IN THE COURT OF APPEALS OF IOWA

No. 3-159 / 91-1039

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DAVID DeVETTER,

Plaintiff-Appellant,

vs.

PRINCIPAL MUTUAL LIFE INSURANCE COMPANY f/k/a THE BANKERS LIFE,

Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

The plaintiff appeals from a judgment of the district court granting the defendant's motion for summary judgment and dismissing his claim for disability benefits. **REVERSED.**

David DeVetter, pro se, Tracy, Minnesota, for appellant.

Eric F. Turner of Herrick, Langdon & Langdon, Des Moines, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

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SACKETT, J.

Plaintiff-appellant David DeVetter suffered a mental disability and left his employment with the Camanche Community School on January 18, 1980. The Camanche District had a group insurance policy issued by defendant-appellee Principal Mutual Life Insurance Company. Plaintiff was insured for disability under the terms of the policy. Although the plaintiff became totally disabled in January 1980 and qualified for and commenced receiving social security disability in October 1982, he did not make a claim under the school district's policy with defendant until July 1987, some seven and one-half years after the onset of his disability. The question is whether the trial court properly sustained defendant's motions for summary judgment and accepted defendant's computation of benefits owed plaintiff. We reverse.

Defendant determined plaintiff was entitled to a monthly income benefit commencing six months before the claim was filed. Defendant, therefore, agreed to pay plaintiff beginning January 22, 1987, a benefit calculated to be $50. The monthly amount of $50 to be paid plaintiff for sixty months or until January 21, 1992, providing plaintiff's disability continued. Plaintiff contends his sixty months of benefits should have been computed for the sixty months following his disability. Plaintiff claimed he was entitled to receive disability income from the date of his total disability, January 18, 1980, and he should

receive $30,693 for sixty months of total disability beginning on said date.

The policy pays for sixty months of disability. The policy payments are reduced by social security benefits received. Because there was a ten-month lag between the onset of plaintiff's disability and his receipt of social security benefits, plaintiff would be entitled to larger benefits from defendant if defendant's responsibility to pay benefits commenced when he was actually disabled rather than six months before his claim was filed.

It is agreed defendant was required to accept the claim filed seven and one-half years after the onset of the disability because of the following language which appears under section 10 of the insurance policy:

> Failure to furnish notice or proof within the time fixed in this policy will not invalidate or reduce any claim if it shall be shown that it was not reasonably possible to furnish such notice or proof on time and that it was furnished as soon as reasonably possible.

The parties agreed plaintiff's mental incompetency prevented him from filing a claim sooner.

While the issue comes to us as a summary judgment, in reality, the trial court interpreted the contract.

Construction of a contract, the process of determining its legal effect, is always a matter of law to be resolved by the court. Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 107 (Iowa 1981). The cardinal principle is that the intent of the parties must control; and except in cases of ambiguity, this is determined by what the contract

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itself says. Smithway Motor Xpress, Inc. v. Liberty Mut. Ins. Co., 484 N.W.2d 192, 194 (Iowa 1992). We will not write a new contract of insurance between the parties where there is no ambiguity. Cairns v. Grinnell Mut. Reinsurance Co., 398 N.W.2d 821, 824 (Iowa 1987).

Section 10 states that when notice of a claim is given as soon as is reasonably possible, such a claim will not be invalidated or reduced on the ground it is untimely. Here, the claim is not being invalidated on the ground it is untimely. Defendant accepted the claim, even though it was untimely by several years.

Defendant argues section 12 provides benefits will not accrue for the period prior to six months before the proof of claim is filed. This provision applies to all claims, not only those which have been accepted although they are untimely. Thus, section 12 does not act to invalidate or reduce untimely claims.

The question is whether the provision is contrary to public policy. In Chagnon v. Metropolitan Life Ins. Co., 75 A. 2d 167 (N.H. 1950), the court considered a six-month retroactive limitation provision similar to that found in the present case. Id. at 169. The court found the provision had no applicability where the plaintiff was unable to give the required proof of disability due to mental incompetency. Id. The court stated:

> Strict compliance with the contract is not enforced where it will produce a forfeiture so that the insane are protected from the results of their own incapacity.

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Id. at 169-70.

The Iowa Supreme Court has previously stated that a condition precedent in an insurance contract requiring notice or proof of disability is excused where its performance is impossible by reason of the physical or mental incapacity of the insured. Levitt v. New York Life Ins. Co., 230 Iowa 456, 461, 297 N.W. 888, 892 (1941); McCoy v. New York Life Ins. Co., 219 Iowa 514, 518, 258 N.W. 320, 322 (1935).

Defendant argues the six-month retroactive limitation provision does not cause a forfeiture of benefits, but only provides a time limitation on the accrual of benefits for anyone who files a claim of disability. Defendant advances plaintiff is still entitled to sixty months of disability benefits, the same number of monthly benefits he would be entitled to if the six-month retroactive limitation provision had not been enforceable. Defendant argues, therefore, the provision has only operated to reduce, not to deny, plaintiff benefits based on his mental incapacity.

The disability for which the plaintiff claims relief commenced while the policy was in good standing. Section 10 would be of little benefit whatever to the insured unless it operated to excuse both the giving of notice and the making of due proof, where not reasonably possible. An extension of time to give notice of claim

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preceding the making of due proof surely must fairly be construed as an extension of time to furnish such proof of that claim. Levitt, 230 Iowa at 461, 297 N.W. at 892.

The benefits should have been paid for the sixty-month period following the onset of plaintiff's disability.

REVERSED.