

*Maynard v. CNA Group Life Assurance Co.*, No. 06-15296

MAR 20 2008

B. FLETCHER, Circuit Judge, concurring:

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

I agree that this case must be remanded for further proceedings, including discovery to determine the date of adoption of the second policy. I write separately because the majority opinion could be read to imply that—absent estoppel—the second policy will control if it was adopted prior to the date on which CNA denied Maynard’s claim. Our caselaw makes clear, however, that the first policy would apply if (1) by its own terms, Maynard’s rights had vested before CNA denied her claim, or (2) the second policy directed the administrator to apply the first policy. *Shane v. Albertson’s Inc.*, 504 F.3d 1166, 1169 (9th Cir. 2007) (noting that both the original and amended policies directed the administrator to apply the policy in effect on the date of disability). On remand, the district court after discovery will be in a better position to interpret the language of both policies to determine whether Maynard’s rights had vested under the first policy or whether the second policy directed the plan administrator to apply the first policy where, as here, the claimant was not actively at work on the effective date of the second policy.