1988

Bear River Mutual Insurance Company v. Robert Wright and Mark Martinez : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT FOR THE

STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY, Respondent, vs. ROBERT WRIGHT, and MARK MARTINEZ, Appellant.	88-0249-CA Case No. 860579 Category No. 14b

CORRECTED BRIEF OF APPELLANT

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STATEMENT OF ISSUES FOR REVIEW

1. Should an insured motorist be denied uninsured motorist coverage when driving an owned motorcycle not listed on the policy when such exclusion is not part of state law?

2. Do the policy definitions dealing with the subject exclusion exempt owned motorcycles to allow for uninsured motorist coverage when the insured is injured on such vehicle?

3. In the event the subject exclusion is held to violate public policy, should the uninsured motorist benefits be reduced by earlier paid out no-fault benefits?

STATEMENT OF THE CASE

Respondent Bear River Mutual Insurance Company (herafter "Bear River") brought this declaratory judgment action to determine the effectiveness of an exclusionary clause.

Appellant Robert Wright (hereafter "Wright") was injured when involved in an accident between an uninsured motorist and himself. Mr. Wright was driving a motorcycle owned by him but not listed on his automobile policy. Mr. Wright's request for uninsured motorist benefits resulted in this declaratory action.

Both parties filed motions for summary judgment concerning the validity of the exclusion. The lower court upheld the exclusion finding it did not violate public policy.

FACTS

The Accident. The accident occurred on April 28, 1985, at the intersection of 2820 South 7200 West, Salt Lake County, Utah. Wright was driving a 1982 Honda motorcycle owned by him. The other driver, Mark Martinez, was stopped westbound at a stop sign. Wright had a yellow flashing light. (R.194, Depo of App., pp.19-20.) As Wright drove into the intersection, Mr. Martinez darted into the intersection, broadsiding Wright (R.194, Depo of App., p.20.)

The Injuries. Wright was thrown across the intersection and over an adjoining chain link fence (R.194, Depo of App., p.28.) Wright was unconscious for about twenty-five minutes (R.914, Depo of App., p.28.) He suffered three broken ribs (R.194, Depo of App., p.36.) Contusions and injury to his left ankle, right knee and right hip resulted. (R.194, Depo of App., p.36.) A bruised kidney, collapsed lung and cervical injuries were also suffered. (R.194, Depo of App., p.37.)

The Insurance. On or about January 15, 1985, (prior to the accident), Bear River issued to Wright an

automobile insurance policy. (R.2-3.) Said policy provided for uninsured motorist benefits up to $20,000 for bodily injury (R.4.) Said policy was in effect at the time of this accident.

Bear River would be obligated to provide Wright uninsured motorist benefits but for the contested policy exclusion. (R.3.) That is, there is no argument that uninsured motorist coverage is owing, but for the exclusion. The exclusionary clause excuses uninsured motorist protection when the insured is injured while occupying an automobile (other than an insured automobile) owned by the named insured (R.4.)

Wright requested and received PIP (no-fault) benefits from Bear River for the injuries suffered in the accident. (R.194, Depo of App., p.51.)

Counsel has stipulated and Bear River has asserted that for purposes of this action, Mark Martinez is assumed to be an uninsured motorist (R.4-5.) Wright has testified that Mark Martinez admitted to having no auto insurance at the time of the accident (R.194, Depo or App., p.23.)

The Contested Court Decision. Bear River filed this declaratory judgment action pursuant to the Utah Declaratory Judgment Act (R.2.) The Honorable Timothy Hansen, ruled the subject exclusion did not violate public policy and held said exclusion enforceable. (R.186.)

SUMMARY OF ARGUMENT

The Motor Vehicle Safety Responsibility Act mandates all Utah resident drivers maintain prescribed levels of automobile insurance. Included in this statutory mandate is uninsured motorist coverage. (Section 41-12-21 and 41-12-21.1, U.C.A, as amended, See Exhibits 1 and 2.) This statutory mandate included specific exclusions which might appear in Utah automobile policies.

The Utah uninsured motorist statute provides coverage to insured persons for bodily injury, sickness or death resulting from the acts of owners or operators of uninsured motor vehicles.

The language of the Act clearly extends coverage to all insured persons -- not vehicles! That is, uninsured motorist coverage extends to insured persons whether on foot, bike or car.

Included in Bear River's automobile policy is an exclusion avoiding uninsured motorist coverage when the insured is injured while in an owned automobile other than the insured automobile.

This exclusion conditions uninsured motorist coverage on the vehicle involved in the accident, not the injured person. This exclusion results in auto insurance coverage which does not meet the prescribed statutory minimum. The exclusion violates state law and is void.

Recognition of the subject exclusion requires treating uninsured motorist coverage as a risk policy. That is, an assumption must be made that by excluding uninsured owned automobiles, a carrier is reducing its risk and presumably its premiums. This is an incorrect assumption. Utah uninsured motorist coverage follows the person not the vehicle. There is no effective way to base premiums on risk. The exclusion has no rational basis.

Bear River should be prevented from setting off from uninsured motorist coverage amounts paid out under the Utah no-fault law. Such set-off would again result in automobile insurance coverage which does not meet the Utah statutory minimum.

ARGUMENT

POINT I

THE SUBJECT EXCLUSIONARY CLAUSE CONTRADICTS THE MINIMUM COVERAGE SET FORTH BY THE UTAH STATUTES ON UNINSURED MOTORIST PROTECTION

The Utah Motor Vehicle Safety Responsibility Act was written to cover the insured automobile and insured driver. See, Section 41-12-21(b)(1) and (2), U.C.A., as amended 1953. (See Exhibit 1.) That statute specifically requires coverage for both the person and automobile.

That statute also prescribes what exclusions and additions may be made to the minimum coverage. See

41-12-21(f), (g), (h), (i), (j) and (k), U.C.A. as amended 1953. (Exhibit 1.)

The Utah uninsured motorist statute applicable at the time is found at Section 41-12-21.1, U.C.A, as amended 1953. The coverage mandated by the law is clear and inclusive. Unlike the liability statute, the uninsured motorist coverage extends to the insured person, not the insured automobile. It reads:

> Commencing on July 1, 1967, no automobile liability insurance policy insuring against loss resulting from liability imposed by law for bodily injury or death or property damage suffered by any person arising out of the ownership, maintenance or use of a motor vehicle, shall be delivered, issued for delivery, or renewed in this state, with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided in such policy or a supplement to it, in limits for bodily injury or death set forth in section 41-12-5, under provisions filed with and approved by the state insurance commission for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. The named insured shall have the right to reject such coverage, and unless the names insured requests such coverage in writing, such coverage need not be provided in a renewal policy or a supplement to it where the names insured had rejected the coverage in connection with a policy previously issued to him by the same insurer. [Emphasis added.]

The policy issued by Bear River included exclusions to the uninsured coverage. The subject exclusion is as follows:

> Exclusions: This [uninsured motorist] policy does not apply under Part IV:
>
> (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile. (See Exhibit 3.)

The exclusionary clause shifts the focus of the uninsured coverage from the insured person to the insured automobile. In so doing, the coverage provided by the subject policy falls well below the coverage mandated by Utah law.

A. This Court Has Previously Rejected Attempts to Contravene the Minimum Automobile Insurance Coverage Set Out by Statute.

This court has consistently upheld the Utah Motor Vehicle Safety Responsibility Act as providing the minimum coverage a Utah resident can purchase. The Court has struck down attempts by various insurance companies to provide less coverage than mandated by Utah law.

In Coates v. American Economy Insurance Company, 627 P.2d 92 (Utah 1981), this Court held an insured's automobile no-fault benefits was payable to that person while driving an owned motorcycle not listed on the policy.

This Court held the Utah no-fault law provided benefits for:

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

As in this action, Utah law called for the insurance to follow the person, not the insured automobile.

In Thamert v. Continental Casualty Company, 621 P.2d 702 (Utah 1980), this Court declined to allow the insurance company to set-off from uninsured motorist coverage, payments earlier made under a workmen's compensation policy. This court again held the Utah uninsured motorist law set forth the minimum coverage allowed by law. A set-off for other amounts paid would reduce the uninsured motorist protection below that level mandated by Utah law.

In Farmers Insurance Exchange v. Call, 712 P.2d 231 (Utah 1985), the insurance company filed a declaratory judgment action. Earlier, Mrs. Call had negligently run over her child. The boy sued his mother through the legal guardian. Farmers Insurance, the Call carrier, was requested to defend the suit and pay out any damages sustained pursuant to the auto policy. Farmers Insurance argued that a policy exclusion excused them from filling their contractual duties. The exclusion exempted coverage to an insured for liability to a household member.

This court held the exclusion was without a rational basis. The Court found the exclusion contravened the Utah statute by providing less coverage than required by Utah law. This Court held the exclusion violated public policy and void at least up to the minimum coverage required by Utah law.

As in Call, the subject exclusion is without rational basis. As discussed below, uninsured motorist coverage is not risk related. Coverage is founded on the insured person. It does not matter if the injury occurs when the insured is on foot, bicycle, skateboard or motorcycle. The exclusion is not a realistic method of calculating premiums. It is therefore a source of windfall profit to the carrier when rightful claims go unpaid.

The subject exclusion violates the minimum uninsured motorist coverage required by law. This violation is a result of the Bear River conditioning uninsured motorist coverage on the involved insured automobile.

The Federal District Court for Utah has previously ruled on this issue. In Scow v. Farmers Insurance Company, Civil No. C80-0121, unpublished (1980), the Court reviewed the Utah uninsured statute and case law on the topic. The Court held the subject exclusion violated public policy and upheld coverage. A copy of the Order is attached hereto. (See Exhibit 4.)

B. The Fact That Wright Was Driving His Uninsured Motorcycle at the Time of the Crash Does Not Justify the Exclusionary Clause.

Bear River's argument in favor of the exclusionary clause is based in asserted fairness to the insurance carrier. That is, the insured did not pay a premium for the motorcycle. Therefore, the insured should not be entitled to uninsured motorist coverage while on the motorcycle. Other state courts have coined this the "business interest" argument.

The Court in Elledge v. Warren, 263 So.2d 912 (La. Ct. App. 1972), reviewed this argument carefully. The court found this actuarial computation argument did not apply to uninsured motorist coverage. Premiums are charged at a flat rate. That is, no difference exists in premiums costs for the insured's age, sex or numbers under the policy.

Uninsured motorist differs greatly from liability insurance in this regard. Liability premiums vary widely depending on these "risk" factors.

The Elledge court held the flat rate factor was strong evidence that uninsured motorist coverage was intended to protect insureds at all times. It found insurance carriers cannot:

> . . . create irrational and illusory business interests and interpose them as a bar to the comprehensive coverage required by our statute.

The majority of courts that have listened to the business interest argument have rejected it. See Jacobson v. Implement Dealers Ins., 640 P.2d 908 (Mont.. 1982); Elledge v. Warren, 263 So.2d 912 (La.App. 1972); State Farm Mutual Auto Ins. Co. v. Hinkel, 488 P.2d 1151 (Nev. 1971); Nygaard v. State Farm Mutual Auto Ins. Co., 221 N.W.2d 151 (Minn. 1974); and Calvert v. Farmers Ins. Co. of Arizona, 697 P.2d 684 (Ariz. 1985).

C. The Vast Majority of State Courts Which Have Reviewed the Exclusionary Clause Have Struck It Down as Violative of Public Policy.

A host of courts have now examined this issue. Those courts striking down the exclusion include: Calvert v. Farmers Insurance Company, 697 P.2d 684 (Ariz. 1985) (See Exhibit 5); Jacobson v. Implement Dealers Mutual Insurance Co., 640 P.2d 908 (Mont. 1982) (See Exhibit 6); State Farm Automobile Insurance Co. v. Reaves, 292 So.2d 95 (Ala. 1974); Mullis v. State Farm Mutual Automobile Ins. Co., 252 So.2d 229 (Fla. 1971); Bass v. State Farm Mutual Automobile Ins. Co. 196 S.E.2d 485, (Ga. 1973), modified, 201 S.E.2d 444; Doxtater v. State Farm Mutual Automobile Insurance Co., (1972), 8 Ill.App.3d 547, 290 N.E.2d 284 (Ill. 1972); State Farm Mutual Automobile Ins. Co. v. Robertson, 295 N.E.2d 626 (Ind. App. 1973); Cannon v. American Underwriters Inc., 275 N.E.2d 567 (Ind. App. 1971); Elledge v. Warren, 263 So.2d 912 (La. App. 1972); Nygaard v. State Farm Mutual Automobile Ins. Co., 221 N.W.2d 151 (Minn 1974); State Farm Mutual

Autombile Ins. Co. v. Hinkel, 87 Nev. 478, 488 P.2d 1151 (Nev. 1971); Bell v. State Farm Mutl. Auto. Ins. Co., 157 207 S.E.2d 147 (W. Va. 1974).

Also, see 1984 Arizona State Law Journal 814-884, Fall 1984.

The court's thinking in Jacobson v. Implement Dealers Mutual Ins. Co., 640 P.2d 908 (Mont. 1982), is illustrative of those cases. There, the court provided two bases for rejecting the exclusion. " . . . (1) the exclusionary clause is ineffective because it reduces the scope of coverage required by the statutory mandate; . . ." and "(2) . . . the policy behind the statute is to protect the policyholders from uninsured motorists in all instances." at pp.910-911

POINT II

THE EXCLUSIONARY CLAUSE DOES NOT INCLUDE MOTORCYCLES WITHIN ITS TERMS AND COVERAGE EXISTS UNDER THE FACTS

A copy of the subject policy is attached to the brief. (See Exhibit 3.)

Part IV of the policy describes the uninsured coverage. The definition section describes the meaning of "insured automobile" as:

> (a) an automobile described in the policy for which a specific premium

> charge indicates that coverage is afforded. [Emphasis added.]

The term "motorcycle" is not found within the definitions. If the intent was to exclude all owned motor vehicles (not just automobiles) the definition would be more inclusive.

The larger definition section within the liability portion of the policy also leaves out the term motorcycle. Instead, it too, uses the very limiting term of automobile instead of motor vehicle.

The definition section is used to describe what vehicles are covered as well as what vehicles are not. It appears the policy was designed to cover automobiles only. However, the exclusion only covers automobiles as well. The exclusion should not be expanded to include motorcycles. The intent of the policy authoris was to exclude "automobiles" only.

This argument is augmented by the fact that the "no-fault" portion of the policy <u>specifically</u> excludes motorcycles from its coverage. The subject exclusionary clause should not be judicially enlarged to exempt motorcycles. If the intent was to bar owned motorcycles from uninsured motorist protection, the term "automobile" should not have been used.

The policy language clearly calls for uninsured motorist coverage under the facts. Even if the policy is

held to be ambiguous, this court has construed such questions in favor of coverage. American Casualty Company of Redding Penn. v. Eagle Star Insurance Co., 568 P.2d 731 (Utah 1977).

POINT III

IN THE EVENT THE EXCLUSIONARY CLAUSE IS STRUCK DOWN, A SET-OFF CANNNOT BE TAKEN FOR BENEFITS MADE UNDER THE NO-FAULT PORTION OF THE POLICY

Bear River has claimed a right to set-off from uninsured motorist coverage made pursuant to the Utah "no-fault" laws.

This court has previously ruled on this subject. In Thamert v. Continental Casualty Co., 621 P.2d 702 (Utah 1980), this Court held workmen's compensation benefits could not be deducted from uninsured motorist coverage. The court found such a deduction would result in uninsured motorist coverage in an amount less than the statutory minimum.

The same result would occur by deducting no-fault benefits from uninsured motorist coverage.

The uninsured motorist statute is silent on the right of a carrier to set-off benefits. This court in Thamert, Supra, found the lack of a set-off provision in state law prevented such deduction. The court found the Utah statute set out the minimum benefits which could be sold.

Utah is not alone in its position. Many states have not allowed set-off from statutory uninsured motorist benefits. See Bachus v. Farmers Ins. Group Exchange, 475 P.2d 264 (Ariz. 1972); Shearer v. Motorists Mutual Ins. Co., 371 N.E.2d 210 (Ohio, 1978); Dhane v. Trinity Universal Ins. Co., 497 S.W.2d 323 (Tx. 1973); and, Tullev v. State Farm Mutual Auto Ins. Co., 345 F.Supp. 1123 (D.C., W.Va. 1972).

CONCLUSION

The exclusionary clause reduces the automobile insurance coverage below the minimum set by Utah statute.

The exclusionary clause is without rational basis. The uninsured motorist premium paid by Utah residents is paid at a flat rate. The coverage is not realistically risk related. The exclusionary clause by silencing lawful claims results in the carrier keeping the proceeds it should have paid out.

The attempted set-off for the no-fault benefits previously paid would result in benefits being reduced below statutory minimums. Utah law does not allow for such a reduction. Prior case law should be followed by disallowing such set-offs.

DATED this 20 day of May, 1987.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Wright

By: _____

CERTIFICATE OF MAILING

I hereby certify that a true and correct copies of the foregoing BRIEF OF APPELLANT (Bear River Mutual Insurance Company v. Wright, et al.) was mailed, U.S. Mail, postage prepaid, this 9 day of June, 1987, to the following:

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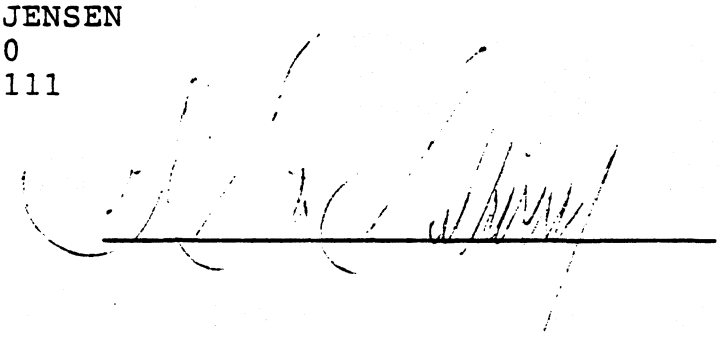

Exhibit 1

(b) If any insurance carrier not authorized to transact business in this state, which has qualified to furnish proof of financial responsibility, defaults in any said undertakings or agreements, the commission shall not thereafter accept as proof any certificate of said carrier whether theretofore filed or thereafter tendered as proof, so long as such default continues.

History: L. 1951, ch. 71, § 20; C. 1943, Supp., 57-13-60.

41-12-21. Motor vehicle liability policy — Definition — Provisions — Coverage. (a) A "motor vehicle liability policy" as said term is used in this act shall mean an owner's or an operator's policy of liability insurance, certified as provided in section 41-12-19 or section 41-12-20 as proof of financial responsibility, and issued, except as otherwise provided in section 41-12-20, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured.

(b) Such owner's policy of liability insurance:

(1) shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted; and

(2) shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada, subject to limits exclusive of interest and costs, with respect to each such motor vehicle, in the amount specified in section 41-12-1 (k) of this act.

(c) Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance.

(d) Such motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefor, the policy period and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this act as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this act.

(e) Such motor vehicle liability policy need not insure any liability under any workmen's compensation law as provided in Title 35, Utah Code Annotated 1953 as amended, nor any liability on account of bodily injury

to or death of an employee of the insured while engaged in the employment, other than domestic, of the insured, or while engaged in the operation, maintenance or repair of any such motor vehicle nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

(f) Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

(1) the liability of the insurance carrier with respect to the insurance required by this act shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy;

(2) the satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damages;

(3) the insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection (b) of this section;

(4) the policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of the act shall constitute the entire contract between the parties.

(g) Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this act. With respect to a policy which grants such excess or additional coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

(h) Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this act.

(i) Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance. 986

(j) The requirements of a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.

(k) Any binder issued pending the issuance of a motor vehicle liability policy shall be deemed to fulfill the requirements for such a policy.

History: L. 1951, ch. 71, § 21; C. 1943, Supp., 57-13-61.

Application.

This section applies only to policies required as proof of financial responsibility after the owner or operator has been in an

Exhibit 2

accident or has violated the motor vehicle laws. Utah Farm Bureau Ins. Co. v. Chugg (1957) 6 U 2d 399, 315 P 2d 277.

Unless the insured was within the purview of this act when a particular policy was issued, its provisions, unless illegal, are subject to the same construction as any other contract. Utah Farm Bureau Ins. Co. v. Chugg (1957) 6 U 2d 399, 315 P 2d 277.

This section applies only to cases where one is compelled to secure a policy after an accident in order to be able to continue to drive; it pertains to policies obtained under the Safety Responsibility Act and has no application to policies written before any accident occurs. Western Casualty & Surety Co. v. Transamerica Ins. Co. (1971) 26 U 2d 50, 484 P 2d 1180.

Policies presented as security under No-Fault Act.

Insurance policies used as security under 31-41-5 of the No-Fault Insurance Act must include minimum omnibus coverage including persons operating the vehicle with the express or implied permission of the owner-insurer as provided in this section. Allstate Ins. Co. v. U.S. Fidelity & Guaranty Co. (1980) 619 P 2d 329.

Reasonable investigation.

Insurer lost right to rescind policy by failure to make reasonable investigation of insurability without regard to provisions of subd. (f)(1). State Farm Mutual Automobile Ins. Co. v. Wood (1971) 25 U 2d 427, 483 P 2d 892.

Collateral References.

Automobile liability insurance: permission or consent to employee's use of car within meaning of omnibus coverage clause, 5 ALR 2d 600.

Cancellation of compulsory automobile insurance, 171 ALR 550, 34 ALR 2d 1297.

Construction and application of automatic insurance clause or substitution provision on automobile liability or indemnity policy, 34 ALR 2d 936.

Recovery under automobile property damage policy expressly including or excluding collision damage, where vehicle strikes embankment, abutment, roadbed, or other part of highway, 23 ALR 2d 389.

Scope of clause of insurance policy covering injuries sustained while alighting from or entering automobile, 19 ALR 2d 513.

Validity of Motor Vehicle Financial Responsibility Act, 35 ALR 2d 1011.

41-12-21.1. Motor vehicle liability policy — Uninsured motorist coverage required. Commencing on July 1, 1967, no automobile liability insurance policy insuring against loss resulting from liability imposed by law for bodily injury or death or property damage suffered by any person arising out of the ownership, maintenance or use of a motor vehicle, shall be delivered, issued for delivery, or renewed in this state, with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided in such policy or a supplement to it, in limits for bodily injury or death set forth in section 41-12-5, under provisions filed with and approved by the state insurance commission **for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease,** including death, resulting therefrom. The named insured shall have the right to reject such coverage, and unless the named insured requests such coverage in writing, such coverage need not be provided in a renewal policy or a supplement to it where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.

History: L. 1967, ch. 59, § 1.

Title of Act.

An act providing that no policy of automobile liability insurance may be issued or renewed which does not provide uninsured motorist coverage. — Laws 1967, ch. 59.

Amount of coverage.

It is the intent of the legislature in adopting this section that an insured, who avails

Exhibit 3

NON-ASSESSABLE MUTUAL AUTOMOBILE INSURANCE POLICY

Bear River Mutual Insurance Company

Salt Lake City, Utah

BEAR RIVER MUTUAL INSURANCE COMPANY

(A Mutual Insurance Company, hereinafter called the company)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statement declarations and subject to all of the terms of this policy:

PART I — LIABILITY

Coverage A—Bodily Injury Liability; Coverage B—Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage",

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

Definitions. Under Part I:

"named insured" means the individual named in Item 1 of the declarations includes his spouse, if a resident of the same household;

"insured" means a person or organization described under "Persons Insured

"relative" means a relative of the named insured who is a resident of the same ho

"[redacted]" means

(a) a private passenger, farm or utility automobile owned [redacted] a specific premium charge indicates that coverage is afforded,

(b) a private passenger, farm or utility automobile owned by the named insured [redacted]

(c) a private passenger, farm or utility automobile, ownership of which is acquired [redacted] provided

[redacted] automobile as defined in (b) above, if

Supplementary Payments. To pay, in addition to the applicable limits of liability:

(a) all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon;

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of an automobile insured hereunder, not to exceed $100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war;

all reasonable expenses, other than loss of earnings, incurred by the insured at the company's request.

Persons Insured. The following are insured under Part I:

(a) with respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile with the permission of the named insured provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and

(3) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a) (1) or (2) above;

(b) with respect to a non-owned automobile,

(1) the named insured,

(2) any relative but only with respect to a private passenger automobile or trailer provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

(3) any other person or organization not owning or hiring the automobile, but only with respect to his or its liability because of acts or omissions of an insured under (b) (1) or (2) above.

The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability

(2) the company insured all private passenger, farm and utility automobi ed by the named insured on the date of such acquisition and the na sured notifies the company within 30 days and during the policy p such acquisition of his election to make this and no other policy issue company applicable to such automobile, or

(d) a temporary substitute automobile;

"**temporary substitute automobile**" means any automobile or trailer, not ow the named insured, while temporarily used with the permission of the owner as stitute for the owned automobile or trailer whenwithdrawn from normal use f of its breakdown, repair, servicing, loss or destruction;

"**non-owned automobile**" means an automobile or trailer not owned by or fu for the regular use of either the named insured or any relative, other than a ter substitute automobile.

"**private passenger automobile**" means a four wheel private passenger, station or jeep type automobile;

"**farm automobile**" means an automobile of the truck type with a load cap fifteen hundred pounds or less not used for business or commercial purpose than farming;

"**utility automobile**" means an automobile, other than a farm automobile, with capacity of fifteen hundred pounds or less of the pick-up body, sedan delivery c truck type not used for business or commercial purposes;

"**trailer**" means a trailer designed for use with a private passenger automobile being used for business or commercial purposes with other than a private pas farm or utility automobile, or a farm wagon or farm implement while used with automobile;

"**automobile business**" means the business or occupation of selling, repairing, ing, storing or parking automobiles;

"**use**" of an automobile includes the loading and unloading thereof.

"**war**" means war, whether or not declared, civil war, insurrection, rebellion c lution, or any act or condition incident to any of the foregoing.

Exclusions. This policy does not apply under Part I:

(a) to any automobile while used as a public or livery conveyance, but this e does not apply to the named insured with respect to bodily injury or damage which results from the named insured's occupancy of a non-owne mobile other than as the operator thereof;

(b) to bodily injury or property damage caused intentionally by or at the dire the insured;

) to bodily injury or property damage with respect to which an insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability;

) to bodily injury or property damage arising out of the operation of farm machinery;

) to bodily injury to any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured;

to bodily injury to any fellow employee of the insured injured in the course of his employment if such injury arises out of the use of an automobile in the business of his employer, but this exclusion does not apply to the named insured with respect to injury sustained by any such fellow employee;

to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which the named insured or such resident is a partner, or any partner, agent or employee of the named insured, such resident or partnership;

to a non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in (1) the automobile business of the insured or of any other person or organization, (2) any other business or occupation of the insured, but this exclusion (b) (2) does not apply to a private passenger automobile operated or occupied by the named insured or by his private chauffeur or domestic servant or a trailer used therewith or with an owned automobile;

to injury to or destruction of (1) property owned or transported by the insured or (2) property rented to or in charge of the insured other than a residence or private garage;

to the ownership, maintenance, operation, use, loading or unloading of an automobile ownership of which is acquired by the named insured during the policy period or any temporary substitute automobile therefor, if the named insured has purchased other automobile liability insurance applicable to such automob which a specific premium charge has been made.

Financial Responsibility Laws. When this policy is certified as proof of financial r sibility for the future under the provisions of any motor vehicle financial respon law, such insurance as is afforded by this policy for bodily injury liability or fo erty damage liability shall comply with the provisions of such law to the extent coverage and limits of liability required by such law, but in no event in excess limits of liability stated in this policy. The insured agrees to reimburse the co for any payments made by the company which it would not have been obliga make under the terms of this policy except the agreement contained i paragraph.

Limits of Liability. The limit of bodily injury liability stated in the declaratic applicable to "each person" is the limit of the company's liability for all dan including damages for care and loss of services, arising out of bodily injury sus by one person as the result of any one occurrence; the limit of such liability in the declarations as applicable to "each occurrence" is, subject to the above sion respecting each person, the total limit of the company's liability for all such ages arising out of bodily injury sustained by two or more persons as the res any one occurrence.

The limit of property damage liability stated in the declarations as applica "each occurrence" is the total limit of the company's liability for all damages out of or injury to or destruction of all property of one or more persons or org tions, including the loss of use thereof, as the result of any one occurrence.

Other Insurance. If the insured has other insurance against a loss covered by of this policy the company shall not be liable under this policy for a greater prop of such loss than the applicable limit of liability stated in the declarations be the total applicable limit of liability of all valid and collectible insurance against loss, provided, however, the insurance with respect to a temporary substitute mobile or non-owned automobile shall be excess insurance over any other val collectible insurance.

PART II — PERSONAL INJURY PROTECTION
SECTION I

Company agrees with the named insured, subject to all of the provisions in this orsement and to all of the provisions of the policy except as modified herein, as ows:

CTION I

SONAL INJURY PROTECTION COVERAGE

Company will pay personal injury protection benefits to or on behalf of each eligible red person for:

a) medical expenses,
b) work loss,
c) funeral expenses, and
d) survivor loss

respect to bodily injury sustained by an eligible injured person caused by an ident involving the use of a motor vehicle as a motor vehicle.

usions

coverage does not apply:

to bodily injury sustained by any person while occupying a motor vehicle which is owned by the named insured and which is not an insured motor vehicle;

to bodily injury sustained by the named insured or any relative while occupying a motor vehicle which is owned by a relative and for which the security required by the Utah Automobile No-Fault Insurance Act is not in effect;

to bodily 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;

o bodily injury sustained by any person injured while occupying or, while a pedestrian through the use of any motor vehicle, other than the insured motor vehicle, or which the security required under the Utah Automobile No-Fault Insurance Act s in effect;

o bodily injury sustained by any person, if such person's conduct contributed to is injury under either of the following circumstances:

1) causing injury to himself intentionally, or
2) while committing a felony;

o bodily injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

o bodily injury due to war, whether or not decl[illegible], civil war, insurrection, rebellion r revolution, or to any act or condition incider[illegible]ny of the foregoing;

o bodily injury resulting from the radioactive, toxic, explosive or other hazardous properties of nuclear material.

Policy Period; Territory

This coverage applies only to accidents which occur during the policy period and v the United States of America, its territories or possessions, or Canada.

Limits of Liability

Regardless of the number of persons insured, policies or bonds applicable, claims r or insured motor vehicles to which this coverage applies, the Company's liabilit personal injury protection benefits with respect to bodily injury sustained by any eligible injured person in any one motor vehicle accident, is limited as follows:

1. the maximum amount payable for medical expenses shall not exceed $2,000;
2. the maximum amount payable for work loss is
   (a) eighty five percent of any loss of gross income and earning capacity, n exceed the total of $150 per week;
   (b) Not exceeding $12.00 per day for services actually rendered or expenses rea ably incurred for services that, but for the injury the injured person would performed for his household.
3. the maximum amount payable for funeral expenses shall not exceed $1,000;
4. the amount payable for survivor loss is $2,000 and is payable only to na persons who are the eligible injured person's heirs;
5. any amount payable by the Company under the terms of this coverage sha reduced by the amount paid, payable, or required to be provided on accou such bodily injury
   (a) under any workmen's compensation plan or any similar statutory plan, than Utah's Workmen's Compensation Plan.
   (b) by the United States or any of its agencies because of his or her bein active duty in the military services.
   (c) under any applicable deductible set forth in this endorsement or in the p to which it is attached.

Conditions

A. Action Against Company. No action shall lie against the Company unless as a cond precedent thereto, there shall have been full compliance with all the terms o coverage.

B. Notice. In the event of an accident, written notice containing particulars suffi to identify the eligible injured person, and also reasonably obtainable inform respecting the time, place and circumstances of the accident shall be given on behalf of each eligible injured person to the Company or any of its authc agents as soon as practicable. If any eligible injured person, his legal represent or his survivors shall institute legal action to recover damages for bodily injury ag a person or organization who is or may be liable in tort therefor, a copy o summons and complaint or other process served in connection with such legal a shall be forwarded as soon as practicable to the Company by such eligible in person, his legal representative, or his survivors.

C. Medical Reports; Proof of Claim. As soon as practicable the eligible injured p or someone on his behalf shall give to the Company written proof of claim, oath if required, including full particulars of the nature and extent of the inj and treatment receiv[illegible]d contemplated, and such other information as may the Company in deter[illegible]ig the amount due and payable. The

(a) the named insured or any relative who [illegible]s bodily injury caused by an accident involving the use of any motor vehi[illegible],
(b) any other person who sustains bodily injury caused by an accident while
(1) occupying the insured motor vehicle with the consent of the insured or
(2) occupying any other motor vehicle, other than a public or livery conveyance, operated by the named insured or a relative, or
(3) a pedestrian if the accident involves the use of the insured motor vehicle.

"funeral expenses" means funeral, burial or cremation expenses incurred;
"insured" means the named insured, the spouse or other relative of the named insured who resides in the same household as the named insured, including those who usually make their home in the same household but temporarily live elsewhere, or any person using the described motor vehicle with the permission, either expressed or implied, of the owner.
"insured motor vehicle" means a motor vehicle with respect to which
(a) the bodily injury liability insurance of the policy applies and for which a specific premium is charged, and
(b) the named insured is required to maintain security under the provisions of the Utah Automobile No-Fault Insurance Act;
"medical expenses" means the reasonable expenses incurred for necessary medical, surgical, x-ray, dental and rehabilitation services, including prosthetic devices, necessary ambulance, hospital, and nursing services, and any nonmedical remedial care and treatment rendered in accordance with a recognized method of healing; it does not include expenses in excess of those for a semi-private room, unless more intensive care is medically required.
"motor vehicle" means any vehicle of a kind required to be registered with the Division of Motor Vehicles of the Utah State Tax Commission under Title 41 1-19, Utah Code Annotated 1953 but excluding motorcycles;
"named insured" means the person or organization named in the declarations;
"occupying" means being in or upon a motor vehicle as a passenger or operator or engaged in the immediate acts of entering, boarding or alighting from a motor vehicle;
"pedestrian" means any person not occupying or riding upon a motor vehicle, other than any person occupying or riding upon a motorcycle.
"relative" means a spouse or any other person related to the named insured by blood, marriage or adoption (including a ward or foster child) who is a resident of the same household as the named insured, or who usually makes his home in the same household but temporarily lives elsewhere;
"survivor loss" means compensation on account of the death of the eligible injured person;
"work loss" means (a) loss of income and loss of earning capacity by the eligible injured person during his lifetime from inability to work during a period commencing three days after the date of the bodily injury and continuing for a maximum of 52 consecutive weeks thereafter, provided that if such eligible injured person's inability to work shall so continue for in excess of a total of two consecutive weeks after the date of the bodily injury, this three day elimination period shall not be applicable; and (b) a special damages allowance for services actually rendered or expenses reasonably incurred for services that, but for the injury, the injured person would have performed for his household commencing not later than three days after the date of the injury and continuing for a maximum of 365 days thereafter, but if the person's inability to perform these services shall so continue for in excess of a total of fourteen days after the date of injury, this three-day elimination period shall not be applicable.

[illegible]s and do whatever else is necessary to secure
[illegible]rights. Such person s[illegible]hing after loss to prejudice such rights.
E. Reimbursement and [illegible] Agreement. In the event of any payment to any p
under this coverage:
1. the Company shall be entitled to the extent of such payment to the pro
of any settlement or judgment that may result from the exercise of any
of recovery of such person against any person or organization legally respon
for the bodily injury because of which such payment is made; and the Com
shall have a lien to the extent of such payment, notice of which may be
to the person or organization causing such bodily injury, his agent, his in
or a court having jurisdiction in the matter;
2. such person shall hold in trust for the benefit of the Company all rights of rec
which he shall have against such other person or organization because of
bodily injury;
3. such person shall do whatever is proper to secure and shall do nothing
loss to prejudice such rights;
4. such person shall execute and deliver to the Company instruments and p
as may be appropriate to secure the rights and obligations of such perso
the Company established by this provision.
F. Non-Duplication of Benefits; Other Insurance. No eligible injured person shall re
duplicate benefits for the same elements of loss under this or any similar insur
In the event that an eligible injured person who is a named insured, a rel
or who is injured in an accident involving the use of an insured motor vehicl
other similar insurance available and applicable to the accident, the max
recovery under all such insurance shall not exceed the amount which would
been payable under the provisions of the insurance providing the highest dollar
and the Company shall not be liable for a greater proportion of any loss to
this coverage applies than the limit of liability hereunder bears to the sum o
applicable limits of liability of this coverage and such other insurance. In the
that an eligible injured person, other than a named insured, relative, or a p
who is injured in an accident involving the use of an insured motor vehicle
other similar insurance available and applicable to the accident, the coverage pro
under this endorsement shall be excess over such other insurance.

SECTION II

In consideration of the coverage afforded under Section I and the adjustment of ad
ble rates:
(a) any amount payable under the Uninsured Motorists Coverage shall be red
by the amount of any personal injury protection benefits paid or payable
this or any other automobile insurance policy because of bodily injury sust
by an eligible injured person.

SECTION III

The premium for the policy is based on rates which have been established in rel
upon the limitations on the right to recover for damages imposed by the provi
of the Utah Automobile No-Fault Insurance Act. In the event a court of compe
jurisdiction declares, or enters a judgment the effect of which is to render, the provi
of such act invalid or unenforceable in whole or in part, the Company shall have
right to recompute the premium payable for the policy and the provisions of
endorsement shall be voidable or subject to amendment at the option of the Compa

PART III – PHYSICAL DAMAGE

Coverage D (1) Comprehensive (excluding Collision); (2) Personal Effects.
(1) To pay for loss caused other than by collision to the owned automobile or to a non-owned automobile. For the purpose of this coverage, breakage of glass and loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion, or colliding with a bird or animal, shall not be deemed to be loss caused by collision.
(2) To pay for loss caused by fire or lightning to robes, wearing apparel and other personal effects which are the property of the named insured or a relative, while such effects are in or upon the owned automobile.

Coverage E—Collision. To pay for loss caused by collision to the owned automobile or to a non-owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto. The deductible amount shall not apply to loss caused by a collision with another automobile insured by the company.

Coverage F—Fire, Lightning and Transportation. To pay for loss to the owned automobile or a non-owned automobile, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported.

Coverage G—Theft. To pay for loss to the owned automobile or to a non-owned automobile caused by theft or larceny.

Coverage H—Combined Additional Coverage. To pay for loss to the owned automobile or a non-owned automobile caused by windstorm, hail, earthquake, explosion, riot or civil commotion, or the forced landing or falling of any aircraft or its parts or equipment, flood or rising waters, malicious mischief or vandalism, external discharge or leakage of water except loss resulting from rain, snow or sleet whether or not wind-driven; provided, with respect to each automobile $25 shall be deducted from each loss caused by malicious mischief or vandalism.
Coverage I—Towing and Labor Costs. To pay for towing and labor costs necessitated by the disablement of the owned automobile or of any non-owned automobile, provided the labor is performed at the place of disablement.
Supplementary Payments. In addition to the applicable limit of liability:
(a) to reimburse the insured for transportation expenses incurred during the period commencing 48 hours after a theft covered by this policy of the entire automobile has been reported to the company and the police, and terminating when the automobile is returned to use or the company pays for the loss; provided that the company shall not be obligated to pay aggregate expenses in excess of $10 per day or totalling more than $300.
(b) to pay general average and salvage charges for which the insured becomes legally liable, as to the automobile being transported.
Definitions. The definitions of "named insured", "relative", "temporary substitute automobile", "private passenger automobile", "farm automobile", "utility automobile", "automobile business", "war", and "owned automobile" in Part I apply to Part III, but "owned automobile" does not include, under Part III, (1) a trailer owned by the named insured on the effective date of this policy and not described herein, or (2) a trailer ownership of which is acquired during the policy period

"insured" means (a) with respect to an owned automobile, (1) the named insu
and (2) any person or organization (other than a person or organization emplo
or otherwise engaged in the automobile business or as a carrier or other p
for hire) maintaining, using or having custody of said automobile with the permis
of the named insured and within the scope of such permission; (b) with respec
a non-owned automobile, the named insured and any relative while using such
mobile, provided his actual operation or (if he is not operating) the other a
use thereof is with the permission, or reasonably believed to be with the
mission, of the owner and is within the scope of such permission;
"non-owned automobile" means a private passenger automobile or trailer not ow
by or furnished for the regular use of either the named insured or any rela
other than a temporary substitute automobile, while said automobile or trailer
the possession or custody of the insured or is being operated by him;
"loss" means direct and accidental loss of or damage to (a) the automobile, in
ing its equipment, or (b) other insured property;

"collision" means collision of an automobile covered by this policy with an
object or with a vehicle to which it is attached or by upset of such automobil
"trailer" means a trailer designed for use with a private passenger automobile,
being used for business or commercial purposes with other than a private passe
farm or utility automobile, and if not a home, office, store, display or passenger tr
Exclusions. This policy does not apply under Part III:
(a) to any automobile while used as a public or livery conveyance;
(b) to loss due to war;
(c) to loss to a non-owned automobile arising out of its use by the insured
he is employed or otherwise engaged in the automobile business;
(d) to loss to a private passenger, farm or utility automobile or trailer owned b
named insured and not described in this policy or to any temporary substi
automobile therefor, if the insured has other valid and collectible insu
against such loss;
(e) to damage which is due and confined to wear and tear, freezing, mechanic
electrical breakdown or failure, unless such damage results from a theft co
by this policy;
(f) to tires, unless damaged by fire, malicious mischief or vandalism, or stol
unless the loss be coincident with and from the same cause as other loss co
by this policy;
(g) to loss due to radioactive contamination;
(h) under Coverage E, to breakage of glass if insurance with respect to such bre
is otherwise afforded.
Limit of Liability. The limit of the company's liability for loss shall not e
the actual cash value of the property, or if the loss is of a part thereo
actual cash value of such part, at time of loss, nor what it would then co
repair or replace the property or such part thereof with other of like kind
quality, nor, with respect to an owned automobile described in this policy
applicable limit of liability stated in the declarations; provided, however, the
of the company's liability (a) for loss to personal effects arising out of any one o
rence is $100, and (b) for loss to any trailer not owned by the named insured is
Other Insurance. If the insured has other insurance against a loss covered by
III of this policy, the company shall not be liable under this policy for a gr

ss the company insures all private passenger, farm and utility automobiles and
ers owned by the named insured on the date of such acquisition and the
ed insured notifies the company during the policy period or within 30 days
the date of such acquisition of his election to make this and no other policy
ed by the company applicable to such trailer.

proportion of such loss than the applicable limit of liability of this policy be
the total applicable limit of liability of all valid and collectible insurance a
such loss; provided, however, the insurance with respect to a temporary sub
automobile or non-owned automobile shall be excess insurance over any othe
and collectible insurance.

PART IV – PROTECTION AGAINST UNINSURED MOTORISTS

rage I—Uninsured Motorists (Damages for Bodily Injury). To pay all sums which
nsured or his legal representative shall be legally entitled to recover as damages
the owner or operator of an uninsured automobile because of bodily injury, sick-
or disease, including death resulting therefrom, hereinafter called "bodily
y," sustained by the insured, caused by accident and arising out of the owner-
maintenance or use of such uninsured automobile; provided, for the purposes
is coverage, determination as to whether the insured or such representative is
ly entitled to recover such damages, and if so the amount thereof, shall be
by agreement between the insured or such representative and the company or,
ey fail to agree, by arbitration.

judgment against any person or organization alleged to be legally responsible
he bodily injury shall be conclusive, as between the insured and the company,
e issues of liability of such person or organization or of the amount of dam-
to which the insured is legally entitled unless such judgment is entered pur-
to an action prosecuted by the insured with the written consent of the company.
itions. The definitions under Part I, except the definition of "insured," apply
rt IV, and under Part IV:

red" means,
e named insured and any relative;
y other person while occupying an insured automobile; and
y person, with respect to damages he is entitled to recover because of bodily
to which this Part applies sustained by an insured under (a) or (b) above.
nsurance afforded under Part IV applies separately to each insured, but the
ion herein of more than one insured shall not operate to increase the limits of
mpany's liability.

[redacted] in the policy for which a specific premium charge has
ther coverage is afforded.

a private passenger, farm or utility automobile, ownership of which is acquired
e named insured during the policy period, provided
replaces an insured automobile as defined in (a) above, or
e company insures under this coverage all private passenger, farm and utility
tomobiles owned by the named insured on the date of such acquisition and the
med insured notifies the company during the policy period or within 30 days
ter the date of such acquisition of his election to make the Liability and Unin-
red Motorist Coverages under this and no other policy issued by the company
plicable to such automobile.
temporary substitute automobile for an insured automobile as defined in (a) or
ove, and

(d) a non-owned automobile while being operated by the named insured; and the
"insured automobile" includes a trailer while being used with an automobile desc
in (a), (b), (c) or (d) above, but shall not include:
(1) any automobile or trailer owned by a resident of the same household a
named insured,
(2) any automobile while used as a public or livery conveyance, or
(3) any automobile while being used without the permission of the owner.
"uninsured automobile" includes a trailer of any type and means:
(a) an automobile or trailer with respect to the ownership, maintenance or u
which there is, in at least the amounts specified by the financial responsibi
of the state in which the insured automobile is principally garaged, no bodily
liability bond or insurance policy applicable at the time of the accident with re
to any person or organization legally responsible for the use of such automob
with respect to which there is a bodily injury liability bond or insurance policy
cable at the time of the accident but the company writing the same denies cov
thereunder, or
(b) a hit-and-run automobile;
but the term "uninsured automobile" shall not include:
(1) an insured automobile or an automobile furnished for the regular use o
named insured or a relative,
(2) an automobile or trailer owned or operated by a self-insurer within the meani
any motor vehicle financial responsibility law, motor carrier law or any simila
(3) an automobile or trailer owned by the United States of America, Canada, a
a political subdivision of any such government or an agency of any of the
going,
(4) a land motor vehicle or trailer if operated on rails or crawler-treads or
located for use as a residence or premises and not as a vehicle, or
(5) a farm type tractor or equipment designed for use principally off public r
except while actually upon public roads.
"hit-and-run automobile" means an automobile which causes bodily injury to a
sured arising out of physical contact of such automobile with the insured or wi
automobile which the insured is occupying at the time of the accident, provide
there cannot be ascertained the identity of either the operator or the owner of
"hit-and-run automobile"; (b) the insured or someone on his behalf shall have re
ed the accident within 24 hours to a police, peace or judicial officer or to the
missioner of Motor Vehicles, and shall have filed with the company within 30
thereafter a statement under oath that the insured or his legal representative h
cause or causes of action arising out of such accident for damages against a pe
or persons whose identity is unascertainable, and setting forth the facts in suc
thereof; and (c) at the company's request, the insured or his legal represent
makes available for inspection the automobile which the insured was occupyin
the time of the accident.

ying" means in or upon or entering into or alighting from.
" includes the District of Columbia, a territory or possession of the United
and a province of Canada.

ions. This policy does not apply under Part IV:
bodily injury to an insured while occupying an automobile (other than an i
omobile) owned by the named insured or a relative, or through being s
such an automobile;
bodily injury to an insured with respect to [redacted] his legal repre-
ntative or any person entitled to payment under this coverage shall, without
tten consent of the company, make any settlement with any person or organ-
ion who may be legally liable therefor;
is to inure directly or indirectly to the benefit of any workmen's compensation or
ability benefits carrier or any person or organization qualifying as a self-insurer
der any workmen's compensation or disability benefits law or any similar law.
of Liability.
limit of liability for uninsured motorists coverage stated in the declarations as
ble to "each person" is the limit of the company's liability for all damages,
g damages for care or loss of services, because of bodily injury sustained by
rson as the result of any one accident and, subject to the above provision
ing each person, the limit of liability stated in the declarations as applicable
n accident" is the total limit of the company's liability for all damages, includ-
nages for care or loss of services, because of bodily injury sustained by two or
ersons as the result of any one accident.
amount payable under the terms of this Part because of bodily injury sustained
ccident by a person who is an insured under this Part shall be reduced by
sums paid on account of such bodily injury by or on behalf of (i) the owner or
rator of the uninsured automobile and (ii) any other person or organization
tly or severally liable together with such owner or operator for such bodily
ry including all sums paid under Coverage A, and
amount paid and the present value of all amounts payable on account of such
ily injury under any workmen's compensation law, disability benefits law or
similar law.
payment made under this Part to or for any insured shall be applied in reduc-
the amount of damages which he may be entitled to recover from any person
under Coverage A.
company shall not be obligated to pay under this coverage that part of the
s which the insured may be entitled to recover from the owner or operator of
sured automobile which represents expenses for medical services paid or pay-
der Part II.

Other Insurance. With respect to bodily injury to an insured while occupying an au
mobile not owned by the named insured, the insurance under Part IV shall apply o
as excess insurance over any other similar insurance available to such insured a
applicable to such automobile as primary insurance, and this insurance shall th
apply only in the amount by which the limit of liability for this coverage exceeds t
applicable limit of liability of such other insurance.
Except as provided in the foregoing paragraph, if the insured has other simi
insurance available to him and applicable to the accident, the damages shall
deemed not to exceed the higher of the applicable limits of liability of this insurar
and such other insurance, and the company shall not be liable for a greater prop
tion of any loss to which this coverage applies than the limit of liability hereunc
bears to the sum of the applicable limits of liability of this insurance and su
other insurance.
Arbitration. If any person making claim hereunder and the company do not agree th
such person is legally entitled to recover damages from the owner or operator of
uninsured automobile because of bodily injury to the insured, or do not agree as
the amount of payment which may be owing under this Part, then, upon writt
demand of either, the matter or matters upon which such person and the company
not agree shall be settled by arbitration in accordance with the rules of the Americ
Arbitration Association, and judgment upon the award rendered by the arbitrators m
be entered in any court having jurisdiction thereof. Such person and the compa
each agree to consider itself bound and to be bound by any award made by the ar
trators pursuant to this Part.
Trust Agreement. In the event of payment to any person under this Part:
(a) the company shall be entitled to the extent of such payment to the proceeds of a
settlement or judgment that may result from the exercise of any rights of recovery
such person against any person or organization legally responsible for the bod
injury because of which such payment is made;
(b) such person shall hold in trust for the benefit of the company all rights of recov
which he shall have against such other person or organization because of the damag
which are the subject of claim made under this Part;
(c) such person shall do whatever is proper to secure and shall do nothing after lo
to prejudice such rights;
(d) if requested in writing by the company, such person shall take, through any rep
sentative designated by the company, such action as may be necessary or appropri
to recover such payment as damages from such other person or organization, su
action to be taken in the name of such person; in the event of a recovery, the compa
shall be reimbursed out of such recovery for expenses, costs and attorneys' fe
incurred by it in connection therewith;
(e) such person shall execute and deliver to the company such instruments and

unless otherwise noted, conditions apply to all Parts.

1. Policy Period, Territory. This policy applies o. accidents, occurrences and loss during the policy period while the automobile is within the United States of America, its territories or possessions, or Canada, or is being transported between ports thereof.

2. Premium. If the named insured disposes of, acquires ownership of, or replaces a private passenger, farm or utility automobile or, with respect to Part III, a trailer, any premium adjustment necessary shall be made as of the date of such change in accordance with the manuals in use by the company. The named insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

3. Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

If, before the company makes payment of loss under Part IV, the insured or his legal representative shall institute any legal action for bodily injury against any person or organization legally responsible for the use of an automobile involved in the accident, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the company by the insured or his legal representative.

4. Two or More Automobiles—Parts I, II and III. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each; but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto.

5. Assistance and Cooperation of the Insured—Parts I and III. The insured shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of bodily injury, property damage or loss with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

Part IV. After notice of claim under Part IV the company may require the insured to take such action as may be necessary or appropriate to preserve his right to recover damages from any person or organization alleged to be legally responsible for the bodily injury; and in any action against the company, the company may require the insured to join such person or organization as a party defendant.

6. Action Against Company—Part I. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

Parts II, III and IV. No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy nor, under Part III, until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

7. Medical Reports; Proof and Payment of Claim—Part II. As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

8. Insured's Duties in Event of Loss—Part III. In the event of loss the insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the insured's failure to protect shall not be recoverable under this policy; reasonable expenses incurred in affording such protection shall be deemed incurred at the company's request;

(b) promptly notify the police if your car is stolen;

(c) permit us to inspect and appraise the damaged property before its repair or disposal;

(d) file with the company, within 91 days after loss, his sworn proof of loss in such form and including such information as the company may reasonably require and shall, upon the company's request, exhibit the damaged property and submit to examination under oath.

9. Proof of Claim; Me. Reports—Part IV. As soon as practicable, the in other person making claim hall give to the company written proof of clair oath if required, including full particulars of the nature and extent of the treatment, and other details entering into the determination of the amount The insured and every other person making claim shall submit to examinatio oath by any person named by the company and subscribe the same, as often reasonably be required. Proof of claim shall be made upon forms furnished company unless the company shall have failed to furnish such forms within after receiving notice of claim.

The injured person shall submit to physical examinations by physicians sel the company when and as often as the company may reasonably require and i the event of his incapacity his legal representative, or in the event of his d legal representative or the person or persons entitled to sue thereof, shall up request from the company execute authorization to enable the company to medical reports and copies of records.

10. Appraisal—Part III. If the insured and the company fail to agree as amount of loss, either may, within 60 days after proof of loss is filed, demand praisal of the loss. In such event the insured and the company shall each competent appraiser, and the appraisers shall select a competent and disin umpire. The appraisers shall state separately the actual cash value and the an loss and failing to agree shall submit their differences to the umpire. An a writing of any two shall determine the amount of loss. The insured and the c shall each pay his chosen appraiser and shall bear equally the other expense appraisal and umpire.

The company shall not be held to have waived any of its rights by any act to appraisal.

11. Payment of Loss—Part III. The company may pay for the loss in money repair or replace the damaged or stolen property; or may, at any time before is paid or the property is so replaced, at its expense return any stolen propert named insured, or at its option to the address shown in the declarations, with for any resultant damage thereto; or may take all or such part of the proper agreed or appraised value but there shall be no abandonment to the company. T pany may settle any claim for loss either with the insured or the owner of the p

Part IV. Any amount due is payable (a) to the insured or (b) if the insured be to his parent or guardian, or (c) if the insured be deceased to his surviving otherwise (d) to a person authorized by law to receive such payment or to a legally entitled to recover the damages which the payment represents; provi company may at its option pay any amount due in accordance with division (d).

12. No Benefit to Bailee—Part III. The insurance afforded by this Policy s inure directly or indirectly to the benefit of any carrier or other bailee for hi for loss to the automobile.

13. Subrogation—Parts I and III. In the event of any payment under this po company shall be subrogated to all the insured's rights of recovery thereto any person or organization and the insured shall execute and deliver instrume papers and do whatever else is necessary to secure such rights. The insured nothing after loss to prejudice such rights.

14. Changes. Notice to any agent or knowledge possessed by any agent or other person shall not effect a waiver or a change in any part of this policy the company from asserting any right under the terms of this policy; nor s terms of this policy be waived or changed, except by endorsement issued to part of this policy, signed by a duly authorized representative of the company.

15. Assignment. Assignment of interest under this policy shall not bind the c until its consent is endorsed hereon; if, however, the insured named in Item declarations, or his spouse if a resident of the same household, shall die, thi shall cover (1) the survivor as named insured, (2) his legal representative as insured but only while acting within the scope of his duties as such, (3) any having proper temporary custody of an owned automobile, as an insured, u appointment and qualification of such legal representative, and (4) under di of Part II any person who was a relative at the time of such death.

16. Cancelation. This policy may be canceled by the insured named in Item declarations by surrender thereof to the company or any of its authorized ag by mailing to the company written notice stating when thereafter the cancelati be effective. This policy may be canceled by the company by mailing to the named in Item 1 of the declarations at the address shown in this policy written stating when not less than ten days thereafter such cancelation shall be effecti mailing of notice as aforesaid shall be sufficient proof of notice. The time of render or the effective date and hour of cancelation stated in the notice shall the end of the policy period. Delivery of such written notice either by such or by the company shall be equivalent to mailing.

If such insured cancels, earned premium shall be computed in accordance v customary short rate table and procedure. If the company cancels, earned p shall be computed pro rata. Premium adjustment may be made either at the ti celation is effected or as soon as practicable after cancelation becomes effect payment or tender of unearned premium is not a condition of cancelation.

17. Declarations. By acceptance of this policy, the insured named in Item 1 declarations agrees that the statements in the declarations are his agreeme representations, that this policy is issued in reliance upon the truth of such sentations and that this policy embodies all agreements existing between him the company or any of its agents relating to this insurance.

In Witness Whereof, the company has caused this policy to be signed by its president and secretary, but this policy shall not be valid unless completed by the atta hereto of a declarations page designated as Part Two and countersigned on the aforesaid declarations page by a duly authorized representative of the company.

The insured is hereby notified that by virtue of this policy he is a member of the Bear River Mutual Insurance Company and that the annual meeting of the company at the home office in Salt Lake City, Utah, on the first Saturday in March of each year, at 11:00 a.m. for the purpose of transacting the general business of the company the election of directors. As a policyholder you are entitled to vote in person at the meeting or by proxy. This notice shall be deemed full notice of the annual mee

Rev. 1

Secretary

Ernest D. Wright

President

Exhibit 4

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CLARENCE H. SCOW, Plaintiff, -vs- FARMERS INSURANCE COMPANY, a California corporation, d/b/a FARMERS INSURANCE GROUP, Defendant.	O R D E R Civil No: C-80-0121

Plaintiff's motion for partial summary judgment and defendant's motion for summary judgment were orally argued on August 18, 1980. Plaintiff was represented by Robert C. Fillerup. Defendant was represented by Don J. Hanson. Following the hearing, the court took the matter under advisement and has since reviewed the memoranda of counsel and various of the authorities cited. Based on the foregoing, the court renders the following decision.

The facts of this case are not in dispute. On March 1, 1976, plaintiff purchased an automobile insurance policy from defendant for a 1970 Ford truck. The expiration date of the policy was December 24, 1976. On March 22, 1976, plaintiff purchased another automobile insurance policy from defendant for a 1972 Chevrolet automobile. The expiration date of this second policy was June 30, 1976. Both policies provided personal injury protection (no-fault coverage) and uninsured motorist coverage.

On April 20, 1976, an automobile driven by Wade J. Sellers collided with plaintiff who was riding a motorcycle. Plaintiff owned this motorcycle but had not purchased a separate insurance policy for it.

Plaintiff brought a suit for personal injuries against Wade Sellers in June, 1976. During the course of that case it was discovered that Sellers was uninsured. After this discovery,

plaintiff contacted Farmers Insurance Company and requested uninsured motorist coverage under his two automobile insurance policies. In addition, plaintiff requested that defendant enter the lawsuit against Sellers to protect its interest. For reasons not material to this decision, defendant denied plaintiff's requests.

Subsequently, plaintiff again made demand upon defendant to provide coverage, including personal injury protection (PIP) payments. Defendant again denied coverage. Following this second denial, a stipulated judgment was entered against Wade J. Sellers in the amount of $30,000.00. A finding of fact was also made that Sellers was an uninsured motorist. Thereafter, plaintiff filed the present action seeking, among other things, PIP payments and uninsured motorist benefits.

[redacted]

> to bodily injury to an insured while occupying an automobile or 2 wheel motor vehicle (other than an insured motor vehicle) owned by a named insured or any relative resident in the same household, or through being struck by such vehicles.

Plaintiff has cited numerous cases for the majority position that this exclusion is void as against public policy. See, for example, Federated American Insurance Co. v. Raynes, 88 Wash. 2d 439, 563 P.2d 815 (1977); Chavez v. State Farm Mutual Automobile Insurance Co., 87 N.M. 327, 533 P.2d 100 (1975); State Farm Mutual Automobile Insurance Co. v. Hinkel, 488 P.2d 1151 (Nev. 1971). [redacted]

that the exclusion is void as against public policy, it being in conflict with the Motor Vehicle Safety Responsibility Act, Utah Code Ann. § 41-12-1 et seq., and particularly 41-12-21 which, as material to this case, provides:

> . . . [N]o automobile liability insurance policy insuring against loss resulting from liability imposed by law for bodily injury or death or property damage suffered by any person arising out of the ownership, maintenance or use of a motor vehicle, shall be delivered, issued for delivery, or renewed in this state, . . . unless coverage is provided in such policy or a supplement to it, in limits for bodily injury or death set forth in Section 41-12-5 . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicle and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. . . .

Plaintiff also argues that he is entitled to the maximum uninsured motorist benefits under each of the separate policies issued by defendant. Defendant argues to the contrary and principally relies upon Condition 8, contained in each policy, which provides:

> With respect to any occurrence, accident or loss to which this and any other insurance policy or policies issued to the insured by the Company also apply, no payment shall be made hereunder which, when added to any amount paid or payable under such other insurance policy or policies, would result in a total payment to the insured or other person in excess of the highest applicable limits of liability under any one such policy.

Plaintiff acknowledges that the wording of this condition operates to limit his recovery but contends that it violates the uninsured motorist statute. While an emerging majority view agrees with plaintiff's position and allows stacking of insurance policies, this court is bound to follow Utah law in this case and therefore holds that stacking is impermissible. Martin v. Christensen, 22 Utah 2d 415, 454 P.2d 294 (1969).

The third issue to be resolved is whether plaintiff is entitled to no-fault benefits from the defendant. Section

31-41-6 of the Utah Automobile No-Fault Insurance Act provides:

> (1) Every insurance policy or other security complying with the requirements of subsection (1) of Section 31-41-5 shall provide personal injury protection providing for payments to the insured and to all other persons suffering personal injury arising out of an accident involving <u>any motor vehicle</u> . . . (emphasis added)

Under § 31-41-10(a)(i), an insurer may exclude benefits for "injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy . . . " "Motor vehicle" is defined in § 31-41-3 as "any vehicle of a kind to be registered under Title 41, but excluding, however motorcycles."

This review of the Act reveals that motorcycles have been excluded from the definition of motor vehicle. As a result, the exclusion provided in § 31-41-10 does not apply to plaintiff because he was not occupying "another motor vehicle" owned by him at the time of the accident. However, the accident in which plaintiff was injured, was one involving "any motor vehicle" as required by Utah Code Ann. § 31-41-6 (i.e. the automobile driven by Sellers). A similar analysis of the PIP endorsement of the policy issued by defendant reaches the same result. The court therefore holds that the exclusions set forth at Utah Code Ann. § 31-41-10(a)(i) and in the PIP endorsement are not applicable and that plaintiff is entitled to coverage for no-fault benefits.

Accordingly,

IT IS ORDERED that plaintiff is entitled to uninsured motorist benefits under the policies issued by defendant up to $15,000.00.

IT IS FURTHER ORDERED that plaintiff is entitled to coverage for no-fault benefits under the policies issued by defendant.

All other issues not disposed of by this order are

reserved for trial.

Dated this 20 day of August, 1980.

David K. Winder
United States District Court

Mailed a copy of the foregoing Order to the following named counsel this 21st day of August, 1980.

Robert C. Fillerup, Esq.
1325 South 800 East
Suite 305
Orem, Utah 84057

Don J. Hanson, Esq.
520 Continental Bank Building
Salt Lake City, Utah 84101

Secretary

ATTEST: A TRUE COPY
PAUL L. BADGER, CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
BY
DEPUTY CLERK

Exhibit 5

be transferred from the county where filed to Maricopa County. A.R.S. § 12–824 (renumbered as A.R.S. § 12–822 by Laws 1984, Ch. 285, § 7); State v. Superior Court in and for the County of Pima, 120 Ariz. 273, 585 P.2d 882 (1978). The argument is advanced that a plaintiff need not wait for a demand by the Attorney General but should be able, in the first instance, to file the action against the state in Maricopa County. If the action against the state was properly brought in Maricopa County, pursuant to A.R.S. § 12–401(7) it was proper for the action to be maintained against the other defendants in Maricopa County.

The defendants contend that the state was never a proper party to this action because the state was immune from liability pursuant to A.R.S. § 26–314. Since the state was never a proper party the residence of the other defendants was the only proper consideration. *See Turner v. Superior Court*, 3 Ariz.App. 414, 415 P.2d 129 (1966).

The arguments raised by the parties need not be resolved in this action. The relevant consideration for the trial judge was whether there was good cause to set aside the dismissal and allow the plaintiff GRL additional time to pay the required fee. *See Lemons*, 141 Ariz. at 505–06, 687 P.2d at 1260–61. The record shows that there was not a specific finding that the action was filed in the wrong county. The Maricopa County trial judge referred to A.R.S. § 12–407 in his order granting a change of venue, but that section is not limited to changes of venue for filing in the wrong county. We are not certain what the trial judge had in mind in granting the change of venue. Under the state of the record we believe that there was sufficient confusion to justify the superior court judge's decision to allow the plaintiff additional time to file the required fee.

While we may question the judgment of counsel in allowing this case to be placed in jeopardy over the payment of a twenty dollar fee, we find no abuse of discretion in the actions of the trial judge.

The opinion of the Court of Appeals is vacated, and the relief sought by petitioners in their special action is denied.

GORDON, V.C.J., and HAYS, JAMES DUKE CAMERON and FELDMAN, JJ., concur.

144 Ariz. 291

Jack CALVERT, Plaintiff/Appellant,

v.

FARMERS INSURANCE COMPANY OF ARIZONA, Defendant/Appellee.

No. 17675–PR.

Supreme Court of Arizona,
In Banc.

March 13, 1985.

Insured brought declaratory judgment action against insurer arising out of his son's death in accident caused by negligence of an uninsured motorist, and following insurer's refusal to pay claim for uninsured motorist benefits under vehicle liability policy. The Superior Court, Pima County, Michael J. Brown, J., granted insurer's motion for summary judgment, and the Court of Appeals, 697 P.2d 707, reversed. On petition for review, the Supreme Court, Gordon, V.C.J., held that exclusion denying coverage to an insured injured by an uninsured motorist while insured is occupying vehicle owned by insured but not listed in policy is invalid as contrary to coverage mandated by statute which controls uninsured motorist protection.

Opinion of Court of Appeals vacated; case reversed and remanded.

1. Statutes ⇐181(1)

Cardinal rule of statutory interpretation is to determine and give effect to legislative intent behind the statute.

2. Statutes ⇐181(2), 184

In determining legislature's intent in enacting statute, Supreme Court will look to policy behind statute and evil which it was designed to remedy, as well as to the words, context, subject matter, and effects and consequences of the statute.

3. Insurance ⇐467.51(1)

Uninsured motorist statute is remedial and therefore should be liberally construed in order to carry out intent of legislature. A.R.S. § 20–259.01.

4. Insurance ⇐467.51(3)

Exclusion denying coverage to an insured injured by an uninsured motorist while insured is occupying vehicle owned by insured but not listed in policy is invalid as contrary to coverage mandated by statute which controls uninsured motorist protection; overruling *Owens v. Allied Mutual Insurance Company*, 15 Ariz.App. 181, 487 P.2d 402, *Chambers v. Owens*, 22 Ariz. App. 175, 525 P.2d 306, and *Rodriguez v. Maryland Indemnity Insurance Company*, 24 Ariz.App. 392, 539 P.2d 196. A.R.S. § 20–259.01.

Miller & Pitt by John L. Tully, Tucson, for plaintiff/appellant.

Chandler, Tullar, Udall & Redhair by D.B. Udall, Tucson, for defendant/appellee.

GORDON, Vice Chief Justice:

Farmers Insurance Company of Arizona (defendant) petitioned this Court for review of the decision of the Court of Appeals, *Calvert v. Farmers Insurance Company of Arizona*, — Ariz. —, 697 P.2d 707 (1984) which struck down an "other vehicle" exclusion clause as violative of the public policy underlying Arizona's Uninsured Motorists Act (hereafter referred to as the "Act" or "Statute"), A.R.S. § 20–259.01. We granted review in this case to settle a conflict in the Court of Appeals decisions concerning the validity of "other vehicle" exclusion clauses in uninsured motorist coverage. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3) and Ariz.R.Civ.App.P. 23.

The facts in this case are not in dispute. On January 3, 1983, Michael Calvert, age 18, while operating a motorcycle was struck and fatally injured by an uninsured motor vehicle. The collision was caused by the negligence of the uninsured motorist. At the time of the accident, Jack Calvert, Michael's father and plaintiff in this case, was the named insured under a motor vehicle liability insurance policy issued by Farmers Insurance Company of Arizona (hereafter referred to as "Farmers").

Subsequent to his son's death, Jack Calvert made a claim upon Farmers for uninsured motorist benefits. Calvert's insurance policy contained $30,000 in uninsured motorist coverage. Part II of the policy states the coverage for uninsured motorist:

> "We will pay *damages* for *bodily injury* which an *insured person* is legally entitled to recover from the owner or operator of an *uninsured motor vehicle.* The *bodily injury* must be caused by *accident* and arise out of the ownership, maintenance or use of the *uninsured motor vehicle.*" (emphasis in original)

Michael Calvert was a resident of his father's household at the time of the accident and consequently an "insured person" under the terms of the Farmers' uninsured motorist coverage:

> "As used in this Part:
>
> "1. *Insured person* means:
>
> "a. You or a *family member.*[1]
>
> "b. Any other person while *occupying your insured car.*
>
> * * *" (emphasis in original.)

Farmers conceded that Michael was an insured under the policy but denied Jack

1. The policy defines "family member" as a person related to [the named insured] by blood, marriage or adoption who is a resident of [named insured] household, including a ward or foster child.

Calvert's claim for uninsured motorist benefits on the basis of an "other vehicle" exclusion clause contained in the uninsured motorist section of the policy, which reads:

> "This coverage does not apply to *bodily injury* sustained by a person:
>
> "1. While *occupying* a *motor vehicle* owned by you or a *family member* for which insurance is not afforded under this policy or through being struck by that *motor vehicle.*" (emphasis in original)

Farmers took the position that the exclusion applied because Michael Calvert sustained his fatal injuries while driving a motorcycle that was owned by either Michael or his father but that was not insured under the policy.

A short time later, Jack Calvert brought a Declaratory Judgment action against Farmers seeking a declaration that the "other vehicle" exclusion clause contained in the uninsured motorist coverage was invalid and unenforceable. The parties filed cross motions for summary judgment. Concluding that the policy did not provide uninsured motorist coverage for the accident in this case, the trial court granted Farmers' motion for summary judgment and denied plaintiff's. The Court of Appeals reversed, holding that the "other vehicle" exclusion clause in the Farmers' insurance policy violated the public policy underlying Arizona's Uninsured Motorist Statute, A.R.S. § 20–259.01.

We agree with the Court of Appeals that the Farmers' "other vehicle" exclusionary provision contravenes the policy underlying our uninsured motorist statute. We vacate the Court of Appeals' opinion, however, to fully explain our reasoning.

The problems caused by the financially irresponsible and uninsured motorist date back to the advent of the mass produced automobile and ultimately prompted our Legislature to enact the Uninsured Motorist Act, A.R.S. § 20–259.01. *See* Austin & Risjord, *The Problem of the Financially Irresponsible Motorist,* 24 U.Kansas City L.Rev. 82 (1955); Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity,* 9 Buffalo L.Rev. 283–320 (1960); Murphy & Netherton, *Public Responsibility and Uninsured Motorist,* 47 Georgetown L.J. 700 (1959); Collins, *Implementation of Public Policy Against the Financially Irresponsible Motorist,* 19 Brooklyn L.Rev. 11 (1952); *see also* A. Widiss, A Guide to Uninsured Motorist Coverage (1969). Consequently, our Uninsured Motorist statute mandates that coverage be provided to insure against bodily injury caused by uninsured motorists:

> "**§ 20–259.01. Motor vehicle liability policy; uninsurance required; underinsurance optional; definitions; subrogation**
>
> "A. No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state, with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided in the policy or supplemental to the policy, in limits for bodily injury or death prescribed in subsection B of this section, but not less than the limits prescribed in § 28–1102, under provisions filed with and approved by the director, for the protection of persons insured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. For the purposes of the coverage provided for pursuant to this section, 'uninsured motor vehicles', subject to the terms and conditions of such coverage, includes any insured motor vehicle if the liability insurer of the vehicle is unable to make payment on the liability of its insured, within the limits of the coverage, because of insolvency."

Since § 20–259.01 controls the uninsured motorist protection mandated in Arizona, to resolve this case we must interpret this

statute and determine whether it authorizes an "other vehicle" exclusion. This is a matter of statutory construction.

[1, 2] The cardinal rule of statutory interpretation is to determine and give effect to the legislative intent behind the statute. *Phoenix Title & Trust Co. v. Burns*, 96 Ariz. 332, 395 P.2d 532 (1964); *Payne v. Knox*, 94 Ariz. 380, 385 P.2d 514 (1963). In determining the Legislature's intent in enacting a statute, this Court will look to the policy behind the statute and the evil which it was designed to remedy. *Cohen v. State*, 121 Ariz. 6, 588 P.2d 299 (1978); *City of Mesa v. Salt River Project Agr. Imp. & Power District*, 92 Ariz. 91, 373 P.2d 722 (1962). Additionally, we will look to the words, context, subject matter, and effects and consequences of the statute. *State ex rel. Flournoy v. Mangum*, 113 Ariz. 151, 548 P.2d 1148 (1976).

[3] Our uninsured motorist statute establishes a public policy that every insured is entitled to recover damages he or she would have been able to recover if the uninsured had maintained a policy of liability insurance in a solvent company. *Transportation Ins. Co. v. Wade*, 106 Ariz. 269, 475 P.2d 253 (1970); *Dairyland Ins. Co. v. Lopez*, 22 Ariz.App. 309, 526 P.2d 1264 (1974). The statute is remedial, and should be liberally construed in order to carry out the intent of the Legislature. *Williams v. Williams*, 23 Ariz.App. 191, 531 P.2d 924 (1975); *Reserve Ins. Co. v. Staats*, 9 Ariz. App. 410, 453 P.2d 239 (1969). The purpose of the statute is to afford protection to victims of financially irresponsible drivers. *Evenchik v. State Farm Ins. Co.*, 139 Ariz. 453, 679 P.2d 99 (App.1984); *see Geyer v. Reserve Ins. Co.*, 8 Ariz.App. 464, 447 P.2d 556 (1968).

[4] We believe that the exclusion provision in this case contravenes the public policy underlying the Uninsured Motorist Act. The Act mandates that every policy issued have at least the minimum limits for uninsured motorist protection. In Arizona, such coverage is not voluntary as in other jurisdictions. Furthermore, the statute does not contain numerous exceptions to coverage as in the uninsured motorist statutes of other jurisdictions.

The only exception to the mandatory requirement of uninsured motorist protection under the Act is contained in A.R.S. § 20-259.01(D), which expressly excludes vehicles "used as public or livery conveyances or rented to others or which are used in the business primarily to transport property or equipment." If the Legislature had intended to include additional exclusions, such as an "other vehicle" exclusion, it would have expressly done so. *Cf. McClellan v. Sentry Indemnity Co.*, 140 Ariz. 558, 683 P.2d 757 (App.1984) (government owned vehicle exclusion).

Consequently, because of the strong public policy mandating coverage for innocent victims from tragic negligent acts of uninsureds, we will not construe the uninsured motorist statute to reduce coverage when it is silent on "other vehicle" exclusions. This conclusion is in accord with the vast majority of jurisdictions that have dealt with this issue. About twenty-six states have held that an "other vehicle" exclusion clause similar to the one herein violates the public policy underlying their respective uninsured motorist statutes. *See Richards v. State Farm Mut. Auto. Ins. Co.*, 122 Wis.2d 172, 361 N.W.2d 680 (1985); *Lindahl v. Howe*, 345 N.W.2d 548 (Iowa 1984); *Harvey v. Travelers Indem. Co.*, 188 Conn. 245, 449 A.2d 157 (1982); *Jacobson v. Implement Dealer Mut. Ins. Co.*, 640 P.2d 908 (Mont.1982); *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 294 N.W.2d 141 (1980); *State Farm Mut. Auto. Ins. Co. v. Williams*, 481 Pa. 130, 392 A.2d 281 (1978); *Kau v. State Farm Mut. Auto. Ins. Co.*, 58 Hawaii 49, 564 P.2d 443 (1977); *Beek v. Ohio Casualty Ins. Co.*, 73 N.J. 185, 373 A.2d 654 (1977), affirming the lower court decision reported at 135 N.J.Super. 1, 342 A.2d 547 (App.Div.1975); *Cothren v. Emcasco Ins. Co.*, 555 P.2d 1037 (Okla.1976); *Chavez v. State Farm Mut. Auto. Ins. Co.*, 87 N.M. 327, 533 P.2d 100 (1975); *Nygaard v. State Farm Mut. Auto. Ins. Co.*, 301 Minn. 10, 221 N.W.2d 151 (1974); *Bell v. State Farm Mut. Auto. Ins. Co.*,

157 W.Va. 623, 207 S.E.2d 147 (1974); *State Farm Auto. Ins. Co. v. Reaves*, 292 Ala. 218, 292 So.2d 95 (1974); *Hogan v. Home Ins. Co.*, 260 S.C. 157, 194 S.E.2d 890 (1973); *Lowery v. State Farm Mut. Auto. Ins. Co.*, 285 So.2d 767 (Miss.1973); *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wash.2d 327, 494 P.2d 479 (1972); *State Farm Mut. Auto. Ins. Co. v. Hinkel*, 87 Nev. 478, 488 P.2d 1151 (1971); *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So.2d 229 (Fla.1971); *Allstate Ins. Co. v. Meeks*, 207 Va. 897, 153 S.E.2d 222 (1967); *Barnett v. Crosby*, 5 Kan.App.2d 98, 612 P.2d 1250 (1980); *Pennsylvania Nat'l Mut. Casualty Ins. Co. v. Gartelman*, 288 Md. 151, 416 A.2d 734 (App.1980); *Otto v. Farmers Ins. Co.*, 558 S.W.2d 713 (Mo.App.1977); *State Farm Mut. Auto. Ins. Co. v. Robertson*, 156 Ind.App. 149, 295 N.E.2d 626 (1973); *Bass v. State Farm Mut. Auto. Ins. Co.*, 128 Ga.App. 285, 196 S.E.2d 485, *aff'd.* 231 Ga. 269, 201 S.E.2d 444 (1973); *Elledge v. Warren*, 263 So.2d 912 (La.App. 1972); *Doxtater v. State Farm Mut. Auto. Ins. Co.*, 8 Ill.App.3d 547, 290 N.E.2d 284 (1972); *Aetna Ins. Co. v. Hurst*, 2 Cal. App.3d 1067, 83 Cal.Rptr. 156 (1969) (The California legislature has since amended the California statute to permit this type of exclusion, *see* Cal.Ins.Code § 11580.2 (West Supp.1984)); *Stephens v. State Farm Mut. Auto. Ins. Co.*, 508 F.2d 1363 (5th Cir. 1975); *see also* A. Widiss, A Guide to Uninsured Motorist Coverage, § 2.9 (1969 & Supp.1981); Annot., 30 A.L.R.4th 172 (1984). We have carefully read these cases, and although the uninsured motorist statutes of the other states are not identical to the Arizona statute, we can find no important distinction among them. We find these cases highly persuasive.

Farmers relies on a Court of Appeals decision, *Owens v. Allied Mutual Insurance Company*, 15 Ariz.App. 181, 487 P.2d 402 (1971), which found an "other vehicle" exclusion clause to be reasonable. We find the reasoning supporting this decision unpersuasive.[2]

First, the three cases relied upon by the court in *Owens* have subsequently been effectively overruled: *Rushing v. Allstate Ins. Co.*, 216 So.2d 875 (La.App.1968) overruled by *Elledge v. Warren, supra; National Union Indem. Co. v. Hodges*, 238 So.2d 673 (Fla.App.1970) overruled by *Mullis v. State Farm Mut. Auto. Ins. Co., supra; McElyea v. Safeway Ins. Co.*, 131 Ill.App.2d 452, 266 N.E.2d 146 (1970) overruled by *Doxtator v. State Farm Mut. Auto. Ins. Co., supra.* These jurisdictions are now aligned with the majority, which consider "other vehicle" exclusion clauses invalid.

Second, the Court of Appeals found "nothing in the statute which prevents an insurer from withholding protection from an insured while he is driving an uninsured vehicle owned by him." We believe, however, that the statute's silence on "other vehicle" exclusions militates against the validity of such an exclusion.

The purpose of our statute is to close the gap in protection under the Safety Responsibility Act, A.R.S. § 28–1101 *et seq.*, by requiring insurance companies issuing automobile liability policies to provide the insured with financial protection against uninsured motorists for bodily injury suffered due to the negligence of such individuals. *Chase v. State Farm Mut. Auto. Ins. Co.*, 131 Ariz. 461, 641 P.2d 1305 (App. 1982); *Balestrieri v. Hartford Acc. & Indem. Ins. Co.*, 22 Ariz.App. 255, 526 P.2d 779 (1974). The statute does not contemplate a piecemeal whittling away at the liability protection for injuries caused by uninsured motorists. *See Touchette v. Northwestern Mut. Ins. Co., supra; Mullis v. State Farm Mut. Auto. Ins. Co., supra; State Farm Mut. Auto. Ins. Co. v. Hinkel, supra; Allstate Ins. Co. v. Meeks, supra.* As noted above, an express provision in § 20–259.01 authorizing "other vehicle" exclusions in uninsured motorist coverage could easily have been incorporated

2. Additionally, Farmers relies on *Chambers v. Owens*, 22 Ariz.App. 175, 525 P.2d 306 (1974) and *Rodriguez v. Maryland Indem. Ins. Co.*, 24 Ariz.App. 392, 539 P.2d 196 (1975) which are the progeny of *Owens* and based on the same reasoning. Our disposal of *Owens* disposes of these two cases also.

into the statute by the Legislature. Thus, we will leave the matter to the Legislature to expressly authorize an "other owned" vehicle exclusion in the statute. *Cf. State Farm Mut. Auto. Ins. Co. v. Hinkel, supra; Aetna Ins. Co. v. Hurst, supra.*[3]

Third, the Court of Appeals concluded that, without the exclusion, an insured would be able to purchase one liability policy on one owned vehicle and claim uninsured motorist protection for himself and others while driving any number of other uninsured automobiles also owned by him. Initially we note that the same argument has been made in other cases and rejected. *See Nygaard v. State Farm Mut. Auto. Ins. Co., supra; Elledge v. Warren, supra; State Farm Mut. Auto. Ins. Co. v. Hinkel, supra. See also* A. Widiss, A Guide to Uninsured Motorist Coverage § 2.9 (1969). The court in *Hinkel*, in construing Nevada's uninsured motorist statute, answered this argument, stating:

> "If our Legislature had intended to prevent an owner of two motor vehicles from paying for insurance on only one and recovering benefits for his injuries sustained while operating the other, it could have followed the lead of the legislatures in some of the other jurisdictions and limited the coverage by providing that N.R.S. 693.115(1) did not apply to bodily injury suffered by the insured while occupying a motor vehicle owned by him, unless the occupied vehicle was an insured motor vehicle. Such an amendment would be the prerogative and responsibility of the legislature and not the function of this court."

87 Nev. at 483, 488 P.2d at 1154.

Furthermore, our Uninsured Motorist Act was created "for the protection of persons," and not for the protection of the insured vehicle. A.R.S. § 20–259.01. *See Harvey v. Travelers Indem. Co., supra; Bradley v. Mid-Century Ins. Co., supra; Otto v. Farmers Ins. Co., supra.* This Court recognized this fact in *Wade*, stating:

> "The Legislature intended the Financial Responsibility Act to protect the general public against the individual, financially irresponsible motorist. On the other hand the Uninsured Motorist law compels the carriers to provide economic *protection for the insured individual* against the financially irresponsible segment of the driving public. The former is for the public in general and the latter for the individuals who have the foresight to protect themselves against the public." (emphasis added)

106 Ariz. at 273; 475 P.2d at 257. There is nothing in our uninsured motorist statute which limits coverage depending on the location or status of the insured. Thus, our uninsured motorist protection is portable. The insured and family members insured are covered not only when occupying an insured vehicle, but also when in another automobile, when on foot,[4] when on a bicycle or when sitting on a porch. *Bradley v. Mid-Century Ins. Co., supra; Mullis v. State Farm Mut. Auto. Ins. Co., supra; Elledge v. Warren, supra; Jacobson v. Implement Dealer Mut. Ins. Co., supra; Richards v. State Farm Mut. Auto. Ins. Co., supra.* Any gaps in uninsured motorist protection dependent on location of the insured should be sanctioned by the Legislature and not by this Court.

Farmers contends that the Legislature has impliedly approved of the judicial interpretation of "other vehicle" exclusions by *Owens* and progeny by reenacting the Uninsured Motorist Act in substantially the same language with knowledge of the holdings of these cases. Farmers cites for this proposition *Cagle v. Butcher*, 118 Ariz. 122, 575 P.2d 321 (1978) and *Jackson v. Northland Construction Co.*, 111 Ariz. 387, 531 P.2d 144 (1975). *Cagle* and *Jackson* state that when a statute construed by

3. The Court of Appeals also noted that the exclusionary clause had been filed with and approved by the Insurance Director pursuant to A.R.S. § 20–259.01. Such acquiescence, however, does not divest this Court of its duty to give the statute its ultimate authoritative interpretation. *See Lindahl v. Howe, supra.*

4. We note that the illustration in the Farmers' policy directly below the heading "Uninsured Motorist Coverage" depicts an injured pedestrian sprawled on the road after being struck by what appears to be a hit and run automobile, an uninsured motor vehicle.

a court of last resort is reenacted in substantially the same terms, the Legislature is presumed to have approved the judicial construction and to have adopted such construction for the reenactment of the statute. *Owens* and progeny, however, were decided by the Court of Appeals, and not the court of last resort in this state, the Arizona Supreme Court. Thus, this principle has no application to the case at bar.[5]

Furthermore, that the Legislature has amended the statute does not mean the Legislature has considered and adopted the court's judicial interpretation concerning the statute. There is no indication of any legislative action concerning other vehicle exclusions. We have searched the general index for the House and Senate for a bill introduced to the Legislature since the enactment of the Uninsured Motorist Act concerning other vehicle exclusions and have found none. *See* General Index: The Journal of the House of Representatives (1965–84); General Index: Journal of the Senate (1965–84); *Cf. Hosogai v. Kadata*, — Ariz. —, (1985) [No. 17665—PR filed February 20, 1985.] We can only infer from the legislative action taken since the inception of the Act that the Legislature has considerable concern regarding the uncompensated injuries inflicted by the uninsured motorist. This inference is compelled by several legislative amendments to § 20–259.01 which effectively expand rather than limit the scope of coverage provided by the Act. *Cf. Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983) (legislative enactment of A.R.S. § 4–244 and of new and stringent laws pertaining to the punishment of drunk drivers shows legislature's concern for damage done by drunk drivers); *Brannigan v. Raybuck*, 136 Ariz. 513, 516, 667 P.2d 213 (1983) (accord). In 1970, the Act was amended to cover insureds injured by motorists whose vehicles were uninsured by reason of insolvency, thus increasing the class of uninsured vehicles. 1970 Ariz.Sess.Laws 195, ch. 80 § 1. In 1972, the Act was amended making uninsured motorist protection mandatory, 1972 Ariz.Sess.Law 1140, ch. 157 § 1, and in 1981, "underinsured motorist" protection was added. 1981 Ariz.Sess.Law 731, ch. 224 § 1. We, therefore, must construe the Act until such a time as the Legislature sees fit to voice an opinion on the subject matter.

We hold that the exclusion denying coverage to an insured injured by an uninsured motorist while the insured is occupying a vehicle owned by the insured but not listed in the policy is invalid as being contrary to the coverage mandated by A.R.S. § 20–259.01. The opinion of the Court of Appeals is vacated. The *Owens*, *Chambers* and *Rodriguez* cases are overruled. This case is reversed and remanded to the trial court for proceedings consistent with this opinion.

HOLOHAN, C.J., and HAYS and CAMERON, JJ., concur.

Note: Justice STANLEY G. FELDMAN did not participate in the determination of this matter.

144 Ariz. 297

MERVYN'S INC., Petitioner,

v.

The SUPERIOR COURT of the State of Arizona, In and For the COUNTY OF MARICOPA, Barry G. Silverman, Judge of the Superior Court, Sandra L. Huston and Kenneth E. Huston, Real Parties In Interest, and Valley National Bank, Respondents.

No. 17773–SA.

Supreme Court of Arizona,
In Banc.

March 28, 1985.

Creditor filed motion for judgment against garnishee. The Superior Court,

5. Although the Petition for Review was denied in both *Chambers* and *Rodriguez*, such a denial of review does not mean we accepted the Court of Appeals' legal analysis or conclusion in those cases. Denial of a petition for review has no precedential value.

Exhibit 6

amination. This Court held that such rules were invalid because they exceeded the express grant of rulemaking authority conferred upon the board by statute. "Administrative agencies, of course, have only those powers specifically conferred upon them by the legislature." 594 P.2d at 332. Any rule promulgated by an administrative agency that is "out of harmony" with the enabling statute will be void. In *Bell*, we said:

> "The courts have uniformly held that administrative regulations are 'out of harmony' with legislative guidelines if they: (1) 'engraft additional and contradictory requirements on the statute' (citing cases); or (2) 'if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature.' (citing cases)." 594 P.2d at 333.

In *Brd. of Barbers*, we considered a factual situation somewhat similar to the present case. In that case, the statute provided that an applicant serve a one-year apprenticeship before being eligible for licensure as a barber. By rule, the board added to this statutory condition a requirement that the one year apprenticeship must include at least six months in a "commercial barbershop." We held that the rule imposed an additional requirement not envisioned by the legislature and was invalid.

Similarly, courts in other states have stricken administrative rules which have added conditions for licensure under grandfather clauses. See *Bloom v. Texas State Bd. of Exam. of Psychologists* (Tex.1973), 492 S.W.2d 460; and *Whittle v. St. Bd. of Examiners of Psychologists* (Okla.1971), 483 P.2d 328.

The board here has promulgated a rule clearly imposing an additional requirement not envisioned by the legislature. The statute requires a master's degree and five years of professional experience, and prescribes no chronological order in which these requirements must be met. The legislature knew how to prescribe such a chronological order. In section 37-17-302(2)(e), which deals with the qualifications of applicants not within the grandfather clause, the *statute* requires two years of professional experience and that "One year of this experience shall be post doctoral." The legislature clearly chose not to impose a chronological requirement in the grandfather clause.

The board is statutorily charged with reviewing the character of an applicants professional experience. In its reliance upon this rule, the board failed to examine the character of McPhail's experience. Instead, it denied him a license by promulgation of a rule "out of harmony" with the grandfather clause.

We reverse the judgment of the District Court and order that the case be remanded to the board so that it may consider McPhail's application on the merits of his professional experience both before and after he received his master's degree.

HASWELL, C.J., and DALY, SHEEHY and WEBER, JJ., concur.

Helen JACOBSON and Elva J. Dike, Personal Representatives of the Estate of Sammy D. Harlan, Plaintiff and Respondent,

v.

IMPLEMENT DEALERS MUTUAL INSURANCE CO. and Kenneth Heimer, Defendant and Appellant.

No. 81-226.

Supreme Court of Montana.

Submitted Dec. 1, 1981.

Decided Feb. 17, 1982.

Personal representatives of estate of deceased insured brought action against insurer to enforce uninsured motorist cover-

age of automobile liability insurance policy issued by insurer. The District Court, Fourth Judicial District, Missoula County, James B. Wheelis, P. J., granted summary judgment in favor of plaintiffs, and defendant insurer appealed. The Supreme Court, Daly, J., held that policy's exclusion, which provided that policy did not apply to bodily injury to insured while occupying automobile, other than insured automobile, owned by named insured, was invalidated by Montana's mandatory uninsured motorist coverage statute.

Affirmed.

1. Insurance ⇐467.51(3)

Automobile liability insurance policy's exclusion, which provided that policy did not apply to bodily injury to insured while occupying automobile, other than insured automobile, owned by named insured, was invalidated by Montana's mandatory uninsured motorist coverage statute, as such exclusion was violation of public policy behind such statute of protecting policyholders from uninsured motorists in all instances and tried to limit scope of coverage mandated by such statute. MCA 33–23–201.

2. Insurance ⇐467.51(2)

All waivers of uninsured motorist coverage are not improper, but waiver must be expressed by insured in manner that is clear, concise and equitable to both parties involved in insurance contract.

3. Insurance ⇐467.51(3)

Where automobile liability insurance policy's exclusion clause, which provided that policy did not apply to bodily injury to insured while occupying automobile, other than insured automobile, owned by named insured, was lost in myriad of verbiage that made up insurance contract, and would be unnoticeable by average policyholder, such exclusion clause could never constitute express waiver of uninsured motorist coverage.

Worden, Thane & Haines, Robert J. Phillips, Missoula, for defendant and appellant.

Garlington, Lohn & Robinson, Paul C. Meismer, argued, Missoula, for plaintiff and respondent.

DALY, Justice.

This is an appeal from the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, the Honorable James B. Wheelis presiding. Plaintiffs are the personal representatives of the estate of Sammy D. Harlan, deceased. They commenced this action in District Court to enforce the uninsured motorist coverage of an insurance policy issued by defendant and appellant, Implement Dealers Mutual Insurance Company (hereinafter IDM), to the plaintiffs' decedent (Harlan). Both parties moved for a summary judgment on the issue of the availability of uninsured motorist coverage. The District Court granted summary judgment in favor of the plaintiffs. IDM appeals from the summary judgment and requests that this Court reverse the District Court and grant judgment in its favor on the basis that there is no coverage available in this case.

Sammy D. Harlan died as a result of a motor vehicle accident two and one-half miles east of Big Timber, Montana, on June 20, 1978, when the 1974 Peterbilt tractor-trailer unit which he owned and was driving was involved in a collision with a motor vehicle driven by Kenneth Heimer. By stipulation of counsel, Heimer is deemed to be at fault in Sammy D. Harlan's death. Heimer had no liability insurance coverage at the time of the accident.

Harlan had purchased a policy of automobile liability insurance from IDM on a 1971 Ford pickup truck which he owned. This policy provided for uninsured motorist coverage in the amount of $25,000. The policy of insurance issued by IDM on the Ford pickup truck contained an exclusion which read:

"This policy does not apply under Part IV:

"(a) to bodily injury to an insured while occupying an automobile (other than an

insured automobile) owned by the named insured or a relative, or through being struck by such an automobile . . ."

Montana's mandatory uninsured motorist coverage statute, section 33–23–201, MCA, requires all motor vehicle liability insurance policies issued in this state to include uninsured motorist coverage unless the named insured rejects such coverage.

The statute in question, section 33–23–201, MCA, provides:

"Motor vehicle liability policies to include uninsured motorist coverage—rejection by insured. (1) No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state, with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in 61–6–103, under provisions filed with and approved by the commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.

"(2) The named insured shall have the right to reject such coverage. Unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer."

[1] **One issue is presented to this Court on appeal: Did the District Court err in holding that the insurance policy's exclusion (a) was not a permissible limitation under Montana insurance law?**

Appellant contends exclusion (a) is not invalidated by section 33–23–201, MCA. More specifically, appellant argues that because there is no express provision in the statute which prohibits this type of exclusion, it is thereby valid. Further, it is argued that if the legislature wished to proscribe this type of exclusion, it would have done so. Finally, appellant contends that in the interest of public policy, the exclusion should be held to be valid.

While it is true that courts in several states have upheld the validity of exclusion clauses similar to exclusion (a), the majority of courts have held similar exclusion clauses are in conflict with the uninsured motorist statutes. See, *State Farm Automobile Insurance Co. v. Reaves* (1974), 292 Ala. 218, 292 So.2d 95; *Mullis v. State Farm Mutual Automobile Ins. Co.* (Fla.1971), 252 So.2d 229; *Bass v. State Farm Mut. Auto. Ins. Co.* (1973), 128 Ga.App. 285, 196 S.E.2d 485, modified, 231 Ga. 269, 201 S.E.2d 444; *Doxtater v. State Farm Mutual Automobile Insurance Co.* (1972), 8 Ill.App.3d 547, 290 N.E.2d 284; *State Farm Mutual Automobile Ins. Co. v. Robertson* (1973), 156 Ind. App. 149, 295 N.E.2d 626; *Cannon v. American Underwriters, Inc.* (1971), 150 Ind.App. 21, 275 N.E.2d 567; *Elledge v. Warren* (La. App.1972), 263 So.2d 912; *Nygaard v. State Farm Mutual Automobile Ins. Co.* (1974), 301 Minn. 10, 221 N.W.2d 151; *State Farm Mutual Automobile Ins. Co. v. Hinkel* (1971), 87 Nev. 478, 488 P.2d 1151; *Bell v. State Farm Mut. Auto. Ins. Co.* (1974), 157 W.Va. 623, 207 S.E.2d 147; Widiss, *A Guide To Uninsured Motorist Coverage*, § 2.9 at 31 (1981).

The discussions upholding the validity of exclusion clauses do so on the grounds that if a statute is silent there is no reason to prevent the withholding of coverage by the insurer. *Widiss*, supra, at 30; see also, *Rodriquez v. Maryland Indemnity Insurance Co.* (1975), 24 Ariz.App. 392, 539 P.2d 196; *Barton v. American Family Mutual Insurance Co.* (Mo.App.1972), 485 S.W.2d 628. **Regardless of this rationale, this Court elects to follow the majority position.**

There are two equally sound positions adopted by the majority of courts holding this type of exclusion clause to be invalid. First, the exclusionary clause is ineffective because it reduces the scope of coverage

required by the statutory mandate. *Mullis v. State Farm Mutual Automobile Insurance Co.* (Fla.1971), 252 So.2d 229; *Allstate Insurance Company v. Meeks* (1967), 207 Va. 897, 153 S.E.2d 222; *Federated American Ins. Co. v. Raynes* (1977), 88 Wash.2d 439, 563 P.2d 815. In *Mullis*, the court stated:

"The public policy of the uninsured motorist statute (Section 627.0851) is to provide uniform and specific insurance benefits to members of the public to cover damages for bodily injury caused by the negligence of insolvent or uninsured motorists and such *statutorily fixed* and prescribed protection is not reducible by insurers' policy exclusions and exceptions any more than are the benefits provided for persons protected by automobile liability insurance secured in compliance with the Financial Responsibility Law. "Insurers or carriers writing automobile liability insurance and reciprocal uninsured motorist insurance are not permitted *by law* to insert provisions in the policies they issue that exclude or reduce the liability coverage prescribed *by law* for the class of persons insured thereunder who are legally entitled to recover damages from owners or operators of motor vehicles because of bodily injury." 252 So.2d at 233–234.

The second, and equally sound, rationale is that the clause is contrary to the public policy embodied in the statute. *Phillips v. Midwest Mutual Insurance Company* (1971), 329 F.Supp. 853. The policy behind the statute is to protect the policyholders from uninsured motorists in all instances.

In this case, when exclusion (a) is analyzed under either or both of the above rationales, it is clear that the exclusion is a violation of public policy and Montana insurance law, and that it tries to limit the scope of coverage mandated by section 32–23–201, MCA.

Appellant alleges that there is a connection between the automobile which is insured and the uninsured motorist coverage. It is contended that the connection is based upon the additional risk which the insurance company incurs by the operation of the insured vehicle. Also, it is contended that the risk of a party being injured by an uninsured motorist increases when a person is operating a motor vehicle. Therefore, appellant concludes that an insurer must attempt to exclude from its coverage any activity involving a risk for which it cannot collect a premium or for which the premium cannot be calculated.

The arguments made by appellant may be true, and they are certainly reflective of sound business judgment. However, they fail to address the underlying purpose and scope of the uninsured motorist statute. The court in *Elledge v. Warren* (La.App. 1972), 263 So.2d 912, when discussing the purpose of its uninsured motorist statute, stated:

"The purpose of the statute is to protect completely, those willing to accept its protection, from all harm, whatever their status—passenger, driver, pedestrian—at the time of injury, produced by uninsured motorists. The only restrictions are that the plaintiff must be an insured, the defendant motorist uninsured, and that plaintiff be legally entitled to recover. We will not enlarge upon these qualifications and restrict the coverage of such a socially desirable policy by allowing insurance companies to pursue alleged 'business interests.'

"... An insurance company may not create irrational and illusory 'business interests' and interpose them as a bar to the comprehensive coverage required by our statute." 263 So.2d at 918–919.

Appellant's argument that premiums for uninsured motorist coverage are somehow risk-related is unfounded. The type of premium charged for uninsured motorist protection illustrates the coverage afforded. The rate is a flat rate, and coverage is available to everyone at the same rate. The rate is not related to risk. In this instance, the fact that Harlan had purchased uninsured motorist coverage for only one vehicle and paid a premium on this vehicle does not give rise to the exclusion of coverage on any other owned vehicles. In

other words, the importance or value of the imputed business purpose for this exclusion seems tenuous as applied to the purchaser who owns more than one vehicle. Acquisition of insurance for a second vehicle, especially with premiums that are not risk-related, is relatively inexpensive; therefore, permitting the insurer to withhold coverage for the small return seems of dubious merit. *Widiss*, supra, § 2.9 at 29.

There is no requirement that the insured be occupying an insured vehicle. Therefore, there is no connection between the insured and the automobile listed on the policy. The named automobile merely illustrates that the person has satisfied the legal requirement of purchasing insurance and has uninsured motorist coverage unless *expressly* waived. Montana's uninsured motorist coverage is personal and portable. This point was exemplified by the court in *Bradley v. Mid-Century Ins. Co.* (1980), 409 Mich. 1, 294 N.W.2d 141, when it held:

"We conclude that once uninsured motorist coverage is purchased, the insured and his relatives insured for liability have uninsured motorist protection under all circumstances. Uninsured motorist coverage, like no-fault coverage, is personal and portable.

". . . They are insured when injured in an owned vehicle named in the policy, in an owned vehicle not named in the policy, in an unowned vehicle, on a motorcycle, on a bicycle, whether afoot or on horseback or even on a pogo stick." 294 N.W.2d at 152.

[2, 3] It must be emphasized that all waivers of uninsured motorist coverage are not improper. The waiver must be expressed by the insured in a manner that is clear, concise and equitable to both parties involved in the insurance contract. The exclusion clause in question in this case does not satisfy this requirement. The Washington Supreme Court, in *Federated American Ins. Co. v. Raynes* (1977), 88 Wash.2d 89, 563 P.2d 815, when discussing an exclusion clause similar to that presented here, stated:

"... R.C.W. 48.22.030 mandates uninsured motorist coverage 'for the protection of persons insured' under the policy, unless the named insured rejects such coverage ... the parties may agree to a narrow definition of insured so long as that definition is applied consistently throughout the policy, but once it is determined that a person is an insured under the policy, that person is entitled to uninsured motorist coverage. Respondent is a named insured in F.A.I.'s policy. Exclusion (b) does not narrow the definition of insured so as to exclude from being an insured under the policy. Rather, the exclusion merely excludes coverage when the insured is injured in a certain situation, i.e., occupying a car owned by him but not insured by F.A.I. This attempt to exclude coverage for an insured is impermissible under R.C.W. 48.22.030." 563 P.2d at 818.

See also, *Chaffee v. USF&G* (1979), 181 Mont. 1, 591 P.2d 1102, 36 St.Rep. 398.

The exclusion clause in the IDM policy is lost in the myriad of verbiage that makes up the insurance contract. This particular exclusion clause would be unnoticeable by the average policyholder and can, therefore, never constitute an express waiver.

The judgment of the District Court is affirmed.

HASWELL, C. J., and HARRISON, SHEA, SHEEHY, MORRISON and WEBER, JJ., concur.

Fred REED, Petitioner,

v.

AMERICAN AIRLINES, INC., Respondent.

No. 81-288.

Supreme Court of Montana.

Submitted Dec. 7, 1981.

Decided Feb. 18, 1982.

Case was certified from United States District Court for the District of Montana