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# Contracts—Applying the Plain Language to Incontestability Clauses

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## CONTRACTS—APPLYING THE PLAIN LANGUAGE TO INCONTESTABILITY CLAUSES

*Kersten v. Minnesota Mutual Life Insurance Co.*, 608 N.W.2d 869  
(Minn. 2000)

Erin Wessling<sup>†</sup>

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### I. INTRODUCTION

Minnesota, like many other states, requires the inclusion of an

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incontestability clause in insurance contracts.<sup>1</sup> However, the Minnesota Supreme Court has never addressed the incontestability clause as a bar to the defense of pre-existing conditions.<sup>2</sup> In *Kersten v. Minnesota Mutual Life Insurance Co.*,<sup>3</sup> the Minnesota Supreme Court recently reviewed the incontestability clause as it applies to pre-existing conditions.

This note addresses the incontestability clause as it applies to those conditions that first manifest themselves prior to the commencement of the policy. An incontestability clause acts as a statute of limitations to limit the insurer from challenging the validity of the contract after a period of time.<sup>4</sup> Minnesota, like a majority of the states, statutorily mandates that the incontestability clause be inserted into the insurance policy.<sup>5</sup>

Recently, insurance companies have begun to insert a "first manifestation" clause into the definition of "sickness" in order to exclude coverage for pre-existing conditions.<sup>6</sup> The first manifestation clause defines "sickness" as those conditions that first manifest while the insurance policy is in force.<sup>7</sup> The "first manifest" doctrine permits insurers to use a first manifestations definition of "sickness" to deny a pre-existing condition.<sup>8</sup> Thus, the insured is no longer protected from invalidation of the policy after the two year time period for inadvertently failing to disclose pre-existing conditions.

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1. MINN. STAT. § 62A.04, subd. 2 (2000). Specific clauses must be contained within an insurance policy in order to be valid. *Id.* Forty-three states require incontestability clauses by statute in life insurance policies, and in many states incontestability clauses are used in health and annuity policies. *Infra* note 29 and accompanying text.

2. *Infra* note 42 and accompanying text.

3. 608 N.W.2d 869 (Minn. 2000). The issue stated in *Kersten* was whether the statutorily required condition provisions of Minnesota Statute section 62A.04, subd. 2(2)(b) preclude Minnesota Mutual from using a definition of "sickness" that required the sickness to first manifest itself while the policy was in force. *Id.* at 871.

4. Katherine Cooper, *Liar's Poker: The Effect of Incontestability Clauses After Paul Revere Life Insurance Co. v. Haas*, 1 CONN. INS. L.J. 225, 227 (1995).

5. MINN. STAT. § 62A.04 (2000).

6. *Neville v. Am. Republic Ins. Co.*, 912 F.3d 813, 814 (5th Cir. 1990).

7. For cases addressing insurance policies using a "first manifest" definition of "sickness," *Equitable Life Assurance Soc'y of the United States v. Bell*, 27 F.3d 1274, 1276 (7th Cir. 1994); *Mass. Cas. Ins. Co. v. Forman*, 516 F.2d 425, 430 (5th Cir. 1975); *Paul Revere Life Ins. Co. v. Haas*, 644 A.2d 1098, 1104 (N.J. 1994).

8. David G. Newkirk, *An Economic Analysis of the First Manifest Doctrine: Paul Revere Life Insurance Co. v. Haas*, 64 A.2d 1098 (N.J. 1994), 76 NEB. L. REV. 819, 821 (1997).

In *Kersten*,<sup>9</sup> the Minnesota Supreme Court rejected the first manifestation doctrine and held that Minnesota's statutorily mandated incontestability clause bars insurers from asserting the defense that a condition first manifested itself prior to the commencement of the policy.<sup>10</sup> In *Kersten*, the insured inadvertently failed to disclose a pre-existing condition prior to the commencement of the policy.<sup>11</sup> Minnesota Mutual had enclosed a provision in the policy defining "sickness" as those conditions that "first manifest" while the policy is in force.<sup>12</sup> The Minnesota Supreme Court ruled for the insured, stating that the "first manifest" definition of "sickness" put the insured in a worse position than the statutorily mandated incontestability clause.<sup>13</sup> The court followed other "first manifest" cases in examining the plain language of the statute as well as examining the legislative intent of the incontestability clause.<sup>14</sup>

This case note will first examine the development of the incontestability clause and then explore cases addressing the first manifest doctrine. Part III examines the facts of the case as well as the majority and dissent's analysis in the *Kersten* decision. Part IV discusses the court's analysis and the effects of the decision. This note will conclude that the Minnesota Supreme Court has upheld public policy by its interpretation of the plain language of the incontestability clause and protecting both the insurer and the insured's rights.

## II. HISTORY

### A. *The Roots Of The Incontestability Clause*

An incontestability clause acts like a statute of limitations to prohibit insurance companies from contesting the validity of the policy.<sup>15</sup> It deprives the insurer, after a passage of a stated period, of the right to declare the policy invalid based on fraud or misrepresentations made by the insured.<sup>16</sup> The time period varies, but

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9. 608 N.W.2d 869 (Minn. 2000).

10. *Id.* at 878.

11. *Id.* at 871.

12. *Id.*

13. *Id.* at 877.

14. *Id.* at 876-77 (citing *Equitable Life Assurance Soc'y of the United States v. Bell*, 27 F.2d 1274, 1274 (7th Cir. 1994) and *Wischmeyer v. Paul Revere Life Ins. Co.*, 725 F. Supp. 995, 995 (S.D. Ind. 1989).

15. *Cooper, supra* note 4, at 227.

16. 43 AM. JUR. 2D *Insurance* § 775 (1982).

many incontestability clauses state that after two years the insurer is barred from declaring the policy invalid.<sup>17</sup>

Incontestability clauses have been in effect for over one hundred and fifty years to assure customers that their claims will be paid.<sup>18</sup> Incontestability clauses were initiated as a marketing device to increase public trust in insurance companies.<sup>19</sup>

An English insurer, Indisputable Life Insurance Company, was the first insurance company to insert an incontestability clause into its policy in 1848.<sup>20</sup> Before incontestability clauses were used, the insured commonly paid premiums for a long period of time and the insurance company would later void the contract for a minor reason when the payment of benefits was due.<sup>21</sup> The incontestability clause was implemented in England in order to address the uncertainty of the insurer's obligation to honor the policy after the insured died, when the beneficiaries' benefits were due.<sup>22</sup> The early English clauses excepted fraud of the insured from the incontestable clause, and this idea continued in America.<sup>23</sup>

In 1864, the Manhattan Life Insurance Company was the first American company to offer a policy containing an incontestability clause.<sup>24</sup> The Manhattan Life Insurance Company introduced the incontestability clause as a sales measure to combat America's skepticism of the insurance industry.<sup>25</sup> Incontestability clauses became established in American insurance policies after the Equitable Life Assurance Company implemented the clause in its policies.<sup>26</sup> By 1895, seven American insurance companies had adopted the incontestability clause and by the turn of the century the use of the clause was common practice.<sup>27</sup>

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17. BETRAM HARNETT & IRVING I. LESNICK, LIFE AND HEALTH INSURANCE ANNOTATED § 5.07 (2000).

18. JANICE E. GREIDER & WILLIAM T. BEADLES, LAW AND THE LIFE INSURANCE CONTRACT 237 (1968); *see also* Cooper, *supra* note 4, at 225.

19. GREIDER & BEADLES, *supra* note 18, at 225.

20. Newkirk, *supra* note 8, at 825.

21. MURIEL L. CRAWFORD & WILLIAM T. BEADLES, LAW AND THE LIFE INSURANCE CONTRACT 423 (6th ed. 1989).

22. HARNETT & LESNICK, *supra* note 17, § 5.07.

23. *Id.*

24. *Id.*

25. *Id.* (citing W. BUCK, THE OLD RELIABLE, AN ACCOUNT OF THE FIRST ONE HUNDRED YEARS OF THE MANHATTAN LIFE INS. CO. 1850-1950, 32 (1950)).

26. HARNETT & LESNICK, *supra* note 17, § 5.07

27. *Id.* (stating that by 1895, Prudential, Northwestern Mutual, New York Life, Mutual of New York, and Metropolitan Life Insurance Company had implemented incontestability clauses).

In 1905, the Armstrong Commission in New York and the “Committee of Fifteen” in Chicago developed model insurance policies and incontestability clauses.<sup>28</sup> In 1946, the National Association of Insurance Commissioners drafted a model incontestability clause statute that has been adopted by at least 47 states.<sup>29</sup> Forty-three of the states have incontestability clauses contained in life insurance policies, while four states have incontestability provisions covering various types of insurance policies.<sup>30</sup> Only three states, North Dakota, Rhode Island, and Wyoming have no express statutorily mandated incontestability clause.<sup>31</sup>

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28. Newkirk, *supra* note 8, at 826. See also Eric K. Fosaaen, *AIDS and the Incontestability Clause*, 66 N.D. L. REV. 267, 269 (1990). The Armstrong Commission was led by Senator William W. Armstrong, and conducted an investigation into the insurance industry. *Id.* In 1906, a national conference in Chicago attended by governors, attorneys general, and insurance commissioners formed the “Chicago Fifteen.” *Id.* Following the Armstrong Investigation in 1907, New York enacted the Standard Policy Law requiring incontestability clauses in all life insurance policies. *Id.*

29. Fosaaen, *supra* note 28, at 295 n.27; see also HARNETT & LESNICK, *supra* note 17, § 5.07 (listing the following states as statutorily mandating an incontestability clause in life insurance contracts: ALA. CODE § 27-15-4, 27-15-15 (2000); ALASKA STAT. § 21.45.040 (Michie 1962 & West Supp. 2000); ARIZ. REV. STAT. ANN. § 20-1204 (West 1956); ARK. CODE ANN. § 23-81-105(a) (Michie 1987 & West Supp. 2000); CAL. INS. CODE § 10113.5 (West 1954); COLO. REV. STAT. § 10-7-102 (1988); DEL. CODE ANN. tit. 18, § 2908 (1974); FLA. STAT. ANN. § 627.455 (West 2000); GA. CODE ANN. § 33-25-7 (Harrison 1994); HAW. REV. STAT. § 431:10D-102(3) (1968); IDAHO CODE § 41-1905 (Michie 1948); 215 ILL. COMP. STAT. 5/231.1 (1993); IND. CODE ANN. § 27-1-12-6 (Michie 1978); IOWA CODE ANN. § 508.28 (West 1949); KAN. STAT. ANN. § 40-420(2) (1964); KY. REV. STAT. ANN. § 304.15-080 (Michie 1971); LA. REV. STAT. ANN. § 22:170 (West 2000); ME. REV. STAT. ANN. tit. 24A, § 2507 (West 1964); MD. CODE ANN., ART. 48A § 390 (1957); MASS. GEN. LAWS ANN. ch. 175, § 132 (West 1958); MICH. COMP. LAWS ANN. § 500.4014 (West 2000); MINN. STAT. ANN. § 62A.04, subd. 2 (West 2000); MONT. CODE ANN. § 33-20-105 (2000); NEB. REV. STAT. § 44-502 (2000); NEV. REV. STAT. ANN. 688A.989 (Michie 1986); N.H. REV. STAT. ANN. § 408:10 (1955); N.J. STAT. ANN. § 17B:25-4 (West 2000); N.M. STAT. ANN. § 59A-20-5 (Michie 1999); N.Y. INS. LAW § 3203 (McKinney 1939); OHIO REV. CODE ANN. § 3911.07 (Anderson 1994); OKLA. STAT. ANN. tit. 36, § 4004 (West 1936); OR. REV. STAT. § 743.168 (1988); PA. STAT. ANN. tit. 40, § 510 (West 2000); S.C. CODE ANN. § 38-63-220 (Law. Co-op. 1976); S.D. CODIFIED LAWS § 38-63-220 (Michie 1978); TENN. CODE ANN. § 56-7-301 (1955); TEX. CODE ANN. § 56-7-301 (Vernon 2000); UTAH CODE ANN. § 31A-22-403 (2000); VT. STAT. ANN. tit. 8, § 3731 (2000); VA. CODE ANN. §§ 38.2-3107, 38.2-3110 (Michie 1950); WASH. REV. CODE ANN. § 48.23.050 (West 2000); W. VA. CODE § 33-13-4 (2000); WIS. STAT. ANN. § 632.46(2) (West 2000))

30. HARNETT & LESNICK, *supra* note 17, § 5.07. Connecticut, Mississippi, Missouri, and North Carolina have incontestability in a variety of insurance policies. *Id.*

31. *Id.*

### B. *The Development Of The Incontestability Clause*

Early decisions inconsistently interpreted the function of the incontestability clause.<sup>32</sup> Some courts construed the incontestability clause strictly as a bar to all defenses.<sup>33</sup> Other courts held that the incontestability clause acted as a bar to defenses concerning only the terms in the contract.<sup>34</sup> However, the courts uniformly barred fraud as a defense after the passage of time contained in the incontestability clause.<sup>35</sup>

In 1930, the *Conway* decision settled the various interpretations of incontestability clauses.<sup>36</sup> The *Conway* decision is the milestone case discussing the incontestability clause that many courts rely upon when interpreting the validity of incontestability clauses.<sup>37</sup>

In *Conway*, Judge Cardozo rejected the idea that an incontestability clause acts as a mandate of absolute coverage for all risks not specifically excluded in the state's incontestability clause.<sup>38</sup> Cardozo concluded that liability did not exist where the insurer has

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32. Fosaaen, *supra* note 28, at 272-73.

33. *Id.*; *Plottner v. N.W. Nat'l Life Ins. Co.*, 183 N.W. 1000, 1000 (N.D. 1921) (barring defenses to recover amount in insurance policy that contained provision stating that after the expiration of one year, the policy was incontestable).

34. Fosaaen, *supra* note 28, at 272 (citing *Scarborborough v. Am. Nat'l Ins. Co.*, 88 S.E. 482, 482 (N.C. 1916)). In *Scarborough*, the court held that the inclusion of an incontestability clause in the insurance policy meant the policy will not be contested. *Id.* at 483. The court held that the incontestability clause did not waive the right of the insurance company to defend against a risk it never intended to assume. *Id.*

35. Fosaaen, *supra* note 28, at 272. Early decisions barred all defenses after the passage of time contained in the incontestability clause. *Id.*

36. *Metro. Life Ins. Co. v. Conway*, 169 N.E. 642, 642 (N.Y. 1930). In *Conway*, Metropolitan wanted to insert a rider into its insurance policy. *Id.* The rider was to except the death of insureds resulting from "service, travel or flight in any species of air craft, except as a fare-paying passenger." *Id.* Chief Judge Cardozo held that the incontestability statute only prohibited contents of validity of the policy. *Id.* at 643.

37. *E.g.*, *Nat'l Life & Accounting & Ins. Co. v. Mixon*, 282 So. 2d 308, 320 (Ala. 1973); *Crawford v. Equitable Life Assurance Soc'y of United States*, 305 N.E.2d 144, 148 (Ill. 1973); *Fisher v. United States Life Ins. Co.*, 249 F.2d 404, 407 (Md. 1957); *Rasmussen v. Neb. Nat'l Life Ins. Co.*, 170 N.W.2d 370, 370 (Iowa 1965); *Paul Revere Life Ins. Co. v. Haas*, 644 A.2d 1098, 1104 (N.J. 1994).

38. *Conway*, 169 N.E. at 642. The *Conway* court stated:

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.

*Id.*

not assumed the risk at issue and did not extend the scope of coverage of the policy.<sup>39</sup>

Following *Conway*, in 1947, the Life Insurance Association of America and the American Life Convention formed a committee to draft model insurance statutes.<sup>40</sup> A total of 27 states have adopted similar statutory limitations to the incontestability clause.<sup>41</sup>

Since *Conway*, the debate as to whether incontestability clauses are effective to limit the coverage, or simply prohibit the insurer from denying validity of the policy continues.<sup>42</sup> Insurance compa-

39. *Id.* at 643. See also HARNETT & LESNICK, *supra* note 17, § 5.07.

40. Fosaaen, *supra* note 28, at 275-76. This committee became known as the Holland Committee. *Id.* The Holland Committee was formed by the insurance industry in response to the growing number of decisions that interpreted the incontestability clause broadly. *Id.* The model statute read:

A clause in any policy of life insurance providing that such policy shall be incontestable after a specified period shall preclude only a contest of the validity of the policy, and shall not preclude the assertion at any time of defenses based upon provisions in the policy which exclude or restrict coverage, whether or not such restrictions or exclusions are excepted in such clause.

*Id.*

41. *Id.* Fosaaen lists the following states as having enacted a statute similar to the clause provided by the Holland Committee: ALA. CODE § 27-15-15 (1986)(enacted 1967); ALASKA STAT. § 21-45-160 (enacted 1966)(Michie 1962); ARIZ. REV. STAT. ANN. § 20-1217 (West 1975)(enacted 1954); ARK. CODE ANN. § 23-83-111(b) (Michie 1962)(enacted 1959); CAL. INS. CODE § 10113.5 (West Supp. 1999)(enacted 1972); DEL. CODE ANN. tit. 19, § 3114 (1975)(enacted 1953); FLA. STAT. ANN. § 627.463 (West Supp. 1999)(enacted 1984); GA. CODE ANN. § 56-2509 (Harrison 1994)(enacted 1960); HAW. REV. STAT. § 431-542 (enacted 1985)(1968); IDAHO CODE § 41-1916 (Michie 1999)(enacted 1961); IND. CODE ANN. § 27-1-12-41(b)(2) (Michie Supp. 1999)(enacted 1985); KY. REV. STAT. ANN. § 304.15-170 (Michie 1971)(enacted 1970); LA. REV. STAT. ANN. § 22:170(B)(5) (West 1973) (enacted 1959); ME. REV. STAT. ANN. tit. 24A, § 2615(2) (West 1964 & Supp. 1999)(enacted 1969); NEV. REV. STAT. ANN. § 688A.170 (Michie 1986)(enacted 1971); N.J. STAT. ANN. § 17B:25-16 (West 1939 & Supp. 1999) (enacted 1971); N.M. STAT. ANN. § 59A-20-16 (Michie 1999) (enacted 1984); N.D. CENT. CODE § 26.1-33-11(2)(1959 & Supp. 1999)(enacted 1985); OKLA. STAT. ANN. tit. 36, § 4015 (West 1936 & Supp. 1999)(enacted 1957); OR. REV. STAT. § 743.168(2)(1988)(enacted 1967); S.D. CODIFIED LAWS § 58-15-11 (Michie 1978)(enacted 1966); VA. CODE ANN. § 38.2-3110 (Michie 1950 & Supp. 1999)(enacted 1952); W. VA. CODE § 33-13-16 (1966)(enacted 1957); WYO. STAT. ANN. § 26-16-115 (Michie 1989) (enacted 1967). Fosaaen, *supra* note 28, at 295 n.67 (providing list of states and statutes).

42. Dale Joseph Gilsinger, *Construction of Incontestable Clause Applicable to Disability Insurance*, 67 A.L.R.5th 513, 513 (1999); see also *Equitable Life Assurance Soc'y of the United States v. Poe*, 143 F.3d 1013 (6th Cir. 1998); *Equitable Life Assurance Soc'y of the United States v. Bell*, 27 F.3d 1274 (7th Cir. 1994); *Neville v. Am. Republic Ins. Co.*, 912 F.2d 813 (5th Cir. 1990); *Oglesby v. Penn. Mut. Life Ins. Co.*, 889 F. Supp. 770 (D. Del. 1995); *Galanty v. Paul Revere Life Ins. Co.*, 97 Cal. Rptr.2d 67 (Cal. 2000); *Paul Revere Life Ins. Co. v. Haas*, 644 A.2d 1098 (N.J.



nies reject coverage of pre-existing conditions by inserting "first manifest" policy language to deny coverage of pre-existing conditions.<sup>43</sup> The "first manifest" doctrine has developed over time and court decisions are split as to whether the doctrine is valid.

### 1. *The First Manifestation Doctrine*

Insurers began to use "first manifest" language in insurance policies to circumvent the requirement of incontestability clauses for the purpose of excluding pre-existing conditions.<sup>44</sup> The first manifest doctrine permits insurance companies to use the "first manifest" definition in order to limit the scope of coverage of the policy from including pre-existing or concealed conditions.<sup>45</sup> Many insurance companies insert the "first manifest" language into the policy's definition of "sickness" to protect themselves against potential insured's concealing any pre-existing conditions.<sup>46</sup> The first manifestation definition of sickness distinguishes between those conditions that exist and manifest themselves before the commencement of the policy and those conditions that exist before the commencement of the policy but have not yet manifested themselves.<sup>47</sup>

Insurance companies argue that the courts extend the policy's coverage by not permitting the use of "first manifest" policy language.<sup>48</sup> Cases addressing the "first manifest" doctrine demonstrate the disagreement as to whether an incontestability clause extends coverage of the policy to cover pre-existing conditions when the insurer has exempted them in a definition of "sickness," or whether it only affects the validity of the policy.<sup>49</sup>

### 2. *First Manifestation Cases*

Many state and federal courts have addressed the "first mani-

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1994).

43. Newkirk, *supra* note 8, at 821-22.

44. *Id.*

45. Aaron A. Haak, *Callahan v. Mutual Life Insurance of New York: Incontestability Clause as a Bar to "First Manifest" Policy Provisions*, 23 AM. J. TRIAL ADVOC. 231, 231 (1999); *E.g.*, *Haas*, 622 A.2d at 1106; *Mass. Cas. Ins. Co. v. Forman*, 516 F.2d 425, 428-31 (5th Cir. 1975).

46. Haak, *supra* note 45 at 231-32; *see also Bell*, 27 F.3d at 1277-83.

47. Haak, *supra* note 45, at 231-32; *see also Bell*, 27 F.3d at 1277-83.

48. *Bell*, 27 F.3d at 1277; *Haas*, 644 A.2d at 1103; *Wischmeyer v. Paul Revere Life Ins. Co.*, 725 F. Supp. 995, 1003-05 (S.D. Ind. 1989).

49. *Gilsinger*, *supra* note 42, at 513.

festation" doctrine.<sup>50</sup> The Fifth Circuit's holding in *Massachusetts Casualty Insurance Co. v. Forman*,<sup>51</sup> and the Seventh Circuit's decision in *Equitable Life Assurance Society of United States v. Bell*,<sup>52</sup> demonstrates the division of authority on the "first manifestation" doctrine.

In *Forman* the insurance company issued a policy insuring against sickness that first manifests itself during the term of the policy.<sup>53</sup> Forman filed a claim for total disability for diabetes.<sup>54</sup> After Forman filed the claim, the insurance company learned of a preexisting diabetic condition.<sup>55</sup> The court held that the "first manifestation" provision protected the insurer from the preexisting condition known to the insured.<sup>56</sup>

In *Bell* the Seventh Circuit addressed a similar "first manifestation" doctrine and held in favor of the insured.<sup>57</sup> The insurer attempted to deny coverage for a preexisting multiple sclerosis con-

50. Haak, *supra* note 45, at 235. Haak lists the following cases as addressing the "first manifestation" clause: *Equitable Life Assurance Soc'y of United States v. Poe*, 143 F.3d 1013, 1017-20 (6th Cir. 1998) (holding incontestability clause prevented denial of all preexisting conditions); *Bell*, 27 F.3d at 1283 (stating first manifest clause is inapplicable); *Neville v. Am. Republic Ins. Co.*, 912 F.2d 813, 815 (5th Cir. 1990) (holding that incontestability clause did not require coverage for a condition that first manifested prior to coverage and the condition was not covered by "first manifest" language in "sickness" definition); *Keaten v. Paul Revere Life Ins. Co.*, 648 F.2d 299, 300 (5th Cir. Unit B 1981) (holding the insurer is not prevented from denying coverage of preexisting conditions); *Mass. Cas. Ins. Co. v. Forman*, 516 F.2d 425, 429 (5th Cir. 1975) (holding that insurer is not responsible for preexisting conditions); *Penn. Mut. Life Ins. Co. v. Ogelsby*, 695 A.2d 1146, 1151 (Del. 1997) (stating that the incontestability statute did not permit under the first manifest policy language absent a provision allowing the insurer to defend against fraudulent statements); *Estate of Doe v. Paul Revere Life Ins. Group*, 948 P.2d 1103, 1116 n.22 (Haw. 1997) (stating that definition describing "sickness" as those conditions that first manifest them during the policy did not specifically exclude conditions); *Mut. Life Ins. Co. of N. Y. v. Ins. Comm'r of Md.*, 723 A.2d 891, 896 (Md. 1999) (stating that first manifest definition of sickness was unenforceable); *Kersten v. Minn. Mut. Life Ins. Co.*, 594 N.W.2d 263, 267 (Minn. Ct. App. 1999) (holding that incontestability provision prevented first manifestation definition of sickness); *Haas*, 644 A.2d at 1105 (holding insurer was able to use first manifestation definition of sickness); *New England Mut. Life Ins. Co. v. Doe*, 93 N.Y.2d 122, 130 (N.Y. 1999) (defining "exist" as covering "only those instances which the applicant is innocent of any knowledge" would contradict the statutory language). *Id.*

51. 516 F.2d 425 (5th Cir. 1975).

52. 27 F.3d 1274 (7th Cir. 1994).

53. 516 F.2d at 422.

54. *Id.*

55. *Id.*

56. *Id.* at 428.

57. *Bell*, 27 F.3d at 1283.

dition that manifested itself before the commencement of the policy.<sup>58</sup> The court focused on the difference between the language of the terms “exist” and “manifest” and held that the term “exist” refers to a state of being, including manifestation.<sup>59</sup> The court disagreed with the *Forman* court and instead applied the plain meaning of the language contained in the insurance policy.<sup>60</sup>

Current interpretation of incontestability clauses, as they apply to pre-existing conditions, differs between jurisdictions.<sup>61</sup> Four federal appellate courts have examined incontestability clauses containing a “first manifest” clause excluding pre-existing conditions.<sup>62</sup> Both the federal courts and state courts are split on whether insurance companies may use pre-existing condition clauses to deny benefits.<sup>63</sup> However, the modern trend is to preclude defenses based on the “first manifestation” doctrine.<sup>64</sup> In *Kersten*, the Minne-

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58. *Id.* at 1276.

59. *Id.*

60. *Id.*

61. Gilsinger, *supra* note 42, at 513.

62. Alexander B. Temel, *Incontestability Statute Nullifies Contract Language: Equitable Life Assurance Society of the United States v. Bell* 27 F.3d 1274 (7th Cir. 1994), 47 WASH. U. J. URB. & CONTEMP. L. 271, 275 (1995). *See also Bell*, 27 F.3d at 1274 (applying the plain language and meaning of the insurance policy incontestability clause, construed to prohibit insurance companies from denying coverage based on a first manifest definition); *Button v. Conn. Gen. Life Ins.*, 847 F.2d 584, 584 (9th Cir. 1988) (holding incontestability clause relates to validity of contract and not to construction of policy provisions); *Mass. Cas. Ins. Co. v. Forman*, 516 F.2d 425, 425 (5th Cir. 1975) (holding the “first manifestation” provision in the policy protected the insurer from coverage for conditions which existing before coverage became effective).

63. Temel, *supra* note 62, at 276. The Fifth and the Ninth Circuits have held that incontestability clauses relate to the validity and not to the coverage of the policy. *Id.* However, the Sixth and Seventh Circuits applied the plain language of the incontestability clause and concluded that defenses to pre-existing conditions were barred by the incontestability clause. *Id.* *See also Nat'l. Life & Accident Ins. Co. v. Mixon*, 282 So. 2d 308 (Ala. 1973) (holding that no conflict existed between the statutorily mandated incontestability clause and the pre-existing condition exclusion); *Petty v. Metro. Life Ins. Co.*, 166 S.W.2d 1034, 1034 (Ark. 1942); *Hooks v. Colonial Life and Accident Ins. Co.*, 259 S.E.2d 567, 567 (N.C. Ct. App. 1979); *Apter v. Home Life Ins. Co. of N.Y.*, 194 N.E. 846, 846 (N.Y. 1935). *But see Posner v. N.Y. Life Ins. Co.*, 106 P.2d 488, 492 (Ariz. 1940) (stating that incontestability clause did not bar defenses of insurer that disease commenced prior to the date of the policy); *Penn. Mut. Life. Ins. Co. v. Oglesby*, 695 A.2d 1146, 1146 (Del. 1997); *Doe v. Paul Revere Ins. Group*, 948 P.2d 1103, 1103 (Haw. 1997); *Jefferson Standard Life Ins. v. O'Bryan*, 192 So. 2d 263, 265 (Miss. 1966).

64. Temel, *supra* note 62, at 276. The majority position is to accept a “first manifest” definition of the term “sickness.” *Mixon*, 282 So. 2d at 314. However, a “growing minority of courts” have rejected the “first manifest” doctrine. *Oglesby v. Penn. Mut. Life Ins. Co.*, 889 F. Supp. 770, 776 (D. Del. 1995).

sota Supreme Court recently had an opportunity to construe the incontestability clause as it relates to conditions manifesting themselves before the insurance policy is in force.<sup>65</sup>

### III. THE *KERSTEN* DECISION

#### A. *The Facts*

On October 18, 1985, John Kersten received a disability insurance policy from Minnesota Mutual Life Insurance Company.<sup>66</sup> The policy provided that if Mr. Kersten became disabled as defined in the policy as the result of an injury or sickness, he would be entitled to a monthly income benefit.<sup>67</sup> The policy contained the requisite incontestability clause.<sup>68</sup> However, the policy defined sickness as “a disease or illness that first manifests itself while the policy is in force.”<sup>69</sup>

On September 1993, Mr. Kersten was involved in an automobile accident.<sup>70</sup> Minnesota Mutual began to pay Mr. Kersten disability benefits.<sup>71</sup> During this time, Mr. Kersten also received no-fault benefits.<sup>72</sup>

In July 1994, an independent medical examiner opined that Mr. Kersten was no longer disabled from the injuries received from the automobile accident.<sup>73</sup> Mr. Kersten’s automobile insurance provider stopped payments.<sup>74</sup> An arbitration panel later decided that Mr. Kersten was not entitled to no-fault benefits.<sup>75</sup> Minnesota Mutual then discontinued Mr. Kersten’s disability benefits.<sup>76</sup> Mr. Kersten disputed the discontinuation of disability benefits, arguing

65. *Kersten v. Minn. Mut. Life Ins. Co.*, 608 N.W.2d 869, 871 (Minn. 2000).

66. *Id.* at 871.

67. *Id.*

68. *Id.* Minnesota Statute section 62A.04 provides:

No claim for loss incurred or disability commencing after two years from the date of issue of the this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

MINN. STAT. § 62A.04, subd. 2(2)(b) (2000).

69. *Kersten*, 608 N.W.2d at 871.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 872.

76. *Id.*

that the loss of his job and continuing pain resulted in psychological disorders.<sup>77</sup> Minnesota Mutual argued that Mr. Kersten's psychological disorder was a pre-existing condition, excluded by the definition of sickness in the policy, because he was previously treated for depression in 1974.<sup>78</sup>

The district court granted summary judgment concluding that Mr. Kersten's claims were collaterally estopped and that Minnesota Mutual's policy excluded Kersten's pre-existing condition from the coverage.<sup>79</sup> The Minnesota Court of Appeals reversed and remanded, holding that Minnesota Mutual could not limit coverage to injuries that "first manifest" themselves after the policy is in force.<sup>80</sup>

## B. *The Court's Analysis*

### 1. *The Majority's Analysis*

The Minnesota Supreme Court affirmed the appellate court's decision for the insured.<sup>81</sup> It applied the plain meaning of the statute, and determined the legislative intent of the statute was to cover pre-existing conditions after the policy was in effect for two years.<sup>82</sup> The court determined that the insurer was able to exclude pre-existing conditions specifically in the policy.<sup>83</sup> The court also con-

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77. *Id.*

78. *Id.*

79. *Id.* The district court determined that Mr. Kersten's claim was collaterally estopped because an arbitration panel previously decided that he was not entitled to no-fault benefits for the psychological condition. *Id.*

80. *Kersten v. Minn. Mut. Life Ins. Co.*, 594 N.W.2d 264, 267 (Minn. Ct. App. 1999).

81. *Kersten*, 608 N.W.2d at 878. The court interpreted Minnesota Statute section 62A.05 to give guidance on the construction of Chapter 62A by providing that "no policy provision which is not subject to section 62A.04 shall make a policy, or any portion thereof, less favorable in any respect to the insured or the beneficiary" than do the requirements of sections 62A.01 to 62A.09. *Id.*

82. *Id.* See also *In re Welfare of J.M.*, 574 N.W.2d 717,721 (Minn. 1998) (concluding that the language of the statute is plain and unambiguous, it manifests the legislative intent and the statute must be given its plain meaning); MINN. STAT. § 645.16 (1998) (providing that when a statute is ambiguous, legislative intent may be determined by examining other factors such as the circumstances surrounding the enactment, purpose, need for the law, and the circumstances of giving the law a certain interpretation).

83. MINN. STAT. § 62A.04, subd.2(2)(b)(1998). See also *Wischemeyer v. Paul Revere Life Ins. Co.*, 725 F. Supp. 995, 1004-05 (S.D. Ind. 1989). In *Wischemeyer*, the court interpreted a statute nearly identical to Minnesota Statute section 62A.04, subd. 2(2)(b). *Id.* The court held that the insurer did not specifically exclude

cluded that insurance companies were protected from fraud by the exception in the statute.<sup>84</sup>

Relying on *Bell*,<sup>85</sup> the court determined that Minnesota Mutual's "first manifest" definition of illness is less favorable to the insured.<sup>86</sup> The court stated that full disclosure of both parties is encouraged and protected by the statute.<sup>87</sup> Affirming the appellate court, the supreme court stated that Minnesota Mutual's exclusion of pre-existing conditions was "less favorable" to the insured and the language contained in the policy.<sup>88</sup>

Rejecting the application of *Forman*,<sup>89</sup> the court stated that Fifth Circuit's decision only addressed the applicability of incontestability clauses and did not address the "first manifest" language in question.<sup>90</sup> The majority chose to protect the insurer by examining the plain language and legislative intent.

## 2. *The Dissent's Opinion*

In the dissent, Justice Stringer argued that the majority created coverage of insurance policies by not permitting the "first manifest" language of Minnesota Mutual's policy.<sup>91</sup> Justice Stringer stated that an incontestability clause does not preclude the insurer from demonstrating that the condition is not covered by the policy because it occurred prior to the commencement of the policy.<sup>92</sup>

Justice Stringer stated that an incontestability clause is meant to prohibit insurers from invalidating policies due to an inadver-

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pre-existing conditions by stating that pre-existing conditions were not covered by the policy. *Id.* at 1005.

84. *Kersten*, 608 N.W.2d at 875.

85. 27 F.3d 1274 (7th Cir. 1994).

86. *Kersten*, 608 N.W.2d at 876. In *Bell*, the court analyzed a statute similar to Minnesota Statute section 62A.04. *Id.* The *Bell* court stated that the purpose of including a pre-existing condition clause is to avoid situations similar to that of *Kersten*. *Id.*

87. *Id.* at 877. The court stated that insurers do not prefer to specifically "by name or specific description" refuse coverage to a potential insured for a "disease or physical condition" for which the insured has a reasonable concern may cause future disability. *Id.* However, the legislature requires that pre-existing condition be excluded by specific description in order to assure that the insured knows of the coverage received. *Id.*

88. *Id.*

89. 516 F.2d 425 (5th Cir. 1975).

90. *Kersten*, 608 N.W.2d at 876.

91. *Id.* at 879 (Stringer, J., dissenting).

92. *Id.* (citing 18 GEORGE J COUCH, COUCH ON INSURANCE § 72:61, at 329 (Ronald A. Anderson ed., 2d ed. 1983)).

tent misstatement; however, it is not meant to create additional coverage.<sup>93</sup> The dissent believed that Kersten's depression was not a condition within the scope of the policy coverage because it did not manifest itself during the policy.<sup>94</sup> Therefore, the first manifestation definition precluded coverage for Mr. Kersten's pre-existing condition.<sup>95</sup>

Justice Stringer examined the effect of the incontestability clause on indemnification of insurance policies and concludes that the insurer is not supposed to bear the risk of pre-existing conditions.<sup>96</sup> The dissent addressed the fact that the majority claims the "first manifest" policy language makes the policy "less favorable" to the insured.<sup>97</sup> However, Justice Stringer stated that the policy defines the risks to which the parties agreed, and that the Commissioner of Commerce approved the "first manifest" language.<sup>98</sup>

#### IV. ANALYSIS

##### A. *Minnesota Supreme Court Protects The Rights Of The Insured And Insurer*

*Kersten* represents a state supreme court making new policy objectives in the insurance industry. Although *Kersten* is a case of first impression in Minnesota, this issue has been examined in other jurisdictions.<sup>99</sup> The Minnesota Supreme Court relied on the other jurisdictions' interpretation of incontestability clauses and applied

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93. *Kersten*, 608 N.W.2d at 879-80 (Stringer, J., dissenting).

94. *Id.* at 880.

95. *Id.*

96. *Id.* at 878. The dissent states that the insurer does not assume the risk of pre-existing conditions, but the insurer only assumes risks of conditions that manifest after the policy commences. *Id.* at 879.

97. *Id.* at 881.

98. *Id.* The majority states that the letter from the Commissioner of Commerce was not properly before the court because it was admitted for the first time on appeal. *Id.* at 874. The majority also stated that the letter was not relevant because it did not address the specific question of pre-existing conditions, and the court is not bound by decisions of the Commissioner. *Id.*

99. *Id.* at 872. See also Gilsinger, *supra* note 42, at 513; Neville v. Am. Republic Ins. Co., 912 F.2d 813, 815 (5th Cir. 1990); Keaten v. Paul Revere Life Ins. Co., 648 F.2d 299, 299 (5th Cir. 1981); Mass. Cas. Ins. Co. v. Forman, 516 F.2d 425, 425 (5th Cir. 1975); Paul Revere Life Ins. Co. v. Haas, 644 A.2d 1098, 1098 (N.J. 1994). But see Equitable Life Assurance Soc'y of United States v. Bell, 27 F.3d 1274, 1274 (7th Cir. 1994); Wischmeyer v. Paul Revere Life Ins. Co., 725 F. Supp. 995, 995 (S.D. Ind. 1989); McMackin v. Great Am. Revere Ins. Co., 99 Cal. Rptr. 277, 277 (Cal. App. 1971).

general contract principles to interpret the statute.<sup>100</sup> The Minnesota Supreme Court's decision correctly interpreted the plain language of Minnesota's incontestability clause to protect both the insured and insurer.

### 1. *Applying The Plain Language Of The Statute*

The Minnesota Supreme Court applied the plain language of the incontestability clause, following current decisions by the Sixth and Seventh Circuits.<sup>101</sup> The general contract principle that ambiguities in insurance policies should be interpreted in favor of the insured has been upheld to be applicable to incontestable clauses.<sup>102</sup> However, when the incontestability clause is statutorily mandated, courts have held that the contract should not necessarily be construed in favor of the insured.<sup>103</sup>

In *Kersten*, the Minnesota Supreme Court recognizes that incontestability clauses should be given the "commonsense construc-

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100. *Kersten*, 608 N.W.2d at 872.

101. *Equitable Life Assurance Soc'y of United States v. Poe*, 143 F.3d 1013, 1013 (6th Cir. 1998); *see also Bell*, 27 F.3d at 1274. The supreme court relied on *Bell* and applied a strict interpretation of the Minnesota Statute. *Kersten*, 608 N.W.2d at 876. The *Bell* court addressed a provision similar to Minnesota Statute section 62A.04, subd. 2. *Bell*, 27 F.3d at 1274. *Bell* protected the insured against insurers seeking to deny benefits for pre-existing conditions years after issuing the policy. *Id.*

102. *Gilsinger*, *supra* note 42, at 513. *See also* *Mut. Life Ins. Co. of N.Y. v. Margolis*, 53 P.2d 1017 (3d Dist. 1936); *Robison v. Bhd. of R. R. Trainmen Ins. Dept.*, 241 P.2d 791 (Ariz. 1952); *Penn. Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146 (Del. 1997); *Mut. Life Ins. Co. of N.Y. v. Childs*, 14 S.E.2d 165 (Ga. Ct. App. 1941); *Penn. Mut. Life Ins. Co. v. Childs*, 16 S.E.2d 103 (Ga. App. 1941); *Pac. Mut. Life Ins. Co. v. Barfield*, 194 S.E. 258 (Ga. App. 1937); *Doe v. Paul Revere Ins. Group*, 948 P.2d 1103, 67 A.L.R.5th 743 (Haw. 1997); *Wilson v. Equitable Life Ins. Co.*, 262 N.W. 525 (Iowa 1935); *Mass. Cas. Ins. Co. v. Vanidestine*, 980 F. Supp. 556 (D. Me. 1997) (applying Maine law); *Provident Life and Accident Ins. Co. v. Altman*, 795 F. Supp. 216 (E.D. Mich. 1992) (applying Michigan law); *Berkshire Life Ins. Co. v. Weinig*, 47 N.E.2d 418 (N.Y. 1943); *Guardian Life Ins. Co. of Am., Inc. v. Schaefer*, 519 N.E.2d 288 (N.Y.S. 2d. 1987); *White v. Mass. Cas. Ins. Co.*, 512 N.E.2d 558 (N.Y.S.2d 1987); *Fischer v. Mass. Cas. Ins. Co.*, 458 F. Supp. 939 (S.D.N.Y. 1978) (applying New York law); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 647 (E.D.N.Y. 1997) (applying New York law); *Horwitz v. N.Y. Life Ins. Co.*, 80 F.2d 295 (C.C.A. 9th Cir. 1935) (applying Pennsylvania law).

103. *Zwirm v. Chubb Life Am.*, 1994 WL 323148 (N.D. Ill. 1994); *Bronson v. Wash. Nat'l. Ins. Co.*, 59 Ill. App. 2d 253, 257, 207 N.E.2d 172, 174, 13 A.L.R.3d 1375 (2d Dist. 1965); *Bell*, 27 F.3d at 274 (applying Indiana law); *Wischmeyer v. Paul Revere Life Ins. Co.*, 725 F. Supp. 995 (S.D. Ind. 1989); *Paul Revere Life Ins. Co. v. Haas*, 644 A.2d 1098 (N.J. 1994).



tion.”<sup>104</sup> The terms of the incontestability clause should be given a meaning that a reasonable person would understand.<sup>105</sup> Incontestability clauses originated in order to encourage laypeople to enter into complex insurance contracts by providing guarantees that the policy could not be invalidated after a specified time period.<sup>106</sup> Thus, the terms of the clause should be given their plain meaning in order to reflect a layperson’s understanding of the policy.<sup>107</sup>

By applying the plain meaning of the statute, the supreme court reasoned that limiting the incontestability clause by excluding pre-existing conditions would be contrary to legislative intent.<sup>108</sup> The legislature included the term “pre-existing” in the statute in order to provide coverage for pre-existing conditions.<sup>109</sup> Although Minnesota Mutual argued that the terms “exist” and “manifest” differ in their meaning, a reasonable person may not recognize the difference.<sup>110</sup>

Using the common meaning of the terms is consistent with the principle that ambiguities shall be construed in favor of the insured.<sup>111</sup> The insured’s interpretation of the contract should prevail in order to protect the rights of the insured.<sup>112</sup>

## 2. *Minnesota Supreme Court Upholds Public Policy*

Public policy upholds incontestability clauses in order to protect the rights of the insured and the insurer, to promote certainty,

104. *Kersten*, 608 N.W.2d at 873. See also COUCH, *supra* note 92, at § 72:9; Cooper, *supra* note 4, at 236.

105. Cooper, *supra* note 4, at 236.

106. *Id.*

107. 1A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 311, at 313 (1972).

108. *Kersten*, 608 N.W.2d at 875.

109. MINN. STAT. § 62A.04, subd. 2(2)(b) (1998).

110. *Equitable Life Assurance Soc’y of United States v. Bell*, 27 F.3d 1274 (7th Cir. 1994). *Bell* provided that the term “exist” in its ordinary term refers broadly to a state of being, including manifestation. *Id.* A reasonable person would not grasp the distinction between existence and manifestation. *Id.* at 1281-1282. See also BLACK’S LAW DICTIONARY 574 (6th ed. 1990) (defining “exist” as to “be in present force, activity or effect at a given time”). *Id.* at 962 (defining “manifest” as “evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident and self evident”).

111. *Kersten*, 608 N.W.2d at 873; see also *Atwater Creamery Co. v. W. Nat’l. Mut. Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985).

112. Cooper, *supra* note 4, at 236.

and to reduce litigation.<sup>113</sup> The Minnesota legislature intended the incontestability clause to protect the insured from the insurer excluding pre-existing conditions after the two-year time period.<sup>114</sup> An incontestability clause provides the insurer with the incentive to investigate all claims within a specific time period. Minnesota's incontestability clause protects the insurer from fraudulent claims by allowing the defense of fraud after the two-year limit.<sup>115</sup> In addition, the insurer is protected because the statute allows for the exclusion of pre-existing conditions by name or specific description.<sup>116</sup>

The insured is guaranteed to receive benefits from the insurance policy after the time period has expired. This prevents insurance companies from denying benefits based on unintentional misstatements of the insured and prohibits the insurer from denying the validity of the insurance policies after it has been in effect for more than two years.<sup>117</sup>

The incontestability clause provides needed security in health and life insurance policies by protecting the insured and the insured's beneficiaries from unintentional misstatements.<sup>118</sup> It acts as a guarantee to the insured that benefits will be received once the incontestability time period elapses.<sup>119</sup> By not permitting insurance companies to liberally exclude all pre-existing conditions from coverage, the court provided certainty to the interpretation of Minnesota Statute section 64A.04.<sup>120</sup>

The incontestability clause reduces the costs of insurance policies for both the insured and insurer.<sup>121</sup> By prohibiting the insur-

113. *Id.*; see also *Wischemeyer v. Paul Revere Life Ins. Co.*, 725 F. Supp. 995, 1000 (S.D. Ind. 1989).

114. *Kersten*, 608 N.W.2d at 875.

115. MINN. STAT. § 62A.04, subd.2(2)(b)(1998). Other states' incontestability clauses do not provide a clause excluding fraudulent statements, or provide that the insurer has the option to insert a clause excepting fraudulent statements from the effect of the incontestability clause. *Wischemeyer*, 725 F. Supp. at 995; *Bell*, 27 F.3d at 1274 (stating that Equitable Life could have worded the clause to exclude fraudulent statements); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 647 (E.D.N.Y. 1997) (applying New York law); *Horwitz v. N.Y. Life Ins. Co.*, 80 F.2d 295 (C.C.A. 9th Cir. 1935) (applying Pennsylvania law); *Morris v. Mo. State Life Ins. Co.*, 171 S.E. 740 (W. Va. 1933).

116. MINN. STAT. § 62A.04 (West 2000).

117. *Fosaaen*, *supra* note 28, at 267.

118. *Cooper*, *supra* note 4, at 225.

119. *Id.*

120. *COUCH*, *supra* note 92, § 72:9.

121. *Cooper*, *supra* note 4, at 229 (citing 1A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 311, at 311 (1972)).

ance company from denying benefits after the incontestability period has expired, frivolous litigation concerning misstatements by the insured is prevented.<sup>122</sup>

Incontestability clauses "avoid the problem of relying on stale evidence in a contract dispute by preventing litigation over information provided by the insured years before coverage was claimed."<sup>123</sup> The plain interpretation of the statute will prevent further litigation as to the interpretation of the statute.

### B. *The Dissent Misconstrues The Coverage Of The Incontestability Clause*

Justice Stringer's opinion in *Kersten* follows the *Forman* line of cases.<sup>124</sup> The dissent misconstrued the majority's opinion by focusing on only the rights of the insurer. Justice Stringer believed that the majority creates coverage in an insurance policy where none existed by denying "first manifest" definition of "sickness."<sup>125</sup> However, the dissent did not address the clause in Minnesota Statute section 62A.04 which states that the insurer has the right to specifically exclude certain conditions from the insurance policy.<sup>126</sup> Therefore, the application of the majority decision does not preclude insurers from specifically denying benefits for pre-existing conditions. Here, Minnesota Mutual failed to specifically state the conditions to be excluded from coverage and instead created an overly broad statement to include all pre-existing conditions.<sup>127</sup>

Justice Stringer concentrated on the indemnification of risk characteristic of insurance policies.<sup>128</sup> Insurance policies commonly insure against losses after a certain date.<sup>129</sup> The incontestability clause states that after two years, the insurer bears the risk of coverage for pre-existing conditions.<sup>130</sup> The majority addressed this issue by stating that the disability is the loss that must occur after the pol-

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122. Cooper, *supra* note 4, at 229-30.

123. *Id.*

124. *E.g.*, Keaten v. Paul Revere Life Ins. Co., 648 F.2d 299 (5th Cir. 1981); Paul Revere Life Ins. Co. v. Haas, 644 A.2d 1098 (N.J. 1998).

125. Kersten v. Minn. Mut. Life Ins. Co., 608 N.W.2d 869, 879 (Stringer, J., dissenting).

126. MINN. STAT. § 62A.04 (West 2000).

127. *Kersten*, 608 N.W.2d at 871.

128. *Id.* at 878-79.

129. *Id.* (quoting 1 JOHN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 102, at 330 (1981)).

130. MINN. STAT. § 62A.04 (2000).

icy is in force.<sup>131</sup> However, once the policy is in effect for two years, Minnesota Statute section 62A.04, subd. 2 prohibits the insurer from denying or reducing coverage due to a pre-existing condition.<sup>132</sup> Thus, the risk is transferred to the insurer after the policy commences.<sup>133</sup>

### C. *The Effect Of The Kersten Decision On The Insurance Industry*

The Minnesota Supreme Court's decision in *Kersten* provides guidance to insurance companies by demonstrating that the plain language and insured's interpretation of the policy prevails. The decision requires insurance companies to specifically exclude conditions from the policy instead of generally excepting pre-existing conditions from the policy.<sup>134</sup> By not permitting a general exception of conditions, insurance companies will be forced to use the two-year time period in order to investigate claims.

In fact, insurance companies may need to invest more time and money into investigation of new insurance policy holders, thus increasing costs. For the few times that a misstatement is made in a new insurance policy, insurers must conduct an investigation in order to prevent coverage for pre-existing conditions.

Insurance companies will be required to use the standard meaning of terms and create insurance policies that are understood by a reasonably prudent person.<sup>135</sup> The supreme court protects the insured by preventing insurance companies from circumventing the incontestability clause by inserting a "first manifestation" definition of "sickness." In addition, the supreme court demonstrates the tendency to protect the insured over the insurer, while considering the rights of the insurer by protecting against fraud.<sup>136</sup>

The *Kersten* decision allows the allocation of risk to remain in

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131. *Kersten*, 608 N.W.2d at 877 n.2 (stating that the dissent misconstrues the majority opinion and misunderstands the nature of a loss under a disability clause).

132. *Id.*

133. *Id.*

134. *Id.* at 873; see also MINN. STAT. § 62A.04, subd. 2(2)(b) (West 2000) (stating "after a policy has been in force for two years, claims may not be reduced or denied on the basis that a disease or physical condition existed before the policy was in force, unless such disease or physical condition has been excluded by name or specific description").

135. *Kersten*, 608 N.W.2d at 873.

136. *Id.* at 875.

the insurer's control.<sup>137</sup> The insurer is capable of lowering its risks by investigating claims within the two-year time period.<sup>138</sup> After the two-year time period, the insurer is barred from denying the validity of the insurance policy and the insurer assumes the risk. In order to decrease the risk, insurers may provide a more exhaustive list of questions before accepting a new insurance policy.

## V. CONCLUSION

The *Kersten* case settles the question of whether Minnesota's incontestability clause covers pre-existing conditions. The supreme court correctly interpreted the incontestability clause by applying the plain language of the statute. Public policy protects the insured from the insurance companies denying benefits. The supreme court equalizes the protection of the insurer and insured. The insured is protected by the strict application of the incontestability clause. The insurer is protected from fraudulent statements and has the incentive to investigate all claims. The Minnesota Supreme Court's interpretation does not allow for exceptions to the incontestability clause and prevents further litigation on the statute.

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137. Cooper, *supra* note 4, at 226 (discussing the decision of the New Jersey court in *Paul Revere Life Ins. Co. v. Haas*, 644 A.2d 1098 (N.J. 1994) as incorrectly applying the incontestability clause and placing the judiciary in the role of risk allocation).

138. Cooper, *supra* note 4, at 229-30.