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INSURANCE - LIFE INSURANCE -WAIVER OF PREMIUMS DURING DISABILITY

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INSURANCE — LIFE INSURANCE — WAIVER OF PREMIUMS DURING DISABILITY — Action by guardian of the insured, who had become insane, for disability benefits under a life insurance policy and for a decree that the policy had not lapsed. The policy contained a typical provision for waiver of premiums and benefit payments during disability. No proof of disability was made until after default in premium payments. *Held*, that the insured's insanity did not excuse the failure to make proof before default and the policy had lapsed. *Reingold v. New York Life Ins. Co.*, (C. C. A. 9th, 1936) 85 F. (2d) 776.

Impossibility of performance, as insanity, does not avoid a forfeiture of the policy for non-payment of premiums.[1] However, when the policy requires notice or proof of the loss insured against within a specified time the same impossibility excuses a failure to perform and prevents a forfeiture.[2] The courts are not in accord as to whether impossibility excuses the insured's failure to comply with a disability clause providing for waiver of premiums on proof of disability before default. In some cases, proof of disability has been called a further "method of payment" and therefore, like payment of premiums, not excused by impossibility.[3] The language of the provision has been thought to make mandatory its construction as a condition precedent to waiver, the assumption being that impossibility does not excuse a condition precedent.[4] This

[1] 15 A. L. R. 318 (1921); 3 COUCH, INSURANCE 677(c) (1929). As to what constitutes impossibility that will excuse, see 34 MICH. L. REV. 257 at 265 (1935).

[2] 54 A. L. R. 611 (1928).

[3] Smith v. Missouri State Life Ins. Co., 134 Kan. 426, 7 P. (2d) 65 (1932); McCutcheon v. All States Life Ins. Co., 229 Ala. 616, 158 So. 729 (1935).

[4] New England Mutual Life Ins. Co. v. Reynolds, 217 Ala. 307, 116 So. 151, 59 A. L. R. 1075 (1928); Egan v. New York Life Ins. Co., (D. C., Ga. 1932) 60 F. (2d) 268; Hanson v. Northwestern Mutual Life Ins. Co., 229 Ill. App. 15 (1923); Dean v. Northwestern Mutual Life Ins. Co., 175 Ga. 321, 165 S. E. 235 (1932).

position is not convincing, for the courts which take it distinguish the clause from like provisions for notice or proof in accident policies, on the ground that there the loss insured against has occurred.[5] Thus a condition is precedent or subsequent depending upon whether its performance is required before or after the loss insured against has arisen.[6] If impossibility does not excuse, it has been suggested that fraudulent claims are prevented[7] and actuarial difficulties avoided.[8] This would be even more true of like provisions in other types of policies. Other cases hold that impossibility, as insanity, excuses.[9] The desire to prevent a forfeiture is an important factor,[10] and the provision has been held a condition subsequent.[11] The courts have felt that the situation was not contemplated by the parties, and that it was unjust to provide for waiver on proof of disability where the very disability prevents proof.[12] Recent decisions suggest that the right to waiver has been paid for and the disability insured against, thus bringing the case within the rule applied in accident policies.[13] This solution

[5] New England Mutual Life Ins. Co. v. Reynolds, 217 Ala. 307, 116 So. 151 (1928); Smith v. Missouri State Life Ins. Co., 134 Kan. 426, 7 P. (2d) 65 (1932); Iannarelli v. Kansas City Life Ins. Co., 114 W. Va. 88, 171 S. E. 748 (1933).

[6] New England Mutual Life Ins. Co. v. Revnolds, 217 Ala. 307, 116 So. 151 (1928); Peele v. Provident Fund Society, 147 Ind. 543, 44 N. E. 661 (1896); McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N. E. 475 (1893).

[7] Berry v. Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445 (1932).

[8] Iannarelli v. Kansas City Life Ins. Co., 114 W. Va. 88, 171 S. E. 748 (1933).

[9] 59 A. L. R. 1080 (1929).

[10] As to treatment when no forfeiture is involved, the action being to recover premiums paid during insanity, see Courson v. New York Life Insurance Co., 295 Pa. 518, 145 A. 530 (1929).

[11] Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600 (1927).

[12] Swann v. Atlantic Life Ins. Co., 156 Va. 852 at 862, 159 S. E. 192 (1931): "The insured could not present proofs before his disability, and he certainly could not present proofs after he became mentally . . . incapable of doing so. It would be unreasonable to say he should present proofs . . . if he were insane. . . . Such a construction of the policy would render it of no value to the insured—, although he may have been influenced thereby to purchase the insurance. . . ."

Rhyne v. Jefferson Standard Life Ins. Co., 196 N. C. 717, 147 S. E. 6 (1929); Levan v. Metropolitan Life Ins. Co., 138 S. C. 253, 136 S. E. 304 (1926); Southern Life Ins. Co. v. Hazard, 148 Ky. 465, 146 S. W. 1107 (1912); Metropolitan Life Ins. Co. v. Carroll, 209 Ky. 522, 273 S. W. 54 (1925).

[13] Northwestern Mutual Life Ins. Co. v. Carneal, 262 Ky. 665, 90 S. W. (2d) 1010 (1935); Michigan Continent Life Ins. Co. v. Harrison, 175 Okla. 543, 53 P. (2d) 266 (1935), where the policy provided for benefit payments, not waiver of premiums, on proof of disability before default. A distinction was attempted to be drawn between benefit payments and waiver of premiums. In the last analysis, waiver of premium is merely a benefit payment.

Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S. C. 192 (1931); Rhyne v. Jefferson Standard Life Ins. Co., 199 N. C. 419, 154 S. E. 149 (1930). It is not clear how far a recitation in the policy of the consideration paid for the waiver clause will lead to the adoption of this solution. See Missouri State Life Ins. Co. v. LeFevre, (Tex. Civ. App. 1928) 10 S. W. (2d) 267; Dean v. Northwestern Mutual Life Ins. Co., 175 Ga. 321, 165 S. E. 235 (1932).

is more realistic, for the layman would consider the provision to mean that his insurance continues even though he becomes unable to pay due to disability.[14] Yet the only logical view is that any condition, not a material part of the exchange for the promissor's performance, is excused by impossibility.[15] A recent decision is based upon this position.[16] Difficulties of construction would be avoided and more attention could be given to the purpose of the provision. The requirement of proof is primarily to bring to the insurer's knowledge the fact of loss, and does not appear to be a material part of the exchange.[17] If the real concerns were an opportunity for investigation to prevent fraud and avoidance of actuarial difficulties, more material matters in point of time from the insurer's view, notice would be apt to be required within a specified time.

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[14] Minnesota Mutual Life Ins. Co. v. Marshall, (C. C. A. 8th, 1928) 29 F. (2d) 977.

[15] CONTRACTS RESTATEMENT, § 301 (1932); Corbin, "Supervening Impossibility of Performing Conditions Precedent," 22 COL. L. REV. 421 (1922).

[16] Johnson v. Mutual Life Ins. Co., (C. C. A. 4th, 1934) 70 F. (2d) 41. But on certiorari the Supreme Court did not pass on the issue, holding that the law of Virginia governed. See 293 U. S. 335, 55 S. Ct. 154 (1934).

[17] 34 MICH. L. REV. 257-268 (1935).