1982

# American Manufacturers Mutual v. Resort Campers, Ltd. Et al : Brief of Respondent and Cross Appellant

Utah Supreme Court


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IN THE SUPREME COURT OF THE STATE OF UTAH

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| AMERICAN MANUFACTURERS MUTUAL,<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>RESORT CAMPERS, LTD., et al,<br><br>Defendants<br><br>and<br><br>ROGER T. RUSSELL, et al,<br><br>Defendants and Appellants | ) | No. 18262<br>No. 18263 |

# BRIEF OF RESPONDENT AND CROSS APPELLANT

Appeal from the Third Judicial District Court of
Salt Lake County, Honorable Dean E. Conder, Judge


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| Respondent, | ) | |
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| | ) | |
| RESORT CAMPERS, LTD., et al, | ) | No. 18262 |
| | ) | No. 18263 |
| Defendants | ) | |
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| and | ) | |
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BRIEF OF RESPONDENT AND CROSS APPELLANT

## NATURE OF THE CASE

Plaintiff commenced this action seeking a declaratory judgment that its maximum liability on a motor vehicle dealer's bond, issued by plaintiff in accordance with §41-3-16 Utah Code Annotated, 1953, as revised and amended, is limited to the sum of $20,000.

## DISPOSITION OF LOWER COURT

The district court ruled that the provisions of the motor vehicle dealer's bond statute, §41-3-16 Utah Code Annotated (1953) must be read in connection with the bond to determine the nature and extent of the surety's liability. The district court

held that the sum of $20,000 is the total limit of the bonding company's liability, regardless of the number of separate claims and the total amount of losses claimed during a bond protection period. In addition, the court determined that the bonding company was liable for the sum of $20,000 total for each of two periods, those periods being October 31, 1978 to October 31, 1979 and October 31, 1979 to April 12, 1980.

## RELIEF SOUGHT ON APPEAL

Plaintiff requests the court to affirm those parts of the declaratory judgment of the trial court holding that the bond must be read in connection with the statute and that the total limit of plaintiff's liability during a bond protection period is $20,000 regardless of the number or the amount of claims. On cross-appeal, plaintiff seeks to reverse the court's ruling that it is liable for the sum of $20,000 for each of the two periods in question, or for each period that a premium was paid on the bond.

## STATEMENT OF FACTS

On October 31, 1978, American Manufacturers Mutual Insurance Company issued a $20,000 bond, No. 8SE296415 (Ex. 1), on behalf of Dick and LaVonne Noren d/b/a Central RV Sales in accordance with §41-3-16 Utah Code Annotated (1953) and received a $400 premium therefor. On October 31, 1979, the bond was renewed by Dick and LaVonne Noren d/b/a Central RV Sales, for

which another $400 premium was received.

All motor vehicle dealerships are required to obtain such a bond pursuant to §41-3-16 Utah Code Annotated (1953). Premiums for these type of bonds are set at a $2.00 per $100 rate thus requiring a $400 premium for a $20,000 bond. (T. 32) In calculating the premium, no consideration is given to the sales volume or size of a motor vehicle dealership because it is the understanding in the surety industry that a surety's maximum liability is $20,000. (T. 51, 63)

The bond form used in this case was provided to plaintiff by the Utah Motor Vehicles Business Administration as a regular form printed by the State for use by any surety company willing to issue this kind of bond. The form of the bond was approved by the Attorney General's Office of the State of Utah, as required by §41-3-16 Utah Code Annotated (1953). Any deviation from this bond form would have been rejected by the Utah Motor Vehicle Business Administration, unless it was approved by the Attorney General's Office. (T. 80, 86)

It was the understanding of the surety industry as well as the Director of the Utah Motor Vehicles Business Administration that the total aggregate liability of a surety who issues such bonds is $20,000 regardless of the number of claimants or the amount of the claims. (T. 63, 71, 83, 99) Plaintiff's representative testified that this was also plaintiff's intent at the time the bond was issued. (T. 71)

Section 41-3-16 Utah Code Annotated (1953) expressly provides that such bonds may be continuous in form. Testimony was presented at trial that the bond in question was a single, continuous bond and that the $400 premium is considered a per annum rate which includes an update of service charge. The additional premium is not considered to extend an additional $20,000 liability against the surety. (T. 42, 43, 73, 133)

Numerous claims have been made against the principal, Dick Noren, and the plaintiff, alleging that Noren conducted himself in such a manner as to give rise to liability on the part of the plaintiff and in favor of each of the defendants.

The amounts claimed by the defendants exceed the $20,000 face amount of the bond.

## ARGUMENT

### POINT I.

### AMERICAN MANUFACTURERS' TOTAL LIABILITY ON THE SUBJECT BOND IS $20,000, REGARDLESS OF THE TOTAL NUMBER OR AMOUNT OF THE CLAIMS.

Defendants claim that the liability of plaintiff should be up to $20,000 per claim. Plaintiff contends, however, that its <u>total</u> liability is $20,000 regardless of the number or amount of claims made against the bond.

A. The Bond and the Underlying Statute Must be Read Together.

The bonding requirement for motor vehicle dealers is found in §41-3-16 Utah Code Annotated (1953). The statute now states:

> (1) New Motor Vehicle Dealer's and Used Motor Vehicle Dealer's Bond: Before a new motor vehicle dealer's license or used motor vehicle dealer's license is issued the applicant shall file with the administrator a good and sufficient bond in the amount of $20,000 with corporate surety thereon, duly licensed to do business within the state, approved as to form by the attorney general, and conditioned that the applicant will conduct business as a dealer without fraud or fraudulent representation, and without violation of this chapter. The bond may be continuous in form, and the total aggregate liability on the bond shall be limited to the payment of $20,000.

The statutory requirement for a bond was originally passed by the legislature in 1949, and required a bond in "a good and sufficient amount." The statute remained virtually unchanged until 1977 when the legislature recognized the need for an increase in the bond amount. The amount was increased from $5,000 to $20,000, but continued to note that "the total aggregate liability on the bond shall be limited" to that amount. While the statute has received minor changes in style through the years, its substantive content has been maintained.

The applicable language of the bond in question, (Ex. 1), states as follows:

> . . . firmly bound to the people of the

> State of Utah to indemnify any and all persons, firms, and corporations for any loss suffered by reason of violation of the conditions hereinafter contained in the penal sum of Twenty Thousand Dollars ($20,000.00) lawful money of the United States . . . .

The lower court held in the instant case that the foregoing statute must be read in connection with the bond to determine the nature and extent of the surety's liability. (R. 242) This conclusion follows the general rule that the bond and the statute should be read together. In Zele v. Industrial Commission of Utah, 102 Utah 164, 128 P.2d 751 (Utah 1942), the Utah Supreme Court stated:

> In situations where a bond has been given in compliance with some statutory provision the provisions of the statute are read in connection with the provision of the bond to determine the nature and extent of the surety's liability. Id. at p. 752.

In the Home Indemnity Co. v. State of Missouri, 78 F.2d 391 (8th Cir. 1935), cited in the Zele case, the court also noted:

> The scope of a surety's obligation under such a statutory bond is prescribed by the statute in compliance with which it is given and by the language employed in the bond defining it. Id. at p. 393.

Hence, by construing the bond language with the statutory requirement, the liability of the plaintiff surety extends to "all persons" with a claim, to the "total aggregate" amount of $20,000 for all such claims together.

B. The Legislature Intended that the Liability of the Surety was Limited to $20,000 Regardless of the Number or the Amount of the Claims.

The court should note that although portions of the statute cited above are permissive in that it provides that the bond "may be continuous . . .", the penal sum or total liability of the surety is mandatory, in that it provides the "total aggregate liability shall be limited to the payment of $20,000." The legislature, therefore, imposed a strict requirement that the aggregate liability for this kind of bond be limited to $20,000.

The term "aggregate" as used in the statute has been defined in numerous cases. According to Black's Law Dictionary, 5th Ed. (1979), "aggregate" means:

> Entire number, sum, mass, or quantity of something; total amount, complete whole . . .

In the 1896 case of Chapin v. Willcox, 46 P. 457 (Cal. 1896), a county government act limited compensation to county officers to $7 per diem and 25 cents per mile in traveling, "all of which compensation in the aggregate shall not exceed $400 per annum." The plaintiff's expenses totaled $487.80, for which he made demand. When the amount was rejected, plaintiff brought suit alleging the limitation of $400 applied only to the per diem compensation, mileage being allowable over this amount. The court rejected this notion and noted the following:

> . . . The legislature has declared that 'all of which compensation in the aggregate shall not exceed $400 per annum each

year,' thus leaving little, if any, room for construction. It would be difficult to express in more explicit language that the entire amount which a supervisor in this class of counties shall receive in the one year for the services required of him by law, or by virtue of his office, is $400.

* * *

If the legislature had merely said, 'all of which compensation' shall not exceed $400 in one year, both the per diem and the mileage would have been included, since 'all' is a term of number, which includes the several items making up the basis of the compensation; but, as if to make its purpose more clear, the legislature has added that all this compensation shall not, 'in the aggregate,' exceed $400 per annum. The term 'aggregate' implies a plurality of units, whose total amount it represents. Id. at p. 457. [emphasis added]

The decision of In re Miller's Estate, 110 Pa.Super. 384, 168 A. 807 (1933), gave a similar definition to the term aggregate as used in a decedent's will. The will established a testamentary fund for the granddaughter and authorized advance expenditure of the interest on the fund for emergencies "not exceeding in the aggregate $500 yearly." The court held that advances were restricted to a total together of $500 and not $500 per emergency. The court further noted that aggregate was defined as, "an assemblage of particulars; a total or gross amount; any combined whole considered with reference to its constituent part; essentially a sum; considered as a whole; collectively." Id. at p. 807.

Anchor Cas. Co. v. McCaleb, et al., 178 F.2d 322 (5th Cir. 1949), was an action for declaratory judgment construing a liability policy. A partnership had obtained the policy in relation to an oil drilling operation. While the policy was in force, an oil well blew up with tremondous gas pressure and raged out of control for several days. During this time, oil, sand and mud were blown into the air and carried onto the properties of nearby persons by the wind. The plaintiffs contended that liability extended to $5,000 coverage for each accident, and not by the limit of $25,000 stated for aggregate damage. The court found that the damage to the properties was a separate accident to each of the owners and therefore the company's liability was $5,000 per person to the extent of the total aggregate liability of $25,000. The court found that, "the term aggregate was meant to serve as a total limit of damage to property of different persons from a closely related series of events such as were evidenced in this case." (emphasis added) Id. at p. 325.

The cases noted above indicate that the courts view the term "aggregate" as meaning the grouping of individual parts to arrive at a sum, the total of all parts considered together. In essence, the terms "total" and "aggregate" are redundant for emphasis. This would indicate that both terms were used in our statute to erase any question as to the amount of liability indicated on a dealership bond, i.e., $20,000 total regardless of the amount or number of claims.

C. Case Law Supports Plaintiff's Position that the Total Liability of this Surety is the Penal Sum Specified in the Bond.

There is an abundance of case law throughout the country holding that the maximum exposure of a surety, under a surety bond required by statute, is the penal sum specified in the bond.

In an action by the administrator of two different estates to recover on the official bond of a peace officer for wrongful death of the intestates, the court in Maryland Cas. Co. v. Alford, 111 F.2d 388 (10th Cir. 1940), stated:

> Under the great weight of authority, surety's liability is limited by the penal sum named in the bond, even though different individuals assert claims based upon distinct wrongful acts of the principal. (numerous cases listed). Id. at pp. 390 and 391.

In Southern Surety Co. v. Bender, 180 N.E. 198 (Ohio 1931), plaintiff filed an action to enjoin the defendant from having an execution issued or taking any other steps to collect a certain judgment rendered in her favor in a liability action on certain official bonds issued by the plaintiff. Plaintiff had earlier paid in judgment to defendant's husband the full amount of penalty noted in the bond, and contended no further liability. The judgment for the plaintiff and decree for injunction against the defendant were granted. Defendant argued that an Ohio statute required a different result. The statute referred to stated:

> A judgment for one delinquency shall not preclude the same or another person from

> bringing an action on the instrument for another delinquency. Id. at p. 200.

The court, in affirming the trial court, discussed the weakness of defendant's argument that the surety remained liable after the total penal sum was exhausted:

> The defendant contends that by virtue of this language a surety remains liable in succeeding suits on a bond, notwithstanding he may have paid on some form or judgment the full amount of the penalty named in the bond. This court cannot so construe the statute. It is true that the purpose of the enactment was to make the surety liable in successive actions; but the limit of liability assumed by the surety in official bonds of this character is the penal sum named in the bonds. Any other construction would result in a great injustice and render it practically impossible to obtain sureties.
>
> It is also true that the statute must be read into and construed as part of the bond, but nothing in the statute or in the bond indicates that the surety obligated itself to one party, or to separate parties, for any amounts which, in the aggregate, exceed the penal sum named in the bond. Any different holdings are based upon the peculiar phraseology of the statute or of the bond. Id. at p. 200.

The above-mentioned cases, together with the obvious intent of the Utah Legislature that the total aggregate liability of the bond shall be $20,000, clearly supports plaintiff's position that its total exposure in the instant case is the penal sum stated in the bond and in the statute, regardless of the number or the amount of the claims.

Defendants in their briefs have argued that because the bond in question does not use the term "aggregate," that the bond could be construed to be broader and provide more coverage than the statute. Cases are cited by defendants holding that a bond may be executed more broadly than the minimal coverage required by statute. In Fountain Green City v. National Surety Corp., 100 Utah 160, 111 P.2d 155 (Utah 1941), and Bamberg County v. Maryland Cas. Co., et al., 173 S.C. 106, 174 S.E. 917 (S.C. 1934), it is true that the respective courts held that a surety could lawfully, by contract, increase the amount of the principal's bond by voluntarily executing a bond in a larger sum than is required by statute. However, in both these cases, the courts extended the surety's liability only up to the actual amount which appeared on the face of the bond in question. The bond in the instant case was issued to comply with the statute and the penal sum is the same in both the bond and the statute.

The court in Royal Indemn. Co., Inc. v. Special Service Supply Co., Inc., 413 P.2d 500 (Nev. 1966), also held that a bond may be conditioned more broadly than is required by statute. This case is also distinguishable from the instant case in that the bond under examination contained language which spoke of "defaults" and "material bills" even though it was issued pursuant to a statute designed to protect persons from unlawful acts of contractors. The court, unable to "discard plain words of a valid contract," ruled the language was inclusive enough to

encompass simple breaches of contracts.

See also Travelers Indem. Co. v. Housing Authority of the City of Miami, 256 So.2d 230 (Fla. 1972), and Peters v. Bechdolt, et al., 100 Ind.App. 395, 192 N.E. 116 (Ind. 1934), in which the language of the bond specifically extended the coverage beyond what was required by statute.

All of the cases cited by defendants are therefore distinguishable since the bond in the instant case does not clearly or specifically provide greater or broader coverage than the statute.

D. If the Bond Language is Ambiguous, Extrinsic Evidence and Other Relevant Testimony May be Admitted.

The lower court in the instant case held that the bond language was "unclear" as to whether the $20,000 penal sum is a per person limit or a per all persons limit (R. 240 - Finding of Fact No. 6)

It is a well-recognized principle of law that if a bond or contract language is in any way ambiguous, extrinsic evidence and other relevant testimony may be admitted. The Utah Supreme Court has stated this principle in Big Butte Ranch, Inc. v. Holm, 570 P.2d 690 (Utah 1977):

> To ascertain the meaning of the agreements, the court should first examine the language of the instruments and accord it the weight and effect which it may show was intended and if the meaning is ambiguous or uncertain, then consider parol evidence of the parties' intentions. Id. at p. 691.

Since the bond in the instant case does not specifically use the term "aggregate" which is specifically mentioned in the statute, extrinsic evidence should be admissible to help the court determine whether the bond was nevertheless to apply in the "aggregate."

In Hartford Accid. & Indemn. Co. v. Maus, 260 Or. 203, 511 P.2d 839 (Or. 1973), the defendant was president of Eugene Escrow Service, Inc., a company engaged in the escrow business. An Oregon statute required companies engaging in such a business to provide a bond. The defendant, Mrs. Maus, secured a bond from Hartford Accident & Indemnity Company after persuading the defendants George and Mary Pile to sign as indemnitors on the application to Hartford for said bond. Eugene Escrow Service, Inc. subsequently defaulted and the state was required to make payments to persons claiming against the escrow company. The state then obtained a judgment against Hartford, as surety, and Hartford brought an action for indemnity to satisfy the judgment according to the provisions of the indemnity agreement.

The Hartford bond application with the indemnity agreement stated the bond was "to cover real estate license," while the bond, when issued, was "bond of escrow agency," and therefore contradictory. In considering this problem, the court noted:

> Being internally inconsistent, the indemnity agreement is ambiguous and, therefore, extrinsic evidence may be introduced to explain the ambiguity. Id. at p. 840.

Another case which held that extrinsic evidence is admissible to interpret an ambiguous bond or note was Jones v. Casstevens, et al., 222 N.C. 411, 23 S.E.2d 303 (N.C. 1942). In this case, the plaintiff sold the defendant his one-half interest in a jewelry business. The defendant executed his note under seal for the amount secured by secured deed or trust on a home. The note contained a provision to the effect that if the defendant defaulted, the note could be foreclosed and the property sold, but if the sale of the property did not wholly satisfy the note, the defendant would not be liable for any deficiency judgment. The court held in regard to admission of parol evidence concerning the note:

> . . . It is the holding with us that parol evidence is admissible to show an agreed mode of payment and discharge other than that specified in the bond. . . . In proper cases it may be shown by parol evidence that an obligation was to be assumed only upon a certain contingency, or that payment should be made out of a particular fund or otherwise discharged in a certain way, or that a specified creditor should be allowed. Id. at pp. 304, 305.

The court in this case recognized the point of law that parol evidence could be shown as long as it did not conflict with what had been written. In the instant case, plaintiffs proposed extrinsic evidence is offered to clarify any ambiguous language in the bond in question, not to contradict what has been written.

Siata International U.S.A., Inc. v. Insurance Co. of North America, 498 F.2d 817 (3rd Cir. 1974), was an action by a

United States importer of automobiles against a United States surety on a bond covering the contracts between importer and an Italian manufacturer for a delivery of a specified number of automobiles. A question arose in this case, whether or not the bond was an advance payment bond or a performance bond. The Third Circuit Court of Appeals noted the bond was "a miracle of ambiguity" and held that:

> The district court should have received evidence to clear up the ambiguity instead of attempting to construe the instrument on its face. Id. at p. 819.

Defendants contend in their briefs that the language of the bond in question is clear and unambiguous and that extrinsic evidence is therefore inadmissible. A careful reading of the bond language itself, however, without the helpful aid of the statute, may well provide for different interpretations. This court has noted before, Bennett v. Robinson's Medical Mart, 18 Utah 2d 186, 417 P.2d 761 (Utah 1966), that where a contract is susceptible of different interpretations, extraneous evidence is admissible to show intention.

The cases cited by defendants which have held that extrinsic or parol evidence is not admissible to interpret a contract, for the large part, have been cases where the contracts examined have had clear and specific language and where extrinsic evidence would tend to vary or contradict the terms of the contracts in question. That is not the result in the instant

case.

E. The Utah Motor Vehicles Business Administration and the Surety Industry as a Whole have Always Understood that the Total Liability and Exposure for a Surety Under a Dealer's Bond was $20,000 Regardless of the Number or Amount of Claims.

The extrinsic testimony offered at the trial clearly reveals that the understanding within the surety industry itself, as well as the understanding applied by the Utah Motor Vehicles Business Administration, was that a motor vehicle dealer's bond was limited to $20,000 in the aggregate regardless of the number or amount of claims. This is highly relevant in determining the intent of the parties in using the specific bond language in question.

At the trial of the instant case, plaintiff called as an expert witness, Thomas J. Brough, who is the manager of the Fidelity & Surety Department of Northwestern National Insurance Company of Salt Lake City. Mr. Brough explained that the function of suretyship was related to a credit function and that the financial standing of the principal, or the motor vehicle dealer, was critical to the surety. The reason given by Mr. Brough for the importance of the financial standing of the principal was based upon the surety's evaluation to determine the ability of the principal to indemnify the surety should a claim result in a payment by the surety. In connection with the surety's evaluation of the ability of a principal to indemnify the company, Mr. Brough clearly stated that the surety never would consider

a need to go after the principal for more than $20,000 in the aggregate. Mr. Brough's testimony on page 63 of the transcript was as follows:

> Q. And when the company does this, does it envision ever going or ever having to go over the principal for an amount in excess of $20,000?
>
> (Objections raised)
>
> * * *
>
> Q. So then the company would envision going after the principals for one 20,000 loss rather than multiples of twenty?
>
> A. That's correct. (T. 63, lines 23-25; 64, lines 10-13)

Further, Mrs. Dorothy Berthelsen who testified on behalf of plaintiff, and who is the manager of an underwriting unit for plaintiff, testified as to her understanding of plaintiff's total liability on the bond at the time it was issued to the principal. Mrs. Berthelsen's testimony was as follows:

> Q. And what would be, based upon plaintiff's Exhibit 1, what is the understanding of American Manufacturers as to the total liability on that bond?
>
> A. $20,000.
>
> Q. What if you have ten people who each have been defrauded out of $30,000?
>
> A. It's still the penal sum is $20,000. (T. 71, lines 10-16)

Finally, the Director of the Utah Motor Vehicles Business Administration, John A. Burt, testified that the clear understanding of the employees in his agency has always been that

the total liability of the surety for the bond in question in this case is $20,000, regardless of the number or the amount of the individual claims. This testimony is critical to the intent of the parties because Mr. Burt in effect represents the "obligee" under the bond, or in other words, he is the representative of the people of the State of Utah who are to receive protection from the bond. Mr. Burt has been with the agency since 1953, and was instrumental in persuading the legislature to increase the statutory limit of the bond of $5,000 to its present day $20,000. (T. 76, 103-104)

Mr. Burt's testimony with regard to his understanding of the surety's liability begins on page 82 of the transcript:

> Q. What is the understanding of your department as to the total liability of that bond?
>
> (Objections raised)
>
> * * *
>
> Q. Do you recall the question, sir?
>
> A. Talking about this particular bond?
>
> Q. Yes. Exhibit 1.
>
> A. $20,000.
>
> Q. So whether we have ten claimants with $30,000 claims of $30,000 each, the total liability of the surety would be $20,000?
>
> A. That's right.
>
> MR. COOK: Objection to that. He's leading the witness.

THE COURT: Sustained

Okay. Based upon what you have told me your understanding is and the understanding of your department, of the total liability of the surety; assuming you have ten claimants with each claiming a $50,000. What is the total liability of the surety?

A. $20,000.

Q. Regardless of the number or the amount of the claims?

A. Yes, sir. (T. 82, line 30; 83, lines 13-30; 84, lines 1-3)

The extrinsic evidence presented at the trial clearly demonstrates, therefore, the intent of at least two of the parties to the bond. Both the surety and the obligee, represented by the state agency, understood that the bond was limited to $20,000 regardless of the total number or the amount of claims.

## POINT II.

### THE LANGUAGE OF THE BOND SHOULD NOT BE CONSTRUED AGAINST THE BOND COMPANY AND IN FAVOR OF DEFENDANTS.

As previously stated in this brief, the substantive language of the bond in question was prepared before 1953. The form is provided by the Utah Motor Vehicles Business Administration, although it is not clear who actually drafted the form. Almost all of the surety companies which issue bonds in Utah use this type of bond form, and they receive it directly from the Motor Vehicles Business Administration. The testimony

of Thomas J. Brough called as an expert witness by plaintiff, and who was employed as the manager of the Fidelity & Surety Department of Northwestern National Insurance of Salt Lake City, clearly supports this contention:

> Q. Okay. Now going back to say the fall or the last six months of 1978; if a prospective motor vehicle dealer were to come and ask your company to provide a bond, where would you get a form?
>
> A. We would obtain the form from the State of Utah and issue it on that form.
>
> * * *
>
> Q. Would you explain to the Court what you have done to determine what other companies are doing concerning these bonds of this type?
>
> A. I've contacted other companies that I am familiar with that handle bonds in this area. And discussed with them what form they use, and on what basis they underwrite the bonds.
>
> Q. Now, as of the present, do you know of any company that is using a form other than the form that you have before you, plaintiff's Exhibit 1?
>
> A. No. I am not aware of any.
>
> Q. Do you know what was being done back in 1978? Were they all using the same form or did they have different forms or what was the situation?
>
> A. The procedure would have been the same then, I am sure. (T. 46, lines 3-8; 47, lines 5-20)

Further, the testimony at the trial from Mr. John Burt, the Director of the Utah Motor Vehicles Business Administration,

amply demonstrates that any deviation from the form provided by the State agency would be rejected because it was not approved by the attorney general's office. In that regard, Mr. Burt testified as follows:

> Q. I guess what you are saying to me is that the form of Exhibit 1 that states that it has been approved as to form by Robert B. Hanson, the Attorney General?
>
> A. Yes, sir.
>
> Q. That form would be acceptable to you?
>
> A. That's correct.
>
> Q. Now, if I had someone in my office type out the language of this Exhibit 1 verbatim, that would also be acceptable?
>
> A. Yes, sir.
>
> Q. Now, are you telling me that in the event that I reworded any portion of this bond it would not be acceptable?
>
> A. We would not accept it. (T. 80, lines 2-14)

Testimony at the trial further indicates that the practice of using the State agency form is customarily applied by surety companies, inasmuch as the State or the public at large in this case is the "obligee" under the bond. (T. 48, 69) By using the bond form that has already been approved by the Attorney General, surety companies throughout the state can rely on the fact that the form complies with the statutory requirements.

As a result of all of this, the strict rule of construc-

tion that normally applies to a party that prepares a written instrument should not apply in this case because the plaintiff did not prepare the bond in question. If any party should be held to this rule of construction, it should be the public at large since it was their representative that provided the bond containing the disputed language.

## POINT III.

### PUBLIC POLICY DICTATES THAT THE TOTAL LIABILITY BE LIMITED TO $20,000 REGARDLESS OF THE NUMBER OR AMOUNT OF THE CLAIMS.

If the court were to rule that there is a $20,000 exposure on every claim, bonds would probably be unavailable to motor vehicle dealers. Although the court did not permit testimony on the public policy ramifications, it is true that if defendants were to prevail, the surety companies could simply not afford to issue these bond because of the total risk involved. If an attempt were made to issue a bond carrying a liability exposure of $20,000 per claim, the premium would have to be so high that the cost would be prohibited to virtually every motor vehicle dealer. As noted in Southern Surety Co., et al. v. Bender, 180 N.E. 198 (Ohio 1931):

> The limit of liability assumed by the surety in official bonds of this character is the penal sum named in the bonds. Any other construction would result in great injustice and render it particularly impossible to obtain sureties. (emphasis added)

## POINT IV.

### THE RENEWAL OF THE BOND BY RESPONDENT DID NOT PROVIDE CUMULATIVE LIABILITY OF $20,000 PER YEAR.

The bond in question was originally issued on October 31, 1978, upon the payment of a $400 premium. The bond was continued in October of 1979, with the additional payment of another $400 premium. The lower court in the instant case ruled that the payment of the additional premium provided an additional $20,000 for claims arising during that second bond period. Plaintiff has filed its cross appeal contesting that portion of the court's ruling. As previously noted, §41-3-16 of the Utah Code Annotated (1953), expressly allows that a bond may be continuous in form and that the total aggregate liability on the bond shall be limited to the payment of $20,000.

There are many decisions, in other jurisdictions, where it has been held that a bond and subsequent renewals thereof are to be construed as a continuing contract which is continued in force by the payment of annual premiums, and the renewal does not impose additional liability for each bond period.

Montgomery Ward & Co., Inc. v. Fidelity & Deposit Co. of Maryland, et al., 162 F.2d 264 (7th Cir. 1947), was a lawsuit involving the criminal activities of a Laurence O'Connoll, who was bonded in the amount of $20,000 by Fidelity & Deposit Company on September 1, 1935, in connection with his activities as chief security examiner of the Industrial Commission of Illinois. The

bond in question had no expiration date, and there was no contractual method for termination by affirmative action of the parties, nor was there any express indication of an intent to create successive periods of liability. The court noted:

> It is undisputed that the most pertinent factors to be considered in the determination of whether the liability of a suretyship bond is cumulative or continuous are the terms of the bond itself and the acts of the parties in contemplation of the terms of the bond. Id. at p. 266.

The court also took into consideration the receipts or invoices for the various annual premiums on the bond and noted that in each instance, they refer back to the original bond, specifying the number thereof and setting forth the amount as being the premium due on the various specified dates. The court held that the bond was a continuous bond and that the extent of the liability of the defendant was $20,000.

In the instant case, the receipt or invoice for the renewal premium referred back to the original bond and number (Ex. 4), and plaintiff's premium transmittal memo refers to the payment of $400 as an "annual service charge -- continuous bond." (Ex. 5) As in Montgomery Ward, the proper interpretation is that this bond is a "continuous" bond, which does not provide cumulative liability each year a premium is paid.

Fourth & First Bank & Trust Co. v. Fidelity & Deposit Co. of Maryland, 153 Tenn. 176, 281 S.W. 785 (Tenn. 1926), was an action involving a blanket bond which was issued by the defen-

dant to the Fourth & First National Bank by way of protection against dishonesty of all the employees of these two banks. The bonding contracts between the parties provided for a one-year term and subsequent annual premiums.

The defendant in this case maintained that the bond issued to the banks was a continuous bond in the sum of $50,000, while the bank contended that the original bond and each renewal thereof for the four years the bond was renewed, were distinct and separate contracts. The Supreme Court of Tennessee affirmed the lower court's decision dismissing the Fourth & First Savings Bank's bill against Fidelity & Deposit Company and noted that the extent of the defendant's liability was the sum of $50,000 as found in the original bond. The court distinguished cases cited by plaintiff which have held that certain bonds were not continuous, noting that the bonds in these cases had covered a specific period, the renewal of the bonds did not take place automatically, and the bonds were renewed each year only by the affirmative action of both parties.

In the instant case, Dick Noren, the principal, did not have to take affirmative action to renew the bonds such as filling out a new application. He simply paid the premium after receiving an invoice for the same and the bond was renewed. Consequently, the instant case is more similar to the facts in the Fourth & First Bank case than the cases cited by plaintiff in that case.

John Church Co. v. Aetna Indem. Co. v. John Church Co., 13 Ga. 826, 80 S.E. 1093 (Ga.), was another action on a bond to recover on the liability of the defendant company upon one bond for $3,000 and two renewals thereof. The plaintiff in this action, alleged that the original bond was made for the purpose of indemnifying an amount of $3,000 for one year, and that during the next two subsequent renewals of the bond, new contracts were made for each year in the amount of $3,000. The renewal receipts for the bond were identical except as to date, and as to the particular term for which the bond would be in force. The language employed in these receipts indicated they were receipts for a $30 renewal premium on a bond for $3,000 and that as a result of a $30 premium, the bond was hereby renewed and continued in force for the period of one year. The court noted:

> While the renewal certificate might be a new contract, it was only a new contract as respect to time; that is to say, it extended the indemnity provided by the old contract to a new period of time . . . Id. at p. 1096.

The Court of Appeals of Georgia upheld the lower court's decision that the bond was a continuing contract and held the extent of the liability was for $3,000.

According to 7 A.L.R.2d 946, 947, with regard to liability on a fidelity bond renewed from year to year, a majority of the cases have held that a bond and the renewal thereof are to be construed as a continuing contract, which, in

the same manner as a life insurance policy, is continued in force by the payment of annual premiums. The annotation further notes that the liability of the surety is limited in the bond to a specified amount, and the surety may not be liable in excess thereof, although the acts giving rise to claims may have occurred during the different periods of each.

Again, with respect to the extrinsic testimony offered at the trial, it is clear that the understanding in the industry, as well as the Utah Motor Vehicles Business Administration, is that a "continuous" bond provides a total liability of $20,000 and not an additional $20,000 for every year a premium is paid. Both Mr. Robert Blackham, the agent who dealt directly with the principal, Mr. Noren, in this case, and Thomas Brough of Northwestern National Insurance Company, testified that, in their opinion, the bond in the instant case, marked as Exhibit 1, was a "continuous bond". (T. 43, 53) Further, Mr. John Burt of the Utah Motor Vehicles Business Administration testified as to his understanding of how the term "continuous bond" is applied in the industry as well as by the State agency:

> Q. Are you familiar with a phrase 'continuous bond' versus a renewal or am I talking Greek to you?
>
> A. No. Continuous bond, as far as we're concerned is one that we get the original bond. And the bond runs continuously. It doesn't have to be renewed each year. The bond is of a continuous bond.
>
> Q. Now, if you have say $25,000 and say the bond runs from January 1 to

> December 31st of say '78. And then we have a continuous bond into '79 and a continuous bond into '80. If you had a bond such as Exhibit 1, and you had say $30,000 in claims in '78, and another $30,000 in '79, what is the total liability of the surety, based upon the understanding of your department?
>
> A. $20,000.
>
> Q. Regardless of when the claims arise?
>
> A. Yes, sir. (T. 84, lines 4-19)

Based on the cases cited above and the extrinsic evidence offered at the trial, plaintiff respectfully requests that the court grant its cross appeal and find that the total liability of the surety is $20,000 regardless of the amount or number of the claims and regardless of the years for which a premium was paid.

## CONCLUSION

Plaintiff respectfully submits that its total liability on the subject bond is $20,000 regardless of the total amount or number of claims. The bond and the underlying statute, §41-3-16 Utah Code Annotated (1953), must be read together. The statute clearly sets forth not the minimum but the maximum liability required on the bond with its wording that the total aggregate liability on the bond shall be limited to the payment of $20,000.

Since there may be some ambiguity in the bond language itself, the trial court was correct in admitting extrinsic evidence and testimony to arrive at the true meaning of the bond.

The extrinsic evidence submitted in this case clearly supports plaintiff's contention that its total liability is $20,000 regardless of the number or amount of the claims, or the years for which a premium was paid.

The strict rule of construction that normally applies to a party that prepares a written instrument should not apply in this case because respondent did not prepare the bond in question.

Dated this 30 day of July, 1982.

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CERTIFICATE OF MAILING

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