

**33. Eric K.Fosaaen, AIDS and the Incontestability Clause, North Dakota Law Review, Vol. 66 : 239, pp. 267-295, 1990.**

Incontestability clauses have been used by the insurance industry for over one hundred years to encourage persons to purchase life insurance. Today, the incontestability clause is required in insurance policies to give a measure of assurance to purchasers that, upon death after many years of premium payments, benefits will be paid to beneficiaries notwithstanding any defect, misstatement, misrepresentation, or even fraud in the application for insurance. The incontestability clause may become increasingly important in coming years with the new issues raised by the Advent of Acquired Immune Deficiency Syndrome, the long latency period of that disease, and its fatal outcome.

**Specific Issues**

Nearly all states with a requirement of an incontestability clause hold that fraud by the insured at the inception of the policy of life insurance ceases to be a defense to the insurer after the running of the two year period of contestability. More than fifteen states' courts have held that the incontestability clause precludes the raising of virtually all defenses of the insurer after the running of the two year period. In these states, even the failure of a condition precedent to the beginning of coverage or the occurrence of a condition terminating coverage will cease to be defenses for an insurer who wishes to avoid a contract of insurance.

As applied to AIDS, such an interpretation of the incontestability clause may force insurers to accept a risk they were otherwise unwilling to assume if they had excluded AIDS from coverage. Without changes in the law of insurance regarding incontestability and HIV testing, in those states following *Simpson*, insurance rates may rise to unreasonable levels for everyone or insurers may elect to withdraw from the market.

Conversely, without protection, persons who are HIV seropositive, suspected to have AIDS, or belonging to an at-risk group may have great difficulty in obtaining life insurance. An approach should be taken to insure that life insurance will continue to be available to most persons and that life insurance premiums will not skyrocket.