

1954

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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

- - -oOo- - -

NORMA LOIS COOPER,)

Plaintiff and)
Respondent,)

-vs-

FORESTERS UNDER-)
WRITERS, INC.,)
a corporation,)

Defendant and)
Appellant.)

RESPONDENT'S

BRIEF

Case No. 8105

FILED
JAN 11 1954

- - -oOo- - -

Clerk, Supreme Court, Utah

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Received two copies this _____ day of

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IN THE SUPREME COURT
OF THE STATE OF UTAH

- - -oOo- - -

NORMA LOIS COOPER,)

Plaintiff and)
Respondent,)

RESPONDENT'S

EXHIBIT

-vs-

Case No. 8105

WORKSTERS UNDER-)
WRITERS, INC.,)
a corporation,)

Defendant and)
Appellant.)

- - -oOo- - -

STATEMENT OF FACTS

The stipulation of facts recited by appellant in its brief constitutes the essential facts of this case. It should be noted that the parties stipulate that the company had certain by-laws and regulations as set forth in Par. 10 of the stipulation, but no stipulation is made that Mrs. Cooper knew of these by-laws or ever read them, or that the policy of insurance referred to them. Sec. VII (1) of Ex. A. limits the contract of insurance to the certificate and the application.

STATEMENT OF POINTS

I

THE POLICY WAS IN FULL FORCE AND EFFECT AT THE TIME OF THE ACCIDENT AND INJURY.

II

THE APPELLANT ACCEPTED AND RETAINED THE PREMIUM FOR THE MONTH OF OCTOBER 1951 AND HAS DEMANDED AND ACCEPTED ALL SUBSEQUENT PREMIUMS, THEREBY WAIVING ANY RIGHT IT MIGHT HAVE HAD TO DECLASS THE POLICY FORFEITED AND TERMINATED.

III

BY ITS PRACTICE OF ACCEPTING LATE PREMIUMS AND APPLYING THEM RETROACTIVELY, APPELLANT HAS WAIVED PROMPT PAYMENT OF PREMIUMS.

ARGUMENT

I

THE POLICY WAS IN FULL FORCE AND EFFECT AT THE TIME OF THE ACCIDENT AND INJURY.

By its own terms (Sec. V) the policy provides a grace period of thirty-one (31) days during which time said policy remains in full force and effect. Therefore, all day on the 31st day of

October, 1951, the policy was in effect because the full thirty-one (31) days of the grace period had not expired. The term of the policy was from the last day of each month through the last day of the succeeding month, plus a grace period for payment of renewal premiums of thirty-one (31) days. During said grace period "the certificate will remain in full force." Sec. V, Ex. 1. (P 5). Therefore, plaintiff was injured at a time when the policy was in full force and effect.

Defendant argues that the provisions on page 1 of the certificate "All periods of insurance hereunder shall begin and end at twelve o'clock noon, standard time, at the residence of the insured" (Italics added) in some way modifies or limits the Grace Period provision which is Sec. V on page 2 of the certificate. But the two are separate and distinct. Insurance coverage has to do with time of injury, but the grace period has to do with the time in which a premium may be paid to keep the policy in continuous force and

effect. The Policy specifically provides "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." (Italics added.) What could be clearer? This is the policy written by the Insurance Company. It could have provided a grace period of thirty and one-half (30½) days (which in this action it does claim) or of twenty-nine (29) days, or ten (10) days, or eight (8) hours. But it provided thirty-one (31) days as a grace period. Plaintiff paid her premium within that period. The Insurance Company in its certificate defined "grace period" as thirty-one (31) days and then provided "during which grace period the Certificate will remain in full force." (Italics added.) In Fenn Plate-Glass Co. v Spring Garden Ins. Co. (Pa) 42 A 138, the Supreme Court of Pennsylvania ruled squarely on this point and held that the noon to noon insurance coverage provision did not apply in computing time on other provisions of the policy such as notice of cancellation. That court held that the rule of construction

of excluding the first day and counting the last until twelve (12) midnight was the proper rule to follow. Indeed the insurance cases on grace periods seem, without exception, to hold that the time runs to midnight of the last day of said period, whatever its length, excluding the date when the premium was due and payable and counting every day after that. See: Swayne v. Mutual Life Ins. Co. 32 F 2d 734; Elgutter v. Mutual Reserve Fund Life Assoc. 28 So. 289; Campbell v. International Life Assur. Soc. 4 Bosw (NY) 296; and United Order, O. S. v. Grigsby 22 SW 2d 31. The United Order Case also expounded the familiar rule followed by our courts that in the event of any conflict in computation of time, the provision most favorable to the insured should be applied and the contract of insurance sustained.

Appellant's confusion of "periods of insurance" and "grace period" has led it to repudiate the terms of its own policy. So long as premiums were paid within the grace period there was con-

tinuous coverage and no question could arise on period of insurance. Only if a premium were not paid within the grace period and the policy lapsed, and thereafter claim was made under the policy, would it be necessary to determine if said injury was sustained during the period of insurance. Respondent paid her premium on the thirty-first day. Her policy never lapsed.

II

THE APPELLANT ACCEPTED AND RETAINED THE PREMIUM FOR THE MONTH OF OCTOBER 1951 AND HAS DEMANDED AND ACCEPTED ALL SUBSEQUENT PREMIUMS, THEREBY WAIVING ANY RIGHT IT MIGHT HAVE HAD TO DECLARE THE POLICY FORFEITED AND TERMINATED.

After plaintiff obtained her certificate of insurance she made all of her subsequent premium payments during the grace periods. On the payment which immediately preceded the one in question, plaintiff made payment in the afternoon of the 1st day of the succeeding month. Without variance defendant accepted and retained the premium and applied said premium to cover insur-

ance during the grace period. On the October 1st payment, as well as on the October 1st payment, defendant accepted the premiums unconditionally. Never at any time did defendant tender back the amount of the premium or any part thereof nor demand a new application for insurance or additional evidence of good health, nor did defendant alter the dates of coverage for the policy. In other words, defendant on October 1st accepted the premium payment for the entire month of October just as it had accepted the October 1st payment for the entire month of September and also accepted payment for the entire month of November. There is the hiatus? Can defendant now say that it accepted a full month's premium for less than a month's coverage under the policy? Having accepted the premium for October unconditionally, which acceptance it has confirmed by subsequently accepting all monthly premiums thereafter, defendant has waived any right it may have had to declare the policy lapsed and forfeited. By accepting the October premium unconditionally,

Defendant received late payment (if it was late) and the policy was continuously in force.

In Ellerbeck v. Continental Casualty Corp., 1939, 13 Utah 530; 207 P 301, this Court said:

"By the terms of the policy, the plaintiff...had the right to make the annual payments to reinstate the policy so as to afford protection for accidents after the date of payment...It is therefore contended by counsel for defendant that even though a waiver of payment was made by the defendant...such...would not keep the policy in force between the date of payment as fixed in the policy and the date of actual payment. The courts usually do not concur in that construction of similar provisions in insurance policies. As stated the insured had a legal right to reinstate his policy by making the annual payment as stipulated in the policy. His rights upon such payment are fixed by the terms or provisions of the policy. Under the construction of the provision contended for by the defendant's counsel, there would be nothing gained for plaintiff in this case by either a waiver or an extension of credit." (Italics added).

And the court held that a premium paid and accepted some four months late was effective to reinstate the accident and health policy to cover plaintiff for an illness contracted after the end of the grace period of the policy and the

fore actual premium payment. Defendant was held to have waived prompt payment. It will be noted that this was an accident and health case, and the policy contained the usual provision which is found in the policy of Mrs. Cooper that reinstatement would provide coverage only after payment of premium. This Court held squarely that acceptance of the late premium provided coverage under the policy all the way back to the date when said premium became overdue and delinquent.

Loftis v. Pacific Mutual Life Insurance

Company, 38 Utah 520; 114P 174, is an accident insurance policy case. The premium in question was not paid on time. However, defendant continued to demand and later collected the late premium. In the meantime, the insured had been killed during the period when the premium was overdue but unpaid. When defendant learned of the death of the insured it tendered back the premium it had collected late. But the court held that defendant had waived late payment and

could not now defeat its liability.

"But when appellant (defendant) by its acts and conduct apparently elected to keep the policy in force for the purpose of collecting premiums, the law will require it to keep it in force for all purposes."

The Loftis case holds that an accident insurance company cannot continue to collect premiums and at the same time treat a policy as lapsed during periods when premiums were overdue and unpaid. If it does not terminate the policy when it has a right so to do, and it accepts a late premium, then the company waives any right it may have to forfeit the policy and it must pay on its contract.

Sullivan v. Beneficial Life Insurance

Company, 91 Utah 405, 64 P2d 351, holds that:

"If any attempt to collect a premium after forfeiture constitutes a recognition of the contract as being in force, certainly actual payment of past-due premiums and receipt thereof by the insurer without conditions attached must be given the same effect."

In the Sullivan case, the premium was due on October 5th, but was not paid until December

24th. Thereafter, in January defendant refused to accept the next premium saying that the policy had lapsed in October for non-payment of premium. The insured died the following December. The court held that the defendant had waived late payment by accepting the premium on the previous December 24th and that it could not refuse the premium payment in January and consequently the policy was in force.

"The law will not permit an insurance company even though a fraternal mutual to accept dues or premiums from its members as if the insurance was in force and then refuse payment on the ground that the failure to pay promptly forfeited the insurance."

Watkins v. Brotherhood of American Yeomen
 (Missouri) 170 SW 510; See: Bennett v. Grand
Lodge Brotherhood of Railroad Firemen (Missouri)
 21 SW 2d 450

The insurance cases universally hold that it is the policy of the law to keep insurance contracts in force and that whenever the conduct of the insurer indicates that it waives its right to declare a forfeiture the courts will so hold to avert a lapse of insurance. Our courts, along with the courts of most other states, have con-

sistently followed this policy. See Bittinger v. N. Y. Life Insurance Co. (Cal) 119 P2d 311; Marston v. Manhattan Life Insurance Co. (Cal) 55 P 773; Huber v. N. Y. Life Insurance Co. 63 P2d 313.

III

BY ITS PRACTICE OF ACCEPTING LATE PREMIUMS AND APPLYING THEM RETROACTIVELY, APPELLANT HAS WAIVED PROMPT PAYMENT OF PREMIUMS

The cases generally hold that if the company has accepted late payment of premiums without declaring a forfeiture of the policy on previous occasions, it cannot later, even if it desires to do so, elect to declare a forfeiture of a policy for late payment. Leftis v. Pacific Mutual Life Insurance Company of California, supra; Ballard v. Beneficial Life Insurance Co., 30 Utah 1, 21 P2d 947; Winther v. Sunset Mutual Life Insurance Co. (Cal.) 53 P2d 130; Melson v. National Surety Life Co. (Cal.) 21 P2d 1002; Lincke Mutual Benefit Health and Accident Assn. (Cal.) 172 P2d 312.

In this case the premium payment for the month of September was accepted by defendant on the 1st day of October and defendant applied that premium to insurance coverage for the month of September. The insurance policy had a term that ran from the last day of the month to the last day of the succeeding month. When plaintiff failed to pay said premium during September, but did tender the premium in the afternoon of October 1st and defendant at that time accepted and retained the premium and applied it for the month of September, it established a practice of waiving any right which it might have to declare a forfeiture for late payment, and in so doing defendant was following the pattern which it set when it accepted the initial premium at 9:00 P.M. and dated coverage back to noon of March 31. Therefore, having allowed plaintiff to make the October 1st payment late, and, in effect, make the March 31st payment late, defendant could not refuse to accept the payment on the afternoon of October 31 to cover the month

of October. (This is assumed for the purpose of argument that the grace period did terminate at noon on the 31st day of October.) Not only was defendant precluded by its prior practice from rejecting the October 31 payment, but, in fact, defendant made no attempt to refuse the payment. Gladly defendant accepted the October 31 premium and applied it to the October period of coverage, just as it has accepted all subsequent premium payments and applied them to the proper monthly coverage under the original terms of the contract.

So even if it is conceded for the sake of argument that the provision of the policy which limited the insurance period from noon on the last day of a month to noon on the last day of the next month somehow affected and limited the grace period to thirty and one-half ($30\frac{1}{2}$) days and, therefore, terminated coverage under the policy at noon on October 31, still, this policy remained in force because defendant by its practice had created a method of operation which over-

mitted the payment of premiums after noon of the last day without having the policy lapse. It will be remembered that the original contract of insurance was made at about 9:00 P.M. on the 31st day of March, 1951. On that day defendant accepted a premium payment at 9:00 P. M., but wrote a certificate of insurance to cover a period beginning at noon on March 31. Again, on October 1, plaintiff made a payment afternoon of that date to cover the period of the month of September. Even if we accept the view that the 31 day grace period extended the September coverage to noon of October 1 (since September is a 30 day month,) still, defendant accepted that payment after noon on the 1st day of October, but did not declare the policy lapsed and applied the premium payment for the preceding month. Consequently, when plaintiff tendered her premium for the month of October at about 5:30 P. M. on October 31, appellant was bound to accept that premium payment in accordance with its practice and could not, if it so desired, declare the policy lapsed. Appellant was bound

to apply the premium payment for all of the pre-
ceding month. In none of the instances, where
 a premium payment was made after noon of 31st
 day of the insurance period, did appellant re-
 quire the respondent to fill out a statement
 as to her present condition of health before it
 accepted the premium and entered into a contract
 for an additional month's insurance. Had appel-
 lant followed this practice of requiring evidence
 of insurability and thereby set up a new con-
 tract of insurance, we would have had a true
 lapse of the previous contract and the creation
 of a new contract. But appellant did not fol-
 low this practice. When the company accepted
 the payment of October 31 without requiring a
 new statement of health, the company chose to
 recognize the policy as in continuous force with-
 out any lapse. This is further emphasized by
 the fact that the appellant did not tender back
 any part of the premium to cover any period when
 it claimed that the contract was not in force.
 Instead the appellant accepted the payment un-
 conditionally. Our court has held that an insur-

er in order to be in a position to declare a policy lapsed for non-payment of premium must, at the time of the tender of the overdue premium, notify the insured that the premium is accepted conditionally upon the filing of proof of insurability by the insured. See Rallard v. Beneficial Life Insurance Company, supra.

In the Rallard case the court held that an insurance company could require an insured to file a new statement of health and thereby create a new contract of insurance running from the date when the policy was reinstated. But that situation is entirely different from the one under consideration. In this case, if the defendant argues (1) that on the 1st day of October when it accepted payment of a premium in the afternoon to cover the month of September that the policy had lapsed and a new term of insurance was created, then the new term would run from the 1st day of October to the 1st day of November, and there would be no question that respondent was covered when she was

injured; but (c) if the appellant accepted the October 1st premium unconditionally and applied it retroactively for the month of September with no lapse in the insurance coverage, then appellant was bound to do the same thing on October 31st when the premium in question was paid. The Louisiana Case of Richardson v. American National Insurance Co., 137 S. 370 relied on by appellant is distinguished in the Lincke case, supra.

It is submitted, therefore, that respondent has been continuously covered by insurance since the 31st day of March, 1951, up to the present date and that there has never been a gap or lapse in that insurance policy. Consequently, respondent was and is entitled to recover under the terms of the policy to reimburse her for the medical and hospital expenses which she incurred as a result of her injury on the 31st day of October, 1951.

Respectfully submitted,

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