Michigan Law Review

Volume 47 | Issue 7

1949

INSURANCE-EFFECT OF INCONTESTABLE CLAUSE IN SUIT FOR REFORMATION OF POLICY

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INSURANCE—EFFECT OF INCONTESTABLE CLAUSE IN SUIT FOR REFORMATION OF POLICY—For over twenty years, defendant insurer accepted premiums on a life insurance policy issued to plaintiff. Defendant then discovered that a clerical error had been made in the original policy, as a result of which plaintiff's premium payments were approximately one-half the premiums defendant normally received for the type of policy actually issued. Defendant asked for reformation of the policy on the ground of mistake, and the trial court granted the relief sought. On appeal, *held*, reversed. The action was barred by the incontestable clause.[1] *Richardson v. Travelers Insurance Co.*, (App. 9th, 1948) 171 F. (2d) 699.

As an inducement to prospective policy holders, insurance companies have included incontestable clauses in their policies, so the insured may be confident that, after a certain period, the obligation to pay on maturity of the policy will become absolute. Public policy favors such clauses and many statutes require them.[2] Courts have made general statements that a policy containing such a clause cannot be contested on any ground not specifically excepted from operation of the clause.[3] Under this view, the clause has been held to preclude such defenses as suicide of the insured,[4] murder of the insured by the beneficiary,[5] and breach of

[1] Principal case at 700: "This contract shall be incontestable after one year from date of issue, except for non-payment of premiums."

[2] 1 APPLEMAN, INSURANCE LAW 347 (1941); VANCE, INSURANCE 820 (1930); 31 ILL. L. REV. 772, n. 13, 14 (1937).

[3] Aetna Life Ins. Co. v. Du Barry, (D.C. Ore. 1935) 12 F. Supp. 664; United States v. Patryas, (C.C.A. 7th, 1937) 90 F. (2d) 715.

[4] The suicide defense has been barred even though the policy contained a specific suicide clause. See 55 A.L.R. 549 (1928).

[5] Lee v. Southern Life & Health Ins. Co., 19 Ala. App. 535 at 537, 98 S. 696 (1923). See 40 COL. L. REV. 918 (1940).

condition.[6] As an original question, it is arguable that the clause should have been confined in its operation to those factors which relate to validity of the contract, such as fraud[7] and misrepresentation,[8] which operate contemporaneously with the inception of the contract and would otherwise be the basis for rescission.[9] Even under this narrower view, since mutual mistake arises at the inception of the contract, it would seem that a suit for reformation based on a mistake could well be held to fall within the scope of the incontestable clause.[10] However, the leading case of *Columbia National Life Insurance v. Black*[11] held that the insurer was not barred from reformation by the incontestable clause. With the exception of the principal case, this rule is undisputed by authors and judicial decisions.[12] The argument for this rule is that a suit for reformation is an attempt, not to contest or rescind the policy, but to make the written instrument state the real agreement.[13] "Contest" has been defined by courts as an attack, the purpose of which is to destroy the validity of the policy, as distinguished from one seeking its enforcement.[14] If this definition is adopted, it can be argued that a suit for reformation is the latter type of proceeding and therefore not within the meaning of the clause. However, this approach avoids the real issue, which seems to be whether the incontestable clause applies to the alleged oral contract or to the written one. In the principal case, the court recognizes this issue and determines that since a valid, written contract has been in force for over twenty years, the clause applies to this written contract. The court ignores the theoretical distinction between rescission and reformation and takes a realistic view that reformation would in effect invalidate the written contract; thus a "contest" of that contract is here sought. If this view is taken, the court seems to be correct in denying reformation, especially since other defenses, not within the original purpose of the clause, have been included within its scope.

N. S. Peterman, S. Ed.

[6] United States Life Ins. & Trust Co. of Penn. v. Massey, 159 Va. 832, 167 S.E. 248 (1933).

[7] 6 A.L.R. 448 (1920); Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 149 P.171 (1915). If the policy is uncontestable from date of issue, however, barring of the defense has been declared to be against public policy. See Reagan v. Union Mut. Life Ins. Co., 189 Mass. 555, 76 N.E. 217 (1905). Cf. MacKendree v. Southern States Life Ins. Co. of Ala., 112 S.C. 335, 99 S.E. 806 (1919).

[8] 5 JOYCE, INSURANCE, 2d ed., §3733 (1917).

[9] 1 APPLEMAN, INSURANCE LAW 384 (1941); VANCE, INSURANCE 821 (1930); Livingston v. Mutual Ben. Life Ins. Co., 173 S.C. 87, 174 S.E. 900 (1934).

[10] 24 CALIF. L. REV. 722, 725 (1936).

[11] (C.C.A. 10th, 1929) 35 F. (2d) 571.

[12] 5 WILLISTON, CONTRACTS, Rev. Ed., §1554, n. 1. (1937); 1 APPLEMAN, INSURANCE LAW, §337 (1941); Neary v. Genl. Am. Life Ins. Co., 140 Neb. 756, 1 N.W. (2d) 908 (1942); Am. Nat. Ins. Co. v. McPhetridge, 28 Tenn. App. 145, 187 S.W .(2d) 640 (1945); Buck v. Equitable Life Ass. Soc. of U.S., 96 Wash. 683, 165 P. 878 (1917); Equitable Life Ass. Soc. of U.S. v. Rothstein, 122 N.J. Eq. 606, 195 A. 723 (1937); Mates v. Penn. Mut. Life Ins. Co., 316 Mass. 303, 55 N.E. (2d) 770 (1944).

[13] Columbian Nat. Life Ins. Co. v. Black, supra, note 11, at p. 577. See Salomon v. North British & Merc. Ins. Co., 215 N.Y. 214, 109 N.E. 121 (1915).

[14] Stean v. Occidental Life Ins. Co., 24 N.M. 346, 171 P. 786 (1918); Ginsberg v. Union Central Life Ins. Co., 240 Ala. 299, 198 S. 855, 857 (1940).