

1992

Kenneth W. Larsen v. Allstate Insurance co., et al. : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 920334CA

IN THE UTAH COURT OF APPEALS

KENNETH W. LARSEN,

Plaintiff and Appellant,

vs.

ALLSTATE INSURANCE CO.,
et al.,

Defendant and Appellee.

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Court of Appeals No. 920068CA

92-0334-CA

Priority No. 16

BRIEF OF DEFENDANT/APPELLEE ALLSTATE INSURANCE CO.

APPEAL FROM AN ORDER OF THE
THIRD DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,
GRANTING DEFENDANT'S/APPELLEE'S MOTION FOR SUMMARY JUDGMENT

District Court Civil No. 91090421 CV

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FILED

JUN 29 1992

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

KENNETH W. LARSEN,	*	
	*	
Plaintiff and Appellant,	*	Court of Appeals No. 920068CA
	*	
vs.	*	
	*	
ALLSTATE INSURANCE CO.,	*	
et al.,	*	
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LIST OF ALL PARTIES TO THE PROCEEDING
IN THE COURT WHOSE JUDGMENT
IS SOUGHT TO BE REVIEWED

1. Kenneth W. Larsen, plaintiff (appellant herein).
2. Curtis L. Porter, defendant (not a party to this appeal).
3. Levonne R. Edwards, defendant (not a party to this appeal).
4. Allstate Insurance Co., defendant (appellee herein).
5. John Does 1 through 5, defendants (not parties to this appeal).

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JURISDICTION

This court has jurisdiction to consider this interlocutory appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1992) and Rule 54(b) of the Utah Rules of Civil Procedure.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Based on the record before it, did the district court err by deciding that an applicant for Utah No-Fault wage loss benefits is entitled to receive those benefits for 52 consecutive weeks following the date of the applicant's injury rather than a 52 week period commencing when benefits are first requested?

Regarding this issue, the Utah Court of Appeals should review the district court's decision for legal correctness.

2. Based upon the record before it, which included uncontested expert affidavits, did the district court err by deciding that as a matter of law Allstate Insurance Company had not breached its duty of good faith to its insured Kenneth Larsen?

With regard to this issue, the Utah Court of Appeals should review the district court's decision for legal correctness.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

1. Utah Code Ann. § 31A-22-307(1)(b)(i):

Personal Injury Protection coverages and benefits include: the lesser of \$250 per week or 85% of any loss of gross income and loss of earning capacity per person from inability to work, for a maximum of 52 consecutive weeks after the loss, except that this benefit need not be paid for the first three days of disability unless the disability continues for longer than two consecutive weeks after the date of injury.

2. Utah Code Ann. § 31A-22-309(5):

Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as expenses are incurred. . . . If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1½% per month after the due date. The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay reasonable attorneys' fee to the claimant.

STATEMENT OF THE CASE

Nature of the case.

On or about July 2, 1991, plaintiff Kenneth Larsen commenced this action in the Utah District Court for the district of Salt Lake County by filing a Complaint against Curtis L. Porter, Levonne R. Edwards, Allstate Insurance Company, and John Does 1 through 5. (R. 00002-00009.) Mr. Larsen alleged that he was involved in an automobile accident on or about October 26, 1989, and that as a result of the negligence of defendants Porter and Edwards suffered injuries in the accident. Plaintiff sought compensation in the form of special and general damages from defendants Edwards and Porter. (*Id.*)

Plaintiff also alleged that his insurer, Allstate Insurance Company had wrongfully denied him certain Utah No-Fault Benefits and in doing so had breached its duty of good faith. Larsen sought recovery of the benefits allegedly due and damages arising from the alleged breach of the duty of good faith. (*Id.*)

Course of proceedings/disposition in the court below.

In lieu of an Answer to Larsen's Complaint, Allstate Insurance Co. filed a Motion to Dismiss or in the Alternative a Motion for Summary Judgment. Allstate argued that under Utah law

and the provisions of its insurance contract with Mr. Larsen, it had already paid all wage loss benefits due. Allstate also argued that because its actions were appropriate, and because an exclusive statutory remedy in derogation of common law remedies exists in the event benefits are wrongfully denied, Larsen had failed to state a cause of action with regard to his alleged bad faith claim. (R. 00003-00074.) After briefing and oral argument, on November 8, 1991, the district court, Honorable Richard H. Moffat presiding, granted Allstate's Motion to Dismiss or in the alternative Motion for Summary Judgment. (R. 00119, the Minute Entry; R. 00120-00121, the Order.). The judgment was certified as final and this interlocutory appeal followed.

Facts Relevant to the Issues Presented for Review.

1. Commencing in September of 1989, and continuing thereafter at all times relevant to this appeal, Kenneth Larsen and the Allstate Insurance Co. were bound by the terms of a automobile insurance contract, policy no. 020813344. With regard to personal injury protection wage loss benefits,¹ the policy provided at page 11 that whenever an injured person entitled to coverage incurred bodily injury caused by an automobile accident

¹ Wage loss benefits are a mandatory part of every Utah auto liability policy pursuant to the Utah No-Fault Act, Utah Code Ann. § 31A-22-307(1)(b)(i).

that person would be entitled to certain wage loss benefits under the following terms:

Allstate will pay to or on behalf of an injured person the following benefits . . .:

(2) Work Loss

Loss of income and loss of earning capacity by the **injured person** during his lifetime from inability to work during a period commencing three days after the date of **bodily injury** and continuing for a maximum of 52 consecutive weeks. (Emphasis in original.)

(R. 00058, page 11 of the insurance policy, *see also*, R. 00050-00052, uncontested affidavit of Allstate employee Louise Redmond establishing that the policy quoted from was in fact the appropriate, applicable policy; R. 00006, paragraph 30 of plaintiff's Complaint.)

2. On October 26, 1989, Kenneth Larsen sustained bodily injury in an automobile accident. (R. 0003, paragraph 9 of Larsen's Complaint; R. 0004, paragraph 16 of Larsen's Complaint; *see also*, R.00070, a letter from Mr. Larsen's treating physician Gordon R. Kimball, M.D., which states in pertinent part: "This patient was involved in a motor vehicle accident on 10/26/89 when he was rear ended and sandwiched between two cars. The patient injured his spine **at that time . . .**" (Emphasis added.))

No evidence was submitted to the district court, nor does any evidence appear in the record of this case indicating

that Mr. Larsen sustained his bodily injury at any time other than October 26, 1989.

3. On May 26, 1990, Mr. Larsen requested wage loss benefits from Allstate Insurance Company pursuant to the personal injury protection coverage of his policy and in response Allstate paid wage loss benefits from May 26, 1990 to and including October 25, 1990. The total amount paid was \$5,500. (R. 00051, paragraph 4 of the uncontested affidavit of Allstate employee Louise Redmond.)

4. On the advice of counsel and pursuant to its internal investigation, Allstate Insurance Company determined that Mr. Larsen was entitled to wage loss benefits commencing on the date of the accident/injury and ending 52 consecutive weeks thereafter. Therefore, Mr. Larsen was paid wage loss benefits from the date he requested such benefits to a date 52 weeks following the date of the accident. (R. 00051, paragraph 5, of the uncontested affidavit of Allstate employee Louise Redmond.)

5. At Count III of Larsen's Complaint he asserted that Allstate should have paid wage loss benefits for 52 consecutive weeks commencing on the date plaintiff first submitted a demand for wage loss benefits, rather than 52 consecutive weeks from the date of the accident and/or injury. (R. 0006-0007.)

6. Under Count IV of Larsen's Complaint, he alleged that Allstate's decision to pay work loss benefits for 52 consecutive weeks after the date of injury, instead of after the date demand was made was a breach of its duty of good faith. (R. 0007-0008.)

SUMMARY OF ARGUMENTS

A. The no-fault benefits issue.

No-fault legislation, including Utah's No-Fault Act, is designed to provide a quick, definite, but limited source of funds on a no-fault basis to persons injured in automobile accidents. Utah appellate courts have consistently refused to accept arguments that would expand benefits beyond those which are specifically mandated by statute or that render benefits paid under the Act generally less predictable, less definite, and less precise or less efficient and more costly to administer. Utah's courts have also rejected arguments that would lead in any way to an erosion of the Act's fundamental purpose of providing quick, definite, but limited benefits to injured persons. The Act was never intended as a substitute for an individual's right to recover compensation from an at-fault tortfeasor. Consistent

with those principles, Allstate urges this court to adopt a wage loss benefit requirement that comports with:

1. The No-Fault Act's language which requires that benefits be paid 52 weeks after the loss and which, when read as a whole, equates the date of loss with the date of the accident. Courts from other jurisdictions have unanimously so held,

2. The stated purpose of the Act, which is to provide quick definite benefits to the insured, not as appellant argues, an open-ended entitlement which may long surpass the claimant's immediate needs and which may require payment of benefits 10, 20, or 40 years after the accident. Such a perpetual liability would make it impossible to adequately investigate the claimant's entitlement to benefits and would be very costly to administer,

3. Allstate's policy language which requires benefits to be paid for 52 consecutive weeks after the date of bodily injury, not, as appellant urges, beginning on an indefinite date when claimant first takes off work which may be years after the date of the accident. Such a result would require insurance companies to maintain loss reserves for every injured insured indefinitely.

Although appellant's tortured reasoning would most certainly result in greater benefits to injured parties, it would do so at the expense of the fundamental purpose of the Utah No-

Fault Act, and would be contrary to the provisions of the contract of insurance freely entered between Allstate and Mr. Larsen. The district court understood that and ruled accordingly. That ruling should be affirmed.

B. The good-faith issue.

Where there is a fairly debatable reason for an insurer's conduct or decision, that insurer cannot be said to have breached its duty of good faith. In this case, should the Court of Appeals agree with Allstate, then obviously Allstate's decision to pay benefits under its interpretation of the law and its policy was not only fairly debatable, but was also correct. On the other hand, if the Court of Appeals disagrees, then the fact that the district court agreed with Allstate is incontrovertible evidence that Allstate's position was at least fairly debatable. Furthermore, Allstate relied on the opinion of its attorney. An opinion that was set forth in an uncontested affidavit submitted to the trial court. As such Allstate met its duty of good faith.

Additionally, Utah law provides an exclusive statutory remedy in the event an insurer fails to pay appropriate no-fault benefits. Under Utah Code Ann. § 31A-22-309(5) if an insurer fails to pay benefits when due, the claimant may bring an action

to recover those benefits and if successful, interest at the rate of 1½% per month will be paid along with reasonable attorneys' fees. Damages for mental pain and suffering such as sought by appellant here are not provided for. That remedial statute is in derogation of the common law remedy and precludes the common law remedy.

ARGUMENT

POINT I

**CONSISTENT WITH THE HISTORY AND PURPOSE
OF THE NO-FAULT ACT, THE LANGUAGE OF THE
NO-FAULT ACT, THE LANGUAGE OF ALLSTATE'S
INSURANCE POLICY, AND TO EFFECTUATE THE
EFFICIENT ADMINISTRATION OF NO-FAULT
BENEFITS, THE DISTRICT COURT'S GRANT OF
SUMMARY JUDGMENT SHOULD BE AFFIRMED**

Allstate submits that this court, just as the trial court, should determine the duration of the insured's wage loss benefits under the Utah No-Fault Act by first looking to the purpose of the Act, then by interpreting the language of the Act in light of that purpose (including reference to case law from other jurisdictions in which this precise issue has been addressed), and then, if there is some doubt as to the

interpretation of the Act, by reference to the Allstate insurance policy.²

Therefore, the history and purpose of legislative no-fault schemes in general and Utah's No-Fault Act specifically, then the language of the Utah No-Fault Act, and then the language of Allstate's policy are each addressed in turn hereafter. Then the reasons why the trial court's decision, rather than appellant's position, is most appropriate are set forth.

A. History/purpose/traditional interpretive guidelines of the Utah No-Fault Act.

No-fault legislation now exists in a majority of states to provide a quick, no nonsense, no frills way to provide immediate funds to those injured in automobile accidents without regard to who or what may have been responsible for the injuries. *Belcher v. Aetna Casualty & Surety Company*, 293 N.W.2d 594, 601 (Mich. 1980). No-Fault Acts are not designed to provide compensation for all economic losses suffered, but merely provide an immediate source of funds while the injured party convalesces

² Allstate concedes that it may not decrease by its policy language the minimum benefits required by the Utah No-Fault Act. However, where the No-Fault Act does not *mandate* a certain level or duration of benefits, then the parties may contract for whatever duration of benefits they desire. See, *Farmers Insurance Company v. U.S. Fidelity and Guaranty Co.*, 619 P.2d 329, 333 (Utah 1980); *State Farm Mutual Auto Insurance v. Mastbaum*, 748 P.2d 1042, 1043 (Utah 1987).

or until an appropriate claim for full compensation is pursued. *Id.*; Long, The Law of Liability Insurance, Volume 4, Section 27.04, page 47 (rev. 291); *Little v. Pepsi-Cola Company*, 656 P.2d 786 (Kan. App. 1983); *Ohio Casualty and Surety Company v. Continental Insurance Company*, 421 N.Y.S.2d 317 (1979); Couch on Insurance, 2d, Section 45:664. It was the uncertainty in the levels of compensation and the delay in compensation which led to the enactment of no-fault legislation in the first place. J. Appleman, Insurance Law and Practice, Volume 8d, Section 5151 et seq. "History of No-Fault Legislation" at pages 372-373 (1981).

Utah courts have consistently interpreted the Utah No-Fault Act to provide for the least amount of controversy, the most amount of certainty, and the most efficiency in spite of the fact that such interpretations at times result in lower benefits for injured parties. *See, Jones v. Transamerica Insurance Company*, 592 P.2d 609 (Utah 1979) (the claimant's argument that the insurer failed to pay disability benefits under the No-Fault Act and by so doing breached its duty of good faith was not accepted by the court in favor of a more narrow definition of disability); *Jamison v. Utah Home Fire Insurance Company*, 559 P.2d 958 (Utah 1977) (the Court refused to expand the nature of household services benefits provided by the No-Fault Act); *see*

also, *Tanner v. Phoenix Insurance Company*, 799 P.2d 231 (Utah App. 1990).

That approach is consistent with other jurisdictions. Specifically, courts have refused to adopt the approach urged by appellant in this case and have instead adopted Allstate's position. See, *Glenn v. Farmers and Merchants Insurance Company*, 649 F. Supp. 1447 (W.D. of Ark. 1986); *Crieg v. Prudential Property and Casualty Insurance Company*, 686 P.2d 1331 (Colo. 1984). Although the details of those two cases will be discussed further herein *infra*, the point is that courts and commentators have consistently viewed no-fault legislation as a means to provide limited benefits, for a limited period of time, to those injured in automobile accidents and have consistently rejected arguments that seek to expand benefits at the expense of efficiency and certainty. See also, *Fleming v. Allstate Insurance Company*, 424 N.Y.S. 2d 831, 832 (1980) (the court noted that no-fault legislation: "Should not be so twisted and extended as to confer on an injured party a benefit not intended by the legislature." (citations omitted)).

B. The language of the Act.

Beginning at Utah Code Ann. § 31A-22-307(1)(a) and continuing through subparagraph (d) the Utah No-Fault Act defines the minimum personal injury protection coverages and benefits that must be included in all Utah automobile liability insurance policies. In general terms the Act mandates medical expense reimbursement benefits, wage loss benefits, household service benefits, and death benefits. Both the wage loss benefits and the household services benefits are limited in amount and duration, while the medical expense benefits and death benefits are limited in amount only. *Id.* at (a)-(d). The Act's definition section offers no assistance regarding the operative words at issue here. Utah Code Ann. § 31A-22-301(1)-(7).

Under the Act, with regard to wage loss benefits, an insured is entitled to: "the lesser of \$250 per week or 85% of any loss of gross income and loss of earning capacity per person from inability to work". Such payments are limited in duration to: "A maximum of 52 consecutive weeks after the *loss*, except that benefits need not be paid for the first three days of *disability* unless the *disability* continues for longer than two consecutive weeks after the *date of injury*." Utah Code Ann. § 31A-22-307(1)(b)(i) (1991). (Emphasis added.)

Three terms used in that section are critical: (1) *the loss*, (2) *disability*, and (3) *date of injury*. Presumably, in order to avoid the payment of wage loss benefits for injuries which produce a disability lasting three days or less, the statute relieves an insurer from paying benefits for the first three days of disability unless the disability continues for longer than two consecutive weeks following the date of injury.³ Thus, the "date of the injury" is unquestionably a critical moment in the calculation of wage loss benefits. Also, by using the date of disability (as opposed to the date of "the loss") to compare with the date of injury a distinction has been drawn between the date of disability and the date "the loss" occurs. Had the legislature intended for the date of "the loss" and the date of "the disability" to be identical, there would be no reason to use the word disability in the same sentence as the

³ Allstate contends that the date of injury and the date of the accident must necessarily be the same day. Although every manifestation of the injury may not occur until some days after the accident, the injury itself, the physiological damage which gives rise ultimately to an inability to work, must necessarily occur on the date of the accident. Otherwise, the two events would not be causally related. In any event, a resolution of that issue is not necessary in this case. The record here establishes that at least in this case the date of injury and the date of the accident are one and the same. As is pointed out in Allstate's statement of facts, the insured's primary treating physician stated in his letter that the injury occurred on the date of the accident (R. 00070.) and such statement was set forth in Allstate's uncontested facts section of its original memorandum and no opposing statement of facts was submitted on that point by the insured.

term "the loss" is used. The statute could have merely read: "This benefit need not be paid for the first three days of *the loss*." Instead of: "This benefit need not be paid for the first three days of *disability*." Thus, the term "the loss" must be something different than "the disability". The only other date that has meaning in this context (aside from the date of disability and the date of injury) is the date of the accident. The accident must be what the legislature was referring to when it adopted the term "the loss." Therefore, the language of the Act mandates payment of wage loss benefits from the date of the accident to a date 52 weeks thereafter. That is exactly what Larsen received.

Notwithstanding the foregoing (and Allstate submits, a similarly arcane argument made by appellant) the more the bare language of the wage loss benefits section, without reference to the purpose of the Act in general, is analyzed, dissected and manipulated, the less clear it becomes. The legislature could have used language that would have clearly and unequivocally resolved the issue presented by this appeal. Unfortunately, it did not. The Utah Supreme Court has been faced with the problem of interpreting similarly imprecise language in the No-Fault Act before. In those instances, the Court has consistently eschewed a formalized process of dissecting the bare language of the Act

in favor of looking to the purpose and function of the Act as a guiding interpretive reference point. As the Court stated in *Jamison v. Utah Home Fire Insurance Company*, 559 P.2d 958 (Utah 1977):

We have no hesitancy in agreeing that the interpretation and application of the law should be a process of reason, as contrasted to a mere reading of tables or schedules, nor that when controversies arise it is both permissible and desirable to look to the background and purpose of a statute to ascertain its meaning and proper application in particular circumstances.

Id. at 959 (the Court was interpreting the extent of household services benefits under the Utah No-Fault Act); see also, *Jones v. Transamerica Insurance Company*, 592 P.2d 609, 611 (Utah 1979) (the Court evaluated the wage loss benefits in light of the purposes of the Utah No-Fault Act.).

Likewise in this case, although Allstate considers its interpretation of the bare language of the statute to be the most accurate among the several less than perfect alternatives, Allstate urges the court to interpret the language of the Act in light of and influenced by the Act's history and purpose.

C. The interpretation urged by Allstate is most consistent with the purpose of the Act.

In *Tanner v. Phoenix Insurance Company*, 799 P.2d 231 (Utah App. 1990), this court held that where the Utah No-Fault

Act is capable of two meanings as understood by reasonably well informed persons, the court must determine the legislature's intent in light of the entire statute's purpose and in so doing it is appropriate to examine the effect each plausible meaning of the statutory language will have "in practical application." *Id.* at 233.⁴

The Utah Supreme Court has twice set forth the purposes of the Utah No-Fault Act and on each occasion has included the reduction in the ever increasing cost of insurance, and the payment, without undue delay, uncertainties and expenses of specified primary damages for necessary medical and hospital expense and loss of wages. *Jamison*, 559 P.2d at 959; *Jones*, 592 P.2d at 611.

⁴ Appellant's contention that any reasonable interpretation of the statute which expands the level of benefits provided to the insured should be preferred over any other reasonable interpretation that limits benefits is not supportable. The Utah Supreme Court has always resolved questions regarding the interpretations of the Utah No-Fault Act by reference to the history and purpose of the Act rather than by mechanical adherence to whatever result will provide the greatest degree of benefits. In fact, the Court has historically preferred interpretations which result in more limited benefits when those interpretations further the Act's purpose of providing a quick, definitive, but limited form of compensation which is intended to supplement, rather than replace traditional damages recoverable in a suit brought by the injured party. *Jamison*, 559 P.2d at 959-962; *Jones*, 592 P.2d at 611-612. In *Jamison*, the Court rejected plaintiff's argument which relied on a strict interpretation of the bare language of the statute in favor of an interpretation which more closely comported with the purpose of the statute even though plaintiff's contention would have provided more benefits to the insured. *Id.* at 960.

In summary, to interpret the pertinent section of the statute, the court should consider the history and purpose of the Act, and the practical effect of each of the available alternative interpretations. The interpretation that is most consistent with the Act's purpose and most practical should be favored. See, e.g., *Tanner v. Phoenix Insurance Company*, 799 P.2d at 233.

If appellant's interpretation of the statute is accepted, a number of problems will occur which are at odds with the statute's purpose and a practical approach to wage loss benefits. If as appellee contends an injured party may recover wage loss benefits at any time following an injury for a period of 52 consecutive weeks after demand is made, insurers will be required to maintain an open file on every accident indefinitely awaiting the potential of the injured party taking time off work. A back injury may result in time off work for the first time ten years after the accident and under appellant's interpretation of the statute, that injured person could then make a claim against an insurer for wage loss benefits for an injury occurring ten years ago. At that point it will be impossible for the insurer to reconstruct the pertinent facts of the accident, the nature of the injury, or to determine whether some intervening circumstance occurred to cause the present inability to work. It will be

impossible to close the file on any accident where the wage loss benefits have not been exhausted and as a result, accurate actuarial calculations regarding the cost of potential claims will be impossible. An insurer cannot evaluate what future premiums should be when potential claims cannot be evaluated. Each insurer will be faced with an ever increasing number of open-ended potential wage loss claims that might be made at any indefinite point in the future. Furthermore, because the Utah No-Fault Act provides for the reimbursement of the insurer that pays no-fault benefits by the insurer insuring the at-fault party, the potential for such reimbursement will last indefinitely into the future. Utah Code Ann. § 31A-22-309(6) (1991). Thus, not only will the injured party's insurer face perpetual indefinite liability, so will the tort feisor's insurer.

Such an open ended potential for the payment of wage loss claims is at odds with the Act's purpose of providing a definite, short term, quick, but limited level of benefits while the injured party determines whether to pursue other means of recourse and is at odds with the Act's purpose of holding down the cost of insurance. The interpretation urged by appellant has precisely the opposite effect as that intended by the legislature. An endless, expensive, indefinite, administrative

nightmare will result if appellant's theory is accepted. Every single auto accident in this state (assuming someone involved is insured) will result in the creation of potential insurer liability for wage loss benefits that will not end until every person involved in the accident is dead. The insurance contract would remain executory until everyone who might benefit--passengers, pedestrians, permissive users--are dead.

On the other hand, the interpretation urged by Allstate will still provide the injured party immediate wage loss benefits for an entire year after the accident or injury. During that time the injured party can presumably evaluate whether to pursue other remedies. The one year wage loss cushion which is provided by Allstate's interpretation is entirely consistent with the Act's purpose of making sure there are some benefits available without undue delay while at the same time keeping the cost of insurance down by limiting the duration of such benefits and limiting the administrative cost of maintaining an indefinitely open file. Furthermore, Allstate's interpretation allows investigation of the wage loss claim during a time when memories are still fresh and medical treatment is most probably ongoing. Thus, Allstate's interpretation strikes a balance between providing the required benefits to the injured party and efficiently administering the delivery of those benefits on a

cost effective basis. Allstate's interpretation does not necessarily reduce the benefits available, it merely provides for a definite manageable time period within which those benefits can be claimed. Allstate submits that such a balance is far more consistent with the purposes of the No-Fault Act than the one-sided and administratively impossible interpretation urged by appellant.

Courts from at least two other jurisdictions have faced the precise issue presented by this appeal. Although the language of the respective No-Fault Acts varied from that used in Utah's No-Fault Act, the reasoning used by those courts in concluding that the wage loss benefits run from the date of the accident or date of injury, rather than from an indefinite date is applicable here. For example, in *Glenn v. Farmers and Merchants Insurance Company*, 649 F. Supp. 1447 (W.D. of Ark. 1986) the appellant argued that wage loss benefits should begin to run from whenever the injured party first takes off work and should continue for 52 consecutive weeks thereafter. The appellee, the insurance company, argued that such an interpretation was impractical and that the only rational interpretation was that benefits cease 52 weeks after the date of the accident. *Id.* at 1450. The court rejected the appellant's argument on the basis that if carried to its logical conclusion,

the insurer's liability for work loss benefits would never end until the injured party dies and that benefits might be paid well into the next century. The U.S. District Court concluded that the Arkansas legislature could not have intended such a result. *Id.*

Another example is *Crieg v. Prudential Property & Casualty Company*, 686 P.2d 1331 (Colo. 1984). Once again, the injured party asserted that the Colorado No-Fault Act should be interpreted to provide 52 weeks of wage loss benefits beginning on the first day that time is taken off work, rather than at the date of the injury or accident. The Colorado Supreme Court recognized that the Colorado No-Fault Act might be construed to be ambiguous and could be interpreted as the injured party asserted, but held that the injured party's contention must be "analyzed in its immediate textual context and with regard to the consequences of any particular construction." *Id.* at 1335. Consistent with that approach, the Colorado Supreme Court determined that the Colorado No-Fault Act's purpose of providing "minimum coverages for discrete losses over a fixed and determinate period of time" would be best served by concluding wage loss benefits 52 weeks after the accident instead of an indefinite time in the future. *Id.*

The Colorado court noted that any other construction places insurers in the impossible position of being liable for wage loss benefits in perpetuity:

Without such limitation, insurers would face the prospect of liability in perpetuity for work loss benefits. We find nothing in the statutory scheme supportive of such a construction.

Id. at 1335.

Likewise, nothing in the Utah No-Fault Act indicates a desire by the legislature to impose such an onerous burden on insurers. Allstate concedes that different statutory language was involved in the cases cited, but contends that the same rationale which lead the Colorado Supreme Court to resolve an ambiguity in the Colorado No-Fault Act in a way consistent with that urged by Allstate in this case for very practical reasons, and to reject the very interpretation urged by appellant, should

also lead this court to the same conclusion.⁵ The decision of the trial court should be affirmed.

D. Allstate's policy language.

If the Court does not find the foregoing argument to be persuasive and instead finds that the Act does not provide for a certain date upon which the 52 consecutive weeks of wage loss benefits begin, then the Court is free to consider the language of the insurance contract. See, *Farmers Insurance Company v. U.S. Fidelity and Guaranty Company*, 619 P.2d 329, 333 (Utah 1980) (where the Court held that allowing the insurance policy to control matters that are not addressed in the No-Fault Act struck a balance between the Act's stated purposes of reducing the high cost of auto insurance and providing a prescribed level of benefits.); *State Farm Mutual Auto Insurance v. Mastbaum*, 748 P.2d 1042, 1043 (Utah 1987) (the Court cited *Farmers Insurance*

⁵ At oral argument before the trial court, Larsen argued that Utah's six year breach of contract statute of limitation could limit wage loss claims. Utah Code Ann. § 78-12-23. Curiously, however, the statute of limitation would actually only extend the time within which to make a wage loss claim to a point 6 years after the contractual obligation is due, i.e., under Larsen's theory when the claimant first takes time off work. Under Larsen's theory the breach would not occur until the insurer refused to pay benefits and the statute of limitation would begin to run at that time. *Koulis v. Standard Oil*, 746 P.2d 1182, 1186 (Utah. App. 1987). Thus, Utah Code Ann. § 78-12-23 offers no limitation to the indefinite liability created by Larsen's theory.

Company v. U.S. Fidelity and Guaranty Company, 619 P.2d at 333 with approval.).

The Allstate insurance policy relevant here unequivocally and unambiguously limits wage loss benefits to a period of 52 consecutive weeks following the date of the bodily injury. The specific language provides:

Allstate will pay to or on behalf of an injured person . . . loss of income and loss of earning capacity by the injured person during his lifetime from inability to work during a period commencing three days after the date of the **bodily injury** and continuing for a maximum of 52 consecutive weeks.
(Emphasis in original.)

See page 11, PART 2, paragraph 2 of the Allstate policy at R. 00058.

Under the clear language of the policy, the benefits commence three days after the date of the bodily injury and continue for a maximum of 52 consecutive weeks. Allstate has unambiguously defined the starting point and the ending point of benefits. In this case, Allstate paid benefits for 52 weeks after the date of bodily injury.⁶

Appellant has incorrectly directed the court's attention to an entirely different section of the policy and then argued that because no duration of benefits provision is set

⁶ Benefits concluded on October 25, 1990, 52 weeks after the injury. (R. 00051.)

forth there, no duration of benefits provisions exist.

(Appellant's brief at pages 12-13.) Such an argument hardly deserves response in light of the clear language of the policy with regard to duration contained in that section of the policy which specifically addresses the nature of work loss benefits provided. That Allstate did not redefine or reiterate those points elsewhere in the policy is irrelevant. Insurers are not required to repeat provisions over and over again when the terms are clearly set forth initially.

Appellant also contends that because Allstate's policy restricts benefits to wage losses incurred during the injured party's "lifetime" that a period longer than 52 weeks after the accident is contemplated. (Appellant's brief at pages 14-15.) The "during his lifetime" limitation, however, is merely used to avoid the payment of benefits after an individual is deceased. In other words the "loss of earning capacity" cannot occur as a result of death. Thus, the period of benefits is limited in two ways: first, the loss of wages must occur while the injured party is alive and second it must occur during a period "commencing three days after the accident and continuing for . . . 52 consecutive weeks." That is what Allstate did in this

case.⁷ The decision of the trial court should therefore, be affirmed.⁸

POINT II

ALLSTATE'S POSITION IS "FAIRLY DEBATABLE" AND THEREFORE CANNOT SUPPORT AN ACTION FOR BAD FAITH

In Utah, if the position taken by an insurer in denying an insured's claim is "fairly debatable", then the insurer has met its duty of good faith to its insured. See, *Western Casualty and Surety Company v. Marchant*, 615 P.2d 423, 427 (Utah 1980); *Hill v. State Farm Mutual Insurance Company*, 183 Utah Adv. Rptr.

⁷ It should be noted that although Allstate's policy does not require payment of wage loss benefits for the first 3 days after the accident, the Act does require payment for the first three days. Utah Code Ann. § 31A-22-307(1)(b)(i). Therefore Allstate paid benefits according to the requirement of statute instead of the policy. (R.00051.)

⁸ Appellant's other arguments--that the date of bodily injury and the date of the accident are not defined as being the same date under the policy and that ambiguities in the policy must be construed in favor of the insured--are irrelevant. First, whether the policy defines the date of injury and the date of the accident as the same date is unimportant because in this case they did in fact occur on the same date. No contrary evidence appears in the Record and appellant did not contest that fact below. With regard to the resolution of ambiguities, Allstate does not contest appellant's statement of the law, however, the policy is simply not ambiguous on this point. Payments are paid: "during a period commencing three days after the date of bodily injury and continuing for a maximum of 52 consecutive weeks."

70, 73 (Utah App. March 27, 1992); *Callioux v. Progressive Insurance Company*, 745 P.2d 838, 842 (Utah App. 1987).

Obviously, in this case if this court agrees with Allstate's position, then Larsen's claim for bad faith is not well taken.

Even if the court disagrees with Allstate's interpretation of the No-Fault statute, Allstate submits that its position was still at the very least "fairly debatable". Indeed, the district court agreed with Allstate and granted summary judgment. Allstate submits that its position is "fairly debatable" enough based upon the arguments set forth herein and the fact that a district court judge agreed with those arguments to preclude a claim for bad faith as a matter of law.

Additionally, Allstate's position was supported by the uncontroverted affidavit of its lawyer (R. 00072.). The Utah Court of Appeals recognized in *Callioux, supra*, that an expert's affidavit generally provides a good faith basis for an insurer's defense of a bad faith claim. *Callioux*, 745 P.2d at 142. In this case Allstate had requested and received opinions from its counsel to the effect that wage loss benefits begin to run on the date of injury, not an indefinite date in the future when the injured party first takes time off work.

Lastly, Larsen's bad faith claim is barred because the Utah No-Fault Act provides the exclusive remedy to an injured party wrongfully denied no-fault benefits. See, Utah Code Ann. § 31A-22-309(5) which provides that:

If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1½% per month after the due date. The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay reasonable attorneys' fee to the claimant.

Id. Therefore, instead of Larsen's action for bad faith and intentional infliction of emotional distress, Larsen is limited to recovering interest on the back benefits due and a reasonable attorneys' fee. The above quoted remedial section of the Utah No-Fault Act is in derogation of the common law and expresses a clear legislative intent to supply a limited remedy with regard to the limited statutory benefits provided by the No-Fault Act. As such, common law remedies such as Larsen's potential bad faith claim are preempted. See, *Horne v. Horne*, 737 P.2d 244, 248 (Utah App. 1987) cert. denied 765 P.2d 1277. In *Horne*, the Court stated:

Where a statute is in derogation of the common law, and is also remedial in nature, the remedial application should be construed so as to give effect to its purpose. (Citations omitted.)

Id. See also, *DeFelice Industries Inc. v. Harris*, 573 S.2d 643 (La. App. 1991). As part of the entire statutory no-fault benefits scheme, the legislature has provided a specific precise remedy in the event that benefits are wrongfully denied. The claimant is entitled to interest and attorneys' fees only. No mention is made of additional tort damages, and no mention is made of the potential for punitive damages. The legislature has expressly limited the damages to those articulated, and has, therefore, eliminated the uncertainties and vagaries of the law of damages pertinent to the intentional infliction of emotional distress and other insurance bad faith claims. Mr. Larsen's damages are clearly provided for and clearly limited and should not be expanded beyond the legislative enactment to include traditional bad faith damages.

CONCLUSION

Based upon the foregoing, Allstate Insurance Company urges the court to affirm the decision of the trial court.

DATED this 26 day of June, 1992.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 26 day of June, 1992, to the following counsel of record:

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