

THE REFORM OF GROUP LIFE INSURANCE LAW¹

REUBEN A. HASSON*

Introduction

If one were to mention the words "life insurance" to a law student, he would almost certainly think of an agent soliciting life insurance from a given individual who had to undergo a medical examination before he was approved by an insurer. If our student were next to study that part of the provincial insurance legislation which deals with life insurance, he would be strengthened in his view that individual life insurance was the usual kind of insurance that was written. That part of *The Insurance Act* that deals with life assurance assumes that the normal type of policy is an individual one; references to group life insurance appear almost as footnotes tacked on to provisions dealing with individual life insurance. Finally, if our hypothetical student examined the case digests and a recent treatise on Canadian life insurance law,² he would feel certain that individual life insurance was more important than group life insurance. But, despite all this "evidence," such a view would be mistaken.

The amount of group life insurance in force at the present time is greater than the amount of individual life insurance as is shown by the following figures:

<u>Year</u>	<u>Individual Life Insurance</u>	<u>Group Life Insurance</u>
1976	\$105,285 million	\$139,596 million
1977	\$118,240 million	\$164,813 million ³

Thus, at the end of 1977, of the total life insurance in force, approximately 58.2% was group life insurance.⁴

The figures demonstrating the development of group life insurance are dramatic. They are as follows for the period from 1948 to 1968:

-
- * Professor of Law, Osgoode Hall Law School.
1. In this article, I am not dealing with creditor's group insurance or fraternal benefit associations. I also do not propose to deal with group disability insurance, although this kind of insurance is very commonly sold together with group life insurance.
 2. See D. Norwood, *Life Insurance Law in Canada* (1977), Approximately one-tenth of the book (33 out of 341 pages) deals with the problems of group life insurance.
 3. Figures kindly supplied to the author by Mr. M. S. Fowler, Chief, Registration and Analysis, Life Insurance Division, Superintendent's Office, Ottawa, in a letter dated August 10, 1978. Unfortunately, it is not known how much group life insurance is term and how much is permanent.
 4. *Ibid.*

<u>Year</u>	<u>Individual Life Insurance</u>	<u>Group Life Insurance</u>
1948	\$ 11,293 million	\$ 1,814 million
1958	\$ 26,092 million	\$ 10,404 million
1968	\$ 51,610 million	\$ 41,602 million ⁵

It seems likely, given these figures, that group life insurance will at least maintain its superior position *vis-à-vis* individual life insurance. Indeed, it is possible that group life insurance's share of the total amount of insurance coverage will go on increasing, until we reach the position where individual life insurance is an appendage to group life insurance.

The difficulty with group life insurance at the present time is that our policy-makers seem to treat group life insurance in the same way as our hypothetical law student. Our present regulation of group life insurance seems to operate on the assumption that we are dealing with a phenomenon of marginal social importance. Since we seem to make that assumption, an irresponsibly casual attitude dominates our policy towards group life insurance. Thus, our principal means of regulating unfair provisions in group life insurance is through the use of non-binding directives issued by the provincial Superintendents of Insurance.⁶ These directives are totally hortatory; there is no evidence that all insurers transacting group life insurance are even familiar with them. If it be argued that competition provides sanctions against companies acting unethically, then it is difficult to see the need for directives at all.

Just as disturbing as the fact that the guidelines are merely hortatory, is the fact that the guidelines do not deal with many of the problems in group life insurance. Before going on to identify the problems in group life insurance law and possible solutions for these problems, it is necessary to describe, in outline, how group line insurance works.

5. See A. Pedoe, *Life Insurance, Annuities and Pensions* (1970) 319.

6. Thus, directives were issued in 1972: Proceedings of the Association of Insurance Superintendents (1972) 76. New directives were issued in 1973: Proceedings of the Association of Insurance Superintendents (1973) 167. These were in turn updated in 1974: Proceedings of the Association of Insurance Superintendents (1974) 179. The more recent directives on group life insurance were issued in 1976 and are to be found in the Proceedings of the Association of Insurance Superintendents for that year at 180.

Unfortunately, regulation by directive is not limited to group life insurance. In recent years, provincial Superintendents have issued directives on subjects such as abuses in creditor's group insurance, misleading life insurance policies, unfair settlement practices and subrogation abuses. Seen as a technique for controlling insurance abuses, it can only be described as bizarre.

The Mechanics of Group Life Insurance⁷

A group life insurance contract is entered into between an insurer and an employer (the policyholder) for the benefit of the employees (the insureds) under the policy. It is of the essence of group life insurance that every life entering the group is covered without medical examination or other proof of insurability except that of being at work. In the early days of group insurance the minimum number of employees for a plan to be accepted without medical examination or evidence of insurability was 100. This number has become progressively reduced and is now as low as three, which may include executive officers, partners, or proprietors.

If the insurance is non-contributory, *i.e.* the employer pays the whole premium, 100% of the eligible employees must be included in the group. If the employees pay part of the premium, a contributory plan, then insurers insist that at least 75% of the eligible employees come into the plan and that that proportion remain in it.⁸

Insurance is usually written on a one-year term basis but it is possible to combine this term insurance with group permanent life insurance. Indeed, this combination of coverages has been developed to such an extent that it is now impossible to say how much of group life insurance is term insurance and how much is permanent.

Group life insurance is said to have distinct advantages for employers, employees and insurance companies. The employer benefits by offering a benefit, at low cost, to his employees. From his point of view, labour turnover is reduced since employees realize that they lose, at least temporarily, insurance coverage if they change jobs. The employee benefits by obtaining insurance at modest cost without the necessity of a physical examination. Finally, for the insurer, group insurance is profitable because the high cost of employing intermediaries is eliminated.⁹ Also, insurers are said to benefit from a low lapse rate.

Although group insurance is said to be a supplementary form of insurance for employees, there are some employees for whom their

7. For fuller accounts of the workings of group life insurance, see *Supra* n. 5, Chap. 25, and D.W. Gregg, *Group Life Insurance* (1962).

8. Contributory plans will not be used unless the employer has at least 50 eligible employees.

9. On the high costs of employing intermediaries, see the Report on Insurance Study submitted to the Superintendent, Ministry of Consumer and Commercial Relations, Ontario by Douglas H. Carruthers, Q.C. (now Mr. Justice Carruthers) (Toronto, 1973-75). The Report states that "Commission rates alone in auto and property insurance range between 7% and 25% of premiums, with more business done at the higher end of that range"; *Id.*, at Vol. 3, 51.

group life insurance is their only life insurance.¹⁰ Even when group life insurance provides supplementary coverage, this fact does not reduce its importance because many employees will buy less individual life insurance than they otherwise would have bought, since they have already "bought"¹¹ a certain amount of group life insurance.

Before discussing the problems of group life insurance law in detail, it is necessary to stress that many, if not most, of the problems arise from the fact that the policyholder (the employer) is not the same person as the insured (employee). For one thing, when the policyholder buys a policy for someone else, he (the policyholder) is less likely to scrutinize the policy to see if there are unfair terms than if he were buying the policy for himself. In a group life situation, there is very strong pressure on the employer to consider only the price of the policy and to ignore the question of whether the policy provisions are fair or not.¹² Further, it is true that very few insureds are able to get insurers to delete obnoxious provisions from their policies but sometimes they have been able to do so. In the group life situation, it is impossible for the insured employees to get the insurer to remove an obnoxious provision since the employees get no notice of the policy provisions at all.¹³

An even more serious difficulty arises from the fact that the policyholder is not the insured. The fact that the policyholder is not the insured means that he (the policyholder) can by wilful or careless acts extinguish the insured's rights without the insured being aware that this has happened. It is instructive, in this regard, to compare the position of an employee under a group life insurance plan with the position of a mortgagee under a fire insurance policy. In the first place, while an employee under a group insurance policy may have his rights extinguished without being informed of that fact, *The Insurance Act* specifically requires that an insurer give the mortgagee

-
10. The proportion of employees who are covered by group plans but who would be uninsurable for individual policies has been estimated by one authority to be between 5 and 10 per cent of the total work force; see Gregg, *Supra* n. 7, at 21. In addition to this number must be added an unknown number of employees who are insurable for individual policies, but who choose to rely solely on their group insurance policies.
 11. Just as there is no such thing as a free lunch, there is no free group life insurance even when the employer pays the entire premium.
 12. I am happy to concede that most purchasers of insurance consider only the price of insurance. My only argument is that some purchasers of insurance who would normally study policy terms and the general reputability of a company before buying insurance are tempted when buying group life insurance to ignore these factors and to concentrate only on a very crude measurement of price.
 13. Even when the employees get notice of unfair provisions, they cannot bargain these away with the insurance company since they (the employees) did not purchase the policy. The employees would have to persuade the employer to enter into negotiations with the insurer to remove unfair provisions and the employer may not be interested in doing this.

notice of any purported cancellation of the policy.¹⁴ Second, while employees may suffer because of some error or omission on the part of the employer, the standard mortgage clause provides that the interest of the mortgagee "shall not be invalidated by any act or neglect of the mortgagor."¹⁵ Neither of these protections afforded to mortgagees is available to employees under a group life insurance policy.

It is now necessary to examine, in some detail, the potentially precarious situation of an employee under a group life insurance plan.

The Legal Problems Involved in the Use of Group Life Insurance

The Problem of Unfair Terms

The first problem that arises from the use of group insurance is one that is common to all kinds of insurance in every country where insurance is sold. That problem is the central one of how to regulate unfair terms in insurance contracts.¹⁶

Our insurance law deals with the problem of unfair terms in a number of ways. In the first place, the Legislature has enacted a number of provisions which give the insured a minimal amount of protection. Thus, an insurer cannot avoid a policy because of the insured's misrepresentation without proof that the misrepresentation related to a material fact.¹⁷ Second, the Legislature can require, as it does in the case of automobile insurance, that an insurer's policy has to be approved by the Superintendent.¹⁸ Third, the Legislature may, as it does in the case of fire insurance, give the judiciary power to strike down any "exclusion, stipulation, condition or warranty. . ." which is found to be "unjust or unreasonable by the court before which a question relating thereto is tried."¹⁹ Fourth, our courts exercise some control over unfair terms by the use of the *contra proferentem* doctrine which allows courts, in effect, to strike out unfair provisions in insurance contracts while purporting to construe them.²⁰

14. *The Insurance Act*, R.S.O. 1970, c. 224, s. 121.

15. See e.g. *London L&S Co. of Canada v. Union Insurance Co. of Canton Ltd.*, [1925] 4 D.L.R. 676 (Ont. S.C. App. Div.).

16. Even Professor Posner concedes, by a circuitous route, that there are unfair provisions in standard form contracts. After pointing out that competition deals adequately with the problem of the unfair provision, Posner states: "An occasional feature of printed contracts that is objectionable is the use of fine print to slip an onerous provision past an unwary customer"; R. Posner, *Economic Analysis of Law*, (1977) 85. Posner would regulate these provisions by deeming them to be fraudulent. Since this technique involves the use of a fiction, I see no merit in adopting it. I shall, therefore, continue talking about unfair provisions.

17. *The Insurance Act*, R.S.O. 1970, c. 224, s. 98(5).

18. *The Insurance Act*, R.S.O. 1970, c. 224, s. 201.

19. *The Insurance Act*, R.S.O. 1970, c. 224, s. 125(b).

20. For a truly remarkable use of *contra proferentem* in a group life insurance contract situation, see the recent decision in *Lund v. Great-West Life Assurance Co.* (1976), 66 D.L.R. (3d) 143 (Sask. Q.B.).

Of the four techniques described above, group life insurance is affected by the first and the fourth techniques. To deal with the legislative protection first, the Insurance Acts provide that a misrepresentation (or a failure to disclose) of a fact by the employer about an employee's insurability does not render the policy voidable, unless the insurer specifically asks for evidence of insurability.²¹ In addition, there are the standard protections available in the case of individual life insurance.²² These statutory provisions give but minimal protection against unfair policy provisions. The protection that is offered by the fourth technique of control, the doctrine of *contra proferentem*, is probably even less than that provided by the skeletal legal protections offered by the Insurance Acts. For one thing, the doctrine of *contra proferentem* requires that the Judge find an ambiguity in the insurance policy and not even the most compassionate Judge may be able to erect an ambiguity to defeat a clear but unfair policy provision. Second, in common with the third technique of control, the power given to courts to strike out unfair clauses, *contra proferentem* is a very crude device for attacking unfair policy provisions. Judges who know little about the insurance industry and who have no means of obtaining the actuarial evidence relevant for an informed decision, are, rightly, going to be very cautious about the way they exercise their power.²³ The danger then becomes that this power is exercised so sparingly as to offer no protection.²⁴

The third drawback with judicial control, overt or covert, is that even if a clause is nullified, the insurer is not prevented from continuing to use an obnoxious clause or one very similar to it. The insurer loses nothing by continuing to use the obnoxious clause and it has a powerful weapon against an insured who does not seek legal advice or one who consults an incompetent lawyer. Even where the insured consults a competent lawyer, the obnoxious clause may serve the function of buying the insurer valuable time. But for the offensive clause, the insurer might have paid immediately. A dispute over an

21. *The Insurance Act*, R.S.O. 1970, c. 224, s. 158(3).

22. See e.g., the protection given by incontestability provision, *The Insurance Act*, *Id.*, and the protection given by the grace provision, *The Insurance Act*, R.S.O. 1970, c. 224, s. 156(2).

23. Thus, I have not been able to find a single reported case in which a court has used its power under s.125(b) of *The Insurance Act* to nullify an unreasonable or unfair provision in a fire insurance policy. This is so, despite the fact that the provision has been in force since 1889, and the courts have been given every opportunity to exercise their power.

24. For a more sanguine view of the ability of the courts to offer protection to the insured see R. Keeton, "Insurance Law Rights at Variance with Policy Provisions" (1970), 83 Harv. L. Rev. 961, 1281. In a later article, Professor Keeton concedes judicial protection through the doctrine of honouring reasonable expectations produces highly unpredictable results; see "Honoring Reasonable Expectations in the Interpretation of Life and Health Insurance Contracts," 1971 Proceedings A.B.A. Section of Insurance, Compensation and Accident Law, 213.

offensive policy provision may give the insurer say, a year's use of the insured's money.²⁵

Since the legislative and judicial protections seem so limited, one is tempted to examine the second technique of control: administrative approval of policies as an alternative means of regulation. It is clearly a better technique for policing insurance contracts than the various judicial techniques. Unlike the courts, the administrative authority is able to get the actuarial evidence necessary to make an informed decision as to whether a policy provision is fair or not. Secondly, the administrative authority, unlike the courts, is able to see that bad insurance contracts ("products")²⁶ are not used again by an insurer. The sanctions for continued use of prohibited insurance policies can be made severe enough to ensure compliance with any order of the administrative agency.²⁷

The administrative technique of control has one advantage over the legislative technique of control. The latter technique is essentially reactive. It operates after abuses have occurred. With administrative controls, it is possible to *prevent* bad policies from being sold.

Administrative policing of insurance contracts is not unknown in Canada; it is the principal technique used to police automobile insurance policies.²⁸ If it be argued that special administrative control is necessary in automobile insurance to safeguard the interests of innocent third parties, then we should have administrative control in group life insurance because that form of insurance is concerned solely with protecting innocent third parties (or their dependents).

To be sure, no known system of administrative control works perfectly. As Kimball and Pfennigstorf have pointed out, it is difficult to counter "the significant role of industry representatives in drafting standard policies."²⁹ But this practical limitation on controlling policy terms is shared by all forms of insurance regulation. The advantage of the administrative means of control, over the other techniques, is that it gets public officials to question and scrutinize

25. Even in cases where the Court has awarded the payment of interest to be made by the insurer, the rate has been sufficiently low for insurers to continue to remain unterrified; see e.g. *Inn Cor Int'l. Ltd. v. American Home Assurance Co.* (1973), 42 D.L.R. (3d) 46 (Ont. C.A.) (5% interest awarded) and *Bohl v. Great-West Life Insurance Co.* (1973), 40 D.L.R. (3d) 584 (Sask. C.A.) (5% interest awarded).

26. For a judicial description of the insurance contract as a product, see the opinion of Mr. Justice Tobriner for a majority of the Supreme Court of California in *Steven v. Fidelity & Casualty Co.* (1962), 377 P. 2d 284 (Cal. S.C.). Professor Leff has, rightly, suggested that we should view all standard form contracts as products. A. Leff, "Contract as Thing" (1970), 19 Am. U.L. Rev. 131.

27. Thus, for persistent offenders, the revocation of the insurer's licence would be an appropriate penalty.

28. *The Insurance Act*, R.S.O. 1970, c. 224, s. 201.

29. S. Kimball and W. Pfennigstorf, "Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice" (1964), 39 Ind. L.J. 674, at 729.

each policy provision for fairness. As argued earlier, they are in a better position than the courts to do this because they are able to obtain the information to make an informed decision on the fairness of a policy provision.

It is sometimes argued that a system of administrative control prevents insurers from marketing new policies. It is difficult to see any force in this argument. There is simply no evidence that insurers in Germany or the United States, to name two countries where administrative regulation is used,³⁰ are less innovative than insurers in the United Kingdom, where administrative regulation of policies is unknown.³¹ It is true that a system of administrative control would forbid the selling of bad group life insurance policies but this is no bad thing because bad insurance policies should be treated in the same way that we treat contaminated food³² or unsafe cars.³³

Unfortunately, there is no evidence that the provincial Superintendents of Insurance are thinking in terms of a system of administrative control for group life policies. According to Mr. James Darwish, Insurance Superintendent for Alberta and Chairman of the Accident and Sickness Legislation Committee, it is proposed that group life insurers spell out all coverage limitations "in concise, colloquial language that is clear, unambiguous and easily readable."³⁴

While the exhortation to insurers to write their policies in plain English is to be welcomed,³⁵ disclosure of unfair terms cannot be regarded as a technique of control. Pointing out unfair terms in an insurance policy is the equivalent of selling a defective product without giving the disappointed purchaser any right to reject the defective product. Since we do not tolerate this state of affairs when

-
30. See S. Kimball and W. Pfennigstorf, "Administrative Control of the Terms of Insurance Contracts: A Comparative Study", (1965), 40 *Ind. L.J.* 143.
 31. See the statement of Professor Gower that "there can be few countries, . . . where the insurance companies are allowed the same freedom to dictate their own terms." See his chapter, "Business" M. Ginsberg (ed.), *Law and Opinion in England in the 20th Century* (1957) 143, at 163. Although Professor Gower wrote this more than twenty years ago, it is still a correct description of present day English law.
 32. See *The Food and Drug Act*, R.S.C. 1970, c. F-27.
 33. See *Motor Vehicle Safety Act*, R.S.C. 1970 (1st. Supp.), c. 26.
 34. Report of meeting of the Provincial Superintendents of Insurance, *The Globe & Mail*, May 7, 1977, at B1.
 35. Complaints relating to the incomprehensibility of insurance policies go back to the days of Lord Mansfield. Thus, in *Simond v. Boydell* (1779), 1 *Doug.* 268; 99 E.R. 175 (K.B.), he said: "It is amazing when additional clauses are introduced, that the merchants do not take some advice in framing them or bestow more consideration upon themselves. I do not recollect an addition made which has not created doubts on the construction of it." *Id.*, at 271; 99 E.R., at 177. Nearly two centuries later, the Select Committee on Company Law said the following about the standard automobile policy: "Despite the fact that all the Committee members had had some experience in studying formal documents of a statutory nature, they nevertheless found the terms of the policy to be obscure in the extreme." Select Committee on Company Law, Report on the Insurance Industry — First Report on Automobile Insurance (1977) 39.

we are dealing with the sale of goods,³⁶ it is difficult to see why we should embrace it when the good that is being sold is called "insurance." One could only justify such a state of affairs if one thought that "insurance" was a less valuable good than ordinary goods. But such a theory is clearly untenable because we recognize in our public policy that insurance is a more valuable good than ordinary articles of commerce. It is on this basis that we require insurance companies to have minimum capital requirements,³⁷ and it is on this basis that we regulate their investment decisions.³⁸ Such extraordinary regulation, which we do not require of ordinary commercial enterprises, shows that we regard insurance as an exceptionally important purchase.³⁹

It is proposed to examine two clauses in group life insurance policies which, it is submitted, would not stand up to critical scrutiny if a fairness test were to be adopted.

The "Actively-at-Work" Requirement

Although direct evidence of individual insurability is not required for the purpose of establishing a group plan, insurers usually rely on indirect evidence of insurability by requiring that each individual be actively at work when the group policy is issued. The employee must also be actively at work when subsequent increases are made in the amount of his insurance.

The purpose of this requirement is said to be to prevent employers, particularly smaller employers, from obtaining "death-bed" coverage for one or more employees.⁴⁰ It may be conceded that in a family business, there is some danger that an employer will include an unemployable member of his family among those insured but the insurer can protect itself by asking for evidence of insurability in that case.⁴¹ To have protection of this kind against the risk of employers employing strangers so as to obtain "death-bed coverage" for the dependents of these strangers seems to be unnecessary and cruel. All the evidence we have suggests that employers discriminate, often irrationally, against those employees who are seen to be dis-

36. E.g., *The Sale of Goods Act*, R.S.O. 1970, c. 421, s. 15 and *The Consumer Protection Act*, S.O. 1971, Vol. 2 (Supp. to R.S.O. 1970), c. 24, s. 44(a).

37. See, principally, the *Canadian and British Insurance Companies Act*, R.S.C. 1970, c. 1-15 and the *Foreign Insurance Companies Act*, R.S.C. 1970, c. 1-16.

38. *Ibid.*

39. See J. Hellner, "The Scope of Insurance Regulation: What is Insurance for Purposes of Regulation?" (1963), 12 *Am. J. Comp. Law* 494. Professor Hellner argues forcefully and, in my view, correctly, that the social importance of a promise should be a very important factor in deciding whether an enterprise is to be treated as being engaged in the business of insurance.

40. See e.g., Gregg, *Supra* n. 7, at 35-36.

41. *The Insurance Act*, R.S.O. 1970, c. 224, s. 158(3).

abled or sick.⁴² Indeed, employers in Canada are given a subsidy through the operation of the Second Injury Fund,⁴³ to encourage them to employ disabled workers.

The arbitrary and unjust results that may occur as a result of the "actively-at-work" requirement can easily be illustrated by considering a number of hypothetical cases:⁴⁴

(i) An employer with 400 employees⁴⁵ takes out a one-year group term policy for his employees commencing on January 2, 1978. On that date, five employees are not working. One of the employees is not working because he is ill and four of the employees are on vacation. On January 5, 1978, the employee who is ill at home is killed in a household accident and the other four employees are killed in an automobile accident. None of the dependents of these employees would be entitled to recover, since none of these employees were "actively-at-work" when the policy was issued.

(ii) An employer with 300 employees took out a one-year group term policy for his employees commencing on January 2, 1968. Every year the policy was renewed and on January 2, 1978, the benefits under the policy were increased. On January 2, 1978, X who had been employed since the policy was first taken out is not at work because of illness. On January 5, 1978, X dies as a result of illness. X's dependents would not be entitled to recover because most group life policies require that employees be "actively-at-work" when the amount of coverage for them is increased.

(iii) An employer with 300 employees took out a one-year group term policy with the Good Faith Insurance Company on January 2, 1948. Every year the policy was renewed until January 2, 1978. On that date, the employer changed insurers and effected a one-year group term policy with the Reliable Insurance Company. On January 2, 1978, Y, an employee who had been covered by the group policy since its inception in 1948, was not at work because of illness. On January 5, 1978, Y died as a result of illness. Y's dependents would not be able to recover since Y was not "actively-at-work" when the

42. For a discussion of discrimination in England against disabled workers, see F. Field, *Unfair Shares: The Disabled and Unemployment*, Low Pay Unit Paper No. 20, (1977).

43. Briefly put, the Second Injury Funds operated by the various provincial Workmen's Compensation Boards seek to encourage employers to employ disabled workers by not charging the full costs of compensating the disabled worker in a subsequent accident to the employer. The efficacy of these funds in achieving their stated purpose is open to very serious doubt.

44. I have been able to find only one reported case on the interpretation of the "actively-at-work" requirement: *Kriluck v. Imperial Life Assurance* (1965), 49 D.L.R. (2d) 196 (Ont. H.C.). We know, however, from other problems in insurance law, notably the insurer's power to terminate coverage, that the absence of reported litigation does not mean that a particular provision is not giving rise to difficulties.

45. I have chosen numbers lower than 500 because insurers generally waive the "actively-at-work" requirement in enterprises with more than 500 employees.

new policy took effect. (Y's dependents would have been able to recover if his employer had maintained his insurance with the Good Faith Insurance Company since Y was actively-at-work when the policy was first taken out).

There is no need to give further examples of employees who are deemed to be ineligible for coverage because of the actively-at-work requirement. Suffice it to say, that in addition to the hypothetical situations canvassed, employees who are laid-off, locked-out, or who are on strike, all run the risk of running afoul of the actively-at-work requirement. What is ironic about the actively-at-work requirement is that many of the employees who are caught by it, are employees who were insurable as good risks. It is, indeed strange, when a form of insurance that is supposed to be more tolerant of the poor risk, turns out to be more demanding in its qualifications for eligibility than a form of insurance which is supposed to impose more stringent criteria for acceptability.

In short, it is suggested that the actively-at-work requirement should be removed. A model statute should state that the only condition the employee needs to satisfy is that there is *bona fide* employment relationship. It should, further, be provided that if an employee is unable to work because of disability, or because of leave of absence, temporary lay-off, lock-out, or a strike, that the employment relationship should not be considered terminated, unless the employer chooses expressly to do so.

The Probationary Work Period

A clause which performs the same function as the "actively-at-work" provision is the requirement present in nearly all group policies that the employee serve a probationary period of employment before coverage becomes effective. The probationary work period differs from the "actively-at-work" requirement in that the former period runs for a stipulated period of time, from say, 30 to 90 days whereas the "actively-at-work" is of indefinite duration.

The difficulty with the probationary work period requirement is that, if it is made a very short period, say 30 days, there is no actuarial evidence that employees who die in the first month of work are likely to be poorer risks than those who do not die within this period. A 30-day period may be too short a time in which to separate out the good risks from the uninsurables. If, however, we insist on say, a 90-day probationary requirement in order to reduce the lottery-like character of a probationary period that is too short, then we are depriving employees of their coverage in a one-year group term policy for one quarter of the period of their coverage.

Another problem with the probationary work requirement is that it gives no security to an employee who changes jobs. Thus, an employee who began work in 1948 and who is now working for say, his seventh employer may run afoul of the probationary period, after having survived probationary periods for his six previous employers. For the vast number of employees who change their jobs, probationary periods mean that these employees have, in effect, to prove that they are insurable on several different occasions. This state of affairs means that an employee is deprived of the security that life insurance is intended to provide.

As I have argued above,⁴⁶ there is not a shred of evidence that employers collude with their employees to obtain the latter "death-bed" coverage. Indeed, the evidence indicates that employers are cautious to a fault in their hiring policies.⁴⁷ Insurers seek to reinforce this caution on the part of employers by a system of experience rating which gives dividends to employers with favourable claims experience.⁴⁸ Finally, insurers are able to cancel a group policy when they suspect a collusive hiring by an employer, and they may ask for evidence of insurability⁴⁹ in situations where they (the insurers) fear that employers are not being selective enough in their hiring policies. In the light of all these protections available to the insurer, it is suggested that the probationary work requirement should be abolished.

The Right of the Employer and the Insurer to Terminate the Policy

In an individual life insurance policy, the insured does not have to worry about the threat of cancellation. It is true that the insurer may avoid the insured's policy because of misrepresentation or non-disclosure on the insured's part⁵⁰ but even this right becomes attenuated after two years because of the incontestability clause which requires the insurer to prove fraud on the part of the insured.⁵¹ By way of contrast, a group life policy may be terminated either by the employer or the insurer. Such terminations may occur without the individual employee being aware of the fact of termination.

The Insurer's Right to Terminate the Policy

It is true that many insurers are unlikely to wish to terminate group life insurance. However, the possibility exists and the insurer may cancel, for example, because it feels that the employer has

46. Text, *Supra* n. 42-43.

47. See *Supra* n. 42.

48. In addition to the employer's claims experience, the other factor that will be relevant in determining whether an employer gets a dividend is the length of time the policy has been in force.

49. See *Supra* n. 41.

50. See *The Insurance Act*, R.S.O. 1970, c. 224, s. 157(2).

51. See *The Insurance Act*, R.S.O. 1970, c. 224, s. 158(2).

dishonestly procured insurance for an employee or else, because the employer suffers catastrophic losses. The guidelines issued by the provincial Superintendents of Insurance in 1976 exhort insurers not to cancel policies except for non-payment of premiums,⁵² but this guideline is not binding on insurers.

As regards non-payment of premiums, it is suggested that the insurer should be able to avoid the policy if the employer is more than twelve months in arrears with the payment of his premiums. It is appreciated that this is a very long grace period,⁵³ but unless a long grace period is allowed, the dislocation suffered by hundreds, perhaps thousands, of employees would be very great.

Insurers should also be able to avoid the policy if they can prove that the employer has been making fraudulent misrepresentations, or has otherwise been misusing the group insurance device. Unless the employer has been guilty of some form of misconduct, it is difficult to see why the insurer should not be under an obligation to renew the policies at reasonable rates. This is the insurer's obligation in individual life insurance. It is impossible to see why the insured under a group life policy should enjoy less protection than he would have had if he had taken out an individual life policy.

The Employer's Right to Terminate the Policy

Just as it is unlikely that many insurers will want to cancel group life insurance policies, so very few employers will want to deprive themselves of the benefits that they (the employers) derive from the group insurance device. Still, it is possible to think of situations where an employer may cancel a group insurance policy either as a cost-saving measure or as a punitive measure against some perceived employee misconduct.

There is a remarkable U.S. decision which gives the employee protection against cancellation of the group policy by the employer but it is extremely unlikely that similar protection would be afforded to employees in Canada. In *Hinkler v. Equitable Life Assurance Society*,⁵⁴ the employee died after the employer had cancelled the policy but within the grace period. The Court held that the employee's beneficiary (his wife) was entitled to recover since as a beneficiary under an insurance policy, she had a vested interest in the policy, which though defeasible by lapse, could not be destroyed by cancellation. It is difficult to see how a Canadian court could reach

52. See Rule 1(3)(c) of the Rules governing Group Life Insurance, Proceedings of the Association of Insurance Superintendents (1976) 180.

53. Compare the usual grace period of 30 days, *The Insurance Act*, R.S.O. 1970, c. 224, s. 156(2).

54. (1938), 22 N.E. 2d 451 (Ohio C.A.); see also a note on the case, "Cancellation of Group Insurance by Employer Without Consent of Employee (1940), 49 Yale L.J. 585.

the same result. The language of vested rights which cannot be destroyed without the employee being notified of that fact does not seem to have even a remote parallel in Canadian jurisprudence.

An employee whose group insurance policy has been terminated by the employer may have a remedy against his employer but even this is somewhat problematic. For example, if the employer agrees to pay premiums under a collective agreement and he cancels the policy, it is not clear what rights the dependents of an employee who died after the policy had been cancelled, would have against the employer. It would appear to be the case that only the union could sue in such a case and the union has not suffered any financial loss. It is true that the employer might be found to have committed an unfair labour practice and it might be possible for the Labour Board or an arbitrator to make some order seeking to reinstate the group policy⁵⁵ or to award damages to an individual employee's dependents, but this kind of relief might be slow and uncertain.⁵⁶

In a situation where there is no collective agreement, an employee's dependents might find similar difficulties in recovering against the employer for breach of contract. For one thing, the contract between the employer and the employee may expressly give the employer the right to terminate the policy at any time. If an employer does cancel the policy without notifying the employee, the right of the employee's dependents are highly problematic. The employee's dependents might try to argue that the *Hedley Byrne*⁵⁷ principle extended to situations where the employer failed to communicate information which he should have done as a prudent employer but it is very doubtful if, fiduciary obligations to one side,⁵⁸ the courts will impose liabilities for negligent withholding of information.⁵⁹

In short, it is suggested that the employer should not be able to cancel a group insurance policy. Similarly, an employer should be under an obligation to renew and maintain policies, unless a majority of employees vote to terminate their policies. Employees in this situation may be persuaded by the employer that he (the employer) can

55. Even if the labour arbitrator (or Board) made an order seeking to compel the employer to reinstate the group policy, the insurer might refuse to do so.

56. For a discussion of the uncertain scope of the labour arbitrator's remedial authority, see P. Weiler, "The Remedial Authority of the Labour Arbitrator: Revised Judicial Version" (1974), 52 Can. Bar Rev. 29.

57. *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

58. See *Bank of British Columbia v. Wren Developments Ltd.* (1974), 38 D.L.R. (3d) 759 (B.C.S.C.).

59. *Bango v. Holt* (1971), 21 D.L.R. (3d) 66 (B.C.S.C.) imposed a tortious duty on a real estate agent to disclose relevant information to a prospective purchaser but there was also a finding of fraud in that case. For a more traditional statement of the law refusing to impose a tortious duty to disclose material information see *Argy Trading Development Co. v. Lapid Developments Ltd.*, [1977] 1 W.L.R. 444; [1977] 3 All E.R. 785 (Q.B.).

find a cheaper group insurer or the employees may be persuaded to accept higher wages in place of group life insurance. In the second situation postulated above, it would be necessary to expressly safeguard the right of the employees to convert their policies.⁶⁰

The Consequence of the Employer's Failure to Pay Premiums Punctually

If an employer fails to pay premiums when due, and does not pay them within the 30-day grace period allowed by the provincial Insurance Acts,⁶¹ then employees under a group life policy are left uncovered, whether they know of this fact or not. This proposition is illustrated by the recent Supreme Court decision in *Northern Life Assurance Co. v. Reierson*.⁶² In *Reierson*, the employer sent a cheque to the insurer in payment of a premium under the policy. The cheque was returned by the drawer's bank because of insufficient funds. The insurer thereupon requested a replacement cheque, retaining the cheque returned by the bank. Shortly after the expiry of the period of grace, one of the employees covered by the policy died and a few days later a cheque was sent to the insurer to replace that returned by the bank. Not surprisingly, the Alberta Court of Appeal (reversing a perfunctory trial court opinion), held that the beneficiary was entitled to succeed on the ground that the insurer by its conduct in retaining the returned cheque and requesting a replacement had elected to treat the policy as still in force, thereby waiving its right to treat the policy as lapsed.⁶³ The Alberta Court of Appeal's decision contains a full analysis and discussion of authorities both in the law of insurance and in contract law generally.

The Supreme Court of Canada reversed the decision in an uncharacteristically tired and careless opinion written by Mr. Justice Dickson for a five-man Court. According to Mr. Justice Dickson, the insurer's conduct in asking for a replacement cheque was not express or unequivocal enough to amount to a waiver. It is difficult to know in what way the insurer's conduct could have been less equivocal. It is true that the insurer could have said, "We hereby waive the breach" but no one, not even a lawyer, uses that kind of language. It is clear that the insurer was going to cash the replacement cheque, rather than say, use it as something to be framed.

Shocking though the decision in *Reierson* is, it is important to point out that it would still be a frightening decision even if the in-

60. I deal with this problem under *The Employee's Right to Convert his Policy*, *infra*.

61. *E.g.*, *The Insurance Act*, R.S.O. 1970, c. 224, s. 156(2).

62. [1977] 1 S.C.R. 390, (1976), 67 D.L.R. (3d) 193 (hereinafter referred to as *Reierson*).

63. *Reierson v. Northern Life Assurance Co.* (1974), 48 D.L.R. (3d) 276 (Alta. S.C. App. Div.).

surer had not waived the breach. It is just as wrong to penalize employees for the negligence of their employer, as it is to penalize the mortgagee for the carelessness of the mortgagor. It is bizarre that we regard the first situation with equanimity whereas we view the second one as intolerable.⁶⁴

There is abundant authority from the United States taking the position that in an action by an employee under a group policy, the failure of the employer to pay the premium could not be raised as a defence so as to defeat the employee's claim.⁶⁵ It is true that the cases from the United States were cases where the employee had made a contribution, but the employer had failed to transmit the premiums. This cannot, however, be treated as a significant difference from the situation in *Reiersen* where the employer was liable for the entire premium.

Since we derived the whole notion of group life insurance from the United States, it is remarkable and disturbing that these cases were not cited to the Supreme Court in *Reiersen*.⁶⁶

It might be argued that in a case where an employee's dependents have suffered as a result of the employer's failure to pay the premium, the dependents should have a right against the employer, rather than the insurer. Such a view would lead to unfortunate results in many cases. As I have argued above, an employee may not be able to prove that he has a contract with his employer or, even if he can prove a breach, he may not be able to prove loss.⁶⁷ Further, it should be noted that the employee has no means of knowing whether the premium was in fact, paid or not. Since the employer and the insurer are the parties who have the knowledge as to whether the premium was paid or not, it is suggested that an employee's dependents should be able to claim from the insurer. The insurer should then be left with its claim for unpaid premiums from the employer.

64. See *Supra* n. 15.

65. See e.g. *All States Life Insurance Co. v. Tillman* (1933), 146 So. 393 (Ala. S.C.); *Missouri State Life Insurance Co. v. Compton* (1934), 73 S.W. 2d 1079 (Tex. C.A.); *Sun Life Assurance Co. v. Coker* (1933), 61 S.W. 2d 447 (Ark. S.C.). But see *Newman v. Home Life Insurance Co.* (1961), 255 N.C.722, 122 S.E. 2d 701 (S.C.).

66. Chief Justice Laskin has said, extra-judicially, "There is no question today about the readiness of Canadian courts to consider American decisions, especially in areas of the law like insurance where American experience has been deep . . ."; "American Legal Influences in Canada," Address to the Law Society of the College of Law of the Arizona State University (April 1, 1975) quoted in M. Herman, "Law Clerking at the Supreme Court of Canada" (1975), 13 Osgoode Hall L.J. 279, at 284. For two recent examples of Supreme Court decisions where U.S. decisions seem to have been of decisive importance see, *Leepo Machine Products Ltd. v. The Western Assurance Co.*, [1973] S.C.R. 171, (1972), 31 D.L.R. (3d) 224; and *Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd.*, [1978] 1 S.C.R. 317, (1976), 69 D.L.R. (3d) 558.

67. See text, *Supra* n. 55, and 57-59.

It is suggested, therefore, that legislation should immediately be passed, stating that the employer's failure to pay a premium under a group life insurance policy should not constitute a valid defence to an employee's claim. As I have argued in the previous section, an insurer should be able to terminate a group policy if the employer is more than twelve months in arrears with the payment of his (the employer's) premiums but in such a situation, the insurer and the employer should be required to advise employees that coverage is terminating, so that the employees can exercise their right to convert their policies. It is suggested that failure on the part of the insurer and the employer to notify employees of the termination of coverage, should render both liable to the employee's dependents for the face amount of the policy.

Employer Errors in Administering the Policy

Sometimes, an insurer will resist liability because of some administrative error on the employer's right. Thus, in some cases, an insurer has resisted a claim because an employer failed to add the employee's name to the list of those persons employed by the employer.⁶⁸

One possible means of giving relief to the employee's dependents is indicated by the decision of the Supreme Court of Canada in *Leepo Machine Products Ltd. v. Western Assurance Co.*,⁶⁹ but there are difficulties with that decision as will be indicated. The plaintiff had taken out an "all perils" subscription policy which covered his inventory property. The policy provided for an annual premium change which varied with the inventory stock holdings of the company over the year. The insured was required to file monthly inventory reports with the insurer, the purpose of the reports being initially to determine the annual premium.

Prior to the fire, a report had been sent to the insurer noting inventory holdings valued at \$40,000 in one of three locations covered by the policy. After the fire it was alleged by the insured that a typing error had been made when the report was typed by the secretary, and that the proper inventory holding at the time was \$140,000. The insurer was notified of this error some four days to two weeks after the fire.

68. See e.g., *Magee v. Equitable Life Assurance Society* (1932), 244 N.W. 518 (N.D.S.C.); *Gilford v. Emergency Aid Insurance Co.* (1949), 40 So. 2d 868 (Ala. S.C.).

69. [1973] S.C.R. 171; (1972), 31 D.L.R. (3d) 224 (hereinafter referred to as *Leepo*). For an excellent discussion of this case and the problem of rectification in insurance law, see Woodcock, "Rectification in Insurance Law: A Lost Remedy or a Legal Chameleon?" (1977), 3 *Queen's L.J.* 151.

Mrs. Justice Osler allowed the plaintiff to rectify the value reporting clause and gave judgment in favour of the plaintiff company. The Supreme Court of Canada, reversing the Ontario Court of Appeal, held by a majority of 3-2 that the plaintiff company was entitled to recover. However, the majority, speaking through Mr. Justice Laskin (as he then was), expressly rejected recovery on the ground of rectification.

Mr. Justice Laskin makes a contrast between the present situation and the position in marine insurance where rectification is readily granted. In his Lordship's words:

It follows that no such practice can be admitted here as prevails in marine insurance under which post-loss correction of values . . . may be made if there is proof of a *bona fide* error: see *Marine Insurance Act*, R.S.O. 1970, C.260, s.30(3). The Court of Appeal was unanimous on this point, and I agree with it.⁷⁰

The basis on which the majority granted recovery is contained in the following passage:

[P]roof of the clerical error and of the circumstances attending it places this case on the same footing as a case where the insurers are aware of or do not dispute the clerical error. For them, in such a state of the facts, to seek to rely on a literal application of cl. 10 would be to deny the good faith which underlies their insurance obligation.⁷¹

The fact that the employee's dependents would have to prove that the insurer was aware of the employer's error or some other extraordinary fact so as to trigger the insurer's obligation to act in good faith, makes *Leepo* a dangerous precedent to rely on in the field of group insurance. The second problem with the *Leepo* case is that a court may take the view that the principles in *Leepo* apply only to value-reporting policies.

A more promising basis for protecting an employee's dependents is to be found in the decision of the Saskatchewan Court of Appeal in *Bohl v. Great-West Life Assurance Co.*⁷² In *Bohl*, the insurer resisted payment to the employee's dependents on the ground that the employee had been wrongly described by the employer as a full-time employee. The Saskatchewan Court of Appeal held that the employee's dependents were entitled to recover because the employee was, in fact, a full-time employee within the meaning of the policy. More significantly, for our present purposes, the Court held that even if the employer had mis-classified the employee, the insurer was

70. *Id.*, at 171; 31 D.L.R., at 233.

71. *Id.*, at 188; 31 D.L.R., at 236.

72. (1973), 40 D.L.R. (3d) 584 (Sask. C.A.) (hereinafter referred to as *Bohl*).

bound by the employer's error since the employer was acting as the agent of the insurer in determining eligibility under the policy. The *Bohl* Court followed, on this point, the decision in *Elfstrom v. New York Life Ins. Co.*,⁷³ decided by the Supreme Court of California. In *Elfstrom*, the Court stated that:

The most persuasive rationale for adopting the view that the employer acts as the agent of the insurer, however, is that the employee has no knowledge of or control over the employer's actions in handling the policy or its administration.⁷⁴

As in the case of a dispute over the payment of premiums, the evidence in a dispute over an administrative error is in the possession of the employer and the insurance company. It is both unnecessary and unfair to the employee to involve him in this dispute, unless the employee has fraudulently colluded with the employer as a means of obtaining insurance.⁷⁵ If it be argued that the *Bohl-Elfstrom* rule is unfair to insurers, it should be pointed out that insurers can protect themselves against employer errors by entering into indemnity agreements with employers whereby employers are made to indemnify insurers for errors made by the employer in administering the policy.

The only weakness with the *Bohl* decision is that it does not have any statutory underpinning. It would, therefore, be open to other provincial Courts of Appeal, to say nothing of the Supreme Court of Canada, to refuse to follow the principle in the *Bohl* case. It is suggested that the *Bohl* principle should be translated into statutory form as soon as possible.

The Employee's Right to Convert his Policy

If the insurance on a person covered under a group policy ceases because of termination of employment or termination of membership in the class or classes eligible for coverage under the policy, such a person will usually be entitled to have issued to him by the insurer, without evidence of insurability, an individual policy of life insurance. This right on the part of an employee to an individual policy is called the right of conversion. In some circumstances, the right of conversion will be useless to an employee because he has lost his job and he cannot afford the premiums. In other situations, the employee will not wish to convert because he is moving into employment where the benefits are at least as adequate as they were in his

73. (1967), 432 P. 2d. 731 (Cal. S.C.) (hereinafter referred to as *Elfstrom*). For discussions of the decision see e.g. "Group Insurance Policies: The Employer/Insurer Agency Relationship," [1968] Duke L.J. 824 and "Group Insurance: Agency Characterization of the Master Policy-Holder" (1971), 46 Wash. L. Rev. 377.

74. *Id.*, at 738.

75. There was some evidence of fraudulent collusion between employer and employee in *Elfstrom* and the Supreme Court of California remanded the case so a finding could be made on this point.

previous employment. According to a guideline adopted by the provincial Superintendents in 1977, and made applicable to group life contracts issued or renewed after July 1, 1977, an employee will have the right to convert his policy to \$5000 or 25% of the amount in effect at the termination date, whichever is the greater.⁷⁶ These limits will come as a great shock to many employees, most of whom would have assumed that they could convert their policies for the full amount.

This option to convert for the whole amount should at least be open to those employees who can furnish evidence of insurability. For other employees, who may be doubtful about their insurability, conversion should be allowed at say, 75% of the amount in effect. The fear that employees will change jobs frequently so as to avail themselves of conversion rights, is utterly fanciful. The insurable employee gains nothing by moving from job to job because he can already buy life insurance at normal rates. The employee who is doubtful about his insurability is unlikely to change jobs in order to obtain conversion privileges, since such an employee will lose valuable rights, *e.g.* loss of seniority and pension rights.

But it is not only the fact that the right to convert is drastically restricted which is disturbing. Probably even more disturbing is the fact that an insurer need not as a matter of law, provide for any right of conversion at all. Such a state of affairs might have been understandable 50 years ago when group life insurance was in its infancy. Today, such a state of affairs borders on the incredible.

Conclusion

To some people, many if not all of the changes proposed above will seem to be far-reaching and impractical. One can readily understand such a view at a time when insurance law reform has come to a virtual standstill.⁷⁷ The reality, however, is quite different. The proposals made in this paper are very modest.

In some cases I have suggested, as with the *Bohl* principle,⁷⁸ that we codify existing doctrine. In other situations, as with the employer's failure to pay the premium being a defence to an employee's dependents' claim under the policy, I have suggested that we follow United States doctrine.⁷⁹ Finally, I have suggested that

76. The Globe & Mail, May 7, 1977, at B5, col. 1.

77. Anyone who doubts the validity of this proposition should compare our present day insurance legislation with our insurance legislation as at say, 1910.

78. See text, *Supra* n. 72-75.

79. See *Supra* n. 66.

atavistic doctrines such as the "actively-at-work" requirement⁸⁰ and the probationary work requirement⁸¹ should be given their quietus.

When it is realized that our real need is a comprehensive accident and sickness scheme,⁸² reforms of the kind I have suggested amount to little more than modest reforms. The fact that the reforms I have suggested will be seen by many as expensive, revolutionary and impractical, is, indeed, a cause for great sadness.

80. See text, *Supra* n. 40-45.

81. See text, *Supra* n. 46-49.

82. See T.G. Ison, *The Forensic Lottery* (1967); P. Atiyah, *Accidents, Compensation and the Law* (1975); H. Glasbeek and R. Hasson, "Fault — The Great Hoax" in L. Klar (ed.), *Studies in Canadian Tort Law* (1977) 395.

