

## Comment to 10-5-09 Draft

This draft (which will be referred to as the 10-05-09 draft) expands the Maryland approach by including among the trust beneficiaries a limited group of persons who most likely would not have an insurable interest in the life of the settlor under traditional insurance law. It would include siblings, grandparents, and grandchildren, all of whom would fall within the second degree. In addition, it would include uncles, aunts, nieces, nephews, great-grandparents, and great-grandchildren, all of whom would fall within the third degree. (Whether it should also include other relations, such as brother- and sister-in-laws and step children of the settlor should also be considered.) Finally, it also includes a limited number of nonprofit corporate entities that would qualify as a beneficiary under an ILIT.

It is not coupled with any type of presumption approach that was discussed in Santa Fe and that was incorporated into the 9-8-09 draft. However, that is still a possibility and could be considered if it would be profitable to do so. The 9-8-09 draft could be used as a framework for such a discussion.

The Maryland statute apparently is designed primarily to deal with two issues: (1) to clarify the law of insurable interest with regard to a trustee in funding an ILIT through the purchase of a life insurance policy, i.e., the *Chawla* issue and (2) to limit the opportunity for an ILIT to be used initially as a cover for those who view life insurance merely for investment purposes rather than its intended purpose of indemnity, i.e., the STOLI issue. In contrast, the NAIC legislation apparently is designed primarily to deal with assignments or other forms of alienation of an interest in life insurance after the policy is issued in furtherance of an investment plan, whereas the NCOIL legislation more generally attempts to negate the purchase of life insurance for such a purpose.

The charge of the ULC Drafting Committee on Insurable Interests for Trusts primarily was to address the *Chawla* issue, although it was not expressly limited to that issue. The 10-5-09 draft adheres to that charge and tries to do it in a responsible manner by dealing only with the issues dealt with in the Maryland statute. More to the point, it responds to the complaint by many estate planners that the Maryland statute is too restrictive. In their view, the statute effectively limits the use of an ILIT to benefitting only members of the nuclear family, i.e., spouses and their natural or adopted children. Because it incorporates all the vagaries that presently exist in the "closely related" prong of insurable interest law, not to mention the inherent ambiguity in the "primarily for the benefit" test, it dictates that an estate planner take the most conservative approach in establishing an ILIT, an approach that arguably does not serve anyone's interest in the long run.

Expanding the category of beneficiaries under the Maryland statute to include a limited number of individuals who are closely related to a settlor and certain nonprofit corporations that are often named as a residual or other type of beneficiary would seem to present little, if any risk, that an ILIT might be used to avoid the purpose of insurable interest laws as they exist today. In fact, these categories have traditionally been used by estate planners with the approval of insurers.