

1975

# Melvin L. Matlock v. Government Employees Insurance Company : Brief of Appellant

Utah Supreme Court

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Richard W. Campbell; Olmstead, Stine and Campbell; Attorneys for Plaintiff and Respondent.

L. L. Summerhays; Strong and Hanni; Attorneys for Defendant and Appellant.

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## Recommended Citation

Brief of Appellant, *Matlock v. Government Employees Insurance Company*, No. 14107.00 (Utah Supreme Court, 1975).

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UTAH SUPREME COURT

BRIEF

14107A

UTAH SUPREME COURT

OF THE STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

MELVIN L. MATLOCK,

Plaintiff and  
Respondent,

-vs-

GOVERNMENT EMPLOYEES  
INSURANCE COMPANY,

Defendant and  
Appellant.

14107  
Case No. 60174

APPELLANT'S BRIEF

Appeal from the Judgment of the  
Second Judicial District Court, Weber County  
Honorable John F. Wahlquist, Judge

L. L. SUMMERHAYS of  
STRONG & HANNI  
604 Boston Building  
Salt Lake City, Utah 84111  
Attorneys for Defendant and Appellant

RICHARD W. CAMPBELL of  
OLMSTEAD, STINE AND CAMPBELL  
2650 Washington Boulevard  
Ogden, Utah 84401  
Attorneys for Plaintiff and Respondent

FILED

AUG 29 1975

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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MELVIN L. MATLOCK,	)	
	)	Case No. 60174
Plaintiff and	)	
Respondent,	)	
	)	
-vs-	)	
	)	
GOVERNMENT EMPLOYEES	)	
INSURANCE COMPANY,	)	
	)	
Defendant and	)	
Appellant.	)	

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Salt Lake City, Utah 84111  
Attorneys for Defendant and Appellant

RICHARD W. CAMPBELL of  
OLMSTEAD, STINE AND CAMPBELL  
2650 Washington Boulevard  
Ogden, Utah 84401  
Attorneys for Plaintiff and Respondent

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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MELVIN L. MATLOCK,	)	
	)	
Plaintiff and	)	
Respondent,	)	Case No. 60174
	)	
-vs-	)	
	)	
GOVERNMENT EMPLOYEES	)	
INSURANCE COMPANY,	)	
	)	
Defendant and	)	
Appellant.	)	

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STATEMENT OF THE KIND OF CASE

This is a declaratory judgment action filed by the plaintiff insured, against the defendant insurer, to determine coverage rights of the insured and insurer under a Family Automobile Policy with respect to a 1951 Chevrolet one and one-half ton truck purchased on January 5, 1973 but not licensed or used until April 6, 1973.

DISPOSITION IN LOWER COURT

The case was tried to the court, the Honorable John F. Wahlquist, District Judge presiding. From a judgment in favor of the plaintiff insured, the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant, appellant, seeks reversal of the judgment and judgment in its favor as a matter of law.

### STATEMENT OF FACTS

This is a declaratory judgment action filed by the plaintiff insured against the defendant insurance company asking that an endorsement issued by the defendant to plaintiff effective the 8th day of April, 1973, to plaintiff's insurance policy be declared in full force and effect as of April 7, 1973 so as to cover a one car accident which occurred on the 7th day of April, 1973, in the area of Delta, Colorado and involved a 1951 Chevrolet one and one-half ton truck.

At the time the declaratory action was filed it was primarily for the purpose of determining the insurance company's responsibility to pay the medical bills of James Horton, the driver of the one and one-half ton truck. The suit was commenced with service of summons on the Insurance Commissioner on June 19, 1974. In September, 1974, a suit was filed by James Horton against Dr. Matlock for damages for injuries arising out of the one car accident. The defense of this suit was tendered to GEICO (R. 116) which had as of May 6, 1974 denied coverage. GEICO declined to defend the Colorado suit which is being presently defended by counsel hired by the company which issued Dr. Matlock's Farm Liability Policy.

Dr. Melvin Matlock first acquired insurance with Government Employees Insurance Company, hereinafter referred to as "GEICO" in the 1950's (R. 123; see also Exhibit "O"). During the period from the purchase of his first policy to the occurrence involved in this lawsuit he changed vehicles many times (R. 123, L. 17). In 1964 he acquired a fruit farm in Delta, Colorado, which then became known as the M & M Orchards (R. 124, L. 1). At that time he owned a 1963



Chevrolet three-quarter ton pickup truck which was insured about August 12, 1963 under his then existing GEICO policy No. 506-14-76-1. This vehicle was placed on the farm for farm use sometime after May of 1964 (R. 119). At the time he transferred the 1963 Chevrolet pickup truck to the farm he also had one or more passenger vehicles insured with GEICO (R. 124, L. 10). These vehicles were insured on the same policy (R. 134, L. 9). He had a 1963 Chevrolet Corvette which was insured with GEICO and which was involved in a serious accident in 1965 in Ogden, Utah (R. 128, L. 14) and he had a 1967 Pontiac which was insured with GEICO (R. 124; see Exhibit "D-7").

On October 1, 1970 he advised the company in writing that the 1963 Chevrolet three-quarter ton pickup truck had been traded in on a 1971 Ford pickup truck and asked that it be covered under policy No. 506-14-76-1 with the same coverage as the Chevrolet had (Exhibit "D-4").

On August 21, 1972 Dr. Matlock wrote a letter from Pocatello, Idaho requesting coverage on a 1972 Chevrolet three-quarter ton pickup truck on which he had a nine and one-half foot camper, which vehicle and camper were kept in Pocatello, Idaho. Coverage was to be under the same policy, 506-14-76-1 (Defendant's Exhibit "D-1", R. 121, L. 22). This vehicle was at the time insured with Security Mutual Insurance Company. He did not hear from GEICO and wrote a reminder letter on October 7, 1972 because he had not heard from them (Defendant's Exhibit 2). When he did not hear from the company immediately, he renewed the existing coverage on the vehicle with Security Mutual Insurance Company. This was one of three vehicles he had insured with Security Mutual Insurance Company prior to January 1, 1973 and continuously through April of

1973 (R. 121, 122, 94).

On December 29, 1972 GEICO wrote Dr. Matlock a letter acknowledging receipt of notice that Dr. Matlock had insured the 1972 three-quarter ton pickup truck and camper with another company and asked that he advise GEICO when he covered the 1972 Chevrolet with another firm so that they could correct his policy coverages for the 1971 Ford without lapse (Exhibit "D-3").

GEICO had, in fact, issued coverage on the 1972 Chevrolet with camper and sent a policy endorsement to him along with a billing which he returned explaining he had taken insurance with another company (Plaintiff's Exhibit "P", P. 2; also Exhibit "B"). The company inadvertently continued for a time to bill him for coverage on this vehicle, and he wrote several letters trying to straighten the billing out (R. 117, 133).

All of the vehicles, both those on the farm and those he had at his home or office were registered in his name (R. 130).

On January 5, 1973 he purchased from North Ogden Canning Company in his name a 1951 Chevrolet one and one-half ton truck (R. 131, Plaintiff's Exhibit "DD," "EE," and Defendant's Exhibit 6). North Ogden Canning Company was closed down at the time and in the process of being sold (R. 132). A check dated January 9, 1973 drawn on the M & M Orchards account for the sum of \$750.00 and signed by Melvin L. Matlock was issued to North Ogden Canning Company in payment for the vehicle (Exhibit "D-6"). The title was endorsed by Leslie E. Randall, president of the North Ogden Canning Company on January 5, 1973 (Exhibit "DD"). Mr. Randall was an uncle of Mrs. Matlock (R. 132). The vehicle was not licensed at the time of purchase and had not been used during 1972

(R. 130, L. 18). It remained in the shed where it was parked at North Ogden Canning Company until April 6, 1973, while the keys were apparently left in the vehicle and the shed was enclosed inside a locked fence area. As far as North Ogden Canning Company was concerned, Dr. Matlock could have removed the vehicle at any time (R. 130, L. 4). Dr. Matlock testified that the title was sent to him or given to him by Mr. Randall, the president of North Ogden Canning Company some time during the period January to March, 1973 (R. 130), and the registration was also apparently given him at the same time (R. 136). The title was sent to his employee, James Horton, at Delta, Colorado some time after Dr. Matlock received it (R. 88).

Mr. Horton acquired a Colorado certificate of title to the truck in the name of Melvin L. Matlock (Exhibit "BB") as of April 6, 1973 and flew to Ogden to drive the truck back to Delta, Colorado. He and Dr. Matlock went to the North Ogden Canning Company, got the truck out of the building in which it was parked and on April 7th about noon Mr. Horton departed Ogden and was involved in a one car accident near Delta, Colorado about 10:00 p.m. on April 7, 1973. At about 6:00 p.m. on April 7, 1973 he mailed a letter advising the company he had purchased and put in service effective that date a used one and one-half ton truck which he would like insured for liability only with the same coverage as the Ford truck had under Policy No. 506-14-76-1 (Plaintiff's Exhibit "I").

He received a call from James Horton's son at about 11:30 p.m. on the 7th of April advising him of the accident and that his father was in the hospital in Grand Junction, Colorado.

A few days later Dr. Matlock wrote a letter to GEICO advising them

that the accident had occurred.

Dr. Matlock contacted, or was contacted shortly after the accident by, McMillan Claims Service in Grand Junction, Colorado and subsequently Miles Hollcraft Company, claims adjusting company in Ogden, Utah, also contacted him regarding the claim (R. 98, 99). In December, 1973, or early 1974, and it could have been earlier, one of Hollcraft's representatives called on him and took a history of the information he had pertaining to the truck accident and coverage questions (R. 136, 137; also Exhibits "F", "X", "E," and "D").

On January 22, 1974 a non-waiver of rights letter was mailed to Dr. Matlock by GEICO (Plaintiff's Exhibit "Z"), and on May 6, 1974 a denial of coverage letter was sent to Dr. Matlock (Plaintiff's Exhibit "AA"), whereupon this declaratory judgment action was filed by plaintiff.

On May 25, 1973 he received a letter from GEICO's Washington office requesting additional information pertaining to the loss (Plaintiff's Exhibit "M"). At this time GEICO was in the process of setting up a new claims office in San Francisco to service the Western States which included Colorado and Utah. Later he was told that his claim had been transferred to the San Francisco office (R. 117, L. 22).

On June 8, 1973 GEICO issued a general change endorsement effective April 8, 1973 to Policy No. 506-14-76-1 extending coverage on the 1951 Chevrolet one and one-half ton truck (Exhibit "B", R. 99). The policy period on this policy was from March 30, 1973 to March 30, 1974 (Exhibit "B"). Until the one and one-half ton truck was insured by the company on April 8, 1973 Dr. Matlock had never insured a truck other than a one-half or three-quarter ton pickup variety

(R. 142,143).

The insurance policy under Definitions, Part I, with respect to owned automobile provides as follows:

"Owned Automobile" means

- (a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded,

\* \* \*

- (c) a private passenger, farm or utility automobile, ownership of which is acquired by the named insured during the policy period, provided:

\* \* \*

- (2) the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile.

"Private Passenger Automobile" means a four wheel private passenger, station wagon or jeep type automobile;

"Farm Automobile" means an automobile of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming;

"Utility Automobile" means an automobile, other than a farm automobile, with a load capacity of fifteen hundred pounds or less of the pickup body, sedan, delivery or panel truck type not used for business or commercial purposes.

The trial court ruled:

1. That the 1951 Chevrolet one and one-half ton truck was not under the terms of the policy acquired nor did it become an owned automobile by the insured until he registered it in his name and took operational control on the 6th of April, 1973, the day before the accident.

2. That the provision in the policy limiting the automatic 30-day coverage with respect to farm vehicles to those having a load capacity of 1,500 pounds or less, is an approximate guide line, not enforced by the defendant in the past and that in any event the controlling word is a farm vehicle.

The court further stated that one-half ton and three-quarter ton pickup trucks are often loaded with more than 1,000 or 1,500 pounds and the one and one-half ton truck was to be used in connection with the orchard and was, therefore, a farm vehicle within the meaning of the policy.

3. That the plaintiff had been led by the defendant insurance company to believe that the defendant would provide a defense and make the necessary investigation to adequately defend the claim and that plaintiff had been prejudiced in this respect and is in no position to adequately take over the defense of the pending action and further that the reservation of rights and denial of coverage were not timely.

From these rulings and findings and any others which the court made supporting its decision, the defendant files this appeal.

#### ARGUMENT

POINT I. THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE 30-DAY AUTOMATIC COVERAGE UNDER THE PROVISIONS OF THE POLICY FOR A NEWLY ACQUIRED VEHICLE COMMENCED ON THE DATE THE ONE AND ONE-HALF TON TRUCK WAS PUT INTO OPERATIONAL USE RATHER THAN FROM THE DATE OF ACQUISITION.

The term "owned automobile" is defined in Part I of the GEICO policy as follows:

(c) a private passenger, farm or utility automobile, ownership of which is acquired by the named insured during the policy period provided:

- (2) The company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of its election to make this and no other policy issued by the company applicable to such automobile.

In attempting to determine whether the plaintiff actually notified the insurance company within the 30 day period, the critical issue hinges on the question of when the plaintiff acquired the 1951 truck. The key phrase to determining the question of coverage is "day of acquisition." Since the terms of the insurance policy do not specifically state what constitutes "date of acquisition" or ownership of the automobile, it is necessary to examine several cases and other authorities in this field.

Appleman, Insurance Law & Practice, Vol. 7, §4293, P. 91 states:

Where the policy states in such provision that coverage is afforded when the insured acquires ownership, it means such ownership as the ordinary man would contemplate by such term, that is, the right of user and such an interest in its protection that goes with a sense of ownership . . . And even the term "acquired" has been held to mean that the insured must have gained some title to the vehicle, it not referring to a mere temporary use without claim of ownership.

In defining the term "acquired ownership" the court looked at such factors as dominion, control, use and the intentions of the parties.

Although the insured, Melvin Matlock, made arrangements to purchase the automobile in January, 1973, he allegedly did not take actual possession of the automobile until approximately April 6, 1973. He did have constructive possession. No one else used the vehicle. It was stored for his benefit. Although it was in a locked fence area, he could have taken it whenever he desired (R. 130, L. 4). The title was endorsed on the date of sale by the owner on January 5, 1973. In attempting to determine when the automobile was "owned"

most courts have held that possession is not a requirement of ownership. In Commercial Standard Insurance Co. v. Universal Underwriters, 282 F.2d 24 (1960, 10th Circuit, Okla.), the insured had purchased a new automobile and had paid the entire purchase price to the automobile agency, but had agreed to pick up the automobile at a later date pending the addition of certain accessories on the automobile. During the interim period the automobile was involved in an accident when driven by the automobile agency. The Tenth Circuit ruled that where the insured automobile had been traded in on purchase of a new automobile and the total purchase price was paid, but certain additional accessories were to be placed on the new vehicle, and that was done by the automobile agency, whose owner suggested to the husband of the named insured that they take a drive, and it was during such a drive while the agency owner was operating the vehicle that the accident occurred, the sale had been completed prior to the accident, and the vehicle was a newly acquired automobile within coverage of the automobile liability policy. One of the defenses raised in that case was that the automobile was not owned by the insured, because the vehicle was not in the actual possession of the insured. The court, applying Oklahoma law, concluded that possession was not a requirement of ownership.

Another general rule is that as between the parties to the transaction, delivery of actual possession is not essential to effect a transfer of title unless so agreed by the parties. Pharaoh v. Burnett and Moore, 112 Okla. 188, 240 P. 743 . . . And a third general rule is that what shall constitute transfer of title ordinarily depends upon the intentions of the parties to be gathered from the facts and circumstances peculiar to the transaction.

In the case of Wisbey v. Nationwide Mutual Insurance Co., (1973), 507 P.2d 17 (Ore.) an insured who had full control of the inoperable automobile



from August 20th when he paid for the same and who was involved in a collision with an uninsured motorist on September 21st was held to have owned the automobile more than 30 days notwithstanding the automobile remained on the seller's premises, the certificate of title was not delivered until September 3rd, and seller was not required to deliver tires which was done on September 3rd when the automobile was moved, being towed from the seller's property.

A similar holding was reached in the case of Williams v. Standard Accident Insurance Co., 322 P.2d 1026 (1958, Calif.) where at the time of delivery of the vehicle to the insured the car was inoperable and without wheels or tires. The insured rebuilt the car, and it was operating at the time of the accident.

One must take into consideration that liability coverage is not the only coverage provided by insurance policies, but theft, fire and others may be involved in the 30-day automatic coverage involved. Automatic coverage is, therefore, important and must be considered even though the car is not being driven on the highway. Dr. Matlock would have a right and would, no doubt, insist on payment if the shed where his truck was stored had caught fire and his truck had been burned or if it had been stolen and he had fire and theft coverage on his policy.

Several Courts have placed primary emphasis on the intentions of the parties in determining whether ownership has been established. In United States Fidelity & Guaranty Co. v. Minault, 72 A.2d 161 (1950, N. H.) action had been filed by U. S. F. & G. against Minault for a declaratory judgment to determine whether the insured automobile at the time of the accident was covered by a liability policy issued by the plaintiff. A decree was entered in favor of the defendants based on a finding that the plaintiff was liable on the policy; the case

was transferred on plaintiff's exceptions. The Supreme Court of New Hampshire held that the evidence established that the insured still had title to the automobile at the time of the accident. The facts of the case revealed that the defendant Minault had decided in July of 1947 to sell his automobile for cash to Richard Detscher. After arriving at an agreement in price Detscher informed Minault that it would be necessary for him to travel to Concord, New Hampshire in order to obtain the necessary funds to purchase the automobile. On the way to Concord Mrs. Detscher was involved in an accident, resulting in a lawsuit. Minault had alleged in the suit that he was not liable because the automobile was no longer his. On the issue of ownership the court said:

The law here is that title passes when the parties intend it should. Their intention is a question of fact to be determined from the terms of the contract, the conduct of the parties and surrounding circumstances. Id. 163.

After reviewing all the facts in the case and examining the intentions of the parties the New Hampshire court ruled that title to the automobile had not passed to Detscher and thus Minault would be considered the owner and liable for subsequent injuries.

In summary, the question of ownership is determined by examining such factors as (1) the intentions of the parties, or (2) the issue of control or dominion over the automobile. Most courts are in agreement that ownership is not based on possession or the registration of an automobile.

If the language in the insurance contract is unclear as to the definition of ownership, courts will frequently turn to motor vehicle statutes for a concise definition. This was done by the California Court of Appeals in the Everly v. Creech, 294 P.2d 109 (Calif., 1956) decision when the court relied on the

definition of "owner" according to West's Annotated Civil Code, &1738; Vehicle Code, §66. If a court should decide that the definition of ownership is unclear pursuant to the terms of the insurance contract, it would then be necessary to examine the definition given in the Utah Code Annotated. The definition of "owner" is found in §41-1-1(u), Utah Code Annotated, 1953.

It states:

Owner--Person who holds the legal title of a vehicle or in the event a vehicle is subject to conditional sale the person with an immediate right of possession. §41-1-72 states:

Until the department shall have issued such new certificate of registration and certificate of ownership, delivery of any vehicle required to be registered shall be deemed not to have been made, and title thereto shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose except as provided in §41-1-77.

The court, however, has construed the provisions of this section as not mandatory or controlling in their application. They do not confer or deny substantive rights. They are procedural or evidentiary in nature and provide a flag of warning to prospective transferees or encumbrances, much as do the registry acts relative to real estate and chattel mortgages. See Jackson v. James, 97 Utah 41, 89 P.2d 235.

§41-1-77 provides that the owner of a motor vehicle who has made a bona fide sale or transfer of his title or interest and who has delivered possession of such vehicle and certificate of registration and the certificate of title thereto properly endorsed to the purchaser or transferee shall not be liable for any damages thereafter resulting from negligent operation of such vehicle by another.

It is our opinion that, whereas here, it would appear the seller had

delivered the registration certificate, the endorsed title, and the possession of the vehicle to Mr. Matlock, he would be deemed to have acquired it under the terms of the policy.

A second question to consider is the effect of failure to notify the insurance company within 30 days after acquisition of the automobile. The general rule is that failure to notify the insurance company within 30 days after acquisition of the vehicle will result in loss of insurance coverage. 34 A.L.R.2d Annotation, Automobile Insurance, 936, §7 states:

It is well established that where the "automatic insurance" clause requires notice of the acquisition of a new automobile to be given the insurer, within a specified time after delivery, the period generally being either 10 or 30 days, a failure to give notice prior to the accident occurring after the expiration of the designated period precludes coverage of the new automobile. Id. 943.

In Mitcham v. Travelers Indemnity Co., 127 F.2d 27 (4th Cir., 1942) the court stated that the requirement of notice was of obvious importance to the insurer, serving to inform it of the identity and character of the vehicle to be covered and to enable it to exercise the rights reserved to it in the policy and to ascertain whether the insured had complied with his obligation thereunder, and that it could not be said that the policy provision was so immaterial to the risk that it could not be invoked for the purpose of avoiding the company's contractual liability. In Matthews v. Marquette Casualty Co., 152 So.2d 577 the court said that the clear impact of the clause insuring additional vehicles from the date of acquisition provided the insured notifies insurer within 30 days is that automobiles in addition to that described in the policy are automatically insured for 30 days following the date of delivery to the insured but that coverage ceases if the insured

fails to give the required notice to the insurer. The generally accepted rule is that an automobile which is newly acquired is automatically covered by the insurance provided the insured notifies the insurance company within 30 days of the acquisition. Failure to notify the company within that time period will result in cancellation of the insurance coverage.

Not all courts, however, are in complete agreement with this theory. In Ashgrove Lime and Portland Cement Co. v. Southern Surety Co., 225 Mo. App. 712, 39 S.W.2d 434 (1931) the court held that a car received by the insured in exchange for another car which had been listed in a fleet policy giving automatic coverage to additional cars purchased by the insured was covered when involved in an accident some five months after the date of the exchange. The court stated that the notice provision was not for the purpose of allowing the insurer to say whether or not it was willing to extend coverage to newly acquired cars, but was rather intended to protect the insurer in collection of additional premiums on such cars, and concluded that the provision was not a condition precedent to coverage, but at most a condition subsequent and since the policy contained no forfeiture provision for failure to perform the condition, coverage was still in effect.

Although there appears to be no cases in Utah directly on point, the Tenth Circuit follows the majority rule that if notice is not given during the 30-day period, the coverage terminates at the end of such period. This position was affirmed in Western Casualty and Surety Co. v. Lund, 234 F.2d 916 (1956, 10th Circuit, Okla.) in an action by the insurer against the insured to determine the obligations and rights under an automobile insurance policy. The Tenth

Circuit Court of Appeals held that under the policy provisions pertaining to automatic coverage for newly acquired automobiles, giving of notice of acquisition was not a pre-requisite to coverage during the 30 day period provided for, but, if the notice was not given during such period, the coverage would terminate at the end of such period. The court said:

Under the clear import of such provision, the automatic coverage becomes effective immediately upon the replacement and continues for a period of 30 days. The giving of the notice is not a pre-requisite of coverage during that period. If the notice is not given during the 30 day period, the coverage terminates at the end of such period. But the automatic coverage protects the insured against liability accruing within that period even though no notice of the replacement is given. Id. 919.

The final question to consider is whether it is material that notification was received the day after the accident. According to the facts, the insured, Melvin Matlock, sent the notification on April 7th, but the notification did not reach the insurance company until April 8th. The date of the accident was April 7th. The general rule accepted by most jurisdictions is that notice is not required to reach the insurance company prior to the accident, but it must reach the insurance company before the expiration of the 30-day time limit. According to 34 A.L.R.2d, supra, §7:

In this situation it has been generally held, on the theory that the requirement of notice is a condition subsequent rather than a condition precedent to extended coverage, that such coverage is automatically effected upon delivery of the new automobile and remains in effect until the end of the specified period, irrespective of whether notice has been given or not. Id. 944.

This general rule is also accepted by the Tenth Circuit in Johnson v. Richard, 445 F.2d 1025 (1971, Utah). There the court held that under an automobile liability policy provision pertaining to automatic coverage for a newly acquired vehicle, giving notice of acquisition would not be a pre-requisite to coverage

during the 30-day period provided for notice and an accident after acquisition of a different vehicle, but before notice to the carrier did not affect the automatic coverage provision. The court said:

In Western Casualty and Surety Co. v. Lund, 234 F.2d 916 (10th Circuit) we held that under a policy with a similar policy provision, the automatic coverage becomes effective immediately on a replacement of the car and continues for the noticed period although the insured does not advise the company one way or the other. This appears to be the almost universal rule. Thus an accident after the acquisition of a different vehicle but before notice to the carrier, does not affect the automatic coverage provision. In the case before us we thus hold there is coverage by Employers on the trailer at the time of the accident and also on the car. Id. 1027.

The rule that is accepted by most jurisdictions is that the insured is covered for the 30-day period, but he must give notification to the insurance company in order to extend coverage beyond that period. However, if the accident should occur during the 30-day period, but before notice is given to the insurance company, that does not negate the insurance coverage during that 30-day period.

In the instant case the insurance would not become effective until at least the date the company received and accepted the application which was on the 8th of April which was the date the company made the endorsement effective on this particular automobile.

POINT II. THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE 1951 CHEVROLET ONE AND ONE-HALF TON TRUCK QUALIFIED AS A FARM VEHICLE UNDER THE TERMS OF THE POLICY AND THAT THE 30-DAY AUTOMATIC COVERAGE, THEREFORE, APPLIED.

In its memorandum decision and in its findings and conclusions

the trial court stated that one-half ton trucks and three-quarter ton trucks are habitually loaded with more than 1,500 pounds and even up to 12,000 pounds; that the one and one-half ton truck was an ordinary farm vehicle when used in connection with the orchard and was so regarded by the defendant company until they discovered the existence of the accident claim in question. That any other interpretation of the policy requirement would subject to no coverage all farm trucks or vehicles that are used or loaded with regular farm type loads at any particular time (R. 45,51).

The trial court appears to have missed the point completely on this issue in the case. The defendant is not and has not claimed that the overloading of a vehicle takes it out of the policy coverage. The issue here is whether under the provisions of the policy the insured is entitled to the benefit of the automatic 30-day coverage provision when the vehicles does not come within the category of those vehicles described in the policy as passenger, farm or utility vehicles.

It is undisputed that the insurance company is entitled to contract and fix its obligations and rights under a policy as long as the provisions are not unreasonable, illegal or contrary to public policy, and such provisions are binding upon both the insurer and insured. Appleman, Vol. 4, Insurance Law & Practice, §2105, P. 8. The insurer in this instance has the right to define the terms passenger, farm and utility vehicles and the parties are bound by their written agreement.

The only load capacity that the contract reasonably could provide for would be the manufacturer's rated capacity. A case directly in point is Buswell



v. Biles, 205 So.2d 165 (La., 1968). In that case the insurance policy contained the exact provisions that are contained in GEICO's policy under definitions of an owned automobile, and passenger, farm and utility vehicle. (These are standard provisions.)

Mr. Biles contended a farm or utility automobile within the terms of the policy depends upon whether the vehicle had a capacity of 1,500 pounds or less, and this capacity limitation refers to actual maximum load capacity. The court said:

It must be conceded the testimony is conclusive that both the 1965 one-half ton pickup and the three-quarter ton pickup were capable of carrying loads in excess of 2,000 pounds each without destroying the vehicle.

The lower court agreed with Biles and held the 1952 Ford three-quarter ton pickup was not a farm or utility automobile as defined in the policy because it was possible for it to haul more than 1,500 pounds.

The appellate court held this was error and stated:

We find from the record that it was the clear intent of both the insurer and the insured that the load capacity as contemplated by these parties was the manufacturer's designation of the pickups as one-half ton and three-quarter ton trucks.

GEICO did not refuse coverage on the vehicle, but they covered the one and one-half ton Chevrolet truck as of the date they received the application for coverage rather than giving Dr. Matlock the 30-day automatic coverage which, under the circumstances, he was not entitled to. The trial court should have ruled that the vehicle did not qualify for the automatic coverage.

POINT III. THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE 30-DAY AUTOMATIC COVERAGE APPLIED UNDER THE POLICY IN SPITE OF THE FACT THAT ALL OF PLAINTIFF'S PASSENGER, FARM AND UTILITY VEHICLES WERE NOT INSURED WITH GEICO AS REQUIRED BY ITS POLICY.

Exhibit "BB" shows definitely that title to the 1951 Chevrolet was issued by the State of Colorado to Melvin L. Matlock, and Mr. Matlock does not dispute this fact. All of the vehicles, both those on the farm and those he had at his home or office, whatever the case may be, were registered in his name (R. 130).

The policy provisions with respect to a newly acquired vehicle clearly set forth that the 30-day automatic coverage applies only if the insured insures all automobiles owned by the insured as of the delivery date of an additional automobile (See Exhibit "A," first page - owned automobile).

Plaintiff's Exhibit "C" which is a policy request form has in bold print on the very front of it:

**"Important"**

Your Policy Provides Automatic Insurance For a Newly Acquired Automobile, whether it replaces one described in your policy or is an additional car, provided we insure all automobiles owned by you as of the delivery date of an additional auto, and GEICO is notified within 30 days of delivery.

The purpose of automatic insurance coverage is to give coverage to persons who are already insured with the company in question upon acquiring a new vehicle. The coverage extends to the new acquisition when it replaces the sole automobile owned by the insured, when the insured owns a number of vehicles and all of them are insured with the company, or when several of the vehicles owned by the insured are covered by the policy and the new acquisition replaces one already covered. It does not apply to new vehicles which are in addition to those insured by the former coverages and which are not used as replacements unless

all vehicles of that insured are covered, in which event it is contemplated that a premium readjustment will be made. . . . The insurance protection given is also limited to the nature of the risk originally insured, and is confined to the same policy period. Appleman, Insurance Law & Practice, Vol. 7, §4293 P. 84,85.

In the case of Auto Lease Co. v. Central Mutual Insurance Co., 7 Utah 2d 336, 325 P.2d 264, our court held that where Central Mutual had issued its policy to Auto Lease Company describing five vehicles which were leased to Bearing Service, but Auto Lease owned other automobiles which were not insured by Central Mutual, a vehicle purchased as a replacement for one of the five cars was not covered under the additional automobile provision of the automatic coverage clause since Central Mutual did not insure all automobiles owned by Auto Lease.

See also Buswell v. Biles, supra; and DeSear v. Hardware Dealers Mutual Fire Insurance Co., (1967 , 5th Circuit), 381 F.2d 367 (Fla.).

There are many cases supporting the holdings of the three cited cases. Appellant has not found any case holding that the provision restricting automatic coverage of additional vehicles to those instances where all vehicles owned by the named insured are insured by the insurer as being unreasonable, illegal or against public policy.

Plaintiff claims that M & M Orchards is also a named insured, but this is not true. Dr. Matlock was the owner of the vehicle and the named insured. M & M Orchards, P. O. Box 6, Delta, Colorado, as appears on Exhibit "B" is only the address for the farm and the place where the vehicle was to be used and kept. M & M Orchards was not a corporation or a legal separate entity but a name under which Dr. Matlock operated his orchard. He was the sole owner of the vehicle.

He was not entitled under his policy with Security Mutual nor his GEICO policy to automatic 30-day coverage for any additional vehicle acquired by him.

His application for coverage was subject to acceptance by the company, and was effected by the company on the 8th of April, 1973. They could have refused to cover the risk at all if they so elected.

POINT IV. THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE DEFENDANT INSURANCE COMPANY HAD WAIVED ITS RIGHTS OR WAS ESTOPPED TO DENY COVERAGE UNDER THE POLICY BECAUSE OF ITS CONDUCT IN INVESTIGATING THE ACCIDENT.

The insurance company issued its endorsement covering the 1951 Chevrolet one and one-half ton truck on June 8, 1973 effective April 8, 1973 to Policy No. 506-14-76-1 which had been in effect for many years, had an annual premium rate with a policy period that dated from March 30 to March 30 of the following year, with the current policy period for the policy involved in this accident of March 30, 1973 to March 30, 1974. When the general endorsement was sent to the insured in June of 1973 he noted the effective date covering the 1951 truck of 4-8-73 and was, therefore, put on notice that the defendant insurance company was not covering his accident of April 7, 1973. Plaintiff claims that the policy was corrected on October 29, 1973 to show coverage on the 1951 Chevrolet, but the evidence does not show this. The exhibit (Plaintiff's Exhibit "B") merely shows that the policy period was from March 30, 1973 to March 30, 1974. These are the same dates that this policy period had run for many years. Dr. Matlock was, therefore, on notice that he should probably investigate the accident himself. He, however,

together with James Horton were the primary witnesses to the transactions involving this matter.

Dr. Matlock did talk to the Hortons and James Horton with his family is still living on the farm property. Until suit was filed by Horton Dr. Matlock had plenty of opportunity to talk to Mr. Horton. The police officer's report is available as is also the investigation of GEICO. The declaratory action was not filed until June of 1974, and the federal action in September of 1974 which is being defended by Dr. Matlock's farm liability carrier. He also had a letter from McMillan Claims Service, an independent adjuster, dated August 8, 1973 that GEICO could not find a policy verifying coverage for the 1951 Chevrolet and for him to send a copy of his policy to them so they could determine coverage which he was claiming (Plaintiff's Exhibit "D"). The company was in the process of establishing a claims office in San Francisco to service the claims for the Western States and this claim was transferred to the San Francisco office for handling which may have caused some delay in correspondence and handling.

On August 21, 1972 Dr. Matlock applied for coverage under his GEICO policy on a 1972 three-quarter ton pickup with a camper on it. This vehicle was at his home in Pocatello, Idaho at the time. He did not hear from the company with respect to his application and wrote a reminder letter on October 7, 1972 because he had not heard from them (Defendant's Exhibit "D-1", R. 121, and Defendant's Exhibit 2). The company subsequently sent him a policy covering the 1972 camper, but in the meantime he had renewed his coverage with Security Mutual Insurance Company and returned the policy

to GEICO, advising them that he had renewed his coverage with Security. He did advise the company he wanted his coverage continued on the 1971 Ford pickup. The company sent him a letter dated December 29, 1972 acknowledging receipt of his notice that the 1972 Chevrolet was covered by a policy with another company and inquired of him as to the date it was insured with the other company so that they could continue the coverage on the 1971 Ford pickup without lapse (Defendant's Exhibit 3).

GEICO had, in fact, issued coverage on the 1972 pickup with camper and inadvertently continued for a time to bill him for coverage on this vehicle, and several letters were written by him trying to straighten the billing out (R. 117, 133).

During this same period of time the investigation of the question of coverage and the facts of the accident were being checked by McMillan Claims Service in Grand Junction, Colorado and Miles Hollcraft Company in Ogden, Utah (R. 136 and 137; Plaintiff's Exhibits "E," "D," "F" and "X").

On May 25, 1973 the GEICO Washington office sent a letter to him requesting additional information pertaining to the loss (Plaintiff's Exhibit "M"). He was in touch with McMillan Claims Service after the accident on several occasions, and then was contacted by a claims representative from Miles Hollcraft Company in Ogden, Utah prior to or in December 1973 or early January, 1974, who took a history from him and told him, "This should wrap it up" (R. 113).

In January, 1974 he received a non-waiver letter dated January 22, 1974 from GEICO's San Francisco office reserving rights in connection with

the investigation of the accident (Plaintiff's Exhibit "Z") and in May, 1974 a letter from GEICO dated May 6, 1974 denying coverage.

In connection with the medical bills incurred by Mr. Horton, Blue Cross and Blue Shield under Mr. Horton's individual policy was paying the medical bills and paid all of them except for a few which Dr. Matlock paid (Exhibit "N"). As previously stated, at the time the declaratory action was filed by the plaintiff no suit had been filed in federal court and it was GEICO's refusal to pay the medical bills which prompted the declaratory action. In connection with payment of the medical bills a memo was sent by McMillan Claims Service dated December 19, 1973 to Charles Traylor, an attorney whose identity or connection with the case is not established, wherein reference is made to a statement alleged to have been made to Dick Bottinelli, of McMillan Claims Service, to the effect that Washington had told him they had issued a draft. The draft was never, apparently, sent. The person who made the statement, if made, was never identified. Mr. Bottinelli, also, apparently on December 19, 1973, according to the memorandum, was told by a secretary or someone not identified in the San Francisco office that she would run the file down and make payment. This was not done, and the identity of the person was never established. He did advise Mr. Traylor in that memorandum that it would be necessary for Horton to submit a statement of claim. Dr. Matlock readily admitted that the fact that GEICO did not recognize the coverage did not influence the amount of the medical bills on Mr. Horton (R. 132).

Section 31-19-34, Utah Code Annotated, 1953, states as follows:

None of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of any provision of the policy or of any defense of the insurer thereunder; (1) acknowledgment of the receipt of notice of loss or of claim under the policy; (2) furnishing forms for reporting a loss or claim, for giving information relative thereto, or for making proof of loss or receiving or acknowledging receipt of any such form of proof filled out; (3) investigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any such loss or claim.

In Buchanan v. Switzerland General Insurance Co., (Wash., 1969), 455 P.2d 344 the court distinguishes between estoppel and waiver:

Waiver, either express or implied, has been defined as the voluntary and intentional relinquishment or abandonment of a known right. It is unilateral in that it arises out of either action or non-action on the part of the insurer or its duly authorized agents and rests upon circumstances indicating or inferring that the relinquishment of the right was voluntarily intended by the insurer with full knowledge of all the facts pertaining thereto. Citing Hopkins v. Northwestern National Life Insurance Co., 41 Wash. 592, 83 P. 1019; Reynolds v. Travelers Insurance Co., (Wash.), 28 P.2d 310; and 16A Appleman Insurance Law & Practice, §9081, 1968; 18 Couch on Insurance 2d §71-13.

Estoppel, on the other hand, refers to a preclusion from asserting a right by an insurer where it would be inequitable to permit the assertion. It arises by operation of law, and rests upon acts, statements or conduct on the part of the insurer or its agents which lead or induce the insured, in justifiable reliance thereupon, to act or forbear to act to his prejudice. Abatement of the right or privilege involved by way of estoppel need not be intentionally, voluntarily or purposely effected by or on the part of the insurer. Reynolds v. Travelers Insurance Co., supra; 16A Appleman Insurance Law & Practice, §9081, 9088; 18 Couch on Insurance 2d §71-16.



An automobile liability insurer was not estopped to deny coverage by the fact that it made a complete investigation of the accident which happened on December 5, 1965, but did not formally disclaim coverage until June 29, 1966, where the insurer would not know whether its policy provided coverage until it had determined what facts and circumstances surrounded the accident. State Farm Mutual Insurance Co. v. Pearce, (1968, Neb.), 157 N.W.2d 399.

Estoppel is the equitable doctrine that a party should not be permitted to repudiate an act done or position assumed where that course would work an injustice to another who, having ample reason to do so, has relied thereon. An estoppel may arise even where there is no intent to mislead, as long as one's conduct is sufficient to induce reasonable reliance upon the part of the other. The party estopped must have acted with the knowledge of the facts. However, the final element which must always be present in an estoppel is a change of position by the relying party with prejudice for injuries suffered as a proximate cause of such reliance.

There has been no change of position by Dr. Matlock with prejudice for injuries suffered by him as a proximate cause of any reliance, and it was incumbent upon the insurer to determine all of the facts to assure itself that it was not making an error in establishing coverage for the one and one-half ton truck on April 8, 1973, rather than accepting coverage under the policy on the 30 day automatic coverage clause.

In the case of State Farm Mutual Auto Insurance Co. v. Richard Kay and Myrtle Kay, 26 Utah 2d 195, 487 P.2d 852 (July, 1971) Richard Kay, who

was 35 years of age and lived with his mother, Myrtle Kay, was riding with his mother on August 4, 1968 when she either fell asleep or suffered a blackout and ran her vehicle off the highway and into a dirt embankment. Both sustained severe injuries. The insurance company made payment under the medical pay provisions of the injuries to both Myrtle Kay and Richard Kay. Subsequently Richard Kay, through his counsel, asserted a claim for his injuries to State Farm. By letter dated May 1, 1969 a field claim representative for State Farm notified Richard's counsel of the following exclusion in the policy:

This insurance does not apply under (1) coverage A to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured; . . . .

On July 15, 1969 Richard filed an action against his mother claiming damages in the sum of \$121,000.00. Myrtle Kay submitted the defense of the action to State Farm and counsel for State Farm filed an answer on August 1, 1969. On August 29, 1969 State Farm took Richard's deposition which was signed by Richard on September 17, 1969 and on October 23, 1969 State Farm filed a declaratory judgment action asserting that no liability could exist under the terms of the policy because of the exclusion of coverage of the insured for bodily injury to a member of the family of the insured residing in the same household and that inasmuch as there was no coverage, there was no duty to defend the insured. Defendants asserted that State Farm was estopped to deny coverage since it unconditionally assumed the defense of Myrtle Kay without taking any reservation of rights, although it possessed knowledge of the defense as evidenced by the letter from the field claims representative. The trial court

ruled as a matter of law that Myrtle Kay had been prejudiced and that State Farm was estopped to deny coverage. The plaintiff appealed. Myrtle Kay claimed that had she known that insurer's counsel would seek to represent conflicting interests, she would have procured her own counsel initially and that by her insurer's counsel representing her on her appearance she lost the right to control and manage her own case and the right to the individualized attention by counsel of her own choice, and the opportunity to settle or compromise the claim. She concluded that she was induced by State Farm to refrain from using such means or taking such action as lay in her power from the time of the accident until the matter was set for trial on January 12, 1970.

The court held:

In the instant action there is nothing in the record to indicate that Mrs. Kay was deprived, by the conduct of State Farm, of an opportunity to prepare an adequate defense before trial or in the alternative, to effect a settlement with her son. There were no assertions that her counsel would have inadequate time to prepare a defense or that he lacked a reasonable opportunity to gather and preserve evidence or to institute certain pre-trial procedures. We are compelled to conclude that the trial court erred in its determination that Mrs. Kay's interest had been prejudicially affected by the conduct of State Farm.

In the State Farm v. Kay case our court has, with respect to that case, followed the rule that there must be actual prejudice, not mere assertions of prejudice, to hold an estoppel against the insurance company. In this case, as in ours, the insurance company had made an investigation of the accident and was aware of the provision in the policy which amounted to an exclusion, if the facts came within that exclusion. The fact that the company extended a defense of the case, by filing an answer and taking a deposition before filing a declaratory action, was held not to constitute an estoppel. In

other words, the company was allowed to continue its investigation even though over a year had expired since the time of the accident without being guilty of conduct amounting to an estoppel.

In the case before this court the lawsuit in Colorado was filed shortly before the tender of the defense on the 5th of September, 1974. The declaratory action was filed by plaintiff in June of 1974.

In effect, Dr. Matlock is trying to bring within the coverage of the insurance policy a risk that is not covered by the terms of the policy in that he had his cars insured with two companies instead of one which would activate the automatic 30-day coverage clause. The 30-day automatic coverage was excluded under those circumstances and also the circumstance that the vehicle, a one and one-half ton truck, did not come within the provisions of the definition of owned vehicle under the policy.

In §1135, 29A American Jurisprudence Insurance at p. 289, it is stated:

The rule is well established that the doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom, and the application of the doctrines in this respect is, therefore, to be distinguished from the waiver of or estoppel to assert grounds of forfeiture. Thus, while an insurer may be estopped by its conduct or its knowledge from insisting upon a forfeiture of a policy, the coverage or restrictions on the coverage cannot be extended by the doctrine of waiver or estoppel. While it is true that if the insurer, with knowledge of facts which would bar an existing primary liability, recognizes such primary liability by treating the policy as in force, he will not thereafter be allowed to plead such facts to avoid his primary liability, the doctrine of waiver cannot be invoked to create primary liability and bring within the coverage of the policy risks not included or contemplated by its terms.

On page 13 of the supplement in Couch 2d on Insurance, Vol. 18, under §71-35 Existence of Contract, it is stated:

Waiver and estoppel cannot create a new contract between the parties. Scott v. Industrial Life Insurance Co., 411 S.W.2d 769. See also Madgett v. Monroe County Mutual Tornado Insurance Co. (Wisc.), 176 N.W.2d 314 where it is also said: Estoppel cannot be used to create a contract of insurance. Waiver and estoppel usually cannot operate to extend coverage where none exists under the contract. Looney v. Allstate Insurance Co. (8th Cir., Ark.), 392 F.2d 401. To establish a waiver evidence must show the acts of the insurer constituted a voluntary intentional relinquishment of a known right and that insurer had full knowledge of all pertinent facts. Wasilco v. Home Mutual Casualty Co. (Penn.), 232 A.2d 60. Also see Buchanan v. Switzerland General Insurance Co., supra.

With regard to plaintiff's claim that defendant's adjuster made certain statements which waived exclusions of liability coverage contained within the policy, defendant cites L. L. Buchanan v. Switzerland General Insurance Co., supra. The court in this case did not allow the adjuster to make any waivers of a policy provision.

Thus, for an independent adjuster, within our statutory framework, to effect a waiver of a policy or statutory framework, i.e., an involuntary and intentional relinquishment of the provision, on the part of his principal, the insurer, it is necessary to establish that he was vested with the requisite degree of authority to effect the waiver.

The court also states that:

[W]e would indulge in no presumptions of authority on the part of an adjuster permitting him to waive such policy provisions on the part of an insurer absent proof of such added authority.

There was no evidence submitted in the trial to show that the adjuster was given such express authority to effect a waiver of policy provisions. Lacking the presumption of authority or actual authority from the insurer, the

adjuster was not able to make such a waiver as plaintiff contends that he did. In additional support to defendant's contention of no presumed authority see Rosengrant v. National Mutual Assurance Co., 76 Pa. D. and C. 188; Berger v. Aetna Life Insurance Co., 95 N.Y.S. 541; and Zick v. Boston Casualty Co., 185 N.E. 362, 282 Mass. 491.

There was no proof that McMillan Claims Service had been authorized to waive any rights that the company had. Exhibit "F" does not constitute such a waiver and, in fact, is not even addressed to Dr. Matlock. No particular employee of GEICO was identified except the secretary who was going to look for the file. The exhibit was introduced over the objection of defendant. See (R. 108, 109).

There was no evidence to show that Dr. Matlock had, in fact, been prejudiced by the investigation of the company in connection with its investigation. He was put on notice initially that the coverage was placed the day after the accident. He knew that the investigation was under way and was continuing and, in fact, received a request for additional information directly from GEICO and was also requested to furnish additional information through McMillan and through Miles Hollcraft Company in Ogden even into December of 1973. The investigation was complicated somewhat by the fact that the participants involved resided in two different states and also by the fact that GEICO was in the process of setting up a Western office at San Francisco to handle the Western States claims. However, the federal court suit was not filed until September of 1974 some three months after the declaratory action was begun by the insured. He, therefore, had plenty of

time to conduct his investigation and to use the necessary discovery procedures in connection with the federal court case. As a matter of fact, counsel for his farm liability carrier is handling that defense. It is, therefore, respectfully submitted that there was neither waiver by the insurance company nor the basis for an estoppel against it.

#### CONCLUSIONS

Defendant respectfully submits that the defendant insurer was entirely within its rights under the terms of the policy in placing the insurance on the one and one-half ton truck on the 8th day of April because the truck did not qualify as an owned automobile under the terms of the policy and also because the insured did not have all of the vehicles registered in his name insured with GEICO. The 30-day automatic coverage provision, therefore, never came into play.

There is no evidence that the company waived any of its rights under the policy or was guilty of conduct which would estop it from standing upon those rights.

The judgment in favor of the plaintiff insured should be reversed and judgment entered on behalf of the defendant that coverage did not exist for the plaintiff.

Respectfully submitted,

STRONG & HANNI

By \_\_\_\_\_  
L. L. SUMMERHAYS  
Attorneys for Defendant and Appellant  
604 Boston Building  
Salt Lake City, Utah 84111

MAILING CERTIFICATE

Mailed two copies of the foregoing to Richard Campbell, Attorney  
for Plaintiff and Respondent, 2324 Adams Avenue, Ogden, Utah, this \_\_\_\_\_  
day of August, 1975.

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