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THE INCONTESTABILITY CLAUSE—SHOULD IT BE INTERPRETED TO PROTECT THE INSURED OF A GROUP INSURANCE POLICY?

INTRODUCTION

The incontestability clause, since its first appearance in an 1864 insurance contract,¹ has achieved a widespread acceptability in modern-day health and life insurance policies. The clause is unique in that it bars the insurance company from contesting the validity of its policy after a specified period, usually one or two years after the policy's date of issue. Insurers developed the clause so that individual policyholder-insureds and their beneficiaries could recover on policies without litigation. Insureds wanted to use insurance with confidence in their financial planning. Insurance companies, recognizing this fact and wanting to maintain sales, invented the clause to stabilize the validity of their long-term contract coverage.²

State insurance laws commonly require some form of the clause to be included in both individual and group life insurance contracts.³ A simple but typical clause provides that "[t]his policy shall be incontestable after one year from the date of issue except for non-payment of premiums."⁴ The clause has generally served its purpose well in individual policies.⁵ It has been applied with much confusion in group policies, however, where the insured is not a party to the contract. The above clause, for instance, when narrowly construed applies only to the policyholder—usually the employer or multiple-employer association that holds the master policy. It does not protect the insured employee covered only as a third party beneficiary through a certificate.⁶

1. Read, *The Evolving Incontestability Clause in Group Life Policies*, 14 ASS'N OF LIFE INS. COUNCIL PROC. 797 (1959).

2. *Powell v. Mutual Life Ins. Co.*, 313 Ill. 161, 164-65, 144 N.E. 825, 826 (1924); *Simpson v. Phoenix Mutual Life Ins. Co.*, 24 N.Y.2d 262, 264, 247 N.E.2d 655, 657 (1969).

3. *See generally* Shield, *A New Look at the Incontestability Clause*, 11 ASS'N OF LIFE INS. COUNCIL PROC. 23 (1952).

4. *Fischer v. United States Life Ins. Co.*, 249 F.2d 879, 881 (4th Cir. 1957).

5. In a common example, the incontestability clause bars an insurance company from contesting the validity of an individual policy procured by an insured who misrepresented on his application that he met the policy's health requirement. The clause, if tolled, forces the insurance company to pay off a valid claim against the policy, whereas absent the clause the insurer could have voided the contract as procured by fraud. *See also* Crawford v. Equitable Life Assurance Society of the United States, 56 Ill. 2d 41, 46-47, 305 N.E.2d 144, 147-48 (1973).

6. *See, e.g.,* Washington National Ins. Co. v. Burch, 270 F.2d 300 (5th Cir. 1959).

Such construction allows insurers to deny the existence of coverage and refuse payment on claims brought by insureds or their beneficiaries after the tolling of an incontestability clause. This situation circumvents the clause's purpose, however, of assuring insureds and their beneficiaries of litigation-free recovery on policies on which premiums have been paid for years.

Illinois recently became the latest state to interpret the incontestability clause in a group policy, holding in *Crawford v. Equitable Life Assurance Society of the United States*⁷ that an insurance company could contest the existence of an insured's coverage in defense to a beneficiary's claim brought after the running of a two-year clause. This article will critically analyze the history of the incontestability clause as interpreted to protect only the policyholder and not the insureds of group policies. It will then analyze the Illinois case as the latest extension of this concept, and conclude by discussing the emerging trend of reasoning on this subject.

A CRITICAL HISTORY OF THE CLAUSE'S APPLICATION IN GROUP POLICIES

In interpreting group policy incontestability clauses, the courts have often been called upon to answer the question of whether the clause bars an insurance company from defending against a claim on the ground that the insured was not an employee eligible for coverage under the policy.⁸ A New Hampshire court in 1966, prefacing its decision in such a case, noted that "[i]t is difficult to explore even a small area of this subject without becoming lost in a maze of conflicting decisions and subtle distinctions."⁹ Nevertheless, at least four major arguments have been advanced for deciding that the clause should not protect insured employees.

A. *The Conway Distinction*

Much confusion has developed because of the courts' insistence on explaining their decisions in terms of limitations set on the clause's application in the famous case of *Metropolitan Life Insurance Company v. Conway*.¹⁰ Justice Cardozo, speaking for the court, approved the addition to an individual policy of a rider stating that certain aviation hazards were risks not assumed by the policy. He said that statutory incontestability restrictions were inapplicable to the rider provision:

The provision that a policy shall be incontestable after it has been

7. 56 Ill. 2d 41, 305 N.E.2d 144 (1973).

8. See Annot., 26 A.L.R.3d 632 (1969) for a collection of cases dealing with this issue. The incontestability clause has been held not to protect insureds in the majority of group policy cases.

9. *Fischer v. Prudential Ins. Co. of America*, 107 N.H. 101, 103, 218 A.2d 62, 64 (1966).

10. 252 N.Y. 449, 169 N.E. 642 (1930).

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 born 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. (Emphasis added.)¹¹

A frequently cited group insurance case, *Fischer v. United States Life Insurance Company*,¹² applied the *Conway* rationale in holding that the incontestability clause was no bar to an ineligibility defense. The *Fischer* court explained that the clause "[w]as never intended to enlarge the coverage of the policy, to compel the insurance company to insure lives it never intended to cover or to accept risks or hazards clearly excluded by the terms of the policy."¹³ This article contends that the import of the *Conway* case has been too broadly interpreted and thus misapplied, as in *Fischer*, to group policy situations.

The rider in *Conway* did not provide that persons who rode in aircraft were ineligible for insurance. If it had, the court would have arguably applied the policy's incontestability clause to the rider in the same way such clauses are commonly applied to bar health eligibility challenges.¹⁴ Rather, the rider provided only that the insurer refused to be obligated to pay on the policy as a result of the insured's death in an air mishap. *Conway* stands for the proposition that an insurer can limit the types of deaths or disabilities for which it will or will not pay on a policy. The case did not decide an eligibility issue.¹⁵

Analogously, a group insurer may provide that it will not assume the risk of its insureds' deaths by an air crash or other causes. Incontestability restrictions could not apply to such provisions that define only the risk the policy assumes, as opposed to defining the persons it covers. On the other hand, incontestability clauses should prevent group insurers from challenging eligibility misrepresentations. The clause was designed to stabilize the validity of coverage after giving insurance companies time to investigate and discover misrepresentations by insureds for which it could void coverage.

B. *The Never-Covered Argument*

A second argument cited to justify permitting an insurance company to contest an insured's eligibility for group coverage despite incontestability restrictions is that an ineligible insured is never covered by the policy nor thereafter affected by the incontestability clause within it.¹⁶ The fallacy of

11. *Id.* at 452, 169 N.E. at 642.

12. 249 F.2d 879 (4th Cir. 1957).

13. *Id.* at 882.

14. See note 5 *supra*.

15. 252 N.Y. 449, 453, 169 N.E. 642, 643 (1930).

16. See *Carp v. California-Western States Life Ins. Co.*, 421 F.2d 959 (5th Cir. 1958); *Spitz v. Continental Casualty Co.*, 40 Wis. 2d 439, 162 N.W.2d 1 (1968).

this contention is that the same never-covered situation exists with individual insurance policies where the clause does protect insureds.

For instance, an insured who contends he does not have a terminal disease, when in fact he does, is likewise ineligible to be covered by the individual policy requiring good health. Yet, an insurer who issues him such a policy based on the insured's misrepresentation will be barred by a tolled incontestability clause from later challenging the coverage.¹⁷ The insurer, in effect, is forced to insure the life of an unhealthy person that it never intended to cover. Opposite to what *Fischer* contended,¹⁸ the clause does not enlarge the coverage of the policy. Rather it validates coverage that the insurer did not intend or write the policy to provide.

The employment requirement¹⁹ in a group policy is, in effect, that policy's health requirement. The insurer, while not requiring the individuals to meet health standards, does require the group to meet an average health expectation by being bound together for a pre-existing interest other than to secure low cost insurance, i.e., as employees for a company.²⁰ The incontestability clause should be applied to force the insurer to verify the group's health standard by determining that its members meet the employment requirement, in the same manner it forces an individual insurer to verify the good health of its insured. Only in this way can the clause serve its purpose of stabilizing coverage and protecting insureds and dependents from costly litigation to recover on policies for which premiums have long been paid.

C. *The Master Policy Argument*

The typical incontestability clause that refers to a "policy" is often narrowly interpreted to apply only to the master policy and protect only the employer or association that holds that policy.²¹ This construction should be discouraged for two reasons. First, the narrow application negates the clause's original function of protecting insureds and their beneficiaries from claim litigation.²² Second, such interpretation renders the clause virtually useless, as it has no meaningful application in connection with protecting employer or multiple-employer association policyholders. As one writer explained:

A simple incontestability clause . . . would have very limited

17. See note 5 *supra*.

18. See note 13 *supra* and accompanying text.

19. Most group policies, in addition to requiring that a prospective insured be employed, require him or her to also be employed full-time or for so many hours per week, or to be actively at work, to be eligible for coverage. See Annot., 26 A.L.R.3d 632 (1969).

20. Gregg, *Fundamental Characteristics of the Group Technique*, in *GROUP INSURANCE HANDBOOK* 40-41 (Eilers and Crowe ed. 1965).

21. See note 6 *supra* and accompanying text.

22. See text following note 6 *supra*.

scope in view of the minimal content of the usual application made by the proposed group policyholder. Few, if any, representations are made therein. Conceivable grounds for contest would be the nature of the group policyholder's business, or the lack of *de jure* existence of the partnership or corporation shown as a group policyholder. Another possible ground would be that there was not the minimum number of covered lives required by the applicable group insurance statute *No reported case was found where any of these defenses were raised by the insurer or where an insurer attempted to rescind a group policy.* (Emphasis added.)²³

The reference to "policy" in group clauses should be read to apply to certificates, and the employees these certificates extend coverage to as a group policy only takes effect through the certificates.²⁴ The "policy" wording of group clauses has been carried over from the individual policy clause that applies to a "policy" that effects coverage itself, without certificates; in applying to the policyholder, the individual clause also protects the insured. The best reasoning would recognize the "policy" wording of the group clause as historical accident, and apply the clause in group or individual policies to protect insureds and their beneficiaries.²⁵

D. *The Group Concept Destruction Argument*

A final argument made in contention that the incontestability clause should not bar the contest of a group insured's eligibility is that an investigation requirement would destroy the advantages of group over individual insurance. However, such a requirement would not significantly effect the unique elements of group insurance, nor add excessively to its overall administrative cost.

The greatest advantage of group over individual insurance from a profit standpoint is that the former is sold on a mass scale. A policy covering a large number of lives does not entail the selling expenses inherent in the sale of the same number of individual policies.²⁶ An enormous savings occurs because the insurer need only contact the group policyholder and sell a policy to him, rather than contact each insured for a separate sale.

The investigation requirement for the most part would not effect this initial selling action, nor reduce its savings.²⁷ Any investigation of individ-

23. W. MEYER, *LIFE AND HEALTH INSURANCE LAW* § 8.23, at 263-64 (2d ed. 1972).

24. "The contest with the beneficiary of a certificate holder, consisting of an attack against the status of such holder as a qualified insured, is in effect a contest directed to the validity of the insurance which is represented by such certificate and for which premiums were paid and accepted." *Simpson v. Phoenix Mutual Life Ins. Co.*, 30 App. Div. 2d 265, 268, 291 N.Y.S.2d 532, 536 (1968).

25. See generally Meyer, *supra* note 23, § 8:22, at 261.

26. Rall and Sfikas, *Group Insurance—Is the Incontestability Clause a Bootstrap Which Enlarges Coverage*, 5 THE FORUM 51, 56 (1969).

27. The insurer, during the selling stage, normally only investigates to determine

ual eligibility comes when or after the master policy is executed. Such inspection is after the employer or association has bought the policy and, in turn, promoted it to the company's or companies' present employees.

A second advantage of group insurance, that would purportedly be destroyed by an investigation requirement, is the minimization of the underwriting expense through the lack of necessity to examine each individual insured for his individual risk. The homogeneity of the group furnishes its own cross-section of risk, making medical examinations unnecessary. It is argued that employment eligibility should not require verification for similar savings reasons.²⁸

The fallacy of this contention is its assumption that such investigation would be as costly as thorough medical examinations. As stated in *Simpson v. Phoenix Mutual Life Insurance Company*,²⁹ a leading case:

Eligible employment can be determined by investigating membership rolls or employment records. The cost of this investigation is appreciably less than medical investigation in private policies and can be undertaken by a nonprofessional staff. The larger the number of persons which comprise the group the more sophisticated will be the accounting system needed to keep track of the group. The better the record-keeping system, the easier it will be for one to have access to information to determine eligibility. The fact that some insurers in the past have not investigated an employee's eligibility until death cannot be given any weight.³⁰

Other sources of group employment data could include payroll records, credit bureaus, and simple inquiries to employers or bookkeepers. It is worth noting that most employers have no incentive to make misrepresentations as to the eligibility of their employees, since they are often paying all or a portion of their insureds' premiums.³¹

It is generally thought that the smaller employer presents the most acute problem in connection with ineligibles, since "in many cases the sick son-in-law is carried on the employment rolls as a regular employee drawing full salary."³² One writer suggests that the incontestability clause should not bar any eligibility challenges because of this threat.³³ Counterargu-

that the group the company hopes to insure has some pre-existing relationship. A group interest other than to obtain low cost insurance is necessary to guarantee a group selection of risk somewhere near the average insurability level. See note 20 *supra* and accompanying text.

28. See note 26 *supra*.

29. 24 N.Y.2d 262, 247 N.E.2d 655 (1969).

30. *Id.* at 269, 247 N.E.2d at 659.

31. *Crawford v. Equitable Life Assurance Society of the United States*, 56 Ill. 2d 41, 52, 305 N.E.2d 144, 151 (1973).

32. Coburn, *The Group Incontestability Clause—Simpson v. Phoenix Mut. Life Ins. Co.*, 1969 PROC. LEG. SEC. AM. LIFE CONV., 67, 80.

33. *Id.*

ments, however, are that the employee eligibility in these cases is often checked anyway,³⁴ and that occasional injustices in smaller cases should not deny the great number of insureds and beneficiaries under large policies the clause's intended protection.

Eligibility violations are easier to discover and less costly when not discovered in large group policies. As the last-quoted writer continued:

In the larger employer case the sick son-in-law is rarely carried on the employment records and even if he were the case would have little if any mortality pooling for experience purposes so that the cost of such adverse selection would ultimately be borne by the employer himself.³⁵

The latter part of the quotation rebuts the argument that claims paid to ineligible insureds always increase group premium rates by lowering experience records.³⁶ Again, the problem exists primarily in small group policy situations and such occasions should not deny the clause's protection to insureds and beneficiaries under larger policies.

It has also been argued that requiring an investigation of insureds' eligibility would impair the self-administration advantage of group insurance.³⁷ However, employer or association administrators generally have little incentive to intentionally misrepresent the eligibility of employees.³⁸ Insurers could generally depend on the employee information such administrators obtain, and could employ mass investigative methods when necessary to obtain verifications.

Finally, insurers argue that the turnover of employees in and out of a policy's coverage would require a constant check of eligibility records.³⁹ This is only partially true. A company could take advantage of incontestability periods and uncover all ineligible employees by conducting one mass investigation within each succeeding incontestability period. Thus, under a two-year clause a company could check the eligibility of all employees every eighteen months to discover ineligibles in time to void their coverage.

Such an investigation would discover employees ineligible because of either enrollment misrepresentations or later terminations of employment not

34. Cody, *Underwriting Group Medical Expense Coverage*, in *GROUP INSURANCE HANDBOOK* 302 (Eilers and Crowe ed. 1965); *First Pennsylvania Banking & Trust Co. v. United States Life Ins. Co.*, 421 F.2d 959 (3rd Cir. 1969).

35. See note 32 *supra*.

36. *Rasmussen v. Equitable Life Assur. Soc. of the United States*, 293 Mich. 482, 487, 292 N.W. 377, 380 (1940).

37. See note 26 *supra*; *General American Life Ins. Co. v. Charleville*, 471, S.W.2d 231, 236 (Mo. 1971).

38. See note 30 *supra* and accompanying text.

39. *First Pennsylvania Banking & Trust Co. v. United States Life Ins. Co.*, 421 F.2d 959, 963 (3rd Cir. 1969).

reported. The *Simpson* case indicates that such a mass investigative system could be relatively inexpensive to develop and operate.⁴⁰

Such scheduled investigations would also aid insurers by reducing the number of claims they have to individually investigate or litigate at great expense. This system would have made unnecessary the Illinois case that recently interpreted the group policy incontestability clause.

THE ILLINOIS DECISION

A. *The Facts and Court Opinions*

The Illinois case, *Crawford v. Equitable Life Assurance Society of the United States*,⁴¹ involved a situation in which a multiple-employer association held the master policy of a group life insurance contract. The policy contained a provision restricting its coverage to employees who worked thirty-two or more hours per week.⁴² The case arose after the insurer issued a certificate for coverage to an ineligible employee, but four years later refused to honor the claim of the then deceased employee's beneficiary.

The beneficiary, Harvey Crawford, was president of a heating company that was a member of the association. In 1965, he submitted an enrollment form to the association seeking coverage for his wife, the insured in question, plus himself and another employee. He misrepresented on the form that his wife worked the number of hours required for eligibility. She made the same misrepresentation in a separate application. The insurer issued her a certificate without investigating the veracity of either of the statements, or of similar statements that accompanied monthly premium payments made on her behalf. The coverage continued until Mrs. Crawford's death in 1969.⁴³

Crawford submitted a claim to the association after his wife's death, seeking to recover \$10,000 as her beneficiary. He also submitted a death certificate listing her occupation as that of housewife, causing the association to advise the insurer to check Mrs. Crawford's eligibility for coverage. The insurance company refused to pay on the husband's claim after discovering his wife's ineligibility through a single call to the heating company's bookkeeper.⁴⁴ Crawford sued the insurer on the claim, contending that the policy's two-year incontestability clause barred the insurer from using his wife's ineligibility for coverage as a defense to his claim as beneficiary.

The majority opinion held that the incontestability clause did not bar the insurer from contesting Crawford's claim on the ground that Mrs. Craw-

40. See note 30 *supra* and accompanying text.

41. 56 Ill. 2d 41, 305 N.E.2d 144 (1973).

42. *Id.* at 43, 305 N.E.2d at 146.

43. *Id.*

44. *Id.*

ford was never eligible for insurance under the policy. The court began by holding that only the first part of the master policy's two-part incontestability clause was applicable to the case. That part stated "[t]he validity of this policy shall not be contested, except for the non-payment of premiums, after it has been in force for two years from the date of issue."⁴⁵ The court noted that the clause incorporated portions of section 231 of the Illinois Insurance Code, continuing:

Subsection (a) of section 231 requires inclusion [in group life policies issued or delivered in Illinois] of 'A provision that the policy shall be incontestable after two years from its date of issue during the lifetime of the insured, except for nonpayment of premiums and except for violation of the conditions of the policy relating to military or naval services in time of war.'⁴⁶

The opinion went on to discuss both the historical purpose of the incontestability clause⁴⁷ and the *Conway* distinction,⁴⁸ but then appeared to make its decision on the basis of the clause's reference to "this policy." The court interpreted the clause as barring insurer challenges against only the master policy's validity. It found no application of the clause to insureds, such as Mrs. Crawford, extended coverage through certificates.

A challenge to eligibility does not, however, involve an attack by the insurer on the validity of the master policy. The defendant is not seeking to set aside the policy because of the misrepresentations made and the only aspect of the insurance plan which is affected is the payment sought by a single beneficiary

The incontestability clause of the policy . . . provides only that the validity of the policy may not be contested, and as we have seen, its validity is not disputed.⁴⁹

The court, in dicta, made additional arguments in support of its deci-

45. *Id.* at 44, 305 N.E.2d at 147.

46. *Id.* at 45, 305 N.E.2d at 147.

47. *Id.* at 46-47, 305 N.E.2d at 147-48.

48. "While the broad distinction drawn in *Conway* between a policy's limits of coverage and its validity has been quite generally recognized, differences of opinion have arisen as to its application, particularly with respect to group life insurance With individual life insurance the policy identifies a specific individual by name, and it is relatively easy to distinguish between a question of coverage (the death of an insured or his death from some specific cause) and a question of validity created by antecedent misrepresentations on the part of the insured. In the case of group life insurance, however, the master policy undertakes to provide insurance for a collection of unnamed persons defined only in terms of membership in a class, such as the employees of a certain company. To ascertain whether a person is insured necessitates a determination of whether he is in fact a member of the class. To the extent that that determination is based upon information furnished by the employer or by an employee or alleged employee, the question whether coverage exists tends to become intertwined with the question whether the coverage was obtained by false representation."

Id. at 48-49, 305 N.E.2d at 149.

49. *Id.* at 51-52, 305 N.E.2d at 150.

sion. It noted that forcing insurers to pay claims on the death of persons not meeting eligibility standards would increase premium rates for other association employers by altering the experience rating.⁵⁰

The court argued further that Crawford's case was analogous to a termination of employment situation, citing the Illinois Appellate case *Baker v. Prudential Insurance Company of America*,⁵¹ which held that an insurer was not liable on a group life policy for the death of a former employee who was discharged shortly prior to his death. The *Crawford* court adopted the *Baker* argument that the incontestability clause could only prevent an insurer "from contending that the policy was obtained by fraud or misrepresentation or upon any other ground, going to the original validity of the policy."⁵²

Lastly, the court argued that an investigation requirement for insurers would cause "substantial expense and the unnecessary duplication of records"⁵³ and would "undermine group life insurance which is customarily conducted on a 'self-administrative' fashion with the employer or employer group maintaining the record of individual employees, thus reducing the cost of premiums."⁵⁴

The dissent in *Crawford* relied on the application to this case of the second part of the incontestability clause:

[A]nd no statement made by any employee insured under this policy relating to his insurability shall be used in contesting the validity of the insurance with respect to which such statement was made, after such insurance has been in force prior to the contest for a period of two years during such employee's lifetime nor unless it is contained in a written application signed by such employee and a copy of such application is or has been furnished to such employee or his beneficiary.⁵⁵

50. *Id.* at 52, 305 N.E.2d at 150-51.

51. 279 Ill. App. 5 (1938).

52. Quoting *Baker v. Prudential Life Ins. Co. of America*, 279 Ill. App. 5, 10 (1938).

53. *Id.* at 53, 305 N.E.2d at 151.

54. *Id.*

55. *Id.* at 54, 305 N.E.2d at 152. This part incorporates portions of subsection (b) of section 231 of the Illinois Insurance Code requiring group life policies in Illinois to contain:

[a] provision that the policy, the application of the employer or trustee of an association of employees and the individual applications, if any, of the employees insured shall constitute the entire contract between the parties, and that all statements made by the employer or trustee or by the individual employees shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall be used in defense to a claim under the policy, unless it is contained in a written application.

ILL. REV. STAT. ch. 73, § 843(b) (1971).

Part of the statute provides, in effect, that fraudulent statements will be interpreted as warranties—that is, as literally true and in the nature of a condition precedent to the contract—so that when discovered false they can be cited as a defense to void the contract. See BLACK'S LAW DICTIONARY 1465, 1758 (4th ed. rev. 1968). The second

The opinion stated that the word "insurability" in the clause meant more than just a condition of the employee's health—as the majority apparently believed.⁵⁶ "[I]t means 'capable of being insured' or the 'quality or condition of being insurable' . . . and the only contention made by [the insurer of the decedent's] ineligibility or lack of insurability is her failure to be regularly employed."⁵⁷ The opinion said that a tolled incontestability clause would bar an insurer's defense that an insured was uninsurable based on illness, and should similarly bar an uninsurability defense based on employee ineligibility.⁵⁸

The dissent argued that the clause gave insurers ample time to investigate for misrepresentations, and that policies provided for, and insurers made, "periodic inspections and audits."⁵⁹ It concluded that an incontestability clause would govern in a termination of employment situation where an insurer failed to learn of the employee's termination and accepted premiums thereafter for the incontestability period.⁶⁰

B. Critique of the Opinion

The dissent correctly applied the second part of the incontestability clause to this case, giving a broad interpretation to "insurability." The word and the clause, if limited to a health application, would have no meaning in group policies, which do not base their coverage on individual health status. The foremost difference between group and individual insurance is:

[T]he group selection of risks as contrasted to individual selection of risks. With few exceptions, group insurance is issued without medical examination or other evidence of individual insurability.⁶¹

part of the *Crawford* clause, which would assumedly be governed by this statutory directive, added an incontestability clause provision that forced the insurer to discover misrepresentations or fraudulent statements by any employee within two years during such employee's lifetime in order to retain the defense. The insurer in *Crawford* did not discover Mrs. Crawford's fraudulent eligibility representation on her application until four years after she made it. The incontestability clause, which had tolled two years before during Mrs. Crawford's lifetime, precluded the insurer from citing her fraudulent statement to void the contract.

56. The majority opinion at page 45, 305 N.E.2d at 147, stated that the parties "apparently consider[ed]" the second part of the incontestability clause inapplicable to the case because it was "intended only to deal with cases where proof of individual insurability [was] required." The Court apparently agreed, but its conclusion makes no sense unless "insurability" was limited to a health meaning, since certainly the decedent's individual insurability, in a broad sense, was at issue here.

57. 56 Ill. 2d 41, 54, 305 N.E.2d 144, 152 (1973).

58. *Id.* at 55, 305 N.E.2d at 152.

59. *Id.*

60. *Id.*

61. Gregg, *Fundamental Characteristics of the Group Technique*, in *GROUP INSURANCE HANDBOOK* 32-33 (Eilers and Crowe ed. 1965); Note, *Some Economic and Legal Aspects of Group Insurance Policies*, 36 *COLUM. L. REV.* 89, 89 (1936).

The application of the second part of the clause is further supported by the fact that, like the first part, the second part incorporates portions of section 231 of the Illinois Insurance Code.⁶² Since that Code section sets out provisions to be used in group life policies, the second part like the first should be given a meaningful group policy application.

This article contends that a decision for the beneficiary could also have been made on the basis of the application of the first part of the clause, had it appeared alone in the policy. The reason is that the statutory paragraph requiring that clause refers to the "lifetime of the insured."⁶³ The statute was designed, despite its "policy" wording, to protect individual insureds. The court should have applied the clause with this understanding.

The dissent advanced an analogy to termination of employment in contending that the incontestability clause should apply if an insurer accepts premiums for two years after an employer stops working.⁶⁴ Insurers could discover termination violations and *Crawford*-type misrepresentations through one low-cost investigation within each successive incontestability period.⁶⁵ Insurers should have such an investigative duty to prevent insureds and beneficiaries from being denied claims after paying premiums for several years.

Lastly, the majority contentions that payments to ineligible would raise premium rates, and that an investigation duty would undermine group insurance, were examined earlier in this article in connection with the general history of the incontestability clause. Those discussions proposed counterarguments to both contentions.⁶⁶

THE EMERGING TREND IN APPLYING THE GROUP POLICY INCONTESTABILITY CLAUSE

The New York case of *Simpson v. Phoenix Mutual Life Insurance Company*⁶⁷ set precedent in 1969 when it created the "discoverability" test in applying an incontestability clause in a group life insurance policy. The insurer in that case issued a certificate to an employee who had misrepresented on his enrollment card that he met the policy's eligibility requirement

62. ILL. REV. STAT., ch. 73, § 843 (1971).

63. See note 46 *supra* and accompanying text. The author of the *Crawford* policy omitted the "lifetime of the insured" phrase from the first part of its incontestability clause, but included it in the second part of the clause that contained additional incontestability restrictions not required by section 231 of the Illinois Insurance Code. It appears that the author intended the second part to apply to individual coverage and the first part to the master policy. But this writer's point is that the statute requires incontestability restrictions to be inserted in group life policies to protect individual insureds, and that the first part if alone would have had to have been so construed.

64. See note 60 *supra* and accompanying text.

65. See text following note 39 *supra*.

66. See text following note 35 *supra*.

67. 24 N.Y.2d 262, 247 N.E.2d 655.

of working thirty hours per week. The insurer thereafter accepted premium payments on the employee's behalf without investigating to discover, until after the two-year clause had tolled, that the employee never met the eligibility standard.

The court held that the tolled incontestability clause barred the insurer from using the employee's ineligibility as a defense to the beneficiary's claim. The court said the clause was applicable to risks discoverable within the incontestability period, and that such a risk was that of insuring an employee ineligible for coverage.⁶⁸

Phoenix had the opportunity at the time it issued the certificates, or within two years of this date, to determine whether in fact the insured was a proper member of the group [eligible for insurance]. The insurer, having failed to investigate, cannot be heard to complain now.⁶⁹

The *Simpson* court compared the employment eligibility requirement of a group policy with the health eligibility requirement of an individual policy. It noted that the problem of "adverse selection" of unfavorable insurance risks exists in both cases, and that employment eligibility would be considerably less costly to investigate than is health eligibility in individual policies.⁷⁰

The *Crawford* dissent, following the appellate court below, adopted the *Simpson* rationale in contending that Crawford was entitled to his claim as his deceased-wife's beneficiary. This article contends that the *Crawford* court should have followed its dissent rather than apply the clause, as it did, to protect the association master policy holder and not the beneficiary.

The incontestability clause, as a 1972 Utah case following *Simpson* said, simply creates "a period during which time the insurer may by investigation guard against risks it did not intend to assume."⁷¹ As in the health fraud situation in individual policies, the clause in group policies bars an insurer from defending on the basis that "the deceased is not the kind of person that he was described to be."⁷²

Such was the situation in *Crawford* where Mrs. Crawford was misrepresented as being a thirty-two hour per week employee. The insurance company in *Crawford* should have been held to the duty of contesting her eligibility for coverage before accepting premiums on her behalf beyond the two-year incontestability period. Only in this way would the clause have served its purpose of protecting the insured and her beneficiary. The incontestability clause was never intended to condone an insured's fraud, but it

68. *Id.* at 265, 247 N.E.2d at 658.

69. *Id.* at 269, 247 N.E.2d at 659.

70. *Id.* at 268-69, 247 N.E.2d at 658-59.

71. *Cragun v. Bankers Life Co.*, 28 Utah 2d 19, 21, 497 P.2d 641, 643 (1972).

72. *John Hancock Mutual Life Ins. Co. v. Dorman*, 108 F.2d 220, 224 (9th Cir. 1940).

was intended to create a period beyond which an insurance company could not use that fraud to challenge the validity of an insured's coverage.⁷³ The clause should be so applied in group insurance policies.

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73. *Morris v. Missouri State Life Ins. Co.*, 114 W. Va. 278, 281, 171 S.E. 740, 742 (1933).