

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

SIMON BERNSTEIN IRREVOCABLE)
INSURANCE TRUST DTD 6/21/95,)
)
Plaintiff,)

**Case No. 13 cv 3643
Honorable John Robert Blakey
Magistrate Mary M. Rowland**

v.)
)
HERITAGE UNION LIFE INSURANCE)
COMPANY,)
)
Defendant,)

**Filers: Simon Bernstein Irrevocable
Insurance Trust Dated 6/21/95,
Ted Bernstein, as Trustee and
Individually,
Pamela B. Simon, Adam M. Simon,
David B. Simon, The Simon Law Firm,
STP Enterprises, Inc. (“Movants”).**

HERITAGE UNION LIFE INSURANCE)
COMPANY)
)
Counter-Plaintiff)

**MOVANTS’ STATEMENT OF
UNDISPUTED MATERIAL FACTS IN
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT**

v.)
)
SIMON BERNSTEIN IRREVOCABLE)
INSURANCE TRUST DTD 6/21/95)
)
Counter-Defendant)

and,)
)
FIRST ARLINGTON NATIONAL BANK)
as Trustee of S.B. Lexington, Inc. Employee)
Death Benefit Trust, UNITED BANK OF)
ILLINOIS, BANK OF AMERICA,)
Successor in interest to LaSalle National)
Trust, N.A., SIMON BERNSTEIN TRUST,)
N.A., TED BERNSTEIN, individually and)
as purported Trustee of the Simon Bernstein)
Irrevocable Insurance Trust Dtd 6/21/95,)
and ELIOT BERNSTEIN)

Third-Party Defendants.)
_____)
ELIOT IVAN BERNSTEIN,)
Cross-Plaintiff)
v.)
TED BERNSTEIN, individually and)
as alleged Trustee of the Simon Bernstein)
Irrevocable Insurance Trust Dtd, 6/21/95)
Cross-Defendant)
and,)
PAMELA B. SIMON, DAVID B.SIMON,)
both Professionally and Personally)
ADAM SIMON, both Professionally and)
Personally, THE SIMON LAW FIRM,)
TESCHER & SPALLINA, P.A.,)
DONALD TESCHER, both Professionally)
and Personally, ROBERT SPALLINA,)
both Professionally and Personally,)
LISA FRIEDSTEIN, JILL IANTONI)
S.B. LEXINGTON, INC. EMPLOYEE)
DEATH BENEFIT TRUST, S.T.P.)
ENTERPRISES, INC. S.B. LEXINGTON,)
INC., NATIONAL SERVICE)
ASSOCIATION (OF FLORIDA),)
NATIONAL SERVICE ASSOCIATION)
(OF ILLINOIS) AND JOHN AND JANE)
DOES)
Third-Party Defendants.)
_____)

Movants, pursuant to Rule 56 and Local Rule 56.1, submit the following statement of uncontested material facts, including an appendix of exhibits hereto, in support of their motion for summary judgment as to Eliot's counterclaims, cross-claims and third-party claims ("Eliot's Claims").

I. THE PARTIES

The following is a review of the Parties (and entities named as potential parties) listed on the civil docket for this matter:

1. Simon Bernstein Irrevocable Insurance Trust Dated 6/21/95 (the "Bernstein Trust"), is an irrevocable life insurance trust formed in Illinois as further described below. The Bernstein Trust is the original Plaintiff that first filed this action in the Circuit Court of Cook County. The Insurer then filed a notice of removal to the Northern District of Illinois. The Bernstein Trust has also been named as a Counterdefendant to Eliot's Claims. The Bernstein Trust is represented by counsel, Adam M. Simon. **(Ex. 1, Aff. of Ted Bernstein, ¶21)**

2. Bank of America, N.A. ("Bank of America"), was named a party to Heritage's counterclaim for Interpleader. Bank of America was terminated as a co-Plaintiff on January 13, 2014, and the Insurer voluntarily dismissed Bank of America as a Third-Party Defendant on February 14, 2014. **(Dkt. #97; Ex. 1, Aff. of Ted Bernstein, ¶22)**

3. Eliot Bernstein ("Eliot") was named a Party by virtue of Heritage's counterclaim for Interpleader, and Eliot filed third-party claims against several Parties described herein making Eliot a Third-Party Plaintiff as well ("Eliot's Claims"). Eliot is the third adult child of Simon Bernstein. Eliot is representing himself, and/or his children, pro se in this matter. **(Ex. 1, Aff. of Ted Bernstein, ¶23)**

4. United Bank of Illinois, now known as PNC Bank, was named as a third-party defendant in Heritage's counterclaim for Interpleader. PNC Bank was served on August 5, 2013, and has never filed an appearance or answer. **(Dkt. #25; Ex. 1, Aff. of Ted Bernstein, ¶24)**

5. "Simon Bernstein Trust, N.A." was named a Party to Heritage's counterclaim for interpleader. "Simon Bernstein Trust, N.A.". There are no Policy records produced by the Insurer indicating that a policy owner ever submitted a beneficiary designation naming Simon Bernstein Trust, N.A. as a beneficiary of the Policy. No one has submitted a claim to the Policy Proceeds with the Insurer on behalf of an entity named "Simon Bernstein Trust, N.A.". **(Ex. 2, Aff. of Don Sanders, ¶69 and ¶78)**

6. Ted Bernstein, as Trustee, of the Bernstein Trust retained Plaintiff's counsel and initiated the filing of this Action. Ted Bernstein, is also a co-Plaintiff, individually, and has been named as a Counter-defendant and Third-Party Defendant to Eliot's Claims. Ted Bernstein is the eldest of the five adult children of Simon Bernstein. Ted Bernstein is represented by counsel, Adam M. Simon. **(Ex. 1, Aff. of Ted Bernstein, ¶25)**

7. First Arlington National Bank was named as a Third-Party Defendant by virtue of Heritage's counterclaim for Interpleader. First Arlington National Bank was never served by Heritage, and instead Heritage served JP Morgan Chase Bank as First Arlington Bank's alleged successor and JPMorgan Chase Bank was substituted as a party in place of First Arlington National Bank on 10/16/2013. **(Dkt. #44; see also JP Morgan Chase Bank at Par. 12 below; Ex. 1, Aff. of Ted Bernstein, ¶26)**

8. Lisa Sue Friedstein is a co-Plaintiff and has been named as a third-party defendant to Eliot's Claims. Lisa Sue Friedstein is the fifth adult child of Simon Bernstein. Lisa Sue

Friedstein is now appearing pro se, and was formerly represented by counsel, Adam M. Simon. **(Ex. 3, Aff. of Lisa Friedstein, ¶2, ¶3, ¶6 and ¶23)**

9. Jill Marla Iantoni is a co-Plaintiff and has been named as a third-party defendant to Eliot's Claims. Jill Marla Iantoni is the fourth adult child of Simon Bernstein. Jill Marla Iantoni is appearing pro-se and was formerly represented by counsel, Adam M. Simon. **(Ex. 4, Aff. of Jill Iantoni, ¶2, ¶3, ¶6 and ¶23)**

10. Pamela Beth Simon is a co-Plaintiff and has been named as a third-party defendant to Eliot's Claims. Pamela Beth Simon is the second adult child of Simon Bernstein. Pamela Beth Simon and is represented by counsel, Adam M. Simon. **(Ex. 5, Aff. of Pam Simon, ¶2, ¶3, ¶6 and ¶38.)**

11. Heritage is the successor life insurer to the original insurer, Capitol Banker Life, that originally issued the Policy in 1982. Heritage was terminated as a party on February 18, 2014 when the court granted Heritage's motion to dismiss itself from the Interpleader litigation after having deposited the Policy Proceeds with the Registry of the Court pursuant to an Agreed Order. The amount of the Policy Proceeds (plus interest) on deposit with the Registry exceeds \$1.7 million. **(Dkt. #101 and Ex. 1, Aff. of Ted Bernstein, ¶30)**

12. J.P. Morgan Chase Bank, N.A., ("J.P. Morgan") was named as a third-party Defendant by virtue of Heritage's counterclaim for Interpleader. In its claim for Interpleader, Heritage named J.P. Morgan, as a successor to First Arlington National Bank (described above). J.P. Morgan filed an appearance and answer to Heritage's counterclaim for Interpleader in which it disclaimed any interest in the Policy Proceeds. J.P. Morgan then filed a motion for judgment

on the pleadings to have itself dismissed from the litigation, and the court granted the motion.

As a result, J.P. Morgan was terminated as a party on March 12, 2014. **(Dkt. #105;**

Ex. 1, Aff. of Ted Bernstein, ¶31)

13. William Stansbury filed a motion to intervene in this action, but his motion to intervene was denied, and he was terminated as a non-party intervenor on January 14, 2014.

(Dkt. #74; Ex. 1, Aff. of Ted Bernstein, ¶32)

14. Adam M. Simon is counsel himself, and for the Bernstein Trust, Ted Bernstein (individually and as trustee), Pamela B. Simon, David B. Simon, The Simon Law Firm, and STP Enterprises, Inc. four of the five adult children of Simon Bernstein. Adam M. Simon was named a third-party defendant to Eliot's Claims. Adam M. Simon is the brother-in-law of Pamela B. Simon, and the brother of David B. Simon. **(Ex. 1, Aff. of Ted Bernstein, ¶33)**

15. National Service Association, Inc. (of Illinois) was a corporation owned by the decedent, Simon Bernstein. According to the public records of the Secretary of State of Illinois, National Service Association, Inc. (of Illinois) was dissolved in October of 2006. There is no record of Eliot having obtained service of process upon National Service Association, Inc. because it is dissolved and has been for over 7 years. **(Ex. 1, Aff. of Ted Bernstein, ¶34)**

16. Donald R. Tescher, Esq. was named a Third-Party Defendant to Eliot's Claims. Donald R. Tescher is a partner of in the firm of Tescher & Spallina. Donald R. Tescher was terminated as a party to this matter when the court granted his motion to dismiss as to Eliot's claims on March 17, 2014. **(Dkt. #106; Ex. 1, Aff. of Ted Bernstein, ¶35)**

17. Tescher and Spallina, P.A. was a law firm whose principal offices were formerly in Palm Beach County, FL. Tescher and Spallina, P.A. was named a Third-Party Defendant to Eliot's Claims. Tescher & Spallina, P.A. Donald R. Tescher was terminated as a party to this

matter when the court granted his motion to dismiss as to the Eliot's Claims. **(Dkt. #106; Ex. 1, Aff. of Ted Bernstein, ¶36)**

18. The Simon Law Firm was named a Third-Party Defendant to Eliot's Claims. The Simon Law Firm is being represented by counsel, Adam M. Simon.

19. David B. Simon is the husband of Pam Simon, and the brother of counsel, Adam M. Simon and was named a Third-Party Defendant to Eliot's Claims. David B. Simon is being represented by counsel, Adam M. Simon. **(Ex. 6, Aff. of David Simon, ¶20 and ¶29)**

20. S.B. Lexington, Inc. was a corporation formed by Simon Bernstein. According to the records of the Secretary of State of Illinois, S.B. Lexington, Inc. was dissolved on April 3, 1998. **(Ex. 1, Aff. of Ted Bernstein ¶39, Dep. of David Simon, p. 51:13-18)**

21. S.B. Lexington, Inc. Employee Death Benefit Trust (the "VEBA Trust") was named a Third-Party Defendant by virtue of Eliot's Claims, and was a Trust formed by Simon Bernstein in his role as principal of S.B. Lexington, Inc. The VEBA Trust was formed pursuant to I.R.S. Code Sec. 501(c)(9) as a qualified Employee Benefit Plan designed to provide a death benefit to certain key employees of S.B. Lexington, Inc. The VEBA was dissolved in 1998 concurrently with the dissolution of S.B. Lexington, Inc. **(Ex. 7, Dep. of David Simon, p. 51:13-18; Ex. 30, Aff. of Ted Bernstein, ¶40)**

22. Robert Spallina, Esq. was named a Third-Party Defendant to Eliot's Claims. Robert Spallina is a partner of in the firm of Tescher & Spallina, P.A. Robert Spallina was terminated as a party to this matter when the court granted his motion to dismiss as to Eliot's Claims on March 17, 2014. **(Dkt. #106; Ex. 1, Aff. of Ted Bernstein, ¶41)**

23. S.T.P. Enterprises, Inc. was named a Third-Party Defendant to Eliot's Claims. S.T.P. Enterprises, Inc. has filed an appearance and responsive pleading and is represented by counsel, Adam M. Simon. **(Dkt. #47; Ex. 5, Aff. of Pam Simon, ¶25)**

24. According to the records of the Secretary of State of Florida, National Service Association, Inc. (Florida) was a Florida corporation formed by Simon L. Bernstein. National Service Association, Inc. (Florida) was named a Third-Party Defendant in Eliot's Claims. According to the records of the Secretary of State of Florida, National Service Association, Inc. (Florida) dissolved in 2012. **(Ex. 1, Aff. of Ted Bernstein, ¶42).**

25. Benjamin Brown as Curator of The Estate of Simon Bernstein filed a motion to intervene in this litigation. The court granted the motion to intervene on July 28, 2014, and as a result the Estate became a third-party claimant in the litigation. **(Dkt. #121).** Subsequently, Brian O'Connell as successor Curator and *Administrator Ad Litem* of the Estate of Simon Bernstein filed a motion to substitute for Benjamin Brown, and the court granted the motion November 3, 2014. For purposes of this motion, Movants refer to this party as the "Estate of Simon Bernstein" or the "Estate". The Estate is represented by the law firm of Stamos & Trucco in this matter. **(Dkt. #126; Ex. 1, Aff. of Ted Bernstein ¶43-¶44)**

II. THE POLICY AND POLICY PROCEEDS

26. In 1982, Simon Bernstein, as Insured, applied for the purchase of a life insurance policy from Capitol Bankers Life Insurance Company, issued as Policy No. 1009208 (the "Policy"). A specimen policy and a copy of the Schedule Page of the Policy are included in Movant's Appendix to the Statement of Facts. **(Ex. 2, Aff. of Don Sanders at ¶38, ¶39, ¶48, ¶52; See Ex. 14).** The amount of the Policy Proceeds (plus interest) on deposit with the Registry

of the Court exceeds \$1.7 million. (**Dkt. #101 and Ex. 1, Aff. of Ted Bernstein, ¶30**). The Policy defines “Beneficiary” as follows:

A Beneficiary is any person *named on our* [the Insurer’s] *records* to receive proceeds of this policy after the insured dies. There may be different classes of Beneficiaries, such as primary and contingent. These classes set the order of payment. There may be more than one beneficiary in a class. Unless you provide otherwise, any death benefit that becomes payable under this policy will be paid in equal shares to the Beneficiaries living at the death of the Insured. Payments will be made successively in the following order:
(emphasis added)

- a. Primary Beneficiaries.
- b. Contingent Beneficiaries, if any, provided no primary Beneficiary is living at the death of the Insured.
- c. The Owner or the Owner’s executor or administrator, provided no Primary or Contingent Beneficiary is living at the death of the Insured.

Any Beneficiary may be named an Irrevocable Beneficiary. An irrevocable beneficiary is one whose consent is needed to change that Beneficiary. Also, this Beneficiary must consent to the exercise of certain other rights by the Owner. We discuss ownership in part 2. (**SoF, ¶26; Ex. 7 at bates no. JCK00101**)

III. MOVANTS’ CLAIMS TO THE POLICY PROCEEDS

27. Plaintiff’s claims to the Policy Proceeds are based on their allegations that the five adult children of decedent, INCLUDING ELIOT, are the beneficiaries of The Simon Bernstein Irrevocable Insurance Trust Dtd 6/21/95, and that this same Trust is the named beneficiary of the Policy Proceeds at issue (the “Stake”). (**Ex. 8, Plaintiff’s First Amended Complaint**).

IV. ELIOT’S NON-EXISTENT CLAIM TO THE POLICY PROCEEDS

28. Eliot Bernstein filed counterclaims, third-party claims and cross-claims in this litigation (“Eliot’s Claims”). (**Ex. 9, Eliot’s Claims**).

29. The pleading setting forth Eliot’s Claims—not including exhibits—is seventy-two pages long and consists of one hundred and sixty-three separate paragraphs. Eliot’s Claims are devoid

of any allegation or supporting facts to show that either Eliot or his children were ever named a beneficiary of the Policy Proceeds. **(Ex. 9, Eliot's Claims)**.

30. This is confirmed by the 30(b)(6) witness designated by the Insurer affirming that no Owner of the Policy ever submitted any change of beneficiary forms which were received by the Insurer that designated Eliot, or any of Eliot's children as a beneficiary of the Policy. **(Ex. 2, Aff. of Don Sanders, ¶¶65-¶68)**.

V. ELIOT'S STATUS VIS-À-VIS THE ESTATE OF SIMON BERNSTEIN

31. The case styled as In Re Estate of Simon L. Bernstein, has been pending in the Probate Division of the Palm Beach County Circuit Court in Florida since 2012. In Re Estate of Simon L. Bernstein, No. 502012CP004391XXXNBIH.

32. A related case styled as Ted Bernstein, as Trustee of the Shirley Bernstein Trust Agreement dtd 5/20/2008 v. Alexandra Bernstein, et. al., has been pending in the same court before the same judges since 2014 involving matters related to a testamentary trust formed by Shirley Bernstein – Simon Bernstein's spouse -- prior to her death. Ted Bernstein, as Trustee of the Shirley Bernstein Trust Agreement dtd 5/20/2008 v. Alexandra Bernstein, et. al, No. 502014CP003698XXXXNBIJ. For purposes of this motion, the actions pending in Palm Beach County are referred to as the "Probate Action(s)".

33. On December 15, 2015, after a trial was held in the Probate Actions, where Eliot Bernstein appeared and represented himself *pro se*, Judge John L. Phillips entered an Order including the following:

- a. This was a "Final Judgment" on Count II of the Amended Complaint;
- b. A trial was held on December 15, 2015 pursuant to the Court's Order setting trial on Amended Complaint Count II;

- c. The Court received evidence in the form of documents and testimony of witnesses;
 - d. The Court heard argument from counsel and pro se parties who wished to argue;
 - e. The Court found that five testamentary documents, including the Will of Simon Bernstein and a Simon Bernstein Amended and Restated Trust Agreement dated July 25, 2012 are “genuine and authentic, and are valid and enforceable according to their terms.”
 - f. That based on evidence presented, “Ted S. Bernstein, Trustee, was not involved in the preparation or creation of the Testamentary Documents...Ted S. Bernstein played no role in any questioned activities of the law firm of Tescher & Spallina, P.A., who represented Simon and Shirley when they were alive. There is no evidence to support the assertion of Eliot Bernstein that Ted Bernstein forged or fabricated any of the Testamentary Documents, or aided or abetted others in forging or fabricating documents. The evidence shows Ted Bernstein played no role in the preparation of any improper documents, the presentation of any improper documents to the Court, or any other improper act, contrary to the allegations of Eliot Bernstein.
 - g. This ruling is intended to be a Final Judgment under Rule 9.170 of the Florida Rules of Appellate Procedure...” **(Ex. 10, Probate Order of 12/15/15, *Ted Bernstein, as Trustee of Shirley Bernstein Trust Agreement v. Alexandra Bernstein...Eliot Bernstein, et. al. No. 502014CP003698.*) (ADD TRANSCRIPT SHOWING ELIOT ATTENDED?).**
34. On April 8, 2016, Hon. John. L Phillips entered another Probate Order including the following findings:
- a. “This court determined after a trial held on December 15, 2015 that the beneficiaries of The Simon L. Bernstein Amended and Restated Trust Agreement dated 7/25/12 (the “Trust”) are Simon Bernstein’s ‘then living grandchildren’. Under that ruling, Simon’s children -- including Eliot – are not beneficiaries of the Trust.” (insert footnote explaining that the Trust is beneficiary of the Will”).
 - b. The Court has already determined in the related matter of the Shirley Bernstein Trust that Eliot Bernstein should not be permitted to continue representing the interests of his minor children, because his actions have been adverse and destructive to his children’s interest resulting in appointment of a guardian ad litem.

- c. Accordingly, the Court appoints Diana Lewis to act as Guardian ad Litem to advance and protect the interests of Jo.B, Ja.B and D.B. as the guardian sees fit. The Guardian ad Litem will have full power and autonomy to represent the interests of the Children of Eliot Bernstein, subject to the jurisdiction and review of the court.” (Ex. 11, Order entered 4/8/16, *Eliot Bernstein, et. al v. Theodore Stuart Bernstein, et al., No. 502015CP001162*).” **(Ex. 11, Probate Order entered 4/8/16)**

35. In this same Probate Order, Judge Philips admonished Eliot that the court intended to use its “*full measure of its coercive powers*” to ensure Eliot’s, and anyone acting in concert with Eliot, non-interference with the guardian ad litem appointed for Eliot’s children. (emphasis added). **(Ex. 11, Probate Order entered 4/8/16)**. For purposes of this motion, the two orders attached as Ex. 10 and Ex. 11 are referred to as the “Probate Orders”.

VI. THE ESTATE’S INTEREVENOR COMPLAINT

36. In its intervenor complaint, the Estate of Simon Bernstein, asserts that it has an interest in the policy because “Plaintiff cannot prove the existence of a Trust document; cannot prove that a trust was ever created; thus, cannot prove the existence of the Trust nor its status as purported beneficiary of the Policy. In the absence of a valid Trust and designated beneficiary, the Policy Proceeds are payable to the Petitioner [Estate].....”. **(Ex. 12 at ¶12, Estate’s Intervenor Complaint)**.

VII. THE INSURER'S INTERPLEADER ACTION

37. A copy of the Insurer's Interpleader Action is included in Movant's Appendix to its Statement of Undisputed Facts as **(Ex. 13, Insurer's Interpleader Action)**. In its Interpleader Action, the Insurer alleges that it failed to pay the Bernstein Trust's death claim because the claimants could not produce an original or copy of an executed trust agreement, and because the Insurer received a letter from Eliot setting forth a potentially conflicting claim. **(Ex. 13 at ¶22)**.

Respectfully submitted,

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