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Insurance Policy Conditions and the Nebraska Contribute to the Loss Statute: A Primer and A Partial Critique

Robert Works

University of Nebraska-Lincoln, rworks1@unl.edu

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By Robert Works*

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I. INTRODUCTION

To those who approach the subject from the vantage supplied by the standard insurance texts,¹ Nebraska's statutory treatment

* Professor of Law, University of Nebraska.

1. I have in mind the two single-volume texts most often consulted by students suffering their first extended exposure to insurance law: R. KEETON, BASIC TEXT ON INSURANCE LAW § 6.5 (1971); E. PATTERSON, ESSENTIALS OF INSUR-

of insurer defenses alleging breaches of policy conditions must appear inexplicably aberrant. In many states, the traditional common law rule reigns undisturbed; if the insured fails to satisfy an express policy condition, the insurer has no duty to perform.² In most other states, this strict common law standard has been ameliorated by "warranty" statutes that make certain failure of condition defenses available only if the failure materially increased the risk that an insured event would occur.³ In Nebraska, however, the legislative reform went even further. Section 44-358 of the Nebraska Revised Statutes prescribes a "contribute to the loss" standard:

The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.⁴

Several other states employ a contribute to the loss standard for very restricted classes of defenses.⁵ Nebraska alone prescribes the standard for all lines of insurance.

A homely example will demonstrate both the significance of those differences in approach and the concerns that prompted the statutory initiatives. Consider that common feature of the Family

ANCE LAW § 72 (2d ed. 1957). As indicated in note 19 and accompanying text, *infra*, most other familiar insurance references provide little warning of the distinctive Nebraska statutory provision discussed in this Article.

2. RESTATEMENT (SECOND) OF CONTRACTS § 225(1) (1981): "Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused."
3. See, e.g., N.Y. INS. LAW § 150(2) (McKinney 1966): "No breach of warranty shall avoid an insurance contract or defeat recovery thereunder unless such breach materially increased the risk of loss, damage or injury within the coverage of the contract."
4. NEB. REV. STAT. § 44-358 (Reissue 1978). This provision was first enacted in 1913 as part of an extensive revision of insurance statutes, Act of 1913, ch. 154, § 51, 1913 Neb. Laws 419. It has never been amended.
5. IOWA CODE ANN. §§ 515.101-102 (West 1949) (applicable to some non-life insurance policy provisions purporting to make "the policy void before loss occurs"); KAN. STAT. § 40-418 (1973) (applicable to misrepresentations in life insurance applications); MICH. COMP. LAWS ANN. § 500.2836 (Supp. 1981) (applicable to pre-loss breaches of fire insurance policy warranties or conditions); MO. REV. STAT. § 376.580 (1978) (applicable to misrepresentations in life insurance applications); R.I. GEN. LAWS § 27-4-10 (1979) (applicable to misrepresentations in life insurance applications); TEX. INS. CODE ANN. art. 6.14 (Vernon 1981) (applicable to breaches of provisions of fire insurance policies covering personal property). For many years New Hampshire prescribed a contribute to the loss standard for "mistake" and "misrepresentation" defenses to claims on fire insurance policies, but that statute was repealed in 1959. N.H. REV. STAT. ANN. § 407:4 (1955) (repealed, 1959 N.H. Laws 171).

Combination Automobile Policy, the provision on the declarations page that "[t]he owned automobile will be principally garaged in the town or city designated"⁶ as part of the address of the named insured. If the provision is violated,⁷ as where the insured car accompanies the college-bound daughter for a four-year sojourn amidst the groves of academe, the jurisdiction's choice of standard may determine whether the insurer will be obligated to indemnify for losses otherwise within the policy coverage.

The common law rule permits no inquiry into whether the new location of the car in any way prejudiced the insurer; the garaging provision is a "warranty," and warranty conditions must be strictly satisfied.⁸ Thus, unless the common law has been modified by statute, it would not avail the insured to demonstrate that the car was moved from a congested, high-rate environment to a pastoral location where the insurer perceives the risk to be less, nor does it

6. INSURANCE INFORMATION INSTITUTE, SAMPLE INSURANCE POLICIES, PROPERTY LIABILITY COVERAGES 18.

7. Sometimes courts stretch to conclude that the provision was not violated by construing the provision as an "affirmative" warranty, relating only to facts existing at the time of contracting. *See, e.g.*, *Karp v. Fidelity-Phenix Fire Ins. Co.*, 134 Pa. Super. 514, 4 A.2d 529 (1939). Sometimes, too, the characterization of the provision as a "declaration" leads to speculation that it might be treated as a representation. *See, e.g.*, *R. KEETON, supra* note 1, at 404. Usually, however, the provision is viewed as a traditional warranty which must be satisfied as a condition precedent to the insurer's liability. *See, e.g.*, *E. PATTERSON, supra* note 1, at 290, 297-99, 404.

8. *See, e.g.*, *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 544 (1840):

The general rule in regard to what constitutes a warranty, in a contract of insurance, is well settled. Any statement or description, or any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty. Whether this is declared to be a warranty *totidem verbis*, or is ascertained to be such, by construction, is immaterial. In either case, it is an express warranty, and a condition precedent. If a house be insured against fire, and is described in the policy as being "copper roofed," it is as *express* a warranty, as if the language had been, "*warranted* to be copper roofed;" and its truth is as essential to the obligation of the policy, in one case as in the other. In either case, it must be strictly observed. There may often be much difficulty in ascertaining from the construction of the policy, whether a fact, quality or circumstance specified, relates to the risk, or is inserted for some other purpose—as to shew the identity of the article insured, &c. This must be settled, before the rule can be applied. But when it is once ascertained, that it relates to the risk, and was inserted in reference to that, it must be strictly observed and kept, or the insurance is void.

See also RESTATEMENT (SECOND) OF CONTRACTS § 225 (1981). Continued adherence to the strict rule has been roundly criticized, perhaps with greatest force in Childres, *Conditions in the Law of Contracts*, 45 N.Y.U. L. REV. 33 (1970). A similar attack on the position of the second Restatement is mounted in Childres & Sales, *Restatement (Second) and the Law of Conditions in Contracts*, 44 Miss. L.J. 591 (1973).

matter how the loss occurred. Any unexcused failure of condition supports a determination of no liability.

The "materiality" standard, by contrast, allows an insurer a defense only if it can demonstrate that the failure of condition materially enhanced the risk that an insured event would occur.⁹ Under this standard, it becomes important whether the car was moved from a low-risk area to a high-risk area, or the converse.¹⁰ However, the actual cause of loss remains of no consequence. If, for example, the move materially exacerbated traffic-related risks but did not increase the risk of hail damage, the insurer will be permitted a failure of condition defense whether the car was damaged in a rush-hour fender-bender, lost its glass in a hailstorm, or had its hood bashed in by the too-precipitous closing of an automatic garage door.

A contribute to the loss standard goes one step further. It requires the insurer to shoulder the burden of demonstrating not only that the risk of loss from some potential cause was enhanced by the change in garaging arrangements, but also that one of those

9. CAL. INS. CODE § 334 (West 1972) puts the requirement most plainly: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." Most judicial formulations maintain this focus, though they sometimes frame the question in terms of the effect of the true facts on a hypothetical prudent insurer rather than the particular insurer involved in the litigation. See generally E. PATTERSON, *supra* note 1, at 408-28; W. YOUNG, CASES & MATERIALS ON THE LAW OF INSURANCE 143-46 (1971). Discussions of materiality often are influenced by the fact that materiality most frequently is made an issue by the effort of an insurer to assert a misrepresentation or concealment defense. However, where a statute makes the materiality standard applicable to a failure of policy condition defense, the inquiry is not changed. See, e.g., *Irv-Bob Formal Wear, Inc. v. Public Serv. Mut. Ins. Co.*, 81 Misc. 2d 422, 366 N.Y.S.2d 596 (Civ. Ct. 1975), *aff'd*, 86 Misc. 2d 1006, 383 N.Y.S.2d 832 (Sup. Ct. 1976) (holding that failure to satisfy policy condition requiring maintenance of inspection records did not provide a breach of warranty defense under the New York statute).

[W]hether or not any records were made and maintained, no evidence was introduced to show that the absence of such records "materially increased the risk of loss." Indeed, it is difficult to imagine how the presence or absence of records in and of themselves could have "materially increased the risk of loss." Inspecting the alarm system and keeping it in working order would be important with respect to the risk of loss . . . [However], [i]t would appear that any failure to keep a record of inspections was just the kind of "immaterial 'breach of warranty'" which the Legislature had in mind in enacting section 150.

81 Misc. 2d at 428, 366 N.Y.S.2d at 603 (quoting N.Y. INS. LAW § 150(2) (McKinney 1966) and *Glickman v. New York Life Ins. Co.*, 291 N.Y. 45, 51, 50 N.E.2d 538, 540 (1943)).

10. R. KEETON, *supra* note 1, at 403-04.

increased risks actually came to fruition in the damage suffered by the car. Under this standard, proof that the car's new location materially increased the risk of traffic-related damages does not help the insurer if the loss was caused by hailstones which were no more likely in the new location than the old.

To Professor Patterson, the contribute to the loss standard was "the most radical innovation in insurance law."¹¹ It was also, he thought, simply and radically wrong. Although he judiciously refused to ascribe its scattered manifestations to "the blind prejudice of untutored legislators"¹²—after all, as Keeton would later point out, "the strongest showing of materiality is proof that the breach contributed to the loss"¹³—he brooked no doubt that it was error. To Patterson, and the critics who have followed his lead, the contribute to the loss standard's commendable solicitude for insureds is outweighed by a long list of objections. To require an insurer to show a causal nexus between a failure of condition and the loss suffered is said to generate wasteful litigation,¹⁴ to subject the insurer to the vagaries of jury decisions,¹⁵ to impede the insurer's ability to tailor insurance coverage to specific marketing needs,¹⁶ and unfairly to penalize other insureds who do not materially fail to satisfy policy conditions.¹⁷ Fortunately, Patterson

11. E. PATTERSON, *supra* note 1, at 353. Keeton calls contribute to the loss statutes "among the most extreme of regulatory measures in the extent to which they protect policyholders from the consequences of violating policy stipulations." R. KEETON, *supra* note 1, at 384.

12. E. PATTERSON, *supra* note 1, at 355.

13. R. KEETON, *supra* note 1, at 382.

14. *Id.* at 383.

15. E. PATTERSON, *supra* note 1, at 357-58.

16. R. KEETON, *supra* note 1, at 383.

17. This, the most telling of the criticisms, deserves careful elaboration; as Patterson noted, the arguments sometimes adduced do little to further the debate:

To condemn these laws by pointing out the unquestioned fact that the insurer in Iowa is legally bound to pay claims that he would not be bound to pay in New York is question begging, since it assumes that the New York law is the only sound scheme of risk distribution. On the other hand, to justify the Iowa statute by saying that the insurance companies can increase their rates to meet the added liabilities is also unsound, for the argument leaves untouched the question whether the insureds who do not breach any of the conditions of their contracts should be called upon to pay additional premiums to satisfy additional claims made collectible by reason of the statute.

E. PATTERSON, *supra* note 1, at 356. Patterson has provided a helpful discussion of the rate-equity implications of a contribute to the loss approach. *Id.* at 356-57. Keeton has presented the issue even more plainly:

First, a contribute-to-loss standard of materiality tends to produce an inequity in rate structure. Insurers will sometimes lack proof that a violation contributed to a loss, even when it in fact did so. From the insurer's point of view, because of this juridical risk it is more expen-

opined, because it was confined chiefly to a few pockets of mid-western error, the contribute to the loss standard could be dismissed as of only "theoretical importance."¹⁸

So much for the view from the East Coast. Those who observe the Nebraska insurance scene from less lofty aeries likely will

sive to service the contracts of those policyholders who engage in policy violations than to service the contracts of those who conform; the risk that the company undertakes for those who commit policy violations is somewhat higher than the risk it undertakes for others. Despite this, the same premiums are paid by the two groups. Of course one might argue that this discrimination is justified on the same basis as any other rate classification that is broad enough to include some persons whose risks are greater than others within the same classification. Also, similar inequities probably arise from juridical risks under any standard of liability. For example, if the decisive question is merely whether a violation of policy terms has occurred, the nonviolators help to pay for the losses of those violators whose violations cannot be proved. The effect of the juridical risks on equity of the rate structure is undoubtedly greater, however, under a contribute-to-loss statute than under an increase-of-risk statute. In cases of fire loss, for example, the evidence needed to prove that a violation contributed to the loss will often be destroyed by the fire. In any event it is so much more difficult to prove contribution to loss than increase of risk that a much higher percentage of cases will be decided by lack of adequate evidence if the former is the decisive issue.

R. KEETON, *supra* note 1, at 382 (footnote omitted).

18. E. PATTERSON, *supra* note 1, at 351.

It is worth noting that the issues raised by contribute to the loss statutes have significance even in jurisdictions that have not adopted that statutory formula. Insurance policies are full of provisions that make insurer liability turn on whether a particular risk factor in fact caused an insured event to occur. Usually, of course, such provisions are there because insurers have chosen to put them there; the insurer is willing to subject itself and its policyholders to the juridical risks associated with determining whether property damage to an automobile was "caused by collision" where the insured purchased one but not both of the "collision" and "comprehensive" coverages marketed by the insurer. Sometimes, however, such provisions are in the policy because effectively mandated by statute. For example, in some jurisdictions life insurers are generally prohibited from conditioning liability upon the occurrence of death in a particular manner or while the insured has a specified status, but insurers may employ provisions drawn from a short statutory laundry list of actual cause provisions. Thus, in such jurisdictions, it would be permissible for an insurer to except liability for death "resulting from service in the military," but it would not be permissible for the insurer to include a suspensive condition preventing liability if death occurs "while in the military." *See, e.g.,* MD. ANN. CODE art. 48A, § 410 (1979). *See generally* W. MEYER, *LIFE & HEALTH INSURANCE LAW* §§ 7.1-7.15 (1972).

Another related phenomenon is the occasional judicial decision that refuses, without statutory warrant, to enforce a policy condition as written because the failure to satisfy the condition did not contribute to the loss. *See, e.g.,* *Bayers v. Omni Aviation Managers, Inc.*, 510 F. Supp. 1204 (D. Mont. 1981); *Avemco Ins. Co. v. Chung*, 388 F. Supp. 142 (D. Hawaii 1975); *South Carolina Ins. Co. v. Collins*, 269 S.C. 282, 237 S.E.2d 358 (1977).

form quite different impressions. In fact, a lawyer who seeks to gain his bearings from the insurance or more generalized encyclopedias might be forgiven for missing the contribute to the loss statute entirely; those sources, concocted by forcing snatches of judicial opinions into narrowly pre-conceived subject matter classifications, and homogenized in order to appear relevant in all jurisdictions, sketch a bland and featureless common law sea into which legislative innovations can sink without trace.¹⁹ Still, the inadequacies of some insurance research materials is faint excuse. A lawyer working the Nebraska sources should find the contribute to the loss statute and its judicial gloss. He also will discover that the hornbook descriptions of that law can be seriously misleading. What the hornbooks portray as a statutory standard of broad application and certain implications upon closer examination looks both less sweeping and less tractable. Legislatively crafted exceptions and judicial construction have combined with changing fashions in insurance policy design to greatly reduce the potential reach of the contribute to the loss standard. Moreover, questions of causal ascription, seldom easy in any context, prove stubbornly resistant to the familiar verbal formulas when the issue is whether particular failures of condition should be said to have contributed to a loss.

This Article will examine the role of the contribute to the loss standard in Nebraska. It will not tackle the much larger question of how Nebraska treats failures of insurance policy conditions; indeed, one major theme not pursued here concerns how the application of various interpretive techniques and equitable doctrines may help to relieve pressures for a more sweeping statutory standard. Instead, this Article will concentrate on questions of application and effect arising directly from the presence of the contribute to the loss statute. This review will proceed in two steps. The first part of this Article will examine problems associated with determining to which failure of condition defenses the standard should

19. The very recent updating of the Appleman treatise devotes an entire chapter to the "Effect of Statutory Provisions" on concealment, misrepresentation, and breach of warranty defenses without ever presenting the language of any of the statutory provisions with which it purports to deal, without attempting even a rudimentary classification of those statutes, and without citation to most of those statutes. *See generally* 12A J. APPLEMAN & J. APPLEMAN, *INSURANCE LAW & PRACTICE* §§ 7251-7258 (1981). Of course, Appleman deserves obloquy no more than its competitors. For a useful guide to the statutory presence in this area, don't see 43 AM. JUR. 2D *Insurance* § 760 (1969) (indicating applicability of some sort of statute in Nebraska); 45 C.J.S. *Insurance* § 473(4)(d) (1946) (signaling presence of Nebraska statute and its inapplicability to post-loss failures of condition); 7 COUCH ON INSURANCE §§ 35:17, :47 (2d ed. 1961) (confusing standards applicable to misrepresentation defenses and to failure of condition defenses).

be applied. The second part of this Article will discuss the nature of the burden imposed by the contribute to the loss standard for those defenses to which it is applicable.

II. WHAT DEFENSES ARE SUBJECT TO THE CONTRIBUTE TO THE LOSS STANDARD?

It may contribute to the efficiency of the discussion to establish at the outset a few observations concerning insurance policy provisions. In most policies, a bewildering array of policy language parades across the pages under many different banners. Some provisions are "declarations," some "exclusions," some "exceptions," some "definitions," some "conditions." Many carry no labels at all.²⁰ In legal effect, however, almost all are conditions.²¹ In the usual insurance relationship, the insured promises almost

20. Indeed, for a time, some insurers solemnly referred to provisions establishing restrictions on and conditions to the insurer's liability as "Privileges." Fouse, *Policy Contracts* in YALE READINGS IN INSURANCE: PERSONAL INSURANCE 250, 261 (2d ed. 1909). Current labeling practices (except where "plain language" sensibilities have been permitted to flower) generally seem less funny but no less bizarre.

21. See generally C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS § 33, at 40-41 (2d ed. 1880), *quoted with approval in* General Credit Corp. v. Imperial Cas. & Indem. Co., 167 Neb. 833, 839-40, 95 N.W.2d 145, 149 (1959) (quoting 3 WILLISTON ON CONTRACTS § 672, at 1930 (rev. ed. 1936)):

Moreover, the words of such a clause will have, in fact, a different meaning, according to the party who uses them. If they are used in a contract by the party who is to do the act, they plainly import that he binds himself to do it; while, if they are used by the party for whose benefit the act is to be done, they fairly mean that he will require it to be done, i.e. that his own obligation shall be conditional upon its being done. How then shall it be ascertained to whom the language of such a clause is to be imputed? If the contract be clearly unilateral (e.g. a policy of insurance), of course the answer to this question admits of no doubt. In such a contract only one party speaks, and that is the covenantor or promisor. Any clause, therefore, in a policy of insurance, requiring any act to be done by the insured, will be a condition of the covenant or promise of insurance, though its language may more naturally import a covenant or promise by the insured.

For a more modern rendition of the same point, see RESTATEMENT (SECOND) OF CONTRACTS 2d § 227(2) (1981) which states a preference for interpreting contracts as imposing a duty rather than as erecting a condition "[u]nless the contract is of a type under which only one party generally undertakes duties."

[The] preference does not apply when the contract is of a type under which only the obligor generally undertakes duties. It therefore does not apply to the typical insurance contract under which only the insurer generally undertakes duties, and a term requiring an act to be done by the insured is not subject to this standard of preference. In view of the general understanding that only the insurer undertakes duties, the term will be interpreted as making that event a condition of the insurer's duty rather than as imposing a duty on the insured.

Id. Comment d.

nothing. The insurer promises much, but both parties expect the insurer to perform only for the few who will qualify by satisfying the many conditions that hedge the insurer's obligation.

Years ago Professor Patterson sought to impose some order on this jumble by proposing that policy conditions be categorized according to the various functions they serve.²² "Coverage provisions" are those that define and delimit the risk transferred to the insurer. In this category belong descriptions of the insured event (*e.g.*, "direct loss by fire"); excepted causes (*e.g.*, "enemy attack by armed forces"); subject matter of the insurance (*e.g.*, "described residence premises . . . located at the above address"); covered or excluded consequences of the insured event (*e.g.*, "without compensation for loss resulting from interruption of business or manufacture"); duration of the insurance (*e.g.*, "Policy Term _____ Inception _____ Expiration _____"); and amount of insurance (*e.g.*, "Liability Limit _____"). To be contrasted with coverage provisions are policy conditions designed to allow the insurer to remove from its underwriting calculus concerns that certain physical and moral hazards might bring about an insured loss (*e.g.*, "Brick, Stone or Masonry Veneer"; "The described dwelling is not seasonal"; "Other insurance . . . is not permitted").²³ A third category of policy provisions is designed to protect the insurer against the juridical risks that may hinder loss adjustment efforts (*e.g.*, "the insured shall give immediate written notice to the insurer of any loss . . . and render to the Company a proof of loss"; "provided there are visible marks of forcible entry upon the exterior of such vehicle").

All this would be of only taxonomic interest were it not for the advent of statutes, like section 44-358 of the Nebraska Revised Statutes, intended to restrict the availability of defenses based on failure of policy conditions. So far as the common law was concerned, an express condition was an express condition, and "express conditions, whatever their nature, must under any and all circum-

22. The early effort is recorded in Patterson, *The Apportionment of Business Risks through Legal Devices*, 24 COLUM. L. REV. 335 (1924), and Patterson, *Warranties in Insurance Law*, 34 COLUM. L. REV. 595 (1934); the mature formulation is presented in E. PATTERSON, *supra* note 1, ch. 6. The categories of policy conditions identified in the text are Patterson's; the examples are mine, drawn from a modern homeowners policy.

23. Of course, both "excepted cause" provisions—already classed as "coverage" provisions—and "continuing warranties" can be viewed as policy provisions by which the insurer seeks to control risks after the policy has been issued. E. PATTERSON, *supra* note 1, at 237. In practical effect, therefore, this second category of policy provisions was conceived by Patterson as encompassing only "continuing warranties."

stances, be literally performed"²⁴ The incautious reader of the standard texts might be led to believe that with the imposition of the contribute to the loss standard all this has changed; in fact, only some things have changed, and those in quite different ways. Sorting it all out requires a self-conscious appreciation of the different roles policy conditions can play and the different reactions they engender. It also is useful to treat separately failures of condition that occur before the inception of the contractual relationship, failures of condition that occur after the insured loss, and failures of condition that occur after the inception of the contract but before an insured event has occurred.

A. Pre-Inception Failures of Condition Are Immune

Imagine an applicant for life insurance who fraudulently answers application questions about his medical history; he knowingly fails to disclose a recent diagnosis of a serious heart condition. At common law, a policy issued in reliance upon this obviously material misrepresentation would be avoidable by the insurer during the period of contestability, either in an action to rescind the policy or as a defense to a claim by the beneficiary on the policy. But what if the *c'est tui que vie* dies as a result of being hit by a bus? May the beneficiary successfully contend that the insurer's misrepresentation defense is not available because the heart condition did not contribute to the death of the *c'est tui que vie*? In several states that have enacted contribute to the loss statutes, that is precisely the result prescribed.²⁵ In Nebraska, however, the contribute to the loss standard is not applicable to such a defense.

Why not? The Nebraska contribute to the loss statute speaks to "[t]he breach of a warranty or condition *in* any contract or policy

24. F. KESSLER & G. GILMORE, CONTRACTS CASES AND MATERIALS 845-46 (2d ed. 1970). The authors continue:

No doubt the great concept of freedom of contract comes in to buttress the conclusion that any express condition is sacrosanct in a way that no implied condition can ever be. In most respectable academic literature the idea that express conditions are somehow fundamentally different from implied conditions [and thus unaffected by the doctrine of substantial performance] is introduced only to be dismissed as false or misleading. . . . To many, if not most, practicing lawyers, however, the idea seems to commend itself as an article of faith. Counsel for insurance companies, . . . have been particularly ardent believers in the sanctity of express conditions.

Id. at 846 (citation omitted).

25. See, e.g., *Jackson v. National Life & Accident Ins. Co.*, 150 Kan. 86, 90 P.2d 1097 (1939); *Snead v. Union Life Ins. Co.*, 340 S.W.2d 184 (Mo. App. 1960); *Madsen v. Metropolitan Life Ins. Co.*, 90 R.I. 176, 156 A.2d 203 (1959).

of insurance.”²⁶ Because a material misrepresentation upon which the insurer reasonably relied provides a basis for rescission, the accuracy of such a representation sometimes is described as a “condition-precident-to-formation” of the insurance contract,²⁷ but that does not mean the truth of representations automatically is a “condition *in* a contract.” The distinction is between “conditions external” and “conditions internal.” However, the question is more complicated than that. Life insurance applications and policies sometimes include provisions declaring that all application answers are “warranties” and that their truthfulness is a condition precedent to any liability of the insurer. For example:

I do hereby declare and agree that each and every statement and answer contained in this application is material to the risk, and I hereby warrant all the answers and statements, . . . to be full, complete and true; and it is agreed that this warranty shall form the basis and shall be a part of the contract²⁸

Is that enough to convert a representation into a policy condition so as to bring the contribute to the loss standard into play?

A primary motivation in the development of statutory restrictions on condition defenses was the success with which insurers employed such provisions to convert misrepresentation defenses, which required a demonstration of materiality, into failure of condition defenses, which did not. Especially in life insurance, where application forms could grow unconscionably detailed and the consequences of voidability could be appallingly graphic, popular, and legal intuitions prompted the conclusion that such immaterial failures of condition should not be the occasions for forfeiture.²⁹ The

26. NEB. REV. STAT. § 44-358 (Reissue 1978) (emphasis added).

27. E. PATTERSON, *supra* note 1, at 282.

28. Kettenbach v. Omaha Life Ass'n, 49 Neb. 842, 847, 69 N.W. 135, 137 (1896).
With not atypical overkill it went on to declare:

I do further agree that if any of the answers or statements made and contained herein are not full and complete, or that if the same or any of them, whether made in good faith or otherwise, are in any respect untrue, then said policy and this contract shall be null and void. . . .
If any statement made in the application for this policy of insurance is in any respect untrue, then and in each and every such case the consideration of this contract shall be deemed to have failed and this policy of insurance shall be null and void.

Id.

29. See, e.g., *Immaterial Warranties in Life Insurance*, 11 ALBANY L.J. 120 (1875).

There are certain so-called principles of the common law which not even age can render respectable—ideas which perhaps were reasonable or at least unobjectionable when first enunciated, but which the world has moved away from or passed by. Three prominent examples now occur to us, namely: the liability of an innkeeper as an insurer of his guest's goods, even in case of a fire without the fault of the former; the absence of any right in an agister to a lien for the keeping of the cattle; and the avoidance of a contract by the breach of an immaterial warranty. For the first of these dogmas there might

early volumes of the Nebraska reports are littered with opinions that wrestle with whether the insurer had managed to achieve the transformation from "representation" to "condition."³⁰ What better place for legislative intervention to deny the insurer a defense when the insurer cannot show that the facts misrepresented actually helped to produce the loss?

Nevertheless, the Nebraska contribute to the loss standard is not applicable to such defenses; they have been factored out for separate treatment. Section 44-502, enacted as part of the package that included the contribute to the loss standard,³¹ requires that non-industrial life and endowment policies include:

A provision that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall avoid the policy unless it is contained in a written application, and a copy of such application shall be endorsed upon or attached to the policy when issued.³²

As a result, innocent misrepresentations cannot be converted into breaches of warranty, but fraudulent misrepresentations can!³³ That distinction proves of no consequence, however, because the first sentence of section 44-358, which is addressed to all lines of insurance, applies equally to misrepresentations and warranties:

No oral or written misrepresentation or warranty made in negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury.³⁴

originally have been some excuse; there is none now. In regard to the second there could never have been any reasonable difference of opinion, and as for the last it is one of those monstrous and absurd perversions of justice that have made the law a subject of reproach among some of the wisest and most humane of men.

... [I]f an insurer inserts these questions and provides that the answers shall be warranties, the man who undertakes to answer them and makes an inadvertent mistake that does no harm, nay, that is less favorable to himself than the strict truth demands, and thus operates to the benefit of the insurer, has lost the benefit of his contract, and that, too, although the insured may not have been deceived in the least, but may have known the truth all the time, and with this knowledge have gone on for half a century taking premiums from its innocent victim. This is so shocking to the moral and common sense of the community that plain men get a bad idea of law, of courts and of the administration of justice.

Id. at 120-21.

30. See, e.g., *Morrissey v. Travelers Protective Ass'n of Am.*, 122 Neb. 329, 240 N.W. 307 (1932); *Beeler v. Supreme Tribe of Ben Hur*, 106 Neb. 853, 184 N.W. 917 (1921); *Action Life Ins. Co. v. Rehlaender*, 68 Neb. 284, 94 N.W. 129 (1903); *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, 69 N.W. 135 (1896); *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N.W. 125 (1896).

31. See note 4 *supra*.

32. NEB. REV. STAT. § 44-502(4) (Reissue 1978).

33. *Gillan v. Equitable Life Assurance Soc'y*, 143 Neb. 647, 10 N.W.2d 693 (1943).

34. NEB. REV. STAT. § 44-358 (Reissue 1978).

By negative implication, the contribute to the loss standard prescribed by the second sentence of section 44-358³⁵ does not apply to negotiation-based, pre-inception failures of condition.³⁶ It makes no difference whether the defense asserted is labeled misrepresentation, breach of warranty, failure of condition precedent to liability, or failure of a condition precedent to formation of the contract. For such defenses, the test is whether the insurer was "deceived to its injury." That standard, the cases indicate, does not differ from the common law materiality standard formerly applicable to misrepresentation defenses.³⁷

Nebraska sources do not disclose why the contribute to the loss standard was not made applicable to pre-inception failures of condition, but at least two hypotheses seem credible. First, a principal preoccupation of those counseling legislative modification of the common law rules applicable to failures of condition was the perceived need to check the ability of insurers to evade the materiality standard otherwise applicable to misrepresentation defenses. The first sentence of section 44-358 assures continued application of the common law misrepresentation rule. Second, pre-inception misrepresentations and breaches of warranty can be raised at two different junctures. When asserted as a defense to a claim on the policy after an insured event has occurred, a contribute to the loss standard can work well enough: there is a "loss" to which the misrepresented fact either did or did not contribute. However, when the insurer seeks to rescind the policy before an insured event—admittedly, a much less frequent occurrence—the contribute to

35. See text accompanying note 4 *supra*.

36. See *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146, 153, 187 N.W. 787, 790 (1922): "It will be observed that this section of the statute is divided into two clauses. The first relates to matters of statements in the negotiations for the insurance" See also *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126, 183 N.W. 92 (1921).

37. See, e.g., *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146, 153-54, 187 N.W. 787, 790 (1922): "If, through the untrue statement of the insured, the defendant was induced to issue the policy, and thus become obligated under its contract, when it would not have done so had a truthful answer been made, it would seem clear that the defendant was deceived to its injury" But cf. *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 660, 150 N.W.2d 268, 272 (1967):

While we do not hold that fraudulent misrepresentations in an application for accident insurance must also contribute to the accident or the loss, the jury is entitled to consider the facts as to how the loss occurred in connection with its determination of fraudulent intent, and whether the insured's misrepresentations or false statements were made knowingly with intent to deceive and that the company was thereby deceived to its injury.

the loss standard simply does not fit: there has been no "loss" to which the misrepresented fact could contribute. In Missouri, where a contribute to the loss standard is applicable *only* to life insurance misrepresentation cases, the courts have recognized this difficulty and have concluded that rescission actions implicitly are excepted from the statute.³⁸ In Nebraska, the two sentence structure of section 44-358 avoids this problem. Pre-inception misrepresentations and the failures of condition they sometimes create are to be judged by whether the insurer was "deceived to its injury." As a consequence, one of the most productive sources of failure of condition litigation has been placed beyond the reach of the contribute to the loss standard.

B. Post-Casualty Failures of Condition Are Immune

Insurance policies usually include a number of provisions that condition the insurer's liability on the insured's taking certain actions after the insured event has occurred. Among the more familiar examples of such conditions are those requiring timely notice to the insurer after an insured event, cooperation by the insured in the liability insurer's efforts to investigate a claim and mount a defense, and submission of prescribed proofs of loss. To the extent that courts and commentators still indulge the distinction, conditions such as these may be denominated conditions subsequent rather than conditions precedent. At the doctrinal level, little beyond allocation of the burden of proof will turn on the outcome of that now-suspect labeling process.³⁹ At another level, however, the sense that an insurer defense is based on the failure of a "mere condition subsequent" often has been associated with the sense that the failure of condition likely was "only technical," and thus supplies a proper occasion for applying the various judicial tech-

38. See, e.g., *Pacific Mut. Life Ins. Co. v. Glaser*, 245 Mo. 377, 385-86, 150 S.W. 549, 550-51 (1912):

It is apparent that this statute applies only to cases in which the "event on which the policy is to become due" has actually happened, and the liability of the insurer under the policy is the question to be determined. It was not intended to restrict the freedom of contract except in such cases as came within its provisions. The case before us is not an action to enforce liability under a contract of insurance. The event on which the obligation is made contingent had not occurred and therefore the rights of the parties are not affected by the statute, but are to be settled under the general law as though the statute did not exist.

See also *Wells v. Great E. Cas. Co.*, 40 R.I. 222, 100 A. 395 (1917).

39. For a still-excellent analysis, see Harnett & Thornton, *The Insurance Condition Subsequent: A Needle in a Semantic Haystack*, 17 *FORDHAM L. REV.* 220 (1948). See also *RESTATEMENT (SECOND) OF CONTRACTS* §§ 224, 230 (1979); Corbin, *Conditions in the Law of Contract*, 28 *YALE L.J.* 739, 746-47 (1919) (tracing the debate back to Coke).

niques for avoiding or ameliorating the normal consequences of a breach of condition.⁴⁰

On a first reading, the second sentence of section 44-358 might seem to respond to this instinct. Although the historic conception of warranty in insurance law is restricted to policy conditions designed to ameliorate the risk that an insured event will occur and thus does not encompass post-casualty conditions, section 44-358 does not purport to regulate only breaches of warranty. It provides that "[t]he breach of a warranty *or condition* . . . shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss"⁴¹ If the "loss" referred to in the statute is understood to be the adverse impact on the insurer's underwriting results if it becomes obligated to perform under the insurance policy, then notice and similar post-casualty conditions could be treated like those that come into play before the casualty occurs. On this reading, failure of an insured automobile owner to give timely notice of property damage to her automobile would give the insurer a defense only if the insurer could demonstrate that the delay in some manner prevented the insurer from escaping all or a portion of its obligation to perform its contractual undertakings. This reading can claim twin advantages: it subjects post-casualty failures of condition to the same standard as other post-inception failures of condition, and it responds to the common intuition that post-casualty breaches of condition often are technical breaches which do not prejudice the interests of the insurer. It also has disadvantages: it depends upon an especially strained conception of "loss," and there is no evidence that it has ever been seriously entertained by any court or commentator.

Instead, there seems to be tacit agreement that "loss" as employed in section 44-358 means the occurrence of the insured event that first triggers insurer liability. This poses a dilemma. If the statute is applicable, the insurer of an automobile damaged by hail will be permitted to invoke a breach of condition defense only if it

40. The most recent effort to capture the essence of this common instinct is found in RESTATEMENT (SECOND) OF CONTRACTS § 229 (1981): "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." See also Morris, *Waiver & Estoppel in Insurance Policy Litigation*, 105 U. PA. L. REV. 925 (1957) (still the best guide to how "underwriting realities" of various policy and marketing arrangements influence application of waiver and estoppel doctrines); R. KEETON, *supra* note 1, ch. 6 (an evocation of the same themes, more broadly framed); E. PATTERSON, *supra* note 1, at 482-83 (a stylish presentation of the argument that "conditions relating to loss adjustment" are more vulnerable to waiver and estoppel than other policy provisions).

41. NEB. REV. STAT. § 44-358 (Reissue 1978) (emphasis added).

can demonstrate that the breach existed at the time of the hail damage and contributed to that hail damage. A failure to give timely notice of hail damage obviously cannot satisfy these statutory requirements. Indeed, no post-casualty breach of condition logically can be said to have contributed to the occurrence of the casualty, so long as we indulge the usual conventions concerning the temporal relations implied by causal statements.

Does that mean that no post-casualty failure of condition can supply the basis for an insurer defense? For a time, Nebraska flirted with this conclusion. In 1931, in *George v. Aetna Casualty & Surety Co.*,⁴² the insured failed to give timely notice of a liability claim against him. The Nebraska Supreme Court struggled with the question of when the obligation to give notice arose, but ultimately concluded that under the Nebraska statute it did not matter: "A lack of literal compliance with the provisions of the policy is insufficient to avoid liability where it does not contribute to the loss or injure the insurer."⁴³ There is no indication in the opinion that the court thought the insurer had failed to prove what might have been proved. Apparently, the court thought it too obvious for comment that a post-loss breach of condition could not contribute to that loss.

A year later the Eighth Circuit employed the same conception of "loss," but used it to support a quite different result. In *American Surety Co. v. Bankers' Savings & Loan Association*,⁴⁴ the insured under a fidelity bond failed to give the required notice of a covered employee's defalcation. The insured tried to wrap itself in the contribute to the loss statute, to no avail. Operating apparently without benefit of the *George* opinion, the Eighth Circuit concluded: "The statute does not apply. In the nature of things, the failure to give notice could not have existed at the time of the loss, or have contributed thereto."⁴⁵ With the statute inapplicable, the strict common law rule applied⁴⁶ so that failure to satisfy the notice condition was enough to warrant a directed verdict for the insurer. On retrial, however, the insured invoked the *George* construction of the statute and received a judgment against the insurer. On a second appeal the Eighth Circuit affirmed.⁴⁷ The *George* approach would be followed. Further, opined the Eighth

42. 121 Neb. 647, 238 N.W. 36 (1931).

43. *Id.* at 656, 238 N.W. at 40.

44. 59 F.2d 577 (8th Cir. 1932).

45. *Id.* at 580.

46. Pre-statute Nebraska decisions applying the strict common law rule to post-loss failures of condition include: *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N.W. 711 (1891) (failure to make proofs of loss); *McCann v. Aetna Ins. Co.*, 3 Neb. 198 (1874) (failure to give notice and to make proofs of loss).

47. 67 F.2d 803 (8th Cir. 1933), *cert. denied*, 291 U.S. 678 (1934).

Circuit, "We think this construction by the State Court of last resort is rather more in harmony with the legislative purpose."⁴⁸

However, the next time the question was presented, the Nebraska Supreme Court changed directions and embraced the position first advocated by the Eighth Circuit. In *Clark v. State Farmers Insurance Co.*,⁴⁹ the insured had delayed four years before giving notice of a fire loss. The supreme court reversed a trial court decision for the insured. "The statute does not relieve an insured of the duty of giving notice and proof of loss to an insurer before a suit for the recovery of benefits under a fire policy may be maintained."⁵⁰ According to the court, the contribute to the loss statute only

relates to those breaches which exist "at the time of loss." It does not relate to a breach of the terms of a policy which could only arise after the loss has occurred. It does not deny the insurer the right to rely upon conditions of its policy which the insured is required to perform as a condition of recovery after the loss has occurred. It relates to the question of a recoverable loss and not to the question of procedure to be followed in collecting for the loss after it has occurred. Clearly a notice of loss and proofs of loss can only be given after the loss has occurred.

To construe the statute as plaintiff contends . . . would be to declare many standard provisions of insurance contracts inoperative.⁵¹

In *Clark*, the *George* precedent was buried in a string citation of wildly heterogeneous decisions which "do not determine the question here presented."⁵² As late as 1974, in *Ach v. Farmers Mutual Insurance Co.*,⁵³ an insured who had failed to comply with a notice of loss condition in his homeowner's policy sought to resurrect the *George* approach in order to contend that the insurer was not prejudiced by the delay in giving notice. This time the court nailed the coffin lid shut. *Clark* was the controlling authority:

It is true that in the earlier case of *George v. Aetna Casualty & Surety Co.*, *supra*, this court used the statute in question as a makeweight argument supporting its opinion, but we did not there really analyze or consider the meaning of the statute. *George v. Aetna Casualty & Surety Co.*, *supra*, is disapproved insofar as it relied on the statute.⁵⁴

To this point, the history of the treatment of post-loss breaches of condition seems straightforward enough: after a brief flirtation with the idea that the Nebraska statute completely deprived insurers of defenses based on post-loss failures of condition, the court concluded that the statute did not apply to such defenses. Thus,

48. 67 F.2d at 806.

49. 142 Neb. 483, 7 N.W.2d 71 (1942).

50. *Id.* at 488, 7 N.W.2d at 73.

51. *Id.* at 487-88, 7 N.W.2d at 73.

52. *Id.* at 489, 7 N.W.2d at 74.

53. 191 Neb. 407, 215 N.W.2d 518 (1974).

54. *Id.* at 409, 215 N.W.2d at 520.

the common law rule remained unmodified and any failure, no matter how technical and immaterial, would entitle the insurer to a defense. However, by the time the Nebraska court produced the *Ach* decision, what apparently was clear in that opinion already had been undercut by what the court had done elsewhere. In 1966, in *MFA Mutual Insurance Co. v. Sailors*,⁵⁵ the Nebraska Supreme Court initiated another line of authority which appeared to sanction significantly different results for at least some post-loss breach of condition defenses. In *Sailors*, an omnibus insured under an automobile liability policy lied to the police and the insurer about who was driving the insured car and failed to notify the insurer when a tort suit was brought against him. The trial court found that Sailors' conduct "had materially and substantially breached the terms of the policy but that there was no showing of prejudice or detriment to the [insurer]."⁵⁶ It therefore concluded that the insurer remained obligated to defend the action against Sailors. The Supreme Court of Nebraska affirmed. Noting "a substantial division of authority"⁵⁷ on the question, the court aligned itself with "[t]he more recent cases" holding "that an insurer cannot assert a breach of cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer."⁵⁸

Less than three months later, the court again refused to apply the strict common law rule to post-casualty breaches of conditions. In *Iowa Mutual Insurance Co. v. Meckna*,⁵⁹ the automobile liability insurer asserted breach of both the notice and the cooperation conditions of the policy. Citing *Sailors*, the court reiterated its requirement that the insurer defending on the basis of breach of a cooperation clause demonstrate "prejudice" or "detriment" as a result of that breach.⁶⁰ The court's handling of the notice condition defense was less direct. It did not purport to apply a prejudice standard; instead, it ascribed a purpose to the notice requirement, determined that the failure to give notice did not impede the insurer's efforts to accomplish that purpose, and concluded that the failure to give notice did not entitle the insurer to a defense:

What is the purpose of this provision? Patently, it is to alert the insurer to a possible claim and to afford it an opportunity to make such investigation

55. 180 Neb. 201, 141 N.W.2d 846 (1966).

56. *Id.* at 203, 141 N.W.2d at 848.

57. *Id.* at 204, 141 N.W.2d at 848. See generally Annot., 9 A.L.R. 4th 218 (1981).

58. 180 Neb. at 204, 141 N.W.2d at 849. See also *Pupkes v. Sailors*, 183 Neb. 784, 788-89, 164 N.W.2d 441, 444 (1969) (garnishment action arising out of same incident) ("The question is no longer an open one in this jurisdiction. . . . Regardless of the nature of the breach, there must be a showing of detriment or prejudice to the insurer.").

59. 180 Neb. 516, 144 N.W.2d 73 (1966).

60. *Id.* at 526-29, 144 N.W.2d at 80-81.

as it deems pertinent to enable it to process any future claim. . . . Insurer had all the information Meckna could give it, and had ample notice to permit it to take any and all necessary steps to protect its interest. Under the facts in this case, there is no merit to this assignment [of error by the trial court].⁶¹

The *Meckna* opinion does not explain why the prejudice standard employed for the cooperation condition defense was not applied to the notice condition defense. Indeed, the difference may be more apparent than real. The conclusion that the notice defense should fail could have been rationalized in the same terms used by the court in its discussion of the cooperation clause defense: the notice defense failed because the insurer failed to show "prejudice" or "detriment" resulting from that breach of condition. Still, the court seemed to go out of its way to employ different verbal structures to explain the unavailability of the two defenses, and the distinction thus created remains a striking and suggestive feature of the *Meckna* opinion.

The reported opinions since *Meckna* have been infrequent and do little to clarify the Nebraska position on post-loss failures of condition.⁶² In 1969, in *Babcock & Wilcox Co. v. Parsons Corp.*,⁶³ an insurer's defense asserted failure to satisfy a machinery and equipment floater policy condition requiring proofs of loss within ninety days of the occurrence. The federal district court did not squarely face the prejudice question; instead, it quoted from *Meckna*, observed that the insurer had received actual notice of the loss within four days of the occurrence, seemed to conflate proof of loss conditions and notice conditions, and concluded that no defense should be available.⁶⁴ Also in 1969, in *Trausch v. Knecht*,⁶⁵ the Nebraska court clearly said that an insured's failure to notify his liability insurer that a suit against him had begun should not provide the insurer a defense "in the absence of

61. *Id.* at 525-26, 144 N.W.2d at 79-80.

62. The prejudice issue often does not arise because the court concludes that the facts alleged do not constitute a breach of condition. However, it is not always easy to maintain a clear distinction between an argument that a delay in giving notice did not prejudice the insurer and an argument that a delay in giving notice did not breach the policy condition because the notice was given "with reasonable celerity, with reasonable and proper diligence, and what is a reasonable time depends upon all the facts and circumstances of each particular case." *Keene Coop. Grain & Supply Co. v. Farmers Union Indus. Mut. Ins. Co.*, 177 Neb. 287, 291, 128 N.W.2d 773, 777 (1964). *See, e.g., R.C. Walters Co. v. DeBower*, 191 Neb. 544, 216 N.W.2d 515 (1974) (prejudice caused the insurer by the delay is basis for determination that the delay was unreasonable).

63. 298 F. Supp. 898 (D. Neb. 1969).

64. *Id.* at 903-04.

65. 184 Neb. 134, 165 N.W.2d 738 (1969).

prejudice."⁶⁶ However, that opinion later was withdrawn,⁶⁷ for reasons that may not have related to the failure of condition defense.⁶⁸ Then, in 1974, the *Ach* decision⁶⁹ permitted a property insurer a notice condition defense without a demonstration of prejudice, on the reasoning that *George*, the decision upon which the insured relied, had been overruled in *Clark*. The *Ach* opinion and the briefs of the parties give no hint of the existence of the *Sailors/Meckna* line of decisions. Thereafter, in 1978, in *Omaha*

66. *Id.* at 137, 165 N.W.2d at 741. The court stated:

"The rule firmly established by weight of authority is that where provisions relating to notice of accident and forwarding of a summons or other process are made conditions precedent to recovery, the failure to act with reasonable timeliness will release the insurer from the contractual obligation, although no prejudice may have resulted." 2 Long, *The Law of Liability Insurance*, s. 13.18, p. 13-45. It is then stated that there is a present-day tendency to consider automobile insurance as not only a contract between the insurer and the insured, but also a contract for the benefit of the public, and to hold the insurer liable in the absence of prejudice. Nebraska appears to follow the latter rule. In *MFA Mutual Ins. Co. v. Sailors*, 180 Neb. 201, 141 N.W.2d 846, it is held that: "An insurer cannot assert a breach of the cooperation clause as a policy defense in the absence of a showing of prejudice or detriment to the insurer."

Id. However, the court concluded that the default judgment rendered against the insured before the insurer learned of the suit "definitely prejudiced" the insurer, *id.*, thus warranting dismissal of the garnishee's action against the insurer. This provoked a stinging dissent from Chief Justice White:

Properly interpreted the insurance company's sole claim of prejudice is the excessiveness of the default judgment entered against it. We now hold in this garnishment action that it was prejudiced because it did not receive the notice and summons of suit. Therefore, I feel, its relief should go no further than the degree of prejudice that it suffers from the entry of the claimed excessive default judgment. The remedy granted should not overreach the mischief sought to be prevented. It would appear that the plaintiff should be given a full opportunity to remove the mischief of the default judgment in the garnishment action by an offer to stipulate to the setting aside of the entry of the default judgment, or by its consent to such entry, or by giving the garnishee a full opportunity to prove the amount and the nature of the prejudice that it has suffered as a result of the entry of the excessive default judgment.

∴ [O]ur rule that prejudice must be shown cannot logically extend beyond relief for the prejudice actually demonstrated by an excessive default judgment.

Id. at 140-41, 165 N.W.2d at 742-43.

67. *Trausch v. Knecht*, 184 Neb. 511, 169 N.W.2d 269 (1969).

68. The court stated: "The inconclusiveness of material evidence and the indefiniteness of the parties in the applicability of certain principles of law flowing therefrom requires, in the interest of justice, that a retrial be had . . ." *Id.* at 512, 169 N.W.2d at 270. Those with a penchant for the daedal may care to consult the briefs, which are similarly opaque.

69. *Ach v. Farmers Mut. Ins. Co.*, 191 Neb. 407, 215 N.W.2d 518 (1974). See text accompanying notes 53-54 *supra*.

Paper Stock Co. v. California Union Insurance Co.,⁷⁰ the Nebraska court held that a misrepresentation of fact in a proof of loss, in violation of an express policy condition, would support a defense only if the insurer "acted upon such false statements, or was in some manner prejudiced by or affected by them."⁷¹ The *Omaha Paper Stock* opinion made no reference to the *Ach* or the *Sailors/Meckna* lines of authority; instead, it located roots for its result in nineteenth century misrepresentation cases that denied relief unless detrimental reliance could be shown.⁷² Finally, in 1980, in *Dockendorf v. Orner*,⁷³ the Nebraska Supreme Court affirmed a summary judgment for the insurer predicated on the insured's failure to satisfy a 120-day notice condition. The court cited no Nebraska authority, but instead settled for a bald citation to *Corpus Juris Secundum*.⁷⁴ Ironically, the C.J.S. reference is supported by a mis-citation to *American Surety*,⁷⁵ the since-discredited Eighth Circuit decision holding that post-loss failure of notice condition defenses require a demonstration that the failure contributed to the loss!

Just what is one to make of all this? Has the "prejudice" innovation of *Sailors* and *Meckna* implicitly been rolled back by *Ach* and *Dockendorf*? Is the different treatment accorded notice conditions and cooperation conditions in *Meckna* significant? Did the court's doubts about the first *Trausch* opinion extend to its broad endorsement of a prejudice standard? Or can these apparently differing signals be rationalized on bases left inarticulate in the opinions? Certainly the inference that a breach of condition inevitably (or usually) prejudices the insurer may be engendered more readily for some kinds of breaches than for others. *Clark* and *Ach* did both involve property insurance policies, while the *Sailors/Meckna* line of cases involved liability insurance, and *Dockendorf* involved a fidelity bond. Those are differences, but they hardly seem to supply a compelling basis upon which to ground principled distinctions. Is an insurer really more likely to be prejudiced by a failure of a notice condition in a property insurance setting?

70. 200 Neb. 31, 262 N.W.2d 175 (1978).

71. *Id.* at 38, 262 N.W.2d at 179 (quoting *Havlik v. St. Paul Fire & Marine Ins. Co.*, 87 Neb. 427, 430, 127 N.W. 248, 249 (1910)).

72. The court cited *Havlik v. St. Paul Fire & Marine Ins. Co.*, 87 Neb. 427, 127 N.W. 248 (1910), and *Springfield Fire & Marine Ins. Co. v. Winn*, 27 Neb. 649, 43 N.W. 401 (1889).

73. 206 Neb. 456, 293 N.W.2d 395 (1980).

74. *Id.* at 461, 293 N.W.2d at 398 (citing 45 C.J.S. *Insurance* § 1092 (1946)).

75. 45 C.J.S. *Insurance* § 1092, at 1328 n.80 (1946) (citing *American Sur. Co. v. Bankers' Sav. & Loan Ass'n*, 59 F.2d 577 (8th Cir. 1932), *rev'd on reh.*, 67 F.2d 803 (8th Cir. 1933)). For a discussion of *American Surety*, see text accompanying notes 44-48 *supra*.

Can there be any justification for treating a notice condition and a cooperation condition differently? Should post-loss condition defenses in liability insurance settings be subject to a prejudice requirement because of the third-party interests involved? At some early point one's enthusiasm for the search for premises to rationalize this erratic pattern begins to flag. A return visit to the opinions does not help. To read them is to conclude that such premises, if they exist, lie remarkably well concealed beneath a surface well-glossed in conclusionary rhetoric.

Perhaps a better reaction to this history is to treat *Ach* and *Dockendorf* as aberrations and not as significant barriers to explicit recognition of a judicially created prejudice standard against which to measure all post-casualty breaches of condition. A similar development, though far from universal, has progressed rapidly in recent years in other jurisdictions.⁷⁶ Absent the *Ach* and *Dock-*

76. See, e.g., *Johnson Controls v. Bowes*, 80 Mass. Adv. Sh. 1831, 409 N.E.2d 185 (1980); *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193 (1977); *Pickering v. American Employers Ins. Co.*, 109 R.I. 143, 282 A.2d 584 (1971); *Factory Mut. Liab. Ins. Co. of Am. v. Kennedy*, 256 S.C. 376, 182 S.E.2d 727 (1971); *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wash. 2d 372, 535 P.2d 816 (1975).

Commentary documenting and evaluating this trend has been remarkably scant. Shure, *Contract Provisions for Notice and Proof of Loss after Discovery of Loss Are Conditions Precedent to Insured's Right of Recovery*, 1967 ABA INS., NEG. & COMP. LAW PROC. 95, provides a useful though hostile discussion of early developments involving sureties. Comment, *The Materiality of Prejudice to the Insurer as a Result of the Insured's Failure to Give Timely Notice*, 74 DICK. L. REV. 260 (1970), provides a rehearsal of the arguments for a prejudice requirement, with the focus on liability insurance.

Perhaps the best presentation of the arguments and authorities is found in the majority and dissenting opinions in *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193 (1977). There the Supreme Court of Pennsylvania changed the long-standing Pennsylvania law to require that auto liability insurers invoking notice clause defenses show not only that the provision was breached but also that the insurer suffered prejudice as a result.

[U]nder our prior decisions, a party claiming rights under a liability insurance policy has had the burden of proving compliance with the terms and conditions of that policy and the determination whether to relieve the insurer of its obligations under the policy on the ground of late notice has depended only on the length of delay in giving the notice and the reasons offered to excuse the delay. As such, our prior decisions are in line with the rule applied in a majority of jurisdictions. See Annot. 18 A.L.R.2d 443 (1951); 8 J. Appleman, *Insurance Law and Practice* § 4732 (1962), and cases cited therein. Our research indicates, however, a trend of late in several jurisdictions away from the classic contractual approach towards a view that considers prejudice to the insurance company as a material factor in determining whether to relieve the insurance company of its coverage obligations by virtue of late notification. Even in these last mentioned jurisdictions, however, there is no agreement as to whether the insurer has the initial burden of demonstrating prejudice. Some courts place the burden on the claimant to establish an absence of prejudice to the insurer in order to recover on the policy despite late

endorf embarrassments, the *Sailors/Meckna* line of cases might be sufficient to warrant announcing its adoption in Nebraska as well. One suspects that the failure of the Nebraska opinions to give more overt and consistent recognition to a prejudice standard has less to do with judicial reservations about its appropriateness than with the inertia and frictions inevitable in a case by case elaboration spread over a long span of years. The prejudice argument was not briefed in *Ach* or *Dockendorf*, but the point is much more pervasive than that. The cases examined here reflect a myopia engrained in the classification system of the *Nebraska Digest*, the insurance treatises, and the habits of mind they help to cement. The result is a disposition among all concerned to crawl too quickly into narrow subject-matter pigeon holes, and to think too infrequently of "conditions" as recurring phenomena calling for the application of recurring conceptual tools. Thus, it hardly is surprising that what has emerged is not a coherent law of "conditions," or even of "post-loss conditions," but rather an atomistic array of discrete rules apparently limited to the specific contexts in which they were generated. It is not surprising, but neither is it inevitable, and it certainly is not desirable. At the next opportunity, the Nebraska court should rationalize this mess by frankly declaring that in Nebraska post-casualty breaches of condition, of

notice, while others require the insurance company to show that it was prejudiced by the tardiness of the notice in order to escape liability. We think the preferable rule is that which requires the insurance company to prove not only that the notice provision was breached, but also that it suffered prejudice as a consequence.

Id. at 71-72, 371 A.2d at 195-96 (footnotes omitted). The court carefully detailed its reasons why the assumptions underlying the strict contractual approach to conditions did not hold for adhesive post-loss notice provisions, *id.* at 73-74, 371 A.2d at 196-97, and why a prejudice requirement was consistent with the legitimate interests of the insurer:

[A] reasonable notice clause is designed to protect the insurance company from being placed in a substantially less favorable position than it would have been in had timely notice been provided, e.g., being forced to pay a claim against which it has not had an opportunity to defend effectively. In short, the function of a notice requirement is to protect the insurance company's interests from being prejudiced. Where the insurance company's interests have not been harmed by a late notice, even in the absence of extenuating circumstances to excuse the tardiness, the reason behind the notice condition in the policy is lacking, and it follows neither logic nor fairness to relieve the insurance company of its obligations under the policy in such a situation. . . . We have in the past excused a condition of forfeiture where to give it effect would have been purely arbitrary and without reason, and we are of the opinion that, in the absence of prejudice to the insurance company, such a situation exists in the context of a late notice of accident.

Id. at 75-76, 371 A.2d at 197. The counterarguments are ably presented in Justice Pomeroy's dissent. *Id.* at 87-94, 371 A.2d at 203-07.

all kinds, will support insurer defenses only if the breach can be shown to have prejudiced the insurer.

C. Post-Inception, Pre-Loss Failures of Coverage Clause Conditions Are Immune

The contribute to the loss standard is inapplicable to defenses generated by events before the inception of the contractual relationship and to those generated after the insured event has occurred. But what of the middle ground, the post-inception, pre-loss failure of condition? Here, too, the answers come grudgingly.

Consider the most recent request that the Nebraska Supreme Court require application of the contribute to the loss standard to such a failure of condition. In *Omaha Sky Divers Parachute Club, Inc. v. Ranger Insurance Co.*,⁷⁷ the policy in which the insurer promised to indemnify the insured for hull damage to the covered aircraft clearly conditioned that obligation on the plane being piloted by a properly certificated pilot. This the policy accomplished in two interwoven provisions. The first, "Item 7" on the declarations page, read as follows: "Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight"⁷⁸ On the second page of the policy, under an "EXCLUSIONS" heading, the policy provided: "This policy does not apply: * * * 2. to any occurrence or to any loss or damage occurring while the aircraft is operated in flight by other than the pilot or pilots set forth under Item 7 of the Declarations"⁷⁹ The plane was damaged while being operated in flight by a pilot whose medical certificate had expired.

An insured who consulted only the statute might with some justification conclude that it prescribed a contribute to the loss standard for all such failures of condition:

The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.⁸⁰

Not so, the insurer argued; the policy provisions upon which the insurer's defense rested were "coverage limitations" and thus fell within an implied exception to the statutory requirement. The Nebraska Supreme Court affirmed a summary judgment for the insurer.

77. 189 Neb. 610, 204 N.W.2d 162 (1973).

78. *Id.* at 612, 204 N.W.2d at 163.

79. *Id.*

80. Neb. Rev. Stat. § 44-358 (Reissue 1978).

Item 7 of the declarations standing alone might well be interpreted as a warranty or a condition, but any such interpretation cannot be extended to the separate exclusion clause. The exclusion clause here provides that the policy does not apply to any "damage occurring while the aircraft is operated in flight by other than the pilot or pilots set forth under Item 7 of the Declarations." Coverage is excluded while the plane is operated in flight by anyone except the pilot or pilots described separately in the declarations. Both the exclusion clause and the declaration are clear and unambiguous. The exclusion does not constitute either a warranty or a condition within the meaning of section 44-358, R.R.S. 1943.⁸¹

What should one make of the *Sky Divers* decision? Two conclusions seem appropriate. First, the court correctly—and not for the first time—recognized that the apparently comprehensive language of the statute must be read as subject to an implied exception for defenses that assert that the insured failed to satisfy a policy condition which operates to define the policy's "coverage." Second, the court improperly classified the defense that the pilot lacked the requisite certificate as outside the statute's ambit, and in the process seemed to sanction a classification criterion that is unworkable, likely to subvert the manifest purpose of the statute, and at odds with the court's earlier decisions. Both points warrant examination.

1. *The Implied Exception for Coverage Clause Defenses*

A moment's thought will persuade that not all failures of condition occurring after inception and before loss belong within the

81. *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 613, 204 N.W.2d 162, 164 (1973). The court continued:

It is well established that an aircraft insurance policy may exclude coverage when the airplane is flown by certain types of persons or pilots. See 11 Couch on Insurance 2d, § 42:634, p. 315. The insurer under an aircraft insurance policy may lawfully exclude certain risks from the coverage of its policy and where damage occurs during the operation of the insured aircraft under circumstances as to which the policy excludes coverage, there is no coverage [citing an Arizona decision]. . . .

. . . Under language in an aircraft policy excluding coverage "while such aircraft is in flight unless the pilot in command of the aircraft is properly certified * * *," it has been held that the lapse of a pilot's medical certificate excluded coverage whether or not there was any causal connection between the breach of an exclusionary clause and the accident [citing North Carolina and Florida decisions].

Id. at 613-14, 204 N.W.2d at 164.

Of course, these last paragraphs provide only an inapt rhetorical flourish. The insured was not challenging the *validity* of the policy conditions; it was asserting that their *effect* had been statutorily altered by the contribute to the loss standard. Further, it hardly furthers the inquiry to detail the effects given similar policy provisions in jurisdictions that do not have statutes comparable to the Nebraska statute invoked by the insured.

statute. To use an absurd example, imagine a claim on a life insurance policy where the insurer defends on the ground that the *c'est tui que vie* has not died. Indisputably, the policy makes death of the *c'est tui que vie* a condition precedent to the obligation of the insurer to pay the death benefits to the beneficiary. Should the beneficiary be allowed to recover in the face of a demonstration that the *c'est tui que vie* is still alive, absent some showing by the insurer that the failure to die contributed to the death? Framed in that manner, the question is nonsense, and the answer is obvious. The statute simply does not fit such a defense, even though the statute purports to apply to all failure of condition defenses, and the insurer is asserting a failure of condition defense.

It is not difficult to generate an extensive list of failure of condition defenses that do not seem compatible with the statutory formula. A defense that a policyholder has failed to pay a renewal premium, so that the policy has lapsed, may be characterized as a failure of condition defense, yet it seems silly to suggest that the insurer be subjected to the impossible task of demonstrating a causal nexus between that failure and the death of the *c'est tui que vie*. So too with the car owner who insures against property damage caused by collision but does not buy comprehensive coverage; when her car burns, can she prevail on the argument that her failure to have a collision does not bar recovery because that failure did not contribute to the loss? And what of the insured whose automobile policy includes "comprehensive" but not "collision"? If his car is damaged in a collision, should the statute be read to prescribe an inquiry into whether the collision contributed to the collision? Of course not. Such questions answer themselves.

What is there about such defenses that makes the inappropriateness of the statutory standard so obvious? The answer traditionally has been that these defenses assert a failure to satisfy a "coverage clause,"⁸² and thus by definition involve matters so central to the insurance relationship that they can never be the sort of "merely technical" defenses to which the statute was supposed to respond. Of course, this response only reframes the question. We may readily concede that the failure of the *c'est tui que vie* to shuffle off this mortal coil hardly qualifies as an insignificant departure from the assumptions upon which the insurer promised to pay death benefits—it is, after all, a *life* insurance policy the beneficiary is seeking to enforce. Similarly, we need not worry long about how to classify the provision in a family automobile policy declaring that the insured automobile is principally garaged at the address provided for the named insured; in both form and substance

82. See, e.g., R. KEETON, *supra* note 1, § 6.6(b).

this provision is a traditional warranty and thus a condition to which the statute should apply. But what of the provisions involved in *Sky Divers*? Are they immune "coverage clauses" or "conditions" subject to the statute? Any second semester Contracts student will recognize that they establish a condition precedent to the insurer's duty to pay for hull damage, but it requires no abuse of language or logic to say that they define when the coverage will be in effect. The dilemma thus posed is obvious. To say that "coverage clauses" should not be subject to the statute regulating "conditions" is to provide little guidance when virtually every policy provision is a condition which plausibly can be said to help establish the "coverage" provided by the policy.

2. *Determining the Scope of the Coverage Clause Exception*

The Nebraska Supreme Court has never tried to explain how it distinguishes immune coverage clauses from conditions that are subject to the statute. Instead it has proceeded, as it did in *Sky Divers*, as though confident that it will recognize a coverage defense when it encounters one. In this fashion, it has classified as immune from the statutory standard⁸³ the lack of certificate defense involved in *Sky Divers*,⁸⁴ a defense that the insured was killed while flying in a scheduled aircraft otherwise than as a fare paying passenger,⁸⁵ and defenses that the policy did not cover the period during which the loss occurred⁸⁶ or the interest for which indemnification was sought.⁸⁷ In the same manner it has included within the statute's reach defenses based on provisions prohibiting changes in interest in the property insured,⁸⁸ other insurance,⁸⁹ changes in location of insured property,⁹⁰ failure to use due care to

83. The cases catalogued here are only those in which the court rejected an argument that the statute should be applicable; the reports are full of decisions in which the court has given literal effect to a coverage clause without addressing if or why it should be outside the statutory ambit. See, e.g., *Peony Park, Inc. v. Security Ins. Co.*, 137 Neb. 504, 289 N.W. 848 (1940).

84. *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973). See notes 77-81 & accompanying text *supra*.

85. *Krause v. Pacific Mut. Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229 (1942).

86. *Christiansen v. Moore*, 184 Neb. 818, 172 N.W.2d 620 (1969). See also *American Employers' Ins. Co. v. Roundup Coal Mining Co.*, 73 F.2d 592 (8th Cir. 1934).

87. *Krug Park Amusement Co. v. New York Underwriters' Ins. Co.*, 129 Neb. 239, 261 N.W. 364 (1935); *Stephenson v. Germania Fire Ins. Co.*, 100 Neb. 456, 160 N.W. 962 (1916).

88. *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194, 206 N.W. 765 (1925); *Security State Bank v. Aetna Ins. Co.*, 106 Neb. 126, 183 N.W. 92 (1921).

89. *Slafter v. New Brunswick Fire Ins. Co.*, 142 Neb. 209, 5 N.W.2d 217 (1942); *Newman v. National Union Fire Ins. Co.*, 122 Neb. 94, 239 N.W. 464 (1931).

90. *Johnson v. Caledonian Ins. Co.*, 125 Neb. 759, 251 N.W. 821 (1933); *Mayfield v. North River Ins. Co.*, 122 Neb. 63, 239 N.W. 197 (1931); *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660, 197 N.W. 404 (1924).

protect damaged property against theft,⁹¹ and failure to properly notify the insurer of changes in the property insured.⁹² The opinions announcing these classification decisions contain almost no direct guidance concerning the distinction being employed. Nevertheless, most of the results are unexceptionable, and examining the kinds of policy provisions placed in each category can prove instructive.

Consider, for example, two early decisions involving the then-standard provision making property insurance policies "void" if any change in interest, title, or possession should occur.⁹³ In *Stephenson v. Germania Fire Insurance Co.*,⁹⁴ the insurer entered into a fire insurance contract with Rice covering Rice's building. During the policy term, Rice sold the building to the plaintiff, and it later burned. The plaintiff sought to argue that the breach of condition—the change of ownership—did not contribute to the loss as required by the statute. The supreme court refused to tolerate such nonsense. In the court's view, the defense only nominally was based on a breach of condition; rather, said the court, "[i]t is the entire absence of a contract relation between the plaintiff and defendant that is relied on as a defense."⁹⁵ However, a few years later, in *Calmon v. Fidelity-Phenix Fire Insurance Co.*,⁹⁶ where the insured tried to recover for a loss to the insured property over the insurer's defense that the insured had mortgaged the property, thus violating the very condition involved in *Stephenson*, the court held that the defense was subject to the contribute to the loss standard of the statute.

What is the basis for this distinction? The court did no more than hint. Quite clearly, though, one may discard any notion that the results turned on vagaries in the policy language or in the facts to which it was applied: in each case, the policy language was the same, and in each the change in title and interest was sufficient to

91. *Sanks v. St. Paul Fire & Marine Ins. Co.*, 131 Neb. 266, 267 N.W. 454 (1936).

92. *Ware v. Home Mut. Ins. Ass'n*, 135 Neb. 329, 281 N.W. 617 (1938).

93. The provision read as follows:

This entire policy unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional or sole ownership, . . . or if any changes, other than by death of the insured, take place in the interest, title, or possession of the subject of the insurance, . . . whether by legal process or judgment or by voluntary act of the insured, or otherwise

Quoted in Krug Park Amusement Co. v. New York Underwriters' Ins. Co., 129 Neb. 239, 244, 261 N.W. 364, 372 (1935).

94. 100 Neb. 456, 160 N.W. 962 (1916).

95. *Id.* at 458, 160 N.W. at 963.

96. 114 Neb. 194, 206 N.W. 765 (1925).

trigger the policy provision making the policy void.⁹⁷ True, there were differences in the relationships between insurers and plaintiffs, but why should that matter? Stephenson had never enjoyed a contractual relationship with Germania, and Calnon's policy said that his contractual relationship with Fidelity-Phenix ended the moment he mortgaged the property. Why did the court choose to emphasize the "absence of a contract" in *Stephenson*, but not in *Calnon*?

That question should prove troubling only if we cannot probe beneath the language in which the policy condition is couched in order to investigate the functions the provision was asked to serve. To its considerable credit, the Nebraska Supreme Court usually has not allowed its classification decisions to be held thrall to form. Many opinions do not bother to record the language of the policy provision being classified.⁹⁸ Others note the text of the provision, but make nothing of it.⁹⁹ The court's disparate treatment of the forfeiting conditions in *Stephenson* and *Calnon* is not unusual; provisions couched as forfeiting or suspensive conditions sometimes have been classed as within the statute,¹⁰⁰ sometimes as beyond its reach.¹⁰¹ In view of this history, the *Sky Divers* opinion's apparent emphasis on the location and style of the policy prohibitions of uncertificated pilots seems more a rhetorical flourish than an application of a formal approach to classification decisions. Throughout the history of the statute, form has not been determinative. But if not form, then what?

97. Pre-statute decisions applying the policy provision to similar facts include *Home Fire Ins. Co. v. Collins*, 61 Neb. 198, 85 N.W. 54 (1901), and *Farmers' & Merchants' Ins. Co. v. Jensen*, 56 Neb. 284, 76 N.W. 577 (1898), *aff'd on reh.*, 58 Neb. 522, 78 N.W. 1054 (1899).

98. *See, e.g.*, *Newman v. National Union Fire Ins. Co.*, 122 Neb. 94, 239 N.W. 464 (1931); *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660, 197 N.W. 404 (1924).

99. *See, e.g.*, *Sanks v. St. Paul Fire & Marine Ins. Co.*, 131 Neb. 266, 267 N.W. 454 (1936); *Krug Park Amusement Co. v. New York Underwriters' Ins. Co.*, 129 Neb. 239, 261 N.W. 364 (1935); *Mayfield v. North River Ins. Co.*, 122 Neb. 63, 239 N.W. 197 (1931).

100. *See, e.g.*, *Slafter v. New Brunswick Fire Ins. Co.*, 142 Neb. 209, 5 N.W.2d 217 (1942) (provision making policy voidable by insurer for breach of condition); *Mayfield v. North River Ins. Co.*, 122 Neb. 63, 239 N.W. 197 (1931) (provision limiting coverage to property *while* located certain places).

101. *See, e.g.*, *Krause v. Pacific Mut. Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229 (1942) (provision removing from coverage losses *while* insured is in certain vehicles); *Krug Park Amusement Co. v. New York Underwriters' Ins. Co.*, 129 Neb. 239, 261 N.W. 364 (1935) (provision declaring entire policy void if condition broken).

a. Method 1: Ask Which Conditions Function to Define Coverage and Thus Are Beyond the Reach of the Statute

One way to attempt to identify substantive differences beneath surface similarities is to employ Patterson's subclasses of "coverage" provisions¹⁰² as a guide to policy conditions likely to be immune from the statutory standard. Rather than being content to ask if a provision defines the risk assumed, we might ask if it functions to establish "the insured event," "excepted causes," "interests insured," "consequences of named events which are or are not covered," "duration of insurance," or "amount of insurance." The perspective supplied by this list of varieties of coverage provisions may seem to make it obvious that the *Stephenson* and *Calnon* insurers sought to put the provision prohibiting changes in interest or title to quite different uses. In *Stephenson*,¹⁰³ the provision was used to establish that the insurer's duty to indemnify did not run with the property to whomever might acquire an interest. The insurer asserted that the interest for which indemnification was demanded—the purchaser's interest—was not the interest the insured agreed to protect. Given that use, it is not surprising that the policy provision should be classed as a coverage provision lying outside the statute's ambit.¹⁰⁴ In *Calnon*,¹⁰⁵ however, invoking the provision served no such purpose. There the provision did not operate to define the contours of the risk transferred. The plaintiff was the original insured and the gravaman of the insurer's objection was that the insured, by mortgaging the property, might have subjected the insurer to increased moral hazard. Quite properly, this method suggests, the court held the *Calnon* insurer to the bur-

102. See generally E. PATTERSON, *supra* note 1, ch. 6, discussed in note 22 & accompanying text *supra*.

103. *Stephenson v. Germania Fire Ins. Co.*, 100 Neb. 456, 160 N.W. 962 (1916), followed in *St. Paul Fire & Marine Ins. Co. v. Ruddy*, 299 F. 189 (8th Cir. 1924).

104. An aside in *Krug Park Amusement Co. v. New York Underwriters' Ins. Co.*, 129 Neb. 239, 261 N.W. 364 (1935), makes the point quite clearly. In *Krug*, the court refused to apply the statute to the defense that the insured "bathing company" had transferred insured personal property to the plaintiff:

The plaintiff in this case is not a party to the insurance contract, nor has any indorsement been made upon the policy transferring to it the interest of the bathing company. It is quite possible that, in an action brought by the bathing company upon the policy, [the contribute to the loss statute] . . . would be applicable, and the mere transfer of title, not contributing to the loss, would not void the policy. But, there being no contractual relation between the plaintiff and the insurer, we hold that this statute has no application.

Id. at 259, 261 N.W. at 373.

105. *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194, 206 N.W. 765 (1925). See text accompanying note 96 *supra*.

den of demonstrating that violation of the provision contributed to the loss.

Patterson's declension of the "coverage clause" idea also may seem to provide a more satisfactory basis for explaining our intuition that the statute should not apply to policy conditions that appear incompatible with the statutory formula. Thus, to assert that the *c'est tui que vie* is not dead is to argue the absence of the insured event; the failure to pay a renewal premium takes the insured beyond the duration of the insurance; collision is an excepted cause of loss under a comprehensive policy, fire under a collision policy. The same technique can also be invoked to explain the Nebraska court's classification decisions: conditions classified as beyond the reach of the statute either are, or seem to have been understood to be, coverage clauses fitting one or another of Patterson's functional subcategories.

Ultimately, however, even the most rigorous application of the Patterson list of varieties of coverage provisions advances the analysis only slightly over what an intuitive, seat-of-the-pants approach can provide. Again, *Sky Divers*¹⁰⁶ supplies an apt example. Are the provisions designed to protect the insurer against the possibility that an uncertificated pilot will fly the plane coverage provisions or conditions subject to the statute? Doubtless, the insurer was as firm in its wish not to assume the risk that loss would occur while the plane was being flown by an uncertificated pilot as in its desire not to provide coverage for damage in excess of the policy limits or occurring after the policy expires.¹⁰⁷ Doubtless, too, few would find it difficult to shove the provisions into one or more of Patterson's subcategories:¹⁰⁸ they help to define "the insured event"—property damage to the plane while it is being flown by a properly certificated pilot; they help to define the "duration of the insurance"—coverage is provided for those periods during the policy term when there is no violation of the certification requirements. On the other hand, the insured might plausibly argue that the certification provisions add nothing to what the policy other-

106. See notes 77-81 & accompanying text *supra*.

107. Not everyone agrees that the protections to be gained from requiring a current medical certificate are worth the candle:

Such a certificate is no longer required by certain major underwriters. They realize that as a practical matter this risk is minimal. A current medical certificate does not assure the physical condition of the pilot on any given occasion, and in most instances where a pilot was operating an aircraft without a current medical certificate, it was inadvertent and in no way related to the loss.

Davis, *Proposed Standardized General Aviation Insurance Policy—Pilot Clause and Exclusions*, 43 J. AIR L. & COM. 371, 373 (1977) (footnotes omitted).

108. See notes 22-23 & accompanying text *supra*.

wise tells us about the coverage provided—this plane, this year, against damage to the hull—but instead function as a traditional warranty to protect the insurer against a potential cause of loss—unqualified pilots.

The problem thus exposed is that Patterson's categories of coverage provisions are descriptive, rather than analytic, and quite fuzzy around the edges. They can be manipulated by the simple expedient of couching conditions as descriptions of the insured event or as statements of the duration of the coverage. Indeed, most of the traditional warranty provisions appear in policies framed as forfeiting conditions—"if . . . , then this policy shall be void"—or suspensive conditions—"while located as described herein"—both of which can seem to be encompassed by Patterson's taxonomy of coverage provisions. Thus, even the *Calnon* provision,¹⁰⁹ a supposedly clear example of a traditional warranty designed to ameliorate moral hazard, can be characterized as a statement that helps to define the duration of the coverage. For one scanning policy provisions in search of immune coverage provisions, the reality is harsh. Only common sense stands in the way of the ultimate absurdity: a conclusion that all of the conditions precedent to the insurer's liability help to define the coverage provided and thus should be immune from the statute. Because most policy provisions in some sense help to define coverage, an attempt to derive a workable classification scheme by asking if a policy provision functions to define coverage leads to a conceptual cul-de-sac. Thus, the question remains: which policy provisions should be subject to the contribute to the loss statute?

b. Method 2: Ask Which Conditions Carry the Potential for Evils Addressed by the Statute and Thus Should Be Within Its Ambit

Just reframing the question in this way suggests a better method for resolving the classification dilemma. Put simply, to try to make the classification decision by asking if a provision is a coverage clause, and thus immune, is to work backwards. In theory the two categories of provisions—conditions subject to the statute and immune coverage clauses—should be complementary, and it should make no difference from which direction one approaches the boundary line. In fact, however, for a few cases along the margin it can make a dramatic difference because, as we have seen, "coverage clause" has no intrinsic analytic content. Instead, "coverage clause" should be understood as a label for a residuary category, a classification always to be defined in terms of what it is not.

109. See text accompanying notes 96 & 105 *supra*.

That limited usage has a long history in several branches of insurance law.¹¹⁰ It should be preserved here, for a workable approach to determining the statutory ambit must focus on whether the defense to be classified poses the potential for evils of the kind which prompted imposition of the statutory standard.

How does that help? It is a long leap from recognition that statutes like section 44-358 were prompted by concerns about technical, immaterial failures of condition to a workable classification criterion for determining which defenses should be subject to the statutory standard. Indeed, as we have seen, post-loss conditions often are triggered by technical, immaterial failures, yet the statute does not reach defenses based on such provisions.¹¹¹ Similarly, some post-inception, pre-loss conditions can be triggered by facts that do not materially prejudice the insurer, yet defenses based on such provisions have not been subjected to the statute.

The answer lies in the contribute to the loss standard itself. Although the statute appears to cover all failures of condition, the standard it imposes supplies a workable discriminant only for defenses predicated on policy conditions designed to protect the insurer against potential causes of loss. The contribute to the loss standard does not fit post-loss notice conditions, for example, because a failure to give notice cannot possibly be one of those physical or moral hazards that might ripen into a causally relevant contributor to a loss. Notice provisions try to control sources of juridical risk with the potential to hamper insurer efforts to adjust claims; they do not treat potential causes of loss. On that basis, the Nebraska court in *Clark*¹¹² concluded that the legislature did not intend to subject post-loss failures of condition to the statutory standard. On the same reasoning, section 44-358 should be interpreted to reach only post-inception, pre-loss defenses predicated on policy provisions designed to treat physical and moral hazards, for only such defenses provide a role for the contribute to the loss standard to play. In this view, the evil addressed by section 44-358 is both clear and narrow: policy provisions that seek to protect the insurer against potential causes of loss with language framed so

110. See generally R. KEETON, *supra* note 1, § 6.6(b) (examining the traditional rules immunizing "coverage clauses" from warranty statutes, incontestable clauses, and doctrines of waiver and estoppel). See also Works, *Coverage Clauses and Incontestable Statutes: The Regulation of Post-Claim Underwriting*, 1979 U. ILL. L.F. 809, 816: "Put simply, the term coverage clause defines a null category; affixing that analytic label to policy language serves only to grant the insurer immunity from the consequences that otherwise would flow from characterizing it as something else."

111. See notes 39-76 & accompanying text *supra*.

112. *Clark v. State Farmers Ins. Co.*, 142 Neb. 483, 7 N.W.2d 71 (1942), discussed in text accompanying notes 49-54 *supra*.

broadly that the condition can be breached by facts that do not contribute to the loss.

Note that the classification inquiry required by section 44-358 has two elements. To fall within the statute, a policy condition must (1) seek to control potential causes of insured events, and (2) be so broadly framed that it could be triggered by facts which did not contribute to the insured event. Thus, a provision in a live-stock insurance policy that prohibits moving the insured horse to a new location without prior permission of the insured clearly reflects insurer concern that new locations might be more hazardous, yet it is possible to envision circumstances in which a violation of that provision would not contribute to the loss of the insured animal. The insurer has chosen to frame its protective measure in language more sweeping than necessary to protect itself against the risk that an unauthorized move might lead to an insured event. If the insurer had provided that it would not be liable for losses "resulting from" or "caused by" an unauthorized change in location, the statute would have no application, because the policy condition by its terms would guarantee that any violation of the provision will have contributed to the loss. Such excepted cause provisions properly are classed as "coverage clauses" beyond the reach of the statute because they do not offer any role for the statute to play. However, the insurer might choose to protect itself against potential causes of loss by using policy language that the insured warrants not to move the livestock, or that baldly prohibits changes in location, or that declares the policy "void" if the livestock is moved, or that suspends coverage "while" the livestock is at other locations. From the insurer's perspective, this more sweeping language is a legitimate way to avoid the greater juridical risks and administrative difficulties associated with demonstrating breach of a "caused by" clause; it is easier to show that the insured horse was in an unauthorized location than to show that the unauthorized location was a cause of the loss. However, section 44-358 brands such tactics impermissible and converts such "potential cause" provisions into "actual cause" provisions. That is the function of the statute, and it should be applied where it can function in that way.

It is important to remember that the statute does not respond to all instances of overly broad policy language, but only to overly broad policy language in provisions designed to protect the insurer from physical and moral hazards that might cause a loss. Once again, location provisions in livestock policies permit a demonstration of how the classification inquiry should proceed. If the policy condition declares that the insurer will be liable for certain losses to livestock "while located" at a specified location, the provision

might seem an apt candidate for application of the contribute to the loss standard: we can imagine an unauthorized change in location which would not be a factor contributing to a loss to the insured animals. However, that by itself is not enough. For the statute to apply, the broadly framed language must appear in a policy condition aimed at controlling potential causes of insured events. If the policy otherwise identifies the animals that are the subject matter of the insurance, the "while located" condition should be subject to the statute.¹¹³ However, if the clause is "an essential term in the *identification* of the goods covered,"¹¹⁴ as where the "while located" language is the only means provided by the policy to determine which portion of the insured's livestock is being insured, then the provision does not involve the sort of overreaching addressed by the statute.¹¹⁵ In the first usage, the only justification for the broad language is the statutorily discredited desire to avoid problems associated with demonstrating a causal nexus between breach of a loss control provision and the insured event. In the second usage, the broadly framed language is justified by its function: it identifies the subject matter of the insurance. Failure to satisfy such a condition should not be subject to the statute even though location in one place rather than another may or may not be a factor which contributes to a loss. For such provisions, the strict common law rule remains appropriate. Any failure to satisfy a policy condition necessary to determine the subject matter of the insurance should provide the insurer with a defense.

"Evidentiary conditions" provide another example of broadly couched policy conditions that remain beyond the reach of the statute because they are not "potential cause" provisions. One familiar "evidentiary condition" is the provision in homeowners' policies limiting the insurer's liability for theft losses of personal property from locked automobiles to those occasions where the automobile shows "visible marks of forcible entry upon the exte-

113. See *Johnson v. Caledonian Ins. Co.*, 125 Neb. 759, 251 N.W. 821 (1933); *Hannah v. American Live Stock Ins. Co.*, 111 Neb. 660, 197 N.W. 404 (1924); cf. *Mayfield v. North River Ins. Co.*, 122 Neb. 63, 64-65, 239 N.W. 197, 197-99 (1931) (classifying fire insurance policy condition limiting coverage to described property "while located" at a specified place as within the statute on the ground that the policy was the New York standard fire insurance policy and New York courts had classified the provision as a warranty subject to the New York statute).

114. E. PATTERSON, *supra* note 1, at 296 (emphasis in original).

115. *Id.* at 296-99; R. KEETON, *supra* note 1, at 402-06. Cf. *Peony Park, Inc., v. Security Ins. Co.*, 137 Neb. 504, 505, 289 N.W. 848, 850 (1940) (enforcing without reference to the contribute to the loss statute a policy provision defining covered contents "while contained in, on or attached to the building above described").

rior.”¹¹⁶ It is not unusual to find this and similar evidentiary conditions hiding in elaborate “definitions” of the insured event,¹¹⁷ thus inviting the conclusion that they must be coverage defining and therefore beyond the statutory ambit. In fact, they are not necessary to identify the subject matter of the insurance. Rather, their immunity stems from their peculiar function: they insist upon a specific mode of proof that the loss was caused by a covered peril. By their terms they prevent liability from attaching even where alternative methods of demonstrating that the loss was within the coverage assure that the failure of the evidentiary condition will not prejudice the insurer. Moreover, they help the insurer avoid difficulties in demonstrating the actual cause of losses, and thus reflect the same concerns that prompt insurers to use the “potential cause” provisions that do trigger the statute. Nonetheless, evidentiary conditions are not subject to the contribute to the loss standard. The lack of visible marks on the outside of a car cannot contribute to a theft from that car, though that lack may or may not prejudice the insurer. Such provisions do not seek to control potential causes of loss; they try to control potential difficulties with demonstrating causes of loss. They should be deemed

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116. This policy does not apply to loss away from the described premises of:

....

(2) [P]roperty while unattended in or on any motor vehicle or trailer, other than a public conveyance, unless the loss is the result of forcible entry into such vehicle while all doors, windows or other openings thereof are closed and locked, provided there are visible marks of forcible entry upon the exterior of such vehicle or the loss is the result of the theft of such vehicle which is not recovered within 30 days, but property shall not be considered unattended when the Insured is required to surrender the keys of such vehicle to a bailee

....

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117. For example, the safe burglary policy construed in *Hazuka v. Maryland Cas. Co.*, 183 Neb. 336, 339, 160 N.W.2d 174, 177 (1968), contained the following definition:

“Safe Burglary” means (1) the felonious abstraction of insured property from within a vault or safe described in the declarations and located within the premises by a person making felonious entry into such vault or such safe and any vault containing the safe, when all doors thereof are duly closed and locked by all combination locks thereon, provided such entry shall be made by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon the exterior of (a) all of said doors of such vault or such safe and any vault containing the safe, if entry is made through such doors, or (b) the top, bottom or walls of such vault or such safe and any vault containing the safe through which entry is made, if not made through such doors, or (2) the felonious abstraction of such safe from within the premises.

outside the statute, just as are post-loss conditions that also function to control juridical risks.

Of course, that evidentiary conditions are not subject to the statute does not mean that the strict common law approach to failures of condition should be applicable. Like post-loss conditions that also seek to control juridical hazards, evidentiary conditions should be legislatively or judicially regulated to assure that they will support a defense only when the insurer is actually prejudiced. Courts in some jurisdictions have gone to extravagant lengths to rationalize decisions curtailing the impact of evidentiary conditions,¹¹⁸ and a few commentators have urged that evidentiary conditions be singled out for special judicial scrutiny.¹¹⁹ In Nebraska, however, the court has evinced no readiness to join this salutary trend. Many years ago, in *Ware v. Home Mutual Insurance Association*,¹²⁰ the court opined in dicta that the contribute to the loss standard should be applicable to an evidentiary condition in an automobile liability policy permitting transfer of coverage to a replacement automobile only upon approval by the president of the insurer.¹²¹ Of course, the *Ware* dictum was wrong. The provision did not involve a potential cause of loss and there-

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118. Prime examples include: *Strickland v. Gulf Life Ins. Co.*, 240 Ga. 723, 242 S.E.2d 148 (1978) (branding as "unreasonable" and refusing to enforce a provision limiting recovery for "dismemberment by severance" to situations in which the amputation occurs within 90 days of the injury); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975) (refusing to enforce a "visible external marks" condition in a burglary policy on the grounds that it violated the reasonable expectations of the insured, was unconscionable, and failed to satisfy an implied warranty that the policy was fit for its intended purpose); *Ferguson v. Phoenix Assurance Co.*, 189 Kan. 459, 370 P.2d 379 (1962) (refusing to enforce a "visible marks" condition on public policy grounds). The *Ferguson* court was nothing if not creative:

We hold that where a rule of evidence is imposed by a provision in an insurance policy, . . . the assertion of such a rule by the insurance carrier, beyond the reasonable requirements necessary to prevent fraudulent claims against it in proof of the substantive conditions imposed by the policy, contravenes the public policy of this state.

Id. at 470-71, 370 P.2d at 387. See also Annot., 99 A.L.R.2d 129 (1965); Annot., 169 A.L.R. 224 (1947).

119. E.g., Holmes, *Interpreting an Insurance Policy in Georgia: The Problem of the Evidentiary Condition*, 12 GA. L. REV. 783 (1978); Slawson, *New Approach to Standard Forms*, TRIAL, July/Aug. 1972, at 49-50. See also RESTATEMENT (SECOND) OF CONTRACTS § 226 Illustration 5 (1981) (apparently explaining *Ferguson* and *C & J Fertilizer*, see note 118 *supra*, as the results of an interpretation that "adequate evidence of force and violence to prevent fraudulent claims" is all that is required to satisfy the condition).
120. 135 Neb. 329, 281 N.W. 617 (1938).
121. The court affirmed a judgment for the insured on the grounds that the record permitted the jury to find that a local agent was cloaked with apparent authority to waive the policy requirement and in fact did waive it. *Id.* at 334-35, 281 N.W. at 620.

fore should not be within the statute despite the potential it posed for a defense based on an immaterial and non-prejudicial failure of condition. The *Ware* dictum has never been explicitly corrected, but it was implicitly rejected in *Christiansen v. Moore*.¹²² There an automobile policy extended coverage to a replacement automobile if "the named Insured . . . notifies the company within thirty days." The trial court's determination that coverage did not extend to the replacement vehicle once the thirty day notice period had run was affirmed despite the insured's demonstration that "the change of vehicles . . . did not affect the risk."¹²³ The insured's brief argued that *Ware* authorized application of the contribute to the loss standard,¹²⁴ but the court's opinion did not mention *Ware*. Unfortunately, the insured did not brief nor did the court address whether a judicially imposed prejudice standard might be appropriate for such evidentiary conditions.

In recent years the court has heard other evidentiary condition cases, but the argument for imposing a prejudice standard has not been squarely presented. Thus, in *Cochran v. MFA Mutual Insurance Co.*,¹²⁵ a "visible external marks" case, the court approved use of the failure of condition defense without inquiry into whether the failure had prejudiced the insurer. However, in *Cochran*, the facts available to the insured were less than compelling,¹²⁶ and counsel for the insured understandably chose to contend that the provision was unfairly surprising instead of arguing that the insurer was not prejudiced by the breach. The closest the court has come to confronting the challenge of evidentiary conditions was *Grace v. State Farm Mutual Automobile Insurance Co.*,¹²⁷ where the insured sought to recover under the hit and run provisions of her uninsured motorist coverage despite the lack of "physical contact" between her vehicle and the one which forced her from the road. The insurer stipulated that the insured's injuries "were the direct and proximate result of the negligence of the driver of the unidentified vehicle" but contended that it had no ob-

122. 184 Neb. 818, 172 N.W.2d 620 (1969).

123. *Id.* at 822-23, 172 N.W.2d at 622.

124. Brief of Appellant at 26-28, *Christiansen v. Moore*, 184 Neb. 818, 172 N.W.2d 620 (1969).

125. 201 Neb. 631, 271 N.W.2d 331 (1978) (noted in Note, "Visible Marks" Insurance Exclusion Clauses, 59 NEB. L. REV. 214 (1980)).

126. Unlike the records available in the decisions cited in note 118, *supra*, the *Cochran* record apparently provided little evidentiary basis for eliminating the inference that the alleged theft was an "inside job," thus making difficult the claim that the insurer's legitimate concerns were unprejudiced by the absence of visible external marks. For a useful elaboration of this view of the *Cochran* decision, see Young, *Insurance Policy Defenses: In Search of Re-statements*, 34 ARK. L. REV. 507, 521-23 (1981).

127. 197 Neb. 118, 246 N.W.2d 874 (1976).

ligation to indemnify the insured in the absence of "physical contact."¹²⁸ The court agreed, rejecting the insured's argument that the physical contact requirement constituted an impermissible restriction of the statutorily mandated uninsured motorist coverage. Once again, the broader question of whether the insurer should be permitted a defense where the failure of an evidentiary condition did not prejudice the insurer was neither briefed nor discussed by the court.¹²⁹

How does the classification method sketched here square with the results actually reached in the Nebraska decisions? Quite well. Understanding the focus of the contribute to the loss statute to be overly broad "potential cause" provisions explains all but three of the Nebraska Supreme Court's classification decisions.¹³⁰ With one exception, policy conditions classed as within the statute have been "potential cause" provisions presenting the difficulties of overbreadth which prompted the statute. All but two of the policy conditions classed as beyond the statute either do not function to control potential causes of loss or, if they do, are framed as "caused by" or "resulting from" clauses which necessarily can be triggered only by facts which have contributed to a loss. The Nebraska classification decisions that are inconsistent with this analysis are, quite simply, wrong.

The first of these erroneous classification decisions, *Ware v. Home Mutual Insurance Association*,¹³¹ has been discussed.¹³² The court's indication that the evidentiary condition was subject to

128. *Id.* at 120, 246 N.W.2d at 875.

129. Justice Clinton dissented on the ground that the physical contact requirement defeats

the underlying purpose of the uninsured motorist statute . . . "Hit-and-run" is a colloquialism. When viewed in the light of the evident legislative purpose, it refers not to physical contact, but rather to causation and to an operator whose identity is unknown because he fled the scene. . . .

It is surely doubtful that the Legislature, when enacting the uninsured motorist statute, was focusing on the literal meaning of the word "hit." Rather it was concerned with affording "uninsured motorist" coverage where an unidentified motorist caused the accident and could not be found.

Id. at 124-25, 246 N.W.2d at 877-78. Justice Clinton's emphasis on whether the facts satisfy the underlying purpose of the provision is consistent with a "prejudice" inquiry, but of course it is legislative purpose, not insurer purpose, that he deemed controlling. For a survey of the physical contact controversy in other jurisdictions, see A. WIDESS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.41 (1969).

130. *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973); *Krause v. Pacific Mut. Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229 (1942); *Ware v. Home Mut. Ins. Ass'n*, 135 Neb. 329, 281 N.W. 617 (1938).

131. 135 Neb. 329, 281 N.W. 617 (1938).

132. See notes 120-24 & accompanying text *supra*.

the statute was a casual aside in an opinion justifying the decision on other grounds, and the force of that conclusion has been undercut by later judicial treatment of evidentiary condition defenses. There is no reason to believe that the *Ware* dictum need prove a continuing embarrassment to a classification criterion that insists that the statute be applied only to policy conditions that seek to control potential causes of loss.

The *Omaha Sky Divers*¹³³ classification of the medical certificate defense as a coverage defense beyond the statute also must be adjudged incorrect. The certification requirement seems designed to protect the insurer against risks posed by pilots with medical problems, and it is drawn so broadly that it purports to provide a defense even when the pilot's lack of certificate had nothing to do with medical deficiencies and even when the loss would have occurred whether or not the pilot was properly certificated. It thus is precisely the sort of provision that should be within the statute. Unfortunately, the *Sky Divers* court uncharacteristically allowed the function of the provision to be clouded by the form of its expression, so that the condition was permitted to masquerade as part of the definition of the insured event. As we have seen, that approach proves a slippery slope bereft of stopping points: all conditions precedent logically can be collapsed into a single giant statement of the insured event. The certification provision did not function to identify the subject matter of the insurance; it did function to control a potential cause of loss to the plane. The *Sky Divers*' preoccupation with form should be recognized as a temporary lapse from the court's usual and appropriate attention to the function of provisions being classified. The *Sky Divers* result should be recognized for what it is: incorrect.

*Krause v. Pacific Mutual Life Insurance Co.*¹³⁴ is the third erroneous classification decision. There, an accident insurance policy contained the following provision:

This policy does not cover loss resulting directly or indirectly, in whole or in part from . . . (D) bodily injury sustained by the insured while in or on any vehicle or mechanical device for aerial navigation . . . unless the insured is actually riding as a fare paying passenger in a licensed commercial aircraft provided by an incorporated common carrier for passenger service, and while such aircraft is operated by a licensed transport pilot and is flying in a regular civil airway between definite established airports¹³⁵

The insured used a "trip pass" to book passage on a licensed air-

133. *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973). See notes 77-84 & accompanying text *supra*.

134. 141 Neb. 844, 5 N.W.2d 229 (1942).

135. *Id.* at 846, 5 N.W.2d at 231.

craft and died when the plane crashed; the insured satisfied all the policy conditions except the requirement that he be a "fare paying passenger." Should this failure of condition defense be subject to the contribute to the loss standard? The Nebraska Supreme Court said no. "What we have here is not a forfeiture of a policy upon conditions broken, but an excepted risk never assumed by the insurer."¹³⁶ The court's attempted distinction fails, of course, for the statute has been and should be held applicable to many failures of condition that do not result in forfeiture. What is less clear is whether the classification approach recommended here demands a different result.

At first glance, the provision seems to have two claims to immune status. First, it may not be obvious that the provision seeks to control potential causes of loss. How can paying or not paying a fare ever be a causally relevant factor contributing to an accidental death? Second, the provision speaks to losses "resulting from" certain activities; it thus might appear to pose no overbreadth problems. Nevertheless, the provision belongs within the statute. The ascription of function for the provision may be more difficult in *Krause* than in *Sky Divers*, but the requirement that the accident victim be a fare paying passenger should be understood to be an attempt to limit air risks assumed by the insurer to a narrow range of risks associated with passengers on scheduled flights on established carriers. That the insurer's way of framing its protective measures may only crudely identify the true object of its concern should not force us to hypothesize some other function for the provision; this is not an instance where the provision operates to distinguish a coverage marketed in one policy from that marketed in another. It is aimed at potential causes of loss, and is just the sort of unfocused, overly broad policy condition that prompted legislative concern in the first place. Moreover, that the provision employs "resulting from" language does not immunize it from the statute. The provision is not triggered by a loss resulting from a lack of fare paying status; instead the provision applies to "loss resulting . . . from bodily injury . . . while in [an aircraft] . . . unless the insured is . . . a fare paying passenger . . ."¹³⁷ Despite first appearances, the provision is a "while" clause designed to control the risks associated with unusual air travel arrangements. It can be triggered by facts that do not contribute to the loss and thus should have been classed as within the statute.

Fortunately, the process of ascribing functions to particular policy provisions rarely will be as difficult as it was in *Krause*. Most policy conditions will yield rather easily to a classification inquiry

136. *Id.* at 850, 5 N.W.2d at 232.

137. *Id.* at 846, 5 N.W.2d at 231 (emphasis added).

that asks whether the provision tries to protect the insurer against potential causes of loss with language framed so broadly that the condition can be breached by facts that do not contribute to the loss. Of course, there will be exceptions, but even where the classification method prescribed here does not produce easy answers, it is still to be preferred to the alternatives. It is grounded in the language and the historic role of the statute, and it responds to substance rather than form. It thus supplies a workable solution to the persistent problem of determining which policy defenses are subject to the contribute to the loss statute.

III. WHEN DOES A FAILURE OF CONDITION CONTRIBUTE TO A LOSS?

Whether a failure of condition subject to section 44-358 contributed to the loss ordinarily is a question that will pose no special difficulties. The question is one of cause-in-fact,¹³⁸ not "proximate," "legal," or "direct" cause,¹³⁹ and here instinctual ascriptions

138. See, e.g., *Slafter v. New Brunswick Fire Ins. Co.*, 142 Neb. 209, 217, 5 N.W.2d 217, 221 (1942) (the issue is whether the breach "*in any manner* contributed to the loss") (emphasis added); *Mayfield v. North River Ins. Co.*, 122 Neb. 63, 69, 239 N.W. 197, 199 (1931) (quoting from *Westchester Fire Ins. Co. v. Norfolk Bldg. & Loan Ass'n*, 14 F.2d 524, 527 (8th Cir. 1926)) (the issue is whether the breach "*contributed in any way to the loss*'") (emphasis added).

139. Of course, many insurance decisions do involve an effort to identify the "direct," "sole," or "active" cause of a loss that may be said to have multiple causes, and thus pose issues quite different from those presented by the contribute to the loss statute. One excellent recent example is *Lydick v. Insurance Co. of N. Am.*, 187 Neb. 97, 187 N.W.2d 602 (1971), in which the court affirmed summary judgment for the insurer on the ground that death of wind-driven cattle who fell through ice on a pond was not a "direct loss by wind-storm" within the policy:

The immediate and direct cause of the loss in this case was the collapse of the ice on which the cattle stood. The cold wind, by maximum inference, merely created an antecedent and preliminary condition which contributed to their wandering upon the snow-covered ice, and thus can only be considered as an indirect cause.

Id. at 100, 187 N.W.2d at 604. See also *Long v. Railway Mail Ass'n*, 145 Neb. 623, 635, 17 N.W.2d 675, 682 (1945):

We think the correct rule is: An accident insurance policy, providing for the payment of stipulated sums for accidental injury or death of the assured, where such injury or death is "from violent and accidental means alone, resulting directly, independently and exclusively of all other causes" and also providing that "There shall be no liability whatever unless death or disability results wholly from the injury, nor where any disease, defect or bodily infirmity is a contributing cause of death or injury," means that recovery may be had when the accident is the active, efficient and precipitating cause which set in motion the agencies which resulted in the injury or death without the intervention of any other independent force, even though existing infirmities of the insured may be necessary conditions to the result.

of causation often serve well enough. For example, in *Sanks v. St. Paul Fire & Marine Insurance Co.*,¹⁴⁰ a policy condition required the insured to use due care to protect damaged insured property from theft. The insured truck trailer was damaged in a highway accident in Chicago, the insured left it in a roadside ditch for a week, and it was stolen. Under these circumstances it is easy to accept the court's conclusion that, as a matter of law, the failure of condition contributed to the loss.¹⁴¹ If pressed to explain our perception that a causal nexus was present, we might say that if the insured had complied with the condition by using due care to protect the trailer, this theft would not have occurred.

Such common sense application of "but for" concepts of causation also explain some decisions in which a breach of condition was said not to have contributed to the loss. Thus, where a policy provision prohibited other insurance on the insured property but other insurance nonetheless was procured, the policyholder clearly was in breach of the condition, and the breach may well have enhanced the moral hazard to which the insurer was exposed.¹⁴² Nevertheless, absent a demonstration that the additional insurance induced the insured to commit arson,¹⁴³ it is difficult to see how the breach of condition could be said to have contributed to the loss. Our conclusion that the breach did not contribute to

140. 131 Neb. 266, 267 N.W. 454 (1936).

141. *Id.* at 273, 267 N.W. at 458.

142. *See, e.g.,* *Slafter v. New Brunswick Fire Ins. Co.*, 142 Neb. 209, 5 N.W.2d 217 (1942); *Newman v. National Union Fire Ins. Co.*, 122 Neb. 94, 239 N.W. 464 (1931).

143. *See Quisenberry v. National Fire Ins. Co.*, 132 Neb. 793, 797, 273 N.W. 197, 199 (1937): "It may be that in reference to the other insurance . . . the only manner by which defendant could prove that said breach contributed to the loss would be to show that plaintiff . . . secured the policy in question, caused the fire and thereby defrauded the defendant"

Some other jurisdictions with contribute to the loss statutes have been reluctant to apply the standard to defenses predicated on policy provisions designed to control moral hazards. *See generally* E. PATTERSON, *supra* note 1, at 359-60.

In Kansas, the debate concerning whether the contribute to the loss standard could be applied to "moral hazard" provisions has demonstrated remarkable staying power. In *Becker v. Kansas Cas. & Sur. Co.*, 105 Kan. 99, 181 P. 549 (1919), the Kansas court declared that the statute was inapplicable where the facts misrepresented or fraudulently concealed are such as increase the moral risk Misrepresentations of this character, although they do not directly contribute to the contingency of death, are deemed not to be within the purpose of the statute. Such misrepresentations never can contribute to the contingency insured against, and therefore it is held that the statute does not apply to or render them harmless.

Id. at 102, 181 P. at 551. That rule reigned in Kansas until 1954, when the Kansas court expressly reversed its position. *Hawkins v. New York Life Ins. Co.*, 176 Kan. 24, 269 P.2d 389 (1954).

the loss rests on our perception that the loss would have occurred even had there been no breach of condition.

Unfortunately, not all contribute to the loss questions yield so easily to simple intuitive ascriptions of causation. Consider for example, these questions:

Case 1: A livestock insurance policy includes a prohibition against moving specified insured stock from a designated pasture without prior permission of the insurer. An insured horse is moved two and one half miles to another pasture without permission and, while there, is struck by lightning and killed. Did the failure of condition contribute to the loss?¹⁴⁴

Case 2: An aircraft hull insurance policy includes a prohibition against allowing the plane to be piloted by any person who lacks prescribed licenses and certificates. While the plane is being flown by a person who lacks a required certificate, a wheel collapses and the hull is damaged. Did the failure of condition contribute to the loss?¹⁴⁵

Case 3: A property insurance policy on a building includes a prohibition against storing combustibles in the insured building. The insured engages in extensive fireproofing improvements to the building, and begins to store combustibles in the building. The building is destroyed by fire which starts spontaneously among the combustible materials. Did the failure of condition contribute to the loss?¹⁴⁶

Here, the simple "but for" formulation functions less well. Students, when presented with these cases, sometimes respond by demanding more facts. Was the adjacent pasture more or less exposed to the lightning hazard? Why was the pilot unlicensed? Could a qualified pilot have prevented the collapse of the wheel? Did the uncertificated pilot take over the controls during a scheduled flight with a licensed pilot or did the uncertificated pilot initiate the flight? Taking into account both the fireproofing and the presence of combustibles, was the insured building more or

144. The facts of Case 1 are drawn from *Johnson v. Caledonian Ins. Co.*, 125 Neb. 759, 251 N.W. 821 (1933). The court, without discussion, held that the failure of condition contributed to the loss. The "conception of cause" underlying that result, Patterson sniffed, was "the primitive one, but-for cause" which "[o]rdinarily, it is believed . . . is not sufficient to show that something contributed to the loss." E. PATTERSON, *supra* note 1, at 359.

145. The facts of Case 2 are drawn from *Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973). The court held the statute inapplicable, and thus did not reach the causation question. See notes 77-81 & accompanying text *supra*.

146. The facts of Case 3 are drawn from a hypothetical posed by Professor Keeton. R. KEETON, *supra* note 1, at 387. Professor Keeton was addressing the dangers of "net risk" arguments and did not reach the causation question.

less subject to the fire hazard than it had been before these damages? Was the fireproofing undertaken because storing combustibles was contemplated, or were the two changes "independent"?

At first look, this concern to establish more fully "what happened" is an expected concomitant of a contribute to the loss standard that subjects insurers to the added burdens of discovering and proving a causal nexus between the breach of condition and the loss.¹⁴⁷ On further reflection, however, such questions may seem irrelevant. It was a breach of condition to move the horse to a different pasture, and but for the move the death by lightning would not have occurred. How can it further the causal inquiry to determine whether the move increased the risk of being struck by lightning? The statute does not explicitly require that the breach of condition *both* enhance the risk *and* contribute to the loss. It is a commonplace that a breach of condition can materially enhance the risk to the insurer yet not contribute to the loss. Can the converse also be true? Can an insurer successfully mount a breach of condition defense under a supposedly more restrictive contribute to the loss standard on facts that would not permit a defense under a materiality standard? Should a trier of fact be permitted to determine that moving the horse to a different pasture did not contribute to the loss because the move did not enhance the risk that the horse would be hit by lightning? Or is the possibility that a breach of condition may contribute to a loss without having enhanced the risk of that loss merely another anomaly that demonstrates the essential absurdity of the contribute to the loss standard?

These questions may best be approached by asking exactly what we mean when we concur with the court's conclusion in *Sanks* that leaving the damaged trailer untended for a week in a Chicago ditch contributed to its loss by theft. We may dismiss at once some of the more formal meanings sometimes accorded causal statements. Clearly we do not mean that leaving the property in the ditch was a *necessary condition* of it being stolen; any number of other scenarios could have resulted in the theft of the trailer. Of course, also, we do not mean that leaving the trailer in the ditch was a *sufficient condition* for its theft; if the trailer had been left in the ditch, but no thief had found it, then no loss by theft would have occurred. Thus, leaving the trailer in the ditch was neither necessary nor sufficient for its theft. Rather, leaving the trailer in the ditch was but one of a complex of conditions which together were sufficient for the theft of the property. The condition of being in the ditch was a *necessary part* of this complex

147. See notes 11-17 & accompanying text *supra*.

of conditions; if the property had not been left in the ditch, the remainder of *this* complex of conditions would not have produced a stolen trailer. According to the formulation favored by some students of causal ascriptions, being in the ditch was an insufficient but necessary part of a complex of conditions which were themselves unnecessary but sufficient to result in the theft of the trailer.¹⁴⁸

How does this venture into scholasticism help us to resolve the three cases posed? By reminding us that conventional "but for" explanations of causal judgments only partially describe the decision processes underlying those judgments. For many results there are any number of circumstances "but for" which the result would not have occurred. Yet we must resist the natural tendency to acquiesce in "the view that everything which is a *sine qua non* or necessary condition of some event has an equal right to be treated as the cause of that event."¹⁴⁹ The point is not just that events may have multiple causes of greater or lesser significance; some conditions *sine qua non* of a result do not deserve to be considered even one among several causes of that result. Imagine that the trailer stolen in *Sanks* was painted in day-glo blue. Being painted blue might be characterized as an insufficient but necessary part of the complex of conditions that were themselves unnecessary but sufficient to produce the theft of *this blue* trailer from this Chicago ditch. Of course, that seems the emptiest of characterizations, as indeed it is. We shrink from concluding that its blue color contributed to the theft of the trailer because intuitively we indulge and apply a distinction between mere conditions *sine qua non* and those conditions *sine qua non* that are causally relevant. Some circumstances attending the theft of the trailer were only incidentally connected with its loss. They only "specify further, or individuate"¹⁵⁰ what happened. To use a formulation often employed to make the same distinction in another branch of the law, being blue was " 'merely an attendant circumstance,' " not " 'an effective and contributing cause.' "¹⁵¹

148. For a formal presentation of the kind of argument rehearsed here, see Mackie, *Causes & Conditions*, in CAUSATION AND CONDITIONALS 15 (E. Sosa ed. 1975).

149. H. HART & A. HONORÉ, CAUSATION IN THE LAW 19 n.1 (1959). The authors criticize the tendency of legal discussions of causation to assume "that, as far as the facts go, any event, however remote in the past, 'but for' which, a given event would not have happened, is as much the cause of the later event as any other." *Id.*

150. *Id.* at 110. For a fuller statement of this point, with many useful examples, see *id.* at 108-16.

151. *Dean v. Leonard*, 323 Mass. 606, 607, 83 N.E.2d 443, 444 (1949) (quoting the trial court).

But upon what does this distinction turn? Which conditions of a result were only attendant circumstances, and which were causally significant? Hart and Honoré have done better than most in grappling with this question. To them, the intuitive judgment that being blue did not contribute to the loss in any causally relevant way rests upon a "common sense" model of causation: "[A] cause must be a necessary element in some set of conditions connected generally with an outcome of this sort, and not merely connected with this particular outcome as a feature happening to characterize the particular action"¹⁵² Again, the test is one of general connection; there is causation if the sequence of events "exemplifies general connexions between kinds of events, statable in broad generalizations, holding good for other instances at other times and places."¹⁵³ In other words, the question is one of materiality: would the fact be generally perceived as enhancing the risk that the feared result will occur? Leaving a trailer untended in a Chicago ditch satisfies the requirement of a general connection; it seems likely to increase the risk of theft. Painting a trailer blue exhibits no such general enhancement of the risk of theft and thus is unlikely to be a causally relevant factor. On the other hand, subjecting insured property to other insurance increases the moral hazard and the risk that an arson fire will damage the property, but the moral hazard usually does not enhance the risk of other fire losses. Thus, breach of an "other insurance" condition usually is not a causally relevant factor in a non-arson fire loss. The critical point is that ascribing causal significance to a breach of a policy condition ultimately requires an attribution of purpose for the policy condition.¹⁵⁴ We need to determine what risk the condition was designed to ameliorate if we are to be able to say whether a breach of that condition contributed to the loss.

Thus, one should not dismiss too quickly demands for more facts to aid in resolving the cases posed. Such questions do not necessarily misapprehend the nature of the contribute to the loss standard, nor should their force be thought to depend on the supposed anomaly that on a particular state of facts an insurer might have a defense in a contribute to the loss state but not in a materiality state. Instead, some such questions reflect concerns that go to the core of the process of making causal ascriptions. To conclude that a failure to satisfy an insurance policy condition was a causally relevant factor in producing an insured loss, one must

152. H. HART & A. HONORÉ, *supra* note 149, at 132.

153. *Id.* at 114.

154. See generally Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 66 (1956) (arguing that causal pronouncements necessarily are "pregnant with a purposive quality").

first determine that, generally speaking, such failures of condition do enhance the risk of a loss of that sort. In a materiality state the inquiry could end there. In Nebraska, however, the contribute to the loss standard prescribes a second step. Did the risk that was enhanced by the breach of condition come to fruition? In *Sanks*, it did. In the "other insurance" cases, where the risk that provokes the prohibition is the risk of reduced incentives to prevent fire losses, it did not.

The more difficult cases posed above also yield to this analysis. In Case 1, if moving the horse to the second pasture enhanced the risk of death by lightning, then the insurer should have a defense because that enhanced risk came to fruition in the death of the horse. However, if moving the horse to a lowland pasture reduced the potential for lightning-caused deaths, that the horse nonetheless was hit by lightning should not mean that the breach of condition contributed to the loss. Those more comfortable with interpretivist approaches might rationalize this result with the technique employed by the Nebraska court in dealing with the notice condition defense in *Meckna*:¹⁵⁵ the purpose of the policy condition was to protect the insurer from the increased risk of loss that some changes in location pose; this change in location did not involve such an enhancement of the risk; therefore the purposes of the condition and thus the condition itself were not breached! A more straightforward rationale acknowledges that the policy condition was breached by moving the horse to an unauthorized location, but denies that the breach contributed to the loss where the death seems coincidental rather than an outcome of a sequence of events which in common experience exemplifies some more generalized connection between the conduct complained of and outcomes of this sort.¹⁵⁶

Note that under this analysis it does not aid the insurer to demonstrate that the move to the unauthorized pasture enhanced the risk of loss by flood, unless *that* enhanced risk was the one which came to fruition. Nor does it aid the insurer to demonstrate that changes of location often enhance the risk posed to the insurer. The issue is not whether the policy provision is material—we may concede that it is—but whether the particular breach of that condition was material.

In Case 2, the dependence on marshalling facts is equally evident. If the plane originally was piloted by a fully licensed and certificated pilot, so that the breach of condition occurred when an uncertificated pilot took the controls during a flight that would

155. *Iowa Mut. Ins. Co. v. Meckna*, 180 Neb. 516, 144 N.W.2d 73 (1966). See notes 59-61 & accompanying text *supra*.

156. H. HART & A. HONORÉ, *supra* note 149, at 115.

have occurred anyway, the argument is quite simple. Turning the controls over to the uncertificated pilot did or did not enhance the risk to the insurer, depending upon the actual skill levels of the pilot. If the risk was materially enhanced because he was unskilled, then the question becomes whether that risk—lack of skill—came to fruition. Did he carelessly drive into a mountain? Did his landing put unnecessary stress on the wheel carriage? These are the sorts of questions that must be answered if the necessary causal nexus between material lack of skill and the property damage is to be made out.

However, if the plane took off with an unlicensed pilot in a flight that otherwise would not have occurred, then the analysis might seem to change. On these facts, so the argument goes, it does not matter whether the pilot was skilled or unskilled, because the risk to the insurer was enhanced by the very fact that the plane was in the air rather than safely tucked away in a hangar. The unlicensed pilot's act of flying without a license enhanced the risk to the insurer, and that risk came to fruition when the plane was damaged as a result of an incident occurring during the flight. Therefore, the breach of condition contributed to the insured loss.

Although this argument can claim some surface plausibility, it is fundamentally flawed because it does not select an appropriate definition of the breach of condition for which causal significance is claimed. The risk against which the insurer sought to protect itself by the policy language was the risk of unqualified pilots, not the risk of extra flights. There is no reason to treat all the facts involved in the breach of condition as a single "indivisible complex" of conditions *sine qua non*: making-a-flight-which-otherwise-would-not-have-occurred-without-a-required-certificate. The focus should be narrower, on whether the lack of a certificate enhanced a risk which then came to fruition.

Case 3 demonstrates that this analysis also can cut in favor of the insurer. There the insured might argue that storing combustibles did not contribute to the loss because there was no *net* increase in the risk when other risk ameliorative measures are taken into account. Should that argument be persuasive? It depends. If the argument is that other unrelated changes offset the increase in risk created by the breach of condition, the insurer should prevail, for the insured's argument depends on the artifice of an improperly identified breach of condition.¹⁵⁷ On the other hand, if storing

157. The policy provision invoked by the insurer reflects a specific insurer concern—storage of combustibles. The contribute to the loss statute insists that a breach of that provision be a causally relevant factor in producing a loss, but it does not convert the policy provision into a prohibition of net increases of risk during the policy term.

the combustibles *did not* materially enhance the risk, because the protective measures were so well done, then the insured should prevail.

IV. CONCLUSION

The Nebraska contribute to the loss statute is not a universal solvent for the problems of insureds who have failed to satisfy insurance policy conditions. Pre-inception and post-loss failures of condition are beyond the statute's reach, as are post-inception, pre-loss failures to satisfy coverage-defining policy conditions. However, a defense predicated on a policy condition designed to protect the insurer against a potential cause of loss should be deemed subject to the statutory standard, thus placing on the insurer the burden of demonstrating that the failure of condition increased the risk that an insured event would occur, and that the increased risk actually came to fruition in an insured loss.