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# CONTRACTO-IMPOSSIBILITY AS AN EXCUSE FOR FAILURE TO PERFORM CONDITIONS IN INSURANCE POLICIES REQUIRING NOTICE OF LOSS

## COMMENTS

CONTRACTS — IMPOSSIBILITY AS AN EXCUSE FOR FAILURE TO PERFORM CONDITIONS IN INSURANCE POLICIES REQUIRING NOTICE OF LOSS — Policies of insurance invariably contain provisions to the effect that, upon occurrence of the event insured against, notice thereof shall be given to the insurer. As in the normal contract, such condition qualifies the undertaking of the promisor unless its performance is legally excused. In actions for breach of promise, impossibility of performance

has been held to constitute a good defense to the suit for damages in certain instances,[1] though the early rule was that payment of damages was never impossible and hence impossibility of performance was no defense in an action for breach.[2] It is to be noted that if impossibility will excuse the performance of a condition, it operates differently in that it does not give a defense as in the cases of inability to perform a promise, but gives the party who has failed to perform the condition a right of action against the other for breach of promise. There is authority for this result in contracts other than insurance policies.[3]

Whether or not the failure to perform the condition in an insurance policy requiring notice of the event insured against will be excused depends upon two considerations: (1) does the court recognize the doctrine that impossibility of performance will excuse non-compliance with the condition, and (2) assuming that such doctrine is recognized, does the fact set up by way of excuse fall within the definition of impossibility?

The decisions generally fail to make such analysis and tend to reach what they consider to be a just result under the circumstances, bolstering up this result with miscellaneous rather than analytical reasoning. This "motive" of the courts may be seen at work in the construction of insurance policies. Many of the courts evade the question by so interpreting the policy as to eliminate the problem of impossibility by holding that the insured will not be prevented from bringing his action if the stipulation as to notice failed to provide expressly for forfeiture in the event of non-compliance (especially if other conditions in the policy expressly provide for forfeiture), provided notice be given prior to bringing suit.[4] To a lesser degree the same attitude is evidenced by

[1] Page, "The Development of the Doctrine of Impossibility of Performance," 18 MICH. L. REV. 589 (1920).

[2] Paradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (1647).

[3] Nolan v. Whitney, 88 N. Y. 648 (1882); Corbin, "Supervening Impossibility of Performing Conditions Precedent," 22 COL. L. REV. 421 (1922).

[4] This result is reached through the device of judicial construction of the contract on the ground that, since it says nothing as to forfeiture, it is to be construed in favor of the insured. If it may be said that this is a *promise* which the insured makes by accepting the policy rather than a condition, the result is explainable for then the insurer could sue for breach of promise, but damages would be nominal only. See Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70 (1900); 18 L. R. A. 85 n. (1893); Coventry Mutual Live Stock Ins. Assn. v. Evans, 102 Pa. 281 (1883); American Nat. Ins. Co. v. Waters, 133 Miss. 28, 96 So. 739 (1923); JOYCE, INSURANCE, 2d ed., § 3277 (1918); 7 COOLEY, BRIEFS ON INSURANCE, 2d ed., 5910 (1928); 7 COUCH, INSURANCE, § 1538 (a) (1930). Contra, St. Louis Architectural Iron Co. v. New Amsterdam Casualty Co., (C. C. A. 8th, 1930) 40 F. (2d) 344.

For additional cases, see 38 L. R. A. (N. S.) 62 n. (1912); 62 A. L. R. 932 (1929); L. R. A. 1915F 1210 n. (1915); 76 A. L. R. 201, n. 2 (1932).

the interpretation of clauses requiring notice to be given "immediately" or "forthwith" to mean notice within a reasonable time under the facts and circumstances of the particular case.[5] On the other hand, the courts usually make certain that the insurer will not be deprived of his part of the bargain by holding that non-payment of premiums operates to terminate the risk and that impossibility of performance in respect to payment of premiums will not serve to preserve the insured's rights under the policy.[6]

I.

Some courts refuse to recognize the doctrine that impossibility of performance will operate to excuse non-compliance with a provision in a policy making notice of the event which gives rise to the insurer's liability a condition, while others, to avoid hardship on the insured, recognize such excuse on one theory or another. The various views of the several state courts as to whether or not this is a valid excuse are significant in cases arising in the federal courts, for the Supreme Court in the recent case of *Mutual Life Insurance Co. v. Johnson*[7] declared

[5] See 7 COUCH, INSURANCE, § 1538 (b) (1930); Chapin v. Ocean Accident & Guarantee Corp., 96 Neb. 213, 147 N. W. 465, 52 L. R. A. (N. S.) 227 (1914); Employers' Liability Assur. Corp. v. Light, Heat & Power Co., 28 Ind. App. 437, 63 N. E. 54 (1902); Simmons v. Nat. Live Stock Ins. Co., 187 Mich. 551, 153 N. W. 696, Ann. Cas. 1917D 42 (1915); Mewborn v. Employers' Liability Assur. Corp., 198 N. C. 156, 150 S. E. 887 (1929).

[6] Hipp v. Fidelity Mut. Life Ins. Co., 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319 (1907); McCann v. Supreme Conclave, I. O. H., 119 Md. 655, 87 A. 383, 46 L. R. A. (N. S.) 537 (1913); and cases collected in 59 A. L. R. 1080 (1929) and 15 A. L. R. 318 (1921). This result may be justified either on the ground that subjective impossibility of the insured to pay is not sufficient to excuse where the act is objectively capable of performance by another for him, or on the ground that the premium is the material exchange for the insurer's promise the non-performance of which will not be excused even by impossibility.

It is true that in some cases arising after the Civil War recovery was allowed where premiums had not been paid due to the war, but since the recovery in each case was the face of the policy minus premiums in default, the theory seems to have been deferred payment of premiums rather than excuse due to impossibility caused by the war. Hamilton v. Mut. Life Ins. Co., Fed. Cas. No. 5,986 (1871); New York Life Ins. Co., v. Clopton, 7 Bush. (70 Ky.) 179 (1870); Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 444 (1874).

[7] 293 U. S. 335, 55 S. Ct. 154 (1934). The court speaking through Justice Cardozo at page 339 said:

> "We think the contract is to be interpreted in accordance with the law of Virginia where delivery was made. . . .
>
> "In this situation we are not under a duty to make a choice for ourselves between alternative constructions as if the courts of the place of contract were silent or uncertain. Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and

the decisions of the state where the policy was delivered to be controlling.

The refusal to recognize impossibility as an excuse, when that view is taken, is based upon the theory that the obligation to give notice is a condition precedent [8] which, since it is voluntarily assumed, must be performed in order to give rise to liability on the part of the insured and is to be differentiated from duties involuntarily imposed by statute, where such excuse is allowed.[9] In reaching this result, it is claimed that there is no ambiguity in the provision for notice and that it is to be interpreted according to its natural meaning.[10] Even if this be so, statutory provisions may exist in the jurisdiction which set a minimum limitation with regard to the time within which notice may be required and render invalid stipulations requiring notice within a shorter period.[11] To add to this general confusion some cases, while *holding* that a given provision for notice is an inexcusable condition precedent in certain types of policies, *say* that the same provision in other types of policies may operate as a condition subsequent, the performance of which may be excused for impossibility, because it merely operates to cut off liability already accrued.[12]

adjudging its effect. The case will not be complicated by a consideration of our power to pursue some other course. The *summum jus* of power, whatever it may be, will be subordinated at times to a benign and prudent comity."

[8] Smith v. Missouri State Life Ins. Co., 134 Kan. 426, 7 P. (2d) 65 (1932); Egan v. New York Life Ins. Co., (C. C. A. 5th, 1933) 67 F. (2d) 899; Clements v. Preferred Acc. Ins. Co., (C. C. A. 8th, 1930) 41 F. (2d) 470; Iannarelli v. Kansas City Life Ins. Co., 114 W. Va. 88, 171 S. E. 748 (1933); United States Fidelity & Guaranty Co. v. W. P. Carmichael Co., 195 Mo. App. 93, 190 S. W. 648 (1916); Phoenix Cotton Oil Co. v. Royal Indemnity Co., 140 Tenn. 438, 205 S. W. 128 (1918). 2 WILLISTON, CONTRACTS, § 808 (1931).

[9] Whiteside v. North American Acc. Ins. Co., 200 N. Y. 320, 93 N. E. 948, 35 L. R. A. (N. S.) 696 (1911); McCutchen v. All States Life Ins. Co., 229 Ala. 616, 158 So. 729 (1935); Hatch v. United States Casualty Co., 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503 (1908).

[10] Iannarelli v. Kansas City Life Ins. Co., 114 W. Va. 88, 171 S. E. 748 (1933); Maryland Casualty Co. v. Nellis, (C. C. A. 6th, 1935) 75 F. (2d) 23.

[11] 76 A. L. R. 75 (1932); and 7 COOLEY, BRIEFS ON INSURANCE, 2d ed., 5908 (1932).

[12] It is held that the notice required in order to get the benefit of a waiver of premium provision in a life insurance policy constitutes a condition precedent because it is a substitute for the premium, the payment of which is admitted to be a condition precedent and not excused by impossibility of performance. See Smith v. Missouri State Life Ins. Co., 134 Kan. 426, 7 P. (2d) 65 (1932); New England Mut. Life Ins. Co. v. Reynolds, 217 Ala. 307, 116 So. 151, 59 A. L. R. 1075 (1928); McCutchen v. All States Life Ins. Co., 229 Ala. 616, 158 So. 729 (1935).

To justify this result the courts often point out that in such cases the insurer must be protected from fraudulent claims by getting notice within time to invesigate, and further that the actuarial machinery of insurance would be disrupted by inability to tell whether or not a policy had lapsed for non-payment of premiums. See Iannarelli

Some courts, without making any distinction between types of policies, hold provisions for notice to be conditions subsequent.[13] They consider the liability to have accrued, and that a forfeiture would result if the condition were not excused for impossibility of performance.[14]

v. Kansas City Life Ins. Co., 114 W. Va. 88, 171 S. E. 748 (1933); Berry v. Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445 (1932).

It is said that the provision for notice in policies where the capital fact of loss insured against has occurred, as in accident insurance, and the company is trying to escape liability by showing that there was delay in giving notice, operates as a condition subsequent which may be excused by impossibility in order to prevent a forfeiture of the accrued right. See Nat. Paper Box Co. v. Aetna Life Ins. Co., 170 Mo. App. 361, 156 S. W. 740 (1913); New England Mut. Life Ins. Co. v. Reynolds, supra. Having assumed that only a condition subsequent can be excused by impossibility, these courts call some conditions precedent and others subsequent by the above rule of thumb where no legal basis for such distinction appears from the stipulations themselves.

If actuarial difficulties are to be determinative, there is no valid reason for not applying the same rule in accident, liability, health, and fire insurance cases as in the waiver of premium cases, for an investigation would protect the insurer in any of these instances. See Hatch v. United States Casualty Co., 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503 (1908), and Clements v. Preferred Acc. Ins. Co., (C. C. A. 8th, 1930) 41 F. (2d) 470.

On the other hand, the insured pays for the right to waiver of premiums and it is really a type of benefit payment by the insurer, rather than a mere excuse of premiums. If this be true, the condition for notice in these policies could be construed to be a condition subsequent, if the assumption is that only such a condition can be excused, with as much reason as in the other type policies referred to. See Mutual Life Ins. Co. v. Johnson, 293 U. S. 335, 55 S. Ct. 154 (1934).

[13] Munz v. Standard Life & Acc. Ins. Co., 26 Utah 69, 72 P. 182, 62 L. R. A. 485 (1903); Trippe v. Provident Fund Society, 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432 (1893); Peele v. Provident Fund Society, 147 Ind. 543, 44 N. E. 661, 46 N. E. 990 (1896); Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783, 297 S. W. 847 (1927), the assumption being that only a condition subsequent can be excused.

[14] In Minnesota Mut. Life Ins. Co. v. Marshall, (C. C. A. 8th, 1928) 29 F. (2d) 977 at 978, the court speaking about a life insurance policy with a waiver of premium clause operative in the event of disability said:

> "However much the legal mind may differ as to the meaning of these provisions, the ordinary layman would construe them to mean that, in the event he became disabled before his premium fell due, his insurance would be continued until his disability was removed or until his death. This is the natural and reasonable construction to be placed upon the language used in this policy. Any other construction . . . would be contrary to the full purpose of the contract and deprive the insured of one of the principal benefits of his policy. The right of the insured to have his premiums discontinued during disability is one that he had paid for. To make its operation depend upon the time of proof of disability, and not upon the time of disability itself, which was the real thing that he was protecting himself against, renders the provision of the policy under consideration inoperative and the right of no value."

See also Patterson, "Supervening Impossibility of Performing Conditions in Insurance Policies," 22 COL. L. REV. 613 (1922), and 2 WILLISTON, CONTRACTS, § 809 (1920).

The rule of construction followed by these courts is succinctly stated by the court in *Missouri State Life Insurance Co. v. Case*:[15] "This court has often held that, unless it is inescapable from the language of the policy that notice of disability and proof thereof are conditions precedent to recovery, it is the existence of disability that fixes liability and not the proof thereof." Conditions which operate prior to the loss are treated as conditions precedent, and those which operate after the loss to define the mode in which it is to be established and recovered are treated as conditions subsequent.[16]

In one case[17] where the condition for notice was not performed because of impossibility, recovery was permitted on the theory that such excuse was recognized by the settled law of the state, and that this excuse became part of the contract by implication because the parties must have contracted with reference to the settled law. The court insisted that by so holding it was only giving effect to the contract as it really stood—rather than falling into the error of other courts[18] in making a new contract for the parties under the guise of construing a clear condition as if it were ambiguous.[19]

[15] 189 Ark. 223 at 236, 71 S. W. (2d) 199 (1934).

[16] McNally v. Phoenix Ins. Co., 137 N. Y. 389, 33 N. E. 475 (1893); Rhyne v. Jefferson Standard Life Ins. Co., 199 N. C. 419, 154 S. E. 749 (1930); Southern Life Ins. Co. v. Hazard, 148 Ky. 465, 146 S. W. 1107 (1912); Mutual Life Ins. Co. v. Marshall, 293 U. S. 335, 55 S. Ct. 154 (1934). This is really a distinction without a difference for it looks to factors outside the stipulations to raise a condition subsequent in order to get around the assumption that a condition precedent will not be excused.

But see San Francisco Savings Union v. Western Assur. Co., (C. C. Cal. 1907) 157 F. 695.

[17] Comstock v. Fraternal Acc. Assn., 116 Wis. 382, 93 N. W. 22 (1903).

[18] See note 14, supra.

[19] In Comstock v. Fraternal Acc. Assn., 116 Wis. 382 at 386, 93 N. W. 22 (1903), the case referred to, the court said:

> "It will not do in a case like this to ground a decision on the doctrine that language will not be so construed as to effect a forfeiture if that can be avoided, without going further and showing that it can be avoided by ascribing some meaning to the words involved which is within the reasonable scope thereof under the circumstances, or by a legitimate application of some rule of law. . . . Courts can only enforce lawful contracts according to the contractual intent of the parties thereto so far as the same can be found expressed in their language taken in its literal sense or viewed in the light of established legal principles, regardless of consequences to either party."

Note that the court in accepting the literal words as the standard does not take into consideration those situations where the event which causes the delay may not reasonably be said to have been in the contemplation of the parties at the time of making the contract. Sometimes the literal words patently include too much. See Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S. E. 192 (1931). See also note 11, supra, for the effect of statutes.

The position has also been taken that the purpose of insurance is indemnity and that for this reason the condition for notice must be construed liberally in favor of the insured.[20] The correctness of this approach can hardly be questioned where there is an actual ambiguity to be resolved,[21] but some courts go further and raise a presumption that the parties by the literal language used did not intend to deprive the insured of the benefits of his policy when the performance of the condition becomes impossible.[22] This amounts to reading in a saving clause or, to put it another way, to making a contract for the parties in a situation which they have not provided for. The court first assumes that this particular contingency was not contemplated by the parties when the contract was made and that the condition, though in terms broad enough to do so, does not cover it, and so the court is driven to make a contract for them.[23]

Recognizing that the purpose of the contract is indemnity and that

[20] Jennings v. Brotherhood Acc. Co., 44 Colo. 68, 96 P. 982, 18 L. R. A. (N. S.) 109 (1908).

[21] In Hawthorne v. Travelers' Protective Assn., 112 Kan. 356, 210 P. 1086, 29 A. L. R. 494 (1922), provision was made in the policy for excuse of delay in giving notice in the event of its becoming impossible due to physical disability or unconsciousness. Here the insured swallowed a fence staple, evidently unaware that he had done so, and was advised by physicians that he had a throat disease. Two years later the presence of the lodged staple was disclosed by x-ray and prompt notice was thereafter given. The court held that since two excuses had been explicitly provided for by the policy, it showed an intention that the provision as to notice should be construed "reasonably." The delay of the insured was excused on this ground.

[22] Levan v. Metropolitan Life Ins. Co., 138 S. C. 253, 136 S. E. 304 (1927); Missouri State Life Ins. Co. v. Le Fevre, (Tex. Civ. App. 1928) 10 S. W. (2d) 267.

[23] Kentzler v. American Mut. Acc. Assn., 88 Wis. 589, 60 N. W. 1002 (1894). The idea is expressed in Roseberry v. American Benev. Assn., 142 Mo. App. 552 at 563, 121 S. W. 785 (1909), as follows:

> "We believe, too, the judgment of the court should be placed upon the grounds that there are no express words in the policy requiring notice in a case circumstanced as this one is, and that therefore, in aid of the insurance and to the end of avoiding a forfeiture, it should be adjudged that it does not appear from the general words employed the circumstances presented were within the contemplation of the parties at the time the contract was entered into, for the reason such general words do not, as a matter of law, include the circumstances of the case."

If the insurer wishes to be protected, it would seem that he must expressly provide against all of the known situations which operate to excuse in order to show that they were contemplated at the time of the making of the contract. Factors of public interest, together with the over-riding purpose of indemnity, lead the courts to strain for a result fair to the insured beyond that inclination in his favor shown by the rule that the language is to be construed most strongly against the insurer. See note 19, supra. This is, however, the orthodox approach of the courts in cases of impossibility to perform a promise.

See also Swann v. Atlantic Life Ins. Co., 156 Va. 852, 159 S. E. 192 (1931); but see Maryland Casualty Co. v. Nellis, (C. C. A. 6th, 1935) 75 F. (2d) 23.

there may be hardship on the insured due to the sometimes technical character of the condition for notice,[24] some courts have stated or hinted that even though it be treated as a condition precedent, it will, nevertheless, be excused by impossibility of performance if it forms no material part of the exchange for the insurer's performance, to prevent undue hardship.[25] It is submitted that this view, adopted also by the *Restatement of the Law of Contracts*,[26] is the most practical and sensible approach to the problem for it avoids much of the questionable distinguishing and construing so often resorted to by the courts in order to excuse non-compliance with the condition. It also has the virtue of leaving but two rather clear-cut issues to be determined by the court: (1) is this condition a "material" part of the exchange for the insurer's performance, and (2) is this a case of impossibility?

The test of materiality is necessarily somewhat indefinite, but its very flexibility should work in its favor inasmuch as each type of policy gives rise to problems peculiarly relative only to that type. A consideration of the reasons for the insurer requiring notice in the particular type policy would disclose the materiality of the condition. If there is great danger of fraudulent claims, or necessity for speedy investigation in order to mitigate claims, or possibility of undue actuarial complications because of excuse of the non-performance of the condition, the provision for notice could well be termed material and impossibility held to be no excuse.[27] If, on the other hand, the main purpose is to bring home the fact of loss to the insurer and there is no

[24] Corbin, "Supervening Impossibility of Performing Conditions Precedent," 22 COL. L. REV. 421 (1922), suggests that if this excuse of condition because of impossibility of performance appears to be directly opposed to the expressed will of the parties and to constitute a limitation on the freedom of contract, it should be remembered that the freedom of contract has limits which prevent the expressed will of the individual from controlling as against the need and desire of the community. The further suggestion made is that the prevailing concept of justice sanctions such excuse.

[25] McCoy v. New York Life Ins. Co., (Iowa, 1935) 258 N. W. 320 (1935); Woodmen Acc. Assn. v. Byers, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291 (1901); Metropolitan Life Ins. Co. v. Carroll, 209 Ky. 522, 273 S. W. 54 (1925); Southern Life Ins. Co. v. Hazard, 148 Ky. 465, 146 S. W. 1107 (1912).

[26] Section 301:

"Impossibility that would discharge the duty to perform a promise excuses a condition if

"(a) a debt for performance rendered has already arisen and the condition relates only to the time when the debt is to be discharged, or

"(b) existence or occurrence of the condition is no material part of the exchange for the promisor's performance and the discharge of the promisor will operate as a forfeiture."

[27] This would presumably be true of liability insurance and would, perhaps, also apply to accident and fire insurance, though not so clearly in the latter cases as in the former.

disproportionate hardship to the insurer on any of the above mentioned grounds, the condition should be treated as not material and excused by impossibility.[28]

2.

Assuming that impossibility of performance is regarded by the court as an excuse for the non-performance of the condition as to notice, there still remains the problem of defining impossibility. *The Restatement of the Law of Contracts*[29] states that objective impossibility, in that the act itself is impossible of performance, is necessary to excuse the non-performance of the condition unless it can be performed only by the particular person, in which case subjective impossibility is the equivalent of objective impossibility. In insurance cases the stress is placed upon the subjective inability of the person who is to give notice to do so, either because of some personal disability or because of extrinsic factors which prevent his having knowledge of such facts as would cause a person to act in compliance with the provision.[30] An examination of the cases dealing with the problem at hand discloses no attempt at definitive analysis, but a classification of what has been held to be an impossibility furnishes a clue, at least, to a workable theory.

Mental disability of the insured in the form of insanity, unconsciousness, or mental incompetence to attend to business affairs induced by physical condition has been held to excuse the failure to give the requisite notice.[31] One court has gone so far as to hold that if the insured is mentally disabled on the last day of the period within which

[28] This should be particularly true of life insurance and fidelity insurance. To a lesser degree it would also be true of fire and accident insurance, but this would depend upon an analysis of the purpose of the provision as to the insurer with a balancing of the effect upon the insurance business generally in allowing the excuse with the effect upon the insured public if it is not allowed.

Note that where it is assumed that only conditions subsequent may be excused, "materiality" is often really the test of whether it is precedent or subsequent. See notes 12 and 14, supra.

[29] Sec. 455.

[30] See 7 COUCH, INSURANCE, § 1538 (k) (1930); and annotations in 18 L. R. A. (N. S.) 109 (1909), accident and health insurance; 41 L. R. A. (N. S.) 285 (1913), life insurance; 76 A. L. R. 74 (1932), liability insurance.

[31] Pfeiffer v. Missouri State Life Ins. Co., 174 Ark. 783, 297 S. W. 847, 54 A. L. R. 600 (1927); McCoy v. New York Life Ins. Co., (Iowa, 1935) 258 N. W. 320; Baylor v. State Mut. Life Assur. Co., 113 N. J. L. 389, 174 A. 526 (1934) (life insurance with waiver of premium clause); Houseman v. Home Ins. Co., 78 W. Va. 203, 88 S. E. 1048 (1916); and L. R. A. 1917A 305 (fire insurance); Woodmen Acc. Assn. v. Byers, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291 (1901); Roseberry v. American Benev. Assn., 142 Mo. App. 552, 121 S. W. 785 (1909); Metropolitan Casualty Ins. Co. v. Johnston, (C. C. A. 3d, 1917) 247 F. 65, 7 A. L. R. 175 (accident insurance).

See also 59 A. L. R. 1080 (1929).

notice is required, the fact that he had a lucid interval during such period will not prevent the failure to give notice from being excused.[32] This holding finds justification on the theory that notice is not "due" until the last day of the period during which it might be given. In any event, notice must be given within the stipulated period after he regains possession of his faculties.[33]

Where physical disability exists, but the person is in full control of his mental powers, he must get another to act for him and a failure to do so will not be excused.[34] Thus, if subjective inability to act is to be the test, it must require such disability as prevents the getting of another to act in his stead.

Bearing close relationship to the excuse of the condition for notice where compliance is prevented by mental disability, are those situations in which the failure to act is due to lack of knowledge of the happening of the insurable event. In the former case it is the incapacity to assimilate the facts which operates to excuse, while in the latter case the capacity exists but is prevented by some external factor from coming to bear on the facts which would induce action in accordance with the condition as to notice. The effect is the same in either case and such lack of knowledge has generally been held to constitute impossibility. Thus, lack of knowledge on the part of the beneficiary that the insured had died or was covered by insurance has been held to excuse delay in giving notice in the case of life insurance policies and policies insuring against death by accidental means,[35] and a similar result has been held

[32] Continental Casualty Co. v. Mathis, 150 Ky. 477, 150 S. W. 507 (1912).

[33] See annotation in 54 A. L. R. 611 (1928).

[34] United Benev. Soc. v. Freeman, 111 Ga. 355, 36 S. E. 764 (1900), the insured being temporarily blinded.

[35] Munz v. Standard Life & Acc. Ins. Co., 26 Utah 69, 72 P. 182, 62 L. R. A. 485 (1903), beneficiary did not learn of the existence of the policy until after she received the personal effects of the deceased and examined them; Peele v. Provident Fund Soc., 147 Ind. 543, 44 N. E. 661, 46 N. E. 990 (1896), beneficiary did not learn that death was due to "accident" until the period for notice had passed; Trippe v. Provident Fund Soc., 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432 (1893), insured died in the collapse of a building and the time for notice was held to begin to run only after the finding of his body which established the fact of his death; Kentzler v. American Mut. Acc. Assn., 88 Wis. 589, 60 N. W. 1002 (1894), insured, a tugboat worker, disappeared in November and his body was found in the water, where he had drowned, after thaw of ice the following April.

But see Tuttle v. Pacific Mut. Life Ins. Co., 58 Mont. 121, 190 P. 993, 16 A. L. R. 601 (1920), failure to give notice was not excused where insured left hunting camp and failed to return. The court said the beneficiary must have known that something had befallen her son, the insured. See annotation at 16 A. L. R. 609 (1922); and Maryland Casualty Co. v. Nellis, (C. C. A. 6th, 1935) 75 F. (2d) 23.

Where the excuse is allowed, notice must be given within the specified time after getting knowledge.

to obtain in accident policies where the insured does not know for some time that his disability is due to accident.[36] In fire and liability insurance, ignorance of the fact that a fire has occurred [37] or that the event against which the policy indemnifies the insured has happened [38] excuses delay in furnishing notice.

While lack of knowledge due to extrinsic circumstances may rightly be regarded as excusing performance of the condition in a proper case, it is clear that a contrary result should be reached where the inability to give notice is due to failure of the insured to take precautions so that the happening of the event will be brought to his attention,[39] or where the knowledge of others may be imputed to him on the theory of agency.[40] These qualifications are particularly applicable to liability insurance, and in such instances the courts have held delay to be inexcusable.[41] Mistake, such as the giving of notice to the wrong insurer or mislaying the policy, has also been held to be no excuse for the delay.[42]

In cases of insurance against liability for accidents some courts announce the doctrine that notice need not be given of trivial occurrences and that delay in giving notice until such time as it is apparent that there may be an actionable claim will be excused.[43] This result is not

[36] Hughes v. Central Acc. Ins. Co., 222 Pa. 462, 71 A. 923 (1909), insured did not find out for some time that a cataract was attributable to a cinder which had fallen into his eye while riding on a train; Hawthorne v. Travelers' Protective Assn., 112 Kan. 356, 210 P. 1086, 29 A. L. R. 494 (1922). See n. 21, supra.

On non-development of injury generally, see: 14 L. R. A. (N. S.) 503 n. (1908); and 29 A. L. R. 500 (1924).

[37] Franklin Fire Ins. Co. v. Orr, (Tex. Civ. App. 1931) 36 S. W. (2d) 576.

[38] John B. Stevens & Co. v. Frankfort M. A. & P. G. Ins. Co., (C. C. A. 9th, 1913) 207 F. 757; 47 L. R. A. (N. S.) 1214 (1913); 38 L. R. A. (N. S.) 62 n. (1912).

[39] See 76 A. L. R. 81 (1932).

[40] See 16 L. R. A. (N. S.) 400 n. (1908); 76 A. L. R. 90 (1932); Mandell v. Fidelity & Casualty Co., 170 Mass. 173, 49 N. E. 110 (1898) (liability insurance); Concordia Fire Ins. Co. v. Waterford, 145 Ark. 420, 224 S. W. 953, 13 A. L. R. 1387 (1920) (fire insurance).

[41] See notes 39 and 40, supra.

[42] Woodard v. Security Ins. Co., 201 Iowa 378, 207 N. W. 351 (1926) (fire insurance); Gifford v. New Amsterdam Casualty Co., 216 Iowa 23, 248 N. W. 235 (1933); Jefferson Realty Co. v. Employers' Liability Assur. Corp., 149 Ky. 741, 149 S. W. 1011 (1912) (liability insurance).

But see Solomon v. Continental Fire Ins. Co., 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707 (1899) (fire insurance).

[43] Chapin v. Ocean Accident & Guarantee Corp., 96 Neb. 213, 147 N. W. 465, 52 L. R. A. (N. S.) 227 (1914); 6 A. L. R. 384 (1920); 28 A. L. R. 1304 (1924); 76 A. L. R. 105 (1932); Haas Tobacco Co. v. American Fidelity Co., 226 N. Y. 343, 123 N. E. 755, 13 A. L. R. 132 (1919).

Contra, McCarthy v. Rendle, 230 Mass. 35, 119 N. E. 188, L. R. A. 1918E

inconsistent with that reached where there is lack of knowledge if it be remembered that in order to be said to have knowledge the insured should have possession of such facts as would induce a reasonable man to act.[44] Ignorance, or doubt as to whether the accident or injury is of the kind covered by the policy, has been similarly treated.[45]

Thus, it would seem that if delay in giving notice to the insurer is to be excused, the insured (or beneficiary) must be unable, either because of external factors or personal mental disability, to have knowledge of such facts as would cause a reasonable man in full possession of his faculties to act under the same circumstances. This is subject to the qualifications in liability insurance that reasonable means for getting knowledge be provided and that knowledge of an agent may be imputed.

C. F. H.

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111, where the court distinguishes a condition requiring notice of the "occurrence" of an accident from one requiring notice "upon occurrence" of the accident and upon notice of "any claim" on account of the accident.

The problem is related to that of non-development of injury in accident insurance. See note 36, supra.

[44] Ohio Casualty Ins. Co. v. Rosaia, (C. C. A. 9th, 1935) 74 F. (2d) 522; Palacine Oil Co. v. Commercial Casualty Ins. Co., (C. C. A. 10th, 1935) 75 F. (2d) 20; Missouri State Life Ins. Co. v. Barron, 186 Ark. 46, 52 S. W. (2d) 733 (1932); Larson v. New Jersey Fidelity Plate Glass Ins. Co., 167 Wash. 86, 8 P. (2d) 985 (1932); Southern Surety Co. v. Heyburn, 234 Ky. 739, 29 S. W. (2d) 6 (1930).

Contra, Oakland Motor Co. v. American Fidelity Co., 190 Mich. 74, 155 N. W. 729 (1916).

[45] 76 A. L. R. 117 (1932).