Michigan Law Review

Volume 32 | Issue 6

1934

INSURANCE - CONDITIONS PRECEDENT TO EXISTENCE OF CONTRACT

INSURANCE — CONDITIONS PRECEDENT TO EXISTENCE OF CONTRACT — The application for a non-medical-examination insurance policy, and the policy itself, contained the provision that the policy should not take effect if the insured should die before the date thereof or if, on such date, the insured should not be in sound health. At the time of delivery of the policy the insured was actually suffering from high blood pressure or heart disease, although this condition was unknown to him. A statute provided that the statements made in the application as to the physical condition of the insured should be valid and binding upon the insurance company "unless wilfully false or intentionally misleading." [1] *Held*, the evidence did not show that the insured's statements were wilfully false or intentionally misleading and the insurer cannot avoid the statute by the insertion of a condition precedent. *Schmidt v. Prudential Ins. Co.*, (Minn. 1933) 251 N. W. 683.

In the absence of statute there is abundant authority to the effect that a stipulation in the application and incorporated in the policy of insurance that the policy is not to take effect until delivered to the insured in good health is valid [2] and a condition precedent to the existence of a contract.[3] Several of the States have passed statutes similar to that in the instant case, providing, in effect, that no misrepresentation made in the negotiation for an insurance policy shall avoid the policy or prevent its attaching unless the matter misrepresented shall have been made with the intent to deceive or shall have contributed to the loss.[4] The

[1] Minn. Stat. (Mason 1927), sec. 3396.

[2] Ray v. Security Trust Co., 126 N. C. 166, 35 S. E. 246 (1900).

[3] Reese v. Fidelity Mutual Life Ass'n, 111 Ga. 482, 36 S. E. 637 (1900); Thompson v. Travelers' Ins. Co., 13 N. D. 444, 101 N. W. 900 (1904); Metropolitan Life Ins. Co. v. Betz, 44 Tex. Civ. App. 557, 99 S. W. 1140 (1907); Gallop v. Royal Neighbors, 167 Mo. App. 85, 150 S. W. 1118 (1912); see 16 THIRD DEC. DIG., "Insurance," sec. 136(4) (1928).

[4] The following statutes provide that no misrepresentation made in the negotiation shall defeat or avoid the policy or prevent its attaching unless made with intent to deceive: Mass. Gen. Laws (1932), c. 175, sec. 186; Ala. Code of 1928 (Michie 1929), sec. 8364; Wash. Comp. Stat. (Remington 1922), sec. 7078.

Mo. Rev. Stat. (1929), sec. 5732, and Kan. Rev. Stat. (1923), sec. 40-330, provide that no misrepresentation made in obtaining a policy of insurance shall render the policy void unless it was material to the risk or actually contributed to the contingency.

Texas Rev. Civ. Stat. (1928), art. 5043, stipulates that any provision in any

purpose of these statutes is to avoid the strict common law doctrine as to the effect of a breach of warranty.[5] The decision in the principal case is not without support;[6] and the statute, thus interpreted, has been held to be constitutional.[7] This result is reached by means of the proposition that the provision, that the policy shall not take effect until the contingency, is a condition precedent which differs from a warranty too technically to avoid the effect of the statute.[8] The numerical weight of authority, however, is that the statute has no application to the provision in question.[9] Admitting the ambiguity of the term "condition precedent," [10] yet when the application for an insurance contract and the policy itself contain the provision that the policy shall not take effect until a specified contingency, the parties have agreed that the proposed contract is not to take place until the fulfillment of the contingency.[11] If, by express agreement, there has been no contract due to the failure of the contingency, it seems obvious

contract or policy which provides that the statements in the application if false shall render the contract void shall be no defense unless it was material to the risk or contributed to the contingency.

Ohio Gen. Code (Baldwin's Throckmorton 1930), sec. 9391, provides that no answer by an applicant for insurance shall bar recovery unless such answer was wilfully false, fraudulently made, or induced the company to issue the policy.

Iowa code (1931), sec. 8770, provides that the issuance of a certificate of good health by the insurance company's doctor estops the insurer from setting up the defense that insured was not in good health at the time the policy was delivered.

[5] VANCE, INSURANCE, 2d ed., 400 (1930).

[6] Mutual Life Ins. Co. v. Mandelbaum, 207 Ala. 234, 92 So. 440 (1922); Salts v. Prudential Ins. Co., 140 Mo. App. 142, 120 S. W. 714 (1909); Mickel v. Mutual Life Ins. Co., 204 Iowa 1266, 213 N. W. 765 (1927). See note, 29 A. L. R. 656 (1924), for further authorities in Alabama and Missouri, and a treatment of the problem.

[7] Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. ed. 168 (1906).

[8] Mutual Life Ins. Co. v. Mandelbaum, 207 Ala. 234, 92 So. 440 (1922); Salts v. Prudential Ins. Co., 140 Mo. App. 142, 120 S. W. 714 (1909); Schmidt v. Prudential Ins. Co., (Minn. 1933) 251 N. W. 683.

[9] N. Y. Life Ins. Co. v. Wertheimer, (D. C. N. D. Ohio 1920) 272 Fed. 730; Metropolitan Life Ins. Co. v. Howle, 62 Ohio St. 204, 56 N. E. 908 (1900); Logan v. N. Y. Life Ins. Co., 107 Wash. 253, 181 Pac. 906 (1919); Hurt v. N. Y. Life Ins. Co., (C. C. A. 10th, 1931) 51 F. (2d) 936; Banco de Sonora v. Banker's Mut. Casualty Co., 124 Iowa 576, 100 N. W. 532 (1904); Southern Surety Co. v. Benton, (Tex. Comm. App. 1926) 280 S. W. 551; Barker v. Metropolitan Life Ins. Co., 188 Mass. 542, 74 N. E. 945 (1905). See 12 BOSTON UNIV. L. REV. 298 (1932) for discussion of Massachusetts cases.

[10] "Generally in contracts when reference is made to conditions, what is meant is conditions qualifying liability under a contract or promise, not conditions qualifying the existence of a contract or promise." 2 WILLISTON, CONTRACTS, sec. 666 (1920).

"It [a condition precedent] must be performed or happen before liability arises on the promise which the condition qualifies. One may also speak of a condition precedent to the existence of a contract." 2 WILLISTON, CONTRACTS, sec. 666a (1920).

[11] Yerger v. Simmons, 136 La. 280, 67 So. 3 (1915); Carmichael v. Life Ins. Co., 116 App. Div. 291, 101 N. Y. S. 602 (1906); Logan v. N. Y. Life Ins. Co., 107 Wash. 253, 181 Pac. 906 (1919).

that there is no basis for liability on the part of the insurer, and that the legislative dictate that the statements of the insured shall be "valid and binding" is inapplicable and meaningless without a contract.[12] So it seems that the decision in the principal case cannot be justified by the law of contracts, and that the remedy should lie with the legislature rather than with the courts.

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[12] It has been suggested that this interpretation of the provision makes the latter inconsistent with the incontestable clause (Salts v. Prudential Ins. Co., 140 Mo. App. 142, 120 S. W. 714 (1909)). And in the cases where the insurer has attempted to avoid payment on a policy on the theory that the provision under discussion prevented the existence of a contract, the courts hold that the incontestable clause precludes the insurer from raising such a defense. Healy v. Metropolitan Life Ins. Co., 37 App. D. C. 240 (1911); Mohr v. Prudential Ins. Co., 32 R. I. 177, 78 Atl. 554 (1911); Hurt v. N. Y. Life Ins. Co., (C. C. A. 10th, 1931) 51 F. (2d) 936. This result, in spite of the apparent unanimity of authority, seems insupportable in that the incontestable clause is one provision of a contract that by mutual agreement never came into existence, and should certainly afford no greater obstruction to this defense than to a showing of non-compliance with a clause limiting coverage which the courts allow. Metropolitan Life Ins. Co. v. Conway, 252 N. Y. 449, 169 N. E. 642 (1930). As the court in Sanders v. Jefferson Standard Life Ins. Co., (C. C. A. 5th, 1925) 10 F. (2d) 143, said, "A provision for incontestability does not have the effect of converting a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen."