Recent Decision: Incontestability Clause Bars Action by Insured
ney's right to protect himself from defama-
tory statements, the Court declared that:

Although the individual attorney, in this
respect, is entitled to no greater judicial pro-
tection than the law affords to others, he is,
in all justice, certainly entitled to no less
protection.\textsuperscript{28}

The Court, therefore, has endorsed the
view which favors strict limitation on the
use of absolute privilege. \textit{Sassower v. Him-
wich} is thus in direct accord with the \textit{Lee}
case, but is patently contrary to the result
reached by the \textit{Toft} case in 1955, and the

\textit{Ramstead} case in 1959.

The \textit{Sassower} case represents an appa-
rently logical and prudent approach to the
issue, with a result that appears to protect
the rights of both parties as equally and as
ethically as possible. On the other hand, the
\textit{Toft} and \textit{Ramstead} decisions represent a
severe and somewhat inequitable approach,
and result not only in an unjust deprivation
of the attorney’s rights, but also cause a
wall of mistrust to arise between the re-
spectable attorney and his client.\textsuperscript{29}

\textsuperscript{28} \textit{Sassower v. Himwich}, \textit{supra} note 26.

\textsuperscript{29} \textit{34} \textit{Chi.-Kent L. Rev.} \textit{328, 329} (1956).

---

\textbf{Recent Decision:}

\textbf{Incontestability Clause Bars
Action by Insured}

\textit{This policy shall be incontestable after it
has been in force for a period of two years
from date of issue.}

The above is a simple form of “incon-
testable clause”\textsuperscript{1} which appears in most life
insurance policies issued today. Within
limits, the courts agree that the clause bars
the insurance company from asserting many
defenses that would otherwise be available.
The question of whether the clause operates
with equal force on the insured had never
been put in issue until the recent case of
\textit{Newton v. New York Life Inc. Co.}\textsuperscript{2} The
plaintiff, a holder of several life insurance
and annuity policies, brought the action to
recover damages for alleged fraud, conceal-
ment and misrepresentation in the issuance
and sale of the policies. All the policies con-
tained clauses providing for incontestability
after either one or two years from date of
issue. In this action, brought more than two
years after the date of issue of the policies,
the district court \textit{held} that the incontest-
ability clauses are for the benefit of both
the insurer \textit{and} the insured and consequently
the action is barred.

While the issue in the \textit{Newton} case is
novel, the incontestable clause itself has
been in use for approximately a century,\textsuperscript{2}
and oral representations by the insurer to
the effect that the policy shall be incontest-
able were upheld before that.\textsuperscript{3} A holder of
a life insurance policy in the early nine-
teenth century could not know whether his
beneficiary would receive the proceeds of

\textsuperscript{1} \textit{210} \textit{F. Supp.} \textit{859} (N.D. Cal. 1962).

\textsuperscript{2} \textit{THE LIFE INSURANCE POLICY CONTRACT} \\textbullet \textit{§ 5.1}
(Krueger & Waggoner ed. 1953).

\textsuperscript{3} \textit{Wood v. Dwarris}, \textit{11 Ex.} \textit{493, 156 Eng. Rep.} \textit{925}
(1856).
the policy upon his death or would become a litigant in a costly action. To overcome this uncertainty and thus increase sales, many insurance companies voluntarily began to use some form of incontestable clause. Shortly thereafter, New York took the first major legislative step in insurance reform and required, among other things, that all life insurance policies issued in New York contain certain standard provisions including an incontestable clause.

Today many states have passed similar legislation in respect to the use of an incontestable clause in various insurance contracts.

It is clear from the legislative pattern that the incontestable clause is viewed favorably, and this attitude is made even more evident from the course the courts have taken. There is general agreement that fraud, misrepresentation or concealment on the part of the insured in procuring the policy cannot be raised by the insurance company once the period set forth in the incontestable clause has elapsed. However, if no period is allowed in which the insurance company may contest the policy, some courts have held that fraud is an implied exception, or that the clause is void.

Where the insurance company does not seek to avoid the policy, but merely to reform it according to the tenor of the intended agreement, it is generally held that reformation is available in spite of the incontestable clause. The action “is not a contest of the policy, but a prayer to make a written instrument speak the real agreement of the parties.” Although there is authority to the contrary, New York and a majority of

---

4 See Massachusetts Benefit Life Ass'n v. Robinson, 104 Ga. 256, 269, 30 S.E. 918, 922 (1898).
7 Wright v. Mutual Benefit Life Ass'n of America, 118 N.Y. 237, 23 N.E. 186 (1890); Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 149 Pac. 171 (1915).
8 Welch v. Union Cent. Life Ins. Co., 108 Iowa 224, 78 N.W. 853 (1899). This issue is seldom raised because few policies are issued providing for incontestability from date.
9 See Couch, Cyclopedia of Insurance Law § 2155, at 6954 (1931).
13 Columbian Nat. Life Ins. Co. v. Black, 35 F.2d 571, 577 (10th Cir. 1929).
jurisdictions follow this reasoning. Substantially the same rationale is employed in allowing the insurer to litigate the question of the insured’s true age, where it has been misstated either innocently or by fraud. This action, too, is not considered to be a contest within the meaning of the clause as long as the sole purpose is to adjust the proceeds payable under the policy according to the age of the insured.

In like manner, the non-contest clause does not bar a defense that the particular risk involved is not covered by the terms of the policy.

If a “contest,” as distinguished from the above actions, is commenced within the time allowed by the incontestability clause, the insurer cannot thereafter be barred by the operation of the clause. A contest begins when the insured avoids, or seeks to avoid, the obligation of the contract by action or defense. If the insured or the beneficiary is plaintiff, suing to declare the policy in force or to recover money due, the contest takes its start when the insurer serves an answer disclaiming liability.

In deciding the instant case, the Court stated that the basic issue is: “Are the . . . incontestable clauses for the benefit of the company-insurers, as well as for the benefit of the insureds and the annuitants?” The question was answered in the affirmative. The Court relied heavily on the fact that there was nothing in the contracts to indicate that the clause was intended for the insured only, and that “numerous cases contain language . . . which leads to the conclusion that incontestability clauses are for the benefit of both the insurer and the insured.”

In one of the cases which the Court relied upon, it was said:

This clause is of vast importance and benefit, both to the insured and to the insurer. It enables the latter to increase his business by giving an assurance to persons doubtful of

---


4. Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 169 N.E. 642 (1930). “If 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 by reason of a condition broken.” Id. at 452, 169 N.E. at 642.
the utility of insurance that neither they nor their families, after the lapse of a given time, shall be harassed with lawsuits...  

While it is true that this case and the other cases cited do contain language to the effect that the incontestable clause is for the benefit of both parties, it is clear upon closer examination of these cases that a different benefit was contemplated for the insurer than the protection contended for by the Court in the instant case. The benefit of the non-contest clause to the insurance company will not be denied. As stated earlier, the insurance companies voluntarily adopted the clause to eliminate understandable apprehensions on the part of the prospective policyholder and to thereby increase their business. Yet, in spite of the fact that the benefit expressed is purely one of sales attraction and not one of protection beyond rights available to the insurer absent the clause, there is still language in several of the cited cases that would tend to lead one to the conclusion that the clause serves to protect both sides.

In discussing the benefit or protection given by the clause, the chief recipient is generally considered to be the policyholder. One reason advanced for this po-

sition is that where there can be more than one meaning available to a provision in an insurance contract the one which is most favorable to the insured will be adopted. A more cogent argument, however, was presented by Chief Justice Cardozo of the New York Court of Appeals:

The value of a clause declaring a policy incontestable lies to no slight degree in the definiteness of the protection accorded to the holder. The good that it promises is in part a state of mind. After a lapse of two years the insured is no longer to be harassed by the fear that the policy will be avoided by interested witnesses asserting in later days that there was a disclaimer long ago. After a like lapse the beneficiaries are no longer to be subjected to the risk of forfeiture though notices or warnings that may be hard to disprove when the insured is in his grave.

The basis for this position becomes obvious when the purpose of the inclusion of the incontestable clause is examined in view of underlying public policy. Life insurance has become an institution in our complex society. It is an integral and important factor in family planning and many estates are built around little more than a single policy. To reach such a high regard, the policy must be able to create complete stability. It must therefore be absolutely free from doubt as to the distribution of proceeds. The incontestable clause accomplishes this and maintains the equilibrium


E.g., Killian v. Metropolitan Life Ins. Co., 251
important to a proper functioning of the community. When the income-producer passes on, the family can, nevertheless, maintain itself. It is with this view in sight that courts have given the clause so broad and encompassing a construction as to defeat any defense with respect to the validity of the policy.

It is this overriding public policy that has caused an anomaly in contract law. It is firmly established that fraud is a ground for vitiating all contracts,29 yet it is possible for an insurer, in effect, to agree never to raise the defense of fraud once a specified period has elapsed. The reason for upholding this agreement is that of the two public policies here in play, the one condemning fraud must succumb to that which favors the interests of the insured and beneficiary.30 Various explanations have been given for this, some of which are: (1) The sense of security given to the great majority of honest policyholders makes the advantage given to the few dishonest people worthwhile;31 (2) The clause does not condone fraud, but on the contrary, recognizes it and gives ample time to establish it as a defense;32 (3) The insurer has ample time and facilities to discover the fraud before the policy is issued;33 (4) The insurer should not be allowed to wait until the insured is dead to contest the contract, since the insured's interest cannot easily be shown and very often the insured's witnesses are no longer available;34 (5) The clause merely creates a short statute of limitations in favor of the insured.35

It has also been said that the several incontestable statutes in New York36 "undoubtedly enunciate a rule of public policy requiring the incorporation of incontestability clauses favorable to policyholders. . . ."37 A number of other cases construing legislative intent have held that an incontestable clause cannot be broader than the statute in exempting defenses from operation of the clause;38 it must be at least as favorable to the insured and beneficiary as required by statute. But this is not to say that the clause cannot be more favorable to the insured.39 In *Columbian Nat. Life Ins. Co. v. Wallerstein*,40 the insurance company did not disclaim coverage but instead brought an action in tort for damages on the ground that the insured had fraudulently induced

---

36 *N.Y. Ins. Law §§ 155(b), 163(b).*
40 *91 F.2d 351, 353 (7th Cir.), cert. denied, 302 U.S. 755 (1937).*
the company to issue the policy. In denying the insurance company recovery, the Court said:

[The purpose of the statutory enactments requiring the inclusion of incontestability clauses in all policies of life insurance, is to protect the insured and his beneficiary from contests arising out of the policy after the expiration of the statutory period and do away with litigation on it. There can be no doubt that the purpose of enacting legislation in this area is to protect the policyholder and the beneficiary.]

In his annual message to the New York State Legislature on January 3, 1906, Governor Higgins said, "You will be called upon to make a radical revision of the law for the benefit of investors in life insurance and for the regulation and restraint of the companies."

Then in April, 1906, the Governor remarked on his recommendations and the proposed draft which was eventually enacted, that the purpose of the proposed legislation was "to restore public confidence and to compel life insurance companies to conduct a safe, honest and open business for the benefit of their policy holders." This is the atmosphere in which our first incontestable statute was drawn.

It seems that if the 'rule of the instant case, Newton v. New York Life Ins. Co.,' were to be adopted, barring the insured as well as the insurer from asserting inception defenses after the contestable period has run, the balance of power in favor of the insurer which the legislature has attempted to eliminate, will once again become firmly entrenched in our insurance law. The problem is real. It is not too difficult to imagine a concerned husband and father purchasing insurance, upon the representations of the insurer, to provide for his family. After the contestable period has elapsed it is learned that the representations were false. What remedies are available to the policyholder besides abandoning the policy and relinquishing all coverage under it? Since the issue of misrepresentation can no longer be raised, neither rescission nor an action in tort for damages would be available. Reformation of the policy would most likely be denied since in the above hypothetical the element of mistake is absent. Further, the insured might not be able to obtain new insurance because of the increase in his age; if he is eligible for a new policy the rates will be higher than they would have been at the time the former policy was purchased.

A consideration not to be overlooked is, to what extent would general judicial acceptance of the Newton rule vary insurance company practice? It has been held that misrepresenting the benefits of a policy, as prohibited by statute in New York, is a misdemeanor. In addition, the insurer is liable to a penalty which may be recovered by the injured party. By strict application of the Newton rule, this statutory cause of action...
action may no longer be available. This, in addition to the fact that the insured would have no other remedy against the company, might encourage fraudulent practices by some insurers. The incontestable clause was given the wide scope it has today largely because of a public policy favoring protection of the policyholder and his beneficiary. This public policy argument, which is in reality the only basis for the very unusual denial of the defense of fraud, cannot logically be applied to the insurer. To so interpret the clause defeats the very purpose for its favorable judicial treatment by weakening the overall position of the policyholder with respect to the company. No special interests of the insurance companies need this extra protection. But even if some interest of the insurer does exist that is deserving of a special consideration, it still remains that the insured does not have equal facilities and opportunities to uncover the unscrupulous acts of the other party. It is hoped that courts subsequently deciding the issue presented in *Newton* will consider the conflicting interests involved in view of potential detriment to beneficiaries of insureds and consequent ill effects upon the public likely to stem from judicial ratification of the instant case.