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Incontestable Clause in Group Life Insurance Policies-Precluded Defenses

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INCONTESTABLE CLAUSES IN GROUP LIFE INSURANCE POLICIES—PRECLUDED DEFENSES

In *Simpson v. Phoenix Mut. Life Ins. Co.*,[1] a New York court held that an incontestable clause[2] in a group life insurance policy precludes the insurer from contesting liability by showing the insured was not covered by the policy. The reasons supporting the decision were not made clear. The court either chose not to follow the distinction followed by most jurisdictions between the effect of an incontestable clause on defenses of no coverage and defenses of invalidity; or, it considered other criteria for this distinction not recognized by the majority of jurisdictions.

This Note will analyze the different views concerning defenses barred by an incontestable clause and the distinction drawn between defenses of coverage and defenses of invalidity. A suggestion will then be offered to arrive at a concept of the effect of an incontestable clause acceptable to both individual and group life insurance policies.

Simpson was an action to recover benefits brought by the beneficiary of a group life insurance policy issued to her late husband. The policy contained a provision defining employees who qualified for the insurance. Decedent was at no time qualified under this definition. The policy also contained an incontestable clause[3] in accordance with section 161 of the Insurance Law of New York.[4] The insurance company refused payment, arguing that

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1. 291 N.Y.S.2d 532 (Sup. Ct. 1968).

2. After the death of the insured, it is often difficult for the surviving beneficiaries to produce competent testimony with which to defend charges brought for the first time by the insurer. Insurance companies, in an attempt to make their policies more attractive to the public, voluntarily included in their policies clauses prohibiting contests after the lapse of a specified time years before such clauses were required by statute. A few insurance companies refused to follow this trend; thus statutory regulation developed. Illinois, in 1907, was the first state to adopt such legislation, and today almost all states require the presence of a prescribed incontestable clause in all life insurance policies.

The wisdom behind this requirement has never been challenged, but the determination of what contests are barred by an incontestable clause is still a source of controversy. *See generally* Cooper, *Incontestable Life Insurance*, 19 ILL. L. REV. 226 (1924); 44 W. VA. L.Q. 390 (1938).

3. "INCONTESTIBILITY: The validity of this policy shall not be contested, except for nonpayment of premiums, after it has been in force for two years from the date of issue."

4. N.Y. INS. LAW § 161 (McKinney 1966). This section provides in part, as follows:

> 1. No policy of group life insurance shall be delivered or issued for delivery in this state unless it contains in substance the following provisions or provisions which in the opinion of the super-

decedent was never covered by the policy; plaintiff contended that this defense, arising more than two years after the issuance of the policy, was barred by the incontestable clause.

In holding for the plaintiff, the majority held: (a) that it is the legislative objective to obtain for policy holders the benefit of an incontestable clause favorable to them; (b) that the incontestable clause required by the legislature to be inserted in group life insurance policies is for the protection of individual certificate holders; (c) that the distinction between the effect of an incontestable clause on defenses of no coverage and defenses of the invalidity of the policy is not recognized in New York;[5] and (d) that this contest was not directed solely to coverage in that the validity of the policy as to decedent was also being contested.

The grounds of the dissenting opinion were: (a) that the decedent was never covered by the policy; (b) that the purpose of an incontestable clause is not to extend the risk or coverage of a policy; (c) that New York does recognize the distinction between the effect of an incontestable clause on defenses of no coverage and defenses directed toward the invalidity of the policy;[6] and (d) that this was solely a defense of no coverage.

Analysis of Applicable Decisions

There are at present two views as to the inclusiveness of an incontestable clause. The older view is that an insurer is barred by an incontestable clause from raising any defense not specifically

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intendent are more favorable to certificate holders, if any, or not less favorable to certificate holders and more favorable to policy holders.

(a) A provision that the policy shall be incontestable after two years from its date of issue, except for nonpayment of premiums by the policyholder and except for violation by the person insured of the conditions of the policy relating to military or naval service;

5. Eagon v. Union Labor Life Ins. Co., 2 App. Div. 2d 843, 156 N.Y.S. 2d 57 (1956), *aff'd*, 3 N.Y.2d 785, 143 N.E.2d 793, 164 N.Y.S.2d 37 (1957). The insured was represented as a union member to the insurer under a group life insurance policy which expressly limited coverage to union members and also contained an incontestable clause. The beneficiary recovered on the policy even though the insured had not been a union member.

6. *Id.* Where the decedent, a certificate holder of a group life insurance policy limited to union members, was not a union member, the incontestable clause barred the insurer from arguing that the decedent was never covered by the policy. The dissent felt that an incontestable clause does not bar a defense that a certificate holder is not a risk covered by the policy. *Eagon* was twice affirmed with no opinion. Since the dissent in *Eagon* was never mentioned, the *Simpson* dissent reasoned that the appellate courts affirmed the result only, leaving Metropolitan Life Ins. Co. v. Conway, note 24 *infra*, as the controlling New York decision on what defenses are barred by an incontestable clause. *Simpson* does little to clarify the law on this point since both *Eagon* and *Conway* were cited by the majority.

excepted.[7]

> The provision in a life insurance policy, making the contract incontestable after a stated period, means something more than that the insurer cannot then contest the validity of the policy on the ground of breach of a condition; it means that the company cannot then contest its obligation to pay, on due proof of the death of the insured, the amount stated on the face of the policy, except for a cause of defense that is plainly excepted from the provision making the policy incontestable.[8]

This view recognizes no distinction between a defense of invalidity and a defense of no coverage. If an incontestable clause excepts any defense, it is implied that no other defense is excluded from its effect.[9] All provisions and conditions may be contested before the incontestable clause takes effect, and all plainly excepted defenses may be contested at anytime.[10]

Under this view the primary purpose of an incontestable clause is to benefit the beneficiaries of insurance policies and thus any ambiguity as to the applicability of the clause should be interpreted in their favor.[11] Another reason for this position is that an incontestable clause enhances the value of a policy after the incontestable period has run by removing all but specifically excepted conditions. Policy holders are thereby encouraged to continue their premium payments during the contestable period. To allow an insurer to qualify this guarantee of the policy after the contestable period would be unfair to the public.[12] Furthermore, the legis-

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7. 1 J. APPLEMAN, INSURANCE LAW & PRACTICE § 331 (1965); 18 G. COUCH, INSURANCE 2d, § 72:59 (1968).

8. Bernier v. Pacific Mut. Life Ins. Co., 173 La. 1078, 1080, 139 So. 629, 632 (1932).

9. Only those defenses which do not conflict with the statutory form of the incontestable clause can be excepted from the incontestable clause in an insurance policy. *See, e.g.*, Pyramid Life Ins. Co. v. Sellkirk, 80 F.2d 553 (5th Cir. 1936); Foster v. Washington Nat'l Ins. Co., 118 N.J.L. 228, 192 A. 59 (1937); Weston v. Metropolitan Life Ins. Co., 206 S.C. 139, 33 S.E.2d 386 (1945); Reserve Loan Life Ins. Co. v. Brown, 159 S.W.2d (Tex. Civ. App. 1954).

10. Guardian Life Ins. Co. v. Barry, 213 Ind. App. 56, 10 N.E.2d 614 (1937); Leidenger v. Pacific Mut. Life Ins. Co., 18 La. App. 348, 135 So. 85 (1931); O'Neil v. Union Life Ins. Co., 162 Neb. 284, 75 N.W.2d 739 (1956); Prudential Ins. Co. v. Cafiero, 126 N.J. Eq. 33, 7 A.2d 882 (1939).

11. Mutual Reserve Fund Life Ass'n v. Austin, 142 F. 398 (1st Cir. 1905); Independent Life Ins. Co. v. Carroll, 222 Ala. 34, 130 So. 402 (1930); Mutual Life Ins. Co. v. Margolis, 11 Cal. App. 2d 382, 53 P.2d 1017 (1936); American Trust Co. v. Life Ins. Co., 173 N.C. 558, 92 S.E. 706 (1917).

12. Obartuch v. Security Mut. Life Ins. Co., 114 F.2d 878 (7th Cir. 1940); Robison v. Brotherhood of R.R. Trainmens Ins. Dep't, Inc., 73 Ariz. 352, 241 P.2d 791 (1952), *modified on other grounds*, 74 Ariz. 44, 243 P.2d 472 (1952); Riley v. Industrial Life & Health Ins. Co., 190 Ga. 891, 11 S.E.2d 20

lature provided that all life insurance policies contain an incontestable clause to preclude insurers from contesting policies years after premiums have been paid and after the insured has died and can no longer defend his position. Certain defenses were excepted. Had the legislature intended other exceptions, they too would have been specifically excepted.[13]

Exceptions from this strict view must be taken when public policy demands. For example, where a beneficiary murdered the insured, the insurer was permitted to defend on the ground that such a risk was not covered. Such exceptions have been justified as a matter of public policy in only the gravest circumstances.[14] Thus, where the insured deliberately mutilated himself[15] or committed suicide,[16] the insurer was barred from defending on the ground that such hazards were not covered.

Contract principles are as applicable to insurance contracts as to any other contract.[17] To determine the true intent of contracting parties, the whole contract of insurance should be considered.[18] But the effect of an incontestable clause seems to be determined by the wording of that clause alone rather than by interpreting the entire contract. Where the meaning of an insurance contract is clear, it is no more subject to judicial change than any other contract.[19] Nor is the application of adhesion contract principles[20] to the interpretation of an incontestable clause commensurate with the purpose behind these principles, since the presence and content of an incontestable clause is required by statute. The statute should be strictly construed in favor of the insurer since it is a limitation on the general right to contract; any ambiguity as to its

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(1940); Leidenger v. Pacific Mut. Life Ins. Co., 18 La. App. 348, 135 So. 85 (1931); Allick v. Columbia Protective Ass'n, 269 App. Div. 281, 55 N.Y.S.2d 438 (1945).

13. Northwestern Mut. Life Ins. Co. v. Johnson, 254 U.S. 96 (1920); Bernier v. Pacific Mut. Life Ins. Co., 173 La. 1078, 139 So. 629 (1932); Republic Nat. Life Ins. Co. v. Smrha, 138 Neb. 484, 293 N.W. 372 (1940); Pacific Mut. Life Ins. Co. v. Fishback, 171 Wash. 244, 17 P.2d 841 (1933).

14. *E.g.*, Protective Life Ins. Co. v. Linson, 245 Ala. 493, 17 So. 2d 761 (1944); Moore v. American Ins. Union, 135 Kan. 311, 10 P.2d 1084 (1932); Henderson v. Life Ins. Co., 176 S.C. 100, 179 S.E. 680 (1935).

15. New York Life Ins. Co. v. Kaufman, 78 F.2d 398 (9th Cir. 1935).

16. Longenberger v. Prudential Ins. Co., 121 Pa. Super. 225, 183 A. 422 (1936).

17. *E.g.*, Mutual Life Ins. Co. v. Daniels, 125 Colo. 451, 244 P.2d 1064 (1952); Werner v. State Life Ins. Co., 104 Ind. App. 27, 6 N.E.2d 786 (1937).

18. *E.g.*, Liverpool & L. & G. Ins. Co. v. Kearney, 180 U.S. 132 (1901); Reed v. Home State Life Ins. Co., 186 Okla. 226, 97 P.2d 53 (1939).

19. *E.g.*, United States v. Patryas, 90 F.2d 715 (7th Cir. 1937); *aff'd*, 303 U.S. 341 (1937); Gordon v. Unity Life Ins. Co., 215 La. 25, 39 So. 2d 812 (1949).

20. 1 J. APPLEMAN, INSURANCE LAW & PRACTICE § 1 (1965).

> Any ambiguity in an insurance policy will be interpreted in favor of the insured since an insurance contract is drafted solely by the insurer, and the burden of any ambiguity in the contract should be borne by the one who created that ambiguity.

applicability should be resolved in favor of this right.[21] If the statute is construed to mean that defenses of coverage as well as defenses of validity are barred, a legal anomaly results. The insurer's right to contract as to certain risks lasts only for the contestable period. After the incontestable clause becomes effective, the policy will insure against all possible risks.[22]

Most jurisdictions have decided that an incontestable clause bars only defenses of invalidity and has no effect on defenses of no coverage.[23]

> 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 in its inception, or thereafter became invalid by reason of a condition broken.[24]

This limitation on the effect of the incontestable clause is based on the belief that the legislature, in requiring an incontestable clause in all life insurance policies, did not intend to nullify an insurer's

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21. Mutual Life Ins. Co. v. Daniels, 125 Colo. 451, 244 P.2d 1064 (1952); Werner v. State Life Ins. Co., 104 Ind. App. 27, 6 N.E.2d 786 (1937).

22. Wilmington Trust Co. v. Mutual Life Ins. Co., 68 F. Supp. 83 (D. Del. 1946).

23. *E.g.*, Metropolitan Life Ins. Co. v. Shalloway, 151 F.2d 548 (5th Cir. 1945) (the policy provided that misstatement of an applicant's age would result in payments adjusted to his true age. The enforcement of this provision did not contest the validity of the policy and thus was not barred by the incontestable clause); Robison v. Brotherhood of R.R. Trainmens Ins. Dep't, Inc., 73 Ariz. 352, 241 P.2d 791 (1952), *modified on other grounds*, 74 Ariz. 44, 243 P.2d 472 (1952); New York Life Ins. Co. v. Hollender, 38 Cal. 2d 73, 237 P.2d 510 (1951) (the application of the age adjustment clause of a policy raises only a question of coverage and is not barred by the incontestable clause); National Life & Accident Ins. Co. v. Chapman, 106 Ga. App. 375, 127 S.E.2d 157 (1962); Carlson v. New York Life Ins. Co., 76 Ill. App. 2d 187, 222 N.E.2d 363 (1966) (an incontestable clause only prevents an insurer from contesting the validity of a policy at its inception or thereafter by reason of a condition broken); Prudential Ins. Co. of America v. Rice, 222 Ind. App. 231, 52 N.E.2d 624 (1944); O'Neil v. Union Nat. Life Ins. Co., 162 Neb. 284, 75 N.W.2d 739 (1956); Mills v. Metropolitan Life Ins. Co., 210 N.C. 439, 187 S.E. 581 (1936); Reed v. Home State Life Ins. Co., 186 Okla. 226, 97 P.2d 53 (1939); Perilston v. Prudential Ins. Co. of America, 345 Pa. 604, 29 A.2d 487 (1943); Smith v. Equitable Life Assurance Soc'y, 169 Tenn. 477, 89 S.W.2d 165 (1936); Collins v. Metropolitan Life Ins. Co., 163 Va. 833, 178 S.E. 40 (1935); Pacific Mut. Life Ins. Co. v. Fishback, 171 Wash. 244, 17 P.2d 841 (1933).

24. Metropolitan Life Insurance Co. v. Conway, 252 N.Y. 449, 169 N.E. 642 (1930). A proposed rider for a life insurance policy excluding from coverage the risk of death resulting from air travel except as a fare paying passenger was held not inconsistent with the required incontestable clause because a contest of no coverage is not barred.

right to contract. Rather, the intent was to prevent contests of validity after the lapse of the contestable period. It did not intend that a policy be issued that would, after the contestable period, cover every conceivable risk other than those specifically excepted in the statute.[25] "The kind of insurance one has at the beginning, but no more, one retains until the end."[26]

Under this view it must be determined if a defense is based on the validity of the policy or on no coverage under the policy. This is a difficult distinction for the courts to make. It is made according to the effect of a contest on the policy. When a contest concerns validity, the whole contract is questioned, while a contest of no coverage is an attempt to enforce the provisions of the contract.[27] Thus, if an insurer successfully argues that a risk was not covered, the policy remains in force as to the risks covered.

The results from the application of this distinction have followed no real pattern. Three such results are offered to illustrate this divergence.

A policy provided that if the insured personally engaged in service on a train the policy would be null and void. The insured represented himself to be an attorney when in fact he was a railroad brakeman. He died while working on a train, and the insurer denied liability on the grounds that such a risk was not covered by the policy. The court held that this defense was barred by the incontestable clause in the policy because the provision against railroad employees was not an exclusion of a risk. The risk was covered when the policy was issued, and the decedent merely violated a condition subsequent. To allege that a condition subsequent has been broken is a challenge to the validity of the policy. The contract was voidable at its inception, and the insurer had the contestable period in which to void the policy.[28]

A group life insurance policy provided coverage to applicants under the age of forty. Decedent misrepresented his age in his application in order to qualify for coverage. The insurer was

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25. Head v. New York Life Ins. Co., 43 F.2d 517 (10th Cir. 1930); Flannagan v. Provident Life & Accident Ins. Co., 22 F.2d 136 (4th Cir. 1927); Field v. Western Indem. Co., 227 S.W. 530 (Tex. Civ. App. 1921).

26. Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 450, 169 N.E. 642, 643 (1930).

27. Rasmussen v. Equitable Life Assurance Soc'y of U.S., 293 Mich. 482, 292 N.W. 377 (1940) (an incontestable clause will not bar an insurer from showing either that the loss was not covered by the policy or that a covered loss did not occur while the insurance was in force since the assertion of these defenses is merely an enforcement of the policy provisions); Livingston v. Mutual Beneficial Life Ins. Co., 173 S.C. 87, 174 S.E. 900 (1934) (an incontestable clause does not prevent an insurer from canceling an insurance policy for failure of the insured to comply with the terms of the policy because the clause relates only to the validity of the policy and does not affect the construction of its terms).

28. United Security Life Ins. & Trust Co. v. Massey, 46 Ga. App. 1, 167 S.E. 247 (1933).

allowed to contest its liability on the grounds that the decedent did not satisfy a condition precedent to coverage under the policy.[29]

A policy contained a provision that it would not become effective if the applicant consulted a physician after his application and before receiving the policy. The insurer was allowed to contest its liability on the grounds that the decedent violated this provision. This was held to be a condition precedent to liability on the contract. An incontestable clause bars only defenses based on nonfulfillment of conditions precedent involving the existence of the contract.[30]

The distinction between defenses involving the validity of the policy and defenses alleging no coverage under the policy becomes increasingly difficult to make when group policies are involved. In *Fisher v. United States Life Ins. Co.*,[31] the insurer was permitted to deny liability on the policy because decedent, having misrepresented himself to be an employee to qualify for coverage under the policy, was not a risk covered by the policy. If this had been an individual life insurance policy, the defense based on the misrepresentation would surely have been barred by the incontestable clause because such defense would be an attack on the validity of the policy.[32] Even if the misrepresentation had been fraudulent, the defense would be barred.[33] Thus, the effect of an incontestable clause on a defense of misrepresentation was nullified because the insured was applying for a group life insurance policy.

Various arguments have been offered for the distinction between the effect of an incontestable clause in group life insurance policies and its effect in individual policies. It is beneficial to the public to enable employed groups to obtain the most advantageous protection that their status warrants at the least cost by restricting coverage to particular individuals.[34] Also, an insurer deals directly

29. Rasmussen v. Equitable Life Assurance Soc'y of U.S., 293 Mich. 492, 292 N.W. 377 (1940).

30. Hurt v. New York Life Ins. Co., 51 F.2d 936 (10th Cir. 1931).

31. Fisher v. United States Life Ins. Co., 249 F.2d 879 (4th Cir. 1957).

32. *See*, Great Southern Life Ins. Co. v. Russ, 14 F.2d 27 (8th Cir. 1926); Andrews v. Cosmopolitan Life, Health & Accident Ins. Co., 238 Mo. App. 1129, 194 S.W.2d 920 (1946); Gorski v. Metropolitan Life Ins. Co., 88 Pa. Super. 326 (1926).

33. *E.g.*, Commercial Life Ins. Co. v. McGinnis, 50 Ind. App. 630, 97 N.E. 1018 (1912); Steigler v. Eureka Life Ins. Co., 146 Md. 629, 127 A. 397 (1925); Malnati v. Metropolitan Life Ins. Co., 165 Misc. 417, 300 N.Y.S. 1313 (Sup. Ct. 1925), *aff'd*, 254 App. Div. 681, 3 N.Y.S.2d 211 (1938); Ludwinska v. John Hancock Mut. Life Ins. Co., 115 Pa. Super. 228, 175 A. 283 (1934), *rev'd on other grounds*, 317 Pa. 577, 178 A. 28 (1935).

34. Rasmussen v. Equitable Life Assurance Soc'y of U.S., 293 Mich. 482, 292 N.W. 377 (1940).

with the insured under an individual policy, but with a group policy it deals only with the entity applying for the group insurance. An insurer must therefore rely to a great extent on the representations of the employer as to the qualifications of his employees for coverage.[35]

These arguments seem to contradict the legislative purpose in requiring an incontestable clause in all group life insurance policies. It appears from the wording of the New York statute[36] that the protection of the certificate holders[37] from stale claims is the primary purpose of the statute.[38] It is equally obvious from the existence of the statute that the legislature considered the protection of the certificate holders more important than the need to maintain low group insurance rates.

An incontestable clause is merely a short statute of limitations,[39] which still gives the insurer ample time to investigate and contest the qualifications of the certificate holders. The legislature must have realized the increased burdens this requirement would place on insurers; but the existence of the requirement is evidence that they considered the need for protection of the certificate holders to be of prime importance. It is difficult to understand why the burden of investigating the qualifications of the certificate holders would prove overburdensome. Group insurance has been extremely profitable because the policies are sold on a mass basis at negligible per capita sales cost a minimal administration cost and a low rate of lapse.[40] To afford a certificate holder of a group life insurance policy protection equal to that given an insured under an individual policy should not prove disastrous either to insurers or group insurance policies.

It has been argued that contesting a group life insurance policy on the ground that the certificate holder does not qualify for the insurance is in effect contesting the validity of the policy as to the certificate holder. On its face a group policy provides such coverage of the certificate holder as is described in the policy. To raise and rely on an extrinsic fact to contest this coverage is an attempt to prove that the certificate holder is not as described in the

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35. Simpson v. Phoenix Mut. Life Ins. Co., 291 N.Y.S.2d 532 (Sup. Ct. 1968) (dissenting opinion).

36. See note 3 *supra*.

37. 1 J. APPLEMAN, INSURANCE LAW & PRACTICE § 46 (1965). The employees covered by a group life insurance policy are in the position of third party beneficiaries to the insurance contract. Their contractual rights are evidenced both by the master policy issued to the employer and by the certificate of insurance issued to each employee.

38. See note 4 *supra*.

39. *E.g.*, Columbian Nat'l Life Ins. Co. v. Wallerstein, 91 F.2d 351 (7th Cir. 1937), *cert. denied*, 302 U.S. 755 (1937); Missouri State Life Ins. Co. v. Cranford, 161 Ark. 602, 257 S.W. 66 (1924); Williamson v. American Ins. Union, 284 Ill. App. 150, 1 N.E.2d 541 (1936); Darden v. North Am. Beneficial Ass'n, 170 Va. 479, 197 S.E. 413 (1938).

40. 7 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 185 (1932).

policy.[41] Such an argument is at least contesting the validity of the application, and an application for insurance is considered to be part of the insurance contract.[42]

To allow an insurer to contest its liability on a group life insurance policy on the grounds that the certificate holder did not qualify for coverage would nullify the effect of the incontestable clause. Any misrepresentation or fraud by the certificate holder in his application could be raised at any time to contest liability on the grounds that his true qualifications exclude him from the intended coverage of the policy. Thus an insurer, by careful drafting, could limit its coverage to such an extent as would render the effect of the incontestable clause null. This would defeat the legislative purpose behind the requirement of an incontestable clause in all group life insurance policies.[43]

Yet, an insurer should be allowed to contract for coverage of a limited number of risks:

> It seems illogical to us to say that a company will issue a policy of insurance wherein it is expressly stated that it will give certain benefits upon the happening of a clearly defined future event, and to further say that because it includes in the policy an agreement that after the policy has been in effect a certain period of time it will not contest the right to the benefits provided upon the grounds of the invalidity of the contract that it thereby agrees to deny itself the right to ask whether the clearly defined future event has happened.[44]

On the other hand, it would be improper to hold that an incontestable clause bars all defenses after the contestable period. A reasonable solution would seem to be that an incontestable clause in both individual and group life insurance policies should bar all contests except those based on the defense that the *hazard* causing death was not covered by the policy.[45] If a policy specifies that death by suicide is not a covered hazard, then a suicidal death could be contested at anytime as a hazard not covered. Likewise, a policy excluding a hazard which in fact *causes* the insured's

41. John Hancock Mut. Life Ins. Co. v. Dorman, 108 F.2d 220 (9th Cir. 1940).

42. Leach v. Metropolitan Life Ins. Co., 124 Kan. 584, 261 P. 603 (1927), *reh. denied*, 125 Kan. 129, 263 P. 784 (1928); Chrysler Corp. v. Hardwick, 299 Mich. 696, 1 N.W.2d 43 (1941); Thull v. Equitable Life Assurance Soc'y, 40 Ohio Op. 486, 178 N.E. 850 (Ct. App. 1931).

43. See note 38 *supra*.

44. Prudential Life Ins. Co. of America v. Elias, 188 Okla. 408, 409, 109 P.2d 815, 817 (1941).

45. John Hancock Mut. Life Ins. Co. v. Dorman, 108 F.2d 220 (9th Cir. 1940); Head v. New York Life Ins. Co., 43 F.2d 517 (10th Cir. 1930).

death would enable the insurer to contest its liability as to that hazard at any time. Thus the distinction made in the majority of jurisdictions between defenses of invalidity and defenses of coverage will be maintained. At the same time equal protection will be afforded both the certificate holder and the insured under an individual policy.

The true nature of an incontestable clause, that of a shorter statute of limitations,[46] will also be preserved. The only defenses barred by an incontestable clause will be those based on grounds which could have been discovered during the contestable period. Therefore, if a group policy limits its coverage to union members, and an insured who is not a union member dies after the contestable period, the insurer can not contest liability on the grounds that decedent was not covered. Non-membership in a union is not a hazard which caused his death. The insurer could have discovered the insured's lack of qualifications during the contestable period. On the other hand, by contrast, those defenses which can only be discovered after a claim to recover benefits has been made will be allowed at any time. This distinction, while offering equal protection to all the insured public, would avoid the harshness of a rule whereby all defenses except those specifically excepted would be barred by the incontestable clause. No exceptions would be needed for such atrocities, as when a beneficiary murders the insured. Such a risk would not be covered by the policy.

There would be little difficulty applying this distinction and thus the outcome of these cases would be more predictable. The incontestable clause would bar all defenses directed toward conditions precedent to the issuance of the policy, but not affect defenses based on the enforcement of provisions and conditions that necessarily relate to matters arising after the issuance of the policy.[47] Of the three examples offered above[48] to illustrate the difficulties of applying the *Conway* distinction,[49] the defenses alleged in the second and third examples would not be allowed since they are directed toward conditions precedent to the issuance of the policy. In the second example the applicant's age did not cause his death, and the insurer could have discovered the misrepresentation of his age during the contestable period. In the third example, the applicant's consultation with a physician during the prohibited period did not cause his death, and the insurer could have discovered this violation of the policy provision during the contestable period. The defense in the first example would be allowed because it is based on the enforcement of a condition that

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46. See note 39 *supra.*
47. Mayer v. Prudential Life Ins. Co. of America, 121 Pa. Super. 493, 184 A. 267 (1936).
48. See notes 26, 27 and 28 *supra.*
49. See note 23 *supra.*

necessarily relates to a matter arising after the issuance of the policy. Here, the insurer had excluded from coverage the risk of riding on a train. The insurer died as a result of engaging in service on a train. This excluded risk was a hazard which caused death. The insurer could have no knowledge that the excluded hazard caused the insured's death until the death occurred. Thus its liability could be contested after the contestable period.

SIMPSON REVISITED

In *Simpson* the insurer attempted to contest its liability on the grounds that the decedent did not qualify for coverage under the terms of the group policy. The court, citing *Eagon v. Union Labor Life Ins. Co.*[50] as controlling New York authority, properly barred the defense after the contestable period. *Eagon* was brought to recover benefits of a group life insurance policy providing coverage to union members. The decedent, who was never a member of the union, was listed as a union member in the insurance application. The insurer was barred by the incontestable clause from contesting its liability on the ground that the decedent was never covered by the policy. *Eagon* was twice affirmed with no majority opinion; the reasons for its holding are unknown.

Simpson also decided that the insurer was trying to contest the validity of the policy as to decedent. *Metropolitan Life Ins. Co. v. Conway*[51] was cited with no comment as an example of a contest directed solely toward no coverage. *Conway* held that a rider which provided that death as a result of travel while in an aircraft, except as a fare-paying passenger, was not a risk assumed and was not barred by the incontestable clause in the policy. In *Conway* the excepted risk was a hazard which could not be discovered and contested before the issuance of the policy. But in *Simpson* the decedent's qualification was a condition precedent to the issuance of the policy which could be discovered and contested by the insurer during the contestable period.[52]

John Hancock Mut. Life Ins. Co. v. Dorman[53] could have been cited by *Simpson* to clarify the reasons for its decision. In *Dorman* the insurer was barred by the incontestable clause from denying liability because decedent was never an employee covered by the

50. See note 5 *supra.*
51. See note 24 *supra.*
52. *Conway* is often mis-cited as authority that an incontestable will not bar a defense that the insured was not qualified for coverage under the policy.
53. 108 F.2d 220 (9th Cir. 1940).

policy. In dictum the court said that only those defenses directed toward no coverage of the hazard causing death are excepted from the incontestable clause.

The *Simpson* result insures equal protection for beneficiaries of all life insurance policies in that no defense barred by the incontestable clause of an individual policy will be excepted from the incontestable clause of a group policy. By preventing the insurer from raising this defense after the contestable period, the court allowed the decedent the protection intended by the statutory requirement of an incontestable clause in group life insurance policies.

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