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Insurance -- Burden of Proof in Insurance Exception Clauses -- Pleading

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The ills effectuated by the refusal of state legislatures to apportion when justice demands it are very similar to the ills which have been repeatedly redressed by the courts in the individual rights cases. It is possible that the Court has at last started to consider gerrymander cases in the light of the individual right decisions. It is submitted that the *Gomillion* case may well mean that the Court has decided that justice demands the granting of equitable remedies in these instances.[35]

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Insurance—Burden of Proof in Insurance Exception Clauses—Pleading

In *Muncie v. Travelers Ins. Co.*,[1] the plaintiff was injured while riding in the automobile of the insured. Eight months after the accident, the insured gave notice to the insurance company. The insurer denied liability under the policy due to the insured's failure to comply with a policy requirement for notification of loss within a reasonable time. The policy designated compliance with this requirement as a condition precedent to recovery. The plaintiff sued the insured and received a default judgment. The insurer knew of this suit but was not a party thereto. In the suit by the plaintiff against the insurer, the trial court instructed the jury that the burden of proof was on the insurer to show that notice had not been given within a reasonable time. This instruction was held error on appeal, the court holding that the notice requirement was a condition precedent to recovery by the insured, thereby placing the burden of proof of compliance with this requirement on the plaintiff.[2]

In reaching this result, the court distinguished the present case from *MacClure v. Accident & Cas. Ins. Co.*,[3] which indicated that noncompliance with a cooperation requirement in an insurance

[35] If the result of a judicial order enjoining the further operation of an archaic electoral district would be slight disorganization by the use of an "at large" electoral system in the next election, it must be answered that necessity will soon generate a newer, fairer and more workable system.

[1] 253 N.C. 74, 116 S.E.2d 474 (1960).

[2] In *Muncie* the plaintiff was the insured's judgment creditor. The court stated that as such he could have no greater right to recover from the insurer than the insured himself would have. *Id.* at 81, 116 S.E.2d at 479.

[3] 229 N.C. 305, 49 S.E.2d 742 (1948).

policy was a condition subsequent to recovery and therefore an affirmative defense, stating that this portion of the opinion was merely dictum. Thus, the court avoided any commitment that the condition in *MacClure* was not actually a condition subsequent[4] and upheld a line of earlier cases, culminating in *Peeler v. United States Cas. Co.*,[5] which placed the burden of proving notice requirements on the insured as conditions precedent to recovery.

These cases raise the recurring problem of who has the burden of proof as to particular conditions, exclusions and exceptions within insurance contracts. The courts have failed to determine a uniform rule for this allocation. That this should be of more than passing interest to the parties in insurance cases can be seen in those cases where this allocation itself determined the outcome.[6]

Traditionally the burden of proof has been allocated in four ways:[7] (1) the burden is on the party who seeks an affirmative answer to the issue in question;[8] (2) the burden is on the party to whose case the fact is essential;[9] (3) the burden is on the party

[4] In *MacClure* the insurer denied liability because of an alleged breach by the insured of a cooperation requirement within the policy. The court allowed recovery, stating that noncompliance with the cooperation requirement by the insured was an affirmative defense to liability under the policy. The clause was, the court stated, a condition subsequent. This was true even though the policy designated the clause as a condition precedent, since such matters related to the conduct of the insured after the loss which matured the policy. *Id.* at 310, 49 S.E.2d at 747.

In a concurring opinion to *Muncie*, Mr. Justice Parker refused to accept the dismissal of *MacClure* by merely declaring it to be dictum. He felt that the *MacClure* statement that noncompliance with the policy requirement was an affirmative defense was "erroneous and should be disapproved or overruled by the court," not merely disregarded as dictum. Muncie v. Travelers Ins. Co., 253 N.C. 74, 85-86, 116 S.E.2d 474, 482 (1960). His use of the word "overruled" seems to indicate that the *MacClure* statement might be a holding, not merely dictum.

[5] 197 N.C. 286, 148 S.E. 261 (1929).

[6] See, *e.g.*, Colovos' Adm'r v. Gouvas, 269 Ky. 752, 108 S.W.2d 820 (1937), where the life insurance policy provided that payment of the proceeds be made to the insured's wife should she survive the insured. If the wife predeceased the insured, the proceeds were to be paid to the insured's estate. The insured and his wife died simultaneously in a common disaster. *Held:* the personal representative of the wife could not recover on the policy since he could not prove the condition precedent, namely, that the insured predeceased his wife.

[7] STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 208 (1946); 9 WIGMORE, EVIDENCE § 2486 (3d ed. 1940).

[8] Jones v. Waldroup, 217 N.C. 178, 7 S.E.2d 366 (1940); Wilson v. Inter-Ocean Cas. Co., 210 N.C. 585, 188 S.E. 102 (1936); Stein v. Levins, 205 N.C. 302, 171 S.E. 96 (1933).

[9] Hauser v. Western Union Tel. Co., 150 N.C. 557, 64 S.E. 503 (1909).

having sole knowledge of the fact;[10] and (4) the burden is on the party who has the burden of pleading the fact.[11]

In contract cases generally allocation of the burden of proof for compliance with or occurrence of conditions stated in the contract has long been a problem.[12] Allocation usually has been made on a basis of whether the condition involved is a condition precedent or subsequent. A condition precedent is involved "where the contract provides for performance of some act or the happening of some event, and the obligations of such contract are made to depend on such performance or happening."[13] The condition subsequent is that clause which provides "that the policy shall become void . . . upon the happening of some event, or the doing, or omission to do, some act. . . ."[14] Following these definitions, the burden of proving a condition precedent has been placed on the plaintiff and a condition subsequent on the defendant.[15]

Due to the complexity of insurance policies, a particular amount of confusion has arisen in allocating the burden of proof in cases involving them. If the traditional contract condition precedent-condition subsequent test is used, the problem arises in categorizing the various "conditions," "exclusions" and "exceptions" of the typical policy. First it must be determined if they are conditions at all.[16] If so, they must be categorized as conditions precedent or subse-

[10] Skyland Hosiery Co. v. American Ry. Exp. Co., 184 N.C. 478, 114 S.E. 823 (1922); Ange v. Woodmen of the World, 173 N.C. 33, 91 S.E. 586 (1917).

[11] Hood v. Cobb, 207 N.C. 128, 176 S.E. 288 (1934); Cook v. Guirkin & Co., 119 N.C. 13, 25 S.E. 715 (1896).

[12] Harnett & Thornton, *The Insurance Condition Subsequent: A Needle in a Semantic Haystack*, 17 FORDHAM L. REV. 220 (1948).

[13] Jenkins v. Myers, 209 N.C. 312, 318, 183 S.E. 529, 532 (1936).

[14] 3 WILLISTON, CONTRACTS § 667A, at 1919 (rev. ed. 1936). A similar definition is given in the *Restatement of Contracts:* "[A] condition is . . . either a fact . . . which, unless excused . . . (a) must exist or occur before a duty of immediate performance of a promise arises, in which case the condition is a 'condition precedent,' or (b) will extinguish a duty to make compensation for breach of contract after the breach has occurred, in which case the condition is a 'condition subsequent,' or a term in a promise providing that a fact shall have such an effect." RESTATEMENT, CONTRACTS § 250 (1932).

[15] Barron v. Cain, 216 N.C. 282, 4 S.E.2d 618 (1939); Hyder v. Metropolitan Life Ins. Co., 183 S.C. 98, 190 S.E. 239 (1937).

[16] That a single policy can contain a great number of exceptions can be seen in the policy involved in Travelers Ins. Co. v. McConkey, 127 U.S. 661, 662 (1888). See Seawell, J., in MacClure v. Accident & Cas. Ins. Co., 229 N.C. 305, 311, 49 S.E.2d 742, 747 (1948), quoting 3 WILLISTON, *op. cit. supra* note 14, in context which raises this question. See generally Note, *Burden of Proof of Excepted Causes in Insurance Policies*, 46 COLUM. L. REV. 802 (1946).

quent. Applying the contract test to insurance policies, it could be said that there is only one true condition subsequent, this being the imposition of a time limit within which the suit must be brought. All other conditions would then be conditions precedent which must be proved by the plaintiff.[17] The problem would be simplified if the court followed such a rule strictly. The confusion has arisen, however, where the courts have attempted to lighten the burden of the plaintiff by designating certain conditions as affirmative defenses. An expanded conception of the condition subsequent is one of the vehicles by which this is accomplished.

Some degree of certainty is needed. When applied to insurance "conditions," "exclusions" and "exceptions," the failure of the substantive contract test to supply any workable standard becomes apparent. The problem involved in the *Muncie* and *MacClure* cases clearly demonstrate this. The court in these two cases was dealing with a similar type of policy provision; yet in one case the court held it to be a condition subsequent while in the other the court saw it as a condition precedent. The impossibility of using this as a continuing basis for the allocation of the burden of proof is indicated by an analysis of how the court in these two cases took two different views of the same determining factor. In *MacClure* the court was relating performance of condition to the time of loss, to which it was subsequent;[18] while in *Muncie* the court was relating performance of condition to the time of bringing the suit, to which it was precedent. For any degree of uniformity, the allocation of the burden of proof must contemplate an agreed single reference point.[19] Obviously, the terms "precedent" and "subsequent" are utterly devoid of meaning unless so related. Adding to the con-

[17] Northwest Nat'l Life Ins. Co. v. Ward, 56 Okla. 188, 155 Pac. 524 (1916); Harnett & Thornton, *supra* note 12, at 232.

[18] "It is to be observed that in substance the plea relates to conduct of the insured after the liability on the policy has matured by reason of the accident." MacClure v. Accident & Cas. Ins. Co., 229 N.C. 305, 311, 49 S.E.2d 742, 747 (1948).

[19] The necessity of the single reference point can be shown in another context by considering the requirement for procurement of an architect's certificate for full payment on a building contract. Although this is generally considered to be a condition precedent, this condition can be seen as a condition subsequent merely by changing the reference point. Procurement of this certificate is precedent to duty of payment for full performance, or the right to bring an action for its recovery if payment is refused. Yet, procurement of the certificate is subsequent to certain facts, such as "offer," "acceptance" and "consideration." Harnett & Thornton, *supra* note 12, at 324. See also HOLMES, THE COMMON LAW 316 (1881): "In one sense, all conditions are subsequent; in another, all are precedent."

fusion arising from any use of the substantive standard is the fact that many exclusions and exceptions in insurance policies cannot be based on any chronological conception—for example, a flat exclusion such as suicide.[20]

For the present, such certainty as we have comes from specific decisions which have for one reason or another allocated the burden of proof in respect to specific provisions. For example, on current case authority the insured has the burden of showing that his injury was covered by the policy,[21] that there was a valid policy in effect at the time of loss,[22] that the insurer has waived or is estopped to deny recovery due to a breach by the insured,[23] and general compliance with the requirements set out in the policy, such as "the giving of notice and proof of death (or other event)."[24] On the other hand, the court has placed the burden of proof upon the insurer in respect to suicide exclusion clauses,[25] property damage exceptions,[26] and violent death exceptions.[27] Yet, as *Muncie* reveals, even this apparent certainty based upon specific authority may be illusory.

The problem is of more than mere academic interest. The difficulty is that both litigants may be forced at different stages of the litigation to make definitional decisions which can control the outcome of the case. Such decisions, however, are impossible to make on a rational basis, as they involve deciding which provisions within a policy are "conditions precedent" and which are "conditions sub-

[20] Within this area come the numerous insurance "warranties." They are limitations upon the coverage of the policy, not merely a limitation upon the recovery of the insured per se. As such, they are not easily categorized into any position with relation to the formation of the contract, the loss or the recovery.

[21] Jones v. Life & Cas. Co., 199 N.C. 772, 155 S.E. 870 (1930).

[22] Chavis v. Home Sec. Life Ins. Co., 251 N.C. 849, 112 S.E.2d 574 (1960); Wells v. Jefferson Standard Life Ins. Co., 211 N.C. 427, 190 S.E. 744 (1937); Collins v. United States Cas. Co., 172 N.C. 543, 90 S.E. 585 (1916); Page v. Life Ins. Co., 131 N.C. 115, 42 S.E. 543 (1902).

[23] Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960); Smith v. Aetna Ins. Co., 197 N.C. 621, 150 S.E. 114 (1929).

[24] Fallins v. Durham Life Ins. Co., 247 N.C. 72, 74, 100 S.E.2d 214, 216 (1957).

[25] Hedgecock v. Jefferson Standard Life Ins. Co., 212 N.C. 638, 194 S.E. 86 (1937); Wharton v. New York Life Ins. Co., 178 N.C. 135, 100 S.E. 266 (1919).

[26] Polansky v. Millers' Mut. Fire. Ins. Ass'n, 238 N.C. 427, 78 S.E.2d 213 (1953); Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809 (1950).

[27] Warren v. Pilot Life Ins. Co., 215 N.C. 402, 2 S.E.2d 17 (1939). See generally 9 WIGMORE, *op. cit. supra* note 7, at § 2510.

sequent." The confusion has arisen due to a combination of several factors: our statutory provisions in regard to the pleading and proof of conditions precedent[28] and affirmative defenses;[29] our borrowing for definitional purposes the substantive contract distinction between conditions precedent and subsequent; and our equating of conditions subsequent into affirmative defenses. These factors in combination may confront the insured with the necessity of making this perilous definitional decision at the proof stage, while the insurer may encounter it at both the pleading and the proof stages.[30]

To remove the uncertainty which is apparently now built into our practice by the combination of factors here developed, legislation might be appropriate.[31] Such legislation has been adopted in other

[28] N.C. GEN. STAT. § 1-155 (1953).

[29] N.C. GEN. STAT. § 1-135 (1953).

[30] In a suit on an insurance policy, the insured carries the burden of pleading conditions precedent by pleading generally that he complied with all conditions precedent. If this allegation is controverted, the insured must then establish, on trial, the facts showing performance. N.C. GEN. STAT. § 1-155 (1953). At this stage the insured has not been called upon to make any determination as to what precisely are conditions precedent, but only to plead general compliance. The insurer at this point in the trial is confronted with this situation: he may make a general denial of the insured's general allegation of compliance with the conditions precedent, which poses no definitional problem to him. But, if he desires to raise in defense what the court determines to be a condition subsequent, and so, an affirmative defense, he must specifically plead it. This poses a definitional problem for him and he must at his peril make it correctly. Assuming that the insurer has made a general denial of the insured's allegations of performance of all conditions precedent, the insured is now in turn forced into a definitional decision of what are the conditions precedent within the policy. To recover he must carry the burden of proof on all conditions precedent which have been controverted by the insurer. This has the effect of forcing the insured to proceed blindly and prove facts showing performance of all conditions which could possibly be denominated as precedent. It seems hardly an equitable result since the insurer would be in a much better position than the insured to know which conditions have or have not been performed.

[31] Perhaps North Carolina has inadvertently taken a step in this direction with the passage of the Vehicle Financial Responsibility Act, N.C. GEN. STAT. § 20-279.1 (Supp. 1959). Those applicable provisions of this act which deal with the subject at hand, however, are far too limited to the area of automobile accident policies to cover the allocation of the burden with respect to other types of insurance policies. It must also be noted that this act was passed to fulfill another purpose, not to solve the allocation of the burden of proof with respect to insurance contract conditions.

A recent case, Swain v. Nationwide Mut. Ins. Co., 253 N.C. 120, 116 S.E.2d 482 (1960), shows the effect of this statute on the problem before us. In *Swain* a question similar to that in *Muncie* was before the court. The court distinguished it from *Muncie* by the application of this statute, reaching a contrary result. The court said in *Swain* that under this new statute the failure of the insured to comply with a policy requirement for notice did not defeat the right of the judgment creditor to recover. The court stated that

jurisdictions.[32] The aim of such legislation should be two-fold. First, it should relieve the parties from having to make such a definitional decision. Second, it should cast the burden of pleading and proof in regard to these insurance conditions in accordance with the most appropriate purposes of pleading and proof. A more equitable rule could be devised using such factors as the availability of evidence to one side or another and the relative positions of the parties as the criteria for determining this allocation of the burdens of pleading and proof. Obviously, the substantive results of insurance litigation will be affected by the way the burden is cast, whatever success such rule would have in removing the impossible definitional problem here discussed.[33]

It is submitted that legislation of the following type would be appropriate. Place the burden upon the insurer of *pleading* specifically any grounds for which he denies liability, and upon the insured the burden of *proving* that liability should not be barred by any such facts pleaded by the insurer.[34] The insured would allege

in an accident arising after the effective date of the statute and where the judgment against the insured is equal to or less than the maximum coverage under the statute, non-compliance by the insured with a notice provision will not defeat the judgment creditor's right to recover. However, as to accidents arising prior to this effective date of the statute (as the principal case) and as to any amount in excess of the statutory coverage, such violations by the insured are still valid defenses to the insurer.

[32] *E.g.*, N.Y. INS. LAW § 167.5 (1945); TEX. REV. STAT. §§ 3-48, -62 (1951).

[33] New York allows allegations by the insured of all conditions precedent in general terms and requires the insurer to specifically counter them. The insured is deemed to have proved all conditions not so traversed by the insurer, but must carry the burden of proof of a condition properly denied. N.Y. INS. LAW § 167.5 (1945). Yet, this rule gives no definite answer as to what constitutes a condition subsequent which presumably the insurer must specifically plead as an affirmative defense. The Texas rule solves this by placing the burden on the insured to plead and prove that the loss is not within an excepted area of the policy. TEX. REV. STAT. §§ 3-48, -62 (1951). This would seem to place the burden of proof on the insured for all excepted clauses within the policy, a burden which seems unduly heavy. For typical litigation on the effect of this rule, see Imperial Life Ins. Co. v. Thornton, 138 S.W.2d 295 (Tex. Civ. App. 1939); Coyle v. Palatine Ins. Co., 222 S.W. 973 (Tex. Comm'n App. 1920); see also Note, 6 BAYLER L. REV. 238 (1954).

[34] This would have the effect of dividing the burden of pleading and proof as is now done by the statute of limitations. *Muncie* dealt with the burden of proof, as distinguished from the burden of pleading. The party who has the burden of proof has traditionally under our procedure also been given the burden of pleading. The statute of limitations is one of the few exceptions where the burdens are split between the two parties. The defendant has the burden of pleading the statute, but once properly pleaded the plaintiff

the ultimate facts of execution of the policy, loss within its coverage while the policy was in force, and general performance of all conditions. This, if uncontested, would be sufficient to entitle insured to payment under the policy and the right to maintain the action. The insurer, should he wish to contest liability, would then have the burden of pleading specifically any matter by reason of which nonliability is asserted. This would be true whether the matter relates to provisions denominated or interpreted as "conditions," "exclusions" or "exceptions" of whatever kind. Once specifically raised by the insurer, the insured would have the burden of proving facts which show that his recovery should not be barred by the allegations of the insurer, *i.e.*, facts showing specific compliance with the conditions raised by the insurer.[35]

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Master and Servant—Unfair Use of Customer Lists and Knowledge

In *Henley Paper Co. v. McAllister*,[1] the plaintiff company sought to enjoin a former salesman from working for a competitor, relying upon an employment contract which contained a covenant not to compete. The plaintiff was engaged in a highly competitive business selling paper products and had hired the defendant as a salesman. While working for the plaintiff, the defendant had compiled at his own expense a record of sales and subsequently terminated his service with the plaintiff to work for a competitor, using the record of sales to solicit business for his new employer. The North Carolina Supreme Court affirmed the trial court's decision that the provisions of the covenant not to compete were unreasonable as to time and geography and that the covenant lacked consideration. The view

has the burden of proof to deny it. Lee v. Chamblee, 223 N.C. 146, 25 S.E.2d 433 (1943); see also 1 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 372 (2d ed. 1956).

[35] Under the rule submitted, which is quite similar to the New York rule, there would be no problem with the definitional decision, as there would be no categorizing of conditions as precedent or subsequent. Nor would the insured, when his allegation of performance of all conditions precedent is met by a general denial, be forced (as he presently is) to carry the burden of proof blindly as to which conditions he must prove to satisfy the burden of proof. The insurer is in a better position to know the policy and exactly which facts or occurrences act as a bar to his liability. The more equitable rule, therefore, would be to place the burden of pleading these facts or occurrences upon the insurer, and by so doing we enable the insured to know exactly what he must prove to secure recovery.

[1] 253 N.C. 529, 117 S.E.2d 431 (1960).