

1990

# Vernon J. Thomas v. David P. Adams : Brief of Appellee

Utah Court of Appeals

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Don E. Olsen; Kris C. Leonard; Matheson, Mortensen & Olsen; Attorneys for Plaintiff/Appellant.

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**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO.

900094-CA

IN THE COURT OF APPEALS  
STATE OF UTAH

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VERNON J. THOMAS,

:

Plaintiff/Appellant,

:

Case No. 900094-CA

vs.

:

Priority 16

DAVID P. ADAMS,

:

Defendant/Appellee.

:

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**BRIEF OF APPELLEE**

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**APPEAL FROM SUMMARY JUDGMENT RULING IN THE  
THIRD CIRCUIT COURT OF SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE MICHAEL L. HUTCHINGS PRESIDING**

---

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**JUL 11 1990**

Mary T. Noonan  
Clerk of the Court  
Utah Court of Appeals

IN THE COURT OF APPEALS  
STATE OF UTAH

---

VERNON J. THOMAS,	:	
Plaintiff/Appellant,	:	
vs.	:	Case No. 900094-CA
DAVID P. ADAMS,	:	Priority 16
Defendant/Appellee.	:	

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### **STATEMENT OF JURISDICTION**

This is an Appeal from an Order of the Third Circuit Court granting Defendant David P. Adams', Motion for Summary Judgment and Dismissing with Prejudice Plaintiff, Vernon J. Thomas' claim. The Order was signed by the Honorable Michael L. Hutchings on January 22, 1990. The Court of Appeals for the State of Utah has jurisdiction to hear and decide this appeal pursuant to the Utah Constitution, Art. VII, § 1 and § 5; Utah Code Ann. § 78-2(a)-3(2)(c) (1953), as amended; and Rules of the Utah Court of Appeals, Rule 4(a).

### **STATEMENT OF ISSUES FOR REVIEW**

1. Whether the original Complaint filed by Plaintiff, Vernon J. Thomas, against Defendant David P. Adams constitutes an insurance subrogation claim pursuant to Utah Code Ann. § 31A-21-108 and § 31A-22-309. The standard for review is that in deciding whether the trial court properly granted judgment as a matter of law to the prevailing party, the Court of Appeals should give no deference to the trial court's view of the law; but must review it for correctness. Utah State Coal of Sr. Citizens v. UP&L, 776 P.2d 632, 634 (Utah 1989).

2. Whether Summary Judgment was appropriately granted pursuant to Judge Hutchings finding that the Complaint was an attempt at a subrogation claim and therefore the wrong parties were listed in the Complaint and the parties were required to engage in arbitration prior to suit. The standard for review is the same as in the first issue stated. Where no material facts remain unresolved, the Court must examine the trial court's conclusions of law and review them for correctness. English v. Kienke, 774 P.2d 1154, 1156 (Utah App. 1989).

## **STATUTES**

Interpretation of the following two statutes is determinative of the aforementioned issues in this case:

1. Utah Code Ann. § 31A-21-108 (1986). Subrogation Actions. Subrogation actions may be brought by the insurer in the name of its insured.

2. Utah Code Ann. § 31A-22-309 (1986). Every policy providing personal injury protection coverage is subject to the following:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection then paid by another insured, including the Worker's Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

## **STATEMENT OF CASE AND DISPOSITION**

On October 9, 1989, the Plaintiff, Vernon J. Thomas, filed a Complaint against the Defendant, David P. Adams, alleging that the Defendant negligently and carelessly caused his motor vehicle to collide with the vehicle owned by the Plaintiff. Plaintiff's Complaint states that as a direct and proximate result of Defendant's negligence and carelessness, Plaintiff suffered a heart attack. Plaintiff prayed for judgment against the Defendant in the sum of \$3,000.00. See Complaint, p. 1 and p. 2, Exhibit A. In Mr. Thomas' Appellate Brief, it is stated that his insurer, Allstate Insurance Co. brought a subrogation suit against Defendant's insurer. This is not the case. Nowhere in the Complaint is Allstate Insurance referenced nor is Defendant's insurer. Also, there is no indication in the Complaint that



the suit was to be a subrogation suit for PIP reimbursement. It is merely presented as a negligence action between individual parties.

On November 10, 1989, the Defendant, Mr. Adams, answered Plaintiff's Complaint setting forth as a Fourth Defense that Plaintiff had executed a release of all claims dated August 9, 1989, and that, therefore, Plaintiff's claim was barred. See Answer, p. 1 and p. 2, and Release of All Claims, Exhibits B and C.

On November 17, 1989, the Defendant, David P. Adams, filed a Motion for Summary Judgment. The Plaintiff, Vernon J. Thomas, responded by filing a Memorandum in Opposition to Defendant's Motion for Summary Judgment on November 27, 1989. It was in this Memorandum that Plaintiff, for the first time, indicated that the Complaint was, although not alleged, really a subrogation case for PIP reimbursement pursuant to Utah Code Ann. § 31A-22-309 (1953), as amended. See Plaintiff's Memorandum at p. 2, Exhibit D.

On January 22, 1990, the Honorable Michael L. Hutchings granted Mr. Adams' Motion for Summary Judgment and dismissed the case with prejudice. His reasons for dismissing the case were that: (1) This is a subrogation claim and should be decided by arbitration, and (2) the proper parties are insurance companies. See Order, p. 1, Exhibit E. The Plaintiff, Vernon J. Thomas, has appealed this decision.

### **STATEMENT OF FACTS**

In addition to the facts recited in Appellant's Brief, the following additional facts are pertinent to the issues before the Court and will clarify what is misleading in Appellant's Statement of Facts. It is true that on December 14, 1987, the Plaintiff, Vernon J. Thomas, and the Defendant, David P. Adams, were involved in a motor vehicle accident

in Salt Lake City. Mr. Adams did in fact reimburse Mr. Thomas for damage to his vehicle. It is also a fact that Plaintiff suffered a heart attack some time after the accident. However, it is not a fact that Plaintiff's heart attack was a direct and proximate result of the accident, and, there is no evidence to prove this.

At the time of the accident Plaintiff was insured by Allstate Insurance Company and Defendant was insured by Vanliner Insurance Company. See Release of All Claims, Exhibit C. On January 12, 1988, Allstate Insurance Company sent an inter-insurer subrogation memorandum to Frontier Adjusters (representing Vanliner Insurance Company) requesting payment for repairs to Mr. Thomas' vehicle in the amount of \$1609.00. This was paid by Frontier Adjusters. See Inter-Insurer Memo, Exhibit F. The subrogation memorandum also indicated that medical expenses were pending for Vernon Thomas and Huetta Thomas. Mr. Thomas' medical expenses were related to a heart attack which he suffered as a result of coronary artery disease.

On August 9, 1989, Vernon Thomas represented by Phillip C. Story, Jr. signed a release discharging Mr. Adams, A&M Moving & Storage, Inc., and Transprotection Insurance Company and Vanliner Insurance Company from any liability related to the accident, in consideration of the payment to Mr. Thomas of \$5,000.00.

On April 4, 1988, Peter Stirba representing Vanliner Insurance Company and A&M Moving & Storage sent a letter to Allstate regarding its Subrogation Memorandum and stating that "Allstate's claim for medical expenses relating to Mr. Thomas' heart attack did not arise out of the accident and therefore the claim submitted to Frontier Adjusters was denied." See letter, Exhibit G. There was no mention of arbitration nor was arbitration refused by Mr. Adams' insurer.

On April 12, 1988, Allstate sent a letter to Mr. Stirba stating that it was one doctor's opinion that the accident precipitated Mr. Thomas' heart attack by aggravating his preexisting coronary artery disease. See letter, Exhibit H. Allstate also stated that it had covered Mr. Thomas' medical expenses because of this doctor's opinion. Again, there was no request for arbitration nor was a subrogation suit discussed in this letter. Appellant's characterization of this letter is incorrect. Even the copy Appellant has attached to his Brief does not state that Allstate was "expressly indicating its intent to file suit should the insurer prove not to be a member of the inter-company arbitration." See Appellant's Brief, p. 4 and attached letter. This letter did not call for a response and, therefore, none was made.

On October 9, 1989, the Complaint was filed by Mr. Thomas against Mr. Adams in Circuit Court, State of Utah, for negligence in the amount of \$3,000.00 for medical expenses suffered by Mr. Thomas relating to his heart attack.

### **SUMMARY OF ARGUMENTS**

1. The original Complaint filed in this matter, as pled, was a negligence action by the Plaintiff, Vernon J. Thomas, against the Defendant, David P. Adams, and nothing more. There is no mention in that Complaint of subrogation or insurance companies. The Complaint, as it was pled was a simple negligence action between individual parties and since both parties had already signed a release of all claims relating to the accident, the Complaint was barred.

2. If the intent of Plaintiff was to bring a subrogation claim, the Circuit Court below was correct in granting the Defendant's Motion for Summary Judgment for the following two reasons. First, the Complaint, as a subrogation action, named the wrong parties and

was not pled in the names of the proper parties, the insurance companies. Secondly, binding arbitration is statutorily required to determine the issue of liability for reimbursement of PIP benefits often paid by one insurance company which it is claimed is owed by another. Allstate has not attempted to pursue arbitration.

### **INTRODUCTION**

The standard for appellate review requires that this Court look only to facts which were in the record below. Plaintiff/Appellant has argued several facts for the first time on appeal and Defendant/Appellee would like to address the Court's attention to the impropriety of this. The record below consists of Plaintiff's Complaint, Defendant's answer, Defendant's Motion and Memorandum for Summary Judgment, Plaintiff's Memorandum in Opposition and Defendant's Reply Memorandum. The Release of all Claims was also made a part of the record.

The Plaintiff, Mr. Thomas now seeks to introduce new facts and evidence to this Court for review. Mr. Thomas has included an Inter-Insurer Subrogation Memorandum, a letter to Allstate from Peter Stirba and a letter to Mr. Stirba from Allstate (although not signed by Allstate) with his Brief. Mr. Adams submits that this is improper and that these items should be disregarded by the Court on review.

### **ARGUMENTS**

#### **A. The Original Complaint as Pled Was a Negligence Claim Between Individuals**

Although Allstate Insurance Company seems to be the party appealing the lower court ruling the fact is that the original Plaintiff was Vernon J. Thomas. There is not one single allegation in the Complaint referencing that the action below was a subrogation

action. There was not one single allegation in the Complaint indicating that, although the suit was brought in the name of Vernon Thomas, it was really Allstate Insurance Company who was suing as a subrogation claim. Furthermore, the matter was brought against the Defendant David P. Adams, the driver who was involved in the accident, rather than against his insurance carrier. There is no question that if the case was in fact a subrogation action for the reimbursement of PIP benefits under Utah Code Ann. § 31A-22-309(6) (1953), as amended, the proper party to the lawsuit would have been Defendant's insurance carrier not Defendant individually.

The Plaintiff, Mr. Thomas, continues to reference the following statute which states: "Subrogation actions may be brought by the insurer in the name of its insured. Utah Code Ann. § 31A-21-108 (1986) The Defendant agrees that this statute is relevant generally to subrogation actions. However, this is a very specific subrogation action for the reimbursement of very specific benefits, i.e. PIP benefits. The controlling statute is Utah Code Ann. § 31A-22-309 (1953), as amended. The original pleading by Plaintiff in this action was faulty for two reasons. First, there was no mention made that the claim against the Defendant was subrogation action. Second, under the PIP reimbursement statute, "the insurer of the person who would be held legally liable shall reimburse the other insurer for payment....," Utah Code Ann. § 31A-22-309(6)(a) (1953), as amended. The statute which applies to this action is the specific subrogation statute relating to reimbursement for PIP benefits. It does not allow Allstate to bring an action against an insurer in the name of its insured, nor does it allow Allstate to sue an individual for reimbursement rather than the insurer.

It is clear that the original claim was not intended to be a subrogation action. After Allstate became aware that its insured had already signed a release with the Defendant, the

intent of Allstate to bring a subrogation action arose. This is why the release which was signed by the original parties is so important to this matter. The release was signed by Vernon J. Thomas with representation by his attorney and by David P. Adams, the Defendant, in consideration of \$5,000.00. This amount was paid to Mr. Thomas for the release of the claim. Therefore, there can be no claim of negligence by Vernon J. Thomas against David P. Adams and therefore, the release is dispositive of the original Complaint. It was one month after the original Complaint had been filed when Allstate became aware of the release and that the Complaint, as pled, would be barred by the release. It was only then that Allstate began insisting that the original Complaint was a subrogation action between the insurance carriers.

Thus, based upon the existing allegations in the Plaintiff's Complaint, the release signed by the Plaintiff is dispositive of the case. The case as pled was not a subrogation case and there was absolutely no reference in the Complaint to suggest that it was. Merely because Allstate began calling the Complaint a subrogation claim, does not make it so.

**B. If The Complaint Is To Be Construed As a Subrogation Claim, The Circuit Court Was Correct In Granting Summary Judgment**

Assuming, arguendo, that Plaintiff's Complaint should be construed differently than what has been alleged, that the Complaint is a subrogation claim for PIP reimbursement, then the Circuit Court was correct in granting Defendant's Motion for Summary Judgment based on the grounds that the Complaint named the wrong parties and, under the statute, the Plaintiff did not attempt to arbitrate the claim prior to suit. The express language of Utah Code Ann. § 31A-22-309(6), (1988), requires that the claim be dismissed. Section 31A-22-309(6) states in pertinent part as follows:

(6) Every policy providing personal injury protection coverage is subject to the following:

(a) that where the insured under the policy is or would be held legally liable for the personal injury sustained by any person to whom benefits required under person injury protection have been paid by another insurer, including the Worker's Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

(Emphasis added). Accordingly, Plaintiff's Complaint was deficient and flawed in two major ways as was pointed out by Judge Hutchings and the Court below.

First, Plaintiff has failed to name the proper parties. In a subrogation action for PIP reimbursement, according to the statute, the insurer or the person liable shall reimburse the other insurer. Thus, even if there is a subrogation claim, it is between insurers and the proper party Plaintiff is Allstate and the proper party Defendant is Mr. Adams' insurer. The statute, which Plaintiff continues to cite as determinative of this issue, does not give the insurer in a PIP reimbursement claim the right to sue in the name of its insurer. The statute, Utah Code Ann. § 31A-21-108 (1986) does not apply to this type of subrogation claim. If it did, there would be no reason for the express language of the PIP statute. Therefore, as the Circuit Court properly found, the claim has been brought in the name of incorrect parties and, therefore, Judge Hutchings decision dismissing the action with prejudice is correct.

Mr. Thomas cites several cases for the proposition that "these provisions both embodied in the Insurance Code, must be construed harmoniously absent repeal or amendment of either." The first case, Murray City v. Hall, 663 P.2d 1314 (Utah 1983), had nothing to do with the Insurance Code. The case does, however, cite a general rule of statutory construction that, "if there is an irreconcilable conflict between the new

provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature." Id., at 1318. Accordingly, the newer and more specific statute would be the one to control here, as it reflects the expression of the legislature with regard to subrogation actions for PIP reimbursement. Stahl v. Utah Transit Authority, 618 P.2d 480 (Utah 1980), also has nothing to do with the Insurance Code and provides no assistance in interpreting these statutes.

Second, the subrogation action or liability that is being asserted for PIP reimbursement, according to the No Fault PIP reimbursement statute, must be decided by "mandatory, binding arbitration between the insurers." Utah Code Ann. § 31A-22-309(6)(b) (1988). That being the case, the Circuit Court below was entirely correct in dismissing the action because there has been no binding arbitration between the insurers. Allstate has never initiated arbitration proceedings. Plaintiff has had opportunities to correct the errors in its Complaint and also to request arbitration, but has done neither.

In Appellant's Brief, Mr. Thomas makes the following allegations; "arbitration has become impossible," "Defendant's insurer refused to participate in the required arbitration," "Frontier Adjusters refused to respond to Allstate's arbitration inquiries," and "Allstate's failure to initiate arbitration proceedings was justified where such action clearly would be futile." All of these statements made in Appellant's Brief are false, not to mention the fact that these issues were first raised on appeal. Mr. Adams objects to the issues above being reviewed by this Court and suggests that they are irrelevant for the following reasons.

At no time was Vanliner Insurance Company or Frontier Adjusters ever asked to participate in a binding arbitration with Allstate. Frontier Adjusters, by letter of counsel on April 4, 1988, did refuse to pay a demand by Allstate for medical expenses incurred by Mr. Thomas as a result of his heart attack. The reason for this was that Frontier Adjusters



did not consider those expenses to be related to the automobile accident. There was no mention of arbitration and no refusal by Frontier Adjusters to arbitrate. Mr. Thomas suggests that a letter from Allstate dated April 12, 1988 stated that "If the carrier you represent is not a member of Inter Company Arbitration, we would have no option but to file suit to recover our costs." The letter attached to Mr. Thomas' brief does not say this, nor did the letter sent to Mr. Stirba. Frontier Adjusters did not respond to this letter as there was no response called for and, furthermore, the language of that letter was in no way an invitation to arbitrate the matter.

Even after Judge Hutchings found that the claim had been brought in the name of improper parties and that a binding arbitration was required if this was in fact a subrogation claim, Plaintiff chose to appeal the matter to this Court rather than ask for arbitration. The statute itself states that arbitration is mandatory and therefore, Frontier Adjusters would not be able to refuse as Plaintiff insists they have. Plaintiff admits on page 8 of Appellant's Brief that it has "failed to initiate arbitration proceedings." Plaintiff goes on to state that its failure to initiate arbitration proceedings is justified because the action would "clearly be futile." If Plaintiff has never initiated any arbitration proceedings, how could Plaintiff possibly know that such arbitration would be futile.

Mr. Thomas has improperly pled his claim. Judge Hutchings was correct in dismissing the claim as pled. The basis of Mr. Thomas' action is not within the review of this Court. Plaintiff has violated both statutes cited above by bringing the action in the names of improper parties and by failing to initiate mandatory arbitration proceedings with the insurer. Consequently, Judge Hutchings of the Third Circuit Court was entirely correct in dismissing the claim with prejudice and indicating that arbitration should be sought as

a remedy. Mr. Thomas, however, chose to appeal that decision rather than initiating arbitration with Mr. Adams' insurer.

### CONCLUSION

One of the basic principles of appellate procedure is that an appellate court should review questions of law and may not substitute its own view of the facts or make new fact findings. The Utah Supreme Court has stated that "a grant of Summary Judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P., 56(c); Utah State Coal. of Senior Citizens v. UP&L, 776 P.2d 632, 634 (Utah 1989). This Court, in the above case, went on to note that in deciding whether the trial court properly granted judgment as a matter of law to the prevailing party, "We give no difference to the trial court's view of the law; we review it for correctness." Id., citing Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382, 1384-1385 (Utah 1989).

Here, the Circuit Court below granted summary judgment as a matter of law to Mr. Adams. It is the standard of the Court of Appeals to review that judgment for its correctness as to the law. The Appellant has attempted to mislead the Court by asserting facts which are not in the record below and not within the purview of the Court of Appeals. For example, in Appellant's Brief, Appellant states that "Frontier Adjusters is neither based nor licensed to do business in Utah." See Appellant's Brief, p. 7. This fact is entirely incorrect and not present in the record anywhere below. Another example of Appellant's attempts to mislead the Court by asserting facts which are either completely false or not represented in the record below, is Allstate's repeated assertion that the Defendant has refused to arbitrate this matter. This statement is completely false and also is not present in any record below. Two of the Appellant's arguments are based on this misinterpretation

of the facts. The fact of the matter is that Vanliner Insurance Company and Frontier Adjusters are, and always have been, willing to arbitrate, but have never been asked to do so by Allstate. Since this fact is not in the record below and is the basis of two of the Appellant's arguments, these arguments should be summarily disregarded by the Court of Appeals.

It is unclear what remedy the Appellant is seeking. Allstate has not indicated that it would be willing to arbitrate this matter and Plaintiff has, in fact, chosen to appeal the lower court's determination rather than enter into arbitration with Vanliner Insurance Co.. Mr. Thomas argues that somehow Vanliner may, in the future, refuse to arbitrate. The statute is quite clear in stating that arbitration is mandatory. It appears that, should either party refuse to arbitrate there is a remedy for violation of the statute. Mr. Thomas has also made the argument that res judicata somehow applies here. Res judicata would only apply to a suit for the same negligence claim between the same parties. Allstate has a remedy. Allstate can file a subrogation action in the name of the insurers, pursuant to the statute if arbitration is unsuccessful.

The ruling of the Circuit Court below was quite clear and simple. If Plaintiff was attempting to file a subrogation claim pursuant to the statutes cited above, it should have followed those statutes. While Section 31A-21-108 allows an insurer in a general insurance action to bring an action in the name of its insured, the section does not apply to subrogation claims for PIP reimbursement when there is a specific statute that does apply. In fact, the specific statute for automobile, PIP insurance claims and/or subrogation claims requires that "the insurer of a person who would be held legally liable shall reimburse the other insurer for the payment." Utah Code Ann. § 31A-22-309(6)(a) (1953), as amended. The statute is quite clear. Plaintiff has failed to bring its subrogation action pursuant to


statute in the name of the proper parties. Therefore, the ruling of the Circuit Court below was correct.

The Circuit Court below also ruled correctly that this action should be pursued in binding arbitration. The statute on this is also quite clear. Utah Code Ann. § 31A-22-309(b) states that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers. By not requesting or initiating arbitration, Plaintiff has violated this statute. Plaintiff admits in his Brief that Allstate has never initiated arbitration with the Defendant's insurer. The Defendant's insurer has never refused to arbitrate and has always been ready, willing and able to do so upon request. The Circuit Court's ruling requiring arbitration is clearly pursuant to the statute and correct.

The Defendant, David P. Adams, (Appellee), for the above stated reasons respectfully requests that the Court of Appeals uphold the Circuit Court's Ruling granting Defendant's Motion for Summary Judgment and Dismissing Plaintiff's Claim with Prejudice.

DATED this 11<sup>th</sup> day of July, 1990.

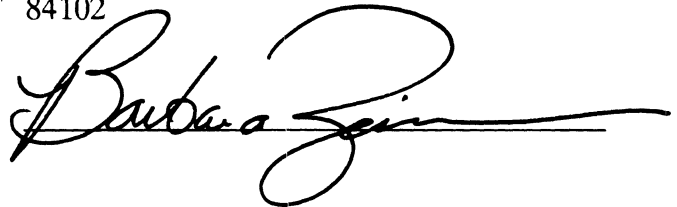
McKAY, BURTON & THURMAN

By   
PETER STIRBA  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11<sup>th</sup> day of July, 1990, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was mailed postage prepaid, to the following:

DON E. OLSEN  
KRIS C. LEONARD  
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648 East First South  
Salt Lake City, UT 84102

A handwritten signature in cursive script, appearing to read "Barbara Zein", written over a horizontal line.

### **ADDENDUM**

- (A) Complaint
- (B) Answer
- (C) Release of All Claims
- (D) Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment
- (E) Order Granting Defendant's Motion for Summary Judgment
- (F) Inter-Insurer Subrogation Memorandum
- (G) Letter to Allstate Insurance Company from Peter Stirba, dated April 4, 1988
- (H) Letter to Peter Stirba from Allstate Insurance Company, dated April 12, 1988
- (I) Utah Code Ann. § 31A-21-107 (1953), as amended
- (J) Utah Code Ann. § 31A-22-309 (1953), as amended

# EXHIBIT A

DON E. OLSEN #2460  
 MATHESON, MORTENSEN & OLSEN  
 Attorneys for Plaintiff  
 648 East First South  
 Salt Lake City, Utah 84102  
 Telephone (801) 363-2244

CIRCUIT COURT, STATE OF UTAH  
 SALT LAKE COUNTY, SALT LAKE DEPARTMENT

VERNON J. THOMAS,

Plaintiff,

vs.

DAVID P. ADAMS,

Defendant.

COMPLAINT

Civil No.

Plaintiff complains of Defendant and for cause of action alleges:

1. That at all times pertinent hereunto, Defendant was a resident of the State of Utah, and the amount in controversy is less than \$10,000.00.

2. At all times pertinent hereunto, Defendant, as a resident of the State of Utah, was operating a motor vehicle over and upon the highways of the State of Utah within the terms of Section 41-12a-503, Utah Code Annotated, 1953 as amended, and Plaintiff is informed and reasonably believes that Defendant has left the State of Utah and his last known address is as follows:

David P. Adams  
 19326 Fernwood Drive  
 Chippewa Falls, Wisconsin 54729.

3. On or about December 14, 1987, on a public street known as SR15, at or near 600 North structure, in Salt Lake City, Salt Lake County, Utah, Defendant negligently and carelessly caused a

*All State 10/10*

motor vehicle operated by her to collide with a vehicle owned by Plaintiff.

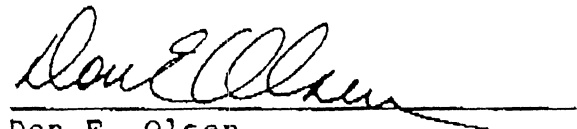
4. As direct and proximate result of Defendant's negligence and carelessness aforesaid, Plaintiff suffered an heart attack occasioned by stress brought on from collision, and has incurred reasonable and necessary medical expenses in the sum of \$3,000.00.

5. Defendant has paid damage to Plaintiff's vehicle but has failed and refused to pay Plaintiff's medical expenses.

WHEREFORE, Plaintiff prays for judgment against the Defendant for the sum of \$3,000.00 together with interest at the highest lawful rate from and after December 14, 1987, until date of judgment herein, for Plaintiff's costs of court and such other relief as the Court deems just.

DATED this 9<sup>th</sup> day of October, 1989.

MATHESON, MORTENSEN & OLSEN

  
Don E. Olsen



PETER STIRBA (3118)  
McKAY, BURTON & THURMAN  
Attorneys for Defendant  
Suite 1200, Kennecott Building  
Salt Lake City, Utah 84133  
Telephone: (801) 521-4135

IN THE THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

---

VERNON J. THOMAS,	:	
Plaintiff,	:	ANSWER
-vs-	:	
DAVID P. ADAMS,	:	Civil No. 893010107CV
Defendant.	:	Judge Michael L. Hutchings

---

Defendant answers plaintiff's complaint as follows:

FIRST DEFENSE

Plaintiff's complaint, and each and every claim or cause of action asserted therein, fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

Defendant responds to the individual paragraphs of plaintiff's complaint as follows:

1. Defendant is without sufficient information or belief as to the allegations of paragraph 1, and therefore denies the same.
2. Admits the allegations in paragraph 2.
3. Denies the allegations of paragraphs 3, 4 and 5.

THIRD DEFENSE

Any injury or damage sustained by plaintiff was solely caused or proximately contributed to by his own actual fault or by the actual fault of other persons who are not parties to this lawsuit, which fault is equal to or greater in degree than any actual conduct on the part of the defendant.

FOURTH DEFENSE

Plaintiff's claim is barred by the execution of a Release of All Claims dated August 9, 1989, a copy of which is attached hereto.

WHEREFORE, having fully answered plaintiff's complaint, defendant demands that the same be dismissed, with prejudice, and that he be awarded his costs incurred herein, and such other relief as this Court deems just and equitable.

DATED this 10<sup>th</sup> day of November, 1989.

McKAY, BURTON & THURMAN

By: 

PETER STIRBA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ANSWER was mailed, postage prepaid, this 10<sup>th</sup> day of November, 1989, to the following:

Don E. Olsen, Esq.  
MATHESON, MORTENSEN & OLSEN  
648 East First South  
Salt Lake City, Utah 84102

PS6



# EXHIBIT C

## RELEASE OF ALL CLAIMS

For and in consideration of the payment to the undersigned of the total sum of FIVE THOUSAND AND NO/100 DOLLARS (\$5,000.00), the receipt of which is hereby acknowledged, the undersigned, VERNON J. THOMAS and PHILIP C. STORY, JR., his attorney, hereby forever release and discharge DAVID P. ADAMS, A&M MOVING AND STORAGE, INC., TRANSPROTECTION INSURANCE COMPANY and VANLINER INSURANCE COMPANY, and any and all other persons, firms, or corporations, from and of any and all claims, demands, benefits either past or future, causes of action both for property damage, damages, costs, loss of services, expenses or compensation on account of or in any way growing out of an incident which occurred on or about December 14, 1987, on Interstate 15, at or near Salt Lake City, Utah.

The undersigned hereby declare and represent that the damages sustained by the undersigned are or may be permanent and progressive and that recovery therefrom may be uncertain and indefinite and in making this release and agreement, it is understood and agreed that the undersigned rely wholly upon their own judgment, belief and knowledge of the nature, extent and duration of said damages and in granting this complete release, they do not rely upon anything told to them or represented to them by the persons, firms or corporations who are being released, or by any person or persons representing them.

The undersigned further understand and agree that this settlement is a compromise of a doubtful and disputed claim and that payment is not to be construed as an admission of liability on the part of any of the persons or companies referred to above and who are released herein and by whom liability is expressly denied.

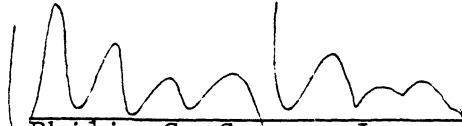
The undersigned further acknowledge and accept the advice of counsel in the settlement of this matter that this is a full, complete and final release of the above-named parties for any matter or thing done or omitted to be done by the said parties and as a result of the incident referred to above. The undersigned further represent that there are no unresolved subrogation claims and agree that if any such claims should be made, they will indemnify and save harmless those parties released hereby.

The undersigned further states that they have carefully read the foregoing Release of All Claims, know the contents thereof

and that they sign the same as their own free act, and it is their intention to be legally bound thereby.

DATED this \_\_\_\_\_ day of 8-9, 1989.

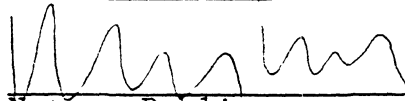
  
Vernon J. Thomas

  
Philip C. Story, Jr.  
Attorney for Vernon J. Thomas

STATE OF UTAH )  
County of Salt Lake

On this 9 day of August, 1989, personally appeared before me VERNON J. THOMAS, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

DATED this 9 day of August, 1989.

  
Notary Public  
Residing at: SLC

My Commission Expires:

12-21-89

# EXHIBIT D

DON E. OLSEN #2460  
KRIS C. LEONARD #4902  
MATHESON, MORTENSEN & OLSEN  
Attorneys for Plaintiff  
648 East First South  
Salt Lake City, Utah 84102  
Telephone: (801) 363-2244

IN THE THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

---

VERNON J. THOMAS,	)	
	)	PLAINTIFF'S MEMORANDUM
	)	IN OPPOSITION TO
Plaintiff,	)	DEFENDANT'S MOTION FOR
	)	FOR SUMMARY JUDGMENT
vs.	)	
	)	Civil No. 893010107CV
DAVID P. ADAMS,	)	Judge Michael L. Hutchings
	)	
Defendant.	)	

---

Plaintiff Vernon J. Thomas, by and through his undersigned counsel, hereby submits the following Memorandum in Opposition to Defendant's Motion for Summary Judgment.

STATEMENT OF FACTS

1. On or about December 14, 1987, on a public street known as U.S. Interstate 15, at or near approximately 600 North, in Salt Lake City, Salt Lake County, Utah, the parties were involved in a motor vehicle accident.

2. As a direct and proximate result of the accident,  
Plaintiff suffered a heart attack occasioned by stress brought on  
from the collision and incurred reasonable and necessary medical  
expenses in the sum of \$3,000.00.

3. On or about January 12, 1988, Plaintiff's insurer, Allstate Insurance Company (hereinafter "Allstate"), filed a no fault subrogation claim with the insurer of the carrier employing Defendant at the time of the accident.

4. By letter dated April 4, 1988, Defendant expressly denied the subrogation claim.

5. On or about October 9, 1989, Plaintiff filed the subject suit against the Defendant for the above-referenced medical expenses, said suit being a subrogation case filed pursuant to Section 31A-21-108, Utah Code Annotated (1988), as amended.

6. On or about November 1, 1989, Defendant notified Allstate of the existence of a document entitled "Release of All Claims" (hereinafter "Release"). Said Release was allegedly executed by Plaintiff and Plaintiff's attorney on or about August 9, 1989.

#### ARGUMENTS

##### Point I

Defendant's Knowledge of the Existence of Allstate's Claim Renders the Release Ineffective, Creating a Genuine Issue of Material Fact for This Court's Determination.

Upon the filing of a Motion for Summary Judgment, the party opposing the Motion has the burden of setting forth specific facts showing the existence of a genuine issue for trial in order to defeat the Motion. Rule 56(e), Utah Rules of Civil Procedure. The facts herein and the documents submitted herewith together raise the genuine issue of the validity and effectiveness of the Release upon which Defendant's Motion is based, requiring a denial of Defendant's Motion.

Following the accident in question, Plaintiff's insurer, Allstate Insurance Co., investigated the occurrence, settled with

Plaintiff under the terms of its policy, and received from Plaintiff an assignment of rights. On or about January 12, 1988, Allstate submitted to Defendant's employer's insurer, Frontier Adjusters, its no fault subrogation claim concerning the accident at issue, indicating its possession of "rights of subrogation for No-Fault benefit payments" for medical expenses. A copy of said claim is attached hereto as Exhibit "A" and incorporated herein by reference. In response to said claim, Plaintiff received from Defendant's counsel a letter dated April 4, 1988, expressly denying Plaintiff's subrogation claim. A copy of said letter is attached hereto as Exhibit "B" and incorporated herein by reference. By this denial Defendant has failed and refused to pay the medical damages incurred by Plaintiff. By letter dated April 12, 1988, Plaintiff requested a reconsideration of Defendant's denial of his claim. A copy of the April 12 letter is attached hereto as Exhibit "C" and incorporated herein by reference. No response to said letter was received by Plaintiff.

As the sole support for his Motion for Summary Judgment, Defendant relies upon a document entitled "Release of All Claims" purportedly executed by Plaintiff on August 9, 1989. A copy of said document is attached hereto as Exhibit "D" and incorporated herein by reference. Said document purports to release Defendant from any claim or demand arising from the collision between the parties occurring on December 14, 1987, and declares that "[t]he undersigned further represent that there are no unresolved subrogation claims and agree that if any such claims should be

made, they will indemnify and save harmless those parties released hereby." See Exhibit D, paragraph 4.

The submission of Plaintiff's claim and Defendant's denial thereof, as outlined above, occurred more than nineteen months prior to the execution of the subject Release. Consequently, Defendant had full knowledge and notice of Allstate's subrogation position more than nineteen months prior to its acceptance of a release stating that no such subrogation claim existed. In addition, Defendant was on notice of the unresolved status of Allstate's claim as evidenced by the request for reconsideration submitted by Allstate to which Defendant failed to respond. Defendant's denial of Allstate's claim is an acknowledgment that Defendant knew of the claim and knew that Plaintiff Thomas had collected payment from Allstate under its insurance policy and had assigned his rights to Allstate. Defendant's actions in subsequently obtaining a Release from Plaintiff which expressly denies the existence of a claim of which Defendant has full knowledge should not be summarily condoned. Neither should Defendant be allowed to rely to its benefit on a Release obtained under such questionable circumstances.

Defendant's actions herein suggest not only an intentional attempt to belatedly circumvent its liability in this matter, but also raise the question of bad faith by Defendant in obtaining Plaintiff's execution of the Release. Defendant has not properly avoided its liability to Allstate in this matter. Rather, Defendant's remedy is one of indemnity from Plaintiff Thomas pursuant to the terms of their agreement. See Exhibit D.



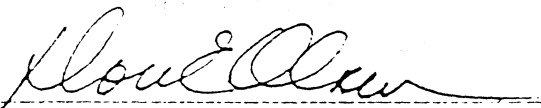
paragraph 4. Defendant's securing of and reliance on the Release obtained nineteen months after the submission of the claim raises an issue of material fact upon which trial must be had in this matter.

CONCLUSION

The peculiar circumstances of this case, including Defendant's prior knowledge of the existence of an unresolved subrogation claim nineteen months prior to obtaining the Release denying the existence of such claim, create a genuine issue of material fact, the existence of which requires a denial of Defendant's Motion for Summary Judgment.

DATED this 27<sup>th</sup> day of November, 1989.

MAIHESON, MORTENSEN & OLSEN

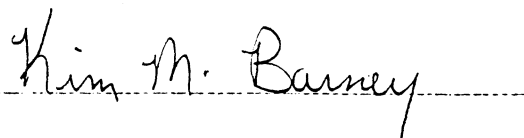


Ben E. Olsen  
Attorney for Plaintiff

Certificate of Mailing

I hereby certify that on the 27<sup>th</sup> day of November, 1989, I mailed a true and correct copy of the foregoing Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment to the following:

Peter Stirba  
McKAY, BURTON & THURMAN  
Suite 1200  
Kennecott Building  
Salt Lake City, UT 84133



# EXHIBIT

PETER STIRBA (Bar No. 3118)  
McKAY, BURTON & THURMAN  
Attorneys for Defendant  
Suite 1200, Kennecott Building  
Salt Lake City, Utah 84133  
Telephone: (801) 521-4135

IN THE THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

---

VERNON J. THOMAS,	:	ORDER GRANTING
Plaintiff,	:	DEFENDANT'S MOTION FOR
	:	SUMMARY JUDGMENT
-vs-	:	
DAVID P. ADAMS,	:	Civil No. 893010107CV
Defendant.	:	Judge Michael L. Hutchings

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This matter was submitted to the Court for decision based upon the memoranda of the parties and the pleadings on file with the Court. The Court, having reviewed Defendant's Motion for Summary Judgment and the entire file in this matter, and good cause appearing therefor,

HEREBY ORDERS that Defendant's Motion for Summary Judgment is hereby granted and this case is dismissed with prejudice *for 2 reasons 1) this is a subrogation claim and should be decided at arbitration 2) The proper parties are insurance companies*  
DATED this 22 day of January, 1990.

BY THE COURT:

*Michael L. Hutchings*  
Michael L. Hutchings  
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, this 12<sup>th</sup> day of January, 1990, to the following:

Don E. Olsen, Esq.  
MATHESON, MORTENSEN & OLSEN  
648 East First South  
Salt Lake City, Utah 84102

A handwritten signature in cursive script, reading "Alice R. White", is written over a horizontal line.

PS18

# EXHIBIT F

## INTER-INSURER SUBROGATION MEMORANDUM

### FILE IDENTIFICATION:

Your Claim No.: 1310092067  
Your Insured: United Leasing  
Your Insured's Address: #1 United Drive  
Fenton Missouri  
Accident: I-15 Northbound (Illion.) 12-14-87  
(Place) (Date)

DATE: JAN 12, 1988  
Our Claim No.: 1310092067  
Our Insured: Vernon J. Thomas

FROM: ☒ Allstate Insurance Co.  
☐ Allstate Indemnity Co.  
☐ Allstate County Mutual Ins. Co. (Texas only)

### MARKET CLAIM OFFICE

5650 South 410 West  
Salt Lake City UT 84123-0000

TO:

Frontier  
7109 So. Highland #102A  
SLC UT 84121

Signature: Ardis N. Hogan

### REGARDING OUR SUBROGATION CLAIM AGAINST YOUR COMPANY...

☐ 1. Repair or replacement of our insured's motor vehicle or other property is being made under the terms of our insured's policy. Our subrogation claim is forthcoming. Please protect Allstate's interests.

☒ 2. Our investigation reveals that your insured was at fault for the accident, and:

☒ a. Payment for repairs to our insured's motor vehicle (or other property \_\_\_\_\_) have been completed and documentation is attached. Please honor our claim:

Allstate's interest: \$ 1509.00

Insured's deductible (if indicated): \$ 1100.00

TOTAL: \$ 1609.00

Please send a separate draft for  
our insured's deductible ☐ Yes ☒ No

☐ b. Our insured's vehicle was a total loss. Documentation is attached. Basis for our claim:

Amount paid to our insured:	\$ _____
PLUS initial towing and storage charges:	\$ _____
TOTAL (1)	\$ _____
Gross recovery on sale of salvage:	\$ _____
LESS fees in sale of salvage:	\$ _____
NET SALVAGE RECOVERY (2)	\$ _____
Our subrogation interest (1 minus 2)	\$ _____
PLUS our insured's deductible interest (if applicable):	\$ _____
TOTAL SUBROGATION CLAIM:	\$ _____

☐ c. We possess rights of subrogation for Medical Expense Coverage payments. Documentation is attached. Please honor our claim for: \$ \_\_\_\_\_

☒ d. We possess rights of subrogation for No-Fault benefit payments. Documentation is attached. Please honor our claim for:

Medical:	\$ <u>pending</u>	Ess. Serv.:	\$ <u>Vernon Thomas</u>	Surv. Loss:	\$ _____
Work Loss:	\$ _____	Funeral:	\$ _____	TOTAL:	\$ _____

☐ 3. Following earlier correspondence to you regarding our subrogation claim, we incurred additional expense involving the loss. Documentation is attached. Please include the following amount in our subrogation claim: \$ \_\_\_\_\_

☐ 4. Our assessment of liability factors warrants a subrogation demand of less than 100%. In lieu of the amount shown in 2a or 2b above, a \_\_\_\_\_% a compromised request is indicated as follows:

☐ Allstate's interest only: \$ \_\_\_\_\_

☐ Allstate's interest including our insured's deductible interest: \$ \_\_\_\_\_

☐ 5. Documentation of our claim was sent to you earlier. Please remit payment.

☐ 6. An arbitration decision in our favor was rendered on \_\_\_\_\_. When may we expect payment?

☐ 7. Your offer of settlement is accepted. Please send your draft.

☐ 8. Your offer of settlement is unacceptable. We will proceed with legal action (or arbitration if applicable) unless our demand is met within 20 days.

# EXHIBIT A

EXHIBIT G

McKAY, BURTON & THURMAN

A PROFESSIONAL CORPORATION

WILFORD M. BURTON  
BARRIE G. MCKAY  
WILLIAM T. THURMAN  
DAVID P. BROWN  
WILLIAM THOMAS THURMAN  
PETER STIRBA  
DAVID L. BIRD  
REID TATEOKA  
STEPHEN W. RUPP  
HARRY CASTON  
BRYAN A. LARSON  
SCOTT C. PIERCE  
JOEL T. MARKER  
BENSON L. HATHAWAY, JR.  
R. BRET JENKINS

ATTORNEYS AND COUNSELORS AT LAW  
SUITE 1200 KENNECOTT BUILDING  
10 EAST SOUTH TEMPLE STREET  
SALT LAKE CITY, UTAH 84133

(801) 521-4135

OF COUNSEL  
DAVID L. MCKAY  
TELEFAX 801-521-4252

April 4, 1988

Allstate Insurance Company  
Market Claim Office  
5650 South 410 West  
Salt Lake City, Utah 84123-0000

Attention: Andra N. Hogan

Re: Subrogation Claim/Vernon J. Thomas

Dear Ms. Hogan:

I have reviewed Allstate's no fault subrogation claim with the carrier for A & M Moving & Storage. Inasmuch as it is our position that your insured's injuries did not arise out of the accident, for which no fault benefits were provided, your claim previously submitted to Frontier Adjusters is denied.

Very truly yours,

*Peter Stirba*  
/KP

PETER STIRBA

PS1:kp  
cc: Libby Lowther  
Faye Strothers

EXHIBIT B

COPY

EXHIBIT H

April 12, 1988

Mr. Peter Stirba  
McKay, Burton & Thurman  
Suite 1200 Kennecott Bldg.  
10 East South Temple Street  
Salt Lake City, Utah 84133

506.10  
119.29  
1509  
213431

RE: Our Claim Number : 1310092067 J30  
Our Insured : Vernon J. Thomas  
Accident Date : December 14, 1987  
Your Client : Frontier Adjusting for  
A&M Moving & Storage

Dear Mr. Stirba:

Thank you for your correspondence of April 4, 1988.

While I can appreciate your concerns regarding the relatedness of the heart surgery to the automobile accident, the matter was carefully and fully investigated prior to any payments being made.

Enclosed is another copy of Dr. Okawa's January 12, 1988 medical report when he states "I feel definitely that the accident did precipitate his (Vernon J. Thomas) myocardial infarction, aggravating a pre-existing condition". I had a long conversation with Dr. Okawa during which he strongly reiterated his assessment that had the accident not occurred, Mr. Thomas would have remained asymptomatic and treatment for his coronary artery disease would not have been necessary.

Dr. Okawa firmly established the relationship between the resulting treatment and the auto accident. Once the correlation was made, we had no option but to cover the reasonable and necessary expenses under Mr. Thomas' personal injury protection coverage.

EXHIBIT

C

## COLLATERAL REFERENCES

C.J.S. — 44 C.J.S. Insurance § 281.

Key Numbers. — Insurance Ⓔ 144(1).

**31A-21-107. Contract rights under noncomplying policies.**

(1) Except as otherwise specifically provided by this title, a policy is enforceable against the insurer according to its terms, even if it exceeds the authority of the insurer.

(2) Any insurance policy, rider, or endorsement issued after July 1, 1986, and which is otherwise valid, which contains any condition or provision not in compliance with the requirements of this title, is not rendered invalid by this title. However, those conditions and provisions shall be construed and applied as if the policy, rider, or endorsement was in full compliance with this title.

(3) Upon written request of the policyholder or an insured whose rights under the policy are continuing and not transitory, an insurer shall reform and reissue or amend by a clearly stated rider its written policy to comply with the requirements of the law existing at the date of issuance of the policy. Subject to this section and § 31A-21-102, a person seeking to reform a written insurance agreement by complaint or petition to a judicial authority shall show by clear and convincing evidence the existence of facts establishing the reformation.

**History:** C. 1953, 31A-21-107, enacted by L. 1985, ch. 242, § 26; L. 1986, ch. 204, § 140.

**Amendment Notes.** — The 1986 amendment, effective July 1, 1986, in Subsection (2), substituted "title" for "code"; and in Sub-

section (3), deleted from the end of the first sentence "or if proved by clear and convincing evidence, to comply with the prior agreement of the parties" and added the present last sentence.

**31A-21-108. Subrogation actions.**

Subrogation actions may be brought by the insurer in the name of its insured.

**History:** C. 1953, 31A-21-108, enacted by L. 1986, ch. 204, § 141.

**Effective Dates.** — Laws 1986, ch. 204, § 299 makes the act effective on July 1, 1986.

**History:** C. 1953, 31A-22-308, enacted by L. 1985, ch. 242, § 27; 1990, ch. 327, § 9.

**Amendment Notes.** — The 1990 amendment, effective April 23, 1990, divided the formerly undivided language in Subsection (1) into present Subsections (1) and (2); redesignated former Subsection (2) as present Subsection (3); substituted "when injured in an accident involving any motor vehicle, regardless of whether the accident occurs in this state, the United States, its territories or possessions, or Canada, except when the injury is a result of

the use or operation of the named insured's own motor vehicle not actually insured under the policy" for "and" in Subsection (1) and "under the circumstances described in Section (1), except where the person is injured as a result of the use or operation of his own motor vehicle not insured under the policy; and" for "when injured in an accident in Utah involving any motor vehicle" in Subsection (2); and, in Subsection (3), deleted "in Utah" after the first instance of "occurring" and inserted "occurring in Utah" near the end of the subsection.

#### NOTES TO DECISIONS

**Limitation of policy covering driver.**

Father of passenger, who was killed while riding in an automobile driven by insured's son but owned by another person, was not entitled

to personal injury protection (PIP) coverage under a policy covering the driver. *McCaffery v. Grow*, 128 Utah Adv. Rep. 36 (Ct. App. 1990).

#### COLLATERAL REFERENCES

**A.L.R.** — What constitutes "entering" or "alighting from" vehicle within meaning of in-

surance policy, or statute mandating insurance coverage, 59 A.L.R.4th 149.

### **31A-22-309. Limitations, exclusions, and conditions to personal injury protection.**

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

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

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

- (i) for any injury sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy;
- (ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle;
- (iii) to any injured person, if the person's conduct contributed to his injury:
  - (A) by intentionally causing injury to himself; or
  - (B) while committing a felony;
- (iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;
- (v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or



- (vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials.
- (b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.
- (3) The benefits payable to any injured person under Section 31A-22-307 are reduced by:
  - (a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan; and
  - (b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because he is on active duty in the military service.
- (4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.
- (5) Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as expenses are incurred. Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer. If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1-1/2% per month after the due date. The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.
- (6) Every policy providing personal injury protection coverage is subject to the following:
  - (a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and
  - (b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

**History:** C. 1953, 31A-22-309, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 160; 1988 (2nd S.S.), ch. 10, § 10.

**Amendment Notes.** — The 1988 (2nd S.S.) amendment, effective September 5, 1988,

added Subsections (2)(a)(iv) to (vi) and made related stylistic changes, and substituted "is subject to the following" for "shall provide" in the introductory language of Subsection (6).

## NOTES TO DECISIONS

## ANALYSIS

Household exclusion clause.  
Personal injury protection requirements.

**Household exclusion clause.**

A household or family exclusion clause in an automobile insurance policy is contrary to public policy and to the statutory requirements found in the No-Fault Insurance Act as to the minimum benefits provided by statute. *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985).

Where the insurer fails to disclose material exclusions in an automobile insurance policy and the purchaser is not informed of them in writing, those exclusions are invalid. Without disclosure, the household exclusion clause fails to honor the reasonable expectations of the purchaser, rendering the exclusion clause in-

valid as to the entire policy limits. *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985).

Household or family exclusions are valid in this state as to insurance provided by an automobile policy in excess of the statutorily mandated amounts and benefits. *State Farm Mut. Auto. Ins. Co. v. Mastbaum*, 748 P.2d 1042 (Utah 1987).

**Personal injury protection requirements.**

In order to invoke the provisions of Subsection (6), the individual who initially pays the amounts for which personal injury protection benefits are also available must be "another insurer." *McCaffery v. Grow*, 128 Utah Adv. Rep. 36 (Ct. App. 1990).

Subsection (6) does not contemplate arbitration between an uninsured victim's father and another's insurance company. *McCaffery v. Grow*, 128 Utah Adv. Rep. 36 (Ct. App. 1990).

## COLLATERAL REFERENCES

**Utah Law Review.** — Note, The Negligent Infliction of Emotional Distress: A New Cause of Action in Utah, 1989 Utah L. Rev. 571.

**A.L.R.** — Injury or death caused by assault as within coverage of no-fault motor vehicle insurance, 44 A.L.R.4th 1010.

Who is "employed or engaged in the automobile business" within exclusionary clause of liability policy, 55 A.L.R.4th 261.

What constitutes "entering" or "alighting

from" vehicle within meaning of insurance policy, or statute mandating insurance coverage, 59 A.L.R.4th 149.

Validity and construction of automobile insurance provision or statute automatically terminating coverage when insured obtains another policy providing similar coverage, 61 A.L.R.4th 1130.

**31A-22-310. Assigned risk plan.**

(1) After consultation with insurers authorized to issue policies containing the provisions specified under Section 31A-22-302, the insurance commissioner shall approve a reasonable plan for the equitable apportionment among the insurers of applicants for those policies who are in good faith entitled to, but are unable to procure, these policies through ordinary methods.

(2) Upon the commissioner's approval of a plan under this section, all insurers issuing policies described under Section 31A-22-302 shall subscribe to and participate in the commissioner's approved plan.

(3) Any applicant for a policy under the commissioner's plan, any person insured under the plan, and any insurer affected by the commissioner's plan may appeal to the insurance commissioner from any ruling or decision of the manager or committee designated to operate the plan.

(4) Section 31A-2-306 applies to the commissioner's decision on this appeal.

**History:** C. 1953, 31A-22-310, enacted by L. 1985, ch. 242, § 27; 1987, ch. 161, § 82.

**Amendment Notes.** — The 1987 amendment, effective January 1, 1988, designated

the previously undesignated provisions of this section and, in Subsection (3), deleted "under Subsection 31A-2-301(3)" following "insurance commissioner."