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performance impossible.¹⁵ Finding this contract to be unfair and manifestly one-sided, the court denied relief.

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THE INCONTESTABILITY CLAUSE IN LIFE INSURANCE POLICIES

A thorough search of the law digests will reveal only two West Virginia decisions¹ on the law of incontestability clauses in life insurance policies,² those having been decided but recently and on a single phase of the subject. It is therefore obvious that a discussion which attempts to consider the West Virginia law on this topic will be hopefully prophetic rather than critical.

A typical incontestable clause reads:

Incontestability. — This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Double Indemnity and Disability Benefits.³

Such clauses, peculiar to life insurance policies, are of recent origin.⁴ Prior to their adoption, it frequently happened that the insured, after paying premiums for many years, was found to have left nothing to his beneficiaries but a disputed claim — the dispute too often being fraudulent. As a consequence, insurance began to lose favor in the eyes of the purchasing public. To induce future business,⁵ the companies began to write into their contracts a promise that they would not dispute the claim after a period of time. This developed into the incontestable clause as we know it today — a private period of limitations between the company and the insured.⁶

¹⁵ *Accord*: *Starcher v. Duty*, 61 W. Va. 373, 56 S. E. 524, 9 L. R. A. (N. S.) 913, 123 Am. St. Rep. 990 (1907); *Hartigan v. Hartigan*, 58 W. Va. 610, 52 S. E. 720 (1906).

¹ *Morris v. Mo. State Life Ins. Co.*, 114 W. Va. 278, 171 S. E. 740 (1933); *Young v. Home Life Ins. Co.*, 114 W. Va. 716, 173 S. E. 566 (1933).

² This statement is verified in a marginal note to *Equitable Life etc. Society v. Deem*, 91 F. (2d) 569, 571 (C. C. A. 4th, 1937).

³ Policy of New York Life Insurance Company.

⁴ *COOKE, LIFE INSURANCE* (1891) 232 refers to the clause only by a brief footnote.

⁵ See *Wright v. Mutual Benefit etc. Co.*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731 (1890), the earliest case interpreting the clause.

⁶ *Mutual Life etc. Co. v. Margolis*, 11 Cal. App. (2d) 382, 53 P. (2d) 1017 (1936).

The provision proved so desirable that many states began requiring the inclusion of such a clause in all policies. A search in 1932⁷ revealed twenty-five states with such statutes, including New York, Massachusetts, Virginia, and other states generally looked to with respect by the West Virginia courts. West Virginia has no such statute. However, it has become so commonplace for policies to include this provision, and competition between companies so requires its inclusion, that these statutes probably have very little effect.

If we look to the intended function of the clause — to prevent the company from contesting the policy years after the grounds for defense occurred, often after the insured is dead and the evidence for him become vague or lost altogether — then it would seem that many courts have taken an incorrect view in interpreting the clause. Clearly it is intended to bar “inceptional defenses” — those which arose during the application period, based on some misrepresentation or fraud by the applicant.⁸ But consider other defenses which have been held to be barred by the clause. A policy is issued which provides that if the insured should die in consequence of his violation of the law, the policy should be void. Years later, the insured is killed while attempting to commit robbery. The court holds⁹ that the incontestability clause bars a defense showing the cause of death. If that defense was not intended to be reserved, why was the provision against such risk ever put into the policy — surely not just for the year or two during the contestable period. Why should an insurance company make the violation of a condition render the policy void, and in the next breath, declare that it will not contest the policy even though it is void? However, so eminent a jurist as Judge (now, Mr. Justice) Cardozo has said that the incontestable clause means that “the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter *became invalid by reason of a con-*

⁷ See Note (1932) 11 N. C. L. Rev. 92, note 6.

⁸ *Morris v. Mo. State Life Ins. Co.*; *Young v. Home Life Ins. Co.*, both *supra* n. 1. In these cases the defenses were set up against recovery of disability benefits which were not excepted in the incontestability clause. *Held*, that the clause applied, in absence of exception, with equal force to these separate special benefits under the policy and barred the defense after the contest period.

⁹ *Sun Life Ins. Co. v. Taylor*, 108 Ky. 408, 56 S. E. 668 (1900).

dition broken."¹⁰ A policy provides that "self-destruction, sane or insane, within one year from the date of this policy is a risk not assumed by the company under this policy." The court holds¹¹ that the company cannot show, after the contest period, that insured committed suicide within a year of the policy's issuance. It is submitted that the parties to the contract did not intend these defenses to be barred and that there are no reasons for giving such effect to the incontestable clause.

One court has held¹² that the passage of the contest period denied the company the right to show that insured had no insurable interest, thus assisting in the enforcement of what is commonly deemed a wagering contract. Fortunately most courts will not go so far.¹³ Though many courts state broadly that the insurer is precluded from contesting the policy after the period on any ground not specifically excepted in the clause,¹⁴ it is doubtful whether they would bar the defense of lack of insurable interest.

There is only one satisfactory reason to explain why conditions set out in the policy as rendering it void, or statements as to risks not assumed by the company should be ignored by the courts. This rests on the common law principle, *Expressio unius est exclusio alterius*. When a clause reads, "This policy shall be incontestable after two years from its date of issue *except for non-payment of premiums*", it may well be argued that if the company really intended to give up its privilege to contest the inceptual defenses only, why did it except "non-payment of premiums" and not any other defense? However, all courts hold that the defense of nonpayment of premiums survives the contest period¹⁵ even though the defense is not excepted in the incontestable clause.¹⁶

Since a defense based on insured's fraud in the procurement of the policy is cut off by the expiration of the contest period, the court will not allow the effect of this to be defeated by indirection.

¹⁰ In *Matter of Metropolitan Life Ins. Co. v. Conway*, 252 N. Y. 449, 169 N. E. 642 (1930) (italics supplied).

¹¹ *Standard Life Ins. Co. v. Robbs*, 177 Ark. 275, 6 S. W. (2d) 520 (1928).

¹² *Wright v. Mutual Benefit etc. Co.*, 118 N. Y. 237, 23 N. E. 186 (1890).

¹³ *E. g.*, *Dakota Life Ins. Co. v. Midland Nat. Bank*, 18 F. (2d) 903 (C. C. A. 8th, 1927); *Bromley v. Washington Life Ins. Co.*, 122 Ky. 402, 92 S. E. 17 (1906); *Wharton v. Home Sec. Life Ins. Co.*, 206 N. C. 254, 173 S. E. 338 (1934).

¹⁴ 37 C. J. 542, note 76, citing fifteen states as so holding.

¹⁵ See *Corley v. Atlantic Life Ins. Co.*, 179 S. C. 95, 183 S. E. 596 (1936).

¹⁶ *Lee v. Southern Life etc. Co.*, 19 Ala. App. 535, 98 So. 696 (1924); *semble Pope v. N. Y. Life Ins. Co.*, 192 Mo. App. 383, 181 S. W. 1047 (1916).

Thus, the company may not sue insured in an action for deceit to recover back what it paid out under the policy which it was unable to contest.¹⁷

The "contest" contemplated in the clause must be by or in judicial proceedings — in equity to cancel the policy,¹⁸ or by plea or answer to an action on the policy.¹⁹ In the latter cases, the company may avail itself of all defenses only if its plea or answer is filed within the contest period.²⁰ However, a suit for reformation on grounds that the wrong policy was issued due to mutual mistake of fact is held not to be a contest²¹ and can therefore be brought by the company after the period has passed. Since such proceedings may be brought years after the insured has lost all his evidence, it would seem more proper that the incontestability clause should bar such action by the company, for the validity of the policy is being brought into question.

State and federal courts have reached widely varied and irreconcilable results in attempting to construe incontestable clauses which except double indemnity and disability benefits from their operation. Obviously the companies intend to retain the right of contesting recovery of these special benefits on some grounds, but just what do they mean?

There are several conceivable defenses which the company could use against recovery of special benefits. The grounds for double indemnity or disability may have been caused by a risk not assumed by the company. Thus, if the policy states, ". . . such Double Indemnity Benefit shall not be payable if the Insured's death resulted, directly or indirectly from (a) self destruction, whether sane or insane . . .,"²² it would seem that the defense that insured committed suicide should be available at any time, regardless of the expiration of the contest period. Then there are those defenses arising at the inception of the policy, when the insurance was applied for, on the ground of negligent or fraudulent misrepresentations. Clearly these latter defenses are not available to the

¹⁷ *Columbian Nat. Life Ins. Co. v. Wallerstein*, 91 F. (2d) 351 (C. C. A. 7th, 1937).

¹⁸ *Peake v. Lincoln Nat. Life Ins. Co.*, 15 F. (2d) 303 (C. C. A. 8th, 1926).

¹⁹ *Chun Ngit Ngan v. Prudential Ins. Co.*, 9 F. (2d) 340 (C. C. A. 9th, 1925).

²⁰ *N. Y. Life Ins. Co. v. Hurt*, 35 F. (2d) 92 (C. C. A. 8th, 1929).

²¹ *Columbian Nat. Life Ins. Co. v. Black*, 35 F. (2d) 571 (C. C. A. 10th, 1929).

²² Policy of New York Life Insurance Company which lists eight other conditions which will defeat payment of double indemnity.

company in an action for the face value of the policy after the period of contestability; but are they also barred if the insured seeks to enforce the special benefits under the policy? The answer is made to depend on the wording of the excepting phrase.

The Federal Circuit Court of Appeals for the fourth circuit in a recent case²³ distinguished between those phrases worded "except as to *provisions* relating to Disability and Double Indemnity" and those which except "provisions and conditions" or "restrictions and provisions", and thus reconciled cases which seemed to conflict. Basing its views on the rules of construction in insurance cases — that if an expression in the policy is clear and unambiguous it must be understood in its plain, ordinary, and popular sense, but if it is ambiguous it must be construed in the way most favorable to the insured — the court held that "provisions", by itself, was unambiguous and so excepted the special benefits from the incontestable clause altogether.²⁴ Therefore, in that case the company was allowed to show fraud in the procurement of the policy as a defense to the action. To be distinguished from this, the court said, were those cases involving policies which excepted "provisions and conditions"²⁵ or "restrictions and provisions".²⁶ Believing that the repetition created an ambiguity, the doubt was resolved in favor of the insured, effect was given to only the narrower word in each case, and inceptional defenses were held to be barred.

Not until 1937 did the United States Supreme Court grant a writ of *certiorari* in one of these cases,²⁷ when it held that an incontestable clause excepting "restrictions and provisions applying to Double Indemnity and Disability Benefits . . . as provided in sections one and three respectively . . ." did not save for the insurer defenses arising in the inception of the policy. Thus it

²³ *Equitable Life etc. Society v. Deem*, 91 F. (2d) 569 (C. C. A. 4th, 1937).

²⁴ *Accord*: *Smith v. Equitable Life etc. Society*, 169 Tenn. 477, 89 S. W. (2d) 165 (1936); *Greber v. Equitable Life etc. Society*, 43 Ariz. 1, 28 P. (2d) 817 (1934); *Guardian Life Ins. Co. v. Katz*, 243 App. Div. 11, 275 N. Y. S. 743 (1934).

²⁵ *N. Y. Life Ins. Co. v. Truesdale*, 79 F. (2d) 481 (C. C. A. 4th, 1935); *N. Y. Life Ins. Co. v. Yerys*, 80 F. (2d) 264 (C. C. A. 4th, 1935); *N. Y. Life Ins. Co. v. Kaufman*, 78 F. (2d) 398 (C. C. A. 9th, 1935); *Horwitz v. N. Y. Life Ins. Co.*, 80 F. (2d) 295 (C. C. A. 9th, 1935); *Thompson v. N. Y. Life Ins. Co.*, 9 F. Supp. 248 (E. D. Okla., 1935). *Contra*: *Pyramid Life Ins. Co. v. Selkirk*, 80 F. (2d) 553 (C. C. A. 5th, 1936).

²⁶ *Mutual Life Ins. Co. v. Margolis*, 11 Cal. App. (2d) 382, 53 P. (2d) 1017 (1936); *Mutual Life Ins. Co. v. Markowitz*, 78 F. (2d) 396 (C. C. A. 9th, 1935); *Ness v. Mutual Life Ins. Co.*, 70 F. (2d) 59 (C. C. A. 4th, 1934).

²⁷ *Stroehmann v. Mutual Life Ins. Co.*, 300 U. S. 435, 57 S. Ct. 607, 81 L. Ed. 732 (1937).

seems the law is now settled on that question, and the company cannot avail itself of inceptional defenses unless it makes its exceptions more specific than did the clause in that case.²⁸ Excepting "provisions" and leaving off the other word would seem sufficient to do this.

Fortunately it may be reported, in conclusion, that a new attitude toward incontestable clauses seems to be arising, with a proper protection of the insurer's rights. This position is adopted by the United States Supreme Court in declaring,²⁹ "To make a contract incontestable after the lapse of a brief time is to confer upon its holder extraordinary privileges. We must be on our guard against turning them into weapons of oppression."

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²⁸ But see Connecticut Gen. Life Ins. Co. v. McClellan, 94 F. (2d) 445 (C. C. A. 6th, 1938) in which the court decides that an exception of "provisions and conditions" is unambiguous so as to except disability benefits altogether. Therefore the court allows the company to cancel the disability provision on grounds of inceptional fraud, after the contest period has passed. The court attempts to distinguish the Supreme Court case, cited *supra* in note 27, because of the different wording of the exceptions.

²⁹ American Life Ins. Co. v. Stewart, 300 U. S. 203, 57 S. Ct. 377, 81 L. Ed. 605 (1937).