the right to appeal something more substantial than the theoretical right hitherto enjoyed by the majority of defendants.57 Prominent among these reforms is provision for a stenographic in lieu of a printed record.58 Further example is found in the provision in the new Arizona code to the effect that the defendant may file an affidavit showing his inability to pay for a copy of the record; if he satisfies the court as to the truth of his allegations, the county will assume the necessary expense.59

The conclusion is inescapable that the movement for reform in criminal procedure is exceedingly mild in its aims. Its so-called reforms are generally liberal so far as they go. But they plainly do not represent any fundamental revaluation or clarification of the objectives of a criminal procedure, in tune with the very changed conditions of modern times. Hence the committee which will be called upon by the Supreme Court to devise a new code for the federal courts will not have, as was the case with civil procedure, a far-seeing and well evolved body of modern principles and rules of practice for its guidance. It will have, however, a splendid opportunity to launch a new and basic program of reform based on its own research, experience, and ingenuity.

PROTECTION OF POLICYHOLDERS UNDER REINSURANCE AGREEMENTS

A life insurance company wishing to discontinue business has two available alternatives: it may cancel all policies and distribute assets, with the obvious economic loss entailed in forced liquidation; or it may follow the more customary practice of executing an assumption agreement, commonly termed "reinsurance," whereby a second insurer assumes the policies and receives the assets of the resigning company.1 The assumption agreement is


57. See ORFIELD, op. cit. supra note 50, c. X (appeal in forma pauperis); Millar, supra note 36, at 366; and note 5 supra.


1. As a label for the assumption agreement, "reinsurance" is a misnomer. In the proper sense of the term, it is the means of distributing the risk of loss further than among the policyholders of one company. This is accomplished by an insurer insuring in another company a portion of its liability on an individual risk. As a result, although the first insurer will be required to pay the entire loss to the insured, it will be indemnified in part by the reinsurer. An assumption-reinsurance, on the other hand, substitutes one insurer for another. HUEBNER, PROPERTY INSURANCE (3d ed. 1938) ch. 14.
used in two situations. In the first, the insurer, a going concern, voluntarily
decides to discontinue all business, to withdraw from a particular area, or
to close out a particular line. In the second and more frequent situation in
recent years, a transfer of all risks is compelled by imminent insolvency or
as part of a receivership proceeding. In any of these instances, it is important
that policyholders, whose contracts are shifted and sometimes altered, be
protected from any disadvantageous transfers.

The chief dangers to policyholders in the first class of assumption agree-
ment are the possibilities that the policies will be shifted to an unsound insurer,
and that the transaction will be used to provide occasion for an unnecessary
reduction in the insured’s advantages. The orthodox means of policyholder
protection against these evils flow from his right that liabilities to him under
the contract shall not be shifted without his consent. Occasionally, however,
insurers, in their rush for speedy dissolution by means of a simultaneous
transfer of all policyholders, have sought to eliminate even that protection.
It has been argued that a provision in a corporate charter giving the insurer
to amalgamate and transfer becomes a part of the insured’s contract,
and must be interpreted as agreement in advance by the policyholder that
the insurer may at any time substitute a different obligor. Inasmuch as no
policyholder is likely to be familiar with the corporate charter, it is extremely
unrealistic to imply advance consent and thus confront him with a new and
possibly less responsible insurer. Further attempt has been made to eliminate
consent by arguing that governmental regulation per se makes the insured’s
acceptance unnecessary. It is claimed that if a company follows statutory
procedure and obtains approval of a court or of an insurance commissioner
it should be allowed to free itself of the burden of obtaining consent. But
the fact of regulation alone hardly seems to justify an inference of legislative
intention to force a new contract on an insured. At the very least, a forth-
right legislative pronouncement would be expected. Neither of these attempts
to obviate the need for consent appears, however, to have succeeded in this
country. Although some American courts have mentioned the possibility

2. Blehl, Bulk Reinsurance (1921) 22 Trans. of Actuarial Soc. of Am. 113.
The fact that no “reinsurance” agreement is actually drawn up, as in some mergers, is
of no legal importance.
4. Cocker’s Case, 3 Ch. D. 1 (1876); see Eve, J., in In re United British Ins. Co.,
[1929] 2 Ch. D. 430, 434; cf. Mellish, L. J., in Conquest’s Case, 1 Ch. D. 334, 344 (1875);
In re India & London Life Assur. Co., 7 Ch. 651 (1872) (charter clause “dissolution
without prejudice to the rights of the parties then assured” held not to permit involun-
tary transfer).
6. Some foreign countries specifically grant an insurer the power to shift his liability.
Hunter, Reinsurance and Transfer of Business in Foreign Countries (1924) 25
Trans. of Actuarial Soc. of Am. 5.
7. Probably the universal American rule that the application and the policy consti-
tute the entire contract would defeat any attempt to refer to the charter. 1 Couch, Cyclo-
of substituting regulation for policyholder assent, actual acceptance of that argument and of the theory of advance consent through the corporate charter has been confined to England.

In the absence of any blanket consent, each individual policyholder must be induced to agree to a novation of his contract in order to make an effectual transfer. But even this may be a hollow gesture. The normal procedure is for the assuming company to send the policyholder a vague notice, in the shape of a rider to be attached to his policy, informing him that his insurer has amalgamated with another insurance company and that his policy will be kept in force as before "subject to the terms of the reinsurance agreement," and further, that he should "address all [future] communications to the new company." Under these circumstances the insured never sees the contents of the reinsurance contract. Even were he to obtain the terms of the agreement, he would be powerless to vary them, for the policyholder’s only alternatives are adhesion to the offered terms or outright rejection. Furthermore, the only evidence of the reinsurer’s stability comes from assurances by the reinsurer’s agents that no important events have taken place. The insured is therefore likely to assume that his company has branched out, that the new company is an agent of the old, and that his policy is unaltered. And if the insured does not actively dissent, but rather delivers his premiums to and accepts benefits from the reinsurer, courts tend to imply a novation by the insured. The burden of taking affirmative action to deny the novation is put upon the policyholders, notwithstanding the ease with which the reinsurer could circularize them and explain the available alternatives. Once a novation is found, of course, the insured is bound by all

10. Cocker's Case, 3 Ch. D. 1 (1876).
11. This phrase serves to incorporate the entire reinsurance agreement into the policyholder’s contract. Spande v. Western Life Indem. Co., 61 Ore. 236, 122 Pac. 38 (1912).
the terms of the assumption agreement, whether advantageous or disadvantageous to him, and can ordinarily look only to the reinsurer for recovery.  

Even when a novation is lacking, either because none will be implied or the insured has expressly refused to assent, the value of the policyholder's exercise of his freedom of choice may be illusory. The resigning company may be a shell retaining no assets, and leaving no remedy but a suit over against the reinsurer, as recipient of all assets, for cancellation damages. And since damages will not generally take into consideration the fact that the insured has become a greater risk, he will not be able to obtain so much

18. Reinsurance does not enlarge the policyholder's rights under the original policy, or renew rights already lost. For example, the reinsurer is entitled to the same defenses as was the insurer. See Eminent Household of Columbian Woodmen v. Bryant, 59 Ga. App. 238, 200 S. E. 321 (1939).


20. Mutual Relief Ass'n v. Poindexter, 178 Ark. 205, 10 S. W. (2d) 17 (1928). But see Fidelity & Dep. Co. of Md. v. Frazier, 190 Ark. 833, 81 S. W. (2d) 915 (1935). Where the contract is not considered a novation, however, the policyholder's remedy against the original insurer remains. Columbia Cas. Co. v. Industrial Acc. Comm., 56 P. (2d) 527 (Cal. 1936). Three forms of assumption contract have been used: (1) novation: see Cunningham v. Great S. Life Ins. Co., 66 S. W. (2d) 765 (Tex. Civ. App. 1933), rev'd, 128 Tex. 196, 97 S. W. (2d) 692 (1936); (2) third party beneficiary: Lincoln Nat. Life Ins. Co. v. Means, 264 Ky. 566, 95 S. W. (2d) 264 (1936); and (3) a separate contract between reinsurer and insured: Indiana Mut. Cas. Co. v. Pratt, 177 Minn. 36, 224 N. W. 253 (1929). Cf. Vance, Insurance (2d ed. 1920) § 285. The courts seldom distinguish clearly among the three. Thus the contract is often found at once (1) to leave unchanged the original insurer's liability, (2) to require an acceptance by the policyholder, and (3) to include the original insurer as a party. See United States Fire Ins. Co. v. Hecht, 231 Ala. 256, 164 So. 65 (1935); cf. Maddy v. National Life Ins. Co., 156 Minn. 375, 194 N. W. 880 (1923). But each finding is inconsistent with the theory of contract bearing the same number above. The difficulties may, however, be rationalized by considering the "acceptance" as not the acceptance of contract terminology, but merely the condition precedent to the reinsurer's duty to perform. This rationale is supported by the fact that courts find the "acceptance" in almost any manifestation. Thus institution of suit against the reinsurer fulfills the acceptance requirement. Delp v. Missouri State Life Ins. Co., 116 W. Va. 508, 182 S. E. 580 (1935).

In the case of third party beneficiary contracts, the policyholder has had to surmount the claim of the reinsurer that the insured is not in privity of contract with and therefore may not sue the reinsurer. But today the courts, realizing vaguely that a transfer is "more than a mere contract of reinsurance," almost invariably allow such a suit. Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405 (1929). For a summary of the cases, see Note (1936) 103 A. L. R. 1485. This is so even where the companies in their contract explicitly deny the insured's right to sue the transferee, Shofa v. Palatine Ins. Co., 127 N. C. 308, 37 S. E. 451 (1900); Richards, Law of Insurance (4th ed. 1932) § 486; where the insured has no notice of the agreement, Stewart v. Inter-Ocean Reins. Corp., 260 Ky. 787, 86 S. W. (2d) 703 (1935); or where the insurer has cancelled the agreement with the reinsurer, Sawyer v. Sunset Mut. Life Ins. Co., 8 Cal. (2d) 492, 59 P. (2d) 208 (1937).


22. See note 90 infra.
coverage as he previously held, should he apply the damages toward new insurance.

It is apparent that a policyholder can seldom protect himself effectively through his ordinary contract rights against any uneconomic alteration in his policy. He must, therefore, seek the assistance of some branch of the government. The courts, which operate retrospectively, can do little more than enforce the new contract or void the entire agreement when assets have been juggled for the purpose of reducing policyholder benefits in spite of a sufficiency of assets to cover liabilities. To remedy the situation, a court may set aside the transfer of assets as a fraudulent conveyance, or hold the reinsurer to the letter of the original policy. The latter is accomplished by applying the rule that the recipient of all assets of a discontinuing corporation is liable for all obligations of the latter. The same result is reached by a decision that the insured reasonably thought he was accepting a novation of his contract unchanged and that this is binding on the reinsurer. But judicial protection is not fully satisfactory, for the court

27. When the reinsurer expressly agrees to assume all existing liabilities he is, of course, bound by the old liabilities. Washington Nat. Ins. Co. v. Scott, 231 Ala. 131, 164 So. 303 (1935).
30. A further remedy for the policyholder whose benefits have been decreased by the reinsurer under the transfer agreement is a suit for wrongful cancellation. America Ins.
cannot guarantee a sound reinsurer,\textsuperscript{31} or vary individual terms of the contract.\textsuperscript{32}

In view of the inability of courts to cope with specific inequities in the agreement, legislatures have attempted to deal with the problems. But statutory regulations have been confined to rather general requirements that policyholders be given a chance to present their views as to the terms of the agreement.\textsuperscript{33} A common requisite, that no agreement shall be consummated without notice to policyholders and a hearing,\textsuperscript{34} indicates a belief that policyholders can and will vary the terms of the contract. But such is not the case, for the individual 'policyholder's bargaining power is infinitesimal and policyholders' protective committees are notoriously weak\textsuperscript{35} and difficult of formation. It may be for this reason that several states have limited the notice and hearing requirement to "if demanded."\textsuperscript{36} In fact even where notice and hearing are compulsory, commissioners have often refused to enforce them.\textsuperscript{37} A vote by policyholders before consummation of a transfer, another device designed to strengthen the policyholder's right to protect himself, has met similar treatment.\textsuperscript{38} Since speed is essential to the success of a reinsurance agreement,\textsuperscript{39} most states have eliminated as a prerequisite to a transfer the vote of policyholders in both mutual\textsuperscript{40} and stock companies\textsuperscript{41} as well as of stockholders in the latter.\textsuperscript{42}

Union v. Mead, 135 Okla. 93, 274 P. 475 (1929). But this remedy is unsatisfactory. See text accompanying note 22 \textit{supra}.

31. Many policies have been reinsured a number of times, each insurer being unsound, although each reinsurance has been subjected to court scrutiny in litigation. See \textit{e.g.}, Hahn v. General Am. Life Ins. Co., 132 Neb. 509, 272 N. W. 321 (1937).


33. The statutes vary from one form of life insurance company to another. The form most consistently regulated is the fraternal benefit society. See Cavlovic v. Baker, 118 Kan. 412, 234 Pac. 1009 (1925).

34. See, \textit{e.g.}, N. D. COMP. LAWS ANN. (1925) § 4890.

35. Policyholder apathy is demonstrated in Watson v. National Life & Trust Co., 189 Fed. 872 (C. C. A. 8th, 1911). There, despite an effort to stir up litigation because evidence of speculation existed, only twenty policyholders out of 30,061 dissented.

36. See, \textit{e.g.}, ILL. STAT. ANN. (Jones, 1939) § 66.850.


38. \textit{Ibid}.

39. Delay will give an opportunity to agents of the old insurer, who are seldom taken along to the transferee, to attempt to convince the policyholders to cash in and take out insurance in any company with whom the agent is then associated.

40. Most of the states which require a vote insist on a two-thirds vote. See, \textit{e.g.}, IDAHO CODE ANN. (1932) § 40-1723. A few require a majority vote: \textit{e.g.}, MINN. STAT. ANN. (Mason, 1927) § 3436.

41. Among the few states requiring a vote of policyholders in stock companies is N. C. CODE ANN. (Michie, 1935) § 6462.

42. Votes of stockholders are required generally by the same states which require votes of mutual policyholders. See, \textit{e.g.}, KAN. GEN. STAT. ANN. (Connick, 1935) c. 40,
The only other general statutory provisions in addition to the procedural safeguards do little more than confirm accepted practices. Thus Kentucky has put in statute form the necessary rule that the age limit on writing cannot apply to reinsurance, as policies are transferred regardless of the insured’s age at assumption; California has legislated that the recipient of all the insurers’ assets assumes all the liabilities. Finally, the legislatures’ only noteworthy effort directly to eradicate the prevalent evil of using the transfer as a speculative device to provide promoters with huge commissions, is apparently not too successful. The TNEC hearings on insurance showed that these statutes did not prevent indirect promotional profits obtained as brokerage fees and by stock manipulation.

Since statutory regulations do not seem to have stamped out profiteering and can hardly determine the best contract in the particular case, or choose the most responsible reinsurer, reliance must be placed on the state insurance commissioner. Except in the few instances where the commissioner’s approval is to be granted automatically upon proof that the statutory procedure has been followed, the insurance commissioner has plenary power to approve, disapprove, and even to order a reinsurance. In exercising his power


43. A few remedial statutes do exist. Utah tries to deal with the uninformed policyholder by stipulating that “in case the transfer is to result in increased premium or decreased insurance, notice shall so state.” Utah Rev. Stat. Ann. (1933) §§ 43-4-17. In an attempt to guarantee a solvent reinsurer, Wyoming sets up a minimum capital and surplus which the reinsurer must have. Wyo. Rev. Stat. Ann. (Courtright, 1931) §§ 57-208. In order to avoid claims of reinsurers that they are not liable directly to the insured, two states specifically impose that liability, and insist that the reinsurer endorse the policy, apparently with the idea of thereby creating privity of contract. Idaho Code Ann. (1932) §§ 40-802; Wash. Rev. Stat. Ann. (Remington, 1932) § 7126.

44. Ky. Stat. Ann. (Baldwin, 1936) § 678. The same rule was laid down in Cathcart v. Equitable Mut. Life Ass’n of Waterloo, 111 Iowa 471, 82 N. W. 964 (1900). A similar problem arises when a company subject to a statute limiting the amount which it may insure on one risk assumes the risks of an insurer not so subject. The statute is not applied to reinsurance. American Ins. Co. of Texas v. Jenkins, 133 S. W. (2d) 847 (Tex. Civ. App. 1940).


he can force inclusion of protective provisions. The effectiveness of commissioner supervision on that score is demonstrated by the treatment accorded the practice of inducing policyholders to accept policies rewritten by the reinsurer on less favorable terms than the old policies for which they are substituted. Eradication of this profiteering has been accomplished by commissioner insistence on insertion of a "no rewriting" clause in the agreements. To make doubly certain that companies will subject themselves to the commissioner, statutes strengthen the grant of power with the declaration that disobedience entitles the commissioner to take over and run or liquidate the recalcitrant insurer.

Although legislatures have been liberal in their grants of power to a commissioner, they attempt to put checks on his discretion by requiring the further approval of two other major state officials, or, where one of the insurers is not domestic, of other insurance commissioners. But these limitations are not overly important, for, in practice, the commissioner's decision controls that of his colleagues within the state. And the check provided by other commissioners is hardly a limitation; while it may serve to cut down on a commissioner's discretion in a particular case, it enhances the power of commissioners in general, for each ruling covers a larger area.

50. Usually the commissioner must first find that the insurer's capital is impaired before he demands a reinsurance. See, e.g., W. Va. Code Ann. (Michie and Lublett, 1937) § 3314.

51. Watts, Life Insurance Reorganization (1935) 29 Ill. L. Rev. 559, 578. Although the new policy appears identical to the old, there may be a danger to the insured in the clauses which put the policyholder under a disability for a period of time beginning with the writing of the policy. The time may be doubled by starting it running again from the time of rewriting. Williamson v. American Ins. Union, 284 Ill. App. 150, 1 N. E. (2d) 541 (1936) (no recovery for suicide clause). A recurring problem has resulted when a legal reserve company reinsured an assessment company. A great number of assessment policyholders usually switch to the level premium plan. Therefore few remain subject to assessment, and an assessment of those brings in much less than the policy's face value. American Ins. Union v. Wylie, 23 S. W. (2d) 491 (Tex. Civ. App. 1929). But see Smith v. Northwestern Nat. Life Ins. Co., 123 Wis. 586, 102 N. W. 57 (1905).


53. The statute usually declares that bulk reinsurance without the approval of the commissioner is an indication of insolvency giving the commissioner the right to apply to a court for an order requiring the company to show cause why it should not be liquidated, rehabilitated or reinsured; or why, if a foreign company, its assets should not be conserved. See, e.g., Wash. Rev. Stat. Ann. (Remington, 1932) § 7042(1).

54. The other officials are usually the Attorney General and the Governor or his appointee. See, e.g., Iowa Code (1935) § 9108.


56. In Sachs v. Roseland State Savings Bank, 32 F. Supp. 152 (N. D. Ill. 1940) the commissioner testified that he never bothered to call in the other officials.

In addition to the dangers that policyholders may be shifted to an unsound insurer and that the transfer may be a profiteering scheme, special needs for policyholder protection arise when the transfer is compelled by insolvency. The problem here is one of assuring the policyholder as creditor that, as in other kinds of debtor rearrangement, any plan of administration will be "fair, equitable and feasible." If a reinsurance is used, the transfer is possible only if some reduction is made in the liabilities of the resigning company in order to offset the insufficiency of assets transferred. It might be possible, of course, partially to avoid this loss by providing in advance for a preference to transferred policyholders through segregation of those assets which offset the balance sheet measure of the assets to be transferred—i.e., the legal reserve. This would, in effect, immunize a portion of assets so that neither loss claimants nor ordinary creditors could share in them. Obviously, if such segregated assets retained a value approaching the necessary reserve which they offset, there would be little need to reduce policyholder liability.

Such a device is not favored, however, by either courts, legislatures, or commissioners. The legal reserve is at present no more than an accounting device; assets are not segregated, and there is consequently no orthodox legal method by which to substantiate a preference. Nevertheless, there is an indication that this type of preference might not be considered equitable. In mutual insurance cases, for example, loss claimants are always preferred over the unmatured claimants. Legislatures also reflect a similar attitude for, of the four states that set up priorities, only an unenforced Wisconsin statute favors the unmatured.

A stronger manifestation of disapproval of preferences for transferred policyholders is demonstrated by the treatment accorded the segregated fund in the form of a deposit of securities required by the several states as a prerequisite to doing business. This fund is earmarked for the benefit of


59. This plan has been suggested by the traditional theory that in fire insurance the "reinsurance reserve is a trust fund for the policyholders." Leavens, Orthodoxy of Unearned Premium Reserves, 11 J. of A.M. Ins., June, 1934, p. 23. Since the fire company's unearned premium reserve, which is the basis of the "reinsurance reserve," has many of the characteristics of the life company's legal reserve, it might be possible to label the legal reserve a "reinsurance reserve" and thereby carry the trust fund theory over to life insurance. See HUEBNER, LIFE INSURANCE (1925) 205. But see (1935) 35 COL. L. REV. 615.


61. This results from the theory that upon a loss, a policyholder is no longer a member, and members must defer to non-members. Rosenberg, supra note 60, at 14.

62. MASS. GEN. LAWS (1932) c. 175, § 46; MO. STAT. ANN. (1940 Supp.) § 5951; OHIO CODE ANN. (Throckmorton, 1938) § 6348; WIS. STAT. (1939) § 203.05.
policy-holders living within the state requiring the deposit. Despite the fact that the usual reinsurance agreement provides for the transfer to the reinsuring company of title to the deposits, the provision is sometimes defeated. Courts in receivership cases, and commissioners in other instances usually insist that the deposit be held for the benefit of those resident policyholders who are not transferred to the reinsurer. Furthermore, where an insurance commissioner controls the terms of a reinsurance agreement, he usually requires a stipulation to the effect that all assenting policyholders renounce claims to deposits. Thus all preferences to the funds are killed, the deposits becoming available equally to all creditors.

In the absence of any method of advance protection of policyholders in an insolvent company, reliance must be placed on the safeguards surrounding the transferring process. Of paramount importance in this regard are the devices used for scaling down liabilities. The usual method is to place a lien on the policyholder's net reserve, or equity, to cover insufficiency of transferred assets. The lien functions as a policy loan, cutting down pro tanto the insured's recovery, except where a loss occurs shortly after assumption of the policy, and eliminating the right to extended insurance which is

67. See, e.g., Peoria reinsurance agreement, supra note 64, § 48. This effort to disregard deposit preferences in reinsurances is in line with the Uniform Reciprocal Liquidation Act's similar attempt in liquidation. See (1937) 37 Col. L. Rev. 1031, 1035.
68. An obvious alternative to the lien as a means of scaling down liabilities is the immediate reduction in the face of the policy. But if the reduction is a permanent one it has the drawback of being a guess based on the probable future value of the assets taken over. And the alternative of making periodic adjustments in the face as asset value changes is disfavored because of administrative difficulties. Watts, supra note 51, at 576. A Wisconsin statute suggests this method. Wis. Stat. (1937) § 201.27. Cf. Kentucky Home Mut. Life Ins. Co. v. Hardin, 277 Ky. 565, 126 S. W. (2d) 427 (1939) (partial assumption only).
ordinarily available to a policyholder who permits his insurance to lapse.63 As the assets increase in value, and profits increase, the lien is reduced.70 The reinsurance agreement will also probably provide for a few years' moratorium on the cash surrender value, which means that the insured cannot turn in his policy should he decide that immediate cash is more valuable than continued insurance. These several requirements naturally prejudice policyholders, particularly because no insured is ordinarily aware of their existence.71

Some attempt has been made to avoid by statute the incidence of a transfer in insolvency.72 Indiana, for example, provides that the reinsurance contract must not impair the insured's rights.73 This would literally mean that no lien could be placed on the policy and that no other change be made under a reinsurance agreement. But this is obviously impracticable, because no reinsurer would assume liabilities unmatched by equivalent assets. Litigation in Indiana demonstrates the unworkability of the statute.74 In the first place, it has been held that if the policyholder agrees to an alteration, the statute


70. The assets of the old company and the entire reinsured business are segregated for a period of some fifteen years. The lien remaining at the end of that time is usually made permanent. See, e.g., Peoria reinsurance agreement, supra note 64, § 31.

71. That the lien holds great potential harm for the unknowing policyholder is demonstrated by the volume of cases centering around policyholders who have been lulled into a false sense of security by the apparent continuance of their policy in its old form. For a particularly unfortunate case, see Spears v. Independent Order of Foresters, 107 S. W. (2d) 125 (Mo. App. 1937). The courts have not, however, always sympathized with the policyholder, arguing that “cheap insurance is generally expensive insurance in the long run.” [See Lewis v. Columbia Mutual Life Ins. Co., 197 So. 619, 638 (La. App. 1940)], and that but for the reinsurance, the policyholder would have nothing. Roper v. Columbian Circle, 113 Kan. 280, 214 P. 421 (1923).


74. See cases cited in Note (1923) 25 A. L. R. 1535, 1536, and notes 75 and 76 infra.
does not apply.⁷⁵ And, further, the provision has been whittled down to
cover only assessment companies not in receivership.⁷⁶ An equally unsatis-
factory statutory provision is one requiring that a policyholder who refuses
to be transferred under the agreement should be allowed to choose any other
company to which he wishes to be transferred.⁷⁷ This implies that a separate
reinsurance contract is to be made for each dissenter. But such an arrange-
ment would probably result in prohibitive administrative expenses. Further-
more, it is doubtful that a company would be interested in the assumption
of only one, or at most a few, policies.

It might be possible under ordinary circumstances, of course, for an in-
sured to rely upon his privilege to refuse novation of his contract. And if
full information were given him concerning the alterations which would
be made under the agreement, there would be little reason to fear that the
special qualifications placed on policies would prejudice the holder. The
insured would doubtless be left without insurance, but presumably would
prefer this to the disadvantages of reinsurance. But the difficulty with util-
izing this protective device is that exercise of the privilege to refuse to be
reinsured jeopardizes the entire reinsurance plan. A large number of refusals
would require wholesale liquidation of assets to pay off dissenters, thus defeat-
ing the very purpose of a reinsurance agreement.⁷⁸ In fact, a sufficiently
large number of dissenters may require abandonment of any transfer because
insufficient assets are left unliquidated to make it worthwhile for a reinsurer
to attempt to salvage the reserve required to carry the policies assumed.
Even if the entire transaction is not defeated, problems are raised whose
solution is reached only at the expense of some group. When there is only
a partial transfer for reinsurance purposes, payment of dissenters raises the
question of an equitable distribution of the assets between them and the
transferred policyholders. To pay dissenters, cash must be raised either by
selling assets or by borrowing from continuing creditors.⁷⁹ The latter is
difficult as policyholders can hardly be expected to contribute; and since
insolvencies generally occur during periods of depression, the reinsurer may
neither wish to nor be able to advance cash. If it does advance cash, it
probably will insist on severing some assets for its exclusive use. Some
assets will probably have to be sold or severed, therefore, and either the dis-
senting or continuing policyholders will suffer, for one group must accept some
illiquid assets. Should the dissenters receive them, sale will bring in far
less than their sound value; should they be segregated for the assenters, con-

⁷⁵ Federal Life Ins. Co. v. Frazer, 192 Ind. 565, 137 N. E. 273 (1922) (by impli-
⁷⁶ Western Life Indem. Co. v. Bartlett, 84 Ind. App. 589, 145 N. E. 786 (1924);
⁷⁸ Watts, supra note 51, at 573.
⁷⁹ Cf. Watts, supra note 51, at 580.
Continuing policyholders must gamble on future values; and should the assuming company receive them, future increase in value would inure to neither assenters nor dissenters.

Obviously, then, the evils which flow from being forced to take a new policy with a lien attached and a moratorium on cash surrender value are intensified if a number of policyholders dissent, thus requiring partial liquidation. Consequently, if liquidation is held to a minimum, policyholders as a group stand to gain because the lien will be smaller through the potentially greater amount of assets transferred.

In view of the importance of encouraging the largest possible number of acceptances, it is not surprising that the insurance commissioner exercises his power to further the transfer. Among the means at his disposal to convince possible dissenters that discontinuance is not worthwhile is the use of the appraisal or fair upset price methods of valuation to produce a value of the assets so low that dissenters would receive a sum in cash too small to make it worth their while to dissent. The loopholes in the law of novation are taken advantage of by labeling the insured's quiescence as acquiescence in the novation, at the same time providing the insured with so little information that he is unaware of any change in his policy. If all these indirect means of persuasion are insufficient, the commissioner often agrees to employ personal pressure on the policyholders. It might be possible to go even further and provide the commissioner with statutory power to compel all policyholders to be transferred, thus avoiding almost any liquidation. Constitutional objections might of course be raised as to the abrogation of the contractual right that obligations shall not be altered without the policyholder's consent. But the public benefit flowing from an avoidance of liquidation would probably offer a basis sufficient for sustaining such a


82. See, e.g., Lucas v. Pittsburgh Life & Trust Co., 137 Va. 255, 119 S. E. 169 (1923). The efficacy of these various methods is illustrated by the generally small number of dissents. See note 35 supra.

83. See Patterson, Insurance Commissioner in the United States (1927) 215.

84. The impairment of contracts clause of the federal constitution would be the chief barrier. Nor could this barrier be overcome by analogy to the constitutionality of federal bankruptcy statutes, for the clause applies only to the states. Glenn, Liquidation (1936) § 438.

85. A major benefit to policyholders would result from the ending of the need to misinform policyholders in order to secure their assent. The public also benefits, for as the mortgages of small life companies are generally in one area, entire communities
grant of power, provided that normal requirements of notice and hearing were guaranteed.86

If the commissioner were thus given complete power to compel acceptance, some of the peripheral difficulties of reinsurance agreements would be eliminated. There is, for example, the peculiar judicial treatment accorded uninsurable risks who insist on sharing in liquidation rather than accepting a new contract. Inasmuch as the usual rule in liquidation—measuring the claim by the amount of the reserve87—seems to work a hardship on uninsurable risks because of their inability to obtain new insurance, some courts have granted them a refund of all premiums,88 and even the face value of the policy.89 But either measure of the claim is a preference to the uninsurable at the expense of the insurable. Furthermore, to return all premiums is to fail to take into account the protection accorded during the period for which the premiums were paid; and to make payment of the face value a fair measure, it would be necessary to subtract the additional premiums the insured would pay before his death plus the income on his reserve during the same period were the company to continue in existence.90

In connection with an additional grant of power to the commissioner to compel acceptance, it would be necessary to reconsider the frequent practice of omitting paid-up policyholders from a reinsurance agreement.91 It is true

undergo deflation when forced liquidation results. The suggested plan would avoid this liquidation.

86. The power of the equity courts to compel dissenters to accept securities, exemplified in Phipps v. Chicago, R. I. & P. Ry., 284 Fed. 945 (C. C. A. 8th, 1922); the upholding of statutes similarly reorganizing state banks [Legis. (1934) 34 Col. L. Rev. 152], and the decisions in Nebbett v. Carpenter, 305 U. S. 297 (1938) and People ex rel. Van Schaik v. National Surety Co., 264 N. Y. 69, 190 N. E. 153 (1934) upholding the rehabilitation statutes on the ground that insurance is affected with the public interest, can be relied on to prove the plan's constitutionality. See, on the general subject, Matter of People (Title & Mtge. Guar. Co. of Buffalo), 264 N. Y. 69, 190 N. E. 153 (1934) (case upon which the memorandum opinion in the National Surety case was based); Comment (1940) 49 Yale L. J. 1443; Note (1934) 34 Col. L. Rev. 663, 701; Watts, Insurance Company “Rehabilitation” (1939) 33 Ill. L. Rev. 798, 802.


90. There may, however, be ample reason for the preference. The basis of the damages measure is the desire to put the policyholder in statu quo. This is accomplished by giving him damages sufficient to allow taking out of the same amount of insurance in another company at no increased cost to the policyholder. Illinois Bankers' Life Assur. Co. v. Payne, 62 S. W. (2d) 315 (Tex. Civ. App. 1933). Where the policyholder is no longer insurable, logically he should receive face value less premiums he would normally pay. Because this scheme is difficult of calculation, some courts have seized on the one set figure which is more than the reserve—the premiums paid in.

that paid-up policyholders contribute nothing further to the reinsurer, and in that sense their inclusion in the transfer might be at the expense of other policyholders. But the situation was identical before the transfer—income from paid-up policyholders was always obtained from the profit on the investment of their reserves, not from premium payments. The loss of income from impaired reserves can be offset by establishing a lien against the policy.

Otherwise, their exclusion would have a bad effect on all policyholders because partial liquidation would then be necessary.

With the policyholder’s privilege to dissent from a reinsurance agreement curtailed either by practical methods such as implying consent or by statutory power to compel transfer, it is important to provide for fair terms under the agreement. To make such provision is within the power of the commissioner today. In receivership cases, the commissioner cooperates with the court in supervising the contract’s formulation. Although the court jealously guards the power it possesses by virtue of the insolvent’s assets always being in custodia legis, it generally bows to the commissioner’s superior knowledge. And, beyond this nominal supervision of contracts prepared under its own jurisdiction, the court is loathe to void an assumption, reasoning

92. Rheinberger v. Security Life Ins. Co. of Am., 4 F. Supp. 824 (N. D. Ill. 1933). This is so because some profits made from the other policyholders’ premium payments might have to be used to pay paid-up loss claimants. Thus there will be less profits available to reduce the lien on the non-paid-up policies.

93. Two alternatives are possible: the lien may be made permanent, subject to reduction only by interest from investment of the paid-up policy reserve; or the profits from all policy holders may be used to cut down the lien in the same proportion as that of the non-paid-up policies is reduced. The former does away with the preference argument (except as to the period during which death claimants are paid in full) but is undesirable because (1) often the reserve is so impaired that the policy would be worthless if no change in the lien were permitted, see Green v. American Life & Acc. Ins. Co., 112 S. W. (2d) 924 (Mo. 1938) (100% lien); and (2) there are administrative difficulties in separating the profits from different segments of the business. The second alternative is therefore preferred.

94. See p. 123 supra. See also Daniel v. Layton, 75 F. (2d) 135 (C. C. A. 7th, 1935), cert. denied, 295 U. S. 753 (1935), where commissioner’s plan apparently preferred policyholders at the expense of the general creditors, but was nevertheless upheld.


either that reinsurance is an internal affair,\textsuperscript{100} or that the commissioner's approval removes all doubt of the validity of the agreement.\textsuperscript{101} By means of his power, the commissioner can see that the reinsurer is sound, that the lien is not too large, that the cash surrender moratorium does not cover too great a period, and that other like protections to policyholders are included.

It is worthy of note that the importance of using the commissioner to handle reinsurance in insolvency has been recently recognized by the legislatures of three important states. New York,\textsuperscript{102} California\textsuperscript{103} and Illinois\textsuperscript{104} have enacted rehabilitation statutes by which the commissioner has been given power to take over a defunct or near-defunct insurer and form a new and sound company which will reinsure the old to whatever degree he determines. While the law does not go to the extent of compelling acceptance of the new company, the policyholder who refuses to go along may not receive the same share of the assets of the old company as do the assenting policyholders.\textsuperscript{105} Thus an additional persuasive factor is made available to the commissioner. Rehabilitation may not, of course, always be as satisfactory as a reinsurance agreement with a new company, particularly if the commissioner were given power to compel a transfer. An established reinsurer is more likely to have stability than a rehabilitated company. Moreover, the publicity generally accorded rehabilitation may frighten away new business.\textsuperscript{106} A rehabilitated insurer may, on the other hand, be able to grant policyholders better terms than a reinsurer would be willing to offer. In any event the commissioner will be able, in individual cases, to weigh the relative merits of the form of relief to be employed.

The conclusion is inescapable that the power granted to the commissioner to supervise reinsurance agreements is extremely broad. And if he were declaring a reinsurance agreement \textit{ultra vires}, if at the behest of the reinsurer. See Sachs v. Roseland State Savings Bank, 32 F. Supp. 152 (N. D. Ill. 1940); Held v. Bankers Ins. Corp., 205 Ill. App. 585 (1917); Bankers' Union v. Crawford, 67 Kan. 449, 73 P. 79 (1903); Whaley v. Bankers' Union, 39 Tex. Civ. App. 385, 88 S. W. 259 (1905); \textit{cf.} Wojtczak v. American United Life Ins. Co., 292 N. W. 364 (Mich. 1940) \textit{(ultra vires) claim by policyholder of reinsurer denied).\textsuperscript{107}

102. N. Y. Ins. Law § 512.
103. CAL. INS. CODE (Deering, 1937) § 1043.
104. ILL. ANN. STAT. (Smith-Hurd, 1934) c. 73, § 804.
106. Legis. (1933) 33 COL. L. REV. 722, 723.
given statutory authority to compel acceptance of a proposed transfer, particularly in insolvency cases, it would be almost unlimited. To a considerable degree, this would harmonize with the prevailing philosophy in other forms of reorganization that it is essential to have judicial or administrative supervision over the formulation, submission for approval, and fairness of a plan together with the power to bind a dissenting minority to the plan. But at the same time, the commissioner's power would go further in that it would deprive policyholders, as creditors, of their right to participate in the approval of the plan of reorganization. The reason for this is not hard to find. The large number of policyholders, the need for speed in effecting the transfer, the ignorance of the insured about the financial intricacies of insurance—all militate against making policyholder participation a useful adjunct of insurance reorganization. Reliance must be placed in the only effective protective device—the independent insurance commissioner's supervisory power, subject to judicial review, over the fairness of the reinsurance agreement.