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Joni M. Iverson v. State Farm Mutual Insurance Company, : Unknown

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JONI M. IVERSON, individually and as
personal representative for the estates of
CARTER AND GLENADA IVERSON,

Plaintiff/Appellant,

vs.

STATE FARM MUTUAL INSURANCE
COMPANY,

Defendant/Appellee

**DEFENDANT'S BRIEF ON
CERTIFICATION FROM FEDERAL
DISTRICT COURT**

Utah Supreme Court Case No.: 20081016-
SC

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JUDGE DEE V. BENSON**

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STATEMENT OF THE QUESTION CERTIFIED

This Court has accepted the following question for certification:

“Whether provision of lower limits for underinsured motorist coverage than for liability coverage, properly complies with former Utah Code Ann. §§ 31A-22-305(9)(b) and 31A-22-305(9)(g) (currently codified under Utah Code Ann. § 31A-22-305.3).”

STATUTORY PROVISIONS INVOLVED

(b) For new policies written on or after January 1, 2001, the limits of underinsured motorist coverage shall be equal to the lesser of the limits of the insured’s motor vehicle liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured’s motor vehicle policy, unless the insured purchases coverage in a lesser amount by signing an acknowledgment form provided by the insurer that:

- (i) waives the higher coverage;
- (ii) reasonably explains the purpose of underinsured motorist coverage;

and

- (iii) discloses the additional premiums required to purchase underinsured motorist coverage with limits equal to the lesser of the limits of the insured’s motor vehicle liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured’s motor vehicle policy.

...

(g) (i) In conjunction with the first two renewal notices sent after January 1, 2001, for policies existing on that date, the insurer shall disclose in the same medium as the premium renewal notice, an explanation of the purpose of underinsured motorist coverage and the costs associated with increasing the coverage in amounts up to and including the maximum amount available by the insurer under the insured’s motor vehicle policy.

Utah Code Ann. § 31A-22-305(9) (2001). A complete copy of this statute was attached to Plaintiff's brief as Addendum "A."

STATEMENT OF THE CASE

Carter and Glenada Iverson (the "Iversons") insured their automobile with Defendant State Farm Mutual Automobile Insurance Company ("State Farm") under the same policy from August 1981 through the date of the accident giving rise to the subject lawsuit. On several occasions subsequent to January 1, 2001, State Farm explained to the Iversons the costs and purposes of uninsured ("UM") and underinsured ("UIM") motorist coverage and invited them to purchase such coverage in an amount equal to the liability limits set forth under their Policy. Despite being so informed, the Iversons opted to maintain their UIM coverage at its existing limit.

Plaintiff now seeks to revoke the Iversons' rejection of higher UIM limits on the basis that changes to that Policy after January 1, 2001, involving a substitution in vehicles and an update in State Farm's standard policy form, created a new policy, requiring a new offer of UIM coverage. The Iversons do not dispute that their coverage under the Policy remained in continuous force during that entire period.

This matter is before this Court upon the Certification of Question of State Law by the United States District Court for the District of Utah.

The UM/UIM Notices

On February 27, 2001, State Farm sent a renewal notice to the Iversons (R. at 105), insureds for whom it had been providing automobile insurance coverage since 1981

under policy number 479 7848 (the “Policy”). (R. at 65, 68). That notice informed the Iversons of the costs and benefits associated with UM and UIM coverage and invited them to purchase such coverage at amounts greater than those which currently existed under their State Farm policy. (R. at 105, 145-46). Specifically, the renewal notice included the following language:

Please read the enclosed insert titled IMPORTANT NOTICE REGARDING UNINSURED AND UNDERINSURED MOTOR VEHICLE COVERAGES.

If you want to increase your [UM or UIM] limits to equal your Bodily Injury Liability Coverage limits or \$250,000/\$500,000 (whichever is less), please contact your agent.

(R. at 105). Along with that notice, State Farm included an insert which further expounded on UM/UIM coverage. (R. at 72). That insert stated as follows:

Utah law requires that auto policyholders carry Uninsured Motor Vehicle (Coverage U) and Underinsured Motor Vehicle (Coverage W) with limits equal to the lesser of:

1. the policyholder’s Bodily Injury Liability Coverage limits, or
2. \$250,000 per person and \$500,000 per accident.

However, you may, in writing, reject either Coverage U or Coverage W or select lower limits for either or both of these coverages.

Coverage U provides protection to you and others in your motor vehicle if there is an accident caused primarily by the fault of another party and the other party has no liability insurance to compensate you for your bodily injuries.

Coverage W provides protection to you and others in your motor vehicle if there is an accident caused primarily by the fault of another party and the other party has liability insurance, but not enough to compensate for your bodily injuries.

Your Bodily Injury Liability Coverage, Coverage U, and Coverage W limits are shown on your enclosed renewal notice. Following are the Coverage U and W limits available and the applicable premium for each.

(R. at 145-46). The insert proceeded to list various UM/UIM limits and the corresponding premiums for each, then closed with the following notice:

If you want to increase your Coverage U or Coverage W limits to equal your Bodily Injury Liability Coverage limits (but not more than \$250,000 per person and \$500,000 per accident), or if you have any questions, please contact your State Farm agent. If you want to keep the limits you have, no action is needed.

(R. at 146).

State Farm included the same language and insert with its next renewal notice, dated August 27, 2001 (R. at 108), then again in three subsequent renewal notices, dated February 27, 2004, August 27, 2004, and February 27, 2005. (R. at 73, 121, 123, 126). And even on several occasions prior to 2001, State Farm had informed the Iversons of the purpose of UM/UIM coverage and offered them the opportunity to purchase it in higher amounts. (R. at 131-33). Despite being provided with those numerous opportunities to obtain greater UIM coverage, the Iversons took no action, thereby opting to maintain such coverage at the existing amount of \$10,000 per person and \$20,000 per accident. (R. at 87-126).

The Accident and UIM Offer

On July 4, 2005, the Iversons were killed in a head-on collision while traveling in their PT Cruiser. (R. at 149-50). Plaintiff subsequently made a claim for UIM benefits under the Iversons' Policy. (R. at 25, 31). Just one month after the accident, State Farm offered its UIM limits of \$10,000 for Mr. Iverson and \$10,000 for Mrs. Iverson, for a

total of \$20,000. (R. at 152). However, Plaintiff has taken the position that State Farm was required to increase the Iversons' UIM limits to make them equal to the liability limits set forth under the Policy. (R. at 197-98). As such, Plaintiff rejected State Farm's repeated offers of the \$20,000 limit (R. at 26, 31) and instead filed suit against State Farm on August 9, 2006, stating claims for breach of contract and bad faith. (R. at 49).

The Policy

As opposed to insurance policies offered by some other carriers, which cover multiple cars under the same policy, State Farm policies only cover a single vehicle on one policy. (R. at 87-126). The Policy language established that coverage would be provided for any car replacing the one previously insured under the policy, so long as State Farm is asked to insure it within thirty days of delivery and any additional premium amount is paid. (R. at 300). The Iversons replaced the vehicle covered under the Policy on several occasions. (R. at 90, 92, 119). The final replacement took place in April 2003, when the Iversons requested that a 2001 PT Cruiser be substituted for the 1995 Chevy van previously covered under the Policy. (R. at 78, 119, 143).

In August 2001, State Farm made a periodic update to its standard policy form. (R. at 304). This policy form update made no substantive changes to the coverages provided to the Iversons under the Policy. (R. at 304; 355-407).¹ Such an update was anticipated by the language of the Policy itself, which explained that some changes would be made to the policy form over the life of the policy and specified that such changes

¹ As discussed further below, the form update primarily incorporated minor changes which had previously been made by endorsement. (See Addendum "C".)

would not create a new policy. (R. at 374). Specifically, the Conditions section of the Policy states that the terms of the Policy may be changed by endorsement or by the revision of the policy form. (R. at 374). Furthermore, that section also specified that unless State Farm mailed the Iversons a “notice of cancellation or notice of our intention not to renew the policy,” State Farm would continue to renew the policy upon payment of the renewal premium. (R. at 375).

When State Farm made the above changes in vehicles and policy forms, the letter code found on the end of the Iversons’ policy number changed to reflect the differences. (R. at 111, 119, 304). However, the base policy number, 479 7848, has remained the same throughout the life of the Policy. (R. at 70, 137-38, 295). Change codes are used by State Farm to identify which declarations are in effect and to track changes in an existing policy such as a change in vehicle. (R. at 294-95). After the Iversons substituted vehicles in 2003, State Farm issued a Declarations Page which documented the substitution and related change in letter code by informing the Iversons that the current Declarations Page had “Replaced policy number 4797848-44E”. (R. at 259).

Aside from those changes set forth above, the only other differences in the Policy subsequent to January 1, 2001 were slight variations in premiums from one policy period to the next. (R. at 103-26). Such changes in pricing are not handled through State Farm’s underwriting department, as premiums are set by actuaries in State Farm’s corporate headquarters. (R. at 70). When discussing the difference between underwriting and pricing, State Farm representative Tammy Chase testified as follows:

Underwriting takes into consideration eligibility guidelines, what your driving record's like, things like that. The actual rating of the policy then, the price you're going to charge, can depend on who's driving the car, what coverages you choose, where that car is garaged, the territory, things like that. The classification how that car is used.

So there's a difference in being eligible and underwriting for coverage for acceptability for eligibility and then choosing what -- determining what rate is appropriate then for that risk, that underwriting risk that's presented.

(R. at 68). She further testified that “[t]here are two separate functions. Underwriting eligibility and then rating. They're two separate functions.” (R. at 70). She also clearly indicated that “underwriting has nothing to do with setting a premium amount” (R. at 71), and that a change in vehicles changes the pricing of the risk, but not necessarily the underwriting. (R. at 68). Although Ms. Chase did indicate that a material change to the Policy could potentially impact pricing, at no point did she state that any change in pricing was material. (R. at 254-55).

Except for the minor ones detailed above, there were no changes to the Policy on or after January 1, 2001. (R. at 103-26). The coverage limits in place on the Policy prior to January 1, 2001 remained the same through the end of the Policy. (R. at 103-26). Furthermore, there was no change in drivers listed under the Policy from 2001 on, and Carter Iverson was the only named insured under the Policy during its entire duration. (R. at 103-26). The Iversons were never asked to complete another application once the Policy was initially obtained and there were no additional insureds added to the Policy after January 1, 2001. (R. at 103-26).

Insureds benefit greatly from the existence of a continuous policy. (R. at 70, 75). First, they are not required to repeat the application process, as they are when they obtain a new policy. (R. at 70, 75). Furthermore, they are able to maintain time accrued toward any discounts. (R. at 70, 75). For instance, State Farm provides a discount for policies remaining in force and accident-free for at least three years. (R. at 106). The longer the policy remains in force and accident-free, the greater the discount. (R. at 106). The Iversons benefited from such a discount. (R. at 105-26).

SUMMARY OF ARGUMENTS

Pursuant to Utah Code Ann. § 31A-22-305(9), an insurer is only required to obtain a written UIM election/waiver from an insured on new policies written on or after January 1, 2001. The statute does not define the term “new policies”, but courts interpreting that term have held that an existing policy is only converted into a new policy if it undergoes some sort of significant change that alters the nature of the risk covered under the policy.

State Farm issued its policy to the Iversons long before January 1, 2001, and no material changes were made after that date which would convert it into a new policy. There was no change in policy limits, nor did the Iversons complete a new application. At no time was the number of vehicles insured under the policy increased, and there were no additional insureds added to the policy. The only changes involved the substitution of one vehicle for another and the updating of State Farm’s standard policy form. Courts

have widely held that such changes are not material and therefore do not create a new policy.

Inasmuch as the Iversons' policy existed prior to January 1, 2001, State Farm was required to include in its first two renewal notices an explanation of the costs associated with UIM coverage, along with the purposes of such coverage. State Farm did just that, and then went on to include the explanation in three additional renewal notices.

The purpose of § 31A-22-305(9) is to ensure that insureds are adequately informed with regard to UIM coverage. State Farm made every effort to comply with its obligations under that statute, and the legislative intent was fulfilled in this instance, as the Iversons were thoroughly informed concerning UIM coverage on numerous occasions. The Iversons were given multiple opportunities to increase their existing UIM coverage, but decided not to do so. Mandating a higher level of coverage despite that informed decision could potentially destroy, in large part, the benefits an insured enjoys from continuous coverage under a policy.

ARGUMENT

INASMUCH AS STATE FARM DID NOT WRITE A "NEW POLICY" TO THE IVERSONS ON OR AFTER JANUARY 1, 2001, IT FULFILLED ITS OBLIGATIONS UNDER UTAH CODE ANNOTATED § 31A-22-305(9) BY INFORMING THE IVERSONS OF THEIR OPTIONS WITH REGARD TO UIM COVERAGE THROUGH NUMEROUS RENEWAL NOTICES.

In 2000, the Utah legislature enacted legislation intended to insure that insureds are aware of the purpose of UM/UIM as well as the various options associated with such coverage under their automobile policies of insurance. See Utah Code Ann. § 31A-22-305(9); General Sec. Indem. Co. v. Tipton, 2007 UT App. 109, ¶11. That legislation

established two separate and distinct methods by which insureds were to be so informed, one method applicable to new policies written on or after January 1, 2001, and one applicable to policies in existence prior to that time. See id.

Inasmuch as State Farm had issued Iversons policy long before January 1, 2001, it complied with the requirements applicable to existing policies by providing the required information in numerous renewal notices sent subsequent to January 1, 2001. Indeed, State Farm went beyond what was required in providing that information, and the Iversons were well-informed of their options with regard to UIM coverage. After being so informed, the Iversons made an educated decision to maintain their UIM coverage at its existing level, instead of increasing the coverage. As such, a greater level of coverage should not now be mandated, as so doing would create a substantial and unintended burden on insurers.

A. A signed waiver of UIM coverage is only required on new policies written on or after January 1, 2001.

According to legislation passed in 2000, insurers must provide UIM coverage “equal to the lesser of the limits of the insured’s motor vehicle liability coverage or the maximum underinsured motorist coverage limits” available under the insured’s policy on “new policies written on or after January 1, 2001 . . .” Utah Code Ann. § 31A-22-305(9)(b) (2001) (emphasis added.) The statute also permits insureds with such “new” policies to choose UIM coverage in lesser amounts should they not wish to pay the costs associated with coverage at greater amounts. An insured may purchase the lesser amount, or waive UIM coverage entirely, “by signing an acknowledgment form provided

by the insurer that: (i) waives the higher coverage; (ii) reasonably explains the purpose of underinsured motorist coverage; and (iii) discloses the additional premiums required to purchase underinsured motorist coverage” at the various limits. Id.

B. State Farm did not write a new policy for the Iversons on or after January 1, 2001 because no material changes were made to the policy that was in existence prior to that date.

The above requirements only apply to “new policies written on or after January 1, 2001.” Utah Code Ann. §31A-22-305(9)(b) (2001). Plaintiff does not dispute that the Iversons had a policy in place with State Farm on January 1, 2001. (See Plaintiff’s Brief at 17.) Therefore, at issue is whether some change occurred to that policy, on or after January 1, 2001,² which converted it into a “new policy.” As set forth below, no such change occurred.

The Utah legislature has not defined the term “new policy.” However, the Tenth Circuit has noted that a new policy is created when there has been a material change to the type of risk insured by an existing policy. See May v. Nat’l Union Fire Ins. Co., 84 F.3d 1342, 1346 (10th Cir. 1996). A material change is one which alters the type of risk being covered. See Johnson v. Life Investors Ins. Co. of Am., No. 98-4120, 2000 U.S. App. LEXIS 16049, at *21 (10th Cir. July 11, 2000). (Attached as Addendum “A”.) In

² Plaintiff spends a great deal of time discussing what are described as changes to the Iverson policy prior to January 1, 2001. Such changes are irrelevant as concerning the issue before this Court as Plaintiff recognized in her Summary of the Argument, in which she states that “the myriad changes and circumstances demonstrate that the Iverson’s coverage changed materially after the legislature enacted a written waiver requirement.” (See Plaintiff’s Brief at 13.) As such, State Farm will focus its brief on those changes which took place subsequent to January 1, 2001.

the context of statutory UM/UIM selection/rejection requirements, “[t]he determinant question is whether the change in the policy is material to the initial selection or waiver of UM coverage that would require the execution of a new selection or waiver.” Allstate Ins. Co. v. Kaneshiro, 998 P.2d 490, 500 (Haw. 2000) (quoting Lewis v. Lenard, 694 So. 2d 574, 577 (La. Ct. App. 1997)). That change “must have a significant impact on the legal relationship and obligations between insurer and insured under the policy . . .” Id.

A substantial increase or decrease in coverage limits is widely considered to be one such material change. See e.g. May, 84 F.3d at 1346 (\$2 million reduction in liability coverage constituted the issuance of a new policy as opposed to a renewal); Johnson v. Farmers Ins. Co., 817 P.2d 841, 849 (Wash. 1991) (nothing that “where coverage levels remain constant, the majority of jurisdictions support the conclusion that no new policy is created”). Other potential material changes include increasing the number of insured vehicles or adding an additional insured to the policy. See Millet v. Imperial Fire and Cas. Ins., 887 So. 2d 603, 606 (La. Ct. App. 2004). Furthermore, courts will often consider whether a new application was completed in determining whether a new policy was issued. See e.g. Chatlas v. Allstate Ins. Co., 892 N.E.2d 106, 110 (Ill. App. Ct. 2008).

No such changes occurred to the Iversons’ Policy subsequent to January 1, 2001. The coverage limits set forth under the Policy remained the same that entire period. (R. at 103-26). The number of insured vehicles did not increase nor were any additional

insureds added to the Policy during that time. (R. at 103-26). And the Iversons were not required to complete a new application at any point.

Plaintiff has essentially argued that a change in vehicles and in policy forms converted the prior policy into a new policy. (See Plaintiff's Brief at 16-17.) However, such changes are not considered material and therefore do not create a new policy.

1. The replacement of a vehicle under an existing policy does not create a new policy.

The replacement of a vehicle on an existing policy does not create a new policy. See Millet, 887 So. 2d at 606-07; Dodd v. Allstate Ins. Co., 99 P.3d 1219, 1223 (Okla. Civ. App. 2004). Gasch v. Harris, 808 So. 2d 1260, 1262 (Fla. Dist. Ct. App. 2002); Wells v. Detroit Auto. Inter-Ins. Exch., 185 N.W.2d 147, 150 (Mich. Ct. App. 1970); Johnson, 817 P.2d at 849. Rather, the “mere substitution of automobiles with no additional changes in coverage constitutes the *renewal of an existing* policy.” See Gasch, 808 So. 2d at 1262 (emphasis added). By contrast, the addition of another vehicle to a policy, as opposed to the replacement of a vehicle, may create a new policy because the nature of the insured risk would be materially changed. See Dodd, 999 P.3d at 1223 (Okla. Civ. App. 2004); but see Makela v. State Farm Mut. Auto Ins. Co., 497 N.E.2d 483 (Ill. App. Ct. 1986) (finding that even the addition of a new vehicle does not create a new policy).

In Millet, the insured purchased UM coverage with limits lower than those applicable to his liability coverage. Millet, 887 So. 2d at 605. The insured subsequently replaced one of his vehicles with a newer model. After being involved in an accident

with the replacement vehicle, the insured claimed that he had intended to obtain UM coverage equal to his liability coverage at the time he replaced the vehicle on his policy. However, the court held that the replacement vehicle did not create a new policy. Therefore, the insurer had no obligation to provide a new UM selection form at that time. Id. at 606-07.

And in Johnson, the statute at issue established that the requirement of a written rejection of UIM coverage did not apply to renewal or replacement policies. Johnson, 817 P.2d at 849. The court then went on to find that the replacement of an automobile under the policy at issue did not create a new policy, and that the existing UIM limits set forth under the policy applied because the statute did not “require insurers to reoffer full UIM coverage on renewal policies.” Id.

Plaintiff attempts to distinguish some of the cases set forth above based on slight differences between the governing statutes of those states and Utah Code Ann. § 31A-22-305(9)(b). (See Plaintiff’s Brief at 21-22.) Some of those statutes do incorporate terms such as “renewal”, “replacement”, “reinstatement”, “substitute”, or “amended” in describing policies for which the obligation to obtain a written waiver of higher UIM coverage does not apply. Plaintiff argues that such language makes those statutes “much broader than Utah’s – the Utah legislature chose to allow an exception to written waivers only for renewals . . .” (See Plaintiff’s Brief at 21.) However, in making that contention Plaintiff misstates Section 31A-22-305(9). As set forth above, that section simply juxtaposes “new” policies with “existing” policies. By so doing, the legislature has

created a broad exception to written waivers, for if a policy does not qualify as a “new” policy, it must therefore be an “existing” policy. And the above cases are unanimous in holding that replacing a vehicle under an existing policy does not create a new policy.

Furthermore, even if the Utah legislature had truly intended to only waive the written waiver requirement in strict renewal situations, the replacement of a vehicle under an existing policy is no more than a renewal of that policy. See Gasch, 808 So. 2d at 1262; Johnson, 817 P.2d at 849. Indeed, the term “renewal” has been defined as “[t]he substitution of a new right or obligation for another of the same nature.” Black’s Law Dictionary 899 (6th ed. 1991). By replacing one vehicle under a policy with another, an insurer is doing nothing more than switching the same obligations from one vehicle to another, as opposed to assuming an additional risk.

Plaintiff cites several cases in support of her argument that the mere replacement of a vehicle constitutes a material change in the policy. (See Plaintiff’s Brief at 24-28.) However, upon close review, even those cases help establish that a change in vehicles, standing alone, does not create a new policy. First, in Withrow v. Pickard, 905 P.2d 800 (Okla. 1995), the court found that the *addition* of a new vehicle to the policy, not the replacement of a vehicle, created a new policy. Importantly, that decision was based in part on Beauchamp v. Southwestern Nat’l Ins. Co., 746 P.2d 673 (Okla. 1987). In Beauchamp, the insureds originally rejected UM coverage on a policy covering two vehicles. They later requested coverage for a third vehicle under the policy, and no UIM coverage was offered at that time. Id. at 674. In finding that the addition of a new

vehicle created a new policy, thereby mandating a new offer of UM coverage, the court reasoned that the “vehicle was not a substitute for one of those insured under the original policy.” Rather, an additional vehicle was added, necessitating an additional premium. As such, the original policy had undergone a material change, as opposed to a renewal. Id. at 676. See also Kaneshiro, 998 P.2d at 500 (finding that as opposed to merely substituting vehicles, the insured added a vehicle, which led to an additional premium and the creation of a new policy).

Plaintiff’s other cases can also be distinguished because they involve situations in which in addition to replacing a vehicle, the policy underwent some sort of material change. See Whaley v. Allstate Ins. Co., 595 F. Supp. 1023, 1026 (D.C. Del. 1984) (in addition to substitution of vehicles, a vehicle was also eliminated from the policy); Arms v. State Farm Mut. Auto. Ins. Co., 465 A.2d 360 (Del. Super. Ct. 1983) (also involved the addition of collision and comprehensive coverage); Folstad v. Farmers Ins., 210 N.W.2d 238 (Minn. 1973) (adding a new driver to the policy made it more than a renewal). Furthermore, Arms, a case relied upon heavily by Plaintiff, has since been superseded by statute. See Matney v. Nationwide Gen. Ins. Co., No. 88C-AP-135, 1989 Del. Super. LEXIS 298, at *3 (Del. Super. Ct. July 7, 1989). (Attached as Addendum “B”.) As noted in Matney, Arms was decided under a previous statute which required carriers to reoffer UM coverage each time a vehicle was added or substituted on a policy. Id.

In 2003, the Iversons substituted a 2001 PT Cruiser for the Chevrolet that had previously been covered under the policy. (R. at 78, 119, 143). Under the case law set

forth above, such a substitution does not create a new policy. As opposed to the cases relied upon by Plaintiff, the Iversons did not add an additional vehicle to their existing policy, nor did they make any material changes to their policy.

Considering a replacement vehicle to merely be an extension of an existing policy, as opposed to the creation of a new policy, is consistent with the contractual obligations imposed upon insurers in most policies. Such an obligation was recognized by the court in Wells. That case involved a “replacement vehicles” provision, which established that coverage would be provided for such a vehicle “provided it replaces the described automobile . . . and notice of its acquisition is given [to the insurer] within 30 days of the date of its delivery to such named insured . . .” Wells, 185 N.W.2d at 148. The court recognized that “[i]n extending the insurance coverage to the new automobile, the insurance company was merely providing the insureds with that which it had already bound itself to provide . . .” Id. at 150. As such, the replacement of a vehicle under that policy did not create a new policy, and therefore a UM statute that had gone into effect subsequent to the original issuance of the policy did not come into play. Id. at 150; see also Makela, 497 N.E.2d at 488-89 (basing holding in part on the fact that the insurer “had contracted to insure any car on the declarations page, including any replacement, substitute, and additional cars . . .”)

Just as in Wells and Makela, State Farm was only providing the coverage it had bound itself to provide when it replaced the Chevrolet with the PT Cruiser. The terms of the Iversons’ policy established that coverage would be provided for any car replacing

the car that was previously insured under the Policy, so long as State Farm is asked to insure it within thirty days of delivery and any additional premium amount is paid. (R. at 300). Furthermore, State Farm agreed to continue to renew the Policy, unless it provided the Iversons with a notice of cancellation. (R. at 375). Inasmuch as State Farm was simply complying with its obligations under the Policy by extending coverage to the PT Cruiser, such a substitution of vehicles does not create a new policy.

Plaintiff also claims that a change in premiums, such as the one associated with the vehicle replacement, constitutes a material change. (See Plaintiff's Brief at 8-14, 29-30.) That contention is based in large part on select portions of the testimony of State Farm representative Tammy Chase, which Plaintiff relies upon in an attempt to show that the rating process of a policy is a part of the underwriting process. (See id.) However, when Ms. Chase's testimony on this subject is viewed in its entirety, it is clear that underwriting and pricing are two separate processes. (R. at 68, 70-71). Indeed, when asked directly whether the rating of a vehicle was a part of the underwriting process, Ms. Chase indicated that "[t]here are two separate functions. Underwriting eligibility and then rating. They're two separate functions." (R. at 70). She also clearly testified that "underwriting has nothing to do with setting a premium amount" (R. at 71), and that a change in vehicles changes the pricing of the risk, but not necessarily the underwriting. (R. at 68). And although Ms. Chase did indicate that a material change could potentially impact pricing, at no point did she state that any change in pricing was material. (R. at 254-55).

More importantly, the courts have held that an increase in premiums does not equate to a material change because such an increase does not change the nature of the risk assumed by the insurer. See Johnson, 2000 U.S. App. LEXIS 16049, at *21; see also Gasch, 808 So.2d at 1262 (increased premium, which accompanied the replacement of a vehicle under the policy, did not create a new policy because the increase was not associated with a change in coverage). Therefore, even though the Iversons premium was increased when the PT Cruiser was substituted for the previous vehicle (R. at 116, 119), that increase did not convert the Iversons' existing policy into a new policy.

2. Periodic updates to a standard policy form do not create a new policy.

In August 2001, State Farm updated its policy form. (R. 304). Such an update does not create a new policy. See Wells, 185 N.W.2d at 149-50 (finding that an update in a policy form did not create a new policy). It is common practice in the insurance industry for carriers to make periodic updates to their policy forms. Such updates are often made to clarify policy provisions or bring the policy in compliance with statutory amendments. Indeed, the Conditions section of the Iversons' Policy specifically contemplates that revisions to the Policy would be made over time. (R. at 374).

Plaintiff has put forth great effort to find differences between State Farm's pre-2001 policy form (the "previous form") and the form that was put into place in August 2001 (the "subsequent form"). (See Plaintiff's Brief at 5-6.) Plaintiff claims that those differences have narrowed the coverages and substantially altered the Policy's terms. (See id. at 5.) Such was not the case, as set forth more fully below.

However, even if the changes could be construed as material, they did not convert the Iversons' existing policy into a new policy subsequent to January 1, 2001 because those changes were incorporated into the Policy by endorsement prior to that date. The subsequent form merely combined those changes with the remainder of the Policy. The adaptations pertaining to the bodily injury definition, motorcycle no-fault coverage, and the newly acquired car definition were originally set forth in Endorsement 6126FA. (Attached as part of Addendum "C").³ Endorsement 6126FA was made effective August 28, 2000. (R. at 103). The distinction with regard to the rental of business vehicles was originally established by way of Endorsement 6082P. (Attached as part of Addendum "C".) That Endorsement was effective with the March 30, 1994 policy period. (See Declarations Page, Attached as part of Addendum "C".)⁴ As such, the primary changes relied upon by Plaintiff were made prior to January 1, 2001 and therefore could not have created a new policy subsequent to that date.

Furthermore, the differences cited are no more than minor variations, made for clarification purposes, or semantics. For instance, Plaintiff claims the subsequent form alters the definition of "bodily injury" by eliminating coverage for emotional distress which is unaccompanied by "physical bodily injury." (See *id.* at 5-6.) That definition merely offers further clarification of the definition set forth in the previous form, which

³ Endorsement 6126FA was not made part of the current record because Plaintiff's policy form argument was not raised in the underlying proceedings. However, it is the subject of State Farm's Motion to Supplement Record, filed concurrently herewith.

⁴ Endorsement 6082P and the March 30, 1994 Declarations Page are also subjects of State Farm's Motion to Supplement Record.

specifies that there is no coverage for “sickness” unless such sickness is attached to a bodily injury. (R. at 356).

Plaintiff contends that the subsequent form also “redefin[es] the nature of coverage for rental vehicles” by excluding liability coverage for such vehicles when they are used in connection with an insured’s business or employment. (See Plaintiff’s Brief at 6.) However, under the previous form, coverage for a non-owned vehicle such as a business rental was only provided when that vehicle was rented or in the possession of the insured for less than twenty-one consecutive days. (R. at 356). Furthermore, such coverage was only available in excess of other liability coverage available on that vehicle. (R. at 361). Under then-existing Utah law, a rental company was obligated to provide renters with primary coverage meeting the requirements of Utah’s financial responsibility laws, unless other valid or collectible insurance applied. See Utah Code Ann. §31A-22-314(1)(1999). Therefore, the only difference between the two forms with regard to coverage for rental vehicles was that under the previous form, *excess* coverage was provided for the *short-term rental* of a *business* vehicle, while under the subsequent form that coverage is not available.

Plaintiff also argues that the subsequent form removes no-fault coverage for the occupation of a motorcycle. (See Plaintiff’s Brief at 6.) However, under the previous form, the Iversons would not have had no-fault coverage for the operation of any motorcycle owned by them or a relative because no such vehicle was listed as insured under the policy. (R. at 363). As such, the only situation in which the Iversons would

have received no-fault motorcycle coverage under the previous form is one in which they were operating a motorcycle which happened to belong to someone other than themselves or a relative.

And in some situations, the differences between the two forms relied upon by Plaintiff make no changes whatsoever. For instance, Plaintiff argues that the subsequent form eliminates the ability of an insured to recover attorney fees when they elect to arbitrate a dispute over no-fault benefits. (See Plaintiff's Brief at 6.) However, as recognized by Plaintiff, the previous form did not contain any language with regard to attorney fees in arbitration disputes. (R. at 363). Under Utah law, a party is only entitled to attorney fees in a contract claim if such fees are specifically permitted by contract or statute. See Smith v. Grand Canyon Expeditions Co., 2003 UT 57, ¶30, 84 P.3d 1154. Therefore, the subsequent form did not remove any right that existed under the previous form with regard to attorney fees.

Plaintiff also contends that the subsequent form gives State Farm the "right to rely on mailing as sufficient proof of notice" of cancellation. (See Plaintiff's Brief at 6.) However, that same right was set forth under the previous form. (R. at 375). And finally, Plaintiff contends that the subsequent form is materially different from the previous form in that it now requires an insured to "ask" for coverage on a "newly acquired car" as opposed to "tell[ing]" State Farm about such a car. (See Plaintiff's Brief at 6-7.) Although there is a technical distinction between "asking" someone to do something and

“telling” them to do something, the exchange of those two words does nothing to alter an insured’s ability to obtain coverage on a “newly acquired car.”

Plaintiff has offered no case law which would suggest that any of the above minor changes to the policy form would be considered material. As discussed in Kaneshiro, “the determinant question is whether the change in the policy is material to the initial selection or waiver of [UIM] coverage . . .” See Kaneshiro, 998 P.2d at 500 (quoting Lewis, 694 So. 2d at 577). The changes set forth by Plaintiff certainly would not have caused the Iversons to rethink their selection of UIM coverage, nor could those changes be said to significantly affect the legal relationship between State Farm and the Iversons.

The Iversons’ Policy anticipated that some changes would be made to the policy form over the life of the policy, and specified that such changes would not create a new policy. (R. at 374). As set forth above, none of those changes altered the Policy in any material way. Therefore, as was the case in Wells, the mere existence of a new policy form does not create a new policy.

3. An isolated phrase found on a declarations page or changes in the policy number’s lettering do not convert an existing policy into a new policy.

Plaintiff argues that a declarations page issued by State Farm includes a sentence indicating that the page “[r]eplaced policy number 4797848-44E.” (See Plaintiff’s Brief at 15-18.) However, this phrase does not represent the establishment of a new policy. Rather, it refers to the replacement of the policy change code letter from an “E” to an “F”. (R. at 259). Change codes are used to identify which declarations are in effect and

to track changes in an existing policy such as a change in vehicle or a change to the named insured. (R. at 294-95).

It is ironic that Plaintiff contends State Farm's use of the word "replaced" operates to convert the policy into a new policy, and yet at the same time argues that State Farm should not have the "power to wholly dictate the characterization of its insurance without deference to the legislative requirements or the undisputed facts." (See Plaintiff's Brief at 17.) State Farm agrees that the Policy's status should be determined in light of the legal and factual issues set forth above, and that its use of a single word amongst numerous pages of policy documents does nothing to alter that status.

Relatedly, slight variations to the lettering of the Iversons' policy number also do not indicate that a new policy was issued. The single-digit letter codes on the end of the Iversons' base policy number changed on two occasions subsequent to January 1, 2001. (R. at 111, 119, 304). As indicated above, these changes codes are used to track which declarations page is in effect under the Policy. (R. at 294-95). However, the testimony on the record is that the base policy number associated with the Policy, 479 7848, has remained the same throughout the life of the Policy. (R. at 70, 137-38, 295).

Furthermore, even if the policy number had changed, such a change, standing on its own, is insufficient to create a new policy. See e.g. Chatlas, 892 N.E.2d at 110. Once again, to allow an insurer to dictate the characterization of a statute simply by changing a letter at the end of a policy number would cause great concern to insureds everywhere, who benefit greatly from the continuance of an existing policy.

In light of the above, it is clear that there was no material change made to the Iversons' policy on or after January 1, 2001. There was no change in coverage limits, no new application, no addition of a vehicle, or no other significant action during that time period which impacted the risk assumed by State Farm under the Iversons' policy. As such, there was no new policy written for the Iversons on or after January 1, 2001, and the requirements of Utah Code Ann. §31A-22-305(9)(b) therefore do not apply.

C. State Farm complied with the requirements set forth under § 31A-22-305(9)(g), pertaining to policies in existence on January 1, 2001, by sending the Iversons numerous renewal notices which informed them of their options with regard to UIM coverage.

Inasmuch as the Iversons' State Farm policy was in existence prior to January 1, 2001, Utah Code Ann. § 31A-22-305(9)(g)(i) governs. As set forth below, State Farm went above and beyond the requirements set forth under that statute.

For policies existing prior to January 1, 2001, an insurer was required to include in its first two renewal notices sent after that date "an explanation of the purpose of underinsured motorist coverage and the costs associated with increasing the coverage" Utah Code Ann. §31A-22-305(9)(g)(i). See also Tipton, 2007 UT App. 109, ¶22 (recognizing that the statute only requires "that a notice be sent to existing policyholders informing them of the opportunity to purchase additional [UIM] coverage . . .").

On January 1, 2001, the Iversons' Policy had UIM limits of \$10,000 per person and \$20,000 per accident. (R. at 103). For the first two policy periods after that date, State Farm sent the Iversons renewal notices which included the following language:

Please read the enclosed insert titled IMPORTANT NOTICE REGARDING UNINSURED AND UNDERINSURED MOTOR VEHICLE COVERAGES.

If you want to increase your [UM or UIM] limits to equal your Bodily Injury Liability Coverage limits or \$250,000/\$500,000 (whichever is less), please contact your agent.

(R. at 105, 108). In the insert included along with the renewal notice, State Farm included the following information:

Utah law requires that auto policyholders carry Uninsured Motor Vehicle (Coverage U) and Underinsured Motor Vehicle (Coverage W) with limits equal to the lesser of:

1. the policyholder's Bodily Injury Liability Coverage limits, or
2. \$250,000 per person and \$500,000 per accident.

However, you may, in writing, reject either Coverage U or Coverage W or select lower limits for either or both of these coverages.

Coverage U provides protection to you and others in your motor vehicle if there is an accident caused primarily by the fault of another party and the other party has no liability insurance to compensate you for your bodily injuries.

Coverage W provides protection to you and others in your motor vehicle if there is an accident caused primarily by the fault of another party and the other party has liability insurance, but not enough to compensate for your bodily injuries.

Your Bodily Injury Liability Coverage, Coverage U, and Coverage W limits are shown on your enclosed renewal notice. Following are the Coverage U and W limits available and the applicable premium for each.

(R. at 145-46). The insert proceeded to list various UM/UIM limits and the corresponding premiums for each. It also notified the Iversons that in order to increase their limits they should contact their agent, otherwise, the limits would remain the same.

(R. at 145-46).

State Farm has verified that the above insert was included along with the February 27, 2001 and August 27, 2001 renewal notices. (R. at 72). Those notices clearly explain “the purpose of underinsured motorist coverage and the costs associated with increasing the coverage . . .” See Utah Code Ann. §31A-22-305(9)(g)(i). Furthermore, State Farm went beyond the statutory mandate by including the same notice and inserts in three additional renewals. (R. at 73, 121, 123, 126). As such, State Farm has clearly complied with the requirements set forth in Utah Code Ann. § 31A-22-305(9)(g)(i).

D. The legislative intent behind Utah Code Ann. §31A-22-305(9) has been met in this instance because the Iversons were well-informed of the purposes and costs associated with various levels of UIM coverage.

The purpose of the 2000 amendments to Section 31A-22-305(9) was to ensure that consumers possessed adequate information about the options at their disposal with regard to UM and UIM coverage. See Tipton, 2007 UT App. 109, ¶11. The statute was not intended to mandate a certain level of UM/UIM coverage for consumers, but to simply make them aware that greater levels of coverage may be available under their policies. See id. Those purposes have clearly been met in this instance.

On five occasions, between February 27, 2001 and February 27, 2005, State Farm explained to the Iversons the protections which were afforded by UIM coverage. (R. at 105, 108, 121, 123, 126, 145-46). On each of those occasions, they were told that they could purchase UIM coverage equal to their liability limits if they so desired. (R. at 105, 108, 121, 123, 126, 145-46). Furthermore, they were made aware of the costs associated with those coverages and were told that if they took no action, their limits would remain

at their current levels. (R. at 145-46). And even on several occasions prior to 2001, State Farm had informed the Iversons of the purpose of UM/UIM coverage and offered them the opportunity to purchase it in higher amounts. (R. at 131-33). This is not a case of an insurer attempting to shirk its duties or to get away with providing a lesser coverage than it was obligated. It is clear that State Farm went to great lengths to comply with its statutory duty by ensuring that the Iversons were properly informed. The Iversons made an informed decision not to purchase UIM coverage in greater amounts, and such coverage should therefore not be mandated.

Furthermore, to hold that a new policy is created every time a vehicle or booklet is changed under a policy would have an unintended and detrimental impact on insureds and insurers alike. First, insureds would lose those benefits associated with a continuous policy. For instance, every time a new policy is created, an insured must meet new underwriting eligibility guidelines, and time accrued toward accident-free or similar discounts would be lost. (R. at 70, 75). Plaintiff points out that a new policy might not always cost more than a renewal. (Plaintiff's Brief at 9.) While it is true that insureds may not *always* receive such benefits from a continuing policy, it is certain that they will *never* receive those benefits under a new policy. For instance, in order to receive an accident-free discount a policy must remain in force and accident-free for at least three years. (R. at 106). The longer the policy remains in force and accident-free, the greater the discount. (R. at 106). The Iversons benefited from such a discount for a number of years. (R. at 105-26).

Additionally, there are several disadvantages from a practical standpoint. If the replacement of a vehicle created a new policy, an insured would need to go through the application process every time they purchased a new vehicle. (R. at 70, 75). As such, they would be unable to drive away from the dealership knowing they were covered, as they can currently. And they would be required to expend the time and hassle of dealing with the paperwork, including the UM/UIM election/waiver form, every time a vehicle is replaced, a policy form is updated, a new policy number is issued, or a premium is increased. The legislature certainly did not intend such a result.

As set forth above, State Farm has complied with the technical requirements of Utah Code Ann. § 31A-22-305(9) and has fulfilled the legislature's intent behind that statute. The Iversons knowingly opted to maintain UIM coverage at a level lower than their bodily injury limits, and that decision should be upheld.

CONCLUSION

Based on the foregoing, this Court should answer the certified question by finding that the lower limits of underinsured motorist coverage set forth under the Iversons' Policy were in compliance with Utah Code Ann. §§ 31A-22-305(9)(b) and 31A-22-305(9)(g) because that Policy was in existence prior to January 1, 2001.

DATED this 12th day of August, 2009

STRONG & HANNI

By Stuart H. Schultz
Stuart H. Schultz
Andrew D. Wright
Andrew B. McDaniel
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2009 two true and correct copies of the foregoing **DEFENDANT'S BRIEF ON CERTIFICATION FROM FEDERAL DISTRICT COURT** were served by the method indicated below, to the following:

James R. Hasenyager
Peter W. Summerill
HASENYAGER & SUMMERILL
1004 24th Street
Ogden, Utah 84401

(☒) U.S. Mail, Postage Prepaid
() Hand Delivered
() Overnight Mail
() Facsimile
() Electronic filing

Stuart H. Schultz

Tab A



LEXSEE 2000 U.S. APP. LEXIS 16049

**LAJUAN C. JOHNSON and STEVEN JOHNSON, Plaintiffs-Appellees and
Cross-Appellants, v. LIFE INVESTORS INSURANCE COMPANY OF AMERICA,
an Iowa corporation, and MONUMENTAL LIFE INSURANCE COMPANY, a
Maryland corporation, Defendants-Appellants and Cross-Appellees.**

Nos. 98-4120, 98-4121, 98-4122

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2000 U.S. App. LEXIS 16049; 2000 Colo. J. C.A.R. 4282

July 11, 2000, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *2000 U.S. App. LEXIS 25077*.

PRIOR HISTORY: (D. Utah). (D.Ct. No. 96-CV-283-K).

Johnson v. Life Investors Ins. Co. of Am., 216 F.3d 1087, 2000 U.S. App. LEXIS 25077 (10th Cir. Utah, 2000)

DISPOSITION: AFFIRMED in part, REVERSED in part, and REMANDED.

COUNSEL: For LAJUAN C. JOHNSON, STEVEN JOHNSON, Plaintiffs - Appellees (98-4120): Timothy C. Houpt, Jones, Waldo, Holbrook & McDonough, Salt Lake City, UT. Marci Batty, Jones, Waldo, Holbrook & McDonough, Salt Lake City, UT.

For LIFE INVESTORS INSURANCE COMPANY OF AMERICA, Defendant - Appellant (98-4120) (98-4122): Claudia F. Berry, J. Angus Edwards, Sutter & Axland, Salt Lake City, UT.

For LAJUAN C. JOHNSON, Plaintiff - Appellee (98-4121): Timothy C. Houpt, Jones, Waldo, Holbrook & McDonough, Salt Lake City, UT. Marci Batty, Jones, Waldo, Holbrook & McDonough, Salt Lake City, UT.

For MONUMENTAL LIFE INSURANCE COMPANY, Defendant - Appellant (98-4121): Joy L. Clegg, Julianne R. Blanch, Snow, Christensen & Martineau, Salt Lake City, UT.

For LAJUAN C. JOHNSON, STEVEN JOHNSON, Plaintiffs - Appellants (98-4122): Timothy C. Houpt, Jones, Waldo, Holbrook & McDonough, Salt Lake City, UT. Marci Batty, Jones, Waldo, [*2] Holbrook & McDonough, Salt Lake City, UT.

For LIFE INVESTORS INSURANCE COMPANY OF AMERICA, Defendant - Appellee (98-4122): Claudia F. Berry, J. Angus Edwards, Sutter & Axland, Salt Lake City, UT.

For MONUMENTAL LIFE INSURANCE COMPANY, Defendant - Appellee (98-4122): Joy L. Clegg, Julianne R. Blanch, Snow, Christensen & Martineau, Salt Lake City, UT.

JUDGES: Before TACHA, BRORBY, and EBEL, Circuit Judges.

OPINION BY: WADE BRORBY

OPINION

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment

ment may be cited under the terms and conditions of 10th Cir. R. 36.3.

This case arises out of a dispute over insurance policies issued by Life Investors Insurance Company of America (Life Investors), and Monumental Life Insurance Company (Monumental) in favor of Marvin Johnson, deceased. Life Investors and Monumental [*3] appeal the order of the district court granting summary judgment in favor of LaJuan Johnson and Steven Johnson, the plaintiffs and beneficiaries of insurance policies issued by the two insurance companies. LaJuan and Steven Johnson (the Johnsons) cross-appeal the denial of attorney fees. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm the grant of summary judgment in favor of the Johnsons in their case against Monumental, affirm the denial of attorney fees to the Johnsons from Monumental, and reverse and remand the grant of summary judgment against Life Investors, and denial of attorney fees to the Johnsons from Life Investors, to the district court for further proceedings in accordance with this opinion.

I. FACTUAL BACKGROUND

For the purpose of ruling on the summary judgment motions, the district court relied on the following undisputed material facts. In February 1989, Mr. Johnson bought an accidental death policy from American Express Life Assurance Company (AMEX). In December 1989, Mr. Johnson and his wife, LaJuan Johnson, completed a "request for increased benefits" form in response to a request they received from AMEX. In February [*4] 1993, Life Investors assumed responsibility for the insurance policy issued by AMEX to Mr. Johnson. Also in 1993, Mr. Johnson purchased a policy for accidental death insurance from Monumental, designating his wife, LaJuan, and his son, Steven, as beneficiaries.

Years prior to his purchase of these policies, Mr. Johnson had been diagnosed with myotonic dystrophy, a form of muscular dystrophy. He received treatment for this disease until his death in 1995. Mr. Johnson developed muscle weakness as a result of the myotonic dystrophy. Although he remained relatively active, Mr. Johnson did occasionally stumble and fall down. In 1991, Mr. Johnson fell down the stairs in his home and received treatment in the hospital for his injuries.

On July 29, 1995, Mr. Johnson stumbled and fell while carrying a tray up the stairs in his home, causing a cervical neck fracture and a possible thoracic rib fracture. Mr. Johnson was admitted to the hospital in the early morning hours of July 30, 1995 and was treated for his injuries. On August 1, 1995, while still in the hospital, Mr. Johnson began to experience symptoms of pneumonia. His doctor transferred him to the care of a pulmo-

nologist in the intensive [*5] care unit. Because Mr. Johnson began experiencing difficulty breathing, physicians attempted to intubate him to clear his lungs. However, this proved extremely difficult due to his neck fracture. During the next day, it became apparent Mr. Johnson could no longer breathe on his own and would survive only with the assistance of long-term ventilatory support. On August 2, 1995, authorized hospital staff withdrew artificial life support measures and Mr. Johnson passed away. Dr. Edward Campbell filled out the death certificate and listed the immediate cause of death as pneumonia, due to or as a consequence of a cervical spine fracture, and the underlying cause of death as myotonic dystrophy. He identified the manner of death as an "Accident."

Mrs. Johnson and Steven Johnson made claims under the insurance policies following Mr. Johnson's death. Both insurance companies denied these claims, relying on language in their policies excluding death caused by sickness and defining an "injury" as a bodily injury caused by an accident "independent of all other causes."¹

1 The relevant language in the Monumental policy is as follows:

DEFINITIONS

....

INJURY means bodily injury caused by an accident. The accident must occur while the Covered Person's insurance is in force under the Group Policy. The Injury must be the direct cause of the Loss and must be independent of all other causes. The Injury must not be caused by or contributed to by Sickness.

....

EXCLUSIONS

We will not pay a benefit for a loss which is caused by, results from, or [is] contributed to by:

....

(5) Sickness or its medical or surgical treatment, including diagnosis

The pertinent language from the Life Investors/AMEX policy is as follows:

Definitions

....

"Injury" means bodily injury of a Covered Person which:

1. is caused by an accident which occurs when the Covered Person's insurance is in force under the Policy; and

2. results in loss insured by the Policy; and

3. creates loss due, directly and independently of all other causes, to such accidental bodily injury.

....

General Exclusions

The Policy does not insure for any loss resulting from any Injury caused or contributed to by, or as a consequence of ...

....

3. any sickness or infirmity unless the treatment of such is required as the direct result of an accidental bodily injury

[*6] II. PROCEDURAL BACKGROUND

Following the insurance companies' denial of coverage, the Johnsons filed suit in the district court, claiming the companies breached their contracts. However, rather than making a determination on whether the companies breached the contracts, the district court instead concluded the companies were estopped from relying on the sickness exclusions to deny coverage because the companies failed to disclose the sickness exclusions in the manner required by Utah insurance regulations. Consequently, the district court granted the Johnsons' motions for summary judgment in both cases, and denied the companies' cross-motions for summary judgment. The district court also denied the Johnsons' request for attorney fees.

Monumental and Life Investors now appeal the district court's grant of summary judgment to the Johnsons and denial of their motions for summary judgment. Neither company denies it failed to disclose the sickness exclusion in the manner required by the regulation.² Instead, each argues the regulation is inapplicable to its

policy. Monumental contends the disclosure obligations do not apply to accidental death policies. Life Investors concedes the [*7] disclosure regulation applies to accidental death policies but contends the regulation is inapplicable to its policy because Utah adopted the rule after AMEX issued the original policy to Mr. Johnson. Both companies argue they are entitled to summary judgment because the Johnsons failed to show Mr. Johnson's death resulted from an accident and independently of all other causes. The Johnsons cross-appeal the denial of their request for attorney fees.

2 The district court determined the language of the exclusionary provisions is buried in each policy and not in bold or color typeface as required by Utah's regulations. The court also concluded the exclusions do not clearly inform laymen as to what coverage exists.

III. APPLICATION OF THE DISCLOSURE REQUIREMENT TO THE POLICIES

A. Standard of Review

Because the district court's jurisdiction over this matter was based on diversity of citizenship, it was required to discern and apply the substantive law of Utah, the forum state, with the objective of reaching [*8] the same result as would a Utah court. *See Brodie v. General Chem. Corp.*, 112 F.3d 440, 442 (10th Cir. 1997). We review *de novo* the district court's determinations of the substantive law of Utah. *See id.* However, although the substantive law of Utah governs the analysis of the underlying claim in this case, federal law controls the ultimate procedural question - whether summary judgment is appropriate. *See Oja v. Howmedica, Inc.*, 111 F.3d 782, 792 (10th Cir. 1997); *May v. National Union Fire Ins. Co.*, 84 F.3d 1342, 1345 (10th Cir. 1996). "We review the grant of summary judgment *de novo*, applying the same standard as did the district court. Summary judgment is then appropriate if, after reviewing all of the evidence submitted in the light most favorable to the non-movant, no genuine issue of material fact survives to merit a trial." *Chambers v. Colorado Dep't of Corrections*, 205 F.3d 1237, 1241 (10th Cir. 2000) (citations omitted); *Fed. R. Civ. P. 56(c)*. "Where, as here, the parties file cross motions for summary judgment, we are entitled to assume that no evidence needs to be considered other than that filed [*9] by the parties, but summary judgment is nevertheless inappropriate if disputes remain as to material facts." *James Barlow Family Ltd. Partnership v. David M. Munson, Inc.*, 132 F.3d 1316, 1319 (10th Cir. 1997), *cert. denied*, 523 U.S. 1048, 140 L. Ed. 2d 513, 118 S. Ct. 1364 (1998). "Where different ultimate inferences may properly be drawn, the case is not one for a summary judgment." *Seamons v. Snow*, 206

F.3d 1021, 1026 (10th Cir. 2000) (quotation marks and citation omitted).

B. Monumental

We first address Monumental's argument the Utah disclosure regulation does not apply to its accidental death policy. The regulation at issue is found in the portion of the Utah Administrative Code dealing with insurance administration, and entitled "Individual and Franchise Disability Insurance, Minimum Standards." Utah Admin. Code R590-126. The disclosure regulation provides:

Accident-Only Disclosure. All accident-only policies shall contain a prominent statement on the first page of the policy, or attached thereto, in either contrasting color or in boldface type at least equal to the size of type used for policy captions, as follows: [*10] "This is an accident-only policy, and it does not pay benefits for loss from sickness."

Utah Admin. Code R590-126-6G. The scope of Rule 590 is described as follows:

This rule shall apply to all individual and franchise *disability* insurance policies The rule shall apply only to coverage issued after the effective date of the rule.

Utah Admin. Code R590-126-2B (emphasis added). Rule 590 provides a list of definitions "in addition to the definitions of *Sections 31A-1-301 and 31A-22-605(2)*, U.C.A. [the general provisions of the Utah Insurance Code]," which are to "apply for the purposes of this rule." Utah Admin. Code R590-126-3A. The term "disability insurance" is defined in the general provisions of the Utah Insurance Code as:

insurance written to indemnify for *losses and expenses resulting from accident* or sickness, to provide payments to replace income lost from accident or sickness, and to pay for services resulting directly from accident or sickness, including medical, surgical, hospital, and other ancillary expenses.

Utah Code Ann. § 31A-1-301(26) (Supp. 1996) (emphasis added). Monumental contends the term "disability insurance" [*11] as defined above, is too narrow to encompass an accidental death policy, and thereby argues the disclosure requirement contained in the regulation

section entitled "disability insurance," does not apply to its policy.

The Utah courts have never determined whether the rules set forth in the "Individual and Franchise Disability Insurance" section of the insurance code apply only to disability insurance policies or to other types of insurance policies such as those addressing accidental death insurance. However, the general provisions of the Utah Insurance Code define "disability insurance" broadly to include insurance policies covering "losses" resulting from accident or sickness. *See Utah Code Ann. § 31A-1-301(26)*. Nothing in the regulations indicates that "losses" resulting from accident or sickness do not include death. Moreover, as the district court noted, the regulations dealing with "disability insurance" specifically mention policies providing for accidental death benefits in several subsections.³ Thus, it is clear Utah implemented the "disability insurance" regulations with the intent to cover accidental death policies. Even though these regulations are not codified, [*12] in Utah, insurance regulations "passed pursuant to a statutory grant of authority have the full force and effect of law." *Horton v. Utah State Retirement Bd.*, 842 P.2d 928, 932 n. 2 (Utah Ct. App. 1992) (citations omitted); *see also V-1 Oil Co. v. Department of Envtl. Quality*, 904 P.2d 214, 218-19 (Utah Ct. App. 1995). Consequently, we conclude the mandatory disclosure provision contained in section R590-126-6G of the Utah Administrative Code applies to Monumental's accidental death policy.

3 For example, the subsection entitled "Disability, Minimum Standards for Benefits," defines and sets the minimum standards for "Accident-Only Coverage" as follows:

a policy of accident insurance which provides coverage, singly or in combination, *for death*, dismemberment, disability, or hospital and medical care caused by accident. *Accidental death* and double dismemberment amounts under such a policy shall be at least \$ 1,000 and a single dismemberment amount shall be at least \$ 500.

Utah Admin. Code R590-126-7H (emphasis added). Likewise, "Specified Accident Coverage" is defined as:

an accident insurance policy which provides coverage for a specifically identified kind of accident (or accidents) for each per-

son insured under the policy for *accidental death* or accidental death and dismemberment, combined with a benefit amount not less than \$ 1,000 for accidental death, \$ 1,000 for double dismemberment and \$ 500 for single dismemberment.

Utah Admin. Code R590-126-71(1) (emphasis added).

[*13] Because Monumental's policy did not comply with the disclosure regulation when issued, we also conclude the district court applied the appropriate remedy by striking the exclusionary language of the policy. *See General Motors Acceptance Corp. v. Martinez*, 668 P.2d 498, 502 (Utah 1983) (holding the insurance company was estopped as a matter of law from denying coverage under its policy due to its failure to comply with Utah insurance law). ⁴ *See also Cullum v. Farmers Ins. Exch.*, 857 P.2d 922, 926-27 (Utah 1993) (concluding failure to comply with Utah insurance law rendered an exclusion provision in the insurance contract unenforceable). ⁵ As a result, under the circumstances presented, Monumental's claim Mr. Johnson's myotonic dystrophy caused or contributed to the fall which led to his death is irrelevant to our determination. ⁶ Because no material, controverted facts are left for a jury to decide in Monumental's case, the district court properly granted summary judgment in favor of the Johnsons.

4 We reject Monumental's argument *Martinez* cannot apply because it involved an insurance company's failure to comply with Utah codified law as opposed to mere insurance regulations. In support of its argument, Monumental also contends estoppel cannot apply to violation of an agency rule which it claims prohibits private relief. Contrary to these contentions, nothing in Utah's insurance regulations prohibits private relief. Given Utah's insurance regulations maintain the full force and effect of law, *Horton*, 842 P.2d at 932 n.2, we see no difference in whether Monumental violated codified or regulatory provisions. As a consequence, it follows that if the private remedy of estoppel is available for one, it is also available for the other.

[*14]

5 Monumental argues the district court erred by striking the language defining "injury" in its policy. Monumental argues the district court acted overzealously by striking this language as a consequence of its violating the disclosure regulation. Monumental also contends even if the dis-

trict court correctly determined its definition was more restrictive than allowed by Utah insurance regulations, the proper remedy would have been to substitute the statutory definition of "injury" provided in Utah Admin. Code R590-126-3A(1)(a). Monumental further argues even if the district court substituted the less restrictive language to define injury under the contract, it still would not have been required to pay death benefits to the Johnsons. We disagree.

The purpose of the disclosure regulation is to alert the insured to the sickness exclusion. *See* Utah Admin. Code R590-126-2A. It is nonsensical to assert the insurer may violate the disclosure regulation and be estopped from relying on the sickness exclusion, but then allow the insurer to nevertheless deny coverage based on other language in the policy which effectively excludes injuries allegedly resulting, in part, from sickness. Thus, we reject Monumental's argument it is entitled to summary judgment because myotonic dystrophy contributed to Mr. Johnson's death.

[*15]

6 Despite Monumental's contentions, the district court's ruling did not turn the policy into a "disability" or "life insurance" policy. Rather, the district court recognized the policy extended only accidental death insurance, but under the circumstances, extended such coverage without determining if an underlying illness caused the "accident," given the policy's failure to follow Utah's disclosure requirements. While Monumental argues the district court should have applied the exclusion and denied benefits under our holding in *Winchester v. Prudential Life Ins. Co. of America*, 975 F.2d 1479 (10th Cir. 1992), it misses the point. First, the district court never reached the issue on whether *Winchester* applied to this case given Monumental's failure to comply with Utah's disclosure requirements. Consequently, even if we determined the exclusion adequately discloses that coverage does not extend to accidents resulting from pre-existing conditions, Monumental nevertheless violated Utah's disclosure regulations by burying the disclosure in the policy and not setting it out in bold or colored type.

[*16] D. Life Investors

Life Investors asserts the disclosure regulation does not apply to its policy because AMEX issued the original policy before the disclosure regulation became effective. ⁷ The district court concluded Life Investors/AMEX subjected itself to the provisions of the regulation by ac-

cepting additional premiums for increased benefits after the effective date of the disclosure rule. * Life Investors argues the district court made this determination in error, and suggests the subsequent agreement did not constitute the formation of a wholly new contract that brought it under the auspices of the mandatory disclosure regulation.

7 As stated previously, Mr. Johnson bought the accidental death policy from AMEX in February 1989. Utah enacted the Regulations at issue on June 20, 1989. Mr. Johnson increased his benefits in December 1989. In February 1993, Life Investors assumed responsibility for the AMEX insurance policy.

8 Life Investors points out the district court relied on the wrong certificate when rendering its decision. This mistake arose from the confusion generated when, during discovery, Life Investors mistakenly produced a copy of a specimen certificate which it did not send to the Johnsons. However, Life Investors drew the court's attention to this error in a motion to file a supplemental memorandum in support of its motion for summary judgment. The district court granted Life Investors' motion, and Life Investors subsequently filed a supplemental memorandum in support of its motion for summary judgment and attached the correct certificate. Although Life Investors maintains the district court committed plain error by relying on the incorrect certificate in rendering its decision, it contends the court would have reached the same decision even if it relied on the correct certificate, and asks us to review the district court's decision as if it relied on the correct certificate. The district court reasoned the definition of a "covered injury" contained on page five of the wrong certificate acted as an exclusion for sickness and struck the provision because it lacked bold-faced or colored type as required by the disclosure regulation. We agree the reasoning of the district court concerning the applicability of the disclosure regulation to Life Investors' policy would have been the same whether it relied on the correct or incorrect certificate, and thus, in the interest of resolving this dispute, we review the district court's decision as if based on the correct certificate.

[*17]

Under Utah law, substantive statutes affecting vested rights do not apply retroactively. See *Olsen v. Samuel McIntyre Inv. Co.*, 956 P.2d 257, 260 (Utah 1998). However, because the Utah courts have never addressed whether an agreement to increase benefits in a

life insurance contract creates a new policy, subject to statutes and regulations enacted after issuance of the original policy, we look to "other state court decisions, federal decisions, and the general weight and trend of authority" to determine how the Utah courts would resolve this issue. *May*, 84 F.3d at 1345 (quotation marks and citations omitted). Other courts, analyzing similar issues, have held an increase in premiums, benefits, or coverage, does not constitute the creation of a new certificate of insurance subject to regulations enacted after the original date the policy became effective. See, e.g., *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449, 1456 (5th Cir. 1991) (applying Louisiana law and holding the modification of the terms of an insurance policy does not create a new policy); *Metropolitan Property and Liability Ins. Co. v. Gray*, 446 So. 2d 216, 219-20 (Fla. Dist. Ct. App. 1984) [*18] (holding the mere addition of another person on a policy does not amount to a reissuance of the policy and thus, does not make the policy subject to statutes effective after the issuance of the original policy); *Crow v. Capitol Bankers Life Ins. Co.*, 119 N.M. 452, 891 P.2d 1206, 1211 (N.M. 1995) (construing the insurance policy and rider as part of same contract for insurance); *Massachusetts Mut. Life Ins. Co. v. Thacher*, 15 A.D.2d 242, 222 N.Y.S.2d 339, 343 (N.Y. App. Div. 1961) (determining a rider attached to the face of a policy containing an option for extended benefits on the payment of additional premium merely amounts to an extended privilege and does not create a new policy); *Hidary v. Maccabees Life Ins. Co.*, 155 Misc. 2d 993, 591 N.Y.S.2d 706, 710 (N.Y. Sup. Ct. 1992) (finding increases in face amount of coverage for payment of additional premiums did not constitute separate new policies); *French v. Insurance Co. of N. Am.*, 591 S.W.2d 620, 621-22 (Tex. Civ. App. 1979) (reasoning the addition of a car to insurance policy did not create a new policy subject to a statute which became effective after the issuance [*19] of the original policy). We can see no reason why Utah would depart from the majority view on this point of law. Nevertheless, we turn to the Johnsons' argument the increase in benefits amounted to new "coverage" and thus, became subject to the disclosure regulation.

In support of their argument Life Investors became subject to the disclosure regulation when it accepted the Johnsons' additional premium payment after the disclosure regulation became effective, the Johnsons focus on the word "coverage" and point out the disability insurance rules "apply only to coverage issued after the effective date of the rule." Utah Admin. Code R590-126-2B (emphasis added). In applying this provision to their policy, the Johnsons point out AMEX sent them a letter after it received the additional premium payment stating:

I have enclosed your revised Data Page
for your Certificate APG1000984 which

reflects your *increase in coverage*. Please replace the original Data Page with this new one.

Your new quarterly premium will be \$ 82.32. A charge of \$ 56.95 has been placed on your American Express Card account. This represents the difference in premium due for your *additional coverage*. [*20]

(Emphasis added.) Based on this language, the Johnsons maintain that by increasing the benefits under the policy, AMEX issued new "coverage" after the effective date of the disclosure regulation, making Life Investors subject to the disclosure regulation. We disagree.

The term "coverage" when used in the context of an insurance contract is widely held to mean "inclusion of a risk under an insurance policy; the risks within the scope of an insurance policy." Black's Law Dictionary 372 (7th ed. 1999). See *Traders State Bank v. Continental Ins. Co.*, 448 F.2d 280, 283 (10th Cir. 1971) ("The word coverage is, indeed, a term of art in the insurance industry, meaning the sum of all the risks assumed under the policy.") (quotation marks and citation omitted); see also *In re Joint E. and S. Dist. Asbestos Litig.*, 993 F.2d 313, 315 (2d Cir. 1993); *Guaranty Nat'l Ins. Co. v. Bayside Resort, Inc.*, 635 F. Supp. 1456, 1458 (V.I. 1986); *Illinois Farmers Ins. Co. v. Tabor*, 267 Ill. App. 3d 245, 642 N.E.2d 159, 163, 204 Ill. Dec. 697 (Ill. App. Ct. 1994); *Delcampo v. New Jersey Auto. Full Ins. Underwriting Ass'n*, 266 N.J. Super. 687, 630 A.2d 415, 422 (N.J. Super. Ct. Law Div. 1993); [*21] *Farmers Ins. Co. of Washington v. Frederickson*, 81 Wn. App. 319, 914 P.2d 138, 140 (Wash. Ct. App. 1996). On the other hand, the term "benefit" is defined in Black's Law Dictionary as: "Financial assistance that is received from an employer, insurance, or a public program (such as social security) in time of sickness, disability, or unemployment." Black's Law Dictionary 151 (7th. ed. 1999). See *Vogel v. Wells*, 57 Ohio St. 3d 91, 566 N.E.2d 154, 161 (Ohio 1991) (quoting Black's Law Dictionary to define "benefit"); *Kratz v. Kratz*, 905 P.2d 753, 755 (Okla. 1995) (relying on Black's Law Dictionary to define "benefit" in the context of an insurance contract).

Hence, neither definition persuades us an increase in "benefits" alone increases the "coverage" or assumed risks of an insurance contract, thereby creating a new or different contract or policy. Under the circumstances presented we conclude the increase in premiums and benefits did not change the nature of the coverage or create a new policy subject to the disclosure regulation because it did not alter the type of risk Life Investors assumed under the policy - it only altered the [*22]

amount of the benefits Life Investors was obligated to pay in the event a legitimate claim arose under the policy. For these reasons, the district court erred by determining Life Investors was estopped as a matter of law from refusing to honor the Johnsons' claim. We therefore remand to the district court for further proceedings in accordance with this opinion on the Johnsons' claims against Life Investors, including their breach of contract claim.⁹

9 The Johnsons contend they are entitled to summary judgment even if the district court erred by determining Life Investors was estopped from relying on the sickness exclusion to deny coverage. In support, the Johnsons argue the majority of jurisdictions, examining language in insurance contracts similar to the exclusionary language contained in their policy, refused to allow the insurance companies to rely on such language to deny coverage unless the preexisting illness constituted the "predominant cause" of the injury, or the preexisting illness "substantially contributed to the loss." In response, Life Investors argues the Utah Supreme Court would interpret the definition of "injury" in its policy to preclude coverage. Relying on *Winchester v. Prudential Life Ins. Co. of America*, 975 F.2d 1479 (10th Cir. 1992), Life Investors urges us to reverse the district court's denial of its cross-motion for summary judgment and rule the Johnsons are not entitled to coverage under the policy as a matter of law because they cannot prove Mr. Johnson's death resulted directly from an accident, independent of all other causes. We leave the determination of this issue to the district court on remand.

After filing their brief with this Court, the Johnsons filed a motion for us to certify this issue to the Utah Supreme Court, contending certification is proper because the Utah courts have not yet determined "how, under state law, language limiting coverage under accidental death policies where an insured suffers a preexisting disease should be interpreted" Life Investors filed no response to the Johnsons' motion to certify, but in its opposition to the Johnsons' motion for certification, Monumental argues this Court should interpret the "direct cause of loss, independent of all other causes" language as allowing it to deny coverage based on *Winchester* and without resorting to certification to the state court. We deny the Motion for Certification without reaching its merits, and decline addressing Monumental's motion in opposition, leaving the Johnsons free to reassert their motion to certify in the district court on remand.

[*23] IV. ATTORNEY FEE ISSUE

Finally, we address the Johnsons' contention the district court erred by denying them attorney fees. In a diversity suit, the issue of attorney fees is considered a substantive matter and is controlled by state law. *Jones v. Denver Post Corp.*, 203 F.3d 748, 757 (10th Cir. 2000). However, our standard of review is a matter of federal law and "we review a district court's award of attorney fees for abuse of discretion. The district court's factual findings are only reversed if clearly erroneous. Legal conclusions and statutory analysis are reviewed de novo." *Parks v. American Warrior, Inc.*, 44 F.3d 889, 892 (10th Cir. 1995) (citations omitted).

In Utah, the general rule is attorney fees are recoverable only if provided for in a contract at issue or by statute. *Occidental/Nebraska Fed. Sav. Bank v. Mehr*, 791 P.2d 217, 221 (Utah Ct. App. 1990). However, exceptions to this general rule exist. In an insurance contract dispute where the insured sues the insurer for breach of contract, attorney fees may be recovered as consequential damages for either a breach of the express terms of the contract or for a breach [*24] of the implied covenant of good faith and fair dealing. *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 468 (Utah 1996).

A. Breach of the Express Terms of the Contract

An insured may recover attorney fees as consequential damages for the breach of an express term in the insurance contract if the fees "were reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." *Billings*, 918 P.2d at 468 (quotation marks and citation omitted). Thus, in order to recover attorney fees as consequential damages flowing from a breach of express terms in the contracts, the Johnsons need to first show the companies breached the contracts. However, the district court never ruled on whether either company breached the express or implied terms of its contract. The district court instead found Monumental and Life Investors were estopped from relying on the sickness exclusions in their policies, and under the doctrine of estoppel, held the Johnsons could not recover attorney fees.

Given our and the district court's holdings that Monumental is estopped from denying coverage, we must examine the principles of estoppel [*25] to determine if attorney fees from Monumental are warranted in this case. To begin, estoppel does not operate to alter the terms of the contract as originally written. See *Perkins v. Great-West Life Assurance Co.*, 814 P.2d 1125, 1131 (Utah Ct. App. 1991). Rather, estoppel is normally asserted as a defense to a claim or right and does not create an independent cause of action. See *Raymond v. Halifax*

Hosp. Med. Ctr., 466 So. 2d 253, 255 (Fla. Dist. Ct. App. 1985); *Lohse v. Atlantic Richfield Co.*, 389 N.W.2d 352, 357-58 (N.D. 1986); see also *General Motors*, 668 P.2d at 502 ("Although estoppel is usually a factual defense, it may be established as a matter of law to preclude an insurance company from relying on an exclusion in a credit life and accident policy."). Estoppel merely abates the insurer's right to defend against the insured's claim for breach of contract by relying on the language in its policy. See *id.* Moreover, unlike breach of contract where the award of attorney fees is reasonably contemplated at the time of the contract, *Billings*, 918 P.2d at 468, estoppel is not an independent cause [*26] of action like breach of contract, or a circumstance in which attorney fees are ever contemplated. It is not the same as breach of contract for the purpose of awarding attorney fees.

In applying this conclusion to the facts of this case, we note neither we nor the district court ever reached the issue of whether Monumental breached its contract with the Johnsons when holding Monumental is estopped as a matter of law from relying on the sickness exclusion. Therefore, the Johnsons are not entitled to attorney fees from Monumental under the theory Monumental breached the express terms of the contract. However, because we are reversing and remanding the district court's grant of summary judgment in favor of the Johnsons on their claim against Life Investors, we leave the determinations of whether Life Investors breached the express terms of its contract, and whether the Johnsons are entitled to attorney fees under Utah law, to the district court.

B. Implied Covenant of Good Faith and Fair Dealing

The Johnsons alternatively assert an award of attorney fees is proper because the companies breached the implied covenant of good faith and fair dealing.¹⁰ In *Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah 1985), [*27] the Utah Supreme Court recognized attorney fees may be available as consequential damages flowing from a breach of the implied covenant of good faith and fair dealing by an insurance company. *Id.* at 801. Under *Beck*, an insurer may be found to breach the implied covenant of good faith and fair dealing if it fails to diligently investigate the facts underlying a claim, fairly evaluate the claim, or "act promptly and reasonably in rejecting or settling the claim." *Id.* "The overriding requirement imposed by the implied covenant is that insurers act reasonably ... in dealing with their insureds." *Billings*, 918 P.2d at 465. However, "when an insured's claim is fairly debatable, the insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so." *Id.*

10 The Johnsons assert because Life Investors did not answer their cross-appeal from the denial of attorney fees, it waived the issue. Although an appellant who chooses not to brief an issue may be deemed to waive the issue, *see Sheets v. Salt Lake County*, 45 F.3d 1383, 1390 (10th Cir.), *cert. denied*, 516 U.S. 817, 133 L. Ed. 2d 34, 116 S. Ct. 74 (1995), this rule does not apply to appellees. The Johnsons, as the appellants, retain the burden to prove on appeal the trial court erred. If the insurance companies, as the appellees, choose not to defend the trial court's decision, this does not relieve the Johnsons of their burden to convince us of the district court's errors.

[*28] The Johnsons contend "as a matter of law, the Companies could not have acted diligently, fairly or reasonably in rejecting the Johnsons' claims, as they violated applicable Utah Insurance Department Regulations by which they were bound, and denied the claims in the face of the Regulations." However, they cite no case where failing to comply with insurance regulations has been found to be the equivalent of failing to fairly evaluate a claim or act promptly and reasonably in rejecting the claim. Nor are we persuaded by the Johnsons' argument. Monumental's contention the disclosure regulation did not apply to its contract is "fairly debatable" as the Utah courts have not ruled directly on the issue of whether the disability insurance regulations apply to accidental death policies. Obviously, because we agree

with Life Investors that the regulation does not apply to its contract, we cannot hold Life Investors violated the covenant of good faith and fair dealing by asserting it is not estopped from relying on the sickness exclusion. However, on remand, the Johnsons might prove Life Investors breached the covenant of good faith and fair dealing on other grounds and that they are entitled [*29] to attorney fees in accordance with Utah law.

V. CONCLUSION

For the foregoing reasons, and applying the principles for reviewing summary judgment determinations, we **REVERSE** the district court's order granting summary judgment to the Johnsons in their suit against Life Investors, and **REMAND** for further proceedings consistent with this opinion. As to the issue of attorney fees, we **REVERSE** and **REMAND** the district court's denial of attorney fees to the Johnsons from Life Investors for further proceedings consistent with this opinion. We **AFFIRM** the district court's grant of summary judgment in favor of the Johnsons against Monumental and **AFFIRM** the denial of attorney fees to the Johnsons from Monumental.

Entered by the Court:

WADE BRORBY

United States Circuit Judge

Tab B



LEXSEE 1989 DEL. SUPER. LEXIS 298

**KATHLEEN L. MATNEY and DAN MATNEY, Plaintiffs, v. NATIONWIDE
GENERAL INSURANCE COMPANY, a foreign corporation, Defendants**

C.A. No. 88C-AP-135

Superior Court of Delaware, New Castle

1989 Del. Super. LEXIS 298

**Submitted: March 30, 1989
July 7, 1989, Decided**

DISPOSITION: Plaintiffs' motion for summary judgment is therefore granted. Defendant's cross-motion is denied.

COUNSEL: Beverly L. Bove, Esq., of Tomar, Simonoff, Adourian & O'Brien, for plaintiffs.

James F. Kipp, Esq., of Trzuskowski, Kipp, Kelleher & Pearce, for defendant.

JUDGES: [*1] Before John E. Babiarz, Jr., Judge

OPINION BY: BABIARZ, JR.

OPINION

MEMORANDUM OPINION

JOHN E. BABIARZ, JR., Judge

Plaintiffs Kathleen and Dan Matney have filed a motion for summary judgment, asking this Court to declare as a matter of law that they are entitled to uninsured/underinsured motorist (UM) coverage up to a single limit of \$ 300,000. Defendant Nationwide Insurance Company has filed a cross-motion for summary judgment, asserting that its liability in this claim is limited to \$ 100,000.

The Matneys initially insured a vehicle with Nationwide in March, 1984, which provided liability coverage in the amount of \$ 25,000 per person, \$ 50,000 per occurrence. UM coverage was in the same amounts. On June 11, 1984, the Matneys renewed their policy, increasing their liability coverage to \$ 300,000. They did not increase the \$ 25,000/50,000 limit on their UM coverage. At the time of that renewal, Mr. Matney executed

*a "Form A" document, which is a coverage election form required by Regulation No. 9 of the Insurance Commissioner¹ which contains general [*2] information about automobile insurance and also provides spaces where the coverage selected by the insured is filled in. The form contained the following language²:*

1 *The Insurance Commissioner is authorized under 18 Del.C. § 314(a) to "make reasonable rules and regulations necessary for or as an aid to the administration or effectuation of any provision of this title.*

2 *The Form A issued by the Insurance Commissioner states that uninsured/underinsured vehicle coverage is available in limits "up to the Bodily Injury Liability Limits or \$ 100,000/300,000 whichever is less." That form, which is included in Defendant's Exhibit "A", was amended effective December 1, 1983. An April 23, 1980 version of the form reflects the \$ 300,000/300,000 limits found on the Nationwide form Mr. Matney signed on June 11, 1984. Another revision occurred April 10, 1987.*

Uninsured Motorist Coverage *

(Optional) (Available in limits up to the Bodily Injury Liability Limits or \$ 300,000/300,000 whichever is less)

* Uninsured Motorists Coverage is not mandatory but it is required that the coverage be offered to all policyholders

....

There is an issue of fact as to whether the [*3] Matneys were informed of the cost of the varying amounts of UM coverage available.

At the time the Form A was signed, the insurer was required to offer the UM option with each material change in the policy, which included adding a new vehicle to the policy. *Arms v. State Farm Mutual Automobile Insurance Company*, Del. Super., 465 A.2d 360 (1983), *aff'd* Del. Supr., 477 A.2d 1060 (1984). On July 20, 1984, an amended version of 18 Del.C. § 3902 went into effect which relieved insurance carriers of the burden of reoffering the UM option each time a vehicle is added or substituted.

The Matneys subsequently had occasion to review their policy on four occasions. In March, 1985, they added a second car. The next month they renewed their policy. In June they replaced one car with a newer model and in September they did the same for their second car. All of these events occurred after the amended version of 18 Del.C. § 3902 went into effect, and no further Form A documents were executed by the Matneys.

When it came time to renew the policy in September, 1986, Nationwide unilaterally raised the UM coverage on the Matney's vehicles to \$ 100,000/300,000 split limits. The \$ 300,000 [*4] single limit liability insurance was unaffected by the change. Nationwide included a "stuffer message" with the renewal which included the following statements:

With the enclosed renewal billing we have either added UMC coverage to your policy or increased your present limit on each vehicle to equal your present Bodily Injury coverage limits or the maximum limit permitted by Delaware law, whichever is less.

-- The maximum Uninsured Motorists Bodily Injury limit permitted by law is \$ 100,000 per person, \$ 300,000 per accident.

-- There will be no change in your present policy if your Bodily Injury and UMC Bodily Injury limits are equal.

-- Higher limits of Bodily Injury and UMC Bodily Injury coverage are available from your Nationwide Agent.

You still have the option to select lower UMC Bodily Injury limits or reject UMC coverage.

If you have any questions concerning these changes in your policy limits, we urge you to contact your Nationwide Agent.

The Matneys took no action to reject the change in UM coverage. Mrs. Matney was subsequently injured in

an automobile accident on January 2, 1987, by an underinsured motorist.

The parties dispute whether Nationwide had a duty to [*5] offer the Matneys the option of increasing their UM limits when vehicles were added or substituted on their policy. Nationwide argues that the new legislation relieved them of that duty. The Matneys counter that argument by asserting that the amendment to 18 Del.C. § 3902(a) (1) was deemed not to apply retroactively to policies and renewals coming before July 20, 1984.³

3 The cases cited by the plaintiff in support of this argument, *Whaley v. Allstate*, D. Del., 595 F.Supp. 1023, 1027 (1984), and *Ritter v. Amica Mut. Ins. Co.*, D. Del., 633 F.Supp. 362, 367 (1986) concern accidents which occurred prior to July 20, 1984, the effective date of the amendment, a situation markedly different from the case at bar.

It is unnecessary to resolve that particular dispute because, whether or not Nationwide was obliged to do so, it did, in fact, make an offer in September, 1986, to increase the UM coverage by way of the stuffer message coupled with the increased UM coverage.

The Matneys accepted the offer by not requesting that the lower limits be reinstated and by paying the concomitant higher premiums. The effect of this acceptance was to alter the agreement reflected on Form [*6] A.

Nationwide contends that the affirmative rejection of the \$ 300,000 single limit UM coverage reflected in Form A is still operative today, notwithstanding the change in coverage due to Nationwide's initiative. *Section 3902(a)(1)* reads as follows:

(1) No such coverage shall be required in or supplemental to a policy when rejected in writing, on a form furnished by the insurer or group of affiliated insurers describing the coverage being rejected, by an insured named therein, or upon any renewal of such policy or upon any reinstatement, substitution, amendment, alteration, modification, transfer or replacement thereof by the same insurer unless the coverage is then requested in writing by the named insured. . . .

Ordinarily, once an insured rejects in writing UM coverage he would otherwise be entitled to, he must make a written request to obtain that coverage at a later date 18 Del.C. § 3902(a)(1). No such request was made here. However, the stuffer message which accompanied the 1986 renewal contained a material misstatement of the law.

Subsection (b) provides as follows:

(b) Every insurer shall offer to the insured the option to purchase additional coverage for personal [*7] injury or death up to a limit of \$ 100,000 per person and \$ 300,000 per accident or \$ 300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage

This subsection requires that the insurer offer UM coverage up to a \$ 300,000 single limit to those insureds, like the Matneys, who carry that amount in liability insurance. *Kulas v. Nationwide*, Del. Super., C.A. No. 87C-OC-87, Babiarz, J., (May 30, 1989).

Although the Form A Mr. Matney signed on June 11, 1984, makes reference to the availability of UM coverage up to \$ 300,000/300,000, the stuffer message misstates the law as follows: "The maximum Uninsured Motorists Bodily Injury limit permitted by law is \$ 100,000 per person, \$ 300,000 per accident." In fact, Nationwide was *obliged* to offer the Matneys \$ 300,000 single limit coverage, *see Kulas, supra*, and was *permitted* to offer even higher amounts. Nationwide in effect represented that the amount of coverage that they were now offering, which the Matneys accepted, was the maximum allowable by law. The Matneys could reasonably have understood [*8] that the \$ 300,000/300,000 coverage was no longer available.

There is a dispute over whether the insureds' decision in choosing UM coverage was informed. The dispute centers on whether a meaningful offer must include information about the cost of such insurance. *See Morris v. Allstate*, Del. Super., C.A. No. 82C-OC-23 (Taylor,

Judge) (July 10, 1984). I do not need to reach that issue because I find that the renewal offer made in this case was misleading and therefore not meaningful. Because Nationwide, at the time it induced the Matneys to reevaluate their UM coverage, suggested that \$ 300,000/300,000 limits were no longer available, there was no clear rejection of those limits. Nationwide cannot rely on the Form A rejection of the \$ 300,000/300,000 limits for two reasons. First, Regulation 9, Article 9(e), in effect when the form was signed, stated that the form "will remain in effect until modified by the insurance." ⁴ Since the Matneys have modified their UM coverage, it follows that the form, at least insofar as UM coverage is concerned, is no longer applicable. Second, the stuffer message suggested that the \$ 300,000 single limit was no longer available as an option. Nationwide [*9] withdrew that option at a time when it induced the Matneys to accept what was represented to be the maximum permitted by law. Thus a rejection of what was in fact the maximum required to be offered, the \$ 300,000 single limit, is far from clear.

4 The provisions of article 9(e) are now found in article 11. The above-cited language is no longer incorporated into Regulation No. 9 *See* Regulation No. 9, Art. 11(a), revised May 16, 1987 and December 31, 1987.

Failure to offer the required coverage serves to extend a continuing offer of such coverage. *State Farm Mut. Auto. Ins. Co. v. Arms*, Del. Supr., 477 A.2d 1060 (1984). Plaintiffs are now entitled to elect UM coverage up to the \$ 300,000 single limit.

Tab C

6126FA AMENDATORY ENDORSEMENT

This endorsement is a part of *your* policy. Except for the changes it makes, all other terms of the policy remain the same and apply to this endorsement. It is effective at the same time as *your* policy unless a different effective date is specified by us in writing.

In consideration of the premium charged, it is agreed that *your* policy is changed as follows:

1. DEFINED WORDS

- a. The definition of *bodily injury* is changed to read:

Bodily Injury – means physical bodily injury to a *person* and sickness, disease or death which results from it. A *person* does not sustain *bodily injury* if that *person* suffers emotional distress in the absence of physical bodily injury.

- b. The definition of *newly acquired car* is changed to read:

Newly Acquired Car – means a *replacement car* or an *additional car*.

Replacement Car – means a *car* newly owned by or newly leased to *you* or *your spouse* that replaces *your car*. This policy will only provide coverage for the *replacement car* if *you* or *your spouse*.

1. ask us to insure it within 30 days after its delivery to *you* or *your spouse*, and
2. pay us any added amount due.

Additional Car – means an added *car* newly owned by or newly leased to *you* or *your spouse*. This policy will only provide coverage for the *additional car* if.

1. it is a *private passenger car* and we insure all other *private passenger cars*; or
2. it is other than a *private passenger car* and we insure all *cars*

owned by or leased to *you* or *your spouse* on the date of its delivery to *you* or *your spouse*.

This policy provides coverage for the *additional car* only until the earlier of:

1. 12:01 A.M. Standard Time at the address shown on the declarations page on the 31st

day after the delivery of the *car* to *you* or *your spouse*, or

2. the effective date and time of a policy issued by us or any other company that describes the *car* on its declarations page.

You or *your spouse* may apply for a policy that will provide coverage beyond the 30th day for the *additional car*. Such policy will be issued only if both the applicant and the vehicle are eligible for coverage at the time of application.

If a *newly acquired car* is not otherwise afforded comprehensive or collision coverage by this or any other policy, this policy will provide the comprehensive or collision coverage not otherwise provided for the *newly acquired car*. If such coverage is provided by this paragraph, it will apply only until 12:01 A.M. Standard Time at the address shown on the declarations page on the sixth day after the delivery of the *car* to *you* or *your spouse*. Any comprehensive or collision coverage provided by this paragraph is subject to a deductible of \$500.

- c. The definition of *relative* is changed to read:

Relative – means a *person* related to *you* or *your spouse* by blood, marriage, adoption or guardianship who resides with *you*, including those who usually make their home in *your* household but temporarily live elsewhere.

- d. The definition of *spouse* is changed to read:

Spouse – means *your* husband or wife who resides with *you*.

2. SECTION I — LIABILITY — COVERAGE A

- a. The third paragraph is changed to read:

In addition to the limits of liability, we will pay for an *insured* any costs

6126FA

listed below resulting from such accident.

1. Court costs of any suit for damages that we defend.
2. Interest on damages owed by the *insured* due to a judgment and accruing:
 - a. after the judgment, and until we pay, offer or deposit in court the amount due under this coverage; or
 - b. before the judgment, where owed by law, and until we pay, offer or deposit in court the amount due under this coverage, but only on that part of the judgment we pay.
3. Premiums or costs of bonds:
 - a. to secure the release of an *insured's* property attached under a court order;
 - b. required to appeal a decision in a suit for damages if we have not paid our limit of liability that applies to the suit; and
 - c. up to \$250 for each bail bond needed because of an accident or related traffic law violation.

We have no duty to furnish or apply for any bonds. The amount of any bond we pay for shall not be more than our limit of liability.

4. Expenses incurred by an *insured*:
 - a. for loss of wages or salary up to \$100 per day if we ask the *insured* to attend the trial of a civil suit.
 - b. for first aid to others at the time of the accident.
 - c. at our request.
- b. The provision titled Trailer Coverage is changed to read:

Trailer Coverage

The liability coverage extends to the ownership, maintenance or use, by an *insured*, of:

1. trailers designed to be pulled by a *private passenger car* or a *utility vehicle*, except those trailers in 2.a. below.

Farm implements and farm wagons are considered trailers while pulled on public roads by a *car* we insure for liability.

These trailers are not described in the declarations and no extra premium is charged.
2. the following trailers only if they are described on the declarations page and extra premium is paid:
 - a. trailers designed to be pulled by a *private passenger car* or a *utility vehicle*:
 - (1) if designed to carry *persons*; or
 - (2) while used with a motor vehicle whose use is shown as "commercial" on the declarations page (trailers used only for pleasure use are covered even if not described and no extra premium paid); or
 - (3) while used as premises for office, store or display purposes; or
 - b. trailers not designed to be pulled by a *private passenger car* or a *utility vehicle*.

When we refer to trailer coverage, *insured* means:

1. *you*;
2. *your spouse*;
3. the *relatives* of the first *person* named in the declarations;
4. any other *person* while using *your car*, a *newly acquired car* or a *temporary substitute car*, if its use is within the scope of consent of *you* or *your spouse*; and
5. any other *person* or organization liable for the use of a covered trailer by one of the above *insureds*.

THERE IS NO COVERAGE WHEN A TRAILER IS USED WITH A MOTOR VEHICLE THAT IS NOT COVERED UNDER THE LIABILITY COVERAGE OF THIS POLICY.

- c. The first paragraph of **Limits of Liability** is changed to read:

Limits of Liability

The amount of bodily injury liability coverage is shown on the declarations page under "Limits of Liability - Coverage A - Bodily Injury, Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to *bodily injury* to one *person*. "*Bodily injury* to one *person*" includes all injury and damages to others resulting from this *bodily injury*, and all emotional distress resulting from this *bodily injury* sustained by other *persons* who do not sustain *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to *bodily injury* to two or more *persons* in the same accident.

- d. Item 1 of **If There Is Other Liability Coverage** is changed to read:

1. **Policies Issued by Us to You, Your Spouse, or Any Relative**

If two or more vehicle liability policies issued by us to *you*, *your spouse*, or any *relative* apply to the same accident, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

- e. Item 3 of **If There Is Other Liability Coverage** is changed to read:

3. **Temporary Substitute Car, Non-Owned Car, Trailer**

Subject to items 1 and 2, if a *temporary substitute car*, a *non-owned car* or a trailer designed for use with a *private passenger car* or *utility vehicle*:

- a. has other vehicle liability coverage on it; or
- b. is self-insured under any motor vehicle financial responsibility law, a motor carrier law or any similar law,

then this coverage is excess over such insurance or self-insurance.

However, subject to items 1 and 2 above, this policy shall provide primary coverage if:

- a. the vehicle is owned by a *car business*;
- b. an *insured* is operating the vehicle; and
- c. the *insured* is neither a *person* engaged in such *car business* nor that *person's* employee or agent.

3. **SECTION II — NO-FAULT — COVERAGE P**

- a. Item 2, **Disability Benefits, of What We Pay** is changed to read:

2. **Disability Benefits.** This is reimbursement for:

- a. 85% of an *insured's* loss of;
 - (1) gross income; or
 - (2) earning capacity
 due to that *insured's* inability to work during a period that:
 - (1) begins when the loss of gross income or earning capacity begins; and
 - (2) ends either:
 - (a) when the *insured* no longer has any loss of gross income or earning capacity;
 - (b) when the *insured* dies; or
 - (c) 52 weeks after the loss,

whichever occurs first.

This benefit is not paid for the first three days of disability, unless the disability continues for longer than two consecutive weeks after the date of injury. The most we will pay is the amount shown in the Schedule for *your* coverage symbol.

- b. services actually rendered or expenses reasonably incurred for services the *insured* would have performed for his or her household except for the injury. These services must be performed during a period that:
 - (1) begins three days after the date of the injury; and

- (2) ends either:
- when the *insured* can perform these services;
 - when the *insured* dies; or
 - 365 days after the date of the injury, whichever occurs first.
- If the *insured's* disability continues for more than 14 consecutive days after the date of the injury, the period begins on the date of the injury. The most we pay per day is \$20.
- b. Item 2 of the definition of *Insured* under Definitions is changed to read:
- any other person:
 - while occupying your car or a newly acquired car with the permission of:
 - you, your spouse, any relative; or
 - the person driving such car with your permission; or
 - while a pedestrian, if injured in an accident that occurs in Utah and involves your car or a newly acquired car.
- c. Item 4 of When Coverage P Does Not Apply is changed to read:
- WHILE OPERATING OR OCCUPYING A MOTORCYCLE;
- d. The following is added to item 1, Deciding Amount, of the provision Settlement of Loss:
- An *insured* is not entitled to attorney fees if the *insured* elects arbitration as provided for by this policy.
4. SECTION III — UNINSURED MOTOR VEHICLE — COVERAGE U AND UNDERINSURED MOTOR VEHICLE — COVERAGE W
- a. The second paragraph under UNINSURED MOTOR VEHICLE — COVERAGE U is changed to read:
- We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle*. The *bodily injury* must be sustained by an *insured* and caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle*.
- b. The first paragraph of the definition of *Uninsured Motor Vehicle* is changed to read:
- Uninsured Motor Vehicle* — means:
- a land motor vehicle, the ownership, maintenance or use of which is:
 - not insured or bonded for bodily injury liability at the time of the accident; or
 - insured or bonded for bodily injury liability at the time of the accident; but
 - the limits of liability are less than the minimum limits required by section 31A-22-304 of the Utah Insurance Laws. The minimum required limits are \$25,000 for each person and \$50,000 for each accident; or
 - the insuring company denies coverage or is or becomes insolvent; or
 - coverage for an accident is disputed by the liability insurer for more than 60 days; or
 - an unidentified land motor vehicle which was the proximate cause of the *bodily injury*. If the unidentified land motor vehicle does not strike either the *insured* or the vehicle the *insured* is occupying, the *insured* must show the existence of the other motor vehicle by clear and convincing evidence, which shall consist of more than the *insured's* testimony.
- c. The second paragraph under UNDERINSURED MOTOR VEHICLE — COVERAGE W is changed to read:
- We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *underinsured motor vehicle*. The *bodily injury* must be sustained by an *insured* and caused by accident arising out of the operation, maintenance or use of an *underinsured motor vehicle*.

d. Item 1 of Limits of Liability — Coverage U is changed to read:

1. The amount of coverage is shown on the declarations page under "Limits of Liability — U — Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to *bodily injury* to one *person*. "*Bodily injury* to one *person*" includes all injury and damages to others resulting from this *bodily injury*, and all emotional distress resulting from this *bodily injury* sustained by other *persons* who do not sustain *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to *bodily injury* to two or more *persons* in the same accident.

e. Item 1 of Limits of Liability — Coverage W is changed to read

1. The amount of coverage is shown on the declarations page under "Limits of Liability — W — Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to *bodily injury* to one *person*. "*Bodily injury* to one *person*" includes all injury and damages to others resulting from this *bodily injury*, and all emotional distress resulting from this *bodily injury* sustained by other *persons* who do not sustain *bodily injury*. Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to *bodily injury* to two or more *persons* in the same accident.

5. SECTION IV — PHYSICAL DAMAGE COVERAGES

a. Item 2 under COMPREHENSIVE — COVERAGE D is changed to read

2. We will pay *you* for transportation costs incurred if *your car* is stolen. We will pay up to \$25 per day beginning when *you* tell us of the theft and ending when we offer to pay for the *loss*.

If the daily incurred transportation costs are payable under both Comprehensive Coverage and Car Rental and Travel Expenses Coverage, we will pay only under the one coverage where *you* collect the most. If payments have been made under Car Rental and Travel Expenses Coverage and such payments have either exhausted the total amount payable under Car Rental Expense or reduced the total amount payable under Car Rental Expense to less than \$25, then we will pay under Comprehensive Coverage.

b. The following is added to EMERGENCY ROAD SERVICE — COVERAGE H:

5. locksmith services, up to one hour, to open *your car* if *your key* is lost, stolen or locked inside *your car*. We will pay only the cost of labor.

c. The last paragraph under CAR RENTAL EXPENSE — COVERAGE R is changed to read:

If the incurred daily rental charge is payable under both Comprehensive Coverage and Car Rental Expense Coverage, we will pay only under the one coverage where *you* collect the most.

d. The last paragraph of item 1 under CAR RENTAL AND TRAVEL EXPENSES — COVERAGE R1 is changed to read

If the incurred daily rental charge is payable under both Comprehensive Coverage and Car Rental and Travel Expenses Coverage, we will pay only under the one coverage where *you* collect the most.

e. Item 1 of If There Is Other Coverage is changed to read:

1. Policies Issued by Us to You, Your Spouse, or Any Relative

If two or more vehicle policies issued by us to *you*, *your spouse* or any *relative* apply to the same *loss* or occurrence, we will pay under the policy with the highest limit.

6. CONDITIONS

Item a under 1. Policy Changes is changed to read

- a. Policy Terms. The terms of this policy may be changed or waived only by:

- (1) an endorsement issued by us; or
- (2) the revision of this policy form to give broader coverage without an extra charge. If any coverage *you* carry is changed to give broader

coverage, we will give *you* the broader coverage without the issuance of a new policy as of the date we make the change effective.


Chief Executive Officer

6082P AMENDATORY ENDORSEMENT

This endorsement is a part of *your* policy. Except for the changes it makes, all other terms of the policy remain the same and apply to this endorsement. It is effective at the same time as *your* policy unless a different effective date is shown for the endorsement on the Declarations Page.

Issued by the STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY of Bloomington, Illinois, or the STATE FARM FIRE AND CASUALTY COMPANY of Bloomington, Illinois, as shown by the company's name on the policy of which this endorsement is a part.

In consideration of the premium charged, it is agreed *your* policy is changed as follows:

1. The definition of *non-owned car* under **DEFINED WORDS** is changed to read:

increased by an additional 21 days for each such additional policy.

Non-Owned Car – means a *car* not owned, registered or leased by:

A *non-owned car* must be a *car* in the lawful possession of the *person* operating it.

1. *you, your spouse;*
2. any *relative* unless at the time of the accident or loss:
 - a. the *car* currently is or has within the last 30 days been insured for liability coverage; and
 - b. the driver is an *insured* who does not own or lease the *car*;
3. any other *person* residing in the same household as *you, your spouse* or any *relative*; or
4. an employer of *you, your spouse* or any *relative*.

2. **REPORTING A CLAIM – INSURED'S DUTIES**

- a. The following provision is added to item 4:

The *person* making claim also shall answer questions under oath when asked by anyone we name, as often as we reasonably ask, and sign copies of the answers.

- b. Item 4b is changed to read:

The *person* making claim also shall:

- b. be examined by physicians chosen and paid by us as often as we reasonably may require. A copy of the report will be sent to the *person* upon written request. The *person*, or his or her legal representative if the *person* is dead or unable to act, shall authorize us to obtain all medical reports and records.

Non-owned car does not include a:

1. rented *car* while it is used in connection with the *insured's* employment or business; or
2. *car* which has been operated or rented by or in the possession of an *insured* during any part of each of the last 21 or more consecutive days. If the *insured* is an *insured* under one or more other car policies issued by us, the 21 day limit is

3. **SECTION IV – PHYSICAL DAMAGE COVERAGES**

- a. The provision titled **Limit of Liability – Comprehensive and Collision Coverages** is changed to read:

6082P

The limit of our liability for *loss* to property or any part of it is the lower of:

1. the actual cash value; or
2. the cost of repair or replacement.

Actual cash value is determined by the market value, age and condition at the time the *loss* occurred. Any deductible amount that applies is then subtracted.

The cost of repair or replacement is based upon one of the following:

1. the cost of repair or replacement agreed upon by *you* and us;
2. a competitive bid approved by us; or
3. an estimate written based upon the prevailing competitive price. The prevailing competitive price means prices charged by a majority of the repair market in the area where the *car* is to be repaired as determined by a survey made by us. If *you* ask, we will identify some facilities that will perform the repairs at the prevailing competitive price. We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. *You* agree with us that such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers.

Any deductible amount that applies is then subtracted.

- b. The first paragraph under Settlement of Loss – Comprehensive and Collision Coverages is changed to read:

We have the right to settle a *loss* with *you* or the owner of the property in one of the following ways:

1. pay the agreed upon actual cash value of the property at the time of the *loss* in exchange for the damaged property. If the owner and we cannot agree on the actual cash value, either party may demand an appraisal as described below. If the owner keeps the damaged property, we will deduct its value after the *loss* from our payment. The damaged property cannot be abandoned to us;

2. pay to:

- a. repair the damaged property or part, or
- b. replace the property or part.

If the repair or replacement results in betterment, *you* must pay for the amount of betterment; or

3. return the stolen property and pay for any damage due to the theft.

Appraisal under item 1 above shall be conducted according to the following procedure. Each party shall select an appraiser. These two shall select a third appraiser. The written decision of any two appraisers shall be binding. The cost of the appraiser shall be paid by the party who hired him or her. The cost of the third appraiser and other appraisal expenses shall be shared equally by both parties. We do not waive any of our rights by agreeing to an

appraisal. We have the right to move the damaged property, at our expense, to reduce storage costs during the appraisal process.

The Settlement of Loss provision for comprehensive and collision coverages incorporates the Limit of Liability provision of those coverages.

c. Trailer Coverage

Items b and c under "A non-owned trailer or detachable living quarters unit is one that:" are changed to read:

b. has not been used or rented by or in the possession of *you, your spouse* or any *relative* during any part of each of the last 21 or more consecutive days. If *you* are insured by one or more other car policies issued by us, the 21 day limit is increased by an additional 21 days for each such additional policy; and

c. is not rented and used in connection with the employment or business of *you, your spouse* or any *relative*.

Edward B. Rutledge Jr.

President

35BF9

04-08-94

DECLARATIONS PAGE



STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

3001 8TH AVENUE GREELEY, CO 80638

NAMED INSURED

POLICY NUMBER 724 8479-C12-44B

POLICY PERIOD MAR-30-94 TO SEP-12-94

44-1379-47 B
 IVERSON, CARTER O
 5795 N 4800 W
 BEAR RIVER CITY UT 84301

DO NOT PAY PREMIUMS SHOWN ON THIS PAGE.
 SEPARATE STATEMENT ENCLOSED IF AMOUNT DUE.

DESCRIBED VEHICLE	YEAR	MAKE	MODEL	BODY STYLE	VEHICLE IDENTIFICATION NUMBER	CLASS
	1993	PONTIAC	SUNBIRD	CONV	1G2JB34H1P7566710	6B304

COVERAGES (AS DEFINED IN POLICY)
 SYMBOL-PREMIUM-COVERAGE NAME-LIMITS OF LIABILITY

A	\$ 62.05	BODILY INJURY/PROPERTY DAMAGE LIABILITY LIMITS OF LIABILITY-COVERAGE A-BODILY INJURY EACH PERSON, EACH ACCIDENT 50,000 100,000 LIMITS OF LIABILITY-COVERAGE A-PROPERTY DAMAGE EACH ACCIDENT 50,000
P3	\$ 17.82	NO-FAULT (SEE POLICY SCHEDULE FOR LIMITS.)
D50	\$ 76.63	\$50 DEDUCTIBLE COMPREHENSIVE
G100	\$106.27	\$100 DEDUCTIBLE COLLISION
H	\$ 2.16	EMERGENCY ROAD SERVICE
U	\$ 4.05	UNINSURED MOTOR VEHICLE LIMITS OF LIABILITY - U EACH PERSON, EACH ACCIDENT 25,000 50,000
W	\$ 2.70	UNDERINSURED MOTOR VEHICLE LIMITS OF LIABILITY-W EACH PERSON, EACH ACCIDENT 10,000 20,000

\$271.68 TOTAL PREMIUM FOR POLICY PERIOD MAR-30-94 TO SEP-12-94
 \$301.86 CURRENT 6 MONTH PREMIUM FOR MAR-12-94 TO SEP-12-94

EXCEPTIONS AND ENDORSEMENTS

FINANCED-FIRST INTERSTATE BANK OF UTAH NA, PO BOX 8126, WALNUT CREEK, CA
 94596-8126.

6078FF.1 AMENDMENT OF NO FAULT-COVERAGE P.

6082P AMENDATORY ENDORSEMENT: CHANGES-DEFINED WORDS; INSURED'S DUTIES;
 COVERAGES.

6885EE.1 AMENDMENT OF UNINSURED MOTOR VEHICLE-COVERAGE U AND UNDERINSURED
 MOTOR VEHICLE-COVERAGE W.

THIS IS YOUR DECLARATIONS PAGE.
 PLEASE ATTACH IT TO YOUR AUTO POLICY BOOKLET.

AGENT: RON JEPPESEN
 PHONE: (801) 257-3940 1379-47

YOUR POLICY CONSISTS OF THIS PAGE, ANY ENDORSEMENTS, AND THE POLICY BOOKLET, FORM 9844.3

PLEASE KEEP TOGETHER

REPLACED POLICY 7248479-44A

155-4978

Iverson, Joni v. SFMAIC
 IVERSON00000763PROD