

2005

# Jakobe and Nicole Valentine v. Farmers Insurance Exchange: Brief of Appellant

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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**JAKOBE & NICOLE VALENTINE,**

**Appellants,**

**vs.**

**FARMERS INSURANCE  
EXCHANGE,**

**Appellee.**

Case No. 20050160

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**BRIEF OF APPELANTS**

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Appeal from the Fourth Judicial District Court

Utah County, State of Utah

Honorable Derek Pullan, presiding

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## **PARTIES**

The names of all parties to the proceeding in the lower court are set forth in the caption of the case on appeal.

## **TABLE OF CONTENTS**

<b>Table of Authorities</b>	<b>iii</b>
<b>Jurisdiction</b>	<b>1</b>
<b>Issues Presented for Review</b>	<b>1</b>
<b>Preservation of Issues in Trial Court</b>	<b>2</b>
<b>Statement of Case</b>	<b>2</b>
<b>Relevant Facts</b>	<b>4</b>
<b>Determinative Law</b>	<b>5</b>
<b>Summary of Argument</b>	<b>6</b>
<b>Argument</b>	<b>7</b>
<b>Utah’s Motor Vehicle Insurance Code</b>	<b>7</b>
<b>Component Parts of the Statutory Scheme</b>	<b>7</b>
<b>Purpose and policy</b>	<b>10</b>
<b>UIM Coverage Follows and Protects the Person</b>	<b>15</b>
<b>The Regular Use Clause</b>	<b>17</b>
<b>Some Interpretations of the Meaning of “Regular Use”</b>	<b>17</b>
<b>The phrase is ambiguous</b>	<b>19</b>
<b>Alternate views: the phrase is NOT ambiguous</b>	<b>25</b>
<b>The “Regular Use” Clause as Applied in this Case</b>	<b>27</b>
<b>Conclusion and Relief Sought</b>	<b>29</b>

## TABLE OF AUTHORITIES

### Cases

<i>Alf v. State Farm Fire and Casualty Co</i> , 850 P.2d 1272 (Utah 1993)	2
<i>Allstate v. Kaneshiro</i> , 998 P2d 490 (Hawaii 2000)	15
<i>American States Insur Co v Tanner</i> , 563 SE 2d 825 (W. Virginia 2002)	18
<i>Ault v. Holden</i> , 44 P.3d 781 (Utah 2002)	2
<i>Bass v. State Farm Mutual</i> , 196 SE2d 485 (Georgia App 1973)	15
<i>Bilbrey v. American Auto Insur Co</i> , 495 SW 2d 375 (Tex. app 1973)	15
<i>Blazekovic v. City of Milwaukee</i> , 610 NW2d 467 (Wisc. 2000)	9
<i>Cashman v. Cherry</i> , 13 P3d 1265 (Kan. 2000)	12
<i>Central Sec. Mut. Ins. Co. v. DePinto</i> , 681 P2d 15 (Kan. 1984)	18, 25
<i>Clark v. Amer. Family Mutual Insur Co</i> , 577 NW2d 790 (Wisc. 1998)	15
<i>Columbia Mutual Insur Co v. State Farm</i> , 905 P2d 474 (Alaska 1995)	18
<i>Crum and Forster v. Travelers Corp</i> , 631 A2d 671 (Pa. Supp. 1993)	18, 25
<i>Cruz v. Farmers Insurance Exchange</i> , 12 P.3d 307 (Col. 2000)	23, 24
<i>Dairyland Ins. Co v. Ward</i> , 517 P2d 966 (Wash. 1984)	20
<i>Dupin v. Adkins</i> 17 SW3d 538 (Kentucky App 2000)	15
<i>Farmers Insurance v. Gilbert</i> , 791 P2d 742 (Kan. App 1990)	15
<i>Farmers Insurance v. Zumstein</i> , 675 P2d 729 (Ariz. App 1983)	25
<i>George B. Wallace Co v. State Farm</i> , 349 P2d 789 (Or. 1960)	18
<i>Grange Insur v. Great American Insur</i> , 575 P2d 235 (WA 1978 en banc)	15
<i>Gunnels v. American Liberty Ins Co</i> , 161 SE2d 822 (SC 1968)	12
<i>Hamm v. Allied Mutual Insurance Co</i> , 612 NW2d 775 (IA 2000)	12
<i>Hobbs v. Rhodes</i> , 667 So2d 1112 (LA app 1995), rehearing denied	15
<i>Jones v. Auto Club Inter-Insur Exchange</i> , 981 P2d 767 (KN app 1999)	12
<i>Jones v. Horace Mann Insurance Co</i> , 723 A2d 390 (Del. 1998)	15

<i>Mann v. Preferred Risk Mutual Insurance Co</i> , 382 P2d 884 (Ut 1963)	15, 17
<i>Metro Prop. &amp; Liab v. Finlayson</i> , 751 P2d 254 (Utah App. 1988), vacated 766 P2d 437 (Utah App. 1989)	17, 25
<i>Motorists Mutual Ins Co v. Bittler</i> , 235 NE2d 745 (Oh. Misc. 1968)	14-16
<i>Niswonger v. Farm Bureau</i> , 992 SW2d 308 (Mo. App. 1999)	15, 16, 20-22
<i>Ohio Casualty v. Travelers Indem Co</i> , 334 NE2d 1 (Oh. App. 1974)	19
<i>Pentz v. Davis</i> , 927 P2d 538 (Ok. 1996)	15
<i>Perfetti v. Fidelity &amp; Cas. Co. of N.Y.</i> , 486 NW2d 440 (Minn. App. 1992)	13
<i>Prince v. Bear River Mutual Insurance Co.</i> , 56 P.3d 524 (Utah 2002)	9
<i>Prudential Insurance Co v. Martinson</i> , 589 NW 2d 64 (Iowa 1999)	15
<i>Ricci v. United States Fidelity and Guaranty Co</i> , 290 A2d 408 (RI 1972)	19
<i>Sears v. Riemersma</i> , 655 P2d 1105 (Utah 1982)	21
<i>Snodgrass v. State Farm</i> , 804 P2d 1012 (Kan. 1991)	18
<i>Squire v. Economy Fire and Casualty Co</i> , 370 NE2d 1044 (Il. 1977)	15
<i>State Farm v. Duran</i> , 785 P2d 570 (Ariz. 1989)	15
<i>SW Energy Corp v. Continental Insurance Co</i> , 974 P2d 1239 (Utah 1999)	2
<i>Taylor v. Travelers Indemnity Co</i> , 9 P3d 1049 (Ariz. 2000)	8
<i>Tillotson v. Farmers Insurance Co</i> , 637 SW2d 541 (Ark. 1982)	19
<i>Travelers Indemnity Co v. Hudson</i> , 488 P2d 1008 (Ariz. App 1971)	18
<i>Unisun Insurance Co v. Schmidt</i> , 529 SE 2d 280 (SC 2000)	12
<i>U S Fidelity &amp; Guaranty Company v. Sandt</i> , 854 P.2d 519 (Utah 1993)	10, 11
<i>Veach v. Farmers Ins. Co.</i> , 460 NW2d 845 (Iowa 1990)	12
<i>Veness v. Midland Risk Insurance Co</i> , 732 NE2d 209 (Ind. 2000)	15
<i>West Bend Mutual v. Amer. Fam. Mutual</i> , 586 NW2d 584 (Minn. 1998)	13

### **Utah Statutes**

Utah Code Annotated 31A-22-301, <i>et seq</i>	7
Utah Code Annotated 31A-22-302	7
Utah Code Annotated 31A-22-305	5, 8, 11, 27-28
Utah Code Annotated 31A-22-306	8
Utah Code Annotated 78-2a-3	1

### **Other**

Constitution of Utah, Article VIII § 3	1
Couch on Insurance 3d	27
Williston on Contracts 4 <sup>th</sup> (2000)	20, 21



## **JURISDICTION**

This court has jurisdiction of this appeal by virtue of Utah Code Ann. 78-2a-3 (j), and the Constitution of Utah, Article VIII § 3.

## **ISSUES PRESENTED FOR REVIEW**

Appellants Jakobe and Nicole Valentine present the question whether the lower court erred in granting Defendant's Motion for Summary Judgment. The question includes the following issues:

1. Is the exclusion from uninsured motorist coverage in the policy of automobile insurance at issue ambiguous and unclear?
2. Does the exclusion from uninsured motorist coverage in the policy deviate from the statutorily prescribed bounds, thereby violating public policy and the intent of underinsured motorist coverage protections?
3. Is the exclusion from underinsured motorist coverage claimed by Appelle Farmers inapplicable and/or void on the facts of this case?

Summary judgment is appropriate only when there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ut.R.Civ.Pro. 56 (c). The material facts are generally not in dispute in this case. The appellate court is to determine whether the district court erred in applying

governing law. *Alf v. State Farm Fire and Casualty Co*, 850 P.2d 1272 (Utah 1993). Interpretation of an insurance contract involves ordinary rules of contract construction. *SW Energy Corp v. Continental Insurance Co*, 974 P2d 1239, 1242 (Utah 1999). The appellate court reviews the district court’s legal conclusions, according no deference to the trial court’s interpretation of the policy of insurance, but reviews the court’s legal conclusions for correctness. *Id.* In making this determination, the appellate court is to “view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *Ault v. Holden*, 44 P.3d 781 (Utah 2002).

### **PRESERVATION OF ISSUES IN TRIAL COURT**

The issues before this court were preserved in the trial court by Defendant’s Motion for Summary Judgment [R. 113], Plaintiff’s Opposition [R. 186], and evidence and argument presented to the court at the hearing on that Motion [R. 227, Partial Transcript of Hearing Ruling].

### **STATEMENT OF CASE**

This appeal arises out of a first party contract action by Plaintiffs Nicole Valentine and her husband, Jakobe, who brought suit in the Fourth District Court to enforce the terms of the Underinsured Motorist Coverage portion of their automobile

insurance policy with Farmers Insurance Exchange.<sup>1</sup> [R. 12] Due to clerical error, Plaintiff's counsel initially filed the complaint in the Third District Court, which accepted the case and assigned a case number. Plaintiff filed a first amended complaint on April 7, 2003. [R. 21] Upon realizing the filing error, Plaintiff filed a Motion to Change Venue, which was granted on June 3, 2003, and the court Ordered the case transferred to the Fourth District Court. [R. 32]

Farmers answered and cross-claimed for declaratory relief, alleging that coverage was excluded under provisions of the underinsured motorist coverage policy at issue. [R. 72] On July 15, 2004, Farmers filed a Motion for Summary Judgment. [R. 113] On November 10, 2004, the Fourth District Court, Judge Pullan, heard oral argument on Farmers' motion. [R. 207, Minutes Oral Argument; R. 227, Partial Transcript] Judge Pullan granted Farmers' Motion for Summary Judgment at the hearing. [R. 207] On November 29, 2004, the clerk transferred the case to the American Fork department, with case number, 050100086. [R. 209] On January 13, 2005, the court entered an order granting Farmers' Motion for Summary Judgment. [R. 214] On February 11, 2005, Valentine timely filed a Notice of Appeal. [R. 217] On March 22, 2005, this Court ordered the deposition of Nicole Valentine be part of the record on appeal. [R. 224]

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<sup>1</sup> As it is Nicole Valentine's injuries and damages caused by the collision at issue, references to "Valentine" will be to Nicole only, unless otherwise noted.

### **Relevant Facts**

On December 6, 2000, Nicole Valentine was seriously injured when the vehicle she was driving was struck from behind by another vehicle, which in turn had been struck by the negligently operated vehicle driven by Robert Nielsen (Valentine settled her claim against Nielsen, and he has never been party to this action or any other action arising out of this incident). [R. 20] Valentine recovered the policy limits of \$25,000 under Nielsen's automobile liability insurance. Valentine also received Workers' Compensation benefits, as she suffered the injury in the course of her employment as a parts delivery runner for Frank Edwards Company (Parts Plus). *Id.* Valentine repaid a Workers' Compensation lien out of the settlement she received from Nielsen's insurance. *Id.* The monetary value of the total damages Valentine suffered exceeded the insurance coverage available to her. [R. 19] Valentine made a claim against the underinsured motorist coverage portion of her automobile insurance policy. Farmers Insurance Exchange, the issuer of the Valentine policy, denied that claim. *Id.*

At the time of the crash on December 6, 2000, Valentine was driving a Chevy pick-up truck, owned by her employer, which she used to deliver parts in the

course of her employment. [R. \_\_\_, Deposition of Nicole Valentine (hereafter “Valentine Depo”) at 26-27] In her duties as a parts runner, Valentine used the Chevy pick-up or another of the four vehicles owned by her employer for use in parts delivery. [R. \_\_\_, Valentine Depo at 28] She kept no keys to any of the vehicles, and never took the vehicle home at the end of the day, to lunch, or on any other personal errands. [*Id.*] Generally, on each workday she would receive assignments for parts deliveries, get the keys to a vehicle, and make that portion of the day’s deliveries. [*Id.* at 31-36] She was one of six parts runners each of whom made use of the vehicles owned by the company for their deliveries. [*Id.* at 31-32] At lunch, she left the vehicle, and either took her own vehicle for lunch or made other arrangements. [*Id.* at 28] At the end of the day she would retrieve her personal vehicle from the parking lot and travel to home in her car. [*Id.* at 41]

### **DETERMINATIVE LAW**

Appellant maintains that UCA §31A-22-305 (10) (a), (in effect at the time of the collision, December 6, 2000) is of central importance to the determination of this appeal, in that the exclusion claimed by Farmers exceeds the authority of the statutorily permissible limitation on underinsured motorist coverage:

Underinsured motorist coverage under this section applies to bodily injury, sickness, disease, or death of an insured while occupying or using a motor

vehicle owned by, furnished, or available for the regular use of the insured, a resident spouse, or resident relative of the insured, only if the motor vehicle is described in the policy under which a claim is made, or if the motor vehicle is a newly acquired or replacement vehicle covered under the terms of the policy. [Remainder of paragraph is not relevant to issues herein.]

### **SUMMARY OF ARGUMENT**

Appellant maintains that the endorsement to the automobile insurance policy at issue, relied upon by Farmers as an exclusion to coverage, is unclear and ambiguous, and accordingly void. [See R. 39]

Appellant also maintains that the endorsement at issue is in derogation of the statute allowing for specified limitation on underinsured motorist coverage, and is in violation of Utah public policy and thus, unenforceable.

Appellant maintains that the exclusion claimed by Farmers is not applicable on the undisputed facts presented and should not be given effect to exclude underinsured motorist coverage for damages suffered by Nicole Valentine as a result of the negligence of a driver with insufficient liability insurance coverage.

## **ARGUMENT**

### **Utah's Motor Vehicle Insurance Code**

In 1985 the Utah legislature enacted a comprehensive legislative scheme for motor vehicle financial responsibility, codified at Utah Code § 31A-22-301, *et seq.*

Though amended many times since its inception, the motor vehicle insurance law remains functionally the same as the statutory scheme put in place two decades ago.

### **Component Parts of the Statutory Scheme**

The motor vehicle financial responsibility statute defines three primary types of insurance coverage:

1. Liability coverage, to pay injured third parties resulting from the insured's negligent operation of a motor vehicle resulting in damage. Utah requires a minimum of \$25,000 bodily injury liability coverage per individual, \$50,000 total per incident coverage regardless of number of cars or individuals involved, and \$15,000 property damage coverage on every vehicle. See UCA 31A-22-302;

2. No-fault, or personal injury protection (PIP) benefits. Utah law requires a fixed amount of medical payment coverage (at least \$3,000), certain lost wages and related limited financial benefits paid to the insured in the event of injury arising from use of the insured automobile, without regard to fault or liability. See UCA 31A-22-306-309; and finally,

3. Uninsured and **underinsured** motorist coverage (UM and UIM coverage, respectively),<sup>2</sup> which provides financial recovery for loss or damages suffered by the insured due to the negligent operation of someone else's motor vehicle, when that negligent operator is either not insured at all or insured in an amount less than the legally required minimum amount (generally, **uninsured**) or insured in an amount less than the damages suffered by the injured party (**underinsured**). Utah law requires insurers who issue liability policies in the State to provide UIM coverage in an amount equal to the liability limits on that policy, or to obtain a written waiver from the insured in the event the insured requests UIM coverage in a lesser amount than the liability limits, or, alternatively if the insured chooses to forego UIM coverage completely. See UCA 31A-22-305.

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<sup>2</sup> Being substantially similar in most material respects (see, e.g. Taylor v. Travelers Indemnity Co, 9 P3d 1049 (Ariz. 2000)), UM and UIM coverage are often used interchangeably, and will be referred to generally as UIM throughout this brief unless otherwise noted.



The three types of insurance defined in Utah law are distinctly different, of course, in purpose, form, and nature. (See, e.g. *Blazekovic v. City of Milwaukee*, 610 NW2d 467, 474-75 (Wisc. 2000): “liability coverage differs from uninsured motorist coverage, and the two are not to be equated”). A key difference is the relationship(s) between the party seeking recovery under the insurance policy, and the insurance company that is asked to pay under the policy.

In recovering on a liability policy, an injured individual nominally seeks payment of damages from the negligent insured. On certain conditions and terms, the insurer steps in to defend the claim and pay the damages, up to the limits of liability under the policy. The individual(s) receiving money under the policy and the company paying money generally need not have any contractual relationship and the action is in tort law.

The action for no-fault (PIP) benefits is, as the name implies, not a matter of tort, or fault, but a matter of contract between the injured insured and his insurer. Upon proving certain facts and the amounts of expenses incurred, the insurer pays to the insured (or medical providers or others, through the insured) benefits. *Prince v. Bear River Mutual Insurance Co.*, 56 P.3d 524, 531 (Utah 2002).

The claim for underinsured motorist damages is a first party claim by the injured policyholder against the insurer. *United States Fidelity & Guaranty Company v. Sandt*, 854 P.2d 519, 521 (Utah 1993). To make a claim under a UIM policy, the policyholder must establish damages to an extent exceeding the available liability insurance coverage from the negligent driver.

The distinction between liability and UIM coverage is critical, in that many of the authorities, cited by the parties in the trial court and by Appellant, *infra*, give more favorable treatment to, and most often approval of, attempts by insurers to apply the “regular use” clause to exclude coverage for liability insurance. On the other hand, many authorities discussed in more detail, *infra*, refuse to apply the “regular use” clause to exclude first-party, UM or UIM benefits to the innocent insured, who is injured by the negligence of a third-party tortfeasor. The idea that courts often express is that UM/UIM coverage is personal, and follows the insured wherever she goes, and is designed to protect the insured against the risk of damages caused by a negligent driver with inadequate liability insurance coverage.

### **Purpose and policy**

In defining the term “underinsured motor vehicle” in the statute, the Utah legislature implies some of the purpose and policy of UIM coverage in the

statutory scheme. The statute identifies the underinsured vehicle as one “**which has insufficient liability coverage to compensate fully the injured party for all special and general damages**” [UCA 31A-22-305 (8) (a).]

This definition implies that one of the central intents of first-party UIM coverage is the motive to compensate the injured party for damages caused by a driver with insufficient liability coverage. The Supreme Court of Utah has affirmed this purpose of UIM coverage:

Underinsured motorist coverage is a facet of uninsured motorist coverage; its **purpose is to provide insurance protection to the insured against damages caused by a negligent motorist** as if the motorist had another liability policy in the amount of the underinsured policy. *United States Fidelity & Guaranty Company v. Sandt*, 854 P.2d 519, 521 (Utah 1993) (Emphasis added).

Courts of numerous jurisdictions have recognized similar purposes in the underinsured motorist coverage provided for in various states’ laws.<sup>3</sup>

The Iowa Supreme Court, comparing the purpose of uninsured motorist coverage with its counterpart, UIM, held:

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<sup>3</sup> Due to a dearth of controlling Utah case law on many of the specific issues presented, persuasive opinions from sister states form a large portion of the authority cited herein.

The purpose of uninsured motorist coverage is to ensure minimum compensation to victims of uninsured motorists. The goal of underinsured motorist coverage, on the other hand, is full compensation to the victim to the extent of injuries suffered.

***Hamm v. Allied Mutual Insurance Co***, 612 NW2d 775 (Iowa 2000), **quoting** ***Veach v. Farmers Ins. Co.***, 460 NW2d 845 (Iowa 1990) [Internal citations omitted.]

Finding a similar legislative intent, the Supreme Court of Kansas agreed that, since:

The legislature's purpose in mandating UIM coverage is to "fill the gap inherent in motor vehicle financial responsibility legislation and compulsory insurance legislation." [The statute at issue] should be liberally construed in light of the legislative intent to compensate innocent persons damaged by others without sufficient insurance. ***Cashman v. Cherry***, 13 P3d 1265 (KN 2000), **quoting** ***Jones v. Automobile Club Inter-Insurance Exchange***, 981 P2d 767 (Kan. App 1999).

South Carolina's Supreme Court found similar legislative intent and gave like effect to the statute at issue there, holding that the

uninsured motorist statute 'is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished.' ***Unisun Insurance Co v. Schmidt***, 529 SE 2d 280 (SC 2000), **quoting** ***Gunnels v. American Liberty Ins Co***, 161 SE2d 822, 824 (SC 1968).

As these passages have demonstrated, courts are in general agreement as to the nature and purposes of the UIM laws and insurance policies issued thereunder. A

noteworthy distinction, however, and a critical element in considering underinsured coverage, involves giving careful consideration to the relationship of the party seeking damages to the negligent driver and to the insurer who is asked to pay. The Minnesota Court denied recovery to an injured passenger who had already recovered on a liability claim against the negligent driver of the car in which the injured passenger was riding, and who then sought UIM coverage under the same policy, holding that:

[c]laiming first-party benefits under the policy of the owner or insurer of the ‘at-fault’ vehicle would be tantamount to converting \* \* \* underinsured motorist coverage into more expensive third-party liability insurance. *West Bend Mutual v. American Family Mutual*, 586 NW2d 584 (Minn. 1998), (alteration as in original) quoting *Perfetti v. Fidelity & Cas. Co. of N.Y.*, 486 NW2d 440, 443 (Minn. App. 1992).

Here, the danger noted in *West Bend* is absent: Valentine is **not** claiming both liability coverage and UIM coverage from the same policy. She received liability coverage from the negligent driver’s insurance, and now makes a first-party claim on her own policy for that part of the value difference between the liability coverage received and her actual damages, as her policy promised to pay.

Rather than the insured trying to “convert...underinsured motorist coverage into more expensive third-party liability insurance” as discussed in *West Bend*, it is the

insurer attempting to convert first-party underinsured motorist coverage, for which Valentine paid regular premiums in good faith, into conditional, “if only” coverage: “if only” Valentine had been a pedestrian, delivering goods for her employer on foot, when she was injured by the underinsured driver – she could recover. “If only” she had been a bicycle courier, injured by the same driver – she could recover. Even, perhaps, “if only” she had been a passenger in the same company truck, which she never drove but daily went out together with another employee on delivery runs, would she have recovered? Or would Farmers claim that the vehicle had been “furnished or available for the regular use by” Valentine, such that the company would claim the exclusion applied? “If only” she had been on a skateboard, on horseback, on roller-skates, or even in a rocking chair on her employer’s front porch on her ten minute break when injured by the underinsured driver<sup>4</sup>, she would have recovered under her policy of underinsured motorist coverage.

In keeping with the authorities discussed, *supra*, and the policy and intent of the Utah UIM coverage statute, Valentine maintains that the policy at issue should be liberally construed in her favor to effectuate coverage for her damages caused by the negligence of an underinsured motorist.

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<sup>4</sup> With apologies to the *Motorists Mutual Ins Co v. Bittler*, 235 NE2d 745 (Oh. Misc. 1968) court.

### **UIM Coverage Follows and Protects the Person**

In considering similar exclusionary clauses in UIM coverage, many cases have held that the nature of UIM coverage is that it follows and protects the insured, rather than depending on a particular vehicle covered, as in liability policies. (See, e.g.: *State Farm v. Duran*, 785 P2d 570, 572 (Ariz. 1989); *Jones v. Horace Mann Insurance Co*, 723 A2d 390, 393 (Del. 1998); *Bass v. State Farm Mutual*, 196 SE2d 485, 489 (Ga. App 1973), affirmed in part, reversed in part, *State Farm Mut. Auto. Ins. Co. v. Bass*, 201 S.E.2d 444 (Ga. 1973); *Allstate v. Kaneshiro*, 998 P2d 490, 499 (Hawaii 2000); *Prudential Insurance Co v. Martinson*, 589 NW 2d 64, 66 (Iowa 1999); *Veness v. Midland Risk Insurance Co*, 732 NE2d 209, 214 (Ind. 2000); *Squire v. Economy Fire and Casualty Co*, 370 NE2d 1044, 1049 (Il. 1977); *Farmers Insurance v Gilbert*, 791 P2d 742 (Kan. App 1990); *Dupin v. Adkins* 17 SW3d 538, 543 (Kentucky App 2000); *Hobbs v. Rhodes*, 667 So2d 1112, 117 (LA app 1995), rehearing denied; *Niswonger v. Farm Bureau*, 992 SW2d 308, 313 (Mo. App. 1999); *Motorists Mutual Ins Co v Bittler*, 235 NE2d 745, 751 (Oh. Misc. 1968); *Pentz v. Davis*, 927 P2d 538 (Ok. 1996); *Bilbrey v. American Automobile Insurance Co*, 495 SW 2d 375 (Tex. app 1973); *Grange Insurance v. Great American Insurance*, 575 P2d 235, 239 (Wash., en

*banc* 1978); *Clark v. American Family Mutual Insurance Co*, 577 NW2d 790 (Wisc. 1998)).

A statement from the *Niswonger* decision is typical of the holdings of this line of cases:

Both uninsured motorist coverage and underinsured coverage are in the nature of floating, personal accident insurance rather than insurance on a particular vehicle, and thus follow the insured individual wherever [s]he goes.” *Niswonger v. Farm Bureau*, 992 SW2d 308, 313 (Mo. App. 1999) (Emphasis in original).

Similarly, an oft-quoted decision has held that UIM coverage is “limited personal accident insurance chiefly for the benefit of the named insured.” *Motorists Mutual Ins Co v. Bittler*, 235 NE2d 745 (Oh. Misc. 1968).

The public policy considerations inherent in the holdings noted above apply equally here. The Utah legislature has created a comprehensive scheme of insurance coverage, with insurance companies required to offer UIM with every policy of automobile insurance issued, which UIM coverage may only be waived by an express written waiver from the policyholder.



### The “Regular Use” Clause

The “regular use” exclusionary clause has a long and somewhat convoluted history in case law interpreting the phrase and some phrases of very similar exclusions. A body of jurisprudence has built up around the “regular use” clause and its close variants, but Utah courts seem to have contributed only two fairly ambiguous decisions to that body of law, one of which is procedurally unorthodox and of little, if any, precedential authority.<sup>5</sup>

In *Mann v. Preferred Risk Mutual Insurance Co*, 382 P2d 884 (Utah 1963), the Utah Supreme Court considered the application of the “regular use” exclusion. The *Mann* court found the exclusion applicable on the facts presented without elaborating on the rationale behind its holding.

### Some Interpretations of the Meaning of “Regular Use”

Courts interpreting the phrase “regular use” have reached widely varied conclusions as to factually, what is “regular use.” Appellants submit that the

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<sup>5</sup> In *Metropolitan Prop. & Liability v. Finlayson*, 751 P2d 254 (Utah App. 1988), *vacated procedurally*, 766 P2d 437 (Utah App. 1989), the Utah Court of Appeals considered the application of the “regular use” exclusion and initially found the exclusion ambiguous, and therefore, construed the clause in favor of coverage. After the Court issued its opinion, the losing party requested, and the Court granted, a rehearing. Before the court heard the matter again, though, the parties to the case reached a settlement. The Court then vacated its prior decision.

jurisdictions and opinions that have the more compelling arguments are among those authorities that have found that “regular use” implies and includes:

-- “unfettered ability to regularly use a vehicle according to his/her whims, needs, or desires.” *American States Insurance Co v Tanner*, 563 SE 2d 825, 833 (W. Virginia 2002);

-- “expressed or implied understanding with the owner of an automobile that the insured could have the use of the particular automobile or perhaps any automobile of the other at such times as he desired, if available.” *George B. Wallace Co v. State Farm*, 349 P2d 789, 792 (Or. 1960), accord *Crum and Forster v. Travelers Corp*, 631 A2d 671, 673 (Penn. Supp. 1993)

-- “**continuous** use, uninterrupted **normal** use for **all purposes, without limitation** as to use; customary use as opposed to occasional use or special use” *Travelers Indemnity Co v. Hudson*, 488 P2d 1008, 1012 (Ariz. App 1971); *Snodgrass v. State Farm*, 804 P2d 1012, 1024 (Kan. 1991); *Central Sec. Mut. Ins. Co. v. DePinto*, 681 P2d 15 (Kan. 1984) (Emphasis added).

-- “steady or uninterrupted use for all purposes and without limitation” *Columbia Mutual Insurance Co v. State Farm*, 905 P2d 474, 478 (Alaska 1995).

Appellant submits that there is no dispute that Valentine had **no** “regular use” as defined and accepted by these numerous authorities. Her opportunity to use her employer’s vehicle was not “unfettered,” “at such times as she desired,” “uninterrupted normal use for all purposes,” nor “without limitation.” To the contrary, Valentine had explicitly circumscribed authority to use the truck only directly in service of her employer’s business needs: to take parts from the warehouse to the customer. She had no personal use of the vehicle. She did not keep the vehicle at her home, nor did she even retain keys to the vehicle. She did not take the vehicle for personal errands or trips such as lunch breaks. Under the undisputed facts of the case, arguably, Valentine may have used the vehicle with regularity (that is, in a regular pattern on her workdays) but the vehicle was absolutely **not** furnished or available for her “regular use” in the sense rationally and reasonably described by the authorities noted above.

### **The phrase is ambiguous**

Many courts that have considered the “regular use” and similar exclusions have found it to be ambiguous as a matter of law. (See, e.g., Tillotson v. Farmers

*Insurance Co*, 637 SW2d 541, 543 (Ark. 1982); *Ohio Casualty Insurance Co v. Travelers Indemnity Co*, 334 NE2d 1, 3 (Ohio App. 1974); *Ricci v. United States Fidelity and Guaranty Co*, 290 A2d 408 (RI 1972) (listing cases finding the phrase ambiguous or not); *Dairyland Ins. Co v. Ward*, 517 P2d 966 (Wash. 1984) (calling the phrase “ambiguous in a very real sense”).

According to principles of contract law, “[g]enerally, an ambiguity in insurance policy language exists only if the language is fairly or reasonably susceptible to two or more different but reasonable interpretations or meanings”. [16 Williston on Contracts, 49:17 (4<sup>th</sup> ed, 2000)] Beyond this oft-repeated test and its variants, however, are questions probing deeper into the language of the phrase at issue.

One court has framed the issue of ambiguity more starkly, holding that an “ambiguity arises when there is duplicity, indistinctness or uncertainty in the meaning of the words used in the policy”. *Niswonger v. Farm Bureau*, 992 SW2d 308, 316 (Mo. App. 1999). The *Niswonger* Court went on to state:

[l]anguage is ambiguous if ‘it is reasonably open to different constructions,’ and, in determining whether that is the case, ‘the language used will be viewed in the meaning that would ordinarily be understood by the layman who bought and paid for the policy.’ *Id.* [Citations omitted.]

Further, “[a]n automobile insurer, having affirmatively expressed coverage, through broad promises, is under a duty to define any limitation or exclusionary clauses in clear and explicit terms. [17 Williston on Contracts, 49:112 (4<sup>th</sup> ed, 2000)].

Once an ambiguity is found in a contract:

[t]he well-established rule in Utah is that any uncertainty with respect to construction of a contract should be resolved against the party who had drawn the agreement. *Sears v. Riemersma*, 655 P2d 1105, 1107 (Utah 1982).

With these principles of insurance contract interpretation in mind, the question follows: is the exclusionary clause Farmers relies on to deny UIM coverage to Valentine ambiguous? Whatever else it may be, it certainly is confusing:

Uninsured Motorist Coverage (and Underinsured Motorist Coverage if applicable) does not apply to **damages** arising out of the ownership, maintenance, or use of any vehicle other than **your insured car** (or **your insured motorcycle** if this is a motorcycle policy), which is owned by or furnished or available for the regular use by you or a **family member**. (Emphasis in original). [R. 39]

A simple reading of the wording of the endorsement reveals that it is “fairly or reasonably susceptible to two or more different but reasonable interpretations or meanings” and that there is “indistinctness or uncertainty in the meaning of the words used in the policy.” (*Niswonger, supra*). It is unclear whether the

endorsement attempts to exclude from UIM coverage protection vehicles that are “furnished ... by you”. If so, clearly the Frank Edwards vehicle Valentine was driving does not come within the ambit of the exclusion in any way, in that the insured (Valentine) or a family member in no way “furnished” or made available that vehicle to Valentine. That is, the vehicle she was driving when she was injured by the negligence of the underinsured driver was not “furnished...by you [the insured]” in any sense.

Also, not only is the phrase awkwardly worded so as to make it reasonably susceptible to two or more plausible meanings, but the word that makes the phrase most odd is also the principle deviation in the phrase from the language of the statute. The Utah code speaks in terms of a “vehicle owned by, furnished, or available for the regular use of the insured” [emphasis added], which, while perhaps not perfectly clear, is at least far more intelligible grammatically than Farmers’ choice of the word “by” in the spot in the sentence where “of” appears in the statute.

Further, the endorsement containing the exclusion is set apart from the body of the insurance policy, appended after the end of the main text of the policy language. The purported exclusion is placed such that it would be unlikely to be ascertained

as a potential restriction on coverage by the “layman who bought and paid for the policy” (*Niswonger, supra*).

The twelve words directly at issue, “owned by or furnished or available for the regular use by you” are far from the clear and unequivocal language required to appraise an insured of her rights and responsibilities under the policy. Nowhere in the policy is the phrase “furnished or available for the regular use by” nor any of its component parts defined. Only upon the denial of a reasonable claim and the instigation of litigation is the insured left to ask “what is meant by the words ‘furnished or available for the regular use by’”?

On initially scanning the words for grammatical correctness, it seems as if there is some typographical error in the choice or alignment of the words, in that the word “by” to modify the words “furnished or available” seems to require that it is the insured, Valentine, who is to have “furnished” the vehicle. Clearly, under that reasonable reading of the plain language of the policy, Farmers could show no set of facts that would make the exclusion applicable to Valentine.

The Colorado Court of Appeals considered a challenge to a nearly identical phrase in *Cruz v. Farmers Insurance Exchange*, 12 P.3d 307 (Col. 2000), and dismissed

the plaintiff's contentions that the strange word choice significantly affected the clarity of the exclusion. Here, however, the odd phrase is one step more bizarre than in *Cruz*, in that the otherwise identical phrase contains the word "the" where it seems to have no logical place ("furnished or available for **the** regular use by you or a family member"). Perhaps the *Cruz* court would dismiss that irregularity as well, but appellants maintain that, taken together, the phrase crosses the line into legal ambiguity, and urges the Court to so find.

Finally, even the two simple words at the heart of this and many other insurance policy disputes – "regular use" – are ambiguous in that they are undefined in the policy and are susceptible of more than one reasonable interpretation. Does "regular use" mean substantially similar to the use one makes of one's own vehicle – that is, available and capable of being used for all purposes, at any time, without restriction, similar to the finding of the courts discussed, *supra*? If so, the exclusion clearly does not apply. Or, is "regular use" limited to mean recurring in a regular pattern, as the trial court found? If so, Valentine's use may have been "regular" even if the vehicle was not necessarily "furnished" or "available" for her "regular use." Appellant maintains that the clause is ambiguous in a very real sense, and this Court should hold the claimed exclusion to be void.



**Alternate views: the phrase is NOT ambiguous**

At least one court has noted that it is “not the use of ambiguous language which causes courts to disagree about the meaning of the exclusionary language, ‘[c]ourts struggle with its application because each case must be decided on its own facts and circumstances and therefore, its application is a struggle. Its meaning is not.’” *Crum and Forster v. Travelers Corp.*, 631 A2d 671 (Penn. Supp. 1993), quoting *Central Sec. Mut. Ins. Co. v. DePinto*, 681 P2d 15 (Kan. 1984).<sup>6</sup>

Some courts have found that the phrase, as included in policies of insurance, is not ambiguous. See, e.g. *Farmers Insurance v. Zumstein*, 675 P2d 729 (Ariz. App 1983); *Central Sec. Mut. Ins. Co. v. DePinto*, *supra* (noting that the phrase “regular use” may seem to have several possible meanings, but still finding it unambiguous nevertheless).

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<sup>6</sup> As the Court noted in *Finlayson*, *supra* “[s]omewhat surprisingly in view of the inconsistent interpretations courts have given the term, some courts have found the term ‘regular use,’ even when undefined, is not ambiguous.” *Finlayson*, 751 P2d at 257 (Utah App. 1988), *vacated procedurally*, 766 P2d 437 (Utah App. 1989).

It is important, however, to note that the vast majority of courts to consider the “regular use” exclusion, and uphold it, as not ambiguous and not in violation of public policy **are considering the exclusion in the liability coverage context.**

That is, when an injured third party, a stranger to the contract of insurance, seeks to recover damages that the insured would otherwise be liable to pay because of the insured’s negligent use of the insured vehicle, courts are much more likely to find the “regular use” or some similar “other vehicle” exclusions to be valid and applicable. But to the contrary, when courts consider the “regular use” clause in the UIM context, as here, there is more generally agreement that the UIM coverage should properly follow the person, regardless of where she is when she is injured by an underinsured, negligent driver. (See discussion, *supra*).

Valentine maintains that the clause in her policy of UIM coverage is ambiguous in a very real sense, and this Court should hold the claimed exclusion to be void.

The choice of words is confusing and unclear, and the insured is left to speculate as to their meaning. In such a case, public policy and the weight of authority mandate that the ambiguous phrase be interpreted against the party who drafted it – Farmers – and in favor of underinsured motorist coverage for the innocent, injured, insured. Nicole Valentine consistently paid her premium to minimize the risk of substantial financial damages caused by a negligent driver without

adequate liability insurance, but she is now in danger of not getting the benefits of her bargain with Farmers.

### **The “Regular Use” Clause as Applied in this Case**

In granting Farmer’s Motion for Summary Judgment, the trial court adopted the definition found in the Concise Oxford Dictionary defining “regular” as “acting” or “done” or “recurring uniformly” or “calculably in time or manner, habitual, constant, orderly.” [R. 227 at page 32-33] Taking the word “regular” by itself, apart from the other language of the clause requiring that the other vehicle must be “furnished or available for the regular use by you” further contributes to a misleading application.

The meaning of the words “furnished” or “available” are equally critical as the word “regular”:

In non-owned automobile coverage ‘furnished’ and ‘available’ are not synonymous; the former term requires that the potential use of the automobile be to a substantial degree under the control of the insured.” (Citations omitted); **Couch on Insurance 3d, Section 121:65.**

It is this issue of the “substantial degree” of control over the vehicle that the insured is using that is critical. In the underinsured motorist coverage statute in

effect at the time, UCA § 31A-22-305 (10) (a) – amended since the date of the collision at issue, December 6, 2000, to place the operative language in a different sub-paragraph and slightly reworded<sup>7</sup> – the law allows that UIM coverage will apply to the use of a vehicle “owned by, furnished, or available for the regular use of” the insured only if the vehicle is described in the policy under which claim is made, or is a newly acquired or replacement vehicle covered under the policy. See UCA 31A-22-305 (10) (a) (2000). The issue the legislature seems focused on is the degree of control the insured has over the “other vehicle” – is it a vehicle over which the insured had sufficient control to have an insurable interest in it? If so, the vehicle is “owned by or furnished or available” to the insured, and the insured should take responsibility for covering the vehicle with requisite insurance.

The statute seems to be putting the burden on the insured, when using a vehicle other than that listed in the policy, to see that it is covered, rather than relying on coverage on another vehicle to cover the risk. Here, however, the vehicle at issue was never in Valentine’s control to the degree that she could insure it, so that burden is not fairly placed on her.

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<sup>7</sup> See current UCA 31A-22-305 (9)(a)(ii)(A) and (B), deleting the phrase “regular use” from the statute and appearing to clarify the focus on a vehicle which the covered person has a requisite degree of control over (e.g., an insurable interest, as discussed, *infra*).

Valentine's use may have been "regular" in a sense that the trial court, in applying the dictionary definition, found it to be, in that it was "recurring uniformly" on typical workdays. Appellants maintain, however, that it is logically and legally incorrect to leap from that simple isolated definition of just one of the words of the disputed phrase, to a blanket definition of the entire exclusion **against the interest of the insured**. Appellant maintains that this Court should properly reverse the ruling in favor of Farmers.

Further, the trial court, on more than one occasion, emphasized the view that the "main purpose of the exclusion is to limit coverage of vehicles that are not declared in the insurance contract." [R. 227 at 33] Appellants argue that the trial court's finding on this issue is in error, and inconsistent with the reasoned authorities cited at length, *supra*, holding that UIM coverage is personal to the insured, and not vehicle-dependent as **liability** insurance certainly is.

### **Conclusion and Relief Sought**

Appellant submits that the conclusions of the court are incorrect as a matter of law, and this court should properly reverse those conclusions. The phrase at issue in the endorsement upon which Farmers relies for an exclusion of coverage is ambiguous. As an ambiguous element in a contract of insurance, the phrase

should be read most favorably to the insured, and in favor of coverage. Further, the endorsement upon which Farmers relies for exclusion of coverage exceeds the mandate of Utah law in regards to underinsured motorist coverage by adding unnecessary and confusing words, and is void as against public policy. Finally, the exclusionary clause is inapplicable on the facts presented in this matter, in that Valentine did not have the Frank Edwards vehicle “furnished or available for the regular use by” her on the undisputed facts. For all these reasons, Appellants respectfully request this court reverse the Order granting Summary Judgment in favor of Appellee Farmers.

DATED this 30 day of June 2005

GREGORY, BARTON & SWAPP, P.C.

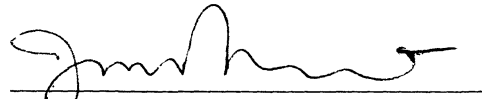
A handwritten signature in black ink, appearing to read 'John F. Fay', written over a horizontal line.

John F. Fay  
James L. Mouritsen  
Attorneys for Appellants

**CERTIFICATE OF MAILING**

I hereby certify that on this 3<sup>rd</sup> day of June 2005 I caused to be mailed by first class U.S. Mail, postage prepaid, two true and correct copies of **BRIEF OF APPELANTS** to the following:

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