The risk theory requires a careful analysis of the duty, provides for the application of significant public policy considerations, and affords a convenient means for a clear, understandable instruction to the jury. These advantages make Cardozo's approach not only desirable but necessary to an intelligible explanation of the basis of determination in negligence actions. Courts have employed the risk theory in decisions concerning manufacturers' liability, statutorily imposed fault, and even in some early common negligence cases. Judges have been applying the risk analysis of duty under the foreseeability test of causation making them a part of Indiana law; proximate cause language of these opinions serves only to veil and confuse the critical issues. Since proper use of the risk theory leaves nothing to be considered under the element of proximate cause, the judiciary should abandon the language of the causation concept and clearly adopt Judge Cardozo's rationale.

PROBLEMS CREATED BY THE PURCHASERS' INABILITY TO BARGAIN OVER LIFE INSURANCE

Recent criticism of the insurance industry has not been aimed at either the financial practices or management of the companies but rather at the product sold, the insurance policy.[1] Basically this is due to a prevailing dissatisfaction with certain results accruing when contract law is applied to the policy.[2] The field of life insurance contains many examples of these unsatisfactory results. Although each instance is a complete problem in itself, they are, when viewed together, illustrative of the larger issue.

The law of misrepresentation has an important position in present day life insurance litigation. It owes its prominence, in a large sense, to judicial and legislative dissatisfaction with the results obtained when the strict common law doctrine of warranties was applied to life insurance contracts.[3] Today, the statutes of most states provide that all statements

since the consequences were not unnatural. By the definition of the risks to be perceived, the court answered the issue of proximate cause.

1. "Generally, the criticism which is aimed at insurance is not criticism with respect to financial matters or management. It is criticism of the product which insurance companies sell. . . . This condition of affairs has been developing for two hundred years or more. It grows worse instead of better. . . ." Shaver, *Pitfalls in Insurance Policies*, [1950] INS. L.J. 801, 802.

2. The policy of insurance is a contract between the parties and is governed by the principles of contract law. 1 FREEDMAN, RICHARDS ON THE LAW OF INSURANCE §1 (5th ed. 1952).

3. The application by the early courts of the strict doctrine of warranties to the life insurance policy resulted in widespread hardships for the insured. VANCE, HANDBOOK ON

made by the insured shall, in the absence of fraud, be deemed representations rather than warranties.[4] However, in most jurisdictions a material false representation will void the policy, even though innocently made by the insured.[5] In the ordinary insurance purchasing situation, in which the insured fills out a lengthy and complex application prepared by the company, the possibilities of a negligent false statement are numerous. For this reason, the courts have, in many cases, gone to great lengths to avoid forfeitures of policies because of a misrepresentation.[6] Thus, representations are construed liberally in favor of the insured and need be only substantially true.[7] Some courts even require knowledge by the insured of the falsity of the statement before they will void the policy.[8]

The doctrine of concealment as applied in insurance law, differing from that in contract jurisprudence, has also been severely criticized.[9] The Restatement of Contracts defines concealment as an affirmative act, such as covering up a material defect.[10] In insurance law, however, according to the strict marine rule, concealment includes mere nondisclosure of a material fact.[11] The doctrine has been somewhat modified in life and fire insurance by requiring that such omissions be "fraudulent,"[12] but the

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THE LAW OF INSURANCE §74 (3d ed. Anderson, 1951). A warranty is characterized by the fact that it must be strictly and absolutely complied with. A mere misstatement of an immaterial and trivial fact made in good faith by the insured is sufficient to void the policy under this doctrine. *Id.* §71. With the adoption by many states of the "entire contract" statutes, *e.g.*, NEW YORK INSURANCE LAW §142, statements made by the insured in the application also became part of the contract and under strict common law rules would be warranties. Due to the imposition of hardships in many cases, the courts began to avoid such results by liberal construction in favor of the insured. 2 FREEDMAN, RICHARDS ON THE LAW OF INSURANCE §319 (5th ed. 1952).

4. NEW YORK INSURANCE LAW §142; IND. ANN. STAT. §39-4206a(5) (Burns Repl. 1952). There are similar statutes in twenty-five other states. PATTERSON, ESSENTIALS OF INSURANCE LAW §83 (1935).

5. MACLEAN, LIFE INSURANCE 493 (6th ed. 1945); VANCE, *op. cit. supra* note 3, §67.

6. See Harnett, *Misrepresentation in Life Insurance Applications: An Analysis of the Kansas Law and a Proposal for Reform,* 17 KAN. B.J. 214 (1948).

7. See Insurance Co. v. Wilkinson, 13 Wall. 222 (U.S. 1871). VANCE, *op. cit. supra* note 3, §70.

8. Metropolitan Life Insurance Co. v. Burno, 309 Mass. 7, 33 N.E.2d 519 (1941). There have also been numerous dicta to the effect that the statement, to void the policy, must be made with fraudulent intent. VANCE, *op. cit. supra* note 3, §67 n.13. See also Prosser, *Innocent Misrepresentations of Health in Insurance Applications,* 28 MINN. L. REV. 141 (1944).

9. Harnett, *The Doctrine of Concealment: A Remnant in the Law of Insurance,* 15 LAW & CONTEMP. PROB. 391 (1950).

10. RESTATEMENT, CONTRACTS §471, comment f (1932). See also RESTATEMENT, RESTITUTION §8, comment b (1937).

11. PATTERSON, CASES AND MATERIALS ON INSURANCE 587 (2d ed. 1947).

12. "The non marine rule . . . has four prerequisites: (1) The insured knew the fact; (2) The insured did not disclose the fact to the insurer, and the insurer was not chargeable with its knowledge; (3) The fact was material; (4) The insured knew the fact was material." Harnett, *supra* note 9, at 403. See also AMRHEIN, LIBERALIZATION OF THE LIFE INSURANCE CONTRACT 129 (1933); VANCE, *op. cit. supra* note 3, §61 n.12.

determination of fraud involves numerous difficulties. It is open to question as to whether the insured need only know the materiality of the concealed fact or if in addition an actual intent to deceive is required to render the policy voidable.[13] It has been suggested that this doctrine no longer serves a useful purpose and that adoption of the ordinary contract law definition would be beneficial.[14]

Some of the problems arising through the application of the doctrines of misrepresentation and concealment have been substantially mitigated by the adoption in many states of statutes requiring incontestable clauses. Under these provisions, after a specified amount of time has elapsed (usually two years), the insurance company cannot contest the policy except for nonpayment of premiums.[15] However, in the interim before the clause becomes effective, these doctrines are still applicable.

The effect and interpretation of exclusionary clauses are quite important to the life insurance purchaser for they are found in most policies and preclude recovery if death occurs under certain circumstances.[16] If the insured knows of the exclusions or never participates in the prescribed

13. "It [the nonmarine rule as to concealment] requires the insured's knowledge of the fact and nondisclosure of the fact to the insurer who is not chargeable with its knowledge and materiality. But in addition, the nondisclosure must have been in bad faith. The meaning of this last requirement is muddy in the very best tradition of empty legal verbalisms. Some courts tell us the disclosure must be fraudulent, others say there must be an actual intent to deceive. Then others rush in to say that a reasonable man would have known the fact was material, and that therefore the insurer's defense of concealment is effective." Harnett, *supra* note 9, at 402.

14. Kessler, *Forces Shaping the Insurance Contract,* [1954] INS. L.J. 151, 161. See also, Comment, *Life Insurance Receipts: The Mystery of the Non-Binding Binder* 63 YALE L.J. 523 (1954).

15. This clause was voluntarily adopted by some companies and has subsequently been required by statute in many states. *E.g.,* NEW YORK INSURANCE LAW §155; IND. ANN. STAT. §39-4206a(3) (Burns Repl. 1952). The basic effect of this clause is to give the company a reasonable time to determine the veracity of the insured's representations, while also declaring a time limit after which the beneficiary may be confident of recovery in case of death. VANCE, *op. cit. supra* note 3, §97. See Keesling, *The Ubiquitous Incontestable Clause,* [1928] LEGAL SECTION, AM. LIFE CONV. 229; Shield, *A New Look at the Incontestable Clause,* 9 ASS'N OF LIFE INS. COUNSEL 23 (1952).

16. Exclusions contained in life policies are usually of two kinds: those waived upon the payment of an extra premium, and those which void the policy in case of violation. The former include restrictions as to disease, occupation, residence, travel, war service, and aviation; the latter include voiding of the policy in case of suicide, dueling, violation of the law, death as punishment for crime. Although early policies were filled with restrictions and exclusions, modern policies have relatively few.

The basic exclusion clauses may now be said to include: suicide, military service, and aviation. Some states regulate these exclusions by statute (*e.g.,* NEW YORK INSURANCE LAW §155). However, the law is not clear as to the exact meaning or application of many exclusions.

Concerning the aviation exclusion clause, see KRUEGER, THE LIFE INSURANCE POLICY CONTRACT 309-310 (1953); VANCE, *op. cit. supra* note 3, §100.

Concerning the war exclusion clause, see KRUEGER, *loc. cit. supra* at 319-333; VANCE, *op. cit. supra* note 3, §101; Billings, *Of War Clauses,* [1952] INS. L.J. 793; Goldstein, *The War Clause in Life Insurance Contracts,* [1953] INS. L.J. 458; Wheeler, *The War Clause,*

activities, the insurance is probably adequate. However, in the event of his decease difficulties may arise when the beneficiaries discover that recovery is barred because the insured, unaware of the exclusion, met death in a manner not covered by the policy. In an effort to mitigate the ofttimes harsh results of these provisions, some courts have adopted the rather tenuous position that an incontestable clause overrides any exclusions and creates an absolute assurance of the benefit free from any dispute of fact except that of death.[17] Although the majority view is to the contrary,[18] these minority opinions tending toward a more than liberal construction in favor of the insured indicate a further attempt by the courts to accomplish by questionable means what they feel to be just results.

Another unsettled problem in life insurance is that of who should bear the risk of loss during the interim between the application for insurance and the delivery of the policy—the company or the insured. Under strict contract law the policy is not effective until delivered to the insured.[19] However, when a loss occurs during this period, the courts have sought to reach just results by varied interpretations.[20] Recovery has been allowed on a tort theory for the company's delay in acting on the application[21] and, occasionally, upon contract principles.[22] The use of a binding receipt on the part of the companies has often served to further confuse the issue. By such a receipt the company, in consideration of payment of the first premium, purports to extend coverage before delivery of the policy. However, due to the multiplicity of forms used, and possibly the different factual situations in which the question has arisen, the

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[1953] INS. L.J. 727.

Concerning the suicide clause, see KRUEGER, *loc. cit. supra*, at 294-307; VANCE, *op. cit. supra* note 3, §95; Fallon, *Coverage and Suicide in Life Insurance*, [1953] INS. L.J. 811.

17. Mr. Justice Holmes has stated: "The object of the [incontestable] clause is plain and laudible—to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death. . . ." Northwestern Mutual Life Insurance Co. v. Johnson, 254 U.S. 96, 101-2 (1920).

18. The leading case is Metropolitan Life Insurance Co. v. Conway, 252 N.Y. 449, 169 N.E. 642 (1930), which is followed in a majority of jurisdictions. VANCE, *op. cit. supra* note 3, §97. However, there are a number of jurisdictions in which this doctrine is not followed. For a complete and exhaustive analysis of the cases by jurisdictions, see Shield, *supra* note 15, at 53-120.

19. VANCE, *op. cit. supra* note 3, §42.

20. Delivery may often be constructive, and the courts have gone to great lengths to construe such a delivery from the words and acts of the parties. See Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198 (1919); VANCE, *op. cit. supra* note 3, §43; Carlton, *The Delivery of Life Insurance Policies As It Affects the Inception of Risk*, [1950] LEGAL SECTION, AM. LIFE CONV. 7.

21. See Collier, *Tort Liability for Negligent Delay in Acting on Applications*, [1948] LEGAL SECTION, AM. LIFE CONV. 10; Kessler *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COL. L. REV. 629, 635-637 (1943); Prosser, *Delay in Acting on An Application for Insurance*, 3 U. OF CHI. L. REV. 39 (1935).

22. See Kessler, *supra* note 21, at 634.

courts have reached conflicting results.[23] Whether or not such a receipt is in fact binding may be subject to conjecture in each case.

In each of these areas the pattern is similar. Either the application of strict contract law to the policy in question results in decisions harsh for the insured, or the courts attempt to avoid this difficulty by torturing or partially abandoning contract law.[24]

The basic cause of conflict lies in the fact that the purchase of insurance differs from the making of an ordinary contract. Insurance policy terms are, for the most part, not subject to negotiation. Although there are some differences in policy forms among the insurers and within an individual company, basic provisions do not vary substantially. These policies are prime examples of standardized contracts[25] to which the insured, if he desires protection,[26] must adhere.[27]

However, even if the bargaining position of prospective purchasers was such that they could negotiate for the terms of the policy, few would

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23. Havighurst, *Life Insurance Binding Receipts,* 33 ILL. L. REV. 180 (1938); Comment, *supra* note 14.

24. ". . . [M]any courts have shown a remarkable skill in reaching 'just' decisions by constructing ambiguous clauses against their author even in cases where there was no ambiguity." Kessler, *supra* note 21, at 633. Professor Patterson has stated: "The general law of contracts has been warped almost beyond recognition in applying it to insurance controversies." PATTERSON, ESSENTIALS OF INSURANCE LAW 44 (1935).

25. "Such contracts [life insurance] do not truly express an agreement at which the parties have arrived by mutual participation in determining all the terms and conditions of their contract. Most of the contractual terms are already fixed in advance by one of the parties, the insurer . . . leaving nothing to the party of the second part, the insured, except to 'adhere' to terms he cannot change, if he chooses to accept them." Carlton, *supra* note 20, at 11. See also AMRHEIN, *op. cit. supra* note 12, at 71-72; VANCE, *op. cit. supra* note 3, §§41, 44; Kessler, *supra* note 21; Schultz, *The Special Nature of the Insurance Contract; A Few Suggestions for Further Study,* 15 LAW & CONTEMP. PROB. 376 (1950).

For discussions of standardized contracts in general, see Cohen, *The Basis of Contract,* 46 HARV. L. REV. 553 (1933); Isaacs, *The Standardizing of Contracts,* 27 YALE L.J. 34 (1917); Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939).

For a discussion of English and Continental standardized contracts, see PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937).

However, for a contrary view as to the nature and effect of the present life insurance contract, see Dawson, *A Few Simple Rules of Contract Law and Their Application to Life Insurance Contracts,* 2 JOUR. AM. SOC. C.L.U. 325, 331 (1948); Eiber, *The Significance of Standardized Mass Contracts in Insurance,* 6 JOUR. AM. SOC. C.L.U. 84, 85 (1951).

26. "Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus, standardized contracts are frequently contracts of adhesion; they are a prendre ou a laisser." Kessler, *supra* note 21, at 632.

27. The term contract of adhesion was first used as applying to American insurance contracts by Professor Patterson. Patterson, *The Delivery of a Life-Insurance Policy,* 33 HARV. L. REV. 198, 222 (1919).

have the ability. The modern insurance contract is so complex and difficult to understand that the ordinary buyer is, due to lack of technical knowledge, largely unable to discriminate between provisions more or less favorable to himself.[28] He usually fails to read the policy and relies on the agent or the company to provide him with adequate insurance.[29] As a result, the insured does not have knowledge of either the extent of protection granted under the policy or of the duties and liabilities which he has assumed.[30]

In light of this situation, the problems that arise would seem to be expected in the logical course of events. When strict contract law is applied to policies standardized by the companies, the provisions of which are practically unknown to the insured, harsh results often occur. The insured or his beneficiary then finds himself without the protection that he thought he had purchased. Or, in the alternative, the courts have stretched contract law to the point of abandoning it in order to reach equitable conclusions. Both results are undesirable.[31]

If, then, existing contract law as applied to present company standardized contracts produces undesirable results, there are two methods which may be considered as possible remedies: changing the law applicable to the policy or altering the contract itself. Both have the common goal of modifying the present relationship between company and insured.

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28. This is the main reason that competition among the companies has not solved the problem. As Professor Patterson has stated: ". . . [C]ompetition assumes that the purchaser is able and willing to discriminate between the articles offered by different competitors, and that is just what the purchasers of insurance could not or would not do." PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES, 246 (1927).

See also Shaver, *Pitfalls in Insurance Policies,* [1950] INS. L.J. 801, 802.

29. "The prevailing business custom is for the insured to rely upon the accuracy, skill, and good faith of the person who acts for the insurer in filling out the application, delivering the policy, and collecting the premium." VANCE, *op. cit. supra* note 3, §44.

30. See Shaver, *supra* note 28, at 803.

However, the insured is usually held to a duty to read his policy and is charged with knowledge of its contents. See VANCE, *op. cit. supra* note 3, §44 n.27; Spain, *The Effect of the Failure of the Insured to Read His Policy,* [1948] LEGAL SECTION, AM. LIFE CONV. 109.

31. It is clear that a situation in which certain persons are without insurance protection, after having relied on it, is both socially and economically undesirable.

In regard to attempting to alleviate this difficulty by judicial construction, Professor Llewellyn has said: "A court can 'construe' language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throw out the troublesome ones. . . . The difficulty with these techniques of ours is threefold. First, since they all rest on the admission that the clauses in question are permissable in purpose and content, they invite the draftsman to recur to the attack. Give him time, and he will make the grade. Second, since they do not face the issue, they fail to accumulate either experience or authority in the needed direction: that of marking out for any given type of transaction what the *minimum decencies* are which a court will insist upon as essential to an enforceable bargain of a given type. . . . Third, . . . they seriously embarrass later efforts at true construction. . . ." Llewellyn, *supra* note 25, at 702-3.

It has been suggested that contract law should no longer govern the relationship of the parties to an insurance policy.[32] The assumption is thus made that by changing the applicable law the harsh results of an unequal contract may be mitigated. This method, when carried to its logical conclusion, would transform the relationship between the parties to one of status rather than contract.[33] The insured and the company would, then, each be bound by a body of rules constituting the insurance arrangement to which each party had impliedly assented—the one by purchasing insurance, the other by selling protection.

The other method, that of modifying the contract through governmental regulation, accompanied by a few alterations in the law, would primarily seek to alleviate the problem by assuring that the policy is a fair agreement from its inception. Thus, when the usual contract rules are applied to such a policy, the results should be equitable. By standardization through governmental action, the effects of unequal skill, knowledge, and bargaining power between the parties are counterbalanced by public supervision, thus creating a new relationship between the parties. This is predicated on the assumptions that fault lies in the present policy and that contract law is a necessary and useful part of this relationship.

At the present time, it would appear that both of these methods are being utilized to a limited extent in the field of life insurance. Most states require that certain standard provisions be inserted in all life insurance policies.[34] Although confined to limited areas, the effect of these re-

32. For example, Note, 35 YALE L.J. 203 (1925), suggests that the implied warranty of commercial law be applied to insurance contracts. It is maintained that an implied warranty of fitness for use would do away with the necessity of courts employing "conclusive presumptions" and others construing contracts against the insurance company in order to do justice to the insured.

See also Pfeister v. The Missouri State Life Insurance Co., 85 Kan. 97, 101, 116 Pac. 245, 247 (1911); Kessler, *supra* note 21, at 637-9; Patterson, *supra* note 27, at 216.

33. A relationship determined by status may be contrasted to a contractual agreement in that in the former the rights, duties, and liabilities of the parties arise not through negotiation but rather because of the nature of the relationship itself. Status thus means that the parties by assuming a certain relationship have also incurred certain duties and liabilities which are deemed essential to it, although neither party may have actually accepted or bargained for them. A contractual relationship, on the other hand, implies that the parties have bargained and negotiated for each right, duty, or liability constituting the agreement.

For a discussion of the present trends and problems concerning status and contract, see Cohen, *supra* note 25; Issacs, *supra* note 25.

34. See, for example, NEW YORK INSURANCE LAW §155. This Section provides for ten provisions which must be inserted, to the extent that they are applicable, in each policy that is issued. They need only be substantially complied with, and the insurer may issue a policy which is more favorable to the insured. Each policy form must be approved by the state insurance commissioner.

In brief, the statute requires: 1) grace period; 2) incontestable clause; 3) policy to constitute the entire contract; 4) misstatement of age provision; 5) participating policies to participate in the surplus annually; 6) cash surrender specified; 7) loans and loan

quirements has been to liberalize the contract in favor of the insured. However, at the same time, because these standard provisions do not completely eliminate the inequalities existing between the parties, courts still distort contract law to obtain desirable results. They are in effect applying a new body of law to insurance policies. By disregarding the terms of the contract in order to allow recovery, courts are actually making the relationship between insured and insurer one of status rather than contract.[35] However, this is being done in a haphazard way, and the result is confusion. On one side the contract is being modified in favor of the insured by governmental regulation; on the other the courts may refuse to apply contract law to interpret the policy.

It is not enough to say in justification of this practice that both methods are designed to accomplish the same goal—achieve desirable results when applying the law to the existing policy. This position ignores the fact that the two methods, although similar in this respect, have widely varying secondary ramifications.

To reason that strict contract law should not apply to insurance policies since harsh results often accrue fails to recognize that the problem is basically one of inequalities in the company-standardized contract which the law, when applied, merely emphasizes rather than creates. Removal of insurance policies from this law and attempted substitution of new rules of relationship derived from the proposition that the parties have assumed a certain status invites and creates new problems. Of what should this status consist? So long as the courts determine it, they may only occasionally depart from contract law. But should the legislature attempt to remove insurance from this jurisprudence, the problems would be immense. It would be impossible to determine legislatively an adequate status between insurer and insured without turning back to contractual tenets.[36]

Governmental standardization of policies is far more consistent with the real problem and much more likely to reach desired results without accompanying ill effects. Standardized contracts in themselves are not bad. They are beneficial to both the insurer and the insured when they

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values; 8) specification of the options in event of default in premium payment after three years; 9) installment table; 10) reinstatement clause. See also IND. ANN. STAT. §§39-4206a, 39-4206b (Burns Repl. 1952).

35. "In dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's 'calling,' and to what extent the stronger party disappointed reasonable expectations based on the typical life situation." Kessler, *supra* note 21, at 637.

36. Legislative prescription of such a status would appear to be dependent on relating it to some presently existing body of law since it would be impossible to provide in advance for each type of situation that might arise.

represent a fair relationship between the parties.[37] It is only when the contract has been standardized to embody the best interests of only one of the parties, such as prevails now, that difficulties arise. A revision is then necessary to express a relationship which might have resulted had they possessed equal skill and bargaining power. Since the policyholder does not now possess this equality or skill, and it is not conceivable that he ever will, the government must represent his and the general public's interest by a statutorily standardized contract.

This form of governmental intervention is not inimical to freedom of contract.[38] With policies at present subject to company standardization, it would be unrealistic to contend that governmentally standardized requirements represent a destruction of such freedom. It does not now exist under company control; consequently, the entrance of the public interest through the medium of legislation is only the logical step to balance the relationship.[39]

Furthermore, insurance contracts are already subject to governmental regulation. This varies from the completely standardized policy of fire insurance[40] to the very limited requirements of the uniform health and

37. "The legitimate interests of both the public and the insurance industry are served by a high degree of uniformity among insurance policies. The industry, with its mass production of policies, cannot afford the luxury of extensive bargaining with each individual policyholder; rational conduct of its business requires a wide range of uniformity. . . . But standardization means more than uniformity among policies issued by the same company. It means, ideally, uniformity of the product irrespective of the producer. . . .

"To the policyholder uniformity means a cheapening of costs, fair and equal treatment and the setting up of proper classifications without endangering the safety of the scheme." Kessler, *Forces Shaping the Insurance Contract,* [1954] INS. L.J. 151, 156.

38. "The notion that standardization is necessarily inimical to real freedom is a fallacy of the same type as the one that habits are necessarily hindrances to the achievements of our desires. There is doubtless the real possibility of developing bad social customs, as we develop bad individual habits. But in the main, customs and habits are necessary ways through which our aims can be realized. By standardizing contracts, the law increases that real security which is the necessary basis of initiative and the assumption of tolerable risks." Cohen, *supra* note 25, at 588.

39. ". . . [F]reedom of contract must mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract." Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract,* 43 COL. L. REV. 629, 642 (1943).

40. In 1873 agitation for reform resulted in the adoption by statute of a standard fire policy in Massachusetts. Mass. Laws 1873, c. 331, §§1, 2. However, the use of the policy by the underwriters was not mandatory and few were written under the statute. Following this, in 1886, New York adopted a standard form which was drafted by the New York Board of Fire Underwriters and adopted by the legislature. N.Y. Laws 1886, c. 488. Neither the policyholders nor the insurance department of the state had any representation or voice in the preparation of the form, and for this reason the main result of the standard policy was to codify its provisions in favor of the insurer. See O'Neil v. American Fire Insurance Co., 166 Pa. 72, 74, 30 Atl. 943, 945 (1895), for a judicial criticism of Pennsylvania's standard policy patterned after the New York form. However, the standard contract did to a great extent mitigate the previously confusing situa-

accident provisions law.[41] In the field of life insurance, standardization is at present limited to a few items;[42] they have been entirely satisfactory in the areas in which employed.[43] Their chief weakness is that they have restricted application.

It is possible to extend these standard requirements to embrace all of the major controversial aspects of the life policy without making it unadaptable to various conditions. Criticism of the statutory policy stems from its failure to allow for expansion of coverage or addition of provisions. Statutes requiring that certain clauses be inserted in the policy

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tion caused by the use of many varied forms.

After being in use for over a quarter of a century, the 1873 form became obsolete. Inequities resulting from its use became apparent and led to demands for revision. Thus, in 1918, a new form was adopted which, although like its predecessor was still balanced in favor of the insurer, was a substantial improvement over the 1873 provisions. N.Y. Laws 1917, c. 440.

Finally, in 1943, demands for a more simplified and modernized contract, resulted in the adoption of the 1943 New York Standard Fire Policy which is widely used today. N.Y. Laws 1943, c. 671; N.Y. INS. LAW §168. This form is a great improvement over all previous attempts at fire policy standardization and has resulted in simplified interpretation and greater protection for the insured.

For analysis of the 1943 form, see HEDGES, PRACTICAL FIRE AND CASUALTY INSURANCE 63-64 (5th ed. 1951); Chrichton, *The Statutory Fire Insurance Policy*, [1951] INS. L.J. 785; Patterson, *Insurance During the War Years*, 46 COL. L. REV. 345 (1946); Note, 42 COL. L. REV. 1227 (1942).

41. The Uniform Individual Accident and Sickness Policy Provisions Law was adopted by the National Association of Insurance Commissioners in 1950. See Van Wilhite, *The New Policy Provisions Law*, [1951] INS. L.J. 963; Cover, *Consideration of Legal Problems Presented When a Legal Reserve Life Insurance Company Enters the Accident and Health Field*, 9 ASS'N OF LIFE INS. COUNSEL 157, 179 (1952).

42. See note 34 *supra* for an analysis of the present New York requirements.

Statutes specifying completely standardized policies of life insurance, by enactment of the entire policy, have been attempted and subsequently repealed. New York enacted such policies in 1906. N.Y. Laws 1906, c. 326, §101. Their adoption came about largely as a result of the Armstrong investigation and the recommendations of that committee. REPORT OF THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK APPOINTED TO INVESTIGATE THE AFFAIRS OF LIFE INSURANCE COMPANIES, vol. 10, 439 (1905). However, the law was early held by the attorney general to apply only to the intrastate business of domestic companies, leaving foreign insurers free to write any type of policy in New York. Moreover, the contract forms were felt to be too inflexible. See Appleton, *Wherein Have Insurance Conditions Improved During the Past Twenty Years in the Field of Life Insurance*, 46 PROCEEDINGS NAT'L CONVENTION INS. COMM'RS 97-98 (1915). The provision prescribing standard policy forms was repealed in 1909, being replaced by a requirement that each contract must contain certain specified clauses, the form not being prescribed. N.Y. Laws 1909, c. 301, §7.

A few other states have adopted standard life policy forms, but their use is not compulsory. See VANCE, *op. cit. supra* note 3, §7, n.19.

Life insurance must fit many needs and flexibility is of prime importance. See HUEBNER, LIFE INSURANCE 13-82 (4th ed. 1950). Enactment of the policy was not able to accomplish this. However, this does not indicate that life insurance cannot benefit from increased governmental standardization.

43. "The insurance laws which are designed to regulate the terms of life insurance policies have had a very salutory effect in accomplishing their objective of assuring that the policyholder shall receive a fair contract. Such laws are also beneficial to insurers who are interested in maintaining high standards and who value the resulting good will." KRUEGER, *op. cit. supra* note 16, §19.11.

merely establish the minimum standard requirements for insurance protection. The underwriter may revise his policy to include new coverage and modifications as the needs of the business might demand as long as certain requisites of both inclusion and exclusion are met. Many of these desirable provisions can be found in some of the better policies now being written.

These standard clauses should be drafted with one basic goal in mind: granting the most adequate insurance protection consistent with the continued advancement of the insurance industry. These statutes should follow the present method of prohibiting certain provisions as well as requiring others. For example, exclusion clauses in so far as possible should be eliminated, and those that are retained should be incorporated in the name of the policy or otherwise stated in a prominent place on its face. Binding receipts should be of the satisfaction type,[44] and use of the acceptance type should be prohibited.[45] The doctrines of fraudulent misrepresentation and concealment as applied in insurance law should be reexamined to determine their necessity.[46]

With extension of standard clauses to other provisions of the life policy, the courts should abandon the practice of twisting and departing from contract law by strained constructions in favor of the insured.[47] The standard life insurance policy, if it represents a fair and equitable agreement between the parties, would result in a minimum of harsh decisions for the insured. Courts should recognize that the standard insurance policy is no longer the creation of the company and, thus, must be construed according to its terms rather than in either party's favor. Unfortunately, the latter practice still prevails in the interpretation of the completely standardized fire policy.[48] Possibly the addition of the life policy to the group of more stringently regnlated insurance contracts will hasten judicial recognition of the fact that when the reason for such a

44. Under this type of receipt, coverage commences the moment the premium is paid provided that the applicant is insurable according to the company's general regulations. Therefore, the insured and his beneficiaries would be protected whether or not the company "accepts" the application or "delivers" the policy. See Comment, *supra* note 14, at 536.

45. The approval type of receipt provides that if, prior to the insured's death, the application is approved by the company, coverage would commence from the date of application. However, the dangers inherent in this form are readily apparent; coverage depends not upon any act of the insured which he may control but upon "approval" of his application by the company.

46. Concealment as presently applied in insurance law should be discarded and the ordinary contract definition adopted. See Harnett, *supra* note 9, at 413.

47. See Kuvin, *Would a Uniform Insurance Law or Code be Advisable?*, [1953] INS. L.J. 422; Mooney, *Construction of the Life Policy*, [1952] INS. L.J. 200.

48. See 1 JOYCE ON INSURANCE 546-547 (2d ed. 1917); VANCE, *op. cit. supra* note 3, §136; Kuvin, *supra* note 47, at 426.

practice is removed, the practice itself should be discontinued. If this happens, insurance law would become a predictable body of jurisprudence.

Since the decision in the *South Eastern Underwriter's Case,*[49] federal control of insurance has been a real possibility.[50] However, standard provisions for life contracts could be promulgated under state supervision in a manner similar to the adoption of the standard fire policy.[51] Through this means substantial uniformity would be achieved without the disadvantages of centralized control in which it is difficult to consider or provide for local differences.[52]

These proposals are obviously not, nor are they intended to be, a panacea for the present or future ills of the life insurance industry. Such a program is not opposed to the best interests of the majority of present day companies, which are attempting to write a more than acceptable policy. It should rather act as a deterrent to those few companies which are less public spirited than their brethern and a stimulant to those companies who correlate the best interests of the insurance industry with the best interests of the public.

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49. United States v. South Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

50. See Leslie, *The Case for State Regulation of Insurance,* PROCEEDINGS OF AM. BAR. ASS'N, SEC. OF INS. LAW 188 (Sept. 17-19, 1951).

51. Probably the group most qualified to examine present conditions and determine the substantive requirements of further standard provisions would be the National Association of Insurance Commissioners. Their knowledge of the field could be supplemented by other experts in insurance. At the same time representatives of the insurance industry should have an opportunity to be heard on all issues.

See Martin, *The National Association of Insurance Commissioners and State Insurance Department Functions,* [1952] INS. L.J. 583.

52. For a discussion of relative advantages and disadvantages of state and federal control, see HUEBNER, *op. cit. supra* note 42, at 484-486.

For the position advocating state control, see Leslie, *supra* note 50; Lincoln, *Insurance Supervision,* LIFE INSURANCE TRENDS AND PROBLEMS 33-34 (McCohan ed. 1943).