

2000

Melvin R. Pollard v. Truck Insurance Exchange : Brief of Appellant

Utah Court of Appeals

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Clifford J. Payne; Nelson, Chipman, Quigley and Hansen; Attorneys for Appellee.

Edward M. Garrett; Garrett and Garrett; Attorney for Appellant.

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MELVIN R. POLLARD,)	
)	
)	
Plaintiff/Appellant,)	Trial Court No. 990905650
)	
vs.)	Appellate Court No. 20000167CA
)	
TRUCK INSURANCE EXCHANGE,)	
)	PRIORITY 15
Defendant/Appellee,)	
)	

Appeal from the Third District Court, Salt Lake County, Judge Ann M. Stirba

**Edward M. Garrett, #1163
GARRETT & GARRETT
2091 East 1300 South,
Suite 201
Salt Lake City, Utah 84108
Telephone: 801-581-1144
Attorney for
Plaintiff/Appellant**

Julia D'Alesandro
Clerk of the Court

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STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to Section 78-2-2 (j) of the Utah Code Annotated (1953) and pursuant to Rules 3 and 4 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

Did the Lower Court err in granting Summary Judgment to Defendant (Truck Insurance Exchange) by ruling that the comprehensive general liability policy (Business Insurance Policy) issued by Truck Insurance Exchange to Climate Source Inc., and Pollard Mechanical Inc., did not provide Uninsured Motorist Coverage to Melvin R. Pollard, the owner of both Corporations.

Standard of Review: Correction of Error

State v. Pena, 869 P.2d 932 (Utah 1994); *United Park City Mines Co., v. Greater Park City Co.*, 870 P.2d 880 (Utah 1993); *Jacobson Investment v. State Tax Commission*, 839 P.2d 789 (Utah 1992)

Issue preserved in Lower Court by Memorandum Decision of the Lower Court, dated February 3, 2000.

DETERMINATIVE STATUTES

Title 41-12a-101 UCA (1953)

Title 31A-22-302 UCA (1953)

Title 31A-22-305 UCA (1953) § 33(a)(b)

Title 41-1a-102(37) UCA (1953)

Title 41-22-2(11) UCA (1953)

STATEMENT OF THE CASE

A. Nature of the Case.

This is an action by Melvin R. Pollard (Pollard) to determine that he is entitled to Uninsured Motorist Coverage (UM) for injuries he received in an auto-motorcycle accident that occurred on September 23, 1997, under the terms of a Comprehensive Liability Insurance Policy issued by Truck Insurance Exchange (Farmer's) which contains a section providing UM Coverage.

B. Course of Proceedings.

Following the Answer filed to Pollard's Complaint, both parties filed Motions for Summary Judgment. Pollard moved for Partial Summary Judgment seeking a declaration as a matter of law that he was covered under the UM provision of the policy. Issues of damages and UM liability were reserved. Farmers moved for Summary Judgment seeking a declaration that Pollard was not covered under the UM provisions of the Policy.

The matter was briefed by both parties and argued to the Court.

On the 4th day of February, 2000 the Trial Court rendered a Memorandum decision, granting Farmers Motion for Summary Judgment and denying Plaintiffs Motion for Partial Summary Judgment. (The Memorandum decision is Appendix 1, R.39)

STATEMENT OF FACTS

1. Pollard is the owner of all of the issued and outstanding stock of two corporations, namely Climate Source Inc., and Pollard Mechanical Inc. He has been the sole

owner since the two corporations were organized. The business of both corporations is the installation and repair of heating and air-conditioning systems. (Affidavit of Pollard, Appendix 2, R.30)

2. On or about July 14, 1997, Truck Insurance Exchange, a member of the Farmers Insurance Group Companies, (herein "FARMERS") issued its Farmer's Insurance Business Policy, policy 06590-13-39, which is a comprehensive liability and property damage insurance policy. Among the coverage's contained in the policy is one entitled Business Auto Coverage form. Within that coverage is a section called "Utah Uninsured Motorist Coverage". This part of the policy is attached hereto in full in Appendix 3.

3. Pollard has been insured personally and in his businesses by Farmers for many years. It is his belief that he was personally covered for all of the coverage's in the Business auto policy and all prior policies. This fact was imparted to him by Farmers agents. (Affidavit of Pollard, Appendix 2, R.30)

4. On September 23, 1997, at approximately 8:00 o'clock a.m., Pollard while operating a motorcycle, sustained severe disabling injuries in an accident involving an uninsured motorist (hit and run) at the 700 East 4500 South intersection in Salt Lake County, State of Utah.

5. Following the accident, Pollard claimed coverage under the policy here in question as well as a separate policy issued by Farmers covering his motorcycle. The motorcycle policy had a limit on One Hundred Thousand Dollars (\$100,000.00). The policy

at issue here has limits of One Million Dollars (\$1,000,000.00). Farmers settled and paid the \$100,000.00 limits under the motorcycle policy but denied coverage under the policy here involved. Pollard's damages will likely exceed the \$1,000,000.00 policy limit.

6. In the settlement agreement entered into by the parties when the motorcycle policy was paid, it was agreed to that Pollard's rights under the subject policy were reserved and not affected by the settlement.

7. Farmers concedes that Pollard is and insured under the business policy and would be covered if he were a pedestrian (more on this important concession, later in the brief).

SUMMARY OF ARGUMENT

The Lower Court based its decision on a provision of the business policy; Title 31A-22-305 (7)(a) of Utah's Uninsured and Underinsured Motorist Statute; and Utah Cases, *Clark v. State Farm Mut. Auto Ins. Co.*, 743 P.2d 1227 (Utah 1987) and *Bear River Mutual v. Wright*, 770 P.2d 1019 (Utah App. 1989).

The argument will show that neither the policy provision or the statutory provision limit or deny coverage in this case. The *Clark* case ruled that a party could not insure one of his vehicles for UM coverage and transfer that coverage to his other vehicles that did not have UM coverage. That case has no application because Pollard is not seeking to transfer coverage to his motorcycle. He insured his motorcycle with Farmers along with 14 business autos, on which he paid a premium. Whether he was operating a listed vehicle is not material.

The *Wright* case is important because it holds that a motorcycle is not an automobile, under the terms of an exclusion in the policy. It teaches the significance of proper application of definitions in the interpretation of insurance contracts. It does not however preclude coverage in this case.

The argument below will show in detail the error committed by the Lower Court.

ARGUMENT

POINT ONE

THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT (TRUCK INSURANCE EXCHANGE) BY RULING THAT THE COMPREHENSIVE GENERAL LIABILITY POLICY (BUSINESS INSURANCE POLICY) ISSUED BY TRUCK INSURANCE EXCHANGE TO CLIMATE SOURCE INC., AND POLLARD MECHANICAL INC., DID NOT PROVIDE UNINSURED MOTORIST COVERAGE TO MELVIN R. POLLARD, THE OWNER OF BOTH CORPORATIONS.

A. The Terms Of The Policy.

The Lower Court quoted a provision in the "Auto" portion of the policy, which reads:

"This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those 'autos' shown as covered 'autos'. 'Autos' are shown as covered 'autos' for a particular coverage by the entry of one or more of the symbols from the COVERED AUTO section of the Business Auto coverage".

The Court then held that that provision of the policy prohibits UM coverage in this case because the motorcycle operated by Pollard was not listed in the policy and that there was no coverage if Pollard was not operating a listed vehicle. In reaching this conclusion the Court necessarily had to ignore the language of the UM coverage which reads;

“A. Coverage

1. We will pay all sums the ‘insured’ is legally entitled to recover as compensatory damages from the owner or driver of an ‘uninsured motor vehicle’. The damages must result from ‘bodily injury’ sustained by the ‘insured’ cause by an ‘accident’. The owner’s and driver’s liability for these damages must result from the ownership, maintenance or use of the ‘uninsured motor vehicle’.
2. We will pay only after all liability bonds or policies have been exhausted by judgments or payments.
3. Any judgment for damages arising out of ‘suit’ brought without our written consent is not binding on us.

B. WHO IS AN INSURED

1. You
2. If you are an individual, any ‘family member’.
3. Anyone else ‘occupying’ a covered ‘auto’ or a temporary substitute for a covered ‘auto’. The covered ‘auto’ must be out of service because of its breakdown, repair, servicing, ‘loss’ or destruction.
4. Anyone for damages he or she is entitled to recover because of ‘bodily injury’ sustained by another ‘insured’.”

“You” is defined in the Business Auto Coverage (App. 3) as the named insured shown in the Declarations. The named insured is shown on the policy to be Climate Source Inc., and Pollard Mechanical Inc., both corporations owned by the Plaintiff, Pollard. He is the sole shareholder. All fourteen of his company vehicles are covered for UM insurance.

The Lower Court entirely overlooked the fact that the language of the UM coverage is ambiguous. A corporation cannot be injured by a UM and a corporation does not have family members.

The Lower Court ruled that since Pollard's motorcycle is not listed on the policy there is no UM coverage for him. The Lower Court analysis of the case is not the correct measure of this case.

The fundamental issue in this case is not whether Pollard was operating a covered vehicle, but whether he is an “insured” under the policy.

The significance of the UM provision quoted above and the point that the Lower Court missed is that the policy does not require that an “insured” must be occupying a listed vehicle in order to claim UM benefits. The fact that Pollard was riding a motorcycle that was not a listed “auto” is immaterial. All that is required is that an “insured” suffer an injury caused by an uninsured motorist. Coverage is provided without regard to the operation of any auto, or not auto.

As a subsidiary argument, it was unnecessary to list the motorcycle in order to have coverage.

Throughout the policy the word “auto” is used frequently. Under section 5 -definitions of the auto policy on page 9 of 11 pages, (see appendix 3) "auto" is defined:

"B. 'Auto' means a land motor vehicle, trailer or semi-trailer designed for travel on public roads but does not include 'mobile equipment'."

Pollard was operating a motorcycle. The case of *Bear River Mut. Ins. Co., v. Wright*, 770 P.2d 1019 (Utah App. 1989) provides guidance in this definitional field. That case explicitly held that for the purpose of a policy exclusion in that case, the word automobile as used in the exclusion did not include motorcycle.

We look again at the policy definition, which describes “auto” as a land motor vehicle, designed for travel on public roads. The word "auto" in the policy is a shorthand way of saying "automobile". Automobile is a four-wheel vehicle designed for use on highways and a motorcycle is a two wheeled vehicle and although used on public roads, its primary use is off road. This is what gives the motorcycle its primary attraction. The term "motorcycle" is not mentioned in the policy. (See *Bear River Mut. Ins. Co., v. Wright*, supra.)

B. Statutory Provision.

In support of its conclusion that there is no coverage, the Lower Court quoted Title 31A-22-305(7)(a) of the Insurance Code relating to Uninsured and Underinsured Motorist Coverage the Section quoted reads:

"Uninsured motorist coverage under this section applies to bodily injury, sickness, disease, or death of covered persons while occupying or using a motor vehicle as described in the policy under which a claim is made, or if the motor vehicle is a newly

acquired or replacement vehicle covered under the terms of the policy. . . ."

The Statute has no application for several reasons. The Lower Court failed to discern that the Statute does not apply to motorcycles.

Under part three of the Motor Vehicle Insurance Code, Title 31A-22-301 a definition of Motor Vehicle is stated as follows:

"(1) 'Motor vehicle' has the same meaning as under Subsection 41-12a-103 (4)."

Quoted section reads:

"(4) (a) 'Motor vehicle' means every self-propelled vehicle that is designed for use upon a highway, including trailers and semi trailers designed for use with other motorized vehicles.

(b) 'Motor vehicle' does not include traction engines, road rollers, farm tractors, tractor cranes, power shovels, and well drillers, and every vehicle that is not propelled by electric power obtained from overhead wires but not operated on rails."

The term "motorcycle" is not mentioned in the above section and the term "motor vehicle" refers to self propelled vehicles designed for use upon a highway. It is true that motorcycles are frequently seen on highways, but more often they are used as off-highway vehicles.

Even further the UM statute has a specific reference to "motor vehicle". 31A-21-22-305 (4)(b)(c)(ii) which reads:

"(4)(c)(ii) 'Motor vehicle' has the same meaning as under Section 41-1a-102"

which reads:

"(33)(a)'Motor vehicle' means a self propelled vehicle intended primarily for use and operation on the highways.

(b) 'Motor vehicle' does not include an off-highway vehicle."

Further on in the definitions we find under (37) the following definition:

"'Off-highway vehicle' has the same meaning as provided in Section 41-22-2."

Subsection 11 of that Section reads:

"'Off-highway vehicle' means any snowmobile, all-terrain type I vehicle, all-terrain type II vehicle, or motorcycle."

When we follow the trail of definitions we find that a motorcycle is not classified as a motor vehicle under Utah Statutory definitions. This is one of the reasons (7)(a) has no application to this case.

The Lower Court in its decision made one observation with which we agree:

"Furthermore, it must be remembered that the policy provides the applicable coverage not the statute. (R.)"

Simply stated Farmers cannot deny coverage based upon a statute that is not contained in its policy.

Furthermore, an insurance company can always provide by contract coverage greater than that outlined in a statute. (*Bear River Mut. Ins. Co., v. Wright, supra.*)

The Court should note also the language of 31a-22-305 (1) (Uninsured Motorist Coverage) which reads:

- "(1) As used in this section, 'covered persons' includes:
- (a) the named insured;
 - (b) persons related to the named insured by blood, marriage, adoption or guardianship, who are residents of the named insured's household, including those who usually make their home in the same household but temporarily live elsewhere;
 - (c) any person occupying or using a motor vehicle referred to in the policy or owned by a self-insurer; and
 - (d) any person who is entitled to recover damages against the owner or operator of the uninsured or underinsured motor vehicle because of bodily injury to or death of persons under Subsection (1)(a), (b), or (c)."

It will be noted that there is no requirement that the insured or his family members be operating a vehicle mentioned in the policy or indeed operating any vehicle at all.

Distinguished from these two classes of insured are other persons who must be operating a motor vehicle referred to in the policy. The Farmers UM coverage contains a similar provision. (See above quotation). However, the fourteen vehicles listed in the policy are company vehicles used in the company business of heating and air conditioning. Most likely they would be operated by a company employee who would be acting within the course and scope of his employ. This would include Pollard. The policy however, does not provide coverage if the loss is covered by Workmens Compensation. (See the policy, appendix , SECTION D., LIMIT OF INSURANCE).

The Lower Court held that there was no coverage because 305(7)(a) excluded coverage unless the claimant was operating a listed vehicle. The Lower Court necessarily had to ignore 305 (1)(a)(b). All that is necessary for a covered person to obtain benefits is to be injured or killed by an Uninsured Motorist.

The Court must also consider the terms of the UM coverage under Section E entitled Changes in Conditions, it is stated:

“If there is other applicable insurance available under one or more policies or provisions of coverage:

a. The maximum recovery under all coverage forms or policies combined may equal but not exceed the highest applicable limit for any one vehicle under any coverage form or policy providing coverage on either a primary or excess basis.”

The quoted section contemplates the fact that there may be multiple coverages available to a covered person. It limits that coverage to the highest limit for any one vehicle under any coverage form. When Farmers wrote that language it must have contemplated that multiple UM coverage could be available to an insured. It cannot now ask this Court to ignore that provision.

C. The Concession By Farmers.

In one of the briefs filed by Farmers in the Lower Court it is stated:

"The Uninsured Motorist Coverage issued on Mr. Pollard's business vehicles was for a very specific and meaningful purpose of providing coverage to the users of the business vehicles in the event that

such person was injured by an uninsured motorist in three possible situations:
(1) While using one of the business vehicles,
(2) As a pedestrian, or
(3) While occupying a vehicle not owned or available for his regular use."

Aside from the fact that the terms of the policy contradict the above statement for the most part, it is interesting that Farmers would concede that Pollard would be covered if he were a pedestrian and struck by an Uninsured vehicle. (R. 92, 93) Farmers does not cite any provision of the "auto" policy that mentions the word pedestrian, and we are unable to find any such reference. Given the fact that UM coverage is remedial in nature and designed to protect families who are injured by Uninsured Motorists it is very clear that Pollard would be covered if he were operating a bicycle, a motorized wheelchair, a scooter, or an off road vehicle including a motorcycle.

The admission by Farmers underscores the fact that the policy is ambiguous. That is the subject of our final section.

D. The Policy Is Ambiguous And Should Be Construed To Provide UM Coverage To Pollard.

This point is best illustrated by reference to the cases from many other jurisdictions that have construed family type UM coverage engrafted upon Commercial policies having the same or very similar terms as that contained in the Farmers policy.¹ The cases have been reproduced and are under Appendix 4.

¹ The Farmers policy form as indicated on the bottom of each page, states "Copyright, Insurance Services Office, Inc. 1993". These forms are prepared for and commonly used in the insurance industry throughout the United States.

One of the leading cases in this field is *Hansen v. Ohio Cas. Ins. Co.*, 687 A.2d 1262 (Conn. 1996). In this case the corporate owner of a closely held corporation was killed while operating a snowmobile by an Uninsured Motorist. Under a commercial policy containing UM coverage identical to the Farmers case, the Court held that the policy was ambiguous and would therefore be construed as providing coverage for the decedent.

In a case decided the same day by the Connecticut Court, *Agosto v. Aetna Cas. and Sur.*, 687 A.2d 1267 (Conn. 1996), the Court held that coverage would be available to the estate of a State Trooper, under a State Commercial policy after he had left his vehicle on a traffic stop and was killed by a third vehicle. The same ambiguity was found to exist in the State Commercial policy providing for UM coverage.

Hawkeye-Sec. Ins. v. Lambrecht & Sons, 852 P.2d 1317 (Colo. App. 1993), in this case Plaintiff's husband owned all of the capital stock of the closely held corporation. Plaintiff worked for the corporation and was an officer and director. She was injured while in a vehicle owned by the corporation. The Court held that the UM coverage, which is very similar to the Farmers policy, if read literally, would provide no coverage at all and would result in the insurance company receiving a premium while providing no consideration. It held that the language must be interpreted to provide some meaningful coverage and in so doing ruled that Plaintiff was entitled to UM coverage. The concept of "you" being the corporate named insured and the term "family member" are thoroughly discussed in arriving at the conclusion that no meaningful coverage was provided if the terms are interpreted literally.

Grain Dealers Mut. Ins. Co., v. McKee, 911 S.W.2d 775 (Tex. App. San Antonio 1995). *McKee's* eleven year old daughter was injured in a one car accident in which her Underinsured Step-Sister was the driver. The auto was not covered under the corporations Business policy. The injured girl was a member of the immediate family of the sole share holder of the family owned corporation; the corporate insured. The Court held that the use of the term "family members" in the UM-UIM coverage of the corporate policy was ambiguous and would be resolved in favor of coverage for the corporate owners daughter.

Jacobson v. Implement Dealers Mut. Ins. Co., 640 P.2d 908 (Mont. 1982), the decedent died as a result of an accident with an Uninsured Motorist. Decedent was driving a tractor trailer unit he owned. Claimants applied for UM coverage under a policy covering a Ford pickup truck that decedent owned. The policy had an exclusion similar to an exclusion in the policy before this court, eliminating coverage for an insured if occupying and automobile owned by the insured but not described in the policy. The Court noted that some courts held the exclusion valid and some did not. The Court held that UM coverage represents public policy providing coverage for insureds for damages caused by irresponsible drivers who are uninsured. The Court held that the exclusion was contrary to the public policy of the State of Montana, and that Claimants must be afforded UM coverage.

Hager v. American West Ins. Co., 732 F. Supp. 1072 (D. Mont. 1989), *Hagers Inc.*, is a closely held family corporation. Plaintiff *Hager*, was a minority share holder and was injured by a hit and run vehicle as she was walking in a parking lot. The Court ruled:

"A construction of the term based upon the conclusion that a corporation cannot have 'family members' in a literal sense would directly contravene the mandate of Montana law requiring the ambiguity be construed against the Defendant. Consequently, the Court finds that coverage under the Uninsured Motorist provision of the automobile liability policy issued by the Defendant to Hagers, Inc., is appropriately extended to the Plaintiff, Colleen L. Hager, as a shareholder of that closely held corporation for the injuries she sustained in the hit and run accident of October, 1985."

Colokathis v. Hartford Acc. and Indem. Co., 244 Cal. Rptr. 779 (Cal App. 1 Dist. 1988), the question before the Court was whether the President and sole shareholder of a company can recover for injuries under the UM provision of a commercial automobile insurance policy, which designates only the company as the named insured. In this case the injured party, the president and sole shareholder of the insured corporation was operating a rental car in California when injured by an Uninsured Motorist. The Court held that the Corporation paid for coverage which it could never hope to collect. The Court held this to be a violation of public policy and would not enforce an interpretation which rendered the coverage illusory. The Court ruled further that the Plaintiff as the principle officer of the company, was the most likely person that should benefit from the paid for coverage and accordingly the Court concluded that the policy would interpreted to provide Uninsured Motorist coverage for the Plaintiff.

Decker v. CNA Ins. Co., 585 N.E.2d 884 (Ohio App. 11 Dist. 1990), this case involved a policy where the named insured was a corporation. It contained language virtually identical to the policy here involved. The decedent, an employee of the corporation was struck and killed while jogging by and Underinsured Motorist. The Court citing other Ohio cases, found that the Corporation was the named insured and the policy contained "family member" coverage. The Court ruled the policy to be ambiguous and that the employee was entitled to coverage.

The above cases provide well reasoned precedent for the conclusion that Pollard is insured under the Business Insurance Policy.

CONCLUSION

No one will dispute the fact that the policy is ambiguous; if for no other reason than it includes "family coverage" in a commercial "auto" policy.

The named insureds in the policy are two corporations. Corporations cannot be injured by an UM and corporations do not have family members. Read literally the policy provides no coverage at all. However, Farmers cannot charge a premium for a policy that is illusory and does not provide meaningful coverage.

Actually the concession made by Farmers that Pollard would be covered if he were a pedestrian, underscores the fact that Pollard is not required to be occupying a "covered auto" or any vehicle to be insured for UM coverage. This is a major concession and should end all further argument in this case.

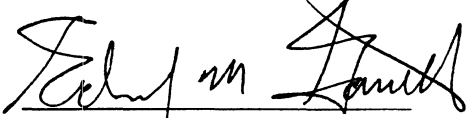
Pollard is the owner of both Corporations and insured all 14 of his company vehicles for UM coverage. His understanding from Farmers agents was that he would be personally covered under all the coverages that he purchased.

Pollard should be granted Partial Summary Judgment declaring that he is insured under the UM provisions of the Business Insurance policy.

The Summary Judgment granted in favor of Pollard by the Lower Court should be reversed and the Motion for Summary Judgment denied.

Respectfully Submitted,

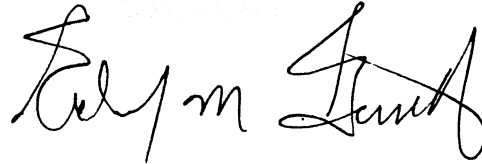
GARRETT & GARRETT


Edward M. Garrett

CERTIFICATE OF MAILING

I hereby certify that two correct and true copies of the foregoing, BRIEF OF THE PLAINTIFF/ APPELLANT, was mailed, postage prepaid on this ____ day of ____, 2000 to:

Clifford J. Payne, #5533
NELSON, CHIPMAN, QUIGLEY AND HANSEN
215 South State Street, Suite 800
Salt Lake City, Utah 84111
Telephone: 801-364-3627
Attorneys for Defendant/Appellee

A handwritten signature in black ink, appearing to read "Elym Lund". The signature is written in a cursive, flowing style with a large initial "E" and a distinct "Lund" at the end.

APPENDIX 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MELVIN R. POLLARD,

Plaintiff,

vs.

TRUCK INSURANCE EXCHANGE,

Defendant.

MEMORANDUM DECISION

Case No. 990905650

Honorable ANNE M. STIRBA

Court Clerk: Marcy Thorne

February 3, 2000

The above-entitled matter comes before the Court pursuant to Defendant's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment. The Court heard oral argument with respect to these motions on December 10, 1999. Following the hearing the matter was taken under advisement.

The Court having now considered the motions, memoranda, exhibits attached thereto and for the good cause shown hereby enters the following ruling.

BACKGROUND

1. On July 14, 1997, Truck Insurance Exchange ("Truck Insurance") issued a Commercial auto Insurance Policy to Climate Source and Pollard Mechanical, Inc.

2. On September 23, 1997, plaintiff, Melvin Pollard

("Pollard"), was involved in a motor vehicle accident which was allegedly caused by an unidentified driver of a Jeep while Pollard was operating a motorcycle.

3. At the time of the subject accident, Pollard had a personal Motor Vehicle Liability insurance policy in effect on the motorcycle, providing uninsured motorist coverage for his involvement in the accident. He made a claim under that policy and the \$100,000 limit was paid to or on behalf of Pollard in settlement.

4. With this action, Pollard has asserted a claim for uninsured motorist benefits under the Commercial Auto Policy issued to Climate Source and Pollard Mechanical, Inc. by Truck Insurance Exchange.

ANALYSIS

With their motion for summary judgment, Truck Insurance argues (1) the insurance contract between Pollard and Truck Insurance does not provide uninsured motorist coverage with respect to the use of vehicles not described in the policy, such as Pollard's personal motorcycle and 2) the uninsured motorist statutory scheme and case law in Utah support this position, and do not allow the additional UM coverage claimed by Pollard in this case.

Pollard in opposition to defendant's motion and in support of his own motion for partial summary judgment argues that in

accordance with the applicable case law, he is covered under the under the Truck Insurance policy regardless of whether he is operating a described auto, any other vehicle or no vehicle at all.

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). "In considering a summary judgment motion, the Court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in the light most favorable to the party opposing summary judgment." Cinder v. A.L. Williams & Assocs., 739 P.2d 634, 634 (Utah Ct. App. 1987).

Pursuant to Pollard's policy:

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "autos" shown as covered "autos." "Autos" are shown as covered "autos" for a particular coverage by the entry of one or more of the symbols from the COVERED AUTO section to the Business Auto coverage. (Emphasis added).

The motorcycle which plaintiff was driving at the time of the accident is not one of the "autos" described in the relevant section. Accordingly, under the clear and unambiguous language of the policy, there is no coverage.

With respect to the coverage under Utah's Uninsured and Under Insured Motorist statute, §31A-22-305(7)(a) provides:

Uninsured motorist coverage under this section applies to bodily injury, sickness, disease, or death of covered persons while occupying or using a motor vehicle only if the motor vehicle is described in the policy under which a claim is made, or if the motor vehicle is a newly acquired or replacement vehicle covered under the terms of the policy. . . .

The Utah Court of Appeals in the case of Bear River Mut. Ins. Co. v. Wright, 770 P.2d 1019 (Utah App. 1989) acknowledged that either a motorcycle or an automobile may be considered a "motor vehicle" although it is not an automobile. Id. at 1021 Under the statute, "motor vehicle" is the term used. This, combined with the holding in Clark v. State Farm Mut. Auto Ins. Co., 743 P.2d 1227 (Utah 1987) that "coverage was intended to rest with the vehicle and not with the named insured, since owners can opt in favor of uninsured motorist coverage on some vehicles and against it on others," leads to the conclusion that summary judgment in favor of defendant is appropriate. Furthermore, it must be remembered that the policy provides the applicable coverage, not the statute.

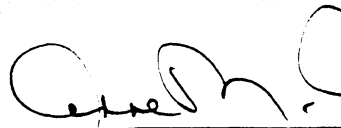
As to plaintiff's argument that the statute contains internal inconsistencies between its subsections, the Court is not persuaded such is the case, and indeed, plaintiff has cited no authority to the contrary.

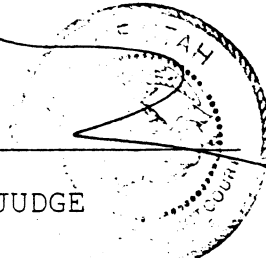
Based upon the forgoing, Defendant's Motion for Summary Judgment is granted. Plaintiff's Motion for Partial Summary

Judgment is respectfully denied.

DATED this 3rd day of February 2000.

BY THE COURT


ANNE M. STIRBA
DISTRICT COURT JUDGE



APPENDIX 2

FILED
JUL 16 PM 3:13

97

Edward M. Garrett #1163
GARRETT & GARRETT
2091 East 1300 South Suite 201
Salt Lake City, Utah 84108
Telephone: (801) 581-1144

Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MELVIN R. POLLARD,)	AFFIDAVIT OF MELVIN R. POLLARD
)	
Plaintiff,)	
)	
vs.)	
)	Civil No: 990905650
TRUCK INSURANCE EXCHANGE,)	
)	Judge Anna M. Stirba
Defendant.)	
)	

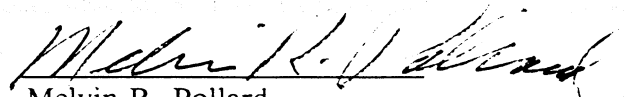
STATE OF UTAH)
 : ss
COUNTY OF SALT LAKE)

Melvin R. Pollard being first duly sworn, deposes and says:

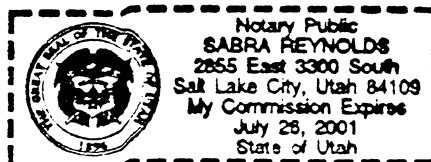
1. He is the Plaintiff in the above entitled action.
2. Climate Source, Inc., is a Utah corporation which was organized in 1989. Affiant is the owner of all the issued and outstanding stock of the Company and serves as its President and only Director. There are no other officers or directors in the Company.
3. Pollard Mechanical, Inc., is a Utah corporation which was organized in 1994. Affiant is the owner of all the issued and outstanding stock of the Company and serves as its President and only Director. There are no other officers or directors in the Company.

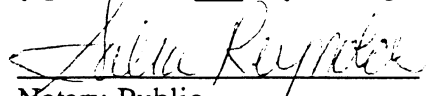
4. The business of both companies is the installation and repair of heating and air conditioning systems.
5. Before Climate Source, Inc., was incorporated, Affiant operated the business as a sole proprietor.
6. For many years, both, while acting as a sole proprietor and later under corporate form, Affiant purchased all business insurance, including automobile insurance, from Farmers Insurance Group of Companies. The only insurance not purchased from Farmers was workman's compensation insurance.
7. All policies were renewed annually.
8. It is Affiant's belief, gained over the years from conversations with Farmers' agents, that Affiant, as the business owner, was personally insured under the Business Owner's Policy Coverages whether the vehicle he was operating was described in the policy or whether it was not.
9. When Affiant had the motorcycle accident in September 1997, Affiant believed and expected that the uninsured motorized section of the Farmers' policy would fully cover Affiant's injuries and damages.

DATED this 13 day of August, 1999.


Melvin R. Pollard

SUBSCRIBED AND SWORN to before me a notary public this 15th day of August, 1999.




Notary Public
Residing in 1295 S. 2100 E. Salt Lake City, UT 84105

APPENDIX 3

**BUSINESS
AUTO
DECLARATIONS**

☐ POLICY

☒ COVERAGE PART

☒ TRUCK INSURANCE EXCHANGE ☐ MID-CENTURY INSURANCE COMPANY ☐ FARMERS INSURANCE EXCHANGE

☐ MEMBERS OF FARMERS INSURANCE GROUP OF COMPANIES

HOME OFFICE: 4680 WILSHIRE BLVD., LOS ANGELES, CALIFORNIA 90010

ITEM ONE

NAMED : CLIMATE SOURCE & POLLARD
INSURED : MECHANICAL INC
MAILING : 4020 SO 210 W
ADDRESS : SALT LAKE CITY UT 84107

3560034

Prematic Acc't No.

76-13-358

Agent

Prod. Count

06590-13-39

Policy Number

The named insured is an individual
unless otherwise stated:

☐ Partnership

☐ Joint Venture

☒ Corp.

☐ Organization (Other than Partnership or joint venture)

Type of
Business

HEATING & A/C

Policy Period from 07/14/97 (not prior to time applied for) to 07/14/98 12:01 AM Standard Time

If this policy replaces other coverages that end at noon standard time on the same day this policy begins, this policy will not take effect until the other coverage ends. This policy will continue for successive policy periods as follows: If we elect to continue this insurance, we will renew this policy if you pay the required renewal premium for each successive policy period subject to our premiums, rules and forms then in effect.

ITEM TWO SCHEDULE OF COVERAGES AND COVERED AUTOS

*This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "autos" shown as covered "autos". "Autos" are shown as covered "autos" for a particular coverage by the entry of one or more of the symbols from the COVERED AUTO Section of the Business Auto Coverage Form next to the name of the coverage.

COVERAGES	* COVERED AUTOS	LIMIT THE MOST WE WILL PAY FOR ANY ONE ACCIDENT OR LOSS (LIMITS SHOWN IN THOUSANDS)	PREMIUM
LIABILITY	2 8 9	\$ 1000	6,662.00
PERSONAL INJURY PROTECTION (or equivalent No-Fault Coverage)	5	SEPARATELY STATED IN EACH PIP ENDORSEMENT	86.00
ADDED PERSONAL INJURY PROTECTION (or equivalent added no-fault cov.)		SEPARATELY STATED IN EACH ADDED PIP ENDORSEMENT	
PROPERTY PROTECTION INSURANCE (Michigan only)		SEPARATELY STATED IN THE P.P.I. ENDORSEMENT MINUS \$ DEDUCTIBLE FOR EACH ACCIDENT	
AUTO MEDICAL PAYMENTS		\$ SEE SCHEDULE	
UNINSURED MOTORIST	7	\$ 1000	195.00
UNINSURED MOTORIST PROPERTY DAMAGE		\$	
UNDERINSURED MOTORISTS (When not incl. in Uninsured Motorists Coverage)	7	\$ 1000	1,092.00
PHYSICAL DAMAGE COMPREHENSIVE COVERAGE	7	Actual Cash Value or Cost of Repair, whichever is less minus \$ SEE SCHEDULE Ded. for Each Covered Auto. But no Deductible Applies to Loss Caused by Fire or Lightning. See Item Four for hired or borrowed "autos".	569.00
PHYSICAL DAMAGE SPECIFIED CAUSES OF LOSS COVERAGE	7	Actual Cash Value or Cost of Repair, whichever is Less Minus \$25 Ded. for Each Covered Auto for loss Caused by Mischief or Vandalism. See Item Four for hired or borrowed "Autos".	8.00
PHYSICAL DAMAGE COLLISION COVERAGE	7	Actual Cash Value or Cost of Repair whichever is less minus \$ SEE SCHEDULE Ded. for Each Covered Auto. See item four for hired or borrowed "Autos".	923.00
PHYSICAL DAMAGE TOWING AND LABOR		\$ for each disablement of a private passenger "auto." (ACTUAL LIMIT)	
PREMIUM FOR ENDORSEMENTS			
ESTIMATED TOTAL PREMIUM			9,535.00



**DECLARATIONS SUPPLEMENTAL
SCHEDULE OF COVERED AUTOS YOU OWN**

Covered Auto No.	DESCRIPTION				PURCHASED		TERRITORY		
	Year, Model, Trade Name, Body Type Serial Number (S) Vehicle Identification Number (VIN)				Original Cost New	Actual Cost & New (N) USED (U)	Town & State where Covered Auto will be principally garaged		
6	92	DODGE	CARAVAN		16500		MURRAY	UT	1
7	86	CHEVROLET	VAN		9500		MURRAY	UT	1
8	86	CHEVROLET	VAN		10000		SALT LAKE CITY	UT	1
9	90	GMC	P/U	3/4 T	10000		SALT LAKE CITY	UT	1
10	94	PACE	TRAILER	CARGO			SALT LAKE CITY	UT	1

Covered Auto No.	CLASSIFICATION								Except for towing, all physical damage loss is payable to you and the loss payee named below as interests may appear at the time of the loss.
	Radius of Operation	Business use s - service r - retail c - commercial	Size GVW, GCW or Veh. Seating Capacity	Age Group	Primary Rating Factor		Secondary Rating Factor	Code	
					Liab.	Phy. Dam.			
6	50	S	10000	6	1.0000	1.0000		01499	SEE E1112
7	100	S	10000	6	1.1000	1.0500		01599	
8	50	S	7000	6	1.0000	1.0000		01499	
9	50	S	7000	6	1.0000	1.0000		01499	
10	50	S	5000	4	.1500	.6500		68499	

COVERAGES-PREMIUMS, LIMITS AND DEDUCTIBLES(Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding ITEM TWO column applies instead)

Covered Auto No.	LIABILITY		PERSONAL INJURY PROTECTION		ADDED P.I.P.	PROP. PROT. (Mich. only)	
	*Limit	Premium	Limit stated in each P.I.P. End minus de- ductible shown below	Premium	Limit stated in each Added P.I.P. End. Premium	Limit stated in P.P.I. end. minus deduct. shown below	Premium
6	1000	445.00	0	6.00			
7	1000	490.00	0	6.00			
8	1000	445.00	0	6.00			
9	1000	445.00	0	6.00			
10	1000	64.00	0				
Total Premium		1,889.00		24.00			

COVERAGES-PREMIUMS, LIMITS AND DEDUCTIBLES(Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding ITEM TWO column applies instead)

Covered Auto No.	AUTO MED. PAY		UNINSURED MOTORISTS		UNINSURED MOTORIST PROPERTY DAMAGE		UNDERINSURED MOTORISTS	
	*Limit	Premium	*Limit	Premium	*Limit	Premium	*Limit	Premium
6			1000	15.00			1000	84.00
7			1000	15.00			1000	84.00
8			1000	15.00			1000	84.00
9			1000	15.00			1000	84.00
10								
Total Premium				60.00				336.00

COVERAGES-PREMIUMS, LIMITS AND DEDUCTIBLES(Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding ITEM TWO column applies instead)

Covered Auto No.	COMPREHENSIVE		SPECIFIED CAUSES OF LOSS		COLLISION		TOWING LABOR	
	Limit stated in ITEM TWO minus deduc- tible shown below	Premium	Limit stated in ITEM TWO Premium		Limit stated in ITEM TWO minus deduct. shown below	Premium	Limit Per Disablement	Premium
6	0	51.00			250	71.00		
7			8.00		250	49.00		
8	0	31.00			250	46.00		
9	0	31.00			250	46.00		
10								
Total Premium		113.00	8.00			212.00		

*(LIMITS SHOWN IN THOUSANDS)



**DECLARATIONS SUPPLEMENTAL
SCHEDULE OF COVERED AUTOS YOU OWN**

Covered Auto No.	DESCRIPTION				PURCHASED		TERRITORY			
	Year, Model, Trade Name, Body Type Serial Number (S) Vehicle Identification Number (VIN)				Original Cost New	Actual Cost & New (N) USED (U)	Town & State where Covered Auto will be principally garaged			
11	86	CHEV	VAN	G20	10000		SALT LAKE CITY	UT	1	
12	91	FORD	VAN	2 T	32000		SALT LAKE CITY	UT	1	
13	91	FORD	VAN	2 T	32000		SALT LAKE CITY	UT	1	
14	97	JEEP	CHEROKEE		37000		SALT LAKE CITY	UT	1	

Covered Auto No.	CLASSIFICATION								Except for towing, all physical damage loss is payable to you and the loss payee named below as interests may appear at the time of the loss.
	Radius of Operation	Business use s - service r - retail c - commercial	Size GVW, GCW or Veh. Seating Capacity	Age Group	Primary Rating Factor		Secondary Rating Factor	Code	
					Liab.	Phy. Dam.			
11	50	S	12000	6	1.0500	.8500		21499	SEE E1112
12	51	C	18000	6	1.6000	1.2000		23599	
13	50	C	18000	6	1.3500	.9500		23499	
14	50	S	10000	1	1.0000	1.0000		01499	

Covered Auto No.	COVERAGES-PREMIUMS, LIMITS AND DEDUCTIBLES(Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding ITEM TWO column applies instead)						
	LIABILITY		PERSONAL INJURY PROTECTION		ADDED P.I.P.	PROP. PROT. (Mich. only)	
	*Limit	Premium	Limit stated in each P.I.P. End minus deductible shown below	Premium	Limit stated in each Added P.I.P. End. Premium	Limit stated in P.P.I. end. minus deduct. shown below	Premium
11	1000	468.00	0	6.00			
12	1000	712.00	0	9.00			
13	1000	601.00	0	8.00			
14	1000	445.00	0	6.00			
Total Premium		2,226.00		29.00			

	COVERAGES-PREMIUMS, LIMITS AND DEDUCTIBLES(Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding ITEM TWO column applies instead)							
Covered	AUTO MED. PAY		UNINSURED MOTORISTS		UNINSURED MOTORIST PROPERTY DAMAGE		UNDERINSURED MOTORISTS	
Auto No.	*Limit	Premium	*Limit	Premium	*Limit	Premium	*Limit	Premium
11			1000	15.00			1000	84.00
12			1000	15.00			1000	84.00
13			1000	15.00			1000	84.00
14			1000	15.00			1000	84.00
Total Premium				60.00				336.00

Covered Auto No.	COVERAGES-PREMIUMS, LIMITS AND DEDUCTIBLES(Absence of a deductible or limit entry in any column below means that the limit or deductible entry in the corresponding ITEM TWO column applies instead)						
	COMPREHENSIVE		SPECIFIED CAUSES OF LOSS	COLLISION		TOWING LABOR	
	Limit stated in ITEM TWO minus deductible shown below	Premium	Limit stated in ITEM TWO Premium	Limit stated in ITEM TWO minus deduct. shown below	Premium	Limit Per Disablement	Premium
11	0	26.00		250	39.00		
12	50	87.00		500	145.00		
13	50	69.00		500	115.00		
14	50	110.00		500	186.00		
Total Premium		292.00			485.00		

***(LIMITS SHOWN IN THOUSANDS)**



BUSINESS AUTO DECLARATIONS (CONTINUED)

ITEM FOUR

SCHEDULE OF HIRED OR BORROWED COVERED AUTO COVERAGE AND PREMIUMS

LIABILITY COVERAGE RATING BASIS, COST OF HIRE

STATE	ESTIMATED COST OF HIRE FOR EACH STATE	RATE PER EACH \$100 COST OF HIRE	FACTOR(If liab. COV. IS PRIMARY)	PREMIUM
UT				24.00
PREMIUM				

Cost of hire means the total amount you incur for the hire of "autos" you don't own(not including "autos" you borrow or rent from your employees or their family members). Cost of hire does not include charges for services performed by motor carriers of property or passengers.

PHYSICAL DAMAGE COVERAGE

COVERAGES	LIMIT OF INSURANCE THE MOST WE WILL PAY DEDUCTIBLE	ESTIMATED ANNUAL COST OF HIRE	RATES PER EACH \$100 COST OF HIRE	PREMIUM
COMPREHENSIVE	ACTUAL CASH VALUE, COST OF REPAIRS OR \$ WHICHEVER IS LESS MINUS \$ DED. FOR EACH COVERED AUTO. BUT NO DEDUCTIBLE APPLIES TO LOSS CAUSED BY FIRE OR LIGHTNING.			
SPECIFIED CAUSES OF LOSS	ACTUAL CASH VALUE, COST OF REPAIRS OR \$ WHICHEVER IS LESS MINUS \$25 DED. FOR EACH COVERED AUTO FOR LOSS CAUSED BY MISCHIEF OR VANDALISM.			
COLLISION	ACTUAL CASH VALUE, COST OF REPAIRS OR \$ WHICHEVER IS LESS MINUS \$ DED. FOR EACH COVERED AUTO			
PREMIUM				

ITEM FIVE

SCHEDULE FOR NON-OWNERSHIP LIABILITY

NAMED INSURED'S BUSINESS	RATING BASIS	NUMBER	PREMIUM
Other than a Social Service Agency	Number of Employees	3	\$ 53.00
	Number of Partners		\$
Social Service Agency	Number of Employees		\$
	Number of Volunteers		\$

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

Premium shown is payable:\$ 9,535.00 at inception.

ENDORSEMENTS ATTACHED TO THIS POLICY: IL 00 21-Broad form Nuclear Exclusion(Not applicable in New York)

CA00011293 CA01590394 CA21621095 CA22440394 CA31061095 E0207-ED1 E1112-ED1
IL00030689 IL00171185 IL00211194 IL02660287 565236-ED2

LOSS PAYEE

COUNTERSIGNED _____ BY _____
(Date) Authorized Representative

BUSINESS AUTO COVERAGE FORM

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

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

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

SECTION I - COVERED AUTOS

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

A. DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS

SYMBOL	DESCRIPTION
--------	-------------

- | | |
|---|--|
| 1 = ANY "AUTO". | |
| 2 = OWNED "AUTOS" ONLY. Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins. | |
| 3 = OWNED PRIVATE PASSENGER "AUTOS" ONLY. Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins. | |
| 4 = OWNED "AUTOS" OTHER THAN PRIVATE PASSENGER "AUTOS" ONLY. Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins. | |
| 5 = OWNED "AUTOS" SUBJECT TO NO-FAULT. Only those "autos" you own that are required to have No-Fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have No-Fault benefits in the state where they are licensed or principally garaged. | |

6 = OWNED "AUTOS" SUBJECT TO A COMPULSORY UNINSURED MOTORISTS LAW. Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.

7 = SPECIFICALLY DESCRIBED "AUTOS". Only those "autos" described in ITEM THREE of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in ITEM THREE).

8 = HIRED "AUTOS" ONLY. Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent, or borrow from any of your employees or partners or members of their households.

9 = NONOWNED "AUTOS" ONLY. Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your employees or partners or members of their households but only while used in your business or your personal affairs.

B. OWNED AUTOS YOU ACQUIRE AFTER THE POLICY BEGINS

1. If symbols 1, 2, 3, 4, 5 or 6 are entered next to a coverage in ITEM TWO of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.

2. But, if symbol 7 is entered next to a coverage in **ITEM TWO** of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if:

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

C. CERTAIN TRAILERS, MOBILE EQUIPMENT AND TEMPORARY SUBSTITUTE AUTOS

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

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

SECTION II - LIABILITY COVERAGE

A. COVERAGE

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

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

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

1. WHO IS AN INSURED

The following are "insureds":

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

(5) A partner of yours for a covered "auto" owned by him or her or a member of his or her household.

c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

2. COVERAGE EXTENSIONS

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

(1) All expenses we incur.

(2) Up to \$250 for cost of bail bonds (including bonds for related traffic law violations) required because of an "accident" we cover. We do not have to furnish these bonds.

(3) The cost of bonds to release attachments in any "suit" we defend, but only for bond amounts within our Limit of Insurance.

(4) All reasonable expenses incurred by the "insured" at our request, including actual loss of earning up to \$100 a day because of time off from work.

(5) All costs taxed against the "insured" in any "suit" we defend.

(6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" we defend, but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

b. Out-of-State Coverage Extensions.

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

(1) Increase the Limit of Insurance for Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.

(2) Provide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered "auto" is being used.

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

B. EXCLUSIONS

This insurance does not apply to any of the following:

1. EXPECTED OR INTENDED INJURY

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

2. CONTRACTUAL

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

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

b. That the "insured" would have in the absence of the contract or agreement.

3. WORKERS' COMPENSATION

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

4. EMPLOYEE INDEMNIFICATION AND EMPLOYER'S LIABILITY

"Bodily injury" to:

a. An employee of the "insured" arising out of and in the course of employment by the "insured"; or

b. The spouse, child, parent, brother or sister of that employee as a consequence of paragraph a. above.

This exclusion applies:

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

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

5. FELLOW EMPLOYEE

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

6. CARE, CUSTODY OR CONTROL

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

7. HANDLING OF PROPERTY

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

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

8. MOVEMENT OF PROPERTY BY MECHANICAL DEVICE

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

9. OPERATIONS

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

10. COMPLETED OPERATIONS

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

In this exclusion, your work means:

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

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

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

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

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

11. POLLUTION

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

- a. That are, or that are contained in any property that is:
 - (1) Being transported or towed by, handled, or handled for movement into, onto or from, the covered "auto";
 - (2) Otherwise in the course of transit by or on behalf of the "insured"; or

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

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

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

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

- (1) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and

- (2) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

12. WAR

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

13. RACING

Covered "autos" while used in any professional or organized racing or demolition contest or stunting activity, or while practicing for such contest or activity. This insurance also does not apply while that covered "auto" is being prepared for such a contest or activity.

C. LIMIT OF INSURANCE

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

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

No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Medical Payments Coverage endorsement, Uninsured Motorists Coverage endorsement or Underinsured Motorists Coverage endorsement attached to this Coverage Part.

SECTION III - PHYSICAL DAMAGE COVERAGE

A. COVERAGE

- 1. We will pay for "loss" to a covered "auto" or its equipment under:
 - a. Comprehensive Coverage. From any cause except:
 - (1) The covered "auto's" collision with another object; or
 - (2) The covered "auto's" overturn.

- b. Specified Causes of Loss Coverage. Caused by:

- (1) Fire, lightning or explosion;
- (2) Theft;
- (3) Windstorm, hail or earthquake;
- (4) Flood;
- (5) Mischief or vandalism; or

- (6) The sinking, burning, collision or derailment of any conveyance transporting the covered "auto".

c. Collision Coverage. Caused by:

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

2. Towing.

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

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

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

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

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

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

B. EXCLUSIONS

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

a. Nuclear Hazard.

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

b. War or Military Action.

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

- 2. We will not pay for "loss" to any covered "auto" while used in any professional or organized racing or demolition contest or stunting activity, or while practicing for such contest or activity. We will also not pay for "loss" to any covered "auto" while that covered "auto" is being prepared for such a contest or activity.

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

- a. Wear and tear, freezing, mechanical or electrical breakdown.
- b. Blowouts, punctures or other road damage to tires.

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

- a. Tapes, records, discs or other similar audio, visual or data electronic devices designed for use with audio, visual or data electronic equipment.
- b. Equipment designed or used for the detection or location of radar.
- c. Any electronic equipment, without regard to whether this equipment is permanently installed, that receives or transmits audio, visual or data signals and that is not designed solely for the reproduction of sound.
- d. Any accessories used with the electronic equipment described in paragraph c. above.

Exclusions 4.c. and 4.d. do not apply to:

- a. Equipment designed solely for the reproduction of sound and accessories used with such equipment, provided such equipment is permanently installed in the covered "auto" at the time of the "loss" or such equipment is removable from a housing unit which is permanently installed in the covered "auto" at the time of the "loss", and such equipment is designed to be solely operated by use of the power from the "auto's" electrical system, in or upon the covered "auto"; or
- b. Any other electronic equipment that is:
 - (1) Necessary for the normal operation of the covered "auto" or the monitoring of the covered "auto's" operating system; or

- (2) An integral part of the same unit housing any sound reproducing equipment described in a. above and permanently installed in the opening of the dash or console of the covered "auto" normally used by the manufacturer for installation of a radio.

C. LIMIT OF INSURANCE

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

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

D. DEDUCTIBLE

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

SECTION IV - BUSINESS AUTO CONDITIONS

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

A. LOSS CONDITIONS

1. APPRAISAL FOR PHYSICAL DAMAGE LOSS

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

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

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

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

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

- (1) How, when and where the "accident" or "loss" occurred;
 - (2) The "insured's" name and address; and
 - (3) To the extent possible, the names and addresses of any injured persons and witnesses.
- b. Additionally, you and any other involved "insured" must:
- (1) Assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost.
 - (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".
 - (3) Cooperate with us in the investigation, settlement or defense of the claim or "suit".
 - (4) Authorize us to obtain medical records or other pertinent information.
 - (5) Submit to examination, at our expense, by physicians of our choice, as often as we reasonably require.

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

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

3. LEGAL ACTION AGAINST US

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

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

4. LOSS PAYMENT - PHYSICAL DAMAGE COVERAGES

At our option we may:

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

5. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

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

B. GENERAL CONDITIONS

1. BANKRUPTCY

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

2. CONCEALMENT, MISREPRESENTATION OR FRAUD

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

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

3. LIBERALIZATION

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

4. NO BENEFIT TO BAILEE - PHYSICAL DAMAGE COVERAGES

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

5. OTHER INSURANCE

a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. However, while a covered "auto" which is a "trailer" is connected to another vehicle, the Liability Coverage this Coverage Form provides for the "trailer" is:

- (1) Excess while it is connected to a motor vehicle you do not own.
- (2) Primary while it is connected to a covered "auto" you own.

b. For Hired Auto Physical Damage coverage, any covered "auto" you lease, hire, rent or borrow is deemed to be a covered "auto" you own. However, any "auto" that is leased, hired, rented or borrowed with a driver is not a covered "auto".

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

6. PREMIUM AUDIT

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

7. POLICY PERIOD, COVERAGE TERRITORY

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

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

The coverage territory is:

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

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

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

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

SECTION V - DEFINITIONS

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

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

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

- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured".

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

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

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

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

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

F. "Insured contract" means:

1. A lease of premises;
2. A sidetrack agreement;
3. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

4. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

5. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;

6. That part of any contract or agreement entered into, as part of your business, pertaining to the rental or lease, by you or any of your employees, of any "auto". However, such contract or agreement shall not be considered an "insured contract" to the extent that it obligates you or any of your employees to pay for "property damage" to any "auto" rented or leased by you or any of your employees.

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

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

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

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

1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

2. Vehicles maintained for use solely on or next to premises you own or rent;
3. Vehicles that travel on crawler treads;
4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - a. Power cranes, shovels, loaders, diggers or drills; or
 - b. Road construction or resurfacing equipment such as graders, scrapers or rollers.
5. Vehicles not described in paragraphs 1., 2., 3., or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - a. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - b. Cherry pickers and similar devices used to raise or lower workers.
6. Vehicles not described in paragraphs 1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
 - a. Equipment designed primarily for:
 - (1) Snow removal;
 - (2) Road maintenance, but not construction or resurfacing; or
 - (3) Street cleaning;
 - b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
 - c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting or well servicing equipment.
- I. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
- J. "Property damage" means damage to or loss of use of tangible property.
- K. "Suit" means a civil proceeding in which:
 1. Damages because of "bodily injury" or "property damage"; or
 2. A "covered pollution cost or expense", to which this insurance applies, are alleged.
 "Suit" includes:
 - a. An arbitration proceeding in which such damages or "covered pollution costs or expenses" are claimed and to which the "insured" must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages or "covered pollution costs or expenses" are claimed and to which the insured submits with our consent.
- L. "Trailer" includes semitrailer.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UTAH CHANGES

This endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
BUSINESS AUTO PHYSICAL DAMAGE COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, Utah, CONDITIONS are changed as follows:

- A. The Legal Action Against Us Condition does not apply.
- B. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US is changed by adding the following:
 - a. We shall be entitled to a recovery only after the "insured" has been fully compensated for damages.
 - b. If we make any payment and the "insured" recovers from another party, the "insured" shall hold the proceeds in trust for us and pay us back the amount we have paid.

- C. The Concealment, Misrepresentation or Fraud Condition is replaced by the following:

FRAUD OR MISREPRESENTATION

Subject to Utah Code Ann. Section 31A-21-105, this Coverage Form may be voided in the event of fraud or misrepresentation by you or any other "insured" relating to:

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

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UTAH PERSONAL INJURY PROTECTION

For a covered "auto" licensed or principally garaged in, or for "garage operations" conducted in, Utah, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Endorsement effective	07/14/97	
Named Insured CLIMATE SOURCE & POLLARD		Countersigned by

(Authorized Representative)

SCHEDULE

Benefits	Limit Per Person
Medical expenses	\$3,000
Work loss	(a) Eighty-five percent of any loss of gross income and earning capacity, not to exceed the total of \$250 per week; (b) \$20 per day for inability to perform services for the household;
Funeral expenses	\$1,500
Survivor loss	\$3,000

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

We agree with you, subject to all of the provisions in this endorsement and to all of the provisions of the policy except as modified herein, as follows:

A. COVERAGE

We will pay Personal Injury Protection benefits in accordance with Title 31A, Utah Code Annotated to or for an "insured" who sustains "bodily injury" caused by an "accident" arising out of the use of an "auto" as an auto.

Subject to the limits shown in the Schedule, these Personal Injury Protection benefits consist of:

- 1. Medical expenses.** Reasonable expenses incurred for necessary medical, surgical, x-ray, dental and rehabilitation services, including prosthetic devices, necessary ambulance, hospital and nursing services, and any non-medical remedial care and treatment rendered in accordance with a recognized religious method of healing; however, it does not include expenses in excess of those for a semi-private room, unless more intensive care is medically required.

2. Work loss.

- a. Loss of income and loss of earning capacity by the "insured" during his or her 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. If such "insured's" inability to work continues 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. An allowance for services actually rendered or reasonably incurred that, but for the "bodily injury" the "insured" would have performed during his or her lifetime for his or her household commencing three days after the date of the "bodily injury" and continuing for a maximum of 365 consecutive days thereafter. If such "insured's" inability to perform such services continues in excess of 14 consecutive days after the date of the "bodily injury", this three day elimination period shall not be applicable.

3. **Funeral expenses.** Funeral, burial or cremation expenses incurred.

4. **Survivor loss.** Compensation on account of the death of the "insured" and is payable only to natural persons who are the "insured's" heirs.

B. WHO IS AN INSURED

1. You, unless you are injured in an "accident" which resulted from the use or operation of any motor vehicle which is owned by you and which is not a covered "auto".
2. If you are an individual, any "family member", unless the "family member" is injured in an "accident" which resulted from the use or operation of any motor vehicle which is owned by such "family member" and which is not a covered "auto".
3. Any person while "occupying" a covered "auto" with the consent of the "insured".
4. Any person while "occupying" any other "auto" other than a public or livery conveyance, operated by you or a "family member".
5. A "pedestrian" if the "accident" involves the use of a covered "auto".

C. EXCLUSIONS

We will not pay Personal Injury Protection benefits for "bodily injury":

1. Sustained by the "insured" while "occupying" an "auto" owned by, or furnished for the regular use of, that "insured", or if you are an individual, any "family member", that is not a covered "auto".
2. Sustained by any person while operating the covered "auto" without the express or implied consent of the "insured" or while not in lawful possession of the covered "auto".
3. Sustained by a "pedestrian" if the "accident" occurs outside the state of Utah. This exclusion does not apply, if you are an individual, to you or any "family member".
4. Sustained by any person if such person's conduct contributed to his injury under either of the following circumstances:
 - a. Causing injury to himself or herself intentionally, or
 - b. While committing a felony.
5. Sustained by any person arising out of the use of any "auto" while located for use as a residence or premises.
6. 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.
7. Resulting from the radioactive, toxic, explosive or other hazardous properties of nuclear material.

D. LIMIT OF INSURANCE

1. Regardless of the number of "insureds", policies or bonds applicable, claims made, premiums paid or covered "autos" to which this coverage applies, the most we will pay for Personal Injury Protection benefits for "bodily injury" sustained by an "insured" in any one "accident" is the Limit Per Person amount shown in the Schedule.
2. Any amount payable under this coverage will be reduced by the amount paid, payable or required to be provided for "bodily injury":
 - a. Under any workers' compensation plan or any similar statutory plan;
 - b. By the United States or any of its agencies because of his or her being on active duty in the military services;

E. CHANGES IN CONDITIONS

The following is added to the DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS Condition:

- d. If an "insured" or his or her legal representative or survivor institutes legal action to recover damages for "bodily injury", he or she must promptly give us a copy of the summons and complaint or other process served in connection with the legal action.
- e. The "insured" or someone on his or her behalf must promptly give us written proof of claim, under oath if required, including:
 - (1) Full particulars of the nature and extent of the "bodily injury", treatment and rehabilitation received and contemplated; and
 - (2) Such other information that will help us determine the amount due and payable.

The following CONDITIONS are added:

REIMBURSEMENT AND TRUST

- 1. If we make any payment to any "insured" under this coverage and that person recovers from another party, he or she shall hold the proceeds in trust for us and pay us back the amount we have paid. We will have a lien against such payment, and may give notice of the lien to the person or organization causing "bodily injury", his or her agent or insurer or a court having jurisdiction in the matter.
- 2. Any "insured" receiving payment must hold in trust for our benefit all rights of recovery he or she has against the party causing "bodily injury".
- 3. That person must do everything necessary to secure such rights and must do nothing to impair them.
- 4. That person must execute and deliver to us instruments and papers that may be appropriate to secure his or her and our rights and obligations established by this provision.

COORDINATION AND NON-DUPLICATION

- 1. No "insured" may recover duplicate payments for the same elements of "loss" under this or any other insurance.
- 2. This insurance is primary only for "bodily injury" sustained by an "insured" in an "accident" arising out of the use or operation of a covered "auto".

- 3. If an "insured" is entitled to Personal Injury Protection benefits under more than one policy, the maximum recovery under all policies combined will not exceed the amount payable under the policy with the highest dollar limit of benefits. Our share is the proportion that our Limit of Insurance bears to the total of all applicable limits covering on the same basis.
- 4. Personal Injury Protection benefits paid or payable under this Coverage Form or any other Coverage Form or policy providing auto insurance because of "bodily injury" sustained by an "insured" shall be primary to any Auto Medical Payments Coverage provided under this Coverage Form.

PREMIUM RECOMPUTATION

The premium for this policy is based on rates which have been established in reliance upon the limitations on the right to recover for damages imposed by the provisions of Title 31A, Utah Code Annotated. If a court declares any of these provisions unenforceable, we have the right to recompute the premium, and the provisions of this endorsement are voidable or subject to amendment at our option.

F. ADDITIONAL DEFINITIONS

As used in this endorsement:

- 1. "Auto" means every self-propelled vehicle which is designed for use upon a highway, including trailers and semi-trailers designed for use with such vehicles, except traction engines, road rollers, farm tractors, tractor cranes, power shovels, and well drillers, and every vehicle which is propelled by electric power obtained from overhead wires but not operated on rails.
- 2. "Family member" means a person related to you by blood, marriage or adoption, including a ward or foster child, who is a resident of your household, whether or not temporarily residing elsewhere.
- 3. "Occupying" means being in or upon an "auto" as a passenger or operator or engaged in the immediate acts of entering, boarding or alighting from an "auto".
- 4. "Pedestrian" means any person not "occupying" or riding upon an "auto".

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UTAH UNINSURED MOTORISTS COVERAGE

For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, Utah, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below:

Endorsement effective 07/14/97	
Named Insured CLIMATE SOURCE & POLLARD	Countersigned by

(Authorized Representative)

SCHEDULE

LIMIT OF INSURANCE

\$ 1,000,000

Each "Accident"

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. COVERAGE

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle". The damages must result from "bodily injury" sustained by the "insured" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle".
2. We will pay only after all liability bonds or policies have been exhausted by judgments or payments.
3. Any judgment for damages arising out of a "suit" brought without our written consent is not binding on us.

B. WHO IS AN INSURED

1. You.
2. If you are an individual, any "family member".
3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.
4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

C. EXCLUSIONS

This insurance does not apply to any of the following:

1. Any claim settled without our consent.
2. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.

3. "Bodily injury" sustained by:

- a. You while "occupying" or when struck by any vehicle owned by you that is not a covered "auto" for Uninsured Motorists Coverage under this Coverage Form;
- b. Any "family member" while "occupying" or when struck by any vehicle owned by that "family member" that is not a covered "auto" for Uninsured Motorists Coverage under this Coverage Form; or
- c. Any "family member" while "occupying" or when struck by any vehicle owned by you that is insured for Uninsured Motorists Coverage on a primary basis under any other Coverage Form or policy.

4. Anyone using a vehicle without a reasonable belief that the person is entitled to do so.

5. Punitive or exemplary damages.

D. LIMIT OF INSURANCE

1. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for all damages resulting from any one "accident" is the LIMIT OF INSURANCE for UNINSURED MOTORISTS COVERAGE shown in the Schedule or Declarations.
2. No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Liability Coverage Form, Medical Payments Coverage endorsement or Underinsured Motorists Coverage endorsement attached to this Coverage Part.

We will not make a duplicate payment under this Coverage for any element of "loss" for which payment has been made by or for anyone who is legally responsible.

We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law.

E. CHANGES IN CONDITIONS

The CONDITIONS are changed for UNINSURED MOTORISTS COVERAGE as follows:

1. OTHER INSURANCE in the Business Auto and Garage Coverage Forms and OTHER INSURANCE - PRIMARY AND EXCESS INSURANCE PROVISIONS in the Truckers and Motor Carrier Coverage Forms is replaced by the following:

If there is other applicable insurance available under one or more policies or provisions of coverage:

- a. The maximum recovery under all coverage forms or policies combined may equal but not exceed the highest applicable limit for any one vehicle under any coverage form or policy providing coverage on either a primary or excess basis. However, the maximum recovery for damages sustained by you or any "family member" while "occupying" an "auto" you do not own under all Coverage Forms or policies combined may equal but not exceed the sum of:
 - (1) The limit of liability for Uninsured Motorists Coverage applicable to the "auto" you or any "family member" were "occupying" at the time of the "accident"; and
 - (2) The highest applicable limit of liability for Uninsured Motorists Coverage under any Coverage Form or policy that provides coverage for you or any "family member".
- b. Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible uninsured motorists insurance providing coverage on a primary basis.
- c. If the coverage under this coverage form is provided:
 - (1) On a primary basis, we will pay only our share of the loss that must be paid under insurance providing coverage on a primary basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage on a primary basis.

- (2) *On an excess basis, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage on an excess basis.*
2. DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS is changed by adding the following:
- Promptly notify the police if a hit-and-run driver is involved, and
 - Promptly send us copies of the legal papers if a "suit" is brought.
3. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US is changed by adding the following:
- We shall be entitled to a recovery only after the "insured" has been fully compensated for damages.
 - If we make any payment and the "insured" recovers from another party, the "insured" shall hold the proceeds in trust for us and pay us back the amount we have paid.
4. The following Condition is added. However, this Condition does **not** apply if a small claims court having jurisdiction resolves the matter or matters upon which we and an "insured" do not agree.

ARBITRATION

- If we and an "insured" disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an "uninsured motor vehicle" or do not agree as to the amount of damages that are recoverable by that "insured", then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated. Either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will pay the expenses it incurs and bear the expenses of the third arbitrator equally.
- Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to arbitration procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding.

F. ADDITIONAL DEFINITIONS

As used in this endorsement:

- "Family member" means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.
- "Occupying" means in, upon, getting in, on, out or off.
- "Uninsured motor vehicle" means a land motor vehicle or trailer:
 - For which no liability bond or policy at the time of an "accident" provides at least \$65,000 for each "accident", which is the minimum combined single limit of liability specified by UTAH CODE ANN. Section 31A-22-304.
 - For which an insuring or bonding company denies coverage or is or becomes insolvent; or
 - That is a hit-and-run vehicle whose operator or owner cannot be identified and that hits or causes an "accident" resulting in "bodily injury" without hitting:
 - You or any "family member";
 - A vehicle that you or any "family member" are "occupying"; or
 - Your covered "auto".

If there is no physical contact with the hit-and-run vehicle the facts of the "accident" must be proved. We will only accept clear and convincing evidence, which must consist of more than the "insured's" testimony.

However, "uninsured motor vehicle" does not include any vehicle:

- Owned or operated by a self-insurer under any applicable motor vehicle law, other than Utah motor vehicle law, except a self-insurer who is or becomes insolvent and cannot provide the amounts required by that motor vehicle law;
- Owned or operated by a self-insurer under Utah motor vehicle law, except a self-insurer who is or becomes insolvent and cannot provide the applicable minimum limit for "bodily injury" liability specified by UTAH CODE ANN. Section 31A-22-304. The applicable minimum limit is:
 - \$65,000 for each "accident", if the limit of liability is a single limit that applies for each "accident"; or
 - \$25,000 for each person/\$50,000 for each "accident" if the limit of liability is indicated as a split limit;

- c. Owned by a governmental unit or agency;
or
- d. Designed for use mainly off public roads
while not on public roads.
- e. For which a bodily injury liability bond or
policy applies at the time of the "accident"
but the amount paid for "bodily injury"
under that bond or policy to an "insured"
is not enough to pay the full amount the
"insured" is legally entitled to recover as
damages caused by the "accident".

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UTAH UNDERINSURED MOTORISTS COVERAGE

For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, Utah, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Endorsement effective 07/14/97	
Named Insured CLIMATE SOURCE & POLLARD	Countersigned by

(Authorized Representative)

SCHEDULE

LIMIT OF INSURANCE

\$ 1,000,000

Each "Accident"

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. COVERAGE

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "underinsured motor vehicle". The damages must result from "bodily injury" sustained by the "insured" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "underinsured motor vehicle".
2. We will pay under this coverage only if a. or b. below applies:
 - a. The limits of any applicable liability bonds or policies have been exhausted by judgments or payments; or
 - b. A tentative settlement has been made between an "insured" and the insurer of the "underinsured motor vehicle"; and we
 - (1) Have been given prompt written notice of such tentative settlement; and

- (2) Advance payment to the "insured" in an amount equal to the tentative settlement within 30 days after receipt of notification.

3. Any judgment for damages arising out of a "suit" brought without our written consent is not binding on us.

B. WHO IS AN INSURED

1. You.
2. If you are an individual, any "family member".
3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.
4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

C. EXCLUSIONS

This insurance does not apply to any of the following:

1. Any claim settled without our consent.
2. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.
3. "Bodily injury" sustained by:
 - a. You while "occupying" or when struck by any vehicle owned by you that is not a covered "auto" for Underinsured Motorists Coverage under this Coverage Form;
 - b. Any "family member" while "occupying" or when struck by any vehicle owned by that "family member" that is not a covered "auto" for Underinsured Motorists Coverage under this Coverage Form; or
 - c. Any "family member" while "occupying" or when struck by any vehicle owned by you that is insured for Underinsured Motorists Coverage on a primary basis under any other Coverage Form or policy.
4. Anyone using a vehicle without a reasonable belief that the person is entitled to do so.
5. Punitive or exemplary damages.

D. LIMIT OF INSURANCE

1. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for all damages resulting from any one "accident" is the LIMIT OF INSURANCE for UNDERINSURED MOTORISTS COVERAGE shown in the Schedule or Declarations.
2. No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Liability Coverage Form, Medical Payments Coverage endorsement or Uninsured Motorists Coverage endorsement attached to this Coverage Part.

We will not make a duplicate payment under this Coverage for any element of "loss" for which payment has been made by or for anyone who is legally responsible.

We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law.

E. CHANGES IN CONDITIONS

The CONDITIONS are changed for UNDERINSURED MOTORISTS COVERAGE as follows:

1. OTHER INSURANCE in the Business Auto and Garage Coverage Forms and OTHER INSURANCE - PRIMARY AND EXCESS INSURANCE PROVISIONS in the Truckers and Motor Carrier Coverage Forms is replaced by:
 - a. With respect to coverage we provide when a covered "auto" you own is involved in an "accident", the LIMIT OF INSURANCE for UNDERINSURED MOTORISTS COVERAGE applicable to that "auto" will apply for damages for which the owner or operator of the "underinsured motor vehicle" is legally responsible.
 - b. If there is other applicable insurance available under one or more policies or provisions of coverage:
 - (1) The maximum recovery under all Coverage Forms or policies combined may equal but not exceed the highest applicable limit for any one vehicle under any Coverage Form or policy providing coverage on either a primary or excess basis. However, the maximum recovery for damages sustained by you or any "family member" while "occupying" an "auto" you do not own under all Coverage Forms or policies combined may equal but not exceed the sum of:
 - (a) The limit of liability for Underinsured Motorists Coverage applicable to the "auto" you or any "family member" were "occupying" at the time of the "accident"; and
 - (b) The highest applicable limit of liability for Underinsured Motorists Coverage under any Coverage Form or policy that provides coverage for you or any "family member".
 - (2) Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorists insurance providing coverage on a primary basis.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UTAH UNDERINSURED MOTORISTS COVERAGE

For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, Utah, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

This endorsement changes the policy effective on the inception date of the policy unless another date is indicated below.

Endorsement effective 07/14/97	
Named Insured CLIMATE SOURCE & POLLARD	Countersigned by

(Authorized Representative)

SCHEDULE

LIMIT OF INSURANCE

\$ 1,000,000

Each "Accident"

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

A. COVERAGE

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "underinsured motor vehicle". The damages must result from "bodily injury" sustained by the "insured" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "underinsured motor vehicle".
2. We will pay under this coverage only if a. or b. below applies:
 - a. The limits of any applicable liability bonds or policies have been exhausted by judgments or payments; or
 - b. A tentative settlement has been made between an "insured" and the insurer of the "underinsured motor vehicle"; and we
 - (1) Have been given prompt written notice of such tentative settlement; and

- (2) Advance payment to the "insured" in an amount equal to the tentative settlement within 30 days after receipt of notification.

3. Any judgment for damages arising out of a "suit" brought without our written consent is not binding on us.

B. WHO IS AN INSURED

1. You.
2. If you are an individual, any "family member".
3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.
4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

C. EXCLUSIONS

This insurance does not apply to any of the following:

1. Any claim settled without our consent.
2. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.
3. "Bodily injury" sustained by:
 - a. You while "occupying" or when struck by any vehicle owned by you that is not a covered "auto" for Underinsured Motorists Coverage under this Coverage Form;
 - b. Any "family member" while "occupying" or when struck by any vehicle owned by that "family member" that is not a covered "auto" for Underinsured Motorists Coverage under this Coverage Form; or
 - c. Any "family member" while "occupying" or when struck by any vehicle owned by you that is insured for Underinsured Motorists Coverage on a primary basis under any other Coverage Form or policy.
4. Anyone using a vehicle without a reasonable belief that the person is entitled to do so.
5. Punitive or exemplary damages.

D. LIMIT OF INSURANCE

1. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for all damages resulting from any one "accident" is the LIMIT OF INSURANCE for UNDERINSURED MOTORISTS COVERAGE shown in the Schedule or Declarations.
2. No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Liability Coverage Form, Medical Payments Coverage endorsement or Uninsured Motorists Coverage endorsement attached to this Coverage Part.

We will not make a duplicate payment under this Coverage for any element of "loss" for which payment has been made by or for anyone who is legally responsible.

We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law.

E. CHANGES IN CONDITIONS

The CONDITIONS are changed for UNDERINSURED MOTORISTS COVERAGE as follows:

1. OTHER INSURANCE in the Business Auto and Garage Coverage Forms and OTHER INSURANCE - PRIMARY AND EXCESS INSURANCE PROVISIONS in the Truckers and Motor Carrier Coverage Forms is replaced by:
 - a. With respect to coverage we provide when a covered "auto" you own is involved in an "accident", the LIMIT OF INSURANCE for UNDERINSURED MOTORISTS COVERAGE applicable to that "auto" will apply for damages for which the owner or operator of the "underinsured motor vehicle" is legally responsible.
 - b. If there is other applicable insurance available under one or more policies or provisions of coverage:
 - (1) The maximum recovery under all Coverage Forms or policies combined may equal but not exceed the highest applicable limit for any one vehicle under any Coverage Form or policy providing coverage on either a primary or excess basis. However, the maximum recovery for damages sustained by you or any "family member" while "occupying" an "auto" you do not own under all Coverage Forms or policies combined may equal but not exceed the sum of:
 - (a) The limit of liability for Underinsured Motorists Coverage applicable to the "auto" you or any "family member" were "occupying" at the time of the "accident"; and
 - (b) The highest applicable limit of liability for Underinsured Motorists Coverage under any Coverage Form or policy that provides coverage for you or any "family member".
 - (2) Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorists insurance providing coverage on a primary basis.

(3) If the coverage under this Coverage Form is provided:

(a) On a primary basis, we will pay only our share of the loss that must be paid under insurance providing coverage on a primary basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage on a primary basis.

(b) On an excess basis, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage on an excess basis.

2. DUTIES IN THE EVENT OF ACCIDENT, CLAIM, SUIT OR LOSS is changed by adding the following:

A person seeking Underinsured Motorists Coverage must also promptly notify us in writing of a tentative settlement between the "insured" and the insurer of the "underinsured motor vehicle" and allow us 30 days to advance payment to that "insured" in an amount equal to the tentative settlement to preserve our rights against the insurer, owner or operator of such "underinsured motor vehicle".

3. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US is changed by adding the following:

Our rights do not apply under this provision with respect to Underinsured Motorists Coverage if we:

- a. Have been given prompt written notice of a tentative settlement between an "insured" and the insurer of an "underinsured motor vehicle"; and
- b. Fail to advance payment to the "insured" in an amount equal to the tentative settlement within 30 days after receipt of notification.

If we advance payment to the "insured" in an amount equal to the tentative settlement within 30 days after receipt of notification:

- a. That payment will be separate from any amount the "insured" is entitled to recover under the provisions of Underinsured Motorists Coverage; and

b. We also have a right to recover the advance payment.

4. The following Condition is added. However, this Condition does **not** apply if a small claims court having jurisdiction resolves the matter or matters upon which we and an "insured" do not agree.

ARBITRATION

a. If we and an "insured" disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an "underinsured motor vehicle" or do not agree as to the amount of damages that are recoverable by that "insured", then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated. Either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. Each party will pay the expenses it incurs and bear the expenses of the third arbitrator equally.

b. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to arbitration procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding.

F. ADDITIONAL DEFINITIONS

As used in this endorsement:

1. "Family member" means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.
2. "Occupying" means in, upon, getting in, on, out or off.
3. "Underinsured motor vehicle" means a land motor vehicle or trailer for which a bodily injury liability bond or policy applies at the time of the "accident" but the amount paid for "bodily injury" under that bond or policy to an "insured" is not enough to pay the full amount the "insured" is legally entitled to recover as damages caused by the "accident".

However, "underinsured motor vehicle" does not include any vehicle:

- a. Owned by a governmental unit or agency; or
- b. Designed for use mainly off public roads while not on public roads.

- c. For which no liability bond or policy at the time of the "accident" provides at least \$65,000 for each "accident", which is the minimum combined single limit for "bodily injury" liability specified by UTAH CODE ANN. Section 31A-22-304.
- d. For which an insuring or bonding company denies coverage or is or becomes insolvent; or
- e. That is a hit-and-run vehicle whose operator or owner cannot be identified and that hits or causes an "accident" resulting in "bodily injury" without hitting:
 - (1) You or any "family member";
 - (2) A vehicle that you or any "family member" are "occupying"; or
 - (3) Your covered "auto".

PUNITIVE OR EXEMPLARY DAMAGES EXCLUSION ENDORSEMENT

Regardless of any other provision, this policy does not cover punitive or exemplary damages or the cost of defense related to such damages.

This endorsement is part of your policy. It supersedes and controls anything to the contrary. It is otherwise subject to all other terms of the policy.



☒ TRUCK INSURANCE EXCHANGE
☐ MID-CENTURY INSURANCE COMPANY

☐ FARMERS INSURANCE EXCHANGE

4680 WILSHIRE BLVD., LOS ANGELES, CALIFORNIA 90010

E1112
1st Edition

LOSS PAYABLE ENDORSEMENT

1. Named : CLIMATE SOURCE & POLLARD
Insured : MECHANICAL INC
Mailing : 4020 SO 210 W
Address :
SALT LAKE CITY UT 84107

3560034
Prematic Acc't No.
76-13-358
Agent Policy Number 06590-13-39

Effective from 07/14/97
to "Continuous until cancelled"

(not prior to time applied for)
12:01 a.m. Standard Time

KIND OF INSURANCE AUTOMOBILE PHYSICAL DAMAGE	ACTUAL CASH VALUE > LESS DED.	ACV LESS DEDUCTIBLE SHOWN BELOW			
		ALL UNITS	UNIT # 14	UNIT #	UNIT #
Comprehensive Coverage			50		
Specified Causes of Loss					
Collision Coverage			500		

YEAR	TRADE NAME	BODY TYPE AND MODEL	I.D. NUMBER
97	JEEP	CHEROKEE	1J4G278Y0VC631483

Loss under Automobile Physical Damage coverage is payable as interests may appear to the Named Insured and the Lienholder named below in accordance with Loss Payable Endorsement on reverse side.

Unit # <u>14</u>	Unit # _____	Unit # _____
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This policy shall not be cancelled nor reduced in coverage until after 10 days written notice of such cancellation or reduction of coverage shall have been mailed to this lienholder.

MORTGAGEE

Name: BANK OF AMERICA

Address: PO BOX 7400

PHOENIX

AZ 85011

COUNTERSIGNED _____ BY _____
(Date) (Authorized Representative)



LOSS PAYABLE ENDORSEMENT

It is agreed that any payment for loss or damage to the vehicle described in this policy shall be made on the following basis:

- (1) At our option, loss or damage shall be paid as interest may appear to the policyholder and the lienholder shown in the Declarations, or by repair of the damaged vehicle.
- (2) Any act or neglect of the policyholder or a person acting on his/her behalf shall not void coverage afforded to the lienholder.
- (3) Change in title or ownership of the vehicle, or error in its description, shall not void coverage afforded to the lienholder.

The policy does not cover conversion, embezzlement or secretion of the vehicle by the policyholder or anyone acting in his/her behalf while in possession under a contract with the lienholder.

A payment may be made to the lienholder which we would not have been obligated to make except for the terms of this endorsement. In such event, we are entitled to all the rights of the lienholder to the extent of such payment. The lienholder shall do whatever is necessary to secure such rights. No subrogation shall impair the right of the lienholder to recover the full amount of its claim.

We reserve the right to cancel this policy at any time as provided by its terms. In case of cancellation or lapse we will notify the lienholder at the address shown in the Declarations. We will give the lienholder advance notice of not less than 10 days before the effective date of such cancellation or lapse as respects his/her interest.

This endorsement becomes part of your policy. It supersedes and controls anything to the contrary. It is subject to all other terms of the policy.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT (Broad Form)

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS POLICY
COMMERCIAL AUTO COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
FARM COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
SPECIAL PROTECTIVE AND HIGHWAY LIABILITY POLICY NEW YORK DEPARTMENT OF
TRANSPORTATION
UNDERGROUND STORAGE TANK POLICY

1. The insurance does not apply:

A. Under any Liability Coverage, to "bodily injury" or "property damage":

- (1) With respect to which an "insured" under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
- (2) Resulting from the "hazardous properties" of "nuclear material" and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the "insured" is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.

C. Under any Liability Coverage, to "bodily injury" or "property damage" resulting from "hazardous properties" of "nuclear material", if:

- (1) The "nuclear material" (a) is at any "nuclear facility" owned by, or operated by or on behalf of, an "insured" or (b) has been discharged or dispersed therefrom;
- (2) The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an "insured"; or
- (3) The "bodily injury" or "property damage" arises out of the furnishing by an "insured" of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to "property damage" to such "nuclear facility" and any property thereat.

2. As used in this endorsement:

"Hazardous properties" includes radioactive, toxic or explosive properties.

"Nuclear material" means "source material", "Special nuclear material" or "by-product material".

"Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor".

"Waste" means any waste material (a) containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content, and (b) resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility".

"Nuclear facility" means:

- (a) Any "nuclear reactor";
- (b) Any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing "spent fuel", or (3) handling, processing or packaging "waste";

- (c) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the "insured" at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

- (d) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

"Property damage" includes all forms of radioactive contamination of property.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UTAH CHANGES - CANCELLATION AND NONRENEWAL

This endorsement modifies insurance provided under the following:

BOILER AND MACHINERY COVERAGE PART
BUSINESSOWNERS POLICY
COMMERCIAL AUTOMOTIVE COVERAGE PART
COMMERCIAL CRIME COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS COVERAGE PART

A. The following is added to the CANCELLATION Common Policy Condition:

7. If this policy has been in effect for more than 60 days or if this is a renewal of a policy we issued, we may cancel this policy only for one or more of the following reasons:

- (1)** Nonpayment of premium;
- (2)** Material misrepresentation;
- (3)** Substantial change in the risk assumed unless we should reasonably have foreseen the change or contemplated the risk when entering the contract; or
- (4)** Substantial breaches of contractual duties, conditions or warranties.

If we cancel for nonpayment of premium, notice of cancellation must state the reason for cancellation.

8. Notice of cancellation must be delivered or mailed by first class mail.

B. The following is added and supersedes any provisions to the contrary:

NONRENEWAL

- 1.** If we elect to not renew this policy, we will mail, by first class mail, written notice of nonrenewal to the first Named Insured, at the last mailing address known to us, at least 30 days before the expiration or anniversary date of this policy.
- 2.** We need not mail this notice if:
 - a.** You have accepted replacement coverage;
 - b.** You have requested or agreed to nonrenewal; or
 - c.** This policy is expressly designated as nonrenewable.
- 3.** If notice is mailed, proof of mailing is sufficient proof of notice.

APPENDIX 4

239 Conn. 537

Colleen HANSEN, Executrix (ESTATE of Richard P. HANSEN), et al.

v.

OHIO CASUALTY INSURANCE COMPANY.

No. 15535.

Supreme Court of Connecticut.

Argued Nov. 5, 1996.

Decided Dec. 31, 1996.

Named insured's shareholder brought action against garage insurer to vacate arbitration award and recover underinsured motorist (UIM) benefits as individual and executrix of estate of fellow shareholder. The Superior Court, Judicial District of New Haven, Frank S. Meadow, judge trial referee, vacated decision. Insurer appealed. The Supreme Court, Berdon, J., held that shareholders were insureds entitled to UIM benefits.

Affirmed.

1. Insurance ⇨467.51(3)

Shareholders and employees of closely held corporation were "insureds" entitled to underinsured motorist (UIM) benefits under uninsured motorist (UM) endorsement of garage insurance policy issued to corporation; definition of "insured" as "you" or "any family member," if named insured is individual, was ambiguous and had to be construed against insurer, and designation of "you" as insured was nonsensical since corporation could not be compensated for bodily injury, and individual-oriented language combined with family-oriented language injected confusion and uncertainty.

See publication Words and Phrases for other judicial constructions and definitions.

1. See footnote 3.

2. Because of the resolution of this appeal, we need not address the plaintiff's additional argument that the arbitrators improperly failed to allow evidence to be admitted regarding the cir-

2. Insurance ⇨146.7(1)

If insurer uses language that is ambiguous, any uncertainty caused by that ambiguity will be resolved against insurer.

3. Insurance ⇨467.51(3)

Uninsured motorist (UM) endorsement of garage insurance policy issued to closely held corporation should not have contained in definition of "insured," language oriented toward individuals and family members, since named insured was corporation.

1538 Daniel P. Scapellati, with whom, on the brief, was John W. Lemega, Hartford, for appellant (defendant).

Susan M. Cormier, Hartford, with whom were Louise R. Zito, New Haven, Kenneth J. Bartschi and, on the brief, Wesley W. Horton, Hartford, for appellee (plaintiff).

Before BORDEN, BERDON, NORCOTT, PALMER and McDONALD, JJ.

BERDON, Associate Justice.

The sole issue in this appeal is whether, under the facts of this case, the estate of the decedent, Richard P. Hansen,¹ is entitled to underinsured motorist benefits, as a covered insured, pursuant to a garage insurance policy (policy) issued by the defendant insurer to a closely held corporation owned and operated by the decedent and his wife.² The plaintiff, Colleen Hansen, as executrix of the estate of her deceased husband, and in her individual capacity,³ sought to recover underinsured motorist benefits as a result of the death of her husband under the policy issued by the defendant, Ohio Casualty Insurance Company, to West Wharf Garage Inc., the corporation owned by the plaintiff and the decedent. In accordance with the

circumstances surrounding the purchase of the policy and of the plaintiff's expectations.

3. The plaintiff's claim, in her individual capacity for bystander emotional distress; see *Clohesy v. Bachelor*, 237 Conn. 31, 675 A.2d 852 (1996);

terms of the policy, the parties submitted to arbitration. They agreed to have the arbitrators first determine the threshold issue of coverage. A majority of the panel of three arbitrators determined that the plaintiff's decedent was not 1539 covered under the underinsured motorist endorsement to the policy.

Upon application of the plaintiff,⁴ the trial court concluded that there was coverage and vacated⁵ the arbitration panel's decision. The trial court relied heavily on the reasoning of our previous decision in *Ceci v. National Indemnity Co.*, 225 Conn. 165, 622 A.2d 545 (1993). In short, the trial court concluded that "any reference to family members in a business policy issued to a corporation is ambiguous in light of the *Ceci* decision . . ." The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 4023 and General Statutes § 51-199(c). We now affirm the judgment of the trial court.

The undisputed facts are as follows. The plaintiff and the decedent were the sole shareholders of West Wharf Garage, Inc., a closely held corporation (corporation). The corporation was an automobile repair business operated by the plaintiff and the decedent. The decedent was the president and sole paid employee of the corporation, working as a mechanic and the manager of the

based on § B.4 of the uninsured motorist endorsement of the policy, which provides that an insured includes "[a]nyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.'" Apparently, the plaintiff brought this claim under the theory that if her decedent fell within the coverage under the uninsured motorist endorsement as an insured, then she could also pursue her derivative claim. The arbitration panel and the trial court addressed the two claims together, with no separate analysis of the plaintiff's derivative claim. We do likewise.

4. The plaintiff's application was made both in her individual capacity and as executrix of the estate of the decedent.

5. General Statutes § 52-418 provides in pertinent part: "Vacating award. (a) Upon the application of any party to an arbitration, the superior

garage. The plaintiff was the secretary and treasurer⁶⁴⁰ of the corporation, and she also worked, without salary, as the corporation's bookkeeper. The plaintiff also participated in the management of the daily affairs of the corporation. The defendant issued to the corporation a business automobile insurance policy, otherwise known as a garage policy, to cover its automobile repair business. The policy covered two wreckers owned by the corporation and three vehicle registration repair plates. The policy also contained an uninsured/underinsured motorist endorsement (uninsured motorist endorsement). On February 27, 1993, the decedent, while vacationing in Vermont with the plaintiff, was killed while riding a snowmobile that collided with an underinsured motor vehicle. The decedent and the plaintiff had traveled on their vacation to Vermont in a vehicle utilizing one of the repair plates. Following the accident, the estate of the decedent recovered the policy limits of the tortfeasor's motor vehicle insurance, thereby satisfying the exhaustion of liability coverage requirements. See *General Accident Ins. Co. v. Wheeler*, 221 Conn. 206, 603 A.2d 385 (1992). Subsequently, through the arbitration proceeding, the plaintiff, individually and in her capacity as executrix of the decedent's estate, sought underinsured motorist benefits from the defendant.

[1] The policy issued to the corporation by the defendant provided in pertinent part:

"GARAGE COVERAGE FORM . . .

"Throughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations . . .

court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made . . ."

"SECTION VI—DEFINITIONS...."

"C. 'Bodily injury' means bodily injury, sickness or disease sustained by a person including death resulting from any of these...."

The uninsured motorists endorsement of the policy provided in pertinent part:

1541"CONNECTICUT UNINSURED MOTORISTS COVERAGE...."

"For a covered 'auto' licensed or principally garaged, or 'garage operations' conducted in, Connecticut, this endorsement modifies insurance provided under the following...."

"GARAGE COVERAGE FORM...."

"A. COVERAGE"

"1. We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured motor vehicle.' *The damages must result from 'bodily injury' sustained by the 'insured' caused by an 'accident.'* ..."

"B. WHO IS AN INSURED"

"1. *You.*"

"2. *If you are an individual, any 'family member.'*"

"3. Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' The covered 'auto' must be out of service because of its breakdown, repair, servicing, loss or destruction."

"4. Anyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.'"

"C. EXCLUSIONS"

"This insurance does not apply to any of the following ..."

"3. 'Bodily injury' sustained by you or any 'family member' while 'occupying' or struck as a pedestrian by an 'uninsured motor vehicle' that you own...."

"F. ADDITIONAL DEFINITIONS...."

1542"1. 'Family member' means a person related to you by blood, marriage or adop-

tion who is a resident of your household, including a ward or foster child."

"2. 'Occupying' means in, upon, getting in, on, out or off...." (Emphasis added.)

In this case, the named insured in the declarations of the basic policy was the corporation. Therefore, the plaintiff's decedent technically did not fall within § B.1 of the uninsured motorist endorsement referring to "You," if read solely in relation to who is the named insured in the basic policy. See *Testone v. Allstate Ins. Co.*, 165 Conn. 126, 129-30, 328 A.2d 686 (1973). It is undisputed that the plaintiff's decedent did not fall within the provisions of § B.3 of the uninsured motorist endorsement as a designated insured because he was not "occupying," as that term is defined in § F.2 of the policy, a covered auto at the time of his fatal accident. The plaintiff essentially argues that the individual oriented and family oriented language throughout the uninsured motorist endorsement, and elsewhere in the policy, renders the policy ambiguous and creates uncertainty about who constitutes the "You" covered as an insured under the uninsured motorist endorsement. Therefore, the plaintiff argues that because the policy is ambiguous, it should be construed against the insurer and in favor of coverage for the plaintiff's decedent. We agree.

"An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract and enforced in accordance with the real intent of the parties as expressed in the language employed in the policy. *Schultz v. Hartford Fire Ins. Co.*, 213 Conn. 696, 702, 569 A.2d 1131 (1990). The policy words must be accorded their natural and ordinary meaning. *Kelly v. Figueiredo*, 223 Conn. 31, 35, 610 A.2d 1296 (1992). Under well established rules of construction, 1543any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy. *Streitweiser v. Middlesex Mutual Assurance Co.*, 219 Conn. 371, 375, 593 A.2d 498 (1991). This rule of construction may not be applied,

however, unless the policy terms are indeed ambiguous. *Kelly v. Figueiredo*, supra, [at] 37[, 610 A.2d 1296]. Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. *Id.*" (Internal quotation marks omitted.) *Stephan v. Pennsylvania General Ins. Co.*, 224 Conn. 758, 763-64, 621 A.2d 258 (1993). "[C]onstruction of a contract of insurance presents a question of law for the court which this court reviews de novo." *Aetna Life & Casualty Co. v. Bulaong*, 218 Conn. 51, 58, 588 A.2d 138 (1991).

We view this case as a sequel to *Ceci v. National Indemnity Co.*, supra, 225 Conn. at 173, 622 A.2d 545, in which we considered the effect of a "family member" clause in an uninsured motorist endorsement issued to a corporation on the coverage for the plaintiff, where the plaintiff could not be a family member of the corporation. Although the issue in this case does not solely revolve around family member language, we believe that the starting point here is that "[b]ecause corporations do not have families, uninsured motorist endorsements containing family member language should not be appended to business automobile liability insurance policies. If they are, then, in keeping with the consumer oriented spirit of the rules of insurance policy construction, the claimed ambiguity should be construed from the standpoint of the reasonable layperson in the position of the insured and not according to the interpretation of trained underwriters." *Id.*, at 174-75, 622 A.2d 545. We believe that the same approach is warranted for language oriented toward individuals.

1544As we indicated in *Ceci*, "[i]t is a basic principle of insurance law that policy language will be construed as laymen would understand it and not according to the interpretation of sophisticated underwriters, and that ambiguities in contract documents are resolved against the party responsible for its drafting; the policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of view.... The premise behind the rule is

simple. The party who actually does the writing of an instrument will presumably be guided by his own interests and goals in the transaction. He may choose shadings of expression, words more specific or more imprecise, according to the dictates of these interests.... A further, related rationale for the rule is that [s]ince one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity are resolved in favor of the latter." (Citations omitted; internal quotation marks omitted.) *Id.*, at 173-74, 622 A.2d 545; see also B. Ostrager & T. Newman, *Insurance Coverage Disputes* (8th Ed.1995) § 1.03[b][1], p. 13 ("[t]he insurer 'has the responsibility of making its intention clearly known'"). "In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts...." R. Keeton & A. Widiss, *Insurance Law* (1988) § 6.3(a)(3), p. 633. "[E]ven though not often expressed, there has always been an implicit understanding that ambiguities, which in most cases might be resolved in more than just one or the other of two ways, would be resolved favorably to the insured's claim only if a reasonable person in his position would have expected coverage." R. Keeton, *Insurance Law* (1971) § 6.3(a), p. 352.

This rule of insurance construction dictating that ambiguities be resolved in favor of the insured is sometimes⁵⁴⁵ referred to as the contra-insurer rule. See B. Ostrager & T. Newman, supra, § 1.03[b][1], pp. 13-14. "[T]he contra-insurer rule is based upon the doctrine of contra proferentem, which literally means 'against the offeror' or drafter of the language. See generally Restatement (Second) of Contracts § 206 (1981)...." B. Ostrager & T. Newman, supra, p. 14; see also *Gaunt v. John Hancock Mutual Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir.), cert. denied, 331 U.S. 849, 67 S.Ct. 1736, 91 L.Ed. 1858 (1947) (in Connecticut, as elsewhere, "the canon contra proferentem is more rigorously applied in insurance than in other contracts").

In the present case, it is obvious that the defendant utilized an endorsement that was designed to cover individuals as well as corporations. "Such endorsements are worded in terms of 'family member,' 'spouses' and 'relatives,' which language may have little applicability in the business auto policy context, wherein the named insured is often a corporate business entity." J. Berk & M. Jainchill, *Connecticut Law of Uninsured and Underinsured Motorist Coverage* (1993) § 2.10, pp. 97-98.

Here, in § B.1, under the caption "WHO IS AN INSURED," the defendant provided that "You" are an insured. In addition, the defendant also provided in § B.2, under the caption "WHO IS AN INSURED," that "[i]f you are an individual, any 'family member.'" The defendant argues that the plaintiff's decedent did not fall within those two types of insureds because the policy clearly and unambiguously provided that "You" referred only to the corporation and, since it was not an individual, the corporation could not have family members. We do not agree that the policy was clear and unambiguous.

"When interpreting [an insurance policy], we must look at the [policy] as a whole, consider all relevant ¹⁵⁴⁶portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." *O'Brien v. United States Fidelity & Guaranty Co.*, 235 Conn. 837, 842-43, 669 A.2d 1221 (1996). Using this approach, we find several clauses to be ambiguous and, therefore, potentially misleading and confusing. First, the designation of "You" as the insured in § B.1 of the uninsured motorist endorsement is nonsensical because a corporation cannot be compensated for "bodily injury," which is the subject matter of the coverage. Laypersons reading the coverage in relationship to the bodily injury coverage could have concluded that the "You" in the policy was referring to the shareholders of this small family owned and operated corporation. This is further highlighted by § C.3 of the endorsement, the "EXCLUSIONS" section, which provides that "[t]his insurance does not apply to any of the following ...

'[b]odily injury' sustained by you or any 'family member' while 'occupying' or struck as a pedestrian by an 'uninsured motor vehicle' that you own." (Emphasis added.) In addition, § F.1 of the endorsement specifically provides that "'[f]amily member' means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child." (Emphasis added.)

The uninsured motorist coverage under both §§ B.1 and B.2 are inapposite to the situation in which a corporation is issued an uninsured motorist endorsement, but, rather, are consistent with one seeking coverage for shareholders of a family corporation. Although "many insurers have revised both the format and the wording of insurance policies with a view to making them significantly more understandable to the consumer"; R. Keeton & A. Widiss, *supra*, § 6.3(a)(4), p. 634; leaving a layperson to sort out the ambiguities and misleading inconsistencies in the present policy "is precisely the problem that the rules of insurance policy construction ¹⁵⁴⁷were designed to avoid. See General Statutes §§ 38a-297 through 38a-299 (insurance coverage shall be 'readily understandable')." *Ceci v. National Indemnity Co.*, *supra*, 225 Conn. at 175, 622 A.2d 545. As a matter of law, we hold that the interplay between the provisions in the uninsured motorist endorsement created a situation too misleading to be anything other than ambiguous.

"[I]n some of the coverage disputes involving underinsured motorist insurance, claims have been sustained for individuals on the rationale that when an insurance company elects to use 'family-oriented language' in insurance policies issued to partnerships and corporations, such coverage terms are reasonably susceptible of more than one interpretation and, therefore, they will be construed strictly against the insurer and liberally in favor of the insured." (Internal quotation marks omitted.) 3 A. Widiss, *Uninsured and Underinsured Motorist Insurance* (2d Ed.1995) § 33.3, p. 69. "In effect, when a *corporate* or *governmental*

entity is identified as the named insured in an insurance policy that uses coverage terms appropriate for coverage issued to *individuals*, courts chastise insurers for employing those forms rather than using coverage terms that are appropriate for insurance policies issued to various types of *businesses* or *governmental* entities." (Emphasis added.) *Id.*, p. 70. We adhere to this reasoning.

Furthermore, if we read the "[i]f you are an individual" language in § B.2 as being unambiguous, as the defendant would have us do, then the provision "You" in § B.1 would be superfluous. This construction, however, would conflict with the canon of construction of insurance policies that "a policy should not be interpreted so as to render any part of it superfluous." *Ceci v. National Indemnity Co.*, *supra*, 225 Conn. at 176, 622 A.2d 545 (*Borden, J.*, concurring). As noted in *Ceci*, "we have consistently stated that [i]f it is reasonably possible to do so, every provision of an insurance policy must be given operative ¹⁵⁴⁸effect; *Kelly v. Figueiredo*, [*supra*, 223 Conn. at 36, 610 A.2d 1296] ... because parties ordinarily do not insert meaningless provisions in their agreements. *Connecticut Co. v. Division 425*, 147 Conn. 608, 617, 164 A.2d 413 (1960); *A.M. Larson Co. v. Lawlor Ins. Agency, Inc.*, 153 Conn. 618, 622, 220 A.2d 32 (1966)." (Citation omitted; internal quotation marks omitted.) *Ceci v. National Indemnity Co.*, *supra*, at 175-76, 622 A.2d 545. "[E]ach and every sentence, clause, and word of a contract of insurance should be given operative effect. Since it must be assumed that each word contained in an insurance policy is intended to serve a purpose, every term will be given effect if that can be done by any reasonable construction.... A construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent." 2 L. Russ & T. Segalla, *Couch on Insurance* (3d Ed.1995) c. 22, § 22.43, pp. 22-90 through 22-93. Because the policy must be construed against

the defendant, the superfluous provisions cannot be read out of the policy. Therefore, we must conclude that the two clauses are clearly irreconcilable and, therefore, render the uninsured motorist endorsement ambiguous. See *Ceci v. National Indemnity Co.*, *supra*, at 176-77, 622 A.2d 545.

[2, 3] We conclude that the individual oriented language, combined with the family oriented language, interspersed throughout the uninsured motorist endorsement provided to the corporation injected confusion and uncertainty into the coverage afforded by the policy. If an insurer uses language that is ambiguous, any uncertainty caused by that ambiguity will be resolved against the insurer. See *Cody v. Remington Electric Shavers*, 179 Conn. 494, 497, 427 A.2d 810 (1980). Put simply, the defendant should not have used an uninsured motorist endorsement containing language oriented toward individuals and family members ¹⁵⁴⁹when the named insured was a corporation. The plaintiff, individually and as executrix of the decedent's estate, is entitled to coverage under the uninsured motorist endorsement.

The judgment is affirmed.

In this opinion the other justices concurred.



239 Conn. 549

¹⁵⁴⁹Debra Ann P. AGOSTO, Administratrix
(ESTATE OF Jorge A. AGOSTO)

v.

AETNA CASUALTY AND SURETY
COMPANY.

No. 15537.

Supreme Court of Connecticut.

Argued Nov. 5, 1996.

Decided Dec. 31, 1996.

Administratrix of estate of state trooper brought action to recover underinsured mo-

In the present case, it is obvious that the defendant utilized an endorsement that was designed to cover individuals as well as corporations. "Such endorsements are worded in terms of 'family member,' 'spouses' and 'relatives,' which language may have little applicability in the business auto policy context, wherein the named insured is often a corporate business entity." J. Berk & M. Jainchill, *Connecticut Law of Uninsured and Underinsured Motorist Coverage* (1993) § 2.10, pp. 97-98.

Here, in § B.1, under the caption "WHO IS AN INSURED," the defendant provided that "You" are an insured. In addition, the defendant also provided in § B.2, under the caption "WHO IS AN INSURED," that "[i]f you are an individual, any 'family member.'" The defendant argues that the plaintiff's decedent did not fall within those two types of insureds because the policy clearly and unambiguously provided that "You" referred only to the corporation and, since it was not an individual, the corporation could not have family members. We do not agree that the policy was clear and unambiguous.

"When interpreting [an insurance policy], we must look at the [policy] as a whole, consider all relevant ¹⁵⁴⁶portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." *O'Brien v. United States Fidelity & Guaranty Co.*, 235 Conn. 837, 842-43, 669 A.2d 1221 (1996). Using this approach, we find several clauses to be ambiguous and, therefore, potentially misleading and confusing. First, the designation of "You" as the insured in § B.1 of the uninsured motorist endorsement is nonsensical because a corporation cannot be compensated for "bodily injury," which is the subject matter of the coverage. Laypersons reading the coverage in relationship to the bodily injury coverage could have concluded that the "You" in the policy was referring to the shareholders of this small family owned and operated corporation. This is further highlighted by § C.3 of the endorsement, the "EXCLUSIONS" section, which provides that "[t]his insurance does not apply to any of the following ...

'[b]odily injury' sustained by you or any 'family member' while 'occupying' or struck as a pedestrian by an 'uninsured motor vehicle' that you own." (Emphasis added.) In addition, § F.1 of the endorsement specifically provides that "'[f]amily member' means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child." (Emphasis added.)

The uninsured motorist coverage under both §§ B.1 and B.2 are inapposite to the situation in which a corporation is issued an uninsured motorist endorsement, but, rather, are consistent with one seeking coverage for shareholders of a family corporation. Although "many insurers have revised both the format and the wording of insurance policies with a view to making them significantly more understandable to the consumer"; R. Keeton & A. Widiss, *supra*, § 6.3(a)(4), p. 634; leaving a layperson to sort out the ambiguities and misleading inconsistencies in the present policy "is precisely the problem that the rules of insurance policy construction ¹⁵⁴⁷were designed to avoid. See General Statutes §§ 38a-297 through 38a-299 (insurance coverage shall be 'readily understandable')." *Ceci v. National Indemnity Co.*, *supra*, 225 Conn. at 175, 622 A.2d 545. As a matter of law, we hold that the interplay between the provisions in the uninsured motorist endorsement created a situation too misleading to be anything other than ambiguous.

"[I]n some of the coverage disputes involving underinsured motorist insurance, claims have been sustained for individuals on the rationale that when an insurance company elects to use 'family-oriented language' in insurance policies issued to partnerships and corporations, such coverage terms are reasonably susceptible of more than one interpretation and, therefore, they will be construed strictly against the insurer and liberally in favor of the insured." (Internal quotation marks omitted.) 3 A. Widiss, *Uninsured and Underinsured Motorist Insurance* (2d Ed.1995) § 33.3, p. 69. "In effect, when a corporate or governmental

entity is identified as the named insured in an insurance policy that uses coverage terms appropriate for coverage issued to individuals, courts chastise insurers for employing those forms rather than using coverage terms that are appropriate for insurance policies issued to various types of businesses or governmental entities." (Emphasis added.) *Id.*, p. 70. We adhere to this reasoning.

Furthermore, if we read the "[i]f you are an individual" language in § B.2 as being unambiguous, as the defendant would have us do, then the provision "You" in § B.1 would be superfluous. This construction, however, would conflict with the canon of construction of insurance policies that "a policy should not be interpreted so as to render any part of it superfluous." *Ceci v. National Indemnity Co.*, *supra*, 225 Conn. at 176, 622 A.2d 545 (*Borden, J.*, concurring). As noted in *Ceci*, "we have consistently stated that [i]f it is reasonably possible to do so, every provision of an insurance policy must be given operative ¹⁵⁴⁸effect; *Kelly v. Figueiredo*, [*supra*, 223 Conn. at 36, 610 A.2d 1296] ... because parties ordinarily do not insert meaningless provisions in their agreements. *Connecticut Co. v. Division 425*, 147 Conn. 608, 617, 164 A.2d 413 (1960); *A.M. Larson Co. v. Lawlor Ins. Agency, Inc.*, 153 Conn. 618, 622, 220 A.2d 32 (1966)." (Citation omitted; internal quotation marks omitted.) *Ceci v. National Indemnity Co.*, *supra*, at 175-76, 622 A.2d 545. "[E]ach and every sentence, clause, and word of a contract of insurance should be given operative effect. Since it must be assumed that each word contained in an insurance policy is intended to serve a purpose, every term will be given effect if that can be done by any reasonable construction. . . . A construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent." 2 L. Russ & T. Segalla, *Couch on Insurance* (3d Ed.1995) c. 22, § 22.43, pp. 22-90 through 22-93. Because the policy must be construed against

the defendant, the superfluous provisions cannot be read out of the policy. Therefore, we must conclude that the two clauses are clearly irreconcilable and, therefore, render the uninsured motorist endorsement ambiguous. See *Ceci v. National Indemnity Co.*, *supra*, at 176-77, 622 A.2d 545.

[2, 3] We conclude that the individual oriented language, combined with the family oriented language, interspersed throughout the uninsured motorist endorsement provided to the corporation injected confusion and uncertainty into the coverage afforded by the policy. If an insurer uses language that is ambiguous, any uncertainty caused by that ambiguity will be resolved against the insurer. See *Cody v. Remington Electric Shavers*, 179 Conn. 494, 497, 427 A.2d 810 (1980). Put simply, the defendant should not have used an uninsured motorist endorsement containing language oriented toward individuals and family members ¹⁵⁴⁹when the named insured was a corporation. The plaintiff, individually and as executrix of the decedent's estate, is entitled to coverage under the uninsured motorist endorsement.

The judgment is affirmed.

In this opinion the other justices concurred.



239 Conn. 549

¹⁵⁴⁹Debra Ann P. AGOSTO, Administratrix
(ESTATE OF Jorge A. AGOSTO)

v.

AETNA CASUALTY AND SURETY
COMPANY.

No. 15537.

Supreme Court of Connecticut.

Argued Nov. 5, 1996.

Decided Dec. 31, 1996.

Administratrix of estate of state trooper
brought action to recover underinsured mo-

torist (UIM) benefits under policy issued to state. The Superior Court, Judicial District of Litchfield, Pickett, J., 1996 WL 56997 entered summary judgment in favor of insurer. Administratrix appealed. The Supreme Court, Berdon, J., held that: (1) trooper was insured under policy issued to state, and (2) administratrix' reasonable expectation of coverage was relevant.

Reversed and remanded.

1. Insurance ⇐467.51(3)

State trooper who was killed by underinsured motorist while approaching stopped vehicle was "insured" entitled to underinsured motorist (UIM) benefits under policy issued to state employer, even though trooper was not occupying covered auto at time of accident; definition of "insured" as named insured and any family member, if named insured was individual, was ambiguous as to coverage of state employee, and insurer should not have issued uninsured motorist (UM) endorsement containing language referring to individuals and family members since named insured was governmental entity.

See publication Words and Phrases for other judicial constructions and definitions.

2. Insurance ⇐156(1), 467.52

State trooper's surviving spouse, as administratrix of his estate, was third-party beneficiary of automobile insurance policy issued to state employer and, therefore, was entitled to stand in shoes of state with respect to reasonable expectations; surviving spouse's reasonable expectations of underinsured motorist (UIM) coverage for injury to trooper while approaching stopped vehicle were thus relevant.

Eugene P. Falco, New Hartford, with whom were Dennis A. Santore, Torrington, and, on the brief, Ann Marie Groppo, Torrington, for the appellant (plaintiff).

¹550 Louis B. Blumenfeld, Hartford, with whom was Lorinda S. Coon, for the appellee (defendant).

Before BORDEN, BERDON, NORCOTT, PALMER and McDONALD, JJ.

BERDON, Associate Justice.

This appeal presents nearly the same issue, with a slightly different factual basis, that we decided today in the companion case of *Hansen v. Ohio Casualty Ins. Co.*, 239 Conn. 537, 687 A.2d 1262 (1996). Specifically, the sole issue in this appeal is whether, under the facts of this case, the estate of the decedent, Jorge A. Agosto, is entitled to underinsured motorist benefits, as a covered insured, pursuant to the automobile liability insurance policy (policy) issued to the decedent's employer, the state of Connecticut (state). The policy was issued to the state in order to insure the fleet of state police and division of criminal justice vehicles, as well as various other state vehicles. This policy also contained an uninsured/underinsured motorist endorsement (uninsured motorist endorsement). The plaintiff, Debra Ann P. Agosto, as administratrix of the estate of her husband, brought an action to recover underinsured motorist benefits, as a result of his death, under the policy issued by the defendant, Aetna Casualty and Surety Company. The defendant filed a motion for summary judgment claiming that the decedent was not a covered insured under the uninsured motorist endorsement issued to the state. The trial court granted the motion and rendered summary judgment for the defendant. The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 4023 and General Statutes § 51-199(c). We now reverse.

The undisputed facts are as follows. The decedent, in his official capacity as a state trooper, effected a traffic stop of a vehicle on the highway. The decedent exited his police cruiser and proceeded to approach the stopped vehicle at the side of the road when a third vehicle struck and killed him. After

exhausting the tortfeasor's motor vehicle liability policy, the plaintiff¹ brought an action against the defendant for underinsured motorist benefits. The trial court granted the defendant's motion for summary judgment, finding that the uninsured motorist endorsement issued to the state was not ambiguous, and that the decedent did not fall within the definitions of an insured. The trial court found that the only way that the decedent could have been an insured covered by the uninsured motorist endorsement was if he was "occupying"¹ his vehicle, as defined by the uninsured motorist endorsement, at the time of his fatal accident.

[1, 2] The plaintiff claims that the trial court improperly concluded that the uninsured motorist endorsement was unambiguous. The plaintiff essentially argues that the policy was ambiguous because it contained language oriented toward both individuals and family members and, therefore, it should be construed in favor of coverage for the

plaintiff's decedent. Within the context of an uninsured motorist endorsement issued to a corporation, we addressed this very same policy language in *Hansen v. Ohio Casualty Ins. Co.*, supra, 239 Conn. 537, 687 A.2d 1262, and, for the reasons set forth therein, we reverse the judgment of the trial court in this case. Because the uninsured motorist endorsements are practically identical,² we see no reason to distinguish this³ case from *Hansen* on the ground that this policy was issued to a governmental entity, the state, as opposed to a corporation. The same problematic language exists here.³ On the basis of our reasoning in *Hansen*, the defendant in the present case should not have issued an uninsured motorist endorsement containing language referring to individuals and family members when the named insured was a governmental entity. The plaintiff's decedent is entitled to coverage under the uninsured motorist endorsement.

The judgment is reversed and the case is remanded to the trial court for further proceedings according to law.

"F. ADDITIONAL DEFINITIONS...."

"1. 'Family member' means a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.

"2. 'Occupying' means in, upon, getting in, on, out or off...." (Emphasis added.)

3. Although the plaintiff's decedent was not the purchaser of the policy; see *Ceci v. National Indemnity Co.*, 225 Conn. 165, 175 n. 6, 622 A.2d 545 (1993); the reasonable expectations of the intended beneficiaries, such as the decedent in this case, are relevant. "In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts...." (Emphasis added.) R. Keeton & A. Widiss, *Insurance Law* (1988) § 6.3(a)(3), p. 633. The plaintiff's decedent was in essence a third party beneficiary of the insurance policy between the state and the defendant and, therefore, is entitled to stand in the shoes of the state with respect to reasonable expectations. Moreover, "when a corporate or governmental entity is identified as the named insured in an insurance policy that uses coverage terms appropriate for coverage issued to individuals, courts chastise insurers for employing those forms rather than using coverage terms that are appropriate for insurance policies issued to various types of businesses or governmental entities." (Emphasis added.) 3 A. Widiss, *Uninsured and Underinsured Motorist Insurance* (2d Ed. 1995) § 33.3, p. 70.

1. "Occupying," according to the definition in the policy's uninsured motorist endorsement, "means in, upon, getting in, on, out or off" a covered auto.

2. The uninsured motorist endorsement of the policy issued to the state provided in relevant part:

"A. COVERAGE

"1. We will pay all sums the 'insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured motor vehicle.' The damages must result from 'bodily injury' sustained by the 'insured' caused by an 'accident.'...

"B. WHO IS AN INSURED

"1. You.

"2. If you are an individual, any 'family member.'"

"3. Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' The covered 'auto' must be out of service because of its breakdown, repair, servicing, loss or destruction.

"4. Anyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.'"

"C. EXCLUSIONS

"This insurance does not apply to any of the following....

"3. 'Bodily injury' sustained by you or any 'family member' while 'occupying' or struck by any vehicle owned by you or any 'family member' that is not a covered 'auto.'....

including estoppel, and she counterclaimed for title.

Upon counter-motions for summary judgment, the trial court concluded that the Tuttle trust should be awarded title. The trial court found, in essence, that the quitclaim deed by the Tuttles to the Farm conveyed only the surface estate because the Tuttles, at the time of its execution, had no title to the mineral estate. It held that since the mineral deed was then being held in escrow, pending the completion of sale, it did not inure to the Tuttles until it was released some four months thereafter. Consequently, the quitclaim deed was ineffective to transfer a title not vested in the Tuttles at the time of its execution.

On appeal, defendant repeats her arguments made in the trial court, contending, *inter alia*, that the trust, as successor to the Tuttles, is estopped from denying that title to the minerals passed to Farm under the quitclaim deed. We agree, as do the parties and as did the trial court, that the single operative issue on appeal is the effect of the quitclaim deed. And, under the circumstances demonstrated by this record, we determine that the quitclaim deed here did not operate to convey the mineral estate to Farm.

We initially note that, if the evidence consists solely of documents, and if the determinative question concerns the interpretation of those documents, then the issue raised is one of law. *Sentinel Acceptance Corp. v. Colgate*, 162 Colo. 64, 424 P.2d 380 (1967); *Gilpin Investment Co. v. Blake*, 712 P.2d 1051 (Colo.App.1985).

[1] It is the rule, as the trust asserts and the trial court found, that a quitclaim deed does not convey land, but only the grantor's present interest in the land, if any. In other words, a quitclaim deed does not represent that a grantor possesses any interest at all, and it is ineffectual to pass to the grantee any title or right acquired by the grantor subsequent to execution. Compare § 38-30-116, C.R.S. (1982 Repl. Vol. 16A) with § 38-30-115, C.R.S. (1982 Repl. Vol. 16A). Consequently, it does not estop the grantor from asserting a title thereafter acquired. *H. Fusilier, Real Es-*

tate Law § 5.12 (1977). See also *Rocky Mountain Fuel Co. v. Clayton Coal Co.*, 110 Colo. 334, 134 P.2d 1062 (1943).

It is undisputed that at the time of the execution and recordation of the quitclaim deed, the mineral deed to Tuttles remained in escrow pending satisfaction of the agreed purchase price. The mineral deed was thus held in escrow upon a condition which might, or might not, be performed, and it cannot be said that payment of the full purchase price was an event certain to occur. The mineral deed thus did not convey title when deposited. See *Book v. Book*, 71 Colo. 502, 208 P. 474 (1922).

[2, 3] In order to pass title by deed, the instrument must be delivered to and accepted by the grantee. *Larison v. Taylor*, 83 Colo. 430, 266 P. 217 (1928). A deed in escrow, conditioned upon satisfaction or completion of some specified event, consequently cannot be delivered or become operative until the condition has been performed, and no title or estate passes until rightful delivery is made.

[4] Consequently, no delivery of the mineral deed occurred here until August 14, 1974, when the balance of the price was paid and it was released from escrow and recorded. By this delivery, the Tuttles then became owners of the minerals, and the Farm, a separate entity, remained the owner of the Tuttles' former interest in the surface estate.

[5] We recognize that when a deed is properly recorded, it is presumed that due delivery was made which relates back to the date of execution of the deed. Section 38-35-101(4), C.R.S. (1982 Repl. Vol. 16A). However, the presumption is rebuttable, and it may, upon proper proof, be shown that delivery did not occur or occurred at some other point in time. See *Jacquez v. Jacquez*, 694 P.2d 1292 (Colo.App.1984). Here, it is undisputed that the mineral deed was held in escrow pending full payment not made until August 14, 1974. Thus, there can be no earlier delivery than the date the deed was released from escrow.

Burrows, in support of her arguments relying upon equitable principles, argues that the Tuttles held equitable rights in the minerals when the contract with the Curtises was made and the escrow opened, which preceded the date of the Tuttle quitclaim deed. Citing *Kauffman v. Kauffman*, 130 Colo. 583, 278 P.2d 179 (1954), she contends that once the escrow was discharged, these equitable rights merged with the legal title in Tuttles, which merger must be deemed to relate back to the date of the mineral deed. We do not agree.

While it may be true that delivery of the deed to escrow by Curtis was irrevocable under the terms of the contract, delivery was still subject to Tuttles' potential default, in which case the deed would be withdrawn and returned to the Curtises, no conveyance having been effected. Thus, the deed, when placed in escrow, did not operate as an *in praesenti* transfer.

Finally, we agree with the trial court's observation that to adopt Burrows' arguments would inevitably weaken the reliability of record titles.

The purpose of the recording statute is to make titles to real property more secure, so that purchasers and encumbrances may safely rely upon the titles as they are displayed by record. Section 38-34-101, C.R.S. (1982 Repl. Vol. 16A) and § 38-35-109 (1992 Cum. Supp.).

In the case before us, an examination of the real property records on August 13, 1974, would have revealed that the Tuttles had no interest in the minerals at all. An examination of the title thereafter would have revealed the mineral deed to the Tuttles (and their later grantees), but not to the Farm, a wholly separate entity. The position urged by Burrows would render the title shown by the public records extremely questionable and make that title vulnerable to proof of the existence of interests variously effective notwithstanding recordation date.

Accordingly, we conclude, as did the trial court, that the quitclaim deed did not operate to convey an inchoate title in escrow and that the mineral estate by subsequent

conveyance is now owned by the Tuttle trust.

The judgment is affirmed, and both parties' requests for sanctions on appeal are denied.

PIERCE and RULAND, JJ., concur.



HAWKEYE-SECURITY INSURANCE COMPANY, Plaintiff-Appellee,

v.

**LAMBRECHT & SONS, INC.
and Paulette Lambrecht,
Defendants-Appellants.**

No. 91CA1707.

Colorado Court of Appeals,
Div. III.

Jan. 28, 1993.

Rehearing Denied April 15, 1993.

Corporation's automobile insurer brought action against corporation and spouse of sole shareholder for declaratory judgment that spouse was not entitled to uninsured motorist benefits. The District Court, El Paso County, Michael J. Heydt, J., entered summary judgment in favor of insurer. Corporation and spouse appealed. The Court of Appeals, Criswell, J., held that spouse was family member and, therefore, was entitled to uninsured motorist benefits.

Reversed and remanded.

1. Insurance — 467.51(3)

Public policy would be violated by the literal interpretation of definition of "insured" and "family member" in corporation's automobile policy; literal interpretation would preclude uninsured motorist coverage since damages had to result from bodily injury sustained by insured and in-

sured was defined as the corporation or family member who is related by blood, marriage, or adoption and is resident of corporation's household.

2. Insurance ⇐467.51(3)

Terms "insured" and "family member" in corporation's automobile policy had to be considered within context of particular circumstances that surrounded issuance of policy and purposes that it was intended to fulfill.

3. Insurance ⇐467.51(3)

Spouse of insured corporation's sole shareholder was "family member" within meaning of corporation's automobile policy and, therefore, was entitled to uninsured motorist benefits; corporation was small and closely held, and spouse was active officer and designated driver listed on application made to insurer.

See publication Words and Phrases for other judicial constructions and definitions.

Kane, Donley & Shaffer, William A. Palmer, Colorado Springs, for plaintiff-appellee.

William J. McIlwain, Colorado Springs, for defendants-appellants.

Opinion by Judge CRISWELL.

Defendants, Paulette Lambrecht (Lambrecht) and Lambrecht & Sons, Inc. (the corporation), appeal from a declaratory judgment entered pursuant to the summary judgment motion of plaintiff, Hawkeye-Security Insurance Co., decreeing that a policy of insurance issued by plaintiff provided no coverage for the personal injuries received by Lambrecht. We reverse and remand for further proceedings.

Plaintiff issued the insurance policy to the corporation, all of the capital stock of which is owned by Lambrecht's husband. Both Lambrecht and her husband are employed by the corporation, and Lambrecht is also an officer and director thereof. Lambrecht received personal injuries while in a vehicle not owned by the corporation.

The policy in question was a general automobile policy. It provided liability,

personal injury protection, medical payments, uninsured motorist, comprehensive, and collision coverages. For each of these coverages, a separate premium was charged.

Several automobiles owned by the corporation were described in an endorsement to this policy. In addition, the application required by plaintiff to be filed to obtain the policy's issuance listed Lambrecht and several others as drivers of the vehicles described.

According to the general declarations of this policy, the terms "you" or "your," as used in the policy, refer to "the person or organization shown as the named insured in ITEM ONE of the declaration." The name insured was, of course, the corporation.

There are, however, special provisions applying only to the uninsured motorist coverage. Those special provisions make "any family member" an additional "insured" for purposes of this coverage, and they define a "family member" to include "a person related to you by blood, marriage or adoption who is a resident of your household...." (original emphasis)

Under this coverage, plaintiff has agreed to pay:

all sums the insured is legally entitled to recover as damages from the owner or driver of an *uninsured motor vehicle*. The damages must result from *bodily injury* sustained by the insured caused by an accident. The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the *uninsured motor vehicle*. (original emphasis)

There is no requirement that either the insured or any family member be driving one of the vehicles designated in the policy at the time of the injury in order to recover under this uninsured motorist coverage.

If these insuring provisions were to be interpreted literally, there could *never* be any coverage afforded under the uninsured motorist provisions of this policy. This is so because plaintiff has agreed to pay only for damages resulting from "bodily inju-

ry," and only the corporation ("you") or a person who is "related" to the corporation by "blood, marriage or adoption," and is a resident of the corporation's "household," may recover such damages under these provisions. A corporation can itself never sustain "bodily injury," and since it also can have no relatives by "blood, marriage or adoption," no other person could ever be considered a "family member" so as to be entitled to coverage.

Hence, if read literally, these provisions would result in plaintiff receiving a monetary premium for such uninsured motorist coverage, while providing no consideration of any type for such premium. See *Dixon v. Gunter*, 636 S.W.2d 437 (Tenn.App.1982) (because insured corporation can have no family members, similar provision constitutes a patent ambiguity which must be treated as surplusage and is ineffective in providing any coverage).

However, at least two courts, when faced with a similar absurdity, have concluded that the insuring language must be interpreted to provide some meaningful coverage.

In *King v. Nationwide Insurance Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), the court concluded that substantially similar language was required to be interpreted within the context of the particular purpose for which the coverage was obtained. When considered in such context, the term "family member" can reasonably be construed to include either all of the corporation's employees, certain key employees, or the drivers specifically designated in the application.

Likewise, in *Colokathis v. Hartford Accident & Indemnity Co.*, 199 Cal.App.3d 264, 244 Cal.Rptr. 779 (1988), the court concluded that to limit the term "family member" to the literal definition contained in the uninsured motorist policy issued to a corporation would result in a lack of any coverage. Such a result would violate public policy. Hence, it concluded that the term "family member" should be interpreted to include the individual who, in that case, was the corporation's principal officer and sole stockholder.

[1] We agree with the conclusion that the relevant terms used in this policy cannot be interpreted literally without violating public policy. See *Barnett v. American Family Mutual Insurance Co.*, 843 P.2d 1302 (Colo.1993).

[2] We also agree that the terms used must be considered within the context of the particular circumstances that surrounded the issuance of the policy and the purposes the insuring agreements were intended to fulfill. Thus, we do not determine the identity of all of the persons to whom the pertinent term might be extended in all cases. That determination must be guided by the relevant circumstances.

[3] However, we conclude that Lambrecht must be considered to be a "family member" for purposes of the uninsured motorist coverage contained within the instant policy.

Here, the corporation was a small, closely-held, family business enterprise. As noted, Lambrecht was the wife of the corporation's sole stockholder; she was herself an active officer of the corporation; and she was one of the designated drivers listed on the application that was made to plaintiff. It is apparent, therefore, that the purpose to be fulfilled by providing uninsured motorist coverage in this policy was to protect the family members who were engaged in the corporation's business. Given these circumstances, we hold that Lambrecht was a "family member" of the corporation and, as such, was entitled to the benefits of the uninsured motorist coverage provided in plaintiff's policy.

The judgment of the trial court is reversed, and the cause is remanded to that court for further proceedings consistent with the views set forth in this opinion.

SMITH and ROTHENBERG, JJ., concur.



scheme and, thus, was governed by law in existence at time of offense, even though defendant was not actually convicted until after date of amendment, and (2) equal protection did not require that defendant be sentenced under reduced punishment scheme.

Affirmed.

1. Criminal Law ⇨1206.4

Offense of conviction, unauthorized use of vehicle, was committed prior to effective date of Penal Code amendment effecting reduced punishment scheme and, thus, was governed by law in existence at time of offense, even though defendant was not actually convicted until after date of amendment; defendant's citations to general code construction provisions, public policy and general statement of law were defeated in light of specific, unambiguous and express intent of legislature that amendment apply only to offenses committed after its effective date. Acts 1993, 73rd Leg., p. 3705, ch. 900, § 1.18.

2. Criminal Law ⇨1130(5)

Merely calling matter of purported constitutional violation in trial court's failure to apply reduced punishment scheme to attention of appellate court was insufficient to present error for review; defendant did not raise purported constitutional violation in separate point of error and had completely failed to offer any analysis or authority to support his contention.

3. Constitutional Law ⇨250.3(1)

Criminal Law ⇨1206.4

There was no equal protection violation in trial court's refusal to apply reduced punishment scheme to defendant whose offense was committed prior to effective date of amendment effecting reduced scheme, despite defendant's claim that it was unconstitutional "for two citizens in the same courtroom charged with the very same offense to be subject to differing ranges of punishment merely because one of the defendants committed the offense before [specified date]"; defendant failed to demonstrate that he was treated in any manner differently from all other criminal defendants who committed unauthorized use of vehicle prior to effective date of amendment. U.S.C.A. Const.Amend.

14; Acts 1993, 73rd Leg., p. 3705, ch. 900, § 1.18.

Allen F. Cazier, Law Offices of Allen Cazier, San Antonio, for Appellant.

Steven C. Hilbig, Criminal District Attorney, Edward F. Shaughnessy, III, Assistant Criminal District Attorney, San Antonio, for Appellee.

Before RICKHOFF, L. LOPEZ and HARDBERGER, JJ.

OPINION

PER CURIAM.

[1] Appellant entered a plea of guilty to a charge of unauthorized use of a vehicle and received deferred adjudication. Appellant thereafter entered a plea of true to a violation of probation. The trial court adjudicated his guilt and sentenced him to ten years confinement. In a single point of error, appellant contends that the court erred in denying appellant's election to be sentenced under the amended penal code because his guilt had not been adjudicated before the amendment took effect. We affirm.

The date of the offense to which appellant pleaded guilty was January 22, 1993. At that time, unauthorized use of a vehicle was a third degree felony subject to a term of imprisonment of not more than ten years or less than two years. See Act approved June 19, 1993, 73rd Leg., R.S., ch. 900, sec. 1.01, 1993 Tex.Gen.Laws 3586, 3603, 3640 (illustrating prior classification of offense as third degree felony). Effective September 1, 1994, this offense became a state jail felony, subject to a term of confinement of not more than two years or less than 180 days. Act approved June 19, 1993, 73rd Leg., R.S., ch. 900, sec. 1.01, 1993 Tex.Gen.Laws 3586, 3603, 3640. The legislature, in amending the penal code and creating state jail felonies, specifically provided:

(a) The change in law made by this article applies only to an offense committed on or after the effective date of this article. For purposes of this section, an offense is committed before the effective date of this

article if any element of the offense occurs before the effective date.

(b) An offense committed before the effective date of this article is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

Act approved June 19, 1993, 73rd Leg., R.S., ch. 900, sec. 1.18, 1993 Tex.Gen.Laws 3586, 3705. The effective date of the amendment was September 1, 1994. Act approved June 19, 1993, 73rd Leg., R.S., ch. 900, sec. 1.19(a), 1993 Tex.Gen.Laws 3586, 3705.

There is no dispute that the offense for which appellant was convicted was committed prior to the effective date of the relevant amendment to the penal code. Thus, it is governed by the law in existence at that time. The fact that appellant was not actually convicted prior to the date of the amendment is irrelevant. Also, appellant's citations to general code construction provisions, public policy, and a "general statement of law," are defeated in light of the specific, unambiguous, and express intent of the legislature that the amendment apply only to offenses committed after its effective date. The trial court did not err in sentencing appellant for commission of a third degree felony rather than a state jail felony. See *Perry v. State*, 902 S.W.2d 162 (Tex.App.—Houston [1st Dist.] 1995, review refused) (possession of controlled substance prior to amendment of Health & Safety Code subject to sentencing as second degree felony not state jail felony); *Wilson v. State*, 899 S.W.2d 36 (Tex.App.—Amarillo 1995, review refused) (possession of controlled substance prior to amendment of Health & Safety Code subject to sentencing as first degree felony not state jail felony).

[2,3] Appellant also urges that equal protection requires that he be sentenced under the reduced punishment scheme. His argument, in its entirety, is that "[i]t is unconstitutional for two citizens in the same courtroom charged with the very same offense to be subjected to differing ranges of punishment merely because one of the defendants committed the offense before midnight on August 31, 1994." We first note that appellant did not raise this purported constitutional violation in a separate point of error and that he has completely failed to offer any analysis or authority to support his conten-

tion. Merely calling the matter to our attention is not sufficient to present error for review. *McWhorter v. State*, 607 S.W.2d 531, 536 (Tex.Crim.App.1980); see also *Burks v. State*, 876 S.W.2d 877, 910 (Tex.Crim.App. 1994), cert. denied, — U.S. —, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995).

In any event, appellant's contention lacks merit. The exact same argument (differing only in two words) was rejected by the Amarillo Court of Appeals in *Wilson v. State*, 899 S.W.2d 36 (Tex.App.—Amarillo 1995, pet. filed July 19, 1995). That court noted that the argument "implicates neither a denial of equal protection nor any class discrimination." *Id.* at 39. Appellant has not demonstrated that he was treated in any manner different from all other criminal defendants who committed unauthorized use of a vehicle prior to the effective date of the amendment to the penal code. See *id.* The sentencing scheme utilized by the trial court does not violate equal protection.

For all the foregoing reasons, appellant's sole point of error is overruled. The judgment is affirmed.



GRAIN DEALERS MUTUAL INSURANCE CO., Appellant,

v.

Gerald Wayne McKEE and Wife, Diana
Michelle McKee, Individually and as
Next Friends of Kelly McKee, Minor,
Appellees.

No. 04-94-00815-CV.

Court of Appeals of Texas,
San Antonio.

Sept. 27, 1995.

Rehearing Overruled Nov. 28, 1995.

President and sole shareholder of corporation sued insurer that had issued business

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166a(c).

6. Judgment ⇨186

When counter-motions for summary judgment are properly before trial court at time judgment is rendered, all evidence accompanying both motions should be considered in deciding whether to grant either party's motion; trial court is not limited to considering only evidence filed in support of party's motion, but can look to other movant's proof as well when granting first party's motion. Vernon's Ann.Texas Rules Civ. Proc., Rule 166a(c).

7. Appeal and Error ⇨863

When both parties file motions for summary judgment and one is granted and one is denied, Court of Appeals reviews all questions presented. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

8. Appeal and Error ⇨854(1)

When trial court enters summary judgment order that does not specify particular ground on which it is based, party appealing must show that each independent argument alleged in motion for summary judgment is insufficient to support trial court's order. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

9. Appeal and Error ⇨852

When trial court's summary judgment order does not specify grounds relied on for its ruling, judgment will be affirmed if any of theories advanced are meritorious. Vernon's Ann.Texas Rules Civ.Proc., Rule 166a(c).

10. Insurance ⇨467.51(3), 467.61(2.1)

Ambiguity requiring construction in favor of coverage existed as to whether daughter of president and sole shareholder of corporation qualified as "insured" under endorsement to business auto policy that provided uninsured/underinsured motorist (UM/UIM) protection and personal injury

orsement as providing UM/UIM and PIP coverage for members of president and sole shareholder's family.

See publication Words and Phrases for other judicial constructions and definitions.

11. Contracts ⇨143(2)

Court may conclude that contract is ambiguous even in absence of such pleading by either party.

12. Contracts ⇨176(2)

Whether contract is ambiguous is question of law for the court.

13. Insurance ⇨146.8

In event court finds insurance policy ambiguous, it must necessarily find in favor of coverage.

14. Insurance ⇨146

Insurance policies are controlled by rules of construction which are applicable to contracts generally.

15. Insurance ⇨146.7(1, 6)

Court must interpret and construe insurance policies liberally in favor of insured and strictly against insurer, especially when dealing with exceptions and words of limitation.

16. Insurance ⇨146.7(1), 146.8

When language of insurance policy is susceptible of more than one reasonable construction, courts will apply construction that favors insured and permits recovery.

17. Insurance ⇨146.7(6)

Where disputed insurance policy clause involves exceptions or limitations on insurer's liability under policy, even more stringent construction than usual is required, even if construction urged by insurer appears more reasonable or more accurate reflection of parties' intent.

18. Insurance ⇨146.7(8)

Rules of policy construction favoring insured do not apply if term in question is susceptible of only one reasonable construction.

initions.

20. Courts ⇨95(1)

Insurance ⇨146.10

When insurance policy language has not been previously interpreted by state courts, Court of Appeals looks to other jurisdictions in which courts have interpreted same language.

21. Insurance ⇨146.1(2)

Differing conclusions in decisions from other jurisdictions concerning insurance policy language may be considered further evidence that language at issue is susceptible of two reasonable conclusions.

22. Insurance ⇨602.2(1)

Statute entitling insured to recover twelve percent penalty when personal injury protection (PIP) benefits are not paid within thirty days provides no exception for good faith withholding of benefits pending resolution of coverage dispute. V.A.T.S. Insurance Code, art. 5.06-3(d)(3).

23. Judgment ⇨181(14)

Summary judgment order granting insured declaratory relief on coverage issue was interlocutory until balance of suit against insurer was severed.

24. Costs ⇨199

Where summary judgment order granting insured declaratory relief on coverage issue also included grant of attorney fees, but remainder of insured's action against insurer was severed and abated, amount of fees awarded was issue to be determined when severed cause was heard, especially since no competent proof on the issue had been presented.

Edward C. Mainz, Jr., Thornton, Summers, Biechlin, Dunham & Brown, L.C., San Antonio, for Appellant.

Malcolm C. Halbardier, San Antonio, for Appellees.

Before CHAPA, C.J., and RICKHOFF and STONE, JJ.

OPINION

CHAPA, Chief Justice.

Grain Dealers Mutual Insurance Co. appeals from a summary judgment. This case reviews a business auto insurance contract in which the named insured is a corporation, but which includes uninsured/underinsured and personal injury protection endorsements that provide coverage to "you or any family member." Because this family-oriented language caused an ambiguity, we find that the corporation's sole shareholder could reasonably understand that his family members were covered. We affirm the summary judgment which so held.

Procedural and Factual Background

[1-3] The appellant insurance company issued a Business Auto Coverage policy for Future Investments, Inc. d/b/a/ DK & M Construction, of which Gerald McKee is president and sole shareholder.¹ The policy includes Personal Injury Protection (PIP) and Uninsured/Underinsured Motorist protection, and additional premiums were paid for this coverage. McKee's eleven-year-old daughter, Kelly, was seriously injured in a one-car auto accident in which her stepsister was the driver. The parties stipulated that the car involved in the accident was not covered

under the policy, the stepsister was not covered, and the accident occurred on a purely personal outing, which was not made in connection with any business pursuit of the corporate named insured. Both the stepsister's policy and the McKees' personal policy paid off to their maximum limits. When McKee filed claims against his corporation's business policy, the appellant refused to pay on the grounds that Kelly was not an insured. Appellees filed suit alleging breach of contract, negligence, bad faith, and deceptive trade practices. The parties agreed to submit the issue of coverage to the trial court by way of counter-motions for summary judgment to avoid delay and expense in the event the court determined that coverage was not applicable. The remaining causes of action were severed and abated pending resolution of the coverage issue. The trial court granted a general summary judgment to appellees finding in favor of coverage. Thus, the appeal before us presents the single issue of whether, as a matter of law, the policy's UM/UM and PIP endorsements provide coverage to Kelly. Appellant brings this appeal on four points of error, all asserting that the trial court erred in granting appellees' summary judgment and in denying appellant's summary judgment.

Standard of Review

[4-7] The standard of review in a summary judgment case is whether the movant met its burden for summary judgment by establishing there exists no genuine issue of

evidence. See *Waddy v. City of Houston*, 834 S.W.2d 97, 102 (Tex.App.—Houston [1st Dist.] 1992, writ denied); *Owen Elec. Supply, Inc. v. Brite Day Constr., Inc.*, 821 S.W.2d 283, 286 (Tex.App.—Houston [1st Dist.] 1991, writ denied). Moreover, a "statement made by a person, authorized by a party to make a statement concerning the subject, ... is considered an admission by that party. Tex.R.Evid. 801." *Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 540 (Tex.App.—Corpus Christi 1985, writ ref'd n.r.e.), cert. denied, 475 U.S. 1016, 106 S.Ct. 1200, 89 L.Ed.2d 313 (1986). An admission is "any statement made or act done by one of the parties to any action or on his behalf which amounts to a prior acknowledgement by such party that one of the facts relevant to the issues is not as he now claims." *Hartford Accident & Indem. Co. v. McCordell*, 369 S.W.2d 331, 337 (Tex.1963) (quoting 2 MCCORMICK & RAY, TEXAS LAW OF EVIDENCE § 1121).

material fact and that it is entitled to a judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex.1985); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); Tex.R.Civ.P. 166a(c). When both parties move for summary judgment, each party must carry its own burden of establishing a right to judgment. *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 549-50 (Tex. App.—Dallas 1990, writ denied). Neither can prevail solely because of the failure of the other party to discharge its burden. *Federal Deposit Ins. Corp. v. Attayi*, 745 S.W.2d 939, 948 (Tex.App.—Houston [1st Dist.] 1988, no writ); see *The Atrium v. Kenwin Shops of Crockett, Inc.*, 666 S.W.2d 315, 318 (Tex.App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). When counter-motions for summary judgment are properly before the trial court at the time judgment is rendered, all the evidence accompanying both motions should be considered in deciding whether to grant either party's motion. *Dallas County Appraisal Dist. v. Institute for Aerobics Research*, 766 S.W.2d 318, 319 (Tex.App.—Dallas 1989, writ denied). The trial court is not limited to considering only the evidence filed in support of a party's motion, but can look to the other movant's proof as well when granting the first party's motion. *Farm Credit Bank v. Snyder Nat'l Bank*, 802 S.W.2d 709, 712 (Tex.App.—Eastland 1990, writ denied). Thus, when both parties file motions for summary judgment and one is granted and one is denied, we review all questions presented. *Nationwide Property & Casualty Ins. Co. v. McFarland*, 887 S.W.2d 487, 490 (Tex.App.—Dallas 1994, writ denied).

[8,9] When a trial court enters a summary judgment order that does not specify the particular ground on which it is based, the party appealing must show that each independent argument alleged in the motion for summary judgment is insufficient to support the trial court's order. *McCrea v. Cu- villa Condominium Corp.*, 685 S.W.2d 755, 757 (Tex.App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). When the trial court's order does not specify the grounds relied on for its ruling, summary judgment will be affirmed if any of the theories advanced are meritorious.

Rogers v. Ricane Enters., Inc., 772 S.W.2d 76, 79 (Tex.1989).

The Insurance Policy

In the disputed policy, the "named insured" in the declarations page is the corporation. The corporation is also the named insured on the UM/UM and PIP endorsements. On the UM/UM endorsement, a space for a "Designated person" has been left blank. The business auto coverage page provides that throughout the policy the words "you" and "your" refer to the named insured on the declarations page. There is also a definitions section, but the word "you" does not appear there.

The UM/UM lists three categories of "insured." The policy provides UM/UM coverage to:

1. You and any designated person and any family member of either.
2. Any other person occupying a covered auto.
3. Any person or organization for damages that person or organization is entitled to recover because of bodily injury sustained by a person described in 1. or 2. above.

The PIP has two categories of insured:

1. You or any family member while occupying or when struck by any auto.
2. Anyone else occupying a covered auto with your permission.

(emphasis in original to denote specially defined terms deleted). Both parties agree that Kelly must fit into the first category as a family member in each instance to receive coverage.

"Family member" is defined in both endorsements as "a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child." It is undisputed that Kelly is the appellees' daughter residing in their household.

Analysis

[10] The sole issue before us is whether a family member of the president and sole shareholder of a family-owned corporation is covered under family-oriented language in an

1. The parties stipulated that McKee was the president of the corporation. Appellant contends, however, that there is no competent summary judgment proof that McKee was the sole shareholder of the corporation. Part of appellees' summary judgment evidence as designated in their motion, and of which the court took judicial notice, is appellant's Response to a Request for Production, filed in the trial court a month before the hearing. In response to the request for letters concerning coverage, appellant produced an opinion letter from attorney Scott Patrick Stolley, of Dallas, Texas, in which he states, "I understand that Future Investments, was incorporated on May 1, 1992, and that Mr. Gerald Wayne McKee is the president and sole shareholder." The opinion letter is written from the perspective "of whether a 'family member' is covered when a family-owned corporation is the named insured." Responses to requests for production can be considered as summary judgment

insurance policy in which only the corporation is the named insured. This is a case of first impression in Texas, although courts in other jurisdictions have both approved and disapproved coverage in comparable circumstances. In a similar claim, one Texas court of appeals has found that a corporation's employee is not covered as a "family member" under an identical policy in which the entity is the named insured. *Webster v. U.S. Fire Ins. Co.*, 882 S.W.2d 569 (Tex.App.—Houston [1st Dist.] 1994, writ denied). In *Webster*, an employee of a car dealership sought to recover under the corporation's uninsured motorist coverage for injuries incurred while he and his wife were test driving a customer's car by contending they were "family members" of the corporation. We agree with the Houston court's conclusion that it is "not reasonable to interpret the family-oriented language in a policy issued to a corporation to extend to employees," and that the contract is not ambiguous in this regard. *Id.* at 573 (emphasis added). In the instant case, however, we are confronted with a situation in which the injured is a member of the immediate family of the sole shareholder of a family-owned corporation. Thus, we must determine whether a reasonable interpretation of the policy could encompass actual family members.

[11–13] Appellant contends that the contract is not ambiguous, and also contends that appellees did not move for summary judgment on the basis of ambiguity, although they pleaded it in the alternative in their Second Amended Original Petition. However, a court may conclude that a contract is ambiguous even in the absence of such pleading by either party. *Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445 (Tex.1993); *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex.1983). Whether a contract is ambiguous is a question of law for the court. *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 917 (Tex.App.—Fort Worth 1988, writ denied). The parties agree that specific grounds alleged in the appellees' motion were (1) that the Grain Dealer's policy clearly covered the McKees as insureds, and (2) that the McKees were clearly covered under Grain Dealer's policy by virtue of articles 5.06–1 and 5.06–3 of the insurance code, which mandate UM/UIIM and PIP coverage.

See TEX.INS.CODE ANN. arts. 5.06–1, 5.06–3 (Vernon 1981). Nonetheless, in the event a court finds an insurance policy ambiguous, it must necessarily find in favor of coverage. *Ramsay v. Maryland Am. Gen. Ins. Co.*, 533 S.W.2d 344, 349 (Tex.1976); see *State Farm Life Ins. Co. v. Beaton*, 907 S.W.2d 430, 438 (Tex.1995) (Phillips, C.J., concurring in part and dissenting in part) (noting he would affirm trial court's directed verdict in favor of insured because under an ambiguous contract an insurance company owes "the proceeds of the policy as a matter of law"). We conclude that appellees' motion sufficiently stated a ground upon which the summary judgment could be granted by asserting that Kelly was covered as an insured as a matter of law.

[14–17] It is fundamental that insurance policies are controlled by rules of construction which are applicable to contracts generally. *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex.1987). The determination of whether a contract is ambiguous in light of its wording and the surrounding circumstances is a question of law. *Coker*, 650 S.W.2d at 394; *Yancey*, 755 S.W.2d at 917. We must interpret and construe insurance policies liberally in favor of the insured and strictly against the insurer, especially when dealing with exceptions and words of limitation. *Kelly Assocs., Ltd. v. Aetna Casualty & Surety Co.*, 681 S.W.2d 593, 596 (Tex. 1984); *Blaylock v. American Guar. Bank Liability Ins. Co.*, 632 S.W.2d 719, 721 (Tex. 1982); *Ramsay*, 533 S.W.2d at 349. When the language of a policy is susceptible of more than one reasonable construction, courts will apply a construction that favors the insured and permits recovery. *Barnett*, 723 S.W.2d at 666; *Kelly*, 681 S.W.2d at 596; *Glover v. National Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex.1977); *Ramsay*, 533 S.W.2d at 349. Where the clause of the insurance policy subject to dispute involves exceptions or limitations on the insurer's liability under the policy, even more stringent construction than usual is required. *Glover*, 545 S.W.2d at 761; *Adrian Assocs., Gen. Contractors v. National Surety Corp.*, 638 S.W.2d 138, 140 (Tex.App.—Dallas 1982, writ ref'd n.r.e.). This is true even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection

tion of the parties' intent. *National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex.1991).

[18, 19] These special rules favoring the insured are only applicable when there is an ambiguity in the policy; if the term in question is susceptible of only one reasonable construction, then these rules do not apply. *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex.1984); *Ranger Ins. Co. v. Bowie*, 574 S.W.2d 540, 542 (Tex.1978). However, when the language of the policy is susceptible to more than one reasonable construction, it is patently ambiguous. *Barnett*, 723 S.W.2d at 665.

In the instant case the "named insured" is unequivocally the corporation. The policy also clearly defines "you" and "your" as used throughout the policy as the "named insured." These terms are unambiguous. On the other hand, the UM/UIIM and PIP endorsements² indicate that the "insured" are "you or any family member." It is uncontested that a corporation cannot have family members. However, a "family member" is defined as "a person related to you . . . who is a resident in your household." (emphasis added). When the contract is considered in the surrounding circumstances, namely, providing insurance coverage to a sole shareholder corporation, it is entirely reasonable that "[a]n endorsement that specifically added coverage for 'family members,' as did this one, would reasonably be understood as providing [underinsured] motorist insurance for members of the [McKee] family independent of whether they were occupying a covered automobile at the time of the injury." *Ceci v. National Indem. Co.*, 225 Conn. 165, 622 A.2d 545, 549 (1993). Therefore, we conclude that the combination of the family-oriented language in a policy insuring a family-owned business, appearing in an endorsement that expands coverage to insure family members when the balance of the policy does not, creates an ambiguity. See *Barnett*, 723

S.W.2d at 665 (while language used is definite, meaning and scope of the language is ambiguous). "Thus, once the insured presents a reasonable construction of the terms of the policy at issue, any ambiguity must be resolved, as a matter of law, against the insurer and in favor of coverage." *Pioneer Chlor Alkali v. Royal Indem. Co.*, 879 S.W.2d 920, 929 (Tex.App.—Houston [14th Dist.] 1994, no writ) (citing *Balderama v. Western Casualty Life Ins. Co.*, 825 S.W.2d 432, 434 (Tex.1991); see *State Farm Life Ins. Co. v. Beaton*, 907 S.W.2d 430, 438 (Tex.1995) (Phillips, C.J., concurring in part and dissenting in part)).

[20, 21] As noted above, other jurisdictions addressing this policy language have variously found for or against coverage. For example, in *Ceci v. National Indem. Co.*, 225 Conn. 165, 622 A.2d 545, 549 (1993), the Supreme Court of Connecticut found that the family-oriented language in a policy insuring a family-owned and operated corporation provided coverage to the brother of the corporation's sole stockholder. The court found the policy ambiguous and noted:

By inserting a family member provision in the business policy, the defendant has left the [appellants] in the unenviable position of having to divine the meaning and purpose of the family member language in the context of the policy. . . . The defendant could have clarified or omitted the problematic language to provide notice to the [appellants] of the precise nature of the coverage that was being purchased. It failed to do so, . . . thereby creating the ambiguity in the policy.

Id. at 550; see *Hager v. American West Ins. Co.*, 732 F.Supp. 1072, 1075 (D.Mont.1989) (ambiguity is created by utilizing term "family member" in a policy issued to a closely held family corporation). Appellant contends that this is a minority position and that a majority of courts do not find ambiguity or coverage under similar wording.³ However,

S.E.2d 497 (N.C.1991); see also *Peterson v. Universal Fire & Casualty Ins. Co.*, 572 N.E.2d 1309 (Ind.Ct.App.1991) (majority shareholder, who was also an officer and employee, not covered under corporate policy). Indeed, *Sproles* and *Huebner* were relied upon by the First Court of Appeals in *Webster* to determine that employees are not covered. But, as previously explained,

2. On the endorsement form, the purchaser is told, "This endorsement changes the policy. . . ."

3. Several of the cases cited by appellant deal solely with employees seeking coverage under their employers' corporate policies. See, e.g., *Huebner v. MSI Ins. Co.*, 506 N.W.2d 438 (Iowa 1993); *Sproles v. Greene*, 329 N.C. 603, 407

as noted in *Pioneer Chlor Alkali*, when insurance policy language has not been previously interpreted by Texas courts, we look to other jurisdictions in which the courts have interpreted the same language. *Pioneer Chlor Alkali*, 879 S.W.2d at 929. While we recognize that decisions in other jurisdictions are merely persuasive authority, when those cases have reached differing conclusions we may certainly consider this to be further evidence that the language at issue is "susceptible of two reasonable conclusions." *Id.* In such a circumstance, following the dictates of the supreme court, we necessarily must adopt the construction that most favors the insured and must, as a matter of law, find in favor of coverage. *Balderama*, 825 S.W.2d at 434; *Hudson Energy Co.*, 811 S.W.2d at 555; *Ramsay*, 533 S.W.2d at 349. We conclude that the trial court did not err in finding, as a matter of law, that Kelly McKee was covered as a "family member" under the UM/UIM and PIP endorsements of the policy at issue.

Penalty under Article 5.06-3

[22] Appellees contend that they are also entitled to a twelve percent penalty under article 5.06-3 of the insurance code. TEX.INS. CODE ANN. art. 5.06-3 (Vernon 1981). This provision entitles an insured to recover a twelve percent penalty when PIP proceeds are not paid within thirty days. The wording of the statute is mandatory:

In the event the insurer fails to pay such benefits when due, the person entitled to such benefits may bring an action in contract to recover the same; and, in the event the insurer is required to pay such benefits, the person entitled to such benefits shall be entitled to recover ... 12% penalty, plus interest thereon[.]

Id. art. 5.06-3(d)(3). The statute provides no exception for the withholding of benefits in good faith pending resolution of a dispute. We therefore affirm the granting of the twelve percent penalty.

Attorney Fees

[23, 24] Appellees contend that they are entitled to attorney fees for the prosecution of this declaratory judgment action to determine coverage because they requested the

we find the situation in which an employee seeks

fees in their motion for summary judgment and the court granted their motion "in all things." The order granting the motion does not mention attorney fees. Appellees ask that this court remand to the trial court for a determination of fees, because no proof was proffered as to the amount of reasonable attorney fees, nor were they mentioned at the hearing on the summary judgment. Although appellant did not challenge an award of attorney fees on appeal, it challenged appellees' right to attorney fees in its motion for new trial, and it contends that the trial court's order severing the declaratory judgment cause of action from the rest of appellees' suit clearly severed the issue of attorney fees. The Agreed Order on Severance and Abatement, signed February 1, 1995, stated:

It is ORDERED, ADJUDGED and DECREED that all of Plaintiffs' claims and/or causes of action, including all Plaintiffs' claims for attorney's fees, against Grain Dealers Mutual Insurance Company, except Plaintiffs' cause of action for declaratory judgment on the coverage issue and the counterclaim of Grain Dealers Mutual Insurance Company for declaratory judgment on the coverage issue, are hereby severed from the above-styled and numbered suit. ... [and] that all such severed claims and causes of action ... are hereby abated.... (emphasis added).

Appellees point out that the severance order was signed after the order entering summary judgment, and thereby contend that the grant of all relief prayed for in their motion, including attorney fees, is not covered by the subsequent severance order. However, until the coverage issue was severed from the balance of the suit by the February 1, 1995, order, the summary judgment order was interlocutory. See *City of Beaumont v. Guillory*, 751 S.W.2d 491, 492 (Tex.1988) (summary judgment on some issues in pending suit is interlocutory until severed by trial court); see also *McRoberts v. Ryals*, 863 S.W.2d 450, 452-53 (Tex.1993) (order severing part of a cause of action is effective when signed). Nonetheless, we agree with appellees that the summary judgment order on the declaratory judgment action included a grant of

coverage distinguishable from the case before us.

attorney fees for the declaratory judgment portion only. However, the trial court's severance order clearly severed and abated any determination of attorney fees until the coverage issue was settled. Further, no competent proof of the amount of attorney fees was presented to the trial court in the declaratory judgment action. We conclude that the amount of attorney's fees for the declaratory judgment action, which fees are granted to appellees by the summary judgment, is to be determined when the severed cause is heard.

The judgment of the trial court is AFFIRMED.



LAUREL LAND MEMORIAL PARK, INC., Little Bethel Memorial Park, Inc., Restland of Dallas, Inc., and Roselawn Memorial Gardens, Inc., Appellants,

v.

DALLAS CENTRAL APPRAISAL DISTRICT, Dallas Central Appraisal District Appraisal Review Board, and Foy Mitchell, Jr., Appellees.

No. 05-94-01668-CV.

Court of Appeals of Texas,
Dallas.

Oct. 20, 1995.

Taxpayers filed suit to challenge appraisal district's decision to assess ad valorem taxes on taxpayers' publicly dedicated cemetery property. The 160th Judicial District Court, Dallas County, granted summary judgment to appraisal district, and taxpayers appealed. The Court of Appeals, Morris, J., held that publicly dedicated cemetery property was statutorily exempt from ad valorem taxation.

Reversed.

1. Judgment ⇨185(2)

When both parties move for summary judgment, each must carry its own burden of proof to show entitlement to summary judgment as matter of law by conclusively proving all elements of cause of action or defense.

2. Taxation ⇨245

Under Tax Code, property qualifies for tax exemption as cemetery if it is used exclusively for human burial, and not held for profit. V.T.C.A., Tax Code § 11.17.

3. Taxation ⇨245

Taxpayer's publicly dedicated cemetery property was exempt from ad valorem taxation as matter of law, regardless of taxpayer's corporate character, as once cemetery property was dedicated as required by Health and Safety Code, it was no longer held for profit and could only be used for human burial. V.T.C.A., Tax Code § 11.17; V.T.C.A., Health & Safety Code § 711.035.

4. Dedication ⇨57

Effect of publicly dedicating cemetery property is to commit land to public purpose different from any other land. V.T.C.A., Health & Safety Code § 711.035.

5. Taxation ⇨245

Once property is publicly dedicated for cemetery, property not only must be used exclusively for cemetery purposes as required by Health and Safety Code, but also must be used exclusively for human burial as contemplated by Tax Code, to qualify for exemption from ad valorem taxation. V.T.C.A., Tax Code § 11.17; V.T.C.A., Health & Safety Code § 711.035.

6. Taxation ⇨245

Once public dedication fixes property's use as cemetery, dedication also causes property not to be held for profit, for purposes of exemption from ad valorem taxes, as public dedication of land for burial purposes effects abandonment of land's use and possession for all purposes other than burial. V.T.C.A., Tax Code § 11.17; V.T.C.A., Health & Safety Code § 711.035.

7. Dedication ⇨53

Once property is dedicated for use as cemetery, it cannot be sold or otherwise disposed of for any purpose other than burial. V.T.C.A., Health & Safety Code § 711.035.

8. Dedication ⇨53

Property dedicated as cemetery can no longer be subject of any conveyance or inher-

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 barber-shop." 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 qualifica-

tions 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-

Cite as, Mont., 840 P.2d 908

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. Meisner, 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, *Rodriguez 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 insur-

ance 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 439, 563 P.2d 815, when discussing an exclusion clause similar to that presented here, stated:

"... R.C. 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

to the Montana Supreme Court for purposes of determining whether airline, defendant in a negligence action, was found in Montana. The Supreme Court, Morrison, J., held that where airline solicited business in Montana by listings in 19 Montana telephone directories, by television advertising broadcasts in Montana, and by furnishing material to travel agents in Montana, airline personnel occasionally came to Montana to instruct Montana travel agents, and airline had provided a service enabling Montana residents to call toll free, scheduling flights on airline, airline was "found within Montana," and thus there was in personam jurisdiction in United States District Court for the District of Montana.

Order accordingly.

Daly, J., dissented and filed opinion, in which Haswell, C. J., joined.

1. Federal Courts ⇐81

Where airline solicited business in Montana by listings in 19 Montana telephone directories, by television advertising broadcast in Montana, and by furnishing material to travel agents in Montana, airline personnel occasionally came to Montana to instruct Montana travel agents, and airline provided service enabling Montana residents to call toll free, scheduling flights on airline, airline was "found within Montana," and thus there was in personam jurisdiction in the United States District Court for the District of Montana.

2. Corporations ⇐642(6)

Before activities of a foreign corporation can create a physical presence within state for purposes of in personam jurisdiction, those activities must be substantial, continuous, and systematic as opposed to isolated, casual, or incidental; the activities must comprise a significant component of the company's business, although percentage as related to total business may be small.

William Boggs, argued, Missoula, for petitioner.

Keller, Reynolds, Drake, Sternhagen & Johnson, Helena, Kieth Keller, argued, Helena, for respondent.

MORRISON, Justice.

This case is certified from U.S. District Court, the District of Montana, Missoula Division. Petitioner had filed a diversity action based upon the alleged negligence of American Airlines, Inc., in the handling and subsequent loss of petitioner's luggage in New York City. In that complaint, plaintiff Reed affirmatively alleged that the defendant corporation was "found within Montana." Defendant, American Airlines, filed a motion to dismiss the complaint for the reason that the United States District Court lacked personal jurisdiction over the defendant. The certification followed.

Certification presents the following issues:

"(1) Was the defendant American Airlines found in Montana?

"(2) If not, do the lettered subdivisions of Rule 4B(1) extend that jurisdiction to cases where the claim does not arise out of the doing of the acts mentioned in the lettered subdivisions?"

We find issue 1 to be dispositive.

Resolution of the first issue depends upon the facts found in this record. We therefore set them forth in detail.

Plaintiff traveled to New York City from Missoula, Montana, via Northwest Airlines on December 5, 1978. Plaintiff intended to transfer flights and continue to Nepal on British Airways. During the process of transfer, the plaintiff lost a case containing in excess of \$2,000 worth of professional camera equipment. The case ultimately arrived in Nepal several weeks later but was found to be empty. The damages attendant this loss formed the basis of plaintiff's claim.

Except for an infrequent charter flight, American Airlines does not fly into or out of Montana. It has no property nor personnel in Montana. It pays no taxes in Montana. American Airlines does solicit business in Montana by listings in 19 Montana

In light of the Ninth Circuit's ruling denying Defendant's petition it is no longer necessary to reach the merits of Plaintiff Lum's motion. "A case is 'moot' ... 'when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.'" *Federal Sav. & Loan Ins. Corp. v. Director of Revenue*, 650 F.Supp. 1217, 1220 (N.D.Ill.1986), quoting, *Leonhart v. McCormick*, 395 F.Supp. 1073, 1076 (W.D. Pa.1975). Since a determination on Plaintiff Lum's motion cannot have any practical effect on the existing controversy this motion must be dismissed as moot. By denying Defendant's petition the Ninth Circuit, in effect, upheld this court's ruling limiting *Caldeira* to affording full faith and credit only where there has been a review on the merits of an arbitrator's decision. Moreover, since the Ninth Circuit apparently agreed with this Court that *Caldeira* is not controlling under the facts of this case; the Ninth Circuit had no need to address the Supreme Court's aforesaid concern that an arbitration proceeding is not an appropriate forum to decide federal statutory and constitutional rights.

Therefore, it is hereby ORDERED that Plaintiff Lum's Motion for Reconsideration be DISMISSED as moot.



Colleen L. HÄGER, Plaintiff,

v.

AMERICAN WEST INSURANCE COMPANY (formerly known as Implement Dealers Mutual Insurance Company), Defendant.

No. CV-88-185-GF.

United States District Court,
D. Montana,
Great Falls Division.

Oct. 11, 1989.

Injured shareholder brought diversity action seeking compensatory damages un-

der uninsured motorist provision of general liability automobile policy issued to closely held family corporation. On cross-motions for summary judgment, the District Court, Hatfield, Chief Judge, held that under Montana law, shareholder was an additional insured entitled to uninsured motorist coverage under provisions defining insured as "You or any family member."

Plaintiff's motion granted and defendant's motion denied.

1. Insurance ⇨467.51(4)

Members of class of insureds under automobile policy consisting of named insured and relatives of named insured while resident in the same household need not be occupying an automobile in order to be afforded coverage under the uninsured motorist provisions, under Montana law.

2. Insurance ⇨467.51(3)

Any attempt to exclude from coverage under uninsured motorist provisions those persons falling within the purview of the insured class created by the liability provisions of the automobile policy are appropriately rejected in favor of a construction of policy provisions consistent with remedial nature of uninsured motorist statutes. MCA 33-23-201.

3. Insurance ⇨467.51(3)

Intent of parties to insurance contract is of paramount significance in determining whether uninsured motorist provision is properly extended to a particular individual.

4. Insurance ⇨467.51(3)

As a general rule, employees or officers of a corporate entity are not entitled to claim coverage under uninsured motorist provision in policy issued in the name of the corporate entity, where the employees or officers are not expressly named as insureds under the policy.

5. Insurance ⇨467.51(3)

Where automobile liability policy containing "family member" terminology has

been issued to a closely held corporation, it is legitimate to conclude that the readily identifiable officers and shareholders of the corporate entity fall within the purview of the term "family member," in determining insured status.

See publication Words and Phrases for other judicial constructions and definitions.

6. Insurance ⇨146.7(1)

Under Montana law, ambiguities in an insurance policy must be construed against the insurer in favor of the insured.

7. Insurance ⇨467.51(3)

Under Montana law, a minority shareholder of an insured closely held family corporation was an additional insured entitled to uninsured motorist coverage under automobile policy issued to the corporation, with respect to injuries sustained as a pedestrian, under uninsured motorist provisions defining insured as "You or any family member." MCA 33-23-201.

Michael W. Cotter, Cotter & Cotter, Great Falls, Mont., for plaintiff.

Paul Haffeman and Edward W. Borer, Cure, Borer & Davis, Great Falls, Mont., for defendant.

MEMORANDUM AND ORDER

HATFIELD, Chief Judge.

The plaintiff, Colleen Hager, instituted the present diversity action seeking compensatory damages under the Uninsured Motorist provision of a general liability automobile insurance policy issued by the defendant, American West Insurance Company ("American West") to the closely held family corporation, Hager's, Inc. Hager

1. Because the court finds that Hager is properly considered an insured under the subject policy and entitled to the protection afforded insureds by the uninsured motorist provision of the policy, the court need not address the correlative issue regarding Hager's entitlement to coverage as a permissive user of a covered vehicle. In that regard, Hager argues in general that coverage under the uninsured motorist provisions must be coextensive with coverage under the liability section of the policy. Restated, Hager asserts that persons covered under the liability

seeks coverage under the uninsured motorist provision of the policy for injuries she sustained after being struck by a hit and run vehicle as she was walking in a parking lot in Bozeman, Montana. The matter is presently before the court on the parties' cross motions for summary judgment.

In denying coverage to Hager, American West maintains Hager was neither a named insured under the policy, nor was she entitled to coverage as a family member of Hager's, Inc., the policy's sole named insured. Additionally, American West, contending that, at best, Hager was a permissive user of a covered vehicle at some point in time during the term of the subject policy, submits that as a non-insured under the policy, Hager cannot be afforded coverage under the uninsured motorist provision in that she was a pedestrian and not "an occupant" of a covered vehicle at the time of the mishap.

The determinative issue is whether or not Hager was an insured within the meaning of the subject policy. Because the court finds the answer to this query to be in the affirmative, Hager is clearly entitled to coverage under the uninsured motorist provisions of the policy. This point can hardly be disputed by the defendant in light of the Montana Supreme Court's decision in *Jacobson v. Implement Dealers Mutual Ins. Co.*, 196 Mont. 542, 640 P.2d 908, 911 (1982).¹ Hager concedes that she was not a "named" insured under the subject policy, since the policy was issued to Hager's, Inc., a corporate entity. Hager contends, however, that even though she is not a named insured under the subject policy, as a minority shareholder of Hager's, Inc., she is an additional insured under the liability provisions of the policy and is cov-

provisions of the policy are also covered under the uninsured motorist provisions. Implicit in Hager's position is the conclusion that all permissive users would be entitled to coverage under the uninsured motorist provisions of the policy regardless of their status at the time of injury. The court expressly declines to address this contention and expresses no opinion as to the validity of Hager's position since the court concludes Hager was an insured under the terms of the subject policy.

ered as an insured under the uninsured motorist provision of the policy. In support of her position, Hager emphasizes the undisputed fact that she consistently paid a premium to insure a vehicle she owned under the subject policy.

The operative provisions of pertinence to the issue *sub judice* are as follows:

First, at Part 1, Words and Phrases, "insured" is defined:

"Insured" means any person or organization qualifying as an insured in the "Who is Insured" section of the applicable insurance.

Second, the "Who is Insured" section of the policy defines insured as follows:

1. You are an insured for any covered auto.
2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow....

Third, the uninsured motorist provisions define an insured as follows:

1. You or any family member.
2. Anyone else occupying a covered auto or a temporary substitute for a covered auto.

The thrust of the defendant's position is that Hager is not the named insured or a "family member" of the named insured, i.e., Hager's, Inc., and consequently, is not entitled to coverage under the uninsured motorist provisions of the policy. The defendant acknowledges that Hager is a shareholder in Hager's, Inc., a closely held family corporation, but reasons *a priori* from the fact that Hager's, Inc., is a corporate entity, that it cannot have any "family member" in the literal sense.

[1-3] The provisions of the subject policy affording protection against uninsured motorists define the term "insured" in the acknowledged standard form to mean the named insured, and any relative of the

2. Public policy considerations aside, the intent of the parties to the insurance contract is of paramount significance in determining whether an uninsured motorist provision is properly extended to a particular individual. See, *United Services Auto Assn. v. Akers*, 102 Nev. 598, 729 P.2d 495 (1986). In that regard, the court notes that the defendant, in moving for summary

judgment, has failed to establish by affidavit, or otherwise, its intent in issuing the subject policy, and utilizing the language ordinarily utilized in an individual automobile liability insurance policy. Rather, defendant's motion is based upon what it perceives to be an unequivocal expression of the parties' intent as reflected in the language utilized in the policy itself.

named insured while a resident in the same household as the insured. The definition also includes any other person while occupying an insured vehicle. The first of the two classes of insured claimants consists of the named insured, and any member of the named insured residing in that individual's household. As noted, *Jacobson* establishes that members of the first class need not be occupying an automobile in order to be afforded coverage under the uninsured motorist provisions. *Jacobson*, 640 P.2d at 911-912. See also, *Lopez v. Foundation Reserve Ins. Co.*, 98 N.Mex. 166, 646 P.2d 1230 (1982). Any attempt to exclude persons falling within the purview of the class created by the provisions of the policy are appropriately rejected in favor of a construction of policy provisions consistent with the remedial nature of uninsured motorist statutes. See, e.g., *Hulsey v. American Family Mutual Ins. Co.*, 142 Wis.2d 639, 419 N.W.2d 288 (1987); *Cadillac Mutual Ins. Co. v. Bell*, 50 Mich.App. 144, 212 N.W.2d 816 (1973); *California Casualty Indemnity Exchange v. Stevens*, 5 Cal. App.3d 304, 85 Cal.Rptr. 82 (1970). This conclusion is consistent with the generally accepted principle that the uninsured motorist coverage of an insurance policy may not limit the class of persons covered under the endorsement to a group smaller than that covered under the liability provisions of the same policy. See, e.g., *Girrens v. Farm Bureau Mutual Ins. Co.*, 238 Kan. 670, 715 P.2d 389 (1986); *Welch by Richards v. State Farm Mutual Auto Ins. Co.*, 122 Wis.2d 172, 361 N.W.2d 680 (1985); *State Farm Mutual Auto Ins. Co. v. Jackson*, 462 So.2d 346 (Ala.1984); *Abshire v. Prudential Ins. Co.*, 38 Wash.App. 1, 683 P.2d 625 (Wash.Ct.App.1984); *Anderson v. State Farm Mutual Auto Ins. Co.*, 471 N.E.2d 1170 (Ind.App.1984).²

[4, 5] With the foregoing general observations in mind, the court turns to consider the present situation where a corporate entity is the named insured under an automobile liability policy providing uninsured motorist coverage. At first blush, it would appear reasonable to accept the proposition offered by the defendant to the effect that where a corporate entity is the named insured, a particular individual would be covered under the uninsured motorist provisions of a liability policy only if separately named as an insured. In fact, as the defendant accurately notes, a number of courts have accepted this proposition. See, e.g., *Berry v. Aetna Casualty and Ins. Co.*, 607 F.Supp. 397 (S.D.Miss.1985); *General Ins. Co. of America v. Icelandic Builders, Inc.*, 24 Wash.App. 656, 604 P.2d 966 (1979). The court has no quarrel with the general rule that the employees or officers of a corporate entity are not entitled to claim coverage under an uninsured motorist provision contained in a policy issued in the name of the corporate entity, where the employees or officers are not expressly named as insureds under the subject policy. However, the defendant cannot simply ignore the fact that the corporate entity in the case at bar is a closely held corporation with limited and clearly identifiable officers and shareholders. Where an automobile liability policy containing the "family member" terminology has been issued to a closely held corporation, it is entirely legitimate to conclude the readily identifiable officers and shareholders of that corporate entity fall within the purview of that terminology.³ The construction of a policy in this manner is consistent with the remedial nature of uninsured motorist statutes. See, *Kaysen v. Federal Ins. Co.*, 268 N.W.2d 920 (Minn.1978).

[6, 7] The court's conclusion is not only consistent with the remedial nature of Mon-

tana's uninsured motorist statute, Mont. Code Ann. § 33-23-201, but, under the circumstances of the case at bar, is compelled by the law of Montana recognizing that ambiguities in an insurance policy must be construed against the insurer and in favor of the insured. See, *State Farm v. Taylor*, 223 Mont. 215, 725 P.2d 821, 823 (1986) (citing, *Bauer Ranch v. Mountain West Farm Bureau Mutual Ins.*, 215 Mont. 153, 695 P.2d 1307, 1309 (1985)). The ambiguity in the subject policy is created by utilization of the term "family member" in a policy issued to a closely held family corporation. A construction of the term based upon the conclusion that a corporation cannot have "family members" in the literal sense, would directly contravene the mandate of Montana law requiring the ambiguity to be construed against the defendant. Consequently, the court finds that coverage under the uninsured motorist provision of the automobile liability policy issued by the defendant to Hager's, Inc., is appropriately extended to the plaintiff, Colleen L. Hager, as a shareholder of that closely held corporation for the injuries she sustained in the hit and run accident of October, 1985.

For the reasons set forth herein, the court concludes the plaintiff's motion for partial summary judgment be, and the same hereby is, GRANTED; and the motion for summary judgment of the defendant is appropriately DENIED.

IT IS SO ORDERED.



3. The court is cognizant of the fact that a definitive ruling on the precise issue presented for determination has not been rendered by the Montana Supreme Court. However, when presented with an issue of substantive state law as to which there has not been a definitive ruling by the Montana Supreme Court, this court, guided by all available sources of Montana law, must undertake to predict how the

Montana Supreme Court would rule if confronted with that issue of law. See, *Meredith v. Winterhaven*, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9 (1943); *Molsbergen v. United States*, 757 F.2d 1016, 1020 (9th Cir.1985); cert. dismissed, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985); *Takahashi v. Loomis Armored Car Service*, 625 F.2d 314, 316 (9th Cir.1980).

e that *Rosack* represents the better center, decided by division three of court, and *Morrissey*, decided by division one of this court, both involved appeals after final judgment challenging order of the trial court denying class certification and dismissing the class allegations. In cases, relying on the holding in *Daar v. Yellow Cab Co.*, *supra*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732, that the order was appealable when made, held the appeals untimely. In *Hogya* the court apparently assumed without deciding that an immediate appeal from the order dismissing the suit as a class action was not available. That court found that under the facts of the case an appeal after final judgment was not a practical remedy and that appellate intervention by way of writ of mandate was warranted because the issue presented was substantial and one of first impression. (*Hogya v. Superior Court*, *supra*, 75 Cal.App.3d at pp. 130-132, 142 Cal.Tr. 325.) In *Rosack*, the court determined an order denying class certification and dismissing the class action was not an appealable order and that "[a] party seeking an earlier appellate review of an order of class certification must rely on a writ of mandate as provided in Code of Civil Procedure sections 1085 and 1086." (*Rosack v. Volvo of America Corp.*, *supra*, 131 Cal.App.3d at p. 749, 182 Cal.Rptr. 800.)

We determine plaintiffs' appeal from this intermediate order certifying a statewide class action against General Motors violates the "final judgment rule" set forth in Code of Civil Procedure section 904.1. The order certifying²⁵¹ the class defined the class members as "each entity that was an original purchaser of a 1981 Cadillac V8-4 automobile within the State of California." The class numbered 21,000 entities. The class action was certified as to all causes of action against General Motors stated in the first amended complaint.

This order does not have what has come to be known as the "death knell" effect of making further proceedings in the action impractical because of denial of class action status. In *Coopers & Lybrand v. Livesay* (1978) 437 U.S. 463, 469-470, 98 S.Ct. 2454,

2458-59, 57 L.Ed.2d 351, the Court stated: "The 'death knell' doctrine assumes that without the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination." Without challenging the assumption, the Court held class certification orders were not independently appealable prior to judgment. Our Supreme Court, however, has held that where an order has the "death knell" effect of making further proceedings in the action impractical, the order is appealable. In *Daar v. Yellow Cab Co.*, *supra*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732, the court held that an order sustaining a demurrer to class action allegations and transferring the action from superior court to municipal court was an appealable order. The court stated: "[H]ere the order under examination not only sustains the demurrer, but also directs the transfer of the cause from the superior court, where it was commenced as a class action, to the municipal court. We must assay the total substance of the order. It determines the legal insufficiency of the complaint as a class suit and preserves for the plaintiff alone his cause of action for damages. In 'its legal effect' the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff. It has virtually demolished the action as a class action. If the propriety of such disposition could not now be reviewed, it can never be reviewed." (*Id.* at p. 699, 63 Cal.Rptr. 724, 433 P.2d 732, citations omitted.)

Where a trial court has certified a class of 21,000 members, although of lesser scope than requested, and denied a class action status to two causes of action against the automobile dealers, appealability of the order is governed by the holding of our Supreme Court in *Vasquez v. Superior Court*, *supra*, 4 Cal.3d 800, 806-807, 94 Cal.Rptr. 796, 484 P.2d 964, which determined that an order dismissing one of two causes of action as class actions was not an appealable order. This decision was recently affirmed in *Green v. Obledo* (1981) 29 Cal.3d 126, 149, 172 Cal.Rptr. 206, 624 P.2d 256, footnote 18.

We are aware that this decision is contrary to the recent decision of the Fourth Appellate District in *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 236 Cal.Rptr. 605. That court reversed a trial court order¹²⁵² denying plaintiffs' motion to modify the class definition and amend the complaint to state a nationwide class without any discussion of whether the order was an appealable order. We disagree with that opinion because we believe the issue of appealability is governed by the above-cited holdings of our Supreme Court and because we believe experience has shown it unwise to allow multiple appeals in a single action. To allow an appeal as a matter of right from each detail of a class certification order would delay trials and vex litigants with multiple proceedings. The detriment of delay and increased costs in pursuing the litigation far outweigh any benefit to the parties of an early determination of a minor correction in a certification order. Allowing such appeals would also have a debilitating effect on judicial administration by injecting appellate courts into the day to day proceedings of trial court law and motion departments and by causing delay in determination of appeals from final judgments in the appellate courts.

III ***

IV

Disposition

The alternate writ of mandate is discharged. The petition for writ of mandate is denied. The stay of proceedings in the trial court is lifted. Plaintiffs' appeal is dismissed. Each party is to bear his or its own costs in the appeal.

KLINE, P.J., and ROUSE, J.,
concur.



*** See footnote *, *ante*.

Bertha COLOKATHIS, Plaintiff
and Appellant,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, Defendant
and Respondent.

A035183.

Court of Appeal, First District,
Division 5.

March 4, 1988.

Review Denied May 19, 1988.*

President and sole shareholder of company sued insurer claiming coverage under uninsured motorist provision of commercial automobile policy issued to company. The Superior Court, San Francisco County, Thomas Dandurand, J., found that policy did not cover president, and appeal followed. The Court of Appeal, Low, P.J., held that president was entitled to recover under uninsured motorist provision, as literal enforcement of provision would render uninsured motorist provision a nullity which was against public policy.

Reversed.

Insurance §467.51(3)

President and sole shareholder of company was entitled to recover under uninsured motorist provision of commercial automobile policy that designated only company as named insured; literal enforcement of policy provisions would render uninsured motorist provision a nullity which was against public policy.

Richard J. Idell, San Francisco, for plaintiff and appellant.

Larry D. Langley, Langley & Haigh, Palo Alto, for defendant and respondent.

* In denying review, the Supreme Court ordered that the opinion be not officially published.

LOW, Presiding Justice.

In this declaratory relief action, we decide whether the president and sole shareholder of a company can recover for injuries under the uninsured motorists provision of a commercial automobile insurance policy which designates only the company as the named insured. The trial court found that the policy did not cover the plaintiff. Plaintiff appeals, contending, inter alia, her reasonable expectation requires that she be provided coverage. We conclude that since the corporation paid a premium for total uninsured motorist coverage, and under certain instances it cannot hope to collect, public policy requires that coverage be provided to plaintiff as the most likely beneficiary under the policy. We reverse the judgment.

Plaintiff Bertha Colokathis, a Massachusetts resident, was injured in a head-on collision with another vehicle on the Golden Gate Bridge. Plaintiff is founder, president and sole stockholder of Chem-o-matic, Inc., a Massachusetts corporation. The company had three full-time employees, including plaintiff, and several part-time employees. In addition, she owns a small metal-plating concern called Exotic Plating. Both of these entities are run from a laboratory in plaintiff's house. At the time of the accident she was in San Francisco for a combined business and pleasure trip. The business purpose was the convention of the National Federation of Business Women's Club.

The day of the accident she was touring the wine country with friends and did not attend the convention. She was driving a rental car. The driver of the other car involved in the accident was underinsured and plaintiff made a claim against the uninsured motorists endorsement of the company's automobile policy, issued by defendant Hartford Accident and Indemnity Company (Hartford).¹

1. The policy coverage applies to claims against uninsured and underinsured motorists.

Hartford also insured plaintiff's 1972 Ford Galaxy for which she was the registered owner. Plaintiff was the named insured under that poli-

The policy was issued to a 1979 Oldsmobile Cutlass, title to which was in the name of the company. The "named insured" designated on the policy was Chem-o-matic, Inc. Plaintiff was noted to be the principal driver of the vehicle in defendant's records. The policy is a standard comprehensive policy available in Massachusetts which contains both compulsory and optional coverages. The uninsured motorists coverage (Coverage U), upon which plaintiff's claim is based, is compulsory in that state. Coverage U provides that Hartford will pay "such sums as the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile or underinsured automobile because of bodily injury...."

"Insured" is defined as: "(1) the named insured as stated in Item 1 of the declarations (herein also referred to as the 'principal named insured') and, while residents of the same household, the spouse of any such named insured and relatives of either; [¶] (2) any other person while occupying an insured automobile; and...."

"Insured Automobile" means: "(1) an automobile for which a specific coverage U (uninsured motorists) premium has been charged under this policy, and includes any newly acquired motor vehicle with respect to which the bodily injury liability insurance of this policy applies; or [¶] (2) an automobile while temporarily used as a substitute for an insured automobile as described in subparagraph (1) above, when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction; or [¶] (3) an automobile, other than an insured automobile as described in subparagraph (1) above, while being operated by the named insured, or by his spouse if a resident of the same household...."

Hartford denied coverage on the ground that plaintiff had not purchased any "hired

cy. Hartford paid plaintiff the policy limits under the uninsured motorists provision of this policy. Plaintiff's rights under this policy were not at issue in the court below and are not implicated on appeal.

auto" insurance and that she was not a named insured under the policy. Plaintiff sued for declaratory relief, and at trial she argued that the agent who sold her the policy led her to believe she was covered. Alternatively, she claimed the rental car was a substitute for the Oldsmobile listed under the policy as defined in subparagraph (2) above. The trial court rejected all her claims and entered judgment for Hartford.

At the outset, we note that the parties have indicated this case presents a choice of law problem and they have agreed that Massachusetts law should apply. Simply because two states are involved does not present a "conflict of laws" or a "choice of law" problem. "There is obviously no problem where the laws of the two states are identical. [Citations.]" (*Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 580, 114 Cal.Rptr. 106, 522 P.2d 666.) Here, the laws of California and Massachusetts concerning the interpretation of insurance contracts are the same. (See *Cody v. Connecticut General Life Ins. Co.* (1982) 387 Mass. 142, 439 N.E.2d 234, 237.) The parties concede as much. As the forum state, we will apply California law.

Plaintiff contends that as president, sole stockholder and principal user of the insured vehicle, she should be considered a "named insured" under the policy. The argument goes that a corporation cannot sustain bodily injury, and that unless she can recover under these provisions the contract would be a nullity. In support of this interpretation, she points to the family coverage provision which insures spouses and other relatives of the named insured who reside in the same household. She reasons that the inclusion of a "spouse" indicates the intent to insure others than simply the "named insured" as designated on the declarations page.

The rules on interpretation of insurance contracts are familiar. Each clause of the insurance contract must be interpreted together with the other clauses to which it is related and they must be construed together to determine the intent of the contracting parties. (*Jarrett v. Allstate Ins. Co.*

(1962) 209 Cal.App.2d 804, 809, 26 Cal. 231.) The words used in an insurance policy are to be interpreted according to meaning which an insured would reasonably expect. Courts will not adopt strained or absurd interpretation in order to create an ambiguity where none exists. (*Reserve Insurance Co. v. Pisciotto* (1980) 30 Cal.3d 800, 807, 180 Cal.Rptr. 628 P.2d 764; *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 270-271, 54 Cal. 104, 419 P.2d 168.) If by applying these principles we find an ambiguity to exist, the insurance policy is construed strictly against the insurer and most liberal favor of the insured. (*Reserve Insurance Co. v. Pisciotto*, *supra*, 30 Cal.3d at 807-808, 180 Cal.Rptr. 628, 640 P.2d 764; *California State Auto. Assn. Inter Bureau v. Antonelli* (1979) 94 Cal.App. 113, 118, 156 Cal.Rptr. 369.) But where ambiguity exists and the terms of the policy are clear, the courts will not indulge in forced construction to fasten liability on the insurance company where none has been assumed. (*Jarrett v. Allstate Ins. Co.*, *supra*, 209 Cal.App.2d at p. 81 Cal.Rptr. 231.)

The language of the policy limiting insured motorists coverage to the "named insured," i.e., Chem-o-matic, is clear, unambiguous and is not susceptible to the broad interpretation advanced by plaintiff. This is a commercial policy issued in the name of the corporation. Only the corporation is the named insured. Compare *son v. United States Fire Ins. Co.* (1980) 259 Cal.App.2d 248, 66 Cal.Rptr. 115, by Hartford. The corporate policy in this case specifically listed the organizational board of directors as additional named insureds; but see, *Polzin v. Phoenix Hartford Insurance Companies* (1980) 113 Ill.App.3d 84, 283 N.E.2d 324, 327; *B v. State Farm Mutual Automobile Insurance Co.* (Mo.1971) 466 S.W.2d 696, 699; *Antee Ins. Co. v. Anderson* (E.D.Pa. 1980) 585 F.Supp. 408, 411; *O'Hanlon v. Hartford Acc. & Indem. Co.* (D.Del.1977) 585 F.Supp. 377, 387-388. But this does not end our inquiry.

In response to questioning by the court at oral argument, defendant conceded that paragraph (3) in the definition of "Insured Automobile" has no effect when the named insured is a corporation. An insured is entitled to no more than what he paid for (*Oakland Stad. v. Underwriters at Lloyd's* (1957) 152 Cal.App.2d 292, 296, 313 P.2d 602), but he should not receive less. Here, the corporation paid for coverage under which it could never hope to collect. It is a violation of public policy to collect a premium for coverage which turns out to be nonexistent. Accordingly, we cannot enforce an interpretation which renders the coverage illusory. Instead, it is our duty to interpret that provision in a manner consistent with public policy. It has long been the public policy of this state that where it is semantically permissible the contract will be interpreted to effect coverage for losses to which the insurance relates. (See *State Farm Mut. Auto. Ins. Co. v. Johnston* (1973) 9 Cal.3d 270, 273-274, 107 Cal.Rptr. 149, 507 P.2d 1357; *Otter v. General Ins. Co.* (1973) 34 Cal.App.3d 940, 949, 109 Cal.Rptr. 831.) This is especially true for uninsured motorist claims. (See *State Farm Mut. Auto. Ins. Co. v. Crockett* (1980) 103 Cal.App.3d 652, 655, 163 Cal.Rptr. 206.)

Colokathis is the principal officer and employee of the company and also she is the primary user of the insured vehicle. This provision is designed to protect an insured from the misery and hardship experienced when injured by an uninsured or financially irresponsible motorist. (See *Waite v. Godfrey* (1980) 106 Cal.App.3d 760, 770-771, 163 Cal.Rptr. 881.) Since the corporation cannot collect for personal injuries, the most likely person that should benefit from the paid-for coverage is plaintiff. Accordingly, we conclude that this clause should be interpreted to provide uninsured motorist coverage to plaintiff.

Hartford could have avoided this result simply by modifying the boilerplate language to eliminate this clause in corporate policies and to reduce the premium charged for uninsured motorist coverage proportionally. This would have the dual effect of removing the underlying ambiguity and

alerting plaintiff, as the insured, that she must decide whether she wants to pay an additional premium for personal coverage.

The declaratory judgment is reversed. The trial court is directed to enter judgment for plaintiff declaring coverage and is further directed to determine the extent of her recovery under the policy.

KING and HANING, JJ., concur.



199 Cal.App.3d 253

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Steven James HOLDSWORTH, Defendant and Appellant.

No. AO36921.

Court of Appeal, First District, Division 3.

March 4, 1988.

As Modified March 29, 1988.

Defendant, who was in county jail after being sentenced for assault with deadly weapon, was convicted in the Contra Costa County Superior Court, Michael J. Phelan, J., of destroying jail property, for acts committed after sentence had been imposed, and he appealed. The Court of Appeal, White, P.J., held that section providing for different sentencing treatment of felonies committed while person is confined in state prison did not apply to defendant lodged in county jail at time he committed offense, even though defendant was parolee in custody, and even if defendant were subject to parole hold at time he committed offense.

Affirmed in part and reversed in part, with directions.

Barry-Deal, J., filed opinion concurring in reasoning and judgment.

1. Criminal Law §1208.6(1)

Section providing for different sentencing treatment for felonies committed while person is confined in state prison did not apply to defendant who had been sentenced for felony and was in county jail, not having been delivered to state prison. West's Ann.Cal.Penal Code § 1170.1(c).

2. Criminal Law §1208.6(1)

Section providing for different sentencing treatment of felonies committed while person is confined in state prison did not apply to defendant who was parolee in custody at time of offense on theory defendant's parole status made him state prisoner; constructive or legal custody of defendant was not the issue, for it was place of confinement, rather than status of person confined, that was decisive for purposes of sentencing statute. West's Ann.Cal.Penal Code § 1170.1(c).

3. Criminal Law §1208.6(1)

Section providing for different sentencing treatment for felonies committed while person is confined in state prison did not apply based on parole hold applicable to defendant located in county jail, even if defendant were subject to parole hold; parole hold could not be equated with delivery of convicted felon to state prison. West's Ann.Cal.Penal Code § 1170.1(c).

4. Criminal Law §1208.6(1)

"Parole hold" is temporary measure to restrain parolee suspected of violating parole; parole hold is not prison sentence, nor does it transform parolee into state prisoner, for purposes of statute authorizing different sentencing treatment for those committing offenses while state prisoners.

See publication Words and Phrases for other judicial constructions and definitions.

5. Pardon and Parole §80

Parole agent has no power to confine parolee in state prison in first instance; rather, parole agent's power is limited to

booking parolee into local jail, and a later parolee may be transferred to state prison, if such transfer is warranted.

6. Criminal Law §1208.6(1)

Whether person who commits crime after his parole is revoked can be sentenced under section providing for different sentencing treatment of felonies committed while person is confined in state prison depends on whether parolee is physically confined in state prison within meaning statutes. West's Ann.Cal.Penal Code § 1170.1(a, c).

7. Criminal Law §1192

Trial court was directed to strike enhancements imposed in sentencing defendant for destruction of jail property committed while defendant was confined in county jail, as prior prison term enhancement could be imposed only once in single sentencing package; defendant who lodged in county jail could not be sentenced under section providing for different sentencing treatment for felonies committed while person is confined in state prison. West's Ann.Cal.Penal Code §§ 1170.4600.

¹²⁵⁵Robert J. Calhoun, Executive Director, Matthew Zwerling, Staff Atty., Francisco, for defendant and appellant.

John K. Van de Kamp, Atty. Gen., S. White, Chief Asst. Atty. Gen., John H. Iiyama, Sr. Asst. Atty. Gen., Stan M. Iman, Supervising Deputy Atty. Gen., D. H. Rose, Deputy Atty. Gen., San Francisco for plaintiff and respondent.

WHITE, Presiding Justice.

Appellant Steven Holdsworth was Contra Costa County jail after being sentenced for assault with a deadly weapon (Pen.Code, § 245, subd. (a)(1)). Four months after sentence was imposed, ¹²⁵⁶destroyed jail property. He was later convicted of this crime. (Pen.Code § 4600.)¹ The trial court determined the crime should be sentenced as an inchoate offense under section 1170.1, sub

1. All further statutory references are to the Penal Code.

N.E.2d 333, 336-337, citing *Posin, supra*, it was stated:

"The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied."

In the instant case, there is believable evidence which would permit reasonable minds to come to different conclusions. *TLT-Babcock, Inc. v. Service Bolt & Nut Co.* (1984), 16 Ohio App.3d 142, 143, 16 OBR 149, 151, 474 N.E.2d 1223, 1225, states:

"* * * [T]he trial court must not consider the weight of the evidence or the credibility of the witnesses when ruling upon a motion for a directed verdict. * * * Therefore, the trial court must submit an issue to the jury if there is evidence which, if believed, would permit reasonable minds to come to different conclusions."

As to appellant's argument based on the Statute of Frauds, Plaintiff's Exhibit 3 is a sufficient memorandum in writing to meet the requirement of that statute. In the case of *Soteriades v. Wendy's of Ft. Wayne, Inc.* (1986), 34 Ohio App.3d 222, 517 N.E.2d 1011, the court states in paragraph two of the syllabus:

"When an individual has a contract of employment for more than one year, the memorandum in writing satisfying the requirement of the Statute of Frauds may consist of several related writings, even though only one such writing is signed if the signed writing refers to the unsigned writing or if it appears by inspection and comparison of the writings that they logically relate to or form part of the same transaction."

* Reporter's Note: An appeal to the Supreme Court of Ohio was dismissed as having been

In that case there were unsigned corporate minutes together with a signed agreement, neither of which made direct reference to the terms of the employment contract; but, nevertheless, the court found those two documents were a sufficient memorandum in writing to meet the requirement of the Statute of Frauds. In the instant case, Plaintiff's Exhibit 3 and the oral statement by appellant, as a matter of law, were sufficient to overcome a motion for a directed verdict.

For the foregoing reasons, I would affirm the judgment of the trial court.



66 Ohio App.3d 576

1576 DECKER, Exrx., et al., Appellants,

v.

CNA INSURANCE COMPANY
et al., Appellees.*

No. 89-P-2106.

Court of Appeals of Ohio,
Portage County.

Decided June 4, 1990.

Executrix of employee's estate commenced declaratory judgment action against employer's insurer, seeking determination that employee was "insured" pursuant to uninsured motorist provisions of automobile policy issued to employer. The Common Pleas Court, Portage County, entered summary judgment in favor of insurer, and executrix appealed. The Court of Appeals, Ford, J., held that: (1) policy provision defining insured as "you" or any "family member" was ambiguous and provided coverage for employee, and (2) insurance coverage was not precluded by facts that employee was not within scope of his

improvidently allowed in (1991), 61 Ohio St.3d 1201, 572 N.E.2d 689.

DECKER v. CNA INS. CO.

Cite as 585 N.E.2d 884 (Ohio App. 11 Dist. 1990)

employment and that employee was pedestrian at time of accident.

Reversed and remanded.

Christley, P.J., filed concurring opinion.

Jurisdictional motion allowed, 56 Ohio St.3d 712, 565 N.E.2d 836.

Appeal dismissed, 61 Ohio St.3d 1201, 572 N.E.2d 689.

1. Judgment ⇐185(4)

Insured's provision of insurance policy in response to motion for summary judgment in declaratory judgment action by insurer was sufficient response to motion, where provisions of insurance policy contradicted insurer's assertions and demonstrated genuine issues for trial.

2. Insurance ⇐467.51(3)

Uninsured motorist provision of automobile policy issued to corporation that provided employee with company car under policy, under which insured was defined as "you" or any "family member," which was nonsensical as 1577 applied to corporation, was ambiguous and was to be interpreted as providing uninsured motorist coverage to employee.

3. Insurance ⇐467.51(3)

Fact that corporate employee was outside scope of his employment at time he was killed in accident while jogging did not preclude uninsured motorist coverage under automobile policy issued to corporation on vehicle which corporation had issued to him, where policy did not limit coverage to persons within scope of their employment; nor did fact that employee was pedestrian at time of accident bar him from coverage under uninsured motorist provisions.

Ralph Oates, Kent, for appellants.

Gary L. Nicholson and John B. Robertson, Cleveland, for appellees.

FORD, Judge.

On May 2, 1987, Robert L. Decker was struck and killed by an automobile while jogging in Portage County, Ohio. The

automobile was driven by Christopher R. Albert who, at the time of the accident, was insured by Federal Kemper Insurance Company, under a policy of insurance which carried a bodily injury liability limit of \$25,000 for each person and \$50,000 each occurrence.

The decedent had been employed by appellee, Envirodyne Industries. Envirodyne had provided the decedent with a company car, as well as insurance on the car, through the appellee, CNA Insurance Company.

Appellant, Laurie Decker, the executrix of decedent's estate, accepted \$25,000 in full settlement from Federal Kemper Insurance Company. Further, appellant endeavored to make a claim against the underinsured provisions of Envirodyne's insurance policy with appellee. When appellee refused to recognize the claim, appellant commenced a declaratory judgment, on September 21, 1988, requesting a determination as to whether the decedent was an "insured," pursuant to the "uninsured/underinsured motorist" provisions contained in the appellee's policy.

Under the terms of the uninsured motorist policy drafted by appellee, the following persons/entities were insured under the policy:

"D. WHO IS INSURED

"1. You or any family member.

1578 "2. Anyone else occupying a covered auto or a temporary substitute for a covered auto. The covered auto must be out of service because of breakdown, repair, servicing, loss or destruction.

"3. Anyone for damages he is entitled to recover because of bodily injury sustained by another insured." (Emphasis sic.)

Appellee's policy contains a provision defining certain terms of art contained in the policy. "You" or "your" is defined by the policy to be "the person or organization shown as the named insured * * *." The named insured in the policy in question was Envirodyne. The policy further defines "family member" as "a person related to

you by blood, marriage or adoption who is a resident of your household * * *." The uninsured motorist provision does not contain any special definitional wording which would limit the applicability of the policy to persons or family members in the scope of their employment. Instead, it would appear as if appellee utilized the same form for both corporate and personal automobile insurance policies.

Appellee, along with Envirodyne, filed a joint motion for summary judgment on April 3, 1989. Attached to this motion for summary judgment was an affidavit from an officer of Envirodyne which stated that it was not the intent of either Envirodyne or appellee that the decedent be covered for the accident at issue. On July 11, 1989, appellant filed a brief in support of declaratory judgment and in opposition to summary judgment. This brief did not dispute appellees' affidavit; instead, the brief asserted that the decedent was covered by the insurance company as a matter of law.

After oral arguments on the motion for summary judgment, the trial court, on July 28, 1989, issued an order stating:

"The Court finds that neither the Plaintiff, the Decedent nor the Decedent's Estate are insured under the Defendant's Insurance Policy, and that there is no dispute of material fact that the decedent was not in the scope of his employment at the time of his injury and death and was not operating a company owned vehicle."

Appellant timely filed a notice of appeal from this order and raises the following assignment of error:

"The trial court erred in sustaining the defendants' motion for summary judgment."

[1] Prior to any consideration of the merits of appellant's assignment, however, this court must first consider the threshold issue of whether appellant's assignment is properly cognizable by this court. Appellees argue that the grant of summary judgment is proper because appellant failed to contradict, in any way, the allegations in their motion.

1579 " * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Civ.R. 56(E).

Appellees' argument is traditionally very compelling and would prevail in the case *sub judice* except that it assumes that appellant relied solely on a paper refutation of appellees' contentions. However, appellant also provided the court with the insurance policy in question. The provisions of the insurance policy itself contradict appellees' assertions and demonstrate genuine issues for trial. This court is, therefore, capable of considering appellant's argument.

[2] The underlying issue in this case, which is the construction of an ambiguous insurance provision, has been the subject of considerable judicial scrutiny of late. Several courts, including this one, have addressed the question of who the insured party is in policies of uninsured/underinsured motorist coverage, where the form in question is used for both corporate and personal use. The interpretive difficulty in construing these provisions (which are all very similar to that in the case *sub judice*) is in construing phrases such as "you" or "a family member." The dilemma that one reaches when interpreting these provisions was set forth in *Aetna Cas. & Surety Co. v. Borden, Inc.* (Sept. 15, 1989), Lake App. No. 88-L-13-163, unreported, at 8, 1989 WL 107031, as follows:

" * * * '[Y]ou,' in the quoted language, indicates the named insured, the corporation; [a family member] becomes a nonsensical phrase when describing a relative of a corporation; a second possible interpretation of 'a relative' or 'you' could be 'an employee.' Thus, the court [is] faced with ambiguous language."

The starting point for the investigation of the question of whether decedent was

covered by the appellee's insurance policy is *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380. In *King*, the Ohio Supreme Court heard a case in which the named insured was a community action agency and the injured party was one of the agency's employees. This employee was driving a co-worker's car (rather than the agency's) in the scope of his employment. The policy in question defined "you" exclusively in terms of the agency and also contained language defining "family member" in the same manner as the policy in the case *sub judice*.

At trial, the insurance company argued that the word "relatives" in the form was a nullity, resulting solely from the cross-pollination of insurance forms for individuals and business entities. The Ohio Supreme Court, however, held that "[w]here provisions of a contract of insurance are reasonably susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." *Id.* at syllabus; *Faruque v. Provident Life & Acc. Ins. Co.* (1987), 31 Ohio St.3d 34, 31 OBR 83, 508 N.E.2d 949, at syllabus. The *King* court noted that interpreting phrases such as "[r]elatives living in your household" as relatives of the corporation was "manifestly absurd." *King, supra*, 35 Ohio St.3d at 212, 519 N.E.2d at 1384. The "relatives" phrase could also mean "the employees of the corporation," "the relatives of the employees of the corporation," or simply be construed as a nullity. Consequently, the court held that the phrase "a relative living in your household," in the business entity context, was inherently ambiguous and must be construed in such a way as to include the insured.

Five months after the release of *King*, the Ninth District Court of Appeals, in *Simon v. Midwestern Indemn. Co.* (Aug. 31, 1988), Lorain App. No. 4346, unreported, 1988 WL 93220, had occasion to construe an insurance policy similar to the one found in *King*. In *Simon*, the injured party, not within the scope of his employment, was struck and killed by an uninsured motorist. The decedent's employers had taken out uninsured motorist insurance, with

the company designated as the named insured and with provisions in the policy extending coverage to the "relatives" of the named insured. The *Simon* court, applying *King*, held that the decedent was covered by the company's uninsured motorist policy, even though he had not been within the scope of his employment at the time of the accident. Since "[t]he automotive policy in controversy [did] not specifically provide that 'insureds' were only covered if they [were] acting within the scope of their employment at the time they [were] injured[.]" the *Simon* court found the trial court's construction of the policy in favor of the insurers to be clearly contrary to law. *Simon, supra*, at 5.

This court also had occasion to hear a case involving an uninsured motorist policy similar to the case *sub judice*, in *Aetna, supra*. In *Aetna*, the company in question, Carroll Glass, was designated as the named insured on the insurance policy, a policy which also contained language covering the "relatives of the same household." The daughter of one of the employees of Carroll Glass, who was not an employee of the company, was injured while driving in a car, not owned by the company and outside of any company business.

This court, examining the insurance policy in *Aetna*, and applying the logic of *King* and *Simon*, stated that the employee of Carroll Glass was covered under the provisions of the uninsured motorists' policy and, "as [the insurer] has seen fit to amplify its coverage via the residential relative clause [the daughter] is also covered under the auspices of the policy." *Aetna, supra*, at 7-8. Further, in *Aetna*, this court took exception to Professor Widiss's treatise, *Widiss, Uninsured and Underinsured Motorists Insurance* (1985) 60, Section 4.4, quoted in *Aetna*, at 10. Widiss had opined that courts tend to limit analysis such as that found in *King* to situations in which the employee was engaged in the scope of his or her employment. This court noted, however, that Ohio law, as set forth in *King*, required that ambiguous provisions were to be construed liberally in favor of the insured. Acceptance of Widiss's posi-

tion, therefore, would require the adoption of a provision which did not encompass the full scope of persons who could be insured under the policy. Such a reading, the court felt, would scarcely comport with the liberal construction of the insurance provisions mandated by *King*.

In conclusion this court, in *Aetna*, observed:

"A reading of the insurance policy in the way advocated by the trial court may well extend appellant's liability beyond what [the insurer] had originally intended. However, appellant had the opportunity, when drafting the policy provisions, to formulate specific exclusions from coverage. 'Where exceptions, qualifications or exemptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof.' *Home Indemnity Co. v. Plymouth* (1945), 146 Ohio St. 96 [32 O.O. 30, 64 N.E.2d 248], paragraph two of the syllabus. (Further citations omitted.) Having drafted the insurance policy provisions and dictated its terms to its insureds [the insurer] must now accept the consequences of its own overinclusive drafting." *Aetna*, *supra*, at 11-12.

Appellees argue that the language of their policy does not cause the ambiguities inherent in *King* and *Aetna*. Appellees support this contention by stating that the terms "you" and "family member" are defined in the policy itself. Appellees' policy defines "you" as the "person or organization shown as the named insured in the policy." The named insured of the policy is Envirodyne. Appellees further note that "family member" is defined by the policy as "a person related to you [the named insured] by blood, marriage or adoption who is a resident of your household" Appellees conclude that, since decedent was clearly not a relative of Envirodyne, he was not covered by the insurance policy.

This conclusion is incorrect as a matter of law. Appellees' contention essentially states: ". . . that language, which is nonconforming or ambiguous, is simply the by-product of the cross pollination of insur-

ance forms for varying purposes. This contention is contrary to law. Each word in an insurance contract is presumed to have been included for a purpose and must be given some meaning. *National Life and Accident Ins. Co. v. Ray* (1927), 117 Ohio St. 13, 22 [158 N.E. 179, 182]. When an insurance company provides an insured with a policy, which it has drafted, containing terms with which it intends to bind the insured, the insurance company must expect to be held to the obligations which it, through its own drafting, has subjected itself." *Aetna*, *supra*, at 10.

In the case *sub judice*, like *Aetna*, *King*, and *Simon*, this court is faced with attempting to interpret a provision which could easily insure several different persons or no person at all. As a matter of law, in the interpretation of these provisions, courts have construed the language to include the employee under the protection of the policy.

Appellees direct this court's attention to *Troy Model Laundry, Inc. v. Robinson* (Nov. 17, 1989), Sandusky App. No. S-88-41, 1989 WL 138117, urging that the case is directly on point and should be considered dispositive of the issue. *Troy Model Laundry* case, in which the Sixth District Court of Appeals held that a pedestrian, not in the scope of his employment, was not covered by his company's uninsured motorist policy is in contravention not only of *Aetna*, but also of *King*. As the *Troy Model Laundry* case is not binding on this court, and as it fails to apply *King* and its progeny, we decline to follow it.

[3] Appellees further contend that appellant should be precluded from coverage because the decedent was outside the scope of his employment at the time of the accident. This argument is without merit for several reasons. First, examination of the insurance policy in question indicates that nowhere in the policy is there any restriction which limits coverage to persons within the scope of their employment. As noted, it has long been a governing rule of contractual interpretation that what "is not clearly excluded from the operation of such contract is included in the operation there-

of." *Home Indemn. Co.*, *supra*, at paragraph two of the syllabus.

Moreover, appellees point to no case law which indicates that underinsured motorist coverage is only available to persons within the scope of their employment. In fact, in *Simon*, the Ninth District, construing an insurance policy remarkably like the one at bar, found that the employee was protected by the uninsured motorist protections of his company's policy, despite not being within the scope of his employment at the time of his death. Similarly, this court, in *Aetna*, extended the ambit of the policy in question to cover a woman who was not only not within the scope of her employment, but was not even an employee of the corporation at all. Nor does the fact that the ¹⁵⁸³decedent was a pedestrian bar him from the protection of the insurance policy. Ohio law is replete with instances where courts have found a litigant to be entitled to benefits, arising from uninsured/underinsured motorist insurance, despite having been pedestrians at the time of the accident. See, e.g., *Dues v. Dodge* (1988), 36 Ohio St.3d 46, 521 N.E.2d 789; *Shear v. West American Ins. Co.* (1984), 11 Ohio St.3d 162, 11 OBR 478, 464 N.E.2d 545.

Appellant's assignment has merit.

Therefore, for the reasons set forth in this opinion, the judgment of the trial court is reversed and this case remanded for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

CHRISTLEY, P.J., and JOSEPH E. MAHONEY, J., concur.

CHRISTLEY, Presiding Judge, concurring.

I concur with the well-written opinion of the majority. That opinion comes to the only legal conclusion possible despite the absurdity of that conclusion from a common-sense viewpoint.

Nevertheless, this court is duty bound to follow the legal principles, precepts and case law presently existing in Ohio until such time as the legislature or the Ohio

Supreme Court sees fit to change those guidelines.



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¹⁵⁸³In re LOZANO, Appellee; OHIO DEPARTMENT OF MENTAL HEALTH, Appellant.

No. 58558.

Court of Appeals of Ohio, Cuyahoga County.

Decided June 4, 1990.

Complaint for dependency was filed, seeking to have custody of child placed in county so that child could be admitted to private nonpublic psychiatric institution. The Court of Common Pleas, Cuyahoga County, Juvenile ¹⁵⁸⁴Division, ordered Ohio Department of Mental Health (ODMH) to pay for child's care. ODMH appealed. The Court of Appeals held that trial court lacked statutory authority to require ODMH to bear costs associated with psychiatric treatment of child in private institution.

Reversed and remanded.

Krupansky, J., issued concurring opinion.

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Juvenile court lacked statutory authority to require Ohio Department of Mental Health to pay psychiatric costs associated with care of child who was placed in private nonpublic psychiatric institution. R.C. §§ 2151.01 et seq., 5122.01 et seq., 5123.01 et seq.

Martin Keenan, Cleveland, for appellee.

Steger, Delbaum & Hickman and Franklin J. Hickman, Cleveland, for Cuyahoga Coun-