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Corporate-Owned Life Insurance: Another Financial Scheme That Takes Advantage of Employees and Shareholders

SUSAN LORDE MARTIN*

I. INTRODUCTION

For many years, corporations have been insuring the lives of their key employees to protect the corporations from economic losses in the event of the employees' deaths.¹ Insurance companies encouraged the corporate-owned life insurance (COLI) programs by emphasizing their tax advantages.² Corporations began to maximize the tax benefits by taking large loans to pay for policy premiums and then obtaining large income tax deductions for the interest payments.³ When the Tax Reform Act of 1986⁴ curtailed these unintended tax benefits by imposing a \$50,000 per-insured-employee limit on the amount of indebtedness for which interest was deductible, insurance companies created new kinds of COLI policies.⁵ One kind has been called "dead peasant policies"⁶ or "janitors' insurance."⁷ These are life insurance policies that corporations purchase for rank-and-file employees, naming the corporation as the beneficiary when the employee dies.⁸

There is widespread use of janitors' insurance by corporations and by banks (BOLI)⁹ because it boosts their bottom lines.¹⁰ However, the current arrangement takes advantage of uninformed employees and mis-

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1. *Am. Elec. Power, Inc. v. United States*, 136 F. Supp. 2d 762, 768 (S.D. Ohio 2001), *aff'd*, 326 F.3d 737 (2003).

2. *Id.*; see also *infra* notes 75-82 and accompanying text.

3. *Am. Elec. Power*, 136 F. Supp. 2d at 768.

4. Pub. L. No. 99-514, § 1003, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

5. H. REP. NO. 102-432, at 61 (1992).

6. 149 CONG. REC. E76-02 (daily ed. Jan. 28, 2003) (statement of Rep. Green).

7. Ellen E. Schultz & Theo Francis, *The Economy: Senator to Target Tax Boon to Firms Insuring Workers*, WALL ST. J., May 3, 2002, at A2.

8. 149 CONG. REC. E76-02, *supra* note 4.

9. See, e.g., Ellen E. Schultz & Theo Francis, *Many Banks Boost Earnings with 'Janitors' Life Insurance*, WALL ST. J., Apr. 26, 2002, at A1 (noting that many banks in the United States buy life insurance policies on the lives of their rank-and-file employees); Ellen E. Schultz & Theo Francis, *Valued Employees: Worker Dies, Firm Profits*, WALL ST. J., Apr. 19, 2002, at A1 (noting that millions of current and former employees at hundreds of large companies are covered by COLI).

10. See *infra* notes 134 & 139 and accompanying text.

leads shareholders. Shareholders pay for hidden executive compensation when corporations buy “split-dollar” life insurance policies for top executives. These arrangements, in which the premiums are split between the corporation and the executive, create millions of dollars of tax-free compensation for the executives without shareholder knowledge.¹¹

Insurance companies have been very successful in marketing these products to corporations and to banks and, now, even to charities (CHOLI).¹² These developments have drawn little attention from the public and Congress. The intense focus on corporate scandal after the Enron, Tyco, Adelphia, and WorldCom debacles, however, has created interest in these insurance schemes in the business press and among legislators. Reporters for the Wall Street Journal have been writing regularly about these issues since the beginning of 2002.¹³ The Internal Revenue Service increasingly has been disallowing deductions taken with respect to these schemes, and courts have been upholding the disallowances.¹⁴ It is important that remaining loopholes are plugged while the public’s attention is focused on overreaching by corporations. When no one is watching, it is difficult for rank-and-file employees and non-institutional shareholders to know that they are being taken advantage of by large corporations, which are aided and abetted by large insurance companies.

Employees should not be worth more to their employers, or former employers, dead than alive. Not only should the employees’ consent be required for such an arrangement, but the consent has to be meaningful so they fully comprehend the scope of the benefits accruing to the employer. Similarly, shareholders must be able to know when a company’s earnings are increased by COLI — rather than from business activities — and when the company’s payments for life insurance premiums for executives increase executives’ pay and benefits beyond what is clearly reported.

This article explores in Part II the issue of insurable interest, specifically, why employers may be allowed to insure the lives of employees whose deaths, individually, have no particular effect on the financial well-being of the company. Part III discusses employee rights, with

11. See, e.g., Ellen E. Schultz & Theo Francis, *Top Executives at Enron Shield Pension Benefits*, WALL ST. J., Feb. 7, 2002, at A3.

12. Ellen E. Schultz & Theo Francis, *Dying to Donate: Charities Invest in Death Benefits*, WALL ST. J., Feb. 6, 2003, at B1.

13. See, e.g., *supra* notes 6, 8, 10, & 11.

14. See *infra* notes 95-107 and accompanying text. But see *Dow Chem. Co. v. United States*, 250 F. Supp. 2d 748 (E.D. Mich. 2003) (ordering the IRS to return to Dow over \$22 million in deductions for interest on COLI policies after holding that the policies were not economic shams).

respect to COLI, and relevant litigation. The tax considerations of COLI and relevant litigation are examined in Part IV. Part V describes how corporations profit from COLI and discusses shareholders' right to know the sources of corporations' income. Part VI summarizes, in light of recent legislation, split-dollar arrangements that hide executive compensation and their future viability. The final section concludes that no one should be able to insure the life of another without the consent of the insured; that corporations should not be able to shift the cost of employee benefit programs to the taxpayer through tax-advantaged COLI programs; and that a corporation should be required to indicate clearly to shareholders the total compensation it is granting top management and the profit it enjoys that is directly attributable to COLI programs.

II. INSURABLE INTEREST

In 1921 the Supreme Court of Pennsylvania declared that '[a]n insurable interest . . . must . . . reasonably justify a well-grounded expectation of advantage, dependent upon the life insured, so that the purpose of the party effecting the insurance may be to secure that advantage, and not merely to put a wager upon human life.' . . . [T]here [must be] a real concern in the life of the party named, whose death would be the cause of substantial loss to those who are named as beneficiaries. This does not follow the cessation of ordinary service, but arises where the success of the business is dependent on the continued life of the employee.¹⁵

This explanation of "insurable interest" indicates why the law will not allow an individual to pay premiums on a life insurance policy for a stranger and then collect as beneficiary when the stranger dies. For example, years ago it was not unusual for people to buy insurance on the lives of famous people they did not know, betting on the celebrities' early demise.¹⁶ The law of "insurable interest" developed to discourage people without a genuine interest in the continued life of another from wagering on that person's death and from creating a circumstance in which they would benefit from that person's death. As the Texas

15. *United Sec. Life Ins. v. Trust Co. of Pa.*, 113 A. 446, 446 (Pa. 1921); *see also* *Turner v. Davidson*, 4 S.E.2d 814 (Ga. 1939).

An employer does not have "insurable interest" in life of employee solely because of relationship of employer and employee, but employer must have substantial economic interest in life of employee, and, by virtue of relationship, must reasonably expect to reap substantial pecuniary benefit through continued life of employee and to sustain consequent loss upon employee's death A small and insignificant readjustment, which would normally follow death of employee performing ordinary duties requiring no special skill or knowledge, will not give employer an "insurable interest" in life of employee. *Id.* at 814-15.

16. *See Dow Chem.*, 250 F. Supp. 2d at 748.

Supreme Court has said, “[T]he public has a controlling concern that no person have an interest that may give rise to a temptation to destroy [the insured’s] life.”¹⁷ The U.S. Supreme Court has held that life insurance policies purchased by one without an insurable interest in the insured are against public policy because they constitute “a mere wager, by which the party taking the policy is directly interested in the early death of the [in]sured. Such policies have a tendency to create a desire for the event.”¹⁸ Lower courts have noted that the “public policy against ‘wager’ policies is so strong that the carrier issuing such a policy may be liable for death or other injury to the insured resulting from the carrier’s failure to exercise reasonable care in the issuance of the policy,” that is, issuing it to one without an insurable interest.¹⁹

Thus, an insurable interest is required to purchase a life insurance policy, but it “is not easy to define with precision what will in all cases constitute as insurable interest, so as to take the contract out of the class of wager policies.”²⁰ Nevertheless, it has been well accepted since at least the nineteenth century that each person has the right to insure his or her own life by naming someone else as the beneficiary.²¹ In addition, many states have statutes outlining other circumstances when an insurable interest exists for personal insurance. Most of the statutes describe two situations when there is an insurable interest: when there is a close blood or legal relationship that engenders “love and affection;” or when there is “a reasonable expectation of pecuniary advantage through the continued life” of the insured person and consequent loss by reason of his or her death.²²

17. *Drane v. Jefferson Standard Life Ins. Co.*, 161 S.W.2d 1057, 1059 (Tex. 1942).

18. *Warnock v. Davis*, 104 U.S. 775, 779 (1881); *see also Grigsby v. Russell*, 222 U.S. 149, 154 (1911). Justice Holmes delivered the opinion of the Court noting that a “contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end.” *Id.* In 1884, the Supreme Court of Alabama said:

There is no limit to the insurable interest which a man may have in his own life; but there are forcible reasons why a mere stranger should not be permitted to speculate upon the life of one whose continued existence would bring to him no expectation of possible benefit or advantage. . . . [W]ager policies, or such as are procured by a person who has no interest in the subject of insurance, are undoubtedly most pernicious in their tendencies, because in the nature of premiums upon the clandestine taking of human life. . . . [S]uch policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against.

Helmtag’s Adm’r v. Miller, 76 Ala. 183 (1884).

19. *Burton v. John Hancock Mut. Life Ins. Co.*, 298 S.E.2d 575, 577 (Ga. Ct. App. 1982).

20. *Warnock*, 104 U.S. at 779.

21. *Aetna Life Ins. Co. v. France*, 94 U.S. 561, 564 (1876).

22. *See, e.g.*, ALA. CODE § 27-14-3(a) (2002); ALASKA STAT. § 21.42.020(d)(1) & (2) (Michie 2002); ARIZ. REV. STAT. § 20-1104(C)(1) & (2) (2002); ARK. CODE ANN. § 23-79-

The latter situation contemplated the interests of creditors or sureties who have obvious financial interests in the continued life of the insured. The “love and affection” interest was generally viewed “as more powerful . . . to protect the life of the insured than any other consideration.”²³ The statutes also often create a specific corporate insurable interest in the lives of any directors, officers or employees whose death might cause financial loss to the corporation.²⁴ The corporation buys insurance on the lives of these “key” employees, naming itself as beneficiary to protect it in the event of the death of such an employee who is important to the corporation’s success.²⁵ In the 1980s, in response to vigorous lobbying by insurance companies, many state insurance departments modified their rules to allow businesses to purchase COLI on the lives of rank-and-file employees whose specific deaths will not have any appreciable effect on the success of the business.²⁶ Moreover, in the last decade or so, some state legislatures have amended their insurable interest statutes so that charitable organizations are deemed to have an insurable interest in the life of any individual who consents to the charity’s owning or purchasing life insurance on his or

103(c)(1)(A) & (B) (Michie 2002); CAL. INS. CODE § 10110.1(a) (West 2002); DEL. CODE ANN. tit. 18, § 2704(c)(1) & (2) (2002); GA. CODE ANN. § 33-24-3(a) (2002); IDAHO CODE § 41-1804(3)(a) & (b) (Michie 2002); KY. REV. STAT. ANN. § 304.14-040(4)(a) & (b) (Banks-Baldwin 2002); ME. REV. STAT. ANN. tit. 24-A, § 2404(3)(A) & (B) (West 2002); MD. CODE ANN., INS. § 12-201(b)(2)(i) & (b)(3) (2002); MISS. CODE ANN. § 83-5-251(3)(a) & (b) (2002); MONT. CODE ANN. § 33-15-201 (3)(a) & (b) (2002); NEV. REV. STAT. 687B.040(3) (2001); N.Y. INS. LAW § 3205(a)(1)(A) & (B) (McKinney 2002); N.D. CENT. CODE § 26.1-29-09.1(3)(a) & (b) (2001); OKLA. STAT. tit. 36, § 3604(C)(1) & (2) (2002); 40 PA. CONS. STAT. ANN. § 512 (West 2002); R.I. GEN. LAWS § 27-4-27(c)(1) & (2) (2001); S.D. CODIFIED LAWS § 58-10-4 (1) & (2) (Michie 2002); UTAH CODE ANN. § 31A-21-104(2)(a)(i)(A) & (B) (2002); VA. CODE ANN. § 38.2-301(B)(1) & (2) (Michie 2002); WASH. REV. CODE § 48.18.030(3)(a) & (b) (2002); W. VA. CODE § 33-6-2(c)(1) & (2) (2002); WYO. STAT. ANN. § 26-15-102(c)(i) & (ii) (Michie 2002). *But see* TEX. INS. CODE ANN. art. 3.49-1 § 3 (Vernon 2001) (having only a blanket rule that permits anyone of legal age to consent in writing to the purchase of insurance on his or her life by any other person or legal entity).

23. *Warnock*, 104 U.S. at 779.

24. *See, e.g.*, ALA. CODE § 27-14-3(c)(2002); ARK. CODE ANN. § 23-79-103(c)(1)(D) (Michie 2002); CAL. INS. CODE § 10110.1(c) (West 2002); GA. CODE ANN. § 33-24-3(c) (2002); MASS. GEN. LAWS ch. 175, § 123A (2003); N.C. GEN. STAT. § 58-58-75 (2002) (granting any employer an insurable interest in the life of an employee for the benefit of the employer). *But see* DEL. CODE ANN. tit. 18, § 2704(c)(3) (2002) (stating that an employer that provides life, health, disability, retirement or similar benefits to employees (even if it is only to some of them) has an insurable interest in the lives of all its employees); IND. CODE § 27-1-12-17.1(c) (2002) (stating that “[a]n employer that provides life insurance, health insurance, disability insurance, retirement benefits, or similar benefits to an employee . . . has an insurable interest in the life of the employee” — but not, presumably, in the lives of all employees); 40 PA. CONS. STAT. ANN. § 512 (West 2002) (permitting corporations to insure the lives of employees without any qualifying requirement based on the employees’ financial value to the corporation).

25. 3 COUCH ON INSURANCE § 43.13 (1995).

26. Ellen E. Schultz & Theo Francis, *Why Are Workers in the Dark?*, WALL ST. J., Apr. 24, 2002, at C1.

her life.²⁷ As one reporter commented, "Why hold a bake sale when you can have a dead pool?"²⁸

The result of buying insurance on the life of someone in whom one does not have an insurable interest varies by state. In some states the policy is void; the insurance company is not liable on the contract and may have to pay nothing or may just have to repay the premium payments.²⁹ In others, if one without an insurable interest in the life of the deceased receives the benefits of a life insurance policy, the executor or administrator of the estate of the deceased may sue to recover the benefits from the recipient.³⁰ The latter is the better arrangement because the insurance company will not benefit by writing policies purchased by those without insurable interests. If the policy just becomes void, the insurance company has a strong incentive to write such policies: It collects premiums and will never have to pay out on the policy. In a commentary accompanying its insurable interest statute, the Wisconsin statutory compilation notes that:

[t]he best way to discourage insurers from issuing insurance policies to persons without insurable interest is to make them pay if they do, not to permit them to freely issue such policies knowing that they have a good public policy defense that lets them off the hook whenever a loss occurs. The court should have the power to order the proceeds paid as justice dictates.³¹

Furthermore, some state courts have held that insurance carriers are lia-

27. See, e.g., ALA. CODE § 27-14-3(d)(2002); ARIZ. REV. STAT. § 20-1104(C)(4) (2002); ARK. CODE ANN. § 23-79-103(c)(2)(A) (Michie 2002); CAL. INS. CODE § 10110.1(f) (West 2002); COLO. REV. STAT. § 10-7-115 (2002); FLA. STAT. ch. 627.404(2) (2002); IOWA CODE § 511.39 (2001) KANS. STAT. ANN. § 40-450(b) (2001); MINN. STAT. § 61A.073 (2002); MONT. CODE ANN. § 33-15-201 (5) (2002) (requiring that insurance is purchased with the insured individual's contributions); NEB. REV. STAT. § 44-704(4) (2002); N.M. STAT. ANN. § 59A-18-5 (2002); N.D. CENT. CODE § 26.1-29-09.1(3)(d) (2001); OKLA. STAT. tit. 36, § 3604(D) (2002); S.D. CODIFIED LAWS § 58-10-4 (4) (Michie 2002); VA. CODE ANN. § 38.2-301(b)(4) (Michie 2002); WASH. REV. CODE § 48.18.030(3) & (4) (2002); W. VA. CODE § 33-6-2(c)(4) (2002). *But see* MASS. GEN. LAWS ch. 175, § 123A(2) (2003) (stating that a charitable institution has an unlimited insurable interest in the life of any donor without requiring specific consent); N.Y. INS. LAW § 3205(b)(3) (McKinney 2002) (permitting a charitable institution to obtain life insurance on any person without requiring consent).

28. Jennifer Schuessler, *Office Indemnity: Does Your Employer Want You Dead?*, BOSTON GLOBE, Mar. 9, 2003, at D3.

29. See, e.g., ALA. CODE § 27-14-3(f)(2002) (premium payments); CAL. INS. CODE § 10110.1(e) (West 2002) (nothing); N.J. STAT. ANN. § 17:35-11 (West 2002) (nothing).

30. See, e.g., ALASKA STAT. § 21.42.020(b) (Michie 2002); ARIZ. REV. STAT. § 20-1104(B) (2002); ARK. CODE ANN. § 23-79-103(b) (Michie 2002); DEL. CODE ANN. tit. 18, § 2704(b) (2002); HAW. REV. STAT. § 431:10-204(c) (2002); IDAHO CODE § 41-1804(2) (Michie 2002); ME. REV. STAT. ANN. tit. 24-A, § 2404(2) (West 2002); N.Y. INS. LAW § 3205(b)(4) (McKinney 2002); OKLA. STAT. tit. 36, § 3604(B) (2002); OR. REV. STAT. § 743.024(2) (2001); R.I. GEN. LAWS § 27-4-27(b) (2001); WIS. STAT. § 631.07(4) (2001).

31. WIS. STAT. § 631.07 cmt. (2001).

ble in negligence for issuing policies to people without an insurable interest in the insured.³²

Only a minority of the statutes described above require employers with an insurable interest in their employees to obtain the consent of the individuals being insured.³³ Among those that do, only Oklahoma specifies that the employee's consent must be sought and obtained before a life insurance policy is purchased.³⁴

Most of the statutes require that the insurable interest exists at the time the life insurance policy first goes into effect, but it does not have to exist at the time the loss occurs.³⁵ That is, a corporation can continue to insure and remain the beneficiary of an employee who has been fired, who has resigned, or who has retired.

Some states have created an insurable interest for employers in the lives of their employees only when the proceeds of policies are used to support employee benefit plans. Kentucky, for example, permits an employer to obtain life insurance on the life of an employee with itself as beneficiary only "for the purpose of funding a pension or other bene-

32. See, e.g., *Liberty Nat'l Life Ins. Co. v. Weldon*, 100 So. 2d 696 (Ala. 1958); *Bajwa v. Metropolitan Life Ins. Co.*, 776 N.E.2d 606 (Ill. Ct. App. 2002); *Ramey v. Carolina Life Ins. Co.*, 135 S.E.2d 362 (S.C. 1964).

33. See, e.g., CAL. INS. CODE § 10110.1(c) (West 2002) (requiring consent but without definition); DEL. CODE ANN. tit. 18, § 2708 (2002) (requiring consent but without definition); 215 ILL. COMP. STAT. ANN. 5/224.1 (West 2002) (requiring consent and defining it as "written notice of the coverage and [not rejecting the coverage] within 30 days of receipt of such notice"); KANS. STAT. ANN. § 40-452(a) & (b) (2001) (requiring consent and defining it as written notice of the coverage and not rejecting the coverage within 30 days of receipt of such notice and noting that retaliation for refusal to consent is unlawful); MD. CODE ANN., Ins. § 12-201(b)(4)(ii)(A) (2002) (requiring written consent); MO. REV. STAT. § 376.531(2) (2002) (requiring consent and defining it as written notice of the coverage and not rejecting the coverage within 30 days of receipt of such notice); NEB. REV. STAT. § 44-704 (2002) (requiring written consent for anyone obtaining life insurance on another except that obtained by a spouse or a child); N.D. CENT. CODE § 26.1-29-09.1(3)(e)(2001) (requiring consent and defining it as written notice of the coverage and [not rejecting the coverage] within 30 days of receipt of such notice); OHIO REV. CODE ANN. § 3911.091 (Anderson 2002) (requiring consent and defining it as written notice of the coverage and not rejecting the coverage within 30 days of receipt of such notice and noting that retaliation for refusal to consent is unlawful); UTAH CODE ANN. § 31A-21-104(2)(a)(v)(B)(II) (2002) (requiring written consent).

34. OKLA. STAT. tit. 36, §§ 3604(C)(4)(b)(1) & (2) (2002). The Oklahoma statute also prohibits retaliation against an employee who refuses to consent. *Id.* § 3604(C)(4)(c). In addition, the insurable interest of the employer is limited to either an amount agreed to by the employee or the amount the employee is entitled to under all employer benefit plans. *Id.* § 3604(C)(4)(d).

35. See, e.g., ALA. CODE § 27-14-3(e)(2002); CAL. INS. CODE § 10110.1(d) (West 2002); GA. CODE ANN. § 33-24-3(d) (2002); KANS. STAT. ANN. § 40-453 (2001); OKLA. STAT. tit. 36, § 3604(C)(4)(g) (2002); see also *Ficke v. Prudential Ins. Co.*, 202 S.W.2d 429, 431 (Ky. Ct. App. 1947) (noting the general rule that "an insurable interest at the inception of a contract of life insurance is regarded by most courts as sufficient, and it is immaterial that such an interest ceases prior to the death of the insured").

fit plan established for the employee.”³⁶ Maine determined that a corporation has an insurable interest in the lives of its employees, past and present, only for the purpose of funding aggregate employee benefit plans.³⁷ The Maryland, Missouri, Rhode Island, and Virginia statutes require that the amount of the insurance on non-management or retired employees not exceed an amount commensurate with employer-provided benefits.³⁸

New York puts the most specific restrictions on corporations that want to insure the lives of non-management employees. Its statute creates a corporate insurable interest in employees or retirees who are eligible to participate in an employee benefit plan, but it requires: (1) the corporation to notify “prospective insureds in writing that coverage is being obtained on their lives;” (2) “prospective insureds’ consent in writing to such coverage;” (3) corporate notification to terminated employees of their right to have the coverage terminated unless they have or will have the right to receive any employee benefit that is financed by the life insurance coverage; and (4) corporate notification to terminated employees whose benefits terminate that they have the right to have the coverage terminated.³⁹ Moreover, if the insurer changes, the insureds must be informed of the change.⁴⁰ During the first five years after the corporation obtains life insurance on employees, it may not use the policies as collateral for loans except in the case of unforeseen losses or financial obligations.⁴¹ The commentary accompanying the legislation that became effective in 1996 specifically notes that the purpose of allowing corporations to insure the lives of non-management employees is to help “employers in developing innovative means of financing employee health and other benefits in the best interest[s] of the working people of this state.”⁴² The legislation was “not intended to authorize . . . ‘leveraged’ COLI,” to permit employers to improve their earnings by borrowing against the policies at reduced rates, and then reaping the benefits of tax deductions and payouts upon the deaths of the insured employees.⁴³ In carrying out the statutory intent, the New York Department of Insurance requires any corporation using a COLI product to

36. KY. REV. STAT. ANN. § 304.14-040(1) (Banks-Baldwin 2002).

37. ME. REV. STAT. ANN. tit. 24-A, § 2404(3)(D) (West 2002).

38. MD. CODE ANN., Ins. § 12-201(b)(4)(ii)(2)(B) (2002); MO. REV. STAT. § 376.531(3) (2002); R.I. GEN. LAWS § 27-4-27(c)(ii) (2001); VA. CODE ANN. § 38.2-301(B)(3) (Michie 2002) (also requiring that employees other than key employees must have been employed for 12 consecutive months).

39. N.Y. INS. LAW § 3205(d)(1) (McKinney 2002).

40. *Id.* § 3205(d)(4).

41. *Id.* § 3205(d)(5).

42. 1996 N.Y. Laws 491 § 1.

43. *Id.*

submit a letter stating the basis for determining insurable interest and explaining how conditions satisfying the basis will be verified.⁴⁴ Usual bases would be to fund an employee benefit plan including, for example, post-retirement health benefits, or a plan for key persons.⁴⁵ The letter must also include the notice, consent, and right to termination forms that will be given to employees.⁴⁶ The letter must also confirm that for employee benefit plan COLI, the total amount of insurance coverage will not exceed the costs of the program, or for key person COLI, the steps the corporation will take to insure that the amount of insurance will not exceed “the estimate of the potential loss that the corporation would incur from the untimely death of the key employee.”⁴⁷

Although the concept of “insurable interest” has long been considered an important requirement for creating a valid insurance policy, it is not particularly effective in protecting employees and shareholders from corporate abuse in insuring the lives of rank-and-file employees. The unique Texas regimen of having an insurable interest created merely, but only, by the insured’s consent is a much better way of protecting employees from having their lives, or more specifically their deaths, used in ways they find offensive.⁴⁸ In addition, Texas Department of Insurance guidelines note that “[w]hen a person is no longer eligible to be a member of the group, the person should no longer be insured.”⁴⁹

44. N.Y. STATE DEPT. OF INS., GUIDELINES FOR CORPORATE-OWNED LIFE INSURANCE (Feb. 28, 2002), available at www.ins.state.ny.us/acrobat/colich.pdf (last visited Mar. 17, 2003).

45. *Id.* § II.A.2.

46. *Id.* § II.A.4.

47. *Id.* § II.A.7.

48. Furthermore, replacing “insurable interest” with “consent of the insured” as a prerequisite for insuring the life of another in all circumstances, including where there is a relationship the law would consider one of love and affection, is probably a good idea. Relationships of love and affection seem more fleeting than they once were. Consent of the insured might discourage a disaffected spouse, for example, from considering the benefits of his or her spouse’s demise. There are many reported examples of one spouse killing the other “for the insurance money.” See, e.g., Leslie Brown, *Triad*, GREENSBORO NEWS & RECORD, Dec. 30, 2001, at R1; Walter Griffin, *Jury Selection to Begin in Contract Murder*, BANGOR DAILY NEWS, July 27, 2002, at 5; Craig Jarvis, *Start of Trial Caps Months of Suspense*, NEWS & OBSERVER (Raleigh, NC), May 4, 2003, at A1; Jacqueline M. Jauregui, *Toxic Mold: Do Insurers Have a Duty to Warn Policyholders or Others of the Potential Health Risks?*, FICC Q., Oct. 1, 2001, at 191; Derek Jensen, *Witness Tells of Payoff for Slaying Allen’s Wife*, DESERET NEWS, Feb. 9, 2000, at B4; *Week in Review; Nov. 3-9*, WASH. POST, Nov. 10, 2002, at C4; *Wife Killed Lane for Insurance Policy, Prosecutor Says*, NAT’L POST, Aug. 26, 2000, at A17; see also *Ramey v. Carolina Life Ins. Co.*, 135 S.E.2d 362 (S.C. 1964) (plaintiff alleging he sustained serious injuries when his wife poisoned him with arsenic in an attempt to collect on a \$5000 life insurance policy she bought on his life without his knowledge or consent); cf. *Liberty Nat’l Life Ins. Co. v. Weldon*, 100 So. 2d 696 (Ala. 1958) (father alleging carrier’s negligence in selling life insurance policy on life of his daughter, without his consent, to daughter’s aunt who then murdered insured niece).

49. TEXAS DEPT. OF INS., CORPORATE OWNED LIFE INSURANCE CHECKLIST (2002) (relying on TEX. INS. CODE ANN. arts. 21.24, 3.42(i)(2), 3.50 (Vernon 2002)).

Prohibiting corporations from maintaining life insurance on former employees certainly carries out the public policy of eliminating “temptations to the party interested to bring about, if possible, the event insured against.”⁵⁰ Corporations receive no benefit from the continued life of former employees.

III. EMPLOYEES’ RIGHTS AND CONSENT

Because Texas law supports the position that COLI policies are unreasonable and unfair if they are taken out on the lives of non-key employees without their consent, courts in Texas have been the forums for lawsuits seeking to void such policies and to obtain the insurance proceeds for the estate of the deceased employee. The plaintiffs’ theory in these cases has been based on the corporations’ lack of an insurable interest in the lives of their non-key employees. Although the Texas statutes are not as explicit as those in other states, Texas courts have routinely held that “[i]t is against the public policy of this state to allow anyone who has no insurable interest to be the owner of a policy of insurance upon the life of a human being.”⁵¹

In a case decided in 2002 by the U.S. District Court for the Southern District of Texas, the estate of a deceased former employee of Wal-Mart sued Wal-Mart and its insurer to obtain the proceeds of an insurance policy that Wal-Mart had taken out on the life of the employee, Douglas Sims, naming itself as beneficiary.⁵² From 1993 through 1995, Wal-Mart bought about 350,000 COLI policies (through a trust it had created to buy and be the beneficiary of the policies) on the lives of its employees.⁵³ When Sims died, his estate successfully sued Wal-Mart to recover approximately \$64,000 in death benefits payable under one of those policies.⁵⁴ The estate claimed that Wal-Mart had no insurable interest in Douglas Sims’s life.⁵⁵ The federal court reiterated the Texas Supreme Court’s common law rule that one can have an insurable interest in the life of another only when: (1) there is such a close relation “‘by blood or affinity that [one] wants the other to continue to live, irrespective of the monetary considerations;”⁵⁶ or (2) one is a creditor; or (3) one has “a reasonable expectation of pecuniary benefit or advantage

50. *Helmtag’s Adm’r v. Miller*, 76 Ala. 183 (1884).

51. *Cheeves v. Anders*, 28 S.W. 274, 275 (1894); *accord* *Empire Life Ins. Co. of America v. Moody*, 584 S.W.2d 855, 859 (Tex. 1979); *Drane v. Jefferson Standard Life Ins. Co.*, 161 S.W.2d 1057, 1058-59 (Tex. 1942).

52. *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 794, 796 (S.D. Tex. 2002).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 798 (*citing* *Empire Life Ins. Co. of Am. v. Moody*, 584 S.W.2d at 859).

from the continued life of another.”⁵⁷ The last category, according to the Texas Supreme Court

is determined by monetary considerations, viewed from the standpoint of the beneficiary. Would he . . . enjoy more substantial economic returns should the insured continue to live; or would he have more, in the form of the proceeds of the policy, should he die. . . . [If the beneficiary] would profit by [the insured’s] death, the policy is void . . . since the public has a controlling concern that no person have an interest that may give rise to a temptation to destroy [the insured’s] life.⁵⁸

In other words, the employee must be so important that the success of the enterprise might be compromised by his or her death.⁵⁹

A mere employer-employee relationship is insufficient to give rise to an employer’s insurable interest in the employee.⁶⁰ Sims was not an officer, director or shareholder of Wal-Mart; he was just an employee.⁶¹ The court noted that it was “obvious” and “[c]ommon sense” that not all 350,000 Wal-Mart employees whose lives Wal-Mart had insured “could have been individuals that the company looked to ‘primarily for the success of the business.’”⁶² Because Wal-Mart failed to demonstrate Sims’s specific importance to the company, the court rejected its assertion that it had an insurable interest in Sims.⁶³ The court also rejected Wal-Mart’s claim of an insurable interest based on its need to defray the costs of replacing an employee who dies; insurable interest is based on the pecuniary value that the employee contributes when alive.⁶⁴ In arriving at these conclusions, the district court relied on several Texas Supreme Court decisions⁶⁵ and two recent Texas Courts of Appeals decisions.⁶⁶

Finally, the district court referred to public policy in Texas as evidenced by the Texas Legislature’s grant to individuals of the right to

57. *Id.*

58. *Drane v. Jefferson Standard Life Ins. Co.*, 161 S.W.2d 1057, 1059 (Tex. 1942).

59. *McBride v. Clayton*, 166 S.W.2d 125, 128-29 (Tex. 1942).

60. *Stillwagoner v. Travelers Ins. Co.*, 979 S.W.2d 354, 358 (Tex. App. 1998). A mere employer-employee relationship is distinguished from the “key man” concept that was recognized by the Texas Legislature in 1921. *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 794, 799 n.11 (S.D. Tex. 2002). The statute, originally enacted in 1921 and recodified in 1951, allows a business to purchase and be the beneficiary of life insurance policies on officers or stockholders who are deemed significant to the ongoing success of the business. *Mayo*, 220 F. Supp. 2d at 799.

61. *Mayo*, 220 F. Supp. 2d at 800.

62. *Id.* at 801.

63. *Id.* at 802-03.

64. *Id.* at 804.

65. *Id.* at 805 (citing *Empire Life Ins. Co. of Am. v. Moody*, 584 S.W.2d 855 (Tex. 1979)); *McBride v. Clayton*, 166 S.W.2d 125 (Tex. 1942); *Drane v. Jefferson Standard Life Ins. Co.*, 161 S.W.2d 1057 (Tex. 1942).

66. *Id.* at 805 (citing *Tamez v. Certain Underwriters at Lloyd’s London*, 999 S.W.2d 12 (Tex. App. 1999)).

decide who their insurance beneficiaries would be and to select and approve in writing any third party owner of insurance on their lives.⁶⁷ Wal-Mart did not ask for Sims's consent or obtain his approval in writing as required by Texas statute.⁶⁸ Wal-Mart did send flyers to its store managers briefly describing its new program, but there was no evidence that the managers or rank-and-file employees ever received them.⁶⁹ Moreover, the flyer contained only an "opt out" form that would eliminate any way for Wal-Mart to obtain evidence that a worker actually received the flyer or understood it, clearly an abridgment of Texas public policy, which requires an informed choice on the part of employees as to whether their employer should be the owner and beneficiary of insurance policies on their lives.⁷⁰

Wal-Mart has discontinued its COLI program for non-key employees.⁷¹ Unless employees are comfortable with the notion that most of us would be worth more dead than alive to our employers, and that is probably not a comforting thought, COLI programs without informed consent for rank-and-file employees should be outlawed in every state. In fact, members of the Corporate Owned Life Insurance Working Group of the National Association of Insurance Commissioners, a voluntary organization of the chief insurance regulatory officials of the fifty states, the District of Columbia, and the four U.S. territories recommended in September 2002 that state laws be amended to require notice and affirmative consent for COLI.⁷²

On the federal level, Representative Gene Green of Texas, outraged that corporations are profiting from the deaths of their employees and former employees, has introduced a bill, the Life Insurance Employee Notification Act,⁷³ that would eliminate some of the secrecy that exists about COLI.⁷⁴ The act would require companies to inform employees that an insurance policy has been purchased on their lives and provide the name of the insurer, the name of the beneficiary, and the amount of the policy.⁷⁵ Although the act would be an improvement over the pro-

67. *Id.* at 806, 808.

68. *Id.*

69. *Id.* at 807.

70. *Id.* at 807 n.36.

71. L.M. Sixel, *Profiting from Death*, HOUSTON CHRON., Apr. 16, 2002, at 1.

72. Press Release, National Association of Insurance Commissioners, Working Group Makes Recommendation on Corporate Owned Life Insurance Sales (Sept. 10, 2002), available at www.naic.org/pressroom/releases/re102/091002_COLIpressrelease.htm.

73. H.R. 414, 108th Cong. (2003).

74. 149 CONG. REC. E76-02 (daily ed. Jan. 28, 2003) (extension of remarks by Rep. Green).

75. *Id.* A violation of the act would be an "unfair method of competition and an unfair or deceptive act or practice under section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1))." H.R. 414, 108th Cong. § 2(c) (2003).

tections employees have now, it does not go far enough because it does not require employee consent. Meaningful, informed consent, with a well-enforced prohibition on retribution for failure to consent, is the only way to protect the rights of employees to control who benefits from their deaths.

IV. TAX IMPLICATIONS

COLI plans have become favored arrangements for corporations in large part because of their tax advantages. First, beneficiaries of life insurance policies receive the death benefits free of income tax.⁷⁶ Second, the cash value that builds up in a life insurance policy is tax-deferred and sometimes is never paid.⁷⁷ Third, withdrawals from the cash value build-up are treated as withdrawals from basis first and then from earnings. As a result, those initial withdrawals up to basis are also not taxable.⁷⁸ Fourth, it is the strange, but usual, custom in the insurance industry that insurance policy loans are not considered withdrawals of cash from the value of the build-up within the policy itself, but rather loans from the insurance company with the policy's cash value serving only as collateral for the loan.⁷⁹ The proceeds of those loans are not taxable because loan proceeds are not considered income under the tax code.⁸⁰ Finally, interest on loans taken with the cash value of life insurance policies as collateral are often tax deductible.⁸¹

To allow businesses to take full advantage of these tax benefits, the insurance industry created a variety of plans, adapting them as the tax

76. I.R.C. §§ 72, 101(a)(1) (2002); see also *In re CM Holdings, Inc.*, 254 B.R. 578, 581 (D. Del. 2000), *aff'd* 301 F.3d 96 (3d Cir. 2002); *Dow Chem. Co. v. United States*, 250 F. Supp. 2d 748, 756 (E.D. Mich. 2003).

77. I.R.C. § 72(e) (2002); see *In re CM Holdings*, 254 B.R. at 581. COLI plans generally use one of two kinds of insurance policies: whole life or universal life. *In re CM Holdings*, 254 B.R. at 584. A whole life policy has a term equal to the whole life of the insured, and the owner of the policy buys it from the insurance company by paying a fee called a premium. *Id.* at 583-84. The premiums paid, less an administrative expense charge that includes an additional margin for unanticipated expenses, are added to the cash value of the policy. *Id.* at 584. Furthermore, the cash value accrues interest. *Id.* The "inside build-up" in the policy enables the policy owner to take a policy loan from the insurance company, up to the cash value of the policy, using the cash value as collateral. *Id.* Meanwhile, the encumbered cash value continues to earn interest. *Id.* The interest rate on the loan is set in the policy and the loan does not have to be repaid because all of the principal and interest on the loan can be deducted from the death benefit when the insured dies. *Id.* A universal life policy is similar to a whole life policy with some additional flexibility in annual premiums, death benefits, the ability to partially withdraw cash value, and interest rates. *Id.*

78. *Dow Chem. Co. v. United States*, 250 F. Supp. 2d 748, 756 (E.D. Mich. 2003).

79. *Am. Elec. Power, Inc. v. United States*, 136 F. Supp. 2d 762, 780 (S.D. Ohio 2001), *aff'd*, 326 F.3d 737 (2003).

80. I.R.C. § 61 (2002) (loan proceeds not included in list of items constituting gross income).

81. See *In re CM Holdings*, 254 B.R. at 581.

laws changed, to maximize the interest deductions.⁸² Without the interest deduction, some of these plans would not have been profitable to the businesses despite the tax advantages given to the build-up within the policies and the death benefits.⁸³ In 1964, Congress attempted to limit this tax arbitrage in plans contemplating “the systematic direct or indirect borrowing of part or all of the increases in the cash value of such [life insurance] contract[s],”⁸⁴ but deductions were still allowed where “no part of 4 of the annual premiums due during the [first] 7-year period . . . is paid under such plan by means of indebtedness.”⁸⁵ The Tax Reform Act of 1986 attempted to limit these tax advantages further by imposing a limit of \$50,000 per insured employee on the amount of life insurance policy indebtedness for which interest may be deducted.⁸⁶

In 1996, Congress again tightened this deduction loophole on COLI loans.⁸⁷ The House Report on the change noted that a “general principle of accurate income tax measurement under an income tax system provides that expenses, such as interest, are not deducted from income if they are costs of accretions to wealth that are not included in income.”⁸⁸ The House committee noted that it was “not appropriate to permit a deduction for interest that is funding the increase in value of an asset of which the [corporation owning the policy] is the ultimate beneficiary, as recipient of the proceeds upon the insured [employee’s] death.”⁸⁹

The Internal Revenue Code still allows a corporate deduction for “all interest paid or accrued within the taxable year on indebtedness.”⁹⁰ However, a tax deduction will be allowed for interest on COLI loans in only three years of any seven-year period. This “4-of-7 safe harbor was designed specifically to recognize the importance of borrowing on policies for ‘other than tax saving purposes.’”⁹¹ The safe harbor does not apply, however, if the COLI program is a sham.⁹² The sham-transaction doctrine provides that a transaction is not entitled to respect in assessing tax if it serves no business purpose other than generating tax benefits.⁹³ A “taxpayer can legitimately structure a transaction to minimize tax lia-

82. *In re CM Holdings, Inc.*, 301 F.3d 96, 100 (3d Cir. 2002).

83. *Id.*

84. Revenue Act of 1964, Pub. L. No. 88-272 (codified as I.R.C. § 264(a)(3) (2002)).

85. I.R.C. § 264(d)(1) (2002).

86. H. REP. NO. 102-432, at 61 (1992) (referring to U.S.C. §§ 264(a)(1) & (e)(1)).

87. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, 2090.

88. H. REP. NO. 104-280, at 303 (1995).

89. *Id.*

90. 26 U.S.C. § 163(a) (2002).

91. *In re CM Holdings, Inc.*, 301 F.3d 96, 106 (3d Cir. 2002) (citing S. REP. NO. 830 (1964)).

92. *Winn-Dixie Stores, Inc. v. Comm’r*, 254 F.3d 1313, 1316 (11th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002).

93. *Id.*

bility . . . [but] the transaction must nevertheless have factual and economic substance.”⁹⁴

Because the new limits on COLI interest deductions did not grandfather in plans already in place, the Internal Revenue Service (IRS) began disallowing these deductions that had been taken in prior years, asserting the sham doctrine.⁹⁵ In August 2001, the IRS implemented a settlement plan that permitted businesses with COLI programs to settle with the IRS if they conceded eighty percent of the interest deductions they had taken for interest on loans associated with COLI.⁹⁶ The IRS settled with a variety of companies under the plan. For example, the IRS reached a settlement with R.R. Donnelly & Sons Co. that called for the company to pay the IRS \$150,000,000, representing part of the taxes plus interest on all prior deductions on loans secured by COLI policies.⁹⁷

In reaction to the notable successes the IRS had in persuading courts to affirm the deduction disallowances in suits brought by CM Holdings,⁹⁸ Winn-Dixie,⁹⁹ and American Electric Power,¹⁰⁰ the IRS in 2002 terminated its settlement initiative with respect to leveraged COLI plans.¹⁰¹ Companies had until the beginning of 2003 to participate in the settlement program by agreeing to give up eighty percent of the COLI deductions they had claimed.¹⁰² About a hundred other companies, including American Greetings Corp., W.R. Grace, Hershey Foods, Proctor & Gamble, Western Resources and Hillenbrand Industries, were involved in disputes with the IRS concerning COLI-related deductions.¹⁰³ Some estimate that these back taxes could amount to \$6 billion.¹⁰⁴ Others have said the sum could be much greater, and the

94. *Am. Elec. Power, Inc. v. United States*, 136 F. Supp. 2d 762, 778 (S.D. Ohio 2001), *aff'd*, 326 F.3d 737 (2003).

95. *See, e.g., Winn-Dixie Stores, Inc.*, 254 F.3d at 1316 ; *In re CM Holdings*, 301 F.3d at 108; *Am. Elec. Power*, 136 F. Supp. 2d at 778; *see also* Ellen E. Schultz & Theo Francis, *Valued Employees: Worker Dies, Firm Profits*, WALL ST. J., Apr. 19, 2002, at A1.

96. I.R.S. Announcement 2002-96, 2002-43 I.R.B. 756.

97. R.R. Donnelly & Sons Co., *R.R. Donnelly Settles IRS Dispute over Corporate Owned Life Insurance Deductions* (Apr. 5, 2002), available at www.rrdonnelly.com.

98. *In re CM Holdings*, 301 F.3d at 96.

99. *Winn-Dixie Stores*, 254 F.3d at 1313.

100. *Am. Elec. Power*, 136 F. Supp. 2d at 762.

101. I.R.S. Announcement, *supra* note 96.

102. *Id.*

103. *See* David M. Katz, *The COLI Wars*, CFO MAGAZINE, Jan. 1, 2001, at 87, available at www.cfo.com; *see also* Mark P. Gergen, *The Logic of Deterrence: Corporate Tax Shelters*, 55 TAX L. REV. 255, 257 (2002).

104. *Government Wins Tax-Shelter Victory in Winn-Dixie Case*, WALL ST. J., June 29, 2001, at B3.

investigation could involve as many as 700 companies.¹⁰⁵ American Greetings, for example, recorded a charge in 2001 of \$143 million for possible exposure to an IRS disallowance of COLI interest deductions.¹⁰⁶ W.R. Grace noted an exposure of \$57 million resulting from its deduction of \$163 million in COLI interest payments after 1992.¹⁰⁷

Inspired by its three big wins in *Winn-Dixie*, *In re CM Holdings*, and *American Electric Power*, the IRS also began using an unusual and comprehensive set of document requests when auditing banks with BOLI programs.¹⁰⁸ The American Bankers Association (ABA) warned banks that these audits were not routine inquiries, but preparation for litigation involving favorable tax treatment of BOLI plans.¹⁰⁹ The ABA cautioned banks to pay particular attention to insurable interest and economic substance in their BOLI plans.¹¹⁰ It noted the IRS's public concern when a "'29 year old employee who is making \$30,000 and is insured under a BOLI policy for \$4 million.'"¹¹¹ In such a case, it fore-saw the IRS's asserting that "policy coverage far in excess of the risk of loss of the bank may belie the intended business purpose for purchasing policies."¹¹² The ABA was concerned about the IRS's search for documentation for the non-tax business purposes for purchasing BOLI and, in light of the IRS's recent successes in courts in COLI cases, warned banks to have the relevant documents available.¹¹³

In 2003, however, the IRS suffered a setback when the U.S. District Court for the Eastern District of Michigan ordered the IRS to pay Dow Chemical Company more than \$22 million plus interest and costs for deductions the IRS improperly disallowed for interest and expenses Dow claimed on its 1989, 1990, and 1991 tax returns in connection with its COLI plans.¹¹⁴ In 1988, Dow purchased COLI policies on the lives of 4,051 upper management employees.¹¹⁵ Then, in 1991, Dow purchased COLI on the lives of 17,061 additional employees.¹¹⁶ The Dow COLI plans were similar to the plans in the *Winn-Dixie*, *CM Holdings*,

105. Ellen E. Schultz & Theo Francis, *Valued Employees: Worker Dies, Firm Profits*, WALL ST. J., Apr. 19, 2002, at A1.

106. *Id.*

107. *Id.*

108. White Paper, American Bankers Association, Bank Owned Life Insurance, May 25, 2001, available at www.aba.com/NR/rdonlyres/00005350pkzlobiatfnisfsv/COLI+white+paper+draft+5-21b93.pdf.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 753.

116. *Id.*

and American Electric Power cases, insofar as they all involved cash value policies, premium payments over a relatively short period, highly leveraged premium financing without loans in years four through seven, and they were all used to fund future benefit obligations.¹¹⁷ Nevertheless, the differences between the latter three plans and the Dow plan were significant enough for the courts in the latter three cases to hold that those plans were economic shams, whereas the Dow court held that “there was an economic benefit that potentially could be derived from the plans without relying solely on the tax deductions for policy loan interest” namely, “providing a source of cash to cover unfunded future medical obligations for its retirees.”¹¹⁸

Dow became interested in COLI in 1989 when the Financial Accounting Standards Board (FASB) issued Exposure Draft 105, Employer’s Accounting for Post Retirement Benefits Other than Pensions. When adopted in 1990, it required employers to accrue current liabilities for retiree medical and life insurance benefits on a current basis on their financial statements.¹¹⁹ Dow had been accounting for its retiree medical benefits on a pay-as-you-go basis, and now under FAS 105, Dow had accrued retiree medical liabilities of \$1.34 billion.¹²⁰ It planned to use COLI to fund these liabilities.¹²¹ In 1990, Michigan enacted a statute that created an employer’s insurable interest in the lives of non-key employees and retirees up to the level of the employer’s projected unfunded benefit liabilities.¹²² Dow sought the consent of its employees for participation in its COLI program, encouraging consent by offering each employee a \$5,000 death benefit.¹²³

The IRS disallowed Dow’s tax deductions on its loans to pay the COLI premiums, reasoning that the only economic benefit from the plans was the tax deduction and, therefore, the plans were shams.¹²⁴ Although taxpayers are allowed to reduce their tax obligations by any legal means, where the only purpose of the transactions is to create tax deductions, the transactions are not recognized by the government, are considered shams, and will not support tax deductions.¹²⁵ The court in *Dow* determined that unlike the other cases, Dow had pre-purchase illus-

117. *Id.* at 765.

118. *Id.* at 764.

119. *Id.* at 766.

120. *Dow Chem.*, 250 F. Supp. 2d at 766.

121. *Id.* at 768.

122. MICH. COMP. LAWS § 500.2210 (1991).

123. *Dow Chem.*, 250 F. Supp. 2d at 785.

124. *Id.* at 798.

125. *Knetsch v. United States*, 364 U.S. 361, 365-66 (1960); *ACM P’ship v. Comm’r*, 157 F.3d 231, 247 (3d Cir. 1998); *see also Gregory v. Helvering*, 293 U.S. 465, 469 (1935) (discussing sham transaction doctrine).

trations that indicated a positive cash flow from the plan even without tax deductions for loan interest.¹²⁶ Furthermore, in the Winn-Dixie, CM Holdings, and American Electric Power cases, the respective courts found that the plans eliminated all risk by retrospectively “truing up” the cost of insurance and the death benefits paid out each year to render them equal.¹²⁷ Thus, all risk was eliminated, making the COLI transaction meaningless as far as providing insurance.¹²⁸ This did not occur in the Dow plan; therefore, the Dow court determined that the COLI was not a sham.¹²⁹

Even if successful, the IRS attack on the deductibility of interest on COLI loans does not end COLI tax benefits for corporations. Corporate owners of COLI still build up tax-free gains in the policies, and they receive tax-free death benefits when their employees die, even if they have not been employees for many years.¹³⁰ The Treasury Department estimates that the tax exemption on COLI earnings will cost taxpayers \$9.3 billion in lost revenue each year for the next five years.¹³¹

V. PROFITING FROM COLI

The Texas *Wal-Mart* case discussed above just begins to suggest the huge numbers of employees who are affected by COLI abuses. Nestle USA has policies on the lives of 18,000 employees; Pitney Bowes Inc. on 23,000; Proctor & Gamble Co. on 15,000; American Electric Power Inc. on 20,000.¹³² One insurance company attorney has estimated that between five million and six million workers in the United States are covered by such insurance policies and that about a quarter of the Fortune 500 companies have them.¹³³

COLI has become an efficient profit center for companies. One estimate has corporations earning up to sixteen percent of their profits from “janitors’ insurance.”¹³⁴ Not only do the policies yield tax-free income as their investment value rises, but companies also use that value as collateral for loans when they need to raise cash.¹³⁵ In one case,

126. *Dow Chem.*, 250 F. Supp. 2d at 801.

127. *Id.* at 807-08.

128. *Id.*

129. *Id.*

130. Theo Francis, *Proposal Aims to Cut Tax Breaks in Corporate-Owned Life Policies*, WALL ST. J., Mar. 12, 2003, at C9.

131. *Id.*

132. Schultz & Francis, *supra* note 105.

133. L.M. Sixel, *Profiting from Death?*, HOUSTON CHRON., Apr. 16, 2002, at 1.

134. Press Release, Congressman Gene Green, *Congressman Gene Green Calls for Hearing on Corporate-Owned Life Insurance* (Oct. 1, 2002), available at www.house.gov/green/nr100102.htm

135. Schultz & Francis, *supra* note 105.

Public Service Company of New Mexico bought COLI policies for hundreds of employees when the company needed to raise money to take its nuclear power plants out of service.¹³⁶ Then, of course, there is the death benefit when the employee dies, which the corporation can use for any purpose it chooses. Businesses find out when retired or other former employees die by having the firms that manage the COLI policies for them do "death runs" of Social Security numbers every quarter.¹³⁷ Then, the former employer obtains the death certificates and sends them to its insurance carrier.¹³⁸ CM Holdings, for example, had COLI policies for at least 1,400 employees in 1990.¹³⁹ Younger workers would typically generate between \$400,000 and \$500,000 in death benefits; older workers would generate between \$120,000 and \$200,000.¹⁴⁰ A CM Holdings administrative assistant, for example, died in 1998 at age 62.¹⁴¹ Her family received a death benefit of \$21,000 provided under an employee benefit program while CM received a COLI benefit of \$180,000.¹⁴² A CM music store worker died in 1992 at age 29 of AIDS, providing CM with a death benefit of about \$340,000.¹⁴³

One COLI arrangement that is particularly galling to workers was the one created by Portland General, an Enron subsidiary.¹⁴⁴ About seventy-five percent of an estimated \$80 million in benefits from the policies paid for a long-term compensation plan for managers, directors and other top officers; the remaining twenty-five percent contributed to a supplemental executive retirement plan.¹⁴⁵ Workers who had their entire retirement funds of hundreds of thousands of dollars wiped out by Enron's collapse were shocked to discover that their deaths will support benefit plans for top Enron executives.¹⁴⁶

Banks also have become significant purchasers of life insurance.¹⁴⁷ Wachovia Corp., for example, has BOLI policies insuring the lives of about 20,000 of its employees,¹⁴⁸ constituting about one-fourth of its workforce. The policies generate approximately three percent of the

136. *Id.*

137. Sixel, *supra* note 133.

138. *Id.*

139. Schultz & Francis, *supra* note 105.

140. *Id.* The same premium buys more coverage for younger workers because they are less likely to die soon.

141. *Id.*

142. *Id.*

143. *Id.*

144. L.L. Sixel, *Enron Utility's 'Dead Peasant' Policies Rankle*, HOUSTON CHRON., Apr. 24, 2002, at 1.

145. *Id.*

146. *Id.*

147. Theo Francis, *Workers' Lives: Best Tax Break?*, WALL ST. J., Feb. 19, 2003, at C1.

148. *Id.* Wachovia has about \$6.1 billion in COLI policies.

bank's operating earnings.¹⁴⁹ KeyCorp of Cleveland and Sovereign Bancorp of Philadelphia generated about twelve to fifteen percent of their net income from BOLI policies.¹⁵⁰ Washington Mutual has more than \$1.3 billion of BOLI policies.¹⁵¹ Bank of America, J.P. Morgan Chase, and Bank One have billions of dollars of BOLI policies on the lives of present and former employees.¹⁵² One financial services analyst has estimated that about a quarter to a third of the nation's publicly traded banks have BOLI policies covering their employees.¹⁵³

By federal statute, national banks are permitted to purchase and hold an interest in life insurance as an exercise of "incidental powers as shall be necessary to carry on the business of banking."¹⁵⁴ The Office of the Comptroller of the Currency (OCC) issues guidelines so banks can correctly interpret the statute to determine if they can legally purchase particular insurance products.¹⁵⁵ A 1991 OCC circular¹⁵⁶ clearly indicated that there was no federal statutory authority for national banks to purchase life insurance for their own account as an investment.¹⁵⁷ In 1996, the OCC issued new guidelines for national banks instructing that a "purchase of life insurance is incidental to banking, and . . . therefore, legally permissible, if it is convenient or useful in connection with the conduct of the bank's business."¹⁵⁸

When businesses use COLI or BOLI to fund employee benefit plans (which some state statutes mandate as the only way for businesses to have the required insurable interest in non-key employees),¹⁵⁹ they generally use one of two methods to determine the amount of insurance needed to finance the plans. First, using the recovery method, the business projects the amount that will be owed to employees as benefits and determines that sum's present value.¹⁶⁰ The business then purchases enough life insurance on the lives of its employees to ensure that the gain from the insurance proceeds will reimburse the business for the

149. Theo Francis & Ellen E. Schultz, *Big Banks Quietly Pile Up 'Janitors' Insurance*, WALL ST. J., May 2, 2002, at C1.

150. *Big Business: Cashing in When You Cash Out*, CERT TIMES: FIN. ED., May 2, 2002, available at www.certtimes.com/fin/article.php?sid=45.

151. *Id.*

152. Francis & Schultz, *supra* note 149.

153. *Id.*

154. 12 U.S.C. § 24 (2002).

155. Activities and Investments of Insured State Banks, 61 Fed. Reg. 43,486 (1996) (proposed rule for F.D.I.C. to amend 12 C.F.R. pt. 362).

156. OFFICE OF THE CONTROLLER OF THE CURRENCY, BANKING CIRCULAR 249 (May 6, 1991).

157. *Id.* See also Activities and Investments of Insured State Banks, 61 Fed. Reg. 43,486 (1996) (proposed rule for F.D.I.C. to amend 12 C.F.R. pt. 36).

158. Guidelines for National Banks, 1996 OCC CB Lexis 92 (1996).

159. See *supra* notes 36-38 and accompanying text.

160. Guidelines for National Banks, *supra* note 158, at 29.

benefit payments.¹⁶¹ Alternatively, the cost offset method allows the business to project the annual expense of the benefit plan and purchase enough insurance on the lives of employees so that the income earned on the cash surrender value offsets the benefit expense.¹⁶² When the business collects death benefits, the proceeds enhance the business' bottom line.¹⁶³

Employees and shareholders are generally uninformed about COLI and BOLI programs because the Securities and Exchange Commission (SEC), the OCC, and state insurance regulators do not require specific disclosure of them.¹⁶⁴ For example, the OCC requires national banks to record their interest in the cash surrender value of BOLI policies as an "other asset."¹⁶⁵ The increase in the cash surrender value over time is recorded as "other non-interest income."¹⁶⁶ There is no easy way for an interested person to know that these additions to an enterprise's bottom line come from life insurance policies. A result of the secret nature of these programs is that shareholders can be misled about the success of the businesses in which they have invested. Businesses can disguise poor results in their core enterprises through substantial additions to their bottom lines of death benefits and the tax-free build-up of funds in insurance policies.

To facilitate these arrangements, a small California banking systems design firm, Bancorp Services, has created a new life insurance administration system through which large companies with substantial investments in COLI policies may minimize the effect of short-term market volatility on the companies' bottom lines.¹⁶⁷ The system allows a company to report a "smoothed value on its quarterly profit and loss statements."¹⁶⁸ Its insurer records the policies' market value separately from their "smoothed 'book' value" and the company "records the increase in the smoothed book value to its income statement each year."¹⁶⁹ The fact that Bancorp's system has been in great demand suggests a widespread use of COLI policies to beef up company profits rather than merely to protect the company from financial losses due to

161. *Id.*

162. *Id.*

163. *Id.* at 30.

164. Theo Francis & Ellen E. Schultz, *Why Secret Insurance on Employees Pays Off*, WALL ST. J., Apr. 25, 2002, at C1.

165. Guidelines for National Banks, 1996 OCC CB Lexis 92 (1996), at 23.

166. *Id.*

167. *Bancorp Serv. v. Hartford Life Ins. Co.*, No. 4:00-cv-70 CEJ, 2002 U.S. Dist. LEXIS 26267 (E.D. Mo. Feb. 25, 2002). See also *Fight over New Idea Leads to \$118 Million Award*, NAT'L L.J., Feb. 3, 2003, at C7.

168. *Id.*

169. Francis & Schultz, *supra* note 164.

the deaths of employees, or to cover the costs of employee benefit programs. Bancorp has been involved in litigation with their former client, the Hartford Life Insurance Company, as well as Metropolitan Life Insurance Company and Sun Life to determine who has rights to the system.¹⁷⁰

Businesses purchasing COLI are not the only ones profiting from the arrangement. Insurance companies aggressively market COLI, and in recent years COLI has accounted for about twenty-five to thirty percent of all new life insurance sales.¹⁷¹

VI. SPLIT-DOLLAR INSURANCE

Through the use of split-dollar insurance, businesses use insurance in another way that keeps shareholders and others from understanding the true nature of the transactions. In a split-dollar scheme, a company executive (or an insurance trust created for the executive) owns a permanent life insurance contract.¹⁷² The executive then chooses the policy beneficiary.¹⁷³ The term "split-dollar" refers to the arrangement whereby the corporation pays most of the premiums on the policy, and the executive makes only a small contribution to the premium payments.¹⁷⁴ The executive can use the value that builds up in the policy. When the executive dies, the corporation gets back the money it has advanced for premiums, and the executive's estate gets the remainder of the death benefit, free of estate and income taxes.¹⁷⁵ Split-dollar policies have several important advantages for executives: (1) the policies are more secure than pensions because pensions are backed only by corporate promises, whereas the policies are backed by a regulated insurance company; (2) the executives own the policies outright, and therefore can take the policies with them when they leave the company; (3) if the company goes into bankruptcy, creditors do not have any rights to the policies, in contrast to the vulnerability of pension plan assets; (4) the executive can choose how the policy's cash value is invested; (5) the split-dollar arrangement hides large amounts of executive compensation because the policies are valued in corporate filings as having the

170. *Bancorp Serv.*, 2002 U.S. Dist. LEXIS 26267. The United States District Court for the Eastern District of Missouri awarded Bancorp \$118.34 in its lawsuit against the Hartford Life Insurance Company for breach of contract and misappropriation of a trade secret.

171. *See Francis*, *supra* note 147.

172. Alan L. Meltzer, *Employer-Paid Life Insurance, A Benefit to Shareholders*, WASH. BUS. J., Oct. 18, 2002, available at <http://washington.bizjournals.com/washington/stories/2002/10/21/focus8.html>.

173. *Id.*

174. *See id.*

175. *Id.*

same value as term life insurance policies which, in reality, are worth only a small fraction of the whole or universal life insurance policies in the split-dollar arrangement; and (6) the executives pay tax only on the term value of the policy.¹⁷⁶

Split-dollar policies have become a major method of giving top corporate executives tax-favorable pay and loans and death benefits to their heirs, hidden from shareholder scrutiny.¹⁷⁷ Enron had created a split-dollar arrangement for its former Chief Executive Officer (CEO) Kenneth Lay, who received a \$12 million life insurance policy, with the corporation contributing \$1.25 million in premiums.¹⁷⁸ GE also paid for a split-dollar policy for its former CEO and chairman Jack Welch.¹⁷⁹ John W. Snow, the new Secretary of the Treasury and former CEO and chairman of CSX Corporation, had a split-dollar agreement under which CSX promised in 2001 to buy him a \$25 million life insurance policy within seven years.¹⁸⁰ When Snow left CSX to become Treasury secretary, the company had not yet bought the insurance policy; instead, CSX will pay Snow \$5 million, the amount needed to buy about \$25 million of life insurance.¹⁸¹ Significantly, the Treasury Department is considering new regulations that could result in a ban on split-dollar agreements,¹⁸² but the insurance industry is lobbying vigorously to protect these arrangements.¹⁸³ Snow characterized the lump-sum payment he is to receive in lieu of the split-dollar insurance policy as a step to avoid a conflict of interest.¹⁸⁴

Former Treasury Secretary Paul O'Neill had a split-dollar life insurance policy for which his corporation, Alcoa, had paid \$891,000 in premiums.¹⁸⁵ His federal disclosure form listed the value of the policy as between \$250,000 and \$500,000, but SEC filings state that the policy would add about \$750,000 a year to O'Neill's pension in retirement.¹⁸⁶

Split-dollar policies have become a major method of giving top cor-

176. Theo Francis & Ellen E. Schultz, *Insurers Move to Protect Executive Policy*, WALL ST. J., Dec. 30, 2002, at C1.

177. *Id.*

178. Ellen E. Schultz & Theo Francis, *Accounting for Enron: Enron Pensions Had More Room at the Top*, WALL ST. J., Jan. 23, 2002, at A4.

179. Joann S. Lublin, *Under the Radar*, WALL ST. J., Apr. 11, 2002, at B7.

180. Theo Francis, *Snow's Latest Contract Covered Exit to Washington*, WALL ST. J., Dec. 10, 2002, at A10.

181. *Id.*

182. *See id.*

183. *See What's News: Business and Finance*, WALL ST. J., Dec. 30, 2002, at A1.

184. Bob Davis, *Treasury Nominee Snow Pledges to Sell Stock, Cash Out Pay Plans*, WALL ST. J., Jan. 23, 2003, at C14.

185. Ellen E. Schultz & Theo Francis, *Questioning the Books: Retirement Rules Won't Affect Appointees*, WALL ST. J., Feb. 13, 2002, at A12.

186. *Id.*

porate executives tax-free pay and loans, and death benefits to their heirs, hidden from shareholder scrutiny.¹⁸⁷ Other companies that have split-dollar agreements with their top executives include Equifax, General Motors, H.J. Heinz, and Unifi.¹⁸⁸ Charities have also been involved in split-dollar arrangements allowing donors to make a donation to a charitable organization, and in return receive a tax deduction. The charity then uses part of those funds to buy life insurance policies for the benefit of the donor.¹⁸⁹ The IRS outlawed this scheme in 1999 as an abusive tax shelter.¹⁹⁰

Some critics forecast the demise of split-dollar arrangements because of the enactment of the Sarbanes-Oxley Act of 2002.¹⁹¹ The act, which is supposed to “protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws,”¹⁹² prohibits corporations from making loans to directors or executive officers.¹⁹³ The purpose of the prohibition is to prevent directors and executive officers from obtaining favorable loans from the corporation at the expense of shareholders.¹⁹⁴ If access to the build-up of the value within a split-dollar policy is deemed a loan, it would now be banned under the act. Moreover, if each premium payment is considered a material modification of the loan, then split-dollar plans existing at the time of the act’s enactment would not be grandfathered, and would be in violation of the law.¹⁹⁵ Violations of the act are punishable as criminal offenses.¹⁹⁶ Leading corporate law firms appear unsure of whether Sarbanes-Oxley does, in fact, cover the split-dollar insurance plans.¹⁹⁷ If it does, shareholders would be well served because split-dollar schemes serve no purpose but to hide executive compensation.

VII. CONCLUSION

It is unseemly for businesses to benefit from the deaths of their employees, some of whom may have been terminated many years

187. Francis & Schultz, *supra* note 176.

188. *Id.*

189. Monica Langley, *Effort to Limit Popular Tax Break Gains Momentum*, WALL ST. J., May 5, 2000, at B8.

190. *Id.*

191. Pub. L. No. 107-204, 116 Stat. 745 (2002); see Lynnley Browning, *The Perks Flow (but with Less Fizz)*, N.Y. TIMES, EXECUTIVE PAY: A SPECIAL REPORT, Apr. 6, 2003, at 6.

192. Pub. L. No. 107-204, 116 Stat. 745 (2002).

193. *Id.* § 402(a).

194. See Andrew J. Willms, *Split-Dollar Insurance: New Rulings, New Regulations (and Sarbanes-Oxley?)*, 17 NO. 2 PRAC. TAX LAW. 23, 26 (2003).

195. Pub. L. No. 107-204, 116 Stat. 745, 787 (2002).

196. Willms, *supra* note 194, at 26.

197. *Corporate Law Firms Explore Gray Areas of New Ban on Loans*, WALL ST. J., Oct. 16, 2002, at C15.

before, without the employees' having agreed to the arrangement or, in fact, having known about it. The Rev. Jesse Jackson analogized COLI policies to those that slaveholders purchased on the lives of their human property.¹⁹⁸ That is a particularly dramatic and distasteful comparison, but modern-day COLI policies may actually be worse. Considering the importance of many slaves to the commercial enterprises of the slaveholders, it is probable that many slaves were worth more to their masters alive than dead. On the other hand, individually, each of the 300,000 rank-and-file employees whose lives were insured by Wal-Mart had little or no impact on the fortunes of their employer, and would be worth more to Wal-Mart dead than alive.

Basic public policy in every state dictates that one should not be able to insure the life of another when that person is worth more to the beneficiary dead than alive. At the very least, to protect an employee's interest in his or her own life, no employer should be able to insure the life of an employee and name the employer as beneficiary, without the informed consent of the employee. In fact, in light of indications of societal breakdowns of family and "love and affection" relationships, no person should be the object of any life insurance policy without his or her consent.

Some states decided to make an exception to this basic public policy concern when the purpose of COLI plans is to fund employee benefit plans. This exception, however, does not only impose on employees and former employees, it also creates a tremendous imposition on taxpayers when the federal trend is to relieve taxpayers of employee benefit burdens. At the same time that the federal government is encouraging the privatization of retirement benefits, COLI does exactly the opposite — but secretly, so the taxpayer will not know about it. Companies are funding their employee benefit plans with the tax-free income that builds up in COLI and with the tax-free payouts the companies receive when the insured employees die. They are shifting their responsibility for their employees' benefits programs to the taxpayer. President Bush has said he would like the government to pay less and the private sector to pay more. If that is truly the goal, then the tax advantages that COLI now enjoys must be eliminated. Currently, the costs of COLI to the taxpayer is more than the cost of the tax breaks the government gives to encourage economic empowerment zones (\$9.3 billion compared with \$7.2 billion over five years), or the cost of the deductions for interest on student loans (\$3.5 billion over five years).¹⁹⁹

198. Jennifer Schuessler, *Office Indemnity: Does Your Employer Want You Dead?* BOSTON GLOBE, Mar. 9, 2003, at D3.

199. Theo Francis, *Workers' Lives: Best Tax Break?*, WALL ST. J., Feb. 19, 2003, at C1.

Finally, the SEC has to require clear and specific disclosure of profits earned from COLI programs and of executives' actual benefits from insurance policies. The shareholder has a right to know how much top management is earning in total and whether the strength of publicly traded companies comes from the performance of its core businesses or from some financial scheme involving COLI.