eradicate criminal motives towards an insured (family members can be rather unscrupulous too), but simply that it will reduce the odds of such motives by keeping out the *world*, cutting down the class from which a wagerer may arise.³³

Likewise, a wager of sorts still exists on assignment, as the assignee will still benefit from the insured’s demise. But the world of the unscrupulous, once again, is removed; the wagerer is one with whom the insured *intends* to do business, one whom she is “not afraid to trust,” unscrupulous or not.³⁴ In other words,

to stranger investors for immediate cash. The insureds’ low survival rate in turn made the cash payments good investments for investors. Further, these assignments did not cause insurers some of the pricing and underwriting concerns that STOLI does, because a death benefit was likely to be paid out whether an assignment occurred or not, given the insureds’ terminal illness. See, e.g., *First Penn-Pacific Life Ins. Co. v. Evans*, No. 05-444-AMD, 2007 WL 1810707 (D. Md. June 21, 2007) (quoting *Forbes Magazine* on viatical settlements); see also Lovendusky, *supra* note 7 (discussing the modern history of viatical settlements).

²⁹ Grigsby, 222 U.S. at 155.

³⁰ INSURABLE INTEREST, *supra* note 1, at 5, ¶ 2.3.

³¹ Grigsby, 222 U.S. at 155.

³² *Id.*

³³ This same reasoning would not seem to hold up in cases of reassignment. Reassignment would essentially have the effect of reintroducing the “world.” *But see Recent Cases*, 18 HARV. L. REV., No. 5, 390, 396 (1905) (“Nor does the objection that [reassignment] is void as a wagering contract apply in this case more than in that of the first assignment, for the element of wager is not increased by the fact that the insured did not assent.”).

³⁴ Grigsby, 222 U.S. at 155

assignment accomplishes what the insurable interest rule does—only via an agreement rather than some familial-type relationship. As with the insurable interest rule itself, the notion that murder remains a possibility at all hardly makes any of this unique.³⁵ As the *Grigsby* Court succinctly put it: the law “has no universal cynic fear of the temptation opened by a pecuniary benefit accruing upon a death.”³⁶

The question to ask, then, is why worry about the insurable interest rule in the assignment context at all? If assignment is an *agreement* and the “world of the unscrupulous” is removed, then the need for an insurable interest would seem to end; the interest would be redundant to its purpose. The Court, not having explicitly drawn the comparison I have between the effect of assignment and an insurable interest, answered this question to some extent by clarifying what it meant by wager: “Indeed, the ground of the objection to life insurance without interest in the earlier English cases *was not* the temptation to murder, but the fact that such wagers came to be regarded as a mischievous kind of gaming.”³⁷ Thus, the Court distinguished the principal fear of the “world,” which is murder, from a separate concern, mischievous gaming. Unlike in *Warnock*, however, the Court in *Grigsby* relied on this dichotomy to realize which of these senses of wager actually has an impact in the assignment context. For the reasons already discussed, viz. the elimination of the world of the unscrupulous, the Court could logically only be concerned with the “gaming” sense of wager.³⁸

At this point, it is useful to categorically examine some key concepts in *Grigsby*, based on the Court’s own language and some extrapolation.

³⁵ To borrow from the post-*Grigsby* case discussed next, the court in *Travelers Ins. Co. v. Reiziz* noted that “the same temptation exists in the case of an estate limited to take effect on the death of a designated person” *Travelers Ins. Co.*, 13 F. Supp. at 820.

³⁶ *Grigsby*, 222 U.S. at 156.

³⁷ *Id.* (emphasis added).

³⁸ The *Grigsby* Court considered both “murder” and “gaming” to be aspects of a wager, as implied by its statement that “gaming” and not “murder” was the *primary* concern with a wager. See *id.* But we know from *Grigsby* that the murder (or moral hazard) concern is not a necessary attribute of wager, as in the assignment context. The Court in *Warnock* missed this last step, as indicated by its statement that, “[s]uch a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.” *Warnock*, 104 U.S. at 779. While “speculative contract” sounds similar to “gaming wager,” the court treats the moral hazard concern as necessary.

1. What is a Wager?

The *Grigsby* Court stated its concern for this “gaming” sense of wager as follows: “[a]nd cases in which a person having an interest lends himself to one without any, as a cloak to what is, in its inception, a wager, have no similarity to those where an honest contract is sold in good faith.”³⁹ There is a lot in this quote to unpack. But first and most fundamentally, is the meta-question of what exactly is a gaming wager, which, at this point, we can simply call wager. And separately, why should it be prevented in the assignment context and how does the insurable interest rule help prevent it? If the purpose in preventing this type of wager is solely to prevent the aversion of the insurable interest rule, then that would be circular. We are asking *why* the insurable interest rule should be enforced in the assignment context; thus, the answer cannot be tautologically to enforce it. So, to be clear, we are asking two questions: (1) what is the wager with which the *Grigsby* Court is concerned; and (2) how does the insurable interest rule impact wagering in the assignment context?

Unfortunately, neither *Grigsby* nor any of the early cases did a satisfactory job of directly answering these questions. That a wager was objectionable seemed largely to be a truth courts presumed without elaboration. For example, in the 1919 case of *Finnie v. Walker*, the Second Circuit Court of Appeals simply discussed the force of *Grigsby* and conclusively stated: “[t]he assignment of a policy to a party not having an insurable interest, with wagering intent, is as objectionable as the taking out of a policy in his name.”⁴⁰ In the 1929 case of *Home Life Ins. Co. of N.Y. v. Masterson*, the Supreme Court of Arkansas reiterated the same, adding only that “it has been uniformly held that a wagering contract of insurance [as so assigned] is contrary to public policy and void.”⁴¹

This explanatory dearth notwithstanding, different tacks can be taken to answer our first question and better understand what constitutes a wager. One way is to examine the *Grigsby* Court’s descriptive phrase, “a mischievous kind of gaming.”⁴² The term “gaming” essentially means gambling, and the adjective “mischievous” means “harmful, injurious, tending to cause

³⁹ *Grigsby*, 222 U.S. at 156.

⁴⁰ *Finnie v. Walker*, 257 F. 698, 701 (2d Cir. 1919).

⁴¹ *Home Life Ins. Co. of N.Y. v. Masterson*, 21 S.W.2d 414, 416 (Ark. 1929).

⁴² *Grigsby*, 222 U.S. at 156.

annoyance or trouble.”⁴³ Thus, “mischievous” here indicates gambling with the result of some harmful, troubling, *etc.* consequences. It should also be noted that “mischievous kind of gaming” comes from Olde England’s Life Assurance Act of 1774 (the Act),⁴⁴ and, while wagering on life policies was unique, it was viewed largely as a subset of gambling in general. Some have viewed the Act as part of a lineage that culminated in 1845 with the Gaming Act, which prohibited all gambling (wager) contracts.⁴⁵ Thus, we have some historic continuity here between the terms gaming, gambling, and wager.

As the modern day court in *Sun Life Assurance of Canada v. Paulson* noted in discussing *Grigsby*, this concern with gaming involved a distinction between contracts that “sought to dampen the risk of actual future loss and those that instead sought to speculate on whether some future contingency would occur. Without an insurable interest, there would be no actual loss; the contract would thus be a pure *gamble*.”⁴⁶ This first sentence draws a distinction between the basic principal of insurance, to hedge against a potential loss, and a matter of pure investment.⁴⁷ The second sentence is true when viewed strictly in conjunction with the first, *i.e.*, if there is no insurable interest (that is, no interest in not losing something) then there is no loss to hedge against. In this sense, the court in *Sun Life Assurance* simply uses the term “gamble” where I have used “investment.”⁴⁸

⁴³ *Mischievous Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/mischievous> (last visited Mar. 18, 2011).

⁴⁴ INSURABLE INTEREST, *supra* note 1, at 6, ¶ 2.7.

⁴⁵ *Id.* ¶ 2.11.

⁴⁶ *Sun Life Assurance of Canada v. Paulson*, Civil No. 07-3877(DSD/JJG), 2008 WL 451054, at *2 n.4 (D. Minn. Feb. 15, 2008) (emphasis added) (quoting Jacob Loshin, *Insurance Law’s Hapless Busybody: A Case Against the Insurable Interest Requirement*, 117 YALE L.J. 474, 480 (2007)). This is the same “speculative contract” phrase used in *Warnock*. See *supra* note 38.

⁴⁷ This non-insurance use of insurance products is seen as a major problem for insurers today. Indeed, the modern concern with STOLI focuses largely on the effect it has on insurers, and the effect in turn it has on pricing of insurance products. STOLI and even life settlements in general are seen as turning what was intended to be insurance into *pure* investments. However, courts in the time of *Grigsby* did not seem concerned with, or even cognizant of this broader impact on the insurance industry. As stated in *Grigsby*, “life insurance has become in our days one of the best recognized forms of investment and self-compelled saving.” *Grigsby*, 222 U.S. at 156.

⁴⁸ The statement, “[w]ithout an insurable interest, there would be no actual loss” is, strictly by itself, not true. After all, time is money and the payment of premiums over time is a real investment by the stranger. A possible risk exists (however remote) of losing that investment if the insured lives to a point in time in which the assignee can no longer afford the premiums and, thus, is forced to reassign the policy at a loss.

This notion of gambling in general helps us see the image that so troubled the Court in *Grigsby*: one rolling dice on when another, for whom he has no care, will die. But, again, attitudes towards gambling in general were traditionally negative. It certainly seems for present purposes that we need a more specific wrong to ascribe to wagering (in the assignment context) on people's lives. This is simply another way of asking why this particular form of gaming is "mischievous." Without the fear of murder, it is not obvious that there is anything particularly worrisome about gambling on people's lives.

Of course, a fundamental negative consequence of STOLI was the same in the time of *Grigsby* as it is now—the targeting of elderly or otherwise vulnerable insureds for profit. Indeed, this negative consequence is guaranteed by the savvy of investors, as those insureds will always make the "best bets" to die quickest. By allowing assignments to serve as an unchecked loophole to the insurable interest rule, the court would—no doubt knowingly—be giving blanket approval for such practice by stranger investors. However, the Court in *Grigsby* never stated its aversion to wagering so grandly. Furthermore, even if the insured is vulnerable, he is still forging his own agreement in assigning the policy—presuming he is not being defrauded in some way, which would be an extraneous problem.

It might be enough to say that the court had a distaste for the idea of gambling on when people will die, regardless of whether those people agreed to the wager. It was troubling in the days of *Grigsby* for the same reason it is today: we generally don't like the idea of someone profiting off of mom's death. Logic need not rule this negative connotation; taste can have a substantial influence.⁴⁹ And while this distaste is difficult to define, it has been illustrated throughout the history of the insurable interest rule. For example, early reasons for the insurable interest requirement included newspapers in England printing the odds on survival of public figures.⁵⁰ The logic associated with permissible life policy assignment has apparently not been enough to rid the bad taste left over from such examples.

⁴⁹ As discussed *infra*, even in the recent case of *Kramer v. Phoenix Life Ins. Co.*, neither the majority nor the dissent could expand beyond notions of taste in describing the public policy against wagers by assignment. See *Kramer*, 15 N.Y.3d at 553, 555.

⁵⁰ INSURABLE INTEREST, *supra* note 1, at 6, ¶ 2.5 (citing WELFORD, INSURANCE GUIDE AND HANDBOOK 27-28 (4th ed. 1901)), quoted in COLINVAUX AND MERKIN'S INSURANCE CONTRACT LAW A-0385.

This brings us to the second question of how insurable interest impacts such an amorphous (taste-related) problem. As we have seen, any purpose for insurable interest in the assignment context is hardly obvious. Furthermore, there are even movements to abolish the insurable interest requirement in other legal systems that allow for policy assignment—and at least one country has done just that.⁵¹ There is a key difference, however, between U.S. common law and these other legal systems I have in mind: those legal systems typically allow for *immediate* life policy assignment, while U.S. law, dating back to *Grigsby*, typically does not. Thus, let us now focus on this distinctive trait of U.S. jurisprudence, what I term the “temporal component,” and how it helps make sense of continuing to require insurable interest in a permissible assignment context.

2. *England’s Take on Life Policy Assignment via the Life Assurance Act of 1774*

It will be helpful to examine one of these other legal systems I have in mind, and which better than the one that gave rise to the U.S. conception of the insurable interest rule: Olde England. Given that little has changed regarding the insurable interest requirement for life insurance policies, the relevant law of Olde England is essentially the same for modern England—which doesn’t sound nearly as catchy. As stated, the Act set out the requirement for insurable interest. Although the Act offered no specific guidance on how that requirement was supposed to continue in an assignment context, if at all, the 1854 English case of *Dalby v. India and London Life Assurance Company* held that insurable interest had to exist only at the inception of the life policy and not at the time of loss.⁵² This basic principal has been further interpreted to literally allow for immediate assignment. As has been observed:

Once the policy has been properly created, the policyholder does not need to continue to hold an insurable interest in the life insured. The contract is still legal if the policyholder has no insurable interest at the time of the death. It is, for example, possible to hold an insurance policy on the life of a divorced spouse. This finding has enabled life policies to be assigned,

⁵¹ INSURABLE INTEREST, *supra* note 1, at 71, app. A, ¶ A.2-12 (Comparative Law on Australia).

⁵² *Dalby v. India and London Life Assurance Co.*, 15 C.B. 365 (1854) (Can.).

bought, and sold on the Traded Endowment Policies (“TEPS”) market.⁵³

The TEPS market is essentially a coherent life settlement market, which allows strangers to buy insureds’ life policies.⁵⁴ Under this system, immediate assignment has become a common occurrence, often with one taking a life policy out on his or her own life with the permissible intention of *immediately* assigning it.⁵⁵ As has been fully recognized, all of this allows for the Act to be side-stepped quite easily. The conceptual awkwardness noted in the introduction of this article, where a stranger cannot take out a life policy on someone for whom he has no insurable interest, but can eventually achieve the same through policy assignment, is in this case an absolute and immediately realizable reality.

Indeed, under English law neither an insured nor a stranger need mask anything with respect to policy assignment. A stranger-investor is presumably free to influence in any otherwise legal manner the insured’s purchase of a life policy solely with the intention of assigning it. More directly, there is really no such thing as *illegal* STOLI under English law.

3. Temporal Component under U.S. Law

The temporal component, as I have termed it, can be defined as the time that passes between policy inception and policy assignment. Distinct from the Act and English common law, the court in *Grigsby* made this temporal component a key determining factor for a wager. In offering a paradigmatic wager, the court in *Grigsby* described the case of *Warnock* as follows: “[A case] of the type just referred to, the policy having been taken out for the purpose of allowing a stranger association to pay the premiums and receive the greater part of the benefit, and having been assigned to it at once.”⁵⁶

The Court’s description can be broken down into two evidential parts: (1) stranger-based premium financing; and (2) the temporal component. The Court indicates the latter—the immediacy of the assignment—with “at once.” In this manner, the temporal component can serve as important evidence of impermissible assignment, or rather, STOLI: the less time that

⁵³ INSURABLE INTEREST, *supra* note 1, at 19, ¶ 3.49

⁵⁴ *Id.* ¶ 4.14.

⁵⁵ *Id.* ¶ 3.51.

⁵⁶ *Grigsby*, 222 U.S. at 156.

passes between policy inception and assignment, the more likely the policy was taken out simply to assign. But overlapping with this evidential role, the temporal component serves a less obvious purpose. It is a logical bridge between insurable interest and permissible assignment—a bridge lacking under English law.

This additional role can be understood as follows. The *Grigsby* Court's very purpose in allowing assignment was to recognize policyholders' legitimate private property interests in their policies, including their right to assign them. As the Court stated:

[L]ife insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property. . . . To deny the right to sell except to persons having [an insurable interest] is to diminish appreciably the value of the contract in the owner's hands.⁵⁷

The Court saw a profound difference between such a good faith sale/assignment and the obtaining of life policies solely to assign them—solely as a “cloak” to effect a wager.⁵⁸

Related to this distinction, if the passing of time is required before a policy can be assigned, then the assignment is more likely to be for legitimate property value considerations and the original transaction less likely to have been a sham. This, of course, is not a necessary correlation. But if insurable interest is required at inception, and the passing of time is required before the policy can be assigned to one without an insurable interest, the court's purpose is *better* ensured.

Furthermore, the temporal component impacts the negative consequences noted above. If time must pass between policy inception and assignment, the strangers can no longer as easily control *who* takes out the policy in the first place. The strangers' role as “originators” of policies lessens as their connection to the policyholders becomes more attenuated. In other words, the would-be stranger is less likely to be connected to the original transaction, and thus the original transaction is less likely to be a sham.

Finally, the temporal component keeps the subject of this article relevant. If one could immediately assign a policy, there would be no reason to inquire about his intent in doing so. What

⁵⁷ *Id.*

⁵⁸ *Id.*

real difference would an insurable interest requirement make as to how an insured or a stranger behaves, if the insured could immediately assign his policy?⁵⁹ Whether he purchased the policy with the intent to assign it or for a legitimate good faith purpose, the outcome *could* look exactly the same. How would a legal system police intent in such a scenario? For these reasons, there is virtually no discussion of intent in English law where immediate assignment is allowed. There is, however, discussion of intent in the U.S., because the temporal component allows intent to matter.

It is important here to gain some additional perspective on the role of intent. The ultimate goal under U.S. law on STOLI is not much different than that of English law: ensuring that insurable interest *truly* exists at the time of policy inception. However, the temporal component in U.S. law provides a means to police whether this is so, or whether a sham has occurred. Intent in this regard is a component of STOLI made accessible by the temporal component. The temporal component provides a spectrum of time from policy inception; and the amount of time passing from then until assignment provides evidence of whether: (1) a third-party stranger was connected to the original transaction; and, (2) concomitantly, the parties intended to assign at the time of the original transaction.⁶⁰ As stated in *Steinback v. Diepenbrock*:⁶¹

The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of *one* transaction.⁶²

As for the temporal component specifically, the optimal question is what point on the spectrum between policy inception and assignment indicates “one transaction.” An immediate assignment provides a strong indication.⁶³

⁵⁹ INSURABLE INTEREST, *supra* note 1, at 65, ¶ 7.94.

⁶⁰ All of this is more clear when turning back to the *Grigsby* Court’s description of *Warnock*, whereby the Court lists four evidential parts: (1) the policy is “taken out for the purpose” (*i.e.*, intentionality); (2) “of allowing a stranger” (*i.e.*, one with no insurable interest); (3) “to pay the premiums and receive the greater part of benefit” (the wager); and (4) the policy “having been assigned at once” (*i.e.*, the temporal component). *Grigsby*, 222 U.S. at 156.

⁶¹ *Steinback v. Diepenbrock*, 158 N.Y. 24, 31 (1899) (emphasis added).

⁶² *See Grigsby*, 222 U.S. at 156 (citing *Home Life Ins. Co. of N.Y.*, 21 S.W.2d at 416) (using similar language).

⁶³ In *Travelers*, however—the case discussed next—the court noted that an immediate assignment does not *necessarily* indicate an assignee’s involvement in policy origination. *Travelers*, 13 F. Supp. at 821. Likewise, *immediate* assignment is not necessary for a wager determination. In *Home Life Ins. Co. of N.Y. v. Masterson*, 21 S.W.2d 414, 416 (1929), the

Turning back to the wager language in *Grigsby*: “And cases in which a person having an interest lends himself to one without any, as a cloak to what is, in its inception, a wager, have no similarity to those where an *honest contract* is sold in good faith.”⁶⁴ In fitting this language to our discussion, the Court is essentially objecting to an insured assigning a life policy on his own (for which the insured has an insurable interest) to someone with no such interest in order to cloak what is, *in its inception*, a wager. The Court specifically contrasted this situation with one in which an *honest contract* is assigned. “Honest” here qualifies the original contract, in which a later assignee played no part.

4. *How All of this Impacts the Question of “Whose Intent?”*

The temporal component not only makes intent meaningful as part of the evidential indicia of STOLI, it also helps answer the subject of this article: whose intent? Immediate assignment by its nature implies mutual intent, lest an assignee be immediately available by coincidence the moment of policy inception. Indeed, the other tangible evidence the *Grigsby* Court lists, premium financing—especially when all premiums beginning from policy inception are paid—implies mutual intent, lest there just happens to be someone at policy inception ready to pay the premiums. And, of course, *Warnock*, the paradigm chosen by *Grigsby*, involved a wager scheme with an identified assignee from inception.⁶⁵

B. Travelers’s *Continuation of Grigsby*

Almost twenty-four years to the day after *Grigsby*, *Travelers*⁶⁶ provided perhaps the most comprehensive analysis of intent to date. In *Travelers*, the insured purchased a policy and shortly thereafter assigned it to a stranger investor. The insured had substantially paid the first premium, but the assignee took over the payments thereafter with apparently no further consideration.⁶⁷ The insurance company caught wind of the transaction and

court found that even though the “policy was applied for on the 26th of November, 1924, and was not assigned . . . until June 27, 1925[.] . . . the attendant circumstances indicated that it was *one transaction*.” (emphasis added).

⁶⁴ *Grigsby*, 222 U.S. at 156 (emphasis added).

⁶⁵ *Warnock*, 104 U.S. at 775 (the assignment occurred the same day as policy inception).

⁶⁶ *Travelers*, 13 F. Supp. at 819.

⁶⁷ *Id.*

challenged the assignment for lack of insurable interest. Following *Grigsby*, the court in *Travelers* focused on whether the assignment—which was now *per se* permissible—was made “with the intention that the assignment is to be used as a mere cover for a wager policy.”⁶⁸ And with this quote came the first explicit post-*Grigsby* mention of intention.

In the vein of *Grigsby*, the court in *Travelers* stated:

It is undoubtedly true that, if the policy was taken out by the parties with a *view to* its immediate assignment, the transaction would be nothing more than a mere subterfuge to avoid the well-settled rule that a party cannot *procure* insurance upon the life of one in whom he has no insurable interest.⁶⁹

There are a couple of notable elements here. First, “with a view” clearly refers to intention in this context and it is attributed to the “parties.” Second, harkening back to the temporal component, the court here, as in *Grigsby*, includes “immediate assignment” in its description of a wager. In addition, the term “procure” naturally refers to the potential assignee, as the insured would have an insurable interest in his own life.⁷⁰

The court then proceeded to focus on the insured’s and the assignee’s actions individually—both having testified before the court. The lack of evidence the court chose to discuss is instructive on intent: no evidence that (1) the insured’s signature was forged; (2) the assignee influenced the procurement of the policy; (3) the assignee knew of the policy before assignment; or (4) the assignee was connected to the original transaction at all.⁷¹ The last of these factors is really the underlying tenet of them all, concerning, as in *Grigsby*, the assignee’s connection to the original transaction. If this were not clear enough, the court summarized its reasoning as follows:

There is nothing in the record which can serve to support a finding that [the assignee] was in any wise connected with, or had any knowledge of, the original transaction involving the issuance of the policy, and the record is also barren of any

⁶⁸ *Id.* at 820.

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.* (emphasis added). Note that the term “procure” and “procurement” are used by numerous courts discussed in this article. The most recent example is in *Kramer*, wherein the majority and dissent disagreed over whether New York Insurance Law Section 3205(b)(1)’s language that an insured must “procure” a policy on “his own initiative” reflected the common law rule that no wagerer can participate in policy origination. *Kramer*, 15 N.Y.3d at 558.

⁷¹ *Travelers*, 13 F. Supp. at 820.

evidence upon which could be predicated a finding that [the insured] procured the policy at the behest of [the assignee] or for the purpose of assigning it to him immediately.⁷²

Again, the court here is explicitly focused on the “original transaction” and evidence connecting the assignee thereto. And again, immediate assignment is the red flag for concern.

However, let’s unpack the court’s language a bit more decisively for purposes of intent. In the first half of the above quote, the court focuses primarily on the assignee and any connection he may have had to the issuance of the policy. This makes sense for the reasons discussed. The second half of the quote, however, separated by the “and” and the “also,” is substantially concerned with the insured, his state of mind in obtaining the policy. To be clear, we can further deconstruct the second half of the quote in two parts, as divided by the “or.” The first part (of the second half) simply refers to evidence of the insured obtaining the policy at the request or initiation of the assignee. This, like the first half of the quote, entails an agreement or some prior meeting of the minds to skirt the insurable interest rule. Thus, the assignee’s intent is still optimal. The second part (of the second half), however, requires some scrutiny, as it only literally concerns the insured’s purpose—his state of mind/intent. However, the use of “him” and “immediately” in the sentence indicates an agreement based on the now familiar temporal component reasoning: a “him” must exist to “immediately” claim the policy. In this case, the use of “or” in this last quoted sentence does not denote two completely distinct alternatives, but rather serves to emphasize that evidence lacks for the insured’s state of mind and for the assignee’s.

This analysis, including a perhaps belabored examination of “or,” may seem a bit academic—and certainly will once we get to where the court explicitly adopts a mutual intent standard. But this level of scrutiny serves the purpose of foreshadowing a root cause of the modern confusion over intent. As discussed later, a persistent minority argues that courts have adopted a unilateral intent standard, even when those courts cite to the historic cases discussed herein. This is likely because, as in *Grigsby* and here in the language of *Travelers*, insured intent is not only analytically necessary for STOLI, it is usually the primary link between the insurer and the STOLI. It is the insured, after all, who applies for

⁷² *Id.*

insurance, and it is his intent in doing so that the insurer usually first calls into question. But the question in determining the proper standard of intent is whether the insured's intent is *sufficient* for STOLI. It is not simply whether it is necessary; and any amount of focus on the insured's intent will not answer this sufficiency question. To answer that question and avoid the forewarned confusion, the inquiry needs to concern the court's focus on the assignee, on whether the assignee's intent is *also* necessary (*i.e.*, whether mutual intent is sufficient).

To this end, the court in *Travelers* went on to make clear that the assignee's intent is necessary. The court did this, no less, by discussing the role of the temporal component:

The assignment was in point of time very close to the issuance of the policy, and it may well have been (although there is no evidence on the point) that, when the insured took out the policy, he intended to assign it to the plaintiff. This, however, would not be sufficient. If it is to be shown that he, in the words of Mr. Justice Holmes, lent himself to one without an insurable interest as a cloak to a gambling transaction, *it must appear that the assignee participated in some way.*⁷³

In other words, the assignee's intent, which is evidenced by the temporal component, is an explicit piece of the puzzle for determining STOLI. The temporal component, in its evidential sense, is probative on the question of whether an agreement existed at the time of policy issuance—a question of course that supervenes on the question of whether there was an assignee with the impermissible wagering intent.

Again, the question is whether the original transaction was a wager. And for it to have been a wager, the court is saying there must have been a wagerer involved in the original transaction. The court in *Travelers* essentially reformulates *Grigsby's* requirement of a wagerer—and thus mutual intent—in a logical conditional: if A then B, where A is a wager and B is the assignee's/wagerer's participation. Apart from this analytical formulation, the court summed up its factual observation as follows:

As there is nothing in the record before me which can justify a finding that [the assignee] had anything to do with the original transaction or that [the insured] procured the policy pursuant to a preconceived plan to assign the same, it cannot be held

⁷³ *Id.* at 821 (quoting *Lawrence v. Travelers' Ins. Co.*, 6 F. Supp. 428, 430 (D.C. Pa. 1934)) (emphasis added).

that the transaction was entered into as a mere cover for a wager or gambling transaction.⁷⁴

As an important aside to the above discussion, once you accept that a wagerer is necessary for STOLI, and thus that a mutual intent standard applies, intent becomes quite secondary. Indeed, “mutual intent” is somewhat of a misnomer. If a wagerer is shown to be connected to policy origination, his intent is fairly presumable. And the insured’s intent is definitely presumed. The mutual intent standard is thus really the equivalent to saying, without more, that a wagerer must be connected to policy origination. For ease of discussion, I will continue to refer to the necessity and sufficiency of the insured’s and assignee’s/wagerer’s intent and how these notions comport with both standards. But this fundamental observation about the reality of the mutual intent standard is a useful way of distinguishing it from the unilateral intent standard, which relies primarily on the insured’s intent.

In sum, *Grigsby* and *Travelers* can only support the application of a mutual intent standard to STOLI. While the Court in *Grigsby* did not explicitly express its support for such a standard like the court in *Travelers*, it cited *Warnock* as a paradigm of wager, which likewise involved a premeditated scheme. The Court in *Grigsby* also principally relied on the temporal component, which, for the reasons discussed, implies a premeditated scheme and thus mutual intent. Conversely, these cases offer absolutely no support for a unilateral intent standard. Had the courts thought such a standard sufficient, they could have easily said so, weighing the evidence solely on the insured’s state of mind.

III. *FIRST PENN-PACIFIC LIFE* V. THE UNILATERAL INTENT STANDARD

The 2009 case of *First Penn-Pacific Life Insurance Company v. Evans*⁷⁵ essentially took over where *Travelers* left off (if you discount the eighty some years that passed in between). Yet, the

⁷⁴ *Travelers*, 13 F. Supp. at 821. This is a good example of the forewarned confusion that can result in putting too much weight on a court’s discussion of the insured’s intent. The manner in which the court states that there is no evidence that the insured “procured the policy pursuant to a preconceived plan to assign it” could lead one to think that evidence of such a plan, even if only contemplated by the insured, is enough for a wager policy. However, this is clearly not the holding of *Travelers*, which explicitly required the participation of an assignee in such a plan.

⁷⁵ *First Penn-Pacific Life Ins. Co. v. Evans*, 2009 WL 497394 (4th Cir. 2009).

case still caused controversy for explicitly requiring “mutual intent” for a STOLI finding.⁷⁶ Further, any controversy was made all the more surprising because the court in *First Penn-Pacific Life* cited *Grigsby* and *Travelers* and, although it did not give those cases direct credit, followed their reasoning on the mutual intent standard religiously. In other words, there was really nothing new about the decision.

The scheme in *First Penn-Pacific Life* is familiar by now, if a bit more sophisticated. The insured committed a myriad of misrepresentations in taking out multiple life insurance policies on his own life.⁷⁷ After he purchased the policies he met with a viatical settlement broker to discuss selling them.⁷⁸ Pertinent here, the Fourth Circuit, in essentially adopting the district court’s analysis, held that the insured had an insurable interest when he purchased the policy at issue “despite his *plan* ‘to sell all or most of his life insurance policies at the time he applied for them.’”⁷⁹ In its brief opinion, the court stated:

[W]here there is no evidence that anyone other than Moore was a participant in the scheme at the time [the insured] obtained the . . . policy, [he] had an insurable interest when he obtained the policy. No third party participated in the procurement of Moore’s policy and therefore no one was “wagering” on [the insured’s] life in violation of public policy.⁸⁰

This reasoning is axiomatic to that of *Travelers* and *Grigsby*. The court concisely expresses *Travelers*’s requirement of an assignee’s participation in the wager, by pointing out that without an assignee there is no “wagering.” No assignee, thus no wagerer, thus no wager on a life without an insurable interest. Like *Travelers*, the court focuses its analysis on the point in time of policy inception: “at the time [the insured] obtained the . . . policy . . .”⁸¹ Furthermore, the second sentence of the above quote compliments *Travelers*’s logical formulation. While *Travelers* states: if A (wager) then B (assignee’s participation); *First Penn-Pacific Life* states: without B, there can be no A.

⁷⁶ See, e.g., Jason Walters, *4th Circ. Stance in First Penn v. Evans*, LAW360 (May 15, 2009), <http://www.law360.com/articles/101427/the-4th-circ-stance-in-first-penn-v-evans>; Hoffman, 2010 Presentation, *infra* note 115.

⁷⁷ *First Penn-Pacific Life Ins. Co.*, 2009 WL 497394, at *1.

⁷⁸ *Id.*

⁷⁹ *Id.* at *2 (quoting *First Penn-Pacific Life Ins. Co.*, 2007 WL 1810707, at *4 n.7) (emphasis added).

⁸⁰ *Id.* at *3 (internal citation and quotation marks omitted).

⁸¹ *Id.*

The court in *First Penn-Pacific Life* notes that a majority of courts have similarly held that “a third party must be involved in the *procurement* of the policy to eliminate the insurable interest.”⁸² For example, the court cites *Sun Life Assurance Co.* which held: “[The insured’s] intent . . . is *irrelevant* without facts or allegations suggesting that a third party lacking an insurable interest intended, at the time [the insured] *procured* the . . . *policy*, to acquire the policy upon expiration of the contestability period.”⁸³ Furthermore, the court notes that “evaluating insurable interest on the basis of the subjective intent of the insured at the time the policy issues, as First Penn would have us do, would be unworkable and would inject uncertainty into the secondary market for insurance.”⁸⁴

In addition to this significant practical problem noted by the court, the unilateral intent position is simply fundamentally untenable under the holdings of all the cases reviewed thus far. Under the *Grigsby* line of cases, as discussed, intent is a secondary, evidential consideration. The ultimate question under all of these cases in answering whether STOLI has occurred is whether there has been a sham transaction in which a wagerer is involved. Under a unilateral intent position, however, intent essentially becomes the STOLI. A wagerer is simply unnecessary under the unilateral intent position; and, thus, an actual wager (an actual sham) is unnecessary at the time of policy inception—something very important to the *Grigsby* line of cases. In other words, the insured’s intent alone could constitute STOLI—even if an actual assignee had nothing to do with the original transaction. Not only is this a completely impractical position to police, as the court in *First-Penn Pacific Life* notes, it is simply not what *Grigsby* and

⁸² *Id.* at *3 n.3 (emphasis added).

⁸³ *Sun Life Assurance Co. of Can. v. Paulson*, No. 07-3877 (DSD/JJG), 2008 WL 451054, *3 n.3 (D. Minn. Feb. 15, 2008) (emphasis added). Most states have a two-year contestability period for life insurance policies. See Lovendusky, *supra* note 7, at 11-12. Insurers are thereby prohibited from contesting the validity of a policy beyond two years from policy inception—even if it turns out the insured misrepresented material facts on his policy application. *Id.* Only in New York and Michigan, however, does this rule limit an insurer’s ability to contest a policy based on a lack of insurable interest. *Id.* Thus, modern STOLI schemes often time the assignment to occur after the two-year period to escape challenges based on policy misrepresentations in general, but still must be sure to maintain the appearance that there was an insurable interest at policy inception. See, e.g., Kramer, 15 N.Y.3d at 547 n.3 (the district court had dismissed the insurers’ counterclaims and cross claims for fraud, fraudulent concealment and aiding and/or abetting fraud based on the two-year contestability period).

⁸⁴ *First Penn*, 2009 WL 497394 at *3.

Travelers and the courts that followed suit had in mind in outlawing wager polices (*i.e.*, STOLI).

IV. UNILATERAL INTENT EXPOSED

The continuity between *Travelers's* and *First Penn-Pacific Life's* support of a mutual intent standard could hardly be more seamless. Indeed, at this point, one has to wonder what the unilateral intent standard has going for it. Have I been hiding for dramatic effect a body of equally convincing case law in support of the unilateral intent position? Sadly, no. The case that seems to be most often cited as supporting a unilateral intent position is *Life Product Clearing, LLC v. Angle*.⁸⁵ However, underscoring just how uneven the battle over competing intent standards is, the court in *First Penn-Pacific Life* cited *Life Product Clearing* together with *Sun Life Assurance*, as supporting the mutual intent position.⁸⁶ Thus, the unilateral intent supporters cannot even rely on *Life Product Clearing* without debate. Given this declension, the best way to proceed here is to independently examine the case of *Life Product Clearing* and then evaluate the reasoning proffered for why it supports a unilateral intent position.

A. Life Product Clearing, LLC v. Angel

In *Life Product Clearing*, the insured established a trust in his name and then on the same day (*i.e.*, immediately) applied to Lincoln Life & Annuity Co. (Lincoln) for a \$10 million insurance policy, with the trust named as the sole beneficiary.⁸⁷ The trust agreement mentioned a stranger investor, Life Product Clearing, and indicated a possible future transfer of the trust to this investor.⁸⁸ According to the allegations, all of this had been orchestrated by an insurance agent for Lincoln, who handled the insured's policy and left blank the question on the policy application of whether he knew of any intent to transfer the policy through a secondary market.⁸⁹ Ultimately, in exchange for the policy's death benefit, Life Product Clearing was to pay the

⁸⁵ *Life Prod. Clearing*, 530 F. Supp. 2d at 648.

⁸⁶ *First Penn*, 2009 WL 497394, at *3 n.3. The court in *Sun Life Assurance* also cited *Life Product Clearing* as supporting a mutual intent standard. See *Sun Life Assurance*, 2008 WL 5120953, at *5.

⁸⁷ *Life Prod. Clearing*, 530 F. Supp. 2d at 646-47.

⁸⁸ *Id.* at 647-48.

⁸⁹ *Id.* at 650.

premiums—\$572,000 in the first year alone, which the insured could not possibly afford—and an immediate payment of \$300,000 to the insured.⁹⁰ This all took place shortly after the policy was issued, with the insured selling his interest in the trust to Life Product Clearing.⁹¹

Dying just five days later, the insured's life made an excellent gamble.⁹² After an extended period of inquiry, Lincoln paid the death benefit of \$10 million plus interest to Life Product Clearing.⁹³ Shortly thereafter, Life Product Clearing filed an action seeking a declaration that the trust agreement and the sale of the trust to Life Product Clearing were valid and that it, and not the insured's estate, was entitled to the beneficial interest in the trust. The insured's daughter in turn asserted counterclaims against Life Product Clearing and third-party claims against the trust, alleging that the transfer of interest in the trust to Life Product Clearing constituted a "wager policy" against public policy.⁹⁴ Life Product Clearing filed a motion for judgment on the pleadings.

As one might readily expect at this point, the court found that even the scarce facts noted above made out a potential STOLI violation and denied Life Product Clearing's motion to dismiss. The pertinent question here, however, is: with a stranger assignee alleged, why would the District Court for the Southern District of New York in *Life Product Clearing* alter the District Court for the Eastern District of New York's precedent in *Travelers*—a case on which it relied—to require only an insured's intent for STOLI? This implicit rejection of *Travelers*, after all, is what certain litigators have proffered, whether they understand this consequence of their proffering or not. The short answer is a bit anticlimactic: the court did not reject or even alter *Travelers* and there is no good reason to think it did.

After providing the typical explanation of *Warnock* and *Grigsby*, the court in *Life Product Clearing* actually quotes the first explicit mention of "intention" in *Travelers*: "An assignment of a life insurance policy, when not made by the insured in bad faith and with the *intention* that the assignment is to be used as a mere

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Life Prod. Clearing, 530 F. Supp. 2d at 651.

⁹³ *Id.*

⁹⁴ *Id.* at 648.

cover for a wager policy, is not against public policy.”⁹⁵ As alluded to before, this quote’s immediate focus on the insured’s intent, taken by itself, could imply a unilateral intent position. However, this would be so only for one who did not read the rest of *Travelers*. We now know from the prior discussion that pursuant to *Travelers*, “wager policy,” itself, necessarily involves an assignee/wagerer as part of the scheme/wager. Thus, no change of the “mutual intent” analysis is indicated by this quote. Quite the opposite.

The court in *Life Product Clearing* next cites the following cases:

For a court to assess whether a policy was procured “with a view to its immediate assignment,” it considers the intent of the insured who transfers the policy at the time the policy is procured. See *Finnie v. Walker*, 257 F. 698, 701 (2d Cir.1919) (non-contemporaneous assignment of policy held invalid because “wagering intent” was established by fact assignee knew that insured was ill and potential payout was large); *Steinback*, 158 N.Y. at 31, 52 N.E. 662 (“The intention of the parties procuring the policy would determine its character, which the courts would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction.”).⁹⁶

These cases have all been cited in this article and none of them contradict our prior examination of *Travelers*. Taking the citations in order, the *Life Product Clearing* court “considers” the insured’s intent to be just that, a consideration. The court in *Travelers* did the same. Indeed, as stated, it is a necessary consideration, just not a sufficient one. Furthermore, the quote states that the court “considers” the insured’s intent for the purpose of determining whether the policy “was procured ‘with a view to its immediate assignment’”—language that, as discussed, implies a preexisting agreement. Making this all the more clear, the court’s citation to *Finnie* includes a parenthetical referencing the assignee’s “wagering intent.”⁹⁷ Finally, the additional citation to *Steinback* explicitly recognizes the importance of “the intention of the parties”—thus, directly negating any support for a unilateral intent standard.⁹⁸

⁹⁵ *Id.* at 654.

⁹⁶ *Id.*

⁹⁷ *Life Prod. Clearing*, 530 F. Supp. 2d at 654.

⁹⁸ *Id.*

What is also clear is that the court in *Life Product Clearing*, much like the court in *Travelers*, is primarily concerned with determining what factors evidence STOLI. The court mentions “premium financing,” which involves participation of an assignee, and the temporal component, which, as discussed, evidences an assignee’s involvement at policy inception.⁹⁹ Furthermore, the court, as it must, relied on New York Insurance Law Section 3205(b)(1), which provides:

Any person of lawful age may on his own initiative procure or effect a contract of insurance upon his own person for the benefit of any person, firm, association or corporation. Nothing herein shall be deemed to prohibit the immediate transfer or assignment of a contract so procured or effectuated.¹⁰⁰

The court applies this provision in conjunction with the following “cloak” and “wager” language from *Grigsby*: “the motion must be denied if Angel sufficiently pleads that [the insured] did not procure the Policy ‘on his own initiative’ and that instead the transactions were designed ‘as a cloak to what [was], in its inception, a wager by Life Product Clearing’”¹⁰¹ According to the court, the assignee is therefore statutorily required to be involved in STOLI in order to deprive the insured of procuring the policy on his own initiative and for a wager to exist at policy “inception.”¹⁰² This is essentially what the court in *Travelers* held when it required a “wagerer” and relied on the immediacy of assignment as evidence that the original transaction was a wager.

Let’s recap. In order for the court in *Life Product Clearing* to have endorsed a unilateral intent position, it would have had to: (1) reject *Travelers*’s mutual intent analysis, a case on which it relies; (2) ignore the requirements it reads into New York’s own statute, on which it relies; and (3) do so for no reason at all, given that an assignee and, thus, mutual intent, were alleged.¹⁰³ The court, of course, did none of this.

B. Life Product Clearing as Interpreted by Unilateral Intent

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 655 (quoting N.Y. INS. LAW § 3205(b)(1)). As discussed *infra*, the court’s interpretation of Section 3205(b)(1) is now at odds with the interpretation adopted by the New York Court of Appeals in *Kramer*.

¹⁰¹ *Life Prod. Clearing*, 530 F. Supp. 2d at 655.

¹⁰² *See id.* at 654.

¹⁰³ *See Sun Life Assurance Co.*, 2008 WL 5120953, at *5 (noting that in *Life Product Clearing* the “third party purchaser’s identity and intent [were] known”).

Proponents

It should now be clear why *First Penn-Pacific Life* cited *Life Product Clearing* in support of a mutual intent standard. What should not be clear is why anyone says otherwise. In exploration of this question, we will now turn to how the unilateral intent supporters have interpreted *Life Product Clearing*. In so doing, I will first examine the court's opinion in *Lincoln National Life Insurance Co. v. Calhoun*,¹⁰⁴ which some have understood as interpreting *Life Product Clearing* in a unilateral intent light. I will then examine the position of a unilateral intent proponent who unabashedly sees *Life Product Clearing* as supporting a unilateral intent standard.

I. *Lincoln National Life Insurance Company v. Calhoun*

At first blush, *Lincoln National* seems straightforward in pitting the two intent standards against each other. In that case, Lincoln National claimed that the policy it issued to the insured, Mr. Calhoun, was void for lack of an insurable interest because at the time of policy issuance, Mr. Calhoun intended to sell the policy to stranger investors.¹⁰⁵ Mr. Calhoun, along with the trustee of the trust he established as the owner and beneficiary of the policy, moved to dismiss the suit because no stranger investor had been identified.¹⁰⁶ As the court saw it, this case involved the typical modern STOLI situation, where an elderly person “procures life insurance on his own life in order to subsequently assign the policy to a third party following the lapse of the two-year contestability period.”¹⁰⁷

Mr. Calhoun was apparently taking his position to its logical extreme, arguing that “it is legally permissible for an individual applying for life insurance to have a pre-existing agreement with a stranger lacking an insurable interest in the life of the person applying for insurance”¹⁰⁸ After noting that the laws of both potentially applicable states—New Jersey and California—require an insurable interest to exist only at the time an insurance policy is issued, the court entered the world of useless vacuity, stating that “[i]nsureds begin to run afoul of the insurable interest

¹⁰⁴ *Lincoln Nat'l Life Ins. Co. v. Calhoun*, 596 F. Supp. 2d 882 (D.N.J. 2009).

¹⁰⁵ *Id.* at 884.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* See *supra* note 83, concerning the contestability period.

¹⁰⁸ *Id.* at 887.

requirement . . . when they intend at the time of the policy's issuance, to profit by transferring the policy to a stranger with no insurable interest at the expiration of the contestability period."¹⁰⁹ What "begin to run afoul" means is anyone's guess. When does the "begin" end and the "foul" begin? Vagueness further permeates the court's depiction of facts: "Lincoln National alleges that at the time he applied for the policy, Calhoun had already entered into an informal arrangement to assign the policy to a third party who would finance all of its premium payments for the Policy"¹¹⁰ What is an informal arrangement? What seems clear is that on the facts of this case, there was no arrangement, informal or otherwise, which identified a third-party assignee. Thus, Mr. Calhoun's stated position that he was legally permitted to enter into a pre-existing agreement sounds stronger than it is.

The court in *Lincoln National* cited *Life Product Clearing* in support of the modest proposition that questions of intent should be factually developed. The court characterized *Life Product Clearing* as standing for the proposition that "summary disposition was inappropriate where the plaintiff alleged that the insured had intended at the time of procuring his insurance policy to assign it to a third party with no insurable interest"¹¹¹ This is hardly an adequate description of *Life Product Clearing*, but it also hardly endorses a unilateral intent position. However, the court did contrast *Life Product Clearing* with *Sun Life Assurance*, which it noted had held that the insured's intent to enter into a STOLI scheme was "irrelevant" without an identified third-party buyer.¹¹² The court failed to recognize that, in accord with this precept, such a third-party buyer was alleged in *Life Product Clearing*. Indeed, the court did not examine *Life Product Clearing* at all.¹¹³ Ultimately, the court agreed, as had the court in *Sun Life Assurance*, to allow time for Lincoln National to "discover" whether an assignee could be identified.¹¹⁴ If anything, this preliminary decision on the matter supports the notion that identification of an assignee is necessary; otherwise the court could have saved Lincoln National the extra discovery.

¹⁰⁹ *Lincoln Nat'l Life Ins.*, 596 F. Supp. 2d at 889.

¹¹⁰ *Id.* at 889.

¹¹¹ *Id.* at 890.

¹¹² *Id.* at 889 (citing *Sun Life Assurance Co.*, 2008 WL 451054, at *2).

¹¹³ The court did note that "compelling policy considerations are raised by either [the unilateral intent or mutual intent] position." The court did not bother to list any such policy considerations nor examine *Life Product Clearing* any further. *Id.* at 890.

¹¹⁴ *Lincoln Nat'l Life Ins.*, 596 F. Supp. 2d at 890.

2. Insurance Industry Litigators

As for industry litigators who see *Life Product Clearing* through a unilateral intent prism, one example is James Hoffman, who commonly defends insurance companies in STOLI-related cases. In a presentation titled “The New Frontier of STOLI Litigation—Stranger . . . and Even More Strange,” Hoffman proffered that *Life Product Clearing* supports a unilateral intent standard for STOLI.¹¹⁵ A caveat is needed before I critically discuss Hoffman’s presentation, because it is just that—a presentation—not a formal paper with the usual amount of cited research. And the presentation’s analysis of *Life Product Clearing* is limited to approximately one page. That said, however, I am not sure that Hoffman’s position requires further analysis or that any further analysis would strengthen his position.

Hoffman spends one paragraph describing the case of *First Penn-Pacific Life* as standing for the “third-party participation” standard.¹¹⁶ In explaining the antithesis of that standard, he goes on to claim that the court in *Life Product Clearing* “adopted the ‘intent’ standard to determine whether a policy is a STOLI policy lacking an insurable interest.”¹¹⁷ Hoffman concludes that *Life Product Clearing* stands for the proposition that “the Policy lacks an insurable interest if the insured intended to sell the Policy at the outset, *regardless* of whether others were involved or whether steps were taken to effectuate a sale.”¹¹⁸ This, of course, is the exact opposite of the holding that I (and the court in *First Penn-Pacific Life*) took away from *Life Product Clearing*.

Although a bit redundant, taking Hoffman’s interpretation of *Life Product Clearing* piecemeal is the most earnest way to critique it. First, Hoffman states the following: “the district court held that Angel had alleged sufficient facts to support her counterclaim that [the insured] obtained the Policy ‘with the prior intent to transfer it to a stranger with no “insurable interest” in his life.’”¹¹⁹ Of course, as alluded to in the prior discussion of

¹¹⁵ James A. Hoffman, Counsel, Drinker Biddle & Reath L.L.P., Presentation at the 2010 Association of Life Insurance Counsel Annual Meeting: The New Frontier Of STOLI Litigation—Stranger . . . and Even More Strange (May 24, 2010) [hereinafter Hoffman, 2010 Presentation].

¹¹⁶ *Id.* at 9.

¹¹⁷ *Id.* at 8. Hoffman uses “intent” standard for what I have termed the “unilateral intent” standard.

¹¹⁸ *Id.* at 9 (emphasis added).

¹¹⁹ *Id.* (citing *Life Prod. Clearing*, 530 F. Supp. 2d at 648).

Travelers, one could easily hunt for individual sentences in just about any opinion, and proffer that they convey support for a unilateral intent position simply because they mention only the insured's intent.¹²⁰ As stated, this might be the most fundamental and common mistake made in concluding that decisions support a unilateral intent standard. Since the insured's intent is a necessary condition for STOLI, any decision analyzing STOLI will refer to it.

Furthermore, what is particularly relevant here is that when the decision is not contemplating a choice between the unilateral intent standard and the mutual intent one, the court need not be careful in mentioning a stranger's intent every time it mentions the insured's. Indeed, as previously mentioned, the insured's intent is probably more natural to discuss, because the stranger's intent is all but assumed.¹²¹ In short, the sentence quoted by Hoffman notes the STOLI-required intent of the insured, but does not say it is sufficient for STOLI.

Next, Hoffman quotes the following:

[O]nly one who obtains a life insurance policy on himself "on his own initiative" and in good faith – that is, with a genuine intent to obtain insurance protection for a family member, loved one, or business partner, rather than an intent to disguise what would otherwise be a gambling transaction by a stranger on his life – may freely assign the policy to one who does not have an insurable interest in him.¹²²

First, the court in *Life Product Clearing* was quoting New York Insurance Law Section 3205(b)(1)'s "on his own initiative" language, which the court held implies the involvement of a third-party—presumably an assignee.¹²³ That is, the court held that "on his own initiative" means not via someone's else's initiative.¹²⁴ Second, although not mentioned by Hoffman, the court in *Life Product Clearing* immediately follows this language with a long quote from *Travelers*:

[A]n assignment of a life insurance policy, when not made by

¹²⁰ See *supra* Section II.B; *supra* note 74.

¹²¹ This, of course, assumes that a stranger-investor has been identified.

¹²² Hoffman, 2010 Presentation, *supra* note 115, at 8 (citing *Life Prod. Clearing*, 530 F. Supp. 2d at 653). Not to beat a dead horse, but again, this language says nothing of a stranger or her intent being unnecessary.

¹²³ *Life Prod. Clearing*, 530 F. Supp. 2d at 653 (citing N.Y. INS. LAW § 3205(b)(1)).

¹²⁴ The court contrasted a situation in which the insured acts "on his own initiative" with one in which the insured has "an intent to disguise what would otherwise be a gambling transaction by a stranger on his life . . ." *Life Prod. Clearing*, 530 F. Supp. 2d at 653 (emphasis added).

the insured in bad faith and with the intention that the assignment is to be used as a mere cover for a wager policy, is not against public policy and is sanctioned.... It is undoubtedly true that, if the policy was taken out by the parties with a view to its immediate assignment, the transaction would be nothing more than a mere subterfuge to avoid the well-settled rule that a party cannot procure insurance upon the life of one in whom he has no insurable interest. The authorities do not conflict upon this point. But obviously the question whether the insured lent himself to one without an insurable interest in his life as a cloak to a gambling transaction (*Grigsby v. Russell, supra*) is not a question of law, but rather is a question of fact.¹²⁵

This quote, which we examined previously, bears all the indicia of mutual intent: (1) cover for a *wager* policy; (2) the *parties'* view; (3) immediate assignment; and (4) procurement of the policy by a stranger. And of course we know that *Travelers* explicitly imposed a mutual intent standard, making the above list—if not academic—secondary.¹²⁶ For good measure, the *Life Product Clearing* court then cites *Steinback* and *Finnie*, which, again, also support a mutual intent standard.¹²⁷

All of this aside, Hoffman next states that the *Life Product Clearing* court recognized that “it considers the intent of the insured who transfers the Policy at the time the Policy is procured” when deciding “whether an arrangement is simply a sham transaction designed to evade the insurable interest rule or a genuine, good-faith assignment.”¹²⁸ This quoted language, which skips almost an entire paragraph to connect two incomplete sentences, is quite misleading. The first quoted portion comes from the same full quote with which I began my discussion of *Life Product Clearing*, which reads as follows: “For a court to assess whether a policy was procured ‘with a view to its immediate assignment,’ it considers the intent of the insured who transfers the policy at the time the policy is procured.”¹²⁹ As discussed, the “with a view to its immediate assignment” language is obviously meaningful, as it indicates the immediate presence of a third-party stranger and thus, mutual intent. But more important is the point I made when discussing this very language: *consideration* of the

¹²⁵ *Id.* at 653-54 (quoting *Travelers*, 13 F. Supp. at 820).

¹²⁶ *Travelers*, 13 F. Supp. at 820.

¹²⁷ *Life Prod. Clearing*, 530 F. Supp. 2d at 654.

¹²⁸ Hoffman, 2010 Presentation, *supra* note 115, at 9.

¹²⁹ *Life Prod. Clearing*, 530 F. Supp. 2d at 654.

insured's intent is necessary to a STOLI analysis—but this says nothing of its sufficiency or of a unilateral intent standard.

The incompleteness of the second half of the language quoted by Hoffman is perhaps even more misleading. The complete sentence by the court in *Life Product Clearing* reads: “Courts consider factors such as whether the insured paid premiums and the length of time the insured held the policy before assigning it when deciding whether an arrangement is simply a sham transaction designed to evade the insurable interest rule or a genuine, good-faith assignment.”¹³⁰ As discussed in the prior analysis of *Life Product Clearing*, here the court was laying out two factors evidencing STOLI: payment of premiums and the temporal component, both of which can demonstrate the immediate participation of an assignee or, in the court's words, “an arrangement” that is a “sham.”¹³¹

This ends Hoffman's discussion of *Life Product Clearing*. And the prior recapped reasoning on page 706 (as well as the entire discussion of *Life Product Clearing*) seems no worse for wear.

Next, Hoffman cites in a footnote three cases with accompanying parentheticals that he contends likewise follow the unilateral intent view. First, he cites *Wuliger v. Manufacturers Life Ins. Co.*,¹³² from which he quotes the following: “The viators' purchases of the insurance policies with the intent to re-sell them . . . immediately constituted insurance fraud, because the viators never intended to insure their own lives.”¹³³ Again, this sentence mentions only the insured's intent. However, the preceding sentence in the opinion makes clear that not only was there an alleged assignee, the assignee “persuaded” the elderly viators to purchase life insurance policies and assign them.¹³⁴ So the court had no reason to decide that the presence of the assignee was unnecessary for a STOLI finding. Moreover, none of this was the crux of the case, which uniquely concerned whether a receiver standing in the shoes of the assignee could move for rescission.¹³⁵ In this context, one sentence's emphasis on an insured's intent is

¹³⁰ *Id.*

¹³¹ *Id.* at 654 (emphasis added).

¹³² *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787 (6th Cir. 2009).

¹³³ Hoffman, 2010 Presentation, *supra* note 115, at 9 n.43 (citing *Wuliger*, 567 F.3d at 787).

¹³⁴ *Id.*

¹³⁵ Typically, of course, the insurer moves for rescission, and the premiums paid are returned to the insured.

hardly a strong counterweight to the body of case law requiring mutual intent.¹³⁶

The second case listed fares little better for a unilateral intent view. In *Bankers' Reserve Life Co. v. Matthews*,¹³⁷ the court, as quoted by Hoffman, characterizes the issue of insurable interest as follows: "The crux is whether the policy was a wagering contract at the time it became effective as a contract. If, at that time, such assignment was contemplated by the insured, it is a wagering contract, otherwise it is not."¹³⁸ None of this language is inconsistent with a mutual intent requirement. Indeed, "wagering contract" implies a wager, and the two sentences imply an agreement to assign at policy inception, thus entailing mutual intent. Furthermore, just as in *Wuliger*, an assignee was before the court. As the court states: "[t]he question here is whether this insured, at the time these policies became contracts, contemplated assignment to Mrs. Matthews [the assignee]."¹³⁹ Indeed, all of the evidence the court relied on for determining STOLI came from the assignee. As the court noted in dismissing Mrs. Mathews and focusing instead on her husband, who essentially acted as the actual assignee: "Mrs. Mathews had nothing to do with the procuring of this insurance, the payment of the premiums, nor the change in beneficiaries, and was not, therefore a witness."¹⁴⁰ These, of course, are common factors relevant to establishing mutual intent.

Finally, Hoffman cites *Home Life Ins. Co. of N.Y. v. Masterson*, with the following parenthetical: "the policy is a 'wagering contract' if 'at the time the policy was taken out, the insured intended to make such an assignment.'"¹⁴¹ Following a familiar pattern, the sentence that immediately preceded this one provided: "the assignment of a policy of insurance to one having no insurable interest in the life of the insured, although issued to one having such interest, is invalid if made in pursuance of *an*

¹³⁶ Furthermore, the district court in *Wuliger* stated: "In this case, the viators were merely a *pass-through* for the viatical broker and derived a financial benefit for their *service* of securing the policy. It seems difficult to imagine such a situation can fall outside the definition of a wagering contract." *Wuliger v. Mfrs. Life Ins. Co.*, No. 3:03 CV 7457, 2008 WL 397591, at *10 (N.D. Oh. Feb. 11, 2008) (emphasis added).

¹³⁷ *Bankers' Reserve Life Co. v. Matthews*, 39 F.2d 528 (8th Cir. 1930).

¹³⁸ Hoffman, 2010 Presentation, *supra* note 115, at 9 n.43 (quoting *Bankers' Reserve Life Co.*, 39 F.2d at 529).

¹³⁹ *Bankers' Reserve Life Co.*, 39 F.2d at 529 (emphasis added).

¹⁴⁰ *Id.* at 530.

¹⁴¹ Hoffman, 2010 Presentation, *supra* note 115, at 9 n.43 (citing *Home Life Ins. Co. of N.Y.*, 21 S.W.2d at 414).

agreement made at the time of the issuance of the policy."¹⁴² And just for good measure, the court later states: "[t]he intention of the parties determines the character of the transaction."¹⁴³

Given the above, one has to wonder why anyone would cling to a unilateral intent position. The answer probably lies in their motivation: to better represent the interests of their client-insurers, who would potentially benefit from a law that allowed them to challenge a policy as STOLI without having to identify a third-party assignee.¹⁴⁴ I do not offer this speculation lightly, as I too represent insurers. But such an overtly wrong interpretation of the law seems pointless to me. When one takes the time to study the lineage of the law as we have here, it becomes clear that this is not even a close issue. If it were close, better cases than *Life Product Clearing* would exist to cite to for support of a unilateral intent standard. Moreover, because the issue is not close, courts have simply not been fooled by efforts to paint the issue otherwise.

A good starting point for unilateral intent proponents would be a case that actually chooses a unilateral intent position over a mutual intent one—presumably a case where no third-party assignee exists. But, alas, I have not been able to locate such a case—either on my own or via someone else's efforts. The courts that have been faced with a choice between unilateral intent and mutual intent, as in *First Penn-Pacific Life*,¹⁴⁵ have chosen the latter. They have done so for practical reasons. But, as previously stated, a unilateral intent position is also simply fundamentally untenable pursuant to the age-old common law cases on which virtually all courts rely.

To be clear, I am not critical of efforts to change the law on STOLI intent. All are free to make whatever arguments they like as to what the law *should* be. Thus far, I have been discussing efforts to change the perception of what the law currently says, which, as we have seen, is severely restricted by what the law *actually* says. There is no better example of this *actual* limitation

¹⁴² Home Life Ins. Co. of N.Y., 21 S.W.2d at 414 (emphasis added).

¹⁴³ *But see* First Penn-Pacific Life Ins. Co., 2007 WL 1810707, at *4 (including a *but see* citation to *Home Life Ins. Co. of N.Y.*, 21 S.W.2d at 416 with the following parenthetical: "holding that assignment of a life insurance policy to one not having an insurable interest in the life of the insured violates public policy if 'at the time the policy was taken out, the insured intended to make such assignment.'").

¹⁴⁴ There's also the ever present echo chamber effect—where views are repeated with neither appropriate vetting nor ownership.

¹⁴⁵ *Id.*

than in *Kramer v. Phoenix Life Insurance Co.*¹⁴⁶

V. THE *KRAMER* EFFECT

The recent New York Court of Appeals case, *Kramer v. Phoenix Life Ins. Company*,¹⁴⁷ has left resounding implications for STOLI. The court's decision had not been issued until after this article was well underway, so I decided not to incorporate the case into the earlier discussion. Rather, I am letting it play the role in this article that it did in reality—a useful check on much of what I have inferred from old case law, which the court does a good job of marshalling. Relatedly, it is fitting that this decision has caused some to once again see the sky falling on a unilateral intent standard; thus implying such a sky existed in the first place. For instance, a law firm's client advisory stated:

[T]he *Kramer* majority's rejection of an intent based standard is significant in and of itself for the changes it may bring to the insurance marketplace. Prior to *Kramer*, a court examining a transfer could look to the insured's intent at the time the policy was purchased in order to establish whether the insurable interest standard was met and the transfer of the policy at a later point was lawful.¹⁴⁸

While there is some wiggle room in this quote for a mutual intent standard, its emphasis on only the insured's intent is all too familiar. Like Hoffman, the advisory contributes to the echo effect of citing *Life Product Clearing* in support of a unilateral intent standard, despite that case's undeniable support of a mutual intent standard.

Furthermore, a discussion of *Kramer* belongs here because it caps our discussion, and takes STOLI and the question of intent in a somewhat unexpected direction. In actuality, *Kramer* tacitly supports my reading of a historical mutual intent standard, but this debate is not on the court's mind at all; without saying so, the court renders the debate meaningless.

As alleged in *Kramer*, Lockwood Pension Services, Inc.—essentially playing the role of broker—approached a New York attorney, Arthur Kramer, about participating in a STOLI

¹⁴⁶ *Kramer v. Phoenix Life Ins. Co.*, 15 N.Y. 3d 539 (2010).

¹⁴⁷ *Id.*

¹⁴⁸ See Client Advisory: New York Court of Appeals Decision Could Give Added Life to "Life Settlements" Industry, KELLY DRYE, PHILLIP ROBBERN & CLIFFORD KATZ (Nov. 22, 2010), http://www.kelleydrye.com/publications/client_advisories/0613/_pdf/client_advisories_0613.pdf?

scheme.¹⁴⁹ Kramer agreed, established two trusts with several of his children named as beneficiaries, and funded those trusts with multiple life insurance policies on his own life, totaling \$56,200,000 in coverage.¹⁵⁰ Various entities, including Lockwood, served as trustees of the trusts at various times.¹⁵¹ Once the trusts were funded, Kramer's children-beneficiaries assigned their beneficial interest in the trusts to various stranger investors, including Life Products Clearing, LLC.¹⁵² After the two-year contestability period had passed, the trustees sold their interest in the policies to other non-parties.¹⁵³ Neither Kramer nor his children-beneficiaries ever paid premiums and, as alleged, their intent at policy inception was to immediately assign their interests in the policies to stranger investors.¹⁵⁴

Pertinent here, the District Court for the Southern District of New York had denied Lockwood's motion to dismiss, noting that, as alleged, Lockwood had played the quintessential stranger-bad-guy:

Lockwood breached provisions of the New York Insurance Law in that he *caused* to be *procured* directly or through assignment or other means, a contract of insurance upon the life of the decedent [Kramer] for the benefit of strangers who did not have an insurable interest in his life at the time the policy was obtained.¹⁵⁵

On appeal, the Second Circuit Court of Appeals certified the following question to the New York Court of Appeals:

Does New York Insurance Law § 3205(b)(1) and (b)(2) prohibit an insured from procuring a policy on his own life and immediately transferring the policy to a person without an insurable interest in the insured's life, if the insured did not ever intend to provide insurance protection for a person with an insurable interest in the insured's life?¹⁵⁶

The majority of the New York Court of Appeals answered in the negative.

While the majority agreed that the common law generally

¹⁴⁹ Kramer, 15 N.Y. 3d at 545-46.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 546.

¹⁵² *Id.*

¹⁵³ *Id.* at 546.

¹⁵⁴ Kramer, 15 N.Y. 3d at 546.

¹⁵⁵ *Id.* at 547 (quoting Kramer v. Lockwood Pension Servs. Inc., 653 F. Supp. 2d 354, 388 (S.D.N.Y. 2009) (emphasis added)).

¹⁵⁶ *Id.* at 545.

prohibits immediate assignment, it found that a strict reading of the relevant New York statute, which supersedes common law, does not.¹⁵⁷ With one fell swoop, the court bypassed the rich history of STOLI common law and focused strictly on the language New York chose to codify in Section 3205(b)(1). That provision, as discussed in the case of *Life Product Clearing*, provides:

Any person of lawful age may on his own initiative procure or effect a contract of insurance upon his own person for the benefit of any person, firm, association or corporation. Nothing herein shall be deemed to prohibit the immediate transfer or assignment of a contract so procured or effectuated.¹⁵⁸

Unlike the court in *Life Product Clearing*, the majority in *Kramer* did not find the statute complimentary of the common law in important respects.

For example, similar to this article's analysis of *Warnock*, *Grigsby*, and *Travelers*, the *Kramer* majority puts a lot of stock in the moment of policy inception:

The statute . . . incorporates the common law rule that a policy valid at the time of procurement may be assigned to one without an insurable interest in the insured's life and, relatedly, no insurable interest is required when one holds a policy on another's life, so long as the policy was "valid in its inception."¹⁵⁹

The majority effectively says here that an insurable interest is required only at the time of policy inception. Next, the majority is consistent with this article in recognizing the role of the temporal component under common law; but the court significantly sees the temporal component as inapplicable under the statute:

There is simply no support in the statute for plaintiff and the insurer's argument that a policy obtained by the insured with the intent of *immediate* assignment to a stranger is invalid. The statutory text contains no intent requirement; it does not attempt to prescribe the insured motivations. To the contrary, it explicitly allows for "immediate transfer or assignment" (Insurance Law § 3205[b][1]). This phrase evidently anticipates that an insured might obtain a policy with the intent of assigning it, since one who "immediately" assigns a policy likely

¹⁵⁷ *Id.* at 553.

¹⁵⁸ N.Y. INS. LAW § 3205(b)(1) (2010).

¹⁵⁹ *Kramer*, 15 N.Y. 3d at 551.

intends to assign it at the time of procurement.¹⁶⁰

The court's reasoning on this last point of course fully supports the role of the temporal component, but does so in the negative to reach the opposite conclusion. That is, while I have argued that U.S. common law has been chiefly concerned with preventing immediate policy assignment, which indicates a wagering intent at the time of policy inception, the majority upholds this reasoning by saying, since the statute *allows* for immediate assignment, it must allow for an intent to assign at the time of policy inception (*i.e.*, it must allow for a wager). The court did not need to take the extra step of extending this reasoning to support mutual intent, because it was denying the necessity of *any* intent.

This combination of a focus on policy inception without a concern for the temporal component creates, pursuant to New York's statute, a system not unlike the English one, in which insurable interest plays little meaningful purpose in the world of life policy assignment. The majority appears to know this—the similarities to England notwithstanding:

[W]e are not persuaded by the plaintiff and the insurer's argument that § 3205(b) is limited by the common law requirement that an insured cannot obtain a life insurance policy with the *intent of circumventing* the insurable interest rule by *immediately* assigning it to a third party.¹⁶¹

The majority simply does not see the statute as equipping it to prevent such shams. The common law does, because it prohibits immediate assignment.

As the majority concludes:

Finally, we recognize the importance of the insurable interest doctrine in differentiating between insurance policies and mere wagers, and that there is some tension between the law's distaste for wager policies and its sanctioning an insured's procurement of a policy on his or her own life for the purpose of selling it. It is not our role, however, to engraft an intent or good faith requirement onto a statute that so manifestly permits an insured to immediately and freely assign such a

¹⁶⁰ *Id.* (emphasis added). The majority's statement that there is no intent requirement is important. This is also true of the common law, and while I have spoken of both the insured's intent and the wagerer's intent being necessary under the common law—that has been in part for ease of discussion. If there is no unilateral intent, then we are really saying no intent. If intent matters, it's the wagerer's—and thus his involvement, not really his intent (which is to be presumed).

¹⁶¹ *Id.* at 553 (emphasis added).

policy.¹⁶²

We will discuss the ramifications of the majority's reasoning shortly, but it is easy to see how *Kramer* leads us back to Olde England, where STOLI is essentially legal. As for the issue of intent, the majority essentially rejected any standard, unilateral or mutual. As in Old England, intent simply does not matter under the *Kramer* majority's interpretation of Section 3205(b)(1).

Its primary disagreement with the majority comes down to the "on his own initiative" language in Section 3205(b)(1)—the same language discussed in *Life Product Clearing*.¹⁶³ Similar to the court in *Life Product Clearing*, the dissent reads this language as effectively prohibiting the "cloak for a wager" scenario that *Grigsby* and New York courts have long prohibited.¹⁶⁴ Although the dissent notes that the meaning of Section 3205(b)(1)'s "on his own initiative" is difficult to pin down—and certainly does not prevent a situation in which a life policy purchase is initiated in the sense of being "proposed or suggested" by a spouse or insurance agent—it interprets the language as follows:

Rather, I see in the words "on his own initiative" an echo of the rule recognized in *Steinback* and *Grigsby* – that an insured may not, in procuring a policy, act as an agent for a third-party gambler without an insurable interest. So read, Insurance Law § 3205(b)(1) is completely consistent with the pre-existing common law of New York, and with the wise public policy underlying the common law.¹⁶⁵

This reasoning is rather familiar at this point. But whatever procurement on an insured's own initiative means, the statute certainly prohibits some type of involvement by a third party—presumably a stranger-buyer. But this just pushes the inquiry down the line; the question remains: what type of involvement?¹⁶⁶

As one might expect, the *Kramer* majority cannot get past this definitional trouble. It dispenses with the dissent's point by giving a literal reading to "on his own initiative," without the benefit of the common law input: "In common parlance, to act on 'one's own

¹⁶² *Id.* at 539.

¹⁶³ *Kramer*, 15 N.Y.3d at 558; *Life Prod. Clearing*, 530 F. Supp.2d at 653.

¹⁶⁴ *Kramer*, 15 N.Y.3d at 558; *Life Prod. Clearing*, 530 F. Supp.2d at 653.

¹⁶⁵ *Kramer*, 15 N.Y.3d at 558.

¹⁶⁶ As already belabored, this necessarily indicates a focus on mutual intent via someone else's involvement, the level of involvement notwithstanding. Otherwise, the statute could have left out "initiative" altogether. There would certainly be no point in including that language to state the obvious—that one cannot be forced to purchase a policy.

initiative’ means to act ‘at one’s own discretion: independently of outside influence or control.’”¹⁶⁷ On strict statutory construction grounds, unless one argues that “on his own initiative” is ambiguous, it is hard to fault the majority’s plain reading of the text.

Finally, the only thing the majority and dissent agree on, with respect to their divided interpretation of Section 3205(b)(1), is that their disagreement is of limited importance. This is because, as the majority and dissent point out, New York has recently passed legislation that purposefully and explicitly prohibits STOLI: New York Insurance Law Section 7815.¹⁶⁸ Thus, just as *Kramer* mitigated *Grigsby* by insisting on a purely statutory handling of STOLI, the new legislation has mitigated *Kramer* by supplanting the statutory framework on which *Kramer* relied. This battle of legal forces is indicative of what is occurring in many states that have now passed (or are in the process of passing) legislation similar to New York’s. This evolution of New York law is also indicative of the fate of the unilateral intent position. As discussed below, the statute may help the unilateral intent proponents overcome many of the practical difficulties faced in such cases as *First-Penn Pacific*; therefore, it aids insurers in expanding their defenses against STOLI. However, the statute does this without supporting a unilateral intent standard.

VI. NEW YORK’S ANTI-STOLI LEGISLATION

In 2009, New York enacted a *new* Article 78 to regulate the life settlement industry.¹⁶⁹ This Article is based in part on the National Conference of Insurance Legislators (NCOIL) Model Act.¹⁷⁰ A vast number of states have adopted, or are in the process of adopting, versions of this Act or the similar National Association of Insurance Commissioners (NAIC) Model Act.¹⁷¹

¹⁶⁷ *Kramer*, 15 N.Y.3d at 551.

¹⁶⁸ *Id.* at 549, n.5, 559.

¹⁶⁹ N.Y. INS. LAW., art. 78.

¹⁷⁰ See Legislative Memo from the Business Council of New York State, Inc., Regulation of Life Settlement Business, A.7131-A (Morelle)/S.3655-A (Breslin), (Sept. 8, 2009), available at <http://www.bcnys.org/inside/Legmemos/2009-10/a7131s3655lifeselement.htm>.

¹⁷¹ One notable difference between the two is that the NAIC model recommends a five-year moratorium on policy assignments—meaning that the insured must wait five years from policy inception to assign his policy. The NCOIL Act, as adopted by New York, recommends a two-year moratorium. See, e.g., Client Advisory: Recently Proposed New York Life Settlement Regulation May Have a Significant Impact Upon Those Conducting

Pertinent here, Article 78's Section 7815 specifically defines and prohibits STOLI.¹⁷² This provision is of course relatively new, and there has been almost no litigation to date concerning its interpretation. Indeed, *Kramer* is the first case in New York to even reference Section 7815, and the only guidance it offered was via the dissent's statement—that it saw Section 7815 as codifying the traditional common law prohibition on wager policies and that it would, presumably, invalidate a scheme like the one in *Kramer*.¹⁷³

Consequently, there is a great deal to freshly examine in the statute. Section 7815 defines and prohibits STOLI as follows:

(a) In this chapter, “stranger-originated life insurance” means any act, practice or arrangement, at or prior to policy issuance, to initiate or facilitate the issuance of a policy for the intended benefit of a person who, at the time of policy origination, has no insurable interest in the life of the insured under the laws of this state, including:

- (1) the purchase of life insurance with resources or guarantees from or through a person that, at the time of policy initiation, could not lawfully initiate the policy;
- (2) an arrangement or other agreement to transfer the ownership of the policy or the policy benefits to another person; or
- (3) a trust or similar arrangement that is used, directly or indirectly, for the purpose of purchasing one or more policies for the intended benefit of another person in a manner that violates the insurable interest laws of this state.

(b) Stranger-originated life insurance arrangements do not include lawful life settlement contracts as permitted by this article or those practices set forth in paragraph three of subsection (k) of section seven thousand eight hundred two of this article, provided that such contracts or practices are not for the purpose of evading regulation under this article.

(c) No person shall directly or indirectly engage in any act, practice or arrangement that constitutes stranger-originated life insurance.

Business in the State, KATTEN MUCHIN ROSENMAN LLP (June 3, 2009), http://www.kattenlaw.com/files/Publication/38b34424-7218-4915-b933-021a2e9e773b/Presentation/PublicationAttachment/a128a11a-dac9-4051-bc69-98273e824445/Recently_Proposed_New_York_Life_Settlement_Regulation.pdf.

¹⁷² N.Y. INS. LAW § 7815 (2010).

¹⁷³ *Kramer*, 15 N.Y.3d at 559.

(d) The failure to follow the provision of subsection (c) of this section shall be a defined violation under article twenty-four of this chapter.¹⁷⁴

Before we analyze this text, it is important to note something rather obvious. Section 7815 is specifically designed to prohibit STOLI in relation to the life settlement industry. Article 78 in general deals with licensing and registration of life settlement companies and related entities, as well their reporting requirements.¹⁷⁵ In this context, the anti-STOLI provision is primarily aimed at prohibiting sophisticated STOLI schemes perpetuated by sophisticated life settlement professionals. Indeed, a prior proposed version of Section 7815 said as much:

No life *settlement provider, life settlement broker, or any representative thereof*, shall directly or indirectly engage in any act, practice or arrangement, at or prior to policy issuance, to facilitate the issuance of a policy for the intended benefit of a person who, at the time of policy origination, has no insurable interest in the life of the insured.¹⁷⁶

Moreover, failure to abide by Section 7815 is defined as a violation under Chapter 24 of Article 78, titled: “Unfair Methods of Competition and Unfair and Deceptive Acts and Practices.”¹⁷⁷ Accordingly, Section 7815 is aimed at industry players, not individual insureds.

Regardless of this distinction, comparing Section 7815’s text on STOLI to the common law wager-related principals is useful. Virtually all of Section 7815’s elements are the familiar common law elements of STOLI. The “at or prior to policy issuance”¹⁷⁸ language ensures the common law’s focus on policy inception. “Initiate or facilitate”¹⁷⁹ is similar in concept to “procure” and is perhaps less ambiguous.¹⁸⁰ And Section 7815 still only connects insurable interest to the point in time of policy inception by ensuring that “the person” has an insurable interest “at the time of

¹⁷⁴ N.Y. INS. LAW § 7815.

¹⁷⁵ See, e.g., N.Y. INS. LAW. §§ 7803 (2010); 7804 (2010); 7807 (2010).

¹⁷⁶ Bill No. A7131, 2009 Leg., 232nd Sess. (N.Y. 2009) (emphasis added), available at <http://open.nysenate.gov/legislation/api/1.0/lrs-print/bill/A7131A-2009>. This bill was sponsored by New York Assemblyman Joseph D. Morelle, the Democratic chairman of the Assembly’s Insurance Committee and one of the co-sponsors of the 2008 Bill. *Id.*

¹⁷⁷ N.Y. INS. LAW § 7815(d).

¹⁷⁸ N.Y. INS. LAW § 7815(a).

¹⁷⁹ *Id.*

¹⁸⁰ “Initiate” and “facilitate” would seem to imply a higher level of involvement than Section 3205(b)(1)’s “procure.” N.Y. INS. LAW § 3205(b)(1) (2010).

policy origination.”¹⁸¹

Related to this last point, even though Section 7815(a) only requires insurable interest at policy inception¹⁸²—as does the common law—the fate of Section 3205(b)(1), as decided in *Kramer*, does not befall it, because, similar to the common law, immediate assignment is strictly prohibited. Indeed, Section 7813(j)(1) imposes a two-year moratorium on assignments.¹⁸³ That provision provides in pertinent part:

No person, at any time prior to, or at the time of, the application for, or issuance of, a policy, or during the two-year period commencing with the date of issuance of the policy, shall enter into a life settlement contract, regardless of the date the compensation is to be provided and regardless of the date the assignment, transfer, sale, devise or bequest of the policy is to occur.¹⁸⁴

¹⁸¹ N.Y. INS. LAW § 7815(a).

¹⁸² *Id.*

¹⁸³ N.Y. INS. LAW § 7813(j)(1) (2010).

¹⁸⁴ *Id.* Section 7813(j) provides in full:

(1) No person, at any time prior to, or at the time of, the application for, or issuance of, a policy, or during the two-year period commencing with the date of issuance of the policy, shall enter into a life settlement contract, regardless of the date the compensation is to be provided and regardless of the date the assignment, transfer, sale, devise or bequest of the policy is to occur. This prohibition shall not apply if the owner certifies to the life settlement provider that:

(A) the policy was issued upon the owner’s exercise of conversion rights arising out of a policy, provided the total of the time covered under the conversion policy plus the time covered under the prior policy is at least twenty-four months. The time covered under a group policy shall be calculated without regard to a change in insurers, provided the coverage has been continuous and under the same group sponsorship; or

(B) one or more of the following conditions, for which the owner submits independent evidence to the life settlement provider, have been met within the two-year period:

- (i) the owner or insured is terminally or chronically ill;
- (ii) the owner or insured disposes of ownership interests in a closely held corporation, pursuant to the terms of a buyout or other similar agreement in effect at the time the insurance policy was initially issued;
- (iii) the owner’s spouse dies;
- (iv) the owner divorces his or her spouse;
- (v) the owner retires from full-time employment or involuntarily ceases employment;
- (vi) the owner becomes physically or mentally disabled and a physician determines that the disability prevents the owner from maintaining full-time employment;
- (vii) a final order, judgment or decree is entered by a court of competent jurisdiction, on the application of a creditor of the

This prohibition under the statute avoids any gray area by creating what is essentially a two-year *temporal component* (i.e., a minimum two-year period between policy inception and policy assignment), unless specified exceptions are evidenced (e.g., the insured's terminal illness).¹⁸⁵

Turning back to Section 7815, although the provision is replete with similarities to the common law, there is a fundamental difference in how the provision's collective language defines STOLI. The statute focuses on nouns and/or ambitransitive verbs—act, practice, or arrangement—without explicitly connecting them to specified actors, e.g., an insured or an assignee. This is due in part to the fundamental difference between court-made law and statutes: the former is creating law based on the specific facts (and actors) before it, the latter is trying to

owner, adjudicating the owner bankrupt or insolvent, or approving a petition seeking reorganization of the owner or appointing a receiver, trustee or liquidator to all or a substantial part of the owner's assets; or

(viii) any other condition that the superintendent may determine by regulation to be an extraordinary circumstance for the owner or the insured.

(2) Copies of the independent evidence required by subparagraph (B) of paragraph one of this subsection shall be submitted to the insurer when the life settlement provider submits a request to the insurer for verification of coverage. The copies shall be accompanied by a letter of attestation from the life settlement provider that the copies are true and correct copies of the documents received by the life settlement provider. Nothing in this section shall prohibit an insurer from exercising its right to contest the validity of any policy.

(3) For the purposes of this section a person is:

(A) terminally ill if the individual has an illness, sickness or physical condition that can reasonably be expected to result in death in twenty-four months or less; or

(B) chronically ill if that individual has been certified by a licensed health care practitioner as:

(i) being unable to perform without substantial assistance from another individual at least two activities of daily living (i.e., eating, toileting, transferring, bathing, dressing or continence) for a period of at least ninety days, due to a loss of functional capacity;

(ii) requiring substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment for a period of at least ninety days, due to a loss of functional capacity; or

(iii) having a level of disability similar to that described in clause (i) of this subparagraph, as determined by the United States Secretary of Health and Human Services.

N.Y. INS. LAW § 7813(j).

¹⁸⁵ *Id.*

predicatively and comprehensively eradicate a potential problem.

By focusing only on “act, practice, or arrangement” (essentially “actions”), terms that are broad in potential application and attributable to any potential actor, the statute can have a much broader prohibitive effect than traditional common law. This is surely purposeful as a means to invalidate STOLI via a wider array of culprits, including brokers, life settlement professionals, and other industry players.¹⁸⁶

A. *The Statutory Role of Intent*

With some of the statute’s basic characteristics drawn out, it’s a good point to ask what, if any, is the difference between Section 7815 and the common law regarding the role of intent? To date, few have opined on this question directly. Michael Lovendusky, however, has noted that legislation like New York’s Section 7815 prevents “unilateral” STOLI threats like those that were permitted in *First Penn-Pacific Life* and *Sun Life Assurance*.¹⁸⁷ As Lovendusky noted, unlike in those cases, “the [common statutory] definition of ‘stranger-originated life insurance’ removes the necessity that a complainant particularly allege there is an agreement with a specific third party to settle the policy.”¹⁸⁸ Lovendusky further stated that under such a statutory definition the validity of a policy *could* be challenged based on discovery that “the policy owner unilaterally ‘initiate[d] a life insurance policy for the benefit of a third party investor who, at the time of policy origination, has no insurable interest in the insured.’”¹⁸⁹ Some of this is undoubtedly true; some depends on how you read it.

The first sentence I quote from Lovendusky seems to convey that a third party stranger investor, *i.e.*, a wagerer (as found lacking in *First Penn-Pacific Life* and *Sun Life Assurance*), does not need to be known by the insured at policy inception for STOLI to exist. I’m deducing a bit from Lovendusky’s use of “agreement,” because if the insured knows the third party and STOLI (in its traditional sense) *does* occur, then an agreement between them existed at policy inception. Moreover, Lovendusky specifies that the third party does not need to be a “specific” one.

¹⁸⁶ As stated, without reference to specific actors, the statute gained an even greater reach. *See supra* note 176.

¹⁸⁷ Lovendusky, *supra* note 7, at 28.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

I'm also assuming that a "specific third party to settle the policy" means a stranger investor (*i.e.* a wagerer), since that is what was lacking in *First Penn-Pacific Life* and *Sun Life Assurance* and that is what Lovendusky specifies in the second sentence I quote above. In other words, all of this means that a wagerer need not be privy to the origination of the policy. The second sentence I quote suggests that the insured may cause the invalidity of his life policy "unilaterally" by initiating the policy for the benefit of a (presumably unspecified) third party investor. This statement seems to suggest that the insured may act alone in causing STOLI.

Lovendusky was basing his analysis on legislation passed in a handful of states.¹⁹⁰ For purposes of comparison with New York's Section 7815, let's take Ohio's Section 3916.01(W), which provides:

(1) "Stranger-originated life insurance," or "STOLI," means a practice, arrangement, or agreement initiated at or prior to the issuance of a policy that includes both of the following:

(a) The purchase or acquisition of a policy primarily benefiting one or more persons who, at the time of issuance of the policy, lack insurable interest in the person insured under the policy;

(b) The transfer at any time of the legal or beneficial ownership of the policy or benefits of the policy or both, in whole or in part, including through an assumption or forgiveness of a loan to fund premiums.

(2) "Stranger-originated life insurance" also includes trusts or other persons that are created to give the appearance of insurable interest and are used to initiate one or more policies for investors but violate insurable interest laws and the prohibition against wagering on life.¹⁹¹

Based on this language, Lovendusky's first point seems to hold up: nothing in Section 3916.01(W)(1) implies that the "persons" must be specifically known at policy inception; indeed, the use of the plural *persons* here is plausibly intended to deal with multiple investors, as through packaged securities—which by their nature involve investors unknown to the insured.

New York' Section 7815(a) is similar in this respect. Its

¹⁹⁰ Lovendusky, *supra* note 7, at 28 n.79 (citing ARIZ. REV. STAT. § 20-443.02; CONN. INS. CODE § 38a-465; IND. INS. CODE § 27-8-19.8-7.8; IOWA INS. CODE § 508E.2; KAN. STAT. ANN. § 40-500-2(1); ME. REV. STAT. ANN. tit. 24A, § 6802; OHIO INS. CODE § 3916.01; OKLA. STAT. tit. 36 § 625.1).

¹⁹¹ OHIO INS. CODE § 3916.01(W).

comparable language provides, “to initiate or facilitate the issuance of a policy for the intended benefit of a person who, at the time of policy origination, has no insurable interest in the life of the insured” There’s really only two ways to interpret this language, depending on how one interprets “person.” First, “person” could refer to a specific wagerer known to the insured at policy origination. Under this reading, the traditional mutual intent standard would apply, and a wagerer would still seemingly need to be connected to the original policy transaction.

This would seem to be an odd reading of a statute designed to prevent more sophisticated STOLI schemes. Under such an interpretation, the statute would be vulnerable to schemes like those in *First Penn-Pacific Life* and *Lincoln National*, where a wagerer connected to policy origination had not been identified. So interpreted, one need only wait out Section 7813(j)(1)’s two-year moratorium before locating an investor/wagerer.¹⁹²

The second way of interpreting this provision, however, is that “person” can be anyone other than one with an insurable interest, regardless if he is known at policy inception or not. In other words, the statute essentially says if certain actions are performed at or prior to policy origination to initiate the life policy for the intended benefit of anyone not meeting this select classification (*i.e.*, the insurable interest bestowed class), it is STOLI.¹⁹³ Such a reading is only enforced by the broad definition Article 78 gives to person: “any natural person or legal entity, including a partnership, limited liability company, association, trust or corporation.”¹⁹⁴

This second interpretation of “person” is more plausible, as it naturally allows the statute to prevent STOLI schemes via a wider array of culprits, including life settlement professionals, while avoiding the common law limitation of requiring a wagerer’s involvement at policy origination. It also provides a higher level of consistency to the statute. That is, the statute focuses on specific types of modern schemes such as premium financing and trust arrangements.¹⁹⁵ These devices are effective in part because they can operate—for a time, at least—without an identified

¹⁹² N.Y. INS. LAW § 7813(j)(1).

¹⁹³ An insured of course would know if he or she was intending to benefit someone who did not have an insurable interest via knowing the select group of people who do have such an interest.

¹⁹⁴ N.Y. INS. LAW § 7802(o) (2010).

¹⁹⁵ N.Y. INS. LAW §§ 7815(a)(1) and (a)(3).

investor/wagerer. It would be odd for the statute to single these STOLI schemes out and yet leave them largely unaffected.

Another way of thinking of how important this distinction is: under the traditional common law requirement of a wagerer, premium financing arrangements and the use of a trust are evidence of possible STOLI, as is the temporal component—especially in the case of an immediate policy assignment. Under the statute, all of these things are violations in themselves. It is a fundamental game changer. STOLI really no longer needs to be STOLI; it can be STOLI-light.¹⁹⁶ In sum, New York's Section 7815 does not require an assignee/investor/wagerer at policy origination.

B. *The Future of the Unilateral Intent Position*

Lovendusky's second point (from the second of his two sentences I quote above), as I have interpreted it, would appear to give the unilateral intent proponents what they've always wanted. That is, in the words of Hoffman, "the Policy lacks an insurable interest if the insured intended to sell the Policy at the outset, regardless of whether others were involved or whether steps were taken to effectuate a sale."¹⁹⁷ Here we have a subtle, but important distinction: it is one thing to say a wagerer is not required for STOLI under New York's Section 7815—and like statutes—but it is another to say that only the insured and his intent are needed to effectuate STOLI.

The latter assertion can be phrased in the form of a question as follows: can the insured become culpable under Section 7815 for taking out a life policy on himself solely because he has the intent to assign it? To be clear, certainly the insured can be a culpable actor under the statute's pervasive reach to any "person;" and "act" is a broad enough term to reach virtually any action, including the simple act of taking out a life policy.¹⁹⁸ But can the *prohibited* "act" simply be the taking out of the policy itself with the insured's *prohibited* intent? If so, the unilateral intent position lives anew.

Despite the breadth of the statute's optimal language, the answer must be no. First, as stated, the statute directly proscribes

¹⁹⁶ STOLI-light is a particularly apt phrase when you consider that a stranger-investor need not originate anything.

¹⁹⁷ Hoffman, 2010 Presentation, *supra* note 115, at 9.

¹⁹⁸ N.Y. INS. LAW § 7815.

premium payment arrangements that involve any “stranger’s” resources or guarantees, or the establishment of trusts.¹⁹⁹ That proscription combined with the statute’s two-year moratorium²⁰⁰ on policy assignments means that the insured is necessarily stuck with the policy—all of its payments and benefits, included—for two years, regardless of what he intends to do beyond the two-year period. To incriminate an insured for doing nothing more than taking out a life policy, with some sort of intent for a future assignment that otherwise complies with the statute, would simply circumvent the statute and its clear directive. Either the insured complies with the statute or does not; if he simply intends to assign a policy beyond the two-year moratorium—well, that’s complying. If he takes some action to assign the policy within the first two years, including those mentioned above, then he directly violates the statute. There is no middle ground based purely on intent.²⁰¹ To hold otherwise would not only undermine the statute, it would expose the statute to the unilateral intent position’s core fallacy: an attempt to police someone’s private thoughts. As in England, STOLI *could* look no different than a legal policy initiation and thus be impossible to police.

The statute avoids these problems by proscribing actions of a certain type, tangible in nature—which was the true method of the *Grigsby* line of cases in the first place. The intent of the parties comes into play in conjunction with a relevant act to evade the insurable interest rule. Under the *Grigsby* line of cases, the “act” was involving a wagerer in the original policy transaction; under Section 7815, it’s a wider array of acts via a wider array of actors. Either way, intent is secondary to the act. In the scenario in which the “act” is not extraneous to the purchase of a life policy, intent would be the primary concern. In that scenario, an insured could violate the statute based on his private intent, regardless if he ever actually acted on it, *i.e.*, regardless if he *acted* in full compliance with the statute or not. That’s the unilateral intent position—and it is equally senseless under Section 7815 as it is under the common law.

¹⁹⁹ *Id.*

²⁰⁰ N.Y. INS. LAW § 7813(j).

²⁰¹ The NCOIL Model Act, on which New York’s Article 78 is based, “makes almost any sort of agreement to sell a life insurance policy within two years of issue a fraudulent act punishable by criminal and civil penalties.” Peter Katz, *STOLI on the Rocks*, CALIFORNIA BROKER MAGAZINE (Mar. 21, 2011), available at <http://www.calbrokermag.com/featured-blogs/stoli-on-the-rocks-by-peter-katz/>.

VII. CONCLUSION

Despite protestations and asserted implications to the contrary, U.S. common law on STOLI has been remarkably united in proffering a mutual intent standard. This unity is not surprising when one considers the following: a wager policy, which averts the insurable interest rule and violates public policy, has always been understood to involve a “wagerer” who is connected to life policy origination. In modern STOLI parlance, this is the same as saying there must be a stranger originating the life insurance policy. The question of intent is secondary, coming into the picture once the appropriate actors and actions are alleged. Indeed, if it wasn’t for the law’s hang-up with immediate assignment, which strongly suggests a wager has occurred, questions about intent and evidential concerns, such as the temporal component, would not even matter. As in England, permissible assignment would essentially mean unquestionable assignment.

Kramer notwithstanding, modern anti-STOLI statutes, like New York’s Section 7815, are both more expansive and focused in proscribing actions and actors related to STOLI. Because of this, a wagerer/stranger-investor is no longer required to be connected to life policy origination. Insurers are thus more protected and the life settlement market, which has caused this modern STOLI resurgence, is more regulated. To be sure, “mutual intent” in its traditional sense is becoming outdated. The statutes imply something more akin to an “anyone’s intent” standard. But none of this changes the fundamental precept that no one cares what you intend unless you do something wrong. The unilateral intent standard be damned.

