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CREDITOR GROUP LIFE INSURANCE—PROTECTING THE INSURED AGAINST MISREPRESENTATIONS AT THE TIME OF APPLICATION

Increasingly employed in the area of home financing, creditor group life insurance is designed to provide security to the mortgagee beyond the mortgage lien in event of the borrower's death. Unlike individual term life insurance, the group plan involves the issuance of a master policy to the creditor institution insuring the lives of its borrowers with the death benefit, covering the balance of the debt, payable directly to the mortgagee. Since the mortgagee as policyholder assumes complete administration of the plan, the mortgagor enjoys the resulting economies in the form of reduced rates as well as other advantages inuring from group rather than individual coverage.¹

111. Rule 2-2, Rules of the Indiana Supreme Court.

112. *Johns v. State*, 227 Ind. 737, 748, 89 N.E.2d 281, 285 (1949) (dissenting opinion); *Lobaugh v. State*, 226 Ind. 548, 551, 82 N.E.2d 247, 248 (1948); *Wilson v. State*, 222 Ind. 63, 78, 51 N.E.2d 848, 856 (1943).

1. On creditor group life insurance generally, see GREGG, AN ANALYSIS OF GROUP LIFE INSURANCE, at index, 261 (1950).

The arrangements of creditor group insurance differ with the various types of loan transactions and the various types of financial institutions. The particular arrangement discussed in this note which was litigated in *Broidy v. State Mutual Life Assurance Co.*, 186 F.2d 490 (2d Cir. 1951), was designed much like a typical employer group plan. (See note 2 *infra*). The Aetna Life Insurance Company, however, occasionally has written a creditor group plan in which no negotiation with individual debtors is involved. The bank reports a single monthly premium based on the total outstanding balance of insured loans on the first day of the month. Coverage of the borrower is automatic on consummation of the loan, and the borrower's only knowledge of the plan comes by way of the bank's advertising of its loan facilities. (Personal interview with a representative of Aetna Life Insurance Company.) See also a pamphlet, PERSONAL LOAN INSURANCE

Highly important to the future success of this unusual form of insurance is the approach ultimately adopted by the courts in cases arising under the creditor group contract. In the past, individual and group insurance have been accorded differing judicial treatment and this distinction is reflected in the rules of decision applicable to each. Nowhere is the differentiation more significant than in those cases where the insured, at the time of application, has been misled as to important conditions or extent of coverage of the group plan.

In many respects some creditor group plans resemble, at least to the borrower-insured, the ordinary term life insurance transaction. Thus, where the plan is one in which the insured debtor's participation is optional and requires individual application for coverage; where the insured receives an individual certificate evidencing participation; and where the insured bears the total premium expense, it would seem that, in controversies arising out of misrepresentations at the time of application, judicial reliance upon individual life cases would be justified. However, since the insured obtains protection by membership in the group rather than by a separate policy, and is not individually selected by the insurer, the plan is highly analogous to the widely used employer group life insurance. Consequently the creditor group contract is equally amenable to judicial treatment employing precedents in the employer group cases.²

(Aetna Life Insurance Company, 1938). It is beyond the scope of this note to discuss the legal aspects of such a plan.

It is interesting to note that, because of the absence of medical examinations, the success of any group plan depends on the homogeneity of the group of insured lives. It would seem that a group of mortgage debtors is inherently more heterogeneous than a group of employees of one employer, as in an employer group plan. Therefore, the danger of "adverse selection" in creditor group insurance is greater than in employer group insurance.

Creditor group life insurance is to be distinguished from other types of insurance used by creditors for security purposes. It differs from credit insurance, which is insurance against loss sustained by reason of the insolvency of debtors owing the insured, usually for merchandise. See COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 1191 (1929). And it is not the same as ordinary life insurance naming the creditor as the beneficiary, although such ordinary life policies are issued today *pro forma* through the facilities of financial institutions and without medical examinations.

2. Group life insurance is defined as a distinctive plan for insuring groups of persons without individual selection of their lives. GREGG, *op. cit. supra* note 1, at 25. Its most extensive use has been in employee benefit programs, where it is called employer group insurance. In a typical employer group plan, a master policy is issued to an employer covering all or most of his employees with provisions for death and disability benefits. The employees hold individual certificates evidencing participation in the program. Usually coverage ceases at termination of employment. Today, the plans are usually "contributory," *i.e.*, the employer and employee share the premium expense. The employer administers the plan, enlisting new participants, submitting proofs of loss, and keeping records of those covered and the extent of coverage. Because of this economy in administrative expense and the elimination of medical examinations, the group insurer provides security for the wage earner at rates below those for ordinary life insurance.

Generally, see GREGG, *AN ANALYSIS OF GROUP LIFE INSURANCE* (1951); STRONG, *EMPLOYEE BENEFIT PLANS IN OPERATION* 125-149 (1951); Hanft, *Group Life Insurance: Its Legal Aspects*, 2 *LAW & CONTEMP. PROB.* 70 (1935); Notes, *Some Economic and Le-*

In litigation involving individual insurance contracts where the insured has relied upon the unauthorized misrepresentations of the insurer's agent, the rule is well established that the claimant's recovery is not necessarily precluded by a failure to note that the contents of the policy differ from the representations of the agent or that the agent's authority is limited. In so holding, the courts emphasize that it is the representation made at the "time the policy is taken out" that are most likely to be relied upon. Realistically it is noted that the insured, in all probability, never actually reads the terms of the policy. Thus, in the absence of notice of limitation on the agent's authority actually brought home to the applicant, the insurer will be bound by the agent's waivers and interpretation of the terms of coverage set out in the policy.³

This broad protection afforded in the individual term life cases has not been extended to the insured in litigation involving employer group contracts. A majority of the courts have held the claimant bound by the written provisions of the master policy despite contrary representations by the employer at the time of application.⁴ The contention that the employer is the agent of the insurer for purposes of administration of the plan is rejected.

The reasoning supporting this result is premised on traditional contract and agency concepts. Thus, the contract of insurance, the master policy, "runs" between the employer and insurer for the benefit of third persons—the employee.⁵ Since the employer is an adverse party to the contract, receives no commission for insurance solicited, and is not controlled by the insurer, his position cannot be that of an agent.⁶ Indeed the contrary is said to be true,

gal Aspects of Group Insurance Policies, 36 COL. L. REV. 89 (1936); *Group Insurance: Some Legal Problems*, 26 VA. L. REV. 487 (1940). Regarding employee benefit programs in Indiana, see NYHART, *RETIREMENT PLANS IN INDIANA* (Indiana State Chamber of Commerce) (1948); BORDNER, *THE ESTABLISHMENT AND OPERATION OF INDUSTRIAL PENSION PLANS* (unpublished thesis in Indiana University School of Business Library, 1948).

3. *Bible v. John Hancock Mut. Life Ins. Co.*, 256 N.Y. 458, 176 N.E. 838 (1931); *Lewitt v. Jewelers' Safety Fund Soc.*, 249 N.Y. 217, 164 N.E. 29 (1928); *Davern v. American Mut. Liability Ins. Co.*, 241 N.Y. 318, 150 N.E. 129 (1925); *Northeastern Shares Corp. v. International Ins. Co.*, 240 App. Div. 80, 269 N.Y. Supp. 351 (1st Dept. 1934); *Paskie & Co. v. Commercial Casualty Ins. Co.*, 223 App. Div. 603, 229 N.Y. Supp. 121 (1st Dept. 1928). For an excellent discussion see Note, *Power of Unauthorized Agents to Make Binding Modifications of Insurance Policies*, 62 HARV. L. REV. 87 (1948).

4. *Pool v. Protective L. Ins. Co.*, 26 Ala. App. 161, 155 So. 631 (1934); *Equitable L. Assur. Soc. v. Hall*, 253 Ky. 450, 69 S.W.2d 977 (1934); *Rogers v. Metropolitan L. Ins. Co.*, 265 Mich. 202, 251 N.W. 312 (1933). *Cf.* *John Hancock Mut. L. Ins. Co. v. Dorman*, 108 F.2d 220 (9th Cir. 1939); *Equitable L. Assur. Soc. v. Florence*, 47 Ga. App. 711, 171 S.E. 317 (1933); *Leach v. Metropolitan L. Ins. Co.*, 124 Kans. 584, 261 Pac. 603 (1927).

5. *Kingsland v. Missouri State L. Ins. Co.*, 228 Mo. App. 198, 202, 66 S.W.2d 959, 961 (1933).

6. *Duval v. Metropolitan Life Ins. Co.*, 82 N.H. 543, 136 Atl. 400 (1927). See also BROOKE, *SOME PHASES OF GROUP LIFE INSURANCE LAW*, PROCEEDINGS OF THE AMERICAN LIFE CONVENTION, LEGAL SECTION 37 (1948) and cases cited; COX, *LEGAL RELATIONSHIPS, RIGHTS AND OBLIGATIONS UNDER GROUP INSURANCE CONTRACTS*, PROCEEDINGS OF THE

and if the parties must be aligned, the policyholder is more nearly an agent of the employee for purposes of obtaining insurance.

Once the agency relationship is denied and the employee is relegated to the status of a third party beneficiary, the familiar rule to the effect that he must accept the contract as made precludes recovery except upon the express terms of the master policy.⁷ Illustrative of this analysis is *Equitable Life Insurance Company v. Hall*,⁸ involving an employer group policy with permanent disability benefits for employees disabled prior to the age of sixty. The plaintiff admittedly was over the age of sixty at the time of application for coverage; a fact known to the employer. In the action for disability benefits, the employee contended that because of the employer's decision to accept the plaintiff's participation in the plan, the insurer was bound by the employer's action. In denying recovery the court refused to hold the employer to be an agent of the insurer. Moreover, the employee was a third party beneficiary to the contract and having accepted it for his benefit he was bound by its terms. Thus, the approach provides a theoretical barrier whereby the insurer can never be liable contrary to the terms of the master policy. Such analysis is favorable to the insurance company for it renders the dispute a matter of law for the judge, whereby the insurer avoids the "juridical risk" of an adverse jury determination of disputed questions of fact; an almost fatal risk in insurance litigation.⁹

Faced with the potential inequities of this situation, several courts have endeavored to avoid the rigors of the third party beneficiary analysis by familiar judicial techniques.

One method, adopted in a few cases, has been an express rejection of the view that the employer is not the insurer's agent. Typical of these cases is *Equitable Life Assurance Society v. Florence*.¹⁰ There a controversy arose as

AMERICAN LIFE CONVENTION, LEGAL SECTION, 134 (1932) and cases cited. The same reasoning is used in deciding disputes arising out of all other phases of the "life-cycle" of the employer group plan: when the employer knows of the death or disability of the employee, that knowledge cannot be substituted for proof of loss to the insurer. See *Metropolitan L. Ins. Co. v. Quilty*, 92 F.2d 829 (7th Cir. 1937); *Wing v. John Hancock Mut. L. Ins. Co.*, 314 Mass. 269, 49 N.E.2d 905 (1943); *Dewease v. Travelers Ins. Co.*, 208 N.C. 732, 182 S.E. 447 (1935); *Ammons v. Equitable L. Assur. Soc.*, 205 N.C. 23, 169 S.E. 807 (1933). Cf. *Bahas v. Equitable L. Assur. Soc.*, 128 Pa. Super. 167, 193 Atl. 344 (1937), *aff'd* 331 Pa. 164, 200 Atl. 91 (1938) (The policyholder was an employee's association, not an employer). Also, when the employer fails to remit premiums to the insurer, the coverage of the employee has been held to have lapsed. See *Mariotti v. Metropolitan L. Ins. Co.*, 122 N.J.L. 360, 5 A.2d 759 (1939); *Degnan v. Metropolitan L. Ins. Co.*, 178 Misc. 312, 34 N.Y.S.2d 238 (Sup. Ct. 1942); *accord*, *Best v. Equitable L. Assur. Soc.*, 165 Pa. Super. 452, 68 A.2d 400 (1949); *Peyton v. Equitable L. Assur. Soc.*, 159 Pa. Super. 318, 48 A.2d 145 (1946).

7. See notes 5 and 6 *supra*.

8. 253 Ky. 450, 69 S.W.2d 977 (1934).

9. "A juridical risk is . . . a chance that the insurer will have to pay something that he does not owe, because of erroneous or prejudiced determinations of fact in litigation." PATTERSON, ESSENTIALS OF INSURANCE LAW 280 (1935).

10. 47 Ga. App. 711, 171 S.E. 317 (1933). See, *John Hancock Mut. L. Ins. Co. v.*

to whether the insured was an employee of the Standard Oil Company so as to be covered under Standard's group policy. The court stated that even if the insured were not an employee within the terms of the master policy, Standard Oil had actual knowledge of this fact. This knowledge was imputable to the insurer as the employer was the agent of the insurer in submitting the application and having the policy issued.

In finding this agency relationship, the courts have emphasized that all of the insurer's contacts with the employee are through the employer; the lack of any knowledge, or any means of obtaining knowledge, by the employee of the relationship between the insurer and employer; the fact that the employee was instructed to make payment of premiums, to submit proof of loss, etc., to his employer rather than directly to the insurer; and, generally, that the employee had done all that he could reasonably be expected to do in his dealings with the employer.¹¹ Also, the payment of a commission to the employer for conducting the operation of the plan was sufficient to make him the agent of the insurer.¹²

The doctrine of equitable estoppel also has occasionally been utilized to hold the insurer contrary to the terms of the master policy, even by courts that follow the third party beneficiary theory. Thus, in *John Hancock Mutual Life Insurance Co. v. Dorman*¹³ the insurer was estopped from asserting that the status of the insured was not that of an employee. The employer knew of the connection of the insured with the company and accepted the insured's premiums as agent of the insurer, the insured relying upon the representations that he was within the coverage of the group policy.

It is noteworthy that in the *Dorman* case the employer was considered to be an agent of the insurer. Since the employer ordinarily administers the group insurance program, enlisting new participants, submitting proof of loss, and the like, the estoppel doctrine is seldom applicable in those states which are committed to the view that the employer is not an agent of the insurer.

Dorman, 108 F.2d 220 (9th Cir. 1939).

11. This reasoning is found in cases where the employer-as-agent theory has been used in disputes arising out of other phases of the life-cycle of the employer group plan. See *Neider v. Continental Assurance Co.*, 213 La. 621, 632 (1948) (insurer liable after employer's failure to remit premiums). Deduction of the contribution by the employer has been held to constitute payment to the insurer. *Somog v. West Virginia & Kentucky Ins. Agency*, 110 W. Va. 205, 157 S.E. 400 (1931); *Starling v. West Virginia & Kentucky Ins. Agency*, 110 W. Va. 219, 157 S.E. 399 (1931); *accord*, *Missouri State L. Ins. Co. v. Compton*, 73 S.W.2d 1079 (Tex. Civ. App. 1934); *All States Ins. Co. v. Tillman*, 226 Ala. 245, 146 So. 393 (1933).

Also the employer has been considered an agent of the insurer for receiving notice of loss. *Coleman v. Metropolitan L. Ins. Co.*, 127 S.W.2d 764 (Mo. App. 1939); *Sullivan v. John Hancock Mut. L. Ins. Co.*, 110 S.W.2d 870 (Mo. App. 1937); *accord*, *Quinn v. Metropolitan L. Ins. Co.*, 187 Misc. 629, 67 N.Y.S.2d 195 (Sup. Ct. 1946).

12. *Somog v. West Virginia & Kentucky Ins. Agency*, 110 W. Va. 205, 157 S.E. 400 (1930).

13. 108 F.2d 220 (9th Cir. 1939).

This is true since an estoppel can be brought into play against the insurer only when the insurer or its agents has made some representations, or taken some action, upon which the insured has reasonably relied to his detriment.¹⁴ However, if the insurer himself has so misled the employee, he may still be estopped even though the employee is considered a third party beneficiary of the master policy.¹⁵

A third device whereby the employee has escaped being bound by the actions of his employer is the definition of the group insurance relation as that of a tri-party contract between the insurer, employer, and employee.¹⁶ As yet, this definition has been applied solely to prevent cancellation of coverage of an individual employee by the insurer and employer because of termination of the employment of the employee, without notice of such termination to the employee.¹⁷ This departure from orthodox contract theory has been justified on the grounds that the employee has given consideration—payment of premiums—and that such notice is necessary to enable the employee to preserve his right to convert the group coverage to individual insurance, or to obtain another insurance policy.¹⁸ Other courts, while still adhering to the third party beneficiary analysis, have stressed the same factors in recognizing that

14. For discussions of the doctrine of estoppel in employer group cases see Recent Case Note, 62 HARV. L. REV. 317 (1948); Note, *Group Insurance—Relation of the Contracting Parties*, 6 U. OF NEWARK L. REV. 252 (1941).

15. *DeLeon v. Aetna Life Insurance Co.*, 194 Misc. 953, 88 N.Y.S. 2d 415 (N.Y. Mun. Ct. 1949) (insured estopped to deny that first certificate was additional to coverage in later certificate when insurer failed to call in old certificate or notify insured of the change); *Sullivan v. John Hancock Mut. L. Ins. Co.*, 110 S.W.2d 870 (Mo. App. 1937) (insurer estopped by representations of its local office worker); *Beets v. Inter Ocean Casualty Co.*, 159 Tenn. 564, 20 S.W.2d 1040 (1929) (insurer estopped to deny collection of premiums when its agent wrongfully neglected to collect from the employer); *American L. Ins. Co. v. Stone*, 78 Ga. App. 98, 50 S.E.2d 231 (1948) (insurer bound by its agent's representations that employee was an acceptable participant despite the latter's hernia). *Contra*: *Mariotti v. Metropolitan L. Ins. Co.*, 122 N.J.L. 360, 5 A.2d 759 (1939); *cf.*, *Pool v. Protective L. Ins. Co.*, 26 Ala. App. 161, 155 So. 631 (1934); *Rogers v. Metropolitan L. Ins. Co.*, 265 Mich. 202, 251 N.W. 312 (1933).

If the certificate contradicts the terms of the master policy, the certificate should prevail by estoppel. See 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 46 (1941).

16. "The policy on its face purports to be a contract between the defendant [insurer] and the company. But when plaintiff [employee] was given the certificate and contributed her portion of the monthly premium, she became a party to the contract. As applied to plaintiff, the policy then became a tripartite contract. It could not then be modified without the knowledge and consent of plaintiff." *Aetna Life Ins. Co. v. Wilson*, 190 Okla. 363, 366, 123 P.2d 656, 657 (1942).

17. *Aetna L. Ins. Co. v. Wilson*, 190 Okla. 363, 123 P.2d 656 (1942); *Poch v. Equitable L. Assur. Soc.*, 343 Pa. 119, 22 A.2d 590 (1941).

18. See note 19 *infra*. See also *Nick v. Travelers Ins. Co.*, 354 Mo. 376, 189 S.W.2d 532 (1945); *Jones v. Metropolitan L. Ins. Co.*, 156 Pa. Super. 156, 39 A.2d 721 (1944). *Contra*: *Metropolitan L. Ins. Co. v. Thompson*, 203 Ark. 1103, 160 S.W. 852 (1942); *Morales v. Equitable L. Assur. Soc.*, 115 Ind. App. 565, 60 N.E.2d 747 (1945); *Szyman-ski v. John Hancock Mut. L. Ins. Co.*, 304 Mich. 483, 8 N.W.2d 146 (1943); *Degnan v. Metropolitan L. Ins. Co.*, 178 Misc. 312, 34 N.Y.S.2d 238 (Sup. Ct. 1942). On this problem see Goldstein, *Some Legal Aspects of Group Life Insurance*, [1947] *Ins. L.J.* 199, 402, 1023.

group insurance contracts are not like the usual third party beneficiary contract.¹⁹ This is said to constitute an important factor in the construction of the master policy, and these courts have usually managed to construe the policy as requiring that notice of termination be given to the employee.²⁰

The result is that by the rule in most states the group insurer will not be held liable beyond the written terms of the master policy in spite of any misunderstanding that the employer may create in the insured's mind. It becomes interesting, therefore, to consider whether a court when presented with a dispute involving a similar misunderstanding in a creditor group life plan would apply rules laid down in individual insurance cases or would take the judicial approach found in the majority of the employer group cases. Apparently the first appellate case to present a court with an opportunity to make such a choice is *Broidy v. State Mutual Life Assurance Co. of Worcester, Massachusetts*,²¹ decide by the Court of Appeals for the Second Circuit.

19. *Emerick v. Conn. Gen'l. Life Ins. Co.*, 120 Conn. 60, 179 Atl. 397 (1935); *John Hancock Mut. Life Ins. Co. v. Pappageorgu*, 107 Ind. App. 327, 24 N.E.2d 428 (1940).

20. Other techniques than those mentioned in the text have been used in various problems involving employer group plans: (1) All ambiguities in the master policy are resolved against the insurer. See e.g., *Eisen v. John Hancock Mut. L. Ins. Co.*, 230 Mo. App. 312, 91 S.W.2d 81 (1936). (2) The provisions of the certificate were said to be a part of the contract when many of them were not mentioned in the master policy. *John Hancock Mut. L. Ins. Co. v. Dorman*, 108 F.2d 220 (9th Cir. 1939). (3) The employer is said to be the agent by statute in Oklahoma. 36 OKLA. STAT. ANN. § 197. Therefore, the insurer is bound in that state by the employer's representations that the employee was covered, *Voris v. Aetna Life Ins. Co.*, 26 F. Supp. 722 (N.D. Okla. 1939), and by the employer's deduction of the employee's contribution, *Shanks v. Travelers Ins. Co.*, 25 F. Supp. 740 (N. D. Okla. 1938).

A possible substitutionary remedy when the participant has been misled by the policyholder in the administration of the plan is one against the policyholder. *Degnan v. Metropolitan L. Ins. Co.*, 178 Misc. 312, 34 N.Y.S.2d 238 (Sup. Ct. 1942) (employer liable for wrongful cancellation of policy). See *Aetna L. Ins. Co. v. Lembright*, 32 Ohio App. 10, 15, 166 N.E. 586, 588 (1928); *Best v. Equitable L. Ins. Soc.*, 165 Pa. Super 452, 456, 68 A.2d 400, 402 (1949). See COX, LEGAL RELATIONSHIPS, RIGHTS AND OBLIGATIONS UNDER GROUP INSURANCE CONTRACTS, PROCEEDINGS OF THE AMERICAN LIFE CONVENTION, LEGAL SECTION 134, 145-149 (1932); 1 APPLEMAN, INSURANCE LAW AND PRACTICE § 42 (1941). *Contra*: *Metropolitan L. Ins. Co. v. Quilty*, 92 F.2d 829 (7th Cir. 1937) (employer not liable for failure to notify insurer of employee's death); *Colter v. American Woolen Co.*, 270 Mass. 424, 170 N.E. 407 (1930) (employer not liable for failure to give notice of termination of coverage); *Kowalski v. Lovell & Covel Co.*, 266 Mass. 255, 165 N.E. 477 (1929) (same); *cf. Venditto v. Spratt's Patent*, 113 N.J.L. 357, 174 Atl. 697 (1934) (employer not required to renew the coverage); *Minter v. Georgia Piggly-Wiggly Co.*, 185 Ga. 116, 194 S.E. 176 (1937) (employer not liable for misinforming employee that he was eligible for coverage); *accord, Meyerson v. New Idea Hosiery Co.*, 217 Ala. 153, 115 So. 94 (1927) (employer's liability does not extend to the beneficiary).

A labor union was held liable for breach of contract to procure insurance, *International Brotherhood of Boiler Makers v. Rodriguex*, 193 S.W.2d 835 (Tex. Civ. App. 1945).

21. 186 F.2d 490 (2d Cir. 1951), reversing 91 F. Supp. 447 (E.D. N.Y. 1950). There were two preliminary questions raised in the District Court: (1) Whether the case ought to be tried in a New York state court. The District Court re-aligned the loan association with the plaintiff. By so shifting the loan association, the court aligned all

There the group plan had recently been established between the defendant insurance company and a New York savings and loan association. Colonel Broidy, an Air Force officer, who was negotiating the purchase and financing of a home through the association, was invited by a representative of the insurance company to apply for group insurance. The representative, who was present because he was instructing the association in administration of the plan, mistakenly informed Broidy that he would be covered in case of death in a non-commercial aircraft, contrary to the express terms of an "aviation limitation" clause in the master policy. Broidy filed an application without seeing the master policy and later received his certificate, which contained the aviation limitation clause but not the customary "agency limitation" or "non-waiver" clause found in the master policy. Later Broidy was killed in a military aircraft crash, and on the insurer's refusal to pay the association the \$10,000 death benefit on the mortgage indebtedness, his widow sued for reformation to strike out the aviation limitation. The District Court, relying on the rules laid down in the majority of employer group cases, held that Broidy and his widow were bound by the terms of the master policy. The Court of Appeals reversed in an opinion by Judge Clark, holding that the careless misrepresentations at the time of application by the insurer's representative concerning the extent of coverage were binding.

Whatever novel legal theory may be embodied in the case, it may have little effect on group insurance law because the facts were atypical. Instead of dealing with a representative of the insurer, as Broidy did, the insured usually deals solely with the policyholder, *i.e.*, the employer or creditor. Hence, the result can be reconciled with those cases which hold the insurer by estoppel even though the insured is considered a third party beneficiary: Broidy relied on the misrepresentations of coverage by the insurer's representative.

However, two striking elements in the opinion mark the case as a departure from the usual judicial analysis of the nature of the group insurance relationship. First, the remedy of reformation cannot be reconciled with the third party analysis. Reformation makes an instrument correctly speak the terms of a contract. If the primary contracting parties were only the insurer and the association, reformation was an improper remedy since it is available only when the instrument does not speak the agreement of the contractors.²² Further, there was no evidence that these two parties did not fully understand and agree, when the master policy was issued, that there was to be no coverage

New York parties against the insurance company, a Massachusetts corporation. Therefore, diversity jurisdiction was found to exist. 87 F. Supp. 271. (2) Whether the colonel's widow was a proper party to bring the action. 10 F.R.D. 195.

22. See *Pennsylvania Oil P. R. Co. v. Willrock Producing Co.*, 267 N.Y. 427, 434, 196 N.E. 385, 387 (1935); *Leitner v. Goldwater*, 48 N.Y.S.2d 614, 616 (Sup. Ct. 1944). See POMEROY, EQUITY JURISPRUDENCE §§ 112, 870, 1375, 1376 (5th ed., Symons, 1941).

of a non-commercial aviation death. Only if Broidy were a contractor, not a beneficiary, could reformation properly be granted.

Second, the Court's classification of the dispute as one arising out of the formation of a contract, instead of one involving a beneficiary's rights under a pre-existing contract between insurer and policy holder, is significant. The Court rejected defendant's argument that in no event could coverage be extended beyond the terms of the master policy because of the "agency limitation" and "non-waiver" clause contained therein to the effect that no agent could alter its provision. Broidy was not bound by either the agency limitation or aviation limitation clauses because he had not seen them when making application. This principle was transferred from the New York ordinary life, fire and casualty cases²³ to the group case before the court.

The implication of these aspects of the opinion is that the Court considered Broidy something more than a third party beneficiary to a contract. Judge Clark's language strengthens this conclusion, for the insurer was held liable, it seems, not because its representative had misled Broidy, but because ". . . it would be too harsh a requirement to hold that the insurance company's acceptance of the offer which it had directed and canalized in its own type of application could be limited and made nugatory by the insertion of details not brought home to the applicant."²⁴ Indeed, the facts of the case disclose that it was questionable whether the representative of the insurance company was, by any view, its agent.

It is believed that, had the case grown out of careless misrepresentations by an officer of the association rather than a representative of the insurer, the Second Circuit would have *expressly* taken the position that the insured was a party to a tri-partite contract between insurer, creditor and borrower, as it did by implication in the *Broidy* case. Whether the loan association or the insurer would bear the loss in that hypothetical case; the insured's rights would be determined by what he reasonably believed to be the coverage at the formation of his phase of the contract. Consequently, the mortgage indebtedness would be reduced by \$10,000. In other words, by such a "multi-party" analysis, the insured would not be bound by the master policy's exculpatory provisions of which he had no knowledge nor should reasonably have known at the time of his application. As noted above, this multi-party analysis has been used by a few courts in disputes arising out of another phase of the life-cycle of the employer group plans, that is, termination of coverage.

Clearly, Judge Clark was little concerned with the niceties of the group insurance relation. Instead, he was engaged in securing what he felt was con-

23. See note 3 *supra*.

24. *Broidy v. State Mut. L. Assur. Co.*, 186 F.2d 490, 496 (2d Cir. 1951).

sidered to be proper protection for insurance applicants.²⁵ In doing so the entire body of group insurance case law was disregarded. Such decisions open the door to the dangers of parol evidence, leaving the insurer to the fate of a jury's adverse determination of disputed questions of fact. If applied to the typical employer group situation, this approach would impose the same responsibility for the employer's conduct on the insurer as the ordinary life cases impose for the conduct of an insurer's trained agent, over whom the insurer has direct control. In effect, the youthful group insurance business is charged with the mature responsibilities that the law places on the ordinary life business. Decisions such as the *Broidy* case may result in increased premiums for group insurance contracts.

Nevertheless, such an approach is defensible. Responsibility for the inevitable errors occurring in the technical transactions of group insurance should last of all be borne by the insured, who is in no position to discipline the system. The insurer places the group policyholder in a position to deal with the insured, instructs the policyholder how to administer the plan and expects that the insured will deal exclusively with the policyholder. Since the economy of group insurance results from the insurer's use of the policyholder's records and administrative facilities, the insurer, not the individual insured, should bear the burden of those mistakes which occur despite the insured's diligence.

Especially at the time of application, the participant in a group plan needs protection. He cannot be expected to distinguish between statements that are in derogation of the master policy and those that are not. The judicial attitudes embodied in the *Broidy* case places the task of minimizing the opportunities for dispute on the group insurer. Personnel administering the plans must be schooled fully in the meaning of the various terms of coverage; "intended policy limitations"²⁶ must be brought home to the individual participants at the time of application, just as is now done in other forms of insurance.

25. It is significant that Judge Clark in the opinion of the *Broidy* case referred to *Gaunt v. John Hancock Mut. L. Ins. Co.*, 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947), 60 HARV. L. REV. 1164, a case also involving a formation-of-contract problem, but in the context of the effect of a binding receipt on an ordinary life policy. There, in a concurring opinion, he said the insurer should be liable because of the "inequities" involved if the insured were to be required to comprehend confusing wordage in the application providing for a delay in the beginning of coverage. See Schultz, *The Special Nature of the Insurance Contract—A Few Suggestions for Further Study*, 15 LAW & CONTEMP. PROB. 377 at 383-4 (1950).

26. *Broidy v. State Mutual L. Assur. Co.*, 186 F.2d 490, 496 (2d Cir. 1951).