

Protection against creditors

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The protection of life insurance policies against the policyholder's creditors is among the features most often cited in favour of the instrument. Under Swiss law, two rules achieve this effect. The first is the privilege of family beneficiaries. If the policyholder's spouse, registered partner or descendants are designated as beneficiaries, neither the beneficiary's claim nor the policyholder's own claim under the contract is subject to enforcement by the policyholder's creditors, subject to existing pledges. The second is the right of entry: when the policyholder's claim is seized or he becomes bankrupt, a spouse or descendants designated as beneficiaries enter into the rights and obligations of the policyholder, unless they expressly refuse.¹

The protection is limited in several respects. A revocable designation of other persons expires when the policyholder's claim is seized or he is declared bankrupt, and revives only if the seizure lapses or the bankruptcy is revoked. An irrevocable designation of any person removes the policy from the policyholder's assets, since he has waived his right to dispose of it, but the waiver itself may be challenged under the rules of the Debt Enforcement and Bankruptcy Act on voidable transactions. The policyholder's creditors may therefore attack an irrevocable designation or the payment of a large premium made shortly before insolvency, or made with the intention of disadvantaging creditors, by means of the *actio pauliana*.²

The protection also depends on where enforcement takes place. A Swiss court will apply the Swiss rules to a Swiss policyholder's claim against a Swiss insurer. A foreign court enforcing a judgment against a policyholder resident in its jurisdiction may disregard the protective rules of Swiss or Liechtenstein insurance law and treat the surrender value as part of the policyholder's assets, which it can seize by ordering the policyholder to surrender the policy. Since the policyholder holds the right of surrender, a

court that has jurisdiction over him can compel him to exercise it. Protection against creditors is therefore strongest when the policyholder, the insurer and the assets are all subject to the law that grants the protection, and weakest when the policyholder lives in a country whose courts do not recognise it.

Asset protection through life insurance must also be distinguished from the concealment of assets. A policyholder who fails to disclose the policy in enforcement proceedings, who transfers assets into a policy to evade a known claim or who uses the policy to defeat the claims of a spouse in divorce exposes himself to civil liability and, in many countries, to criminal liability. The insurer and the adviser who know or ought to know of such a purpose risk complicity. The legitimate use of the instrument is the long-term protection of family wealth against risks that are not yet foreseeable, arranged at a time when the policyholder is solvent and with full disclosure to the tax authorities.³

1 Notes

1. Art. 80 VVG (exclusion of enforcement where spouse, registered partner or descendants are beneficiaries) and Art. 81 VVG (right of entry of the spouse or descendants on seizure or bankruptcy). Wording after the revision of the VVG and inclusion of registered partners to be verified. ↩
2. Art. 79 VVG (expiry of revocable beneficiary designations on seizure or bankruptcy, revival on lapse), Art. 82 VVG (reservation of the rules on avoidance), and Art. 285 ff. SchKG (Anfechtungsklage, in particular Art. 286 on gifts and gratuitous dispositions and Art. 288 on intent to disadvantage creditors). To be verified. ↩
3. On the limits of asset protection and the criminal liability for concealment of assets in enforcement and bankruptcy (Art. 163 ff. StGB, in particular Art. 163 on fraudulent bankruptcy and Art. 164 on reduction of assets to the detriment of creditors), see the commentaries on the Swiss Criminal Code. To be verified. ↩

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