

GOING PUBLIC AND LISTING OF LIFE INSURANCE COMPANIES ON STOCK MARKETS AND PROFIT SHARING IN KOREA: A LEGAL STUDY

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I. INTRODUCTION

Throughout the 1990's, the Korean economy has experienced full-swing deregulation, market opening, and globalization. Life insurance companies in Korea have been struggling for survival in this era of unlimited competition; in the wake of the financial crisis that hit the nation at the end of 1997, these companies have witnessed the fall of several uncompetitive rivals during the government-led restructuring of the nation's major industries.¹

Recently, the listing of life insurance companies on the Korean stock market has become the center of the debates across the nation. This debate started when Lee Kun-hee, the Chairman of the Samsung Group, offered to sell 4 million shares of Samsung Life Insurance Company in an effort to bear a part of the enormous debt owed by the startup Samsung Motors, one of its affiliated companies.² Lee was under pressure to hold him responsible for the debt due to Samsung Group's glaringly inefficient investment in Samsung Motors.³ During the period of IMF control of the Korean economic system, Samsung and Daewoo, two of the leading Korean conglomerates, had attempted a so-called "big-deal"⁴ swap of Samsung Motor Company and Daewoo Electronics as a part of the government-led restructuring of the nation's *chaebol* (conglomerates), but had gotten nowhere. With his back to the wall, Lee decided to offer his own stock holdings for sale. This move began the debate over various points concerning the listing of Samsung Life Insurance as well as Kyobo Life insurance,⁵ which also expressed its intention to go public.⁶

1. See CHOI HEUNG-SHIK, ET. AL., PUBLIC LISTING OF LIFE INSURANCE COMPANIES, KOREAN INSTITUTE OF FINANCE 7-9 (1999).

2. See YONHAP NEWS, June 30, 1999.

3. See *id.*, June 18, 1999.

4. See *id.*, December 2, 1998.

5. Kim Woo-Choong, ex-Chairman of the now-bankrupt Daewoo Group owned 11% of the equity shares of Kyobo Life Insurance (KLI) and contributed 1.5 million shares of KLI as part of the workout program for his Group. See CHOI, *supra* note 1, at 6.

6. See generally Joseph M. Belth, *Distribution of Surplus to Individual Life Insurance Policy Owners*, JOURNAL OF RISK AND INSURANCE, 7-26 (1978); Roger A. Formisano, *Dividend Decisions and the Structure of the Life Insurance Industry*, JOURNAL OF BUSINESS RESEARCH, 329-344 (1978); David Mayers & Clifford W. Smith, Jr., *Ownership Structure and Control: The Mutualization of Stock Life Insurance Companies*, 16 JOURNAL OF FINANCIAL ECONOMICS 73-98 (1986); S. Travis Pritchett and Ronald P. Wilder, *Company Characteristics and Policyowner Cost Structures for Cash Value Life Insurance*, JOURNAL OF RISK AND INSURANCE, 355-372 (1977); Kim Sung-Jae, *A Theoretical Analysis on the Initial Public Offerings of the Life Insurance Company Stocks*, 37 KOREAN INSURANCE JOURNAL 143-167 (1991); Lee Kyung-Lyong, *A Study on the Surplus Distribution of Life Insurance Companies*, 36 KOREAN INSURANCE JOURNAL 37-66 (1990).

There are 29 life insurance companies in Korea,⁷ but the so-called "Big Three," (that is, the Samsung, Kyobo and Daehan Life Insurance Companies), had a market share of 74.2% as of September 1999 (compared to 65% at the end of 1998). In Korea, if the biggest three businesses in an industry hold a combined market share of more than 75%, they can be designated "dominant businesses." This subjects them to punitive measures such as the imposition of fines if they are found to be engaged in abuse of their market position.⁸ Experts⁹ have attributed the rise in the Big Three's market share to the transfer of many customers to better-performing life insurance companies after the designation of some life insurance companies as poorly-performing after the government-led restructuring of the industry. Under such circumstances, the matter of listing of Samsung Life Insurance and Kyobo Life Insurance (the "Big Two") should be the center of attention.

The present financial status of the two life insurance companies in question is presented in Table 1.¹⁰

Table 1. Financial Status of Samsung and Kyobo Life Insurance
(Unit: Korean won)

	Samsung Life Insurance	Kyobo Life Insurance
Capital Amount	93.6 billion (increased to 100 billion in 1999)	69.6 billion
Total Assets	36.3746 trillion	20.6768 trillion
Earned Premium	16.4415 trillion	8.9426 trillion
Number of Sales People	60,222	55,325
Balance of Contract Amount	225.3762 trillion	114.1363 trillion
Current Net Profit	95.6 billion	51.2 billion
Branches	1,707 (Sales Offices: 1,828)	1,568 (Sales Offices: 3,354)

The current debate about the Big Two life insurance companies is focused on three issues. First is how to allocate the marginal profit (the difference between the face value of the stocks and the post-listing stock price). Some argue that the marginal profit that comes with the listing should be fully

7. As of September 1999.

8. See Regulating Monopoly and Fair Trade Act, art. 4-6 (S. Korea).

9. See YONHAP NEWS, May 14, 1998.

10. FINANCIAL SUPERVISORY COMMISSION (S. Korea). Earned premiums are the figures for April 1998 through March 1999. The others, except the capital amount, are those as of the end of March 1999. U.S.\$1 averaged around 1100 Korean won during the period in question.

returned to the shareholders.¹¹ Others argue that a certain portion (up to 90%, according to some) of the marginal profit should be allocated to the insurance subscribers, since the current assets of life insurance companies are basically formed by the insurance premiums paid by the subscribers.¹² Both sides strike fast to their respective viewpoints. Out of the three problems listed here, it is the first that particularly requires legal interpretation.

The second problem is how to allocate the revaluation excess in the process of listing the firm on the stock exchange. This problem involves the methodology for reservation of the excess within the firm, calculation of the total amount of dividends, and allocation of the total amount of dividends between the subscribers and the shareholders.¹³ The current controversy is whether to follow the ratio stipulated in the existing "Regulation for Allocation of Surplus and Asset Revaluation Profit in Life Insurance Companies,"¹⁴ or to set out new criteria.

Finally, there are also controversies regarding how to decide on the equity share of participating policies. This is the problem of how to calculate the degree of contribution by each party to the formation of the present value of a company. That is very hard to measure and inevitably entails subjective judgment, which will lead to another controversy, as witnessed in the conversion process of mutual companies to corporations in Korea during the 1990s.

II. CAUSE OF CONTROVERSIES

The complexity of the listing process can be blamed on the nation's chronically government-controlled financial system. In order to facilitate the supply of industrial funds, the Korean government had approved the establishment of all life insurance companies in the organizational form of corporations, even though the structure of Korean life insurance companies more closely resembles the mutual company form. It has been said that it is easier under the government-controlled financial system to control corporations than mutual companies.¹⁵ In any case, all life insurance companies in Korea are presently incorporated. The original aim to facilitate

11. ACADEMIC SEMINAR ON THE CHALLENGES TO THE PUBLIC LISTING OF LIFE INSURANCE COMPANIES, KOREAN INSURANCE ACADEMIC SOCIETY, December 23, 1999 (S. Korea).

12. *Id.*

13. Kim Sung-Jae, *A Theoretical Study of Life Insurance Companies' Going Public*, 37TH COLLECTED PAPERS OF THE KOREAN INSURANCE ACADEMIC SOCIETY, 146-149, 154-155, (1991).

14. As of Spring 2000. CHOI, *supra* note 1, at 25-26.

15. This is a common assumption among researchers in the subject of commercial law in Korea.

the supply of capital to life insurance companies through the corporate form also has something to do with the fact that most Korean life insurance policies resemble savings-type policies paying dividends with a certain secured interest rate rather than guarantee-type returns without dividends. For examples, the ratio of the merchandise cum dividends in the entire operation of Samsung Life Insurance and Kyobo Life Insurance came to as high as 89% and 87.2% respectively out of their earned premiums in the fiscal year 1998.¹⁶

In the case of a corporation, its owners are the shareholders, who form a board of directors as the main instrument of its operation, and the results of the operation are returned to them in the form of dividends. The management team of a life insurance corporation must make profits for the shareholders by selling policies; therefore, insurance premiums must include the profit that should be paid to the shareholders in return for their investment. In contrast, in the case of a mutual company, it is not necessary to incorporate the profit in calculation of the premium, as it has no shareholders. Mutual companies were established for the purpose of providing the insurance to customers at a cheaper price. Likewise, mutual companies allow both management and subscribers to participate in the operation of the company on an equal standing, as the company is organized by the policyholders themselves, whereas a corporation may allow a few large shareholders to operate the company arbitrarily.

Intrinsically, participating policies belong to mutual companies. Mutual companies in the U.S., for example, sell only policies that pay dividends, whereas life insurance corporations there mainly issue policies without dividends, limiting the sales of dividend-paying policies. That is because payment of dividends to policyholders by a life insurance corporation can cause conflicts between the shareholders and the subscribers in the allocation of profit. Life insurance companies in more advanced countries take the form of mutual companies that sell participating insurance. These companies can easily be listed on the stock exchange by having the existing subscribers participate as shareholders in the newly-converted corporation. Korean life insurance companies, however, though corporations in form, sell very few nonparticipating policies because focusing on sales of participating insurance allows them to have subscribers assume their part of profits and losses. This has led to complications in allocating the marginal profits that come with their listing on the stock exchange, since the argument for allocation of the marginal profits to subscribers is based on the fact that the life insurance companies in Korea,

16. FINANCIAL SUPERVISORY COMMISSION (1999) (S. Korea).

even though they take the form of corporations, sell participating insurance like mutual companies.

There would be few problems if there had been fair and consistent allocation of current term net profits between shareholders and subscribers and strict division between the assets of shareholders and those of subscribers. In fact, however, there has been no allocation of profits to subscribers until recently.¹⁷ The short history of profit allocation to subscribers by Korean life insurance companies begins with a special-dividend system designed to offset the difference between market interest rates and the expected dividends for the subscribers.¹⁸ This system was followed by a fixed-dividend system with a similar purpose. When interest rates dropped under a new economic structure in the 1980s, while all the life insurance companies experienced losses in interest and losses after expenses, they also enjoyed a mortality gain. As might be expected, they used the mortality gain to offset their operational losses in interest and expenses rather than allocating it to the subscribers. After some time, the government adopted a system of mortality gain dividends, which required the life insurance companies to return a part of the mortality gain to the subscribers. These mortality gain dividends corrected the discrepancy that had resulted when the companies set the expected mortality rate higher than the actual past mortality rate in the calculation of the insurance premiums, for the purpose of safer operation of the company. Thereafter, the government encouraged life insurance companies to adopt a system of profit dividends, in which they returned surplus profits to the subscribers if they succeeded in harvesting higher investment profits than the fixed interest. It also encouraged them to adopt the special-dividend system for long-term contracts.¹⁹

Before these attempts were made to provide subscriber dividends, the portions that should have been returned to the subscribers were being accumulated by the life insurance companies as part of their assets. Thus, a certain portion of the present asset value of a life insurance company is what should have been returned to the subscribers. The problem becomes much more complicated when consideration is given to the ex-subscribers who have already been paid their surrender values or insurance monies by the

17. See, e.g., Barry Savage, *The System of Life Insurance Dividend in North America*, LIFE INSURANCE, April 1997, 7-16; John S. Ferguson, *The System of Dividend Payment of Insurance Industry of the UK*, LIFE INSURANCE, April 1997, 17-24.

18. See Lee Myung-Joo, *A Rational Way of Operation of Subscribers' Dividend*, LIFE INSURANCE, April 1997, 29-30 (S. Korea).

19. See, e.g., Lee, *supra*, note 18 at 25-38; Kim Jae-Woo, *A Desirable Way of Improving Subscribers' Dividend in Korea*, 8 INSURANCE DEVELOPMENT AND RESEARCH (1993) (S. Korea).

insurance companies, since they were the ones who played more important roles in the formation of the present asset values of the companies. Supposing a life insurance company has gained a profit after it bought a tract of land 20 years ago with the then-subscribers' premiums, what should be the fair share between the shareholders, present subscribers, and former subscribers? It is realistically difficult to allocate a portion of the profit to past subscribers who have already terminated their insurance contracts with the company. Given the complex problems associated with going public and becoming listed on the stock exchange, the Korean life insurance industry needs the firm establishment of a universal principle for profit allocation in order to grow and become more competitive, allow its stocks be transacted briskly in the market, and build investor trust in the market.

III. GOING PUBLIC AND LISTING

A. Background

A capital increase is one of the ways of financially stabilizing a company. Because of the social role of life insurance companies, this capital increase should be achieved by taking the company public. The disclosure of financial details to the general public and the diffusion of stock ownership will result in a separation of capital and management that will make it possible to expect the companies to be run in a socially responsible manner. Taking the company public will also make it possible to have stocks transacted among an unspecified multitude of investors in open stock markets. In contrast to other business entities, which can be listed on the stock exchange automatically if they meet the requirements stipulated by relevant laws and regulations, some life insurance companies have been excluded from listing, despite meeting the requirements, due to the controversy concerning the subscribers' portion over the past 10 years. However, as they started in the form of corporations, not mutual companies, it seems inevitable that the life insurance companies will be listed on the stock exchange sooner or later.

The realization of the current term net profit and the open-door policy of the nation's life insurance market since the latter half of the 1980s led to a deep interest on the part of Korean companies in going public.²⁰ The government reacted positively to this interest during the early stages, providing the original "Regulation for Allocation of Surplus and Asset

20. See CHOI, *supra* note 1, at 1.

Revaluation Profit in Life Insurance Companies.”²¹ Under this regulation, Samsung Life Insurance and Kyobo Life Insurance carried out the revaluation of their assets as a preliminary step for the listing, in 1989 and 1990 respectively. However, the government has since changed its policy and postponed listing the two life insurance companies while extending several times the time limitation for receiving corporate tax breaks for the valuation excess. This has been on the grounds of the sluggishness of the stock market, the problem of the rights for the post-listing profits, and the controversy over the possible “special favors” granted to a few large shareholders. The government has amended the Law for Limitation on Special Treatment concerning Taxation no less than twice, in order to effectuate this extension of the special tax break.²²

B. Requirement for Listing Marketable Securities On the Stock Market

As of spring 2000, in order to be listed on the stock market, a corporation is required to meet the following requirements:

- Paid-in capital of more than 3 billion won,
- Equity capital of more than 5 billion won,
- Average annual earnings of 15 billion won for the past three years, with annual earnings of more than 20 billion won in the most recent year,
- An asset value exceeding the face value by a factor of 3,
- Value of earning power exceeding the face value by a factor of 2,
- Positive operating income, ordinary profit, and net profit for the past three consecutive years, and
- The requirements stipulated in Article 15 (Requirements for New Listing of Equities) of the *Regulation on Listing of Marketable Securities* and Article 20 (Requirements for Stocks Subject to Takeover) of *Regulation on Takeover of Marketable Securities*.²³

Effective April 1999, the government has allowed corporations to be listed on the stock market if they pass the substantial screening criteria set by the stock exchange even if they fail to meet the formal requirements for the listing, in order to alleviate their fund supply pressures.

21. *Id.*

22. Law for Limitation on Special Treatment on Taxation, art. 138 (S. Korea).

23. See Regulation on Listing of Marketable Securities, art. 15 (S. Korea); Regulation on Takeover of Marketable Securities, art. 20 (S. Korea).

C. Examples of More Advanced Nations

The insurance industries of the U.S., the U.K. and France, which have a longer history than in other countries, are made up generally of subscriber-owned mutual companies. They have striven to incorporate due to the difficulty in securing capital. Those established in the form of a corporation have already been listed on the stock exchange for the most part. As mentioned earlier, the most important advantage of the corporate form is easy access to capital through listing on a public stock exchange. In contrast, a mutual company's supply of equity capital is dependent on the introduction of funds or subordinate loans that entail interest. Another advantage of a corporation is that it gives the management wider choices, including mergers and acquisitions or the introduction of foreign capital.

Since the 1970s, there has been a brisk movement in the U.S. for the conversion of mutual companies into publicly listed corporations. In order to compete in the capital market, large big-name mutual companies like Metropolitan Life Insurance and Prudential Life Insurance have promoted a big shift toward becoming listed corporations. One noteworthy thing is that Prudential Life Insurance is considering allocating its shares to its 10 million-odd subscribers in the course of being transferred to a corporation. As mentioned earlier, the subscribers to a mutual company correspond to the shareholders of a corporation, so they are entitled to allocation of stocks. Prudential Life Insurance is also reportedly planning to go public after converting to a corporation.²⁴

In Japan, mutual life insurance companies such as Mitsui and Daido are hurrying to incorporate and be listed on the stock exchange in the wake of the bankruptcy of Toho Life Insurance. That is because the mutual companies are having difficulty in getting funds and finding it hard to positively adapt themselves to the need for strategic partnerships, mergers and acquisitions, or restructuring. It has been reported that debates about how to help mutual life insurance companies convert to corporations are under way at Japan's Financial Deliberation Commission, an advisory institution for the Ministry of Finance.²⁵ As mutual life insurance companies regard the subscribers as their staff members, the subscribers are also regarded as sharing their assets. Accordingly, when these companies convert to corporations, their net assets are allocated to the subscribers depending on the degree of contribution based on their period of subscription or premiums they have paid.

24. See KOREA ECONOMIC DAILY, August 5, 1999.

25. See THE INSURANCE NEWS, September 13, 1999 (S. Korea).

A possible problem in the Japanese case is that due to the excessive number of subscribers, there may be too many fractional shares whose prices are lower than the lowest face value. The Financial Deliberation Commission is said to be considering paying cash to the subscribers rather than allocating stocks after selling all fractional stocks.²⁶ Likewise, the current world-wide trend is for life insurance companies established in the form of a corporation to go public and for those established in the form of a mutual company to convert to corporations. As of the end of 1999, not a single life insurance corporation had gone public out of the 29 in Korea, whereas 230 out of 1,927 U.S. life insurance corporations and 16 out of 260 U.K. life insurance corporations had listed by that time. Seven out of 58 life insurance corporations had gone public by that time in Germany, compared to 2 (the largest and the second largest in terms of capital) out of 20 Taiwanese life insurance companies.

Under these circumstances, it is not reasonable to block Korean life insurance companies from going public simply because they are life insurance companies, if they meet the legal requirements for a corporation. The matter of the listing of life insurance companies must be decided based on whether they meet the relevant legal requirements. It is fortunate, therefore, that the majority of opinions voiced in various debates and public hearings are for the allowing of their listing while simultaneously pointing out the need for remedial actions for remaining problems.²⁷ The Korean Financial Supervisory Commission also seems to be in a position to conclude the matter sometime soon. Considering the sheer size of the two life insurance companies in question (Samsung & Kyobo) and the nation's life insurance industry's standing in the world market, there should be no postponement of their listing on the stock exchange.²⁸

IV. EFFECTS OF LISTING OF CORPORATION

A. *Forms of Management by Domestic Life Insurance Companies*

Korean life insurance companies tend to be controlled by a few, arbitrary, large shareholders. This, in turn, leads to an undue emphasis on

26. *Id.*

27. KOREAN INSURANCE ACADEMIC SOCIETY, *supra* note 11.

28. Recently, Samsung completed a capital increase (with consideration) of 6.4 billion won and then allocated the entire 1.28 million stocks to the employees' stock ownership association, thus completing the procedure of paying the share capital. Accordingly, its amount of the capital was increased to 100 billion won from 93.6 billion won.

the gross sales amount and moral laxity. The impossibility of separating ownership from management also drives management into poor performance. In particular, Korean life insurance companies have taken advantage of their unlisted status to serve as a private source of funds for a few large shareholders and to provide support for affiliate companies' corporate bonds, stocks or commercial paper. For instance, the government has cited the provision by Samsung Life Insurance of funds worth 540 billion won to Samsung Motors as an example of the company's abdication of its function as the manager of its subscribers' funds in order to assume the role of private funding source for the parent *chaebol* (conglomerate).²⁹ The government has also charged that Samsung and Kyobo have abused subscribers' property by using special profits occurring from the changes in the way of depositing the policy reserve in offsetting the valuation loss for marketable securities instead of entering it as a separate reserve for the subscribers. Such practices have led to ever-worsening management in some Korean life insurance companies, which in turn has caused their weakened competitiveness in international markets. Furthermore, the companies have been in the habit of passing the losses occurring in such cases on to the subscribers, rather than making up for the loss with an increase in the shareholders' investment.

B. Positive Effects of Listing a Corporation

The benefits of listing life insurance companies on the stock exchange include securing transparency of management, maintaining soundness of the capital, protecting the rights of the subscribers, and enhancing their competitiveness. First, the listing leads to the diffusion of stock ownership, which brings about transparency in management activities. The company comes to be under constant watch by foreign investors, institutional investors, and minority shareholders. Furthermore, a listed company must make public factors such as changes in the equity share of large shareholders or the status of investment in affiliated companies. Second, ownership by the general public rather than a few large shareholders can form the basis for a sound financial structure, eventually making it possible to realize an economy of scale. A sound financial structure also results in more profits to the subscribers. The listing of life insurance companies on the stock exchange is one of the effective ways by which the government can recover the public funds it has poured into bad-performing life insurance. Finally, in this era of global competition, it is

29. See CHOI, *supra* note 1, at 11-13.

essential to make life insurance companies go public to enhance their competitiveness. The improved corporate governance and transparency of financial structures and management systems under the stronger supervision system makes them more competitive.

C. *Controversies over Allocation of Profits from Listing*

1. Allocation of Asset Revaluation Profit

There are two kinds of profits that come with the listing of life insurance companies: marginal profits from the revaluation of assets, and capital gains from the rise in the stock price after the listing. Generally, when a corporation goes public, a considerable revaluation profit is made through the process of asset revaluation. For example, a tract of real estate which used to be entered based on its acquisition price comes to be appraised on the basis of the current actual price at the time of going public, thus bringing about a considerable amount of revaluation profit. The life insurance corporations in Korea have mainly sold participating insurance, which mean they have to allocate the results of their operation to the subscribers. Accordingly, the revaluation profits must be allocated to both the subscribers and the shareholders. Regulations current as of Spring 2000 allocate 85% of the marginal profits from asset revaluation to subscribers and 15% to shareholders.³⁰ A subscriber makes an insurance contract in preparation against future risks and the insurance company must always be ready to pay the insurance money stipulated in the contract to the subscriber.

If the life insurance company's payment reserve ratio is less than 4%, the subscribers are entitled 90% of the revaluation profits. For companies with a ratio of 4-8%, the equity division between subscribers and shareholders is 87.5: 12.5.³¹ In the case of a blue-chip company whose payment reserve ratio is more than 8%, the subscribers are entitled to 85% of the revaluation profit. In this case, however, they are paid only a portion of the profit in the form of dividends, with the remainder reserved in the company. According to the regulations on insurance contracts in effect as of Spring 2000, the company is required to pay the subscribers a special dividend at the time of the maturity or redemption (calculated proportionate to the accumulated amount of their insurance premiums), while the remaining amounts are retained or put in a mandatory public-goods fund in specified proportions.³²

30. See Insurance Supervision Regulation (S. Korea), art. 78, as of Spring 2000.

31. See *id.*, art. 81, ¶ 3.

32. See *id.*

2. Arguments on the Allocation of Post-Listing Profits

a. Opinions of life insurance companies and counter-opinions

When a company becomes listed and issues stock, the objective appraisal of experts on factors such as the operating results, equity capital, future prospects of growth, value of contract balance and goodwill will drive the stock price higher than the face value. Both Samsung Life Insurance and Kyobo Life Insurance insist that post-listing capital gains belong entirely to the shareholders, as all Korean life insurance companies take the form of corporations rather than mutual companies. They maintain that this is the basic principle of the Corporation Law, the Articles of Association, and the Commercial Code in Korea.³³

Their insistence is also based on the following facts. Based on the 1989/1990 asset revaluations and public hearings on how to deal with the marginal profits from those revaluations, a decision was made to apportion these profits between the shareholders and the subscribers on a 30:70 ratio. The shareholders' portion was spent, without consideration, to increase capital. The subscribers' portion was used for a reserve for dividend stabilization, a special dividend for the subscribers, and for public goods projects. Thus, the subscribers' marginal profits have been faithfully allocated so far. In addition, most of the shareholders' portion of operating profits have been reserved in the form of retained earnings, greatly contributing to the substantiation of their equity share. Thus, the shareholders argue that the marginal profits from the stocks, which are a reflection of the asset value, should belong to them.

The shareholders add that it is not reasonable to expect the company to arbitrarily allocate the capital gains to the subscribers when the relevant laws stipulate that the entire capital gains should be returned to the shareholders. The life insurance companies recognize past and present subscribers' contributions to the formation of the present value of their assets, but they also credit their own management skills for the growth from 3 billion won in capital and 2 trillion won in asset value 10 years ago to 100 billion won and 36 trillion won, respectively. (For reference, the Samsung Life Insurance Company's shareholders are as presented in Table 2.)³⁴

33. See Commercial Law (S. Korea), art. 418, 420.

34. FINANCIAL SUPERVISORY COMMISSION (S. Korea), as of June 28, 1999.

Table 2. Samsung Life Insurance Company Shareholders (Spring 2000)

Single Shareholders	Equity Share (%)	Corporate Bodies	Equity Share (%)
Lee Kun-hee (4 million shares x 700,000 won = 2.8 trillion won [when listed])	26.00	Samsung Everland	20.67
Lee Jong-ki	5.00	Shinsegaye	14.50
Lee Soo-bin	4.00	Cheiljedang	11.50
6 persons including Kang Jin-goo	10.67	Samsung Cultural Foundation	5.00
Total	45.67	Total	51.67

However, the opposite view is also very strong. As mentioned above, it is difficult for the general public to accept the allocation of the entire post-listing capital gains to just a few large shareholders, given the predominant type of policy offered by the companies and the companies' corporate form. For instance, in the case of Samsung Life Insurance, its capital comes to no more than 100 billion won, though its asset value is 36 trillion won.³⁵ This means the amount of insurance premiums paid by the subscribers is hundreds of times larger than the shareholders' investments. Under these circumstances, many people maintain that it is not right to return the entire marginal profit from the post-listing rise in the stock price to the shareholders. When a company increases its capital with consideration, it generally allocates a considerable portion to existing shareholders, thus giving them further marginal profits from taking in new stocks in addition to those from existing stocks. Furthermore, there have been no allocation of profits to subscribers until recently, even though incorporated Korean life insurance companies mostly have sold participating insurance products. Based on these factors, the opposing view maintains that a considerable portion of the post-listing marginal profit should be allocated to the subscribers — in other words, that the value of a life insurance company should be evenly shared between the shareholders and the present and past subscribers.

This opposing view is linked with the suggestion that the subscribers' equity share (the capital surplus reserved in-house at the time of the asset revaluations)³⁶ should be accepted as the subscribers' capital,

35. Samsung Life Insurance recently allocated the stocks to the members of the employees' stock ownership association after the paid-in capital increase by 6.4 billion won. Thus, the capital amount came to 100 billion won. See YONHAP NEWS, September 16, 1999.

36. 93.9 billion won for Samsung Life Insurance and 68 billion won for Kyobo Life Insurance. See YONHAP NEWS, *supra* note 35; CHOI, *supra* note 1, at 34.

distinguishing it from the paid-in capital,³⁷ which is the existing shareholders' capital. Proponents of this opposing view further argue that the retained earnings, which were returned to the shareholders in their entirety due to the lack of authoritative criteria regarding their disposal, should now be allocated to the subscribers at a proper ratio. The insistence is based on the idea that the total capital of a company consists of the paid-in capital (the shareholders' portion), the capital surplus (the subscribers' portion) and the retained earnings (which are shared between shareholders and subscribers). Some also argue that the subscribers should be given priority in buying stocks in a public offering, thus allowing them to harvest the marginal profits. This is linked to the suggestion that a certain portion of the marginal profits should be used for subscriber dividends or for funds for public goods in consideration of public opinion, though legally the capital gain belongs to the shareholders.

b. Problems in calculation of estimated price of stock after listing

The matter of the post-listing stock price of Samsung, Kyobo and other life insurance companies may bring about another controversy. As there has never been a listed life insurance company, there may be many different opinions on the proper price of the stocks. At the moment, there are four life insurance companies (Samsung, Kyobo, Heungguk and Jeil) that meet the requirements for the listing. They say the value of their stocks are somewhere between 200,000 and 700,000 won when compared to that of their counterparts in more advanced countries.

Samsung Group claims that its leader, Lee Kun-hee, has contributed personal property worth 2.8 trillion won (based on an estimated price of 700,000 won per stock at the time of the listing times 4 million stocks) as a way of bearing his part of the liability concerning Samsung Motor Company.³⁸ However, there is controversy over whether this calculation is reasonable. Various appraising institutions and criteria can affect the estimated stock price. Unlike other manufacturers, in the case of life insurance companies, the net asset value per stock (net asset value divided by the number of stocks issued) is ordinarily regarded as the approximately proper stock price. Samsung Securities reached a price of 280,960 won per share by estimating the net asset value of Samsung Life Insurance at 5.2 trillion won and dividing that amount by 18.72 million stocks. The company

37. 100 billion won for Samsung Life Insurance and 68.6 billion for Kyobo Life.

38. See YONHAP NEWS, *supra* note 2.

then used a multiplier of 2.5 (stock price/net asset value per stock) to reach what it assumed was the proper stock price, 702,400 won ($2.5 * 280,960$ won/share). According to this estimate, the total stock price of Samsung Life Insurance comes to 13.1489 trillion won. (Samsung Securities based its multiplier of 2.5 upon the multipliers of 2 for listed blue-chip banks in Korea, 1.82 for the listed Samsung Fire Insurance Co., and 1.2-4.1 for United States life insurance companies.)³⁹

Table 3 is an estimate of stock prices made by the Hanjin Investment & Securities Co.

Table 3. Estimate of Stock Prices

(Unit: won)

	Total Assets	Capital Amount	Premium Received	Current Period Net Profit	Market Share (%)	Expected Stock Price
Samsung	36.376 trillion	100 billion	16.4415 trillion	95.6 billion	35.4	At least 700,000
Kyobo	20.676 trillion	68.6 billion	8.9426 trillion	51.2 billion	19.3	At least 500,000
Heungguk	3.403 trillion	8 billion	1.3837 trillion	2.6 billion	3.0	At least 250,000
Jeil	3.827 trillion	3.8 billion	1.6610 trillion	2.2 billion	3.6	At least 300,000

Were such estimates made on a reasonable basis? Some experts say that the net asset value per stock was highly overestimated, as these estimates did not exclude the equity share for the subscribers.⁴⁰ In other words, in the Samsung Insurance case, the entire amount of the revaluation surplus was calculated as the capital share. The Insurance Supervision Regulation stipulates that "in the allocation of revaluation surplus of an insurance company, the shareholders' portion shall be less than 15% and the remainder shall be entered as liability."⁴¹ In the process of calculating the stock price for Samsung Life Insurance, the surplus reserve for termination of contracts or unrealized asset profits was regarded as belonging to the shareholders, even though the regulation stipulates that more than 85% of the revaluation surplus shall be allocated to the subscribers. When the subscribers' share is

39. SAMSUNG SECURITIES INTERNAL REPORT (1999) (S. Korea).

40. KOREAN INSURANCE ACADEMIC SOCIETY, *supra* note 11.

41. Insurance Supervision Regulation (S. Korea), art. 81.

excluded, the net asset value comes to less than 5.2 trillion won, lowering the net asset value per stock to somewhere near 100,000 won. With the 2.5 multiplier, the net value per stock of Samsung Life Insurance comes to 250,000 won.

It clearly does not stand to reason to regard the entire equity share of the subscribers as belonging to the shareholders in the calculation of the net asset value when the nation's life insurance companies depend on participating policies as their core product, unlike liability insurance companies or foreign life insurance companies whose core policies do not pay dividends. The net profits belonging to the shareholders should be the residual profits calculated by deducting subscriber dividends from the total surplus from the life insurance business. The stock price of an insurance company when it goes public should reflect only the shareholders' portion of the combined figure of the net asset value, calculated by deducting the liability due to subscribers from total assets plus the shareholders' portion from future profits. One independent estimate of the net asset value per stock by the Korean Financial Research Institute placed Samsung at 38,499 won and Kyobo at 42,536 won.⁴² This figure is quite different from Samsung Life Insurance's own estimate, 280,960 won, which was used as the basis for the 700,000 won stock price.

*D. Legal Interpretation about How to Allocate Profit from Listing*⁴³

1. Degree of Contribution After Listing

The argument for allocating a share of the listing profits to subscribers is based on the need to consider the degree to which subscribers have contributed. There are two methods of making such an allocation. The first is to allocate the capital gains profit after the listing, which is the preferred position of many subscriber-allocation proponents. However, this is in violation of the Commercial Law. As long as life insurance companies in Korea take the corporate form, there exists a legal difference between shareholders and subscribers. A subscriber, being subject to the Insurance Contract Act and Insurance Contract Clauses, has the legal status of a creditor in relation to the insurance company. A subscriber pays a premium in advance in return for the pledge that the insurer will pay out the amount

42. CHOI, *supra* note 1, at 96.

43. See generally Kim Jung-Dong, *Allocation of Life Insurance Company's Profit from Listing*, THE INSURANCE NEWS, August 30, 1999 (S. Korea); Kim Hyung-Gi, *How to Allocate Profit from Listing of Life Insurance Company*, THE INSURANCE NEWS, September 6, 1999 (S. Korea).

stipulated in the contract in case of an accident. Accordingly, a subscriber to a life insurance corporation maintains the status of a creditor who has lent funds to the corporation.⁴⁴ In short, as a creditor rather than an investor, the subscriber has no right to share in capital gains. He can only claim his right to the insurance money stipulated in the contract in case of an accident.

Shareholders, on the other hand, are investors in the insurance corporation. As components of a corporation, they are subject to the Corporation Law and the Articles of Association under the Korean Commercial Code. According to the basic principle of the corporate law, the results of investment should only belong to the investors. Since an investor exposes himself to the benefits of gains or the danger of losses from the investment, the profit from the listing of a life insurance company that is a result of investment should belong to the shareholders.⁴⁵ Thus, the shareholder's rights in relation to the company come from fulfilling the duty of investment. The shareholder's right is divided into the right to receive economic profits from the company and the right to secure such benefits. The right to receive economic profits is divided again into the right to receive profits from investment and the right to withdraw the investment. Examples of the right to receive profits from investment include the right to dividends,⁴⁶ the right to interest in certain cases,⁴⁷ and a default right to new stock.⁴⁸ A typical example of the right to withdraw the investment is the right to a liquidation preference.⁴⁹ Such rights of the shareholder show that profits and losses resulting from managerial performance belong completely to the shareholders as investors in the company in accordance with the corporate law and the relevant articles of association.

The argument for a subscriber share in the listing profit conflicts with the shareholders' default right to new stock. A corporation can issue stock remaining unissued within the scope of the total number of shares authorized by the board of directors for its funds. This is called issuance of new stock.⁵⁰ The default right to new stock in this case means the right to purchase the new stock in preference over others. A special provision in the Commercial Law intended to protect shareholders clearly stipulates that the

44. See, e.g., Kim Kyung-Hyun, *Relation between Life Insurance Company and Subscriber*, 36th COLLECTED PAPERS OF THE KOREAN INSURANCE ACADEMIC SOCIETY, 89-107 (1990) (S. Korea); Kim Sung-Jae, *A Theoretical Study of Allocation of Dividend among Subscribers*, 33rd COLLECTED PAPERS OF THE KOREAN INSURANCE ACADEMIC SOCIETY, 151 (1989) (S. Korea).

45. Commercial Law (S. Korea), art. 331.

46. *Id.*, art. 462.

47. *Id.*, art. 463.

48. *Id.*, art. 418.

49. *Id.*, art. 538.

50. *Id.*, art. 416.

preemptive right to new stock belongs in principle to shareholders.⁵¹ The purpose of this stipulation is to give as much power as possible to the board of directors in the issuance of new stock and to prevent the board of directors from arbitrarily giving the default right to newly issued stock to those other than the existing shareholders. A special stipulation in the relevant articles of incorporation can allow the board of directors to give the default right to new stock to persons other than the existing shareholders.⁵² In sum, the Commercial Law emphasizes that the default right to new stock is an important right for a shareholder, though there are exceptions provided. Furthermore, the default right to new stock is an inherent right of a shareholder stipulated by the law, not a right arising from a resolution of the board of directors or the relevant articles of incorporation.

Accordingly, the argument for a subscriber share in the profit from the listing constitutes a breach of the shareholders' default right to new stock specially guaranteed by the Commercial Law and may only be permitted within the legal limit through stipulation in the articles of incorporation or agreement of all the shareholders. This difference in the status of shareholders and subscribers was demonstrated when some life insurance companies were closed down during the government-led restructuring of the industry. The subscribers were protected by being allowed to transfer their existing contracts to other insurance companies, whereas the shareholders were not.⁵³ The subscribers were also guaranteed to receive the full amount of insurance money in case of an accident even if the company suffered a loss.

For the government or the press to force a corporation to allocate the profit from the listing to those other than the shareholders or to use it for the public good without any legal basis to support their view may cause serious problems under the rule of law and capitalism. Nor is it legal under the existing law to force a new obligation not stipulated by the law upon the shareholders of the life insurance companies. There has been no precedent, even in more advanced countries, of allocating the profit from the listing to the subscribers when a life insurance corporation goes public. When Hartford (of the United States) went public in 1997 after years of selling participating policies with considerable conditions in the form of a

51. *Supra* note 48.

52. *Id.*; Securities and Exchange Act, art. 189-3 and 191-7.

53. As a result of the restructuring of the life insurance companies, Kukje, BYC, Taiyang, and Koryo closed their doors. Official public funds were put into Korea Life Insurance. Liquidation is underway for Pacific, Chosun, Handuk, Doowon, and Donga, all of which were judged to be non-performing. See YONHAP NEWS, December 29, 1999.

corporation, it allocated the entire profit from the listing to the shareholders.⁵⁴

2. Degree of Contribution Before Listing

The second method of allocating profits from the listing to subscribers is to allocate the net asset value of the company to the subscribers before the listing on the pre-agreed ratio. With a pre-listing allocation of the net asset value, the profit from the listing, which is an objective evaluation of the post-listing asset value, belongs solely to the shareholders. The listing of a corporation on the stock market is just in consideration of the share of the shareholders, and the stock price of the life insurance company reflects only the share of the shareholders after the liabilities for the subscribers have been deducted from the total assets. With the pre-listing allocation to the subscribers completed, the post-listing valuation excess of the assets minus the share for the subscribers should naturally belong to the shareholders. This interpretation is in agreement with the Commercial Law.

Under the current system, the nation's life insurance companies allocate the ordinary profit from the sale of policies and the revaluation excess to the subscribers and shareholders at a proper ratio. That is the extent of insurance companies' responsibility to their subscribers. Legally, therefore, all the profit from the listing should go to the shareholders. Thus, it is against both the law and the principle of legality for the shareholders to bear more burdens than their intrinsic obligations require.

It is true that the nation's life insurance corporations have never allocated proper dividends in selling participating insurance. Before 1990, the entire profit of a life insurance company was entered as retained earnings that amounted to tens of trillions of won that was not allocated to the subscribers. Now the subscribers have come to claim their rights for a share in the profits from the listing. However, responsibility for the financing practices of that period should be laid at the feet of the government or relevant supervisory institutions, as they undoubtedly neglected their duty of supervision as the entities in control of the life insurance companies. The main concern of the government at that time was the quantitative expansion of the insurance companies, rather than protection of the rights of the insurance subscribers. This emphasis led to the growth of the Korean life insurance market into the sixth largest in the

54. Also in the case of Nationwide (U.S.), all the profits from listing were allocated to the shareholders. See CHOI, *supra* note 1, at 78.

world. Under the principle of legalism, the failure to allocate proper dividends for policyholders in the past should be settled with the help of the Insurance Business Act or other relevant regulations, rather than through a linkage to the matter of rightful ownership of the profits from the listing. Also, the charge that the shareholders of life insurance corporations have neglected to increase the capital with consideration can be countered with the fact that there was little need to increase of the capital with consideration under the government-controlled system. Thus, such insistence can be said to be ill-grounded.

As mentioned above, the insistence upon returning a certain portion of the post-listing capital gains to subscribers is based on the fact that the nation's life insurance corporations have sold participating insurance with little increase in the capital with consideration, in a manner similar to mutual companies. Thus, the subscriber proponents insist that the listing of a life insurance company should be basically regarded as a matter of converting from a mutual company to a corporation. However, as far as legal theory is concerned, the ownership of the marginal profits that come with the listing should be decided on the basis of whether the company is a corporation or a mutual company, rather than by such factors as the company's method of management or the kinds of policies the company has sold.

To repeat, there is no legal ground, nor has there been any precedent, that can justify the insistence that the marginal profits should also be allocated to the subscribers on the ground that the incorporated companies' management methods resemble those of mutual companies. A corporation cannot be a mutual company just because it sells participating insurance. A corporation may focus on sales of participating insurance, or a mutual company may focus on sales of nonparticipating policies. What to sell as an insurance company is a matter of a company's management policy. Decisions on the types of core products offered should be made by the relevant companies' policies.

In a sense, most life insurance commodities are types of participating policies. Life insurance corporations in the U.S. deal in dividend-paying policies such as variable amount insurance or pensions where insurance money or premium amounts vary depending on managerial performance and interest rates. Insurance corporations in Taiwan deal in participating policies, as their counterparts do in Korea. Life insurance companies' commodities are long-term contractual policies, unlike non-life insurance commodities, and thus it is impossible to accurately predict the interest rates at the time of sale. This being the case, they apply affordable

premium rates in preparation against the uncertainties in management, and naturally participating policies, which allocate a portion of the profit to the subscribers, have a higher weight in sales.

V. CONCLUSION

Samsung Life Insurance and Kyobo Life Insurance will have to go through the asset revaluation procedure again immediately before their listing, in which case they will have to return a proper portion to the subscribers, based on Korea's "Insurance Supervision Regulation."⁵⁵ There could possibly be a renewed debate for revision of the proper ratio of allocation of the revaluation profits. Some have said that the shareholders' portion, 15% of the entire marginal profits, is too much and more than 90% should be returned to the subscribers. The position of the Korea Institute of Finance (KIF), in particular, is that the rightful share of the shareholders in the profits of a life insurance company should be no more than 5%.⁵⁶ However, the standard of giving 10 to 15% to the shareholders as their equity share depending on a company's "payment surplus capability," which has been accepted by the nation's life insurance companies, appears to be reasonable because a company's financial stability has to be given priority when considering the disposition of the allocable revaluation profits. An allocation rate of 15% for the shareholders can serve as an incentive for a life insurance company that has performed well, selling participating policies that increase the profit for the subscribers. This eventually results in a higher profit for the subscribers. KIF bases its position on the law of the state of New York, but it seems problematic to apply the law of New York, which is centered on mutual life insurance companies, in Korea.

Subscriber dividends are intrinsically different from those of the shareholders. Generally, subscriber dividends are regarded as a return to the subscribers of overpaid insurance premiums. Because the contracts entered into by the company are generally long term, the need to operate the company with a safe margin will result in a difference between the

55. Insurance Supervision Regulation (S. Korea), art. 74-81, as of Spring 2000.

56. The Korea Institute of Finance (KIF) is of the opinion that, according to the theories of Belth, the rightful share in the profit should be larger for the subscribers by a factor of 4.8: 95.2 in the case of Samsung Life Insurance. Belth, *supra* note 6. Belth set out five theories on the allocation of profits between the shareholders and the subscribers: 1) that the subscribers can claim right to the profit that had deducted all insurance money and dividend for the subscribers, 2) that the shareholders can share the profit with the subscribers, 3) that the shareholders can claim interests on their money invested, 4) that the shareholders can claim the right for results of management, and 5) that the shareholders have no right for the profit from commodities cum dividend. KIF's position is based on the foregoing 3) and 4).

estimated and accurate actual amount of insurance premiums. This difference should be returned to the subscribers. Korean Supreme Court precedent indicates that an allocation by a life insurance corporation to subscribers of the revaluation reserve that comes with the asset revaluation is an act of subsequent settlement of insurance premiums.⁵⁷ In contrast, stock dividends are the shareholders' right, to have a part of the profit returned to those who invested for profit. The argument that a portion of the stock should be allocated to the subscribers may deprive the shareholders of their legally intrinsic right, i.e. the default right to new stock as stipulated by the Commercial Law. Accordingly, it is not right to attempt to make the shareholders give up their right to new stock unless all of the shareholders agree to it.⁵⁸ Therefore, the view that a portion of the stock should be allocated to the subscribers after the listing is legally unpersuasive.

The value of the stock of a company belongs to the shareholders, who are its owners. This fact is basically guaranteed under capitalism and the rule of law. The purpose of listing a corporation on the stock exchange is to enable the life insurance companies that meet the legal requirements to trade their stock in the market. Legal principles should be the decisive aspect for this debate and matters of morality or people's emotions should be left to the individual life insurance companies' own decisions. This is the only choice and proper interpretation in a society which is governed by capitalism and the rule of law. A decision made under pressure from the government or public opinion will not help the development of capitalism, the rule of law, or the Korean stock market. Even if the method suggested here does not provide an a fully satisfactory answer to the problems raised by the sales of participating insurance in the past without allocation of subscriber dividends or a method of calculating their asset value, it seems to be the only possible choice. If the Korean Financial Supervisory Commission tries to forcefully settle the matter based solely on the public clamor, it is highly possible that the shareholders whose property rights guaranteed under the Constitution or the Commercial Law are infringed upon will file lawsuit after lawsuit, further complicating the situation. The Court has already blocked one action by the Korean Financial Supervisory Commission to artificially prohibit Daehan Life Insurance Co., which was designated as a bad-performing life insurance company by the Korean government, from issuing new stock.⁵⁹ In this case, the court accepted the organizational characteristics of Daehan Life Insurance as a corporation.

57. See 96 Nu 10119, Supreme Court (S. Korea), July 25, 1997.

58. See *supra*, note 48.

59. See YONHAP NEWS, August 28, 1999 (S. Korea).

The opportunity of listing the life insurance companies should not be missed this time. The argument for a subscriber share, paid in stocks, in the profit from the listing lacks a legal basis and has no precedent even in more advanced countries. The Korean government should be wise enough to take advantage of the precious chance to carry out the listing of life insurance companies and to make them go public.