1983

Guaranty National Insurance Company v. Occidental Fire And Casualty Company : Brief of Plaintiff-Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

GUARANTY NATIONAL INSURANCE COMPANY,	)	
Plaintiff-Respondent,	)	
vs.	)	No. 18964
OCCIDENTAL FIRE AND CASUALTY COMPANY,	)	
Defendant-Appellant.	)	

BRIEF OF PLAINTIFF-RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Philip R. Fishler

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Plaintiff-Respondent,	)	
vs.	)	No. 18964
OCCIDENTAL FIRE AND CASUALTY COMPANY,	)	
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BRIEF OF PLAINTIFF-RESPONDENT

NATURE OF THE CASE

This is a declaratory action to determine which insurance company provided primary coverage for the claim asserted for personal injuries in Howcroft v. Bisel, Civil No. 78-5021. The Howcroft suit was settled out of court for a total sum of $150,000.00. Guaranty National Insurance Company paid its policy limits under protest and Occidental Fire and Casualty Company paid the balance of the settlement.

DISPOSITION IN LOWER COURT

Both parties filed motions for summary judgment based on stipulated facts. The Honorable Phillip R. Fishler, Third Judicial Court, granted plaintiff's motion and held the Occidental Fire and

Casualty Company policy taken out by Bisel, covering the ... Bisel as owner-driver was primary, granting plaintiff's mot... summary judgment.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent, Guaranty National Insurance Co... seeks to have the lower court judgment affirmed.

ISSUES

1. Whether primary coverage for a tractor-trailer un... lease, driven by the owner-lessor, is provided by the insurer ... the lessor or that of the lessee.

2. Whether in a declaratory action between two insur... companies, after the injured third-party's claim has been satis... I.C.C. regulations negate the insurance contract provisions or whether general insurance contract principles are determinative coverage.

FACTS

On July 17, 1978 Deloy Bisel drove his International tractor and dump trailer into an intersection and collided wit... automobile driven by Mrs. Brenda Howcroft. As a result of the... accident, Mrs. Howcroft and her two children were injured. At ...

[illegible] the accident, Mr. Bisel and his truck were under lease to [illegible]wood Transportation Company. (R. 91-92)

Bisel and his tractor-trailer were insured under an Occidental Fire and Casualty Company policy number CA 21-57-74 issued in 1977, which was in effect on July 17, 1978. That policy contains the following pertinent provisions and endorsements.

> INSURING AGREEMENTS
> III. Definition of Insured:
> (a) With respect to the insurance for bodily injury liability, the unqualified word "insured" includes the named insured and . . . any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either. (R. 7)
>
> LONGHAUL TRUCKMEN ENDORSEMENT
> 3. Other Insurance: With respect to any automobile of the commercial type while leased or loaned to any person or organization, other than the named insured, engaged in the business of transporting property by automobile for others, or any hired private passenger automobile insured on the "cost of hire" basis, or any non-owned automobile, this insurance shall be excess over any other valid and collectible insurance. (R. 13) (emphasis added)

On July 17, 1978, Norwood Transportation was insured under an automobile liability policy number GLA 0022857 issued by Guaranty National Insurance Company. That policy contains the following pertinent provisions and endorsements:

> PERSONS INSURED . . .
> a) The named insured;
> b) Any partner or executive officer thereof . . .

c) Any other person while using an owned automobile or a temporary substitute automobile with the permission of the named insured . . . (R. 23)

TRUCKMEN ENDORSEMENT

a) . . .

b) . . . provided, however, a driver or other person furnished to the named insured with an automobile hired by the named insured shall be deemed not to be an employee of the named insured.

d) With respect to (1) . . . (2) . . . (3) any non-owned automobile, the insurance under this endorsement shall be excess insurance over any other valid and collectible insurance, whether primary, excess or contingent, available to the insured. (emphasis added, R. 29)

ARGUMENTS

POINT I

NEITHER THE I.C.C. REGULATIONS OR ENDORSEMENTS NOR THEIR UNDERLYING PUBLIC POLICY NEGATE THE PROVISIONS OF THE INSURANCE POLICIES IN THIS CASE.

At the time of the Bisel-Howcroft collision Appellant's combination automobile policy number CA 21-57-75, purchased by Bisel in 1977, was in full force and effect. Bisel purchased the policy to cover his tractor-trailer and liability arising from its use. In the suit that arose from the Bisel-Howcroft accident, Appellant refused to defend and cover Bisel except to provide excess coverage.

In Utah, the courts have traditionally held that primary coverage is provided by the vehicle owner's policy covering the

Cir. 1). National Farmer's Union Property and Casualty Co. vs. [illegible] Insurance Group, 14 Utah2d 89, 377 P.2d 786 (1963); Christensen v. Farmers Insurance Exchange, 21 Utah2d 194, 443 P.2d 665 (1968). Judge Fishler, an experienced insurance lawyer himself, recognized the Utah position in holding Appellant's policy primary.

Appellant seeks now to circumvent the Utah principle and shift the risks it specifically contracted to insure, to Respondent. That would result in forcing Respondent to cover Bisel, whom it expressly contracted to exclude. Such a result is contrary not only to the recognized Utah position regarding primary coverage, but also the public policy of freedom to contract and allocate risks which underlies all contract law.

The issue of primary versus excess coverage in truck-lease situations is one which has been frequently litigated and as Appellant points out in its brief, has given rise to two distinct legal theories. Appellant cites Transport Indemnity Co. v. Carolina Casualty Co., 652 P.2d 134 (Ariz. 1982) as the better reasoned position, holding the lessee's insurance policy primary because the required I.C.C. endorsement nullified the excess provision that otherwise may have relieved Transport Indemnity of liability. The Transport case can and should be distinguished on a crucial fact. There the parties had been unable to reach an agreement as to who would defend and settle the underlying tort claim prior to filing their declaratory action. It is that specific situation that the I.C.C. regulations at issue here, were intended to prevent. In the

instant case however. Respondent defended and settled the [illegible] tort claim paying full policy limits before it filed the pre[illegible] declaratory action.

On these facts, a majority of jurisdictions have he[illegible] I.C.C. regulations supercede policy provisions only in disputes between the motor carrier and members of the public; and that between insurers the language of the specific policy provisions govern. Pacific National Insurance Co. v. Transport Indemnity 341 F.2d 514 (8th Cir. 1965); National Mutual Insurance Co. v. Liberty Mutual Co., 196 F.2d 597 (D.C. Cir. 1952); Carolina Cas. Ins. Co. v. Pennsylvania Thresherman and Farmers Mutual Casualty Ins. Co., 327 F.2d 374 (3d Cir. 1964); Wellman v. Liberty Mutual Ins. Co., 496 F.2d 191 (8th Cir. 1974); and Carolina Casualty Co. Ins. Co. of North America, 595 F.2d 128 (3d Cir. 1979).

Respondent argues that based on the facts of the pres[illegible] case, the Transport Indemnity case is not applicable. Even whe[illegible] limited to its own facts, the Transport case is not illustrative the controlling law on this issue and does not hold up under ca[illegible] analysis.

The Arizona Supreme Court based its holding, in Trans[illegible] on two rationale. First, it held that even assuming arguendo t[illegible] I.C.C. regulations are limited in their effect to disputes betw[illegible] the lessee and members of the public, the lessee's policy is a[illegible] by an endorsement attached to the policy. The Court stated:

> . . .The transport policy contains an endorsement providing that the body of the policy (which contains the excess-other insurance clause) 'is hereby amended' so that '. . .no condition, provision, stipulation, or limitation contained in the . . . policy . . . shall relieve [Transport] from liability hereunder or from payment of any final judgment . . .'. Id. at 142.

The endorsement referred to is required by I.C.C. regulations, so in effect the Arizona Court argued that even if I.C.C. regulations do not limit the policy provisions as to a dispute between insurers, the I.C.C. endorsement attached to lessee's policy does. In the present case the endorsement language quoted above was not part of the Guaranty National policy, but only implied by the I.C.C. regulations.

In Carolina Casualty Insurance Co. vs. Insurance Company of North America, 595 F.2d 128 (3d Cir. 1978), the Court discussed the same issue and concluded:

> 49 U.S.C. §315 and 49 C.F.R. §1043.1(a), governing insurance and other assurances of motor carrier's financial responsibility, require only that the carrier give security to pay any final judgment recovered against such motor carrier . . .; they mention nothing about defense of actions and nothing about payment of judgments recovered against other parties such as lessors. . . .Nor does the I.C.C. endorsement operate to relieve the lessor or its insurer of any ultimate financial responsibility for claims or judgments against them.[36] . . .
>
> Footnote 36:
> In the recent decision of Carolina Casualty Insurance Co. vs. Underwriters

Insurance Co. 569 F.2d 304, 312 (5th Cir. 1978), the Court stated the following about the I.C.C. endorsement:

> The purpose of §215 of the Interstate Commerce Act and Regulations is to assure to to members of the public and shippers that a certified carrier has independent financial responsibility, with the dollar limits prescribed, to pay for losses created by its carrier operations. On the face of the endorsement this is accomplished by reading out 'other insurance', 'excess', or similar clauses insofar as the amount available to a third-party victim would be reduced. But there is no need for or purpose to be served by this supposed automatic extinguishment of the clause insofar as it effects the insured or other insurers who clamor for part or all of the coverage. Id. at 139.

The second rationale the Arizona Court adopted was th even without the I.C.C. endorsement, the intent of the Interst Commerce Act was to ". . .permit the I.C.C. to abolish and regu a wide range of practices which had come into existence in the trucking industry by imposing 'responsibility-and-control regulations' governing the regulation of non-owned vehicles". 652 P.2d at 143. The Court went on to summarize the congressio intent, apparently paraphrasing a U.S. Supreme Court case, as follows:

> Congressional intent included 'fixing' financial responsibility by adopting a rule of law making the lessee liable for any negligent act of the driver, even though he was employed by the lessor. It included adoption of requirements that the lessee give proof of financial responsibility for its liability for the acts of the driver. It included language preventing the insurer whose policy was filed as proof of financial responsibility (Transport in this case) from relieving itself of its obligation to pay damages. Transamerican Freightlines, Inc. v. Brada Miller, supra. [423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975)] Id. at 144.

Respondent is unable to determine what portion of the Brada Miller opinion the Arizona Court paraphrased. In reference to the intent and purpose of the I.C.C. regulations, the United States Supreme Court in the Brada Miller case did make the following statement:

> After a detailed examination of the proceedings of the Commission that resulted in the promulgation of the protective provisions at issue in this case, the Court observed: 'The purpose of the rules is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system,' and to assure safety of the operation. (citations) 'So the rules in question are aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress.' (citation) It is apparent, therefore, that the sound transportation services and the elimination of the problem of a transfer of operating authority, with its attendant difficulties of enforcing safety requirements and of fixing financial responsibility for damage and injuries to shippers and members of the

> public, were the significant aims and guideposts in the development of the comprehensive rules. 423 US. 28, 37, 96 S.Ct. 329, 334, 46 L.Ed.2d 169, (1975) quoting American Trucking Associations vs. United States, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953) (emphasis added).

From this language apparently, the Arizona Supreme Court has jump to the conclusion that congress intended the lessee's policy to be primary as a matter of law. The Court cites no authority, other than the Brada Miller case to support its conclusion. Indeed, the Arizona Court acknowledges that the conclusion they reach, cited Appellant's brief at 8, is the minority view. 652 P.2d at 143.

Respondent asserts the Brada Miller case does not support the Arizona Supreme Court analysis nor does it support Appellant's contention in the instant case. In the Brada Miller opinion, the U.S. Supreme Court went no further than to state that among other considerations "fixing financial responsibility for damages and injuries to shippers and members of the public, were significant aims and guideposts in the development of the comprehensive rules. 423 U.S. at 37. In fact, the Court upheld an indemnification provision that the lessor "save harmless" the lessee. The Court specifically pointed out that the lessee had defended and settled the underlying tort claim and then held:

> The [I.C.C.] regulations do not expressly prohibit an indemnification provision in the agreement between the lessor and the lessee. In fact, they neither sanction nor forbid it. It would seem to follow, then, that the mere presence of a clause such as the one here - that the lessor

> is to bear the burden of its own negligence - does not, in and of itself, offend the regulations so long as the lessee does not absolve itself from the duties to the public and to the shippers imposed upon it by the Commission's regulations . . .
>
> Although one party is required by law to have control and responsibility for conditions of the vehicle, and to bear the consequences of any negligence, the party responsible in the law to the injured or damaged person may seek indemnity from the party responsible in fact. 423 U.S. at 39 and 40. (emphasis added)

It is clear that the U.S. Supreme Court views the I.C.C. regulations as intended to provide a source of compensation for shippers and injured third-parties in trip-lease circumstances. The Court does not hold or imply, as the Transport Indemnity case suggests, that the registered motor carrier's insurance provide absolute and exclusive primary coverage.

The Brada Miller case suggests rather, that as long as the tort claimant is compensated, valid provisions within the competing insurance policies will be given effect. As noted earlier, in the Transport Indemnity case, both insurers had refused to defend or settle the underlying tort claim at the time the Arizona Supreme Court heard the case. In an effort to prevent that very situation, the court adopted the policy "establishing a uniform rule fixing primary financial responsibility for defense and payment of claims in all cases involving trip leases". 652 P.2d at 144. The Court then limited its holding:

> We do not go so far as to hold that federal law imposes upon the lessee's insurer the status of sole primary insurer. There may be other primary insurers, depending upon the terms of the lessor's insurance contract. (citation) And there may be indemnification agreements between the lessor, lessee and other respective insurers. (citation) Where they exist, these rights may be enforced by action for contribution or indemnity, but such actions will not ordinarily delay disposition of the tort claim by enforcement of the primary liability which the lessee and its insurer must bear. 652 P.2d at 145.

In practice, however, the Arizona Court's attempt to provide a consistent, fixed rule produces inconsistent results. When applied to the facts of the present case, after the tort claim has been settled, the Arizona analysis, holding the lessee's policy primary as a matter of law, has the effect of denying Respondent's rights to indemnification and contribution. A judicial fiat that either policy is primary would render any contribution question moot between Appellant's and Respondent's insured's moot.

Respondent asserts the best reasoned authority and analysis is Carolina Casualty Insurance Co. vs. Insurance Company of North America, 595 F.2d 128 (3d Cir. 1978) (hereinafter INA). In that case the Third Circuit Court addressed the same issues as presented in the instant case and quoted the same language from the Brada Miller case that the Arizona Court quoted in the Transport Indemnity opinion, that "fixing financial responsibility for damages and injuries to . . . members of the public as one of the

significant aims of the federal rules". 595 F.2d at 137. The Third Circuit Court then stated:

> We may assume, without deciding, that if Refrigerated, [lessee] as the holder of the I.C.C. permit, were the only available defendant in this case, it could not escape the significant duties of care and financial accountability to the public which the Federal Rules, and the contractual undertakings pursuant thereto, impose upon lessees. We may also assume, without deciding, that INA as Refrigerated's certified liability insurer could not absolve itself of a duty to make the initial payment of compensation to an injured member of the public, in the event that neither Refrigerated nor any other party involved could answer financially for the damage. The District Court in this action may have intended to state nothing more than the above two propositions when it declared that 'Refrigerated and INA . . . are in that order primarily responsible for defending the Babcocks' suit and for paying any damages the Babcocks might recover'. We agree that these two principles are in accordance with the policy of this Court. 595 at 137. (emphasis added)

In the INA case, the tort claim had been tried and the jury found no negligence on the part of the driver, but found both lessor and lessee independently liable for negligence. The Court then stated:

> However, the pleadings in this declaratory action do not seek a determination of the duty owed by a motor-carrier lessee and its insurer to the injured public. Rather, we view this case in its present posture as an action to determine where the ultimate financial responsibility for the injury rests, after the injured

> plaintiff has obtained a judgment against two parties held responsible in fact and law. In this situation, the pertinent question is whether the federal policy of assuring compensation for loss to the public prevents courts from examining the manner in which private agreements or state laws would otherwise allocate the ultimate financial burden of the injury. 595 F.2d at 137 & 138.

In the INA case, counsel for the lessor, Carolina Casualty, presented the same argument as does Appellant herein the Third Circuit Court rejected as follows:

> Carolina and Stanford appear to argue in this appeal that our court's analysis should stop with consideration of the I.C.C. regulations and the public policies serve thereby. We disagree. While a lessee cannot free itself of its federally imposed duties when protection of the public is at stake, the federal requirements are not so radically intrusive as to absolve lessors or their insurers of otherwise existing obligations under applicable state tort law doctrines or under contracts allocating financial risk among private parties. Thus, in a declaratory action similar to this one, determining which of two insurers owed primary coverage for liability arising from a leased vehicle accident, this Court rejected the reasoning of a District Court which had relied solely on the 'responsibility and control' regulations to impose liability exclusively on the lessee's insurer. Allstate Insurance Co. vs. Liberty Mutual Insurance Co., 368 F.2d 121 (3rd Cir. 1976). That decision held that where the case is 'concerned with the responsibility as between insurance carriers,' and not with the federal policy of protecting the public, 'I.C.C. considerations are not determinative' and a court should consider the express

terms of the parties' contracts. Id. at 138.

Respondent has defended and settled the underlying tort claim in the present case. In its current posture this action is tantamount to an action for contribution and therefore based on the cases discussed above, the coverage should be determined by examining the express terms of the two policies.

POINT II

UNDER GENERALLY ACCEPTED INSURANCE CONSTRUCTION PRINCIPLES, OCCIDENTAL FIRE AND CASUALTY COMPANY IS THE PRIMARY INSURER HAVING NAMED BISEL AS INSURED UNDER ITS POLICY, WHILE THE GUARANTY NATIONAL INSURANCE POLICY EXPRESSLY EXCLUDES BISEL.

After all the smoke of I.C.C. regulations and policy has been cleared away, the only real issue in this case is which insurance policy covers Deloy Bisel, since Norwood's liability if any, is only vicarious and therefore Norwood's insurer as subrogee would be entitled to succeed to Norwood's rights of indemnification against Bisel or his insurer.

The Occidental policy contains two clauses pertinent to this issue. The first is the definition of insured which provides coverage for the named insured (Bisel) and "any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured . . .". (R. 7) The Lease Hauling Contract executed by Bisel and Norwood legally grants Norwood the right of use and control of the truck during the lease period (Lease paragraph 7; R. 37). Bisel, the named insured, was

driving the truck at the time of the accident. This clause only names Bisel, but Norwood as insured under the Occidental policy.

The second clause in the Occidental policy pertinent to the case is the "other insurance" clause under the Longhaul Truckmen Endorsement, which provides, "With respect to any automobile of commercial type while leased or loaned to any person or organization, . . . this insurance shall be excess over any other valid and collectible insurance". (R. 13) (emphasis added) By its own language, this clause operates to make the Occidental policy excess only when there is other valid and collectible insurance available to the insured. Appellant argues at page 7 of its brief that "the policy extends only excess coverage for any accident which occurs while the described vehicle is leased to a common carrier". Appellant gives no argument on appeal that its policy is not valid and collectible other than "the I.C.C. filing mandates that the Guaranty policy be primary." (Appellant Brief at 7).

The Guaranty policy also contains an "excess clause" in its Truckmen's Endorsement which provides, "d. With respect to (. . . (2) . . . (3) any non-owned automobile, the insurance under this endorsement shall be excess over any other valid and collectible insurance, whether primary, excess or contingent, available the insured." (R. 29). In construing such competing excess clauses Couch on Insurance states:

> Where an automobile liability policy issued to the owner provided that its coverage was available to anyone legally responsible for its operation, but also provided that coverage should not extend to claims covered by other valid insurance and the lessee of the car carried insurance under another policy providing that such insurance should be merely the excess coverage over and above the valid and collectible insurance taken out by the owner, such latter insurance is not 'other valid insurance' so as to affect the insurance taken out by the owner. (cases cited therein) Couch on Insurance 2d §62-91, Effect of Excess Insurance Contract, at 569.

According to the "Couch" rule, the excess clause in the Guaranty National policy removes it from consideration as "other valid and collectible insurance" under the Occidental policy. Under this rule the Occidental policy would provide primary coverage up to its limits and only then would the Guaranty National policy provide excess coverage.

The Guaranty policy also expressly excludes Bisel from coverage under the Truckmen Endorsement:

> (b) Except with respect to the named insured or an employee thereof, but subject otherwise to the "persons insured" provision, the insurance does not cover as an insured any person or organization or any agent or employee thereof engaged in the business of transporting property by automobile for the named insured or for others under any of the following conditions; 1) . . ., 2) . . ., 3) . . ., 4) . . . provided, however, the driver or other person furnished to the named insured with an automobile

> hired by the named insured shall be deemed not to be an employee of the named insured." (emphasis added) (R. [illegible])

Bisel is in fact expressly excluded by that clause as a driver furnished with a hired automobile. Bisel is not deemed to be employee and therefore is not an insured. Appellant cites no provision in the Guaranty National policy that covers Bisel as insured either expressly or impliedly.

According to the express provisions of the Guaranty National policy Bisel is not covered as an insured, therefore, Guaranty National policy is not valid and collectible insurance to Bisel and the Occidental excess clause cannot operate to deny coverage to Bisel for his liability arising from the accident of July 17, 1978. Even if the Court were to find the excess clause both Truckmen Endorsements as mutually repugnant and void, the Occidental policy remains the only policy covering Bisel as an insured and by reason of the omnibus clause in the Occidental p naming Norwood as an insured, Occidental is the primary insurer.

This is the conclusion reached by the Tenth Circuit i Carolina Casualty Company vs. Transport Indemnity Company, 488 F.2d 790 (10th Cir. 1970). There the facts were the same a the instant case except both policies contained I.C.C. endorsem The Court looked beyond the I.C.C. endorsements and beyond the provisions to the insurance contracts themselves and held the lessor's omnibus clause covered both the lessee motor carrier a driver who was an employee of the lessor and special employee o

; the lessee's policy contained no omnibus clause, and it covered only the named lessee. The Court further held:

> No cases from this circuit or from Utah appear to be to the contrary. Ringsby (lessee) had full control over the truck, tractor and trailer, and over Freeze (driver and lessor's employee). Ringsby's liability, if any, is vicarious. If Ringsby should be found liable it would have the right to proceed by indemnification against Freeze. As Ringsby's subrogee, Transport could then sue Freeze, a permissive user under Carolina's policy, ultimately recovering against Carolina. Based on the above and to avoid circuity action, we hold Carolina's policy (the lessor's policy) to be primary. Id. at 794.

The same rationale would be consistent in the instant case if the Court were to look beyond the I.C.C. endorsement. To hold otherwise would have the effect of transferring the risk that Occidental specifically contracted to insure over to Guaranty National Insurance Company which specifically contracted to exclude just such risk.

CONCLUSION

Based on the majority position illustrated by the Carolina Casualty vs. Insurance Company of North America analysis adopted by the Third Circuit, an I.C.C. endorsement is not determinative of policy coverage as between two insurance companies, when the obligation to make a third-party whole has been satisfied. Federal

regulations cannot extend coverage of a policy beyond that
the parties contract. Therefore, the better reasoned view i
apply general insurance contract principles in construing the
insurance contracts themselves. Under this analysis, the Occid
Fire and Casualty Company's policy, covering Eisel as named insu
and Norwood Transportation as insured under the omnibus clause i
primary as opposed to the Guaranty National insurance policy whic
covers only Norwood Transportation and is excess.

The plaintiff-Respondent respectfully submits that the Third District Court was correct in its holding and should there be affirmed.

RESPECTFULLY SUBMITTED this 17 day of June, 1983.

HANSON, RUSSON & DUNN

By David H. Epperson
DAVID H. EPPERSON
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed two copies of the foregoing Brief of Plaintiff-Respondent to Mr. David W. Slagle, Attorney for Appellant, Snow, Christensen & Martineau, P. O. Box 3000, Salt Lake City, Utah 84111 this 17 day of June, 1983.