

1991

Maurine Stevenson v. First Colony Life Insurance Company : Brief of Appellee

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

MAURINE STEVENSON,
personal representative of
LAMAR STEVENSON,

Plaintiff/Appellant/
Cross-Appellee,

vs.

FIRST COLONY LIFE INSURANCE
COMPANY,

Defendant/Appellee/
Cross-Appellant.

91-0561-CA

Case No. 900251
Argument Priority 16

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY
Judge Ray M. Harding, Presiding

BRIEF OF APPELLEE AND

CROSS-APPELLANT

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DEC 25 1990

Clerk, Supreme Court, Utah

MAURINE STEVENSON,
personal representative of
LAMAR STEVENSON,

vs.

Case No. 900251
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BRIEF OF APPELLEE AND

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LIST OF ALL PARTIES

Plaintiff

MAURINE STEVENSON, as personal representative of LaMar Stevenson
and as trustee of LaMar Stevenson Trust

Defendants

FIRST COLONY LIFE INSURANCE COMPANY, TALBERT CORPORATION, and
ROBERT FLEISS

Third-Party Defendant

UNITED UNDERWRITERS*

*United Underwriters accepted First Colony's tender of defense
rendering the third-party complaint unnecessary.

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction of this appeal by virtue of the provisions of Utah Code Annotated § 78-2-2(3)(i) in that this appeal was taken from an order of the Fourth Judicial District Court for Utah County over which the Utah Court of Appeals does not have original appellate jurisdiction. The defendant/appellee/cross-appellant is entitled to its appeal as a matter of right by virtue of the order of the trial court entered herein on April 30, 1990, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this appeal:

1. Does a life insurance company effectively terminate temporary life insurance coverage simply by rejection of the insurance application and notice to the applicant of that rejection prior to his death, or must the insurer also return the initial premium and provide written notice of rejection, even where the applicant has received actual notice of the rejection and has no expectation of coverage?

2. Did the trial court err in determining that the Stevensons did not receive adequate notice of the rejection of LaMar Stevenson's application for life insurance?

3. Did the trial court err in determining that the amount of life insurance which became effective upon issuance of the conditional receipt was \$300,000?

STANDARD OF REVIEW

Issues 2 and 3 above present factual questions, while issue 1 presents a purely legal question. This court recently articulated its settled standard of review for considering factual and legal challenges to summary judgment in Ron Case Roofing and Asphalt v. Blomquist, 773 P.2d 1382 (Utah 1989), stating:

A grant of summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c); see, e.g., Geneva Pipe Co. v. S & H Insurance Co., 714 P.2d 648, 649 (Utah 1986). In determining whether the trial court correctly found that there was no genuine issue of material fact, we view the facts and inferences to be drawn therefrom in the light most favorable to the losing party. E.G., *id.* at 649; Atlas Corp. v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987); Beck v. Farmers Ins. Exch., 701 P.2d 795, 802 (Utah 1985). And in deciding whether the trial court properly granted judgment as a matter of law to the prevailing party, we give no deference to the trial court's view of the law; we review it for correctness. E.G., Atlas Corp., 737 P.2d at 229; Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985); see also Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

Id. at 1385. Under this standard of review, the court should give no deference to the trial court's view of the law under Smith v. Westland Life Insurance Company, 539 P.2d 433 (Cal. 1975), that written notice and return of premium are necessary to the termination of a temporary contract of life insurance, but should review

the law, de novo for correctness. On issues 2 and 3, concerning the court's implicit determination that no material facts exist as to the adequacy of the notice of rejection of the life insurance application and as to the amount of coverage created by the conditional receipt, this court should view the facts and inferences to be drawn therefrom in the light most favorable to First Colony Life Insurance Company and reverse the summary judgment unless it is clear that no genuine issues of material fact exist.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

LaMar Stevenson was killed in an automobile accident on October 16, 1986. The plaintiff and appellee, Maurine Stevenson, filed this action against First Colony Insurance Company and others, claiming, among other things, that a valid temporary contract of insurance existed at the time of her husband's death.

Defendant and appellant First Colony Life Insurance Company filed a motion for summary judgment arguing that the temporary contract of insurance created by the conditional receipt was terminated by First Colony's rejection of LaMar Stevenson's insurance application and notification to Mr. Stevenson of that rejection. The plaintiff countered with a motion for summary judgment arguing that the contract remained in force as a result of the failure of defendant to give written notice of the rejection and failure to return the premium prior to LaMar Stevenson's death.

Without oral argument, the trial court granted plaintiff's motion for summary judgment and denied First Colony's motion for summary judgment, relying upon the authority of the California Supreme Court case of Smith v. Westland Life Insurance Company, 539 P.2d 433 (Cal. 1975), and holding that "because there was not adequate notice that plaintiff's temporary insurance had been cancelled, and because the premium was not returned timely, the contract was in full force and effect at the time of Mr Stevenson's death." R. 296-297. A copy of Judge Harding's Memorandum Decision is attached hereto as Exhibit 1 to the Addendum. After objections and oral argument over the amount of the coverage, the court ultimately entered judgment in the amount of \$300,000 plus interest.

On April 30, 1990, the court entered an order for Rule 54(b) certification. R. 487-488.

Defendant/appellee and cross-appellant First Colony filed its notice of appeal with the court on May 16, 1990, appealing the order granting plaintiff summary judgment and denying the motion of First Colony Life Insurance Company for summary judgment.

B. STATEMENT OF FACTS

In May of 1986, Roger Fleiss, LaMar Stevenson's insurance agent employed by Talbert Agency, recommended to LaMar Stevenson that he obtain a life insurance policy with First Colony Life Insurance Company. R. 124, 144-147. On June 30, 1986, LaMar Stevenson filled out and signed an application for life insurance

with First Colony and on July 7, 1986, he gave his agent a check payable to First Colony in the amount of \$410 as an initial premium payment. R. 124, 149-150. The check for \$410 was forwarded to United Underwriters, the general agent in the State of Utah for First Colony Life Insurance Company. United Underwriters negotiated the check.

On that same date, July 7, 1986, Norman Close, another agent of LaMar Stevenson and employee of the Talbert Agency, issued, on behalf of First Colony Life Insurance Company, a conditional receipt stating that coverage was dependent upon the insurer's determination of whether or not the applicant was insurable. R. 124, 152. A copy of the conditional receipt given to LaMar Stevenson is attached hereto as Exhibit 2 to the Addendum of this brief.

At the time the conditional receipt was issued on July 7, 1986, it was standard practice in the life insurance industry that a conditional receipt not be issued for more than \$250,000, a practice which was followed by First Colony Life Insurance Company. Affidavit of Leonard Reynolds, R. 349-350. First Colony Life Insurance Company intended to issue the conditional receipt for the amount of \$250,000, a sum which is \$50,000 less than the \$300,000 amount which the conditional receipt specifically establishes as an amount which cannot be exceeded. Affidavit of Loretta Stacey and attached exhibit, R. 351-353. Upon receipt of LaMar Stevenson's insurance application, United Underwriters informed the Talbert

office that First Colony would not bind coverage under a conditional receipt for more than \$250,000. Exhibit A to Affidavit of Loretta Stacey, R. 353. Talbert, in turn, informed the Stevensons and it was agreed that the amount of insurance effective under the conditional receipt was \$250,000. R. 353. Norman Close testified that Exhibit A of the Loretta Stacey affidavit was accurate in stating that Mr. Stevenson agreed to temporary coverage under the conditional receipt being limited to \$250,000. Transcript of Norman Close Deposition pp. 93-94, 98. Copies of these pages are attached hereto as part of Exhibit 6 of the addendum.

In August of 1986, First Colony Life Insurance Company notified Talbert Corporation that the life insurance application of LaMar Stevenson had been rejected and defendants Roger Fleiss and Talbert Corporation notified the Stevensons that First Colony had rejected the life insurance application. R. 154-158, 161. Plaintiff Maurine Stevenson specifically acknowledged in her deposition testimony that she was told that First Colony had declined coverage on LaMar. Maurine Stevenson deposition, pp. 46-48, 105 and 106, R. 154-158; see also Plaintiff's Answers to Interrogatories at p. 3, R. 161. Copies of pages 46-48, 105 and 106 of the transcript of the deposition of Maurine Stevenson are attached hereto as Exhibit 3 of the Addendum. As of August, 1986, the Stevensons knew that First Colony Life Insurance Company had denied LaMar Stevenson's application and that insurance was not in force. R. 154-158. One month later, on October 1, 1986, LaMar

Stevenson signed and submitted an application for life insurance with Banker's Life Insurance Company which specifically disclosed that he had been declined by First Colony due to the Chapter 11 bankruptcy status of his business. R. 168. A copy of the signature page of this insurance application to Banker's Life Company is attached to this brief as Exhibit 4 of the Addendum.

On September 29, 1986, United Underwriters, the general agent for First Colony, advised Mr. Stevenson's agents, Roger Fleiss and Talbert Corporation, that First Colony was closing its file and would return the premium within ten days. R. 256, para. 7; see also R. 284, Entry for 9-29-86. At no time did First Colony or United Underwriters ever refuse to refund Stevenson's premium deposit; Maurine Stevenson testified that she knew First Colony had denied the application, but understood that the premium would be returned to the agent and used to apply with another company. R. 342-343. She was not disturbed by the fact that the premium was not returned. R. 343. See Exhibit 3 of the Addendum, p. 105 and 106.

LaMar Stevenson was killed in an automobile accident on October 16, 1986, before Banker's Life had finished processing his insurance application. R. 125, 170. Due to oversight on the part of employees of United Underwriters, the premium deposit of \$410 was not returned until after Mr. Stevenson's death, on December 4, 1986. R. 125, 172-173.

First Colony denied coverage for the death of LaMar Stevenson because it had effectively terminated the temporary insurance contract in question by rejecting the application and providing notice of the rejection to the Stevensons over one and one-half months prior to LaMar Stevenson's accidental death on October 16, 1986.

RESPONSE TO APPELLANT'S RELEVANT FACTS

The brief of appellant, already on file with this court, contains a section entitled "Relevant Facts" at pages 4, 5 and 6. None of the factual statements contained in this section of appellant's brief makes an appropriate reference to the record on appeal, and many of the statements made therein and in other parts of the brief contradict facts established in the record.

A copy of the conditional receipt issued to LaMar Stevenson is part of the record in this case, R. 152, and is attached as Exhibit 2 of the Addendum to this brief. The second paragraph of that conditional receipt reads as follows:

SECOND. LIMITS PROVISION: MAXIMUM AMOUNT OF INSURANCE WHICH MAY BECOME EFFECTIVE PRIOR TO POLICY DELIVERY. The total amount of life insurance and ADB which may become effective prior to policy delivery cannot exceed \$300,000.

R. 152. The brief of appellant repeatedly characterizes this language of the conditional receipt as "small print" (Brief of Appellant at 3, 8, 11, 18), "not clear enough to be binding" (Brief of Appellant at 7), "neither plain nor conspicuous" (Brief of Appellant at 14), "ambiguous" (Brief of Appellant at 15). This

court need only review the conditional receipt to understand that the limitation language quoted above is clear, plain, conspicuous, unambiguous, and printed in the same size type as the rest of the conditional receipt.

Appellant's brief asserts that no one explained the terms of the [conditional] receipt to Mr. Stevenson, citing from page 45 of the transcript of the deposition of Norman Close. In fact, the testimony of Norman Close is simply that he did not talk to LaMar about the conditional receipt. As set forth in the factual statement above, upon receipt of LaMar Stevenson's insurance application, United Underwriters informed Stevenson's agents at Talbert that First Colony would not bind coverage under a conditional receipt for more than \$250,000. Exhibit A to the Affidavit of Loretta Stacey, R. 353. The Talbert office, in turn called Mr. Stevenson, who agreed to drop down to \$250,000 which would fall within the limits of coverage which could be bound by the conditional receipt. R. 353. When confronted with this evidence later in his deposition, Mr. Close confirmed its accuracy. Norman Close Deposition transcript pp. 93, 94 and 98. Copies of these pages are attached as part of Exhibit 6 to the addendum.

LaMar Stevenson's understanding that coverage would be limited to \$250,000 under the conditional receipt, is further supported by the fact that the initial complaint in this action contained a prayer for relieve of \$250,000. In addition, it is supported by the undisputed evidence that after he was declined by

First Colony, LaMar Stevenson made a subsequent application to Bankers Life for \$250,000. R. 167.

The depositions of Roger Fleiss and Maurine Stevenson were taken on May 10 and July 26, 1989, respectively; however, defendants did not have an opportunity to fully discover from Roger Fleiss and Maurine Stevenson facts concerning the amount of coverage LaMar applied for, because at the time of the depositions, plaintiff's claim was for \$250,000 and the amount of coverage was not at issue. On October 2, 1989, plaintiff filed a motion for leave to amend the complaint to raise the amount of damages prayed for from \$250,000 to \$500,000. The amended complaint was filed following court approval on November 1, 1989, after commencement of the summary judgment motions and defendants have not had sufficient opportunity to discover from witnesses further evidence relating to the amount of coverage. Affidavit of Denton Hatch, R. 398-399.

Appellant's brief states that Mrs. Stevenson "was told that First Colony "intended" to decline coverage Brief of Appellant at 5. In fact, Mrs. Stevenson's actual testimony did not use the word "intended", but stated that she was told "that First Colony had declined coverage on LaMar". R. 154, Transcript of Maurine Stevenson Deposition p. 46. (Emphasis added), see Exhibit 3, p. 46.

Plaintiff's repeated assertions that LaMar Stevenson did not receive notification of the declination by First Colony are contradicted by the record. By the end of August, 1986, the

Stevensons knew that First Colony had declined LaMar's application. Maurine Stevenson Deposition at 46. R. 154-158. One month later, on October 1, 1986, LaMar Stevenson signed and submitted an application for life insurance with Bankers Life Insurance Company which specifically disclosed that he had been declined by First Colony due to the Chapter 11 Bankruptcy status of his business. R. 168. See copy of the signature page of the Bankers Life application attached to this brief as Exhibit 4 of the Addendum. Clearly, LaMar Stevenson had no reasonable expectation of coverage at the time of his death.

Appellant's brief asserts that Mr. Stevenson wanted his premium returned and asked Fleiss about the premium. This assertion highlights the disingenuous nature of appellant's claim that Mr. Stevenson was not aware of the rejection of his insurance application. Certainly he would not expect a return of premium if he still anticipated that his insurance application would be accepted.

Appellant's assertion that Mr. Stevenson was somehow prejudiced by the retention of the premium is further contradicted by his wife's testimony in the record. Maurine Stevenson testified that she knew First Colony had declined the application, but understood that the premium would be returned to the agent and used by him ultimately for coverage with another company. R. 342-343. She was not disturbed by the fact that the premium was not returned. R. 343. See Exhibit 3 of the Addendum, p. 105, 106. The Steven-

sons had no immediate need for a return of premium, because Bankers Life Insurance Company would not issue a conditional receipt due to Mr. Stevenson's rejection by First Colony. In fact, Bankers Life would never have accepted a premium until completion of the processing of the insurance application, which began two short weeks prior to his death. Norman Close, one of the Stevenson's agents with Talbert in Denver, testified that Bankers Life requested the application COD, that Bankers Life would not accept a conditional receipt and therefore no money was needed with the application. Norman Close Deposition p. 86. He further testified that the return of premium would not have made any difference with respect to the Stevenson's ability to obtain coverage with Bankers Life. Norman Close Deposition p. 87. Copies of pages 86 and 87 of the Norman Close Deposition are attached hereto as part of Exhibit 6 to the Addendum.

SUMMARY OF ARGUMENT

Under Utah law, the issuance of a conditional receipt by a life insurance company after tender of an applicant's initial premium and policy application creates a contract of temporary or interim insurance which is subject to the right of the insurer to terminate the agreement. All that is necessary for the termination of such an agreement is rejection of the application by the insurance company and notice of that rejection to the applicant during his lifetime. The majority of jurisdictions which have considered the question are in agreement with this rule of law.

Under this rule of law, it is clear that First Colony Life Insurance Company effectively terminated its temporary insurance contract with LaMar Stevenson when it rejected his application and provided notice of that rejection over one month prior to his death. There is no factual issue before this court. The record clearly establishes that Mr. Stevenson's application was rejected and that he received notice of that rejection.

The conclusion of the trial court below that a temporary contract of insurance cannot be terminated unless the initial premium is returned and written notice of rejection of the application is conveyed to the applicant is inconsistent with Utah law. This court has aligned itself with the view that rejection of the application and notice thereof are sufficient to cancel a temporary contract of life insurance.

None of the authorities relied upon by the trial court has ever concluded that written notice is required and it is clear that the trial court's conclusion that the notice in this case was inadequate is erroneous.

Because there existed no valid contract of insurance at the time of LaMar Stevenson's death, this court need not consider the question of whether the amount of coverage created by the conditional receipt was \$300,000 or \$250,000. Alternatively, there is evidence in the record which clearly suggests that the amount of coverage created by the conditional receipt was \$250,000, and the trial court erred in concluding that the amount of coverage was

\$300,000, particularly where the defendants were not allowed sufficient time to do discovery on the question after the court allowed plaintiff to amend the complaint to increase her initial demand from \$250,000 to \$500,000.

Appellant Stevenson's repeated assertions that the language of the \$300,000 limitation in the conditional receipt is somehow unclear and ambiguous are contradicted by a reading of the language itself which clearly informs any applicant or average lay person not trained in insurance that the amount of temporary coverage cannot exceed \$300,000. The rule of strict construction urged by appellant is therefore inapplicable and the handwritten \$500,000 amount in the application does not prevail because no ambiguity results from considering it together with the language of the conditional receipt delivered to LaMar Stevenson.

The law does not require that the \$300,000 limitation of the conditional receipt be called to an applicant's attention; however, even if it did, the evidence indicates that prior to notice of the rejection of his application LaMar Stevenson was advised that First Colony would not bind coverage under the conditional receipt for more than \$250,000 and agreed to this limitation.

The Stevensons were not confused or prejudiced in any way by the delay in returning the premium. They knew LaMar had been declined by First Colony long before he applied to Bankers Life over a month later on October 1, 1986, two weeks before his death.

Moreover, the premium was not needed because Bankers Life would not issue a conditional receipt nor would it accept a premium until acceptance of the application and issuance of a policy, which never occurred.

ARGUMENT

I

FIRST COLONY LIFE INSURANCE COMPANY EFFECTIVELY TERMINATED THE TEMPORARY CONTRACT OF LIFE INSURANCE BY REJECTING THE INSURANCE APPLICATION AND COMMUNICATING NOTICE OF THE REJECTION TO LAMAR STEVENSON PRIOR TO HIS DEATH.

In Long v. United Benefit Life Insurance Company, Inc., 29 Utah 2d 204, 507 P.2d 375 (1973), this court considered at length the creation and termination of contracts for temporary life insurance coverage. There, Mr. Long applied for life insurance, made the first premium payment and was given a conditional receipt. Seventeen days later he died in an automobile accident. Three days after his death, the insurer, through its local agents, attempted to give notice to Mr. Long that the application had been rejected for "confidential reasons" and attempted to return the premium. Id. at 376. After considering the legal effect of the conditional receipt, this court adopted the view that the issuance of a conditional receipt by an insurance company after tender of an applicant's initial premium and policy application creates a "contract of temporary or interim insurance" subject to the right of the insurer to terminate the agreement. Id. at 377. This court then ruled that the conditional receipt

. . . created temporary insurance coverage until such time as the insurers had considered the application and determined to issue a policy or reject the risk. Thereafter, the insurer cannot terminate the risk so assumed unless the insured is notified during his lifetime that his application was rejected. The facts are undisputed that Mr. Long did not receive notice of the company's rejection; and, therefore, the company is liable to the beneficiary, Mrs. Long.

Id. at 379. From this court's ruling in Long, it is clear that as a matter of Utah law, an insurer terminates its obligations under a temporary life insurance contract by rejection of the application and notice of the rejection to the applicant during his lifetime.

In the earlier case of Winger v. Gem State Mutual of Utah, 22 Utah 2d 132, 449 P.2d 982 (1969), this court held that no contract of insurance existed in favor of the plaintiff where the insurer made its determination that he was not insurable and elected to decline his application, even though the local agent was unable to contact the insured to communicate the declination to him prior to his fatal injury two days later. Id. at 983.

The majority of other jurisdictions which have considered this question are in agreement with this rule of law that a temporary contract of insurance is terminated by rejection of the application and notice of the rejection to the insured. The Ohio Supreme Court, for example, has held that an "insurer may not be lawfully required to pay a loss against which it had specifically refused to insure or be held liable when it had definitely rejected the application for insurance and thereby refused to accept the

risk." Leube v. Prudential Insurance Co., 73 N.E.2d 76, 77 (Ohio 1947), cited in Quindlen v. Prudential Insurance Co. of Am., 482 F.2d 876, 880 (5th Cir. 1973). In Leube, the court upheld the trial court's directed verdict which was entered because the applicant had received notice of the rejection.

Even the California Supreme Court, in Smith v. Westland Life Insurance Co., 539 P.2d 433 (Cal. 1975), the case relied upon by Judge Harding in granting summary judgment to the plaintiff, conceded that "the most frequently stated rule appears to be that a temporary contract of insurance is terminated by rejection of the application and notice thereof to the insured." Id. at 439. Couch on Insurance likewise states: "The temporary contract is therefore effective until either superceded by a policy . . . or terminated by a rejection of the application, and notice thereof to the insured." 9 Couch on Insurance § 39:208, at 653 (2d Ed. 1985).

Applying the foregoing legal principle, it is clear that First Colony effectively terminated the temporary insurance contract in question by rejection of the application and providing notice thereof to Stevenson over one and one-half months before his accidental death on October 16, 1986. The material facts in this issue are not in dispute. By the first of September, 1986, LaMar Stevenson received notice of the rejection of his application. Mrs. Stevenson testified that Roger Fleiss called her and told her that First Colony had declined coverage on LaMar. Maurine Stevenson Deposition p. 46. R. 54. She also testified as follows:

Q: From the point that Roger Fleiss notified you or United Underwriters, whichever it was first, you understood that you didn't have coverage with First Colony Life; is that correct?

A: Probably.

Maurine Stevenson Deposition, p. 105, R. 157.

Later, on October 1, 1986, LaMar Stevenson signed and submitted an application for life insurance with Banker's Life Insurance Company on which he specifically acknowledged that he had been declined by First Colony due to the bankruptcy status of his business. See Exhibit 4 of the Addendum, R. 168. In short, the undisputed evidence from the record before this court indicates that in accordance with Utah law as established in Long, supra, First Colony effectively terminated its interim insurance contract with LaMar Stevenson by rejection of the application and notice of that rejection prior to his death.

A. Utah Law Does Not Require The Return Of An Applicant's Premium Payment As A Condition For The Termination Of A Temporary Contract Of Insurance.

In her summary judgment motion, plaintiff argued that an insurer cannot terminate a temporary insurance contract without returning the premium tendered with the application, relying on Smith v. Westland Life Insurance Company, 539 P.2d 433 (Cal. 1975), and Tripp v. Reliable Life Insurance Co., 499 P.2d 1155 (Kan. 1972). The trial court accepted this argument, and in his memorandum decision quoted, verbatim, the holding of Smith v. Westland. See Exhibit 1 of the Addendum. The Smith case is representative of

a line of authority adopted by a small minority of courts, which is contrary to the majority position adopted by this court in Long, supra. In addition, the Smith and Tripp cases are clearly distinguishable from this case and are based upon policy considerations which are inapplicable.

As stated above, the California Supreme Court concedes that "The most frequently stated rule appears to be that a temporary contract of insurance is terminated by rejection of the application and notice thereof to the insured." Smith, 539 P.2d at 439. This reference in the Smith case is followed by a lengthy citation of authorities including Service v. Pyramid Life Insurance Company, 440 P.2d 944 (Kan. 1968), which is quoted from with approval by this court in Long v. United Benefit Life Insurance Co., 507 P.2d at 377-379. Couch on Insurance agrees that "a temporary contract is therefore effective until either superceded by a policy . . . or terminated by a rejection of the application, and notice thereof to the insured." 9 Couch on Insurance § 39:207, at 653 (2d Ed. 1985). This rule terminating temporary insurance coverage simply by rejection of the application and receipt of notice also squares with the general principle of contract law that a party exercising the right to terminate a contract is not required to return consideration at the time of communicating the rescission. 12 Williston, Contracts (3rd Ed. 1970) p. 108 et seq.; 5 Corbin, Contracts (1960) p. 607 et seq.

In addition, both the Smith and Tripp cases are clearly distinguishable from this case. As a policy matter, both cases focused on eliminating the confusion or uncertainty which might be caused by retention of premiums by the insurance carrier. In Smith, the insurance company actually issued a policy which modified the coverages from the coverages applied for. Mr. Smith died within twenty-four hours of his last discussion with a company representative, who tried to persuade him to accept the modifications. He had been approached twice about the modifications and probably expected further contact.

In Tripp, the court did not adopt a general rule that return of premium is always necessary, but specifically confined its decision to "the facts disclosed in this record" 499 P.2d at 1159. Those facts revealed that the conditional receipt specifically stated that the insurance company would issue a policy or reject the application within sixty days. The insured died one hundred and four (104) days after submission of the application and it was undisputed that the insurer failed to comply with the provisions of its own conditional receipt, as it had taken no action to either reject the application or notify the insured.

Notwithstanding plaintiff's arguments to the contrary, First Colony's delay in returning Stevenson's premium did not cause confusion or uncertainty, which prompted the rulings in the Smith and Tripp cases. To say that First Colony did not communicate unequivocal notification of its decision requires the plaintiff to

ignore the record. As indicated above, the plaintiff admits having been expressly informed of First Colony's rejection of coverage during a conversation with Roger Fleiss in August of 1986. Plaintiff admitted she had no reasonable expectation of continued coverage under the temporary insurance contract. In such situations, where "the minds of the parties have met upon the point that there is an actual cancellation, or expressly understand that the policy is cancelled, formal tender of the premium is not a condition precedent to cancellation." 17 Couch on Insurance § 67:240, at 693 (2d Ed. 1983).

Furthermore, the fact that Stevenson was aware of the implications of First Colony's rejection of his application is clearly evidenced by his subsequent application for insurance with Banker's Life. Stevenson acknowledged on the Banker's Life Application that First Colony had rejected a previous application for insurance. R. 168, Exhibit 4 of the Addendum.

B. Utah Law Does Not Require Written Notice Of Rejection Of An Insurance Application As A Condition For Termination Of A Temporary Contract Of Insurance.

The trial court appears to have held that the notice of rejection of Mr. Stevenson's application was not adequate because it was not written. See Memorandum Decision, R. 296, Exhibit 1 of the Addendum. This holding appears to be based on an argument from Tripp v. Reliable Life Insurance Company, supra, that written notice is required; however, nowhere does the opinion in the Tripp case make any mention whatsoever of written notice or notification.

Plaintiff's opposition memorandum to the First Colony Motion for Summary Judgment, R. 187, attributes the following quote to the Tripp case:

Similarly, in Tripp v. Reliable Life Insurance Co., 210 Kan. 33, 499 P.2d 1155 (1972), the Supreme Court of Kansas held,

"where application for life insurance was made, and insurer received the initial premium and issued a receipt therefor, a policy of temporary insurance was created, and said policy continued in effect until the insurer declined application, sent written notification to the insured, and returned their premium, notwithstanding contrary provisions of application and receipt." Id. at p. 1159.

Record on Appeal, p. 187. (Emphasis added by plaintiff). The actual language of the opinion in the Tripp case is as follows:

We conclude under the facts disclosed in this record that when an application for life insurance is made and the company receives the initial premium and issues a receipt therefor, a policy of temporary insurance is created and said policy of temporary insurance continues in effect until the insurance company declines the application, notifies the insured, and returns the premium, notwithstanding the provisions of the application and the receipt to the contrary.

499 P.2d at 1159. (Emphasis added). Copies of the actual quote from plaintiff's memorandum and page 1159 from the Tripp opinion are attached as Exhibit 5 of the addendum. In the entire text of the Tripp opinion there is no mention of any requirement of written notification, and plaintiff's inclusion and underlining of the

words "written notification" constitute an egregious misstatement of the law, which was relied upon by the trial court.

In fact, research has failed to disclose even one case from any jurisdiction requiring insurance carriers to dispatch written notice in order to terminate temporary insurance contracts. All that is required is that the insured be " . . . notified during his lifetime that his application was rejected." Long, supra, 507 P.2d at 379. More importantly, a requirement of written notice does not square with the ruling of this court in Winger v. Gem State Mutual of Utah, 22 Utah 2d 132, 449 P.2d 982 (1969), where on facts similar to this case, this court absolved the defendant insurer of liability even though the applicant never received Gem State's notification of rejection of the application just prior to his death. The Winger case does not concern itself with what form of notification Gem State pursued, only that the defendant acted with "reasonable dispatch" in attempting to communicate its action. Id. at 983.

Based upon the foregoing, it is apparent that Utah cases and cases from all other jurisdictions follow the rule that "[i]n the absence of a policy requirement of written notice, any communication of an intent to cancel is sufficient and a writing is not required." See 17 Couch on Insurance § 68:140, at 601 (2d Ed. 1983).

Moreover, the accurate language from the Tripp case, quoted above, makes it clear that the court's conclusion is

confined to the facts disclosed in the record before it, which established that Reliable Life Insurance sat on its hands for 104 days after receiving the Tripp application and attempted to avoid coverage after learning of the applicant's death. Id. at 1159. In this case, there is no question that First Colony acted with reasonable dispatch in both rejecting the application and communicating its rejection. Plaintiff acknowledges communications with Roger Fleiss in August of 1986, little more than a month and one-half after submitting the application. Fleiss provided notice that First Colony had rejected the application due to Stevenson's bankruptcy. The plaintiff cannot possibly bear the burden of proof when she admits that she "probably" knew coverage was terminated after talking to Mr. Fleiss. Maurine Stevenson Deposition pp. 46-48, 105-106, R. 221-224.

No court has ever imposed a requirement of written notice for the cancellation of a temporary insurance contract, and the trial court's reliance upon plaintiff's misstatements of the law on this issue is clearly erroneous.

II

THE TRIAL COURT ERRED IN CONCLUDING THAT THERE WAS NOT ADEQUATE NOTICE OF THE REJECTION OF PLAINTIFF'S APPLICATION.

In the initial memorandum decision filed by the court after consideration of the cross-motions for summary judgment, the court stated: "The issue before the court is whether written notice and return of premium are required to terminate a temporary

life insurance contract." R. 296. Exhibit 1 of Addendum. The holding of the court, however, simply concludes that " . . . there was not adequate notice" Id., R. 296. The memorandum decision is susceptible to two interpretations on this point. The first and most likely is that the trial court concluded that written notification is required and that because First Colony did not provide written notification prior to Mr. Stevenson's death, the notice was inadequate. As argued above, no court in any reported decision has ever required written notice, and under Utah law, all that is required is that the insured be notified during his lifetime that his application was rejected. Long, supra, 507 P.2d at 379.

The second, less likely, interpretation is that Judge Harding examined the facts of the record in this case and somehow concluded that even under the standard of the Long case, Mr. Stevenson did not receive notice of the rejection of his application.

To say that the Stevensons did not receive notice of First Colony's rejection of the insurance application requires plaintiff to ignore the record. Maurine Stevenson testified: "I think the next day or two he returned the call, told me that First Colony had declined coverage on LaMar". Maurine Stevenson Deposition p. 46, R. 221, Exhibit 3 of the Addendum. The Banker's Life application signed by LaMar Stevenson on October 1, 1986, expressly responds "yes" to the question "Have you ever had life or health

insurance rated, declined, modified or cancelled?" Below that, the application states: "First Colony declination due to a business owned filed Chapter 11 - Reorganization." R. 229, Exhibit 4 of Addendum.

There simply is no question of fact on this issue; LaMar Stevenson received actual notice of the rejection by First Colony of his life insurance application before his death and any conclusion by the trial court that he did not receive such notice, or that the notice was somehow inadequate, is clearly erroneous.

III

THE TRIAL COURT ERRED IN CONCLUDING THAT THE AMOUNT OF THE INSURANCE WAS \$300,000, AS THERE EXISTS AN ISSUE OF FACT CONCERNING THE AMOUNT OF COVERAGE CREATED BY THE CONDITIONAL RECEIPT.

Because First Colony effectively terminated the temporary contract of insurance, this court need not consider the questions raised in the remainder of this brief and in appellant's brief involving the amount of insurance coverage created by the conditional receipt. Plaintiff's entire appeal deals with these issues and is responded to in arguments IV through VI below. Alternatively, if this court ultimately considers the question, it must determine whether the trial court correctly found that there was no genuine issue of material fact as to the amount of insurance, and in doing so, must view the facts and inferences to be drawn therefrom in the light most favorable to First Colony Insurance Company, the party against whom summary judgment was granted.

Atlas Corp. v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987). The trial court initially signed a judgment in the amount of \$500,000, but later limited the amount of the judgment to \$300,000 reasoning that plaintiff's judgment should be based upon the conditional receipt rather than the policy applied for. Memorandum Decision, R. 407. In so doing, the trial court failed to take into consideration factual evidence suggesting that the amount of insurance created by the issuance of the conditional receipt was limited to \$250,000. The record in this case contains two affidavits, one from Leonard Reynolds, Executive Vice President of United Underwriters, stating unequivocally, that "it is the standard practice in the industry not to issue a conditional receipt for more than \$250,000, this practice was followed by First Colony Life." R. 350. Also, Exhibit A to the Affidavit of Loretta Stacey indicates that United Underwriters advised Talbert that coverage could not be bound for \$500,000, and that Mr. Stevenson agreed with Talbert that the amount of coverage under the conditional receipt was to be \$250,000. R. 351-353.

Plaintiff's original complaint in this action claimed general damages "in the amount of \$250,000", R. 4, and defendants believe that this was the amount applied for originally by Mr. Stevenson. The depositions of Roger Fleiss and Maurine Stevenson were taken on May 10 and July 26, 1989; however, defendants did not fully discover from Roger Fleiss and Maurine Stevenson facts concerning the amount of coverage LaMar applied for, because at the

time of the depositions, plaintiff's claim was for \$250,000; the amount was not at issue. On October 2, 1989, plaintiff filed a motion for leave to amend the complaint to raise the amount of damages prayed for from \$250,000 to \$500,000. The amended complaint was filed following court approval on November 1, 1989, after commencement of the summary judgment motions in this action and defendants have not had a sufficient opportunity to discover from the witnesses evidence concerning the amount of coverage created by the conditional receipt. See Affidavit of Denton Hatch R. 398-399. The court denied First Colony's requests for further discovery on this issue and simply ruled based upon his interpretation of the language of the conditional receipt. In view of the recent amendment to the complaint and the factual issues created by the affidavits of Leonard Reynolds and Loretta Stacey, the trial court erred in ruling on the amount of coverage without allowing further time for discovery to resolve factual issues as to the amount of coverage under the conditional receipt.

IV

THE \$300,000 LIMITATION OF THE CONDITIONAL RECEIPT IS CLEAR AND UNAMBIGUOUS AND THEREFORE NOT GOVERNED BY THE RULE OF STRICT CONSTRUCTION ADVOCATED BY APPELLANT.

Appellant's Brief repeatedly characterizes the \$300,000 limitation of the conditional receipt as "a limitation in small print," (Brief of Appellant at 3, 8, and 18) "not clear enough to be binding," (Brief of Appellant at 7), "ambiguous," (Brief of

Appellant at 7 and 15), and "neither plain nor conspicuous." (Brief of Appellant at 14). None of these seven conclusory references is supported by reference to the actual language of the conditional receipt given to LaMar Stevenson which plainly and unambiguously states that "the total amount of life insurance . . . which may become effective prior to policy delivery cannot exceed \$300,000." R. 152. Exhibit 2 of Addendum. The entire conditional receipt is printed on one side of a single page with no "fine or small print," and a simple review of the receipt itself by this court will refute appellant's conclusory assertions. Appellant completely fails to articulate with any degree of specificity what it is about the \$300,000 limitation of the conditional receipt that is somehow unclear or ambiguous. Appellant urges this court to apply a rule of strict construction to conclude that the handwritten \$500,000 figure in the application for insurance prevails over the \$300,000 limitation of the conditional receipt and to resolve alleged "ambiguities and uncertainties" in favor of the insured. However, this court has long held that this rule

. . . has no application unless there is some genuine ambiguity or uncertainty in the language upon which reasonable minds may differ as to the meaning.

Auto Lease Company v. Central Mutual Insurance Co., 7 Utah 2d 336, 325 P.2d 264, 266 (1958). Utah courts, as well as the courts of other jurisdictions recognize that if the terms of an insurance contract are clear and unambiguous, those terms are to be interpreted in accordance with their plain and ordinary meaning. L.D.S.

Hospital v. Capital Life Insurance Company, 765 P.2d 857, 858-859 (Utah 1988); Valley Bank & Trust v. U.S. Life Title Insurance Company, 776 P.2d 933, 936 (Utah App. 1989). The plain and ordinary meaning of the terms in the conditional receipt before this court is evident, even for "the average purchaser of insurance who is not trained in law or in the insurance business." Wagner v. Farmers Insurance Exchange, 786 P.2d 763, 765 (Utah App. 1990). Prior to policy delivery, the amount of coverage cannot exceed \$300,000.

The cases cited by appellant invariably deal with ambiguous and uncertain policy provisions and are therefore not controlling. Prince v. Western Empire Life Insurance Company, 19 Utah 2d 174, 428 P.2d 163 (1967), for example is cited as an example of this court's application of the doctrine of reasonable expectations. In Prince it was undisputed that the life insurance company had not rejected the application prior to Dr. Prince's death, and the only question before the court involved resolving an uncertainty as to whether the temporary insurance became effective upon completion of the initial medical examination or whether a subsequent medical examination ordered by the company, but not undertaken prior to the applicant's death, should be determinative. It should be noted that in the Prince case this court specifically quoted the \$50,000 limitation of the conditional receipt (Id. at 164) and specifically held that Dr. Prince was insured "in an amount not exceeding \$50,000 . . .", precisely the amount not to be

exceeded under the conditional receipt. Id. at 169. Contrary to the assertion at page 10 of appellant's brief, it is obvious that this court considered the amount of temporary coverage in Prince and ruled in accordance with the plain and unambiguous limitation of the conditional receipt.

Thompson v. Occidental Life Insurance Co., 513 P.2d 353 (Cal. 1973), is likewise distinguishable. There, the California Supreme Court found ambiguity in the statement that the insurer was not "required" to insure the applicant in excess of amounts specified, noting that nothing in the receipt's language prevented the insurer from voluntarily exceeding the amount specified. Id. at 364. By contrast, the conditional receipt before this court expressly states that the amount cannot exceed \$300,000. R. 153, Exhibit 2 of Addendum (Emphasis added).

Appellant cites three cases from the Colorado Court of Appeals in support of a general rule that an insurer must use clear and unequivocal language evidencing an intent to limit temporary coverage and must also call the limiting conditions to the attention of the applicant. Two of these cases, State Compensation Insurance Fund v. Wangerin, 736 P.2d 1246 (Colo. App. 1986) and Leland v. Travelers Indemnity Company, 712 P.2d 1060 (Colo. App. 1985), have nothing to do with temporary life insurance coverage or conditional receipts, and appellant's reliance upon these authorities is misplaced. State Compensation Insurance Fund v. Wangerin involved an existing workers compensation policy. Leland v.

Travelers Indemnity Co. involved the cancellation and reinstatement of an automobile no-fault policy. Appellant's assertion that these two Colorado cases have anything to do with temporary coverage is simply false.

Sanchez v. Connecticut General Life Insurance Co., 681 P.2d 974 (Colo. App. 1984), is also not controlling. The court's ruling in Sanchez is confined to the circumstances of the case, which did not involve any issue as to the amount of temporary coverage. Mr. Sanchez was notified of his rejection as a standard risk and requested consideration for non-standard coverage; however, the conditional receipt was never delivered to him and he was not informed of a provision in the conditional receipt terminating temporary coverage if the applicant was rejected as a standard risk. Id. at 976-977. It should also be noted that in Sanchez, although the insurance application was for \$1,000,000 in coverage, the temporary insurance contract was limited to \$300,000, even though the insured had not received the conditional receipt.

Likewise, the cases of Puritan Life Insurance Co. v. Guess, 598 P.2d 900 (Ala. 1979), and Keene Corp. v. Insurance Company of North America, 667 F.2d 1034 (D.C. Cir. 1981), cert. den. 455 U.S. 1007 (1982) are not on point. Puritan Life, supra, also involved a conditional receipt which was never delivered to the applicant, who paid the initial premium, but died prior to a required medical examination. Keene v. INA, supra, is an asbestos declaratory judgment action construing the obligations of insurers

under comprehensive general liability policies and is yet another example of appellant's use of string citations containing cases that do not even remotely relate to temporary coverage under a conditional receipt.

Appellant's use of these string citations to argue that courts "often" require that limiting conditions of a conditional receipt be called to the attention of the insured is inaccurate. Appellant cites only two cases, Collister v. Nationwide Life Insurance Company, 388 A.2d 1346 (Pa. 1978), cert. denied, 439 U.S. 1089 (1979) and Young v. Metropolitan Life Insurance Co., 77 Cal. Rptr. 382, 272 Cal. App. 2d 453 (1969), where the court rejected clear and unambiguous language in a conditional receipt delivered to the applicant because the requirement of a medical examination as a prerequisite to temporary coverage was not called to his attention. The decisions of these two cases are contrary to the clear weight of authority of all other jurisdiction, including Utah.

In Fabrizio v. Fidelity and Guaranty Insurance Co., 27 Utah 2, 248, 494 P.2d 953 (1972), this court considered the same unambiguous limitation of a conditional receipt rejected in Collister and Young, i.e., the requirement that the applicant first undergo a medical examination. In upholding the trial court's judgment for the defendant insurance company, this court stated:

The language here provides that the insurance take effect "as of the last of any medical examinations or tests required under the rules and practices of the company or the date of

this payment, whichever shall be the later . . .
. . .

We have carefully reviewed the record in this case and we do not discover error which would require the decision of the trial court to be reversed.

Id. at 955. Utah common law follows the contractual rule that it is not the function of a court to rewrite express and unambiguous terms in a contract to comport with what might be considered fair in a particular situation. Corbin on Contracts, § 559, p. 268 (1960). Utah common law further agrees with authorities on insurance law that ". . . the court is not authorized to rewrite the terms of a binder which is clear." 1 Couch on Insurance 2d § 14:36, at 616 (1959). The \$300,000 limitation of the conditional receipt before this court is simple and unambiguous and therefore not controlled by the various rules of strict construction which appellant urges this court to apply.

V

EVIDENCE IN THE RECORD INDICATES THAT PRIOR TO NOTICE OF THE REJECTION BY FIRST COLONY OF HIS APPLICATION, MR. STEVENSON AGREED TO LIMIT TEMPORARY COVERAGE TO \$250,000 AND THEREFORE NEVER HAD ANY EXPECTATION, REASONABLE OTHERWISE, OF TEMPORARY COVERAGE IN EXCESS OF \$250,000.

Even if it is assumed, for purposes of argument, that the rule of Collister and Young, supra, applies to this case, there is evidence in the record (appellants assertions notwithstanding) that Mr. Stevenson's agents called to his attention the fact that First Colony would not bind coverage under the conditional receipt for

any amount in excess of \$250,000. As set forth in the factual statement above, the affidavit of Loretta Stacey states that United Underwriters informed the Talbert office that they could not bind coverage with First Colony for \$500,000 and the Talbert office called Mr. Stevenson, who agreed to drop down to \$250,000, which would fall within the limits of coverage which could be bound by the conditional receipt. Affidavit of Loretta Stacey, R. 353. The deposition testimony of Norman Close, one of Mr. Stevenson's agents at Talbert confirms the accuracy of this indication. Transcript of Deposition of Norman Close at 93, 94, and 98. His testimony on page 98 confirms that "LaMar wanted the reduction of the amount to \$250,000." See Exhibit 6 to the addendum. In addition, prior to the amended complaint, the original prayer for relief in this case was \$250,000. If the Stevensons had any reasonable expectation of insurance coverage in excess of \$250,000, Maurine Stevenson certainly would have conveyed that expectation to counsel prior to the filing of the complaint. Under these circumstances, even the rule expressed in Young, supra, 77 Cal. Rptr. at 387, would render the \$300,000 limitation controlling. See, Young v. Metropolitan Life Ins. Co., 98 Cal. Rptr. 77, 20 Cal. App. 3d 777 (1971).

VI

THE DELAY IN RETURNING THE PREMIUM DID NOT IN ANY WAY CAUSE UNCERTAINTY OR CONFUSION, NOR DID IT IN ANY WAY PREJUDICE MR. STEVENSON'S EFFORT TO OBTAIN OTHER LIFE INSURANCE.

By the end of August of 1986, the Stevensons clearly understood, as acknowledged by Maurine Stevenson in her deposition testimony, "that First Colony had declined coverage on LaMar." Maurine Stevenson deposition p. 46, R. 154. They also understood that LaMar didn't have coverage with First Colony. Maurine Stevenson Deposition, p. 105, R. 157. Over one month later, on October 1, 1986, LaMar Stevenson finally reached a decision that he was not going to apply for different coverage with a sister company to First Colony and signed and submitted an application for life insurance with Bankers Life Insurance Company, which application specifically disclosed that he had been declined by First Colony. R. 168. As a result of that decision, United Underwriters, the general agent for First Colony specifically advised Mr. Stevenson's agents, Roger Fleiss and Talbert Corporation, that First Colony was closing its file and would return the premium within ten days. R. 256. Clearly, under these circumstances, the retention of the premium for the two week period from October 1 to October 16, when LaMar Stevenson died, did not lead to the uncertainty and confusion which confronted the California Supreme Court in Smith v. Westland Life Insurance Co., 539 P.2d at 442 (1975). First Colony had unequivocally given notice of its declination weeks earlier and had clearly expressed an intention to return the premium.

Appellant's contention that the retention of the premium prejudiced Mr. Stevenson and that "the delay kept Mr. Stevenson from obtaining other life insurance" flies in the face of the record. Maurine Stevenson, who actually made the premium payment and dealt first hand with Mr. Stevenson's agents, testified that she knew First Colony had declined the application, but understood that the premium would be returned to the agent and used by him ultimately for coverage with another company. R. 342-343. She was not disturbed by the fact that the premium was not returned. R. 343. See Exhibit 3 of the Addendum, pp. 105, 106. The Stevensons had no immediate need for a return of the premium because Bankers Life Insurance Company would not issue a conditional receipt. In fact, Bankers Life would never have accepted a premium until completion of the processing of the insurance application, which began two short weeks prior to Mr. Stevenson's death. Norman Close, Mr. Stevenson's agent with Talbert in Denver, testified that Bankers Life requested the application COD, that Bankers Life would not accept a conditional receipt and therefore no money was needed with the application. Norman Close Deposition p. 86. Exhibit 6 of the addendum. He further testified that the return of premium would not have made any difference with respect to the Stevensons' ability to obtain coverage with Bankers Life. Norman Close Deposition p. 87, Exhibit 6 of addendum.

Appellant's suggestion that First Colony has somehow taken arbitrary action to the disadvantage of Mr. Stevenson is

simply inaccurate, and the law of Bonneville Properties, Inc. v. Simmons, 677 P.2d 1113 (Utah 1984) and Resource Management Co. v. Weston Ranch and Livestock Co. Inc., 706 P.2d 1028, 1037 (Utah 1985) is inapplicable to a situation such as this where inadvertence in failing to return the premium did not result in any disadvantage to Mr. Stevenson.

CONCLUSION

Under Utah law, the temporary insurance contract created by the conditional receipt was effectively terminated by First Colony's rejection of the insurance application and notice of that rejection to Mr. Stevenson during his lifetime. It is undisputed that Mr. Stevenson received notice of the company's rejection and, therefore, First Colony Life Insurance Company is not liable to his beneficiary, Mrs. Stevenson. First Colony Life Insurance Company respectfully requests that this court reverse the trial court's entry of summary judgment in favor of the plaintiff and remand the case to the trial court with directions to enter summary judgment in favor of defendant First Colony.

Respectfully submitted this 26th day of October, 1990.

CHRISTENSEN, JENSEN & POWELL, P.C.



Denton M. Hatch
Roger R. Fairbanks

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 26th day of October, 1990, to:

Allen K. Young, Esq.
Douglas A. Baxter, Esq.
YOUNG & KESTER
Attorneys for Plaintiff
101 East 200 South
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Roger Fleiss
175 East 400 South, Suite 330
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Roger R. Fairbank

ADDENDUM

INDEX TO ADDENDUM EXHIBITS

- | | | |
|----|------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|
| 1. | Memorandum Decision | R. 296-297 |
| 2. | Conditional Receipt | R. 152 |
| 3. | Maurine Stevenson Deposition
pp. 46-48, 105-106 | R. 154-158 |
| 4. | Banker's Life Application
signature page | R. 168 |
| 5. | <u>Tripp v. Reliable Life Insurance Co.,</u>
499 P.2d 1155 (Kan. 1972) plaintiff's
misquote, actual page is 1159 | R. 187 |
| 6. | Normal Close Deposition
pp. 86-87, 93-94, 98 | Not paginated
as part of
record on
appeal |

Tab 1

EXHIBIT 1

112A

MAURINE STEVENSON as personal
representative of LAMAR STEVENSON,
and as trustee of LAMAR D. STEVENSON
TRUST,

Case Number CV88-875

RAY M. HARDING, JUDGE

MEMORANDUM DECISION

The Court, having considered the cross motions for summary judgment in this case, will grant plaintiff's motion, and will deny defendant First Colony Life's motion.

Where the insurer has received an application for insurance, together with payment of the premium, and thereafter decides to reject it, the contract of insurance immediately created upon the receipt of the application and payment of the premium is not terminated until (a) the insurer has actually rejected the application and by appropriate notice communicated such rejection to the insured, and (b) refunded the premium payment to the insured. Smith V. Westland Life Ins. Co., 539 P.2d 433 (1975).

The Court holds that because there was not adequate notice that plaintiff's temporary insurance contract had been cancelled, and because the premium was not returned timely,

the contract was in full force and effect at the time of Mr. Stevenson's death.

Counsel for plaintiff to prepare a summary judgment consistent with the terms of this decision and submit it to opposing counsel for approval as to form prior to submission to the court for signature.

Dated this 2nd day of January, 1989.

BY THE COURT:


RAY M. HARDING, JUDGE

cc: Allen K. Young, Esq.
Denton M. Hatch, Esq.
D. Gary Christian, Esq.

Tab 2

EXHIBIT 2

(Please detach and give to Proposed Insured)

NOTICE TO PROPOSED INSURED — PART I

In connection with your application for insurance, an investigative consumer report may be prepared whereby information is obtained through personal interviews with your family, friends, neighbors, business associates, financial sources, or others with whom you are acquainted. This inquiry includes information as to your character, general reputation, personal characteristics, and mode of living. If an investigative consumer report is prepared in connection with your application, you may receive a copy of that report upon written request to the Company.

Information regarding your insurability will be treated as confidential. First Colony Life Insurance Company or its reinsurers may, however, make a brief report thereon to the Medical Information Bureau, a non-profit membership organization of life insurance companies, which operates an informational exchange bureau on behalf of its members. If you apply to another Bureau member company for life or health insurance coverage, or a claim for benefits is submitted to such a company, the Bureau, upon request, will supply such company with the information it may have in its file.

Upon receipt of request from you, the Bureau will arrange disclosure of any information it may have in your file. NOTE (Medical information will be disclosed only to your attending physician.) If you question the accuracy of information in the Bureau's file, you may contact the Bureau and seek a correction in accordance with the procedures set forth in the federal Fair Credit Reporting Act. The address of the Bureau's information office is Post Office Box 105, Essex Station, Boston, Massachusetts 02112 Tel. (617) 426-3660.

First Colony Life Insurance Company or its reinsurers may also release information in its file to other life insurance companies to whom you may apply for life or health insurance, or to whom a claim for benefits may be submitted.

FIRST COLONY LIFE INSURANCE COMPANY, P.O. Box 1280, Lynchburg, Virginia 24505 Tel (804) 845-0911

CONDITIONAL RECEIPT

No. L 0942277

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

The conditions specified in Paragraph "FIRST" must be fulfilled exactly if insurance is to become effective prior to policy delivery. Neither the agent or the medical examiner is authorized to alter or waive these conditions.

received from Lamar Stevenson, this 7th day of July, 19 86 the sum of \$ 410.00/00 in connection with this application for life insurance to the Company. This receipt bears the same date and number as the application.

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

All the following conditions are fulfilled exactly.

- (1) All medical exams, tests, X-rays, and EKG's required by Company rules must be completed
- (2) The first modal premium for the amount of insurance which may become effective prior to policy delivery must be received with this application.
- (3) On the date that insurance becomes effective under the terms of this receipt, each person to be covered must be insurable at the class of risk applied for, for the plan and amount applied for, without change and at the rate of premium paid.

When insurance as provided by the policy applied for and for an amount not exceeding that specified in Paragraph "SECOND" will become effective on the test of:

- (1) the date of Part I of this application;
- (2) the date of completion of all medical exams, tests, X-rays, and EKG's required by Company rules; and
- (3) the Date of Issue, if any, requested in the application

Any alternate or additional insurance applied for will not become effective under this receipt.

SECOND. LIMITS PROVISION. MAXIMUM AMOUNT OF INSURANCE WHICH MAY BECOME EFFECTIVE PRIOR TO POLICY DELIVERY

The total amount of life insurance and ADB which may become effective prior to policy delivery cannot exceed \$300,000. This amount includes any insurance and ADB previously issued or applied for in the Company.

THIRD. RETURN OF AMOUNT REMITTED.

The sum paid in exchange for this receipt will be returned upon demand and surrender of this receipt if:

- (1) no insurance becomes effective under the terms of this receipt, or
- (2) the Company declines this application

This receipt is not valid unless signed by the agent who receives payment. THE PREMIUM MUST BE PAID BY CHECK OR MONEY ORDER MADE PAYABLE TO THE COMPANY. DO NOT MAKE CHECK OR MONEY ORDER PAYABLE TO THE AGENT OR LEAVE THE PAYEE BLANK. Any check or money order given in payment of this premium must be honored on the first presentation for payment. If you do not hear from the Company regarding the proposed insurance within 60 days, notify the Company at its home office in Lynchburg, Virginia. Give the name of the agent, date and amount paid, and the number of this receipt.

Signed at Salisbury this 24th day of July, 19 86

Tab 3

EXHIBIT 3

CERTIFIED COPY

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

-----000000-----

MAURINE STEVENSON as : Civil No. CV-88-875
personal representative of
LAMAR STEVENSON, :

Plaintiff, :

VS. :

Deposition of:

FIRST COLONY LIFE INSURANCE :
COMPANY, TALBERT CORPORATION :
and ROGER FLEISS, :

MAUREEN STEVENSON

(Judge Ray Harding)

Defendants. :

FIRST COLONY LIFE INSURANCE
COMPANY, :

Third-Party Plaintiff, :

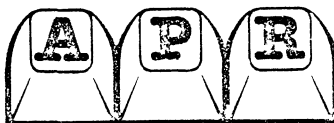
VS . :

UNITED UNDERWRITERS AGENCIES, :

Third-Party Defendant. :

Deposition of MAUREEN STEVENSON, taken at the instance and request of Defendants Talbert Corporation and Roger Fleiss, at the law offices of Kipp & Christian, City Centre I, Suite 330, 175 East 400 South, Salt Lake City, Utah, on the 26th day of July, 1989, at the hour of 10:15 a.m., before DENISE M. THOMAS, a Certified Shorthand Reporter, Utah License No. 129, and Notary Public in and for the State of Utah.

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1 had not yet received the policy and we were concerned.

2 Q When you called Roger's office on the occasion
3 you're telling me about, you identified yourself, I presume?

4 A Oh, yes.

5 Q Did this man seem to know who you were?

6 A Yes.

7 Q When you talked about the policy, did this man seem
8 to know about the policy?

9 A He said he didn't know what the status was, that he
10 would check it out and get back to me.

11 Q Did he?

12 A Yes.

13 Q How much longer?

14 A I think the next day or two he returned the call,
15 told me that First Colony had declined coverage on Lamar. I
16 asked why, because he had cleared everything in the physical
17 aspect. He said because we were in a Chapter 11, the company
18 was in a Chapter 11.

19 Q Was it?

20 A Yes. And I said, "What does that have to do with
21 life coverage on Lamar?" And the fellow said, "You have to
22 understand the mentality of an insurance company," and I said
23 okay. "What do you mean?" He said, "They do not want to
24 issue a policy when someone is in that sort of financial
25 position," and I said, "Why?" He said, "Because of a

1 possibility of suicide," and I said, "Well, so. With suicide
2 the policy isn't in effect anyway." I had no comprehension of
3 what he was trying to tell me, and he said, "Well, there have
4 been such occasions when suicides have been done and looked
5 for real as an accident," and so they were just -- First
6 Colony had backed off because of those reasons.

7 Q Now, when this man, whatever his name was, was
8 giving you the information you have just described, did you
9 understand that he was telling you something that was coming
10 from the company or something he was making up and telling
11 you? How did you take that?

12 A I hadn't thought of that.

13 Q Or did you take it in any sense?

14 A No, I really didn't, just as the facts of what was
15 taking place.

16 Q Who did you talk to next?

17 A Roger then called. He returned --

18 Q How long after?

19 A Just shortly. The next day or so forth.

20 Q Okay.

21 A He again reiterated basically what was said by the
22 fellow in his office and that he didn't see any problem
23 because he could get Lamar right into another company who he
24 didn't see would give this same reasoning or any problem about
25 securing the policy.

1 Q Did Roger give you any more explanation or talked
2 about the Chapter 11 or suicide that this other fellow was
3 talking about?

4 A I don't recall if we got really into that. I
5 suppose we did. I don't remember anything specifically.

6 Q What sticks in your mind was that Roger confirmed
7 yes, First Colony won't issue the policy and we'll just try to
8 get you somewhere else?

9 A Yes.

10 Q Is that what it was?

11 A Yes.

12 Q Any more discussion than that?

13 A He just said that it had been so recent since Lamar
14 had had a physical and all of the other things was in place
15 that all that would be required would be an updated urine
16 specimen and that he would have a kit sent to us to accomplish
17 that.

18 Q About when did this conversation take place, Mrs.
19 Stevenson?

20 A This was at the end of August.

21 Q Who did you talk to next?

22 A Roger himself.

23 Q How much longer?

24 A Within a week or two weeks.

25 Q Was that a call you initiated?

1 Q You may or may not have received it, but you don't
2 recall it?

3 A That's correct.

4 Q It was your understanding, I believe you said, that
5 when you wrote the check, Exhibit 17, you understood that you
6 had coverage with First Colony?

7 A Yeah.

8 Q But you understood that that existed up to, I think
9 you said earlier, a certain point that you had discussed, and
10 I assume you meant by that statement when you were notified by
11 Roger Fleiss that First Colony wouldn't cover you?

12 A That's correct.

13 Q From the point that Roger Fleiss notified you or
14 United Underwriters, whichever it was first, you understood
15 that you didn't have coverage with First Colony Life; is that
16 correct?

17 A Probably.

18 Q When you wrote the premium and you gave it to Roger
19 or Talbert Corporation, and when they started to look for
20 another policy for you, it was your understanding, wasn't it,
21 that you would not receive the premium back --

22 A Yes.

23 Q -- the refund back?

24 A That's correct.

25 Q You knew that First Colony had denied your

1 application, but you understood that the premium would be
2 returned to Roger or his company and that they would reuse it,
3 reapply it in-house to a new policy; is that correct?

4 A Yes.

5 Q So the fact that you didn't have it in hand didn't
6 disturb you; is that right?

7 A That's correct.

8 Q You just assumed that it was being taken care of by
9 Roger and his company?

10 A Yes. I had complete trust in Roger as an agent
11 that these things were handled in his expertise as an agent.

12 Q Did someone tell you that's the way it would
13 happen, or did you just assume that?

14 A No. No one spelled it out, no.

15 Q Did someone tell you when you wrote out the \$410
16 check, Exhibit 17, that coverage was in force at that time?

17 A No, I don't think anyone specifically said that.

18 Q How are you supporting yourself now?

19 A I'm living on Social Security.

20 Q Is that your only source of income?

21 A Yes.

22 Q Did you ever talk to Roger Fleiss about whether he
23 had authority to issue binding insurance when you gave his
24 company the check, Exhibit 17?

25 A Did I have any discussions about that? No.

Tab 4

EXHIBIT 4

INSURANCE APPLICATION

No 306123

	Yes	No
Do you plan to live or travel (other than vacation) outside of the U.S.?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Have you ever had life or health insurance rated, declined, modified or cancelled?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Have you ever requested or received benefits because of injury or sickness?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Do you have an application for life or disability income insurance pending in any company, or have you within the last three months applied for such insurance?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Have you, or do you plan to engage in hang kite gliding, scuba or sky diving, stock, modified, sports car, drag strip, motorcycle, motor boat, snowmobile or other type of racing?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Do you plan to fly or have you, within the last five years flown as a pilot, student pilot or crew member?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Are you or do you intend to become a member of a military service?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Driver's license number <u>1067924</u> . In the last 2 years have you been charged with:		
(a) 2 or more motor vehicle moving violations or accidents?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(b) driving while intoxicated?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(c) suspension or revocation of your license?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Have you in the last five years been arrested for other than traffic violations?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Are you in a regular exercise program (jogging, swimming, etc.)?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Any family history of heart or kidney disease, high blood pressure or cancer?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Within the last 5 years have you:		
(a) been treated or counselled or joined an organization for alcohol or drug use?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(b) used amphetamines, barbiturates, sedatives, LSD, marijuana, cocaine, heroin, or morphine, except as prescribed by a doctor?	<input type="checkbox"/>	<input checked="" type="checkbox"/>

"Yes" answers to 33, 34 and 35 require Sports, Aviation, Military Statement respectively. Explain or give reasons if "Yes" for questions 29 - 32 and 36 - 40.

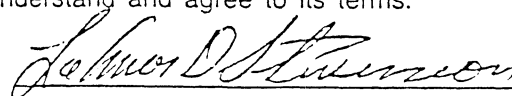
30 First Colony declaration due to a business owned filed Chapter 11 - Reorganization. Business is currently restructuring to continue - no personal reorganization.

I represent that all statements in this application are true and complete to the best of my knowledge and belief. I understand they are the basis of any insurance issued. I agree that, except as the Conditional Receipt provides, the Company shall incur no liability less and until: (1) a policy is issued (2) the policy is received and accepted by the applicant and (3) the first premium is paid. I agree that these three conditions must occur while, as far as the applicant knows, there has been no change since the date of this form in the health or any other factor affecting the insurability of any person proposed for insurance. I agree that only the Home Office is authorized to pass on insurability or to make, change or discharge any contract or waive any of the Company's rights. I agree that the right to change the beneficiary is reserved to the owner unless otherwise provided in question 19. Any change in issue age, amount, class, plan or benefits made by the Company shown under "Amendments" is subject to my written ratification.

I understand the laws of the state listed below shall apply to any policy issued.

This application is COD OR ☐ I have paid \$_____ for ☐ Life ☐ Disability Income insurance. If money paid have been given the Conditional Receipt in return. I have read it, and understand and agree to its terms.

Signature of Applicant or Owner (if other than Proposed Insured) If Owner is Corporation, Officer other than Proposed Insured should sign.



Signature of Proposed Insured
(only if over age 9)

Signature of Parent if
Proposed Insured is under age 15

Signed at Mapleton Utah Oct. 1, 1986
City State Date

Witness


Agent

Tab 5

EXHIBIT 5

other, the retention of the premium indicates that the immediate insurance he was getting for his money is still continuing. This uncertainty in which the applicant finds himself can be resolved by conditioning termination on both notice of rejection and refund of premium. Such a rule will at the same time go far in eliminating risk of unfairness to the applicant, where the circumstances surrounding the rejection of his application and notification thereof to him are disputed. In addition, our decision to adopt this rule is fortified by the fact that it is unconscionable for an insurance company to hold premiums without providing coverage." Smith, at p. 442-443.

Similarly, in Tripp v. Reliable Life Insurance Co., 210 Kan. 33, 499 P.2d 1155 (1972), the Supreme Court of Kansas held,

"where application for life insurance was made, and insurer received the initial premium and issued a receipt therefor, a policy of temporary insurance was created, and said policy continued in effect until the insurer declined application, sent written notification to the insured, and returned their premium, notwithstanding contrary provisions of application and receipt." Id. at p. 1159.

In a recent appellate court decision in the ninth circuit, the court held, "Telephonic notification of an insured that he is not insurable is insufficient to terminate a temporary insurance contract created by an insurance application." State Farm Mutual Insurance Co. v. Khoe, 872 F.2d 1427 (9th Cir. 1989; pending petition for re-hearing).

C. Utah courts also require notice to terminate temporary insurance contracts.

Although the above opinions are not Utah cases, Utah courts have considered similar issues, and have almost universally required notice to the insured of the insurer's rejection of their application. In Winger v. Gem State Mutual of Utah, 22 Utah 2d 132, 449 P.2d 982 (1969), cited by defendants in their motion, the court emphasizes in its decision the fact that the insurer acted within a reasonable time in making its determination that the applicant was not insurable, and in attempting to communicate with the insured its action in declining his application.

one year as there were days intervening between the date of the application and the approval. In other words, the insured would be paying for something which he did not receive. . . .” (p. 214, 440 P.2d 959.)

The defendant distinguishes *Service* from the facts in the instant case for the reason that in *Service* a regional manager of the defendant company had the same power as a general agent and that his statement to the applicant, that the applicant was covered on receipt of the initial premium, was binding on the company. We do not have a general agent in this case. However, the import of the reasoning in *Service*, as far as temporary insurance was concerned, was not based on the status of the agent who made the statement binding the coverage.

We recognize that the death of the applicant in the *Service* case occurred during the sixty-day period. The insured's child in the instant case died forty-five days after the sixty days had passed. The reasoning in *Service*, supporting the theory of temporary insurance, is consistent with an extension of the doctrine of temporary insurance until the company acts upon the application.

This is also in accord with the rule of law established in *Waldner* and *Harvey*, that the company, having received the premium, had a reasonable time and no more than a reasonable time in which to act. It should be pointed out that in the application made by the plaintiff for insurance it was provided that the company would have sixty days from the date of the receipt of the application to determine the insurability of the applicant, and the application further provided that sixty days was deemed to be a reasonable period. In view of this it would logically follow that the insurance company should have returned the premium at the end of the sixty-day period since they had agreed in writing that this was the extent of the time they needed to determine the insurability of the ap-

plicant. Any delay in returning the premium thereafter falls directly under the rule established in *Waldner* and *Harvey*.

[4] The only reason for failure to return the premium at the end of the sixty days would be that the company was still contemplating issuing the policy. We cannot support a rule which would permit an insurance company to make a decision on an application after the insured's death. We conclude under the facts disclosed in this record that when an application for life insurance is made and the company receives the initial premium and issues a receipt therefor, a policy of temporary insurance is created and said policy of temporary insurance continues in effect until the insurance company declines the application, notifies the insured, and returns the premium, notwithstanding the provisions of the application and the receipt to the contrary.

The defendant argues that attorney fees should not be allowed in this case for the reason that the defendant had in good faith a reasonable basis for refusing to pay the plaintiff's claim. We have stated in many instances that the allowance of attorney fees depends upon the facts and circumstances of each particular case and only when the insurer refuses without just cause or excuse to pay in accordance with the terms of the policy can an allowance be made to the insured for reasonable attorney fees. (*Parker v. Continental Casualty Co.*, 191 Kan. 674, 383 P.2d 937.)

[5] In view of the necessity of construing the language of the application and the receipt for the first time as applied to the facts disclosed by this record we feel the defendant had just cause and excuse to refuse payment; therefore, no attorney fees should be allowed. Costs are assessed against the defendant.

The judgment is affirmed in part and reversed in part.

Tab 6

EXHIBIT 6

1
2 IN THE JUDICIAL DISTRICT COURT OF UTAH COUNTY
3 STATE OF UTAH

4 Civil No. CV-88-875

COPY

5 DEPOSITION OF: NORMAN CLOSE, January 23, 1990

6 MAURINE STEVENSON, as personal representative of
7 LAMAR STEVENSON,

8 Plaintiff,

9 v.

10 FIRST COLONY LIFE INSURANCE COMPANY, TALBERT CORPORATION and
11 ROGER FLEISS,

12 Defendants.

13 FIRST COLONY LIFE INSURANCE COMPANY,

14 Third-Party Plaintiff,

15 v.

16 UNITED UNDERWRITERS AGENCIES,

17 Third-Party Defendant.

18
19 PURSUANT TO NOTICE, the deposition of NORMAN CLOSE was
20 taken on behalf of the Defendants and Third-Party Plaintiff at
21 1120 Lincoln Street, Suite 1100, Denver, Colorado 80203, on
January 23, 1990 at 2 p.m., before Jill L. Webster, Registered
Professional Reporter and Notary Public within Colorado.



PARK SPANGLER & WEDGWOOD INC.

FAX 332-9525 • 1600 Grant St., Suite 420, Denver, CO 80203, (303) 532-5966 • 1-800-525-3430

1 contract. That would be my supposition.

2 You have to understand, I don't have a lot of
3 control over that money. Like I said before, in the majority of
4 the cases, in my experience, the money went to the insured. And
5 I have a very difficult time trying to find out when the money
6 was received.

7 Q. If that was her plan--that is, that she would not
8 receive it back, but the agent would reapply it--if that was her
9 plan, you were entirely unaware of it; is that correct?

10 A. That's correct.

11 Q. Did you need it for your re-application to Bankers
12 Life?

13 A. Bankers Life requested the application COD.

14 Q. What does that mean?

15 A. They would underwrite the case, look at the
16 underwriting material, look at the exam from First Colony before
17 they would make a decision.

18 Q. They would not accept a conditional receipt?

19 A. That's correct.

20 Q. Did you not need the money to apply to Bankers
21 Life?

22 A. No.

23 Q. So was there any advantage lost by not having the
24 premium that you know of?

25 A. Advantage to Maurine?

1 Q. To the Stevensons. Were they prejudiced in any
2 way by not having the premium?

3 A. You'll have to explain that one to me.

4 Q. As far as being able to obtain other insurance.

5 A. Would having the money made the insurance go in
6 force with Bankers Life?

7 Q. Yes.

8 A. The answer is no.

9 Q. So having the money would not have made any
10 difference with respect to their ability to obtain coverage?

11 A. They're only accepting the application, not a
12 conditional receipt.

13 Q. So the answer to that question is it would not
14 have made a difference?

15 A. No. Yes, it would not have made any difference.

16 Q. If First Colony said they would return the premium
17 within ten days on September 29, and it was not returned by
18 October 18, do you have an opinion as to whether or not that
19 would be an unreasonable length of time?

20 MR. BAXTER: Object to the form of the question.

21 A. How do I respond to that?

22 MR. BAXTER: That just goes on the record. You
23 can answer his question, if you can.

24 Q. (BY MR. HATCH) This is a yes or no question. Do
25 you have an opinion as to whether 19 days, basically what I'm

1 Q. Have you seen that before?

2 A. No, I haven't.

3 Q. Does that refresh your recollection about--

4 A. \$250,000, yes.

5 Q. It does?

6 A. Yes.

7 Q. What do you recall?

8 A. I had forgotten when and how we arrived at that.

9 Q. Is this memo accurate, to the best of your
10 recollection?

11 A. Yeah, I guess. I think so.

12 Q. Okay.

13 A. I have three questions. May I?

14 Q. Sure.

15 A. In the middle of the memo it says, "There's no
16 covering letter." Is there anything that has come out that
17 describes what that means? I have no idea what that means.

18 Q. Not to my knowledge. It says, "July 13, a
19 conditional receipt signed by Norm Close was mailed to
20 Stevensons. There was no covering letter." I guess we don't
21 have a cover letter in the file and--not that I know of.

22 MR. CHRISTIAN: What's Mr. Close supposed to do
23 with this now?

24 Q. (BY MR. HATCH) Go ahead and ask your questions
25 and I'll ask you a question.

1 A. I would probably disagree with the one statement
2 that says, "Final notice of declination was advised by United
3 Underwriters," because my understanding, as per our
4 notice--Chris's chronology was the file was closed, and I
5 believe that the declination was in August. And so my
6 understanding would conflict with this, as far as this final
7 notice of declination, because in my opinion and in Roger's
8 understanding, we were done in August.

9 Q. (BY MR. HATCH) With respect to the \$250,000, is
10 that--

11 A. I guess it surprises me. And I didn't have
12 anything down in my file about when we decided to do it and how
13 it was done, and it's just missing from my recollection of it
14 entirely when and how and what the process was.

15 Q. Well, let's be clear. Now, can you say whether or
16 not that is accurate?

17 A. I believe it to be accurate.

18 Q. Look at the next one. When I say that and when
19 you say you believe it to be accurate, we're talking about the
20 \$250,000 question, right?

21 A. Yes. What it indicates to me is that we didn't
22 make that adjustment, or the adjustment was requested while the
23 policy was in underwriting. Which would mean that if the policy
24 was issued, it would have come out with an amendment, which is
25 First Colony's standard procedure to say we've reduced the face

1 I'm getting confused with that letter, but I thought there was
2 one, too.

3 Q. (BY MR. HATCH) Just to be clear, back on 38, if
4 was your understanding the reduction--Lamar wanted the reduction
5 of the amount to \$250,000?

6 A. Yes.

7 Q. Did you have an understanding of where the premium
8 was located?

9 A. Supposition.

10 Q. Based on your experience with United Underwriters,
11 you didn't know, is that what you're telling me?

12 A. I can give you my best opinion of where I thought
13 it was; that's at First Colony. Either Lynchburg or in
14 California where the underwriting is, because the check was made
15 out to First Colony.

16 Q. You did not bring any documents with you today
17 pursuant to the subpoena; is that correct?

18 A. No. Everything that I know that exists is
19 represented here, or was duplicated from the files that I had at
20 Talbert Corporation.

21 MR. HATCH: Gary's already produced those to me.
22 You didn't have any new ones?

23 MR. CHRISTIAN: I understand I have the whole
24 file. I haven't checked.

25 MR. GILL: As far as I know, that's right.