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COURT OF APPEALS
STATE OF NEW YORK

BRETTLER,

Appellant,

-against- No. 77

ALLIANZ LIFE,

Respondent.

20 Eagle Street
Albany, New York
October 18, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber

1 CHIEF JUDGE WILSON: The first case on today's
2 calendar is Brettler v. Allianz Life. Counsel?

3 MR. BENHAIM: Good afternoon, Your Honor. David
4 BenHaim. Kew Gardens, New York. And I would like to
5 reserve two minutes for rebuttal.

6 CHIEF JUDGE WILSON: Of course.

7 MR. BENHAIM: Okay. May it please the court.
8 Your Honors, the certified question before this court today
9 is - - - is not an easy one, but it does not have a lot of
10 moving parts.

11 My client, Herman Brettler, obtained an
12 assignment. It's on the appendix page 103. Prima facie,
13 the assignment is valid. It gives him the right to bring
14 suit. Something in the policy, Allianz claims, destroys
15 this assignment. By definition, that would make this a
16 assign - - - this provision in the policy an anti-
17 assignment clause as it strips Mr. Brettler with - - - with
18 his standing. So we turn to that provision in the policy
19 and examine it. Does it - - - does it meet the requirement
20 of New York law for an anti-assignment clause? Well, this
21 court, in Allhusen v. Caristo - - -

22 JUDGE GARCIA: Well, counsel, I think it's - - -
23 it's more - - - they're not arguing, as far as I can say -
24 - - see, that it's an anti-assignment clause. It's just
25 that the assignment doesn't become effective until this

1 condition is fulfilled. So how does that affect the anti-
2 assignment argument?

3 MR. BENHAIM: Well, if - - - if Allianz is
4 claiming that the assignment is not valid unless it's done
5 a certain way, it destroys the assignment unless it's done
6 a certain way, that is a negatively implied anti-assignment
7 clause, which - - -

8 JUDGE GARCIA: It doesn't destroy it. It just
9 isn't effective in terms of the policy until it's
10 registered. And that's - - - I think there's two
11 differences right in those district court opinions. Judge
12 Pauley essentially concluded that, right?

13 MR. BENHAIM: I think that there - - - there has
14 been two ways to look at this. There's one court indeed
15 said, well, there's a difference, but if in practice the
16 assignment is invalid, then what's the difference? It's
17 destroyed the - - - it's destroyed the assignment. And you
18 know, as the court said in Semente v. Empire Healthcare
19 (ph.), the Eastern District of New York said this, it says
20 that under New York law, citing Allhusen, an anti-
21 assignment clause must be overt and not to be negatively
22 implied from a positive right of assignability. That is
23 the same thing as saying you're not going to do it - - -

24 JUDGE GARCIA: Could it be effective in a certain
25 way? I mean, let's say there's the beneficiary - - - the

1 insured dies. You've been assigned this clause. It hasn't
2 been registered with the company. There's been no notice,
3 but there's a payout to the original beneficiary. Can't
4 you sue that original beneficiary and say, no, I get the
5 money? You assigned the clause to me. Why wouldn't it be
6 effective in a suit between you and the assignor?

7 MR. BENHAIM: Well, I think there - - - there
8 needs to be noted a difference between a change of owner
9 and a change of beneficiary. The policy does say, and your
10 courts have agreed - - -

11 JUDGE GARCIA: No, but they - - - who - - - the
12 policy stays the same as it always did. There's an
13 assignment that's not registered. There's a death of the
14 insured, and you, the assignee, you want the money. But
15 the insurance company pays out the person they're supposed
16 to pay, as they have as the owner of the policy. Can't you
17 sue the person who assigned you the contract and say,
18 that's my money, you - - - you assigned me the contract?

19 MR. BENHAIM: I think it's possible for a person
20 to take assignment - - -

21 JUDGE GARCIA: So why isn't the assignment
22 effective then?

23 MR. BENHAIM: You know, but - - - but the
24 assignment transferred ownership of the policy to the
25 assignee. It doesn't transfer the beneficiary of the

1 policy to the - - - so - - -

2 JUDGE CANNATARO: But the - - - the point is that
3 even when there's an assignment that doesn't include the
4 notice, you might still have enforceable rights vis-a-vis
5 the assignor. It's - - - it seems obvious that the
6 insurance company - - - since you're all here today - - -
7 that the insurance company might say, it's not effective as
8 to us, but we're not saying you don't have an assignment
9 with enforceable rights. So the question, I guess,
10 becomes, doesn't it matter who you're talking about, which
11 - - - which part of this tripartite relationship we're
12 referring to?

13 MR. BENHAIM: Well, that's not what the - - - the
14 New York court has said. New York court said that unless
15 the anti-assignment provision is overt and straightforward,
16 it's basically a covenant not to assign. And so what will
17 happen - - -

18 JUDGE HALLIGAN: So it's your - - - it's your
19 view that you could not have sued Ms. Muschel if she had
20 received payment under the policy? Let's assume that the
21 insured had died and you address the lapse issue, and the
22 insurer made payment to her because she was the person that
23 was on record as the owner. Is your position that you
24 could not have sued her to recover?

25 MR. BENHAIM: I think it's possible that we could



1 have sued her, but - - -

2 JUDGE HALLIGAN: Is your position that if there
3 was payment, you could have still sued the insurer? If - -
4 - if - - -

5 MR. BENHAIM: I think - - - I think the question
6 is, could we have sued the - - - the beneficiary that
7 received it for breaching the purchase agreement?
8 Probably. Could we have a sue - - - could we sue the
9 insurance company, in the alternative, for paying the - - -
10 making the payment directly to them? Well, after the
11 payment's been made, I don't think that - - - that a cause
12 of action would - - - would remain against the insurance
13 company.

14 JUDGE HALLIGAN: And presumably - - - go ahead.

15 JUDGE GARCIA: No. No.

16 JUDGE HALLIGAN: Presumably, Ms. Muschel could
17 have joined this litigation over the lapse and that - - -
18 is it your view that that would have cured any question
19 about contractual standing if she had?

20 MR. BENHAIM: Well, you know, under New York law
21 - - - and this is a point we made in our brief - - - if she
22 - - - she wouldn't have the right to sue if she assigned
23 it. She has - - - she has been stripped of the right to
24 sue.

25 JUDGE HALLIGAN: But - - - but if both of you



1 sued, right?

2 MR. BENHAIM: You could say in the alternative
3 one of us is the owner, I think someone would have
4 standing.

5 JUDGE HALLIGAN: Right. But - - - but clearly,
6 that was not the path you took. And I take it you didn't
7 seek to implead her at any point?

8 MR. BENHAIM: Correct. Yeah, but you know, the
9 insurance company claims they'd like to control their own
10 environment, and I'm sure they would like to, but they
11 already do not.

12 I mean, take a simple case where a policy is
13 issued to a trust, and the trustee of the trust changes.
14 The trustee of the trust can be changed through the EPTL.
15 It could be changed through the provision of the trust
16 instrument itself. There's nothing in the policy that says
17 anything about all of a sudden there's a new trustee, and
18 that new trustee is now stepping in on behalf of the trust.
19 The insurance carrier, at this point, has no way of
20 controlling who the trustee of the trust is. They're
21 dealing with a new trustee that comes forward. And when
22 that new trustee comes forward, they'll ask him, how did
23 you get here? And that new trustee will have to say, okay,
24 here's the - - - here's the - - - the way we got here, but
25 there was a change by the EPTL. There was a change by some

1 other - - - the provisions of the trust itself, and they'll
2 deal with it. So they already do not control - - -

3 CHIEF JUDGE WILSON: It seems like a sort of
4 strange argument that you're saying they wrote a contract
5 that protects them in some cases that they care about, but
6 they didn't write a contract that protects them in other
7 cases, and therefore, we should conclude that the first
8 contract didn't protect them.

9 MR. BENHAIM: Well, I think that - - -

10 CHIEF JUDGE WILSON: They could have written a
11 better contract; I take that point. But they wrote the
12 contract they wrote.

13 MR. BENHAIM: And - - - and if they - - - if they
14 wanted to have an anti-assignment clause, they could have
15 simply said assignments - - -

16 CHIEF JUDGE WILSON: Well, maybe that's not what
17 they wanted. Maybe what they wanted was notice.

18 MR. BENHAIM: The question is - - -

19 CHIEF JUDGE WILSON: I mean, it seems to me the
20 argument you're making is - - - essentially boils down to a
21 notice provision for assignments is invalid - - -
22 unenforceable.

23 MR. BENHAIM: Well, it gives the insurance
24 company the right to sue the - - - to sue the original
25 owner for the breach. If they don't receive notice, and

1 there was an assignment, that's what - - - that's what that
2 assignment is. It's a pledge not to assign.

3 JUDGE HALLIGAN: Is that your view of what the -
4 - - I'm interested in your take on what the clause is
5 intended to do, I think, to pick up on the Chief Judge's
6 question. Who is it intended to protect and against what?

7 MR. BENHAIM: I think it's intended to give the
8 insurance company as much control over their environment as
9 they possibly can get. But I don't - - - I don't know if
10 it strips a person of standing when they have an actual
11 assignment. And that's - - - and that's really our point.

12 JUDGE HALLIGAN: So what protection exactly then,
13 does it - - - does it give them? Tell me what you mean by
14 control over their environment, if you would.

15 MR. BENHAIM: Yeah. So for example - - - you
16 know, this is something that - - - that the insurance
17 carrier raised - - - what happens when they have to give
18 notice over - - - you know, in the COVID scenario, they had
19 to give notice to policy owners. As far as they're
20 concerned, they complied with those notice provisions if
21 they give notice to the owner that's on record that they
22 have before them.

23 JUDGE HALLIGAN: But in this - - - in this case,
24 I take it your view is that the only benefit that they get
25 from this provision is that they could sue Ms. Muschel for

1 damages according to whatever the metric might be, but - -
2 -

3 MR. BENHAIM: I don't know if there are any
4 damages, but yeah.

5 JUDGE HALLIGAN: Well, there may not be, but - -
6 - but that - - -

7 MR. BENHAIM: That's our position.

8 JUDGE HALLIGAN: - - - that's your reading of
9 what they intended to accomplish with the provision.

10 MR. BENHAIM: I think that's what they actually
11 accomplished.

12 JUDGE GARCIA: Counsel, they - - - wouldn't they
13 also have a defense if the assignment isn't registered,
14 there's no notice given to the company, and they terminate
15 the policy and say, you know, we gave you notice that you
16 hadn't paid your premiums, and the assignor comes in and
17 says, no, no, no, that notice was faulty, you sent it to
18 the wrong person. The insurance company says, no, we
19 didn't. We didn't have any notice of assignment. We sent
20 it to the person we had listed.

21 MR. BENHAIM: I think they would - - - they would
22 be entitled to rely on that notice provision in order to
23 make that claim.

24 JUDGE GARCIA: Right.

25 MR. BENHAIM: Yeah. And so they do have a very



1 specific benefit from that. It's what notice is under the
2 policy and whether it's - - - it's notices that are
3 statutory - - - statutorily required by some other
4 provision or - - - or - - - or by the policy terms
5 themselves, like a notice of a grace notice, and they would
6 be protected - - - we gave notice to the last owner on
7 record. That doesn't change the fact that someone else
8 might be able to obtain standing through an assignment.

9 JUDGE CANNATARO: In your view, what would be the
10 - - - the legally correct consequence, vis-a-vis your
11 client, of the failure to file the notice contemplated in
12 the policy in this case, in the - - - in the scenario that
13 happened here? Is it nothing?

14 MR. BENHAIM: Nothing. That's what it is.

15 JUDGE GARCIA: Well, if they sent the notice to
16 the wrong person, and your claim was I didn't get notice,
17 they would have that defense because it wasn't - - - I'm
18 not saying that's the case here.

19 MR. BENHAIM: Yeah - - - yeah that's - - - you
20 know, but - - - but in this case it is, it is nothing. You
21 know, we're not claiming that the - - - that the notice was
22 sent to the wrong party because we were the assigned - - -
23 you know, we're the assignee.

24 So it's really - - - the consequence was, you
25 know, if you have damages, sue on damages - - - sue Muschel

1 on damages. Here, it's - - - you know, we're just holding
2 you accountable to the terms of the policy as the - - - as
3 the owner - - - as the current owner of the policy, there's
4 no difference between us doing it and the actual owner of
5 the policy.

6 JUDGE HALLIGAN: I know this is coming to us on a
7 certified question, but does the record say anything about
8 what happened between the time at which it looked to me
9 that the insurer told the trust that the check bounced?
10 There was an effort to send another check, it looked like.
11 And then three years later, which is 2016. Is there
12 anything in the record about whether there's any additional
13 effort to resolve payment or address whether there's a
14 lapse?

15 MR. BENHAIM: There's nothing in the record.
16 There - - - what - - - what - - - what has evolved through
17 not only this litigation but the other two litigations
18 which arose out of the - - - between Allianz and policy
19 owners, you know, this is one of three policies that were
20 issued on this insured to three different policy owners by
21 Allianz. The other two have reached the conclusion through
22 their litigation.

23 What has emerged there was that the law - - - you
24 know, and I would argue that would be the law here as well
25 - - - was that if a - - - if a policy owner attempts to

1 make payment within a year of a lapse and the insurance
2 carrier rejects that payment, the policy owner has no
3 further obligation to try to resolve the issue. The only
4 restriction would be the statute of limitations, and that
5 hasn't been reached.

6 So you know, there is nothing in the record that
7 tells us what happened during that time. But it doesn't
8 matter. There's a statute that says an insurance - - -
9 insurance policy owner must attempt to make a premium
10 payment within a year of a lapse in or - - - or otherwise
11 the policy lapse - - - lapses even without notice.

12 JUDGE CANNATARO: There was no statute of
13 limitations issue here.

14 MR. BENHAIM: There wasn't.

15 JUDGE CANNATARO: So what would - - - was there
16 anything to prevent you once they raised this whole notice
17 issue from, you know, you discontinuing your first action,
18 giving them the notice, and then just suing again?

19 MR. BENHAIM: With the same - - - with the same
20 plaintiff? No, I don't think - - - I don't know if there
21 would have been. I mean, I think at that point - - - you
22 know, I think - - - and this is just conjecture - - - but I
23 think that - - - and it based on my experience - - - is
24 that Allianz would have said, we don't change owners after
25 a policy has lapsed. But you know, taking Allianz'

1 argument today, I don't think there is - - -

2 JUDGE CANNATARO: That's the thing you wanted to
3 litigate, the lapse, right?

4 MR. BENHAIM: Correct. Yeah.

5 So - - - so it's - - - it's our position that the
6 plaintiff does have standing and - - - and I'll reserve the
7 rest of my time.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. VAN OORT: Good afternoon, Your Honors. May
10 it please the court. I'm Aaron Van Oort for Allianz.

11 Before a new owner of a life insurance policy
12 gains rights against the insurer, notice must be given to
13 the insurer that the record owner has transferred the
14 policy.

15 JUDGE GARCIA: Let's pick up with this
16 hypothetical we were doing with your adversary here. The
17 assignment is made. It's not - - - no notice is given.
18 The company pays out to the original assignor, and the
19 assignee can sue that assignor. I assume you would take no
20 position on that case, right?

21 MR. VAN OORT: That's correct.

22 JUDGE GARCIA: Because you're not blocking that.

23 MR. VAN OORT: That's correct.

24 JUDGE GARCIA: So my question is then, why can't
25 that assignee sue you? Because that's not a right under

1 the contract. That's an ownership right that we, the Court
2 of Appeals, has created. So it seems the rights under the
3 contract, which you lay out on page 13 of your brief, are
4 the owner's rates include, inter alia, the ability to take
5 a loan, to change the beneficiary, to surrender the policy,
6 to receive notices, to change the death benefit, and to
7 alter premiums. So all of those things you can control is
8 rights under the policy, but what does that have to do with
9 standing to sue you?

10 MR. VAN OORT: The other right under the policy,
11 Your Honor, is at page appendix 83. It's the definition of
12 you and your. And - - -

13 JUDGE GARCIA: Yeah.

14 MR. VAN OORT: - - - and it says the owner, you,
15 are solely entitled to exercise all rights of this policy,
16 which means enforcing them, too. And Your Honor - - -

17 JUDGE GARCIA: Why isn't that the rights you laid
18 out in your brief? Because the rights of the policy are
19 those, it seems to me, arguably, and the right to sue - - -
20 the standing right is a common law right.

21 MR. VAN OORT: The right to sue, Your Honor,
22 arises from the rights that are given by the contract.
23 There are no other rights at issue here. There isn't an
24 independent statutory right.

25 JUDGE GARCIA: Right.

1 MR. VAN OORT: It is a right created by it. And
2 - - - and the foundational case in this court, Your Honor,
3 as you know, is the Allhusen case. And in that case, Your
4 Honors wrote, or Your Honors' predecessors more accurately
5 wrote, while the courts have striven to uphold freedom of
6 assignability, they have not failed to recognize the
7 concept of freedom of contract. And they said, no sound
8 reason appears why an assignee should remain unaffected by
9 a provision in the very contract which gave life to the
10 claim he asserts.

11 The provision here says the assignment will be
12 effective when notice was given. And - - - and this is to
13 Your Honors' questions - - -

14 JUDGE GARCIA: To me that goes more - - - and you
15 could have defined it differently, but that goes to the
16 rights under the contract, right? So the things that you
17 put in your brief - - - but the right to sue is a different
18 right. It goes to the owner.

19 And if the assignment is effective, and we agree
20 this isn't an anti-assignment clause, then why don't they
21 have that common law right to sue you as the owner of the
22 policy now, and you have all these defenses which you've
23 actually specified in your clause to say, well, if we gave
24 notice to the wrong person and you didn't tell us, you
25 can't do this, you can't do that under the contract. All

1 those things under the contract, yes, I agree with you,
2 they can't do. But why don't they have a common law right
3 to sue you because now that assignment is effective? If
4 they can sue the person who assigned it to them saying, no,
5 I'm the owner, why can't they sue you and say, no, I'm the
6 owner?

7 MR. VAN OORT: It's - - - it's common in the law,
8 Your Honor, for rights to transfer and be effective as
9 between some parties, but not others. And so for example -
10 - - example, in mortgages, property recording. This New
11 York property recording statute says that if you give an
12 owner - - - or mortgage interest or transfer that, but
13 don't record it, it's valid as against the two of you - - -

14 JUDGE HALLIGAN: So - - -

15 MR. VAN OORT: - - - but it is not valid against
16 any subsequent purchase.

17 JUDGE HALLIGAN: - - - so what - - -

18 JUDGE RIVERA: So - - - so aren't you referring
19 to a statutory right?

20 JUDGE GARCIA: Right.

21 JUDGE RIVERA: And I think Judge Garcia is asking
22 you about a common law right.

23 MR. VAN OORT: So no, Your Honor, what - - - my -
24 - - my point is just this. It is commonplace in the law
25 for rights to be effective as to one party but as another.

1 And usually it turns on notice. And - - - and that's why
2 in this case - - - you know, so under our point - - - under
3 our view here, what happens is that the assignee gets
4 rights against the insurer when notice is given to the
5 insurer, not before.

6 And so after notice is given, they have the
7 direct suit. Before notice is given, they have the suit
8 against the assignor. Under a notice regime, Your Honors,
9 no one can breach without knowing it. If there's no - - -

10 JUDGE RIVERA: And can I just interrupt you?
11 Just to be clear, you all think this is their position - -
12 - but you all agree that anyone can give notice? It need
13 not be the assignor, correct?

14 MR. VAN OORT: Yes. It's not important where the
15 notice comes from. It's important what the notice conveys.
16 You could imagine, Your Honor, situations where Joe writes
17 up and say, hey, guess what Allianz, Sally assigned me the
18 contract - - -

19 JUDGE RIVERA: Right.

20 MR. VAN OORT: - - - and we'd be skeptical about
21 that.

22 JUDGE RIVERA: Yeah.

23 MR. VAN OORT: But it doesn't matter where the
24 notice comes from, it matters what it conveys.

25 JUDGE RIVERA: Well, you'd be skeptical, and what



1 do you need? You need it, like, in writing, and they need
2 to send you a copy of the assignment? What do you need?

3 MR. VAN OORT: Yeah. And - - - and Your Honor, I
4 don't think this court needs to get into what would be
5 sufficient here, because the record here on the certified
6 question is that no notice was given prior to this. And -
7 - - and there may be questions down the line about what's
8 sufficient, and the - - - the court would consider that.

9 JUDGE RIVERA: Was there a - - - I'm sorry, I
10 don't know the answer to it. I should, but I don't. Under
11 this policy, were there provisions about how to effectuate
12 notice?

13 MR. VAN OORT: Yeah, the notice is defined as a
14 satisfactory written request, Your Honor. Nothing more or
15 less.

16 JUDGE RIVERA: So - - - so how would the assignee
17 know that? They're all dependent on the assignor giving a
18 copy or otherwise telling them you're going to have to do
19 this?

20 MR. VAN OORT: Exactly, Your Honor. And that's
21 not uncommon. If you're purchasing rights, you would
22 expect to know what the rights are.

23 JUDGE SINGAS: Does the policy outline what the
24 consequences are for failure to give notice?

25 MR. VAN OORT: It just says that it won't be

1 effective until notice is given, so - - -

2 JUDGE SINGAS: So there's nothing about the
3 consequences of such absence to give notice.

4 MR. VAN OORT: No. Just effectiveness or - - -
5 there's - - - in other words - - - and maybe this is what
6 Your Honor is getting at - - - there isn't a duty placed on
7 the owner - - -

8 JUDGE SINGAS: I'm getting more at ambiguity.
9 And our case law says pretty clearly, if the terms are
10 ambiguous, then they run against the insurance company.

11 MR. VAN OORT: You're right. There - - - there's
12 nothing - - - and - - - and I - - - and I - - - there's
13 nothing ambiguous about the sentence that says an
14 assignment will be effective upon notice. And that's not
15 been argued. Now - - -

16 JUDGE CANNATARO: It's not the same thing as
17 saying an assignment is ineffective based on the failure to
18 provide notice.

19 MR. VAN OORT: No, it's the converse, Your Honor.

20 JUDGE CANNATARO: It is.

21 MR. VAN OORT: In the void situation, this court
22 has created basically what I think is a super clear
23 statement rule. If you want to make something void, you've
24 got to say it really clearly. But that's - - -

25 JUDGE HALLIGAN: But aren't you - - - aren't you

1 voiding - - - if you look at the sales agreement, right, it
2 seemed to me that one of the rights that's being
3 transferred there is the right to take legal action. And I
4 take it you're saying that you take no position on the
5 assignment generally, but that the attempt to assign the
6 right to take legal action is ineffective? Is that a fair
7 characterization?

8 MR. VAN OORT: No, it's - - - Your Honor, whether
9 they transferred the right to bring action or not
10 ultimately doesn't matter. What matters is whether they
11 gain the rights that they're suing on.

12 JUDGE TROUTMAN: So under - - -

13 JUDGE HALLIGAN: Wait, I thought you were saying
14 - - - sorry, Judge Troutman.

15 JUDGE TROUTMAN: So here no one - - - does anyone
16 have any right to standing based on your assessment?

17 MR. VAN OORT: On our view, Ms. Muschel would
18 have had standing to sue us, because, as of our records,
19 she was the owner.

20 CHIEF JUDGE WILSON: And then so back to Judge
21 Cannataro's question from earlier, what would have happened
22 had the plaintiffs discontinued this action, giving you
23 notice the next day and filed thereafter? Is that valid?

24 MR. VAN OORT: They - - - they would have had
25 standing to sue. And that's the strange thing about this,

1 Your Honor. And this is why notice requirements are
2 different than bars on voiding and saying you just can't do
3 it. That's a bar, or you need our consent.

4 Notice is just a natural part of assignment,
5 because any time you get new rights, the first thing you do
6 is you tell the person you have them again, hey, we have
7 them so you can enforce them, and you can block the other
8 party from exercising them.

9 JUDGE GARCIA: What's - - - what's the protection
10 you get out of the no bringing suit rule - - - other than
11 this - - - I mean, but what does that get you? Because I
12 see what the notice provisions get you, what you can't
13 change the beneficiary gets you. What does you don't have
14 a common law right to sue get you?

15 MR. VAN OORT: Your Honor, I don't know that
16 there's any difference between all those rights. It would
17 be strange to have a rule that's, say, the right to sue
18 could be assigned without notice but none of the other
19 rights of ownership could be assigned without notice. That
20 the contract term says the assignment period won't be
21 effective. So everything that goes with it.

22 JUDGE GARCIA: But then why would you even spell
23 out these other things in there? You know, why would you
24 say, you know, we will not be liable for actions taken on
25 payments? Why would you need to say that if the assignment

1 is just not effective at all and you can't sue me?

2 MR. VAN OORT: Yeah, I - - - Your Honor, I think
3 this could have stopped with the sentence, it won't be
4 effective. I think the additional sentence you point to
5 gives further notice.

6 JUDGE GARCIA: To go back to my original - - -
7 what is the harm to the insurance company to have someone
8 come in that's not a registered assignee and sue? What's
9 the - - - what is the harm to the insurance company?
10 What's the prejudice?

11 MR. VAN OORT: I mean, the harm general is what
12 happened here, Your Honor. And you can see this from our
13 original motion to dismiss. This complaint was filed on
14 behalf of the trust. And the trust says we own this. We
15 looked at the records and saw that the trust had assigned
16 it to Ms. Muschel in 2012 and didn't do it. And so our
17 response in litigation was, you must have just forgotten
18 the assignment. We have no idea who we're dealing with
19 here and - - -

20 JUDGE SINGAS: It would still be protected.

21 JUDGE GARCIA: Yeah. So - - -

22 JUDGE SINGAS: You're still protected?

23 MR. VAN OORT: We're - - - we're protected, Your
24 Honor, by dismissing the suit because they don't have the
25 rights to sue. They were the wrong owner here, Your Honor.

1 And Your Honor, to - - - to your question more directly,
2 contractual rights are enforceable whether there's
3 prejudice or not.

4 JUDGE GARCIA: Oh, I think it just - - - to me,
5 it goes more towards what was the purpose of this clause,
6 because clearly protecting the insurance company here with
7 notice provisions, with ability to change the policy, and I
8 don't see the protection aspect of changing that right.
9 And if you wanted to do that, I think it's something
10 different.

11 But just if it's unclear, and we're looking at it
12 as a policy matter, one, on drafting, as I think some of my
13 colleagues have raised, but also on who's harmed here. I
14 mean, I think you would certainly have the right to say, we
15 don't know who we're dealing with here. You have to come
16 into court and prove you are a legitimate assignee, and the
17 court would have to make that determination, like they do
18 in other contexts.

19 MR. VAN OORT: But - - -

20 JUDGE GARCIA: But why just bar them from the
21 courthouse? I don't see the prejudice to you, whether
22 you're sued by the original assign - - - you know, the
23 original beneficiary or owner or the assignee, what's the
24 prejudice to you? It's the same claim. You have all your
25 defenses you would have if the assignment hadn't taken

1 place.

2 MR. VAN OORT: Yeah. Yeah, I hear, Your Honor.
3 And because this is coming here on a certified question,
4 the federal courts have decided that what mattered is - - -
5 is the rights as they existed when the complaint was filed,
6 not anything that changed later. And so it's coming to
7 here in this cabin thing, that they decided that if this
8 were coming and if this were an issue of amending the
9 complaint in - - - in all of that, it would be very
10 different.

11 JUDGE GARCIA: Okay.

12 MR. VAN OORT: But the question here, though, is
13 simply the one, if there is a policy provision saying the
14 transfer is not effective until notice, and notice hasn't
15 been given, is that enforceable?

16 JUDGE RIVERA: Yeah, but there is confusion about
17 - - - because - - - maybe you can explain to me the point
18 of the other two sentences. We will record your
19 assignment. We will not be responsible for its validity or
20 effect, nor will we - - - will we be liable for actions
21 taken on payments made before we receive and record the
22 assignment. Now, it strikes me that it's not just about
23 notice; it's about the actual recording of the assignment.

24 MR. VAN OORT: Yes, Your Honor. And so just to
25 go through, we will not be responsible for its validity or

1 effect, that's to the - - - the point of Your Honor's
2 questions and others. We - - - we aren't getting in the
3 middle of the assignor and the assignee. That - - - that's
4 up to them.

5 And then after that, it's we will not be liable
6 for actions taken or payments made before we receive and
7 record the assignment, which is if we make a payment to the
8 record owner - - -

9 JUDGE RIVERA: Uh-huh.

10 MR. VAN OORT: - - - because the record owner
11 asked to cash out or asked us something, we will not be
12 held liable for that if we weren't told there's a different
13 owner. And - - - and this is the thing, Your Honor, under
14 - - -

15 JUDGE RIVERA: Well, if you weren't told, then
16 you record the assignment.

17 MR. VAN OORT: Yeah.

18 JUDGE RIVERA: There is another step you have to
19 take.

20 MR. VAN OORT: You're right, Your Honor. And - -
21 - and I think the enforceable - - -

22 JUDGE RIVERA: Why doesn't that create confusion
23 or ambiguity about this provision?

24 MR. VAN OORT: I don't think it creates any
25 ambiguity - - -



1 JUDGE RIVERA: It's not a pure notice - - - it's
2 not a pure notice provision. This is a notice of
3 recordation provision.

4 MR. VAN OORT: Yeah. The - - -

5 JUDGE RIVERA: To get full protection, going to
6 Judge Garcia's point.

7 MR. VAN OORT: Yes.

8 JUDGE RIVERA: Real protection requires the
9 recording, which I - - - I'm not sure that you could - - -
10 you need whatever kind of notice you're saying you need.
11 But - - - so - - -

12 MR. VAN OORT: So Your Honor, on - - - on this
13 one, if - - - if this were a fact situation where we had
14 received notice but not recorded it - - -

15 JUDGE RIVERA: Yeah.

16 MR. VAN OORT: And we're saying, well, it wasn't
17 effective because we didn't record it, I think that would
18 be a very different case.

19 JUDGE RIVERA: What if they didn't give you
20 notice but they recorded it themselves?

21 MR. VAN OORT: Well, the recording - - - there
22 isn't any place to record it other than with us, Your
23 Honor. There isn't any - - -

24 JUDGE RIVERA: So that's what you're referring
25 to. Recording with you - - -



1 MR. VAN OORT: Yes.

2 JUDGE RIVERA: - - - is notice to you.

3 MR. VAN OORT: Yes, it's - - - well, it's the
4 company - - -

5 JUDGE RIVERA: What does that mean?

6 MR. VAN OORT: - - - actually recording it on its
7 books for purposes of regulatory purposes.

8 JUDGE RIVERA: Ah, okay.

9 MR. VAN OORT: That's - - - that's what that is,
10 Your Honor.

11 JUDGE RIVERA: That's what you meant by that.
12 Okay.

13 MR. VAN OORT: But - - - but to go back to the
14 main point here, under the regime they propose, the Allianz
15 could breach this contract without knowing it. It could -
16 - - the existing record owner could cash out, and under
17 their view, the rights have transferred, and that would be
18 a breach. The existing owner could reduce it to fully
19 paid-up status. And there's actually a new owner that we
20 didn't - - -

21 JUDGE GARCIA: I think that reaction is protected
22 against.

23 JUDGE RIVERA: Yeah.

24 JUDGE GARCIA: I think that's exactly what this
25 clause protects you against.



1 MR. VAN OORT: I agree, Your Honor. And the way
2 it does it is by enforcing what it says, which is rights
3 don't transfer until notice. That's why there's no breach.
4 Otherwise, if they did transfer, there would be a breach
5 and then we'd have - - -

6 JUDGE HALLIGAN: But I think the question is, is
7 - - - is there a distinction between these substantive
8 rights that you're identifying and the right to sue?

9 MR. VAN OORT: I - - - and - - -

10 JUDGE HALLIGAN: And - - - and - - - and I take
11 it you're saying there isn't. But tell - - - tell us why,
12 if you would.

13 MR. VAN OORT: Yeah. Our - - - our view, Your
14 Honor, is that there isn't for two reasons. Number one,
15 the contract doesn't distinguish between the two in terms
16 of what's effective or not and what's transferred or not.
17 And second, the right to sue doesn't do any good unless you
18 have the rights that you're suing on - - - on that. And if
19 those haven't been assigned and - - - and they aren't under
20 this clause, and there's no public policy reason to
21 override that, that's why we think it's ineffective.

22 JUDGE HALLIGAN: May I ask one last question,
23 Chief?

24 CHIEF JUDGE WILSON: Of course. Yeah.

25 JUDGE HALLIGAN: I take it you're saying you're



1 agnostic as to whether the assignment transfers rights as
2 between Ms. Muschel and the trust?

3 MR. VAN OORT: That's correct, Your Honor.

4 JUDGE HALLIGAN: But if - - - if under your
5 reading the trust can't sue you, then what meaningfully has
6 been effectuated by any assignment, because the assignment
7 really just has to do with any rights vis-a-vis you, I - -
8 - I think.

9 MR. VAN OORT: Yeah. So let me be clear. We're
10 - - - we're not taking a position in this case on whether
11 this assignment was effective or not, because it's not in
12 the record, and we don't have standing. But as a legal
13 matter, Your Honor, under New York law, if you assign
14 something, it's effective. And so the trust could sue Ms.
15 Muschel.

16 JUDGE HALLIGAN: But not you?

17 MR. VAN OORT: But not us. And that's the
18 difference. You gain rights as to the people who have
19 notice. You don't gain rights as to the people who don't
20 have notice. And you need to do that to make this
21 enforceable so that life insurers are not breaching
22 unknowingly.

23 JUDGE RIVERA: But again, isn't the breach
24 between the assignor and you? And that's where any claims
25 lie, but that they should be able to bring - - - as it's a

1 - - - you just conceded it. The assignment is - - - there
2 is an assignment under New York law.

3 MR. VAN OORT: No, Your Honor - - - and - - -
4 there is no duty on an existing owner to give notice to us.
5 There's no breach by the owner if they don't give notice.
6 We aren't suing them on that, that - - - this just says the
7 consequences of what happens.

8 And this is why in the reply brief, the
9 Plaintiff's reply brief, at page 5, they concede that if
10 Ms. Muschel borrowed from the trust before they gave
11 Allianz notice, they say, "That is a risk that the trust
12 undertakes at its own peril." Why is that? Because they
13 haven't met it.

14 Under a notice regime, only the people who know
15 can breach. People who don't know can't breach. It is
16 administrable. It's what the policy says. There's no
17 public policy reason to override it; and therefore, we ask
18 the court to enforce it.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. BENHAIM: Yeah. If I could just - - - really
21 just in - - - in sum - - - in summary, just address the
22 issue. The notice provision protects the insurance carrier
23 from take - - - when they take action without having notice
24 of who the proper owner is, and they - - - and they - - -
25 and they proceed pursuant to who they believe is the owner.

1 The notice provision protects them that their actions are
2 considered valid if they've - - - and so if a trust - - -
3 in our case, the trust takes an assignment and fails to
4 record it with the insurance carrier, and the insurance
5 carrier deals with the prior owner and drains the policy of
6 value - - -

7 JUDGE TROUTMAN: So are you saying there's a
8 difference between the right to sue? It's standing and
9 substantive rights.

10 MR. BENHAIM: Exactly. The - - - the - - - the
11 insurance carrier could not lock the doors of this
12 courthouse with a notice requiring - - -

13 JUDGE CANNATARO: And counsel, where does your
14 standing come from? Is it a common law right conferred by
15 the court, or is it a right that arises under the agreement
16 itself, which is - - - which has now been assigned to you?

17 MR. BENHAIM: I think it's both.

18 JUDGE CANNATARO: Okay.

19 MR. BENHAIM: Thank you.

20 CHIEF JUDGE WILSON: Thank you.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Brettler v. Allianz Life, No. 77 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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