gains.[41] He will make this decision either where he feels that the full amount of the debt will not be collectible when it falls due, where he wants the benefit of some money before the obligation matures, or because he feels that by not forcing payment in full he will be able to continue a profitable business relationship with the debtor.

It appears that the unrealistic concept of a "gift in the commercial world" has been abandoned, although it is true that the *Jacobson* decision did not expressly overrule the *American Dental* case.[42] If some satisfactory limitation of the gift concept is devised, it may be applicable to some cases. However, it is not likely that such a limitation will be formulated. If so, the answer to the question of when the cancellation of indebtedness results in taxable income is again to be found in the principle of the *Kirby* case and the two satellite concepts, constructed about reduction in purchase price and insolvency, that were developed around that principle prior to the *American Dental* decision.

## RIGHTS OF BENEFICIARIES UNDER FACILITY OF PAYMENT CLAUSES

The plaintiff was the named beneficiary of four small industrial insurance policies which contained facility of payment clauses. The clauses provided that "[i]f the Beneficiary does not surrender this policy with due proof of death within 30 days after death of the insured, . . . the death benefit will, upon surrender of this Policy with due proof of death, be paid to the executor or administrator of the Insured, but . . . the Company may . . . pay the benefit to any relative by blood or connection by marriage . . . or to any person appearing to the Company to be equitably entitled . . . because of having incurred expense for . . . medical attention or burial of the Insured." The plaintiff, not possessing the policies, was unable to present them for payment within the 30-day period; she ultimately brought suit against the insurer and the person retaining the policies —the insured's widow. The company interpleaded the plaintiff, the widow, and the administrator, and paid the proceeds of the policies into court. It was held that upon the expiration of the initial 30-day period the beneficiary assumed a status under the facility of payment clause similar to that of any other person to whom the insurer might have elected to pay the benefits. The plaintiff accordingly had no right to compel payment, and since the insurer had failed to elect a recipient of the proceeds, only the administrator had a right to receive payment. *Matejicska v. Metropolitan Life Ins. Co.*[1]

Industrial insurance policies pay benefits averaging about $250; premiums

[41] Compare Haden Co. v. Com'r, 118 F. 2d 285 (C.C.A. 5th, 1941), cert. den. 314 U.S. 622 (1941) (decided before the American Dental case and holding that because the cancellation of indebtedness benefited the creditor, the cancellation did not constitute a gift).

[42] Justice Rutledge, concurring with the majority, was of the opinion that the two cases were inconsistent. Com'r v. Jacobson, 69 S. Ct. 358, 370 (1949).

[1] 335 Ill. App. 81, 80 N.E. 2d 278 (1948).

are usually collected weekly. Such protection is purchased by members of low income groups especially to cover funeral costs and the last expenses of the insured.[2] The facility of payment clause, which invariably appears in industrial policies, constitutes an appointment by the parties to an insurance contract of persons or classes of persons who may receive payment of the benefits. From the insurer's viewpoint, the purpose of these clauses is to permit prompt payment, to protect itself in making such payment, to avoid the delay attendant upon the administration of the insured's estate, and to remove the possibility of litigation between claimants and the insurer.[3] The social purpose of the clause is to meet such exigencies as usually arise in case of death,[4] and to eliminate the time and expense necessary for the administration of the estate, especially where there is no estate other than the proceeds of the policies. Policies similar to the instrument in the instant case generally include a named beneficiary as well as the facility of payment clause; others, lacking a beneficiary, authorize payment to the executor or administrator of the insured's estate if no election to pay is made under the clause; still other forms of policies include all potential recipients of benefits under the facility of payment clause.[5]

The insurer has an option in deciding whether to make payment and to whom payment will be made under the facility of payment clause even though the policy names a beneficiary.[6] Election and payment, if made in good faith, act to discharge the insurer from further liability under the contract of insurance.[7] In two Pennsylvania cases, however, the court treated the facility of payment clause as mere surplusage and concluded that good faith payment to

[2] Williams, Industrial Policies—Facility of Payment Clause, 18 Neb. L. Bull. 100 (1939); see Beard v. John Hancock Mut. Life Ins. Co., 326 Pa. 430, 192 Atl. 411 (1937); Pioneer Trust & Savings Bank v. Metropolitan Life Ins. Co., 278 Ill. App. 113 (1934); Zornow v. Prudential Ins. Co., 210 App. Div. 339, 206 N.Y. Supp. 92 (1924).

[3] Williams, op. cit. supra note 2; Fuller, The Special Nature of the Wage Earner's Life Insurance Problem, 2 Law & Contemp. Prob. 10, 29 (1935). For judicial recognition of insurer's purpose in including the facility of payment clause in industrial insurance, see Uptegrove v. Metropolitan Life Ins. Co., 145 Neb. 51, 15 N.W. 2d 220 (1944); Bragdon v. Prudential Ins. Co., 109 Ind. App. 278, 34 N.E. 2d 173 (1941); Zornow v. Prudential Ins. Co., 210 App. Div. 339, 206 N.Y. Supp. 92 (1924); Bishop v. Prudential Ins. Co., 217 Ill. App. 112 (1920).

[4] Prudential Ins. Co. v. Tomes, 45 F. Supp. 353 (D.C. Neb., 1942); Pioneer Trust & Savings Bank v. Metropolitan Life Ins. Co., 278 Ill. App. 113 (1934); Dorsey v. Metropolitan Life Ins. Co., 145 So. 304 (La. App., 1933); Prudential Ins. Co. v. Howell, 144 Okla. 166, 289 Pac. 734 (1930).

[5] See The Facility of Payment Clause in Industrial Life Insurance Policies, 32 Col. L. Rev. 1185, 1186 (1932).

[6] Jenkins v. Metropolitan Life Ins. Co., 113 Colo. 68, 155 P. 2d 772 (1944); Turner v. Prudential Ins. Co., 150 Kan. 899, 96 P. 2d 641 (1939); Moldovan v. John Hancock Mutual Life Ins. Co., 124 S.W. 2d 541 (Mo. App., 1939); Prudential Ins. Co. v. Brock, 48 App. D.C. 4 (1918).

[7] Minuto v. Metropolitan Life Ins. Co., 58 R.I. 71, 191 Atl. 117 (1937) (company held not warranted in paying executor without properly investigating who had actually paid funeral expenses); Dorsey v. Metropolitan Life Ins. Co., 145 So. 304 (La. App., 1933); In re O'Neill's Estate, 143 N.Y. Misc. 69, 255 N.Y. Supp. 767 (1932); Bishop v. Prudential Ins. Co., 217 Ill. App. 112 (1920).

one not the designated beneficiary did not relieve the insurer of liability to the named beneficiary.[8]

The courts are in general agreement that those persons who are mentioned only in the facility of payment clause have no right to enforce payment.[9] An impressive majority of cases indicate that the named beneficiary, rather than the administrator of the insured's estate or any other claimant, has the exclusive right to maintain an action for the proceeds of the policy when the insurer fails to elect to pay anyone.[10] A few distinguishable cases hold that the administrator may bring suit rather than the beneficiary.[11] Recognition of the administrator by the courts as the only person who may enforce payment under a facility of payment clause would defeat the social purpose of these policies; the appointment of an administrator necessitates weeks of delay and expenditures which may appreciably diminish the small estate represented in many instances only by the policy.

Occasionally insurers fail to make payment because of belief that there are two or more worthy claimants. While the insurers could relieve themselves from liability by making an election of an eligible party under the clause, the companies sometimes wait to be sued and then interplead all claimants. The problem of selecting a proper recipient of benefits is thus delegated to the court. Where the claimants in an interpleader action are the named beneficiary and the executor or administrator of the insured's estate, the courts usually award payment to the beneficiary.[12] Indeed, it has been held that the propriety of the beneficiary's claim in such circumstances is so apparent that interpleader will not be allowed.[13] In interpleader proceedings the courts seek to determine who

[8] Smith v. Metropolitan Life Ins. Co., 222 Pa. 226, 71 Atl. 11 (1908); McNally v. Metropolitan Life Ins. Co., 199 Pa. 481, 49 Atl. 299 (1901); cf. Capuano v. Boghosian, 54 R.I. 489, 175 Atl. 830 (1934).

[9] Morticians' Acceptance Co. v. Metropolitan Life Ins. Co., 321 Ill. App. 277, 53 N.E. 2d 30 (1944); Voris v. Rutledge, 297 Ill. App. 383, 17 N.E. 2d 622 (1938); Craig v. Metropolitan Life Ins. Co., 220 Mo. App. 913, 296 S.W. 209 (1927); Metropolitan Life Ins. Co. v. Chappell, 151 Tenn. 299, 269 S.W. 21 (1924).

[10] Chandler v. American Life & Accident Ins. Co., 96 S.W. 2d 883 (Mo. App., 1936); Capuano v. Boghosian, 54 R.I. 489, 175 Atl. 830 (1934); Smooth v. Metropolitan Life Ins. Co., 157 So. 298 (La. App., 1934); French v. Lanham, 57 F. 2d 422 (App. D.C., 1932); Washington Fidelity National Ins. Co. v. Heard, 148 Okla. 294, 298 Pac. 622 (1931).

[11] Plummer v. Metropolitan Life Ins. Co., 229 Mo. App. 638, 81 S.W. 2d 453 (1935) (named beneficiary was insured's divorced husband who had deserted her ten years previously); Schlereth v. Neely, 285 S.W. 168 (Mo. App., 1926) (heirs of predeceased beneficiary have no rights to compel payment as against administrator of the estate); McCarthy v. Metropolitan Life Ins. Co., 162 Mass. 254, 38 N.E. 435 (1894) (insurer had already made a valid election to pay when beneficiary brought suit).

[12] Jenkins v. Metropolitan Life Ins. Co., 113 Colo. 68, 155 P. 2d 772 (1944); Butler v. Fowler, 188 S.W. 2d 612 (Tenn. App., 1944); Turner v. Prudential Ins. Co., 150 Kan. 899, 96 P. 2d 641 (1939); Pashuck v. Metropolitan Life Ins. Co., 124 Pa. Super. Ct. 406, 188 Atl. 614 (1936); Ogletree v. Hutchinson, 126 Ga. 454, 55 S.E. 179 (1906).

[13] Golden v. Metropolitan Life Ins. Co., 35 App. Div. 569, 55 N.Y. Supp. 143 (1898); cf. Sampson v. Metropolitan Life Ins. Co., 36 Pa. Co. Ct. 481 (1909) (mother and beneficiary interpleaded).

is equitably entitled to payment. One who has paid the funeral expenses, a creditor of the insured, or a person who supported the insured prior to his death has such an equity.[14]

In litigation between beneficiaries or equitable claimants and those who have in fact received payment, the courts have held that the one chosen by the company to receive payment does not become vested with absolute ownership of the benefits but holds as agent or trustee for the party ultimately entitled to the proceeds.[15] Generally, a beneficiary named in the policy, or the estate of the insured if no beneficiary is named, may recover proceeds paid under the facility of payment clause if it can be shown that the recipient has no beneficial interest in the payments. The administrator, if paid, may be held to retain the funds for the use of the named beneficiary.[16] The administrator may also be held to retain part of the proceeds for one equitably entitled thereto.[17] A person receiving payment from the insurer may be required to pay any residue beyond the extent of his equitable interest to the beneficiary, or lacking the latter, to the estate.[18]

Under the particular facility of payment clause in the instant case, the company could not exercise its option to choose a relative or one equitably entitled to receive payment until after an initial 30-day period.[19] The usual facility of payment clause contains no such 30-day proviso. This restriction on the exercise of the insurer's option is apparently included for the benefit of the beneficiary since during the period the insurer is precluded from making payment to anyone other than the beneficiary. When the period has elapsed, the parties should occupy the same position as under the usual facility of payment clause.[20] If the insurer does not exercise its option under the clause after the initial period has expired—a privilege which is lost after suit has been initiated to compel pay-

[14] Brown v. Ehlers, 130 Neb. 918, 267 N.W. 156 (1936); Bojczuk v. Skradski, 137 Kan. 4, 19 P. 2d 468 (1933); Ellis v. Metropolitan Life Ins. Co., 3 S.W. 2d 397 (Mo. App., 1928). See The Facility of Payment Clause in Industrial Insurance, 14 Tulane L. Rev. 114, 118 (1939).

[15] Lutostanski v. Lutostanski, 120 Conn. 471, 181 Atl. 533 (1935); In re Van Pelt's Estate, 153 N.Y. Misc. 155, 275 N.Y. Supp. 317 (1934); Smith v. Massie, 93 Ind. App. 582, 179 N.E. 20 (1931); Blanchett v. Willis, 161 S.C. 83, 159 S.E. 469 (1931); Ogletree v. Hutchinson, 126 Ga. 454, 55 S.E. 179 (1906).

[16] French v. Lanham, 57 F. 2d 422 (App. D.C., 1932).

[17] In re Grasso's Estate, 178 N.Y. Misc. 114, 34 N.Y.S. 2d 58 (1941).

[18] Bragdon v. Prudential Ins. Co., 109 Ind. App. 278, 34 N.E. 2d 173 (1941); Apps v. Braun, 279 Mich. 221, 271 N.W. 739 (1937).

[19] Lain v. Metropolitan Life Ins. Co., 388 Ill. 576, 58 N.E. 2d 587 (1944), construing the same clause held that the beneficiary has a vested right if he produces the policies and proof of death within 30 days of insured's death. At the expiration of that period, if the beneficiary has not delivered the policies to the insurer, the latter may exercise its option under the facility of payment clause.

[20] The opinion of the court in the instant case seems to place a premium on the ability of the beneficiary to deliver up the policies within a month of the insured's death. This appears arbitrary, for the company may easily verify the beneficiary's claim for payment whether or not the beneficiary possesses the policies.

ment[21]—the clause has no effect on the rights of the parties, and the instrument is to be construed as if the facility of payment clause were not included.[22] Thus if the beneficiary has not claimed payment within the 30 days, and if the company has not exercised its option after the period has expired, only the beneficiary should have a right to institute proceedings to recover the proceeds of the policy. He should occupy the same status under these circumstances as the beneficiary under any ordinary policy of insurance. It follows that once proceedings were instituted, the beneficiary's right to payment should have been recognized as vested.

Consideration of the intention of the insured, the rights of the beneficiary under ordinary life insurance, and the purposes of small industrial policies, point to the need for recognition by the courts of a vested claim in the named beneficiary, subject to being divested upon payment by the insurer to one who has already supplied funds to accomplish the task for which the proceeds of the policy were intended. Recognition by the courts of a right of action in the beneficiary may well be an inducement to prompt payment and tend to restore the advantages to the insured's estate and loved ones which can arise from the inclusion of facility of payment clauses in industrial insurance policies.[23]

## APPLICATION OF STRIKE SUIT STATUTES IN FEDERAL COURTS

The plaintiff, owning a fraction of one per cent of the stock in a Delaware corporation, filed, on diversity grounds, a derivative suit in a New Jersey federal district court against the corporation's officers and directors.[1] Before the determination of the suit, the New Jersey legislature passed a law requiring as a condition precedent to a derivative action that a plaintiff hold shares either worth $50,000 or constituting five per cent of the value of all outstanding shares.[2] Otherwise, the corporation might require that the complainant give security for "reasonable expenses," including counsel fees incurred by the cor-

[21] Prudential Ins. Co. v. McMahon, 60 R.I. 446, 199 Atl. 305 (1938); Pashuck v. Metropolitan Life Ins. Co., 124 Pa. Super. Ct. 406, 188 Atl. 614 (1936); Prudential Ins. Co. v. Tutalo, 55 R.I. 160, 178 Atl. 859 (1935); Prudential Ins. Co. v. Godfrey, 75 N.J. Eq. 484, 72 Atl. 456 (1909); Floyd v. Prudential Ins. Co., 72 Mo. App. 455 (1897). But see Slingerland v. Prudential Ins. Co., 94 N.J.L. 532, 110 Atl. 913 (1920) (mere assertion of a claim by beneficiary or administrator does not terminate company's right to make payment under the facility of payment clause).

[22] Uptegrove v. Metropolitan Life Ins. Co., 145 Neb. 51, 15 N.W. 2d 220 (1944); Pashuck v. Metropolitan Life Ins. Co., 124 Pa. Super. Ct. 406, 188 Atl. 614 (1936); In re O'Neill's Estate, 143 N.Y. Misc. 69, 255 N.Y. Supp. 767 (1932); Williams v. Metropolitan Life Ins. Co., 233 S.W. 248 (Mo. App., 1921).

[23] For a discussion of how the facility of payment clause is actually administered by the companies see Fuller, The Special Nature of the Wage Earner's Life Insurance Problem, 2 Law & Contemp. Prob. 10, 30 (1935).

[1] See Cohen v. Beneficial Industrial Loan Corporation, 7 F.R.D. 352 (1947).

[2] N.J. Rev. Stat. (Supp., 1947) tit. 14, c. 3, §§ 15, 17.