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Recommended Citation
Sidney A. Simon, The Effect of Conditions Precedent in Insurance Policies, 44 Dick. L. REV. 77 (1940). Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol44/iss2/3

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THE EFFECT OF CONDITIONS PRECEDENT IN INSURANCE POLICIES

In insurance law, the courts and text writers have not infrequently stated that the term "warranty" is convertible with "condition." This is, however, an improper description. The distinction between a warranty and a condition is plain. A condition precedent requires the performance of an act, such as payment of the first premium, or the happening of an event, or the continuance of a physical condition after the terms of the contract have been determined and before the contract becomes effective. A condition precedent stands at the threshold of the making of the contract. It is one without the performance of which the contract, although in form executed by the parties and delivered, is prevented from becoming enforceable.1

1RICHARDS, LAW OF INSURANCE (1932) 168.
In those states where remedial statutes applying to warranties include conditions precedent as well, there is little difficulty. In the states, however, where the remedial statutes are silent as to conditions, it has been held that the statutes did not embrace conditions, but applied only to warranties. A contrary view has been adopted by some few courts, on the ground that the distinction between warranties and conditions precedent was purely technical. This view may be tenable on the grounds of the conclusion sought to be reached, which is to give substance to a declared policy of protection for the insured, but can have no other real foundation in law. Since our own jurisdiction, however, falls into line with the majority of the states, wherein the distinction is recognized, the existence of the problem is a reality, and must be considered and dealt with. A subordinate question may arise as to how far matters ordinarily the subject of warranties can be made the subject of conditions precedent to a contractual duty on the policy. Some courts have intimated that there might be such limits, but that problem is not ordinarily a basis for controversy, and so will not be dealt with here. Conceding that such limits might exist, the question still remains as to how to deal with the situation as existing within those limits.

**Sound-Health Clauses**

Policies of life insurance often provide that they shall not become effective unless delivered during the continued good health of the insured. Between the date of the application and the delivery of the policy the insured may be taken ill or suffer an accident. Is it his duty to take the initiative in disclosing such fact to the insurer? If a serious condition as to the state of his health develops, such as the necessity for a major operation, a failure to disclose this situation prior to the delivery of the policy would avoid the policy. This result would follow, regardless of statutes which make the policy and the documents attached thereto the entire contract between the parties.

It has been stated that health is a relative term, for probably no one is altogether free from ailments, and therefore no general definition of sound health can be given which would accurately apply to all cases. Each must be determined on its own particular circumstances.

It would appear from the cases that in life insurance "sound health" means that state of health which is free from any disease or ailment that seriously affects the general healthfulness of the system; not a mere indisposition. A federal judge reviews many authorities on the subject and has this to say:

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5Act of May 11, 1881, P. L. 20; made optional by Act of 1921, P. L. 682, § 410 (d), 40 PURD. STATS. (Pa.) § 510.
"What is to be understood by a serious illness? If any sickness which may terminate in death, then it must embrace almost every distemper in the entire catalogue of diseases. To give such an interpretation to this expression, would, we have no doubt, defeat a recovery in a large majority of such certificates issued. The true construction of the language must be that the applicant has never been so seriously ill as to permanently impair his constitution and render the risk unusually hazardous."

If, however, after applying to the language of the contract a liberal rule of construction in favor of the assured, the court perceives that a condition of sound health has been broken, the action of the beneficiary upon the policy must be dismissed.

THE PENNSYLVANIA ATTITUDE ON SOUND HEALTH CLAUSES

As stated before, the Pennsylvania courts have always recognized the validity of the so-called "sound health clauses." In the leading case of Panopoulos v. Metropolitan Life Insurance Co., the policy contained a clause stating that it was issued subject to conditions stated—one of which was a provision that the applicant had not been attended by a physician or suffered a named disease within two years, and if that were untrue, the company could avoid the policy. The court said: "This case does not involve the question of the truth or falsity of a warranty as to some matter material to the risk made in the policy. Under this policy the application, if one there was, is not made part of the contract, but the company protected itself by the provision that the policy constitutes the entire agreement between it and the insured. It must be held to have meant what it said."

Previous to this, in Hood v. Prudential, the court had said: "the object of the Act of 1881 was to relieve policyholders from warranties contained in their application, unless said application was attached to the policy, but it has not been held, as far as we know, that the fact of whether the insured was in sound health or not could not be proved outside the application. It probably would not be proper to show the contents of the paper. Certainly not, if the insured or his representatives were to be bound by anything contained in the paper from the effects of which he is relieved by the act of assembly, but substantive facts not connected with the representations contained in the application may undoubtedly be proved by competent testimony outside the application. The question here is not whether the legal representative of the insured is bound by the answers contained in the application, but was he in good health as a matter of fact?"

Although the Act of 1881 was repealed by the Act of 1921, a similar provision, even more inclusive, is contained in the latter. It provides that "No

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8a22 Pa. Super. 244 (1903).
10Act of 1921 P. L. 682, Art. 4, Sec. 410 (d), 40 PURD. STATS. (Pa.) § 510.
policy of life or endowment insurance, except industrial insurance, shall be issued in this Commonwealth unless it contains in substance the following provision:

(d) a provision that the policy shall constitute the entire contract between the parties; but if the company desires to make the application a part of the contract it may do so, provided a copy of such application shall be endorsed upon or attached to the policy when issued and in such case the policy shall contain a provision that the policy and the application therefor shall constitute the entire contract between the parties."

This act was amended in 1937 to include "industrial insurance."\(^{11}\)

Probably the first case which recognized the validity and efficacy of a sound health clause as a condition precedent was that of Connell v. Life Insurance Co.,\(^{12}\) wherein the court said: "there is a difference between obtaining a contract through a misrepresentation as to a fact, and making the existence of that fact a condition upon which the contract, by its written terms, is dependent." In that case the policy provided: "This policy is void if the insured, before its date has been rejected for insurance by themselves or any other company, or has been attended by a physician for any serious disease or complaint." Referring to this language, Judge Porter said: "These were unequivocal, absolute covenants. Whether the policy was void was dependent upon actual conditions, past or present, and not upon the knowledge of those conditions possessed by the parties. The Act of 1885\(^{13}\) relates to warranties in the application for life insurance policies and has no application to the express covenants of the policy itself, not directly dependent upon such warranties."

The problem, as discussed in this case, and the decision as handed down, is carried forth essentially in our present-day state of the law, untouched by statute, and uncontroverted by a different holding in any subsequent case. A reiteration of the main principle is aptly worded in Youngblood v. Prudential Life Insurance Co.,\(^{14}\) where the court said: "The provision in this policy that 'This policy shall not take effect if the insured dies before the date hereof, or if on such date the insured be not in sound health . . . etc.' is a condition and not a covenant. It operates more strongly in favor of the company than even a covenant in the policy that answers to questions in the application shall be deemed warranties. It goes to the very heart or essence of the insurance contract."

**Effect of Incontestability Clause on a Condition**

An interesting question arises in this situation with reference to the effect of an "incontestability clause" upon the breach of a condition precedent. There have

\(^{11}\)Act of May 21, 1937 P. L. 769, 40 PURD. STATS. (Pa.) § 763.

\(^{12}\)16 Pa. Super. 520 (1901).

\(^{13}\)Act of June 23, 1885 P. L. 134, repealed by Act of June 1, 1911, P. L. 581, but re-enacted Act of May 21, 1937 P. L. 774, No. 210, 40 PURD. STATS. (Pa.) § 512.

been two opposing views advanced on this question, with, of course, conflicting results. One contention takes the view that such a clause precludes the defense of breach of a condition after the stated period of time. This view is seemingly taken by Judge Rice in *Central Trust Co. v. Fidelity Mutual Life Insurance Co.*, where, in discussing the effect of an incontestability clause, he said: "Its purpose is not to preclude inquiry into the truthfulness of the statements made in the application, but to fix a time within which such inquiry shall be made. This is unquestionably a matter concerning which the parties may contract, and such contracts have been upheld as reasonable and proper, and not against public policy." It should be noted, however, that this case concerned a representation, and not a condition. The case of *Lwawinska v. John Hancock Mutual Life Insurance Co.* is much more on point. The policy in this case contained a provision that the policy shall not take effect unless upon its date the insured shall be alive and in sound health, and the premium duly paid. The defense took the position that a condition precedent was not performed, so that the policy was never in effect. This would necessarily include the corollary argument that, since the incontestability clause was part of the contract, it also did not take effect and become binding. But the court held that there had been a recognition of the existence of the policy too long to repudiate the contract and disavow liability on the ground that statements in the application were untrue. The payment of the premium and delivery of the policy would not have been binding on the insured, if the questions of sound health, etc., were now disputable. Although apparently expounding the inviolability of an incontestability clause and allowing recovery on the policy, the case, it is felt, might be distinguishable on its facts. The court paid special attention to the fact that the policy had been in force and premiums accepted for a long period of time, thus suggesting that they might have proceeded on the theory that the company had waived the defense by so doing, notwithstanding the language used by the court.

The contrary, and perhaps the better, view was advanced by the late Justice Cardozo, in *Metropolitan Life Insurance Co. v. Conway*, wherein he stated: "The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years, is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid at its inception, or thereafter become invalid by reason of a condition broken." Thus, after a policy once goes into effect, it is immaterial if a condition subsequent is broken, but the non-fulfillment of a condition precedent prevents the contract from ever coming into effect and thus there is no incontestability clause to rely on. In *Lopardi v. John Hancock Mutual Life Insurance Co.*, 16

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1845 Pa. Super. 313 (1911).
17252 N. Y. 449, 169 N. E. 642 (1930).
18Italics added.
the court made this clear, holding that breach of a condition precedent precluded recovery, and expressly saying that this was so, notwithstanding the presence of an incontestability clause in the policy.

The Act of 1921,\textsuperscript{19a} does not change any holding on this matter, since that statute merely provides that every policy of insurance shall contain such an incontestability clause, making mandatory what had previously been a voluntary custom among reputable insurance companies.

**CONCLUSION**

A careful perusal and study of the cases and statutes dealing with the law of insurance will disclose one salient feature. There has been a very marked trend toward liberality in the construction of policies for the benefit of the insured, and a broad general policy of protection of the insured as against the insurance companies has permeated the field of legislative enactments on the subject. In view of the repeated expressions of this general policy, the silence on the subject of conditions precedent in policies is singular. The paucity of revolutionary decisions on this question might be explained on the ground that only a minority of the insurance companies have sought to avail themselves of this defensive weapon. But the law cannot always rely upon what has been done—it must also consider what may possibly be done under present restrictions.

The Act of 1935\textsuperscript{20} does not adequately cope with the problem, since that deals with estoppel after the medical report, whereas industrial insurance does not usually require an examination. That it was essaying a step in the right direction, by setting forth a partial restriction, is shown by a recent case construing the statute,\textsuperscript{21} wherein the court said: "The company, if it waives any health examination, has the right to protect itself by incorporating a condition (sound health clause) into the contract. If an examination is made and the company, either with knowledge of an illness of the applicant thereby disclosed or without discovery of a pathological condition which in fact existed, thereupon issues a policy, it should not be allowed to repudiate liability by reason of any defective status of the health of the insured at that time, in the absence of misrepresentations on his part. We conclude, therefore, that the sound health clause has no application to such diseases as the insured may have had up to the time of the medical examination, but that its legal scope must be restricted to mean only that the applicant did not contract any new disease impairing his health nor suffer any material change in his physical condition between the time of such examination and the date of the policy." It will be noted that the court expressly limits the decision to those cases where there has been a medical report. A more recent case has expressly upheld the validity of such a clause when contained in a policy of industrial

\textsuperscript{19a}See note 10, \textit{supra}.

\textsuperscript{20}Act of July 19, 1935 P. L. 1319, 40 PURD. STATS. (Pa.) § 511 A.

insurance." To make matters worse, companies specializing in such insurance are most likely to be the offenders by inserting conditions precedent in their policies.

The failure to include conditions precedent in the statutes reducing warranties to the plane of representations, except in cases of bad faith, would seem to be an oversight rather than a deliberate exclusion. This oversight should be remedied. Those few courts which have done so by a devious method of interpretation have taken a step in the right direction. But in the legislatures lies the opportunity for conclusively taking care of the problem, and, in view of the avowed policy of protection for policyholders, immediate legislation disposing of the problem is both advisable and necessary.

SIDNEY A. SIMON