

2000

# Windsor Insurance Company v. American States Insurance Co : Reply Brief

Utah Supreme Court

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## Recommended Citation

Reply Brief, *Windsor Insurance v. American States*, No. 20000093.00 (Utah Supreme Court, 2000).  
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|                                |   |                                    |
|--------------------------------|---|------------------------------------|
| WINDSOR INSURANCE COMPANY,     | ) |                                    |
|                                | ) |                                    |
| Plaintiff / Appellant,         | ) | Appellate Case No. 20000093 - SC   |
|                                | ) |                                    |
| vs.                            | ) | District Court Civil No. 980903520 |
|                                | ) |                                    |
| AMERICAN STATES INSURANCE CO., | ) |                                    |
|                                | ) | Priority Number: 15                |
| Defendant / Appellee.          | ) |                                    |
|                                | ) |                                    |

**Counsel for Plaintiff / Appellant,  
Windsor Insurance Company**

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## SUMMARY OF THE REPLY ARGUMENT

The dispute centers on COVERAGE for Brenda Chambers provided by American States. This is NOT a dispute concerning the legal *liability* of Labor Services, Inc. (LSI) for its vicarious negligence.

Brenda Chambers's entitlement to coverage under American States's insurance policy is dependent upon her legal liability, but that issue has been decided in what American States refers to as the Personal Injury / Tort Litigation.

Under the express terms of American States's insurance policy, Brenda Chambers was an insured if she incurred legal liability while acting within the course and scope of her employment. Because Brenda Chambers is an insured under American States's insurance policy and is a person against whom Windsor obtained a judgment (and the underlying lawsuit was not susceptible to a statute of limitations defense), American States's arguments regarding Windsor's rights against LSI as Kathryn Zaborski's subrogee are not relevant. In addition, because Brenda Chambers is an insured under American States's insurance policy, American States's arguments regarding the presence of LSI or American States in the underlying lawsuit are not relevant. In addition, because Brenda Chambers is an insured under American States's insurance policy, American States's arguments regarding the applicability of Holt are not relevant.



## ARGUMENT

### I. BRENDA CHAMBERS IS AN “INSURED” PURSUANT TO THE TERMS OF AMERICAN STATES’S INSURANCE POLICY.

This case involves Windsor’s allegation that American States owed coverage to Brenda Chambers, and should be ordered to indemnify her and Windsor. This is not a novel concept.

An injured person suing a liability insurer to recover on a judgment which he has secured against a negligent motorist has the burden of proving that such motorist was a person covered by the policy and where he was injured by a driver who was an employee of the named insured, the judgment creditor of such driver is bound to prove by independent evidence that the terms of the policy contract afforded protection to the employee as an additional insured. — Mycek v. Hartford Accident & Indemnity Co., 20 A.2d 735, 128 Conn. 140.

46 C.J.S. § 132, n. 32 at p. 457.

Brenda Chambers is entitled to primary liability coverage as an additional insured from American States, thus Windsor is entitled to indemnification under the written contract of insurance. Brenda Chambers was an insured for actions that were within the course and scope of her employment because she is deemed in law to have been LSI at the time she negligently injured Kathryn Zaborski. American States’s insurance policy provides as follows:

## SECTION II - LIABILITY COVERAGE

### A. COVERAGE

We will pay all sums an “insured” legally must pay . . . .

\* \* \*

#### 1. WHO IS AN INSURED

The following are “insureds”:

a. You for any covered “auto.”

\* \* \*

c. Anyone liable for the conduct of an “insured” . . . .

American States’s Business Auto Coverage Form at Section II, attached hereto as

EXHIBIT A.

Therefore, the question presented to this Court is whether Brenda Chambers’s liability was incurred while she was deemed in law to have been acting as LSI (“You”) or, alternatively, whether Brenda Chambers was liable for the conduct of LSI (“Anyone liable for the conduct of an ‘insured’”) because, as a matter of law, Brenda Chambers’s

negligent driving was the “conduct of LSI”<sup>1</sup> for which Ms. Chambers is legally liable.<sup>2</sup>

It is not disputed that these questions rest on the predicate that Brenda Chambers’s actions must have occurred within the course and scope of her employment with LSI. If Brenda Chambers was acting within the course and scope of her employment, her actions were, as a matter of law, the actions of LSI.<sup>3</sup> Thus, Brenda Chambers is an insured entitled to indemnification under the insurance policy.

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<sup>1</sup> Note: The contract does not require the *liability* of LSI. It provides coverage for any “insured.” The liability of the “insured” is the second part of the condition precedent to the provision of coverage benefits and Brenda Chambers’s liability is not disputed. This lawsuit determines Brenda Chambers’s status as an insured because either (1) She was LSI, as a matter of law; or (2) She was held liable for the conduct which was, as a matter of law, the conduct of LSI.

<sup>2</sup> It is difficult to conceive of a factual circumstance other than this factual circumstance that would give effect to the contract’s Part A(1)(c). And, of course, “contracts ‘should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions.’” Lee v. Barnes, 1999 UT App 126, P11, 977 P.2d 550 (citation omitted).

<sup>3</sup> “When an insurance company, in drafting its policy of insurance, uses a ‘slippery’ word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be found.” Government Employees Ins. Co. v. Dennis, 645 P.2d 672, 675 (Utah 1982).

## II. WINDSOR MAY “STEP IN THE SHOES” OF BRENDA CHAMBERS TO RECOVER UNDER AMERICAN STATES’S LIABILITY COVERAGE.

Windsor (as the uninsured motorist carrier for Kathryn Zaborski) stepped into the shoes of American States’s insured, Brenda Chambers, and may assert all rights against American States that she possessed. See Auerbach Co. v. Key Sec. Police, Inc., 680 P.2d 740 (Utah 1984) (explaining that a one who has a judgment against a judgment debtor may enforce the rights of the judgment debtor). Windsor brought this action against American States to determine Brenda Chambers’s right to liability coverage. The legal liability of LSI is not at issue and is not relevant to American States’s obligation to indemnify Brenda Chambers.

Equity affords Windsor the procedural right to sue American States directly. The Utah Supreme Court has ruled that Windsor has standing to enforce Brenda Chambers’s entitlement to insurance coverage from Defendant:

The right to **subrogation does not depend on contractual relationships**, as its purpose is to “work out an equitable adjustment between the parties by securing the ultimate discharge of a debt by the person who, in equity and in good conscience, ought to pay it. *Allstate Ins. Co. v. Ivie*, 606 P.2d 1197, 1202 (Utah 1980).

State Farm Mutual Automobile Ins. Co. v. Northwestern National Ins. Co., 912 P.2d 983 (Utah 1996). In *State Farm v. Northwestern*, the court addressed facts very similar to those in this case. State Farm insured a borrowed personal vehicle (Windsor insured a borrowed personal vehicle through its UM coverage) and Northwestern insured the

employer of the tortfeasor under a business auto policy (American States insured the employer of the tortfeasor under a business auto policy). State Farm paid the liability of the tortfeasor and brought an action against the employer's insurer for indemnification.

We recently held in *State Farm Mutual Automobile Insurance Co. v. Northwestern National Insurance Co.*, 912 P.2d 983, 985-87 (Utah 1996), that an insurer which settled a claim that should have been covered by another insurance company could recover the amount paid in settlement under the equitable doctrine of subrogation. We reasoned that equity allowed an insurer which paid a debt in full that was owed by another to obtain reimbursement from those who ought to have paid it. *Id.* at 985.

Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127 (Utah 1997). Moreover, the court specifically explained that the right of subrogation is not constrained by the direct-action rule in the context of intercompany litigation:

Utah law clearly recognizes an insurer's right to bring a subrogation action on behalf of its insured against a tort-feasor. . . . More significantly, **we have extended this principle to an action by an insurer against a second insurance company which is primarily liable to defend or pay any claims on behalf of its insured but which has denied coverage.** *National Farmers Union Property & Casualty Co. v. Farmers Ins. Group*, 14 Utah 2d 89, 377 P.2d 786, 787-88 (Utah 1963).

Id. (citations omitted).

### III. THE SO-CALLED "DIRECT-ACTION RULE" DOES NOT APPLY TO INTERCOMPANY LITIGATION.

American States ignores *State Farm v. Northwestern* that addressed facts that are nearly indistinguishable from the facts underlying this case and relies, instead, on *State*

*Farm v. Holt*<sup>4</sup>. Although a direct-action rule does exist, its nearly-sacrosanct status has permitted it to become boundless and incomprehensible. The only constant abstraction is the liability carrier's supposed right to lurk in the shadows of litigation or disappear completely based upon nothing more than its own declaration.

*Holt* only stands for the proposition that an insurer that complies with its duties is only obligated to pay the sums for which its insured is legally liable, thus a determination of the insured's legal liability must be determined before liability coverage benefits must be paid to a third party. Thus, *Holt* only explained that the direct-action<sup>5</sup> rule is a cart-before-the-horse principle to be applied in the ordinary case.

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<sup>4</sup> *State Farm v. Holt* is frequently cited by the insurance defense bar as support for the proposition that nobody who is not in "privity of contract" has "standing" to sue insurers who mistreat their insureds. See Wasatch Bank of Pleasant Grove v. Surety Ins. Co., 703 P.2d 298, 300 (Utah 1985) ("As an equitable doctrine, subrogation is not dependent on contractual rights and obligations."); see also Tallman v. City of Hurricane, 1999 UT 55, P8 (Utah 1999) (referring to the principle of privity as "archaic" and dispensing with the privity requirement in tort cases involving an independent contractor who creates artificial conditions on land).

<sup>5</sup> The courts of the State of Utah have also held that a liability insurer should not be named in the ordinary case where such disclosure can be shown to constitute an inordinate risk of unfair prejudice. See Dairyland Insurance Co. v. Smith, 646 P.2d 737 (Utah 1982). Certain *obiter dicta* from appellate opinions (e.g., among others, those concerning the importance of privity of contract with respect to the existence of a duty of good faith) have led attorneys and judges to mix the foregoing principles and now grant something slightly less than absolute legal immunity and impenetrable legal privilege to third-party insurance carriers. It is now standard practice to grant mistrials based upon any disclosure of the existence of a third-party carrier although this result is hardly compelled by a proper interpretation of the relevant caselaw.

This is not the ordinary case.

First, American States argues, repeatedly, that LSI's legal liability has not been determined. This litigation is brought to determine coverage for Brenda Chambers, not LSI's liability. American States may not alter the allegations in order to disprove the altered allegations. The only allegation that is being made, or has ever been made in this litigation, is that American States must indemnify Brenda Chambers because she is an insured under American States's insurance policy.

Second, Windsor's contractual obligation was secondary to American States's contractual obligation. Its right to recover the sums it paid from an insurer whose obligation is primary is well-settled.

Third, American States had the opportunity to defend Brenda Chambers, but it refused to do so based upon the conclusion that she was not its named insured and, therefore, not an insured. See Correspondence dated October 9, 1997 attached hereto as EXHIBIT B. An insurer that complies with its contractual obligations may avoid direct involvement in litigation arising from its insureds' torts, but the same principle does not protect miscreant insurance carriers that breach their obligations. See Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985) ("Although the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach."); see also Deseret Fed. Sav. & Loan Assoc. v. United States Fidelity & Guar. Co., 714 P.2d 1143, 1146 (Utah 1986).

Fourth, this is a declaratory judgment action. In *Jenkins v. Swan*, 675 P.2d 1145, 1148 (Utah 1983), the court held that before the district court could proceed in an action for declaratory judgment, “(1) there must be a justiciable controversy; (2) the interests of the parties must be adverse; (3) the parties seeking relief must have a legally protected interest in the controversy; and (4) the issues between the parties must be ripe for justiciable determination” (citing *Jenkins v. Finlinson*, 607 P.2d 289 (Utah 1980)). All of the elements set forth above are present in this case where Windsor seeks a declaration that American States provided liability coverage for Brenda Chambers and that its coverage obligation was primary.

Fifth, Windsor is a third-party creditor beneficiary under Defendant’s insurance contract with LSI. It is well-settled that where a contract confers a clear benefit on a third party, such third party has enforceable rights despite the fact that no consideration was proffered for those rights. See, e.g., Tracy Collins Bank & Trust v. Dickamore, 652 P.2d 1314 (Utah 1982); Rio Algom Corp. v. Jimco, Ltd., 618 P.2d 497 (Utah 1980).

A victim of negligence is a third-party creditor beneficiary under a liability insurance contract which provides for payment to third parties contingent upon the insured’s (promisee’s) legal liability:

If . . . the promisee’s expressed intent is that some third party shall receive the performance in satisfaction and discharge of some actual or supposed duty or liability of the promisee, the third party is a creditor beneficiary.



Fleck v. National Property Mgt., Inc., 590 P.2d 1254 (Utah 1979). As a beneficiary of the contract, Windsor has standing to sue the promisor, American States.

All of the foregoing bases invoke the contractual obligations of American States. The applicable statute of limitations is six years on the written contract. UTAH CODE ANN. § 78-12-23(2).

#### IV. WINDSOR IS ENFORCING THE JUDGMENT AGAINST BRENDA CHAMBERS.

American States argues, as an affirmative defense, that the four-year catch-all statute of limitations bars Windsor's claims. Defendant's Brief at pp. 11-12. The only obligation borne by Windsor is to disprove the arguments presented by American States.

The fact that Astill could have anticipated Clark's defense and presented the expert testimony in her case-in-chief is likewise not determinative because Astill need not anticipate and then disprove defendant's potential theory of the case. *See id.*; *see also McFall v. Inverrary Country Club, Inc.*, 622 So. 2d 41, 44 (Fla. Dist. Ct. App. 1993) (stating plaintiff has no duty to anticipate and disprove all potential defenses in its main case);

Astill v. Clark, 956 P.2d 1081 (Utah App. 1998).

The four-year statute of limitations argument is based upon the repeated discussion of the underlying accident and the assertion that a negligence cause of action against LSI would be barred (if that *were* the cause of action relied upon and the party charged in the cause of action) by the four-year statute of limitations. See Defendant's Brief at pp. 11-12.

**This argument is without merit**, for when a valid and final judgment for the payment of money is rendered, the original claim is extinguished, and a new cause of action on the judgment is substituted for it. In such a case, the original claim loses its character and identity and is merged in the judgment.

Yergensen v. Ford, 402 P.2d 696, 697 (Utah 1965) (emphasis added). Legal proceedings based upon a money judgment must be brought within eight years. UTAH CODE ANN. § 78-12-22(1).

V. BECAUSE AMERICAN STATES BREACHED ITS FIDUCIARY OBLIGATION TO DEFEND BRENDA CHAMBERS, IT MAY NOT INVOKE THE STATUTE OF LIMITATIONS AS AN AFFIRMATIVE DEFENSE.

It is pertinent to observe that the statute of limitations is an affirmative defense in which the burden is upon the Defendant to prove that the action was not commenced within the limitation period. Where there is a fiduciary relationship, such as between an insurer and an insured to whom the insurer owes a duty to defend, the statute of limitations does not begin to run until the insured discovered, or in the exercise of reasonable care should have discovered, that there was a wrong to be complained of; and it hardly needs to be stated that this rule has application where knowledge of the right to a defense is wrongfully withheld from the insured. See, e.g., Leach v. Anderson, 535 P.2d 1241 (Utah 1975). Defendant's argument in the district court was that a defense was "not tendered" to it by Brenda Chambers.

Utah's appellate courts have held that an insurer's duty to defend is broader than

its duty to indemnify. Its defense duty arises not when a defense is “tendered,” but rather, when the insurer ascertains facts giving rise to potential liability under the insurance policy. Deseret Fed. Sav. & Loan Assoc. v. United States Fidelity & Guar. Co., 714 P.2d 1143, 1146 (Utah 1986). This potential liability is determined by referring to the allegations in the underlying complaint. When those allegations, if proved, could result in liability under the policy, then the insurer has a duty to defend. Id. at 1147.

In this case, American States asks that the statute of limitations bar the action because it was successful in camouflaging the nature of its insured’s business and, thus, its contractual obligation to indemnify its named insured’s employees. Defendant is estopped from profiting from its own wrong. See Snow v. Rudd, 2000 UT 20, P11.

VI. WINDSOR’S CAUSE OF ACTION AGAINST AMERICAN STATES RELATES BACK TO THE FILING OF THE COMPLAINT AGAINST BRENDA CHAMBERS.

In 1997, the Utah Supreme Court addressed a subrogation action between insurers where the statute of limitations was asserted as an affirmative defense. Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127 (Utah 1997). The claim for subrogation arose because environmental contamination occurred over a period of many years, and multiple insurance companies had provided coverage during the contamination period.

The defendants in *Sharon Steel* argued that the statute of limitations began to run on the date the plaintiff began to incur its defense costs. The court disagreed and ruled

that the subrogation action (cross-claim) related back to the filing of the initial complaint. The court made the following observations when it determined that the plaintiff's claim should relate back:

The . . . claim [against American States] involves contribution for the **same . . . costs that [Kathryn Zaborski] sought from [Windsor as her UM carrier]**. The [claim against American States] is therefore not an independent action for affirmative relief. It is based in part upon the sums that [Windsor] paid to [Kathryn Zaborski on behalf of Brenda Chambers] which were alleged in the original complaint [against Brenda Chambers]. We therefore hold that [Windsor's claim against American States], to the extent that it seeks contribution for sums [Windsor] paid [as the uninsured motorist carrier], relates back to the date of the filing of the original complaint [against Brenda Chambers] and was therefore timely filed.

Id. at 132; see also Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1359 (Utah App. 1990) ("If a new claim relates back to the date of the original pleading, a party may include it even when the statute of limitations has otherwise run on that claim."); Utah R. Civ. P. 15(c) ("Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.").

The supreme court's rationale in *Sharon Steel* is consistent with prior caselaw in which the courts mandated relation back when new and old parties had an identity of interest such as insurer/insured. See Allstate Ins. Co. v. Ivie, 606 P.2d 1197, 1203 (Utah 1980) (Stewart, J. concurring) (explaining that the insurance company stands in privity with its insured therefore principles of res judicata and collateral estoppel apply to

decisions rendered against or for either party). The court explained that “the rationale underpinning this [relation-back] exception is one which obstructs a mechanical use of a statute of limitations; to prevent adjudication of a claim. Such is particularly valid where, as here, the real parties in interest were sufficiently alerted to the proceedings . . . .”

Doxey-Layton Co. v. Clark, 548 P.2d 902 (Utah 1976); see also Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 216-17 (Utah 1984); Vina v. Jefferson Ins. Co., 761 P.2d 581, 586-87 (Utah App. 1988); see also EXHIBIT B.

In this case, there is no dispute that Windsor’s cause of action against Brenda Chambers was filed well within the four-year statute of limitations applicable to personal injury actions. American States was advised of the litigation and was offered a chance to defend. American States chose, instead, to claim that Brenda Chambers was not its insured and refused to participate in that litigation. Because the claims brought in this action arise from the same facts giving rise to the claims brought against Brenda Chambers, this claim relates back to the filing of the complaint against Brenda Chambers.

VII. ALTERNATIVELY, WINDSOR IS ENTITLED TO AMEND ITS COMPLAINT TO ADD LSI AS A CO-DEFENDANT.

In lieu of suing American States, Windsor had (and has) the option of making LSI a party to this litigation. It is procedurally unnecessary, but Windsor reserved the right under Utah R. Civ. P. 15 in its memorandum in opposition to Defendant’s motion for summary judgment. And, of course, LSI is in privity with Defendant; therefore, the

amendment will relate back to the original filing of the complaint. See Allstate Ins. Co. v. Ivie, 606 P.2d 1197, 1203 (Utah 1980).

#### VIII. AMERICAN STATES IGNORES LSI'S BUSINESS STRUCTURE.

American States argues that Brenda Chambers was “not performing clerical duties” at or near the landfill at the time of the accident, and LSI did not specifically apportion any of her compensation to reimbursement for travel expenses. Defendant's Brief at pp. 15-16. It also argues that Ms. Chambers was not directed to take any specific route when traveling to the premises of the special employer. Id. It completely ignores Brenda Chambers's different relationships with each of her two employers.

The fact that Brenda Chambers was not performing clerical duties at or near the landfill would be relevant to a determination that she was not providing services to her *special* employer. But her duties for her *general* employer, LSI, consisted of traveling. The fact that Ms. Chambers was not directed to take any specific route is wholly irrelevant. It is the right of control, not the exercise of control, that is relevant. The fact that pay was not apportioned to travel time could be relevant, but not dispositive. In this case, it is not relevant because all other undisputed facts show that Brenda Chambers was performing LSI's work. Monetary compensation is not a mandatory component of the scope of employment analysis.

A recent opinion by the Utah Court of Appeals in which an employee was found to

be acting in the course of his employment for purposes of workers' compensation when he slipped and fell while sprinkling salt on his home's driveway is enlightening. See AE Clevite, Inc. v. Labor Comm'n, 2000 UT App 35, P 9. In that case, the injured party was found to have been acting within the course of his employment even though he was injured at home. The court found that the man's decision to clear the driveway was to facilitate delivery of business materials to his home. American States's assertion that Brenda Chambers's was not at or near the landfill at the time of the accident is not relevant to the question of whether she was traveling on behalf of LSI.

IX. BRENDA CHAMBERS WAS NOT ON A PERSONAL ERRAND  
AT THE TIME OF THE COLLISION.

Defendant argues that Brenda Chambers was on a personal errand which took her outside the course and scope of her employment because (prior to the collision) Ms. Chambers bought nylons. Defendant's Brief at p. 15. The mere fact that Brenda Chambers purchased nylons during her travel does not demonstrate a *distinct* departure from LSI's business. The collision occurred *after* Brenda Chambers had *completed* her purchase of the nylons. At the time of the collision, she was traveling directly to the landfill. Deposition of Brenda Chambers at p. 37.

X. BRENDA CHAMBERS'S PURCHASE OF THE NYLONS WAS NOT A PERSONAL ERRAND.

The purchase of the nylons was not a personal errand because the extent of Brenda Chambers's departure from her travel to the landfill was not so great or distinct that an intent to abandon the job temporarily may be inferred. To the contrary, Brenda Chambers believed that nylons were required in order to serve her employer, and the special errand was undertaken with the express permission or acquiescence of LSI. Deposition of Brenda Chambers at pp. 13-14.

In *Buczynski*, the Utah Court of Appeals discussed personal errands and the factual situation necessary to constitute a distinct departure from employment. The court explained that purely personal missions having nothing to do with employment are not within the course of a person's employment, however:

**Employees who, within the time and space limits of their employment[,] engage in acts which minister to personal comfort do not thereby leave the course of employment,** unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Buczynski v. Industrial Comm'n, 934 P.2d 1169 (Utah App. 1997) (quoting Ford v. Bi-State Dev. Agency, 677 S.W. 899, 902 (Mo. Ct. App. 1984)).

In order for Defendant to demonstrate that the nylons purchase was a personal errand, Defendant would have to prove that it was not reasonably incidental to her



employment with LSI. Brenda Chambers swore that she purchased the nylons because she believed that it was a job requirement.

The *Buczynski* court also referred to the “paramount or predominant motivation and purpose” test. *Id.* (quoting *Martinson v. W-M Insurance Agency, Inc.*, 606 P.2d 256 (Utah 1980)). This test involves a balancing analysis, wherein the social activities engaged in during a business-related trip are weighed against the business aspects of the trip. If the social pleasures or diversions are viewed as being merely incidental to the employer’s business carried on during the trip, then the employee is deemed to be in the course of his employment. Because the evidence in this case shows that the social aspect of buying nylons was “incidental or adjunctive” to the business aspect of her trip, Brenda Chambers’s conduct was within the course and scope of her employment.

### CONCLUSION

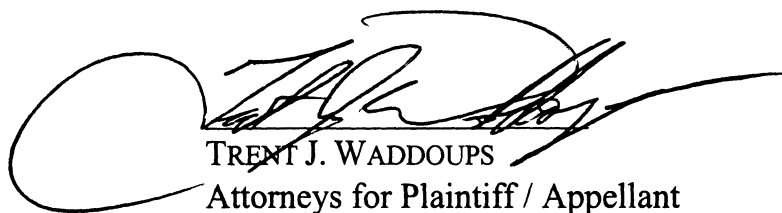
The Court should reverse the district court’s denial of Windsor’s motion for summary judgment. All material facts are undisputed and support a finding that Brenda Chambers’s travel was within the course and scope of her employment. It is undisputed that Brenda Chambers was, therefore, an insured under American States’s liability coverage. The Court should remand the case to the district court for a determination of the amount of the judgment to be entered against American States.

The Court should also reverse the district court’s award of a summary judgment to

American States. Brenda Chambers was its insured, and the four-year statute of limitations has nothing to do with this case.

DATED this 30 day of June, 2000.

CARR & WADDOUPS

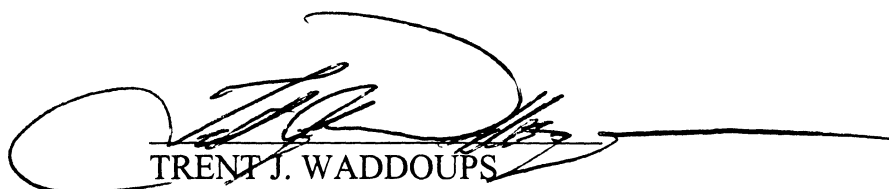


TRENT J. WADDOUPS  
Attorneys for Plaintiff / Appellant

MAILING CERTIFICATE

I HEREBY CERTIFY that on the 30 day of June, 2000, a true and correct copy of Reply Brief of Appellant Windsor Insurance Company was mailed, via U.S. Mail, postage prepaid, to the following:

Mr. Tim Dalton Dunn  
Mr. Robert C. Morton  
DUNN & DUNN, P.C.  
Midtown Plaza, Suite 460  
230 South 500 East  
Salt Lake City, Utah 84102



TRENT J. WADDOUPS

Tab A

## BUSINESS AUTO COVERAGE PART DECLARATIONS

PAGE BA 1

ITEM ONE -- NAMED INSURED:  
LABOR SERVICES, INC.  
FORM OF BUSINESS: CORPORATION

POLICY NUMBER: 02-CC-146701-5

## ITEM TWO -- SCHEDULE OF COVERAGES AND COVERED AUTOS

THIS POLICY PROVIDES ONLY THOSE COVERAGES WHERE A CHARGE IS SHOWN IN THE PREMIUM COLUMN BELOW. EACH OF THESE COVERAGES WILL APPLY ONLY TO THOSE "AUTOS" SHOWN AS COVERED "AUTOS." "AUTOS" ARE SHOWN AS COVERED "AUTOS" FOR A PARTICULAR COVERAGE BY THE ENTRY OF ONE OR MORE OF THE SYMBOLS FROM THE COVERED AUTO SECTION OF THE BUSINESS AUTO COVERAGE FORM NEXT TO THE NAME OF THE COVERAGE.

| COVERAGES  | LIMIT OF INSURANCE                               | DEDUCTIBLE | COVERED AUTO SYMBOL | PREMIUM     |
|--|--|------------|---------------------|-------------|
| LIABILITY  | \$ 1,000,000                                     |            | 7,8,9               | \$ 5,084.00 |
| UNINSURED MOTORISTS  | \$ 50,000  |            | 2                   | \$ 18.00    |
| PERSONAL INJURY PROTECTION (PIP)   | SEE ENDORSEMENT                                  |            | 5                   | \$ 103.00   |
| COMPREHENSIVE -<br>EACH COVERED AUTO   | LESSER OF ACTUAL<br>CASH VALUE OR<br>REPAIR COST | \$ 250     | 2                   | \$ 481.00   |
| SPECIFIED CAUSES OF LOSS -<br>EACH COVERED AUTO<br>\$25 VANDALISM OR MISCHIEF DED. | LESSER OF ACTUAL<br>CASH VALUE OR<br>REPAIR COST |            | 2                   | \$ 24.00    |
| COLLISION - EACH COVERED AUTO  | LESSER OF ACTUAL<br>CASH VALUE OR<br>REPAIR COST | \$ 500     | 2                   | \$ 1,240.00 |
| UNDERINSURED MOTORIST (UIM)  | \$ 50,000  |            | 2                   | \$ 34.00    |
| ESTIMATED TOTAL PREMIUM  |  |            |                     | \$ 6,984.00 |

## ITEM THREE -- SCHEDULE OF COVERED AUTOS YOU OWN

| DESCRIPTION, CLASS CODE, AND OTHER INTERESTS |    |                   |                                 |           |            |                |                           |
|--|----|-------------------|---------------------------------|-----------|------------|----------------|---------------------------|
| AUTO NO.                                     | YR | MAKE MODEL BODY   | AUTO IDENTIFI-<br>CATION NUMBER | COST NEW  | CLASS CODE | OTHER INTEREST | GARAGE LOC:<br>STATE/TERR |
| 001  | 85 | CHEV VAN          | 2GAFG35L9F4161929               | \$ 9,800  | 034990     |                | UT/001                    |
| 002  | 90 | CHEV 1T VAN       | 2GAGG39K2L4117904               | \$ 15,000 | 234990     | 1              | UT/001                    |
| 003  | 92 | CHEV ASTRO VAN LT | 1GNEL19Z2NB105176               | \$ 21,000 | 739100     |                | UT/001                    |
| 004  | 87 | FREIGHTLINER      | 1FUWYBYA1HH292260               | \$ 20,000 | 334990     |                | UT/001                    |
| 005  | 91 | DODGE F350 VAN    | 2B5WB35Z7MK450531               | \$ 12,900 | 234990     | 2              | UT/001                    |

## BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we," "us" and "our" refer to the Company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION V - DEFINITIONS.

### SECTION I - COVERED AUTOS

ITEM TWO of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos." The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos."

#### A. DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS

- | SYMBOL   | DESCRIPTION   |
|--|---|
| 1 = ANY "AUTO."  |   |
| 2 = OWNED "AUTOS" ONLY.  | Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.   |
| 3 = OWNED PRIVATE PASSENGER "AUTOS" ONLY.                          | Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.   |
| 4 = OWNED "AUTOS" OTHER THAN PRIVATE PASSENGER "AUTOS" ONLY.       | Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.  |
| 5 = OWNED "AUTOS" SUBJECT TO NO-FAULT.                             | Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged.            |
| 6 = OWNED "AUTOS" SUBJECT TO A COMPULSORY UNINSURED MOTORISTS LAW. | Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement. |
| 7 = SPECIFICALLY DESCRIBED "AUTOS."                                | Only those "autos" described in ITEM THREE of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in ITEM THREE).  |
| 8 = HIRED "AUTOS" ONLY.  | Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent, or borrow from any of your employees or partners or members of their households.  |
| 9 = NONOWNED "AUTOS" ONLY.   | Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your employees or partners or members of their households but only while used in your business or your personal affairs.  |

#### B. OWNED AUTOS YOU ACQUIRE AFTER THE POLICY BEGINS

1. If symbols 1, 2, 3, 4, 5 or 6 are entered next to a coverage in ITEM TWO of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.
2. But, if symbol 7 is entered next to a coverage in ITEM TWO of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if:

- a. We already cover all "autos" that you own for that coverage or replaces an "auto" you previously owned that had that coverage; and
- b. You tell us within 30 days after you acquire it that you want us to cover it for that coverage.

**C. CERTAIN TRAILERS, MOBILE EQUIPMENT AND TEMPORARY SUBSTITUTE AUTOS**

If Liability Coverage is provided by this Coverage Form, the following types of vehicles are also covered "autos" for Liability Coverage:

- 1. "Trailers" with a load capacity of 2,000 pounds or less designed primarily for travel on public roads.
- 2. "Mobile equipment" while being carried or towed by a covered "auto."
- 3. Any "auto" you do not own while used with the permission of its owner as a temporary substitute for a covered "auto" you own that is out of service because of its:
  - a. Breakdown;
  - b. Repair;
  - c. Servicing;
  - d. "Loss"; or
  - e. Destruction.

**SECTION II - LIABILITY COVERAGE**

**A. COVERAGE**

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos." However, we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident."

We have the right and duty to defend any "suit" asking for such damages or a "covered pollution cost or expense." However, we have no duty to defend "suits" for "bodily injury" or "property damage" or a "covered pollution cost or expense" not covered by this Coverage Form. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

**1. WHO IS AN INSURED**

The following are "insureds":

- a. You for any covered "auto."
- b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
  - (1) The owner or anyone else from whom you hire or borrow a covered "auto." This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.
  - (2) Your employee if the covered "auto" is owned by that employee or a member of his or her household.
  - (3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing or parking "autos" unless that business is yours.
  - (4) Anyone other than your employees, partners, a lessee or borrower or any of their employees, while moving property to or from a covered "auto."
  - (5) A partner of yours for a covered "auto" owned by him or her or a member of his or her household.
- c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

## **2. COVERAGE EXTENSIONS**

**a. Supplementary Payments.** In addition to the Limit of Insurance, we will pay for the "insured":

- (1) All expenses we incur.
- (2) Up to \$250 for cost of bail bonds (including bonds for related traffic law violations) required because of an "accident" we cover. We do not have to furnish these bonds.
- (3) The cost of bonds to release attachments in any "suit" we defend, but only for bond amounts within our Limit of Insurance.
- (4) All reasonable expenses incurred by the "insured" at our request, including actual loss of earning up to \$100 a day because of time off from work.
- (5) All costs taxed against the "insured" in any "suit" we defend.
- (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" we defend; but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

**b. Out-of-State Coverage Extensions.**

While a covered "auto" is away from the state where it is licensed we will:

- (1) Increase the Limit of Insurance for Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.
- (2) Provide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered "auto" is being used.

We will not pay anyone more than once for the same elements of loss because of these extensions.

## **B. EXCLUSIONS**

This insurance does not apply to any of the following:

### **1. EXPECTED OR INTENDED INJURY**

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured."

### **2. CONTRACTUAL**

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
- b. That the "insured" would have in the absence of the contract or agreement.

### **3. WORKERS' COMPENSATION**

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

### **4. EMPLOYEE INDEMNIFICATION AND EMPLOYER'S LIABILITY**

"Bodily injury" to:

- a. An employee of the "insured" arising out of and in the course of employment by the "insured"; or
- b. The spouse, child, parent, brother or sister of that employee as a consequence of paragraph a. above.

This exclusion applies:

- (1) Whether the "insured" may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages

because of the injury.

But this exclusion does not apply to "bodily injury" to domestic employees not entitled to workers' compensation benefits or to liability assumed by the "insured" under an "insured contract."

#### 5. FELLOW EMPLOYEE

"Bodily injury" to any fellow employee of the "insured" arising out of and in the course of the fellow employee's employment.

#### 6. CARE, CUSTODY OR CONTROL

"Property damage" to or "covered pollution cost or expense" involving property transported by the "insured" or in the "insured's" care, custody or control. But this exclusion does not apply to liability assumed under a sidetrack agreement.

#### 7. HANDLING OF PROPERTY

"Bodily injury" or "property damage" resulting from the handling of property:

- a. Before it is moved from the place where it is accepted by the "insured" for movement into or onto the covered "auto"; or
- b. After it is moved from the covered "auto" to the place where it is finally delivered by the "insured."

#### 8. MOVEMENT OF PROPERTY BY MECHANICAL DEVICE

"Bodily injury" or "property damage" resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered "auto."

#### 9. OPERATIONS

"Bodily injury" or "property damage" arising out of the operation of any equipment listed in paragraphs 6.b. and 6.c. of the definition of "mobile equipment."

#### 10. COMPLETED OPERATIONS

"Bodily injury" or "property damage" arising out of your work after that work has been completed or abandoned.

In this exclusion, your work means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

Your work includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in paragraphs a. or b. above.

Your work will be deemed completed at the earliest of the following times:

- (1) When all of the work called for in your contract has been completed.
- (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
- (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

#### 11. POLLUTION

"Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:

- (1) Being transported or towed by, handled, or handled for movement into, onto or from, the covered "auto";
- (2) Otherwise in the course of transit by or on behalf of the "insured"; or



- (3) Being stored, disposed of, treated or processed in or upon the covered "auto";
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured."

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate, or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and
- (2) The "bodily injury," "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in paragraphs 6.b. and 6.c. of the definition of "mobile equipment."

Paragraphs b. and c. above of this exclusion do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (1) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (2) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

## 12. WAR

"Bodily injury" or "property damage" due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution. This exclusion applies only to liability assumed under a contract or agreement.

## C. LIMIT OF INSURANCE

Regardless of the number of covered "autos," "insureds," premiums paid, claims made or vehicles involved in the "accident," the most we will pay for the total of all damages and "covered pollution cost or expense" combined, resulting from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations.

All "bodily injury," "property damage" and "covered pollution cost or expense" resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one "accident."

## SECTION III - PHYSICAL DAMAGE COVERAGE

### A. COVERAGE

1. We will pay for "loss" to a covered "auto" or its equipment under:

a. Comprehensive Coverage. From any cause except:

- (1) The covered "auto's" collision with another object; or
- (2) The covered "auto's" overturn.

b. Specified Causes of Loss Coverage. Caused by:

- (1) Fire, lightning or explosion;
- (2) Theft;
- (3) Windstorm, hail or earthquake;
- (4) Flood;
- (5) Mischief or vandalism; or
- (6) The sinking, burning, collision or derailment of any conveyance transporting the covered "auto."

c. Collision Coverage. Caused by:

- (1) The covered "auto's" collision with another object; or
- (2) The covered "auto's" overturn.

2. Towing.

We will pay up to the limit shown in the Declarations for towing and labor costs incurred each time a covered "auto" of the private passenger type is disabled. However, the labor must be performed at the place of disablement.

3. Glass Breakage - Hitting a Bird or Animal - Falling Objects or Missiles.

If you carry Comprehensive Coverage for the damaged covered "auto," we will pay for the following under Comprehensive Coverage:

- a. Glass breakage;
- b. "Loss" caused by hitting a bird or animal; and
- c. "Loss" caused by falling objects or missiles.

However, you have the option of having glass breakage caused by a covered "auto's" collision or overturn considered a "loss" under Collision Coverage.

4. Coverage Extension. We will pay up to \$15 per day to a maximum of \$450 for transportation expense incurred by you because of the total theft of a covered "auto" of the private passenger type. We will pay only for those covered "autos" for which you carry either Comprehensive or Specified Causes of Loss Coverage. We will pay for transportation expenses incurred during the period beginning 48 hours after the theft and ending, regardless of the policy's expiration, when the covered "auto" is returned to use or we pay for its "loss."

**B. EXCLUSIONS**

1. We will not pay for "loss" caused by or resulting from any of the following. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss."

a. Nuclear Hazard.

- (1) The explosion of any weapon employing atomic fission or fusion; or
- (2) Nuclear reaction or radiation, or radioactive contamination, however caused.

b. War or Military Action.

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

2. Other Exclusions.

a. We will not pay for "loss" to any of the following:

- (1) Tape decks or other sound reproducing equipment unless permanently installed in a covered "auto."
- (2) Tapes, records or other sound reproducing devices designed for use with sound reproducing equipment.
- (3) Sound receiving equipment designed for use as a citizens' band radio, two-way mobile radio or telephone or scanning monitor receiver, including its antennas and other accessories, unless permanently installed in the dash or console opening normally used by the "auto" manufacturer for the installation of a radio.
- (4) Equipment designed or used for the detection or location of radar.

b. We will not pay for "loss" caused by or resulting from any of the following unless caused by other "loss" that is covered by this insurance:

- (1) Wear and tear, freezing, mechanical or electrical breakdown.

(2) Blowouts, punctures or other road damage to tires.

**C. LIMIT OF INSURANCE**

The most we will pay for "loss" in any one "accident" is the lesser of:

1. The actual cash value of the damaged or stolen property as of the time of the "loss"; or
2. The cost of repairing or replacing the damaged or stolen property with other property of like kind and quality.

**D. DEDUCTIBLE**

For each covered "auto," our obligation to pay for, repair, return or replace damaged or stolen property will be reduced by the applicable deductible shown in the Declarations. Any Comprehensive Coverage deductible shown in the Declarations does not apply to "loss" caused by fire or lightning.

**SECTION IV - BUSINESS AUTO CONDITIONS**

The following conditions apply in addition to the Common Policy Conditions:

**A. LOSS CONDITIONS**

**1. APPRAISAL FOR PHYSICAL DAMAGE LOSS**

If you and we disagree on the amount of "loss," either may demand an appraisal of the "loss." In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and amount of "loss." If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we will still retain our right to deny the claim.

**2. DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS**

- a. In the event of "accident," claim, "suit" or "loss," you must give us or our authorized representative prompt notice of the "accident" or "loss." Include:

- (1) How, when and where the "accident" or "loss" occurred;
- (2) The "insured's" name and address; and
- (3) To the extent possible, the names and addresses of any injured persons and witnesses.

- b. Additionally, you and any other involved "insured" must:

- (1) Assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost.
- (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit."
- (3) Cooperate with us in the investigation, settlement or defense of the claim or "suit."
- (4) Authorize us to obtain medical records or other pertinent information.
- (5) Submit to examination, at our expense, by physicians of our choice, as often as we reasonably require.

- c. If there is "loss" to a covered "auto" or its equipment you must also do the following:

- (1) Promptly notify the police if the covered "auto" or any of its equipment is stolen.
- (2) Take all reasonable steps to protect the covered "auto" from further damage. Also keep a record of your expenses for consideration in the settlement of the claim.
- (3) Permit us to inspect the covered "auto" and records proving the "loss" before its repair or disposition.
- (4) Agree to examinations under oath at our request and give us a signed statement of your answers.

### **3. LEGAL ACTION AGAINST US**

No one may bring a legal action against us under this Coverage Form until:

- a. There has been full compliance with all the terms of this Coverage Form; and
- b. Under Liability Coverage, we agree in writing that the "insured" has an obligation to pay or until the amount of that obligation has finally been determined by judgment after trial. No one has the right under this policy to bring us into an action to determine the "insured's" liability.

### **4. LOSS PAYMENT - PHYSICAL DAMAGE COVERAGES**

At our option we may:

- a. Pay for, repair or replace damaged or stolen property;
- b. Return the stolen property, at our expense. We will pay for any damage that results to the "auto" from the theft; or
- c. Take all or any part of the damaged or stolen property at an agreed or appraised value.

### **5. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US**

If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

## **B. GENERAL CONDITIONS**

### **1. BANKRUPTCY**

Bankruptcy or insolvency of the "insured" or the "insured's" estate will not relieve us of any obligations under this Coverage Form.

### **2. CONCEALMENT, MISREPRESENTATION OR FRAUD**

This Coverage Form is void in any case of fraud by you at any time as it relates to this Coverage Form. It is also void if you or any other "insured," at any time, intentionally conceal or misrepresent a material fact concerning:

- a. This Coverage Form;
- b. The covered "auto";
- c. Your interest in the covered "auto"; or
- d. A claim under this Coverage Form.

### **3. LIBERALIZATION**

If we revise this Coverage Form to provide more coverage without additional premium charge, your policy will automatically provide the additional coverage as of the day the revision is effective in your state.

### **4. NO BENEFIT TO BAILEE - PHYSICAL DAMAGE COVERAGES**

We will not recognize any assignment or grant any coverage for the benefit of any person or organization holding, storing or transporting property for a fee regardless of any other provision of this Coverage Form.

### **5. OTHER INSURANCE**

- a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. However, while a covered "auto" which is a "trailer" is connected to another vehicle, the Liability Coverage this Coverage Form provides for the "trailer" is:
  - (1) Excess while it is connected to a motor vehicle you do not own.
  - (2) Primary while it is connected to a covered "auto" you own.
- b. For Hired Auto Physical Damage Coverage, any covered "auto" you hire or borrow is deemed to be a covered "auto" you own.

- c. Regardless of the provisions of paragraph a. above, this Coverage Form's Liability Coverage is primary for any liability assumed under an "insured contract."
- d. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

#### 6. PREMIUM AUDIT

- a. The estimated premium for this Coverage Form is based on the exposures you told us you would have when this policy began. We will compute the final premium due when we determine your actual exposures. The estimated total premium will be credited against the final premium due and the first Named Insured will be billed for the balance, if any. If the estimated total premium exceeds the final premium due, the first Named Insured will get a refund.
- b. If this policy is issued for more than one year, the premium for this Coverage Form will be computed annually based on our rates or premiums in effect at the beginning of each year of the policy.

#### 7. POLICY PERIOD, COVERAGE TERRITORY

Under this Coverage Form, we cover "accidents" and "losses" occurring:

- a. During the policy period shown in the Declarations; and
- b. Within the coverage territory.

The coverage territory is:

- a. The United States of America;
- b. The territories and possessions of the United States of America;
- c. Puerto Rico; and
- d. Canada.

We also cover "loss" to, or "accidents" involving, a covered "auto" while being transported between any of these places.

#### 8. TWO OR MORE COVERAGE FORMS OR POLICIES ISSUED BY US

If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same "accident," the aggregate maximum Limit of Insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy. This condition does not apply to any Coverage Form or policy issued by us or an affiliated company specifically to apply as excess insurance over this Coverage Form.

#### SECTION V - DEFINITIONS

- A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage."
- B. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads but does not include "mobile equipment."
- C. "Bodily injury" means bodily injury, sickness or disease sustained by a person including death resulting from any of these.
- D. "Covered pollution cost or expense" means any cost or expense arising out of:
  - 1. Any request, demand or order; or
  - 2. Any claim or "suit" by or on behalf of a governmental authority demanding that the "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants."

"Covered pollution cost or expense" does not include any cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:

- (1) Being transported or towed by, handled, or handled for movement into, onto or from the covered "auto";
- (2) Otherwise in the course of transit by or on behalf of the "insured";
- (3) Being stored, disposed of, treated or processed in or upon the covered "auto"; or
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured."

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate, or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and
- (2) The "bodily injury," "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in paragraphs 6.b. or 6.c. of the definition of "mobile equipment."

Paragraphs b. and c. above do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (1) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (2) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

E. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.

F. "Insured contract" means:

- 1. A lease of premises;
- 2. A sidetrack agreement;
- 3. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- 4. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- 5. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
- 6. That part of any contract or agreement entered into, as part of your business, pertaining to the rental or lease, by you or any of your employees, of any "auto." However, such contract or agreement shall not be considered an "insured contract" to the extent that it obligates you or any of your employees to pay for "property damage" to any "auto" rented or leased by you or any of your employees.

An "insured contract" does not include that part of any contract or agreement:

- a. That indemnifies any person or organization for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass or crossing; or
- b. That pertains to the loan, lease or rental of an "auto" to you or any of your employees, if the "auto" is loaned, leased or rented with a driver; or

- c. That holds a person or organization engaged in the business of transporting property by "auto" for hire harmless for your use of a covered "auto" over a route or territory that person or organization is authorized to serve by public authority.
- G. "Loss" means direct and accidental loss or damage.
- H. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
  - 1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
  - 2. Vehicles maintained for use solely on or next to premises you own or rent;
  - 3. Vehicles that travel on crawler treads;
  - 4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
    - a. Power cranes, shovels, loaders, diggers or drills; or
    - b. Road construction or resurfacing equipment such as graders, scrapers or rollers.
  - 5. Vehicles not described in paragraphs 1., 2., 3., or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
    - a. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment, or
    - b. Cherry pickers and similar devices used to raise or lower workers.
  - 6. Vehicles not described in paragraphs 1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
    - a. Equipment designed primarily for:
      - (1) Snow removal;
      - (2) Road maintenance, but not construction or resurfacing; or
      - (3) Street cleaning;
    - b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
    - c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting or well servicing equipment.
- I. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
- J. "Property damage" means damage to or loss of use of tangible property.
- K. "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," or "covered pollution cost or expense," to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages or "covered pollution cost or expense" to which you must submit or submit with our consent.
- L. "Trailer" includes semitrailer.

Paragraphs b. and c. above do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (1) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
  - (2) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.
- E. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or

"suit" is brought

F. "Insured contract" means:

1. A lease of premises;
2. A sidetrack agreement;
3. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
4. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
5. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
6. That part of any contract or agreement entered into, as part of your business, pertaining to the rental or lease, by you or any of your employees, of any "auto." However, such contract or agreement shall not be considered an "insured contract" to the extent that it obligates you or any of your employees to pay for "property damage" to any "auto" rented or leased by you or any of your employees.

An "insured contract" does not include that part of any contract or agreement:

- a. That indemnifies any person or organization for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass or crossing; or
- b. That pertains to the loan, lease or rental of an "auto" to you or any of your employees, if the "auto" is loaned, leased or rented with a driver; or
- c. That holds a person or organization engaged in the business of transporting property by "auto" for hire harmless for your use of a covered "auto" over a route or territory that person or organization is authorized to serve by public authority.

G. "Loss" means direct and accidental loss or damage.

H. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
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4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
  - a. Power cranes, shovels, loaders, diggers or drills; or
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  - (3) Street cleaning;
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- c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting or well servicing equipment.
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- J. "Property damage" means damage to or loss of use of tangible property.
- K. "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," or "covered pollution cost or expense," to which this insurance applies are alleged. "Suit" includes an arbitration proceeding alleging such damages or "covered pollution cost or expense" to which you must submit or submit with our consent.
- L. "Trailer" includes semitrailer.

Tab B

# CARR & WADDOUPS

ATTORNEYS AT LAW  
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8 EAST BROADWAY  
SALT LAKE CITY, UTAH 84111

TAYLOR D. CARR  
TRENT J. WADDOUPS

R. STEVEN CHAMBERS  
OF COUNSEL

TELEPHONE (801) 363-0888  
TELECOPIER (801) 363-8512

October 9, 1997

Mr. Bryan McMillan  
AMERICAN STATES INSURANCE  
1035 West 5370 South  
Salt Lake City, Utah 84157

Re: Your Insured: Brenda Chambers  
Our Client: Windsor Insurance (Kathryn Zaborski)  
Our Claim Number: 565380-HL  
Date of Loss: 5-15-93

Dear Bryan:

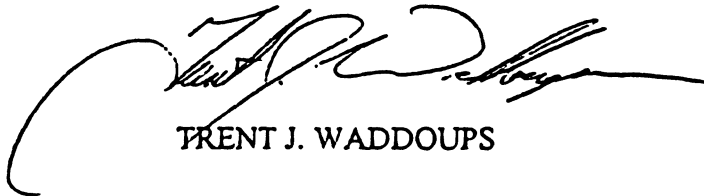
Enclosed are copies of documents relating to the accident and our lawsuit against Brenda Chambers. Ms. Chambers never answered our complaint, therefore, we took a default judgment.

Of course, if you have coverage, we will stipulate to setting aside the judgment.

Thank you for your cooperation.

Very truly yours,

CARR & WADDOUPS

A large, stylized handwritten signature in black ink, appearing to read 'Trent J. Waddoups', is written over the printed name.

TRENT J. WADDOUPS

TJW:bh  
Enclosure