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CONTRACTS-MEASURE OF DAMAGES-LIFE INSURANCE CONTRACT

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CONTRACTS—MEASURE OF DAMAGES—LIFE INSURANCE CONTRACT—When the plaintiff was expelled from defendant Brotherhood an insurance policy issued to the plaintiff by the defendant was canceled and the cash surrender value paid to him in accordance with the terms of his policy. The directors of the Brotherhood

later decided that this expulsion had been wrongful, whereupon the plaintiff returned the cash surrender value of the policy and demanded the return of all premiums paid. When this demand was refused, the plaintiff sued to recover damages for wrongful cancellation of his policy. The trial court instructed the jury to return a verdict for the premiums paid with interest, accumulated dividends, and "the value of any rights that he had under the policy which he lost because of its wrongful cancellation." On appeal the verdict was affirmed subject to the remission of excessive damages. *Held*, where it is not shown that the insured was unacceptable as a risk by another insurer, damages can not exceed the total premiums paid with interest and the accumulated dividends. *McLaughlin v. Brotherhood of Railroad Trainmen*, (S.C. 1950) 57 S.E. (2d) 411.

Where the insurer wrongfully cancels or repudiates an insurance contract there are four courses of action open to the insured. (1) He can sue in equity to set aside the wrongful cancellation and to have the policy declared a valid and subsisting contract.¹ (2) He can treat the policy as in force, continuing to tender the premiums as they become due, and recover on the policy when benefits are payable. (3) He can treat the contract as rescinded and sue for restitution of premiums paid with interest.² (4) He can sue on the contract for damages for the breach.³ Much of the confusion as to the proper measure of damages for wrongful cancellation of a life insurance policy stems from the failure to make a distinction between the latter two theories of action. Many cases do not make clear the theory under which the plaintiff proceeded,⁴ though this election has been clearly recognized in some instances.⁵ There should be a difference in the amount of recovery depending upon the purpose of plaintiff's action. If the plaintiff is suing on a theory of rescission and restitution, recovery should be based on the quasi-contract principle, which is to return the parties to the status quo.⁶ On this theory the return of the premiums paid plus interest would seem the correct measure, although the interest item has not always been included.⁷ The contract having been rescinded there can be no recovery of damages for the expectation interest.⁸ There is a dispute as to whether the value of the protection afforded

¹ Clark v. Equitable Life Assur. Soc., 76 Miss. 22, 23 S. 453 (1898).

² Supreme Council v. Black, (C.C.A. 3d, 1903) 123 F. 650; Van Werden v. Equitable Life Assur. Soc., 99 Iowa 621, 68 N.W. 892 (1896); True v. Bankers' Life Assn. of Minnesota, 78 Wis. 287, 47 N.W. 520 (1890).

³ Merrick v. Northwestern Nat. Life Ins. Co., 124 Wis. 221, 102 N.W. 593 (1905); American Insurance Union v. Woodard, 118 Okla. 248, 247 P. 398 (1926); Protective Mutual Life Assn. v. Duke, (Tex. Civ. App. 1936) 91 S.W. (2d) 753. For an excellent discussion of the Texas cases related to this subject see Mather, "Measure of Damages for Wrongful Repudiation of Executory Life Insurance Contracts in Texas," 12 TEX. L. REV. 251 (1934).

⁴ This lack of clarity is demonstrated in the principal case at 414: "Plaintiff had a right to take the defendant at its word, treat the contract as rescinded and sue for damages."

⁵ Wollman v. Brotherhood of American Yeomen, 231 Mo. App. 36, 95 S.W. (2d) 645 (1936); Slocum v. Northwestern Nat. Life Ins. Co., 135 Wis. 288, 115 N.W. 796 (1908).

⁶ CONTRACTS RESTATEMENT §347 (1932).

⁷ Supreme Council v. Black, *supra*, note 2.

⁸ But see Pinckney v. American Workmen, 196 S.C. 446, 14 S.E. (2d) 273 (1941). As to the possibility of getting judgment for damages in addition to rescission see 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §695 (1929).

while the policy was in force should be deducted.⁹ It is submitted that a calculable benefit has been conferred,¹⁰ and that the insurer is entitled to such a deduction.¹¹ If plaintiff's suit is at law for breach of contract he runs head on into the problem of anticipatory breach. The general rule of contract law is that the repudiation of an unconditional unilateral contract for the payment of money will not give a present right of action to the injured party.¹² A few courts, overlooking the fact that the insurance contract is not unconditional, have followed this rule and have held that the plaintiff may not sue at once for damages even though the insurer has clearly indicated his intent not to perform.¹³ A majority of the courts have permitted an immediate action on an anticipatory breach theory.¹⁴ An immediate right of action can also be predicated on a theory of present breach of contract by the insurer's failure to perform the implied promise to accept premiums at the rate fixed.¹⁵ Plaintiff's measure of recovery should be governed by the usual contract principle of allowing compensation sufficient to place him in the position he would have been in if the contract had been fulfilled. If the plaintiff is still insurable he should receive the difference between the cost of carrying the original insurance and the cost of new insurance for the same amount and term.¹⁶ It is to be noted, in some cases stating that premiums plus interest is the measure of damages, that this was the only recovery sought by the plaintiff.¹⁷ Where the plaintiff is no longer insurable he should receive the face value of the policy less the premiums which would accrue during the period the insured may be expected

⁹ Cases allowing the deduction are *Gilbert v. N.Y. Life Ins. Co.*, 238 App. Div. 544, 264 N.Y.S. 610 (1933); *Grand Lodge v. Martin*, (Tex. Civ. App. 1919) 218 S.W. 40; *Ebert v. Mutual Reserve Fund Life Assn.*, 81 Minn. 116, 83 N.W. 506 (1900); *Lovell v. St. Louis Mutual Life Insurance Co.*, 111 U.S. 264, 4 S.Ct. 390 (1884). This deduction was not permitted in *Belser v. Mutual Life Ins. Co. of N.Y.*, (D.C. S.C. 1948) 77 F. Supp. 826; *Life and Casualty Ins. Co. v. Baber*, 168 Tenn. 347, 79 S.W. (2d) 36 (1935); *Gaskill v. Pittsburgh Life and Trust Co.*, 261 Pa. 546, 104 A. 775 (1918).

¹⁰ The argument that no deduction should be made is based on the idea that no pecuniary benefit has been received since the insured is still alive. But the insurer assumed a risk at the request of the insured which it did not have to assume, and because of this the insured received the benefits and protection to the beneficiaries of the insured for the period the policy was in effect. This benefit can be measured by the market value of term insurance for the time the policy was in effect or by the total of the natural premiums for the period plus the usual loading charge covering the insurer's operating costs. See note, 32 Col. L. Rev. 1437 (1932).

¹¹ The doctrine of *Britton v. Turner*, 6 N.H. 481 (1834) would seem to afford a basis for allowing the defaulting insurer to offset the benefits that it has conferred during the life of the policy, at least where the policy was not cancelled in bad faith.

¹² *Roehm v. Horst*, 178 U.S. 1, 20 S.Ct. 780 (1900).

¹³ *Kelly v. Security Mutual Life Ins. Co.*, 186 N.Y. 16, 78 N.E. 584 (1906); *Porter v. American Legion of Honor*, 183 Mass. 326, 67 N.E. 238 (1903). A better reason for denying an immediate action on the theory of anticipatory breach is that in most cases there is no repudiation by the insurer but only a good faith denial of liability. See *New York Life Insurance Co. v. Viglas*, 297 U.S. 672, 56 S.Ct. 615 (1936).

¹⁴ *American Insurance Union v. Woodard*, supra, note 3. Other cases collected in 107 A.L.R. 1233 (1937).

¹⁵ 5 WILLISTON, CONTRACTS §1328 (1937).

¹⁶ *Franklin v. Northern Life Ins. Co.*, 4 Wash. (2d) 541, 104 P. (2d) 310 (1940); *Bass v. Life and Annuity Assn.*, 96 Kan. 205, 150 P. 588 (1915); *Speer v. Phoenix Mutual Life Ins. Co.*, 36 Hun. (N.Y.) 322 (1885).

¹⁷ *Lovell v. St. Louis Mutual Life Ins. Co.*, supra, note 9.

to live, taking into account his actual physical condition. These amounts should be valued as of the date of cancellation.¹⁸ There is a conflict in the decisions as to whether this period shall be the actual period of survival¹⁹ or the expectancy period²⁰ when the plaintiff has died before the trial. It would seem that the former view is preferable since the present value of the policy as of the date of cancellation can be accurately computed, death removing all uncertainty; but the latter view is supported by the argument that the rights of a party to a contract which has been breached are fixed at the time of the breach. In the principal case there appears to be no reason for limiting the recovery to premiums paid plus interest, since plaintiff's action was not brought on a rescission theory. South Carolina allows punitive damages for a cancellation with a fraudulent intent accompanied by a fraudulent act,²¹ but the facts of the principal case do not warrant such additional damages. It would seem, in any case, that punitive damages should not be recoverable in a contract action.²²

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¹⁸ *National Life and Accident Ins. Co. v. Johnson*, (Tex. Civ. App. 1941) 154 S.W. (2d) 219; *Franklin v. Northern Life Ins. Co.*, *supra*, note 16; *American Insurance Union v. Woodard*, *supra*, note 3.

¹⁹ *Abraham Lincoln Life Ins. Co. v. Moore*, 102 Ind. App. 412, 2 N.E. (2d) 223 (1936); *Mutual Reserve Fund Life Assn. v. Ferrenbach*, (C.C.A. 8th, 1906) 144 F. 342.

²⁰ *National Life and Accident Ins. Co. v. Sims*, 187 Ark. 969, 63 S.W. (2d) 524 (1933).

²¹ *Lamb v. Metropolitan Mut. Fire Ins. Co.*, 183 S.C. 345, 191 S.E. 56 (1937); *Latta v. Sovereign Camp, W.O.W.*, 179 S.C. 376, 184 S.E. 157 (1936). In reference to allowing exemplary damages for breach of contract, see GRISMORE, *CONTRACTS* §198 (1947).

²² *CONTRACTS RESTATEMENT* §342 (1932).