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LIFE INSURANCE POLICY — SECTION 9420 G.C. DOES NOT PROHIBIT ISSUANCE OR DELIVERY IN OHIO WHERE LANGUAGE EXEMPTS INSURER FROM LIABILITY WHERE DEATH IS RESULT OF EMPLOYMENT IN CERTAIN ENUMERATED OCCUPATIONS — COMPANY ORGANIZED UNDER OHIO LAWS NOT PROHIBITED FROM ISSUANCE OF SUCH POLICY CONTAINING SUCH EXEMPTION.

SYLLABUS:

Section 9420, General Code, does not prohibit the issuance or delivery in this state of a life insurance policy containing language exempting the insurer from liability under such policy where death is the result of employment in certain enumerated occupations; nor does such section prohibit a life insurance company organized under the laws of this state from issuing a life insurance policy containing such exemption.

Columbus, Ohio, July 14, 1942.

Hon. John A. Lloyd, Superintendent of Insurance,
Columbus, Ohio.

Dear Sir:

Your request for my opinion reads as follows:

> "Pursuant to Section 9423, General Code, a domestic life insurance company has filed with this office an endorsement which it desires to attach to certain policies of life insurance at time of issue.
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> 'This policy is issued and accepted upon the express understanding that the Company does not assume under this policy the risk of death under the following circumstances:
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> 'If the death of the insured results directly or indirectly from employment with the X Company Shipbuilding Division Y. Yard, or any other shipbuilding company, including death from bombing or any other act of war, and the cause of death arose while the insured was employed in the plant or yards of said Company.
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> 'In the event of death under the above circumstances, the Company will pay to the executors, administrators or assigns of the insured, the reserve of this policy. To the amount payable as above provided there shall be added the reserve of any insurance purchased by dividends and the amount of any dividend accumulations and there shall be deducted the amount of any indebtedness or advances.'
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> Since this exclusion would operate beyond the two year contestable period, I desire your opinion as to whether this endorsement is permissible in view of the provisions of paragraph 3 of Section 9420, General Code."

The business of insurance is one of public interest and subject to legislative regulation and control. Policies and contracts of insurance issued in this state must conform to the statutes of Ohio regulating and controlling the same. Verducci v. Casualty Company, 96 O.S., 260; State, ex rel. Allstate Insurance Company, v. Bowen, 130 O.S., 347. Moreover, policies of insurance issued by Ohio companies in other states must conform to applicable Ohio statutes. 23 Am. Jur., 82, Section 77; State, ex rel., v. Western Union Mutual Life Insurance Company, 47 O.S., 167, 172.

The General Assembly has enacted Chapter 2, Subdivision I, Division III, Title IX, Part Second of the General Code wherein it has prescribed

standard forms of life insurance policies and provisions and prohibitions with respect to policies of life insurance which are not in such standard form. Section 9410, General Code, which is part of said chapter, provides:

> "No policy of life insurance shall be issued or delievered in this state and no policy of life insurance of a life insurance company organized under the laws of this state shall be issued unless authorized by the provisions of this chapter."

Each of the standard forms prescribed by the General Assembly in Sections 9412 to 9417, inclusive, General Code, contains the following language:

> "CONDITIONS. — (The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide. These restrictions except such as refer to military and naval service in time of war, must be applicable only to cases where the act of the insured provided against occurs within two years after the issuance of the policy.)
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> INCONTESTABILITY. — This policy and the application therefor, a copy of which is endorsed hereon, constitute the entire contract between the parties and shall be incontestable from its date, except for nonpayment of premiums and except as otherwise provided in this policy. All statements made by the insured in said application shall, in the absence of fraud, be deemed representations and not warranties."

Section 9420, General Code, requires that certain provisions be contained in policies issued or delivered in this state or issued by a life insurance company organized under the laws of this state where such policies are not in one of the standard forms provided in Sections 9412 to 9417, inclusive, General Code. Section 9421, General Code, prohibits the issuance or delivery in this state of a life insurance policy in form other than as prescribed in Sections 9412 to 9417, inclusive, General Code, if such policy contains certain provisions. This prohibition also extends to policies issued or delivered by a life insurance company organized under the laws of this state.

Section 9420, General Code, in so far as it is pertinent to your question, provides:

> "No policy of life insurance in form other than as provided in sections 9412 to 9417, both inclusive, shall be issued or de-

> livered in this state or be issued by a life insurance company organized under the laws of this state unless the same shall contain the following provisions: * * *
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> (3) A provision that the policy and the application therefor, a copy of which must be endorsed thereon, shall constitute the entire contract between the parties and shall be incontestable after it has been in force during the lifetime of the insured for a period of not more than two years from its date, except for non-payment of premiums and except for violations of the conditions, if any, relating to naval or military service in time of war or to aeronautics and, except also, at the option of the company, with respect to provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident or by accidental means. * * *"

This section in its original form was part of an act which was passed and approved April 22, 1908, but, although it has been in effect for more than thirty years, I have been unable to find any decision of the Supreme Court of this state construing or interpreting that portion thereof here in question. In its original form paragraph 3 of Section 9420, General Code, read as follows:

> "A provision that the policy and the application therefor, a copy of which must be endorsed thereon, shall constitute the entire contract between the parties and shall be incontestable after two years from its date, except for non-payment of premiums and except for violations of the conditions of the policy relating to naval and military service in time of war."

It will be noted that the amendment to this paragraph made changes therein, viz.: (1) the two-year period necessary for incontestability must take place during the lifetime of the insured; (2) violations of conditions in the policy relating to aeronautics were added as a permitted exception to the incontestable provision; and (3) provisions in the policy relative to benefits in the event of total and permanent disability and provisions granting additional insurance in the event of accidental death were also permitted as an exception to the incontestable provision.

The language contained in the endorsement which an Ohio life insurance company proposes to attach to certain policies of life insurance to be issued by it purports to exclude such company from liability if the death of the insured takes place under the circumstances therein enumerated, except to return the reserve of the policy.

Although the proposed language is somewhat vague and uncertain and may give rise to dispute as to its proper construction, the company may use it as proposed unless the provisions of Section 9420, General Code, supra, forbid such use.

It is therefore necessary to determine the true meaning and effect of that part of said section above quoted. Does this part of the statute compel an insurance company to assume risks and hazards not included, or in fact positively excluded, by the terms of the policy, or does it merely preclude an insurance company from questioning the *validity* of a policy either in its inception or by urging that it thereafter became invalid by reason of some condition broken? In other words, does the statute involve the extent of coverage or the validity of the policy?

There is no decision by our Supreme Court which answers your question, and it is therefore necessary for me to resort to decisions of other courts for assistance in answering your question. In Metropolitan Life Insurance Company v. Conway, 252. N.Y., 449, 169 N.E., 642, application was made to the Superintendent of Insurance of New York for his approval of rider to be attached to life policies. The rider was in the following form:

> "Death as a result of service, travel or flight in any species of air craft, except as a fare paying passenger, is a risk not assumed under this policy; but if the insured shall die as a result, directly or indirectly, of such service, travel or flight, the company will pay to the beneficiary the reserve on this policy."

The New York law at that time contained a provision that every life insurance policy "shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue except for nonpayment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war." The New York Superintendent of Insurance refused to approve the rider for the reason that he thought it conflicted with that portion of the New York law above quoted. The matter finally reached the New York Court of Appeals where an order of the Appellate Division reversing the determination of the Superintendent of Insurance was affirmed. The opinion of the court was delievered by Cardozo, C. J., and the following quotation therefrom aptly illustrates the reasons advanced by this eminent jurist in support of the conclusion reached:

"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. * * *

The meaning of the statute in that regard is not changed by its exceptions. A contest is prohibited in respect of the validity of the policy 'except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war.' (No. 101, subd. 2.) Here again we must distinguish between a denial of coverage and a defense of invalidity. Provisions are not unusual that an insured entering the military or naval service shall forfeit his insurance. *A condition of that order is more than a limitation of risk. In the event of violation, the policy, at the election of the insurer, is avoided altogether, and this even though death is unrelated to the breach.* No such result follows where there is a mere restriction as to coverage. The policy is still valid in respect of risks assumed." (Emphasis mine.)

It is interesting to note that after the decision of the New York Court of Appeals in the case above cited, the New York insurance law was amended so that Section 155 thereof now provides in part:

"1. No policy of life insurance, except as stated in subsection three, shall be issued or delivered in this state unless it contains in substance the following provision or provisions which in the opinion of the superintendent are more favorable to policyholders:

* * * (b) A provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue, except for nonpayment of premiums and except for violation of the conditions of the policy relating to military or naval service; and at the option of the insurer, provisions relating to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident or accidental means, may also be excepted. * * *

2. No policy of life insurance issued or delivered in this state shall contain any provision which excludes liability for death caused in a certain specified manner except as follows:

(a) A provision excluding death resulting from military or naval service.

(b) A clause excluding liability of the company beyond the amount of reserve less any indebtedness on the policy, for death

due to suicide occurring within two years from the date of issue of the policy.

(c) A clause excluding from the coverage death resulting from aviation under conditions specified in the policy.

Nothing contained herein shall apply to any provision in a life insurance policy for additional benefits in the event of death by accident or accidental means. * * * "

In the case of John Hancock Life Insurance Company v. Hicks, 43 O.App., 342, an action was brought to recover upon a provision in a life insurance policy providing for benefits in the event of total and permanent disability of the insured. This provision in part read as follows:

"If after the first premium or regular installment thereof shall have been paid hereunder and under the policy, the insured * * * shall become wholly and permanently disabled *by bodily injury or disease contracted after the date hereof,* the Company will upon receipt of due proof of such disability, grant the following benefits subject to the terms and conditions herein set forth."

The policy contained an incontestable clause which read in part as follows:

"This policy * * * shall be incontestable after it has been in force during the lifetime of the insured for a period of one year from its date of issue except for non-payment of premium."

More than one year elapsed after the date of issue of the policy and the action was brought to recover the disability benefits because the insured had become insane. The legal question involved in the case was whether the incontestable clause relieved the plaintiff from proving the disease resulting in insanity was contracted after the date of the policy. In the opinion of the court by Hornbeck, J., it was said at pages 247 and 248:

"We are of opinion that only permanent and total disability from diseases contracted after the date of the issuing of the policies is the subject of insurance in this contract. The incontestable clause does not have the effect of enlarging the diseases or bodily injuries for which the company agrees to compensate the insured or his beneficiary. Had this policy named the specific diseases and injuries the suffering of which would have been compensated, it would not be claimed that any other disease or injury would obligate the company to any liability under the policy. *The incontestable clause only prevents the contest by the company respecting any liability incurred by it by the terms*

of the contract, and does not relieve the plaintiff in the first instance of establishing its right to recover under the specific language of the policy. The incontestable clause would have prevented the company from contesting any answer made by the insured in his application to the effect that he was free from any mental disease, although he then knew that he was so afflicted, unless the claim was asserted by the company during the period in which the incontestable clause was not to be affected; but this would not affect that part of the policy setting forth the nature and extent of the coverage. The clause of indemnity relates to the policy or contract. When it is established by the claimants that the hazard against which the company has insured has been suffered by the insured, then the policy by its terms in that respect is effective and can not be contested. However, until such proof is made the plaintiff has not established a substantive right to recover. *In other words, the company by the incontestable clause has not waived the necessity of allegation and proof that the injury, loss or risk claimed is the subject of the contract.* It was incumbent upon the plaintiff to plead and prove that the insured was at the time of the filing of the petitions suffering from a disease contracted after the date of the issuing of the policies. And the defendant company had the right without respect to the incontestable clause to put the plaintiff upon such proof." (Emphasis mine.)

The policy in question in that case was a life insurance policy which also contained provisions for benefits in the event of total and permanent disability caused by disease contracted or injuries suffered after the issuance of the policy. The incontestable clause was not, however, limited so as to apply only to the life insurance provisions of this policy, but also applied to the disability provisions thereof. However, no reason is perceived why the incontestable clause should receive one construction where the disability provisions thereof are in issue and another where the life provisions are involved. The decision in the Hicks case is therefore authority for the proposition that an incontestable clause does not enlarge the contingency actually insured against and that such policy may not be used to convert "a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen."

Courts in other jurisdictions have often considered the effect of an incontestable clause upon provisions of the policy exempting or limiting the liability of the insurer where the insured is injured or killed in a particular manner or while engaged in a particular occupation. The decisions are in hopeless conflict and cannot be reconciled. No attempt will be here made to collate the various cases dealing with the question, but they are reviewed in detail in annotations found in 55 A.L.R., 554,

67 A.L.R., 1364, 85 A.L.R., 317, and 88 A.L.R., 773. My investigation of this question leads me to believe that the better reasoned cases support the proposition that where language in either a life insurance policy or a statute provides that such a policy shall be incontestable after a certain period of time except for certain enumerated causes, such provision only prevents the insurer from urging that the policy is invalid in its entirety and does not extend the coverage of the policy to risks expressly excluded or not assumed, even though such excluded or unassumed risks are not within the exception.

Probably some mention should be made of the opinion of the Supreme Court of the United States delivered by Mr. Justice Holmes in Northwestern Mutual Life Insurance Company v. Johnson and National Life Insurance Company v. Miller, 254 U.S., 96. The policies in these cases respectively contained the following language:

> "If within two years from the date hereof, the said insured shall * * * die in consequence of a duel, or shall, while sane or insane, die by his own hand, then, and in every such case, this policy shall be void."

> "This contract shall be incontestable after one year from the date of its issue, provided the required premiums are duly paid."

The insured committed suicide more than two years after the date of the policy containing the suicide provision and more than one year after the date of the policy containing the incontestable provision. In the opinion, Mr. Justice Holmes used the following language:

> "We are of opinion that the provision in the first-mentioned document, avoiding the policy if the insured should die by his own hand within two years from the date, is an inverted expression of the same general intent as that of the clause in the second, making the policy incontestable after one year, and that both equally mean that suicide of the insured, insane or sane, after the specified time, shall not be a defense. It seems to us that would be the natural interpretation of the words by the people to whom they are addressed, and that the language of each policy makes the company issuing it liable for what happened."

Concerning this language of Mr. Justice Holmes, it was said by Cardozo, C. J., in Metropolitan Life Insurance Company v. Conway, supra:

"Northwestern Mutual Life Ins. Co. v. Johnson, 254 U.S. 96 (1920) is not a decision to the contrary. The clause there in question was not a limitation as to coverage. It was a provision for a forfeiture. In case of the suicide of the insured, whether sane or insane, the policy was to be 'void.' This meant the forfeiture of the privilege to receive the surrender value of the policy or equivalent benefits, a privilege which would survive if there was merely a limitation of the hazards. * * * What was said by Holmes, J., of the effect of the 'contestable clause' must be read in the light of the question before him. It is true, as he says, that with such a clause the death of the insured coupled with the payment of the premiums, will sustain a recovery in the face of a forfeiting condition. It is quite another thing to say that the same facts will prevail against a refusal to assume the risk. Later cases in the Federal courts develop the distinction clearly. 'A provision for incontestability does not have the effect of converting a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen.' Sanders v. Jefferson Standard L. Ins. Co., 10 Fed. Rep. (2d) 143, 144, citing and distinguishing Northwestern Life Ins. Co. v. Johnson, supra."

In the very well reasoned case of United Security Life Insurance Company v. Massey, 167 S.E., 248, 85 A.L.R., 314, on rehearing, Holt, J., after quoting with approval these comments made by Cardozo, C. J., said:

"This sound distinction appears in many cases."

Furthermore, it seems to me that the General Assembly has distinguished between the incontestable provisions of a policy and provisions thereof excluding liability. The language hereinbefore quoted from the standard forms very clearly evidences this fact. If the General Assembly had intended to prohibit the inclusion of a provision in a life insurance policy excluding liability under certain circumstances, it could very easily have done so by inserting in Section 9421, General Code, language similar to that contained in the standard forms under the heading "conditions." It has not seen fit so to do and I believe that the language of the incontestable clause should not be extended by construction to cover this lack of express statutory enactment. The proposed endorsement contains language obligating the insurer to pay to the executors, administrators or assigns of the insured the reserve of the policy less any indebtedness thereon.

Although your inquiry does not require it, I deem it appropriate briefly to direct your attention to that portion of Section 9421, General

Code, which is pertinent to such provision of the endorsement. This section in part provides:

> "No policy of life insurance in form other than as prescribed in sections ninety-four hundred and twelve to ninety-four hundred and seventeen, both inclusive, shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, if it contain any of the following provisions: * * *
>
> (4) A provision for any mode of settlement at maturity of less value than the amount insured on the face of the policy plus dividend additions, if any, less any indebtedness to the company on the policy and less any premium that may by the terms of the policy be deducted."

In Western and Southern Life Insurance Company v. Horn, 100 O.S., 478, it was said in the opinion:

> "The fact that the policy in the instant case more generously provides for the return of the premiums paid instead of an absolute forfeiture, should not, and does not, operate to make the company subject to the prohibition of paragraph 4, Section 9421, General Code. * * *
>
> Paragraph 4 of this section is the only one that could possibly have reference to the subject, and holding, as we have heretofore indicated, that the language used in the suicide clause is equivalent in effect to a plain denial of recovery, we do not think the provision in question is one prescribing a 'mode of settlement at maturity.' "

The language proposed to be used is therefore not prohibited by paragraph 4 of Section 9421, General Code.

As I have stated heretofore, I believe the use of this language is fraught with possibility of dispute and misunderstanding as to its true meaning, but I have nevertheless reluctantly come to the conclusion that there is nothing in the statutes of Ohio which forbids an Ohio insurance company from using it in an endorsement to be attached to a life insurance policy issued by it. You are accordingly advised therefore that I am of the opinion that the language proposed to be used in the endorsement is not prohibited by Section 9420, General Code.

Respectfully,

THOMAS J. HERBERT
Attorney General.