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LIFE INSURANCE CONDITIONAL RECEIPTS AND JUDICIAL INTERVENTION

ARNOLD P. ANDERSON*

I. INTRODUCTION

A common tool in the life insurance industry is the binding or conditional receipt in return for payment of the first premium. The use of the conditional receipt is generally as follows: A life insurance agent will make contact with a prospect, and if all goes well, the decision is made to purchase insurance. Often times it is necessary to have the prospective insured also undergo a physical examination before the policy is issued. Conditional receipts or binders are utilized during this interim period between application and delivery of the policy. Part of the objective is to commit the proposed insured so that if the company is willing to underwrite, the insured is psychologically committed to the company taking the application.

Life insurance premium receipts have generally been put in three classifications: (1) Insurable risks or satisfaction binders in which insurance takes effect at the time of payment or physical exam (whichever is latest) if, under objective standards, the applicant was insurable on the date in question; (2) Binders in which no insurance comes into effect until it has been approved by an authorized official of the company; (3) Nonconditional temporary insurance during the pendency of the application.¹

Numerous factual situations come to bear on a conditional receipt, but generally the difficulties arise because of death or change in health during the interim period between application and issuance of policy. In litigated cases, the insurance company either rejects the application or moves to rescind the policy upon obtaining knowledge of the death or changed

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1. See Comment, *Life Insurance Receipts: The Mystery of the Non-binding Binder*, 63 YALE L.J. 523, 528 (1954); Annot., 2 A.L.R.2d 943 (1948).

health of the proposed insured. The question then becomes whether there was a contract of insurance in effect pursuant to the conditional receipt.

A life insurance company does not have broad rights of cancellation after a policy is in effect. Thus it will usually take the precautions necessary to avoid underwriting an uninsurable risk. Nevertheless, because of the construction put on conditional receipts by some courts, life insurance companies have been held to have issued an interim policy to an individual who was not insurable by objective underwriting standards.² This approach has in turn raised a number of questions. For example: Are conditional receipts and binders "unconscionable"? Are proposed insureds really "consumers" whose status necessitates judicial intervention to put an insured and insurer "on equal footing" and provide insurance coverage? These issues will be addressed by a review of the rationales various courts have applied in dealing with life insurance conditional receipts.

II. INTERIM INSURANCE

A. General

A number of courts have interpreted the terms of a conditional receipt as being conditions subsequent. Thus, insurance is in effect as soon as a premium is paid. In order to void or nullify the receipt (and insurance coverage), an insurer must establish that the proposed insured was not insurable when the application was issued.³ Other cases have held there is interim insurance, but have done so on the basis of the negligence of the defendant insurance company in handling the application.⁴

2. See *Smith v. Westland Life Ins. Co.*, 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975); *Stonsz v. Equitable Life Assur. Soc'y*, 324 Pa. 97, 187 A. 403 (1936).

3. The following cases recognize that temporary insurance contracts are in effect upon payment of the initial premium. *Turner v. Worth Ins. Co.*, 106 Ariz. 132, 472 P.2d 1 (1970); *Smith v. Westland Life Ins. Co.*, 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975); *Ransom v. Penn Mutual Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954); *Toevs v. Western Farm Bureau Life Ins. Co.*, 94 Idaho 151, 483 P.2d 682 (1971); *Simpson v. Prudential Ins. Co.*, 227 Md. 393, 177 A.2d 417 (1962); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965); *Damm v. National Ins. Co. of Am.*, 200 N.W.2d 616 (N.D. 1972); *Collister v. Nationwide Life Ins. Co.*, 479 Pa. Super. Ct. 579, 388 A.2d 1346 (1978), *cert. denied*, 439 U.S. 1089 (1979).

4. *Damm v. National Ins. Co. of Am.*, 200 N.W.2d 616 (N.D. 1972). See also

Some courts which have embraced the concept of interim insurance still hold that once the applicant has actual notice of rejection, there can be no interim insurance.⁵ In addition, the court in *Harp v. Valley Forge Life Insurance Co.*⁶ held there was no temporary life insurance under the conditional receipt where the applicant failed to take the required physical exam.

Other courts, which recognize interim insurance, require the beneficiary to prove the applicant was insurable on the date of the completion of his or her medical examination. The determination of insurability must be made in good faith. Thus, the standard is whether a reasonably prudent authorized officer of the insurance company, acting in good faith, would find the applicant insurable and acceptable for insurance under the company's rules and practices. For example, in *South Coast Life Insurance Co. v. Robertson*,⁷ the chief underwriter for the defendant insurance company testified that the applicant was not insurable as of the date of the last examination according to the company's underwriting standards and practices. This fact, as well as a lack of showing of bad faith on the part of the company, resulted in judgment for the beneficiary being reversed.

Some jurisdictions have held there is interim insurance in effect as soon as any money is paid, and do so by expanding the normal rules of contract.⁸ For example, in *Goucher v. John Hancock Mutual Life Insurance Co.*,⁹ interim insurance was held to be in existence pursuant to a conditional receipt, even though the insurance company had advised the insured that the initial application had been rejected. The insurance company had, however, countered with a different policy

Etheridge v. Woodmen of the World Life Ins. Soc'y, 114 Ga. App. 807, 152 S.E. 2d 773 (1966), *rev'd on other grounds*, 233 Ga. 231, 154 S.E.2d 369 (1967).

5. *Fabrizio v. Fidelity & Guar. Ins. Co.*, 27 Utah 2d 248, 494 P.2d 953 (1972); *Prince v. Western Empire Life Ins. Co.*, 19 Utah 2d 174, 428 P.2d 163 (1967). *See also* *DiOrto v. New Jersey Mfr. Ins. Co.*, 79 N.J. 257, 398 A.2d 1274 (1979); 43 AM. JUR. 2d *Insurance* § 218 (1969); 44 C.J.S. *Insurance* § 230(3) (1945).

6. 577 S.W.2d 746 (Ct. App. Tex. 1979).

7. 483 S.W.2d 388 (Ct. App. Tex. 1972).

8. *See Goucher v. John Hancock Mut. Life Ins. Co.*, 113 R.I. 672, 324 A.2d 657 (1974); *Service v. Pyramid Life Ins. Co.*, 201 Kan. 196, 440 P.2d 944 (1968); *Simpson v. Prudential Ins. Co.*, 227 Md. 393, 177 A.2d 417 (1962).

9. 113 R.I. 672, 324 A.2d 657 (1974).

which required an increased premium. Rather than holding that the counteroffer was a rejection of the earlier application, the court held the conditional receipt continued in existence without the requirement of any additional health examination.¹⁰

In *Simpson v. Prudential Insurance Co. of America*,¹¹ the Maryland Supreme Court held that a contract of insurance was in effect as soon as the applicant paid the first premium and the company issued a receipt. However, the Court of Appeals of Maryland, in a subsequent case, was not willing to apply the interim contract theory on a disability income and accident policy where the applicant was a sixteen-year old for whom the agent had accepted premiums and issued conditional receipts. In that instance, the applicant was too young to be insured for coverage applied for under the company's honest and objective standards of insurability.¹²

Farmers New World Life Insurance Co. v. Crites,¹³ with limited discussion, held the insured was afforded temporary insurance from the date of the completion of the application until the date of death when the company had neither accepted nor rejected the application. The application provided that insurance would be in effect only in the event it was approved by the home office and then it would take effect from the date of completion of the application. *Simses v. North American Co. for Life and Health Insurance*,¹⁴ held that a reasonable reading of the conditional receipt warranted the conclusion that if the first premium were paid, coverage would come into immediate effect. In addition, the court stated that if the insurance company did not want the policy to take effect until it had actually determined that the applicant was a standard risk, it could easily have stated that in precise language. Thus, because the company had chosen to utilize an ambiguous receipt, it had to bear the burden of any resulting confusion. If, however, the company had notified the proposed

10. *Id.* at ___, 324 A.2d at 660.

11. 227 Md. 393, 177 A.2d 417 (1962).

12. *Cannon v. Southland Life Ins. Co.*, 263 Md. 463, 283 A.2d 404 (1971).

13. 29 Colo. App. 394, 487 P.2d 608 (1971).

14. 175 Conn. 77, 394 A.2d 710 (1978).

insured that he was not an acceptable risk, the policy would have terminated.¹⁵

Indiana courts have held that a conditional receipt issued by a life insurance company constitutes an obligation which, if supported by payment of premium, gives to the applicant a basis for concluding that there is a contract in existence.¹⁶ These decisions were based in part on public policy prohibiting an insurer from collecting premiums for a period when it would not incur any risk.

The Supreme Court of Idaho in *Dunford v. United of Omaha*,¹⁷ and in *Toevs v. Western Farm Bureau Life Insurance Co.*,¹⁸ adopted the temporary contract of insurance concept, holding that under certain circumstances the conditional premium receipt creates temporary insurance subject to the conditions subsequent, that is, rejection of the application by the insurance company. The rationale utilized by the Idaho court included the concept of unequal bargaining power between the applicant and the company, complex and ambiguous phrasing of the contract and the critical analysis of the conditional receipt.

In *Service v. Pyramid Life Insurance Co.*,¹⁹ and *Tripp v. Reliable Life Insurance Co.*,²⁰ the Kansas Supreme Court held that interim insurance comes into effect immediately upon payment of premium, basing its decision upon the payment of premium and the concept that there would be no benefit to the insured during the interim period if insurance was not effective. In addition, in *Tripp* the binder contained a typical provision that the company would have sixty days from the date of receipt to determine the insurability of the proposed

15. See also *Hart v. Travelers Ins. Co.*, 236 A.D. 309, 258 N.Y.S. 711 (1932), *aff'd per curiam*, 261 N.Y. 563, 185 N.E. 739 (1933), where interim insurance was held to be in force. But see *Erath v. Prudential Ins. Co. of Am.*, 25 A.D.2d 707, 268 N.Y.S.2d 235 (1966), adhering to the more traditional view and holding no temporary insurance came into existence.

16. *Meding v. Prudential Ins. Co.*, 444 F. Supp. 634 (N.D. Ind. 1978); *Kaiser v. National Farmers Union Life Ins. Co.*, 339 N.E.2d 599 (Ind. App. 1976); *Monumental Life Ins. Co. v. Hakey*, 354 N.E.2d 333 (Ind. App. 1976). See also *Liberty Nat'l Life Ins. Co. v. Hamilton*, 237 F.2d 235 (6th Cir. 1956).

17. 95 Idaho 282, 506 P.2d 1355 (1973).

18. 94 Idaho 151, 483 P.2d 682 (1971).

19. 201 Kan. 196, 440 P.2d 944 (1968).

20. 210 Kan. 33, 499 P.2d 1155 (1972).

insured. Death occurred forty-five days after the sixty-day period had elapsed. Nevertheless, temporary insurance was held to continue past the sixty-day time period.²¹

B. Reasonable Expectations

The doctrine of reasonable expectations has been applied in various ways. For instance, it has been applied to interpret specific terms in the policy.²² It has also been utilized to establish what an insured may reasonably expect under the policy rather than an analysis of specific terms.²³ However, prior to doing so, courts had determined that there were ambiguous policy provisions present justifying such an approach.²⁴ More recently, some courts have invoked the doctrine of reasonable expectations without first establishing the existence of an ambiguity.²⁵

In the cases which have applied reasonable expectations to conditional receipts, the doctrine is applied to the transaction, rather than to an interpretation of terms. This application puts a priority on the status of the parties and the relationship between insured and insurer. Rather than looking to the language of the conditional receipt, courts have determined what an insured would expect from a combination of (1) the presence of a standard form binder, (2) the insurance company, and (3) the perceived inequitable status between insured and insurer. The result is the application of reasonable expectation to a perceived inequitable relationship. The transition from an interpretation of policy to inequitable standing is made, and the payment of money, together with receipt of

21. *Id.* at ___, 499 P.2d at 1159.

22. *See, e.g.,* *Brown v. Equitable Life Ins. Co.*, 60 Wis. 2d 620, 211 N.W.2d 431 (1973).

23. *See, e.g.,* *Cieslewicz v. Mutual Serv. Cas. Ins. Co.*, 84 Wis. 2d 91, 267 N.W.2d 595 (1978). A reasonable person would expect coverage for all civil liability, including statutory damages, arising out of an occurrence.

24. *See* *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965). *See also* *Couey v. National Benefit Life Ins. Co.*, 77 N.M. 512, 424 P.2d 793 (1967).

25. *Corgatelli v. Globe Life & Accident Ins. Co.*, 96 Idaho 616, 533 P.2d 737 (1975), dealing with health and accident insurance policy. *See also* Keeton, *Insurance Law Rights at Variance With Policy Provisions*, 83 HARV. L. REV. 961 (1970); Note, 24 S.D.L. REV. 200, 200-16 (1979); Cohen, *Flight Insurance: Conforming to the Reasonable Expectations of the Insured*, 30 FED'N INS. COUNSEL Q. 19 (1979); Kelso, *Idaho and the Doctrine of Reasonable Expectations*, XLVII INS. COUNSEL J. 325 (1980).

the standard form binder, equals an expectation of insurance coverage where, in fact, none existed according to the terms of the conditional receipt. This transfer from policy to status is made by use of reasonable expectations as well as describing such receipts as unconscionable and adhesion contracts.

An early application of the concept of reasonable expectations in a conditional receipt case was *Ransom v. Penn Mutual Life Insurance Co.*²⁶ There, a number of reasons were given for holding temporary life insurance was in effect immediately upon payment of premium despite the language in the receipt. First, the language of the receipt was found to be ambiguous.²⁷ Second, the court concluded that an ordinary person paying a premium would expect insurance and, therefore, had a "reasonable expectation" of immediate coverage.²⁸ Third, it noted the monetary and psychological advantage gained by an insurance company in receiving the premium at the time of application.²⁹

The court in *Collister v. Nationwide Life Insurance Co.*³⁰ viewed insurance as imposing stringent requirements upon the insurer. The reasonable expectations of the insured were the important consideration, and, in addition, the insured was not under a duty to read the policy sent by the company. Regardless of ambiguity or lack of it, the court held that the applicant had the right to expect something of comparable value in return for a premium.³¹ Furthermore, the insurance industry was chastised for what were characterized as lengthy, complex, and cumbersomely written applications, conditional receipts and policies.³² Also criticized was the practice of forcing the insurance consumer to rely upon the oral representations of the insurance agent.³³ The court went on to hold that the insurance company had failed to establish by clear and convincing evidence that the proposed insured did not have a rea-

26. 43 Cal. 2d 420, 425, 274 P.2d 633, 635 (1954).

27. *Id.* at —, 274 P.2d at 636.

28. *Id.*

29. *Id.*

30. 479 Pa. Super. Ct. 579, 388 A.2d 1346 (1978), *cert. denied*, 439 U.S. 1089 (1979).

31. *Id.* at —, 388 A.2d at 1353.

32. *Id.*

33. *Id.*

sonable expectation of insurance coverage beginning with payment of the first premium.³⁴

An extreme application of reasonable expectations in conditional receipt cases is illustrated in *Smith v. Westland Life Insurance Co.*³⁵ In *Smith*, the widow brought an action against the insurance company to collect \$10,000 under an alleged temporary life insurance contract. Prior to his death, the proposed insured, Smith, had been advised he was not insurable at the standard rate, and that his application had been rejected. An amended application was offered to Smith which would take effect if he signed an amendment to the application specifying the proposed changes in coverage and payment of an additional \$4.57 for the first month's premium. The initial amount obtained by the insurance company was not returned at that time. Smith refused to accept the policy as amended and refused to pay the additional premium. The insurance agent told Smith that the premium would be refunded. Prior to the refunding of the premium, however, Smith died in an automobile accident. On appeal the California Supreme Court concluded, *inter alia*, that an ordinary person paying the premium at the time of application would have a reasonable expectation of immediate coverage.³⁶ The court also admonished the insurance industry for failing to clarify ambiguities and for being content to endure resulting litigation in an effort to avoid its obligation to pay pursuant to the concept of temporary insurance.³⁷ The court went on to hold that temporary insurance established by payment of an initial premium would be terminated only by a notice of rejection and refund of the premium.³⁸ The court reasoned that the fact the premium had not been returned created uncertainty and was confusing to the insured. Thus, under the circumstances, the court held that Smith could reasonably expect that his temporary insurance would remain in effect during the course of the negotiations and would continue until he had been refunded this premium.³⁹ The dissent of Justice

34. *Id.* at ___, 388 A.2d at 1355.

35. 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975).

36. *Id.* at 121, 539 P.2d at 439, 123 Cal. Rptr. at 655.

37. *Id.* at 122, 539 P.2d at 440, 123 Cal. Rptr. at 656.

38. *Id.* at 125, 539 P.2d at 442, 123 Cal. Rptr. at 658.

39. *Id.* at 127, 539 P.2d at 444, 123 Cal. Rptr. at 660.

Clark, joined by Justices McComb and Richardson, pointed out that the unequivocal rejection of the insurance prevented any reasonable expectation of temporary insurance coverage and any ambiguity was eliminated.⁴⁰

C. Reasonable Expectations in Non-Life Insurance Cases

The doctrine of reasonable expectations has been applied to a variety of insurance policies.⁴¹ For example, in the North Dakota case of *Mills v. Agrichemical Aviation, Inc.*,⁴² the insured had a judgment rendered against it for damages caused by aerial crop spraying. The insured farmer had a comprehensive general liability policy as well as an umbrella policy. The comprehensive general liability policy excluded coverage for property damage arising out of any substance released or discharged from any aircraft. The umbrella policy excluded coverage for liability arising out of any substance released or discharged from any aircraft. The insured never read the policies nor was he aware of the exclusionary clauses. The trial court determined that the two policies were ambiguous.⁴³ Because it was reasonable for the insured farmer to expect coverage for normal farming operation, the insured's reasonable expectations prevailed and coverage was found. On appeal, the North Dakota Supreme Court upheld the lower court's holding finding that the clauses were ambiguous, and upheld the insured's reasonable expectations where an ambiguity could be found.⁴⁴ So, also, in *Bird v. St. Paul Fire & Marine Insurance Co.*,⁴⁵ the court stated, with respect to a marine insurance policy, that the guide to interpretation was reasonable expectations of the ordinary businessman when making an ordinary busi-

40. Application of the concepts of reasonable expectations and contracts of adhesion to insurance policies was also criticized in the dissenting opinion of Justice Pomerooy in *Collister v. Nationwide Life Ins. Co.*, 479 Pa. Super. Ct. 579, 388 A.2d 1346 (1978), cert. denied, 439 U.S. 1089 (1979).

41. See *C & J Fertilizer v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa Sup. Ct. 1975) (coverage for burglary but no marks on exterior of premises); *Corgatelli v. Globe Life & Accident Ins. Co.*, 96 Idaho 616, 533 P.2d 737 (1975) (construing a health and accident policy); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962) (purchase of flight insurance from vending machine).

42. 250 N.W.2d 663 (N.D. 1977).

43. *Id.* at 667.

44. *Id.* at 673.

45. 224 N.Y. 47, 120 N.E. 86 (1918).

ness contract.⁴⁶

Gray v. Zurich Insurance Co.,⁴⁷ involved an insured accused of assault and battery who contended the actions in question were in self defense. The policy contained an exclusion for intentional acts. The insurance company refused to defend. The court held the policy was ambiguous and concluded it would be reasonable for the insured to expect coverage in the face of such an ambiguity.⁴⁸

D. Contract of Adhesion

Contracts of adhesion have been defined⁴⁹ as form contracts submitted on a "take it or leave it" basis. An adhesion contract is based on inequality of bargaining between two parties and grew out of the use of modern commercial contracts. They are generally characterized by a lack of knowledge of one party to the agreement and the fact that it is written entirely by the other party. Generally, these contracts are drafted and presented to the public as opposed to individuals. The drafter writes the contract to his or her best advantage and the adhering party has no chance to bargain. If the organization offering the contract has little or no competition, or the buyer does not have an opportunity for comparative shopping, there may be, in effect, no choice for the buyer. The contract of adhesion concept is an attempt to equalize the bargaining position between the parties and to rectify the inequities in standing which were present when the contract was entered into.⁵⁰

With respect to life insurance, the proposed purchaser of a life insurance policy is depicted as being in an unequal bargaining position, not knowing as much about insurance as the agent. The proposed insured does not have the latitude to change any of the items in the proposed contract but rather is

46. *Id.* at 51, 120 N.E. at 87.

47. 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). See also *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1963).

48. 65 Cal. 2d at —, 419 P.2d at 169-70, 54 Cal. Rptr. at 107.

49. *Id.* at —, 419 P.2d at 171, 54 Cal. Rptr. at 107.

50. A number of writers have accepted insurance contracts as adhesion contracts. See Hollman, *Insurance As A Contract of Adhesion*, 1978 Ins. L.J. 274, 274-83 (1978); 6A A. CORBIN, *CONTRACTS* § 1446 at 490 (1962); see also Ehrenzweig, *Adhesion Contracts in the Conflict of Law*, 53 COLUM. L. REV. 1072 (1953).

tendered the policy on a take it or leave it basis.⁵¹

E. Unconscionability

Unconscionability has been found by some courts in interpreting an insurance contract in order to correct perceived inequities between insured and insurer. The concept of unconscionability was originally set forth under the Uniform Commercial Code Section 2-302 in an effort to resolve the problem relating to standardized agreements.⁵² Section 2-302 was a step apart from common law doctrines in an effort to develop rules to prevent unfair surprise and oppression.⁵³

An early case dealing with the concept of unconscionability and insurance policies was *Western and Southern Life Insurance Co. v. Vale*⁵⁴ wherein the Indiana Supreme Court held it was unconscionable to deny coverage under a conditional receipt situation for an industrial insurance contract for the loss of an arm. More recently in *Steven v. Fidelity & Casualty Co. of New York*,⁵⁵ the California Supreme Court discussed unconscionability with respect to an exclusion clause in a life insurance policy purchased at an airport. The court looked upon the contract as one of adhesion because it was purchased from a vending machine and the insured was unable to review the terms of the policy until after purchase.⁵⁶ In like manner, the Iowa Supreme Court in *C & J Fertilizer, Inc. v. Allied Mutual Insurance Co.*⁵⁷ dealt with the concept of unconscionability in a claim against the defendant insurance company for losses sustained as a result of a burglary. Employees had locked all exterior doors prior to the burglary, and the insured claimed that although the exterior of the premises had not been damaged or marked, the thief had broken an interior door and stolen \$9,582.00 worth of chemicals.⁵⁸ In addition,

51. 7 S. WILLISTON, WILLISTON ON CONTRACTS § 900 (3d ed. 1963). See also *Shannon v. Prudential Ins. Co.*, 90 N.J. Super. 592, 218 A.2d 880 (1966) noted in *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965).

52. For origins of standardized contracts, see Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

53. See U.C.C. § 2-302, Comment 1.

54. 213 Ind. 601, 12 N.E.2d 350 (1938).

55. 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

56. *Id.* at —, 377 P.2d at 297-98, 27 Cal. Rptr. at 176.

57. 227 N.W.2d 169 (Iowa 1975).

58. *Id.* at 173.

there were truck tire marks visible in the driveway leading to an entrance of the warehouse that could be forced without leaving visible marks. The defendant insurance company denied coverage on the grounds that the policy defined a burglary as including and requiring a felonious entry by force or violence and visible marks made by tools, explosives or physical damage to the exterior of the premises at the place of such entry. The trial court held the policy was unambiguous and the insurance company prevailed. On appeal, in a five to four decision, the Iowa Supreme Court reversed, basing its decision, *inter alia*, upon unconscionability and reasonable expectations. The contract was not before the parties when they purchased the protection and there was utilization, in the court's opinion, of fine print with a limitation that covers items not separately listed in the exclusion section.⁵⁹

III. CASES HOLDING NO INTERIM INSURANCE

The cases discussed within seem to indicate a trend of decisions establishing insurance as soon as a premium is paid. Nevertheless, a number of jurisdictions continue to hold that conditional receipts are not ambiguous and there is no insurance until the completion of conditions in the receipt.⁶⁰ The provisions in the receipt are deemed to be conditions precedent. Courts so holding adhere to the traditional view that a contract (receipt) will be looked to first and unless there is some ambiguity or uncertainty, there is no effort to go outside the conditional receipt. In effect, these decisions are based on a determination that conditional receipts do not justify judicial intervention, that is, an equalization of the status of the insured and insurer. For example, in *Williams v. First Colony Life Insurance Co.*⁶¹ the court looked at public policy considerations from the standpoint of both insured and insurer. The court in *Williams* addressed the apparent inequity of allowing an insurance company collecting a premium to cover a period

59. *Id.* at 179. For a detailed analysis of the concept of unconscionability and the impact of courts, see Schwartz, *Seller Unequal Bargaining Power and the Judicial Process*, 49 IND. L.J. 367 (1974). See also Comment, *Binding Receipts in California*, 7 STAN. L. REV. 292 (1955).

60. See notes 36-44 *supra*.

61. 593 P.2d 534 (Utah 1979).

when, in fact, no coverage exists.⁶² On the other hand, the court also recognized that an insurance company must collect a premium as earnest money before it incurs the expenses of paying for a medical examination and processing the application.⁶³ The court stated that the inability to impose conditions precedent could result in some individuals having a difficult time obtaining insurance, if it could be done at all.⁶⁴

In *Erath v. Prudential Insurance Co. of America*,⁶⁵ insurance did not become effective upon execution of the application and payment of the premium. The conditions in the receipt were conditions precedent which had, in fact, not been met. Thus, there was no insurance.⁶⁶ In like manner, in *John Hancock Mutual Life Insurance Co. v. McNeill*,⁶⁷ the Court of Appeals of Arizona affirmed the rule that under an insurable risk conditional receipt, temporary insurance coverage is not provided until the applicant complies with the conditions precedent to coverage. The court did, however, find that there was temporary insurance coverage in accordance with the application for insurance, inasmuch as prior to the date of death, the applicant had complied with all the conditions precedent to that coverage; that is, payment of premium and passing a physical examination. The insurance company in *McNeill* urged that the applicant was not insurable because of his personal habits, particularly his fondness of drinking, and that he had recently been convicted of drunk driving.⁶⁸ The court, however, brushed that aside, finding that the rules of the company did not clearly outline whether those circumstances would preclude issuance of the policy.⁶⁹ In essence, it

62. *Id.* at 537.

63. *Id.*

64. *Id.* But see *Long v. United Benefit Life Ins. Co.*, 29 Utah 2d 204, 506 P.2d 375 (1973), and *Prince v. Western Empire Life Ins. Co.*, 19 Utah 2d 174, 428 P.2d 163 (1967), holding that conditional receipts create temporary insurance coverage until the insured was notified that his application was rejected.

65. 25 A.D.2d 707, 268 N.Y.S.2d 235 (1966).

66. *Contra*, *Hart v. Travelers Ins. Co.*, 236 A.D. 309, 258 N.Y.S. 711 (1932), *aff'd per curiam*, 261 N.Y. 563, 185 N.E. 739 (1933). See also *Adams v. State Capital Life Ins. Co.*, 11 N.C. App. 678, 182 S.E.2d 250 (1971); *Maldonado v. First Nat'l Life Ins. Co.*, 79 N.M. 354, 443 P.2d 744 (1968); *Grandpre v. Northwestern Nat'l Life Ins. Co.*, 261 N.W.2d 804 (S.D. 1977).

67. 27 Ariz. App. 502, 556 P.2d 803 (1976).

68. *Id.* at ___, 556 P.2d at 807-08.

69. *Id.* at ___, 556 P.2d at 808.

was held that an applicant is not required to read the mind of an underwriter. The determination of whether a particular insured was insurable is based on the objective conditions as of the last physical examination. Thus, according to *McNeill*, an insurance company could reject an application and counteroffer on the basis of the subjective standards but, during that interim between the date of the last examination and the tender of a counteroffer, there would be insurance under the terms of the conditional receipt if the applicant were objectively insurable.⁷⁰

In *Brown v. Equitable Life Insurance Co.*,⁷¹ the Wisconsin Supreme Court held that the provisions in the conditional receipt were neither ambiguous nor contrary to public law or policy, and that if interim insurance were to be provided, it was a task for the legislature, not the courts.⁷²

In *Hildebrandt v. Washington National Insurance Co.*,⁷³ the Montana Supreme Court rejected the concept of temporary contract of life insurance. In *Hildebrandt*, however, the applicant was an insurance agent for the defendant and had dealt only with himself. Thus, the court held the reasoning of cases creating a temporary contract of life insurance based on unequal bargaining power did not apply.⁷⁴

Cases holding that conditions in a receipt are conditions precedent also require that an insurance company act upon an application within a reasonable length of time.⁷⁵ Thus, in those jurisdictions holding there is no temporary insurance with issuance of a binder, liability may be established if the company failed to act promptly on the application. This is a cause of action based on negligence with the requirement that

70. *Id.* See also *Simpson v. Prudential Life Ins. Co.*, 227 Md. 393, 177 A.2d 417 (1962).

71. 60 Wis. 2d 620, 211 N.W.2d 431 (1973).

72. For additional cases holding that conditional receipts were not ambiguous, see *Pawelczyk v. Allied Life Ins. Co.*, 120 Ariz. 48, 583 P.2d 1368 (1978); *Quarles v. Nationwide Ins. Co.*, 66 Ill. App. 3d 455, 383 N.E.2d 1234 (1978); *Reynolds v. Guarantee Reserve Life Ins. Co.*, 44 Ill. App. 3d 764, 358 N.E.2d 940 (1976).

73. 593 P.2d 37 (Mont. 1979).

74. *Id.* at 40.

75. See *Liberty Nat'l Life Ins. Co. v. Smith*, 357 So. 2d 646 (Ala. 1978); *Barnes v. Atlantic & Pac. Life Ins. Co.*, 325 So. 2d 143 (Ala. 1975); *Brand v. International Investors Ins. Co.*, 521 P.2d 423 (Okla. 1974); *Peddicord v. Prudential Ins. Co.*, 498 P.2d 1388 (Okla. 1972); *Wallace v. Metropolitan Life Ins. Co.*, 212 Wis. 346, 248 N.W. 435 (1933).

damages be established.⁷⁶ In *Barnes v. Atlantic and Pacific Life Insurance Co.*,⁷⁷ the court held that whether an insurer's delay in issuing a policy from September 8th until the following November 6th was an unreasonable period, was a fact issue. In *Liberty National Life Insurance Co. v. Smith*,⁷⁸ the court held that a policy issued within twenty-one days was a reasonable time as a matter of law.⁷⁹ A delay from January 31, 1966, to March 15, 1966, was held to be a sufficient interlude from which a jury might reasonably conclude that the action was not taken within a reasonable time.⁸⁰

IV. CONCLUSION

Before embracing the principles and concepts of unconscionable and adhesion contracts, as well as reasonable expectations, it is submitted that a court should first determine its role in conflicts between an insured and an insurance company. Should a court rectify an assumed unequal bargaining position between insured and insurer? Are courts in a position to intervene and to determine the status of a proposed insured with an insurer?

No judgment is made in this article on what is or what is not needed to put an insured and an insurance company on an equal footing in their dealings with each other. However, the basic problem of judicial intervention in conditional receipt cases is judicial unsuitability to make the necessary factual determinations such as costs and availability. Courts are not able to gather data, analyze material or devote continuing attention to an insurance company's problems.⁸¹

Judicial intervention which tries to create a balance between an insured and insurer often results in the voiding of exclusions and terms to obtain what the insured reasonably expected. The cases in part II illustrate that some courts have concluded insureds expect no exclusions and as much insur-

76. 212 Wis. 346, 248 N.W. 435 (1933).

77. 325 So. 2d 143 (Ala. 1975).

78. 356 So. 2d 646 (Ala. 1978).

79. *Id.* at 648. See also *Brand v. International Investors Ins. Co.*, 521 P.2d 423 (Okla. 1974).

80. *Peddicord v. Prudential Ins. Co.*, 498 P.2d 1388 (Okla. 1972).

81. See Schwartz, *Seller Unequal Bargaining Power and the Judicial Process*, 49 IND. L.J. 367, 370 (1974).

ance coverage as can be possibly obtained for the least amount of money. Faced with increasing judicial intervention based on the "expectations," insurance companies will be compelled to either refuse insurance on that basis or collect a fee commensurately higher to cover the cost. In addition, the fee will be collected from all prospective applicants whether they are determined to be insurable and whether they subsequently become policy holders.

The problem of interpreting conditional receipts goes far beyond an individual beneficiary suing to collect the proceeds for a deceased insured. The concept of fairness goes to availability of insurance or conditional receipts as well as prices that must be charged to those who are found insurable. In essence, the insurance companies, and conditional receipts, must be regulated. Courts can only exclude or find coverage in individual cases. A court does not know what will take the place of any exclusion or conditional receipt which it does away with, nor is it in a position to regulate the price. Courts do not have the power to order insurance, nor do they have the power to set reasonable rates.

It is submitted that the judiciary should not make public policy determinations based on reasonable expectations, contracts of adhesion, or unconscionability without a detailed analysis of whether they are supplanting the legislative branch of government. Failure to address this threshold question will result in continued uncertainty and ambiguities. In addition, such judicial intervention in conditional receipt cases brings into question states' control and regulation of insurance companies. Such a result necessarily follows when courts make essentially public policy decisions based on reasonable expectations or unconscionability or adhesion theories. The effect is to dilute the status of each state's regulation through the commissioner of insurance office. It becomes easy to argue for nationwide uniform interpretation and regulation of insurance contracts because of the reasonable expectations of insured and the interstate nature of life insurance policies.⁸² Thus, the individual requirements of each state fades

82. Emphasis on public policy in conditional receipt cases may result in greater efforts to go behind the "closed doors" of appellate deliberations. Since courts must base much of their public policy arguments on subjective material not in briefs, it

before the conceptual generalities applied by judicial intervention.

An individual's ability to bargain with a life insurance company may require greater regulation of insurance contracts. Such an objective does not, however, lie in application of "reasonable expectations," contracts of adhesion or rules of unconscionability. The answer lies with state legislatures and offices of commissioners of insurance, dependent in turn upon each state's insurance needs and experience.

may be argued that public visibility of the decision is necessary to determine what facts the court is using in its decision making. It is this writer's opinion, however, that such efforts would be counterproductive and greatly impair the administration of justice.

