

1978

## Mavis Williams v. First Colony Life Insurance Co. : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Prince, Yeates & Geldzahler; Attorneys for Appellant;

Jones, Waldo, Holbrook & McDonough; Attorneys for Respondent;

---

### Recommended Citation

Brief of Respondent, *Williams v. First Colony Life Insurance Co.*, No. 15934 (Utah Supreme Court, 1978).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/1345](https://digitalcommons.law.byu.edu/uofu_sc2/1345)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

MAVIE WALKER

John P. Ashton, Jr.  
PRINCE, YEATES & Ashton  
455 South Third East  
Salt Lake City, Utah  
Attorneys for Appellee

IN THE SUPREME COURT OF THE  
STATE OF UTAH

---ooo0ooo---

|                             |   |                |
|-----------------------------|---|----------------|
| MAVIS WILLIAMS,             | : |                |
|                             | : |                |
| Plaintiff and               | : |                |
| Appellant,                  | : |                |
|                             | : | Case No. 15934 |
| -vs-                        | : |                |
|                             | : |                |
| FIRST COLONY LIFE INSURANCE | : |                |
| COMPANY,                    | : |                |
|                             | : |                |
| Defendant and               | : |                |
| Respondent.                 | : |                |

---ooo0ooo---

BRIEF OF RESPONDENT

---ooo0ooo---

APPEAL FROM JUDGMENT OF THE SECOND JUDICIAL  
DISTRICT COURT IN AND FOR WEBER COUNTY  
STATE OF UTAH

Honorable Ronald O. Hyde, Judge

---ooo0ooo---

Robert M. McDonald, of  
JONES, WALDO, HOLBROOK & McDONOUGH  
800 Walker Bank Building  
Salt Lake City, Utah 84111  
Attorneys for Respondent

John P. Ashton, of  
PRINCE, YEATES & GELDZAHLER  
455 South Third East  
Salt Lake City, Utah 84111  
Attorneys for Appellant

## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| NATURE OF THE CASE . . . . .  | 1           |
| DISPOSITION IN THE LOWER COURT . . . . .  | 1           |
| RELIEF SOUGHT ON APPEAL. . . . .  | 1           |
| STATEMENT OF FACTS . . . . .  | 2           |
| ARGUMENT . . . . .  | 11          |
| I. THE PAYMENT OF THE PREMIUM DID NOT<br>CREATE COVERAGE. . . . .   | 11          |
| II. THERE IS NO AMBIGUITY IN THE CON-<br>DITIONAL RECEIPT AND APPLICATION . . . .                                       | 18          |
| III. ALLEN MEIKLE WAS THE AGENT OF<br>MAVIS WILLIAMS . . . . .  | 22          |
| IV. ALL PARTIES TO THE TRANSACTION WERE<br>AWARE THAT A MEDICAL EXAMINATION<br>WAS A REQUIREMENT OF COVERAGE. . . . .   | 33          |
| V. CONDITIONS OF COVERAGE WERE COMMUNI-<br>CATED TO APPELLANT . . . . .   | 37          |
| VI. APPELLANT HAS ABANDONED THE CLAIM THAT<br>THE REPRESENTATIONS OF MR. MEIKLE ARE<br>BINDING ON FIRST COLONY. . . . . | 39          |
| VII. PUBLIC POLICY CONSIDERATIONS HAVE<br>BEEN SATISFIED . . . . .  | 42          |
| CONCLUSION . . . . .  | 44          |

# AUTHORITIES CITED

| <u>CASES</u>   | <u>Page</u> |
|--|-------------|
| <u>Aho v. United Transportation Union</u> , 571 P.2d 1329 (Utah, 1977) . . . . .   | 17          |
| <u>Atlas Life Insurance Company v. Eastman</u> , 320 P.2d 397 (Okla. 1957). . . . .  | 29          |
| <u>Barnett v. State Automobile and Casualty Underwriters</u> , 26 U.2d 169, 487 P.2d 311 (1971). . .                       | 27          |
| <u>Continental Bank &amp; Trust Co. v. Bybee</u> , 6 U.2d 98, 306 P.2d 773 (1955) . . . . .                                | 35          |
| <u>Denny v. Washington National Insurance Company</u> , 165 N.W.2d 600 (Mich. 1966) . . . . .                              | 29          |
| <u>Drummond v. Union Pacific R. Co.</u> , 111 Utah 289, 177 P.2d 903 (1947) . . . . .                                      | 41          |
| <u>Ephraim Theatre Co. v. Hawk</u> , 7 U.2d 163, 321 P.2d 221 (1958). . . . .  | 35          |
| <u>Ferrington v. Granite State Fire Insurance Company</u> , 120 Utah 109, 232 P.2d 754 (1950) . . . . .                    | 30          |
| <u>France v. Citizens Casualty Company</u> , 79 N.E.2d 28 (Ill. 1948) . . . . .  | 27          |
| <u>H &amp; H Manufacturing Company v. Cimarron Insurance Company</u> , 302 S.W.2d 39 (Mo. 1957) . . . . .                  | 27          |
| <u>Houston Fire &amp; Casualty Company v. Jones</u> , 315 F.2d 116 (10th Cir. 1963). . . . .                               | 28          |
| <u>Imperial Casualty &amp; Indemnity Company v. Carolina Gas Insurance Company</u> , 402 F.2d 41 (8th Cir. 1968) . . . . . | 28          |
| <u>Linnastruth v. Mutual Benefit Health and Accident Association</u> , 137 P.2d 833 (Calif. 1943) . . . . .                | 15          |
| <u>Long v. United Benefit Life Insurance, Inc.</u> , 29 U.2d 204, 507 P.2d 375 (1973) . . . . .                            | 12, 32      |

|   | <u>Page</u> |
|---|-------------|
| <u>Milford State Bank v. West Field Canal &amp; Irrigation Company</u> , 108 Utah 528, 162 P.2d 101 (1945). . | 34          |
| <u>Moore v. Prudential Insurance Company</u> , 26 U.2d 430, 491 P.2d 227 (1971) . . . . .                     | 18          |
| <u>North Salt Lake v. St. Joseph Water and Irrigation Co.</u> , 118 Utah 600, 223 P.2d 577 (1950). . . .      | 41          |
| <u>Oregon Short Line R. Co. v. Idaho Stockyards Co.</u> , 12 U.2d 205, 364 P.2d 826 (1961) . . . . .          | 34          |
| <u>Pfiester v. Missouri State Life Insurance Company</u> , 116 P.2d 245 (Kan. 1911) . . . . .                 | 29          |
| <u>Plain City Irrigation Company v. Hooper Irrigation Company</u> , 11 U.2d 188, 356 P.2d 625 (1960) . .      | 18          |
| <u>Prassel Enterprises, Inc. v. All State Insurance Company</u> , 405 F.2d 616 (5th Cir. 1968). . . . .       | 28          |
| <u>Prince v. Western Empire Life Insurance Company</u> , 19 U.2d 174, 428 P.2d 163 (1967). . . . .            | 11, 16, 37  |
| <u>Ransom v. Penn Mutual Life Insurance Company</u> , 274 P.2d 633 (Cal. 1954) . . . . .                      | 37          |
| <u>Roscoe v. Banker's Life Insurance Company</u> , 526 P.2d 1080 (Ariz. 1974) . . . . .                       | 15          |
| <u>State v. Larkin</u> , 27 U.2d 295, 495 P.2d 817 (1972).  | 41          |
| <u>Tygesen v. Magna Water Co.</u> , 13 U.2d 397, 375 P.2d 456 (1962). . . . .                                 | 41          |
| <u>Warner v. Continental Gas Company</u> , 534 P.2d 695 (Okla. 1975) . . . . .                                | 29          |
| <br><u>STATUTES</u>   |             |
| <u>Utah Code Annotated §31-17-2</u> (1953). . . . .   | 25          |
| <u>Utah Code Annotated §31-17-1</u> (1953). . . . .   | 26          |

| <u>TREATISE</u>                                     | <u>Page</u> |
|---|-------------|
| Couch, <u>Insurance</u> 2d §§25:92, 25:94 . . . . . | 25, 26      |
| 43 <u>American Jurisprudence</u> 2d §149. . . . .   | 27          |

IN THE SUPREME COURT OF THE  
STATE OF UTAH

---ooo0ooo---

|                             |   |                |
|-----------------------------|---|----------------|
| MAVIS WILLIAMS,             | : |                |
|                             | : |                |
| Plaintiff and               | : |                |
| Appellant,                  | : |                |
|                             | : | Case No. 15934 |
| -vs-                        | : |                |
|                             | : |                |
| FIRST COLONY LIFE INSURANCE | : |                |
| COMPANY,                    | : |                |
|                             | : |                |
| Defendant and               | : |                |
| Respondent.                 | : |                |

---ooo0ooo---

BRIEF OF RESPONDENT

---ooo0ooo---

NATURE OF THE CASE

This is an action filed by plaintiff-appellant to recover Fifteen Thousand Dollars (\$15,000.00) which represents the face amount of an insurance policy which plaintiff-appellant alleges was issued or should have been issued by defendant-respondent.

DISPOSITION IN THE LOWER COURT

The Lower Court granted defendant-respondent's Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Plaintiff-appellant seeks reversal of the Summary Judgment entered by the Lower Court.



STATEMENT OF FACTS

In stating the relevant facts, references to deposition transcripts will be made by stating the surname of the witness and the page number of the deposition transcript. References to exhibits will be made by stating the surname of the witness whose deposition contains the exhibit and the exhibit number.

The principle figures in this action are plaintiff-appellant, Mavis Williams and a former defendant in this action, Allen Meikle.

Mavis Williams is the widow of Dean Williams who died on April 19, 1976. Dean Williams is the individual who submitted an application for life insurance coverage to Allen Meikle on April 13, 1976.

Allen Meikle is a part-time insurance salesman who was requested by Mavis Williams to seek life insurance coverage for Dean Williams. Allen Meikle and Mrs. Williams were co-employees at Hill Air Force Base and the two had been friends for approximately eight years before the transactions herein described took place (Williams, p. 6). Mr. Meikle is an agent for Occidental Life Insurance Company (Meikle, p. 6) and on occasion acts as a broker in locating coverage in other companies that he does not normally represent ( Meikle p. 4).

Prior to the events described herein, Allen Meikle had never sold, or attempted to sell a policy for First Colony (Meikle, p. 50-51). In fact, there had been no prior contract whatsoever between Meikle and First Colony (Meikle, p. 49-51).

Other persons involved in the transactions herein described are Kenneth Bischoff and Lowell Smith. Messrs. Bischoff and Smith are partners engaged full time in the insurance business (Bischoff, pp. 6-7, 52). The partnership is the agent for Northwestern Mutual Life Insurance Company (Bischoff, p. 4). However, the partnership also acts as a broker in locating coverage for applicants in other companies that the partnership does not normally represent (Bischoff, p. 5). As in the case with Allen Meikle, neither Bischoff, Smith nor their agency had any association with First Colony prior to the incident described herein (Bischoff, p. 5).

First Colony Life Insurance Company is a life underwriter. It is represented in the State of Utah by its agent, United Underwriters Company.

A. Circumstances Leading up to Application for Insurance.

Mavis Williams and Allen Meikle were co-employees at Hill Air Force Base and had been acquainted for many years prior to the incidents and transactions described herein (Williams, p. 6). By reason of this association, Mrs. Williams was aware that Mr. Meikle was a part-time life insurance salesman and also acted as an insurance broker (Williams, p. 13).

In 1969, Mavis Williams requested Allen Meikle to investigate the possibility of procuring life insurance coverage for her husband, Dean Williams (Williams, pp. 13-14). Meikle responded that he would "check around" with several companies to find the coverage (Williams, p. 14). Mr. Meikle was successful in obtaining coverage with Occidental Life Insurance Company, the underwriter that he represented (Williams, p. 14).

After the policy was issued, Mrs. Williams complained to Mr. Meikle that the provisions of the Occidental policy were unsatisfactory and she asked if he would make some effort to locate other coverage (Williams, pp. 19-21). After some investigation, Mr. Meikle informed Mrs. Williams that he had located a more satisfactory policy and advised her to cancel the Occidental policy (Williams, pp. 19-23). In mid-1974 pursuant to Meikle's advice, Mrs. Williams cancelled the Occidental policy and gave Mr. Meikle a check for the first premium on the new policy (Williams, pp. 21, 24). After delivery of the premium check Mrs. Williams heard nothing for approximately one year (Williams, p. 23). After a one year period, Mr. Meikle returned Mrs. Williams' check and informed her that no policy had been obtained (Williams pp. 23-25). Mrs. Williams did not recall the name of the company involved (Williams p. 28).

When Mr. Meikle returned the premium check and advised

Mrs. Williams that no insurance had been obtained, she requested that he continue to look for a satisfactory policy (Williams, p. 28).

Mr. Williams had a problem with high blood pressure a condition noted by the examining physician at the time of the application for the Occidental policy (Meikle, Ex. 1). By reason of this condition the prior Occidental policy had been subject to a rated premium (Meikle, p. 11). Thus, Meikle knew that finding coverage would be difficult (Meikle, p. 9-10). Therefore, Meikle sought the assistance of Kenneth Bischoff in locating a company willing to accept the risk (Meikle, p. 9). Meikle delivered to Bischoff the medical portion of the Occidental insurance application (attached as Ex. 1 to the Meikle deposition) which noted a history of high blood pressure (Meikle, pp. 16-17; Bischoff pp. 12, 18).

Kenneth Bischoff contacted United Underwriters and requested its assistance in locating coverage (Bischoff p. 12). A short time thereafter, United Underwriters contacted Mr. Bischoff and informed him that the information had been forwarded to First Colony Life Insurance Company (Bischoff, pp. 12-13). Thereafter, First Colony responded by forwarding to Bischoff a letter dated February 18, 1976 (attached as Ex. 1 to the Bischoff deposition) wherein the company offered to consider the risk upon specific conditions, i.e., that an application be prepared and submitted, that a medical examination

with three blood pressure readings, and that the company receive a urine specimen and x-rays. Mr. Bischoff then held a meeting with Meikle to review the conditions of coverage (Bischoff pp. 16-17).

Upon receipt of the letter dated February 18, 1976 and the blank application forms, Mr. Meikle visited the home of Dean and Mavis Williams on April 13, 1976. After some discussion they decided to reduce the amount of coverage from \$25,000.00 to \$15,000.00 (Williams pp. 36-37). The application was completed and signed by Dean and Mavis Williams (Bischoff, Ex. 3).

The initial premium for the contemplated coverage was computed at \$65.88. Mavis Williams drew a check for that amount and delivered the check to Mr. Meikle. In return, Mr. Meikle delivered to Mrs. Williams a "Conditional Receipt" for the money (copy of Conditional Receipt attached as Ex. 2 to the Bischoff deposition). The Conditional Receipt clearly sets forth the conditions to coverage:

"This receipt is to be issued only if payment is made at the time the application is signed; otherwise it must not be detached.

Unless the condition specified in paragraph "FIRST" are fulfilled exactly, no insurance will become effective prior to policy delivery. Neither the agent nor the medical examiner is authorized to alter or waive these conditions.

Received from Mavis Williams this 13th

day of April, 1976, the sum of \$65.88 in connection with this application for life insurance to First Colony Life Insurance Company, which application bears the same date and number as this receipt.

FIRST. CONDITIONS PRECEDENT UNDER WHICH INSURANCE MAY BECOME EFFECTIVE PRIOR TO POLICY DELIVERY.

If the following conditions shall have been fulfilled exactly:

(a) All medical examinations, tests, x-rays, and electrocardiograms required by published company rules must be completed;

. . .

(c) On the date that the insurance becomes effective in accordance with the provisions of this Receipt, each person to be covered must be insurable at the class of risk applied for under the company's rules for the plan and the amount of insurance applied for without modification and at the rate of premium paid.

then insurance as provided by the terms and conditions of the policy applied for and for an amount not exceeding that specified in paragraph "SECOND" will become effective on the latest of the following dates: (a) the date of Part 1 of this application; (b) the date of Part 1 of the application for any companion policy, if applicable; (c) the date of completion of all medical examinations, tests, x-rays, and electrocardiograms required by published company rules; and (d) the date of issue, if any, requested in the application. . . (emphasis added.)

Mrs. Williams acknowledged delivery of the "Conditional Receipt" (Williams, p. 50). Moreover, the "Applicant's Declaration" written immediately above the signature of Dean and Mavis Williams on the application specifically noted that the coverage would begin at the time designated in the

"Conditional Receipt." (Bischoff, Ex. 3).

During the course of the meeting on April 13, 1976, Meikle informed Mr. and Mrs. Williams of the necessity of the physical examination (Williams, p. 43). Mrs. Williams understood that the medical examination was a requirement of the policy (Williams, p. 43).

Q. Okay. What was your understanding of the purpose of the check?

A. That was the first premium. \$65.88 was the amount of the check.

Q. Okay. Is there anything else that you can remember that was talked about regarding the effectiveness of this policy or anything that you or your husband would be required to do regarding this policy, other than make your payments to keep it in effect as you understood?

A. My husband to meet with the doctor for a physical, which we were assured was a routine matter.

Q. A routine matter. Now what do you mean by that?

A. Mr. Meikle said they had all his medical records so that this was just a routine process.

Q. Mr. Meikle said it was routine. What is your understanding of that word 'routine' in this sense, that it was insignificant?

A. No. It was just filling a requirement.  
(Emphasis added, Williams, pp. 42-43)

On the following day, an appointment was made with Dr. Alvord to conduct the medical examination (Williams, pp. 43-44). The examination date was set for April 20, 1976.

Prior to leaving the Williams home on April 13, 1976 Mrs. Williams claims that Mr. Meikle stated: "Well, Dean, you can live dangerously now because you are completely covered." (Williams' Affidavit, Paragraph 5; Williams, p. 40).

It is important to note that at the time of this alleged statement on April 13, 1976, Allen Meikle had no authority whatsoever from First Colony Life Insurance Company (Meikle, p. 50). In fact, on that date, First Colony Life Insurance Company was totally unaware that Allen Meikle was in any manner involved in the transaction. The "Single Case Agreement" which defined the relationship between the selling agent and the issuing company had not even been signed on April 13, 1976 (Meikle, Exhibit 3). When the "Single Case Agreement" was finally executed on April 22, 1976, Allen Meikle was not a party to the agreement (Meikle, Exhibit 3). Said agreement was between Lowell Smith and First Colony Life Insurance Company.

The first notice to First Colony Life Insurance Company that Meikle was involved in the transaction was when the insurance application was received by the company sometime after April 13, 1976 (Bischoff, Ex. 3). Even then, the nature and extent of Meikle's involvement was not disclosed. The application noted only that Meikle was to receive a share of the sales commission (Bischoff, Ex. 3).



Following the meeting on April 13, 1976, Meikle forwarded the completed application and premium check to Kenneth Bischoff who in turn forwarded the same to United Underwriters. The matter then awaited the outcome of the physical examination from Dr. Alvord.

B. Facts Occurring Subsequent to Application.

On the date prior to the scheduled medical examination, Dean Williams died of cardio-vascular ailment. Rather than notify First Colony of the death, it was decided to conceal the fact of Mr. Williams death from First Colony in the hope that a policy would be inadvertantly issued by the company (Meikle, pp. 39-40; Bischoff, p. 36). Thus, the matter remained static inasmuch as First Colony was awaiting notice that the conditions to its offer had been fulfilled. No policy was ever issued by First Colony Life nor was there any communication from First Colony inconsistent with the conditions stated in the Receipt which was delivered to Mrs. Williams on April 13, 1976.

When First Colony was finally informed of the death of Dean Williams, the company tendered its check for the amount of the initial premium by mailing the same to Mrs. Williams. Mrs. Williams refused tender of the premium.

ARGUMENT

POINT I

THE PAYMENT OF THE PREMIUM DID NOT CREATE COVERAGE

The circumstances of life insurance applications create a dilemma for the applicant and the insurance company. The company has an interest in obtaining its premium in advance of coverage but is usually unable to arrange for an immediate medical examination simultaneous with the receipt of the premium. The applicant is interested in immediate coverage and does not wish to pay the premium if coverage may be cancelled because of an unfavorable medical examination. (The dilemma and considerations of the company and applicant are discussed in Prince v. Western Empire Life Insurance Company, 19 U.2d 174 428 P.2d 163 (1967)).

The dilemma is usually resolved in favor of the insurance company inasmuch as it prepares all of the forms involved in the application and receipt of the premium. The usual arrangement is that the company receives the premium and delivers a receipt noting the immediate effective coverage subject to a condition subsequent. The result is a one-sided obligation that permits the insurance company to escape its obligations on the basis of circumstances occurring between the time of the effective date, i.e., (the date the premium is paid) and the later physical examination.

First Colony Life Insurance Company has not adopted a one-sided commitment. Under the terms of First Colony's Conditional Receipt, there is no possibility that the insurance company can avoid coverage by the benefit of hindsight. Unlike the usual situation where the effective date of the coverage begins with the receipt of the premium subject to the company's right to cancel, the First Colony receipt delays the effective date of the insurance until the medical examination is completed. In this manner there is no possibility that the company can earn a premium without undertaking the complete and inescapable obligation of the coverage.

The case of Long v. United Benefit Life Insurance Inc., 29 U.2d 204, 507 P.2d 375 (1973) involves an insurance policy which permits the company to avoid coverage by the benefit of hindsight. In that case the insurance company accepted the applicant's premium and delivered a receipt stating that coverage, if approved, would begin on the date of the application. The applicant died subsequent to the application date, but before the date that the company approved the coverage. Upon learning of the applicant's death, the company disapproved the coverage for "confidential reasons." It was apparent from the facts of the case that had the applicant not died, the coverage would have been approved.

It was on this basis, i.e., the illusory coverage between the application date and the approval date that the court imposed liability on the insurance company.

The holding of the Long case is inapplicable to the case at bar. The First Colony policy has no interium period whereby the company can disapprove coverage if the applicant dies before the approval date and collect a premium for such an illusory coverage if the applicant lives past the approval date.

There are several other aspects of the Long case which make it inapplicable to the issues before the Court. In the Long case, the receipt given to the applicant did not require a medical examination. In the instant case, the receipt clearly made coverage conditional on a medical examination. In the Long case, the salesman was unquestionably an agent of the insurance company and gave the applicant an oral binder of coverage. In the instant case, there is no basis for an agency relationship between Mr. Meikle and the insurance company. On the contrary, the facts establish that Mr. Meikle was acting as the agent of Mr. and Mrs. Williams (see Point III, infra). The Receipt in the Long case did not specifically state that it was "conditional." Thus, when coupled with payment of the premium, an ambiguity was created as to whether coverage existed. However, the insurance company in the instant case, clearly designated the receipt as conditional. The insurance

company in the Long case was not prejudice by the decision imposing coverage inasmuch as there was nothing to indicate that it would have disapproved the risk. In the instant case, there was evidence prior to the medical examination which made coverage questionable and the absence of a medical examination clearly demonstrates that the insurance company was not yet advised of the risk.

Since First Colony has no opportunity to retroactively avoid the obligations, there is no reason to impose upon the parties an agreement different than that stated on the Conditional Receipt. In this case, we are not confronted with the situation where the policy was cancelled by the insurance company after it had the benefit of hindsight. Rather, the situation is one where the insurance company and the insured clearly provided that the coverage never became effective. All parties to the contract agreed that the coverage would be effective on the "the date of completion of all medical examinations, tests, x-rays and electrograms. . . ." (This was the "latest" date of the four alternative dates mentioned in the Receipt). This agreement gave neither party any means to inequitably escape its obligations and thus the agreement should be upheld according to its terms.

In those situations where the Conditional Receipt or other documents dealing with the effective date of the coverage

do not permit the insurance company to escape liability or collect premiums for an illusory coverage, the courts uphold the company's denial of coverage. In Linnastruth v. Mutual Benefit Health and Accident Association, 137 P.2d 833 (Calif. 1943), the plaintiff's deceased husband made application for insurance with the defendant insurance company. He delivered the initial premium to the company subject to the specific agreement that the insurance would not become effective until such time as the insurance company actually issued the policy. After payment of the premium and completion of the application, the applicant was involved in an accident which was within the scope of the coverage. The insurance company denied liability on the basis that the insurance had not yet taken effect.

The appellant court upheld the decision of the trial court that despite payment of premium, and the apparent belief by the applicant that he was covered, there was no liability on the company since such liability would be contrary to the provisions of the insurance application which the applicant had signed.

In Roscoe v. Banker's Life Insurance Company, 526 P.2d 1080 (Ariz. 1974) the plaintiff's deceased husband made application for life insurance to the defendant company and tendered the first annual premium with the signed application. The insurance company's agent issued a receipt for the annual

premium which specifically provided that a medical examination was a condition precedent to coverage. Prior to submitting to the physical examination, the applicant was killed in an airplane crash. The plaintiff in that case commenced an action alleging many of the points alleged by the plaintiff in the instant action, i.e., that the insurance coverage should be effective despite the conditions precedent stated in the Receipt.

The appellant court upheld the summary judgment granted by the trial court, holding that coverage did not exist inasmuch as the conditions precedent to coverage had not been fulfilled. The basis of the court's decision was as follows:

"We hold that where a physical examination and physicians' medical questionnaire is required under the terms and provisions found here, the applicant must arrange for those to be furnished to the company before his application is completed and before coverage can arise. . . . The key factor in this case which distinguishes it from authorities cited by appellant is the failure of [the applicant] to obtain the required medical examination, for without it the essential element of insurability, physical condition, was unknown to the company."

In Prince v. Western Empire Life Insurance Company, 19 U.2d 174, 428 P.2d 163 (1967), the court found no ambiguity or inequity in an applicant pre-paying the premium pursuant to a receipt which postpones coverage until completion of the

required medical examination.

The Court noted that by postponing the effective date of coverage the insurance company had not created a situation where it could escape liability or collect a premium for an illusory coverage. By postponing the effective date, rather than having the coverage subject to a condition subsequent, the Court upheld the fairness of the transaction. In the course of the opinion the Court held:

"We think that the binding receipt became effective on completion of the medical examination by the company doctor on September 22, 1960, unless at that time the applicant was not an insurable risk."

In Aho v. United Transportation Union, 571 P.2d 1329 (Utah, 1977), the applicant and the insurance company negotiated for the issuance of a life insurance policy and agreed that the same would become effective when the policy was actually issued to the applicant. Thus, like the instant case, there was no provision for immediate coverage subject to a condition subsequent, but rather the parties designated a future date when the policy would become effective.

Although the applicant submitted to a medical examination, there was further medical information requested that was not supplied by the applicant. Prior to supplying the additional medical information, the insured died.

The Court held that since the insured died prior to the



effective date of the policy, there was no coverage.

The meaning of an insurance contract is determined by the same rules of construction as any other contract. Moore v. Prudential Insurance Company, 26 U.2d 430, 491 P.2d 227 (1971). The primary rule of construction is that the words used in a contract will be given their ordinary and usual meaning. Plain City Irrigation Company v. Hooper Irrigation Company, 11 U.2d 188, 356 P.2d 625 (1960). The ordinary and usual meaning of the words in the Conditional Receipt establish that the coverage had not commenced at the time of the death of Dean Williams.

## POINT II

### THERE IS NO AMBIGUITY IN THE CONDITIONAL RECEIPT AND APPLICATION

In Section I of appellant's Brief, counsel contends that the Conditional Receipt which was delivered to Mrs. Williams in exchange for the premium check is ambiguous. However, after stating the conclusion of ambiguity, counsel fails to identify the claimed ambiguity and further fails to designate any language that could reasonably lead an applicant to believe that coverage would be effective prior to the physical examination.

As a basis for the claimed ambiguity, appellant has paraphrased the language in the Conditional Receipt and

suggests that the paraphrased version is clearer than that in the Receipt. Even if counsel's language were clearer, such a comparison provides no support that the language in the Receipt is ambiguous. If there is any ambiguity, counsel should be able to state the ambiguity by quoting the language within the document itself and then noting the misinterpretation that can arise from the language.

Counsel argues that reference to the "company rules" in some unexplained manner leads one to believe that coverage was immediately effective. Such an argument is merely an attempt to search for some basis to insert ambiguity into the clear statements of the Receipt.

Despite reference to "company rules", the fact remains that the Conditional Receipt clearly notifies the applicant that coverage does not begin until a medical examination is conducted. Even if the Conditional Receipt were in some manner ambiguous, the requirements of coverage were clearly transmitted to Mrs. Williams in other documents. For example, the insurance company forwarded an "offer" which specifically noted the necessity of a physical examination. The offer specifically and unequivocally noted the conditions to the offer:

Requirements; application, medical  
examination with three blood pressure  
readings, home office specimen, x-ray.  
(Bischoff, Exhibit D-1).

Kenneth Bischoff testified that upon receipt of this offer he contacted Meikle and "reviewed it and outlined what he [Meikle] would have to get from Mrs. Williams" (Bischoff, p. 16). Meikle acknowledged that Bischoff showed him a copy of the offer which specifically stated the requirements to coverage (Meikle, p. 27). Mr. Meikle then went to the Williams residence and showed them the offer (Meikle, p. 27-28). Meikle then discussed arrangements for the medical examination (Meikle, p. 28; Williams, p. 43). Mrs. Williams obviously grasped the meaning of the document inasmuch that she admitted that she knew a physical examination was a "requirement" of the coverage (Williams p. 43).

The requirement of a medical examination was not a surprise for Mrs. Williams. She knew that her husband's condition increased the risk because of the rated premium imposed by Occidental in connection with the prior policy (Meikle, p. 16). Mrs. Williams remembered that a physical examination was a "requirement" of the prior Occidental policy (Williams, p. 45).

Aside from Mrs. Williams' unequivocal admission that she knew that a medical examination was a requirement, and her prior experience with medical examination requirements, her actions after the death of her husband compel the conclusion that she knew there was no coverage without the

examination. Subsequent to the death of the insured, Mrs. Williams concealed her husband's death from the company in the hope that a policy would be erroneously issued (Bischoff, p. 36; Meikle, p. 66). If Mrs. Williams really believed that the policy was in force, she would have immediately submitted a claim.

Aside from the condition clearly noted in the Conditional Receipt, the application which Mrs. Williams signed (Bischoff, Exhibit 3) gave additional notice to Mrs. Williams that coverage was not immediate. On page two of the application, just above the place where Mr. and Mrs. Williams affixed their signatures there was a paragraph heading bearing the title "Applicants Declaration." It is therein noted that unless otherwise stated in the Conditional Receipt, the coverage will not be effective unless "the policy is delivered to the owner during the life time. . ." (Bischoff, Exhibit P-3).

Thus, the fact that coverage was not then effective was transmitted to Mrs. Williams in four different forms: (a) the wording of the Conditional Receipt (Bischoff, Exhibit P-2); (b) the wording of the "Applicants Declaration" in the insurance application (Bischoff, Exhibit P-3); (c) the offer of insurance dated February 18, 1976 (Bischoff, Exhibit D-1); and, (d) the oral statements made by Allen Meikle to Mr. and Mrs. Williams (Meikle, pp. 30-31; Williams, 43). Of greatest

importance, is the fact that one or more of these sources were effective since Mrs. Williams realized that a physical examination was one of the requirements of the coverage (Williams, p. 43).

Only one of these sources is claimed to be ambiguous, and appellant has been unable to state the nature of the ambiguity or the false impression that arises from a reading of the language.

### POINT III

#### ALLEN MEIKLE WAS THE AGENT OF MAVIS WILLIAMS

Many of appellant's arguments are based upon the proposition that Allen Meikle was the agent of First Colony Life Insurance Company. This alleged agency relationship is merely assumed by appellant. No where does appellant offer any facts or authorities in support of this assumption.

Before dealing with the particular points raised by appellant which are based upon this assumption, respondent will deal with the agency question separately rather than repeating the argument each time that agency is assumed by appellant.

A brief review of the circumstances of the case demonstrates that at all times during the course of the transaction in question, Allen Meikle was the agent of Mavis Williams and not

the agent of First Colony.

As previously noted, Mrs. Williams and Mr. Meikle were co-employees at Hill Air Force Base and the two had been friends for approximately eight years before the transactions herein described (Williams, p. 6). Mrs. Williams was aware that Mr. Meikle was an insurance agent and requested that he attempt to locate coverage for her husband (Williams, pp. 13-14).

At the time of Mrs. Williams' request, Allen Meikle was an agent for Occidental Insurance Company (Meikle, p. 6). He had never represented First Colony Life Insurance (Meikle, p. 50).

Meikle obtained coverage with his principal company, Occidental Life Insurance Company which was later cancelled at the request of Mrs. Williams (Williams pp. 19-21).

Subsequent to the cancellation, Meikle began looking for replacement coverage. He realized that coverage may be difficult and sought the assistance of Kenneth Bischoff who had previously assisted him in locating high risk coverages (Meikle, pp. 15-16). Mr. Bischoff, and his partner, Lowell Smith, were agents of Northwestern Mutual Life Insurance and neither had theretofore been involved with First Colony Life Insurance Company (Bischoff, pp.6-7, 52).

Kenneth Bischoff contacted United Underwriters, the local agent of First Colony Life. United Underwriters sent out inquiries to various companies. On February 18, 1976, United Underwriters received the offer of insurance from First Colony Life (Bischoff, Exhibit D-1).

Accompanying the application was a "Single Case Agreement" (Meikle, Exhibit D-3). This is a contract used when insurance is sold through a person who is not a party to a regular agency agreement and is designed to define the rights iwth respect to a single insurance transaction.

The Single Case Agreement was signed by Lowell Smith (Kenneth Bischoff's partner) on April 22, 1976 (Meikle, Exhibit D-3). This was nine days after the application was signed by Mrs. Williams and three days after the death of Dean Williams. Allen Meikle never did sign the Single Case Agreement or any other agency agreement with First Colony or any of its agents (Meikle, p. 49; Meikle, Exhibit D-3). The only document upon which Mr. Meikle's name appears is the last page of the application where the percentage division of commissions is noted (Bischoff, Exhibit 3). Inasmuch as the application was not signed by anyone until April 22, 1976, it is apparent that on that date First Colony did not know Allen Meikle nor did it know that he was involved in the transaction.

It is apparent that in this transaction, Mr. Meikle was acting as an "insurance broker." In Couch, Insurance 2d §§25:92, 25:94, the author states:

"An 'insurance broker' is one who acts as a middleman between the insured and the insurer, and who solicits insurance from the public under no employment from any special company, and who, upon securing an order places it with a company selected by the insured, or, in the absence of such a selection, with the company selected by himself; whereas an 'insurance agent' is one who represents an insurer under an employment by it. Whether a person acts as a broker or an agent is not determined by what he is called but is to be determined from what he does. In other words, his acts determine whether he is an agent or a broker. . . . The fact that one is an insurance agent for some companies, and, as such, authorized to issue policies, etc., does not prevent him from acting merely as a broker in procuring other insurance. This result is not effected by the fact that the agent retained a commission for placing the insurance." (Emphasis added)

Mr. Meikle's status as a "broker" is further confirmed by the description in Utah Code Annotated §31-17-2 (1953), as amended:

"'Broker' means any person who, on behalf of the insured, for compensation as an independent contractor, or commission, or fee, and not being an agent of the insurer, solicits, negotiates, or procures insurance or reinsurance or the renewal or continuance thereof, or in any manner aids therein, for insureds or for prospective insureds other than himself. . . ." (Emphasis added).

Compare the above definition with that of "agent", Utah Code



Annotated §13-17-1 (1953).

Inasmuch as Meikle was acting as a broker rather than as an agent for his company, the following authorities establish that he became the agent of Mr. and Mrs. Williams and did not act as an agent of First Colony Life Insurance Company. The status of brokers is clearly defined in the leading treatise on the subject, Couch, Insurance 2d, §25.94:

"An insurance broker, like other brokers, is primarily the agent of the first person who employs him, and is therefore ordinarily the agent of the insured as to matters connected with the procurement of insurance, including representations and warranties. Absent some special condition or circumstances in the particular case, a broker is not the agent of the insurer and may not be converted into an agent for the insurer without some action on the part of the insurer, or existence of some facts by which his authority to represent it may be fairly inferred. The circumstances that, at the time the broker solicited business, he did not know which insurance company would issue the policy, and that the company which subsequently did issue the policy had no prior dealings with the broker, indeed, had not heard of him, militate strongly against a conclusion that the broker was acting as the agent for such company.

If insurance is written in companies which the agent does not represent, he is generally regarded as acting as a broker and as the agent of the insured in procuring insurance, whereas if it is written in companies which he represents, he is usually held to be the agent of the company and not of the insured."

The proposition that a broker acts as an agent of the

insured, is further noted in 43 American Jurisprudence 2d §149:

"An insurance broker is primarily the agent of the first person who employs him, and ordinarily, where employed to procure insurance, he becomes the agent of the person for whom the insurance is procured, at least insofar as all matters connected with the procurement itself are concerned, with the consequence that his acts and representations within the scope of his authority are binding upon the insured. It has been said that an insurance broker is ordinarily employed by the person seeking insurance and when so employed, is to be distinguished from the ordinary agent who is employed by insurance companies to solicit and write insurance by and in the company. Upon similar principles, an ordinary broker who is not the agent of any insurance company, but procures insurance of a company through its regular agents, is the agent of the insured. . ." (Emphasis added).

This Court has also adhered to the rule that negotiations between an insurance salesman and a person seeking insurance coverage creates an agency relationship between the two if the salesman is not bound to place the insurance in a company which he normally represents. Barnett v. State Automobile and Casualty Underwriters, 26 U.2d 169, 487 P.2d 311 (1971). Accord, H & H Manufacturing Company v. Cimarron Insurance Company, 302 S.W.2d 39 (Mo. 1957); France v. Citizens Casualty Company, 79 N.E.2d 28 (Ill. 1948).

In Section IV of her Brief, the appellant cites several cases which she claims supports the contention that Allen

Meikle was acting as the agent of First Colony Life Insurance Company. However, none of the cited cases support the proposition.

The case of Imperial Casualty & Indemnity Company v. Carolina Gas Insurance Company, 402 F.2d 41 (8th Cir. 1968), has no bearing on the issues involved here inasmuch as the agents in that case had written insurance for the company on a recurring basis. The agency question was therefore resolved in summary fashion. There were no facts which gave rise to a serious dispute as to agency and the affiliation between the insurance companies and the agents was much greater than in the instant case.

In Prassel Enterprises, Inc. v. All State Insurance Company, 405 F.2d 616 (5th Cir. 1968), the question of agency was discussed, but the factors considered in the agency question do not exist in the instant case. The case involved the responsibility of a soliciting agent for failing to notify the insurance company of a pending suit after having received notice of the suit from the insured. The affiliation between the agent and the issuing company was much greater than in the instant case.

The case of Houston Fire & Casualty Company v. Jones, 315 F.2d 116 (10th Cir. 1963), involved a situation where the alleged agent had been instructed in solicitation techniques

and the use of binders by the issuing company. By reason of these instructions and prior association between the agent and the company, the Court held that the agent had implied authority to bind the company. Inasmuch as Mr. Meikle had no prior association whatsoever with the respondent in this case prior to the application, the case has no bearing on the issues before this Court.

In Pfiester v. Missouri State Life Insurance Company, 116 P.2d 245 (Kan. 1911), the issue was the extent of limitation on an agent's authority rather than the existence of agency. The agent had a continuing affiliation with the issuing company, a fact that is absent in the instant case.

The case of Denny v. Washington National Insurance Company, 165 N.W.2d 600 (Mich. 1966), also involved a situation wherein agent had a continuing affiliation with the company, a situation not present in the instant case.

Appellant cites Warner v. Continental Gas Company, 534 P.2d 695 (Okla. 1975) and Atlas Life Insurance Company v. Eastman, 320 P.2d 397 (Okla. 1957) in support of the proposition that a soliciting agent binds his principal with respect to all acts within the apparent scope of his authority. However, in both cases, the existence of agency was uncontested and there was ample evidence establishing a continuous affiliation between the agents and the insurance companies.

The case of Ferrington v. Granite State Fire Insurance Company, 120 Utah 109, 232 P.2d 754 (1950), involved a situation where a plaintiff applied for and was issued a fire insurance policy with the defendant companies. Plaintiff purchased this policy through Bowman. Certain facts relevant to the risk of insuring the building were transmitted to Bowman, but Bowman did not transmit this information to the insurance companies involved. Bowman received the application and transmitted the same to the general agent. When the policy was issued, Bowman affixed his name to the policy as the agent and thereafter serviced the policy by receiving the monthly premiums and transmitting the funds to the general agent.

The Court held that Bowman had implied authority of an agent since he acted as though he were the general agent. On this basis, this Court imputed the knowledge of Bowman to the insurance companies.

The facts of the Ferrington case distinguish it from the case now before the Court:

First, the Ferrington case involved mere imputing knowledge of an agent to a principle whereas the instant case involves an agent binding an insurance company to terms inconsistent with the policy provisions. The insurance companies in the

Ferrington case clothed Bowman with such authority by permitting him to function in the manner outlined in the Court's opinion. However, in the instant case, the insurance company did nothing to permit the proposed insured to reasonably assume that Meikle had authority to bind the company to the policy. On the contrary, the company took reasonable measures to assure the proposed insured that Meikle has no such authority. The Conditional Receipt (Bischoff, Exhibit 2) which was delivered to Mrs. Williams at the time of the alleged oral binder (Williams, p. 50; Meikle, p. 33) specifically stated in the second paragraph:

"Neither the agent nor the medical examiner is authorized to alter or waive these conditions."

Thus, if Mrs. Williams erroneously regarded Meikle as an agent of the company, she was notified that he had no authority to bind the company to coverage. For this reason, the opinion in the Ferrington case has no bearing on the issues now before the court.

Second, the insured in the Ferrington case had every reason to believe that Bowman was a duly authorized agent for the company. In the instant case, Mrs. Williams knew that Meikle was an insurance broker (Williams, p. 13) and that the contemplated coverage would be obtained after Meikle "checked

around" with several companies (Williams, pp. 14, 16, 33).

Third, the insurance company in the Ferrington case knew that Bowman was involved in the transaction and accepted the benefits of his efforts. One of the grounds for implying agency, was that the company accepted the benefits and were attempting to deny the corresponding liabilities. In the instant case, First Colony Life Insurance Company had no knowledge that Meikle was even involved in the transaction and thus did not acquiesce in his involvement. Moreover, inasmuch as a policy was never issued, the company received no benefits from the acts of Mr. Meikle.

There are simply no acts or circumstances in the instant case which could possibly be construed as giving Meikle authority to bind First Colony Life Insurance Company to coverage inconsistent with the terms of the proposed coverage. On the contrary, the documents delivered to Mrs. Williams specifically notified her that Mr. Meikle was not authorized to make such a representation.

Appellant cites Long v. United Benefit Life Insurance Company, 29 U.2d 204, 507 P.2d 375 (1973) as support for the proposition that Meikle was the agent of First Colony so that the company was committed to Meikle's oral binder of coverage.

However, a brief reading of the Long case establishes that the agents involved were clearly general agents of the issuing company and the agency question was, therefore, not contested.

There is no basis whatsoever in the instant case upon which the trier of fact could determine that Mr. Meikle was acting as the agent of First Colony Life Insurance Company. On the date that the application was signed, he had not previously sold insurance for First Colony Life, he had never communicated with First Colony Life, he had not written or oral agency agreement with First Colony Life, he has not to this date signed any contract with First Colony Life with respect to this transaction and his involvement in the transaction were totally unknown to First Colony Life.

Inasmuch as there is no basis to find Mr. Meikle the agent of First Colony Life, the company cannot be held liable on the basis of his statements of coverage or other activity on his part.

#### POINT IV

ALL PARTIES TO THE TRANSACTION WERE AWARE THAT  
A MEDICAL EXAMINATION WAS A REQUIREMENT OF COVERAGE.

In Point II of appellant's Brief, it is argued that the Court should consider facts outside the Conditional Receipt



in order to determine the intent of the parties at the time the Receipt was issued. However, it should be noted, that consideration of evidence other than the Receipt itself should be made only if the wording of the Receipt is ambiguous. Milford State Bank v. West Field Canal & Irrigation Company, 108 Utah 528, 162 P.2d 101 (1945); Oregon Short Line R. Co. v. Idaho Stockyards Co., 12 U.2d 205, 364 P.2d 826 (1961). As previously noted (see Point II, supra), appellant has failed to note any wording in the Conditional Receipt which would lead a prospective insured to believe that coverage would begin at any time prior to the physical examination. For this reason, the Court should not look beyond the wording of the Receipt to determine the intent of the parties. In the event the Court does look to evidence outside the Conditional Receipt, the facts establish that all parties intended coverage to begin at the time of the physical examination.

Everyone associated with the contract knew that a physical examination was a requirement of the coverage. Allen Meikle testified:

"Q. Did you ever in that conversation use the words 'firm offer'?

A. Not to my recollection, no, Sir.

Q. Did you regard that as a firm offer?

A. I knew it wasn't a firm offer."  
(Meikle, pp. 26-27).

Mr. Bischoff testified:

" . . . then I found out that Mr. Williams had not completed the requirements and at that point, then, my counsel would have been the policy is not in force and I don't think the claim will be paid."  
(Bischoff, p. 36).

As previously noted, Mavis Williams also testified that she knew that a physical examination was a requirement of the policy (Williams, p. 43).

The best evidence of the intent of the parties is the wording of the documents involved. Continental Bank & Trust Co. v. Bybee, 6 U.2d 98, 306 P.2d 773 (1955); Ephraim Theatre Co. v. Hawk, 7 U.2d 163, 321 P.2d 221 (1958). In this regard, the wording of the Conditional Receipt is incapable of any reasonable interpretation other than coverage must await a physical examination. The language of the Receipt is quoted on pages 6-7, supra.

The offer of insurance dated February 18, 1976, clearly set forth the fact that there were certain requirements of coverage. Appellant has not contended that these words are in any manner ambiguous. A review of the "requirements" in the offer establishes the absence of any ambiguity.

The offer of insurance was given by First Colony to

Bischoff (Bischoff, p. 14) who carefully reviewed the requirements with Mr. Meikle (Bischoff, p. 16). Mr. Meikle then exhibited the document to Mr. and Mrs. Williams during their meeting on April 13, 1976 (Meikle, pp. 27-28).

The lengthy explanation which Bischoff gave to Mr. Meikle is significant inasmuch as the knowledge of Mr. Meikle is attributed to Mrs. Williams (see agency argument, Point III).

In addition to the acknowledgement by Mrs. Williams as to the requirements of coverage, her past experience with respect to life insurance coverage for her husband supports her full understanding as to the conditions of coverage. Mrs. Williams had been involved in a prior insurance application with Mr. Meikle and understood that a physical examination was a condition to that coverage (Williams, pp. 45-46). There are no statements or activities attributable to First Colony Life which would lead to a different understanding with respect to the policy in question.

By reason of the medical examination associated with the first insurance policy, Mrs. Williams was aware that there were health problems that were significant for insurance purposes (Williams, pp. 25-32, 35). This problem had caused a long delay in locating coverage (Williams, pp. 25-32, 35). Certainly under these circumstances, no one could reasonably

conclude that a physical examination was a meaningless requirement.

The fact that an appointment was made for a medical examination to be held on April 20, 1976, is inconsistent with Mrs. Williams' claimed understanding that such an examination was unnecessary.

Finally, if Mrs. Williams believed that an insurance policy was in full force and effect on the date Mr. Williams died, it is logical that she would have made a claim under the policy immediately after his death. Instead, she concealed his death from First Colony Life in the hope that a policy would be erroneously issued (Bischoff, p. 36; Meikle, p. 66).

#### POINT V

#### CONDITIONS OF COVERAGE WERE COMMUNICATED TO APPELLANT

In Section III of her Brief, appellant argues that First Colony had a duty to communicate the limitations of coverage to her and that the company failed to discharge this duty.

Appellant cites Prince v. Western Empire Life Insurance Company, 19 U.2d 174, 428 P.2d 163 (1967) and Ransom v. Penn Mutual Life Insurance Company, 274 P.2d 633 (Cal. 1954), as standing for the proposition that an insurance company has a duty to explain limitations of the coverage. However,

neither of the cited cases supported that proposition.

In the Prince case, the Receipt delivered to the applicant provided that coverage would commence on the date of the medical examination. Unlike the instant case, the applicant submitted to the physical examination and the physician approved his application. However, due to some medical history, the company requested further physical examinations. While the further medical examinations were being processed, the applicant died. The Court held that the policy became effective upon completion of the first medical examination as stated in the Conditional Receipt.

Inasmuch as the applicant in the instant case did not complete his medical examination, the Prince case has no bearing on the issues before the Court. Moreover, nowhere in the Prince opinion did the Court impose any duty upon an insurance company to explain the limitations of coverage in any more detail than stated in the Conditional Receipt.

In the Ransom case, the applicant also had submitted to a medical examination and the physician found nothing wrong with his physical condition. The wording of the Receipt in the Ransom case was much more involved than the Receipt

involved in the instant case. Moreover, there was language in the Ransom Receipt from which one could conclude that coverage was applicable at the time of the payment of the premium. Based upon that language, the Court held that the coverage was in force at the time of the medical examination. Inasmuch as the insured in the Ransom case submitted to a physical examination and the Ransom Receipt involved dissimilar wording, the case has no bearing on the issues involved in this case.

None of the cases cited by appellant suggest an obligation on the part of the company to explain limitations of its coverage. Even if such an obligation were imposed, it was satisfied in the instant case. The requirements for coverage were clearly stated in the offer of insurance (Bischoff, Exhibit 1), these conditions were explained by Bischoff to Meikle (Bischoff, p. 16), Meikle clearly understood the conditions (Meikle, pp. 26-27) and Meikle showed the offer to Mrs. Williams (Meikle, pp. 28-29).

#### POINT VI

APPELLANT HAS ABANDONED THE CLAIM THAT THE REPRESENTATIONS OF MR. MEIKLE ARE BINDING ON FIRST COLONY

Under Point IV of her brief, appellant argues that the oral representations made by Mr. Meikle on April 13, 1976,

were binding on First Colony. It should be noted, that this is the first time that appellant has asserted this argument. During the hearing on the Motion for Summary Judgment, counsel for appellant clearly and unequivocally stated that he did not regard the oral representations by Mr. Meikle as being binding on the insurance company. During the course of the hearing counsel stated:

" . . . looking at what would be the ordinary person's interpretation of the contract, Mrs. Williams has Mr. Meikle, an agent, a licensed insurance agent, telling her after her husband died, before any medical examination, that there wouldn't be any problem. Now, I guess, in conclusion what I can state is, No. 1, if the Court views the wording in that Conditional Receipt to be unambiguous, then certainly we should avoid going forward with the trial of this matter, because if it is unambiguous then I don't think the plaintiff really has a claim against the insurance company." Record 181.

. . .

"MR. McDONALD: I would like to point out one item in response, your Honor, actually two. I think as counsel has indicated, if the Court finds that the wording of the Conditional Receipt is clear and unambiguous, as I understand Mr. Ashton, that is the only basis of your claim against the insurance company; is that correct?

MR. ASHTON: Well, the other claim as I have tried to describe is that the insurance company is under an affirmative obligation to instruct its agent, either

personally or by written form of the nature of coverage, and that wasn't done in this case.

MR. McDONALD: Well, I suppose that you would acknowledge that if the Receipt is clear then there is no need for an explanation?

MR. ASHTON: Well, that's probably true." (Record 184-185)

The law is clear that an issue not submitted to the trial court cannot be submitted for the first time on appeal. North Salt Lake v. St. Joseph Water and Irrigation Co., 118 Utah 600, 223 P.2d 577 (1950); Drummond v. Union Pacific R. Co., 111 Utah 289, 177 P.2d 903 (1947); State v. Larkin, 27 U.2d 295, 495 P.2d 817 (1972); Tygesen v. Magna Water Co., 13 U.2d 397, 375 P.2d 456 (1962).

To the extent the Court considers this contention of appellant, it is apparent that the statements by Mr. Meikle are not binding on First Colony inasmuch as Mr. Meikle was acting as the agent of Mrs. Williams. See authorities cited under Point III, supra.

Even if Mr. Meikle had been acting as the agent for First Colony, his representations would still not be binding on the company. At the time of the alleged representations by Mr. Meikle, Mr. and Mrs. Williams had in their possession the original of the Conditional Receipt. That Receipt clearly and unequivocally stated:



"Neither the agent nor the medical examiner is authorized to alter or waive these conditions."

The "conditions" which the agent could not waive was the condition requiring medical examinations.

Utah Code Annotated §31-19-18 (1953), as amended, provides:

"No insurer or its agent, nor any solicitor or broker shall make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon. Any such understanding or agreement not so expressed shall be invalid."

The alleged statement by Mr. Meikle as to the existence of coverage was diametrically opposed to the clearly stated conditions precedent to the coverage, and such statement was therefore invalid.

As noted under Point III, supra, Allen Meikle was the agent of Mavis Williams and not First Colony Life. Thus, any false impression created by his alleged oral binder cannot be asserted against First Colony Life.

#### POINT VII

#### PUBLIC POLICY CONSIDERATIONS HAVE BEEN SATISFIED

Appellant argues under Point V, that public policy requires that an insurance company be bound by the oral representations of its agents.

This is another point raised by appellant for the first time on appeal. Public policy considerations were not pleaded nor argued during the course of the Motion for Summary Judgment. For that reason, such arguments should not be considered in this Court (see authorities cited under Point VI, supra).

First Colony has no reason to contest appellant's public policy argument. No one in this action has alleged that First Colony's agent made any misleading statements to Mrs. Williams.

Respondent's local agent, United Underwriters, made no false or misleading statements to Mrs. Williams. Its only communication occurred by its transmission of the application and offer of insurance to Mr. Bischoff.

Appellant has not alleged that Mr. Bischoff or Mr. Lowell Smith were agents of First Colony Life. Even if they were considered agents, they made no false or misleading statements to Mrs. Williams. Their only communication occurred when Mr. Bischoff transmitted the offer of insurance and application to Mr. Meikle and called his attention to the requirements of the coverage.

The only other individual involved is Mr. Meikle, who is

obviously the agent of Mrs. Williams and not the agent of First Colony Life (see Point III, supra).

#### CONCLUSION

Despite the several legal issues involved in this case, the factual situation is rather simple. Mr. and Mrs. Williams made an application for life insurance to First Colony Insurance Company. At the time of the application, both were aware that he suffered from some physical ailments which were significant for insurance purposes. At the time of their application, they had been denied coverage for these health reasons and had received a rated premium policy which they found unsatisfactory.

In these circumstances Mrs. Williams received an offer of insurance from First Colony which required a medical examination. Such a requirement should not come as a surprise to any reasonable person, especially when experienced in the previous attempts to locate coverage.

A belief that First Colony Life, or any other company, would accept the risk of an insured with a known medical problem without first determining the extent of the risk is simply unreasonable regardless of the wording of any particular document.

Aside from the circumstances of the case, it is undisputed that Mrs. Williams received the Conditional Receipt, the offer of insurance and the application, all of which specifically noted that there were conditions and requirements to coverage.

Under such circumstances, the summary judgment granted by the lower court should be sustained.

Respectfully Submitted this 7<sup>th</sup> day of October, 1978.

JONES, WALDO, HOLBROOK & McDONOUGH

BY 

ROBERT M. McDONALD

Attorneys for Respondent

MAILING CERTIFICATE

I hereby certify that on this \_\_\_\_ day of October, 1978,  
I mailed two copies of the foregoing Brief of Respondent  
upon counsel for appellant, to John P. Ashton of PRINCE,  
YEATES & GELDZAHLER, 455 South Third East, Salt Lake City,  
Utah 84111.

---