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Vickie D. Crowther v. Nationwide Mutual Insurance Company : Brief of Appellant

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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DOCKET NO. 88-0242-CA

VICKIE D. CROWTHER,

Plaintiff and
Appellant,

vs.

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendant and
Respondant,

No. 860433

Category No. 13b

CA

APPELLANT'S OPENING BRIEF

Appeal from Order Denying Plaintiff's Motion for Summary
Judgment and Granting Defendant's Motion for Summary
Judgment of the Third Judicial District Court of
Salt Lake County, The Hon. Homer F. Wilkinson,
Judge Presiding

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SEP 19 1986

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I.	STATEMENT OF ISSUES ON APPEAL	1
II.	STATEMENT OF FACTS	3
III.	SUMMARY OF ARGUMENT	6
IV.	ARGUMENT	9
	A. THE UTAH AUTOMOBILE NO-FAULT INSURANCE ACT IMPLICITLY PROVIDED FOR EXCESS PERSONAL INJURY PROTECTION BENEFITS COVERAGE, AS LONG AS THE INSURED DOES NOT RECEIVE DUPLICATION OF BENEFITS	9
	B. THE POLICY EXCLUSION RELIED UPON BY NATIONWIDE IS NOT ONE OF THOSE EXCLUSIONS PERMITTED BY THE UTAH AUTOMOBILE NO-FAULT INSURANCE ACT	14
	C. THE NATIONWIDE POLICY "OTHER INSURANCE" CLAUSE IS NOTHING MORE THAN ANOTHER EXCLUSION NOT PERMITTED BY THE UTAH AUTOMOBILE NO-FAULT INSURANCE ACT	16
	D. THE INSURANCE COMMISSIONER'S REGULATION 73-1, ARTICLE 5, SUBDIVISION i, CONFLICTS WITH U.C.A. § 31-41-7(2) AND IS IN EXCESS OF THE ADMINISTRATIVE AUTHORITY GRANTED HIM	18
	E. IF APPELLANT PREVAILS ON THIS APPEAL, SHE IS ABSOLUTELY ENTITLED TO REASONABLE ATTORNEY FEES. THE TRIAL COURTS ONLY DISCRETION IS AS TO AMOUNT	20
V.	CONCLUSION	22
	ADDENDUM	23
	A. SELECTED STATUTES FROM THE UTAH AUTOMOBILE NO-FAULT INSURANCE ACT (REPEALED, JULY 1, 1986)	
	B. SELECTED STATUTES FROM THE INSURANCE CODE, TITLE 31A UTAH CODE ANNOTATED (EFFECTIVE, JULY 1, 1986)	
	C. STIPULATED FACTS (INCLUDING COPY OF NATIONWIDE'S ENDORSEMENT 1594) (R. 56-61)	

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES CITED

<u>Baron v. State Farm Mut. Auto. Ins. Co., Ga.,</u> 276 S.E.2d 78 (1981)	12
<u>Esler v. United Services Auto. Assoc., S.C.,</u> 255 S.E.2d 676 (1979)	12
<u>IML Freight, Inc. v. Ottosen, Utah, 538 P.2d 296 (1975)</u>	19
<u>National General Ins. Co. v. Meeks, Ga.,</u> 244 S.E.2d 920 (1978)	12
<u>Osuala v. Aetna Life & Cas., Utah, 608 P.2d 242 (1980)</u> . . .	7, 15
<u>Porter v. Utah Home Fire Ins. Co., Or.,</u> 650 P.2d 130 (1982)	12
<u>Travelers Indem. Co. v. Barnes, Colo., 552 P.2d 300 (1976)</u> . .	19
<u>Travelers Ins. Co. v. Lopez, Nev., 567 P.2d 471 (1977)</u>	12
<u>Wasche v. Milbank Mut. Ins. Co., Minn.,</u> 268 N.W.2d 913 (1978)	12

UTAH STATUTES CITED

Utah Code Ann. § 31-41-6	18, 20
Utah Code Ann. § 31-41-7(1)	7, 14, 15, 18
Utah Code Ann. § 31-41-7(2)	1, 2, 6, 7, 10, 11, 18, 19
Utah Code Ann. § 31-41-8	3, 5, 8, 20, 21, 22
Utah Code Ann. § 31-41-10	2, 7, 15, 16, 17, 18
Utah Code Ann. § 31-41-12	18
Utah Code Ann. § 31A-22-302	17
Utah Code Ann. § 31A-22-303(2)	17
Utah Code Ann. § 31A-22-305(6)	11, 18
Utah Code Ann. §§ 31A-22-306 et seq.	1, 9, 11
Utah Code Ann. § 31A-22-309	17, 18
Utah Code Ann. § 31A-22-309(2)(a)	15

Utah Code Ann. § 31A-22-309(4)	10, 11, 18
Utah Code Ann. § 31A-22-309(5)	20

OTHER CITATIONS

Insurance Commissioner's Reg. 73-1, Article 5, Subdivision i	1, 7, 18, 20
§ 26-41-03(2), NDCC (North Dakota)	12
Colorado Auto Accident Reparations Act (CSR §§ 10-4-701 et seq.)	19

I.
STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the Utah Automobile No-Fault Insurance Act, specifically Utah Code Ann. § 31-41-7(2),¹ provided for excess personal injury protection benefits coverage to an insured who has received such benefits under a separate policy of automobile insurance, as long as the insured does not receive duplication of benefits.

2. If the answer to issue no. 1 is affirmative, whether the exclusion contained in respondent Nationwide's policy, which states, "We will not pay for bodily injury to anyone arising from any of the following: . . . e. Occupying or being hit as a pedestrian by any motor vehicle other than your auto, which is covered as required under the Utah Automobile No-Fault Insurance Act", is valid in view of the fact that the exclusion is not one of those permitted by Utah Code Ann. §31-41-10.

3. Assuming that U.C.A. § 31-41-7(2) does permit stacking such as that sought by plaintiff, and assuming further that the above-quoted policy exclusion is not permitted by the Utah Automobile No-Fault Act, additional issues exist as to whether the Insurance Commissioner's Regulation 73-1, Article 5,

1. All references to the Insurance Code, except where otherwise indicated, are to the code prior to its reenactment as Title 31A. The motor vehicle accident giving rise to appellant's claim occurred on January 25, 1986. Title 31A was effective July 1, 1986. The subject matter formerly covered in Title 31, Chapter 41 is now covered at U.C.A. §§ 31A-22-306 through 309.

Subdivision i, conflicts with § 31-41-7(2) and is therefore in excess of the administrative authority granted him; and

4. Whether, under the facts of this case, Nationwide's "Other Insurance" clause bars appellant from recovering benefits from her own insurer in view of the payment of personal injury protection medical benefits to her by the insurer of the vehicle which struck her while she was a pedestrian, or alternatively whether the "Other Insurance" clause conflicts with U.C.A. § 31-41-10.

II. STATEMENT OF FACTS

The relevant facts are undisputed and the parties filed a pleading entitled Stipulated Facts with the trial court (R. 56-61). Briefly, appellant Vickie Crowther has incurred more than \$7,000 in hospital and medical expenses (R. 37) as the result of injuries sustained when she was struck by an automobile while a pedestrian. The automobile which struck her was covered by a liability insurance policy which provided basic personal injury protection (PIP) benefits required under the Utah Automobile No-Fault Insurance Act. Mrs. Crowther has been paid the full \$2,000 in medical benefits provided by that coverage. Mrs. Crowther was also insured under a policy of automobile liability insurance issued by respondent Nationwide. Nationwide's policy also included the minimum required PIP coverage, and under it Mrs. Crowther claimed an additional \$2,000 in medical expenses. Nationwide refused to pay, contending that PIP coverage can not be "stacked" in that manner and further contending that Mrs. Crowther's claim was barred by a specific exclusion in the policy and by the policy's "other insurance" clause.

Upon Nationwide's failure to pay benefits, Mrs. Crowther brought suit as authorized by U.C.A. § 31-41-8. Nationwide answered Mrs. Crowther's Complaint and, after stipulating to the relevant facts, both parties brought cross-motions for summary judgment. In view of the stipulation as to the facts, both sides recognized that one of the motions would in all likelihood be granted and the other denied. The trial court

granted Nationwide's summary judgment motion and denied Mrs. Crowther's summary judgment motion (R. 96-97). Mrs. Crowther then appealed to this Court (R. 98-99).

The stipulated facts (R. 56-61) are as follows:

1. Nationwide is an insurer doing business in the State of Utah and with an office and place of business in Salt Lake County, Utah.

2. On January 25, 1986, Vickie Crowther was the insured under a policy of automobile insurance issued by Nationwide.

3. The automobile insurance policy issued by Nationwide included Endorsement 1594 providing for personal injury protection coverage.

4. On January 25, 1986, Mrs. Crowther sustained accidental bodily injury while a pedestrian when struck by a motor vehicle, other than her own, which was covered as required under the Utah Automobile No-Fault Insurance Act.

5. As a direct and proximate result of the accident described in the preceding paragraph, Mrs. Crowther incurred reasonable and necessary medical expenses in a sum in excess of \$4,000.00.

6. Mrs. Crowther was paid \$2,000 in personal injury protection medical expense benefits by the insurer of the motor vehicle which struck her.

7. Two Thousand Dollars (\$2,000.00) was the entire amount of personal injury protection medical expense benefits available under the policy describing the automobile which struck Mrs. Crowther.

8. Mrs. Crowther made demand upon Nationwide for payment of \$2,000 medical expense benefits pursuant to the terms of the policy under which she was an insured.

9. Nationwide failed within thirty-five (35) days after receipt of proof of Mrs. Crowther's medical expenses, or at all, to pay personal injury protection medical expense benefits under the policy issued by it.

10. Mrs. Crowther does not claim to be entitled to more than \$2,000 in benefits under the policy issued by Nationwide [but she does claim a right to interest and attorney fees pursuant to U.C.A. § 31-41-8].

A true and correct copy of the Stipulated Facts (R. 56) is included in the Addendum to this Opening Brief of Appellant. A true and correct copy of Nationwide's policy's Endorsement 1594 (R. 59-61) is attached to the Stipulated Facts.

III. SUMMARY OF ARGUMENT

The trial court erred when it granted respondent Nationwide's summary judgment motion and denied appellant Vickie Crowther's summary judgment motion. Implicit in the trial court's ruling and Order (R. 96) is a finding that Mrs. Crowther was not entitled to collect personal injury protection medical expense benefits from her own insurance carrier after being paid \$2,000 in PIP medical expense benefits by the insurer of the vehicle which struck her while she was a pedestrian.

Utah's no-fault automobile insurance scheme, as it existed on the date of the accident, January 25, 1986, neither expressly permitted nor prohibited so-called "stacking" of benefits. However, Utah Code Ann. § 31-41-7(2) stated:

"When a person injured is also an insured party under any other policy, including those complying with this act, primary coverage shall be afforded by the policy insuring the motor vehicle out of the use of which the accident arose."

Use of the word "primary" in the statute infers the possible existence of "excess" coverage. Section 31-41-7(2) provided for priority of payment.

The policy exclusion relied on by Nationwide is not one of those exclusions expressly permitted by the Utah Automobile No-Fault Insurance Act. The exclusion upon which Nationwide relied in refusing to make payment states: "We will not pay for bodily injury to anyone arising from any of the following: . . . e. Occupying or being hit as a pedestrian by any motor vehicle other than your auto, which is covered as required under the Utah

Automobile No-Fault Insurance Act." Admittedly, that exclusion does address the factual situation in which Mrs. Crowther was involved. However, since Mrs. Crowther was a person covered by the Act (U.C.A. § 31-41-7(1)), she was entitled to coverage from her own insurer, subject only to the permissible exclusions set forth in U.C.A. § 31-41-10. O'suala v. Aetna Life & Cas., Utah, 608 P.2d 242 (1980).

Neither does Nationwide's "other insurance" policy clause deprive Mrs. Crowther of coverage. For all practical purposes, that clause is nothing more than another exclusion from the coverage required to be provided by the Utah Automobile No-Fault Insurance Act and is not one of the permissible exclusions set forth in U.C.A. § 31-41-10. The reasonable interpretation of the "other insurance" clause is to prohibit receipt of duplicative benefits. Since Mrs. Crowther's medical expenses were in excess of \$4,000 she would not be receiving duplicative benefits were she to be paid \$2,000 in PIP medical benefits from each of two different insurance carriers.

The Insurance Commissioner's Regulation 73-1, Article 5, Subdivision i, which seeks to set a "maximum amount of minimum PIP benefits an injured person may receive pursuant to involvement in a motor vehicle accident" and mandates that "there shall be no stacking or duplication of such benefits", conflicts with the plain language of U.C.A. § 31-41-7(2), and is therefore in excess of the administrative authority granted him.

Finally, if Mrs. Crowther is entitled to receive PIP medical expense benefits from her own insurer, she is also entitled to an award of attorney fees pursuant to U.C.A. § 31-41-8.

IV. ARGUMENT

A.

THE UTAH AUTOMOBILE NO-FAULT INSURANCE ACT IMPLICITLY
PROVIDED FOR EXCESS PERSONAL INJURY PROTECTION
BENEFITS COVERAGE, AS LONG AS THE INSURED DOES
NOT RECEIVE DUPLICATION OF BENEFITS

The issue to be resolved is whether appellant Vickie Crowther, who has been paid \$2,000 PIP medical expense benefits by the insurer of the driver who struck her, is entitled to collect an additional \$2,000 from her own insurer in view of the fact that her medical expenses are well in excess of \$4,000. The case requires interpretation of the Utah Automobile No-Fault Insurance Act² and a determination as to whether any exclusion or other coverage-limiting provision of Nationwide's policy validly permits Nationwide to deny coverage to Mrs. Crowther. As is discussed later in this brief, Nationwide's policy does contain an unambiguous exclusion which, if valid, clearly bars Mrs. Crowther's claim. She submits that the exclusion is not permitted by the Utah Automobile No-Fault Insurance Act.

2. The Act, as such, was repealed along with the rest of Title 31 when Title 31A was enacted and became effective on July 1, 1986. Appellant's accident occurred on January 25, 1986 and this Court's opinion should, therefore, be based on the prior law. Appellant doubts that reference to the new no-fault statutory scheme, U.C.A. §§ 31A-22-306 et seq., would change the result.

Utah's statutory no-fault scheme neither expressly permits nor prohibits so-called "stacking"³ of benefits.

However, Utah Code Ann. § 31-41-7(2) stated:

"When a person injured is also an insured party under any other policy, including those complying with this act, primary coverage shall be afforded by the policy insuring the motor vehicle out of the use of which the accident arose."⁴

Use of the word "primary" in the statute infers the possible existence of "excess" coverage. If the legislature had not intended that an injured person be allowed to make a claim under more than one policy, it would not have used the word "primary". The statute would then read, "When a person injured is also an insured party under any other policy, including those complying with this act, [] coverage shall be afforded by the policy insuring the motor vehicle out of the use of which the accident arose." By using the word "primary", the legislature provided for priority of payment: primary coverage is to be afforded by the policy insuring the motor vehicle out of the use of which the accident arose, and excess coverage is to be afforded by "any other policy, including those complying with this act".

3. Appellant uses the term "stacking" in a broad sense. She really seeks to hold Nationwide liable for excess coverage, primary coverage having been exhausted before she had been totally indemnified for her medical expenses.

4. U.C.A. § 31A-22-309(4) contains almost identical language.

Reference to the new Insurance Code, Title 31A, provides further evidence of the legislature's intent to allow an insured to "stack" personal injury protection benefits, as long as to do so does not result in receipt of duplicative benefits. U.C.A. § 31A-22-305(6) provides that "In no event shall the limit of liability for uninsured motorist coverage for two or more motor vehicles be added together, combined, or stacked to determine the limit of insurance coverage available to an injured person for any one accident. . . ." However, that portion of Title 31A which discusses "personal injury protection" coverage, U.C.A. §§ 31A-22-306 et seq., contains no similar prohibition against combining or stacking personal injury protection benefits. Instead, new section 31A-22-309(4), in almost identical language to that of section 31-41-7(2), provides for the same priority of payment that existed at the time Mrs. Crowther sustained injuries and incurred medical expenses.

In view of the fact that no other state with a statutory no-fault scheme has precisely the same scheme as was contained in the Utah Automobile No-Fault Insurance Act, reference to analagous cases in other jurisdictions has only limited value. Nevertheless, in every other no-fault jurisdiction which has considered whether an insured may combine coverage where two or more policies are issued by different insurers, the courts have held that the insured may avail him or

herself of excess coverage.⁵ See, e.g. Wasche v. Milbank Mut. Ins. Co., Minn., 268 N.W.2d 913 (1978); Esler v. United Services Auto. Assoc., S.C., 255 S.E.2d 676 (1979); Porter v. Utah Home Fire Ins. Co., Or., 650 P.2d 130 (1982); and National General Ins. Co. v. Meeks, Ga., 244 S.E.2d 920 (1978). In Baron v. State Farm Mut. Auto. Ins. Co., Ga., 276 S.E.2d 78 (1981), the injured person was a passenger in an insured motor vehicle. Her medical bills were less than the PIP benefits available under the driver's policy so the Georgia court held that to also allow a claim under her own auto policy would result in an undeserved duplication of benefits. The court did state, however:

"Under our analysis, had the Barons' claim for necessary medical expenses arising from the collision exceeded the \$2,500 limit on that coverage available to them under the [driver's] policy . . . the PIP "no fault" provisions of their own policy would have been triggered and they would have been afforded coverage thereunder for the excess PIP claims up to the limits thereof."

Nevada's no-fault plan is generally similar to the Utah Automobile No-Fault Insurance Act and neither expressly permits nor prohibits "stacking" of benefits. Nevertheless, in Travelers Ins. Co. v. Lopez, Nev., 567 P.2d 471 (1977), the Nevada Supreme Court held that "stacking" was permissible. In that case, Lopez was injured when his automobile collided with that of an

5. The no-fault schemes in some states contain a limiting statute. One such statute--that contained in the North Dakota statutory scheme--states: "The maximum amount of basic no-fault benefits payable . . . resulting from accidental bodily injury to any one person as the result of any one accident shall not exceed fifteen thousand dollars . . ." (§26-41-03(2), NDCC). The Utah Automobile No-Fault Insurance Act contained no such limiting statute.

uninsured motorist. His automobile was covered under two separate policies, each containing no-fault coverage. The court's opinion permitted Lopez to recover benefits under both policies. The court found an important public policy consideration to support its conclusion. The court pointed out that Lopez paid premiums on both policies covering the same vehicle and the insurance company "accepted the payment of premiums and has, in effect, assumed the risk that injury to the insured may occur." (567 P.2d at 473).

The same public policy consideration exists in the instant case. Vickie Crowther paid premiums to Nationwide for, among other things, no-fault coverage. She was entitled to coverage to the full extent permitted by the Utah Automobile No-Fault Insurance Act, and limited only as permitted by the Act. Nationwide's insistence that she must look only to the insurer of the vehicle which struck her frustrates that policy.

In each case where a court has prohibited "stacking" of no-fault benefits the decision was grounded on one of three factual or statutory basis not present in the instant case. Either (1) an insured tried to make a claim on multiple vehicles insured under one policy or by a single insurer, or (2) "stacking" would have resulted in a recovery in excess of actual medical bills or in excess of the amount prescribed by a "limiting" statute [see fn. 5], or (3) the statutory scheme expressly prohibited "stacking". None of those basis exist for denial of coverage in the instant case. Payment by defendant Nationwide of its PIP medical benefits policy limits will not

result in a windfall to its insured because her medical bills exceed the combined limits of the policy covering the automobile which struck her and the policy issued by defendant.

B.

THE POLICY EXCLUSION RELIED UPON BY NATIONWIDE IS NOT
ONE OF THOSE EXCLUSIONS PERMITTED BY THE UTAH
AUTOMOBILE NO-FAULT INSURANCE ACT

Endorsement 1594 to the policy issued by Nationwide, entitled "personal injury protection (Utah)" (R. 59), provides that Nationwide "will pay benefits for accidental bodily injury arising out of the ownership, maintenance, or use of a motor vehicle. It pays regardless of fault in the accident. Benefits include Medical Expenses You and your relatives are covered for bodily injury caused by accident involving the use of any motor vehicle."

Endorsement 1594 also provides, under the heading "Coverage Exclusions", "We will not pay for bodily injury to anyone arising from any of the following: . . . e. Occupying or being hit as a pedestrian by any motor vehicle other than your auto, which is covered as required under the Utah Automobile No-Fault Insurance Act." The exclusion addresses the factual situation in which plaintiff was involved. She was "hit as a pedestrian" by a motor vehicle which was "covered as required" under the Act. However, the policy purports to create an exclusion from PIP coverage which is not permitted by the Act.

Provided an injured person fits within one of the three categories of persons covered by the Act (U.C.A. § 31-41-7(1)), the only exclusions from coverage permitted by the Act are those

set forth in U.C.A. § 31-41-10.⁶ Osuala v. Aetna Life & Cas., Utah, 608 P.2d 242 (1980). None of those exclusions (which are all also included in Endorsement 1594) are applicable in the instant case. Vickie Crowther was a person described in U.C.A. § 31-41-7(1)(a)--she was injured in an accident in this state involving any motor vehicle--and thus is entitled to coverage from her insurer, subject only to the permissible exclusions set forth in U.C.A. § 31-41-10. In the Osuala case, supra, this court did not explicitly hold that the exclusions set forth in Section 31-41-10 were the only permissible exclusions to no-fault coverage. This court did not need to make that finding because it determined that Osuala, an uninsured motorist, was not one of those persons described in section 31-41-7(1). When it enacted Title 31A the legislature, presumably familiar with Osuala, resolved any doubt. The old section § 31-41-10 began, "Any insurer may exclude benefits: . . ." U.C.A. § 31A-22-309(2)(a), covering the same subject matter, begins with the language: "Any insurer issuing personal injury protection coverage under this

6. U.C.A. § 31-41-10 provides,

"Any insurer may exclude benefits:

(a)(i) For injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy, or

(ii) for an injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle.

(b) To any injured person, if such person's conduct contributed to his injury under any of the following circumstances:

(i) Causing injury to himself intentionally; or

(ii) While committing a felony."

part may only exclude from this coverage benefits:" and then lists the same permissible exclusions as were set forth in Section 31-41-10. Under the new Insurance Code, as under the old Utah Automobile No-Fault Insurance Act, the exclusion for pedestrian insureds is not one permitted by the statutory scheme.

C.

THE NATIONWIDE POLICY "OTHER INSURANCE" CLAUSE
IS NOTHING MORE THAN ANOTHER EXCLUSION NOT
PERMITTED BY THE UTAH AUTOMOBILE NO-FAULT
INSURANCE ACT

Nationwide also contends that its "Other Insurance" clause, as contained in Endorsement 1594, bars Vickie Crowther's claim for additional PIP medical expense benefits. That clause (R. 61) states,

OTHER INSURANCE No insured may receive duplicate benefits under this and any similar insurance.

Similar insurance may apply to an accident involving **bodily injury to you or a relative, or bodily injury** to someone else involving the use of **your auto**. If it does, all benefits payable cannot exceed the highest available under any one policy. **We** will pay **our** proportional share of such benefits. That **share** will be **our** proportion of the total benefits available."

All bold print in the quoted portion of the Other Insurance clause is also in bold print on the policy. The first paragraph of the Other Insurance clause provides only that no insured may receive duplicate benefits. In view of the stipulated fact that Vickie Crowther has received \$2,000 in benefits and her medical bills exceed \$4,000, it is clear that plaintiff is not going to receive duplicate benefits should she receive payment from her own insurer, Nationwide.

Apart from the prohibition against duplicate benefits, it is clear that the Other Insurance Clause is nothing more than an additional exclusion from coverage. As was the case with the exclusion from coverage for pedestrian insureds who are injured by an insured driver, the exclusion from coverage for an insured who has received benefits from another source is not one of those exclusions permitted by U.C.A. § 31-41-10.

The intent of the legislature that an insurer who provides personal injury protection coverage should not be allowed to exclude coverage by way of an "other insurance" clause can be discovered by looking to the new Insurance Act, Title 31A. U.C.A. § 31A-22-302(1) provides that every motor vehicle insurance policy shall contain liability coverage (31A-22-302(1)(a)) and uninsured motorist coverage (31A-22-302(1)(b)). U.C.A. § 31A-22-302(2) provides that "except for motorcycles" every motor vehicle insurance policy shall contain personal injury protection coverage. U.C.A. § 31A-22-303(2)(a) provides that a policy of liability coverage may "provide for the prorating of the insurance under that policy with other valid and collectible insurance." However, there is no similar statutory permission granted to insurers to provide for prorating of personal injury protection coverage.

The natural inference is that the legislature meant what it said in Section 31A-22-309, headed "Limitations, exclusions and conditions to personal injury protection": the only permissible limitations to coverage are those set forth in that statute. As previously discussed, there is no provision in

section 31A-22-309, or old section 31-41-10, for an insurer to limit its exposure to pay PIP benefits by means of an "other insurance" clause.

D.

THE INSURANCE COMMISSIONER'S REGULATION 73-1, ARTICLE 5,
SUBDIVISION i, CONFLICTS WITH U.C.A. § 31-41-7(2)
AND IS IN EXCESS OF THE ADMINISTRATIVE
AUTHORITY GRANTED HIM

The Utah Automobile No-Fault Insurance Act provided in part that the insurance "department is authorized to promulgate such rules and regulations as may be necessary for the purposes of this act". U.C.A. § 31-41-12. Pursuant to that authorization the insurance commissioner promulgated Regulation 73-1, Article 5, subd. i, which states:

"It is the intent of the Act to provide a package of minimum Personal Injury Protection (PIP) benefits to each person injured in a motor vehicle accident occurring in Utah. The minimum PIP benefits are to be provided by the insurer of the motor vehicle which the person was occupying at the time of the accident or by which he was struck as a pedestrian. The maximum amount of minimum PIP benefits an injured person may receive pursuant to involvement in a motor vehicle accident shall be those amounts specified under Section 31-41-6. There shall be no stacking or duplication of such benefits."

Appellant submits that the Insurance Commissioner's prohibition against stacking of PIP benefits was in excess of his authority and a misconstruction of legislative intent. The legislature's specific prohibition against stacking of uninsured motorist coverages (U.C.A. § 31A-22-305(6)), while reenacting the language of section 31-41-7 at U.C.A. § 31A-22-309(4), provides strong support for appellant's claim.

It is well settled that the legislature may not delegate authority to a regulatory agency to adopt rules or

regulations which abridge or modify statutorily created rights. IML Freight, Inc. v. Ottosen, Utah, 538 P.2d 296 (1975). The quoted portion of Regulation 73-1 purports to create an exclusion from, or limitation to, PIP coverage which is not permitted by the Utah Automobile No-Fault Insurance Act which, as discussed above, specifically listed permissible exclusions. Regulation 73-1 conflicts with U.C.A. § 31-41-7(2) which implicitly contemplates the existence of "excess" coverage by mandating that "primary coverage shall be afforded by the policy insuring the motor vehicle out of the use of which the accident arose."

There is nothing in the No-Fault Act itself which sets forth "maximum amount of minimum PIP benefits". If the Commissioner's regulation were taken at face value it would be illegal for an insured to bargain for and pay a higher premium for coverage greater than the minimum coverage which auto insurers must offer.

Colorado's no-fault scheme, the "Colorado Auto Accident Reparations Act" (CRS §§ 10-4-701 et seq.), also provides that the director may make rules and regulations necessary for the administration of the Act. However, in Travelers Indem. Co. v. Barnes, Colo., 552 P.2d 300 (1976), the Colorado Supreme Court held as follows:

"Construction of a statute by administrative officials charged with its enforcement shall be given great deference by the courts. [citation]. However, administrative regulations are not absolute rules. They may not conflict with the design of an Act, and when they do the court has a duty to invalidate them. [citation]. Furthermore, when an administrative official misconstrues a statute and issues a regulation beyond the scope of a statute, it is in excess of administrative authority granted." (552 P.2d at 303)

Regulation 73-1, Article 5, Subd. i, is just such a case of misconstruction of the no-fault scheme which, if enforced, would result in an abridgment of the rights of premium paying insureds to receive all the PIP benefits permitted by the Utah Automobile No-Fault Insurance Act. Regulation 73-1 must be held invalid to the extent it purports to bar plaintiff's claim for coverage under her own policy.

E.

IF APPELLANT PREVAILS ON THIS APPEAL, SHE IS ABSOLUTELY ENTITLED TO REASONABLE ATTORNEY FEES. THE TRIAL COURTS ONLY DISCRETION IS AS TO AMOUNT

U.C.A. § 31-41-8, reenacted in substantially the same language at U.C.A. § 31A-22-309(5), stated:

"Payment of the benefits provided for in section 31-41-6 shall be made on a monthly basis as expenses are incurred. Benefits for any period are overdue if not paid within 35 days after the insurer receives reasonable proof of the fact and amount of expenses incurred In the event the insurer fails to pay such expenses when due the person entitled to such benefits may bring an action in contract to recover these expenses plus the applicable interest. If the insurer is required by such action to pay any overdue benefits and interest, the insurer shall also be required to pay reasonable attorney's fees to the claimant."

U.C.A. § 31-41-8 contemplated that if an insurer guesses wrong as to whether or not it owes PIP benefits to a claimant and refuses to pay, the insurer, and not the claimant, bears the risk of the wrong guess. If this court determines that the trial court erred and Vickie Crowther is entitled to benefits from Nationwide, the only way she can recoup 100% of the benefits to which she was entitled is if she is also awarded her attorney fees. That Nationwide has defended Mrs. Crowther's action in good faith is no reason to require her to recover less than she

would have had Nationwide not "guessed wrong" as to the ultimate outcome of the action.

If U.C.A. § 31-41-8 only came into play once an insurer was ordered by the court to pay benefits, an insurer could always refuse to pay benefits until ordered by the court to do so, secure in the knowledge that there is no risk it might later be required to pay a greater sum than had it payed benefits when due.

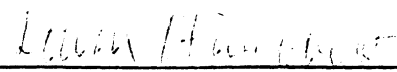
V.
CONCLUSION

Appellant Vickie Crowther is not trying to recover the same item of damage twice. Her medical bills are well in excess of the combined PIP medical expense limits of the two applicable policies. She does, however, wish to recover under each policy containing provision for payment of PIP medical benefits until as many of the medical bills incurred are indemnified as policy limits will permit. In order to accomplish that goal, Mrs. Crowther should be allowed to "stack" the maximum coverages for PIP medical benefits under each of the two applicable insurance policies to the extent of actual losses up to the combined policy limits of both policies.

Based on all of the above, appellant respectfully submits that the Order (summary judgment) entered by the District Court should be reversed and that summary judgment should be entered in her favor and against respondent Nationwide Mutual Insurance Company for \$2,000 together with interest at 1½% per month and reasonable attorney fees, both as permitted by U.C.A. § 31-41-8, and costs of suit.

Appellant further submits that the action should be remanded to the District Court for determination of the appropriate amount of attorney fees to be awarded to her.

Dated: September 17, 1986.



STEVEN H. LYBBERT
Attorney for Appellant
Vickie D. Crowther

ADDENDUM

SELECTED STATUTES FROM THE UTAH AUTOMOBILE NO-FAULT INSURANCE ACT (REPEALED, JULY 1, 1986)

Utah Code Ann. § 31-41-7. Personal injuries covered - Primary coverage - Reduction of benefits.

(1) The coverages described in section 31-41-6 shall be applicable to:

(a) Personal injuries sustained by the insured when injured in an accident in this state involving any motor vehicle.

(b) Personal injuries arising out of automobile accidents occurring in this state sustained by any other natural person while occupying the described motor vehicle with the consent of the insured or while a pedestrian if injured in an accident involving the described motor vehicle.

(2) When a person injured is also an insured party under any other policy, including those complying with this act, primary coverage shall be afforded by the policy insuring the motor vehicle out of the use of which the accident arose.

(3) The benefits payable to any injured person under section 31-41-6 shall be reduced by:

(a) Any benefits which that person receives or is entitled to receive as a result of an accident covered in this act under any workmen's compensation plan or any similar statutory plan; and

(b) Any amounts which that person receives or is entitled to receive from the United States or any of its agencies because of his or her being on active duty in the military services.

Utah Code Ann. § 31-41-8. Payment of benefits - Time limit - Action for overdue benefits and interest.

Payment of the benefits provided for in section 31-41-6 shall be made on a monthly basis as expenses are incurred. Benefits for any period are overdue if not paid within 35 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 35 days after such proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 35 days after such proof is received by the insurer. In the event the insurer fails to pay such expenses when due, the amount of these expenses

shall bear interest at the rate of 1 1/2% per month after the due date, and the person entitled to such benefits may bring an action in contract to recover these expenses plus the applicable interest. If the insurer is required by such action to pay any overdue benefits and interest, the insurer shall also be required to pay reasonable attorney's fees to the claimant.

Utah Code Ann. § 31-41-10. Exclusions from coverage.

Any insurer may exclude benefits:

(a)(i) For injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy, or

(ii) for an injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle.

(b) To any injured person, if such person's conduct contributed to his injury under any of the following circumstances:

(i) Causing injury to himself intentionally; or

(ii) While committing a felony.

B.

**SELECTED STATUTES FROM THE INSURANCE CODE,
TITLE 31A UTAH CODE ANNOTATED (EFFECTIVE JULY 1, 1986)**

Utah Code Ann. § 31A-22-302. Required components of motor vehicle insurance policies.

(1) Every policy of insurance or combination of policies purchased to satisfy the owner's or operator's security requirement of § 41-12a-301 shall include:

(a) motor vehicle liability coverage under §§ 31A-22-303 and 31A-22-304; and

(b) uninsured motorist coverage under § 31A-22-305, unless affirmatively waived under Subsection 31A-22-305(4).

(2) Every policy of insurance or combination of policies, purchased to satisfy the owner's or operator's security requirement of § 41-12a-301, except for motorcycles, shall also include personal injury protection under §§ 31A-22-306 through 31A-22-309. First party medical coverages may be offered or included in policies issued to motorcycle owners or operators. Motorcycle owners and operators are not covered by personal injury protection coverages in connection with injuries incurred while operating a motorcycle.

Utah Code Ann. § 31A-22-303(1) through (2)(a). Motor vehicle liability coverage.

(1) In addition to complying with the requirements of Chapter 21 and Part II of Chapter 22, a policy of motor vehicle liability coverage under Subsection 31A-22-302(1)(a) shall:

(a) name the motor vehicle owner or operator in whose name the policy was purchased, state that named insured's address, the coverage afforded, the premium charged, the policy period, and the limits of liability;

(b) (i) if it is an owner's policy, designate by appropriate reference all the motor vehicles on which coverage is granted, insure the person named in the policy, insure any other person using any named motor vehicle with the express or implied permission of the named insured, and insure any person included in Subsection (1)(c) against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles within the United States and Canada, subject to limits exclusive of interest and costs, for each motor vehicle, in amounts not less than the minimum limits specified under § 31A-22-304; or

(ii) if it is an operator's policy, insure the person named as insured against loss from the liability imposed upon him by law for damages arising out of the insured's use of any motor vehicle not owned by him, within the same territorial limits and with the same limits of liability as in an owner's policy under Subsection (1)(b)(i); and

(c) insure persons related to the named insured by blood, marriage, adoption, or guardianship who are residents of the named insured's household, including those who usually make their home in the same household but temporarily live elsewhere, to the same extent as the named insured.

(2) A policy containing motor vehicle liability coverage under Subsection 31A-22-302(1)(a) may:

(a) provide for the prorating of the insurance under that policy with other valid and collectible insurance;

. . .

Utah Code Ann. § 31A-22-305(6). Uninsured motorist coverage.

(6) In no event shall the limit of liability for uninsured motorist coverage for two or more motor vehicles be added together, combined, or stacked to determine the limit of insurance coverage available to an injured person for any one accident. If uninsured motorist coverage is available to an injured person under more than one insurance policy, the injured person shall elect the policy under which he desires to collect

uninsured motorist benefits. Claimants are not barred against making subsequent elections if recovery is unavailable under previous elections.

Utah Code Ann. § 31A-22-309(1) through (5). Limitations, exclusions, and conditions to personal injury protection.

(1) No person who has direct benefit coverage under a policy which includes personal injury protection may maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (a) death;
- (b) dismemberment;
- (c) permanent disability;
- (d) permanent disfigurement; or
- (e) medical expenses to a person in excess of \$3,000.

(2)(a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy;

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle; or

(iii) to any injured person, if the person's conduct contributed to his injury:

(A) by intentionally causing injury to himself;

or

(B) while committing a felony.

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.

(3) The benefits payable to any injured person under § 31A-22-307 are reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan; and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because he is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.

(5) Payment of the benefits provided for in § 31A-22-307 shall be made on a monthly basis as expenses are incurred. Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer. If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1½% per month after the due date. The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

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Salt Lake City, UT 84145
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR COUNTY OF SALT LAKE, STATE OF UTAH

VICKIE D. CROWTHER,

Plaintiff,

STIPULATED FACTS

vs.

NATIONWIDE MUTUAL INSURANCE
COMPANY,

Civil No. C86-2548

Defendant.

Honorable Homer F. Wilkinson

Plaintiff, by and through her attorney, Steven H. Lybbert, and defendant, by and through its attorney, John R. Lund, stipulate to the following facts. In doing so, counsel agree that other facts not stipulated to may be relevant to the issues raised in the pleadings.

STIPULATED FACTS

1. Defendant Nationwide Mutual Insurance Company (hereinafter referred to as "Nationwide") is an insurer doing business in the State of Utah and with an office and place of business in Salt Lake County, Utah.

2. On January 25, 1986, plaintiff was the insured under a policy of automobile insurance issued by Nationwide.

3. The automobile insurance policy issued by Nationwide included Endorsement 1594 providing for personal injury protection coverage. A true and correct copy of Endorsement 1594 is attached to these Stipulated Facts as Exhibit "A".

4. On January 25, 1986, plaintiff sustained accidental bodily injury while a pedestrian when struck by a motor vehicle, other than her own, which was covered as required under the Utah Automobile No-Fault Insurance Act.

5. As a direct and proximate result of the accident described in the preceding paragraph, plaintiff has incurred reasonable and necessary medical expenses in a sum in excess of \$4,000.00.

6. Plaintiff has been paid \$2,000.00 in personal injury protection medical expense benefits by the insurer of the motor vehicle which struck her.

7. Two Thousand Dollars (\$2,000.00) is the entire amount of personal injury protection medical expense benefits available under the policy describing the automobile which struck plaintiff.

8. Plaintiff has made demand upon Nationwide for payment of \$2,000.00 medical expense benefits pursuant to

the terms of the policy under which she was an insured.

9. Nationwide has failed within thirty-five (35) days after receipt of proof of plaintiff's medical expenses, or at all, to pay personal injury protection medical expense benefits under the policy issued by it.

10. Plaintiff does not claim to be entitled to more than \$2,000.00 in benefits under the policy issued by Nationwide.

DATED this _____ day of June, 1986.

Steven H. Lybbert
Attorney for Plaintiff

DATED this _____ day of June, 1986.

SNOW, CHRISTENSEN & MARTINEAU

By _____
John R. Lund
Attorneys for Defendant



Endorsement 1594

personal injury protection (Utah)

Please attach this important addition to your Century II policy.

With this endorsement your Century II auto policy is amended to provide Personal Injury Protection. Coverage is subject to all terms and conditions of your policy, except as changed by this endorsement.

SECTION I

PERSONAL INJURY PROTECTION COVERAGE

We will pay benefits for accidental **bodily injury** arising out of the ownership, maintenance, or use of a **motor vehicle**. It pays regardless of fault in the accident. Benefits include Medical Expenses, Work Loss, Funeral Expenses, and Survivors' Loss benefits.

For purposes of this coverage:

1. the words "you" and "your" mean the policyholder first named in the attached Declarations. They do not include that policyholder's spouse.
2. the word "relative" means your spouse, any other person related to you by blood, marriage, and a ward or foster child. A relative may temporarily be living elsewhere.
3. the words "bodily injury" mean **bodily injury**, sickness, disease, or death.
4. the words "motor vehicle" mean any vehicle of a kind that must be registered with the Division of Motor Vehicles of the Utah State Tax Commission under Title 41-1-19, Utah Code Annotated 1953. A **motor vehicle** does not include a motorcycle.
5. the word "insured" means a **relative** or anyone using your auto with your permission.

You and your relatives are covered for **bodily injury** caused by accident involving the use of any **motor vehicle**.

Other persons are covered, provided your auto is not a motorcycle, as follows:

1. While occupying your auto with your consent or the permission of an insured.
2. While occupying any **motor vehicle** other than your auto, if it is not used to carry persons for a fee. Such **motor vehicle** must be operated by you or a **relative**. Shared-expense car pools will not be considered carrying persons for a fee.
3. As a pedestrian if hit by your auto. Anyone occupying a motorcycle is not a pedestrian.

We will pay benefits minus any deductible per person, per accident shown in your policy Declarations. Benefits are as follows:

MEDICAL EXPENSES We will pay reasonable and necessary medical expenses incurred. We will pay them up to \$2000 per person, per accident. We will pay for the following: medical, surgical, x-ray, ambulance, hospital, nursing, dental, prosthetic, and rehabilitation services and any recognized religious healing method. For hospital services, we will pay only up to the semi-private room charge unless more intensive medical care is needed.

LOSS. We will pay for the covered person's loss of income if he is unable to work because of the **bodily injury**. We will pay for income lost beginning three days after the accident, and for up to 52 weeks after that day. If the insured is unable to work for the first two weeks after the accident we will pay for income lost beginning the day after the accident, and for up to 52 weeks after that day. We will pay for 85% of lost gross income, not to exceed \$150 per week. We will only pay, however, for income lost during the covered person's lifetime.

We will also pay for services the covered person would have performed for his household, but for the **bodily injury**. We will pay up to \$12 per day. We will pay for expenses incurred beginning three days after the accident, and for up to 365 days after that day. If the insured is unable to perform such household services for the first 14 days after the accident, we will pay beginning the day after the accident, and for up to the 365 days after that day. We will pay for expenses incurred only during the person's lifetime.

NECARY EXPENSES. If the covered person dies from the **bodily injury**, we will pay for funeral and burial or cremation expenses incurred. We will pay up to \$1,000.

REVENUE LOSS. If the covered person dies from the **bodily injury**, we will pay \$2,000 to his natural heirs.

VERAGE EXCLUSIONS

We will not pay for **bodily injury** to anyone arising from any of the following:

- a. The insured's intentional act.
- b. Committing a felony.
- c. Operating your auto without the consent of the insured or when not in lawful possession of it.
- d. Occupying a motor vehicle you own but do not insure under this endorsement.
- e. Occupying or being hit as a pedestrian by any motor vehicle, other than your auto, which is covered as required under the Utah Automobile No-Fault Insurance Act.
- f. Using a motor vehicle located as a residence or premises.
- g. Any act of war.
- h. Any hazard of nuclear material.

We will not pay for **bodily injury** to you or a relative while occupying a motor vehicle owned by a relative and not insured as required under the Utah Automobile No-Fault Insurance Act.

We will not pay for **bodily injury** to anyone entitled to benefits under Utah's Workmen's Compensation Law.

INSURED PERSONS' DUTIES

The insured or someone for him will promptly report any accident to us in writing. This report will identify injured persons. It will give information about the time, place, and circumstances of the accident.

The insured or someone for him will promptly submit written proof of claim to us. This will be under oath if we require. The insured will give all necessary information for us to determine benefits and amounts payable. The insured will submit to physical and mental examinations, by physicians we choose, whenever we reasonably request.

If the insured, his legal representative, or his survivors bring an action against anyone for the **bodily injury**, a copy of the summons or complaint or other process served will be promptly forwarded to us.

LIMITS AND CONDITIONS OF PAYMENT

BENEFITS PAYABLE. Insuring more than one person or vehicle under your policy does not increase our liability to one person in one accident.

We will reduce any amount payable by any amount paid, payable, or required as follows: Under any workmen's compensation or similar plan except Utah's Workmen's Compensation Plan. By the United States or any of its agencies related to active military duty.

OTHER INSURANCE No insured may receive a duplicate benefit under this policy or any similar insurance.

Similar insurance may apply to an accident involving **bodily injury to you or a relative, or bodily injury to someone else** involving the use of **your auto**. If it does, all benefits payable cannot exceed the highest available under any one policy. We will pay **our** proportional share of such benefits. That share will be **our** proportion of the total benefits available.

Similar insurance may apply to an accident that does not involve **you, a relative, or use of your auto**. If it does, we will pay only over and above what is available under the other insurance.

TRUST AGREEMENT

To the extent of any payment we make for a loss, we are entitled to any payment to **the insured** by anyone legally liable for the **bodily injury**. **The insured** will hold in trust for us his rights of recovery against any such party. He will do whatever is proper to secure such rights. He will do nothing to prejudice them. All related papers and instruments will be executed and delivered to us.

SUBROGATION

We have the right of subrogation. This means that after paying a loss, we will have **the insured's** right to sue for or otherwise recover the amount of **our** payment from anyone who may be liable. **The insured** will do nothing to prejudice this right. **The insured** will sign all papers and do whatever is necessary to transfer this right to **us**.

ASSIGNABILITY

No interest in **your** policy can be transferred without **our** written consent. However, if **you** die, this coverage will stay in force for the rest of the policy period for others who were entitled to coverage when **you** died.

SECTION II

PREMIUM RECOMPUTATION

We have certain rights if there is a judicial finding that any provisions of the Utah Automobile No-Fault Insurance law limiting lawsuits are invalid. We will have the right to recompute the premium for any coverage under this policy. We will also have the right to void or amend the provisions of this endorsement.

SECTION III

OTHER COVERAGES

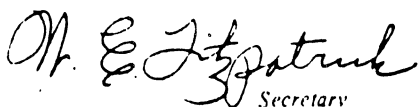
We will pay benefits under any Medical Payments coverage provided by this policy only over and above any Personal Injury Protection benefits that are paid or payable for **bodily injury under this or any other policy**. This includes any benefits that would be payable except for a deductible provision.

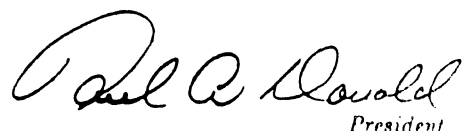
The limits of and any amounts payable under Uninsured Motorists coverage will be reduced by sums paid or payable under any Personal Injury Protection coverage. This includes any benefits that would have been paid or payable except for a deductible provision.

This endorsement applies as stated in the Declarations attached to your policy.

The endorsement is issued by the Nationwide Mutual Insurance Company or Nationwide Mutual Fire Insurance Company, whichever has issued the policy to which it is attached.

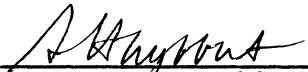
NATIONWIDE MUTUAL INSURANCE COMPANY
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
Columbus, Ohio


Secretary


President

CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 1986, I hand delivered four (4) copies of the foregoing Appellant's Opening Brief to John R. Lund, Esq., Snow, Christensen & Martineau, 10 Exchange Place, Eleventh Floor, Salt Lake City, Utah.



Steven H. Lybbert
Attorney for Appellant
Vickie D. Crowther