

1988

Gary Robert Solomon, Carol June deGolyer and
Debbie Gaye Miller v. University Financial
Concepts v. The Manufactureres Life Insurance
Company and Life Insurance Company of the
Southwest : Brief of Respondent

Utah Court of Appeals

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R. Brent Stevens; Robert C. Keller; Snow, Christensen & Martineau; Brent P. Lorimer; Workman, Nydegger .

Brent P. Lorimer; Workman, Nydegger & Jensen; P. Keith Nelson; George T. Naegle; Richards, Brandt, Miller & Nelson; Attorneys for Appellant.

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IN THE COURT OF APPEALS, STATE OF UTAH
UTAH COURT OF APPEALS

BRIEF

TAH GARY ROBERT SOLOMON, CAROL JUNE
DOCUMENT deGOLYER, and DEBBIE GAYE
FU MILLER, as Trustees of the Fred
, J. Solomon Family Trust,

10 Plaintiff/Respondent,
CKET NO. 880462-CA
vs.

Court of Appeals
Case No. 880462-CA

UNIVERSITY FINANCIAL CONCEPTS,
INC., a Utah corporation,

Priority 14(b)

Defendant and Third-Party
Plaintiff/Appellant,

vs.

THE MANUFACTURERS LIFE INSURANCE
COMPANY, a Canadian corporation;
and LIFE INSURANCE COMPANY OF
THE SOUTHWEST, a Texas
corporation,

Third-Party Defendants/
Respondents.

BRIEF OF RESPONDENT/THIRD PARTY DEFENDANT
THE MANUFACTURERS LIFE INSURANCE COMPANY

Responding to Appeal from Final Decisions Rendered in the
Third Judicial District Court, Salt Lake County, State of Utah

Honorable Michael R. Murphy, Third District Judge

Brent P. Lorimer
WORKMAN, NYDEGGER & JENSEN
57 West 200 South, 3rd Floor
Salt Lake City, Utah 84101
Telephone: (801) 533-9800
Attorneys for Respondent
Gary Robert Solomon et al.

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DEC 11 1988

P. Keith Nelson
George T. Naegle
RICHARDS, BRANDT, MILLER
& NELSON
50 South Main Street, Suite 700
P.O. Box 2465
Salt Lake City, UT 84110
Telephone: (801) 531-1777
Attorneys for Appellant
University Financial Concepts,
Inc.

R. Brent Stephens
Robert C. Keller
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place,
Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Respondent
The Manufacturers Life
Insurance Company

IN THE COURT OF APPEALS, STATE OF UTAH

GARY ROBERT SOLOMON, CAROL JUNE
deGOLYER, and DEBBIE GAYE
MILLER, as Trustees of the Fred
J. Solomon Family Trust,

Plaintiff/Respondent,

vs.

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Brent P. Lorimer
WORKMAN, NYDEGGER & JENSEN
57 West 200 South, 3rd Floor
Salt Lake City, Utah 84101
Telephone: (801) 533-9800
Attorneys for Respondent
Gary Robert Solomon et al.

P. Keith Nelson
George T. Naegle
RICHARDS, BRANDT, MILLER
& NELSON
50 South Main Street, Suite 700
P.O. Box 2465
Salt Lake City, UT 84110
Telephone: (801) 531-1777
Attorneys for Appellant
University Financial Concepts,

R. Brent Stephens
Robert C. Keller
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place,
Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Respondent
The Manufacturers Life
Insurance Company

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JURISDICTION

Respondent/Third-party defendant, The Manufacturers Life Insurance Company (herein "Manulife"), disputes jurisdiction. The appellant filed its Notice of Appeal on June 10, 1988. By its terms, the Notice applies to judgments entered May 12, 1988, and May 26, 1988, in favor of plaintiffs on their negligence claims and in favor of third-party defendant Manulife. Claims were still pending in the Court below, however, on plaintiffs' contract claims. Nor did the Court certify the judgment or order as to Manulife as final pursuant to Rule 54(b) of the Utah Rules of Civil Procedure. Thus, the appellant's Notice of Appeal was from a non-final judgment or order and was technically insufficient to provide jurisdiction as to Manulife.

Subsequently, the Court below disposed of all claims and all parties by granting summary judgment on plaintiffs' contract claims in the fall of 1988. Counsel points out that under these circumstances and in keeping with the policy that practical, not technical, considerations are to govern the application of principles of finality, courts in many jurisdictions hold that the Court's subsequent order validates the otherwise premature notice. See e.g. Annot., Premature Notice of Appeal, 76 ALR Fed. 199 § 4. Nevertheless, counsel has discovered no Utah cases precisely on point. Utah law is clear that a non-final judgment is not appealable, and "a judgment to

be final, must dispose of the case as to all the parties, and finally dispose of the subject matter of the litigation on the merits of the case." Kennedy v. New Era Industries, Inc., 600 P.2d 534, 536 (Utah 1979). Further, the Court's subsequent dismissal of the contract claims could render any decision by this Court moot. See Respondent's Suggestion of Mootness and Motion to Dismiss, filed in this Court December 13, 1988.

NATURE OF THE CASE

Appellant University Financial Concepts, Inc. (herein "UFCI") appeals from the decision of the Honorable Michael R. Murphy granting Manulife's Motion for Summary Judgment.

STATEMENT OF ISSUE

Whether UFCI can support any cognizable claim for indemnity against Manulife upon the factual record.

DETERMINATIVE STATUTES

Rule 14 of the Utah Rules of Civil Procedure, which provides, in pertinent part:

(a) When Defendant May Bring in Third-Party. At any time after commencement of the action, a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

Rule 14, Utah R. Civ. P.

STATEMENT OF THE CASE

As indicated above, this is UFCI's appeal from the decision of the Honorable Michael R. Murphy granting Manulife summary judgment on UFCI's third-party claims against Manulife. The basis of Manulife's motion in the court below was that given the undisputed material facts, UFCI could prove no set of facts by which Manulife would be liable to UFCI for all or part of the principal-plaintiffs claim against UFCI.

The undisputed facts material to the decision below are as follows:

1. On or about September 5, 1983, UFCI sold plaintiff's decedent, Fred J. Solomon (herein "Solomon"), a \$500,000 whole-life insurance policy underwritten by Manulife. (Berrett Depo. at pp. 51-52; Appellant's Brief, Statement of Facts, at ¶ 4.)

2. UFCI agreed with Solomon that if Solomon would pay an annual interest payment of \$2,449.20 for three years, UFCI would pay the premiums to keep the policy in effect for a minimum of three years. (Berrett Depo. at p. 53; Appellant's Brief, Statement of Facts, at ¶ 6.)

3. Solomon paid the first annual interest payment and UFCI paid the first year's premium to Manulife. Thus, the policy was in force from approximately October of 1983 to October of 1984. (Berrett Depo. at pp. 58-60; Appellant's Brief, Statement of Facts, at ¶ 7.)

4. Because of UFCI's financial difficulties, UFCI did not pay the second year premiums on a number of policies, including the Solomon policy, and those policies, including the Solomon policy, lapsed. (Berrett Depo. at pp. 71, 143; Appellant's Brief at pp. 13, 17 and 25, Statement of Facts, at ¶ 8.)

5. In order to conserve the life insurance policies placed with Manulife during 1983, Manulife agreed with UFCI to allow policies with cash value to remain in force under the terms of the extended term insurance provision of the contracts beginning with Manulife's receipt from UFCI of \$50,000, and subject to certain conditions. (Berrett Depo. at p. 141; Smithen Depo. at pp 10-11; Appellant's Brief, Statement of Facts, at ¶ 9.)

6. The written agreement between Manulife and UFCI provided in pertinent part:

Manufacturers agrees to allow the Contracts to remain in force under the terms of the extended term insurance provision of the Contracts beginning with Manufacturers' receipt from you of \$50,000 ("the term payment") subject to the following conditions:

. . .

2. The extended term insurance coverage will only continue on a week-by-week basis as provided below.

. . .

5. Beginning no later than seven calendar days after Manufacturers receives the term payment, you will be required to pay \$25,000 per week (weekly payment) to continue coverage under the

extended term insurance provision, and the weekly payments will continue until all the contracts have been fully reinstated. Each weekly payment must be received by Manufacturers at its Sacramento office no later than seven calendar days after the prior weekly payment has been received.

. . .

9. Failure to meet any of the requirements in clauses 1 to 7 above will result in immediate termination of the extended term insurance coverage on all the contracts that have not otherwise been fully reinstated. Thereafter, any contract that has been fully reinstated or has any remaining cash value will remain in force as per the terms of the Contracts.

(Agreement, attached to Appellant's Brief as Exhibit B.)

7. UFCI did not make weekly payments according the agreement, quoted above; nor did UFCI make sufficient payments to cover the premiums due on all of the policies. Because of this failure a number of policies were never reinstated and the Fred J. Solomon policy was one of the policies which was never reinstated. (Berrett Depo. at pp. 69, 72, 74.)

8. By the spring of 1985, UFCI had ceased altogether making payments to Manulife pursuant to the agreement, and Manulife received no money from UFCI after May of 1985. Accordingly, Manulife terminated the agreement. (Smithen Depo. p. 54; Appellant's Brief, Statement of Facts, at ¶¶ 20-21.)

9. If sufficient premium payments had been received by Manulife from UFCI, all of the policies would have been rein

stated, or none of the policies would have lapsed. Manulife lost significant monies when policies with a high initial cash value like those involved in UFCI's "premium financing" arrangement lapsed in the first or second year. (Smithen Depo. at pp. 4-6.)

10. Manulife sent to UFCI notices that the Solomon policy had lapsed in the second year. UFCI received those notices and never received any notice of reinstatement from Manulife for Fred J. Solomon in any form. In fact, in November or December of 1985, some three months before Solomon's death, UFCI was "scrambling" to find coverage with another insurance company. (Berrett Depo. at p. 166; Christopherson Depo. at pp. 46-47.)

11. On or about February 15, 1986, in what would have been the third year of the policy had the policy not lapsed, Fred J. Solomon died. (Plaintiffs' Amended Complaint, at ¶ 11.)

12. Plaintiffs claim that at the time Mr. Solomon died, he should have been covered by the insurance policy according to his agreement with UFCI. Plaintiffs brought this action against UFCI alleging causes of action against UFCI for breach of its agreement to pay the required premiums to keep the policy with Manulife in force for three years from approximately October 5, 1983, and for negligence for UFCI's failure to pay the required premiums to keep the policy in force. (Plaintiffs' Amended Complaint, at ¶¶ 14-27.)

13. Plaintiffs never claimed that Manulife was at fault in allowing the policy to lapse for non-payment of premium. (See generally, Plaintiffs' Amended Complaint.)

SUMMARY OF ARGUMENT

Manulife's position has been and continues to be that UFCI has not and cannot assert a cognizable indemnity claim under Rule 14 of the Utah Rules of Civil Procedure because Manulife cannot be held liable to UFCI for all or part of plaintiffs' claim against UFCI. Essentially, plaintiffs' claims against UFCI are that UFCI negligently allowed the Manulife policy to lapse by its failure to pay premiums, and thereby breached its contracts with Solomon. However, there is no evidence that Manulife did anything to cause or contribute to UFCI's failure to pay premiums, either after the first year of the policy, or after the agreement between Manulife and UFCI whereby the policy could have been reinstated had UFCI made sufficient weekly payments.

UFCI does not make any reasoned argument to the contrary. Particularly, UFCI does not and cannot argue that if Manulife would have administered the Manulife-UFCI agreement differently the policy would have been in force when Solomon died. Rather, UFCI argues at length that the agreement was ambiguous, and that if disputed issues of fact were resolved in its favor and

the agreement is construed a certain way, the Solomon policy was reinstated for its second year, and lapsed in its third year for non-payment of premiums. If the policy lapsed in its third year, according to UFCI's reasoning, then there is evidence that Solomon was contributorily negligent and himself failed to make required premium payments.

Significantly, however, whether the policy lapsed because UFCI didn't pay premiums, or because Solomon himself didn't pay them, the non-payment does not somehow make Manulife liable to UFCI for plaintiffs claim against UFCI. An insurer's obligation to pay death benefits is premised upon payment of premiums. The fact is and remains that plaintiffs' claim is premised on UFCI's failure to make premium payments, and Manulife did nothing to contribute to that failure.

ARGUMENT

UFCI'S THIRD-PARTY INDEMNITY CLAIM AGAINST
MANULIFE FAILS AS A MATTER OF LAW BECAUSE
UFCI CAN PROVE NO SET OF FACTS BY WHICH
MANULIFE IS OR MAY BE LIABLE TO UFCI FOR
PRINCIPAL-PLAINTIFFS' CLAIM AGAINST UFCI.

Utah Rule of Civil Procedure 14(a) provides that a defending party may only serve a third-party complaint against a person not a party to the action "who is or may be liable to him for all or part of the plaintiff's claim against him." Utah R. Civ. P. 14(a).

Stated another way, the above-cited Rule means that to state a valid claim under Rule 14, UFCI, as a third-party plaintiff, must be attempting to pass on to third-party defendant Manulife all or part of the liability asserted against UFCI. See J. Moore, 3 Moore's Federal Practice ¶ 1407 (2nd ed. 1988).

In this case, plaintiffs' claims against UFCI are premised upon UFCI's failure to live up to its agreement to pay the premiums necessary to provide insurance coverage for Fred J. Solomon for a three-year period. It is undisputed that by the time Solomon died, the life insurance policy underwritten by Manulife had lapsed because of nonpayment of premiums. There is no evidence, however, that Manulife caused the failure to pay the required premiums. In fact, it is undisputed that Manulife made every effort to allow UFCI to make the premium payments, even to the extent of allowing UFCI to make premium payments late and carrying certain of the policies in force when no premium had been received. Under these circumstances, any liability Manulife might incur is entirely independent of the liability claimed against UFCI, and UFCI is not stating a valid third-party claim.

UFCI's argument with regard to its indemnity claim against Manulife is difficult to follow at best. UFCI does not argue that if Manulife had administered the Manulife-UFCI agreement differently, the policy would have been in force when Solomon

died, and that Manulife's mishandling of the agreement caused plaintiffs' loss. Nor does UFCI argue that Manulife caused plaintiffs's loss by inappropriately terminating the Manulife-UFCI agreement at all and thus caused plaintiff's loss. Such arguments are precluded by UFCI's position that the policy in fact lapsed in its third year and before Solomon's death because of Solomon's own failure to make interest payments. See Appellant's Brief, at pp. 13, 17 and 25. Where it is undisputed that no one, not UFCI, nor Solomon, made premium payments in the third year of the policy, and the agreement was terminated well before the second-year anniversary date of the Solomon policy, regardless of the agreement there would have been no coverage when Solomon died in 1986.

Rather, in its Brief UFCI labors for some eight pages arguing the proposition that the Court below erred in holding the Solomon policy lapsed for non-payment of premiums in its second year. See Appellant's Brief, at pp. 17-25. According to UFCI, it was error to hold that the policy lapsed in its second year of existence, and thus UFCI goes on to state:

The Manulife policy was in full force and effect during the second year of its existence. The policy actually lapsed in its third year due to Mr. Solomon's failure to make his third-year interest payment to UFCI. The premium on the Manulife policy, for the third-year, was due September 5, 1985. The grace period on the Manulife policy allowed the premium payment to be made as late as October 6, 1985. Mr. Solomon did not tender his third-year interest payment to UFCI until October 28, 1985, a full

twenty-two days after the policy had already elapsed. UFCI had no duty to tender a payment to Manulife absent Mr. Solomon's interest payment to UFCI, and therefore UFCI did not contribute to the lapse of this policy.

Id. at 25-26 (emphasis added).

Clearly, UFCI is taking the position that the policy did in fact lapse for non-payment of premiums, albeit in its third year. However, whether the policy lapsed in its second year, because UFCI failed to make premium payments, as Judge Murphy held and as plaintiffs contend, or whether the policy lapsed in its third year, because of Mr. Solomon's failure to make the requisite premium/interest payment, as UFCI contends, Manulife is not made liable to UFCI for all or part of plaintiffs' claim against UFCI¹. An insurer's obligation to pay death benefits is premised upon the payment of premiums. Larsen v. Wycoff Co., 624 P.2d 1151 (Utah 1981) ("An insurer has the right to cancel coverage when an employer discontinues payment for an

¹Although it does not do so in its arguments before this Court, in the Court below UFCI made the strange statement that a jury could find that the policy lapsed in its second, rather than its third year. "That being the case, it is clear that Manulife is, or may be liable to UFCI for the claim made against UFCI by the heirs of Fred J. Solomon, if UFCI wrongfully terminated the . . . agreement." See UFCI's Memorandum in Opposition to Third-Party Defendant Manulife's Motion for Summary Judgment, at pp. 13-14. However, whether the policy lapsed in its second year, or its third year, the only difference is that if the policy lapsed in its third year UFCI can then assert a defense of contributory negligence. Not surprisingly UFCI cites no authority for the proposition that Manulife's action, even if proven, resulting in UFCI being precluded from asserting a legal defense gives UFCI a valid indemnity claim.

employee insured under a group life insurance policy, whether or not the employee contributes to the cost of the premiums." Citing Couch v. Connecticut General Life Insurance Co., 216 So.2d 72 (Fla. App. 1968)).

In sum, UFCI's alleged liability arises because it did not make sufficient premium payments to keep the Solomon insurance policy in force. UFCI's indemnity claim is not an attempt to pass on this liability to Manulife because there is no evidence that Manulife was in any way responsible for UFCI's failure to pay premiums, or for plaintiffs' loss. Under these circumstances, UFCI's claim cannot properly be asserted against third-party defendant Manulife under Rule 14 of the Utah Rules of Civil Procedure.

CONCLUSION

For the above reasons, Manulife respectfully submits that Judge Murphy's decision granting Manulife summary judgment on UFCI's third-party indemnity claim must be upheld. Manulife is entitled to judgment, no cause of action, as a matter of law.

DATED this 21st day of December, 1988.

SNOW, CHRISTENSEN & MARTINEAU

By



Robert C. Keller
Attorneys for Respondent
The Manufacturers Life
Insurance Company

SCMRCK256

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing pleading was mailed by first class, postage prepaid, this 21st day of December, 1988 to the following:

P. Keith Nelson
George T. Naegle
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street, Suite 700
P.O. Box 2465
Salt Lake City, UT 84110

Brent P. Lorimer
WORKMAN, NYDEGGER & JENSEN
57 West 200 South, 3rd Floor
Salt Lake City, Utah 84101



Robert C. Keller