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In the Sup[illegible]

of the S[illegible]

MARY JANE G. KL[illegible]

Plaintiff [illegible]

vs.

CONTINENTAL [illegible]
COMPANY,

Defendant [illegible]

Appeal [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Attorneys for [illegible]

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CASES AND AUTHORITIES CITED

CASES CITED

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TEXTS CITED

Appleman, Insurance Law and Practice, Vol. 1, Section 105 5

Appleman, Insurance Law and Practice, Vol. 16 A, Section 9083 8

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In the Supreme Court of the State of Utah

MARY JANE O. KLOEPFER,
Plaintiff and Appellant,

vs.

CONTINENTAL ASSURANCE COMPANY,
Defendant and Respondent.

Case No. 11581

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is a civil action brought by Plaintiff as beneficiary under a life insurance policy on the life of her deceased husband to recover the proceeds of the policy.

DISPOSITION IN LOWER COURT

The Court granted Defendant's Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks reversal of the Court's Order on Defendant's Motion for Summary Judgment

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directing that judgment be entered in favor of Defendant and seeks an Order of the Supreme Court directing entry of judgment in favor of Plaintiff on her Motion for Summary Judgment.

STATEMENT OF FACTS

The deceased, Eldon J. Kloepfer, was an employee of Kloepfer Construction Company, Inc., which employer held a group life policy. (Exhibit D attached to Defendant's Answer).

On March 30, 1968, decedent made application for insurance on his life under said Group Life Insurance Policy. (Exhibit C attached to Defendant's Answer).

That on April 11, 1968, prior to decedent's death, Defendant accepted said application and issued its Certificate of Insurance, *post-dated,* however, to May 1, 1968, and sent said Certificate of Insurance, along with a cover letter dated April 11, 1968, to decedent. (Exhibit A and Exhibit B attached to Plaintiff's Complaint).

Plaintiff is the beneficiary named in said policy.

That with the letter and policy, Defendant mailed to decedent a premium notice showing a due date of May 1, 1968. (Part of Exhibit E attached to Requests to Admit).

That on the night of April 11, 1968, the decedent

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was killed in an airplane accident.

That the cover letter of April 11, 1968, the Certificate of Policy and the Premium Notice were received by Plaintiff after the decedent's death. On May 7, 1968. she tendered the premium to Defendant (part of Exhibit E attached to Request to Admit), which was refused.

That Plaintiff, as benericiary, filed a claim for the proceeds of the policy on decedent's life, which claim was turned down. Defendant based its denial of coverage on the grounds that the policy's effective date was May 1, 1968, and that hence, there was no insurance in force on the date of death, April 11, 1968. This lawsuit followed.

Concerning the effective date of individual policies issued under the Group Policy, Paragraph 2 (A) on Page I.P 53936 aG of the General Provisions of said Group Policy states:

> Each individual eligible for insurance hereunder who makes written request to the Policyholder, on the Company's forms, to participate in the insurance under this Policy, and makes the required payment of premium, if any, shall become insured subject to the following conditions:
>
> (A) Each such Individual must furnish, without expense to the Company, evidence of insurability satisfactory to it before he may become insured. If such evidence is submitted, and payment of the required

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> premium made, if any, *the Individual's insurance shall become effective on the first of the insurance month coinciding with or next succeeding the date the Company determines the evidence to be satisfactory.* (Emphasis added).

ARGUMENT

Point I

The language in the Group Policy on the effective date of an individual policy is ambiguous and should be resolved against Defendant.

Plaintiff contends that the policy on decedent's life was in full force and effect on the day of its issue, to-wit: April 11, 1968, notwithstanding the post-dated effective date arbitrarily inserted by Defendant, to-wit: May 1, 1968, ex parte, without the insured's consent or knowledge, and notwithstanding the non-payment of premium prior to said date.

The application (Exhibit C) provides that the insurance shall become effective only in accordance with the provisions of the Group Policy (Exhibit D).

Exhibit D, the Group Policy, provides under General Provisions, Paragraph 2, Individuals Insured, Subparagraph (A) (Page L P 53936 aG):

> "Each such individual must furnish, without expense to the Company, evidence of insurability satisfactory to it before he may become insured.

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If any, *the Individual's insurance shall become effective on the first day of the insurance month coinciding with or next succeeding the date the Company determines the evidence to be satisfactory.*" (Emphasis supplied).

The term "insurance month" is not defined in either the application or the Group Policy.

It seems logical to assume that the insurance month begins with the date the application is approved and the policy issued.

This would be April 11, 1968, prior to decedent's death.

Also, it is possible that insurance month means calendar month, although it would have been easy for the Defendant, in drafting the Group Policy, to say so in plain and simple language, which would make the policy effective on April 1, 1968, or May 1, 1968, as the parties might determine by agreement.

Here, there was no agreement as to which of several dates would be acceptable only an ex parte arbitrary choice by the Defendant under the above quoted ambiguous language.

Volume I of *Appleman, Insurance Law and Practice*, Section 105, page 145, after stating that the parties may fix the date upon which a policy becomes effective, and that when a time is fixed by the parties, it will usually be controlling, provides:

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> "But where there is an ambiguity in the expression of the policy as to what date shall control, the courts are prone to construe such ambiguity against the insurer so as to allow a recovery under the contract."

Plaintiff submits that there is such an ambiguity in this policy, contained in Paragraph 2 of General Provisions set out in full above.

This Policy uses the term "insurance month."

As stated above, one interpretation of this would be to use it as synonymous with "calendar month." However, this must not be so, or the scrivener of the policy (Appellant assumes this would be the Defendant) would have used the well established phrase of "calendar month," which begins on the first day of the month and terminates on the last day of the month.

Also, it is logical to interpret this phrase to mean the month beginning with the day the policy is issued, whether it be the 11th day of the calendar month, the fifth day, or what have you, and ending on the day before the corresponding day the next calendar month.

If the interpretation that "insurance month" means "calendar month," is followed, then it would seem only common sense that the provisions under interpretation should be further construed to mean that if the evidence of insurability is accepted prior to the middle of the calendar month, the effective date of the

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policy is the first day of that month, and if the acceptance is made after the middle of the calendar month, the effective date is the first day of the succeeding calendar month. Otherwise, why would there be a reference to two dates?

Here, the acceptance was made on the 11th day of April, and under this interpretation, the policy was effective April 1st, and the policy was in full force and effect on the day of the insured's death, to-wit: April 11, 1968

And, if the interpretation that "insurance month" means something other than calendar month is followed, it would seem that when the application was accepted, the premium paid (or waived), and the policy issued, that the insurance month would begin at that time, and the insurance would be in force at that time, which in this case would be April 11, 1968, the date the policy was issued.

One point stands clear, and that is that there is considerable ambiguity attendant to the choice of language used by the insurer in attempting to spell out the the effective date.

It likewise seems clear that in fixing the effective date as May 1, 1968, even though the acceptance was made on April 11th and the policy actually issued that date, the insurer acted arbitrarily and without the con-

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sent or even knowledge of the insured.

The holding in the case of *DiEnes* vs. *Safeco Life Company,* 21 Utah 2d 147, 442 P(2) 468, is that no ambiguous statement is to be enforced against an insured.

In *Christensen* vs. *Farmers Insurance Exchange,* 21 Utah 2d 194, 443 P(2) 385, the Utah Supreme Court ruled that any ambiguity in a policy would be uniformly resolved strictly against the insurer and in favor of the insured.

Under this law, the policy was in full force and effect, subject to either payment or waiver of premium (see Point II) at the time of decedent's death.

ARGUMENT

POINT II

Non-payment of premium prior to death did not preclude the effectiveness of the insurance contract.

A. WAIVER OF PREMIUM

In this case, the Defendant, as a free and voluntary act, issued the policy on April 11, 1968, prior to the time the first premium was paid.

It is generally well accepted that an insurer may waive its right to a premium. (Vol. 16 A, *Appleman, Insurance Law and Practice.* Section 9083 (1968): *Loftis* vs. *Pacific Mutual Life Insurance Company of Califor-*

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nia. (Utah) 38 U. 532, 114 Pac. 134.

And, as a rule, delivery of a policy of life insurance without payment of premium constitutes a waiver of a condition that the policy shall not be in force until payment of the first premium. (Annotation, 118 A.L.R. 1072).

Here, there appears to be no question but that the Policy was issued and delivered. (See Exhibit A, cover letter dated April 11, 1968).

Nor does there appear to be any question concerning the authority of the person making delivery to do so, delivery having been made by Charles O. Finley and Company, Inc. (see Exhibit A), who is named as Administrator in said Policy. (See page LP 542096-4 of Exhibit B and Notice of Premium, being part of Exhibit E).

And, an examination of Exhibit A, the cover letter of April 11, 1968, deliverying the issued Policy, shows no mention of payment of premium as a condition of delivery, nor any mention of payment of premium at all.

B. GRACE PERIOD

Without in any way desiring to minimize her claim of waiver of premium above asserted, but in addition thereto, Plaintiff desires to point out to the Court the Policy provisions on the grace period allowed for pay-

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ment of premiums.

Paragraph 13 of said general provisions of the Group Policy (Exhibit D, Group Policy, page LP 53936 G-6 entitled "Grace Period," provides:

> "A grace period of thirty-one days, without interest charge, shall be granted for the payment of every premium, after the first, during which period the insurance shall continue in force, . . ."

The effective date of the Policy is, and the payment of premiums commences on, the "first of the insurance month." (Exhibit D, Group Policy paragraph 2A, page LP 53936 aG).

By the plain terms of paragraph 13, the grace period of "thirty-one days . . . after the first" would leave the policy in force on April 11, 1968, the day of death, under either interpretation of the effective date of the Policy, to-wit: April 1, 1968, or April 11, 1968.

Under the first interpretation, the grace period would not expire until May 2, 1968, and under the second interpretation the grace period would not expire until May 12, 1968.

In either event, it was still running on the date of decedent's death, April 11, 1968.

CONCLUSION

A policy on the life of decedent, issued by Defendant, was in full force and effect at the time of dece-

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dent's death. Plaintiff, as the beneficiary under said policy, is entitled to judgment for all proceeds thereof as prayed for in her Complaint.

The District Court's Summary Judgment in favor of Defendant should be reversed and judgment on the Complaint entered for the Plaintiff.

Respectfully submitted,

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