

1986

General Motors Acceptance Corporation, a New York corporation v. Hector Martinez and Manuel M. Rivera : Brief of Respondent

Utah Supreme Court

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BRIEF

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DOCKET NO. 860365-CA

IN THE SUPREME COURT OF THE

STATE OF UTAH

GENERAL MOTORS ACCEPTANCE
CORPORATION, a New York
corporation,

Plaintiff-Respondent,

vs.

HECTOR NARTINEZ and MANUEL M.
RIVIERA,

Defendants-Appellants,

vs.

GREAT EQUITY LIFE INSURANCE
COMPANY OF CHICAGO, ILLINOIS;
STREATOR CHEVROLET COMPANY,
INC.; AL BARRUTIA; BRENT H.
JENSEN; and E.C. ROSEBOROUGH,

Third-Party Defendants-
Respondents.

Supreme Court No. 860429

860365-CA

BRIEF OF RESPONDENT GREAT EQUITY LIFE INSURANCE COMPANY

Appeal from Judgment of the District Court of Salt Lake County
State of Utah, Honorable Dean E. Conder, Judge

FILED

15 1987

Clerk, Supreme Court, U.

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CITATION OF STATUTES AND RULES

Utah Code Annotated § 78-27-1 (1953):

An offer in writing to pay a particular sum of money or to deliver a written instrument for specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property.

Utah Code Annotated § 78-27-3 (1953):

The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he is deemed to have waived it; and, if the objection is to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amounts, terms or kind which he requires, or be precluded from objection afterwards.

Utah Code Annotated § 78-27-56 (1953):

In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

Rules of Practice for the District and Circuit Courts of the State of Utah, Rule 2.9(a)-(b):

(a) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within a shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.

(b) Copies of the proposed Findings, Judgments, and/or orders shall be served on opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections thereto shall be submitted to the court and counsel within five (5) days after service.

Third Judicial District Court Rules of Practice, Rule 4(a)-(b) are identical to Rules of Practice for the District and Circuit Courts of the State of Utah, Rule 2.9(a)-(b), cited above.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether Great Equity Life Insurance Company (hereinafter referred to as "Great Equity") is liable to appellants for further costs and fees after making a good and valid tender of its full liability on November 7, 1983.

2. Whether Great Equity is liable to appellants for attorney's fees when the issue was not raised at the trial level and where there is no legal basis for such an award.

3. Whether Great Equity was entitled to a satisfaction of judgment after having paid funds to General Motors Acceptance Corporation pursuant to a garnishment.

STATEMENT OF FACTS

Great Equity Life Insurance Company (hereafter Great Equity) concurs in the Statement of Facts provided by Plaintiffs, General Motors Acceptance Corporation (hereafter GMAC) and adds the following facts relating to activities following the defendants' second attempt to appeal the case on October 13, 1983.

On November 7, 1983, Great Equity, through their counsel, Mr. William J. Hansen, sent a letter to counsel for GMAC, Mr. Jay Barney and counsel for defendants, Mr. Mark Miner, tendering payment of the principal and interest due according to the decisions of the District Court and of the Utah Supreme Court in General Motors Acceptance

Corporation v. Martinez, 668 P.2d 498 (Utah 1983), (R-535-539) (R-647-652, Exhibit A, herein). A check for \$6,135.36, representing the full amount of the principal (\$4,717.50), plus interest at the rate of 14.55 percent from September 30, 1981, was included with a letter to Mr. Barney. Payees on the check were GMAC, Jay Barney, Hector Martinez, Manuel Rivera, and Mark Miner (R-648). The letter requested Mr. Barney to sign off on the check and then forward it to the defendants for their acceptance, conditional upon a satisfaction of judgment (R-647). The intent of the tender was to pay Great Equity's liability in full and terminate the running of interest against it (R-641-645). Enclosed with the letter of tender to Mr. Miner was a check for \$742.85, representing tender of the costs of court awarded by the Supreme Court (R-647, 652). These costs were determined by the memorandum of Mr. Miner and were approved by the District Court (R-540-542, 584-585).

After signing off on the check for principal and interest, Mr. Barney attempted to present it to Mr. Miner for his acceptance. Mr. Barney specifically informed Mr. Miner on November 16, 1983, that he was free to reserve his rights relative to attorney's fees, the only issue then pending before the courts, in signing the satisfaction of judgment accompanying the check (Exhibit C, herein, pending submission to the record). Mr. Barney

also sought other occasion to present the check to Mr. Miner (R-650).

Mr. Miner rejected both the tender of costs and the tender of principal and interest without objection or even comment to either Mr. Barney or Mr. Hansen. Consequently, Mr. Barney returned the check to Mr. Hansen on November 28, 1984, noting that efforts had been made to have Mr. Miner execute the check in order to cut off Great Equity's liability for the principal and interest, but that Mr. Miner had declined to do so (R-650). No reasons for the rejection or objections to the tender were made by Mr. Miner until the hearing on Great Equity's objection to Mr. Miner's proposed judgment, held June 16, 1986.

On December 12, 1985, the Utah Supreme Court filed a per curiam opinion dismissing defendants' appeal (R-607). The Court noted that there had been no final order that disposed of all the issues as to all the parties from which defendants could take an appeal. Rather, defendants had attempted to appeal an interlocutory ruling concerning GMAC's judgment against defendants and the award of additional attorney's fees to GMAC. Notably, the Court affirmed that no appeal had been taken from GMAC's judgment against defendants in Martinez, and that the Court had only decided the third-party judgment against defendants.

On February 5, 1986, following remittitur of the case to the District Court (R-606), GMAC filed a motion to

enter final judgment, establish payment rights, award attorney's fees and justify certain bonds (R-613). However, the defendants filed a motion to disqualify Judge Conder for bias and prejudice on February 6, 1986 (R-616). This motion was denied by the Honorable Philip Fishler on March 7, 1986 (R-634).

Judge Conder, upon hearing, subsequently ordered counsel for defendants, Mr. Mark Miner, to prepare a judgment in accordance with the Supreme Court's rulings (R-637). The proposed judgment prepared by Mr. Miner was objected to by Great Equity on the grounds that it would award attorney's fees to defendants and against Great Equity, and would award interest to defendants beyond November 7, 1983, the date of tender of principal and interest to defendants. These matters had never been ruled on by the court.

A hearing was held June 16, 1986, wherein the Court denied defendants' claim of attorney's fees against Great Equity as having no legal basis and ordered that the November 7, 1983 tenders of principal, interest and costs to defendants was valid and cut off Great Equity's liability for interest after that date (R-688-690). Mr. Miner was asked by the Court to prepare the order and judgment, but he refused. Mr. Barney thereafter prepared the order and judgment.

The subsequent judgment of the Court, appealed

here, dated June 23, 1986, granted judgment for GMAC and against defendants for \$4,717.50, together with interest at the rate of 14.55 percent A.P.R., until fully paid and costs of \$127.00 and attorney's fees of \$3,500.00. It then granted judgment for defendants and against Great Equity for \$4,717.50, together with interest at the rate of 14.55 percent A.P.R. until November 7, 1983 and costs of \$742.85 and no attorney's fees. The judgment finally provided that any payment of Great Equity to GMAC would constitute a satisfaction to the extent thereof of GMAC's judgment against Great Equity (R-694-696).

On June 24, 1986, GMAC issued a writ of garnishment to Great Equity for the amount of its judgment to the defendants as provided in the judgment (R-709-712). Great Equity answered and paid this garnishment on June 26, 1986, totaling \$6,925.95 (R-702, 703). In evidence of this payment, Judge Conder entered an order of satisfaction of judgment, dated June 26, 1986, for the full amount of the judgment against Great Equity (R-697, 698). A partial satisfaction of judgment for \$6,925.95 was also entered as to GMAC's judgment against the defendants on June 23, 1986 (R-699-700).

SUMMARY OF THE ARGUMENT

Great Equity delivered to GMAC and defendants a letter and check constituting tender on November 7, 1983,

representing full payment of Great Equity's liability to all parties in this action. Defendants rejected this tender without any objection, thus waiving any future objections as to the amount, kind, or conditions of tender. The tender was valid as an offer to pay the full amount due on a specific obligation determined by the court. Great Equity lawfully and, of necessity, conditioned receipt of tender on a satisfaction of judgment signed by defendants. Defendants were free to reserve their rights of appeal on issues then pending before the court. Defendants are estopped from claiming that tender was ineffective because no final judgment had been entered, since defendants had the undeniable responsibility to prepare and present such judgment to the court. Proper tender to defendants discharged Great Equity's responsibility for interest and costs after November 7, 1983.

Great Equity is not responsible for the attorney's fees of any other party in this action. Defendants waived any right to attorney's fees by their failure to raise the issue until after the case had been remanded by the Supreme Court. Further, defendants failed to plead, prove, or argue any facts which would provide any legal basis for attorney's fees. The basis of bad faith now argued by defendants must fail because they have failed to meet the statutory requirements for establishing their claim, and have cited no legal basis on which they may

recover fees. Further, defendants cannot establish a claim for attorney's fees because Great Equity has not exercised bad faith in this action.

The execution of judgment granted below by means of garnishment of Great Equity was completely proper and lawful. The notice and procedural steps taken by the parties and the court were in accordance with the rules of law. The law does not require judgment creditors to give preference to bonds in the execution of their judgment.

ARGUMENT

I. THE FINDING AND JUDGMENT BELOW CORRECTLY HELD THAT GREAT EQUITY MADE GOOD AND VALID TENDER OF ITS FULL LIABILITY TO GMAC AND DEFENDANTS ON NOVEMBER 7, 1981, THUS CUTTING OFF ITS LIABILITY FOR INTEREST AND COSTS.

A. Defendants Waived Their Objections to Tender by Their Failure to Offer Any Objections At the Time of Tender.

Counsel for Great Equity tendered full payment of its liability for judgment and costs in its checks and letter of November 7, 1983, to counsel for GMAC, Mr. Jay Barney and defendant, Mr. Mark Miner (R-647-648, 652, Exhibit A, herein). This letter in itself constitutes tender under Utah Code Annotated § 78-27-1 (1953), which states:

An offer in writing to pay a particular sum of money or to deliver a written instrument for specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property.

The letter notified Mr. Miner that a check had been drawn

and was being forwarded to him. Mr. Miner made no objection to this letter. The Honorable Dean E. Conder found and ordered that this tender was valid and that Great Equity had no responsibility for interest to defendants after that date (R-690).

Actual tender to Mr. Miner was also effectuated by Great Equity through the actions of Mr. Barney (Exhibit C, herein, pending submission to the record). Mr. Barney attempted to make tender to Mr. Miner but was rebuffed by Mr. Miner without objection to the amount or kind of tender. Mr. Barney wrote Mr. Hansen on November 28, 1984: "Efforts were made to have Mr. Miner and his clients execute the check that the question of principal and interest accrued might be resolved to cut off the liability of [Great Equity]. This the defendants have declined to do" (R-650, Exhibit B, herein).

Mr. Miner was offered the opportunity to object to tender. A standard satisfaction of judgment and release was included with the tender letter and check (See R-647, Exhibit A, herein). Defendants were free to sign conditional upon the reservation of their rights with respect to the issues and on appeal between GMAC and defendants. The letter of Mr. Barney to Mr. Miner, dated November 16, 1983 further made this clear to Mr. Miner:

[Mr. Hansen] has indicated that he would have no objection to drawing a release that would satisfy the principal and interest due and owing under the contract to [GMAC] and

reserve the issue relative to attorney's fees for further determination on appeal (Exhibit C, herein, pending submission to the record).

The ability of a party accepting tender to reserve his rights to litigate and appeal issues still pending is clearly recognized in Utah. This Court has stated the rule of law:

Generally, when a judgment creditor accepts payment and executes a satisfaction of judgment the controversy becomes moot and the right of appeal is barred. However, the general rule does not necessarily prevent an appeal as to separate and independent claims if it is shown that a controversy remains in regard thereto.

Hollingsworth v. Farmers Insurance Co., 655 P.2d 637, 639 (Utah 1982) (footnotes omitted).

In a decision exactly on point, Jensen v. Eddy, 30 Utah 2d 154, 514 P.2d 1142 (1973), this Court denied a motion to dismiss plaintiff's appeal on the ground that plaintiff had voluntarily paid the judgment, which was then satisfied. In hearing the appeal, the Court noted that the parts of the judgment which were paid and satisfied were separate and distinct from the issues presented on appeal. In the present action, Great Equity explicitly tendered only the principal and interest due and owing GMAC under the insurance claim, and the costs of appeal awarded by this Court (R-647-650, Exhibits A and B, herein; and Exhibit C, pending admission to the record). These parts of the action were concretely determined by

this Court's decision and were not contested by any party on the date of tender. Defendants were certainly free to accept that tender and cut off both their interest and that of Great Equity without possibly hindering their rights on the issue of attorney's fees. See Golden Spike Equipment Co. v. Croshaw, 16 Utah 2d 391, 401 P.2d 949 (1965).

Mr. Miner's refusal of tender without objection waived any objections he may have had to its amount or terms. Utah Code Annotated § 78-27-3 (1953), states:

The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument or property, or he is deemed to have waived it; and, if the objection is to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amounts, terms or kind which he requires, or be precluded from objection afterwards.

Under these terms, the defendants are precluded from asserting that the amount or terms of tender were inadequate. Thus, all of defendants' arguments in this appeal as to the effectiveness and validity of the November 7, 1983 tender are improper and untimely.

B. Good and Valid Tender Was Made to GMAC and to Defendants.

Without waiving its claim that defendants' arguments against tender should be rejected by the Court, Great Equity will address the merits of defendants' objections.

The tender constituted an offer to pay the full amount due on a specific obligation. The Supreme Court

decision of May 24, 1983 clearly established the liability of Great Equity to pay the benefit under its policy owing to GMAC. Martinez, 668 P.2d 498 (R-536). This amount was previously established by the District Court to be \$4,717.50, with interest from September 30, 1981, at a contractual rate of 14.55 percent (R-538, 539). This judgment was never appealed as this Court found in its December 12, 1985 opinion (R-607). The check of October 2, 1983, tendered on November 7, 1983, constituted a full payment of this liability.

The tender check and letters were made to the proper payees. The Supreme Court decision of May 24, 1983 firmly established the liability of Great Equity to satisfy the policy claim of the defendants to GMAC as beneficiary. Great Equity further recognized that, by definition, its position as a third-party defendant in the action, made it "liable to [the defendants] for all or part of the Plaintiff's claim against [the defendants]." Utah Rules of Civil Procedure, Rule 14(a) (1953). In order to properly satisfy its full liability to all parties, Great Equity named as payees on the check the defendants and their counsel, and GMAC and its counsel.

The propriety of this action is most evident when the alternatives are examined. Had Great Equity paid only the defendants, without a satisfaction of judgment from GMAC, and the judgment of GMAC was not satisfied thereafter

by the defendants, GMAC would still have a valid claim against Great Equity as a third-party defendant. Great Equity was bound to seek a satisfaction from GMAC to prevent the possibility of a double payment of its liability and a resulting claim against defendants. The same argument applies to Great Equity's request for satisfaction from the defendants. As established above, defendants had notice and were free to modify their satisfaction to reserve their rights as to issues still pending.

Defendants cite purported authority for their position that the condition of satisfaction sought by Great Equity with its tender invalidated the tender. First, as noted above, Great Equity had every right and, indeed, the necessity of receiving a satisfaction of judgment upon payment of the same. Defendants' argument is tantamount to claiming that a debtor has no right to request a receipt and discharge upon payment of a debt to his creditor. Such a position is wholly without foundation in the law. The cases cited by defendants for this proposition, K. & M., Inc. v. Le Cuyer, 107 Cal. App. 2d 710, 233 P.2d 569 (1951) and Woods v. Dixon, 193 Or. 628, 240 P.2d 520 (1952), state a principle that tender must be free from any condition which the tenderer does not have a right to insist upon. However, defendant can cite no authority claiming that a judgment debtor has no right to insist on a satisfaction of judgment when tendering

payment. A satisfaction of judgment is precisely the mechanism provided by law to record the payment of a judgment and the end of a lawsuit. See, Utah Rules of Civil Procedure, Rule 58B (1986).

The remaining authorities cited by defendants are inapposite to the issues at hand. The cases of Estate of Kohlepp v. Mason, 25 Utah 2d 155, 478 P.2d 339 (1970); Sieverts v. White, 2 Utah 2d 351, 273 P.2d 974 (1954); and Hyams v. Bamberger, 10 Utah 3, 36 P. 202 (Utah 1894), deal with the issue of tender by check being ineffective for lack of sufficient funds. If defendants intend to imply that the checks tendered to them were not backed by sufficient funds, they would be raising the objection for the first time in this action. Thus, it could not be considered here on appeal. Trayner v. Cushing, 688 P.2d 856 (Utah 1984); Simpson v. General Motors Corp., 24 Utah 2d 301, 470 P.2d 399, 401 (1970). If the defendants do not intend to assert this objection, their reliance on these authorities is profoundly misplaced. Defendants' citation of Radalj v. Union Savings & Loan Ass'n., 59 Wyo. 140, 138 P.2d 984 (1943) is inappropriate in that the case turns on a Wyoming statute totally inapplicable here. The fact remains that defendants have cited no authority whatsoever that would allow any legal basis for their untimely and erroneous objections to tender.

Defendants are estopped from asserting that tender

was ineffective because no final judgment had been entered on November 7, 1983. Defendants were responsible, as the party obtaining the judgment, to present the final judgment to the District Court for its approval and entry. The Rules of Practice for the District and Circuit Courts of the State of Utah, in effect at the time of remittitur of the Supreme Court decision in August of 1983, stated at Rule 2.9(a):

In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within a shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.¹

This codifies and reinforces the well-recognized duty of a prevailing party receiving a judgment to prepare that judgment for the signature of the judge and entry in the record pursuant to Rule 2.9(b). Defendants were clearly the party which "obtained the ruling" of a court, here the Supreme Court. Further, defendants noted the receipt by the District Court of the Supreme Court's remittitur when it filed its memorandum of costs on August 8, 1983 (R-540-542). Defendants failed, however, to prepare the judgment directed by the Supreme Court from May

¹Rule 2.9(a) is restated verbatim as the current rule in Third Judicial District Court Rules of Practice, Rule 4(a), effective April 1, 1984. Rule 4 supersedes Rule 2.9 but restates the pertinent sections referred to here and in defendants' brief verbatim. Defendants' reference in their brief to purported violations of Rule 2.9 are thus incorrect in their citation.

24, 1983, to April 11, 1986. After the passage of time made it clear that defendants were not prepared to discharge their responsibility, and in an attempt to halt the continuing accrual of interest, Great Equity tendered the full amount of its liability, including costs paid directly to the defendants, on November 7, 1983 (R-647-652, Exhibit A, herein).

Based on its responsibility to prepare the judgment, defendants are estopped from claiming that the tender could not satisfy a judgment which had not been entered. In Estate of McFarland v. Holt, 18 Utah 2d 127, 417 P.2d 244 (1966), this Court found that an executrix was estopped from asserting on appeal that her own petition, filed without objection, to confirm the sale of certain estate property was insufficient. The Court held: "One who files a pleading asking the court to act thereon vouches for its verity and should not thereafter be permitted to repudiate it for the purpose of upsetting the action the court has taken pursuant to his request." The present case presents the reverse side of the same issue. One who fails to perform his recognized duty as required and relied upon by the court and the other parties in the action should not thereafter be permitted to rely on his neglect to upset the actions of the court and parties to remedy his error. To permit such would allow one to benefit from his own wrongful omission to act.

Defendants' appeal of October, 1983, did not make the tender by Great Equity ineffective. The appeal only addressed the grant of attorney's fees to GMAC and the judgment between GMAC and defendants. No issue was presented in that appeal nor included in the opinion of the Supreme Court which would change the liability of Great Equity or make the tender invalid. The Supreme Court recognized that the only issues on appeal were the judgment between GMAC and defendants and the award of attorney's fees to GMAC (R-607). Likewise, the Amended Judgment of September 22, 1983, did not affect the amount of judgment between defendants and Great Equity (R-579-581). That Amended Judgment dealt only with the liability of defendants to GMAC for attorney's fees and in no way affected the validity of tender offered by Great Equity as determined by the Supreme Court.

C. Valid Tender Precludes Any Further
Liability of Great Equity for Interest
and Costs After November 7, 1981.

It is settled law in Utah that a tender of payment that is rejected discharges interest. Woodmont, Inc. v. Daniels, 290 F.2d 186 (10th Cir. 1961), cited with approval, Utah County v. Brown, 672 P.2d 83 n. 9 (Utah 1983). Because defendants refused a bona fide tender without objection between November 7, 1983 and November 28, 1984 (the date that the check was returned to Great Equity by GMAC, R-650, Exhibit B, herein) defendants may

not now claim additional interest accruing from November 7, 1983. Further, defendants are precluded from objecting to the amount or terms of tender by Utah Code Annotated § 78-27-3 (1953) discussed in Argument I.A., above.

Great Equity is no longer liable to defendants for the costs of trial. In a check dated October 13, 1983, Great Equity paid to defendants and their counsel \$742.85, representing the costs of trial as petitioned by defendants and approved by the court (R-540-542, 584, 585; see R-652, Exhibit A, herein). Because a valid tender of these costs has been made, defendants may not now claim any continuing liability of Great Equity for the costs of court. Utah Code Annotated § 78-27-3 (1953), discussed above.

II. GREAT EQUITY IS NOT LIABLE FOR ANY ATTORNEY'S FEES.

A. Defendants have Waived any Possible Right to Attorney's Fees Against Great Equity.

Defendants waived any possible right to a grant of attorney's fees by their failure to properly raise the issue in the District Court. The appellants third-party complaint against Great Equity is completely void of any allegation for attorney's fees, under any legal theory (R-11-22). Moreover, there was no evidence presented at trial in support of any claim against Great Equity for attorney's fees. Likewise, defendants, in their first appeal, did not claim that Great Equity was obligated to pay any attorney's fees. Defendants first raised the issue of its right to any attorney's fees after remittitur of

the case to the District Court in August of 1983 (R-553). However, in their appeal of October, 1983, defendants did not seek attorney's fees from Great Equity (See R-607).

In Girard v. Appleby, 660 P.2d 245 (Utah 1983), this Court set forth the legal basis for waiver of attorney's fees:

Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel's role of advocacy. Counsel is entitled to control the presentation of evidence, and should there be a failure to present evidence on a claim at issue, it is generally viewed as a waiver of the claim.

In the instant case, we are not apprised of the reason Girard saw fit to rest her case without presenting evidence in support of her claim for attorney's fees. However, even if it be assumed that it was the result of oversight, the interests of justice are not enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would otherwise be dead, it not having been litigated at the time of trial.

Id. at 247. The present facts are an even more compelling case for waiver. In Girard, unlike the present case, the plaintiffs at least presented a claim for attorney's fees in the pleadings. The defendants here have therefore waived any claim for attorney's fees and such claims now, at this stage of the proceedings, would be highly prejudicial to Great Equity.

This Court has previously spoken to those who would introduce a new theory or doctrine of liability for the first time on appeal, which would presumably apply follow-

ing the remand of an appellate decision for entry of judgment. The court set forth the following sound policy:

Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation.

Simpson v. General Motors Corp., 24 Utah 2d 301, 470 P.2d 399, 401 (1970); see Park City v. Ensign Co., 586 P.2d 446 (Utah 1978).

This Court has previously denied an appellant's attempt to assert his claim for attorney's fees for the first time on appeal. In Trayner v. Cushing, 688 P.2d 856 (Utah 1984), the Court denied the appellant's claim because he had not presented his basis for fees at the time of trial. Here, defendants first made their claim for fees even later than the appellant in Trayner--after the appellate decision had been rendered. If defendants believed that they would prevail against Great Equity at trial or on appeal, they were bound to raise any claim they had for attorney's fees at trial.

B. There is No Contractual or Statutory Basis
for Great Equity to Pay Attorney's Fees.

Without waiving its claim that defendants' arguments for attorney's fees should be rejected by the Court, Great Equity will address the merits of defendants' arguments.

Utah law does not permit defendants to recover

attorney's fees in this action. "It is well established in our law that attorney's fees cannot be recovered unless provided for by statute or by contract." B & R Supply Co. v. Bringham, 28 Utah 2d 442, 444, 503 P.2d 1216, 1217 (1972); Turtle Management, Inc. v. Haggis Management, 645 P.2d 667 (Utah 1982). No statute or contract has been identified by defendant which would allow recovery of attorney's fees here.

The only contractual basis for any fees in this case is the defendants' unilateral promise to pay GMAC's costs in enforcing the installment contract. The insurance agreement with Great Equity is a totally separate agreement between Great Equity and defendants. GMAC is merely a third-party beneficiary to the insurance policy. The fact that the disability policy was a condition to the installment contract is independent of Great Equity's obligations. GMAC's predecessor, Streater Chevrolet, required the insurance policy for its own protection. Great Equity had no part in the initiation or terms of the installment contract.

The separate nature of the insurance contract, apart from the installment contract, is recognized by Utah Code Annotated § 31-34-(1) (1953), discussed in this Court's prior opinion. Martinez, 668 P.2d 498 (R-536). The requirement for approval and delivery of the insurance policy by the insurance company, rather than the creditor,

shows the separate nature of the interests of the two. The simple fact is that the defendants' collateral promise to pay GMAC's attorney's fees is their personal obligation which they voluntarily undertook without regard to whether a third party would relieve them of that obligation.

Even if the insurance contract did expressly or impliedly contain an assumption of all of the defendants' collateral obligations under the installment contract, which it did not, defendants are estopped from asserting such a claim under the prior decision in this case. Martinez, 668 P.2d 498 (R-536). There, this Court held that Great Equity was estopped from relying on express terms of the insurance contract because the documents containing the terms were not delivered to the defendants. Id. at 501. This was because the defendants never knew of the terms of the policy and could not be bound by something they did not agree to. Id. Fairness dictates that this argument runs both ways. The appellants cannot now rely on express or implied terms of the insurance contract which are favorable to them and disregard those terms which are not in their favor. Since the defendants never knew the terms of the master policy, they cannot claim reliance on or expectation of the assumption of their collateral obligations.

C. Defendants Have Presented No Legal Basis for the Award of Attorney's Fees.

Defendants, in their appeal and their arguments to

the District Court, appear to rely upon the exception which allows the recovery of attorney's fees upon the breach of an implied covenant of good faith and fair dealing in an insurance contract. This exception is stated in a case where this Court specifically held against an award of attorney's fees in a case similar to the one at bar and relying in part on its prior decision here. In Farmers Insurance Exchange v. Call, 712 P.2d 231 (Utah 1985), before attorney's fees could be awarded in the absence of a statute or contract, the Court held, "it must appear that the insurance company acted in bad faith or fraudulently or was stubbornly litigious." Id. at 237, citing American States Insurance Company v. Walker, 26 Utah 2d 161, 486 P.2d 1042, 1044 (1971). The Court further held that an award of attorney's fees is not warranted where the company merely states its position and sues for a determination of what appears to be a justiciable controversy. Farmers, 712 P.2d at 237.

Each and every authority cited by defendants in their brief and below concerns the recovery of attorney's fees when the bad faith of the insurer has been established. The bad faith of Great Equity has never been pled, proven, or raised in any proceeding of this action. There are several bases upon which defendants' claim for attorney's fees must fail.

First, defendants have not pled, proven or argued

to the District Court the requisite facts and law required to establish a claim for attorney's fees, as set forth in Utah Code Annotated § 78-27-56 (1953 as amended):

In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

This section has been interpreted to require that specific elements be proven in order to recover attorney's fees. Cady v. Johnson, 671 P.2d 149 (Utah 1983). There must also be a finding of fact of bad faith on the part of the insurer before fees may be awarded. Western Cas. & Sur. Co. v. Marchant, 615 P.2d 423, 427 (Utah 1980). Defendants have neither pled nor proven these elements in this action. The District Court never made any statement or finding that could conceivably imply any bad faith on the part of Great Equity.

Second, defendants' authority cited in its brief is entirely inapposite and does not support their position in this issue. Defendants rely on Siegel v. William E. Bookhultz & Sons, Inc., 419 F.2d 720 (D.C. Cir. 1969), which is wholly inapposite as a "duty to defend" action against an insurer. The court held that the insurer was estopped from discontinuing its defense of the insured after it had defended the action for one and a half years, and that the discontinuance of defense was unreasonable

and unjustified, tantamount to bad faith. Further, issues of bankruptcy and insured's inability to defend itself were at issue. No such situation exists here.

Defendants' reliance on Egan v. Mutual of Omaha Insurance Company, 169 Cal. Rptr. 691, 620 P.2d 141 (1979) is likewise misplaced. There, an insurer failed to conduct a complete examination of a claim, resulting in the denial of benefits. The trial court found a breach of the implied covenant of good faith and fair dealing and held that when an insurer unreasonably and in bad faith fails to pay the claim, there is liability in tort. The issue of tort liability for bad faith was pled and proven and was decided by the jury. In the case at bar, there has been neither pleading nor proof of any tort liability. Neither has the issue of bad faith been presented to the jury. Nonetheless, defendant supports the reasoning of Egan by citing Dinkings v. American National Insurance Company, 92 Cal. App. 3d 222, 154 Cal. Rptr. 775 (1979), which held that insureds may recover the amount of attorney's fees to establish liability under an insurance policy. However, defendants fail to note here, as they also failed to do below, that this holding in Dinkings was disapproved in Moore v. American United Life Insurance Company, 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (1984). There, reviewing California cases concerning the award of attorney's fees, the court held that, in the absence of an

agreement between the parties, attorney's fees would not be recoverable in bad faith actions against insurance companies, and specifically disapproved Dinkings. Moore, 197 Cal. Rptr. at 900-901.

Sukup v. State, 19 N.Y.2d 519, 281 N.Y.S.2d 28 (1967), cited by defendants below, directly supports the position of Great Equity. There, an insurer failed to pay a claim under workmen's compensation insurance. The Court of Appeals held that the language of the policy allowed coverage, and that "all this amounts to is an adverse legal controversy between the carrier and insured for which no liability for the legal fees of one party would be chargeable to the other in the absence of some extraordinary showing." Sukup, 281 N.Y.S.2d at 30. The court found that the issue of bad faith had never been pled or asserted during trial. Further, there was no evidence on the record from which a finding of bad faith could be based. Thus, they determined that an insured cannot recover attorney's fees in a legitimate controversy with a carrier over coverage even though the carrier loses the controversy and must pay the claim.

It would require more than an arguable difference of opinion between carrier and insured over coverage to impose an extra contractual liability for legal expenses . . . It would be such bad faith in denying coverage that no reasonable carrier would . . . be expected to assert it.

Sukup, 281 N.Y.S.2d at 31. This position is the law in

Utah under Western Cas. & Sur. Co. v. Marchant, 615 P.2d 423, 427 (Utah 1980). Such a situation certainly has not been shown by defendants and, indeed, does not exist in this action. Martinez, 668 P.2d at 498 (R-536).

Finally, defendants cannot establish a claim for attorney's fees because Great Equity has not exercised bad faith in this matter. An insurer is entitled to challenge claims on the basis of debatable facts without being found in breach of its obligation of good faith and fair dealing. Couch on Insurance 2d §§ 58:1; 58:8. This has been reaffirmed by this Court in Farmers Insurance Exchange v. Call, 712 P.2d 231, 237-238 (Utah 1985), discussed above. No issue was raised nor was evidence presented to the jury which would indicate the lack of good faith and fair dealing on the part of Great Equity. Nowhere in the decisions of either this Court in Martinez or the District Court is there any intimation of a lack of good faith and fair dealing on the part of Great Equity. See, Espinoza v. Safeco Title Insurance Company, 598 P.2d 346 (Utah 1979) (proponent must raise and prove a breach of duty of good faith to recover attorney's fees).

Great Equity's legal position at trial and the prior appeal meets the standard of a bona fide question about its legal obligations. This is borne out by the findings of the jury, the ruling of the trial court, and the 3-2 decision of the Court in the initial appeal. A

frivolous position for these purposes is one having "no legal basis." Cady, 671 P.2d at 151. A claim should not be labeled as "frivolous" merely because it ultimately does not prevail.

There is no bad faith in merely relying on an express term in a contract. Although Great Equity was not allowed to rely on the exclusionary term, the Court in the prior appeal apparently assumed that the clause was otherwise valid and enforceable. Martinez, 668 P.2d at 501 (R-536). The Court also noted that the estoppel arose as a matter of law, thus negating the possibility of some factual basis that could have put Great Equity on notice of the possibility of estoppel. Id. at 502.

There is no indication that Great Equity intended to hinder, delay or defraud anyone. The defendants emphasize that Great Equity did not deny coverage until eight months after the disability began. This fact is not established in the record and is meaningless in any event because GMAC had agreed to delay filing suit on the debt until Great Equity had completed its investigation. Martinez, 668 P.2d at 500 (R-536). Thus, the defendants were in no increased danger of loss because of the delay.

Great Equity further submits that every party has a duty to mitigate damage when a breach of duty occurs. Defendants' counsel agreed with Judge Conder that defendants were individually in default and were liable on the

installment contract notwithstanding the existence of an insurance contract (R-521-525). When the breach of the installment contract occurred, defendants were liable. This is the conclusion of law of the District Court (R-537-538). In accordance with their duty to mitigate losses, they should have tendered full performance to GMAC, then proceeded against Great Equity for their losses in having to perform. Had they tendered performance, GMAC would not have incurred the expenses in issue in this suit. Thus, only two parties would have had the expenses of one round of litigation, instead of three parties bearing the expense of two rounds of litigation: "To the extent the damages sustained are the result of the party's failure to exercise such care and diligence, he cannot recover." DeBry & Hilton Travel Services, Inc. v. Capitol International Airways, Inc., 583 P.2d 1181 (Utah 1978) (footnote omitted).

III. SATISFACTION OF JUDGMENT BY GARNISHMENT IS A PROPER METHOD OF EXECUTION AND WAS PROPERLY EXECUTED HERE.

Defendants have raised as an issue here the propriety of the garnishment employed to partially execute the June 23, 1986, Amended Judgment. The garnishment was paid by Great Equity on June 26, 1986. While this was the same day that defendants' "Notice of Intent to Appeal" was filed in the court, Great Equity had not received any such notice at the time payment was made to GMAC to satisfy the

judgment as ordered and approved by the District Court. In any case, such a "notice" provides no notice of an actual appeal and has little, if any, effect.

Defendants imply in their Statement of Issues Presented on Appeal (Appellants' brief at p.1) that the District Court erred in not requiring GMAC to execute on the bonds in the file before executing by garnishment against Great Equity. Such an allegation, of course, has no foundation whatsoever in the law. Defendant neither cites any authority for his proposition, nor can he. The issue seems to be so obvious that no significant litigation has occurred on the subject since the law only debates legitimate and realistic issues. Bonds are clearly only a security device and have never been elevated in the law to receive preference as a method of execution generally. Only in a situation where the law of a contract between specific parties governs would such a limitation be placed on a judgment creditor. (Great Equity assumes for these purposes, but does not concede, that the bonds referred to by defendants are or ever were actually valid and capable of execution.)

Due to their total failure to mention the issue of satisfaction of judgment through the bonds at any time prior to this appeal, defendants have waived their right to appeal this issue. While the continuing validity of the bonds has been argued below, at no time have defendants

intimated that the bonds must be the primary source of execution by GMAC. The issue was never mentioned or decided by the District Court. As discussed above, Trayner v. Cushing, 688 P.2d 856 (Utah 1984); Simpson v. General Motors Corp., 24 Utah 2d 301, 470 P.2d 399 (1970); and a host of other decisions prevent defendants from raising this issue for the first time here.

The method of execution employed to satisfy the judgment of the District Court followed appropriate procedure as prescribed in the Utah Rules of Civil Procedure. Rule 69 allows for execution of a judgment by a writ of execution "unless the court otherwise directs." Rule 64D(a)(ii) provides a writ of garnishment as an aid to satisfy a money judgment. Nowhere in Rules 64A or 64D is there any requirement that notice be given to a judgment debtor prior to service on a garnishee. Prior notice is only required under Rule 64A for prejudgment writs of garnishment, which does not apply here. Consequently, the procedures employed here were proper contrary to defendants' objections.

Defendant claims the District Court violated Rule 2.9 of the Rules of Practice of the District and Circuit Courts of the State of Utah in its June 1986 allowance of garnishment without notice to defendants. First, Rule 2.9 is an improper citation of the rule defendant advances, as discussed in footnote 1 above. Second, Rule 4(b) of the

Third judicial District Court Rules of Practice, which does state defendant's rule, applies explicitly only to proposed orders, judgments, or decrees of the court. A writ of garnishment does not fall under the auspices of the Rule. Therefore, the District Court could not possibly have violated the Rule.

Defendants also claim that the satisfaction order of the District Court was improper because it was entered without notice to the defendants. Utah Rules of Civil Procedure, Rule 58B(b) (1986) authorizes the court to enter a satisfaction order upon motion and proof. These requirements were met here (R-699-703). Both Rule 2.9 of the Rules of Practice and Rule 4 of the Third District Rules allow entry of orders such as this without notice to all parties when the court so order. Thus, the District Court acted well within authorized limits in entering the satisfaction.

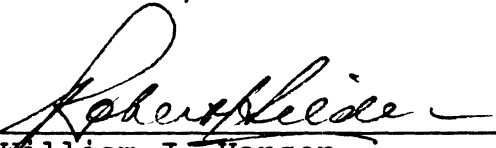
CONCLUSION

For the reasons set forth in the briefs of respondents, the Court should affirm the Amended Judgment of the District court dated June 23, 1986, dismiss defendants' claim for attorney's fees from Great Equity, and uphold

the satisfaction of judgment entered by the District court.

DATED this 15th day of January, 1987.

CHRISTENSEN, JENSEN & POWELL, P.C.

By 
William J. Hansen
Robert K. Hilder
Attorneys for Great Equity Life
Insurance Company

CERTIFICATE OF SERVICE

This is to certify that four copies of the foregoing
BRIEF OF RESPONDENT GREAT EQUITY LIFE INSURANCE COMPANY
were mailed, postage prepaid, this 15th day of January,
1987, to each of the following:

Jay V. Barney, Esq.
Attorney for Plaintiff-Respondent
General Motors Acceptance Corporation
45 East Vine Street
Murray, Utah 84107

Mark S. Miner, Esq.
Attorney for defendants
Hector Martinez and Manuel Rivera
525 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

A handwritten signature in cursive script, appearing to read "Robert Decker", is written over a horizontal line.

EXHIBITS

- Exhibit A: Documents of Tender on November 7, 1983
- Letter from Mr. Hansen to Mssrs. Barney and Miner, dated November 7, 1983 (R-647)
 - Copy of check from Great Equity to GMAC and defendants for principal and interest in the sum of \$6,135.36, dated October 18, 1983 and attached to above letter of November 7, 1983 (R-648)
 - Copy of check from Great Equity to defendants for costs in the sum of \$742.85, dated October 13, 1983, and attached to above letter of November 7, 1983 (R-652)
- Exhibit B: -- Letter from Mr. Barney to Mr. Hansen, cc. Mr. Miner, dated November 28, 1984, indicating return of the check for \$6,135.36 following attempts by Mr. Barney to have Mr. Miner accept the check (R-650)
- Exhibit C: -- Letter from Mr. Barney to Mr. Miner, dated November 16, 1983, attempting to effectuate tender of the check for \$6,135.36 from Great Equity and indicating the willingness of GMAC and Great Equity to accept Mr. Miner's signature of the satisfaction of judgment subject to defendants' then-pending issues on appeal. This letter is pending submission to the record.

LAW OFFICES
CHRISTENSEN, JENSEN & POWELL

RAY R. CHRISTENSEN
JAY E. JENSEN
ELWOOD P. POWELL
ROGER P. CHRISTENSEN
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TODD S. WINEGAR
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900 KEARNS BUILDING
136 SOUTH MAIN STREET
SALT LAKE CITY, UTAH 84101

E. R. CHRISTENSEN
(1886-1979)
TELEPHONE 355-3431
AREA CODE 801

November 7, 1983

Jay V. Barney, Esq.
Attorney for Plaintiff
45 East Vine Street
Murray, Utah 84107

Mark S. Miner, Esq.
Attorney for Defendants
525 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

Re: GMAC v. Hector Martinez - Great Equity Life, et al.

Dear Gentlemen:

I have enclosed a check to Jay in the amount of \$6,135.36 made payable to Hector Martinez, Manuel Rivera and their attorney Mark Miner and GMAC and its attorney Jay Barney, and have also enclosed a check to Mark in the amount of \$742.85 made out to Hector Martinez, Manuel Rivera and their attorney Mark S. Miner.

In addition, I have forwarded the original release to Jay for the signature of his client, after which I would appreciate it if he would forward the same to Mark in order to obtain the signature of his client.

Also, the negotiation of the settlement check is condition upon receiving a satisfaction of judgment from Mr. Miner.

Thank you for your cooperation.

Yours truly,



William J. Hansen

WJH:kp

Enclosure

EXHIBIT A

GREAT EQUITY LIFE INSURANCE COMPANY

CLAIM CHECK

413455 No. 413455

LIFE	PERIOD COVERED		2-1 710
	FROM	TO	
FINAL	X		
PARTIAL			
DATE		AMOUNT	

10/18/83

\$6,135.36

,135== DOLLARS AND 36 CENTS

HECTOR MARTINEZ, MANUEL RIVERA 9000100
& THEIR ATTY MARK MINER &
EMAC & ITS ATTY,
JAY BARNEY.

84111

NATIONAL BANK OF CHICAGO

NOT VALID OVER \$500.00
UNLESS COUNTERSIGNED

Harold J. Kinsley

413455 10710000134 55 92128

DETACH AND RETAIN THIS STATEMENT
THE ATTACHED IS IN PAYMENT OF ITEMS DESCRIBED BELOW.
IF NOT CORRECT PLEASE NOTIFY US PROMPTLY.

STATE	DEALER	CERTIFICATE/POLICY		TERM	MONTHLY-IND	LOSS DATE	PERIOD COVERED	
		NUMBER	DATE ISSUED				FROM	TO
0	43	8416	A536914	36	138.75	11/19/78	0/00/00	0/00/00

ayment is PARTIAL, the claimant has been advised that further
ments are contingent on the receipt of the continuing claim form
ch is the bottom portion of the Claimant's copy.

LIFE	
FINAL	X
PARTIAL	

HECTOR MARTINEZ
8101 S. 2200 WEST
JORDAN, UTAH

8416 STREATOR CHEVROLET CO
475 SOUTH MAIN
84084 DEALER: SALT LAKE CITY UT 84101

RYAN INSURANCE GROUP INC. 222 N. DEARBORN-CHICAGO, IL. 60601

Exhibit A

5/13/86

GREAT EQUITY LIFE INSURANCE COMPANY

CLAIM CHECK

412487 No. 412487

PERIOD COVERED		2-1
LIFE	FROM	TO
FINAL	X	
PARTIAL	0/00/00	0/00/00
DATE		AMOUNT

10/13/83

***742.85

742 DOLLARS AND 85 CENTS

HECTOR MARTINEZ MANUEL M.
RIVERA AND THEIR ATTORNEY
MARK S. MINER

9000100

84111

NOT VALID OVER \$500.00
UNLESS COUNTERSIGNED

[Handwritten Signature]

NATIONAL BANK OF CHICAGO

#412487# 10710000131 57 92188#

DETACH AND RETAIN THIS STATEMENT
THE ATTACHED IS IN PAYMENT OF ITEMS DESCRIBED BELOW.
IF NOT CORRECT PLEASE NOTIFY US PROMPTLY.

STATE	DEALER	CERTIFICATE/POLICY		TERM	MONTHLY-IND	LOSS DATE	PERIOD COVERED	
		NUMBER	DATE ISSUED				FROM	TO
0 43	8416	A536914	9/12/78	36	138.75	11/19/78	0/00/00	0/00/00

Payment is PARTIAL, the claimant has been advised that further payments are contingent on the receipt of the continuing claim form. This is the bottom portion of the Claimant's copy.

LIFE	
FINAL	X
PARTIAL	

HECTOR MARTINEZ
8101 S. 2200 WEST
JORDAN, UTAH

8416 STREATOR CHEVROLET CO
475 SOUTH MAIN
84084 DEALER: SALT LAKE CITY UT 84101

RYAN INSURANCE GROUP, INC. 222 N. DEARBORN-CHICAGO, IL. 60661

Exhibit A

5/19/86

DAY, BARNEY & TYCKSEN

DAVID M DAY
JAY V BARNEY
STEVEN C TYCKSEN
PATRICK R. CASADAY

ATTORNEYS AT LAW
45 EAST VINE STREET
MURRAY, UTAH 84107
801/262-6800

November 28, 1984

Mr. William J. Hansen
Attorney at Law
Christensen, Jensen & Powell
900 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101

Dear Bill:

Enclosed please find your check which you forwarded to us in November 1983 for payment of Great Equity's obligation under the case of GMAC - Martinez - Great Equity Life Insurance Company.

Efforts were made to have Mr. Miner and his clients execute the check that the question of principal and interest accrued might be resolved to cut off the liability of your client. This the defendants have declined to do.

Inasmuch as the check is now stale, and no cooperation is forthcoming from the defendants, GMAC is unable to apply the proceeds to cut off its claims.

In a recent conversation with Jeff Barnum, Utah Supreme Court Clerk, it appears that it will be several weeks before a hearing may be held in this case.

Thank you for your cooperation. It is unfortunate that we were unable to make this resolution. It would appear, if GMAC prevails in the next case as it has in the past, in our opinion, the defendants may be liable for further attorney's fees and accumulated interest as a consequence of their refusal to endorse this check to satisfy the obligation to GMAC.

Sincerely,


Jay V. Barney

JVB/bb

Enc.

cc: Mark S. Miner, Esq.

COPY TO CLIENT

Exhibit B

DAVID H. DAY
JAY V. BARNEY
STEVEN C. TYCKSEN

DAY, BARNEY & TYCKSEN

ATTORNEYS AT LAW
45 EAST VINE STREET
MURRAY, UTAH 84107
(801) 262-6800

November 16, 1983

Mr. Mark Miner
Attorney at Law
525 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111

Re: GMAC v. Hector Martinez v. Great Equity Life

Dear Mark:

Recently we received a check in the sum of \$6,135.36, payable by Great Equity Life Insurance Company to "HECTOR MARTINEZ, MANUEL RIVERA, & THEIR ATTY MARK MINER & GMAC & ITS ATTY, JAY BARNEY".

This check represents the accumulated interest and principal due and owing under the judgment up to mid-October, 1983.

GMAC is willing to receive this check in satisfaction of its debt and obligation and terminate interest as of October 15, 1983, provided that the check is endorsed by your clients and yourself and returned to GMAC to satisfy its claim.

GMAC does not, however, release its claim and rights to attorney's fees.

Mr. Hansen had sent a release document that appeared to be a general release to be signed by the parties. I contacted Mr. Hansen on November 11th to discuss the same. I advised that you were appealing the question of attorney's fees to the Utah Supreme Court relative to the obligation of Great Equity Life to reimburse your client for attorney's fees and to pay the attorney's fees claimed by GMAC against your client. I advised Mr. Hansen that we would not be in a position to execute any release without reserving these rights. Bill has indicated that he would have no objection to drawing a release that would satisfy the principal and interest due and owing under the contract to General Motors Acceptance Corporation and reserve the issue, ~~release attorney's fees for further determination on appeal~~

Page 2

Would you kindly advise whether such a procedure would be acceptable to you and your clients. In the event we cannot come to an immediate resolution of the case, then your clients must understand that they will continue to be responsible for accruing interest under the judgment entered against them.

It would appear that we should be able to resolve the issue concerning principal and interest without violating your client's claims for attorney's fees nor the claims of GMAC with respect to its attorney's fees claim.

Please advise as to your position.

Sincerely,

DAY, BARNEY & TYCKSEN


Jay W. Barney

JVB/bb

cc: William J. Hansen, Esq.
Mr. Art Beery, GMAC