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THE INSURANCE CONDITION SUBSEQUENT: A NEEDLE IN A SEMANTIC HAYSTACK

BERTRAM HARNETT AND JOHN V. THORNTON

I. INTRODUCTION AND DELINEATION OF PROBLEM

Few terms in the law occupy points so ambiguous in reference as does the term “condition.” The basic difficulty of assigning meaning to conditions is often compounded by the introduction of the modifying adjectives “precedent” and “subsequent.” The courts are accustomed to using the language of conditions, but are seldom addicted to careful analysis of the legal theory. Though the professors and the writers have given unsparingly of their literary efforts to the logical development of the condition problem, too often their refinements and semantic niceties produce distinction without practical difference. To the man at the bar, and to the apprentice, comprehension of the true nature of conditions precedent and subsequent, and an awareness of the working utility of the terms, are genuine tasks of mental gymnastics. There are several fertile fields of inquiry in pursuance of this subject, but because of the great extent of the problem, this essay focuses directly upon a most controversial compartment, the role of the condition subsequent in contracts of insurance. The condition subsequent has substantive and procedural implications of sizeable import in the law of insurance, and a comprehension of these implications in this lesser field facilitates understanding of such conditions in the law of contracts generally.

For a real understanding of the conditions precedent and subsequent, it is essential to establish the context in which the terms operate. The unfortunate coincidence that “condition” is at once a word of daily currency in the English language, a broad legal term, and also a narrower legal term, creates confusion, and leads to a certain amount of mental resistance to analysis of the concepts. But this delineation must be narrowed still further for contractual application inasmuch as there are really two levels of meaning to the condition problem in contracts.

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1. Conditions “precedent” and “subsequent” enjoy wide currency in the law of Property, Contracts, Insurance, Sales, Trusts, Wills, and Suretyship. The legion of potential problems is obvious.
2. See Restatement, Contracts § 250, comment a (1933).
3. An allied problem and one which is in some degree necessary of understanding here is the difference between a promise and a condition. While a promise may contain a conditional term, there is nevertheless an important difference. A promise is an undertaking that something will or will not happen; it creates a duty in the promisor, duty being such a legal relationship that on the breach thereof, the holder (promisee) of a corresponding right will have a cause of action for damages or specific performance. A condition,
The first level refers to conditions which must exist in order for a valid contract to be formed; these conditions are the facts which must exist before there is any binding contract. The second level assumes a valid contract has been established, and then within the contract a promisor's actions may be subject to conditions before there is a duty of performance or a liability to recompense for a breach. On the second level the condition is a fact which qualifies a promise of one party to the contract in the sense that the promisor's duty to perform what he promises is dependent on the occurrence or existence of that fact. It is on this second level that the legal tags "precedent" and "subsquent" are typically used. Although it is not uncommon to hear reference to a first level condition as a condition precedent to the formation of the contract, it is on this second level that the contract law of "conditions" is properly applicable.

on the other hand, is a fact qualifying a promise, but which imposes no duty of performance. This difference between the promise or covenant and the condition may be shown best by illustration.

The New York standard mortgagee clause, an endorsement to a fire insurance policy for use in connection with first mortgage interest on real estate, reads in part: "Loss or damage, if any, under this policy, shall be payable to the aforesaid mortgagee, as interest may appear, and this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owners shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same."

The situation sometimes arises where the insurer seeks to collect unpaid premiums on the mortgagor's policy from the mortgagee who is named in the standard mortgage clause. The liability of the mortgagee turns upon a construction of the last part of the standard mortgage clause starting with the word "provided." If this language amounts to a covenant (promise) the mortgagee in possession of the policy is under a duty to pay delinquent premiums. If this language is a condition, the mortgagee has no duty to pay premiums, but in case of loss with the policy in arrears the mortgagee cannot collect the proceeds if the premises are destroyed by fire; his right is dependent upon fulfillment of the condition. The weight of authority holds this to be a condition. Coykendall v. Blackmer, 161 App. Div. 11, 146 N.Y. Supp. 631 (3d Dep't 1914); Whitehead v. Wilson Knitting Mills, 194 N.C. 281, 139 S.E. 456 (1927). Only two states regard the phrase as a promise. Stoddart v. Black, 134 Kan. 838, 8 P. 2d 305 (1932); St. Paul Fire & Marine Ins. Co. v. Upton, 2 N.D. 229, 50 N.W. 702 (1891).

In accident insurance policies providing for a right of autopsy in the insurer if the insured dies, there is some divergence of opinion as to whether the autopsy clause constitutes a promise or a condition. Schmiedeke v. Travelers Ins. Co., 30 F. Supp. 640 (D. C. Tex. 1940) (promise only); Dvorkin v. Commercial Travelers Ass'n, 258 App. Div. 501, 17 N.Y.S. 2d 109 (1st Dep't 1940) (condition).
II. Customary Theoretical Analyses of Conditions Precedent and Subsequent in General Contract Law

A. In the Field of Substantive Law

The customary definition of the condition precedent is a condition which "must exist or occur before a duty of immediate performance of a promise arises. . . ." A condition subsequent, on the other hand, is said to be a condition, the happening of which "will extinguish a duty to make compensation for breach of contract after the breach has occurred." Following through the implications of these conventional definitions it is discovered that they are broad enough to cover many sets of operative facts which are not normally regarded as conditions precedent or subsequent. Manifestly the making of an offer, the rendering of an acceptance, and the transferring of a consideration are all facts which "must exist or occur before a duty of immediate performance of a promise arises." The same is true of other facts such as legality of the subject matter, capacity of the parties, and definiteness of the objectives of the contract. However, while the definition in terms would cover all these operative facts, its ordinary meaning has been modified and narrowed so as to exclude those facts which go to the primary undertaking of the contract itself. In ordinary connotation the condition precedent refers to operative facts which must occur after the formation of the promissory undertaking in order to create the duty of performing the undertaking.

4. Restatement, Contracts § 250 (a) (1933). In the same section the Restatement illustrates a condition precedent in this manner: "A writes to B in a distant city, that if B will advance money to C, A will guarantee repayment by C. B advances the money as requested. B's sending within a reasonable time, notice to A that the advance has been made is a condition precedent within the definition of the section. Failure to give such a notice is a condition subsequent to the existence of a contract; but giving the notice within a reasonable time is a condition precedent to A's duty to make payment and of any right of action against him. . . ."

5. Restatement, Contracts § 250 (b) (1933). In the same section the Restatement illustrates a condition subsequent in this manner: "A owes B a matured debt of $100. B delivers to A his promise under seal that the debt shall be discharged by B's death, if prior thereto B has taken no steps for its collection. The debt remains due and enforceable; but B's death is a condition subsequent that will discharge it if no steps have been taken for its collection. B's death is a condition subsequent, since in view of the sealed release it will extinguish an existing debt."

6. The Restatement proceeds to explain its original definition of condition precedent in a comment which narrows the broad scope of the definition so as to bring it in line with ordinary theoretical formulations. "'Condition' in ordinary legal use is a word of broad signification. In its widest sense as a legal term of art it is, 1, any operative fact that will create some new legal relation or extinguish an existing relation, or, 2, words or other manifestations that indicate that a fact shall have such an operation. In the law governing land and chattels the word is often used for an operative fact which affects
In utilizing the terms “precedent” and “subsequent,” however, courts and writers have not always followed this customary formulation, with resultant difficulty. It is hardly possible to manipulate concepts for socially desirable and consistent purposes unless some basic agreement as to the meaning of the concepts is first attained. Yet, as Professor Williston points out, the term “condition precedent” has been used, contrary to its ordinary meaning, to refer to a set of operative facts, such as the manifestation of an acceptance, which must occur before the agreement of the parties becomes a binding contract. The prevalent view clearly is, however, that the condition precedent is a prerequisite to a duty of immediate performance under an already existing contract.

Difficulties stemming from the imprecision of legal semantics become even more pronounced when effort is made to explain the so-called condition subsequent. Traditionally the condition subsequent is said to
exist in the instance where the parties insert a provision that “the fulfillment of a condition or the occurrence of an event shall discharge them both from further liabilities under the contract.”

The equivocal nature of this phraseology is evident, and such a definition, just as in the case of conditions precedent, is meaningless unless a reference point is selected to which the “subsequent” character of the condition is to be referred.

The selection of the point of reference is of paramount importance because the selection of the reference point determines the precedent or subsequent nature of the “condition”—i.e., the set of operative facts—which is being analyzed. “In one sense, all conditions are subsequent; in another all are precedent.”

Every condition is subsequent to the operative facts and legal relations which have preceded it, and, conversely, every condition is precedent to the operative facts and legal relations which come after it. This is readily demonstrable by consideration of

1. "precedent" and one which is a mere "basis for defeasance?" Just what difference does it make to whom and how and why? How does the [American Law] Institute recognize so easily and so surely that any given limitation 'creates' the one or the other? "The statement that a designated occurrence, such as survival, is a "condition precedent" of an interest means," answers comment k, § 249, 'that the designated occurrence must happen before the interest vests, that is, before the interest acquires those characteristics connoted by the term "vested". . . ." Still, all of these rules about 'characteristics' tell us only what a court is supposed to do once it has determined whether an 'interest' is subject to a condition precedent or a condition of defeasance; they offer no criteria by which 'conditions precedent' and 'conditions as a basis of defeasance' can be identified. By what criteria does the Institute operate and by what criteria is it proposing that courts operate? Are the same criteria relevant for each of these many practical problems which from the perspective of policy norms are so totally different? The present volume offers us no explicit help; its blackletter merely pronounces arbitrarily and summarily . . . that certain 'conditions' are either this or that, fish or fowl.” McDougal, Future Interests Restated: Tradition Versus Clarification and Reform, 55 HARV. L. REV. 1077, 1090 (1942). For a detailed analysis of insurance problems in terms of relevant policy norms, rather than on the level of legal syntax, see Harnett and Thornton, Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept, 48 Col. L. Rev. 1162 (1948).

11. ANSON, CONTRACTS § 358 (2d Am. ed., Huffcut, 1907). Professor Anson gives as an example of a condition subsequent the bond which he views as a promise subject to or defeasible upon a condition expressed in the bond. He refers also to the excepted risks of a charter party, such as the acts of God or of the King's enemies, as conditions subsequent. In the light of the more modern view that a condition precedent is a prerequisite to a duty of immediate performance, the illustrations cited by Professor Anson are conditions precedent since the non-occurrence of the conditions was prerequisite to the duty of performance.

12. HOLMES, THE COMMON LAW 316 (1881). One of the earliest and still one of the best brief analyses of the condition precedent and condition subsequent is that of Justice Holmes.

13. Professor Corbin defines the types of conditions in these terms: "A condition precedent is an operative fact that must exist prior to the existence of some legal relation in which we are interested. . . . A condition subsequent is an operative fact that causes the termination of some previous legal relation in which we are interested." Corbin, Conditions
one of the traditional conditions precedent, the procurement of an architect’s certificate of satisfactory performance as a prerequisite to full payment in the building contract situation. Analytically viewed, it is apparent that this condition, while ordinarily denominated precedent, has within it the elements of either a condition precedent or a condition subsequent depending upon the reference point selected. The procuring of the certificate is subsequent to certain operative facts and legal relations: it is subsequent to those facts which resulted in the legal relation called the “offer,” subsequent also to those facts which represented the “acceptance,” and subsequent to those facts which amounted in legal effect to “consideration.” Yet, at the same time, the procuring of the certificate is precedent to the promisor’s duty to make full payment; precedent to the payment itself if made, and precedent to any right to commence a law suit if payment be not made.

Thus it is that the terms “precedent” and “subsequent” are utterly devoid of meaning unless related to a known point of reference. A further complication is that the points of reference which may be selected are virtually limitless in number. At the nadir is the possible selection for a reference point of the first initiation of any form of contract negotiation; any condition appertaining to the contract must needs be subsequent to that point. At the zenith is the use as a reference point of the ultimate performance under the contract, whether primary performance in the sense of actual completion of the contract or secondary performance in the sense of substituted completion of the contract through pay-


In the same discussion Corbin points out that the legal relation commonly used as the reference point when the term condition precedent is used is the duty of performance by the promisor or the duty to respond in damages for failure to perform. In that sense he gives the following as examples of conditions precedent: Scott v. Avery, 5 H. L. Cas. 811, 10 Eng. Rep. 1121 (1856) (promise to pay such an amount as a third party shall determine; the third party’s determination is the condition); Work v. Beach, 13 N. Y. Supp. 678 (Sup. Ct. 1891) (promise to pay as soon as the promisor is able; the financial ability is the condition); and Granger Co. v. Brown-Ketcham Iron Works, 204 N. Y. 218, 97 N. E. 523 (1912) (promise to pay upon furnishing of certificate by architect; the furnishing of the certificate is the condition). Corbin also speaks of conditions subsequent as either subsequent to the primary contractual duty of performance and terminating it, or subsequent to the secondary duty of responding in damages and terminating it. Within his meanings conditions subsequent are found in Semmes v. Hartford Ins. Co., 13 Wall. 158 (U. S. 1871); Chambers v. Atlas Ins. Co., 51 Conn. 17 (1883); Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011 (1894); Read v. State Ins. Co., 103 Ia. 307, 72 N. W. 665 (1897); and Ward v. Warren, 44 Ore. 102, 74 Pac. 482 (1903).

14. "The terms precedent and subsequent express a relation in time between two facts, one of which is the legal relation itself; and before using either one of them it is necessary to determine just what two facts are being considered." Corbin, Conditions in the Law of Contract, 28 Yale L. J. 739, 747 (1919).
ment of damages; any condition is necessarily precedent to that point. Between these opposite poles of initial negotiation and ultimate performance are many other points which could be used as reference guides, such as the formation of the contract or the accrual of a duty of performance thereunder. Accordingly as these points are selected, the identical operative facts will shift from the category "precedent" to the classification "subsequent." Attempting legal analysis without recognizing the decisive effect of this reference point factor is like trying to locate a city without the aid of geographic meridians and parallels. For, just as New York is south of New Haven, south of Cambridge, and south of Montreal, but north of Princeton, north of Charlottesville, and north of Atlanta, so is any one set of operative facts precedent to some other facts but subsequent to still others.

In recognition of the critical importance of the reference point concept, the leading contract authorities have generally concurred in the selection of the duty of immediate performance as the reference point. Hence any condition prior to the springing up of the duty of immediate performance is conventionally a condition precedent, whereas any condition which thereafter divests the duty of immediate performance is a condition subsequent. A minority current of authority would, however, not select the duty of immediate performance as the point of reference, but rather would choose the existence of the plaintiff's cause of action.

When the conventional reference point, the duty of immediate performance, is selected, the condition subsequent becomes indeed a rare creature. If the other suggested point, the existence of the plaintiff's cause of action, be adopted, the rare creature becomes extinct. Taking the

15. 3 Williston, Contracts § 667 (1936). To the same general effect, see Costigan, Performance of Contracts 12 (1911). "A condition subsequent . . . is any fact or event which will relieve the promisor from a default under the contract—i.e., will relieve him from a cause of action which has accrued against him because performance on his part became due and has not been given,—or which will affect in any way the cause of action which arises from such default." Costigan suggests a "rule of thumb" for discovering the true nature of a condition subsequent in form. The method is to try to phrase the condition in precedent form; if its form can be changed, then, to the extent that it can be changed, it is not genuinely a condition subsequent.

Some writers deny that there ever can be a condition subsequent. See Ashley, Conditions in Contract, 14 Yale L. J. 424 (1905). It is believed that the divergent views on the question are due merely to choice of reference points from which the conditions are examined.

16. Seemingly this is Ashley's view since he avers there is no such thing as a condition subsequent, and that extreme position could only be supported on the assumption that the reference point was the plaintiff's cause of action. See Ashley, supra note 15. Holmes apparently uses a similar point of reference. See Holmes, The Common Law 317 (1881), discussing the condition that a policy of insurance shall be void if not sued upon within one year after default in payment.
customary duty of immediate performance as the locus, one of the few genuine condition subsequent situations is the instance where personal property is sold with the understanding that the vendee may return the property if it is not satisfactory. This instance is a unique blending of the contract and property conceptions of condition subsequent. While the relationship grows out of and is dependent upon contractual stipulation, it is also a situation wherein, in the peculiar metaphysics of property law, the title to the property is said to "pass" subject to a "condition of defeasance" which operates to "divest" the title when the vendee returns the property. It is arguable just how much merit there is in talking in the language of these property terms of ambiguous reference, but it may at least be stated that in such an instance a duty to pay the purchase price arises when the goods are first sold, and this duty is avoided by return of the goods. Contrast this genuine condition subsequent with a situation often regarded as a condition subsequent but which is in fact a condition precedent. That is the case where a master and servant contract contemplates a hiring for a certain period with the master being given the right to discharge the servant upon becoming in good faith dissatisfied with his services. While often categorized as a condition sub-

17. Head v. Tattersall, L. R. 7 Ex. 7 (1871) (horse sold under contract stipulating that if warranty not complied with, horse might be returned within a fixed time). See also Robinson v. Fairbanks, 81 Ala. 132, 1 So. 552 (1887); Kentucky Block Cannel Coal Co. v. Milroy Milling Co., 208 Ky. 676, 271 S. W. 1070 (1925). For fuller discussion on this point, see Clark, Contracts § 240 (4th ed., Throckmorton and Brightman, 1931).

18. The multiplicity of property conceptions of conditions and other factors has at times been subject to scathing and probably very justified criticism. See Lasswell and McDougal, Legal Education and Public Policy, 52 Yale L. J. 203, 236 n. 67 (1943): "What empirical observations can be made to determine whether a mortgagee has 'title,' or whether . . . a right of way is a 'license' or an 'easement,' or whether a covenant 'touches and concerns,' or whether a remainder is 'vested,' or whether a group of donees is a 'class' or whether 'title' under a power of appointment comes from the donor or the donor? Does the mortgagee get possession because he has title or does he have title because he gets possession? . . . Is the promise of a 'right-of-way' revocable because it is a license or is it a license because it is revocable? Does the covenant run because it touches and concerns or does it touch and concern because it runs? Is the remainder alienable because it is vested or is it vested because it is alienable? . . . As Cook has pointed out in Scientific Method and the Law (1927) 13 A.B.A. J. 303, 305, we may say that 'all gostaks are doses' and that 'all doses are galloons' and conclude with the strictest logic that 'all gostaks are galloons' and still not know what we are talking about." Similar criticism might well be made of the tautological propositions of the legal syntax of insurance law. See Harnett and Thornton, Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept, 48 Col. L. Rev. 1162 (1948).

19. In Head v. Tattersall, L. R. 7 Ex. 7, 14 (1871) the court observed that "The effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event, when it would re vest in the seller."

sequent, on the theory that the discharge in good faith avoids a duty which would otherwise exist to respond in damages for the breach of the obligation, the true analysis is simply that the master's satisfaction with the servant's services is a condition precedent to the master's liability. There is no question of divesting a liability; for no liability accrued until the performance of the condition precedent, that is, satisfying the master. Furthermore, the noncompliance with any condition precedent would entitle a party not to perform, and from this it follows that since the master had no duty to perform, he is not liable for failing to perform.

B. In the Field of Adjective Law

Upon close analysis it is seen that numerous affirmative defenses such as accord and satisfaction, fraud, failure of consideration, impossibility of performance, payment, release, and the Statute of Limitations all operate in the nature of conditions subsequent. All of these defenses act to divest a duty of performance which previously existed, and in that sense they are conditions subsequent. It should be noted that they are not usually so categorized inasmuch as they are consequences imposed by operation of law upon certain fact situations, rather than conditions imposed by the parties themselves. There is a genuine condition subsequent analogous to the Statute of Limitations, however, and that is the situation where the parties themselves have specified a particular period within which suit must be brought. This time limit is a condition subsequent since it is a condition agreed upon by the parties which operates to remove the pre-existing duty of immediate performance.

Theoretically the use of the terms conditions precedent and subsequent is determinative of the problems of pleading and proof. The general rule of pleading is that the plaintiff must set forth in his complaint all the facts required to make out his cause of action; if he does not do so, the complaint is demurrable. The critical inquiry then is as to what facts constitute the cause of action in a suit on a contract. Briefly stated, the cause of action involves the formation of a valid contract, the due performance of his part of the contract by the plaintiff, and the failure of performance by the defendant.

21. CLARK, CONTRACTS § 240 (4th ed., Throckmorton and Brightman, 1931) takes this view.
22. 3 WILLISTON, CONTRACTS § 667 (1936).
If this general rule of pleading be pursued to its logical terminus, it is seen that the plaintiff theoretically would have to plead and prove all those operative facts going to the formation and breach of the agreement, and to the existence of a duty on the part of the defendant to make restitution in damages. The rule at common law was an approach to this logical terminus, and thus it was that the common law required considerable particularity of pleading in reference to the due performance of conditions. 25

It has never been supposed, however, that the plaintiff must allege and prove every single fact necessary to the existence of his cause of action. Theoretically it would seem that the plaintiff should plead and prove that there was a valid offer, that a binding acceptance was made of this offer while it was subsisting, that the contract was in the form required by the Statute of Frauds, that a consideration was present, that the subject matter of the contract was legal in nature, that the parties had capacity to contract, that the transaction was free from fraud, duress, or undue influence, that the obligation has never been released or paid, that the court has jurisdiction of the subject matter and of the persons involved, and that the Statute of Limitations has not run. The existence of all those factors are actually necessary prerequisites to the plaintiff’s recovery, but the plaintiff has never been under an obligation to prove them all. The doctrine of affirmative defenses enters at this point to relieve the plaintiff of an otherwise intolerable burden by placing upon the defendant the duty of affirmatively pleading and proving the absence of many of these prerequisites to plaintiff’s recovery if the defendant wishes to avoid liability. 26


26. The earlier codes made no effort to define when matters had to be brought up by way of affirmative defense, preferring to let the courts work out the problem according to common law principles. See Clarke, CODE PLEADING 611 (2d ed. 1947). The later tendency is, however, to incorporate into statutes or rules of practice a working guide for the courts, as in the New York provision adopted in 1920: “The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense or reply, as the case may be, which if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, statute of limitations, release, payment, facts showing illegality either by statute, common law or statute of frauds. The applica-
system of apportioning the burden of pleading and proof between the
parties, the feeling being that some facts are more particularly within the
knowledge or control of one party or another, and hence it is reasonable
to require that party to prove such facts.

Clearly then the plaintiff is never going to be required to establish
every essential element of his right to recover. But, once the magic label
“condition precedent” is affixed by the court to a set of operative facts,
almost inevitably the court will demand that plaintiff plead and prove
those particular facts. And, as a corollary to this rule, when the brand
“subsequent” is affixed, the defendant is obliged to plead and prove the
facts constituting the condition. How lethal this labelling may be is
quickly indicated by the fact that the labelling alone may effectively
decide the course of a case. For instance, one case involved an insurance
policy which provided for payment to the insured’s wife as beneficiary if
she survived and otherwise to the insured’s estate. The husband and wife
died in a maritime disaster and there was no evidence on the question of
survivorship. It was held that the personal representative of the wife
could not recover on the policy because he was unable to prove the neces-
sary condition precedent—that the insured predeceased the wife. Ob-
viously, the actual facts of survivorship were not susceptible of proof;
therefore the party forced to shoulder the burden of proof was neces-
sarily the loser. While the condition problem involved in that case in-

Miller, 10 Cush. 49 (Mass. 1852).

28. While this is almost always the rule of pleading, a court may occasionally for ex-
trinsic policy reasons or because of pure confused thinking place the burden on the plaintiff
to prove a condition which it has called subsequent. In Kennedy v. Grand Fraternity, 36
Mon. 325, 92 Pac. 971 (1907), the court said that since the plaintiff relied on performance of
a condition subsequent he would have to assume the burden of proof of it.

volved property connotations, it is still illustrative of the severe effect which such labelling of conditions may have. Of course, it is true that oftentimes the codes permit the pleading of conditions in some generalized or simplified form, but this sort of provision in and of itself does not affect the burden of proof. The provision allows a generalized wording such as "all conditions precedent have been performed," but when performance is specifically denied by the adverse party, it must then be proved.

The great difficulty with this process of labelling conditions in the adjective law field is that it tends to retard the development of a uniform and sound system of pleading and proving conditions based on notions of procedural policy. As it is now, conditions are branded "subsequent" and "precedent" with effortless abandon, so that what is alleged to be a test for pleading and proof purposes is no longer a test at all but simply a description of what the court has done. The label "precedent" or "subsequent" is often attached after the court has decided what the pleading burden shall be, and, rather than serving as a guide to the court's determination of the procedural question, the words simply explain a result which the court has reached.

III. APPRAISAL OF THE CONDITION SUBSEQUENT IN THE INSURANCE CONTRACT

The insurance contract, while certainly a species of the general contract family, presents particularly pressing problems in the subject of conditions. The sum of the complex contract plus the multiplicity of conditions, particularly in the typical property insurance policy, inevitably totals up to a high susceptibility to defenses based on breach of con-

30. See Fed. R. Civ. P., 9 (c): "Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." For listing of analogous provisions in other jurisdictions, see Clark, Code Pleading 281, n. 16 (2d ed. 1947). See also Prof. Prashker's observations in Pleading Performance of Conditions Precedent: New York and Federal Rules, 13 St. John's L. Rev. 242 (1939).

31. Corbin takes this position in Conditions in the Law of Contract, 28 Yale L. J. 739, 749 n. 24 (1919), expressing the view that "When the court wishes to throw the burden of proving the fact upon the defendant it will frequently bring this about by describing the fact as a condition subsequent." He illustrates his meaning by discussing the clause often found in insurance contracts which provides that the policy is to be void if a certain event occurs or does not occur. The burden of proving that occurrence or non-occurrence is almost always placed upon the insurer on the theory of condition subsequent, although it is clearly precedent to any duty of the insurer to make payment. See Benanti v. Delaware Ins. Co., 86 Conn. 15, 84 Atl. 109 (1912); Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011 (1894). A good discussion of the broad problem is found in the dissenting opinion in Kendall v. Brownson, 47 N. H. 186, 196 (1866).
dition, with a plethora of technical defenses also weighing in the calculation. Both substantive and procedural implications of the condition, then, are of substantial importance to the insurance practising bar.

A. What Constitutes a Condition Subsequent

In reality, a very simple rule of thumb may be employed to recognize the truly designated condition subsequent in the contract of insurance. It is simply this: of all the conditions found in typical insurance policies, there is probably only one condition subsequent properly so called, and that is the usual time limitation provision wherein it is stipulated that no action is to be brought beyond a fixed period of time.\(^2\) Comparing the time limitation condition with the accepted definition of condition subsequent we find a reasonable conformity;\(^3\) for though the insurer may

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32. Lines 157–61 of the 1943 New York Standard Fire Insurance Policy show a contractual time limitation stipulation. “No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.”


The New York Civil Practice Act § 10 (1) specifically permits parties to set a shorter limitation time than that of the ordinary statutory period. “The provisions of this article which sets forth statutory time limitations on various actions] apply and constitute the only rule of limitation applicable to a civil action or special proceeding, except in one of the following cases: 1. A case where a different limitation is specially prescribed by law or a shorter limitation is prescribed by the written contract of the parties.” See Brandyce v. Globe & Rutgers Fire Ins. Co., 252 N. Y. 69, 168 N. E. 832 (1929).

In this connection Professor Williston rightly observes that it is of critical importance to frame any discussion of conditions in terms of a reference point. For example, while these limitations of time to sue are almost invariably regarded as conditions subsequent, i.e., subsequent in time to the duty of performance, they may, by a slight shift in reference
be faced with the duty of immediate performance, noncompliance with this condition will divest the insured right.

Arguably, there is another genuine condition subsequent by usual definitions. Assume an insured under a standard type automobile liability policy has an accident and is sued. His policy has provisions to the effect that the insurer will defend his suits, and further contains a cooperation clause. The insured party successfully prosecutes the suit to judgment, and then returns the judgment unsatisfied. At this point the duty of the insurance company to perform is immediate. Now suppose the time for appeal not yet having expired, the insurer decides to appeal, but the insured declines to participate, thus breaching the cooperation clause, which in turn divests the insurer’s liability to the plaintiff injured party. In states where the injured party has an independent cause of action directly against the insurer, and the insured breaches the cooperation clause after the insurer has suffered judgment in the trial court, there is obviously a much stronger instance for this argument. In both of the situations there is a liability accrued, a duty of immediate performance in the insurer, and it is divested by noncompliance with a condition, namely the cooperation clause. This is a borderline instance, and the

point terminology, become conditions precedent. If the reference point is made the maintenance of the particular action which the plaintiff brings, then the fact that the time for bringing suit has not elapsed becomes a condition precedent to that particular action.

This need for clearly specifying the reference point is so obvious that it is surprising that courts have so often failed to realize it. "The practise is almost universal of using these terms [condition precedent and condition subsequent] to describe the legal operation of some fact without mentioning or even clearly considering the particular legal relation to which the fact is being related in time. The result is most distressing; it leaves the reader confused and doubtful and it is a cause of conflict in decision, uncertainty of law, and actual injustice. In one case a fact will be called a condition precedent and in another case the same fact (or its non-existence) will be called a condition subsequent, because in the first case it is being subconsciously related to the legal relations that follow it and in the other case to the legal relations that preceded it." Corbin, Conditions in the Law of Contract, 28 Yale L. J. 739, 748 (1919).

34. A typical clause is: "Under coverages A and B the company shall defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof. . . ."

35. The cooperation clause is found in many automobile policies under the heading "conditions." A common formulation is as follows: "The insured shall cooperate with the company and upon the company’s request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. . . ."

36. N. Y. Ins. Law § 167 (1) (b).


38. On the state of authority in these states see 12 Wis. L. Rev. 531 (1937).
difficulty here in measuring the meaning of "duty of immediate performance" demonstrates an ambiguity in the traditional analyses of conditions, such as that of the Restatement,\textsuperscript{39} for while duty of immediate performance is in one sense a duty pursuant to judgment, the insurer's duty may also be said to be subject to the terms of the insurance contract.

The corollary of the proposition so severely limiting the number of conditions properly called subsequent, is the recognition that practically all the conditions in insurance contracts are precedent in the accepted sense; the insurer has no duty of immediate performance unless the condition has been fulfilled. This may be illustrated by consideration of the warranty question. In the law of insurance, "warranty" does not connotate the promissory undertaking of the sales warranty, but rather serves as a condition of the insurer's promise. Realization that the insurance warranty can operate only as a condition precedent\textsuperscript{40} has led the New York courts to apply the warranty statute\textsuperscript{41} to conditions precedent, including both statements by the insured which are made a term of the contract, and clauses inserted by the insurer.\textsuperscript{42}

It should now seem that the problem when measured in true perspective is fraught with no difficulty. In actual practice the contractual time limitation stipulation is the sole true condition subsequent, and the vast bulk of conditions are precedent.\textsuperscript{43} But, unhappily, the simple verity of this conclusion has been obfuscated because of faulty analysis and because of the admixture of procedural considerations.

\textsuperscript{39} RESTATEMENT, CONTRACTS § 250 (1933) notes 4, 5 and 6 supra.

\textsuperscript{40} Patterson, Warranties in Insurance Law, 34 Col. L. Rev. 595, 597 (1934).

\textsuperscript{41} N. Y. INS. LAW § 150 (1) reads in part: "The term 'warranty' as used in this section, means any provision of an insurance contract which has the effect of requiring, as a condition precedent of the taking effect of such contract or as a condition precedent of the insurer's liability thereunder, the existence of a fact which tends to diminish or the non-existence of a fact which tends to increase the risk of occurrence of any loss, damage, or injury within the coverage of the contract . . . ." It is to be noted that the term condition precedent is used to include conditions of the both levels.


\textsuperscript{43} Instances of the condition precedent are obvious. Schuster v. National Surety Co., 256 N. Y. 150, 175 N. E. 655 (1931) (undertaking to keep a watchman on touring duty—burglary policy); Fidelity and Deposit Co. of Md. v. Friedlander, 101 F. 2d 106 (C. C. A. 6th 1939) (requirement that a custodian and one other employee be on duty—robbery policy); Arbuckle v. (American) Lumbermens Mut. Cas. Co. of Ill., 129 F. 2d 791 (C. C. A. 2d 1942) (principal place of garage—automobile liability policy); Fowler v. Aetna Fire Ins. Co., 6 Cow. 673 (N. Y. 1827) (brick house—fire insurance policy).
1. Difficulties Arising from Improper Points of Reference

Some courts have adopted the position that conditions to be performed subsequent to the formation of the contract are conditions subsequent. "If there be conditions in a policy of insurance which must be performed before its risk attaches, such conditions are recognized as precedent ones . . . but after the contract has come into legal existence, and has attached as a binding obligation, those warranties or conditions which afford a means whereby the obligation of the insurer may be extinguished are regarded as conditions subsequent." Language of this sort indicates an adoption of the formation of the contract as the point of reference from which to label conditions. Selection of this reference point is contrary to the ordinary demarcation line which is drawn at the accrual of a duty of performance. The selection is also difficult to defend in terms of theoretical symmetry because in insurance contracts the most important prerequisite to liability, which is almost universally regarded as a condition precedent—the loss itself—occurs after the formation of the contract. To be perfectly consistent, a court taking the formation of the contract as its point of reference would be forced to call the occurrence of the loss a condition subsequent.

2. Difficulties Arising from Form of the Language

The condition subsequent carries with it the idea of divesting a right which has accrued but has not yet been enforced. The persistency of this notion leads to an improper evaluation of the true condition precedent expressed in a form which suggests condition subsequent. The condition precedent in condition subsequent form is expressed in this manner, "If occurrence φ happens (or does not) happen, this policy shall be null and void." In terms of conventional analysis, such conditions are precedent in that their existence or non-existence is prerequisite to any duty of immediate performance by the insurer. This may be instantly seen by

45. See note 7 supra.
46. A provocative analysis of this kind of condition appears in Ashley, Conditions in Contract, 14 Yale L. J. 424, 425 (1905). "... suppose A promises to pay B $1,000 on June 1 next, the obligation to become void if a certain ship reaches New York harbor before June 1. In such a case the courts have said that there is a condition subsequent and that consequently as the obligation subsists it must be incumbent upon the defendant to show that it has been terminated. The error lies in supposing that there is a subsisting obligation, but if one says that the contract, as such, is the obligation which is referred to, then it must follow that we can have no such thing as a condition precedent in contract, because there certainly must be a contract in existence, if one is to have a limitation upon
inserting content into "occurrence"; for instance, the storage of gasoline on the premises,\textsuperscript{47} vacancy of the premises,\textsuperscript{48} alteration,\textsuperscript{49} cessation of operation,\textsuperscript{50} over-insurance in fire insurance\textsuperscript{51} policies; rental status\textsuperscript{52} in automobile insurance; or change of occupation\textsuperscript{53} in life insurance. Under all of the above clauses, if the insured has not complied with the condition, the insurer is not bound to immediate performance, namely the rendition of the agreed exchange on the happening of an insured event.\textsuperscript{54}

it. There cannot be such a thing as construing the terms of such contract unless there are such terms. Yet in the case of conditions precedent the uncertain event happens before there is any obligation to perform, but nevertheless there is a subsisting contract. Conditions in contract do not cause an existing obligation to terminate and there is no such thing as a condition subsequent in this class of obligations. Thus in the illustration given above it is clear that the contract as to the payment of the $1,000 on June 1 subsists, but it is equally clear that until June 1 there is no obligation to pay the $1,000, and there will never be such an obligation unless the time passes without the arrival of the ship—that is to say, the obligation to pay does not arise unless there is a non-arrival of the ship, and such non-arrival is a condition precedent." Note the unequivocal statement that "there is no such thing as a condition subsequent . . . " and compare the views of Professor Williston, notes 7 and 15 supra, and Professor Costigan, note 15 supra.

54. Restatement, Contracts § 259 (1933). "When a condition is precedent though expressed in subsequent form.

Words qualifying a promise that in form state that a fact is a condition subsequent mean, when properly interpreted, that non-existence of the fact is a condition precedent, unless the fact is an occurrence that can consistently with the terms of the promise take place after a duty of immediate performance has arisen, and an intention is clearly manifested that the occurrence shall be a condition subsequent.

"Comment: a. Conditions subsequent to the transfer of ownership of land or chattels are not uncommon; but by definition [see § 250 (b)] a condition subsequent as used in the Restatement of the present Subject extinguishes a duty of immediate performance. A condition that terminates a contract before performance is due is included under conditions precedent, since the failure of the event to happen is a prerequisite to the existence of a duty of immediate performance. Conditions of the latter sort are of frequent occurrence; and in early times it became customary to write bonds in a form stating that there was a duty of immediate performance, which nevertheless would be discharged on the occurrence of a condition, the 'grant' of a debt being regarded as analogous to the transfer of land. This form of expression is still common in legal documents, partly because of a tendency to adhere to old forms, and partly because contractors fail to distinguish between the primary duty that is created at the formation of a contract and the duty of immediate performance that often does not exist until long afterwards. Words are often used, therefore, the literal meaning of which would make some fact a condition subsequent to the duty of immediate performance, though the parties really mean to make its non-occurrence a condition
But some courts, in practice, have been misled by formal appearance, failing to observe the essential amorphism of the pattern. Thus, one court said, "conditions which provide that the policy shall become void or inoperative, or the insurer wholly or partially relieved from liability . . . if they may properly be called conditions . . . are conditions subsequent . . ." That imprecise language of this sort is not without repercussion is evidenced by cases holding that conditions voiding policies for alienation are subsequent.

Perhaps the foremost illustration of improper analysis in this area is the construction adopted by some courts that payment of premiums is a condition subsequent in life insurance policies. The general rationale underlying this improper view is based on property concepts, an assumption that the policy was once valid (vested), but that breach of conditions rendered the valid policy void (divested). The impropriety of blind use of property law characterization here leads to bad contract law.

3. Difficulties Arising from the Underlying Tissue of Procedural Purpose

In the action of covenant at common law performance of conditions precedent had to be alleged by the plaintiff, while conditions subsequent

55. Prudential Ins. Co. v. Zimmer, 19 Ohio N. P. (N. S.) 188, 26 Ohio Dec. 327, aff'd, 97 Ohio St. 14, 119 N. E. 136 (1916). Cf. Rosenblum v. Sun Life Assur. Co. of Canada, 51 Wyo. 195, 65 P. 2d 399 (1937), holding a clause similar to that in the Zimmer case was a condition precedent. These cases involve the customary "delivery in good health clause" of the life insurance policy. In reality, these are conditions of the first level, conditions which must exist for a building contract to spring into existence.


58. For an enlightening discussion of the problem of non-payment of life insurance premiums because of war time hindrances, see Mulligan, Does War Excuse the Payment of Life Insurance Premiums? 17 Ford. L. Rev. 63 (1948): Mr. Mulligan correctly points out (at pp. 75 and 76) that payment of premiums is really a condition precedent; he cites 3 WILLISTON, CONTRACTS § 667 (1936) for the proposition that the condition is subsequent in form, but for the purpose of pleading and proof only. The burden of proving non-payment is on the insurer. Liesny v. Metropolitan Life Ins. Co., 147 App. Div. 253, 131 N. Y. Supp. 1087 (4th Dep't 1911).
were matters for affirmative defense.\textsuperscript{59} This procedural framework has been carried over into modern practice, and the plaintiff is thus obliged to allege performance of conditions precedent, while the defendant bears the pleading burden as to conditions subsequent.\textsuperscript{60} But, starting from this base, it is soon observed that many courts wish the insurer to allege and often prove certain breaches of condition, without regard to the nature of the condition. It is when a court desires to make a condition which is properly a condition precedent a matter of affirmative defense for the insurer to prove that the phenomenon of the \textit{condition subsequent procedurally} arises. That is, a true condition precedent is termed a condition subsequent so that the procedural rules applicable to conditions subsequent will apply to a condition that is rightfully precedent.\textsuperscript{61}

In analyzing the case law\textsuperscript{62} it is manifest that this underlying procedural motivation is the principal cause of incorrectly labelled conditions. So widespread is this tendency that the Restatement of Contracts observes in speaking of the condition precedent expressed in subsequent form:\textsuperscript{63} “In an action on a promise stated in absolute terms, but followed by the further statement that the duty will be terminated if a certain contingency occurs, the form of the statement may have the effect of throwing the burden of pleading or of proof on the defendant, whereas the plaintiff must ordinarily plead and prove the happening of conditions precedent.”\textsuperscript{64}

Running through the case law is a definite attempt by the courts to lighten the burden of the insured so far as pleading and proof goes. One technique of solving the insured’s pleading hardship appears in Moody v. Amazon Insurance Co.\textsuperscript{65} The court there held that the insured need only

\begin{itemize}
\item \textsuperscript{59} Hotham v. East India Co., I. T. R. 638 (1787).
\item \textsuperscript{60} Moody v. Amazon Ins. Co., 52 Ohio St. 12, 15, 38 N. E. 1011, 1012 (1894).
\item \textsuperscript{61} Ibid.
\item \textsuperscript{62} As in Moody v. Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011 (1894). To the same effect is Prudential Ins. Co. of America v. Zimmer, 19 Ohio N. P. (N. S.) 188, 26 Ohio Dec. 327, 328, aff’d, 97 Ohio St. 14, 119 N. E. 136 (1916) where the court remarked: “Conditions which provide that the policy shall become void, or inoperative, or the insurer wholly or partially relieved from liability are . . . matters of defense . . . which . . . must be pleaded by the insurer to defeat recovery.” The court in the Moody case spells out an argument based on the unfairness and inconvenience of requiring the plaintiff insured to prove all conditions under a general denial, and this is in view of the multiplicity of conditions in an insurance policy. The court thus denies the clause is precedent because the plaintiff should not have the burden of proof, drawing the precedent-subsequent distinction right there. However, the clause involved was an occupancy clause of a fire insurance policy, a warranty which is a true condition precedent substantively viewed.
\item \textsuperscript{63} The internal relationship of the form of the condition and the procedural burden is obvious. These two ideas have been set forth in separate sections above merely for analytical purposes.
\item \textsuperscript{64} RESTATEMENT, CONTRACTS § 259, comment b (1933).
\item \textsuperscript{65} 52 Ohio St. 12, 38 N. E. 1011 (1894).
\end{itemize}
prove the policy, proof of interest, loss, and furnishing proof of loss in order to show a prima facie liability of the insurer to pay. The court, however, then proceeded to the unnecessary conclusion that those few conditions are the precedent ones, and the rest, which the insurer must prove, are subsequent. There are two other solutions with a substantial similarity. The first is a relaxation of common law rules, leaving the proof burden with the insured, but allocating the pleading burden to the insurer. A second solution is the New York method, utilized in over half of the states, which consists of a statutory scheme allowing allegation of conditions precedent in general terms and requiring the insurer specifically to traverse. The insured is deemed to have proved all conditions not so traversed, but must carry the burden of proof on conditions properly denied. Rule 92 of the New York Rules of Civil Practice specifically uses the term condition precedent.

The moral of this story is clear: when the courts, with varying notions of public policy, commence labeling conditions as "subsequent" in order to shift the burden of pleading and proof to the defendant insurer, unnecessary complication ensues. Thus, the procedural effect of conditions subsequent has been given to clauses making policies null and void for false swearing; breaches of such clauses are matters of affirmative defense to be asserted and proved by the insurer. The same result is reached with clauses making policies null and void except where the loss occurs through the contingency insured against.

67. N. Y. R. Civ. Prac., Rule 92 (1948): "The performance or occurrence of a condition precedent in a contract may be pleaded in general terms as a legal conclusion without stating the facts constituting performance or occurrence. A denial of such allegation of performance or occurrence shall be made specifically and with particularity. In case of such denial the party pleading the performance or occurrence shall be required to prove on the trial only such performance or occurrence as shall have been so specified."
68. Ibid.
69. Home Ins. Co. v. Winn, 42 Neb. 331, 60 N. W. 575 (1894); Benanti v. Delaware Ins. Co., 86 Conn. 15, 84 Atl. 109 (1912). Note that the same procedural effect of making false statements by the insured on matters of affirmative defense was achieved in part in Rosenblum v. Sun Life Assur. Co., 51 Wyo. 195, 65 P. 2d 399 (1937) even though the condition was called precedent. The court simply declared that the delivery of the policy by the insurer raised a presumption of good faith so that the insurer had the burden of making an affirmative showing to the contrary.

In view of the general procedural necessity of alleging fraud as an affirmative defense entirely apart from the question of condition, there is an additional ground for requiring the insurer to carry the burden of proof on the question of false statements. For a fuller discussion of the general policy considerations surrounding the defense of fraud in insurance contracts, see Harnett, Misrepresentation in Life Insurance Applications: An Analysis of the Kansas Law and a Proposal for Reform, 17 J. B. A. Kan. 214 (1948).

70. Western Assur. Co. of Toronto v. Mohlman Co., 83 Fed. 811 (C. C. A. 2d 1897) (fire
The courts have been generally consistent in placing the burden of proof of conditions labelled subsequent on the defendant insurer. However, even this consistency is marred by occasional aberration. Thus in a case where plaintiff's life insurance policy had lapsed for non-payment and he relied on a reinstatement clause, the court constructed this peculiar skein of illogic: "Plaintiff . . . relying on performance of a condition subsequent . . . must assume the burden of proof on that question."  

B. Implications of the Condition Subsequent

1. Substantive Implications

The substantive implication of the condition subsequent in the insurance contract is almost completely negative, primarily because of the nebulous semantics employed and the intangibility of the term "duty of immediate performance." The distinction between conditions precedent and subsequent is of minute utility. However, there are certain facets of advantages to be found in the usage, although the disproportion of confusion entailed may be said largely to outweigh these advantages.

It has been argued that the distinction is of use to contracting parties in knowing whether they have an immediate duty to perform, or whether they may await further action by their opposite members before they themselves must perform. The predictability, of course, is completely nullified by the verbal whirlpool, and it is doubtful how much reliance can ever be put in the supposed distinction.

A necessity for distinction on the substantive plane exists, however, at least for unearthing conditions not governed by the warranty statutes; this need arising because of the assimilation of warranty and condition precedent, and the antinomy between conditions precedent and subsequent. Perhaps another substantive utility of the term condition subsequent is the greater possibility of a judicial discovery of waiver where the condition is felt to be subsequent rather than precedent. Actually a property law simile is effected to achieve this result. The insured is regarded as having a vested right which is being divested. In furtherance of the general judicial disfavor of the forfeiture, the waiver road is less rocky when the destination is subsequent rather than precedent. This judicial preference cannot be ignored; witness the example of Justice Holmes, the famous disbeliever in the condition subsequent. In a case

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2. Procedural Implications

Procedurally, condition subsequent has clear meaning; it means burden of proof. Conditions subsequent are matters of affirmative defense, with all the attendant consequences. The procedural import is significant to all practitioners, though the writers often neglect its practical proportions. For example, Rule 92 of the New York Rules of Civil Practice allows allegation of performance of conditions precedent in general terms, but does not deal with conditions subsequent; therefore, a blanket allegation under Rule 92 is not an averment of compliance with a condition subsequent. As previously analyzed, the time limit stipulation is probably the only proper condition subsequent in insurance contracts, and it would not be covered by a general averment under such a rule.

An important inquiry is whether there can exist in a jurisdiction like New York a condition subsequent procedurally. This designation, as previously indicated, means a true condition precedent which is treated for procedural purposes as subsequent so as to mitigate the hardship of the insured being required to plead and prove the numerous conditions of the average insurance policy. But the erection of the verbal mutant, the condition subsequent procedurally, is merely the response of some courts, as in the previously discussed Moody case. Other jurisdictions have acted by statute, and Rule 92 is the New York answer to the hardship problem. In the face of a definite expression of legislative intent to ameliorate hardship by adoption of a particular device, it is felt that the courts would be acting improperly to smuggle conditions precedent out of Rule 92 in containers marked “condition subsequent.”

74. By provisions of the New York Civil Practice Act § 274, the court is empowered to direct a reply to an affirmative defense. Because of the confusion surrounding the status of the condition subsequent and the effect of Rule 92, the way is open for dilatory and obstructive practices by wholesale advancement of supposed affirmative defenses, which in reality are merely specific denials under Rule 92. These “defenses” can have the effect of bewildering the inexperienced insurance counsel as well as drawing an undeserved compelled reply from the court. Clear appreciation of the nature of the condition subsequent can forestall this sort of conduct which impedes just solutions.

75. Huckins v. Bankers & Shippers Ins. Co. of N. Y., 59 N. Y. S. 2d 755 (City Ct. 1946). Although the procedural setting is not completely clear from the opinion, the court seems to hold that the time limit stipulation is a condition precedent and must be alleged within Rule 92. It is submitted that this result is incorrect.

76. The law of Missouri seems otherwise. Mueller v. Putnam Fire Ins. Co., 45 Mo. 84 (1869) decided that conditions subsequent in form were matters of affirmative defense. The
ment of legislative intent is borne out by the situation surrounding the typical cooperation clause. While this clause viewed in its usual context is a true condition precedent, courts eager to thrust the burden of proof on the insurer have rendered this a condition subsequent procedurally. But in New York the legislature, recognizing the desirability of the insurer proving lack of cooperation, has expressly put the burden on the insurer by statute. Legislative intent to occupy the remedial field would seem to curb the judicial role.

IV. Conclusion

The use of the terms "condition precedent" and "condition subsequent" in construction of insurance contracts has served only to breed confusion and difficulty. Courts have labelled identical operative facts "precedent" in one situation and "subsequent" in another, and have failed even to follow a consistent pattern on the level of purely legal analysis.

It is semantically possible to draw a line between conditions by selecting an agreed point of reference. The point chosen by the majority position is the duty of immediate performance of the obligation of the contract. The selection of this point means that for all practical purposes the only condition in an insurance contract that is a condition subsequent is the time limit clause, for this is the only one which operates to divest a liability previously existing.

In view of the present status of the law it is necessary for the lawyer to understand the legal syntax which operates to categorize conditions as precedent or subsequent. Such understanding is necessary because statutes often refer to these conditions, and unless the lawyer is familiar with the traditional labellings he will be unable to comprehend the scope and effect of the statutes. Then too the legal language is so thoroughly infiltrated with these terms that knowledge of them is essential to an understanding of the senses in which they are used by courts and insurance lawyers.

But, while present-day legal advocacy requires an understanding of these terms, it is believed that the long-range objective should be their elimination from the insurance vocabulary. Use of the terms has no utility whatever on the level of substantive law. They serve to effectuate no basic policy goal in substantive law. Rather do they militate against

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statute requiring the pleading and proof of conditions precedent by plaintiff was Mo. Rev. Stat. § 807 (1929).
77. See note 35 supra.
78. Koontz v. General Cas. Co. of America, 162 Wash. 77, 297 Pac. 1081 (1931).
79. N. Y. Ins. Law, § 167 (5).
80. As for example, N. Y. R. Civ. Prac., Rule 92, already discussed.
the policy values of clarity and definiteness in the law. Substantively speaking, it is of no use to labor constructing possible hairline syntactical distinctions which are drawn only with difficulty in all cases and erroneously so in many instances. The labor is wasted, for the line when drawn means nothing substantively anyway.

On the procedural level the terms, from a long-range view, have also no utility. So long as procedural statutes and rules are framed in terms of conditions precedent and subsequent, the lawyer cannot afford to discard the terms, of course, but he can still recognize their essential lack of meaning and strive for their elimination. It is thought that the words “precedent” and “subsequent” are guides to the determination of the burdens of pleading and proof. Actually, they are not. Sophisticated courts freely call a condition, which from theoretical analysis is a precedent one, a condition subsequent when they desire to shift the burden of proof to the defendant. Thus “condition subsequent” at best is a name which these courts apply to the condition after they have decided that the defendant must plead and prove it. An unsophisticated court, on the other hand, or one bound by the iron hand of past decisions, may feel obliged to call a condition “precedent” and thus feel compelled contrary to its best policy judgment to put the burden of pleading and proving the condition on the plaintiff because traditionally conditions precedent must be proved by the plaintiff. In both instances sound policy and legal analysis have been discarded. In the one case the court has reached its own independent decision on the burden of proof and denominated the condition accordingly; in the other case the court has felt bound to ignore its own feelings as to a just burden of proof because it has labelled the condition in a way which traditionally requires a certain burden of proof allocation.

But what is the utility of all the procedural necromancy? What possible connection is there from the policy viewpoint between the problem of drawing hair-line verbal distinctions between conditions and the problem of an equitable distribution of the burden of proof? The burden of proof question is an entirely different and independent problem of deciding what operative facts should be proved by the plaintiff and what by the defendant. The words “precedent” and “subsequent” are not philosophers’ stones which in some magic way answer the problem of burden of proof. It is not within the scope of this article to lay down detailed regulations for determining what kind of facts a plaintiff or defendant must prove, but suffice it to say that the problem of working out an equitable apportionment of this burden is in no way associated with the problem of what conditions are precedent and what subsequent. Extrinsic policy factors, such as the availability of evidence to one side or another,
the relative positions of the parties, and similar factors, should be the
criteria utilized in determining burden of pleading and proof. The courts
and legislatures should be allowed to work out independently in each
jurisdiction and in each type of case what they consider to be an equitable
balancing of the burden of proof, and in so doing they should not be
encumbered by the meaningless vestigia of condition precedent and con-
dition subsequent.
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