IN THE HO-CHUNK NATION TRIAL COURT

Robert M. Berglin Estate, and, **Lyle R. Berlin** and **Kristine Berglin**, in their own right, Plaintiff, vs. **Ho-Chunk Nation** and its, Tribal Enterprise, the Ho Chunk Casino, Defendant	:	Case No.: CV 97-172 **JUDGEMENT**

Appearances by Beverly Wickstrom and Jeff De La Rosa for the defendant, and Russel W. Devitt for the plaintiffs in a Trial before Hon. Mark Butterfield, HCN Chief Trial Judge August 20, 1998.

Introduction

This is a case seeking to establish whether a valid contract for life insurance was created between the plaintiff and the defendant. It presents relatively novel issues of contract formation and construction, as well as, parole evidence.

The plaintiff is the estate of a young man employed by the Ho-Chunk Nation as a black jack dealer in its Casino in Baraboo, Wisconsin. Mr. Berglin was relatively young, 21 years old, at the time he died while in the employment of the Casino. What gives rise to this case is the ambiguity over whether he elected life insurance as part of his benefits package after having successfully completed his 90-day probationary period. The tragic part of this case is that Mr. Berglin died not long after beginning work in an unrelated traffic accident in April 1997. The ambiguity of whether he had life insurance is present because Mr. Berglin did not affirmatively check the box requesting life insurance, but did not also sign a waiver of life insurance which is

stated to be mandatory in the insurance enrollment form. The question remains as to whether a contract for the life insurance was properly formed.

Findings of Fact

The Court makes the following findings of fact after a Trial on the merits:

1. Mr. Robert M. Berglin was hired as a blackjack Dealer at the Ho-Chunk Casino in Baraboo, WI on July 21, 1996, although he signed some pre-employment paperwork on July 18, 1996. Exhibit 31. The Casino is a wholly owned enterprise of the Ho-Chunk Nation, a federally recognized Indian Tribe. The Casino is located on the trust lands of the Ho-Chunk Nation.
2. At the time he was hired Robert Berglin had a small J.C. Penney term life insurance policy. Prior to that and up to at least June 1996 he was covered for health and life insurance by his father's group policies. Lyle Berglin, Robert's father, testified that he impressed on his two children to have car, life and health coverage after high school.
3. As part of his employment benefit package Mr. Berglin was offered a number of options for insurance coverage, including Health, Life, Dental and Vision Insurance coverage which he was eligible for after having completed a 90 day probationary period. Mr. Berglin's 90 day probationary period was completed October 21, 1996. Mr. Berglin passed his probation with an above average employee evaluation. Exhibit 31.
4. Mr. Berglin, along with other newly hired employees, was required to attend a meeting at the Casino where he filled out a Ho-Chunk Nation *Employee's Group Enrollment Application* [EGEA] form. Exhibit 1. This form is dated October 30, 1996.

5. The EGEA form lists insurance coverage in a series of five boxes in Section 4 of the EGEA: Medical Plan, Dental Plan, Single, Family, Employee Life/ADD.[1] Mr. Berglin clearly marked Medical Plan with an X, Dental Plan with an X, and single with an X. The other two boxes are empty, i.e., Family[2] and Employee Life/AD&D. Exhibit 33.

6. In addition to the above coverage, Mr. Berglin listed no names under "Information about your Family." EGEA Section 3. Under EGEA Section 6, Information about your Beneficiary for Term Life coverage, Mr. Berglin wrote in "M. Kristine Berglin" under Beneficiary Designation and "Lyle R. Berglin" under Contingent Beneficiary Designation. *Id*.

7. The EGEA continues on page two, which states: "You must complete this form if you are waiving (declining) any of the coverage available to you through your employer. I hereby waive insurance coverage for: Myself: Life Health Dental; My Spouse: Health, Dental; My Dependent Children: Health, Dental. No boxes on this form are checked. Id.

8. Mr. Berglin died April 17, 1997 in a non-work related automobile accident.

9. The defendant offered the testimony of the Insurance benefits specialist who conducted the new employee orientation briefing where Mr. Berglin filled out his Employee Group Enrollment Application for Insurance. The testimony contradicts the written form which mandates that Mr. Berglin must fill out the waiver form by testimony that the employees were told not to fill that out if they later wished to enroll for Group life insurance.

10. Included in the EGEA is an additional form titled, "*Insurance Benefits and Services – Non Tribal Employee*." Exhibit 2. In that form are detailed cost breakdowns of the employee portion of insurance costs, i.e., Single Health has a $250 deductible and a

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[1] It is assumed for the purposes of this opinion that ADD refers to "Accidental Death and Dismemberment" coverage, though there is no other reference to this type of coverage elsewhere. It is also understood for the purposes of this opinion that this is a reference to the Nation's standard term life insurance.

[2] Checking single is the only alternative to checking family. Mr. Berglin was single at the time of his death. The fact that Mr. Berglin did not check "family" sheds no light on the absence of a check mark under Life/ADD.

weekly cost of $10.07 with COBRA continuation costs of $218.22 per month; Life insurance ($40,000 Term Coverage) no deductible listed and a weekly cost of $.42 and no COBRA rate.

11. Also on the *Insurance Benefits and Services Form* is a paragraph titled, "Term Life Insurance." It reads as follows:

> A $40,000 term coverage is part of the Health Package, coverage is on the employee only. The Life Insurance is a separate option for the employee and may or may not be chosen as part of the Health Insurance Package. The Term Life Insurance for the Ho-Chunk Nation is designed to cover the employee while employed with the Ho-Chunk Nation. Once the employee terminates employment or retires there is an option to convert the Group Life Insurance and continue to carry this coverage.

Exhibit 2. This is the only statement that Group Life might continue. There is no listing of COBRA costs in any other part of the *Insurance Benefits and Services Form*.

11. At the bottom of the *Insurance Benefits and Services Form* in capitol letters is the sentence in bold **"IF YOU OPT <u>NOT</u> TO ACCEPT THESE BENEFITS, <u>YOU MUST STILL FILL OUT</u> THE <u>ENROLLMENT CARD WAIVING BENEFITS</u>."** Exhibit 2.

12. In the same form under the paragraph ENROLLMENT is the statement, "[Y]ou must have enrolled within 30 days of your eligibility date." Exhibit 2.

13. Mr. Berglin attended the orientation session for newly eligible employees along with his friend and roommate from college, Mr. Robert Nimmer. Both Mr. Nimmer and Mr. Berglin completed blackjack-training classes at the same time and were hired by the Casino within one day of each other. During the orientation session Mr. Berglin stated something to the effect he was "racking up insurance coverage" and Mr. Nimmer and

Mr. Berglin discussed the possibility of putting each other down as their life insurance beneficiary. Mr. Nimmer testified that they thought better of it and did not.

14. Mr. Nimmer checked the box for Life Insurance/ADD.

15. The Nation did not deduct any money from Mr. Berglin's paycheck to pay for life insurance premiums.

16. Pursuant to the *HCN Personnel Policies and Procedures Manual*, an employee becomes a permanent full-time employee upon the successful completion of his probationary period of 90 days. There is no dispute here that Mr. Berglin had successfully completed his probationary period at the time of his death. Indeed, his probationary evaluation was above average in nearly all respects. Exhibit 33.

17. Ms. Haggarty is a personnel specialist at Ho Chunk Casino and had worked there for four years at the time of trial. Ms. Haggarty conducted the October 30, 1996 Orientation session attended by both Mr. Nimmer and Mr. Berglin. The session began at 6 p.m. and had to be concluded by 6:45 PM for the dealer to check into their pit.

18. During the session she pointed out that life insurance had a $.42 per week premium.

19. Ms. Haggarty testified it was her practice to start by going through the enrollment form from the top with the employees, explain its basics to them and answer questions as she went down. Ms. Haggarty stated when asked if she told them to check the box for life insurance, "yes, I think I did."

20. Ms. Haggarty further testified in response to a question about filling out beneficiaries, "We, we would address section 5, information about your beneficiaries. And I would tell them this was where they would note the designee for the life insurance selection they had made."

21. Ms. Haggarty testified that there is a spot on her paycheck indicating each deduction for insurance, health, dental, life insurance.

22. Linda Matti, a personnel specialist at the HCN Dept. of Personnel testified that no deductions were made on Mr. Berglin's behalf specifically earmarked for life insurance.

23. There was evidence that Mr. Berglin filed out a standard withholding form in his personnel file inaccurately. Tr. 106-107.

Decision

This is a case about whether a contract for life insurance was in existence at the time the decedent passed away. The decedent, Mr. Robert Berglin, was hired July 21, 1996 although he signed some pre-employment paperwork on July 18, 1996. He successfully passed his 90-day probationary period in September 1996 and received above average ratings in his job performance as a blackjack dealer at the Ho Chunk Casino in Baraboo, WI. After the completion of probation, Mr. Berglin status was that of a permanent full time employee entitled to all discretionary benefits provided by the Ho-Chunk Nation.

After Mr. Berglin completed probation in September, he attended an employee orientation session in October 1996 along with other newly eligible Ho-Chunk Nation employees so that he could fill out his insurance benefit application. At the orientation he was asked to fill out a form called an *Employee Group Enrollment Application* or EGEA. Mr. Berglin was an employee of the Ho Chunk Casino at the time of his death in April 1997. He worked as a blackjack dealer and had passed his 90 day probationary period. It is not disputed that he was a permanent full time employee of the Nation at the time of his death.

Most of the dispute involved in this case is over what meaning should be given to the EGEA form. In it there is no question that Mr. Berglin, who was 21 at the time he filled out the form, in July 1996, checked boxes indicating he elected both health insurance and dental

insurance to be deducted from his paycheck once he was eligible after his probationary period was over. He did not check the box marked Life/ADD. However, he did fill out a subsequent portion of the form designating beneficiaries. He listed his mother as the primary beneficiary and his father as a contingent beneficiary. What further complicates this is that he did not also fill out a waiver form required to be filled out in order to make certain that he declined coverage. This is the waiver form which states in mandatory language, "You *must* complete this form if you are waiving (declining) any of the coverage available to you through your employer." Exhibit 1 at p. 2 (italics added).

I. Contracts

It is elementary contract law that there must be an offer, an acceptance and consideration in order to form a contract. This case is fundamentally about whether or not a contract for life insurance existed under the circumstances between employer, the Ho-Chunk Nation and Robert Berglin.

A. Offer

In analyzing this case there is no dispute an offer of life insurance was made to the plaintiff. The Ho-Chunk Nation offered to all its permanent employees who successfully passed the 90 day probationary period the discretionary benefit of group term life insurance of $40,000. There is no dispute that Mr. Berglin was a permanent full time employee eligible to receive the discretionary benefit. There is no dispute that Mr. Berglin attended an insurance orientation and enrollment meeting on October 30, 1996. There is no dispute that Mr. Berglin filled out an insurance Enrollment Application [EGEA] on that date.

B. Acceptance

However, there is dispute over whether Mr. Berglin accepted the offer. The dispute centers on how Mr. Berglin filled out the Enrollment Application and the legal significance that

should be given to the way he filled it out. It is undisputed that Mr. Berglin did not check the appropriate box, which is also undisputed to be the box entitled "Employee/AD&D." [3] Above the box in paragraph four of the enrollment Application is the title "INFORMATION ABOUT THE HEALTH COVERAGE YOU ARE APPLYING FOR- check coverage applied for (availability of coverage is based on your group's selected plan of insurance." The defendant argues that the failure to check the box is sufficient to answer the question about the plaintiff's acceptance of the offer.

The problem is that the Ho-Chunk Nation Employee's Group Enrollment Application, Exhibit 33, suggests that this is insufficient to close the door on enrollment for any type of insurance, Life, Health or Dental for the employee, his spouse or dependent children. *See* p. 2 Exhibit 33. The bottom of the insurance form states,

> I hereby enroll for the coverage(s) *for which I am presently eligible or for which I may become eligible under my employer's group contract(s).* I authorize deductions for the coverage from my earnings if any such deductions are required. I reserve the right to revoke this deduction authorization at any time upon written notice.

Exhibit 33 at bottom above signature line. (italics added). It is undisputed that Mr. Berglin signed the form with his name or that he dated it October 30, 1996.

Thus, the bottom of the form suggests that a reasonable person reading the emphasized language might believe that they were applying to enroll in all the insurance they were eligible to receive or even later might become eligible to receive. These insurance coverages included health, dental, and life insurance.[4] Eligibility is determined by the person's job status as a full time permanent employee.

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[3] This reference to "AD&D" is the only reference to life insurance in this form, which the parties and the Court accept to mean Accidental Death and Dismemberment.

[4] It is also undisputed that Mr. Berglin checked the boxes for Medical Plan, or Dental Plan.

The second page of the enrollment form states, "*You must complete this form if your are waiving (declining) any of the coverage available to you* through your employer. I hereby waive insurance coverage for: Myself, Spouse, My Dependent Children: Life, Health, Dental." *Id*. at p. 2 (italics added). Mr. Berglin's waiver form is blank. Mr. Berglin *did not* affirmatively waive coverage by signing page 2 of the Enrollment Application. As Mr. Berglin was without either a spouse or children , there would be no need to fill those portions out because he was only eligible to cover himself for health and dental insurance.

The problem comes in because Mr. Berglin did not sign the waiver form, page two of the EGEA, which would appear necessary to waive coverage. This creates an ambiguity because declination of insurance is a two step process. First not checking the box, and second signing the waiver form. The employer created the two step process not the employee.

The Court is compelled to find that Mr. Berglin effectively accepted the offered coverage for life insurance. This is supported by a number of factors. First, it was the Nation that created the employee enrollment application which had the ambiguity, which required an effective waiver of coverage, yet it was blank; second, it was the Nation that had the opportunity to review the applications for completeness; third, the language requiring an affirmative waiver is mandatory and not permissive; and fourth, Mr. Berglin left both a written indicator of his intent to accept group life insurance, i.e. the designation of beneficiaries, and an oral indication of his belief he had accepted insurance coverage at the time he filled out the form.

1. Ambiguity in a Contract should be construed against the drafter

The first factor in favor of finding that there was acceptance of the contract for insurance is that the Nation itself created the ambiguity in the language of the EGEA. The Nation did not have to set up the EGEA the way it did. It just as easily could have created an enrollment

application which stated, "my signature affirms that I have signed up for only the insurance I have checked above." Either that or similar language would have erased the opportunity for ambiguity which existed in this case. By creating a situation where you must do two things, both fail to check the box and sign a waiver, the Nation accepted the risk such as that here where a person did one but not the other. Even further the language at the bottom of the form seems to contradict the language of checking the boxes, i.e., "I hereby enroll for the coverage(s) *for which I am presently eligible[.]"* (emphasis added). The facts show that Mr. Berglin was eligible for term life insurance. Absent the boxes, the quoted sentence would clearly indicate he had signed up for all insurance that he was eligible for: life, health, and dental. A reasonable person reading the language quoted above could easily believe his signature alone was enough to sign up for all insurance.

This is also in line with an often quoted cannon of construction of insurance contracts that ambiguities in contracts are to be construed against the drafter of the contract because they were in a better position to correct the ambiguity than the person merely agreeing to the contract. This is similar to the related cannon of construction that ambiguities in Treaties with Indians are to be interpreted in favor of the Indians because they did not draft or write the Treaties but merely signed them.

2. The party in a better position to catch an error should be held responsible for not checking to make sure the form was properly filled out

The second factor is that the Nation had the superior ability to catch any error in the execution of the EGEA and have it corrected. Mr. Berglin merely signed the EGEA. There was no testimony that he was given a copy of the EGEA. The Nation had an insurance specialist whose job it was to check over the completed EGEA forms and see if there were mistakes, such

as an enrollee signing up for term life insurance, but not designating a beneficiary. It was her job to process the EGEA's so that payroll would deduct the proper amount for the types of insurance the enrollee's selected. It defies logic to believe that the insurance specialist would not also check to make sure the second part of the EGEA, i.e., the waiver was not also completed. Any mistakes of signing up which were subject to correction are then the fault of the party who was in a superior position to correct the mistake and did not.

3. A Waiver of Insurance Coverage was required to be executed in writing

The third factor in finding that the EGEA effected an acceptance is the fact that the waiver language is mandatory and not permissive. The language of the explanatory form, Exhibit 3, states: **IF YOU OPT <u>NOT</u> TO ACCEPT THESE BENEFITS<u>,</u> <u>YOU MUST STILL FILL OUT</u> THE <u>ENROLLMENT CARD WAIVING BENEFITS</u>. E**xhibit 3 (Bold and underlining in the original). The word "must" is a mandatory word commanding a certain act be done.[5] It is not one which allows the enrollee to permissively sign the waiver, but one which commands that the waiver has to be signed or the implication is that the waiver will not be effective. Furthermore, the fact that this language is especially emphasized by putting it in CAPITALS, in **Bold** and <u>Underling</u> parts of it demand the attention of the reader of the document. It is hard for the average reader of the explanatory form of Insurance benefits and services to non-tribal employees to ignore these directions which appear so prominently emphasized. As they are in writing they are more reliable than oral testimony to the contrary.

In addition, on page two of the EGEA form itself is the language, "You *must* complete this form if you are waiving (declining) any of the coverage available to you through your

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[5] This word, like the word "shall," is primarily of mandatory effect and in that sense is used in antithesis to 'may'. BLACK'S LAW DICTIONARY, p. 919 (5th Ed. 1979)

employer." Exhibit 33 (emphasis added). Again the EGEA form uses the term "must" which requires that an absent the completion of the form there is no declination of coverage.

4. Contemporary Written and Oral indicators support the claim of enrollment of Life Insurance

Fourth, Mr. Berglin did leave contemporaneous indications of his acceptance of life insurance coverage, which contradict the absence of a check in the box. The first and most indication is objective. It is objective because Mr. Berglin did it on October 30, 1996 on the EGEA form itself. That is he designated a beneficiary and a contingent beneficiary. This is an act done only for life insurance. One does not need a beneficiary for health or dental insurance as only those enrolled can be the beneficiary of services of either a doctor or dentist. They get the services and are the beneficiary. The term beneficiary is only used in life insurance where the decedent cannot be the beneficiary for the obvious reason they are dead and cannot spend any of the money, which are the proceeds from the policy. Thus, in life insurance the insured must select someone who will get the proceeds of the policy after their death, i.e., the beneficiary.

The second contemporaneous indication that Mr. Berglin thought he was accepting the offer of insurance is the testimony of Mr. Nimmer, his friend and former roommate who signed up for employee insurance as a blackjack dealer the same day as Mr. Berglin. Mr. Nimmer testified that Mr. Berglin stated something to the effect that he was "racking up insurance policies." Since Mr. Berglin did not have either health or dental insurance from another source, his comment could only refer to life insurance. It was known from the testimony of Mr. Lyle Berglin that his son did have a J.C. Penney life insurance policy at the time he attended the Ho-Chunk Nation Insurance enrollment meeting. It was also known that he was covered by his

father's group term life insurance until June, 1996. Tr. at 23 One can only rack up, or gain more than one insurance policy, if you know you also have another policy.

5. Other Explanatory Forms support claim of Acceptance

Lastly, employees like Mr. Berglin were given an explanatory form entitled a *Insurance Benefits and Services Form*, which further supports the finding that a person in Mr. Berglin's position might reasonably believe he had properly signed up for life insurance. In the Insurance Benefits and Services Form is a paragraph titled, "Term Life Insurance." It reads as follows:

> A $40,000 term coverage is part of the Health Package, coverage is on the employee only. The Life Insurance is a separate option for the employee and may or may not be chosen as part of the Health Insurance Package. The Term Life Insurance for the Ho-Chunk Nation is designed to cover the employee while employed with the Ho-Chunk Nation.

This paragraph does not alleviate the ambiguity of the EGEA, but actually enhances it by implying that the $40,000 term coverage is covered by the Health insurance package. It is not unreasonable to believe that a person might believe that simply designating the Medical[6] box would be sufficient to invoke the life insurance coverage. The explanation form stated that "term coverage is part of the Health package." Thus, if you accepted this at face value you would believe that signing up for Health insurance would include term life insurance as well. This is especially true if taken in conjunction with the waiver language on the EGEA, which mandates that one affirmative waive (decline) life insurance coverage.

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[6] The term Medical is used rather than Health because that is the actual term on the EGEA check the box format. Although the terms are not identical, they are synonymous as are the terms term life, life AD&D and Group life.

C. Consideration

The third requirement after offer and acceptance to make a binding contract is whether there was consideration, i.e., money or something of value, given for the benefit granted by the contract. In a normal contract for purchase, the seller agrees to sell a basket to the buyer for a certain price. If the buyer does not pay the price, even if he accepted the basket, no contract exists because there is a lack of consideration.

The defendant contends that there was no consideration to support the contract for insurance. The defendant points out that no money was ever deducted from Mr. Berglin's paycheck to support the benefit of life insurance. The minimal amount required to be deducted was only $.42 per week. In addition, the defendant argued that the plaintiff should have known that the defendant did not grant him life insurance because when Mr. Berglin looked at his paycheck he must have noticed that nothing was being taken out to cover the life insurance.

The Court is persuaded that several factors weigh in favor of finding that the contract is not void for want of consideration. The first of these is that the EGEA has a blanket authorization to the Nation to deduct,

> I authorize deductions for the coverage from my earnings if any such deductions are required. I reserve the right to revoke this deduction authorization at any time upon written notice.

Exhibit 3. Thus, under the circumstances the fault of failing to deduct for life insurance lies not with the plaintiff, Mr. Berglin, but with the defendant for failing to deduct the required amount.

In addition, there is persuasive precedent that there is not a want of consideration in an insurance contract when the fault of failing to deduct the premiums is that of the insurer and not the insured. *See Clements v. Continental Casualty Ins. Co.*, 730 F.Supp. 1120 (N.D. Ga. 1989). In that case the employer was seen as the agent of the insurer. There the employee had changed his beneficiary from his ex-wife to his daughter by filling out two cards and giving them to his supervisor at Delta Airlines. The problem arose because the employer processed the removal of

his wife but not the enrollment of his daughter as beneficiary and by doing so stopped deducting premium payments. The Court there held that it was not the responsibility of the employee to notice the lack of deductions from his paycheck since he had done all that was required of him to change his beneficiary.

Here the ambiguity of the employer could lead a reasonable person to believe that his Health premiums also covered term life insurance. Indeed, Mr. Berglin authorized all "deductions for the coverage from my earnings if any such deduction are required." Exhibit 33. Moreover, the minimal amount of the deduction, only $.42 per week is not disclosed to the employee at the time of enrollment would be a separate listing of his paycheck. Although unlikely, it is not unreasonable to believe that an employee who sees a weekly deduction for health premiums would also include the deduction for life insurance due to the explanatory form, which accompanied the EGEA. Exhibit 3. Moreover, no copy of Mr. Berglin's paycheck was entered into evidence. This could have been provided by through discovery.

Due to the wording of the Employee's Group Enrollment Application which contains ambiguity and makes a written waiver or declination of coverage mandatory, the absence of a written waiver or declination means that coverage must be provided, which in the alternative obviates the need for consideration for this contract.

Lastly, it must be pointed out that once the employee authorizes the deduction he has done all he can do to effectuate the contract. Should the employer fail to forward the premiums so authorized, this Court agrees with the rationale of the District Court in *Clements v. Continental Casualty Co.* that the contract cannot be held to have lapsed by reason of non-payment. Id., 730 F. Supp. at 1124.

CONCLUSION

For the reasons stated above, the Court finds that a contract for insurance was formed and Mr. Berglin is entitled to its benefits. There was an offer of insurance, an acceptance albeit with

some ambiguity the fault of which lies with the defendant, and an authorization for consideration.

All parties have the right to appeal a final judgement or order of the Trial Court. If either party is dissatisfied with the decision rendered by this Court, they may file a *Notice of Appeal* with the Ho-Chunk Supreme Court. The *Notice of Appeal* must show service was made upon the opposing party prior to its acceptance for filing by the Clerk of Court and must explain the reason the party appealing believes the decision appealed from is in error. All appellate pleadings to the Ho-Chunk Supreme Court must be in conformity with the Ho-Chunk Nation *Rules of Appellate Procedure*.

IT IS SO ORDERED this _____ day of December, 1998 from within the sovereign lands of the Ho-Chunk Nation at Black River Falls, WI 54615.

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Hon. Mark Butterfield
HCN Chief Trial Judge