

INCONTESTABILITY STATUTE NULLIFIES CONTRACT LANGUAGE: EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES V. BELL 27 F.3d 1274 (7th Cir. 1994)

State legislators responded to numerous charges of corruption, fraud, and dishonesty in the insurance industry¹ by passing stricter regulations to police insurance companies.² One such regulation requires insurers to include incontestability clauses in disability policies.³ Incontestability clauses state that after a specified time an insurer may not deny or reduce benefits for a disability caused by a condition existing before the effective date of the policy.⁴ While incontestability clauses are designed to protect the insured⁵ and to reduce litigation,⁶ insurance com-

1. See generally JANICE E. GREIDER & WILLIAM T. BEADLES, *LAW AND THE LIFE INSURANCE CONTRACT* 237 (1968) (discussing common abuses by life insurance companies, including refusing to pay death benefits or offering to settle claims for substantially less than the policy value).

2. See generally SHEPARD B. CLOUGH, *A CENTURY OF AMERICAN LIFE INSURANCE: A HISTORY OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK* 244-45 (1946) (discussing the number of states adopting regulations in response to the improprieties in the insurance industry).

3. Several treatises have examined the debate over the conflicting interests in the application of incontestability clauses. See generally 1A JOHN APPLEMAN, *INSURANCE LAW AND PRACTICE* § 311 (1981) (surveying the law of incontestability clauses); 7 SAMUEL WILLISTON & WALTER H.E. JAEGER, *A TREATISE ON THE LAW OF CONTRACTS* § 912 at 394 (3d ed. 1963) (comparing the interests of the insured and insurer).

4. Historically, incontestability clauses have also included provisions regarding the effect of misstatements, either fraudulent or accidental, in the application process prior to the issuance of the insurance policy. For general discussion of the incontestability clause, see Eric K. Fosaaen, *Aids and the Incontestability Clause*, 66 N.D. L. REV. 267 (1990) (recommending a re-examination of incontestability clauses after the advent of AIDS); William F. Young, Jr., "Incontestable" — *As to What?*, 1964 U. ILL. L.F. 323 (discussing advantages of incontestability clauses); Note, *The Incontestable Clause in Combination Life Insurance Policies*, 31 ILL. L. REV. 769 (1937) (discussing the uncertainty caused by some incontestability clauses).

5. See, e.g., *New York Life Ins. Co. v. Kaufman*, 78 F.2d 398 (9th Cir. 1973) (holding that incontestability clauses are available to the honest seeking their protection), *cert. denied*, 296 U.S. 626 (1935); *Indiana Nat'l Life Ins. Co. v. McGinnis*, 101 N.E. 289 (Ind. 1913) (acknowledging that Indiana has long recognized the validity and benefit of incontestability clauses); *Rex Ins. Co. v. Baldwin*, 323 N.E.2d 270 (Ind. Ct. App. 1975); see also *infra* notes 24-51 and accompanying text (discussing the various interpretations of incontestability clauses).

6. See, e.g., *Columbian Nat'l Life Ins. Co. v. Wallerstein*, 91 F.2d 351, 352 (7th Cir. 1937) ("The incontestability clause . . . is in the nature of a

panies have attempted to circumvent the clauses with language limiting policy coverage for pre-existing conditions.⁷ In *Equitable Life Assurance Society of the United States v. Bell*,⁸ the Court of Appeals for the Seventh Circuit held that under Indiana law, a statutorily mandated incontestability clause in a disability policy bars an insurer from denying a claim made more than two years after the issuance of the policy on the grounds of a pre-existing condition.⁹

In *Bell*, the plaintiff insurance company sought to avoid paying disability benefits because the defendant's disabling illness manifested itself before the issuance of the policy.¹⁰ The insurer relied on policy language limiting coverage for pre-existing conditions.¹¹ The insured, Bell, responded by citing the policy's incontestability clause. Bell stated that once the policy was in effect for two years, Equitable could not deny a claim for benefits even if the underlying condition existed before the policy's effective date.¹² The district court rejected the argument

statute of limitation and repose."); *Wischmeyer v. Paul Revere Life Ins. Co.*, 725 F. Supp. 995, 1000 (S.D. Ind. 1989) (noting that many states enacted statutes requiring life, disability, and health policies to contain incontestability clauses in order promote certainty and decrease litigation).

7. See, e.g., *Neville v. American Republic Ins. Co.*, 912 F.2d 813, 815 (5th Cir. 1990) (holding that incontestability clause does not extend coverage of policy to include a pre-existing condition); *Button v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 584, 588 (9th Cir. 1988) (allowing a challenge to a disability claim, despite incontestability clause, because the policy did not cover pre-existing conditions), *cert. denied*, 488 U.S. 909 (1988). *But see*, e.g., *McMackin v. Great Am. Reserve Ins. Co.*, 99 Cal. Rptr. 227, 234-35 (Cal. Ct. App. 1971) (stating that pre-existing illnesses and injuries are irrelevant once the contestability time has expired); *Lindsay v. United States Life Ins. Co.*, 194 A.2d 31 (N.J. 1963) (holding that the incontestability clause requires insurer to cover all pre-existing conditions).

8. 27 F.3d 1274 (7th Cir. 1994).

9. *Id.* at 1282.

10. *Equitable Life Assurance Soc'y of the United States v. Bell*, 818 F. Supp. 245, 246 (N.D. Ind. 1993). The court addressed a secondary issue involving the incontestability clause and Bell's intentional misstatement of his medical history. Because Equitable chose a version of the statutorily mandated clause that did not refer to fraudulent misstatements, the court did not address this issue at length. 27 F.3d at 1282-83. See *infra* note 16 (quoting the Indiana statute that allows insurers to choose between two clauses). See also 1A APPLEMAN, *supra* note 3, § 311 at 305-06 (discussing incontestability in cases of fraud or misrepresentation by policy holders). For a case involving the misstatement version of the incontestability clause, see *Paul Revere Life Ins. Co. v. Haas*, 628 A.2d 772 (N.J. Super. Ct. App. Div. 1993).

11. The language within the policy limiting coverage read as follows: "This policy will not cover any loss which is caused or contributed to by any of the following: 1. injury occurring or sickness first manifesting itself prior to the effective date of coverage under this policy. . . ." *Bell*, 27 F.3d at 1276.

12. The incontestability clause in the policy before the court read as

that the language of the disability policy¹³ allowed Equitable to withhold benefits and granted summary judgment in favor of the insured.¹⁴ On appeal, the Court of Appeals for the Seventh Circuit affirmed, and held that under Indiana law the policy's incontestability clause barred the insurer from denying benefits, irrespective of the pre-existing sickness.¹⁵

Indiana enacted legislation¹⁶ requiring incontestability clauses in health insurance policies to protect beneficiaries from unne-

follows:

INCONTESTABILITY

(a) After this policy has been in force for a period of two years of the lifetime of the Insured (excluding any period during which the Insured is disabled), *it shall become incontestable as to the statements contained in the application.*

(b) *No claim for loss incurred or total disability (as defined in the policy) commencing after two years from the Date of Issue of this policy shall be reduced or denied on the ground that a disease or physical condition had existed prior to the effective date of coverage under this policy, unless, effective on the date of loss, such disease of physical condition was excluded from coverage by name or specific description.*

Id.

13. The incontestability clause also included language regarding the effect of misstatements on coverage. *See infra* note 16. The court of appeals did not consider this portion of the clause to be a critical issue. *Bell*, 27 F.3d at 1276 n.1.

14. *Bell*, 818 F. Supp. at 252.

15. *Bell*, 27 F.3d at 1282.

16. Indiana Code § 27-8-5-3(a)(2)(A)&(B) requires that insurers insert the first or second of the following clauses, in addition to the third, in all policies:

[1]TIME LIMIT ON CERTAIN DEFENSES: After three (3) years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such three (3) year period.

IND. CODE ANN. § 27-8-5-3(a)(2)(A) (Burns 1992).

[2]INCONTESTABLE: After this policy has been in force for a period of three (3) years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application.

Id. § 27-8-5-3(a)(2)(A)(2).

No claim for loss incurred or disability (as defined in the policy) commencing after three (3) years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition, not excluded from coverage by name or specific description effective on the date of the loss, had existed prior to the effective date of coverage of this policy.

Id. § 27-8-5-3(a)(2)(B). Equitable Life chose the incontestability clause for its life insurance policy rather than the clause with the exception for fraudulent misstatements. *See supra* note 12.

essary litigation after the death of the insured.¹⁷ The clause adopted by the Indiana legislature was identical to the model clause drafted by the National Association of Insurance Commissioners (NAIC) in 1946.¹⁸ The Indiana clause is consistent with clauses used in other states that adopted the NAIC model incontestability clause.¹⁹ Despite applying similar laws, courts disagree on the issue of whether an insurer may deny disability benefits when a policy contains both an incontestability clause and language excluding benefits for disabilities resulting from pre-existing conditions. The majority position holds that incontestability clauses leave the insurer free to exclude coverage for pre-existing²⁰ diseases and conditions.²¹ The minority position holds that incontestability clauses mandate coverage for disabilities resulting from pre-existing conditions, irrespective of any policy terms to the contrary.²²

17. See *Columbian Nat'l Life Ins. Co. v. Wallerstein*, 91 F.2d 351, 353 (7th Cir. 1937).

18. The National Association of Insurance Commissioners (NAIC) drafted the model incontestability clause statute based on New York's Standard Policy language. New York developed its Standard Policy law containing an incontestability clause in response to the Armstrong Commission's findings regarding the corruption in the insurance industry. See Fosaaen, *supra* note 4, at 268-71 (describing the early development and spread of incontestability clauses).

19. Numerous other states have statutorily mandated incontestability clauses. See, e.g., CAL. INS. CODE § 10206 (West 1993); ILL. ANN. STAT. ch. 215, para. 357.3 (Smith-Hurd 1993); IOWA CODE ANN. § 509.2.2 (West 1988); KAN. STAT. ANN. § 40-420(2) (1986). See also Fosaaen, *supra* note 4, at 270-71 (describing the widespread adoption of the NAIC clause).

20. Many courts discuss at length the difference between "existing" and "manifesting." The Seventh Circuit did not consider this distinction to be a viable issue in the *Bell* case. *Bell*, 27 F.3d at 1283. For a lengthy analysis of the distinction, see *Massachusetts Casualty Ins. Co. v. Forman*, 516 F.2d 425, 428 (5th Cir. 1975), *cert. denied*, 424 U.S. 91A (1976).

21. See *supra* note 6. See also *Keaten v. Paul Revere Life Ins. Co.*, 648 F.2d 299, 301 (5th Cir. Unit B June 1981) (holding that under Georgia law, after the contestability period has passed, an insurer may still deny any claim if it is not within the terms of the policy); *Forman*, 516 F.2d at 428 (holding that incontestability clauses do not cut off defenses relating to coverage); *Home Life Ins. Co. v. Regueira*, 313 So.2d 438, 439 (Fla. Dist. Ct. App. 1975) (holding that incontestability clauses prohibit challenges to the validity of the policy but not defenses relating to limitation of coverage).

22. See *supra* note 7. See also *Manzella v. Indianapolis Life Ins. Co.*, 814 F. Supp. 428, 434 (E.D. Pa. 1993) (holding that under New Jersey law, once the incontestability period has passed, no pre-existing conditions can be excluded); *Wischmeyer v. Paul Revere Life Ins. Co.*, 725 F. Supp. 995, 1001-02 (S.D. Ind. 1989) (holding that under Indiana law, if an insured's pre-existing disability results in a claim arising after the contestability period expires, an insurer may not defend on the basis of the pre-existing condition); *Fischer v. Massachusetts Casualty Ins. Co.*, 458 F. Supp. 939, 944 (S.D.N.Y. 1978) (holding that under New York law, a policy defining covered conditions

The two federal appellate courts which examined the effect of statutorily mandated incontestability clauses on pre-existing condition clauses prior to the Seventh Circuit's *Bell* decision, articulated the majority position.²³ In *Massachusetts Casualty Insurance Co. v. Forman*, the Court of Appeals for the Fifth Circuit held that under Florida law, Massachusetts Casualty was not liable for a disability resulting from a pre-existing condition.²⁴ The court reasoned that the policy's incontestability clause sheltered the insurer from liability for existing and known conditions.²⁵ Because the insured's disability resulted from previously diagnosed diabetes,²⁶ it fell outside the scope of policy coverage. Thus, the court held that an incontestability clause does not preclude insurers from refusing benefits on the ground that a particular disability was never within the policy coverage.²⁷

The Court of Appeals for the Ninth Circuit followed the reasoning of the Fifth Circuit in *Forman*. In *Button v. Connecticut General Life Insurance*, the Ninth Circuit held that under Arizona law, the incontestability clause in Button's policy did not preclude Connecticut General from refusing a claim on the ground that Button had a pre-existing disease that contributed to his disability.²⁸ The court reasoned that incontestability clauses relate to the validity of the insurance contract and to its construction.²⁹ Therefore, the court held that an incontestability

as those that first manifest themselves after coverage begins was not proper exclusion by "name or specific description" under incontestability clause); *White v. Massachusetts Casualty Ins. Co.*, 465 N.Y.S.2d 345 (N.Y. App. Div. 1983) (holding that an incontestability clause precludes exclusion of pre-existing illnesses through coverage provisions).

23. See *Button v. Connecticut Gen. Life Ins.*, 847 F.2d 584 (9th Cir. 1988), cert. denied, 488 U.S. 909 (1988); *Massachusetts Casualty Ins. Co. v. Forman*, 516 F.2d 425 (5th Cir. 1975), cert. denied, 424 U.S. 914 (1976).

24. *Forman*, 516 F.2d at 430.

25. *Id.* at 428.

26. *Id.* at 427. Not only had Forman's illness manifested itself, but he was also hospitalized and disabled by diabetes prior to the issuance of the policy. *Id.*

27. *Id.* at 428. The *Forman* court quoted Chief Justice Cardozo's opinion in *Metropolitan Life Ins. Co. v. Conway* to explain its position:

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. at 428-29 (quoting *Metropolitan Life Ins. Co. v. Conway*, 169 N.E. 642, 642 (N.Y. 1930)).

28. *Button*, 847 F.2d at 588 (citing *Carlson v. New York Life Ins. Co.*, 222 N.E.2d 363, 368 (Ill. 1966)).

29. *Button*, 847 F.2d at 588.

clause does not change the meaning of policy terms or enlarge the policy's coverage.³⁰

Although two federal circuits addressing the issue agree, state courts are split on whether insurance companies may use pre-existing condition clauses to deny benefits.³¹ For example, in *National Life & Accident Insurance Co. v. Mixon*,³² the Alabama Supreme Court found no conflict between the statutorily mandated incontestability clause and the policy's pre-existing disease exclusion.³³ The court stated that an incontestability clause does not extend the coverage of a policy to a disease contracted before the issuance of the policy.³⁴ Thus, the clause did not preclude the insurer from denying coverage simply because the insured waited two years to claim disability benefits from a loss of eyesight resulting from a pre-existing and diagnosed disease.³⁵ Conversely, in *Monarch Life Insurance Co. v. Brown*,³⁶ the New York Court of Appeals held that an incontestability clause in the insured's disability policy barred the insurer from disclaiming coverage for a disability resulting from a pre-existing heart condition, notwithstanding a pre-existing condition clause.³⁷ The court reasoned that any decision which allows insurance companies to limit coverage for pre-existing conditions would render the incontestability clause meaningless.³⁸ Because the legislature would not have intended insurers to include a meaningless clause, the only reasonable holding was to declare the pre-existing condition clause invalid.³⁹

Notwithstanding the majority position,⁴⁰ some federal courts have reached a contrary conclusion. For example, in *Fischer v.*

30. *Id.* at 589.

31. See *infra* notes 32-39 and accompanying text. See also *Hooks v. Colonial Life and Accident Ins. Co.*, 259 S.E.2d 567 (N.C. Ct. App. 1979) (holding that policy's incontestability clause did not bar insurer from raising the defense that insured's physical condition prior to issuance of policy contributed to his disability); *Educators and Professional Life Ins. Co. v. Jordan*, 536 S.W.2d 124 (Ark. 1976) (holding disability policy did not cover illness caused by culmination of the insured's osteomyelitis, notwithstanding incontestability clause in the policy).

32. 282 So.2d 308 (Ala. 1973).

33. 282 So.2d at 316. The Alabama incontestability is essentially identical to Indiana's. See ALA CODE § 27-18-4 (1986). Incontestability periods range from one to three years. *Id.* In *Mixon*, the period was one year. 282 So.2d at 310.

34. *Mixon*, 282 So.2d at 311.

35. *Id.* at 312.

36. 512 N.Y.S.2d 94 (N.Y. App. Div. 1987).

37. *Id.* at 103.

38. *Id.*

39. *Id.*

40. See *supra* notes 23-30 and accompanying text for an explanation of

Massachusetts Casualty Insurance Co.,⁴¹ the District Court for the Southern District of New York acknowledged the abundance of opposing case law but rendered a conflicting decision.⁴² In *Fischer*,⁴³ the plaintiff filed a disability claim after the two-year incontestability period expired. The *Fischer* court held that under New York law, once the incontestability period expired the incontestability clause precluded denial of benefits for a disability resulting from a previously diagnosed heart disease.⁴⁴ The court did not follow the majority position because the insurer did not exercise its option under New York law, to exclude specific illnesses from coverage.⁴⁵

Some courts protect insureds even more than the *Fischer* court.⁴⁶ In *Wischmeyer v. Paul Revere Life Insurance Co.*,⁴⁷ the United States District Court for the Southern District of Indiana interpreted the state's incontestability clause as limiting an insurer's ability to deny benefits on the basis of a pre-existing condition.⁴⁸ A doctor diagnosed Wischmeyer with fibromyalgia before the insurance company issued him a policy containing an incontestability clause and a provision denying coverage for pre-existing conditions.⁴⁹ Wischmeyer delayed filing his disability claim until the requisite two years had expired.⁵⁰ The *Wischmeyer* court held that under Indiana law, if the insured's pre-existing

the majority position. See also, e.g., *National Life & Accident Ins. Co. v. Chapman*, 27 S.E.2d 157 (Ga. Ct. App. 1962) (holding that insurer could defend a claim on the grounds that it fell outside the policy); *John Hancock Mutual Life Ins. Co. v. Markowitz*, 144 P.2d 899 (Cal. Ct. App. 1944) (allowing insurer to assert the defense contained in the pre-existing disease clause, notwithstanding the policy's incontestability clause); *Perilstein v. Prudential Ins. Co.*, 29 A.2d 487 (Penn. 1943) (holding that the incontestability clause did not preclude recovery based on insured's suicide); *Apter v. Home Life Ins. Co. of New York*, 194 N.E. 846 (N.Y. 1935) (construing incontestability clause to apply only to the validity of the policy).

41. 458 F. Supp. 939 (S.D.N.Y. 1978).

42. *Id.* at 941-44.

43. *Id.* at 940.

44. *Id.* at 944.

45. *Id.*

46. See *infra* notes 47-52 and accompanying text (illustrating the expansion of the incontestability clause).

47. 725 F. Supp. 995 (S.D. Ind. 1989).

48. *Id.* at 1004.

49. *Id.* at 997. The court discussed a second issue regarding possible misrepresentations over income and medical history. *Id.* at 999.

50. *Id.* at 1002. The incontestability clause specifically excluded any time the insured was disabled during the two-year incontestability period. The court found that a genuine issue of material fact existed as to whether the insured was disabled within the two-year period during which insurer could contest the disability policy pursuant to the incontestability clause. For this reason, the court refused the insured's request for summary judgment. *Id.*

disability results in a claim arising after the incontestability period expires, the insurer may not avoid paying disability benefits because the disability resulted from a pre-existing condition.⁵¹ The court reasoned that the plain, unambiguous language of the statute mandates that no claim be denied after two years because of a pre-existing condition.⁵²

*Equitable Life Assurance Society of the United States v. Bell*⁵³ provided the Seventh Circuit with the opportunity to determine what affect the Indiana incontestability clause has on policy provisions excluding pre-existing conditions.⁵⁴ Because the Indiana courts had not yet resolved the issue,⁵⁵ the court interpreted Indiana law.⁵⁶ In doing so, the Seventh Circuit rejected the majority position adopted by the Fifth and Ninth Circuits.⁵⁷ The *Bell* court held that the Indiana incontestability clause prohibits an insurer, after a policy is in effect for two years, from denying a disability claim because the underlying disease or condition existed before the effective date of the policy, regardless of whether the policy contains a pre-existing exclusion clause.⁵⁸ The court agreed with the *Wischmeyer* court's strict

51. *Id.* at 1001. The court outlined the mandate of the Indiana legislature in establishing the incontestability clause as a three step sequence: "(1) If an insured files a claim for disability; (2) And, if that disability began after two years from the date of issue; (3) Then the insurer *cannot* deny the claim because of a pre-existing condition." *Id.* The court further observed that the legislature struck a balance:

The clause protects an insured who is healthy enough to work throughout the two-year period from losing the security of disability insurance because some prior condition might eventually disable him. On the other had, the insurer is protected in that it is not precluded from denying benefits to an applicant whose pre-existing condition is so bad that he becomes disabled during the two-year period.

Id. at 1001-02.

52. *Id.* at 1003.

53. 27 F.3d 1274 (7th Cir. 1994).

54. *Id.* at 1277.

55. In *Prudential Ins. Co. of Am. v. Rice*, 52 N.E.2d 624 (Ind. 1944), the Indiana Supreme Court was most recently faced an incontestability clause issue. The court held that incontestability clauses in life insurance policies limit the time within which matter affecting the validity of the policy may be raised, and have no reference to whether a particular casualty subsequently occurring is covered. *Id.* at 627.

56. *Bell*, 27 F.3d at 1277. Because the Indiana courts had not addressed the issue, under *Northern Assurance Co. of Am. v. Summers*, 17 F.3d 956, 964 (7th Cir. 1994), the court had to predict how the Indiana Supreme Court would resolve the issue.

57. *Bell*, 27 F.3d at 1281. The court noted that the Fifth and Ninth Circuits ignored the plain and ordinary meaning of the statutorily mandated incontestability clause. *Id.*

58. *Id.* at 1281.

statutory interpretation and reasoned that to limit the incontestability clause by excluding diseases or conditions existing before the issuance of the policy would be contrary to the mandate of Indiana's legislature.⁵⁹ The court criticized the majority position for not applying the plain and ordinary meaning of the incontestability provision.⁶⁰ Because the provision clearly states that after two years the insurer cannot deny a claim on the ground that an underlying disease or condition existed before the policy became effective, the court reasoned that the policy must include all pre-existing conditions, regardless of their time of manifestation.⁶¹

The Seventh Circuit's decision in *Bell* was correct for two reasons: first, the court properly interpreted the plain language of Indiana's incontestability clause and second, the court helped equalize the positions of insurers and insureds.⁶² The Indiana legislature intended its clause to protect insureds against insurers seeking to deny benefits for pre-existing conditions years after issuing a policy.⁶³ Rather than deny the insured the intended protection of incontestability clauses, the court's decision promotes certainty by assuring that insureds receive their contractual benefits.⁶⁴ The court appropriately interpreted the incontestabil-

59. *Id.* at 1281-82. The court rejected Equitable's attempts to nullify the protection of the incontestability clause by excluding from coverage an illness that manifests itself before the policy is issued. *Id.* at 1282 n.8.

60. *Id.* at 1280-81. See *supra* note 12 for the full text of the policy's incontestability clause.

61. *Bell*, 27 F.3d at 1281. The *Bell* court discussed potential criticisms of its holding. In response to an argument that the meaning of paragraph (B) is ambiguous when read in conjunction with the other provisions of the contract, the court cited *Wood v. Allstate Ins. Co.*, 21 F.3d 741, 744 (7th Cir. 1994), for the proposition that ambiguous insurance provisions are construed against the insurer. 27 F.3d at 1282. The court also addressed the fact that its holding tends to reward fraudulent misrepresentations by insureds. In response, the court noted that, through Indiana law, insurance companies have an option to select a "time limit on certain defenses" clause in lieu of the "incontestability" provision. Companies then reserve the right to deny benefits on the basis of fraudulent misstatements during the application process. *Id.* at 1283. See *supra* note 16 (comparing Indiana's incontestability and "time limit on certain defenses" clauses). Paying benefits to the few with pre-existing conditions who successfully hide their illnesses until the end of the incontestability period is a price insurers should pay when they select the more marketable incontestability clause which omits the "fraudulent misstatements" exception. 27 F.3d at 1283.

62. See *supra* notes 59-61 and accompanying text for a discussion of the court's analysis of Indiana's incontestability clause.

63. See *WILLISTON & JAEGER*, *supra* note 3, § 912 at 394 (noting that incontestability clauses resulted from the early greed and ruthlessness of the insurance industry).

64. See *supra* notes 5, 6, 17 and accompanying text for examples of the problems alleviated by statutorily mandated incontestability clauses.

ity clause in a plain and ordinary fashion and properly rejected a position that permits insurance companies to liberally exclude all pre-existing conditions from coverage.⁶⁵ The court's holding also furthers the policy of achieving a balance of power between insurers and insureds.⁶⁶ Instead of following the overreaching holdings of the Fifth and Ninth Circuits, the *Bell* decision provides both parties with the protection the Indiana legislature intended them to have.⁶⁷

The *Bell* court's holding arguably rewards insureds who make fraudulent misstatements on their policy applications. The court reasoned, however, that the legislature allowed insurers to reduce the risk of fraud by excluding fraudulent misstatements from incontestability clauses.⁶⁸ Furthermore, when insurers opt for the more marketable incontestability clause without the exclusion, the two year time period prior to incontestability⁶⁹ is adequate for diligent insurers to discover undisclosed pre-existing conditions.

The Seventh Circuit's holding protects the insured from losing the security of the expected benefits of disability insurance,⁷⁰ and like *Fischer*, preserves the insurer's option to name specific conditions or physical disabilities that will not be covered.⁷¹ This position prevents insurers from relying on a general "all pre-existing conditions" exclusion to withhold benefits years after the issuance of a policy.⁷²

The *Bell* court properly gives the insured the protection intended by state legislators.⁷³ By holding that insurers cannot undermine incontestability clauses with policy language, the court ensured that insured persons will receive expected benefits.⁷⁴ Unfortunately, not all courts have adopted the plain language

65. See *supra* notes 60-61 and accompanying text for the specific criticisms of other interpretations of incontestability clause. See also *supra* notes 23-41 (discussing decisions allowing the exclusion of pre-existing conditions).

66. See *supra* note 51 and accompanying text for an explanation of the balance of power.

67. See *supra* notes 6 and 17 and accompanying text for examples of other problems alleviated by statutorily mandated incontestability clauses.

68. *Bell*, 27 F.3d at 1283.

69. See *supra* note 33 (discussing length of mandatory incontestability periods ranging from one to three years).

70. See *supra* notes 62-67 and accompanying text for a discussion of the impact of the *Bell* holding.

71. See *supra* note 51 and accompanying text for an explanation of the power retained by insurance companies.

72. See *supra* note 61 (explaining the insurer's attempt to exempt all pre-existing conditions from coverage).

73. See *supra* note 2 (discussing the intentions of state legislators).

74. See *supra* note 64 (discussing this aspect of the court's holding).

interpretation of incontestability clauses.⁷⁵ If more courts move towards this standard, insured persons afflicted with pre-existing conditions will not be precluded from receiving the benefits of disability insurance.

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75. See *supra* notes 24-39; see also *supra* notes 52, 61 (discussing the plain language interpretation).

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