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AIDS and the Incontestability Clause

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AIDS AND THE INCONTESTABILITY CLAUSE

I. INTRODUCTION

The purpose of this Note is to re-examine an old concept of insurance law, the incontestability clause, in light of a number of changes which have occurred in state statutory law and in society.[1] This Note will trace the history of the incontestability clause, the conditions in which it has been given effect, and attempts to modify its effect. The Note will also analyze some of the ramifications of the presence of an incontestability clause in a policy of life insurance. This Note will consider various states' statutes as these apply to the incontestability clause and analyze how courts have interpreted incontestability clauses in various jurisdictions. The Note will also reconsider the incontestability clause in light of the advent of AIDS, and recommend how the incontestability clause should be construed in the future.

Incontestability clauses have been used by the insurance industry for over one hundred years to encourage persons to purchase life insurance.[2] Today, the incontestability clause is required in insurance policies to give a measure of assurance to purchasers that, upon death after many years of premium payments, benefits will be paid to beneficiaries notwithstanding any defect, misstatement, misrepresentation, or even fraud in the application for insurance.[3] The incontestability clause effectively prevents an insurer from using the answers of an insured in an application for insurance to void a policy many years after the policy was issued.[4] The incontestability clause may become increas-

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1. Nearly all life insurance policies contain a provision that the policy may not be contested after it has been in effect for two years from the date of its issue except for the nonpayment of premiums or violation of certain policy provisions precluding coverage such as death during active military service. Such incontestability clause policy provisions are generally required by statute. *See infra* note 27. For a general discussion of the incontestability clause, see Young, *"Incontestable" - As To What?*, 1964 ILL. L. F. 323; NOTE, *The Incontestable Clause In Combination Life Insurance Policies*, 31 ILL. L. REV. 769 (1937); Cooper, *Incontestable Life Insurance*, 19 ILL. L. REV. 226 (1924).

2. *See* Plotner v. Northwestern Nat'l Life Ins. Co., 48 N.D. 295, 183 N.W. 1000, 1003 (1921). The *Plotner* court, addressing incontestability clauses in insurance policies, noted that insurance agents undoubtedly point out the clause to prospective purchasers and explain that policy coverage may not be denied and that no defense may be asserted by the insurer after the passage of the period of contestability. *Id.* at 304, 183 N.W. at 1003.

3. Maxwell v. Cumberland Life Ins. Co., 113 Idaho 808, 811, 748 P.2d 392, 395-397 (1987). The *Maxwell* court stated that the purpose of the incontestability clause is to require insurers to carefully scrutinize applications and act quickly to void a contract of insurance. *Id.* Such a duty to immediately investigate suspicious matters prevents insurers from "lulling the insured into a sense of security, only to litigate the issue later." *Id.*

4. Sellwood v. Equitable Life Ins. Co. of Iowa, 230 Minn. 529, 534, 42 N.W.2d 346, 351 (1950). Because of the incontestability clause, the insurer is limited to two years during

ingly important in coming years as courts,[5] legislatures,[6] and the insurance industry[7] struggle with the new issues raised by the advent of Acquired Immune Deficiency Syndrome, the long latency period of that disease,[8] and its fatal outcome.[9]

II. HISTORICAL DEVELOPMENT OF THE INCONTESTABILITY CLAUSE

A. HISTORY OF THE INCONTESTABILITY CLAUSE

1. *Early History and Purpose of the Incontestability Clause*

Insurance companies initially offered the incontestability clause as a policy provision because of public distrust of insurers and their promises to pay benefits in the future.[10] The first incontestability clause was offered in 1848 by London Indisputable Life, a British insurance underwriter, whose company charter provided that it would not contest a policy for any reason.[11] The incontestability clause was first used in the United States as a policy provision by the Manhattan Life Insurance Company in 1864.[12] The first legislation having the effect of rendering a policy incontestable was passed less than ten years later. In 1873 the Ohio legislature passed legislation which provided that, after an insurer had received three premium payments, the insurer was estopped from asserting any defenses other than fraud or misstatements of age against claims on life insurance policies.[13] The first modern stat-

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which it may void the policy for fraudulent answers made in the procurement of the coverage. *Id.*

5. For a discussion of how recent courts have dealt with the interpretation of the incontestability clause, *see infra* notes 80-122 and accompanying text.

6. For a discussion of how legislatures have dealt with the incontestability clause, *see infra* notes 60-67 and accompanying text.

7. For a discussion of how the insurance industry has dealt with the interpretation of the incontestability clause, *see infra* notes 60-64 and accompanying text.

8. For a discussion of Acquired Immune Deficiency Syndrome and the life insurance issues relating to the disease, *see infra* notes 123-142 and accompanying text.

9. *See infra* note 136.

10. J. GREIDER & W. BEADLES, LAW AND THE LIFE INSURANCE CONTRACT 237 (1968) [hereinafter J. GREIDER]. Common abuses by life insurance companies included the refusal to pay death benefits or offers of settlement of substantially less than the policy value because of often minor misrepresentations in the application. H. GRANT, INSURANCE REFORM: CONSUMER ACTION IN THE PROGRESSIVE ERA 22-27 (1979) [hereinafter H. GRANT].

11. J. GREIDER, *supra* note 10, at 237.

12. THE LIFE INSURANCE POLICY CONTRACT 57 (H. Krueger & L. Waggoner 1953).

13. 1872 OHIO LAWS, at 160 (codified as OHIO REVISED STATUTES OF 1880, § 5779 (LANING 1907)). The first incontestability statute was somewhat different than the typical modern version of the incontestability statute in that it barred the raising of all defenses except fraud and misstatements of age and did not permit insurers to preserve other defenses in the policy. *Id.* The text of the original statute provided:

> When companies estopped from certain defenses.
>
> All companies, after having received three annual premiums on any policy

utes requiring incontestability clauses in life insurance contracts did not appear until mounting public pressure forced state legislatures to enact laws to remedy the dishonesty then rampant in the life insurance industry.[14]

In 1906, the Armstrong Commission[15] investigated the insurance industry in New York in response to numerous charges of corruption, fraud, and dishonesty.[16] Through a series of sixty public hearings, the Armstrong Commission carefully probed into every aspect of the insurance industry.[17] The Armstrong Commission uncovered many scandals within the insurance industry[18] and unleashed a reform movement that quickly led to extensive regulation of what had largely been an unrestrained industry.[19]

The Armstrong Commission was quickly followed by other reformer-minded groups. The most important of these reform groups was a national conference of governors, attorneys general, and insurance commissioners held in Chicago in 1906.[20] The conference formed a Committee on Uniform Legislation, known as

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> issued on the life of any person in this state, are estopped from defending, upon any other ground than fraud, against any claim arising upon such policy by reason of any errors, omissions, or misstatements of the assured, in any application made by such assured, on which the policy was issued, except as to age.

Id.

14. *See*, H. GRANT, *supra* note 10, at 28-38. The first modern statute requiring an incontestability clause in insurance contracts was passed after 1905 by New York. J. GREIDER, *supra* note 10, at 237. *See infra* note 24 and accompanying text.

15. The Armstrong Commission was named for the chairman of the eight member committee, state Senator William W. Armstrong of Rochester, New York. H. GRANT, *supra* note 10, at 37.

16. H. GRANT, *supra* note 10, at 28-38. Several New York journals and newspapers chronicled the abuses of the insurance industry in a series of exposes and bitter editorials. *Id.* Various financial improprieties led to much of the public outcry but the chief evil leading to the adoption of a mandatory incontestability clause was the common practice of threatening beneficiaries with expensive litigation if they failed to accept a proffered settlement offer. *Id.* at 30-31.

17. H. GRANT, *supra* note 10, at 47. The chief counsel for the Armstrong Commission was the then little known Charles Evans Hughes. The notoriety of the Commission's scandalous findings lifted Hughes to the New York governorship. He later served as Chief Justice of the United States Supreme Court. *See generally* 1 M. PUSEY, CHARLES EVANS HUGHES (1951) [Hereinafter M. PUSEY].

18. H. GRANT, *supra* note 10, at 38-43. Many, but not all the scandalous details about the insurance industry were financial in nature. *Id.* at 41. For example, The Armstrong Commission uncovered a "House of Mirth," a rooming house operated jointly by several of the largest insurance companies to entertain public servants. *Id.* The "House of Mirth" was used by the insurance industry to help prevent the passage of unfriendly bills. *Id.*

19. *Id.* at 43-54. The report of the Armstrong Commission prompted Wisconsin, and other states, to investigate their insurance companies. *Id.* Further, the report of the Armstrong Commission prompted many other state legislatures to pass regulations to bring the industry under control. *Id.*

20. S. CLOUGH, A CENTURY OF AMERICAN LIFE INSURANCE 224-225 (1946). Many states adopted a large portion of the statutes drafted for the Armstrong Commission by Charles Evans Hughes. M. PUSEY, *supra* note 17, at 166-67.

the Committee of Fifteen.[21] The Committee of Fifteen drafted model insurance policies which included the reform measures recommended by The Armstrong Commission.[22] The Committee of Fifteen included the incontestability clause in the model life insurance policies it proposed.[23] Following the Armstrong Investigation, the state of New York enacted the Standard Policy Law which required an incontestability clause in all life insurance policies sold in New York.[24] In 1907, North Dakota adopted New York's Standard Policy of life insurance as its own.[25]

In 1946, the National Association of Insurance Commissioners (hereinafter N.A.I.C.) drafted a model incontestability clause statute based on the 1907 New York Standard Policy language.[26] At least 47 states have adopted statutes requiring the inclusion of an incontestability clause in every policy of life insurance sold in that state.[27] Most of these states, in enacting incontestability legisla-

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21. S. CLOUGH, *supra*.

22. *Id.*

23. J. GRIEDER, *supra* note 10, at 237. *See also* Jordon v. Western States Life Ins. Co., 78 N.D. 902, 53 N.W.2d 860 (1952) wherein the North Dakota Supreme Court in construing North Dakota's incontestability statute stated:

> All of the statutes before us in this case hark back to the report of the Armstrong Committee and the "Committee of Fifteen" which pointed out the evils then existing in the insurance business and recommended legislation to correct such evils. North Dakota, early in 1907, was the first state to enact the recommended legislation into law.

Id. at 905, 53 N.W.2d at 863.

24. J. GREIDER, *supra* note 10, at 237. *See also* 1906 LAWS OF NEW YORK ch. 326. Much of the New York legislation was written by Charles Evans Hughes, the chief counsel to the Armstrong Commission. M. JAMES, THE METROPOLITAN LIFE: A STUDY IN BUSINESS GROWTH 166 (1947). *See also* M. PUSEY, *supra* note 17, at 166.

25. 1907 LAWS OF N.D. Chap. 140, § 2.

26. W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 591 (3rd ed. 1951).

27. ALA. CODE § 27-18-4 (1986); ALASKA STAT. § 21-48-120 (1988); ARIZ. REV. STAT. ANN. § 20-1260 (1975); ARK. STAT. ANN. § 23-83-111(a) (1987); CAL. INS. CODE § 10206 (West 1989); COLO. REV. STAT. § 10-7-202 (1987); DEL. CODE ANN. tit. 18 § 3114 (1989); D.C. CODE ANN. § 35-515(2) (1988); FLA. STAT. ANN. § 627.560 (West 1984); GA. CODE ANN. § 56-2704 (a)(2) (Harrison 1987); HAW. REV. STAT. § 431-584 (1985); IDAHO CODE § 41-2012 (1977); ILL. ANN. STAT. ch. 73, ¶ 843(a) (Smith-Hurd 1965); IND. CODE ANN. § 27-1-12-41(b)(2) (Burns 1986); IOWA CODE ANN. § 509.2 (West 1988); KAN. STAT. ANN. § 40-420(2) (1986); KY. REV. STAT. ANN. § 304.16-130 (Michie/Bobbs-Merrill 1988); LA. REV. STAT. ANN. § 22:176(2) (West 1959); ME. REV. STAT. ANN. tit. 24A, § 2615(1); MD. ANN. CODE art. 48A, § 428 (1986); MASS. GEN. LAWS ANN. ch. 175, § 134(1) (West 1987); MICH. COMP. LAWS ANN. § 500.4432 (West 1983); MINN. STAT. ANN. § 61A.03 sub. 1(c) (1986); MO. ANN. STAT. § 377.320 (Vernon 1968); MONT. CODE ANN. § 33-20-1203 (1987); NEB. REV. STAT. § 44-1607(2) (1988); NEV. REV. STAT. ANN. § 688B.060 (Michie 1986); N.H. REV. STAT. ANN. § 408:16(II) (1983); N.J. STAT. ANN. § 17B:27-12 (West 1985); N.M. STAT. ANN. § 59A-21-13 (1986); N.Y. INS. LAW § 3220(a)(1) (McKinney 1985); N.C. GEN. STAT. § 58-58-140(2) (1982); N.D. CENT. CODE § 26.1-33-11(2) (1989); OHIO REV. CODE ANN. § 3917.06(B) (Anderson 1989); OKLA. STAT. ANN. tit. 36, § 4103(2) (West 1976); OR. REV. STAT. § 743.315 (1989); PA. STAT. ANN. tit. 40, § 532.6(2) (Purdon 1971); S.C. CODE ANN. § 38-65-210(2) (Law. Co-op. 1976 & Supp. 1987); S.D. CODIFIED LAWS ANN. § 58-16-35 (1978); TENN. CODE ANN. § 56-7-601(3)(B) (1989); TEX. INS. CODE ANN. § 3.50 sec. 2(2) (Vernon 1981); UTAH CODE ANN. § 31A-22-510 (1986); VT. STAT. ANN. tit. 8, § 3814 (1984); VA. CODE ANN. § 38.2-3326 (1986); WASH. REV. CODE ANN. § 48.24.120 (1984); W. VA. CODE § 33-14-10

tion, have adopted the model incontestability clause statute of the N.A.I.C.[28] Thus, the form of the incontestability clause required by various state statutes is quite consistent.

The purpose most commonly stated for the existence of the incontestability clause is the protection of beneficiaries from unnecessary litigation after the death of an insured.[29] Because a life insurance policy is regarded as a form of contract which must be honestly entered into and carefully complied with by the insured to avoid rescission by the insurer, absent an incontestability clause, a beneficiary might be faced with the uncertainty of no death benefit following years of premium payments.[30] Chief Justice Oliver Wendel Holmes, addressing the purpose of the incontestability clause stated: "The object of the clause is plain and laudable—to create an absolute assurance of the benefit, as free as may be from any dispute of the fact except the fact of death, and as soon as it reasonably can be done."[31]

(1988); WIS. STAT. ANN. § 632.46(2) (West 1980); WYO. STAT. § 26-17-112 (1989). The author's research indicates that only Connecticut, Mississippi and Rhode Island do not statutorily require incontestability clauses in life insurance policies.

28. *See supra* note 27. The incontestability statutes are often located in a section of a state's insurance code listing certain required provisions for all group life insurance policies. *See, e.g.*, N.D. CENT. CODE § 26.1-33-05 (1989). Section 26.1-33-05 of the North Dakota Century Code provides:

> Provisions required in life policy. No life insurance policy may be issued or delivered in this state, unless the policy contains: . . .
>
> 3. A provision that the policy constitutes the entire contract between the parties and is incontestable after it has been in force during the lifetime of the insured for two years from its date, except for nonpayment of premiums and except for violations of the policy relating to naval or military service in time of war, and, at the option of the company, provisions relative to benefits in the event of total and permanent disability and provisions that grant additional insurance specifically against death by accident also may be excepted.

Id.

29. *See, e.g.*, Simpson v. Phoenix Mutual Life Ins. Co., 24 N.Y.2d 262, 266, 247 N.E.2d 655, 657, 299 N.Y.S. 2d 835, 839 (1969).

30. *See, e.g.*, Powell v. Mutual Life Ins. Co. of New York, 313 Ill. 161, 164-165, 144 N.E. 825, 827 (1924). The *Powell* court recounted the historical plight of life insurance beneficiaries:

> In the earlier development of insurance contracts it not infrequently occurred that, after the insured had paid premiums for a large number of years, the beneficiaries under the policy found, after the maturity thereof by the death of the insured, that they were facing a lawsuit in order to recover the insurance; that in certain answers in the application it was said by the insurer the insured had made statements which were not true, and the beneficiaries were not entitled to recover on the policy. It is needless to call attention to the fact that this situation gave rise to a widespread suspicion in the minds of the public that an insurance contract was designed largely for the benefit of the company. Recognizing this fact, and seeing the effect of it on the insurance business, numerous insurance companies inserted in their policies what is now known as an incontestable clause.

Id.

31. Northwestern Mutual Life Ins. Co. v, Johnson, 254 U.S. 96, 101-102 (1920).

2. *The Development of the Holland Committee and the Standard Policy*

The function of the incontestability clause was somewhat unsettled through the early years of this century. Some courts held that the incontestability clause only acted as a waiver of an insurer's right to challenge the terms of the policy.[32] Other courts held that the clause barred all of an insurer's defenses to a life insurance claim.[33] Still other courts held that the incontestability clause acted as a statute of limitation or repose.[34] The only generally accepted certainty was that the incontestability clause was clearly meant to remove fraud as a defense after the passage of two years.[35] Courts have almost uniformly held that while the incontestability clause recognizes fraud as a defense, the insurer is limited by the two-year provision as to when the fraud may be

32. *See, e.g.*, Scarborough v. American Nat'l Ins. Co., 171 N.C. 353, 88 S.E. 482 (1916). The *Scarborough* court stated that by the inclusion of an incontestability clause in the insurance contract the parties to the contract must mean that the provisions of the policy will not be contested and not that the insurance company contracts to waive the right to defend itself against a risk which it never intended to assume. *Id.* at 355, 88 S.E. at 483.

33. Many courts treated the effect of the incontestability clause as a total bar which precluded the raising of any defense by an insurer. *See, e.g.*, Plotner v. Northwestern Nat'l Life Ins. Co., 48 N.D. 295, 183 N.W. 1000 (1921). The *Plotner* court held that an insurer, by the terms of the insurance contract, was precluded from voiding the policy on any grounds except for the failure to pay the policy premiums. *Id.* at 303, 183 N.W. at 1003. *See also* Jordon v. Western States Life Ins. Co., 78 N.D. 902, 53 N.W.2d 860 (1952). In discussing the effect of the North Dakota incontestability statute, the *Jordon* court stated that "in this state the legislative intent that the incontestability clause should bar all defenses, not expressly and allowably excepted from its operation, is distinctly expressed." *Id.* at 912, 53 N.W.2d at 865.

34. *See, e.g.*, Wright v. Mutual Ben. Life Ass'n of America, 121 N.Y. 147, 23 N.E. 186 (1890). In *Wright*, the court noted that the incontestability clause does not exonerate fraud, but rather provides sufficient time during which fraud may be discovered, but beyond which time period such fraud may not be employed to invalidate a policy. *Id.* The *Wright* court stated that the incontestability clause resembles and functions much like statutes of limitations. *Id.* at 148, 23 N.E. at 187.

35. Massachusetts Benefit Life Ass'n v. Robinson, 104 Ga. 270, 30 S.E. 918 (1898). The *Robinson* court stated that the incontestability clause drew a bright line and removed all allegations of fraud as a defense to a policy. *Id.* at 277, 30 S.E. at 925. The *Robinson* court noted that if the incontestability clause did not have such a clear cut effect the result would be to create degrees of fraud. *Id.* at 927-928. *But see* Rasmussen v. Equitable Life Assurance Soc. of United States, 293 Mich. 482, 292 N.W.2d 377 (Mich. 1940). The *Rasmussen* court refused to allow an insured's fraudulent answers in an application expand the coverage of a group life insurance policy to cover a person older than that permitted under the terms of the policy. *Id.* at 486, 292 N.W. at 379. The court stated that, notwithstanding the usual preclusion by the incontestability clause of the assertion of fraud as a defense, an insured could not thereby bring himself within policy coverage. *Id.* The *Rasmussen* court stated that if the truth of an insured's age remains undiscovered during the period of contestability, such non-discovery would not create coverage for a risk expressly excluded by the terms of the policy. *Id.* Thus, the understatement of age, where the coverage of a group policy is expressly limited to a specific age group, would not come within the reach of the incontestability clause, any more than a misstatement that one is an employee when in truth an applicant does not belong to the group of employees to be covered. *Id.*

asserted as a defense to payment of the policy benefit.[36] There is usually little doubt that after a policy becomes incontestable by the expiration of the two year period, the answers of the insured in the original application cannot be used by the insurer to avoid the policy.[37] However, there have been persistent questions concerning whether the clause precludes the raising of other defenses by the insurer,[38] or whether the clause acts to expand the coverage of the policy.[39]

Most of the variation in the interpretation of the incontestability clause changed in 1930 when the scope of the incontestability clause was addressed by the New York Court of Appeals in *Metropolitan Life Ins. Co. v. Conway*.[40] In *Conway*, Metropolitan Life Insurance Company applied to the New York superintendent of insurance for approval of a rider for its policies.[41] The effect of the rider was to except, as a risk not assumed, the death of insureds resulting from "service, travel or flight in any species of air craft, except as a fare-paying passenger."[42] The superintendent of insurance held that the proposed rider was inconsistent with the state's incontestability statute which required that the only exceptions to the clause were non-payment of premiums and violation of the conditions of the policy relating to military or naval service in time

36. Wright v. Mutual Benefit Life Ass'n of America, 121 N.Y. 147, 148, 23 N.E. 186, 187 (1890). In *Wright* the court noted that the two year limitation provides sufficient time and opportunity for the insurer to establish a defense of fraud. *Id.* at 148, 23 N.E. at 187.

37. Sellwood v. Equitable Life Ins. Co. of Iowa, 230 Minn. 529, 42 N.W.2d 346, 351 (1950). The *Sellwood* court noted that there are two effects of the incontestability clause. *Id.* at 536, 42 N.W. at 351. The first is, in the absence of fraud, to recast all statements made by the applicant as representations and not as warranties. *Id.* Secondly, the incontestability clause limits the time during which the insurer may contest the policy on the basis of fraudulent answers in the application. *Id.*

38. *See, e.g.*, Wright v. Mutual Benefit Life Ass'n of America, 121 N.Y. 147, 23 N.E. 186-187 (1890). Since at least 1890 courts have been asked to hold that the incontestability clause acts to waive or preclude all defenses of an insurer. *Id.* at 148, 23 N.E. at 187. Since at least that time insurers have complained that the most expansive reading of the incontestability clause served to condone fraud and to remove all of an insurer's defenses. *Id.* To this assertion, the *Wright* court answered that the incontestability clause is:

> [N]ot a stipulation absolute to waive all defenses, and to "condone fraud." On the contrary, it recognizes fraud and all other defenses, but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of, and serves a similar purpose, as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. *Id.*

39. *See, e.g.*, Sanders v. Jefferson Standard Life Ins. Co., 10 F.2d 143 (5th Cir. 1925). The *Sanders* court stated that an incontestability clause does not transform a promise to pay in the event of a stated contingency into a promise to pay regardless of whether the contingency occurs. *Id.* at 144.

40. 252 N.Y. 449, 169 N.E. 642 (1930).

41. Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 169 N.E. 642 (1930).

42. *Id.*

of war.[43] Metropolitan Life appealed the superintendent's ruling.[44] The Appellate Division found the conflict between the rider and the incontestability statute to be unreal and reversed the Commissioner.[45] The New York Court of Appeals affirmed the Appellate Division, holding that the proposed rider and statute were "consistent and harmonious."[46] Chief Judge Cardozo, writing for the court of appeals, held that the incontestability statute only prohibited contests of the *validity* of the policy on any grounds except for violations of specified policy conditions.[47] The court, Cardozo said, "must distinguish between a denial of coverage and a defense of invalidity."[48] When an insurer has elected to restrict coverage under a policy,[49] the policy may still be valid in respect to the risks that are assumed.[50] The incontestability clause could neither create new coverage where there was none before nor expand coverage to include risks that the insurer was unwilling to assume.[51] The *Conway* court construed the incontestability clause to mean only that after two years from the inception of the policy the policy would be unassailable on the basis of fraud.[52] The *Conway* court explicitly rejected the idea that the incontestability clause might act as a mandate of absolute coverage for all risks not explicitly excluded in the state's incontestability statute.[53]

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43. *Id.* Such exclusions from the scope of the incontestability clause are universal in essentially all state insurance codes. For a listing of these statutes, *see supra* note 27.

44. Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 169 N.E. 642 (1930).

45. Metropolitan Life Ins. Co. v. Beha, 226 A.D. 408, 235 N.Y.S. 501 (1929).

46. Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 169 N.E. 642 (1930).

47. *Id.* at 643 (emphasis added).

48. *Id.* The distinction between a denial of coverage and a defense of invalidity was essential to the *Conway* court's holding. *Id.* A denial of coverage is merely a risk not assumed by the insurer such as air travel or perhaps death by AIDS. *See id.* A defense of invalidity, which may be properly barred by the incontestability clause after the passage of two years, reflects any fraud or misstatements made by the insured in the procurement of the policy. *See id.*

49. Insurers typically choose not to assume particular risks as a method of regulating costs. *See generally* Wortham, *The Economics of Insurance Classification: The Sound Of One Hand Clapping*, 47 OHIO ST. L.J. 835 (1986).

50. Metropolitan Life Ins. Co. v. Conway, 252 N.Y. at 450, 169 N.E. at 643. Any challenge that an insurer might make to an insurance policy with an aviation risk exclusion would do so not on the basis of invalidity, i.e. fraud in the application, but on the basis of a lack of coverage. *Id.*

51. *Id.*

52. *Id.* at 449, 169 N.E. at 642.

53. *Id.* at 449, 169 N.E. at 642. The *Conway* court's opinion, in an oft quoted paragraph, 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.

Most, if not all the cases decided after 1930 have cited *Conway* as the touchstone for the interpretation of the incontestability clause.[54] Many courts have followed the reasoning set forth in *Conway* and interpret the coverage of the incontestability clause in terms of factors which would make a life insurance policy invalid at the inception of the policy, rather than as a condition precedent to coverage.[55] Courts following *Conway* generally hold that the incontestability clause only pertains to conditions that would have made the policy void from its inception.[56] These courts do not construe the clause to apply to conditions precedent to coverage, to eligibility requirements, or to limitations or exclusions from coverage.[57]

After the *Conway* decision, only a few courts construed the incontestability clause to bar the raising of all defenses not explicitly listed in the clause.[58] The few courts that have held that an incontestability clause bars all defenses have generally done so in applying the clause in the context of group insurance policies, particularly where death benefits were claimed on the life of an ineligible employee assertedly covered under the policy.[59]

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54. *See, e.g.*, Freed v. Bankers Life Ins. Co. of Nebraska, 216 N.W.2d 357 (Iowa 1974). The *Freed* court noted that *Conway* is cited by nearly all the text and case authorities construing the incontestability clause. *Id.* at 359. *See also* Bonitz v. Travelers Ins. Co., 374 Mass. 327, 372 N.E.2d 254 (1978). "Discussion [of the incontestability clause] commonly begins with the opinion of Chief Judge Cardozo in Metropolitan Life Ins. Co. v. Conway." *Id.* at 329, 372 N.E.2d at 256.

55. Rasmussen v. Equitable Life Assur. Soc., 293 Mich. 482, 292 N.W.2d 377 (1940). A condition precedent to coverage defines the hazards to be borne by the insurer. *Id.* at 484, 292 N.W.2d at 379. Such conditions usually are in the form of eligibility requirements with criteria based on age, employment or good health. *See generally id.*

56. *See* Darden v. North American Benefit Ass'n, 170 Va. 479, 197 S.E. 413, 416 (1938)(court followed *Conway* and held that the incontestability clause applied only to contests of the validity of the policy).

57. *See* Crawford v. Equitable Life Assurance Soc. of U.S., 56 Ill. 2d 41, 305 N.E.2d 144 (1973). The *Crawford* court stated that it considered the question of eligibility as one which relates to the risk assumed, not the validity of the policy. *Id.* at 47, 305 N.E.2d at 150. Thus, a defense based on a lack of eligibility is not barred by the incontestability clause. *Id.*

58. National Life & Casualty Ins. Co. v. Blankenbiller, 89 Ariz. 253, 360 P. 2d 1030 (1961); John Hancock Mut. Life Ins. Co. v. Dorman, 108 F.2d 220 (9th cir. 1940) (applying California law); Suskind v. American Republic Ins. Co., 458 F. Supp. 680 (D. Del. 1979), *rev'd on other grounds*, 607 F.2d 76 (3rd Cir. 1979); Equitable Life Assur. Soc. v. Florence, 47 Ga. App. 711, 171 S.E. 317 (1933); Freed v. Bankers Life Ins. Co. of Nebraska, 216 N.W.2d 357 (Iowa 1974); Jackson v. Continental Cas. Co., 412 So.2d 1364 (La. 1982); Bonitz v. Travelers Ins. Co., 374 Mass. 327, 372 N.E.2d 254 (1978); Strawbridge v. New York Life Ins. Co., 504 F. Supp. 824 (D. N.J. 1980); Simpson v. Phoenix Mutual Life Ins. Co., 24 N.Y.2d 262, 247 N.E.2d 655 (1969); Chavis v. Southern Life Ins. Co., 318 N.C. 259, 347 S.E.2d 425 (1986); Jordon v. Western States Life Ins. Co., 78 N.D. 902, 53 N.W.2d 860 (1952); Baum v. Massachusetts Mutual Life Ins. Co., 357 P.2d 960 (Okla. 1960); Cragun v. Bankers Life Co., 28 Utah 2d 19, 497 P.2d 641 (1972); Millis v. Continental Life Ins. Co., 162 Wash. 555, 298 P. 739 (1931); Poffenbarger v. New York Life Ins. Co., 277 F. Supp. 726 (S.D. W.V. 1967).

59. *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Dorman, 108 F.2d 220 (9th cir. 1940). In *Dorman*, the deceased was an unpaid director of a company who was named as an insured under the company's group life insurance policy. *Id.* at 223. The decedent's named beneficiaries claimed coverage for the decedent's life notwithstanding the eligibility

Perhaps in response to the cases failing to follow *Conway*, the insurance industry drafted a model statute codifying the Cardozo opinion in *Conway*.[60] In 1947, the Life Insurance Association Of America and the American Life Convention formed a committee to draft model insurance statutes.[61] The committee, known as the Holland Committee, was formed by the insurance industry in response to the growing number of decisions which interpreted the incontestability clause broadly.[62] The Holland Committee proposed a model statue with the intention of limiting the broad interpretation of incontestability clauses.[63] The model statute proposed by the Holland Committee 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.[64]

States began to adopt the model statue shortly after the Holland Committee proposal was made.[65] A total of 27 states currently have this or a similar, shorter[66] statutory limitation to the incontestability clause.[67] The purpose of the model statute was to

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requirement of the policy that all participants be employees of the company. *Id.* The insurance company cited to *Conway* and asserted that the eligibility requirement represented a hazard and that the incontestability clause does not prohibit contests based on a lack of coverage by the policy. *Id.* The *Dorman* court distinguished *Conway* by saying that *Conway* had "merely" held that the policy terms did not cover the "*hazard of death of a non-fare paying passenger in an aeroplane as a result of his traveling in it.*" *Id.* (emphasis in original). The *Dorman* court held that the word "coverage" did not apply to attributes or qualities of the insured but only to the hazards to be assumed by the insurer. *Id.* Thus, the *Dorman* court stated the incontestability clause precludes a showing after the two year period has expired that the policy did not cover the insured because he lacks a certain attribute or condition. *Id.* at 224.

60. J. GREIDER, *supra* note 10, at 243.

61. J. GREIDER, *supra* note 10, at 243.

62. *Id.*

63. *Id.*

64. *Id.*

65. For the date of passage of each states' incontestability clause limitation, *see infra* note 67.

66. *See, e.g.*, N.D. CENT. CODE § 26.1-33-11(2) (1989). The shorter limitation of the incontestability clause is typically appended to the incontestability clause itself, rather than standing alone as a separate section. The shorter form is typically quite similar to that used in North Dakota and usually reads that "no such provision [of incontestability] may preclude the assertion of [sic] any time of defenses based upon provisions in the policy which relate to eligibility for coverage." N.D. CENT. CODE § 26.1-33-11(2) (1989).

67. *See*, ALA. CODE § 27-15-15 (1986) (*enacted 1967*); ALASKA STAT. § 21-45-160 (1988) (*enacted 1966*); ARIZ. REV. STAT. ANN. § 20-1217 (1975) (*enacted 1954*); ARK. STAT. ANN. § 23-83-111(b) (1987) (*enacted 1959*); CAL. INS. CODE § 10113.5 (West Supp. 1990) (*enacted 1972*); DEL. CODE ANN. tit. 18, § 3114 (1975) (*enacted 1953*); FLA. STAT. ANN. § 627.463

narrow the scope of the incontestability clause to only those contests of a policy based on misrepresentations in the application that would invalidate a policy.[68] Notwithstanding the success of the model statute, courts in a few states which had not yet adopted the model statute continued to hold that the clause did serve to bar all defenses after the running of the period of contestability.[69]

B. MODERN INTERPRETATION OF THE INCONTESTABILITY CLAUSE

1. *Advent of the Group Life Insurance Policy*

Group life insurance is generally distinguished from individual underwriting by several features unique to the group insurance concept. Perhaps the most important difference between group life insurance and individual life insurance for the purposes of this Note is the general absence of individual medical examination or required proof of individual insurability.[70] Insurers typically only require individual medical screening or proof of insurability in three instances: first, in small groups where the risk

(West 1984) (*enacted 1955*); GA. CODE ANN. § 56-2509 (Harrison 1987) (*enacted 1960*); HAW. REV. STAT. § 431-542 (1985) (*enacted 1955*); IDAHO CODE § 41-1916 (1977) (*enacted 1961*); IND. CODE ANN. § 27-1-12-41(b)(2) (Burns 1986) (*enacted 1985*); KY. REV. STAT. ANN. § 304.15-170 (Michie/Bobbs-Merrill 1988) (*enacted 1970*); LA. REV. STAT. ANN. § 22:170(B)(5) (West 1959) (*enacted in 1959*); ME. REV. STAT. ANN. tit. 24A, § 2615(2) (1964 & Supp. 1989) (*enacted 1969*); MD. ANN. CODE art. 48A, § 400 (1986) (*enacted in 1956*); MONT. CODE ANN. § 33-20-118 (1987) (*enacted 1947*); NEV. REV. STAT. ANN. § 688A.170 (Michie 1986) (*enacted 1971*); N.J. STAT. ANN. § 17B:25-16 (West 1985) (*enacted 1971*); N.M. STAT. ANN. § 59A-20-16 (1986) (*enacted in 1984*); N.D. CENT. CODE § 26.1-33-11(2) (1989) (*enacted in 1985*); OKLA. STAT. ANN. tit. 36, § 4015 (West 1976) (*enacted 1957*); OR. REV. STAT. § 743.168(2) (1989) (*enacted 1967*); S.D. CODIFIED LAWS ANN. § 58-15-11 (1978) (*enacted 1966*); UTAH CODE ANN. § 31A-22-403(4) (1986) (*enacted 1953*); VT. STAT. ANN. tit. 8, § 3733 (1984) (*enacted 1969*); VA. CODE ANN. § 38.2-3110 (1986) (*enacted 1952*); W. VA. CODE § 33-13-16 (1988) (*enacted 1957*); WYO. STAT. § 26-16-115 (1989) (*enacted 1967*).

68. Miller v. Protective Life Ins. Co., 485 So.2d 746, 747 (Ala. Civ. App. 1986). The *Miller* court held that Alabama's statute, which was based on the Holland Committee statute, permitted the insurer to question the terms of the coverage of a policy, notwithstanding the incontestability clause. *Id.* at 746-47.

69. *See, e.g.*, National Life & Casualty Ins. Co. v. Blankenbiller, 89 Ariz. 253, 360 P.2d 1030 (1961). The *Blankenbiller* court asserted that "the majority rule" is that every exception to the incontestability clause not explicitly stated in the statute itself is barred as a defense to the policy at the end of the incontestability period. *Id.* at 255, 360 P.2d at 1032. *But see* National Life & Accident Ins. Co. v. Mixon, 291 Ala. 467, 282 So.2d 308 (1973). The *Mixon* court stated the stance that risks not assumed under the insurance policy are not given coverage by the incontestability clause has "been adopted by a majority of other courts which have considered the question." *Id.* at 473, 282 So.2d at 314. The *Blankenbiller* court was undoubtedly mistaken as to the majority status of its holding in light of the *Conway* case and the widespread adoption of the model statute which limits the application of the incontestability clause. *C.f. id.* (*Mixon* states the majority proposition).

70. D. GREGG, GROUP LIFE INSURANCE: AN ANALYSIS OF CONCEPTS, CONTRACTS, COSTS, AND COMPANY PRACTICES 3-4 (3rd ed. 1962) [hereinafter D. GREGG]. Other characteristics of group insurance include the coverage of many persons under one policy although only the employer is actually a party to the contract; premium rates are subject to experience rating and may rise or fall based on actual losses of a group; and generally no individual selection of benefits is available. *Id.*

to the insurer is greater because the size of the group is too small to spread the risk; second, when individuals are late entrants to a group after previously declining to apply for coverage; finally, when large amounts of benefits are requested as a supplement to basic coverage.[71]

Coverage of individual lives under a single policy of group life insurance is a relatively modern development in underwriting. The first use of group life insurance is generally dated to 1912, although earlier references to the concept do exist.[72] The first policies were characterized by many of the features which today distinguish group life insurance from individual policies: a single policy was issued which covered all persons listed in a "register"; coverage was on a yearly renewable term basis and was only effective during the period of employment; the employer paid the premiums in advance; the policy terms included a grace period of 30 days; a misstatement of age provision; a right of conversion to individual coverage after five years of continuous participation; and a one year incontestability clause.[73]

Today, group life insurance is common. In 1987, more than 110 million persons were covered under some form of group life insurance in the United States[74] and group life accounted for more than 40 percent of all life insurance in force[75] and more than 365 billion dollars of coverage.[76] Death benefits from group life insurance policies totalled more than nine billion dollars.[77] The average group life insurance policy value in 1987 was $22,380.00.[78] As

71. AIDS AND THE LAW 207 (W. Dornette ed. 1987). *See also* Clifford & Iuculano, *Aids and Insurance: The Rationale For Aids-Related Testing*, 100 HARV. L. REV. 1806, 1809, n. 16 (1987) (citing HEALTH INSURANCE ASSOCIATION OF AMERICA, A COURSE IN GROUP LIFE AND HEALTH INSURANCE pt. A, at 153 (1985)).

72. D. GREGG, *supra* note 70, at 6. The first policy of group life insurance was written for Montgomery Wards in 1912 by The Equitable Life Assurance Society of The United States. *Id.* The policy came after two years of effort by Ward to recruit an underwriter to develop a plan to offer employer-paid life insurance for all of Ward's employees. *Id.* As early as 1872, an insurance agent for Metropolitan Life suggested to his "home office a blanket life insurance policy to cover all the workers in a plant without medical examination." *Id.* at 5, n.3 (citing M. JAMES, THE METROPOLITAN LIFE: A STUDY IN BUSINESS GROWTH 53 (1947)). The policy for Montgomery Ward was predated by a 1905 plan covering all employees of the United Cigar Stores chain through a series of individual yearly renewable term policies, the premiums of which were collected and remitted by the employer. *Id.* In 1911, a director of The Equitable Life Assurance Society of the United States, intrigued by Ward's concept of group coverage, purchased a similar policy covering employees of a plant he owned. *Id.*

73. *Id.* at 7.

74. AMERICAN COUNCIL OF LIFE INSURANCE, 1988 FACT BOOK 32.

75. *Id.* at 19.

76. *Id.* at 30.

77. *Id.* at 43. Benefits were paid on the lives of more than 690,000 insureds. *Id.* at 44.

78. *Id.* at 21.

is discussed more fully below,[79] the spread of AIDS is likely to have a tremendous impact on the life insurance industry as the death toll from the disease is felt in greatly increased benefit payments and higher premium charges for all.

2. *The Incontestability Clause as a Bar to All Defenses Not Raised in the Period of the Contestability Clause: Simpson and Its Progeny*

If *Conway* is the principle older case, then perhaps the leading modern case addressing the incontestability clause is *Simpson v. Phoenix Mutual Life Insurance Company*.[80] In 1969, a trend toward a more liberal interpretation of the incontestability clause began when the New York Court of Appeals decided *Simpson v. Phoenix Mutual Life Insurance Company*.[81] *Simpson* marked a movement away from the strict construction of the incontestability clause in *Conway* back toward the original interpretation of the incontestability clause as a bar to all defenses to coverage under the policy.

Simpson involved a group life insurance policy covering full time employees.[82] In a contest over coverage, the insurer asserted a defense that the decedent was not an eligible employee.[83] The *Simpson* court reached a quite different holding from *Conway* and its progeny. Both parties, in support of their respective positions, offered the frequently quoted language from *Conway* which stated that an incontestability clause was "not a mandate as to coverage" but merely provided that "within the limits of the coverage, the policy shall stand, unaffected by any defense that it [the policy] was invalid at its inception."[84] The *Simpson* court stated

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79. *See infra* notes 135 to 137.

80. 24 N.Y.2d 262, 247 N.E.2d 655, 299 N.Y.S. 2d 835 (1969). *See* Cragun v. Banker's Life Company, 28 Utah 2d 19, 497 P.2d 641 (1972). The *Cragun* court acknowledged the traditional "view that the incontestability clause of the policy precludes only those defenses which would have been invalid at the inception of the policy." *Id.* at 21, 497 P.2d at 643. The *Cragun* court also noted that such an interpretation is supported by a majority of the older decisions, including *Conway*. *Id.* However, the *Cragun* court asserted, more recent cases have not followed that view. *Id.* The court continued with a citation to *Simpson* and then followed the holding of *Simpson*. *Id.*

81. Simpson v. Phoenix Mutual Life Ins. Co., 24 N.Y.2d 262, 247 N.E.2d 655, 299 N.Y.S. 2d 835 (1969).

82. *Id.* at 264, 247 N.E.2d at 656, 299 N.Y.S. 2d at 837.

83. *Id.* at 265, 247 N.E.2d at 656, 299 N.Y.S. 2d at 838. Most of the recent cases concerning the incontestability clause have involved contests regarding persons assertedly covered under a group policy and a defense by the insurer that the decedent was not eligible for coverage. *See, e.g.*, Bonitz v. Traveler's Ins. Co., 374 Mass. 327, 372 N.E.2d 254 (1978). For a discussion of cases concerning the incontestability clause in the group insurance context *see* Annotation 26 A.L.R. 3rd 632 (1969).

84. *Simpson*, 24 N.Y.2d at 266-267, 247 N.E.2d at 657, 299 N.Y.S. 2d at 839 (quoting Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 452, 169 N.E. 642, 643 (1930)).

that the passage was instructive but not dispositive noting that the passage in *Conway* offered by both parties merely established a frame of reference by which the court would have to make its decision.[85] The court framed the issue as whether "employment," as defined in the group life insurance policy being contested, was a condition of insurance or a limitation of the risk which the insurer contracted to underwrite.[86] If employment were a condition of insurance the defense was barred by the policy's incontestability clause.[87] If employment were a limitation of the risk assumed, the beneficiary could not recover under the policy.[88] Thus, if employment is a condition to the policy coverage, rather than a limitation of policy coverage, the insurer has to suffer the consequences of its failure to investigate the insured and to contest the validity of the policy during the two years of the incontestability period.[89] The *Simpson* court noted that limitations on the policy are those risks "which could not be ascertained by the insurer by investigation at the time the policy of insurance was issued."[90]

The *Simpson* court concluded that employment was a condition of insurance.[91] The *Simpson* court's rationale for its holding was that the feature which distinguishes between a condition and a limitation is discoverability.[92] The *Simpson* court asserted that eligible employment is undoubtedly ascertainable when a group policy is issued and thus the requirement of eligible employment must be a condition.[93] The court defined limitations to the coverage, which would properly be excluded from the incontestability clause, as only those risks which could not be discovered at the

85. *Simpson*, 24 N.Y.2d at 267, 247 N.E.2d at 657, 299 N.Y.S. 2d at 839.

86. *Id.* at 266, 247 N.E.2d at 657, 299 N.Y.S. 2d at 838. The master policy at issue in *Simpson* contained a provision that employees eligible for coverage under the policy were all full-time employees regularly working a minimum of 30 hours a week at the employer's usual place of business. *Id.* at 264, 247 N.E.2d at 656, 299 N.Y.S. 2d at 837.

87. *Id.* at 266, 247 N.E.2d at 657, 299 N.Y.S. 2d at 838.

88. *Id.* at 266, 247 N.E.2d at 657, 299 N.Y.S. 2d at 838.

89. *Id.* at 266, 247 N.E.2d at 657, 299 N.Y.S. 2d at 838. The *Simpson* court cited to, among others, John Hancock Mut. Life Ins. Co. v. Dorman, 108 F.2d 220 (9th cir. 1939) in support of this proposition. The *Dorman* court had held that the incontestability clause precluded a defense that the insurance policy did not cover an insured because of a failure of a condition. *Id.* at 224.

90. *Simpson*, 24 N.Y.2d at 267, 247 N.E.2d at 657-58, 657, 299 N.Y.S. 2d at 839. The *Simpson* court cited to *Metropolitan Life Ins. Co. v. Conway*, 252 N.Y. 449, 169 N.E. 642 (1930) as support of its interpretation of limitations on coverage. *See also* Cragun v. Banker's Life Company, 28 Utah 2d 19, 497 P.2d 641 (1972). The *Cragun* court agreed with the *Simpson* court's analysis of limitations as being those particular risks which could not be discovered by the insurer at the time the policy was issued. *Id.* at 21, 497 P.2d at 643.

91. *Simpson*, 24 N.Y.2d at 266, 247 N.E.2d at 657, 299 N.Y.S. 2d at 838.

92. *Id.* at 267, 247 N.E.2d at 657, 299 N.Y.S. 2d at 840.

93. *Id.* at 267, 247 N.E.2d at 658, 299 N.Y.S. 2d at 840.

time of the issuance of the policy.[94] Thus, where the insurer cannot, by investigation, guard against assuming a risk it does not wish to insure, such as risks of death in noncommercial aviation or death while on active military duty, the risk is properly classified as a limitation with respect to the incontestability clause.[95]

Since 1969, other courts have followed the lead of *Simpson*, holding that the incontestability clause precludes virtually any defense by an insurer after the passage of two years.[96] The reasoning for these decisions has been that the incontestability clause safeguards an insured from excessive litigation after a policy has been in force many years.[97] The incontestability clause guarantees the insured security in financial planning for named beneficiaries, while providing an insurer a reasonable opportunity to investigate.[98]

3. *The Incontestability Clause as a Bar to Only Those Defenses Which Fall Under That Which the Policy Covers: Crawford and Its Progeny*

Not all cases decided since 1969 have followed *Simpson*. The leading case reaffirming the holding in *Conway* that the incontestability clause bars only those defenses which fall under the coverage of the policy is *Crawford v. Equitable Life Assurance Soc. of U.S.*[99] The *Crawford* case has served as the counterpoint to *Simpson* in many of the cases decided after 1973.[100]

In *Crawford*, the insurance policy at issue was a group policy which limited eligibility to full time employees scheduled for at

94. *Id.* at 267, 247 N.E.2d at 657, 299 N.Y.S. 2d at 839 (citing Metropolitan Life Ins. Co. v. Conway, 252 N.Y. 449, 169 N.E. 642 (1930)).

95. *Id.* at 267, 247 N.E.2d at 658, 299 N.Y.S. 2d at 840.

96. *See* Bonitz v. Traveler's Ins. Co., 374 Mass. 327, 372 N.E.2d 254 (1978)(court held that the incontestability clause barred an insurer from using the defense that insured was never an employee); Cragun v. Bankers Life Co., 28 Utah 2d 19, 497 P.2d 641 (1972)(court held that incontestability clause establishes a period during which an insurer may by investigation guard against risks it doesn't intend to assume); Freed v. Bankers Life Ins. Co. of Neb., 216 N.W.2d 357 (Iowa 1974)(court held that the incontestability clause requires an insurer to use diligence in verifying an applicant's eligibility before insurance is issued).

97. *See* Bonitz v. Travelers Ins. Co., 374 Mass. 327, 372 N.E.2d 254 (1978).

98. *Simpson*, 24 N.Y.2d at 266, 247 N.E.2d at 657, 299 N.Y.S. 2d at 839.

99. 56 Ill. 2d 41, 305 N.E.2d 144 (1973).

100. *See, e.g.*, Searcy v. Fidelity Bankers Life Ins. Co., 656 S.W.2d 39 (Tenn. App. 1983)(court rejected *Simpson*, followed *Crawford*, and held that the incontestability clause did not preclude the raising of a defense of a lack of coverage); Jackson v. Continental Cas. Co., 412 So.2d 1364 (La. 1982)(court cited to both *Simpson* and *Crawford* but relied on existing Louisiana precedent which barred the raising of all defenses by the insurer); Home Life Ins. Co. v. Reguiera, 313 So.2d 438 (Fla. Dist. Ct. App. 1975)(court stated that *Simpson* was wrongly decided and adopted the reasoning of *Crawford*). For a critique of the *Simpson* decision and a critical comparison of that case to *Crawford*, *see* Sfikas, *The Interface Between Coverage and The Incontestable Clause in Group Life Insurance*, 1974 CHI. B. REC. 298.

least thirty-two hours per week.[101] The decedent, the wife of the owner whose business held the policy, worked only a few hours per month.[102] After her death and the submission of the benefits claim, the insurer discovered her part-time status and denied payment of the benefit.[103] The *Crawford* court framed its discussion of the case around whether the eligibility of an employee relates to the "coverage" of the policy and may, therefore, be challenged notwithstanding the inclusion of an incontestability clause in the policy.[104] The *Crawford* court noted that the conventional incontestability clause contained certain common exceptions such as for nonpayment of premiums.[105] However, the *Crawford* court stated that there were other grounds not enumerated in the incontestability clause on which an insurer may deny a claim after the period of contestability has run.[106] The *Crawford* court maintained that the incontestability clause obviously does not preclude a denial based on the failure of a particular event insured against not taking place.[107] Therefore, the insurer would not be barred from "contesting" the claim or the claimant's interpretation of the coverage provisions.[108]

The *Crawford* court reasoned that the split in the jurisdictions on the question of the effect of the incontestability clause was due in part to the application of the clause to both individual life insurance and to group life insurance.[109] In the case of individual life insurance policies the difference between a challenge as to coverage and a challenge as to validity is, as the *Conway* court noted, fairly easy to distinguish.[110] In a group life plan, however, where coverage is based on individuals being included within a certain class of persons, misrepresentations as to that status can create coverage where the insurer was unwilling to otherwise assume a risk.[111]

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101. Crawford v. Equitable Life Assurance Soc. of U.S., 56 Ill. 2d 41, 305 N.E.2d 144 (1973).

102. *Id.*

103. *Id.*

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

105. *Id.* at 47, 305 N.E.2d at 148.

106. *Id.*

107. *Id.* Thus, if the insurance policy provided coverage against the risk of death while an insured was in the employ of the master policy holder, the insurer could properly defend on the basis of the failure of the stated event to occur if the insured died after employment ended. *See id.*

108. *Id.*

109. *Id.* at 48, 305 N.E.2d at 149.

110. *Id.*

111. *Id.* The *Crawford* court stated that in the case of individual life insurance, the policy specifies a particular individual by name, and it is relatively easy to distinguish between a question of coverage, the death of the insured or death from some specified

The *Crawford* court held that the insurer's challenge to eligibility, in the group insurance context, related to the risk assumed and not to the coverage provided.[112] Thus, the *Crawford* court stated, such a challenge was not an attack on the validity of the policy and the incontestability clause would not be implicated because the insurer sought not to void the policy, but to enforce the strict terms of the policy.[113]

The *Crawford* court criticized the holding in *Simpson* as being a basic withdrawal from the rationale of *Conway*.[114] The *Conway* opinion had distinguished between policy provisions concerning the validity of the policy, to which the incontestability clause undoubtedly applies, and those provisions relating to the risk assumed, to which the incontestability clause does not apply.[115] Additionally, the *Crawford* court noted other reasons for its disapproval of the *Simpson* analysis. The *Crawford* court stated that social policy warranted the exclusion of certain claims from the effect of the incontestability clause, noting that the misstatement of an insured's age was such a claim.[116] If individuals not eligible for life insurance coverage were to receive coverage by action of the incontestability clause, the *Crawford* court reasoned, insurance rates would increase for everyone.[117] The *Crawford* court noted a further reason to construe the incontestability clause more narrowly is that a contrary interpretation might permit coverage to be extended to persons whose inclusion in the eligible group might end after the passing of the period of contestability.[118]

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cause, and a question of validity created by a material misrepresentation in the application for insurance by the insured. *Id.* However, in the case of group life insurance, the master policy provides insurance for an assemblage of unnamed persons defined only in terms of membership in a class, such as the employees of a certain company. *Id.* To establish whether a person is insured requires a determination of whether the insured is in fact a member of the class. *Id.* Because this determination is based upon information furnished by the employer or the employee, the question whether coverage exists tends to become interwoven with the question of whether the coverage was obtained by false representations. *Id.*

112. *Id.* at 50, 305 N.E.2d at 150.

113. *Id.* In *Crawford*, the court viewed the challenge by an insurer based on a defense of a lack of coverage to be an attempt by the insurer to strictly enforce the terms of the insurance policy. *Id.* The *Crawford* court's interpretation of the incontestability clause was that the clause only applied to challenges to a policy in which the insurer sought to void the policy and not to actively enforce the terms of the policy. *Id.*

114. *Id.*

115. *Id.*

116. *Crawford*, 56 Ill.2d at 52, 305 N.E.2d at 150-51 (the *Crawford* court relied on Rasmussen v. Equitable Life Assur. Soc., 293 Mich. 482, 292 N.W. 377 (1940), which held that a greater social good was achieved by permitting insurers to restrict admission into group insurance plans).

117. *Crawford*, 56 Ill.2d at 52, 305 N.E.2d at 151.

118. *Id.* A holding contrary to that taken by the *Crawford* court might result in

Finally, the *Crawford* court took issue with the rationale of the *Simpson* decision.[119] In *Simpson*, the incontestability clause effectively estopped an insurer from asserting a defense because of the discoverability of a "condition of insurance" which was asserted by the insurer as a "limitation on insurance."[120] The *Crawford* court stated that this doctrine "would put the insurer to an election between the risk of making payment on unwarranted claims or conducting an investigation . . . of every person purportedly insured."[121] Such a situation would cause increased expense and the duplication of records for group insurance programs that are designed to be conducted in a "self-administrative" fashion.[122]

III. AIDS AND THE INCONTESTABILITY CLAUSE

A. THE PROBLEM WITH AIDS AND LIFE INSURANCE GENERALLY

Acquired Immune Deficiency Syndrome (hereinafter AIDS)[123] first came to public attention in May, 1981.[124] AIDS is caused by a virus known as Human Immunodeficiency Virus (hereinafter HIV).[125] AIDS may be diagnosed either with or without

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persons retaining coverage under a group insurance plan long after leaving the group as the insurer would be barred from raising a defense of a lack of coverage. *Id.*

119. *Id.*

120. *Id. See* Simpson v. Phoenix Mutual Life Ins. Co., 24 N.Y.2d 262, 266, 247 N.E.2d 655, 657, 299 N.Y.S. 2d 835, 838 (1969)(risks which are considered limitations are those which cannot be ascertained through investigation by the insurer at the time the policy is issued).

121. Crawford v. Equitable Life Assurance Soc. of U.S., 56 Ill. 2d 41, 53, 305 N.E.2d 144, 151 (1973).

122. *Id.* Most group plans are administered by the employer of the members of the group. The employer typically ascertains eligibility, collects and remits premiums, and maintains the membership data which is transmitted to the insurer, often on the anniversary date of the policy. The insurer typically only becomes involved in the administration of the plan when a claim is submitted.

123. Acquired Immune Deficiency Syndrome is a clinical syndrome characterized by certain opportunistic infections and which is at minimum moderately predictive of cellular-level immune system dysfunction. AIDS: PATHOGENESIS AND TREATMENT 2 (J. Levy ed. 1989). The Centers for Disease Control has established a very detailed case surveillance definition to guide examining physicians in the diagnosis of AIDS. *See infra* note 126.

124. CENTERS FOR DISEASE CONTROL, *Pneumocystis pneumonia-Los Angeles*, 30 MORBIDITY AND MORTALITY WEEKLY REP. 250 (1981)[hereinafter MORBIDITY AND MORTALITY WEEKLY REPORT]. The report detailed the unusual pneumonia infections of five homosexual men. *Id.* at 250-51. The particular type of pneumonia was quite uncommon and only found in persons with severely depressed immune systems. *Id.* at 251.

125. SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 9 (1987). Several viruses have been implicated in the AIDS disease. The viruses suspected of causing AIDS have been known by several acronyms, including LAV, HTLV-1, HTLV-2 and HIV. V. DANIELS, AIDS: THE ACQUIRED IMMUNE DEFICIENCY SYNDROME 46 (2nd ed. 1987) [hereinafter V. DANIELS]. The scientific community has agreed upon the designation of HIV to indicate the causative agent of AIDS. *Id.* at 47-48. In 1986 the Human Retrovirus Subcommittee of the International Committee on the Taxonomy of Viruses officially proposed the designation of HIV for the AIDS viruses. *Letters*, 232 SCI. 697 (1986).

clinical or laboratory confirmation of the presence of HIV.[126] At least two major tests are used to identify HIV in patients. The Enzyme-Linked Immuno-Sorbant Assay Test (hereinafter ELISA)[127] is generally used first and will be repeated if a positive reading is achieved on the first use.[128] If the patient tests positive for the presence of HIV in a second ELISA test, another test, the Western blot test, is employed to verify HIV infection.[129] The Western blot test is less likely to give false positive results.[130] Positive results on all three tests are highly indicative of HIV infection even if no symptoms appear in the patient.[131]

HIV infection manifests itself in a spectrum or continuum with at least three possible identifiable conditions diagnosable in an individual. An individual may be infected but asymptomatic, an individual may be diagnosed as having AIDS Related Complex (hereinafter ARC) and display certain characteristic symptoms,[132] or an individual may be diagnosed as having fully expressed

126. CENTERS FOR DISEASE CONTROL, *Revision of the CDC Surveillance Case Definition for Acquired Immunodeficiency Syndrome*, 36 MORBIDITY AND MORTALITY WEEKLY REP. 2-3 (Supp. 1-S 1987). The Centers For Disease Control has recently revised its case definition for AIDS. *Id.* In grossly simplified terms, the syndrome may be diagnosed in one of three categories: 1) Without laboratory evidence of the Human Immunodeficiency Virus [HIV], in which case other causes of immunodeficiency must be ruled out and certain indicator diseases must be present; 2) With laboratory evidence for HIV infection, in which case certain indicator diseases must be present; 3) With laboratory evidence against HIV infection (i.e., when an HIV test is negative), in which case all other causes of immunodeficiency must be ruled out and the individual must have either *Pneumocystis pneumonia* or certain other indicator diseases and a T-helper/inducer lymphocyte count of less than 400 per cubic milliliter. *Id.*

127. V. DANIELS, *supra* note 125, at 64. All current AIDS tests, including the ELISA test, do not show the presence of HIV itself. *Id.* The tests instead show the presence of antibodies produced by the response of the body to HIV infection. *Id.* Antibodies are produced to combat specific diseases and the presence of anti-AIDS antibodies indicates infection by HIV. *Id.*

128. V. DANIELS, *supra* note 125, at 64. HIV infection is indicated if the blood sample exhibits seropositivity. Seropositivity is shown when the human serum becomes bound to the AIDS virus on the plastic test sheet. *Id.*

129. *Id.*

130. *Id.*

131. AIDS AND THE LAW 212 (W. Dornette ed. 1987 & Supp. 1989). A researcher at the National Cancer Institute has estimated that two positive ELISA tests followed by a positive Western blot test will indicate HIV in "999 out of 1,000 cases". *Id.*

132. AIDS: PATHOGENESIS AND TREATMENT 325 (J. Levy ed. 1989). AIDS Related Complex is characterized by at least four separate symptoms including, among others, a weight loss of more than 10% of body weight, prolonged fever, diarrhea for more than three months, fatigue, anemia, abnormal skin tests, generalized lymph node enlargement. *Id.* Many researchers, because of the nearly unbroken continuum of progression characteristic of the disease from initial infection to fully expressed AIDS, disapprove of the separate category of ARC. *Id.* The Centers for Disease Control has revised its classification system for HIV infection and no longer specifically recognizes a separate category of ARC. CENTERS FOR DISEASE CONTROL, Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections. 35 MORBIDITY AND MORTALITY WEEKLY REP. 334-39 (1986). The Centers for Disease Control recognizes three distinct classification of HIV infection. *See infra* note 133.

AIDS.[133]

Since its discovery in 1981, AIDS has spread rapidly. A total of 337 persons were diagnosed with AIDS in 1981.[134] As of December 1982 the total number of AIDS cases stood at 878.[135] By 1988 the Centers for Disease Control reported that 56,212 persons had AIDS and between 1,000,000 and 1,500,000 persons were infected by HIV.[136] In 1989 alone, 35,238 new AIDS cases were reported to the Centers for Disease Control.[137]

The increased rate of infection by HIV and the growing death rate resulting from AIDS has already affected and undoubtedly will in the future affect the life insurance industry. Applications for individual life insurance now include a question regarding the

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133. CENTERS FOR DISEASE CONTROL, Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections, 35 MORBIDITY AND MORTALITY WEEKLY REP. 334-39 (1986). The Centers for Disease Control now categorizes the groups of HIV infection as Groups I, II and III. *Id.* Group I is for those individuals with an acute infection, i.e., fully expressed AIDS. *Id.* Group II consists of those individuals with asymptomatic infections. *Id.* Group III includes other individuals with persistent generalized lymphadenopathy, i.e., lymph node enlargement. *Id.* Generalized lymph node enlargement is one of the most common characteristics of ARC. *See supra* note 132.

134. V. DANIELS, *supra* note 125, at 3.

135. CENTERS FOR DISEASE CONTROL, *Update: Acquired Immunodeficiency Syndrome — United States*, 35 MORBIDITY AND MORTALITY WEEKLY REP. 757 (1983). By December of 1983 the total was over 2,900. *Id.* at 759. One year later the total was 7025. This figure had doubled by October of 1985 to 14,049. By December of 1986, the Centers for Disease Control had again doubled the estimate, this time to 28,098. *Id.*

136. CENTERS FOR DISEASE CONTROL, *Quarterly Report to the Domestic Policy Council on the Prevalence and Rate of Spread of HIV and AIDS in the United States*, 37 MORBIDITY AND MORTALITY WEEKLY REP. 223-224 (1988). Such a large estimate of HIV infection may indicate a mushrooming AIDS burden for the health and life insurance industries. One estimate indicates that as many as 36 percent of all persons infected with HIV will develop AIDS within 88 months of infection. AIDS: PATHOGENESIS AND TREATMENT 9 (J. Levy ed. 1989). AIDS remains an incurable and invariably fatal disease. *Id.*

137. CENTERS FOR DISEASE CONTROL, *Update: Acquired Immunodeficiency Syndrome — United States, 1989*, 39 MORBIDITY AND MORTALITY WEEKLY REP. 81 (1990). In 1989 the incidence rate of AIDS was 14 cases per 100,000 of population. *Id.* The Centers for Disease Control has very recently updated and lowered its estimates of the incidence of HIV infection. CENTERS FOR DISEASE CONTROL, *Estimates of HIV Prevalence and Projected AIDS Cases: Summary of a Workshop, October 31-November 1, 1989*, MORBIDITY AND MORTALITY WEEKLY REP. 110-111 (1990). Researchers attending a national AIDS workshop in November of 1989 agreed that an accurate estimate of the current number of persons infected with HIV is about 1,000,000. *Id.* at 111. However, the prevalence of HIV infections will be manifested by a continued increase in reported AIDS cases through at least 1993. *Id.* at 110, 112. Approximately 52,000 to 57,000 new AIDS cases will be diagnosed in 1990 alone. *Id.* at 110. The latest estimates indicate that by 1993 the annual increase of AIDS cases will number between 61,000 and 98,000 individuals. *Id.* at 117. By 1993 the annual number of deaths from AIDS is expected to reach between 53,000 and 76,000. *Id.* North Dakota has had one of the lowest rates of HIV infection and AIDS incidence in the nation. However, in North Dakota, as is true throughout the rest of the nation, the rates of HIV infection and AIDS diagnoses continue to rise. Grand Forks Herald, Jan. 4, 1990, at B2, col. 1. Since April of 1985, 76 persons have been tested as HIV seropositive in North Dakota, 24 have been diagnosed with AIDS and of these, 17 have died. *Id.* Eleven of the AIDS cases were reported in 1989 alone compared with only four reported cases in 1988. *Id.*

diagnosis or treatment of AIDS.[138] An individual with knowledge that he or she has been infected with HIV may fraudulently misrepresent the condition of his or her health in an application for life insurance and thereby obtain insurance that would otherwise be unavailable. Similarly, a person might fraudulently obtain a favorable blood test, perhaps by employing an imposter when no or lax identification procedures are used in administering blood tests. Because AIDS may take four or more years to develop from the time of the initial infection to fully expressed AIDS,[139] any misrepresentations regarding pre-existing diseases, diagnosis of HIV infection, or treatment of AIDS or ARC may not be discovered or be discoverable until the period of contestability has passed.[140]

Fraud and misrepresentation as to HIV infection or exposure in an application of life insurance may pose serious problems for insurers who issue group policies as very few group life insurance plans require a physical examination or blood test before acceptance for applicants who are members of the group to be insured.[141] For example, most group life insurance plans do not require a physical exam for applicants employed full time by the policy holder. The lack of individual underwriting considerations is the very essence of group insurance: coverage at lower rates is

138. *E.g.*, *Application For Life Insurance*, Northwestern Mutual Life Insurance Company. Northwestern Mutual's application for life insurance states at question 41: "Have you ever had a medical diagnosis of or have you received medical advice or treatment for Acquired Immune Deficiency Syndrome (AIDS) or Aids Related Complex (ARC) or any disorder of the immune system?" *Id.* The application also comes with an authorization form for an HIV (AIDS) Antibody status test which includes a release of the results to the insurer. *Id.*

139. AIDS: PATHOGENESIS AND TREATMENT 9 (J. Levy ed. 1989). The incubation period from infection to fully expressed AIDS can vary based on the means of infection. Persons infected by blood transfusion have a mean incubation period of about 29 months while homosexual and bisexual men have a mean incubation period of about 55 months. *Id.*

140. The nearly universal period of contestability is two years. *See* the various states' statutes, *supra* note 27. If the AIDS takes more than two years to become fully expressed from the date of first infection, an applicant for life insurance could apply for and receive coverage under a policy not requiring medical examination, notwithstanding any questions on the application regarding pre-existing diseases or representations of good health. After the passage of the two years such misrepresentations in the application would not void the policy or preclude coverage.

141. AIDS AND THE LAW 206-207 (W. Dornette ed. 1987 & Supp. 1989). An insurer's intent in underwriting a group insurance plan is to insure a group whose aggregate risks are reasonably predictable. *Id.* Most group insurance plans require a high percentage of enrollment of the eligible members of the group. *Id.* Thus, the health of particular individuals is not an underwriting factor and eligible members of the group are not subject to examinations or screenings. *Id.* Generally, the only underwriting factors considered in group life insurance plans are the size of the group to be insured, the percentage of participation by eligible members of the group, the kinds of occupations included in the group and the risks inherent in such occupations, and the source of premium contributions. *Id.* Eligibility for enrollment in the group plan is usually judged by the sole criteria of active, full-time employment at the employers usual place of business. *Id. See also*, Simpson v. Phoenix Mutual Life Ins. Co., 24 N.Y.2d 262, 263, 247 N.E.2d 655, 656 (1969).

available because administration costs are lower and the actuarial characteristics of the group covered are more favorable.[142]

The potential for crisis exists in juncture of the underwriting characteristics of group insurance, the nature of AIDS and the operation and effect of the incontestability clause. Discussed below are some of the ramifications of this juncture.

B. APPLICATION OF INCONTESTABILITY CLAUSES TO THE AIDS DISEASE

To date, surprisingly few cases have reached appellate courts on the issues presented in this Note. Of these few, none have dealt with the conflicting interpretations of the incontestability clause as delineated in *Simpson* and *Conway*.[143]

1. *Under the Simpson View*

The opinion of the *Simpson* court demonstrates the concerns that arise at the intersection of the incontestability clause and the AIDS epidemic. Under the *Simpson* analysis, insurers may be

142. D. GREGG, *supra* note 70, at 18-19. Group insurance enables insurers to efficiently distribute and administer policies of life insurance to a large number of persons. *Id.* The mass selling and enrollment procedures used in group insurance reduce the cost per person of insuring lives. *Id. See also.*, Freed v. Bankers Life Ins. Co. of Nebraska, 216 N.W.2d 357, 359 (Iowa 1974). In the typical group insurance plan such matters as determining who will be included in the group to be insured, collecting and paying insurance premiums, and other such administrative concerns is the responsibility of the master policy holder. *Freed*, 216 N.W.2d at 359. For a discussion of the actuarial characteristics of group insurance, *see* AIDS AND THE LAW 206-207 (W. Dornette ed. 1987). *See also* Simpson v. Phoenix Mutual Life Ins. Co., 24 N.Y.2d 262, 247 N.E.2d 655, 299 N.Y.S. 2d 835 (1969). The major distinction between group life and individual life insurance is that under a group insurance policy a greater number of persons who would not ordinarily procure insurance are covered because of the typical requirement of employer-paid group insurance plans that all employees be included in the plan. D. GREGG, *supra*. The population which comprises the employees in a group insurance plan generally, as a group, constitute a better insurance risk, than the same number of persons seeking private policies. *Simpson*, 24 N.Y.2d at 268, 247 N.E.2d at 658, 299 N.Y.S. 2d at 840-841.

143. *See* Fernandez v. Bankers Nat'l Life Ins. Co., 906 F.2d 559 (11th Cir. 1990) (court of appeals reversed because of genuine issues of material fact regarding whether misrepresentations by the insured made in an application for a $250,000.00 life insurance policy were material and remanded case for further discovery); Zachary Trading Inc. v. Northwestern Mutual Life Ins. Co., 668 F. Supp. 343 (S.D.N.Y. 1987) (insurer which contested the policy before the expiration of the period of contestability was entitled to summary judgment due to the materiality of the insured's misrepresentations and failure to disclose various illnesses in an application for a $500,000.00 key-man life insurance); Roper Group, Inc. v. Home Indemnity Co., No. 88-9752 (E.D. Pa. July 25, 1990) (WL 106724) (court held that beneficiary of a $54,812.70 credit life insurance policy was entitled to the policy benefit as the insurer failed to prove that the insured had an actual intent to deceive when making general representations of good health and failing to disclose various illnesses when the application contained no questions regarding AIDS and did not require a physical examination); Allstate Ins. Co. v. City of Billings, 780 P.2d 186 (Mont. 1989) (the insurer sued for production of insured's police records for evidence of the insured's use of illegal drugs, treatment for AIDS, or the presence of mental or physical disorders because of possible misrepresentations by the insured in an application for a $130,000 life insurance policy).

unable to successfully exclude coverage for death caused by AIDS as the incontestability clause would be interpreted to preclude the raising of any defense not excepted in the policy.[144] The *Simpson* court held that any risks which are ascertainable or discoverable by the insurer at the time the policy of insurance was issued are conditions of insurance and are properly excluded as defenses by the operation of the incontestability clause.[145]

The problem with the *Simpson* analysis arises in the context of the AIDS epidemic when insurers seek to exclude death by certain causes, such as AIDS. If discoverability is the "hallmark of the distinction between conditions and limitations," then attempts at excluding certain diseases from coverage will be unsuccessful unless the disease was not discoverable at the time of the issuance of the policy. Any disease which is excluded from coverage but which was discoverable at the time of the application, will be subject to coverage under the policy, notwithstanding the exclusion. Only when an HIV infection is not discoverable will an insurer be able to exclude coverage for the disease. Insurers will thus be required to test every applicant for infection by HIV regardless of the nature of the insurance policy or the dollar value of benefits.[146] However, a number of states have begun to limit insurers' ability to require blood tests for the presence of HIV in applicants for group life insurance.[147] If such limitations on HIV blood tests are adopted in other states, insurers may find themselves unable to exercise the very act of discovery required by the *Simpson* analysis. In states which follow the *Simpson* analysis but which still permit HIV blood testing, insurers will still be put to much greater expense in investigating possible HIV infection. In states following *Simpson*, if an applicant's infection escapes detection, life insurance is issued, and a claim for benefits is made upon death after the passage of two years. Under a policy which excludes death by AIDS, the insurer will be precluded from raising the exclusion as a defense. Under the *Simpson* analysis, the disease was discoverable and as a condition of insurance, properly pre-

144. *See, e.g.*, Simpson v. Phoenix Mutual Life Insurance Company, 24 N.Y.2d 269, 266, 247 N.E.2d 655, 659, 299 N.Y.S. 2d 835, 841 (1969). The *Simpson* court noted that the problem of adverse risk selection is not unique to group policies. *Id.* Insurers of individual policies had long faced the same problem and resolved it by requiring physical examinations and by investigating medical histories. *Id.*

145. *Id.*

146. Requiring medical examinations or blood tests for all applicants would necessarily increase the cost of group insurance and blur the distinction between group and individual life insurance.

147. *See infra* notes 153-155 and accompanying text.

cluded from assertion by the insurer as a defense by the operation of the incontestability clause.

2. *Under the Crawford View*

The *Crawford* court's analysis, as applied to the problem of group life insurance, AIDS, and the incontestability clause, yields a more sensible solution. The *Crawford* court limited the scope of the incontestability clause to those defenses which are challenges of the validity of the policy.[148] Under the *Crawford* analysis, eligibility for group coverage was not related to the validity of the policy but only to the risk assumed.[149] Risks assumed are those risks which the insurer is willing to cover in the policy. Risks excluded are those of such uncertainty or of such great risk as to be properly limited by the policy to make affordable coverage available to all insureds. Thus, under the *Crawford* analysis, an insurer may exclude those causes of death which are of such an inordinate risk as to radically alter the life expectancies of the group to be covered.

If an insured dies from a cause of death excluded by the policy, the incontestability clause would not work to bring the cause of death within the scope of coverage of the policy. This result would be more logical and would result in the interpretation of life insurance policies more in accord with the plain meaning of the language used by the parties to the contract of insurance. An exclusion from coverage for a specified disease would operate precisely as the parties envisioned. If insurers should wish to include coverage for AIDS they could do so at a commensurately higher premium. Likewise, if state legislatures wish to require AIDS coverage or to prohibit specified disease exclusions in life insurance policies, they would be free to do so. However, the judicial inclusion of coverage for a cause of death which an insurer has expressly attempted to exclude is contrary to the intent of the parties to the insurance contract and contrary to the accepted interpretation of the incontestability clause.

C. LEGISLATIVE RESPONSE TO AIDS AND THE INSURANCE INDUSTRY

In addition to the possible constraints placed on insurers by the application of the incontestability clause to insureds with

148. *See* Crawford v. Equitable Life Assurance Soc. of U.S., 56 Ill. 2d 41, 50, 305 N.E.2d 144, 150 (Ill. 1973).
149. *Id.*

AIDS, other issues regarding AIDS and life insurers have arisen.[150] A number of states have recently passed legislation which regulates the insurance industry's response to AIDS.[151] These regulations fall into several identifiable categories of requirements or prohibitions affecting insurers. The legislation includes statutes which prohibit any inquiry into the sexual orientation of insurance applicants or the use of the knowledge of an applicant's sexual orientation for underwriting purposes;[152] statutes which require informed consent before HIV blood tests are administered;[153] statutes which prohibit the use or consideration by insurers of HIV tests taken prior to an application for insurance;[154] statutes which limit or prohibit insurers from ordering mandatory HIV blood tests;[155] and statutes which prohibit insurers from writing exclu-

150. *See generally*, McMartin, *AIDS (HIV) and Insurance: Discrimination Against HIV-Infected Individuals* (1990) (Westlaw, Text and Periodicals)(found exclusively on Westlaw).

151. *See generally*, AIDS AND THE LAW (W. Dornette ed. 1987 & Supp. 1989).

152. *Id.* at 72. Some of the regulations and statutes relating to AIDS and the insurance industry have been patterned after model guidelines drafted in 1986 by the National Association of Insurance Commissioners [hereinafter NAIC]. *Id.* These guidelines were drafted to prevent the use of the sexual orientation of an applicant or insured in insurance underwriting or in determining insurability. *Id.* The guidelines prohibit the inclusion of any questions in insurance applications which establish the sexual orientation of an applicant. *Id.* By 1988 ten states had adopted the model guidelines of the NAIC. These states are Arkansas, Colorado, Delaware, Florida, Indiana, Iowa, Oregon, South Dakota, Texas, and Wisconsin. *Id.*

153. AIDS AND THE LAW 110-116 (W. Dornette ed. 1987 & Supp. 1989). To date, at least 21 states have enacted informed consent statutes with respect to AIDS testing. *Id.* Some of the statutes simply require that no person may conduct an HIV test without the written, informed consent of the person to be tested. *Id.* Other states have enacted much more comprehensive provisions regarding informed consent which require certain specified disclosures to the person to be tested before the consent will be regarded as informed. *Id.*

154. *Id.* Statutes which prevent an insurer from considering HIV tests administered prior to an application for insurance have been enacted to prevent insurers from unfairly discriminating against applicants. *Id.* Legislatures have been motivated to pass these restrictions because of a concern that insurers might assume that persons tested for HIV were tested because of membership in an at-risk category. *Id.* With the restriction, insurers might use the knowledge of prior HIV tests of applicants to deny coverage, exclude coverage for specified diseases such as AIDS or charge higher premiums. *Id.* The purpose of these regulations is much the same as the NAIC guidelines prohibiting the use of sexual orientation. Both limitations work to curtail an insurers' ability to inquire into the lifestyle and sexual orientation of applicants and to preclude the use of sexual orientation as a risk classification. *Id.*

155. *Id.* Among the jurisdictions which have enacted legislation limiting the right of insurers to order HIV blood tests are California, District of Columbia, Florida, and Wisconsin. *See* CAL. HEALTH & SAFETY CODE & 199.21(f) (1985) (prohibits insurers from using the results of HIV blood tests to determine insurability); D.C. CODE ANN. § 35-223 (1988) (insurers may not deny, cancel, or refuse to renew insurance coverage, or alter benefits covered because an individual has tested positive for HIV or has refused such a test, *repealed* by 1989 D.C. Stat. 7-208); D.C. CODE ANN. § 35-224 (1988) (prohibits the use of blood tests to detect the HIV in the determination of insurability, *rewritten* by 1989 D.C. Stat. 7-208. § 35-224 (1989 Supp.)) (presently permits blood tests and the use of such tests in determining insurability); FLA. STAT. ANN. § 627.429 (Supp. West 1989) (insurers prohibited from: excluding eligible individuals from group insurance coverage because of a positive HIV test or any specific sickness or medical condition resulting from HIV exposure;

sions or limitations of benefits for death related to AIDS, ARC, or HIV infection.[156]

While these statutes generally do not directly affect the operation of the incontestability clause, they may have an effect on the ability of insurers to limit or exclude the coverage of life insurance policies in the event of death caused by AIDS, HIV infection, or one of the opportunistic diseases associated with AIDS.[157] Insurers which are unable to exclude coverage for AIDS may have to rely on pre-existing condition clauses[158] in life insurance policies to

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excluding coverage either as a condition precedent or subsequent to the issuance, but permitting such exclusions if coverage by individual underwriting is otherwise allowed by law); WIS. STAT. ANN. § 631.90 (West 1980 & Supp. 1989) (insurers prohibited from requiring applicants to reveal whether HIV tests have been taken, conditioning coverage on whether a test has been taken, and considering whether an applicant has been tested in establishing premium rates). As to AIDS testing, *see generally*, Campbell, *Mandatory AIDS Testing and Privacy: A Psycholegal Perspective*, 66 N.D. L. REV. — (1990).

156. *See* FLA. STAT. ANN. § 627.429 (5)(a) (West 1989 Supp.) The protections of the statute are somewhat ambivalent. The Florida statute states that providers of group insurance may not deny eligibility for coverage to an otherwise eligible individual on the basis of exposure to HIV or medical conditions related to AIDS. *Id.* However, the guarantee of eligibility is somewhat limited as this section states that the limitation on insurers does not control if individual underwriting is otherwise allowed by law. *Id.* Similarly, the statute prohibits discriminatory actions of insurers by providing that, except for preexisting condition clauses specifically applying to a sickness or medical condition of the insured, benefits under a life insurance policy may not be denied or limited due to the fact that the insured's death was caused, either directly or indirectly, by exposure to the HIV virus or a specific medical condition associated with the virus. *Id.* The statute, however, does permit the issuance of "accidental death only" or "specified disease" policies. *Id.* Thus, insurers in Florida will be permitted to write life insurance policies excepting out from coverage death from exposure to HIV or death resulting from AIDS.

157. *See, e.g.*, FLA. STAT. ANN. § 627.429 (5) (Supp. West 1989) (insurers of group policies may not exclude coverage of eligible individuals due to a positive HIV test or exposure to AIDS unless individual underwriting is otherwise permitted by law; additionally, insurers may not limit or exclude death benefits because of death caused by exposure to HIV or a disease associated with HIV infection unless the exclusion pertains to a pre-existing disease of the insured); ME. REV. STAT. ANN. tit. 24-A, § 2159(4) (West Supp. 1990) (group life insurance policies may contain exclusions for death caused by AIDS, ARC or HIV related diseases but only for such diseases which existed six months prior to the effective date of insurance and if an actuarial justification is filed and approved by the superintendent of insurance; such exclusion may not be effective longer than the period of the incontestability clause); ME. REV. STAT. ANN. tit. 24-A, § 2526-A (West Supp. 1990) (no individual policy of life insurance may contain more restrictive coverage for death resulting from AIDS, ARC or HIV related diseases than for death from other diseases nor exclude coverage for death resulting from AIDS, ARC or HIV related diseases); ME. REV. STAT. ANN. tit. 24-A, § 2629 (West Supp. 1990) (no group life insurance policy may contain more restrictive coverage for death resulting from AIDS, ARC or HIV related diseases than for death from other diseases nor exclude coverage for death resulting from AIDS, ARC or HIV related diseases except for the exclusions for diseases present six months before the effective date of insurance as provided in § 2159 (4)); ME. REV. STAT. ANN. tit. 24-A, § 4120(2) (West Supp. 1990) (fraternal benefit societies may not offer life benefit certificates which contain more restrictive coverage or which exclude benefits for death resulting from AIDS, ARC or HIV related diseases); TEX. INS. CODE ANN. § 350-3(4A) (Vernon Supp. 1990) (the administrative council of Texas State Colleges and Universities may not contract for group health insurance which contains a provision excluding or limiting coverage for AIDS); TEX. INS. CODE ANN. § 351-5A (Vernon Supp. 1990) (local governments may not contract for group health insurance which contains a provision excluding or limiting coverage for AIDS).

158. Pre-existing condition or disease clauses are common in accident, health and

limit their liability for payment of AIDS related deaths. However, in states following *Simpson*, insurers may be barred from raising the defense of a failure of a condition precedent to coverage after the passage of two years from the issuance of the policy.[159] Thus, even if an insurer excluded life insurance coverage for death caused by a pre-existing infection with HIV, failure to discover the infection and challenge the validity of coverage of the policy within the two years of the incontestability clause will likely preclude the later assertion of the defenses.

To date, only one statute addresses AIDS and the life insurance incontestability clause. The District of Columbia Code Annotated, section 35-227 provides that insurers may contest the validity of a life insurance policy within three years of the issuance of the policy, if the challenge is based on a defense of a knowing failure of the insured to disclose to the insurer that the applicant had AIDS.[160] The statute provides a special extension of the period of contestability in life insurance policies from two years to three years when the insurer contests a policy based on a misrepresentation by the applicant regarding AIDS.[161]

As the AIDS epidemic continues to spread, more states will likely enact legislation restricting the ability of insurers to treat persons with AIDS or at risk for AIDS differently from other applicants for life insurance. Thus, insurers will have to consider the interaction of various other statutes with the incontestability clause when writing life insurance policies.

III. CONCLUSION

Nearly all states with a requirement of an incontestability clause hold that fraud by the insured at the inception of the policy of life insurance ceases to be a defense to the insurer after the running of the two year period of contestability.[162] More than fifteen

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disability insurance policies and operate to exclude coverage for any condition or disease which the applicant possesses prior to the beginning of coverage. Presumably, absent a statutory prohibition, an insurer could attempt to exclude from coverage a death caused by specified pre-existing diseases such as AIDS.

159. *See, e.g.*, Simpson v. Phoenix Mutual Life Ins. Co., 24 N.Y.2d 262, 247 N.E.2d 655, 299 N.Y.S. 2d 835 (1969). The *Simpson* court held that defenses which are conditions of insurance are barred by the incontestability clause as these are discoverable by the insurer before coverage begins. *Id.* at 267, 247 N.E.2d at 657, 299 N.Y.S. 2d at 839. If an insurer fails to discover the HIV infection prior to the passage of the two years of the incontestability clause, any condition precedent to insurance predicated on HIV infection will fail.

160. D.C. CODE ANN. § 35-227 (Supp. 1989).

161. *See id.*

162. Button v. Connecticut General Life Ins. Co., 847 F.2d 584, 587-88 (9th Cir. 1988). The *Button* court stated that other courts have uniformly interpreted incontestability

states' courts have held that the incontestability clause precludes the raising of virtually all defenses of the insurer after the running of the two year period.[163] In these states, even the failure of a condition precedent to the beginning of coverage or the occurrence of a condition terminating coverage will cease to be defenses for an insurer who wishes to avoid a contract of insurance.

As applied to AIDS, such an interpretation of the incontestability clause may force insurers to accept a risk they were otherwise unwilling to assume if they had excluded AIDS from coverage. Without changes in the law of insurance regarding incontestability and HIV testing, in those states following *Simpson*, insurance rates may rise to unreasonable levels for everyone or insurers may elect to withdraw from the market.

Conversely, without protection, persons who are HIV seropositive, suspected to have AIDS, or belonging to an at-risk group may have great difficulty in obtaining life insurance. The District of Columbia statutes take some measures to protect against such problems.[164]

The urgency of the AIDS epidemic certainly calls for action on many fronts. The present situation concerning AIDS and life insurance calls for the enactment of uniform laws which offer

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clauses to bar insurers, after the expiration of the period of contestability, from declaring policies void on the basis of misrepresentations in the application. *Id. See also* Crawford v. Equitable Life Assurance Soc. of U.S., 56 Ill.2d 41, 305 N.E.2d 144 (1973). The *Crawford* court noted that one effect of an incontestability clause is to permit recovery by a beneficiary in cases of fraudulent misrepresentations in an application for insurance. *Id.* at 47, 305 N.E.2d at 148. Payment of benefits is mandated on the basis that the misrepresentations were not discovered prior to the expiration of the period of contestability. *Id.* Balanced against this undesirable result of rewarding fraud, however, is the public policy consideration of assuring a beneficiary that a claim could not be challenged at some remote time after the insured's death and when others who might have testified in the beneficiary's behalf might also be unable to testify. *Id.*

163. *See* National Life & Casualty Ins. Co. v. Blankenbiller, 89 Ariz. 253, 360 P.2d 1030 (1961); John Hancock Mut. Life Ins. Co. v. Dorman, 108 F.2d 220 (9th cir. 1940) (applying California law); Suskind v. American Republic Ins. Co., 458 F. Supp. 680 (1978) *rev'd on other grounds*, 607 F.2d 76 (3rd Cir. 1979) (applying Delaware law); Equitable Life Assur. Soc. v. Florence, 171 S.E. 317 (Ga. Ct. App. 1933); Maxwell v. Cumberland Life Ins. Co., 748 P.2d 392 (Idaho 1987); Powell v. Mutual Life Ins. Co. of New York, 313 Ill. 161, 144 N.E. 825 (1924); Freed v. Bankers Life Ins. Co. of Nebraska, 216 N.W.2d 357 (Iowa 1974); Jackson v. Continental Cas. Co., 412 So.2d 1364 (La. 1982); Bonitz v. Traveler's Ins. Co., 374 Mass. 327, 372 N.E.2d 254 (1978); Stratton v. Service Life Ins. Co., 117 Neb. 685, 222 N.W. 332 (1928); Foster v. Washington Nat'l Ins. Co., 118 N.J. Law 228, 192 A. 59 (N.J. 1937); Simpson v. Phoenix Mutual Life Ins. Co., 24 N.Y.2d 262, 247 N.E.2d 655 (1969); Chavis v. Southern Life Ins. Co., 318 N.C. 259, 347 S.E. 425 (1986); Jordon v. Western States Life Ins. Co., 78 N.D. 902, 53 N.W.2d 860 (1952); Baum v. Massachusetts Mutual Life Ins. Co., 357 P.2d 641 (Okla. 1960); Feierman v. Eureka Life Ins. Co., 279 Pa. 507, 124 A.2d 171 (1924); Cragun v. Banker's Life Company, 28 Utah 2d 19, 497 P.2d 641 (1972); Millis v. Continental Life Ins. Co., 162 Wash. 555, 298 P.739.

164. *See* the excerpts from and discussion of the statutes at notes 140-141 and 144-145.

some measure of sensible protection for both insurers and insureds in the acquisition of life insurance. An approach should be taken to insure that life insurance will continue to be available to most persons and that life insurance premiums will not skyrocket.

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