

1994

# Lexington Insurance Company v. M&C Management Corporation, an involuntarily dissolved Utah corporation : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Michael L. Schwab; Richards, Brandt, Miller & Nelson.

Kathleen McConkie; Crippen, McConkie & Cline.

---

## Recommended Citation

Brief of Appellant, *Lexington Insurance Company v. M&C Management Corporation*, No. 940260 (Utah Court of Appeals, 1994).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/5939](https://digitalcommons.law.byu.edu/byu_ca1/5939)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

LEXINGTON INSURANCE COMPANY,  
a Massachusetts corporation,

Plaintiff/appellee,

vs.

M & C MANAGEMENT CORPORATION,  
an involuntarily dissolved  
Utah corporation,

Defendant,

and HARRY NAYLOR,

Intervenor/appellant.

Case No. 940260-CA

Priority 15

---

OPENING BRIEF OF APPELLANT/INTERVENOR

---

Appeal from the Third Judicial District Court  
The Honorable Michael R. Murphy, Presiding

---

**UTAH COURT OF APPEALS  
BRIEF**

UTAH

1

1

50

.A10

DOCKET NO. 940260

Harry Naylor, intervenor/appellant  
Kathleen McConkie (Utah Bar No. 3978)  
Crippen, McConkie & Cline  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 537-1508

Lexington Insurance Company, plaintiff/appellee  
Michael L. Schwab (Utah Bar No. A4662)  
Richards, Brandt, Miller & Nelson  
Key Bank Tower, Seventh Floor  
50 South Main Street  
P. O. Box 2465  
Salt Lake City, Utah 84110-2465  
Telephone: (801) 532-5506

**FILED**  
Utah Court of Appeals

**AUG 30 1994**

Marilyn M. Branch  
Clerk of the Court

LEXINGTON INSURANCE COMPANY,  
a Massachusetts corporation,

**VS.**

Case No. 940260-CA

and HARRY NAYLOR,

Appeal from the Third Judicial District Court  
The Honorable Michael R. Murphy, Presiding

Harry Naylor, intervenor/appellant  
Kathleen McConkie (Utah Bar No. 3978)  
Crippen, McConkie & Cline  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 537-1508

Lexington Insurance Company, plaintiff/appellee  
Michael L. Schwab (Utah Bar No. A4662)  
Richards, Brandt, Miller & Nelson  
Key Bank Tower, Seventh Floor  
50 South Main Street  
P. O. Box 2465  
Salt Lake City, Utah 84110-2465  
Telephone: (801) 532-5506

## TABLE OF CONTENTS

Item	Page
Table of Contents	2
Table of Authorities	3
Statement of Jurisdiction	6
Statement of Issues	6
Statement of the Case	7
Nature of the Case	7
Course of Proceedings	7
Disposition in Lower Court	8
Relevant Facts	8
Summary of Argument	14
Argument: The Lower Court Erred in Granting Summary Judgment Because There Were Triable Issues of Material Fact Whether M & C Was An Insured of Lexington	14
Conclusion and Relief Sought	20

*No addendum needed*

## TABLE OF AUTHORITIES

Item	Page
 <u>Cases</u>	
<u>Allegheny Airlines, Inc. v. Forth Corp.,</u> 663 F.2d 751 (7th Cir. 1981)	16
<u>Bergera v. Ideal National Life Insurance Company,</u> 524 P.2d 599 (Utah 1974)	15
<u>Brugioni v. Maryland Casualty Company,</u> 382 S.W.2d 707 (Mo. Sup. Ct., Div. No. 2, 1964)	16
<u>Dienes v. Safeco Life Insurance Company,</u> 442 P.2d 468 (Utah 1968)	15
<u>English v. Kienke,</u> 774 P.2d 1154 (Utah Ct. App. 1989)	6
<u>Fashion Place Investment, Ltd. v. Salt Lake County,</u> 776 P.2d 941 (Utah Ct. App. 1989)	16
<u>Fuller v. Director of Finance,</u> 694 P.2d 1045 (Utah 1985)	15
<u>Heffler v. Tariff,</u> 57 N.Y.S.2d 583 (N.Y. Sup. Ct., App. Div., 1945)	16
<u>Home Sav. &amp; Loan v. Aetna Cas. &amp; Sur.,</u> 817 P.2d 341 (Utah Ct. App. 1991)	15
<u>Hunt v. ESI Engineering, Inc.,</u> 808 P.2d 1137 (Utah Ct. App. 1991)	6
<u>Lazarus v. Manufacturers Casualty Insurance Co.,</u> 267 F.2d 634 (D.C. Cir. 1959)	16
<u>Moore v. Energy Mut. Ins. Co.,</u> 814 P.2d 1141 (Utah Ct. App. 1991)	15
<u>New York Underwriters Ins. Co. v. Union Const. Co.,</u> 432 F.2d 182 (10th Cir. 1970)	16
<u>North American Acc. Ins. Co. v. Canady,</u> 163 P.2d 221 (Okla. 1945)	17

<u>Pacific Insurance Co. of New York v. Christianson,</u> 111 N.W.2d 679 (Iowa 1961)	16
<u>P. E. Ashton Company v. Joyner,</u> 406 P.2d 306 (Utah 1965)	15
<u>Providence Washington Insurance Company v. Stanley,</u> 403 F.2d 844 (5th Cir. 1968)	16
<u>Unigard Ins. Co. v. Studer,</u> 536 F.2d 1337 (10th Cir. 1976)	16
<u>Utah Farm Bureau v. Orville Andrews &amp; Son,</u> 665 P.2d 1308 (Utah 1983)	15
<u>Whitlock v. Old American Insurance Company,</u> 442 P.2d 26 (Utah 1968)	15
<u>Winegar v. Froerer Corp.,</u> 813 P.2d 104 (Utah 1991)	6

#### Rules

Utah Rule of Civil Procedure 24	13
Utah Rule of Civil Procedure 56	17
Utah Rule of Civil Procedure 60(b)	13
Utah Rule of Appellate Procedure 3	6

#### Statutes

Utah Code Annotated, Section 78-2-2(3)(j)	6
Utah Code Annotated, Section 78-2a-3(2)(k)	6

#### Regulations

Utah Administrative Code, R590-89-2	19
Utah Administrative Code, R590-89-3	19
Utah Administrative Code, R590-89-4	19

Utah Administrative Code, R590-89-7E	19
Utah Administrative Code, R590-89-11	19

### Secondary Authorities

4 J. Appleman, INSURANCE LAW AND PRACTICE, section 2341 (rev. ed. 1968)	15
--	----

2A G. Couch, COUCH CYCLOPEDIA OF INSURANCE LAW 2d, section 23.4 (rev. ed. 1984)	16
--	----

#### STATEMENT OF JURISDICTION

This appeal was perfected to the Utah Supreme Court pursuant to Utah Code Annotated, Section 78-2-2(3)(j) and Utah Rule of Appellate Procedure 3. It subsequently was transferred to the Utah Court of Appeals which has jurisdiction pursuant to Utah Code Annotated, Section 78-2a-3(2)(k).

#### STATEMENT OF ISSUES

The sole issue presented for review is whether the lower court erred in granting summary judgment in favor of appellee Lexington Insurance Company on the ground that it was not an insurer of M & C Management Corporation in connection with an injury suffered by appellant Harry Naylor. Appellant Harry Naylor maintains that triable questions of material fact respecting the existence of this insurer/insured relationship precluded the lower court from granting summary judgment.

The standard of review is as follows. The party against whom summary judgment was granted (in this instance, the appellant, Harry Naylor) is entitled to have all facts and inferences from the same examined in a light most favorable to him, and the judgment should be affirmed only where no triable question of material fact is present. This Court reviews issues of law giving no deference to the views of the lower court. See, e.g., English v. Kienke, 774 P.2d 1154 (Utah Ct. App. 1989), aff'd, 848 P.2d 153 (Utah 1993); Hunt v. ESI Engineering, Inc., 808 P.2d 1137 (Utah Ct. App. 1991), cert. denied, 826 P.2d 651 (Utah 1991); Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).



## STATEMENT OF THE CASE

Appellant/intervenor Harry Naylor submits this statement of the case, including a description of the nature of the case, the course of proceedings, the disposition in the lower court, and the relevant facts. For convenience in reference, the appellant Harry Naylor shall be called "Naylor," the appellee Lexington Insurance Company shall be called "Lexington," and M & C Management Corporation shall be called "M & C."

### Nature of the Case

This was an action for declaratory judgment to determine whether Lexington was the insurer under a policy of liability insurance of M & C in connection with an injury suffered by Naylor.

### Course of Proceedings

Lexington filed a complaint and then an amended complaint under the Utah Declaratory Judgment Statute, naming M & C as the defendant, and seeking a determination that Lexington had no insurer/insured relationship with M & C. The amended complaint is found at R. 38-74. Naylor sought leave to intervene, on the grounds that M & C essentially was defunct and unable to defend, and that Naylor was the only party in interest with incentive and means to action by Lexington. R. 85-88. The motion for leave to intervene was granted. R. 107-108. Lexington then moved for summary judgment, arguing numerous grounds, such as the absence of an insurer/insured relationship with M & C, failure by M & C to comply with the covenant of cooperation in the insurance contract, failure of M & C to give the required notice under the insurance

contract, and so forth. R. 137-233. This motion was granted on the question of the insurer/insured relationship, but on no other basis. Reporter's Transcript of Hearing on December 6, 1993, before the Honorable Michael R. Murphy, pages 39-40, at R. 491-492. Final judgment was entered January 20, 1994. R. 440-444. Naylor timely brought this appeal. R. 445-447.

#### Disposition in Lower Court

As described above, Lexington's motion for summary judgment was granted on the issue of the insurer/insured relationship.

#### Relevant Facts

The relevant facts are presented below in roughly chronological order. While reviewing these facts, the Court should bear in mind that the instant action for declaratory relief from which this appeal arises is one of three related lawsuits, described below.

1. In February, 1990, Naylor filed suit for personal injury against three entities, Coordinated Spa Services, Inc. ("CSS"), Fitness America, Inc. ("Fitness"), and M & C. This suit was commenced in the Third Judicial District Court for the State of Utah, and because it is pending before the Honorable John A. Rokich of that Court, it sometimes will be referenced in this brief as "the Rokich litigation." Affidavit of Kathleen McConkie, paragraph 1 and Exhibit A, at R. 297-298 and 304-309.

2. In March, 1990, the complaint in the Rokich litigation was answered for CSS by an attorney, Thomas J. Klc ("Klc"). CSS and Klc are insurance adjusters, licensed as such in the State of Utah.

There is evidence, as indicated below, that they were acting in the capacity of adjustors on behalf of Lexington in connection with the injury to Naylor and the litigation between Naylor, Fitness, and M & C, or in other words, the Rokich litigation. In the answer for CSS, Klc represented that Fitness and M & C were legally defunct and devoid of assets, including presumably insurance, and that in light of these facts, any defense to the complaint probably would be pointless. Affidavit of Kathleen McConkie, paragraph 2 and Exhibit B, at R. 298 and 310-311.

3. Consistent with this answer to the complaint in the Rokich litigation, CSS and Klc represented to the attorney for Naylor, Kathleen McConkie ("McConkie"), that there was no insurance for Fitness or M & C which would cover the injury suffered by Naylor. Affidavit of Kathleen McConkie, paragraph 3, at R. 298.

4. McConkie, however, persisted in this line of inquiry, using discovery to test the representation of CSS and Klc concerning the lack of insurance for Fitness or M & C. CSS and Klc finally acknowledged, in response to discovery requests, that at a certain point in time they had a contractual duty to procure insurance for Fitness and M & C, and that in satisfaction of this duty, they had obtained a policy of insurance from Lexington. Affidavit of Kathleen McConkie, paragraph 4 and Exhibit C, at R. 298-299 and 312-335.

5. After considerable delay, CSS and Klc produced a copy of the Lexington policy. The copy produced, however, did not contain an endorsement naming M & C as an insured, even though, as noted

above, the answers to discovery indicated that the insurance was procured for M & C. Affidavit of Kathleen McConkie, paragraph 5, at R. 299.

6. CSS and Klc then gave McConkie permission to work directly with Lexington in resolving the question of insurance for M & C and recompense in that regard for the injury suffered by Naylor. Pursuant to this permission, in October, 1990, McConkie called the office of Lexington in Massachusetts. Speaking with an employee at Lexington during this call, McConkie learned that CSS and Klc had adjusted claims in times past for Lexington. Indeed, the employee exuded that CSS and Klc had adjusted many claims to the satisfaction of Lexington. Thereafter, McConkie wrote to Lexington, asking for settlement of the claim of Naylor against Fitness and M & C. This correspondence was accompanied by a large packet of claim information, including a profile of Naylor, description of the accident, medical records, and the like. Pleadings from the Rokich litigation between Naylor, Fitness, and M & C also were attached. These pleadings included the admissions of CSS, via Klc, that insurance had been procured for Fitness and M & C through Lexington. The Lexington policy in this regard (as produced by CSS and Klc) was attached as an exhibit to the correspondence. McConkie invited a settlement from Lexington, but warned that she was prepared to default the defendants in the Rokich litigation. The threat of default, in any event, was implicit in the demand, since the litigation, after all, had been pending since February, 1990. Affidavit of Kathleen McConkie,

paragraph 6 and Exhibit D, at R. 299 and 336-342.

7. On January 8, 1991, Lexington responded to McConkie by letter from an employee, Michael Knox ("Knox"). The Knox letter referenced the "insured" under the policy in question as "Star Health and Fitness." The text of the letter mentioned, as "insured," both Fitness and M & C, and disclaimed, as "insured," only CSS. The text of the letter also noted the discovery responses from CSS and Klc in the Rokich litigation which had been attached to the correspondence from McConkie. Lexington, however, denied coverage to any "insured" (whether Star Health, Fitness, or M & C) on the basis of a so-called Self-Insured Retention Clause (or "SIR") in the insurance policy, rather than on the basis, later asserted in the instant suit, that there was no insurer/insured relationship any of the named entities, such as M & C. Affidavit of Kathleen McConkie, paragraph 7 and Exhibit E, at R. 299-300 and 343-346.

8. In early 1991, following this denial of coverage by Lexington, Naylor took judgment by default against Fitness in the Rokich litigation. Then in the spring of 1991, as judgment creditor of Fitness, Naylor sued Lexington in federal district court (before the Honorable David Sam) to collect under the contract of insurance. Lexington answered this suit, denying coverage under the liability policy on various grounds, including the contention that Fitness was not an "insured" with Lexington. In this regard, Knox submitted an affidavit in the federal district court action, explaining that, in his letter to McConkie, dated

January 8, 1991 and noted above, Knox did not mean to imply that Fitness was an insured under the liability policy. Knox testified in this affidavit that the only insureds under that policy were the four entities named on the "Cover Note" and on the "Declarations Page" of the policy. Fitness and M & C are not listed in either of these places. Affidavit of Kathleen McConkie, paragraph 8 and Exhibit F, at R. 300 and 347-351.

9. While the federal district court litigation was pending, and in an effort to persuade McConkie that coverage under the contract of insurance was not available for the injury of Naylor in any event, Lexington revealed a new copy of the liability policy, different from the copy which earlier had been produced in discovery in the Rokich litigation by CSS and Klc. Lexington invited McConkie to meet and confer respecting the implications of this new copy of the insurance policy. This new copy of the insurance policy did not include an endorsement of M & C as an insured. McConkie, however, discovered that this new copy of the insurance policy was bowdlerized. Affidavit of Kathleen McConkie, paragraph 9, at R. 300-301.

10. In July, 1991, McConkie discovered an M & C endorsement to the Lexington policy in the files of the Poulton Insurance Agency. She also learned that, at the time Naylor was injured, in April, 1986, M & C was paying the premiums for this insurance to Lexington. Also in July, 1991, Naylor took default judgment against M & C in the Rokich litigation. Affidavit of Kathleen McConkie, paragraph 10 and Exhibit G, at R. 301 and 352-368.

11. In August, 1991, Lexington filed a motion for intervention in the Rokich litigation. This request for intervention allegedly was for the purpose of moving, under Rule 60(b) of the Utah Rules of Civil Procedure, to vacate the judgment against M & C.<sup>1</sup> The Rule 60(b) pleadings of Lexington implied that the judgment should be overturned because M & C was defunct and bankrupt, and therefore helpless and defenseless, and that due to a want of notice, Lexington was disabled earlier from supplying this defense. (Lexington asked for intervention in the suit, however, for itself, and not on behalf of M & C, as Lexington still was denying coverage under the policy.) In this batch of pleadings, Lexington also acknowledged that the policy of insurance in question covered the property of M & C, but denied that this policy covered the injury of Naylor. Affidavit of Kathleen McConkie, paragraph 11 and Exhibit H, at R. 301-302 and 369-370.

12. In the fall of 1991, Lexington filed the complaint in this action, seeking declaratory judgment against M & C respecting coverage issues under the insurance policy. Naylor intervened in this action, and summary judgment ultimately was granted on the insurer/insured issue in favor of Lexington, all as noted above. Affidavit of Kathleen McConkie, paragraph 12, at R. 302.

---

<sup>1</sup>This was the second motion for intervention and relief brought by Lexington in the Rokich litigation. In the spring of 1991, shortly after Naylor had filed suit against Lexington in federal district court, Lexington had entered the Rokich litigation, invoking Rule 24 and Rule 60(b), Utah Rules of Civil Procedure, in connection with the judgment against Fitness.

## SUMMARY OF ARGUMENT

M & C was an insured under the policy of insurance with Lexington. The determination whether M & C was an insured under the policy of insurance with Lexington is a question of interpretation of the contract of insurance which turns upon the intent of the parties. Where ambiguities in this regard may be present, the policy should be construed against the drafter, Lexington, and in favor of a finding of coverage for M & C and the injured party, Naylor. There is at least a dispute concerning the intent of the parties to include M & C as an insured under the policy with Lexington, and triable issues of material facts on this point preclude the granting of summary judgment.

## ARGUMENT

The Lower Court Erred in Granting  
Summary Judgment Because There Were  
Triable Issues of Material Fact  
Whether M & C Was  
An Insured of Lexington

The question whether M & C is an "insured" under the policy with Lexington turns upon the intent of the parties, as that intent may be deciphered from the language of the contract of insurance, any endorsements to the same, and other facts and circumstances. If there is ambiguity in the language of the policy which bears upon the designation of the "insured," this language is construed strictly against the insurance company, in this instance, Lexington, and in favor of the beneficiary under the policy, M &



C, and the injured party, Naylor.<sup>2</sup>

The law, as a general rule, imposes "no requirement that a person must be described by name in order to be an insured under the policy. It has been held sufficient that his identity as an insured can be ascertained by applying the description contained in the policy." 4 J. Appleman, INSURANCE LAW AND PRACTICE, section 2341, at 328 (rev. ed. 1968).

Likewise, "[t]he insured may be identified in a policy either by name or by description. As the purpose of a name is to

---

<sup>2</sup>E.g., Fuller v. Director of Finance, 694 P.2d 1045, 1046-1047 and n. 1 (Utah 1985) (ambiguities construed against insurer, and "[a]n insured is entitled to the broadest protection he could have reasonably understood to be provided by the policy"); Utah Farm Bureau v. Orville Andrews & Son, 665 P.2d 1308, 1309 (Utah 1983) ("where the policy is ambiguous, doubt is resolved in favor of coverage ... [s]ince a policy is drawn by the insurer, ambiguities are construed against the insurer"); Bergera v. Ideal National Life Insurance Company, 524 P.2d 599, 600 (Utah 1974) (intent of parties is key to interpretation, ambiguities construed against insurer); Whitlock v. Old American Insurance Company, 442 P.2d 26, 28 (Utah 1968) (intent of parties governs; rule of strictissimi juris; this rule "has been applied almost universally to insurance contracts, giving a liberal construction in favor of the insured toward the coverage which the insured reasonably could assume he is buying and for which he pays his premiums ... [in light of this rule, the court has held] that the insured is entitled to the broadest coverage he could reasonably understand from the policy"); Dienes v. Safeco Life Insurance Company, 442 P.2d 468, 470-471 (Utah 1968) (extended explanation giving historical grounds and practical reasons for construing policy in favor of insured; "no ambiguous statement is to be enforced against an insured"); P. E. Ashton Company v. Joyner, 406 P.2d 306, 308 (Utah 1965) (rule of construction in favor of coverage should be applied not only in case of ambiguity, but also where there may be doubt or uncertainty); Home Sav. & Loan v. Aetna Cas. & Sur., 817 P.2d 341 (Utah Ct. App. 1991) (rules of construction which are applied to insurance policy are applicable to applications for insurance as well); Moore v. Energy Mut. Ins. Co., 814 P.2d 1141 (Utah Ct. App. 1991) (good general discussion of rules of construction for insurance policies).

designate the person intended to be insured, any designation which fulfills that purpose is sufficient. Moreover, when the intent to cover a particular risk is clear, the name of the insured is not always important." 2A G. Couch, COUCH CYCLOPEDIA OF INSURANCE LAW 2d, section 23.4, at 772-774 (rev. ed. 1984).

The cases support these principles, emphasizing that the designation of an "insured" is a matter of intent between the parties, e.g., Allegheny Airlines, Inc. v. Forth Corp., 663 F.2d 751, 759 (7th Cir. 1981), and that an "insured" may be added by endorsement to a policy, e.g., Unigard Ins. Co. v. Studer, 536 F.2d 1337 (10th Cir. 1976).<sup>3</sup>

---

<sup>3</sup>In Utah, a party which is not identified by name in a policy nevertheless may be a "defacto [sic] coinsured." Fashion Place Investment, Ltd. v. Salt Lake County, 776 P.2d 941, 945 (Utah Ct. App. 1989) (contest over rights of subrogation). See also, Lazarus v. Manufacturers Casualty Insurance Co., 267 F.2d 634 (D. C. Cir. 1959) ("[t]he primary intent, we think, was to insure a particular business, and not a particular person[;]" policy written for individual using trade name, but coverage extended to partners where the business was a partnership, even though the partnership may have been dissolved or terminated); Providence Washington Insurance Company v. Stanley, 403 F.2d 844 (5th Cir. 1968), on petition for rehearing, 406 F.2d 735 (5th Cir. 1969) (the identity of the insured was for the jury to determine; dispute whether insured was corporation or owners of corporation; also trade name confusion); New York Underwriters Insurance Company v. Union Construction Company, 432 F.2d 182 (10th Cir. 1970) (agent having knowledge of the business and intentions of the parties selected the designation of insured for the policy; insurer estopped from disputing this intent in contest over coverage); Pacific Insurance Co. of New York v. Christianson, 111 N.W.2d 679 (Iowa 1961) (individual operator of a shoe repair shop -- who is paying premiums -- is insured even though policy is in name of "Kramer Shoe Repair Shop," and even though he has inherited operations from retired owner, his father); Brugioni v. Maryland Casualty Company, 382 S.W.2d 707 (Mo. Sup. Ct., Div. No. 2, 1964) (robbery victim entitled to insurance coverage under bank policy, because he comes within losses provision, even though not listed as named insured); Heffler v. Tariff, 57 N.Y.S.2d 583 (N. Y. Sup. Ct., App. Div.,

Applying this law, the facts bearing upon M & C as an insured are at least sufficiently in conflict to defeat a motion under Rule 56, Utah Rules of Civil Procedure, if they do not preclude altogether the argument of Lexington. For a sampling, please consider.

1. There is an endorsement to the policy, specifically naming M & C, and describing the location of the business to be insured -- the same location as the business of M & C, and where Naylor suffered injury. R. at 301 and 352-368.

2. The endorsement naming M & C is consistent with the pattern, reflected in the policy, of naming through endorsement various entities and business locations intended for coverage. One page alone designates 55 different corporations with addresses across the eastern seaboard. R. at 301 and 352-368.

3. Lexington apparently does not consider the named insured (in item one on the declarations page) as the only insured under the policy. The affidavit of Knox, submitted in the federal district court action, states that "21st Century Spas, Ltd.," "Holiday Health, Inc.," and "Spa Lady, Inc." are insureds, even though they are listed on the "cover note," instead of on item one of the declarations page along with "Spa Health and Fitness Centers" (which is not listed on the "cover note"). R. at 300 and 347-351. Moreover, the letter written by Knox to McConkie, dated January 8, 1991, hints that "Star Health and Fitness," an entity nowhere listed on the declarations page or cover note, also may be an insured. R. at 299-300 and 343-346.

---

Third Dept., 1945) (named insured was individual partner, while injured party claimed coverage because of relation with co-partnership; where the policy "expressly covered the place of injury," then the "'name of the insured in the policy is not always important if the intent to cover the risk is clear'" [citation omitted]); North American Acc. Ins. Co. v. Canady, 163 P.2d 221 (Okla. 1945) (use of adopted or trade name, rather than real name; "'[i]t is said that in view of the common-law principle that the office and purpose of a name is only that of identification, if it is clear that an insurance company is not misled as to the identity of the applicant, there seems to be no reason why it should be allowed to avoid the risk on such an account'" [citation omitted])).

4. The letter of Knox to McConkie, dated January 8, 1991, speaking on behalf of Lexington, calls M & C an "insured." R. at 299-300 and 343-346. This admission is cogent evidence that M & C is an insured, given the context of this correspondence. McConkie had written to Knox, inquiring about a settlement from Lexington on account of the three defendants in the Rokich litigation. Her information packet, which accompanied the letter, among other things, contained discovery pleadings wherein CSS and Klc admit the procurement of insurance (the Lexington policy) for M & C. McConkie is threatening a judgment by default. R. at 299 and 336-342. Knox answers McConkie, under threat, and refers to M & C as an "insured." In the same paragraph of this letter, Knox denies that CSS is a Lexington insured. R. at 299-300 and 343-346. In testimony by affidavit in the federal district court action, before Judge Sam, Knox backpedalled from these admissions, stating that his reference to M & C as an "insured" was based upon the allegations of McConkie in her letter to him, and upon his "assumption" that these allegations were correct. R. at 300 and 347-351. This seems an improbable "assumption" for a claims adjuster, especially one who is being threatened with default judgment, and who is addressing a coverage issue in correspondence to an adversary. It seems even more unlikely given the care taken by Knox, in his letter, to distinguish between the three defendants, owning Fitness and M & C as insureds, but disowning CSS as such. Nevertheless, under Rule 56, the lower court should not have resolved these issues of fact. On the contrary, the lower court should have allowed every possible factual inference in favor of Naylor on this motion, and that includes the inference, noted above, that Lexington's own representative admitted that M & C was insured under the policy.<sup>4</sup>

---

<sup>4</sup>Additional circumstances belie the subsequent abjuration of Knox as an employee of Lexington. By the time he replied to McConkie, Knox should have made a reasonable investigation of the Naylor claim -- including the identity of the insureds under the policy. At a minimum, Knox was calling M & C an "insured" after the time allowed for a reasonable investigation. The Utah Insurance Commissioner has promulgated an "Unfair Claims Settlement Procedures Rule" which "affirmatively establish[es] standards of equity and good faith to guide licensees in the settlement of claims." These standards are "minimum standards." Among other requirements, they impose upon insurers a 45 day limit for the "complete investigation of a claim," once notice has been given of the claim to the insurer. If a longer period is needed, the insurer has the burden, "by adequate records," of showing this.

5. As noted above, CSS and Klc admitted, pursuant to discovery requests in the Rokich litigation, that they obtained insurance for M & C, and the only policy which they have identified in this regard is the Lexington policy. R. at 298-299 and 312-335.

6. M & C paid the premiums for the insurance in question. R. at 301 and 352-368.

7. On pages 1-2 of a "Memorandum of Points and Authorities in Support of Lexington Insurance Company's Motion to Intervene" in the action before Judge Rokich, Lexington states: "While it appears that the property in question [the M & C property] was in fact insured by Lexington when plaintiff's cause of action arose, it is also quite clear that the policy issued by Lexington simply does not cover the injuries alleged by plaintiff." R. at 301-302 and 369-370. Although this admission may be half-hearted, it implies at least property coverage. And this coverage seems clear from the endorsement to the policy which lists M & C and gives the address for the spa in Bountiful. R. at 301 and 352-368. Moreover, neither the endorsement nor the policy anywhere bifurcates coverage for M & C along the lines drawn in the above quotation. And the forms submitted by the Poulsen agency in connection with the application for M & C suggest that coverage was intended for liability as

---

And denying a claim, without conducting a reasonable investigation, is defined expressly as an unfair and deceptive act and practice. 3 Utah Administrative Code, R590-89-2, R590-89-3, R590-89-11, and R590-89-7E (1993).

Hence, whether Lexington's notice of the Naylor claim is measured from March, 1990, when the complaint in the Rokich litigation was served upon CSS and Klc as agents for Lexington, or whether it is measured from October, 1990, when after receiving permission from CSS and Klc, McConkie wrote directly to Lexington, the 45 day limit under the Utah Insurance Commissioner's regulations had expired or virtually expired when Knox responded to McConkie. (Notice is defined in the Commissioner's rules to include notice from a third party claimant or his legal representative, and may be to the insurer or to an agent of the insurer, R590-89-4.)

Thus, unless Lexington was guilty of an unfair and deceptive act and practice, it had conducted a reasonable investigation when it denied the Naylor claim in the letter to McConkie. It is improbable that an adjustor for Lexington would have misstated the identity of the insured after a reasonable investigation.


well as property. R. at 301 and 352-368.

The description of law, and the specification of facts, given above, show that Lexington should not have prevailed on the issue of the insurer/insured relationship with M & C on a motion for summary judgment.

#### CONCLUSION AND RELIEF SOUGHT

Naylor believes that, given the standards under Rule 56, the motion for summary judgment of Lexington should not have been granted in the lower court. Triable issues of material fact on the issue of the intent of the parties under the contract of insurance respecting the status of M & C as an insured precluded summary judgment. The judgment of the lower court should be reversed, and the matter remanded for a trial on the merits.

Dated this 30th day of August, 1994.

  
Kathleen McConkie or  
Alan L. Smith  
Attorneys for Naylor  
Crippen, McConkie & Cline  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
Telephone: (801) 537-1508

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this "Opening Brief of Appellant/Intervenor" was served this 30th day of August, 1994, by mail, first class, postage prepaid, addressed to the office of counsel for Lexington Insurance Company, Michael L. Schwab, Richards, Brandt, Miller & Nelson, Key Bank Tower, Seventh Floor, 50 South Main Street, P. O. Box 2465, Salt Lake City, Utah 84110-2465.

Alan Smith