

1953

# Norma Lois Cooper v. Foresters Underwriters, Inc. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



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.

Romney and Boyer;

---

## Recommended Citation

Brief of Appellant, *Cooper v. Foresters Underwriters, Inc.*, No. 8105 (Utah Supreme Court, 1953).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2126](https://digitalcommons.law.byu.edu/uofu_sc1/2126)

This Brief of Appellant 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 (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

RECEIVED

FILED  
1953-7-1553

APR 12 1953

LAW LIBRARY  
U. of U.

Supreme Court, Utah

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

NORMA LOIS COOPER,  
*Plaintiff and Respondent,*

vs

FORESTERS UNDER-  
WRITERS, INC.,  
a corporation,  
*Defendant and Appellant.*

APPELLANT'S  
BRIEF  
No. 8105

ROMNEY AND BOYER  
Attorneys for Appellant  
1409 Walker Bank Building  
Salt Lake City, Utah

Received two copies this ..... day of  
....., 1953.

\_\_\_\_\_  
*Attorneys for Respondent*

## TABLE OF CONTENTS

	PAGE
STATEMENT OF FACTS .....	3
STATEMENT OF POINTS .....	6
ARGUMENT .....	7
POINT NO. I: THE POLICY HAD LAPSED AT THE TIME OF THE AC- CIDENT .....	7
POINT NO. II: THE GRACE PER- IOD EXPIRED AT NOON ON OCTOBER 31, 1951 .....	9
POINT NO. III: CONCLUSION OF LAW NO. 1 IS NOT SUPPORTED BY THE FINDINGS OF FACT .....	7-9
POINT NO. IV: THE RIGHT OF FORFEITURE WAS NOT WAIVED .....	18

## AUTHORITIES CITED

Ballard, vs. Beneficial Life Insurance Com- pany, 82 Utah 1, 21 Pac. 2d 847 .....	23
Bleicher, vs. Heeter, 4 N. W. 2d 897, 141 Neb. 787 .....	19
Bonnot, vs. Grand Lodge Brotherhood of R. R. Trainmen (Mo.) 81 S. W. 2d 360 .....	22
Commercial Casualty Co. vs. Rice, 157 N.Y.S. 1, 95 Misc. 567 .....	20
Cooper, vs. Foresters Underwriters, Inc., .....Utah....., 257 Pac. 2d 540 .....	15
Ellerbeck, vs. Continental Casualty Co., 63 Utah 530, 227 Pac. 850 .....	21

# TABLE OF CONTENTS (*Continued*)

	PAGE
Fawcett, vs. Security Benefit Association, 99 Utah 193, 104 Pac. 2d 214, 218 .....	16
General Service Corporation, vs. Allhoff Bros., App. (Mo.) 139 S.W. 2d 1062 .....	19
Great American Indemnity Co., vs. Green- berg Bros. Iron & Steel Corporation (N.Y.) 10 N.Y.S. 2d 656, 170 Misc. 489 .....	20
Huber, vs. New York Life Insurance Com- pany (Cal.) 63 Pac. 2d 318 .....	23
Knarston, vs. Manhattan Life Insurance Company (Cal.) 56 Pac. 773 .....	22
Loftis, vs. Pacific Mutual Life Insurance Company, 38 Utah 532, 114 Pac. 134 .....	21
Mutual Benefit Health and Accident, vs. Ken- nedy, 140 Fed. 2d 24 .....	10
Orlando, vs. Rosen, 290 N.Y.S. 270 .....	14
Purvis, vs. Commercial Casualty Co., 159 S. E. 369 (S. C.) (1931) .....	14
Richardson, vs. American National Insurance Co., 137 S. 370 (La.) .....	11
Shankle, vs. Home Insurance Company of New York, 133 S. W. 2d 289 (Tenn.) .....	10
Sullivan, vs. Beneficial Life Insurance Com- pany, 91 Utah 405, 64 Pac. 2d 351 .....	22
Vinther, vs. Sunset Mutual Life Insurance Company, 53 Pac. 182 (Cal.) .....	21
Watkins, vs. Brotherhood of American Yoe- men (Mo.) 176 S. W. 516 .....	22
Section 31-29-8, Utah Code Annotated, 1953 .....	18
Section 68-3-7, Utah Code Annotated, 1953 .....	9
52 American Jurisprudence, Pages 340 and 341 .....	10
44 C. J. S. 1331 .....	19
45 C. J. S. Page 558 .....	20

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

---

NORMA LOIS COOPER,  
*Plaintiff and Respondent*

vs

FORESTERS UNDER-  
WRITERS, INC.,  
a corporation,  
*Defendant and Appellant.*

APPELLANT'S  
BRIEF

No. 8105

---

STATEMENT OF FACTS

This is an action on an insurance policy issued by Appellant to Respondent on March 31, 1951, which provides for certain medical, surgical and hospital benefits described in the Policy (See Exhibit attached to Amended Complaint, Record 3 to 6). This case was submitted to the Court on a written Stipulation of facts, which is as follows:

1. That Plaintiff submitted her application for insurance coverage and paid her first month's premium and application fee thereon to Moses Leese, Agent of Defendant, at approx-

imately 9:00 p.m. on the 31st day of March, 1951.

2. That Plaintiff's application for insurance was accepted by Defendant and Certificate No. A-145 was issued to Plaintiff pursuant to the application mentioned above.

3. That on May 7, June 18, July 17, August 27, and October 1, all in 1951, Plaintiff paid premiums of Six (\$6.00) Dollars each to Defendant on said insurance policy.

4. That the premium payment on October 1, 1951, was made in the afternoon of that date.

5. That on October 31, 1951, in the afternoon, Plaintiff was injured in a fall at the Culligan Soft Water Service Company store, Salt Lake City, Salt Lake County, State of Utah.

6. That in the evening of October 31, 1951, after the accident occurred, the Plaintiff paid the sum of Twelve and no/100 (\$12.00) Dollars, to Moses Leese, an Agent of the Defendant.

7. That as a result of her fall and injuries Plaintiff was hospitalized and expended more than Five Hundred (\$500.00) Dollars for medical, surgical and hospital services.

8. That Plaintiff made timely demand upon the Defendant for payment of insurance benefits under her policy of insurance, but Defendant denied and still denies liability thereunder and has refused to pay.

9. That Defendant is now and at all times herein mentioned has been qualified in the State of Utah as a fraternal benefit society.

10. That at the time of the accident complained of by the Plaintiff, certain by-laws and regulations had been duly adopted by Defendant and were in full force and effect, which read in part as follows:

#### “LAPSATION

“1. A member enrolling for membership, regardless of the time of day that the application is made, his coverage shall start as of the time payment is received but shall be dated as of 12:00 o'clock noon the day premium is received and for said premiums received his coverage would continue in force for one month from that date and in addition would have a 31-day grace period at which time, if no other premiums were received, his membership would terminate at 12:00 o'clock noon of the 31st day of grace. If a member shall have lapsed it is considered that he must pay all back premiums in order to reinstate and the due date shall remain the same as originally stated in his membership certificate and he will be penalized not only the payment of back premiums but his coverage shall become effective for accident only from the time reinstatement premium was received and all other coverage shall commence 10 days thereafter. All coverage shall begin and end at 12:00 o'clock noon, standard time, at the residence of the insured. Where lapsation has been in excess of three months and reinstatement is desired the above can be accomplished or new application must be made with a 90-day waiting period being

in effect for all coverage except accident which would be in immediate benefit from the time premium was received."

#### **"GENERAL PROVISIONS**

"4. If default be made in the payment of the agreed premium for this certificate, the subsequent acceptance of a premium by the organization or by any duly authorized agents shall reinstate the certificate, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten (10) days after the date of such acceptance."

11. That the Amended Answer of Defendant may be considered as an Answer to the Amended Complaint of Plaintiff. (Record 10, 11 and 12.)

Based upon the foregoing the trial Court entered judgment in favor of Respondent (Record 15), from which this appeal has been taken.

#### **STATEMENT OF POINTS**

##### **I**

**THE POLICY HAD LAPSED AT THE TIME OF THE ACCIDENT.**

##### **II**

**THE GRACE PERIOD EXPIRE AT NOON ON OCTOBER 31, 1951.**



## III

CONCLUSION OF LAW NO. 1 IS NOT SUPPORTED BY THE FINDINGS OF FACT.

## IV

## ARGUMENT

Point No. III will not be argued separately, but is included in the discussion under Points No. I and II.

## I

THE POLICY HAD LAPSED AT THE TIME OF THE ACCIDENT.

The policy contains the following provisions (See Exhibit attached to Amended Complaint) :

“This Certificate is dated and takes effect March 31, 1951, in consideration of the statements and agreements made by the insured in the application and the payment in advance of \$6.00 as the first premium, which maintains this Certificate in force for one month from its effective date. The payment in advance and acceptance by the Company of premiums monthly of \$6.00 thereafter is required to keep this Certificate in continuous effect. The Company's acceptance of the premiums will constitute its consent for renewal. All periods of insurance hereunder shall begin and end at twelve o'clock noon, standard time, at the residence of the insured.

“SECTION V. GRACE PERIOD. A grace period of thirty-one (31) days will be allowed for payment of any renewal premium during which grace period the Certificate will remain in full force.”

“SECTION VII. (3) No statement made by the applicant for insurance not included herein shall void the certificate or be used in any legal proceeding hereunder. No agent has authority to change this Certificate or to waive any of its provisions. No change in this Certificate shall be valid unless approved by an executive officer of the organization and such approval be endorsed hereon.”

“(4) If default be made in the payment of the agreed premium for this Certificate, the subsequent acceptance of a premium by the Organization or by any of its duly authorized agents shall reinstate the Certificate, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.”

The policy provides for monthly “periods of insurance” which begin and end at noon on the last day of each month, commencing March 31, 1951, and required the payment of a monthly premium of \$6.00 to keep the “certificate in continuous effect.” The first premium paid the policy to April 30, 1951, at noon, and the premiums paid during the months of May, June, July and August paid the policy to noon of the last day of each of those months. The payment made on October 1st was made on the last day of the grace period and paid the policy to noon

of September 30, 1951. The last "period of insurance" was from noon September 30th to noon October 31st. October having 31 days, the grace period corresponded with the "period of insurance" and expired on October 31, 1951. The premium for this "period of insurance" was not paid during the grace period, therefore the policy had lapsed at the time the accident occurred in the afternoon of October 31, 1951. The payment made in the evening of October 31st does not alter the result for the reason that Section VII (4) of the policy provides for reinstatement "only to cover accidental injury thereafter sustained."

## II

### THE GRACE PERIOD EXPIRED AT NOON ON OCTOBER 31, 1951.

The trial Court apparently took the position that the law does not recognize fractions of days and that the grace period ran until midnight October 31, 1951. That the law does not take cognizance of fractions of days as a general rule is recognized. We are also aware of Section 68-3-7 of the Utah Code Annotated, 1953, which provides as follows:

"68-3-7. TIME, HOW COMPUTED.—The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded."

But the rule adopted by the trial court is a mere legal fiction and subject to limitations as stated in

52 American Jurisprudence, Pages 340 and 341, as follows:

“The general rule that the law knows no fractions of a day is a mere legal fiction, and, like all other legal fictions, is allowed to operate only in cases where it will promote right and justice.

“And although the ends of justice never require that the law depart from the ordinary rule and recognize a fraction of a day to defeat the manifest intention of the parties, where the parties to a contract stipulate for the performance of the contract by an agreed hour on a certain day, the law in such case will take cognizance of the fractions of the day.”

Perhaps the most common exception to the above general rule in the field of insurance is found in cases where the policy expires at a certain time of day, such as in *Mutual Benefit Health and Accident, vs. Kennedy*, 140 Fed. 2d 24, where the policy expired at noon on a certain day and it was held that where the insured drowned two hours thereafter there was no coverage. The same proposition is found in *Shankle, vs. Home Insurance Company of New York*, 133 S. W. 2d 289 (Tenn.) where the policy provided for coverage from December 5, 1936, to December 5, 1937, at Noon Standard Time, place of issue, and it was held that an accident which occurred at 7:30 p.m. on December 5, 1937, was not covered. The Court in the *Shankle* case observed that the principle that the law knows no part of a day has no application to a contract having a definite hour for its expiration.

The Certificate provides "all periods of insurance hereunder shall begin and end at Twelve o'clock Noon, Standard Time, at the residence of the insured." Thus, not only the *hour of beginning*, but also the *hour of ending* of each "period of insurance" is specifically set forth. There is no ambiguity in the wording of the provisions. Likewise, the case at bar should be distinguished from one where the policy provides for a definite hour of commencement on a certain day, but fails to specify a definite hour of termination. The question for decision is whether the time specified in the policy as to the beginning and ending of the "period of insurance" applies to the grace period, the grace period not having such a specification. The wording of the grace provision is:

"A grace period of thirty-one (31) days will be allowed . . ."

The trial court apparently held that the grace period expired at midnight on October 31, 1951. This does violence to the policy in that it allows 31½ days of grace instead of 31 as provided for therein. The interpretation of Appellant is the only one consistent with the terms of the policy.

There are a number of cases which have specifically held that the grace period, renewal period, etc., although not specifically limited as to hour, are limited by the other provisions of the policy. In the case of *Richardson, vs. American National Insurance Company*, 137 S. 370 (La.) the following are the pertinent provisions of the policy:

"In consideration of the . . . payment in advance of a policy fee of Two Dollars and a premium of \$1.95 does hereby insure Thomas Richardson, subject to all the conditions herein contained and endorsed hereon, from 12:00 o'clock noon, standard time, of the day this contract is dated, until 12:00 o'clock noon, standard time, of the 15th day of February, 1925, and for such further periods, stated in the renewal receipts, as the payment of the premium specified in said application will maintain this policy and insurance in force, against death or disability . . ."

"(2) A period of five (5) days of grace is allowed for the payment of any renewal premium, during which the policy shall be maintained in full force and effect in accordance with its terms, but if the payment of any renewal premium is made after the grace period of the policy has expired neither the Insured nor the Beneficiary shall be entitled to recover for any accidental injury sustained between the date of such expiration and 12:00 o'clock noon, standard time, of the day following the date of such renewal payment; or for any illness originating or death occurring before the expiration of ten (10) days after the date of such renewal payment.

"(3) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the Policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

The premium due at noon on February 15, 1929, was not paid until February 22, 1929. The insured was fatally shot on February 20, 1929, at 4:45 p.m. It was contended that inasmuch as the grace period provision was not limited to noon that the insured had until six p.m., or sunset of the last day to pay the premium in accordance with a provision of the Louisiana law. The Court held that the grace period expired at noon of the last day. The language of the Court is as follows:

“We conclude that, under both the common law and the codal article, contracting parties have the right to stipulate for the performance of the contract by an agreed hour on a certain day and the law in such case will take cognizance of the fractions of the day.

“The argument of plaintiff’s attorney is predicated upon only a few words of the clauses in question, which he attempts to isolate from the language of the balance of the clause and the other clauses in the policy. To accept this interpretation would be to give the plaintiff not only five days grace, but five days, four hours, and forty-five minutes. We do not believe that this was contemplated by the parties and that the language in question must be interpreted in connection with the remainder of the clause and also the other provisions of the policy, which, as a whole, show that the policy commenced and ended at 12 o’clock noon, whether it was terminated upon the expiration of the term or upon the termination of a renewal period, or upon the termination of the grace period. All of the periods of time in the policy are based upon 12

o'clock noon. We find no uncertainty or ambiguity or conjecture in the language of the policy on this point."

Orlando, vs. Rosen, 290 N. Y. S. 270. This case involved a workmen's compensation policy which was written to expire on November 11, 1934, at 12:01 a.m. By a rider attached, the policy was extended for a period of one month to expire on December 11, 1934. The rider contains the following provision: "Subject otherwise to all terms, limitations and conditions of the policy to which this endorsement is attached." The claimant was injured at two p.m. on December 11, 1934. It was held that the policy had expired some hours earlier that day.

Purvis, vs. Commercial Casualty Co., 159 S. E. 369 (S. C.) (1931). The defendant insured Jack W. Purvis "for the term of twelve months from the 3rd day of September, 1928, from Noon Standard Time" against loss or disability or death from accidental means. On September 3, 1929, about five o'clock in the afternoon Purvis was fatally injured. The Court held that the policy had lapsed at the time of the injury and stated as follows:

"In the case at bar, the parties stipulated in the contract, as was their right, that the insurance should be for a term of twelve months, beginning at noon of September 3, 1928; in view of the fact that the insured was fatally injured a few hours after noon on September 3, 1929, it would be an injustice to the insurer for the court to hold, nothing else appearing, that the



insurance was in force during the whole of that day.”

The Plaintiff contended that a receipt book issued by the company contained a notation that the premium must be paid on or before September 3, 1929, and that by reason of there being no limitations as to time of day when the premium should be paid that the insured had the entire day to make payment thereof. In discussing this point, however, the Court said:

“The receipt book contains notice that such premium must be paid on or before September 3, 1929. The policy indicates that it was the clear intent of the parties that the insurance should expire at 12 o'clock noon September 3, 1929. There is nothing in the receipt book to indicate a contrary intention; the notice that the renewal premium must be paid on or before September 3, 1929, merely meaning, in connection with the provisions of the policy, that, if payment should be deferred until that date, it must be made by 12 o'clock noon. It being conceded that the renewal premium, was not paid by or before 12 o'clock noon of September 3, and that the insured received his injuries some hours thereafter, it is clear that the policy was not in force at the time of the fatal accident.”

The Court will recall this case was before it on a prior appeal in which the judgment of the trial Court was vacated and the case remanded for further proceedings. *Cooper, vs. Foresters Underwriters, Inc.,* .....Utah.....,

257 Pac. 2d 540. The present and former judgments entered by the trial Court were apparently based on the theory that the grace period did not expire until midnight on October 31, 1951. Appellant contends that by vacating the former judgment this Court rejected the theory of the trial Court and that the judgment now appealed from should be vacated for the same reason. Except the ruling of this Court in the prior appeal of this case, our search has not revealed a Utah case exactly in point on the facts. However, *Fawcett, vs. Security Benefit Association*, 99 Utah 193, 104 Pac. 2d 214, 218, is a case involving the construction of an insurance contract and the principle of construction therein adopted is determinative of the question involved in the case at bar. The language of the Court is:

“Since such provision of the certificate is not so clear as to be susceptible of but one construction, we must determine which of the permissible interpretations thereof is consistent with the other provisions of the entire agreement. Even though a particular provision of a contract of insurance be susceptible of more than one meaning, the construction of such provision more favorable to the assured will not be adopted if other provisions of the entire contract clearly resolve the ambiguity in favor of the contrary construction.”

There is no ambiguity in the contract in the case at bar. The trial court went beyond and outside the contract and adopted a legal fiction contrary to its terms. The contract can not be rendered

ambiguous by a strained misapplication of a legal fiction. In the Fawcett case, where the contract itself was susceptible of more than one meaning, this Court adopted the interpretation consistent with the other provisions of the entire contract. In the case at bar, where an alternative interpretation is made possible only by a legal fiction, this Court is bound to follow the holding in the Fawcett case and adopt the interpretation which is consistent with the entire provisions of the contract.

The Argument thus far has been based upon the provisions of the Certificate only. Appellant's position is well founded upon the provisions of the Certificate without resort to the By-Laws. However, the following provision of the By-Laws supports Appellant's contention:

"1. A member enrolling for membership, regardless of the time of day that the application is made, his coverage shall start as of the time payment is received but shall be dated as of 12:00 o'clock noon the date premium is received and for said premiums received his coverage would continue in force for one month from that date and in addition would have a 31-day grace period at which time, if no other premiums were received, his membership would terminate at 12:00 o'clock noon of the 31st day of grace."

Respondent will probably urge that the By-Laws are not a part of the contract, for the reason that no reference to them was made in the Certifi-

cate. Section 31-29-8, Utah Code Annotated, 1953, provides in part as follows:

“The certificate, together with any riders or endorsements attached thereto, the charter, the constitution and laws of the society, the application for membership, and declaration of insurability, if any, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and the certificate shall so state.

It would seem that where the statute specifically makes the By-Laws a part of the contract that such is conclusive regardless of whether the Certificate so states or not. We have found no case holding to the contrary.

#### IV

#### THE RIGHT OF FORFEITURE WAS NOT WAIVED.

The judgment of the trial Court is not based upon a waiver. There was no finding of waiver. However, it is anticipated Respondent will claim there has been a waiver and will rely upon the following circumstances in support of her claim of waiver: The first premium was paid in the afternoon of March 31, 1951, and coverage started at noon of that day; that the payments on October 1, 1951, and October 31, 1951, were accepted unconditionally; that the payments on October 1, 1951, and October 31, 1951, were made in the afternoon of those days, after the grace period

had expired; that Appellant never tendered back to Respondent any premiums. No waiver exists by reason of such circumstances.

The policy became effective on March 31, 1951, at noon. That the premium was paid and the policy issued later that day is of no consequence. Had the policy been dated the following day Respondent would not have been covered by insurance until Noon of the following day. Undoubtedly it was to the advantage of Respondent to have immediate coverage and that is why the policy was dated on the date of the payment of the premium. No interference arises from this incident that a pattern of accepting premiums late was established.

The premium on October 1, 1951, was paid in the afternoon of said day. Whether paid in the forenoon or afternoon, makes no difference. If paid in the forenoon Appellant was obligated to accept the premium as the grace period had not expired. If it was paid in the afternoon Appellant had the legal right to accept the payment and apply it to the September coverage. Respondent enjoyed coverage during the month of September, which Appellant was entitled to be compensated for. The authorities hold that even in the event of forfeiture the insured is not relieved of the obligation to pay for the period the policy is in force. 44 C. J. S. 1331, Mass. Union Mut. Casualty Ins. Corporation, vs. Insurance Budget Plan, 195 N. E. 903, 291 Mass. 62, 98 A. L. R. 1422. Mo.—General Service Corporation vs. Allhoff Bros., App., 139 S. W. 2d 1062. Neb.—Bleicher v.

Heeter 4 N. W. 2d 897, 141 Neb. 787. N. Y. Great American Indemnity Co., v. Greenberg Bros. Iron & Steel Corporation, 10 N. Y. S. 2d 656, 170 Misc. 489 - Commercial Casualty Co. v. Rice, 157 N. Y. S. 1, 93 Misc. 567.

The payment of \$12.00 on October 31, 1951, was made in the afternoon of said day, but after the accident had occurred. Appellant applied \$6.00 of that amount to the October coverage and the remaining \$6.00 was used to reinstate the policy. However, the policy could be reinstated only according to its terms:

“REINSTATEMENT. The right of the insured to have the policy reinstated after default in the payment of a premium, and his rights under the policy as reinstated, are determined by the provisions of the policy.” 45 C. J. S. Page 558.

The only limitation on reinstatement was that is covered accidental injury thereafter sustained.

The policy does not require a new application or evidence of insurability in order to effect a reinstatement. No reason existed to alter the date of coverage if reinstatement occurred on the last day of the month which had always been the date determining monthly coverage. The policy having been reinstated there was no occasion to tender back any premiums to Respondent.

The cases heretofore relied upon by Respondent to establish waiver have no application to the case at bar.

In *Ellerbeck, vs. Continental Casualty Company*, 63 Utah 530, 227 Pac. 850, the insurance company had forwarded statements to the insured demanding payment of the annual premium. There had been a conversation between a representative of the insurance company and the insured wherein a credit arrangement had been granted by the company to the insured and the company had accepted a partial payment of the premium for the period in question.

In *Loftis, vs. Pacific Mutual Life Insurance Company*, 38 Utah 532, 114 Pac. 134, arrangements had been made with the employer of the insured to deduct premiums from his wages. The insurance company submitted a list to the employer containing the names of policy holders and the amount of premiums owing for the months involved. It was made to appear that the insurance company knew other employees who had not earned sufficient wages each month to pay insurance premiums promptly when due. Several instances of default of payment had occurred, which the insurance company had disregarded. The company had demanded and received payment of premium and treated them as though they had been timely paid.

In *Vinther, vs. Sunset Mutual Life Insurance Company*, 53 Pac. 182 (Cal.) it was made to ap-

pear that ten payments had been made late and accepted by the company, one of which was as much as 38 days late.

In *Sullivan vs. Beneficial Life Insurance Company*, 91 Utah 405, 64 Pac. 2d 351, the wife of the insured was told before the expiration of the grace period by a representative of the company that "When Mr. Sullivan sends the money to you, bring it in." She was also told it would be all right to bring it in after the grace period expired, and was also advised that in case the money does not arrive for some time she could take an application for reinstatement form and have Mr. Sullivan fill it out and bring it in when he returned home.

In *Watkins, vs. Brotherhood of America Yomen (Mo.)* 176 S. W. 516, it was made to appear that it was the practice of the company to permit payments to be made after the due date in 80% to 90% of the cases and in such instances to reinstate the policy.

In *Bonnot, vs. Grand Lodge Brotherhood of R. R. Trainmen (Mo.)* 81 S. W. 2d 360, the Court found the company had waived a forfeiture where it was shown the Treasurer of its local lodges had been permitted to accept premiums late.

In *Knarston, vs. Manhattan Life Insurance Company (Cal.)* 56 Pac. 773, it was made to appear that a general agent had granted a ten day extension and had attempted to collect the premium



on two occasions after the ten days had elapsed and the general agent had testified that he would have accepted the premium had it been tendered to him on the date of the death of the insured.

In *Huber, vs. New York Life Insurance Company (Cal.)* 63 Pac. 2d 318, it was held that the company was estopped under the circumstances to deny that an agent to whom payment had been made within the time allowed by the policy had authority to collect the premium.

The test of waiver is stated by this Court in *Ballard, vs. Beneficial Life Insurance Company*, 82 Utah 1, 21 Pac. 2d 847, as follows:

“Insurance company which, by any course of conduct, induces in mind of insured honest belief, reasonably founded, that strict compliance with stipulation for prompt payment of premiums will not be insisted on, waives right to forfeiture for nonpayment.”

According to this test none of the elements of waiver exists in the case at bar. No “course of conduct” was “reasonably founded” which could have induced in the mind of Respondent an honest belief that strict compliance would not be insisted upon. There is no question but what all payments prior to October 1st had been made within the grace period. Although the October 1st payment was made in the afternoon of that day such does not establish a “course of conduct” upon which waiver can be predicated. None of the above cases so hold, and such is not the law.

The following provision of the By-Laws sustains Appellant's position with regard to waiver:

"If a member shall have lapsed it is considered that he must pay all back premiums in order to reinstate and the due date shall remain the same as originally stated in his membership certificate and he will be penalized not only the payment of back premiums but his coverage shall become effective for accident only from the time reinstatement premiums was received and all other coverage shall commence 10 days thereafter.

### CONCLUSION

The amount involved in this case is small. It would have been far less expensive for Appellant to have paid Respondent's claim. The Court will appreciate that in denying Respondent's claim Appellant bears no ill will toward Respondent and is not trying to avoid its legal obligations, but contends that according to law Respondent was not covered by the policy of insurance in connection with the claim herein sued upon.

*Respectfully submitted,*

ROMNEY AND BOYER

Attorneys for Appellant

1409 Walker Bank Building  
Salt Lake City, Utah