

1971

Onel J. Barnett and Evelyn I. Barnett v. State  
Automobile & Casualty Underwriters and  
Diversified Insurance Agency, and A-1 Agencies  
Diversified : Brief of Appellant State Automobile &  
Casualty Underwriters

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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ONEL J. BARNETT and EVELYN  
I. BARNETT,

*Plaintiffs and Respondents,*

v.

STATE AUTOMOBILE &  
CASUALTY UNDERWRITERS,

*Defendant and Appellant,*

and

DIVERSIFIED INSURANCE  
AGENCY, and A-1 AGENCIES  
DIVERSIFIED,

*Defendants.*

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## BRIEF OF APPELLANT STATE CASUALTY UNDERWRITERS

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Appeal from the District Court  
Honorable Bryant H. [illegible]

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## INDEX

	<i>Page</i>
NATURE OF THE CASE .....	1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
ARGUMENT .....	7
POINT I	
THERE CAN BE NO RECOVERY UNDER THE STATE AUTO HOMEOWNER'S POLICY BE- CAUSE THE POLICY COVERAGE HAD EXPIR- ED BEFORE THE LOSS OCCURRED .....	7
POINT II	
STATE AUTO HAD NO DUTY TO NOTIFY THE PLAINTIFFS OF THE EXPIRATION DATE OR TO RENEW THE POLICY .....	10
POINT III	
THE TESTIMONY OF MR. BARNETT AND WILLIAM SLAUGH ON "CUSTOM OR USAGE" WAS IMPROPER .....	14
POINT IV	
BECAUSE ALL PRIOR CONVERSATIONS AND AGREEMENTS ARE MERGED INTO THE WRITTEN INSTRUMENT ONCE EXECUTED, IT WAS ERROR TO ALLOW PAROL EVID- ENCE IN CONFLICT WITH THE INSURANCE POLICY .....	21
CONCLUSION .....	27

## CASES CITED

Brooks v. Renner & Co., 243 Ark. 226, 419 S.W.2d 305 (1967) .....	20, 21
Cortina v. General Insurance Co. of America, 40 Misc. 2d 916, 244 N.Y.S.2d 243 (1963) .....	19
Field v. Missouri State Line Insurance Co., 77 Utah 45, 290 P. 979 (1930) .....	26

## INDEX (Continued)

	<i>Page</i>
Idaho Forwarding Co. v. Fireman's Fund Insurance Co., 8 Utah 41, 29 P. 826 (1892) .....	25, 26
Jones v. New York Life Insurance Co., 69 Utah 172, 253 P. 200 (1926) .....	23, 24
Kapahua v. Hawaiian Insurance and Guaranty Co., 447 P.2d 669 (Hawaii 1968) .....	11
Kimball v. Clinton County New Patrons Fire Relief Assn., 23 A.D.2d 519, 255 N.Y.S.2d 366 (1965) .....	13
Marriot v. Pacific National Life Assurance Co., 24 Utah 2d 182, 467 P.2d 981, 983 (1970) .....	9
M.F.A. Mutual Insurance Co. v. Black, 441 S.W.2d 134 (Ky. 1969) .....	18, 19
Munro v. Boston Insurance Co., 370 Mich. 604, 122 N.W.2d 654 (1963) .....	12, 13
Okamura v. Time Insurance Co., 24 Utah 2d 209, 468 P.2d 958 (1970) .....	17, 18
Siewerdsen v. U.S.F.&G., 184 Neb. 870, 173 N.W.2d 27 (1969) .....	19, 20
United Pacific Insurance Co. v. Northwestern National In- surance Co., 185 F.2d 443 (10th Cir. 1950) .....	24

## STATUTES CITED

Utah Code Ann. §31-19-11 (1953) .....	8
Utah Code Ann. §31-19-18 (1953) .....	23
Utah Code Ann. §31-19-26 (1953) .....	23

## AUTHORITIES CITED

12 Appleman, Insurance Law and Practice, 247 §7175 (1943)....	9
1 Couch on Insurance 2d 757 §15:61 (1959) .....	14
1 Couch on Insurance 2d 759 §15:63 (1959) .....	15
5 Couch on Insurance 2d 662 §30:128 (1960) .....	16

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I. BARNETT,

*Plaintiffs and Respondents,*

v.

STATE AUTOMOBILE &  
CASUALTY UNDERWRITERS,

*Defendant and Appellant,*

and

DIVERSIFIED INSURANCE  
AGENCY, and A-1 AGENCIES  
DIVERSIFIED,

*Defendants.*

Case No.  
12264

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## BRIEF OF APPELLANT STATE AUTOMOBILE & CASUALTY UNDERWRITERS

---

### NATURE OF THE CASE

This is an action on a fire insurance contract.

### DISPOSITION IN LOWER COURT

Judgment on separate jury verdicts were made and entered in favor of the plaintiffs and against the defendants, Diversified Insurance Agency and State Automobile & Casualty Underwriters in the amount of \$23,484.07.

The lower court granted a judgment of dismissal in favor of the defendant A-1 Agencies Diversified dismissing the plaintiffs' claims against them.

## RELIEF SOUGHT ON APPEAL

This defendant seeks reversal of the judgment of the lower court against it and an order directing the lower court to grant judgment in its favor as a matter of law or in the alternative to grant this defendant a new trial.

## STATEMENT OF FACTS

State Automobile & Casualty Underwriters (hereinafter called State Auto) is an insurance company authorized to write fire insurance in the State of Utah. Guaranty Security Insurance Company is an insurance company of which State Auto had assumed all obligations.

Plaintiffs, the Barnetts, are residents of Vernal, Utah.

On October 19, 1967, the Barnetts' home and furnishings were damaged by fire. A Guaranty Security Insurance homeowners policy (No. HO 112-63035) including fire coverage on the Barnett home had expired October 1, 1967, eighteen days prior to the fire.

Because State Auto later assumed the liabilities under this policy, the policy will hereinafter be referred to as the State Auto policy.

Mr. Barnett admitted at trial that he had not read the policy or made note of the expiration date prior to locking the policy in a Vernal bank safety deposit box (R.179, 191) and had not requested that he be notified prior to the expiration date (R. 199).

Five or six days after the fire Mrs. Barnett back-dated a check to October 1, 1967, in an attempt to create after-the-fact coverage and mailed it to Diversified Insurance Agency, through whom the State Auto policy had originally been written. The check was returned (R.196, 217) (Exhibit 26-DA-1).

No proof of loss was ever filed with State Auto (R.198).

For about twenty-two years prior to October 1, 1964, Noble Kimball, a local insurance agent, handled the fire insurance needs of the Barnetts (R.187). Noble Kimball enjoyed the full confidence of the Barnetts in their insurance needs and always selected the insurer without any preference designation by the Barnetts (R.188).

Noble Kimball over the years had placed the Barnetts insurance with several companies (R.187). From July 5, 1961, to July 5, 1964, they were insured with the Pearl Assurance Company under policy F 10 78 45 75 (Exhibit 2-P) (R.171).

A few days before the State Auto policy became effective on October 1, 1964, Mr. Barnett was introduced to Richard Salisbury, president and manager of Diversi-

fied Insurance Agency, who had been brought into his office by Noble Kimball (R.174). Mr. Kimball explained that he was retiring from business and that Diversified Insurance Agency was going to handle his accounts from that time on. Richard Salisbury told Mr. Barnett that he would do his best to continue the services Noble Kimball had previously given and Mr. Barnett accepted Richard Salisbury as his new agent (R.176).

Diversified Insurance Agency issued the State Auto homeowner's policy effective October 1, 1964 including fire coverage, personal liability coverage, and medical payments coverage. This was a broader coverage than in the Pearl Assurance policy furnished by Noble Kimball which had expired on July 5, 1964, nearly three months before (R.178).

Apparently Noble Kimball had let the Barnetts' fire insurance lapse for the period between July 5, 1964 when Pearl Assurance policy expired and October 1, 1964 when the State Auto policy became effective. No evidence of coverage during this three month period was presented at trial.

Despite this evidence of a three month lapse in coverage Mr. Barnett was allowed, over objections, to testify that it was the custom and practice of Mr. Kimball to renew their fire insurance and bill the Barnetts (R.169-70, 190). It was undisputed that Noble Kimball was never an insurance agent or representative of Guarantee Security or State Auto, the issuers of the policy upon which this case is based.



Plaintiffs called only one other witness besides the Barnetts — William H. Slaugh, an agent serving a single company — State Farm Insurance. State Farm Insurance does not operate through the American Agency System which means it remains the owner of all renewal business as opposed to the local agent having all renewal rights (R.235-36). Mr. Slaugh, over objections, was permitted to testify about State Farm's procedures of notice to insureds of forthcoming renewal dates and cancellation upon expiration of the policy (R.219-22, 226-30). The court further permitted Mr. Slaugh to testify, over objections, as to the practice of other companies in sending notices of expiration or renewal. His testimony was based only upon his past observations of other company's policies (R.229-30).

Mr. Slaugh admitted that he had never heard of Diversified Insurance Agency or seen a policy issued through it prior to his appearance as a witness (R.230).

In October 1964, the effective date of the State Auto homeowner's policy, the Kolob Corporation served as a general agent for Guarantee Security Insurance (R.276). Later, Diversified Insurance Agency became Guaranty Security's general agent. On February 28, 1966, State Auto assumed the liabilities and obligations of Guarantee Security Insurance Company (Exhibit 1-P).

On November 28, 1965 Guarantee Security cancelled the agency agreement with Diversified and appointed Trans-Western Insurance Agency as its new general agent (R.277). Thereafter, Diversified was without authority

to accept or bind State Auto or Guarantee Security on new risks though authorized to service policies then in effect until their expiration dates.

Mr. Elwood Johnson, manager of the regional State Auto office, testified that State Auto operated through the American Agency System in which the agents, not the company, owned the right of renewals, i.e., State Auto had no right to bypass the local agent in an effort to renew an about-to-expire policy (R.276). Accordingly, State Auto did not notify plaintiffs their policy would expire October 1, 1967.

The Barnetts filed a Complaint, an Amended Complaint, and a Second Amended Complaint (R.1, 41, 58). They allege that on October 19, 1967, their home and furnishings were damaged by fire (R.1, 41, 59) and that on said date State Auto's policy No. HO 112-63035 was in full force and effect (R.1, 41, 58). There is no allegation in any of the pleadings that State Auto had a duty to notify plaintiffs of their expiration of their policy or warn them prior to expiration. Neither do the pleadings allege that Diversified was acting within the scope of its authority as an agent for State Auto when it omitted to notify the Plaintiff of the expiration of their policy, nor is there an allegation that State Auto was negligent, careless or breached its contract in failing to notify plaintiffs their policy would expire October 1, 1967.

## ARGUMENT

### POINT I

THERE CAN BE NO RECOVERY UNDER THE STATE AUTO HOMEOWNER'S POLICY BECAUSE THE POLICY COVERAGE HAD EXPIRED BEFORE THE LOSS OCCURRED.

Plaintiffs filed an original Complaint, an Amended Complaint, and a Second Amended Complaint. The Second Amended Complaint alleges three causes of action: one against State Auto, one against Diversified Insurance Agency, and one against A-1 Agencies Diversified.

The cause of action alleged against State Auto in each complaint is an action in contract. With respect to the State Auto policy each complaint contains the sentence:

"That said insurance policy was in full force and effect on October 19, 1967." (R.1, 41, 58)

October 19, 1967 is the date of the fire which damaged the Barnett home.

Plaintiffs' contract theory of recovery under the policy was presented to the jury in Instruction No. 12 which stated:

\* \* \*

"The First Cause of Action in plaintiff's complaint is directed against only the defendant, State Automobile and Casualty Underwriters, and with respect to that defendant plaintiffs allege that said company issued a fire insurance policy upon their home in Vernal, Utah, and its contents and fur-

ther allege that said policy was in full force and effect on October 19, 1967, *and that pursuant to the terms of the policy said defendant is liable to plaintiffs for the loss sustained by them as a consequence of such fire.*" (R.91) (Emphasis added.)

\* \* \*

The jury therefore was instructed that any recovery against State auto must be "pursuant to the terms of the policy."

Utah Code Ann. § 31-19-11 (1953) requires that the policy term be specified in an insurance contract:

**"31-19-11. What constitutes policy — Required specifications in policy.—**(1) The written instrument, in which a contract of insurance is set forth, is the policy.

(2) A policy shall specify:

\* \* \*

(e) the time at which the insurance thereunder takes effect and the period during which the insurance is to continue; \* \* \*

On the front of the State Auto policy directly under the name and address of the Barnetts is stated the coverage term of the policy. The term is from October 1, 1964 to October 1, 1967.

Item nine (9) under the "General Conditions" portion of the policy contains the words "Policy Term" in bold face type followed by:

"This policy applies only to losses or occurrences during the policy term." (Exhibit 1-P)

Under no construction of the policy can any loss occurring after October 1, 1967 be deemed covered "pursuant to the terms of the policy."

12 Appleman, *Insurance Law and Practice*, 247 § 7175 (1943) states:

"Fire policies expire according to their terms. Courts cannot disregard a plain, unambiguous statement in the policy as to the expiration date, in the absence of accident, mistake, or fraud."

There is no ambiguity about the expiration date of the policy — it is conspicuous on the front of the policy. Plaintiffs have not alleged the October 1, 1967 expiration date was placed on the policy through accident, mistake or fraud. To require payment under the policy for a loss occurring after coverage had expired is to ignore the clear and unambiguous language of this contract and require the payment of a loss for which no premium had been charged or paid.

Such a result is contrary to the law and specifically to *Marriot v. Pacific National Life Assurance Co.*, 24 Utah 2d 182, 467 P.2d 981, 983 (1970) where this court stated:

"[I]nasmuch as insurance coverage is based on contract, unless there is some good reason to the contrary, we are obliged to assume that language included therein was put there for a purpose, and to give it effect where its meaning is clear and unambiguous."

The premium paid by Mr. Barnett was for the three year period from October 1, 1964 to October 1, 1967. He received the coverage during that period in return for his premium.

Any coverage the Barnetts had after October 1, 1967 could not have been provided under this policy. If the coverage was provided beyond October 1, 1967 under any other contract there could still be no liability to State Auto because plaintiffs cause of action was based on the policy which expired October 1, 1967.

It was error to submit State Auto's liability under the policy to the jury. In finding State Auto liable the jury ignored their instructions that State Auto's liability must be found from the policy. State Auto should be held not liable under the policy as a matter of law.

## POINT II

STATE AUTO HAD NO DUTY TO NOTIFY THE PLAINTIFFS OF THE EXPIRATION DATE OR TO RENEW THE POLICY.

The Barnett home fire occurred nineteen days after the policy expired. There is no provision in the policy requiring State Auto to renew the policy or notify the insureds of expiration. The policy was not written for a continuous period and State Auto had never insured the Barnett home previously. If suit were brought by an insurer to collect a renewal premium due after expiration of a policy and the insured had already given his business to another insurer, it is certain that the insured

would be outraged and for sure no court in the land would allow a recovery of the renewal premium by the insurance company from the former insured.

The duty to notify of cancellation or renewal has been argued to courts in many different jurisdictions.

The cases consistently hold that under conditions as presented by this case there is no duty to notify or renew absent a specific provision to that effect in the policy.

*Kapahua v. Hawaiian Insurance and Guaranty Co.*, 447 P.2d 669 (Hawaii 1968), involved the issue of duty to renew. Kapahua purchased automobile insurance from the defendant through an agent by the name of Mossman for a term stated from May 9, 1966 to May 9, 1967. The contract contained no grace period provision nor any provision that a notice of expiration would be sent. Plaintiff sued the insurer for damages incurred in an accident seventeen days after the policy expired. Plaintiffs' theory was that the defendants were negligent in their alleged duty, derived from an implied contractual duty determined by custom in the insurance industry, to notify her of the expiration of the policy or to renew the policy automatically. The trial court directed a verdict for the defendants. In affirming the judgment the Hawaii Supreme Court stated:

"It may well be in the public interest that automobile insurance policies should not lapse due to forgetfulness on the part of the insured, or inconsistent action of insurers and that a duty be imposed upon the insurers to give notice of expiration before terminating the current policies.



But, unless expressly written in the insurance contract, such duty may only be imposed by the legislature.” *Id.* at 671.

The court pointed out that the rule urged by plaintiff would violate the statute requiring insurance agreements to be in writing since it would impose a duty upon the insured to pay premiums to the company beyond the expiration date of the policy.

*Munro v. Boston Insurance Co.*, 370 Mich. 604, 122 N.W.2d 654 (1963), involved the same issue. The Munro case was an action on a fire insurance policy in which the policy expired August 29, 1960. The policy was written by a local agency which subsequently was sold to Holly Insurance Agency. Holly Insurance Agency did not notify the insured either before or after August 29, 1960, that the policy would or had expired. The dwelling described in the policy was destroyed by fire on January 23, 1961. After the fire the plaintiffs were advised no payment would be made because the policy had expired. Suit was instituted on the basis of an alleged custom observed by the companies in the area of giving notice prior to expiration of fire insurance policies.

In affirming a directed verdict for the insurer the Michigan Supreme Court stated:

“The provisions of the policy before us were duly observed. The installments of the premium were presumably paid as they fell due. The policy was not one for a continuing period based on compliance with its terms but, rather, specified clearly and unequivocally the date of expiration.



Plaintiffs were bound by that provision. *No obligation rested on defendant to seek the execution of another contract*, and liability was not extended under the expired undertaking on the theory advanced by appellants. (Emphasis added.)

\* \* \*

"The acceptance of appellant's claim would result, in effect, in creation of liability following the expiration of the policy as written, and would from a practical standpoint be the equivalent of creating a new contract between the parties."

*Kimball v. Clinton County New Patrons Fire Relief Assn.*, 23 A.D.2d 519, 255 N.Y.S.2d 366 (1965), is also factually similar to the matter before this court. Kimball brought suit against a fire insurer for damages arising from the destruction of a building after the expiration date of the policy. The policy contained no provision requiring the insurance company to give notice of an expiration date. Kimball relied on a custom of the insurer and the insured's agent to discuss renewal coverage or new and different coverage prior to expiration which was not done prior to the last expiration. The court affirmed judgment for the insurance company stating:

"The policy was not cancelled during its term. *It contained no provision requiring notice of its expiration* other than the expiration date appearing therein; nor, of course, was there a requirement of notice of any assessment not applicable during this term.

"The terms of the policy were always within the knowledge of the plaintiff, and if he failed to remember the policy expired at a certain time before the fire, it was his own negligence, and

not the defendant's which prevented the plaintiff from renewing the policy." 255 N.Y.S.2d at 367.

### POINT III

#### THE TESTIMONY OF MR. BARNETT AND WILLIAM SLAUGH ON "CUSTOM OR USAGE" WAS IMPROPER.

Throughout the trial plaintiffs presented evidence, over repeated objections, to show alteration of the policy through "custom and usage."

Though the policy was clear as to its term, plaintiffs argued that custom required State Auto to continue coverage beyond the expiration date stated in the policy.

1 *Couch on Insurance 2d* 757 § 15:61 (1959) states:

**"Usage or custom at variance with terms of contract.** If the contract is stated in clear, positive, and unambiguous terms, usage or custom *cannot* be permitted to vary or contradict the terms used." (Emphasis added.)

Allowing evidence before the jury which directly conflicted with the clear terms of the State Auto policy was therefore error.

Even where the evidence of usage or custom is presented to show some act not at variance with the contract there are certain characteristics which it must possess before it can be admitted into evidence:

**“Essentials of usage constituting aid in construction.** In order that a usage may be admitted in evidence as an aid to the construction of an insurance policy, it must possess certain characteristics, namely, it must be generally well established and notorious, uniform, and reasonable. *It must be general, that is, general to the whole mercantile world, or in regard to the particular trade to which it has reference.*” 1 *Couch on Insurance* 2d 759 § 15:63 (1959). (Emphasis added.)

State Auto, as many insurers in the industry, operates through what is called the “American Agency System.” This system recognizes that many customers have been secured solely through the efforts of agents who represent several insurers. As such, the customer is deemed to be the agent’s asset as opposed to the insurer’s. Therefore only the agent has the right to directly contact the customer in securing renewal of a policy. Automatic renewal or efforts to secure a renewal by the insurer directly with the customer would violate the regulations of the American Agency System. The customer has the advantage under this system of not being “locked in” to one company and therefore being able to place his insurance with the most favorable insurer among the several his agent represents.

At trial, Mr. Elwood Johnson, manager of the regional State Auto office, explained how the American Agency System operated. He testified that State Auto operated through the American Agency System (R.276).

Other insurers, not members of the American Agency System, own the renewal rights of their policies and therefore contact the customer directly in seeking a renewal.

The custom of giving notice of expiration and cancellation, therefore, is not general to the whole insurance trade. Obviously, then, the custom cannot be binding in its effect upon the insurers not participating in the custom:

"It is to be noted that the custom or usage which gives rise to a duty to give notice is not custom or usage in the general sense in which those terms are employed in contract law but *relates only to the practice of the particular insurer.*" 5 *Couch on Insurance* 2d 662 § 30:128 (1960) (Emphasis added.)

All of the evidence presented by plaintiffs in attempting to show a custom binding upon State Auto was objected to as without foundation, immaterial, irrelevant, or based on hearsay. (R. 169-72, 175-76, 180-83, 220-22, 227-33, 239-47).

Mr. Barnett testified that his agent, Noble Kimball, had always renewed his fire insurance since 1942 without fail (R.187). Plaintiffs were unable to explain, however, why Mr. Kimball had allowed a three month lapse between the effective date of the State Auto policy and the policy with Pearl Assurance held prior to the State Auto policy.

Mr. Barnett admitted that the renewal or notice of expiration was always Mr. Kimball's act and not the insurers. The Barnetts' insurance had been placed in var-

ious companies through the years (R.187). The State Auto policy on the Barnett home which expired prior to the fire was the only State Auto policy Mr. Barnett ever owned because Noble Kimball had never, in his entire career, represented State Auto.

Plaintiffs also called William H. Slaugh to testify concerning insurers' renewal practices. Mr. Slaugh was allowed to testify as to the practices of other companies though he himself represented only one insurer. The company he represented did not operate through the American Agency System (R.235-36). His knowledge of other insurers' renewal practices was in fact not based upon custom at all but upon what was contained in the policies of these other companies (R.229-30)!

The evidence of renewal customs should never have been admitted because no foundation for the testimony was established which showed the custom to be that of State Auto as opposed to some other insurer. Noble Kimball's treatment of the Barnett account over the years could not establish a custom binding upon State Auto — a company he never represented.

Despite the uncontested fact that the Barnetts had owned only a singly policy with State Auto and this single policy was written through an agent they had never seen but once (R. 194, 199, 200), the issue of custom contradicting the policy's terms was allowed to go to the jury.

In the recent case of *Okamura v. Time Insurance Co.*, 24 Utah 2d 209, 468 P.2d 958 (1970), this court rejected

the theory that acceptance of one prior premium after the due date was sufficient to establish a custom waiving prompt payment:

“A custom or usage exists only when followed for a substantial period of time.” 468 P.2d at 959.

It is clear from similar cases that the insurance contract cannot be modified by a custom which is binding only on the insurer — such a custom goes no further than achieving the status of “a business practice.”

In *M.F.A. Mutual Insurance Co. v. Black*, 441 S.W.2d 134 (Ky. 1969), suit was brought on an auto insurance policy. The policy showed on its face that coverage expired January 25, 1965. The accident occurred January 27, 1965, or two days after expiration.

Black claimed coverage under the policy on the theory that since the insurance company had given him three free extra days on the original six months policy, it should have done the same thing on the new policy, which would have extended the coverage period to January 28.

The appellate court reversed a jury verdict for Black and stating that the issue should never have been submitted to the jury; the insurer was entitled to judgment as a matter of law.

The court also pointed out the inconsistency of plaintiff's argument in bringing this action under the insurance contract and at the same time denying the clear terms of the policy as to the expiration date:

“There is nothing in the record creating any additional obligation of appellant. *A person cannot claim both under and against the same instrument.* [Cites omitted] There was no issue to submit to the jury.” 441 S.W.2d at 136. (Emphasis added.)

*Cortina v. General Insurance Co. of America*, 40 Misc. 2d 916, 244 N.Y.S.2d 243 (1963), was an action against an insurer and agent to declare coverage on an automobile stolen several days after the insured's policy had expired. No notice was given by General Insurance Company or its agent that the policy to Cortina would not be renewed. Cortina had secured the policy on September 10, 1955, effective for a period of one year. Hammond, an agent for General Insurance Company, had last renewed the policy September 10, 1958, to expire September 10, 1959. General Insurance Company cancelled the Hammond Agency on September 1, 1959. Therefore, when the policy expired on September 10, 1959, Hammond had no authority to write any insurance for General. Cortina was not informed of the cancellation of the agency. The plaintiff contended the prior course of conduct led him to believe the policy would be automatically renewed. This contention was rejected by the New York Court which stated the policy clearly showed it was not effective on the date the automobile was stolen.

*Siewerdsen v. U.S.F.&G.*, 184 Neb. 870, 173 N.W.2d 27 (1969), involves a set of facts analogous to this case and points out that a custom to renew a policy does not bind the insurer unless the custom is equally binding on the insured. In this case the plaintiff purchased an automobile liability policy on June 6, 1962 from an agency



through a soliciting agent. The policy delivered showed coverage from June 6, 1962 to June 6, 1963. The policy expired by its own terms. The soliciting agent who originally obtained the policy entered into an agency agreement with U.S.F.&G. The agency for U.S.F.&G. did not renew the policy because the soliciting agent had taken the business. No renewal notice was sent to the insured or to the soliciting agent by U.S.F.&G. On May 7, 1963, U.S.F.&G. mailed a renewal policy to the original agency but this policy was returned for cancellation without notice to the plaintiff. The appellant court, in reversing a judgment for the plaintiff, stated:

“An insurance policy is a contract which requires an offer and acceptance to be effective. [Cites omitted.] If there is no obligation as to one of the parties, there is none as to the other.

\* \* \*

“But a custom to renew, even if established, does not bind the insurer unless it is also binding upon the insured. There must be a contract to renew as distinguished from a mere custom.” 173 N.W.2d at 28.

*Brooks v. Renner & Co.*, 243 Ark. 226, 419 S.W.2d 305 (1967), arose from a loss after the policy expired. Brooks, the plaintiff, for ten years had insured one or more automobiles through the Renner Agency. A policy written annually carried a four month expiration date. Prior to the expiration date Renner, the agent, received a four month renewal statement from the insurer. Brooks, however, had moved from Fayetteville to Little Rock, about 200 miles away, and Renner did not renew the policy.



The policy expired October 3, 1964. After an accident on November 2, 1965, Brooks sought coverage for the loss from the Renner Agency and the insurer. Summary judgment was rendered for both defendants.

In affirming the judgment the appellate court emphasized the expiration date was plain and unambiguous and explained that the agency's past offers of renewal were over and above the obligation created by the contracts and that there was no duty to renew.

"We recognize that service agencies are expected to, and usually do take an interest in the welfare of their regular customers. Ofttimes they render courtesies over and above the obligations created by contracts. That is simply good business . . . ." 419 S.W.2d at 307.

#### POINT IV

BECAUSE ALL PRIOR CONVERSATIONS AND AGREEMENTS ARE MERGED INTO THE WRITTEN INSTRUMENT ONCE EXECUTED, IT WAS ERROR TO ALLOW PAROL EVIDENCE IN CONFLICT WITH THE INSURANCE POLICY.

On direct examination Mr. Barnett was asked:

"Q Now would you tell me what the custom and practice was between you and Mr. Kimball as far as renewing your insurance when you ran out?" (R.169)

This defendant then objected on the basis that no proper foundation had been laid for the testimony, that it would be hearsay as concerned what Mr. Kimball might

have allegedly said to him, and that the testimony was irrelevant and immaterial to the issue before the court. The objection was overruled and Mr. Barnett testified:

"A . . . He would always notify me either by mail or in person, mostly in person we transacted our business.

\* \* \*

"A He would either notify me by mail or by statement. I paid all my bills and my insurance by statement and notice, and by personal contact.

"Q (By Mr. Black) Was there ever any time when Mr. Kimball himself paid the premium and you paid him back?

MR. BERRY: Your Honor, I'm going to object, it's immaterial, irrelevant, and no foundation has been laid to show that Mr. Kimball was our agent.

THE WITNESS: Yes he did (R. 170)

Barnett's theory is that because Noble Kimball always notified him concerning renewal of his insurance, and Richard Salisbury had said he would take care of Mr. Barnett as Noble Kimball had done, that State Auto was liable on the policy even after it expired.

Even if Mr. Barnett had specifically asked Richard Salisbury to renew the policy beyond the October 1, 1967 date, and Salisbury had agreed to do so, the agreement would be invalid under Utah law.

Section 31-19-18 Utah Code Ann. (1953) provides:

**“31-19-18. Contract of insurance — Variations of terms of policy invalid. —** No insurer or its agent, nor any solicitor or broker shall make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon. Any such understanding or agreement not so expressed shall be invalid.”

Section 31-19-26 Utah Code Ann. (1953) provides:

**“31-19-26. Insurance contracts — Modification of. —** No modification of any insurance contract shall be effective unless in writing executed by the insurer and if it contains conditions limiting or reducing benefits or protection otherwise applicable such writing shall also be executed by the insured.”

The policy clearly states that it expires on October 1, 1967. This provision of the policy could not be waived without a written endorsement attached to the policy:

**“Waiver provisions.** No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein.” (Exhibit 1-P)

Under the law as set forth in *Jones v. New York Life Insurance Co.*, 69 Utah 172, 253 P.200 (1926), Mr. Barnett is charged with knowledge of the policy terms and bound by them:

"There is nothing to show that the insured was induced by any false or erroneous statements as to the meaning of those provisions and *it must therefore be presumed that the insured knew the contents of the application and bound himself by the terms therein provided.* In other words, *the insured was charged with knowledge that no one save the officers enumerated in the application could waive any the company's rights or requirements and that notice to the soliciting agent was not notice to the company and that the agent was not authorized to accept risks or to pass upon insurability.*" 253 P. at 202, (Emphasis added.)

In *United Pacific Insurance Co. v. Northwestern National Insurance Co.*, 185 F.2d 443 (10th Cir. 1950), an insured contended that his business insurance policy provided broader coverage than was clearly shown by the policy terms.

In reversing a judgment by Judge Willis W. Ritter for the insured, the Court of Appeals stated:

"Neither can Ogden escape the effects of these provisions by not having read the policy when it was delivered to him and thus failing to discover that it did not contain the broad coverage for which he now contends. *It was his duty to read the policy when it was delivered to him and he is charged with knowledge of its provisions, notwithstanding his failure to do so.*" *Id.* at 447 (Emphasis added.)

It has long been the law of Utah that an insurer cannot be held liable on an expired policy for a loss occurring after the expiration date.

An early Utah case is strikingly similar to the present case, *Idaho Forwarding Co. v. Fireman's Fund Insurance Co.*, 8 Utah 41, 29 P. 826 (1892), involved an action against an insurance company on an alleged contract of insurance. On February 1, 1889, in consideration of \$46.20 paid as premium, the stock of goods of Idaho Forwarding Company at Hailey, Idaho, were insured for one year by Fireman's Fund Insurance Company from February 13, 1889 to February 13, 1890. On July 2, 1890 the goods were destroyed by fire.

Mallory, the agent of both parties, had previously told Albert Kiesel, plaintiff's manager, that \$5,000 of the company's coverage was about to expire. Kiesel instructed Mallory to renew the coverage and Mallory responded that he would renew the \$2,000 policy with Fireman's Fund and the remainder with two other companies.

Mallory thought he had renewed the coverage, but after the fire it was discovered that the premium had not been paid. Idaho Forwarding Company attempted to pay the premium six days after the fire.

At trial Kiesel was asked how long the renewed coverage was to be for. An objection to the question was overruled. The trial court found for Idaho Forwarding Company.

On appeal the Utah Supreme Court reversed. Pointing out that plaintiff's theory as in the matter now before the court was "upon a contract *in praesenti*, not a contract

to thereafter insure," the court held it was improper to have allowed Kiesel to testify to the terms of the written contract:

"It was improper to call for the conclusion of the witness as to the term of the insurance, or as to the premium to be paid. Those facts should have been found from the language used by the contractors." 29 P. at 827.

The court also held that Fireman's Fund could not be liable under an expired policy for Mallory's failure to renew the policy:

"For the failure to follow plaintiff's orders the defendant [insurer] cannot be held responsible." 29 P. at 826.

In a later case involving an alleged life insurance contract, *Field v. Missouri State Line Insurance Co.*, 77 Utah 45, 290 P. 979 (1930), the Utah Supreme Court stated:

"It is an elementary rule of law that, where parties have reduced an agreement to writing and such written agreement is not vitiated by fraud or mutual mistake of fact, all prior conversations and parol agreements are so merged therein that they cannot be given in evidence for the purpose of changing the written contract or any part thereof nor showing any intention or understanding different from that expressed in the written agreement."

The court also held that the doctrines of waiver and estoppel cannot be relied upon to avoid the rule of law that all prior conversations and agreements between the parties prior to execution of the written instrument are merged into the written agreement. *Id.* at 983.

The testimony of Mr. Barnett and William Slaugh was presented in contradiction of the policy terms. It obviously was prejudicial to State Auto because it allowed the jury to ignore the State Auto policy and render a verdict based on emotion and not on law.

## CONCLUSION

The action against State Auto was one in contract. It was undisputed that the plaintiffs' home burned after the State Auto policy expired. Judgment for State Auto should have been given as a matter of law. This court should so hold.

The testimony of Mr. Barnett and William Slaugh on insurers renewal and notice of expiration practices was improper because it created the impression that State Auto was bound to renew the Barnett policy because of a custom State Auto had never participated in vis-a-vis the Barnetts.

The result before the trial court in this case destroys the laws of written contracts from the requirement of consideration to the principle of expectancy. Plaintiffs, under their theory, enjoy the luxury of the benefits of insurance

which can never expire while being free at any time to drop at any moment the insurer they claim is bound and take their business elsewhere.

Judgment for State Auto should be given as a matter of law. At the least a new trial should be ordered.

Respectfully submitted,

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## MAILING NOTICE

I hereby certify I mailed two copies of the foregoing brief, postage prepaid, to John L. Black, 530 Judge Building, Salt Lake City, Utah 84111 this       day of January, 1971.

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