

OCT 04 2007

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAUDIA SONNEN,)	No. 05-35733
)	
Plaintiff-Appellant,)	D.C. No. CV-03-00797-AS
)	
v.)	MEMORANDUM*
)	
AMERUS LIFE INSURANCE)	
COMPANY, an Iowa corporation,)	
)	
Defendant-Appellee.)	
_____)	

Appeal from the United States District Court
for the District of Oregon
Garr M. King, District Judge, Presiding

Argued and Submitted September 24, 2007
Portland, Oregon

Before: FERNANDEZ, SILVERMAN, and GRABER, Circuit Judges.

Claudia Sonnen appeals the district court’s grant of summary judgment to AmerUs Life Insurance Company on her action to recover life insurance benefits upon the death of her husband, Patrick Sonnen. We affirm.

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Under the law of the State of Oregon,¹ the district court did not err when it determined that the evidence would not support a determination that a binding life insurance contract had been formed. Rather than accept Mr. Sonnen's application, AmerUs proposed different terms, and Mr. Sonnen did not, and could not, comply with AmerUs's terms before it withdrew and returned his proposed premium.² See Arboireau v. Adidas-Salomon AG, 347 F.3d 1158, 1163 (9th Cir. 2003) (“acceptance of an offer . . . must . . . correspond to the offer at every point” (quoting C.R. Shaw Wholesale Co. v. Hackbarth, 201 P. 1066, 1067 (Or. 1921) (internal quotation marks omitted))); Olsen v. Fed. Kemper Life Assurance Co., 700 P.2d 231, 233, 235 (Or. 1985) (contract formation); Krause v. Wash. Nat'l Ins. Co., 468 P.2d 513, 517–18 (Or. 1970) (same); Morford v. Cal. W. States Life Ins. Co., 113 P.2d 629, 635 (Or. 1941) (proposal of different terms); Simmons v. All Am. Life Ins. Co., 838 P.2d 1088, 1090 (Or. Ct. App. 1992) (the premium is an essential term); Blakeslee v. Davoudi, 633 P.2d 857, 860 (Or. Ct. App. 1981) (counteroffer is rejection of original offer). Nor does AmerUs's retention of the

¹The parties agree that Oregon law controls.

²The premium was greatly increased, and acceptance was conditioned on Mr. Sonnen's continuing health. Incidentally, the original application also provided that Mr. Sonnen's statements about his health must remain true when the policy was delivered.

premium during the counteroffer stage estop it from denying that a contract was entered into. See Morford, 113 P.2d at 635; cf. Zerba v. Ideal Mut. Ins. Co., 773 P.2d 1333, 1335–36 (Or. Ct. App. 1989) (stating if there is no communication of rejection and no refund, there may be an acceptance).³

AFFIRMED.

³We do not overlook Mrs. Sonnen’s argument that AmerUs’s uncommunicated allocation of the premium payment during the period before refund amounted to acceptance. But only communications and overt acts satisfy Oregon’s objective theory of contract acceptance. See Koepping v. Tri-County Metro. Transp. Dist. of Or., 120 F.3d 998, 1002 (9th Cir. 1997); Kitzke v. Turnidge, 307 P.2d 522, 527 (Or. 1957); City of Canby v. Rinkes, 902 P.2d 605, 610 (Or. Ct. App. 1995).