

2005

Liberty Mutual Insurance Company v. Burdene Shores and Unior Shores : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Liberty Mutual Insurance Company,

Plaintiff and Appellee,

vs.

Burdene Shores and Unior Shores,

Defendants and Appellants.

BRIEF OF THE APPELLANT

UNIOR SHORES

No. 20050291-CA

Fourth District Court, American Fork
Civil No. 050100099

APPEAL FROM FINAL JUDGMENT OF THE FOURTH DISTRICT

COURT, UTAH COUNTY

JUDGE DEREK PULLAN

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FILED
UTAH APPELLATE COURTS

2005

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Liberty Mutual Insurance Company, Plaintiff and Appellee, vs. Burdene Shores and Unior Shores, Defendants and Appellants.	BRIEF OF THE APPELLANT UNIOR SHORES No. 20050291-CA Fourth District Court, American Fork Civil No. 050100099
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
Cases Cited	iv
Statutes Cited	iv
Rules Cited	v
Miscellaneous Citations	v
 JURISDICTION	 1
 STATEMENT OF THE ISSUES	 1
Issue No. 1 - Improper Dismissal of the Bad-Faith Refusal to Settle Counterclaim	 1
Issue No. 2 - Improper Dismissal of Counterclaims for Declaratory Relief	1
Issue No. 3 - Improper Granting of Summary Judgment Finding the Liberty Mutual Step down endorsement Provision Valid and Enforceable	 2
Issue No. 4 - Improper Denial of Discovery	2
 STATEMENT OF THE CASE	 3
Nature of the Case	3
Course of the Proceedings	5
Disposition at the Trial Court	7
 RELEVANT FACTS	 8
Background Facts	8
Facts about the Case	8
 SUMMARY OF ARGUMENTS	 13
Improper Dismissal of the Bad-Faith Counterclaim	13
Summary Judgment was not Available to Liberty Mutual on its claims for Declaratory Relief on the Step Down Endorsement	 13
Failure to allow appropriate Discovery	14
 DETAILED ARGUMENTS	 15
A Lay Person Reading of the Policy	16
Policy Ambiguities Must Be Construed Against Liberty Mutual	23
Parol Evidence is Relevant to the Shores' Claims	24
 CONCLUSION AND RELIEF SOUGHT	 29
Unior Shores' Bad-Faith Counterclaim against Liberty Mutual Should be Allowed to go Forward	 29
The Summary Judgment for Liberty Mutual and Dismissal of the Shores' Counterclaims Should be Reversed and the Case Allowed to Go to Trial	

.....	30
The Shores should be allowed appropriate Discovery before Dispositive Rulings by the Court	30
Bill Shores is entitled to an award of attorney fees	31

TABLE OF AUTHORITIES

Cases Cited

<i>Auto Lease Co. v. Cent. Mut. Ins. Co.</i> , 7 Utah 2d 336, 325 P.2d 264 (Utah 1958)	22
<i>Browning v. Equitable Life Assur. Soc'y</i> , 94 Utah 532, 562, 72 P.2d 1060, 1073 (1937)	27
<i>Cullum v. Farmers Ins. Exchange</i> , 857 P.2d 922 (Utah 1993)	26
<i>Farmers Ins. Exchange v. Call</i> , 712 P.2d 231 (Utah 1985)	26
<i>Farmers Ins. Exchange v. Versaw</i> , 2004 UT 73, 99 P. 3d 796 (Utah 2004)	22, 26, 27
<i>Fitzgerald v. Corbett</i> , 793 P.2d 356, 360 (Utah 1990)	29
<i>LDS Hosp. v. Capitol Life Ins. Co.</i> , 765 P.2d 857, 858 (Utah 1988)	22
<i>Phone Directories v. Henderson</i> , 200 UT, 8 P.3d 256 (Utah 2000)	1
<i>Pugh v. North American Warranty Services, Inc.</i> , 2000 Ut App 121, ¶14.	31
<i>Richards v. Standard Accident Ins. Co.</i> , 58 Utah 622, 200 P. 1017, 1020 (1921)	27
<i>Roundy v. Staley</i> , 984 P.2d 404 1999 UT 229 (Utah App 1999)	2
<i>Sittner v. Schriever</i> , 22 P.3d 784, 2001 UT App 99 (Utah App 2001)	2
<i>Speros v. Fricke</i> , 98 P.3d 28, 2004 UT 69, ¶20 (Utah 2004)	2
<i>Union Bank v. Swenson</i> , 707 P.2d 663, 664 (Utah 1985)	29
<i>U.S. Fid. & Guar. Co. v. Sandt</i> , 854 P.2d 519, 521-22 (Utah 1993)	22

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---------------------------------	--------

Utah Code §31A-19a-106.	23, 27
Utah Code §31A-21-308	11
Utah Code §78-2-2(2)(j)	1
Utah Code §78-2a-3(2)(j)	1

Rules Cited

Rule 56(f) Ut.R.Civ.P..	2, 6
------------------------------	------

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Restatement, Second, Contracts § 235..	25
Restatement, Second, Contracts § 237..	22, 28

Miscellaneous Citations

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JURISDICTION

The Utah Court Of Appeals has jurisdiction of this appeal pursuant to Utah Code §78-2a-3(2)(j), by transfer from the Utah Supreme Court. The Utah Supreme Court has original jurisdiction of this appeal pursuant to Utah Code §78-2-2(2)(j).

STATEMENT OF THE ISSUES

Issue No. 1 - Improper Dismissal of the Bad-Faith Refusal to Settle Counterclaim

Did Judge Pullan improperly dismiss Unior Shores' counterclaim against Liberty Mutual for bad faith refusal to settle in violation of an obligation to act in good faith and deal fairly with their insureds under the Liberty Mutual insurance policy issued to the Shores (hereinafter the "insurance policy")?

Standard of Review: Correctness. *Phone Directories v. Henderson*, 8 P.3d 256 (Utah 2000).

Issue No. 2 - Improper Dismissal of Counterclaims for Declaratory Relief

Did Judge Pullan improperly dismiss Unior Shores' and Burdene Shores' (the Shores) claims for declaratory relief by finding as a matter of law, that the Shores' claims that the family exclusion (or step down, hereinafter the "step down endorsement") provision, limiting the liability of Liberty Mutual to statutory minimums complies with Utah law?

Standard of Review: Correctness. *Phone Directories v. Henderson*, 200 UT, 8

P.3d 256 (Utah 2000).

Issue No. 3 - Improper Granting of Summary Judgment Finding the Liberty Mutual Step down endorsement Provision Valid and Enforceable

Did Judge Pullan improperly grant Liberty Mutual Insurance Company's motion for summary judgment on their Declaratory Judgment action finding as a matter of law, without allowing appropriate discovery or inquiry into related facts, that the step down endorsement was valid and enforceable against the Shores?

Standard of Review: Correctness. *Sittner v. Schriever*, 22 P.3d 784, 2001 UT App 99 (Utah App 2001). *Speros v. Fricke*, 98 P.3d 28, 2004 UT 69, ¶20 (Utah 2004).

Summary judgment is appropriate only "if the pleadings, . . . and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Issue No. 4 - Improper Denial of Discovery

Did Judge Pullan improperly deny the appellant's Rule 56(f) motion to allow further discovery on issues related to Liberty Mutual's motion for summary judgment and motions to dismiss; and, was the trial court's failure and refusal to require Liberty Mutual to go forward with discovery proper?

Standard of Review: either abuse of discretion or correctness, *Roundy v. Staley*, 1999 UT 229 (Utah App 1999).

STATEMENT OF THE CASE

Nature of the Case

Burdene Shores and Unior Shores (the Shores) are aged, retired persons in their 70's and 80's. Unior is a WWII veteran who literally fought his way across Europe with the United States Army.

The Shores purchased an automobile insurance policy from Liberty Mutual as a result of advertising targeted at retired military personnel. The Shores are co-insureds under the insurance policy.

This case involves a simple automobile accident in which Burdene Shores was severely injured. Burdene Shores was a passenger in an automobile driven by her husband, Unior Shores. It is alleged that Unior Shores was primarily at fault in the accident.

The accident caused permanent disability to Burdene Shores; and, she incurred direct medical and medical related expenses significantly in excess of \$25,000.

As the PIP insurer for Burdene Shores, Liberty Mutual received copies of all direct medical expenses and most other medical-related expenses.

At the time of the accident, the Shores had in force a policy of insurance from Liberty Mutual (hereinafter the "insurance policy") with declared policy limits for liability of \$100,000 per person and \$300,000 per accident. The Shores should have been adequately insured, including coverage at least sufficient to cover Burdene Shores' medical and medical-related expenses for her injuries in the accident.

Buried within the insurance policy is a conflicting, ambiguous, step down

endorsement provision which Liberty Mutual claims limits its liability to Burdene Shores under the liability provisions of the insurance policy to \$25,000 for the negligence of Unior Shores.

The insurance policy was delivered to the Shores some time after the policy was purchased and coverage was bound.

The step down endorsement and consequent reduced limits of liability for insureds is not stated or otherwise mentioned in the policy declarations. No information (materials or otherwise) provided by Liberty Mutual to the Shores prior to the Shores' receipt of the insurance policy referred to the step down endorsement. The step down endorsement was never pointed out to the Shores by Liberty Mutual in any fashion other than the delivery of a 46-page insurance policy to the Shores some time after the insurance coverage was purchased and after the insurance coverage was bound. The step down endorsement was never meaningfully disclosed to the Shores until after a liability policy limits claim of \$100,000 was made by Burdene Shores.

Liberty Mutual asserts, and Judge Pullan found as a matter of law, that the coverage stated in the step down endorsement liability is the limit of coverage provided to the Shores by the policy. This decision was made at a time when Unior Shores had before the trial court his answer and counterclaim. Counsel for Unior Shores made argument at the summary judgment hearing on Burdene Shore's claims.

Course of the Proceedings

The course of proceedings in the trial court is as follows:

1. Liberty Mutual filed suit for declaratory judgment against Burdene Shores on

February 9, 2004, seeking to limit their liability for damages to Burdene Shores to \$25,000 as a result of the negligence of Unior Shores.

2. On February 13, 2004 the trial court, on Liberty Mutual's ex parte request, ordered the deposit of \$25,000 into the court trust fund by Liberty Mutual, to be held pending the outcome of this litigation.

3. On February 26, 2004, pursuant to request of Liberty Mutual, Burdene Shores, as the only defendant, waived service of the summons and complaint.

4. On March 12, 2004 (filed on March 17, 2004), Liberty Mutual filed an amended complaint adding Unior Shores as a defendant in their declaratory judgement action.

5. On March 25, 2004, Burdene Shores served and filed her answer and counterclaims against Liberty Mutual.

6. On May 25, 2004, Burdene Shores moved for a scheduling and management conference because of Liberty Mutual's failure and refusal to begin discovery or hold a scheduling and management conference as required by Rule 26(f) of the U R C P.

7. On May 28, 2004, Liberty Mutual filed a motion to dismiss Burdene Shores' bad faith counterclaim (Count Two of her Counterclaim).

8. On June 9, 2004, Unior Shores served on Liberty Mutual his answer and counterclaim to Liberty Mutual's action for declaratory judgment.

9. On June 22, 2004, Judge Lynn Davis, at the request of Liberty Mutual and over the objection of the defendants, stayed all discovery until August 9, 2004.

10. On August 9, 2004, oral argument was held on Liberty Mutual's motion to dismiss Burdene Shores' bad faith counterclaim before Judge Derek Pullan. At the hearing, and

on August 27, 2004, by written judgment, Judge Pullan dismissed the bad faith counterclaim of Burdene Shores.

11. At the August 9, 2004 hearing, Judge Pullan did not enter a discovery or scheduling order as requested by the Shores, but did order that the parties confer to work out the outstanding discovery issues.

12. On September 16, 2005 Liberty Mutual filed a motion for summary judgment on its declaratory judgment claims in its complaint; and, for dismissal of the declaratory judgment claims of Unior Shores' and Burdene Shores' counterclaims.

13. On October 4, 2004, Burdene Shores served requests for admission and requests for production of documents upon Liberty Mutual. Liberty Mutual responded to the requests for admission but failed and refused to respond appropriately to the requests for production.

14. On December 10, 2004 Unior Shores filed and served a motion for Summary Judgment.

15. On December 10, 2004 oral arguments were held on Liberty Mutual's Motion for Summary Judgment; and, some arguments were had on Unior Shores' Motion for Summary Judgment.

16. At the December 10, 2004 hearing, the Shores requested that the court defer its decision and allow completion of and additional discovery pursuant to Rule 56(f) of the U R C P.

17. Judge Pullan denied the request to complete and obtain additional discovery; and, ruled in favor of Liberty Mutual on the Motion for Summary Judgment and motion to

dismiss. The formal judgment was signed January 24, 2005 granting Liberty Mutual's motion for summary judgment and dismissing all counterclaims.

Disposition at the Trial Court

The trial court failed and refused to enforce the Shores' discovery rights.

Judge Pullan dismissed Unior and Burdene Shores' bad faith counterclaims.

Judge Pullan granted Liberty Mutual's Motion for Summary Judgment on Liberty Mutual's claims for declaratory relief; and dismissed the Shores' counterclaims for declaratory relief against Liberty Mutual on the same issue – the validity of the step down endorsement reduced liability limits in Liberty Mutual's insurance policy with the Shores. With no evidence and essentially no discovery, Judge Pullan ruled as a matter of law that the step down endorsement in Liberty Mutual's insurance policy was valid and enforceable.

Judge Pullan refused to defer summary judgment until after further discovery. He refused to require Liberty Mutual to go forward with discovery at the time it should initially have gone forward; and, then refused to defer summary judgment to allow discovery long after the discovery should have occurred and been properly responded to by Liberty Mutual.

RELEVANT FACTS

A review of the transcripts of the hearings which are at issue in this case reveal a number of transcription errors. Most of those errors relate to the improper identification of the person speaking. It is hoped that these transcription errors will have no impact on this appeal.

The transcripts contain only arguments, no testimony and no evidence.

Background Facts

1. The Shores are an elderly, retired couple. Burdene Shores was born on June 17, 1929, making her 76 years old at this time. Unior Shores was born on November 1, 1921, making him 83 years old at this time. Affidavit of Burdene Shores in Opposition to Liberty Mutual's Motion for Summary Judgment (hereinafter "Affidavit of Burdene Shores"), para. 3 and 5. Record on Appeal (hereinafter RoA), pgs. 367 and 368.
2. Unior Shores is retired from the Army. Affidavit of Burdene Shores, para. 3 and 5. RoA, pgs. 368 and 367.

Facts about the Case

3. In late 2002, the Shores received direct mail solicitations from Liberty Mutual advertising the availability of preferred rates of insurance for retired military personnel. After receiving several of these solicitations and seeing other advertisements from Liberty Mutual for automobile insurance they invited a local insurance agent of Liberty Mutual to make a presentation to them. Affidavit of Burdene Shores, para. 3 and 5. RoA, pgs. 368

and 367.

4. Burdene Shores and her husband Unior Shores purchased an automobile insurance policy from Liberty Mutual on about January 10, 2003. Affidavit of Burdene Shores, para. 3 and 5. RoA, pgs. 368 and 367

5. The Shores physically received the insurance policy from Liberty Mutual sometime after January 16, 2003. Answer and Counterclaim, Exhibit “A”, Cover letter . RoA, pg. 66. Answer and Counterclaim, Counterclaim, Count One, para. 9, RoA, pg. 78.

6. The purchase occurred as a result of advertising directed at retired military persons by Liberty Mutual. Affidavit of Burdene Shores, para. 8 and 9. RoA, page 367.

7. There were no terms of the insurance policy discussed by Liberty Mutual agents, or otherwise disclosed to the Shores prior to the purchase of the insurance policy, except that the Shores required the same coverage (including limits of liability) they had under their then existing Met Life policy. Affidavit of Burdene Shores, para. 9 through 17. RoA, pgs. 368 and 367.

8. In order to close the sale, the Liberty Mutual salesman assured the Shores they would have the same coverage under the Liberty Mutual insurance policy as the Met Life policy for which the Liberty Mutual salesman was selling a replacement policy.

Affidavit of Burdene Shores, para. 10 through 16, RoA, pgs. 367 and 366

9. On September 9, 2003 the Shores were involved in an automobile accident in which Unior Shores was driving a vehicle owned by the Shores which was then insured by Liberty Mutual. Amended Complaint, para. 6 and 7. RoA, page 17. Answer and

Counterclaim, Counterclaim, Count One, para. 15, RoA, pg. 77.

10. It is alleged that Unior Shores was primarily at fault in causing the accident.

Answer and Counterclaim, Counterclaim, Count One, para. 16, RoA, pg. 77.

11. Burdene Shores was a passenger in the vehicle at the time of the accident, and was without fault in the accident. Answer and Counterclaim, Counterclaim, Count One, para. 15, RoA, pg. 77.

12. Burdene Shores incurred severe and substantial medical and medical-related expenses as a result of the accident. Answer and Counterclaim, Counterclaim, Count One, para. 17, RoA, pg. 77.

13. Those medical and medical related expenses are substantially in excess of \$25,000. Answer and Counterclaim, Counterclaim, Count One, para. 18, RoA, pg. 77.

14. As a result of the accident, Burdene Shores is now severely and permanently disabled. Answer and Counterclaim, Counterclaim, Count One, para. 17, RoA, pg. 77.

15. The Liberty Mutual insurance policy as delivered to the Shores is 46 pages long. Answer and Counterclaim, Exhibit "A", RoA, pgs. 66 through 21.

16. Except for the limits of coverage purchased and rates charged for that coverage there was no discussion nor disclosure of the terms of the insurance policy to the Shores prior to the issuance of the insurance policy. Answer and Counterclaim, Counterclaim, Count One, para. 14, RoA, pg. 77.

17. The Shores had no input into the drafting or terms of the insurance policy. Answer and Counterclaim, Counterclaim, Count One, para. 13, RoA, pg. 77.

18. Other than the above, the step down endorsement liability limits of the Liberty

Mutual insurance policy were never disclosed in any meaningful fashion to the Shores until after the insurance policy was purchased by, issued to, and delivered to the Shores; and, a claim had been made by Burdene Shores. Answer and Counterclaim, Counterclaim, Count One, para. 19, RoA, pg. 77.

19. The Liberty Mutual insurance policy is a contract of adhesion.

20. The Liberty Mutual insurance policy contains declarations listing various types of coverage and the maximum amounts of those coverages (limits of liability). RoA, pgs. 65 through 63.

21. The Liberty Mutual insurance policy at pages 2 and 3 includes the declarations pages (RoA, pgs. 65 through 63) which prominently list limits of coverage, including:

Liability \$100,000 per person, \$300,000 per accident.

Uninsured Motorists (Utah Specific) \$25,000 per person, \$50,000 per accident

Underinsured Motorists (Utah Specific) \$25,000 per person, \$50,000 per accident

Personal Injury Protection (PIP - Utah Specific) \$3,000 medical single limit

22. Nowhere in the insurance policy declarations is there any listing of reduced limits of coverage for any persons insured under the Liberty Mutual insurance policy. RoA, pgs. 65 through 63

23. There is a listing of principal rating factors used in establishing rates in the Liberty Mutual insurance policy listed at pages 28 and 29. RoA, pgs. 39 and 38.

24. The differing limit of liability for insureds is not a differing risk within the meaning of Utah Code §31a-21-308; and, is not clearly stated as required by Utah Code §31a-21-308. Answer and Counterclaim, Counterclaim Count One, para. 22 through 28,

RoA, pgs. 76 and 75.

25. None of the listed rating factors include any reference to different rates or risks based on whether or not a claimant is an insured. Insurance Policy, RoA, pgs. 39 and 38.

26. Buried on page 22 of the policy (RoA, pg. 45) is the step down endorsement liability limit provision which Liberty Mutual claims limits the liability of Liberty Mutual under the insurance policy to \$25,000 for any liability claims by Burdene Shores against Unior Shores.

27. The step down endorsement liability limit provision was hidden on page 22 of the policy with the intent to hide the provision and prevent the Shores' discovery of the step down endorsement and thereby deny them the coverage which they reasonably believed they had purchased. Answer and Counterclaim, Counterclaim, Count One, para. 20, RoA, pg. 76.

28. The step down endorsement liability limit for insureds is ambiguous, and not phrased in a manner that is understandable by ordinary people, and was so phrased and not disclosed in the declarations with the intent to hide the provision from the Shores and other similar insureds. Answer and Counterclaim, Counterclaim, Count One, para. 25 through 27, RoA, pgs. 76 and 75.

29. If the step down endorsement provision is valid, the Liberty Mutual insurance policy is not equivalent in coverage to the Met Life insurance policy of the Shores, which the Liberty Mutual insurance policy replaced.

30. If the step down endorsement liability limit provision is valid, there were false

representations made by Liberty Mutual as to the coverage provided when the Liberty Mutual agent sold the Liberty Mutual insurance policy to the Shores.

SUMMARY OF ARGUMENT

Improper Dismissal of the Bad-Faith Counterclaim

The summary/signature page of the Liberty Mutual policy by its own terms disclaims any language in the step down endorsement which conflicts with the coverage provided by the policy. (RoA, pg. 234) This disclaimer must be read and construed as a layperson of ordinary intelligence would reasonably construe it. Because the Liberty Policy and the declarations repeatedly identify the endorsements as not part being part of the policy, they are subject to this express disclaimer. For the same reason, any attempt to use the Personal Injury Protection Endorsement to limit the coverage provided by Part B. of the policy likewise is ineffective. Under either Part A. of the policy or Part B. of the policy, the Shores have coverage for Burdene's medical payments and expenses up to \$100,000.00.

Summary Judgment was not Available to Liberty Mutual on its claims for

Declaratory Relief on the Step Down Endorsement

The same arguments stated immediately above apply with equal force to Liberty Mutual's claims for a declaration that the step down endorsement fully operates and so limits coverage for the Shores to \$25,000.00.

Failure to allow appropriate Discovery

The trial court failed to require Liberty Mutual to properly engage in discovery,

but allowed it to stall discovery in the case.

There are substantial factual questions as to Liberty Mutual's marketing practices to the Shores and specific false representations to the Shores which Judge Pullan should have allowed discovery regarding before ruling on any motion for summary judgment.

If this court finds the Liberty Mutual step down endorsement valid, the Shores should nonetheless be able to inquire into the marketing practices directed at the Shores and similar persons, and the false representations of policy provisions made by Liberty Mutual to the Shores in the sale of the insurance policy to them.

ARGUMENT

A Lay Person's Reading of the Policy

The step down clause in the Liberty Mutual policy is in Part I of Endorsement PP 01 93 04 02 (hereafter the step down endorsement), which is attached to the policy and referred to on page 2 of the declarations pages. (RoA, pg. 245) Part I of the step down endorsement explicitly states that "Part A [of the policy] is amended as follows", thus limiting the operation of the step down clause to Part A of the policy, which refers to liability coverage.

The policy summary/signature page is where Bill Shore's wife, Burdene, signed to accept the policy. (RoA, pg. 245) This page is the natural starting point in the lay readers (in this case Unior Shores – a.k.a. Bill Shores) attempt to understand the policy. On the summary/ signature page the word policy is defined as that part of the document referring to "specific descriptions, definitions, exclusions, and conditions." No mention is made in

that definition of endorsements.¹ So by definition, endorsements are not included in the policy. The summary/signature page also states that if there is any conflict as to coverage between the policy and anything else, the policy controls.

The cover page of the policy declares in bold letters, **“Please read the policy and each endorsement carefully.”** This declaration clearly uses the words policy and endorsement as a references to separate types of documents. It does not say “please read the policy and each of its included endorsements carefully.” By identifying endorsements as separate documents, this bold statement on the cover page of the policy confirms the lay readers reading of the statement in the first paragraph of the summary/ signature page: that endorsements are documents which are separate from the policy. As well, at the end of the policy, the officers of Liberty Mutual have signed their names.

As the lay reader progresses through the policy, he discovers that the definitions section of the policy does not define the word endorsement. Nor does it define issue or amendatory. Review of Part A of the policy discloses language about limits of liability and refers the lay reader to the declarations page. Paging over to the declarations pages of the policy he discovers halfway down the first page of the page the heading “PART”. Immediately under this is a section for “A. LIABILITY” which recites that there is \$100,000.00 per person liability coverage and \$300,000.00 per accident total liability coverage. This is the coverage Bill and Burdene had on their former policy and what they told the insurance agent they wanted on this policy.

¹The word endorsement only appears on the cover page of the policy, in paragraph A of Part F on page 11 of the policy, and in paragraph C.2 of Part F on the same page – which refers to amendatory endorsements.

Paging back to Part B. of the policy the lay reader reviews the coverage for medical payments. In the limits of liability section for Part B. Medical Payments, the reader is again directed to the declarations page for the limits of that coverage. But unlike the very clear and distinct matching heading on the first page of the declarations page for Part A. liability coverage in the policy, there is no corresponding reference in the declarations pages to Part B. Medical Payments. This creates an ambiguity.

As the declaration pages are further perused the lay reader discovers a reference to Personal Injury Protection. Under that heading is a reference to medical expenses with coverage of \$3,000.00. But in that same section of the declarations page it also recites coverage for Work Loss - Essential Services and Loss of Income Benefits – without stating any coverage amount. Also included in same space on the declarations pages are \$1,500.00 of Funeral Expenses and \$3,000.00 survivors loss benefits.

This raises many questions for the lay reader. What is Personal Injury Protection? It is not defined in the definitions section of the policy and there is no reference to it in Part B. of the policy. There is a reference to medical expenses in Part B of the policy but no reference to work loss, essential services, funeral expenses or survivors loss. Are these all part of Personal Injury Protection? Does the \$3,000.00 coverage refer to both Medical Expense and Work Loss - Essential Services? If so, where in the policy is Personal Injury Protection and doesn't this coverage limit apply only if there is also a loss of work and essential services? Referring again to the summary page of the policy, the lay reader discovers that if there is a conflict between the policy and anything else, the policy controls.

Paging back to Part B. of the policy the lay reader again reviews the limits of liability section. (RoA, pg. 264) It states that no one will be entitled to receive duplicate payments under Part A and C of the policy. Because the declarations page clearly refers to coverage for part A and C (and also Part D) of the policy, but not part B, the lay reader concludes that coverage for part B in the policy, depending on whether or not there is an uninsured motorist in the accident, must be that coverage stated in the declarations page for Part A or C of the policy.

Continuing his review of the policy, the lay reader finally gets to Part F. Here for the first time endorsements are addressed. Part F.A. states that the policy terms can only be changed by endorsements issued by Liberty Mutual. Part F.C. informs the lay reader of the purpose of amendatory endorsements. It refers to changes which broaden coverage in the policy and also refers to changes made through a “general program revision.” In any event, this language indicates that unlike an exclusion from coverage, an endorsement will generally increase coverage.

Paging forward again to the summary/signature page the lay reader again reads the statement that if there is any conflict between the coverage stated in the policy and anything else, the policy will control. The lay reader concludes that an endorsement can change the policy but not conflict with the coverage provided by the policy. He observes that the declarations pages are themselves an endorsement to the policy and that this is the only endorsement which is specifically referenced in the policy. However, it does not contain the headline, like some of the other endorsements, that “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.” The declarations pages

simply provide more detail on coverages stated in other part of the policy and also attaches to the policy additional endorsements.

The fact that these additional endorsements are stated to be attached to the policy but are not stated to be included in or referred to as part of the policy, is entirely consistent with the definition of policy given in the summary/signature page and with the reference on the cover page to endorsements as documents separate from the policy. This again confirms to the lay reader that endorsements are not part of the policy and that if there is any conflict between the coverage stated in the policy and the endorsements, the policy controls.

The next endorsement is for personal injury protection. At the very top of this endorsement it states “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.” This answers the lay readers earlier questions. It is apparent that Personal Injury Protection is an additional coverage that is separate from the Part B. Medical Payments coverage in the policy. Because there is no reference in the Personal Injury Protection endorsement to Part B. in the policy, the lay reader concludes that the coverage in Part B. of the policy is unaffected.

This also confirms the lay readers earlier conclusion that the coverage in Part B is in the amounts stated for Parts A. or C. on the declarations pages. The lay reader is now confident that he has coverage under Part B. of the policy for the amounts stated in Part A. or Part C. on the declarations page. In the unlikely event there is a conflict, Liberty Mutual has affirmatively declared on the summary/signature page that the coverage stated in the policy will control.

After taking a nap or two or three, a walk and having something to eat, the lay reader soldiers on through the labyrinthian language of the Liberty Mutual policy. Finally, he gets to the step down endorsement. Like the Personal Injury Protection endorsement it has the headline “THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.” Apparently, this endorsement also provides supplemental coverage. But it also creates an ambiguity. Part F.A. of the policy refers to endorsements generally. Apparently, two endorsements (the declarations endorsement and the step down endorsement) apply to part A. But only the declarations endorsement is referred to specifically by Part A. of the policy.

By this time having pulled on the oars of policy interpretation until his intellect is about to break, a lay reader will plow through this step down endorsement only if he is very curious or something of an eccentric. The terms single limit and split limit are terms of art specific to the insurance industry. A lay reader would not know what these terms mean. They are not defined in the policy definition, not used in part A of the policy, nowhere found in Title 31A of the Utah Code and not included in Webster's New Universal Unabridged Dictionary of the English Language (published 1996). A plain reading of the policy (and the statute and the dictionary) discloses to the lay reader that a split limit and a single limit – whatever they are – are not part of Part A of the policy.

But whatever a split and single limit are and however they operate in conjunction with Part A of the policy, ultimately, the lay reader again takes comfort in the fact that if there is a conflict between Part A of the policy (which does not refer to a single limit or split limit, but does state that it provides coverage for bodily injury in the \$100,000.00 per

person stated in the declarations endorsement), and the step down endorsement (which recites that it does provide coverage under Part A, but only in the event that there is single limit or split limit coverage) the coverage stated in Part A of the policy, which specifically references only the declarations endorsement, controls.

Stated another way, if there is a conflict between the coverage in Part A and the step down endorsement, the summary/signature page signed by Burdene states that “In case of any conflict, your policy language will control the resolution of coverage questions”. And through careful reading of the policy the lay reader has confirmed that in two other places in the policy (the cover page and the declarations pages) the policy and endorsements attached to it are stated to be separate documents.

In that case, the lay reader concludes that in the unlikely event that the step down endorsement conflicts with Part A. in the policy because the endorsement addresses subjects not found in Part A. of the policy: split limit and single limit; the summary/signature page (which is the plainest English the lay reader can find anywhere in the policy) states that the policy’s explicit reference to the declarations endorsement controls over the step down endorsement. So although the step down endorsement might change some terms in Part A. in the policy, it cannot diminish the liability coverage provided by Part A., and in particular its particular preference for the declarations endorsement. In the lay persons experience, the specific controls over the general.

The Policy Ambiguities Must Be Construed Against Liberty Mutual

The above analysis demonstrates how a reader might reasonably resolve ambiguities in the Liberty Mutual policy. That analysis turns on the summary/signature

page. When presented with a summary of coverage on a page such as this, the natural tendency of the lay reader is to read and rely upon the statements there. This is especially so because the language on that summary page is in plain English.

Using that summary/signature page as the natural starting point for review of the policy, when the lay reader starts to read the policy he is confronted with a number of ambiguities. What are endorsements? What do they do? What is an amendatory endorsement? How does it differ from a plain vanilla endorsement? What is a split limit? What is single limit? If the step down endorsement refers to split limit and single limit and Part A does not, is there a conflict between the step down endorsement and Part A? If a policy part refers to one endorsement specifically, and another not at all, does the specific control over the general?

The lay reader, confronted with a prolix, cross-referenced, abstruse, common sense confounding document, will not attempt to resolve every last ambiguity in the policy. He will only mentally process the policy and its endorsements long enough to determine whether it provides the coverage the insurance agent told him it provides. So if the lay reader determines that the step down endorsement either refers to additional coverage or to diminished coverage that will only apply if the term split limit or single limit is used in Part A. of the policy, and that in any event if there are coverage conflicts with Part A of the policy and an endorsement specifically referenced by that part; the lay reader will know at that point that the policy controls over the un-referenced endorsement and he will never need to find out what a split limit or a single limit is.

In his mind, he has answered enough questions to determine that he has what the

insurance agent told him he has.

The hallmark of this Liberty Mutual policy is question begging drafting. The burden of such drafting should not fall on the insurance consumer but on the scrivener of the boiler plate laden policy. § 237 of the Restatement, Second, Contracts on standardized agreements, addresses such drafting:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to know that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing, . . .

(3) Where the other party has reason to know that the party manifesting such assent believes or assumes that the writing does not contain a particular term, the term is not part of the agreement.

The supreme court has ruled that ambiguous, adhesive insurance contracts are to be read by applying the same reading – contra proferentum – that a lay person would employ in reading that potentially unconscionable adhesive contract. See Farmers Ins. Exchange v. Versaw, 2004 WL 1878215, (Utah Aug 24, 2004) where the court stated:

¶ 8 To communicate its terms with adequate clarity, a contract of insurance must use language and grammar capable of understanding by a reasonable insurance purchaser. U.S. Fid. & Guar. Co. v. Sandt, 854 P.2d 519, 521-22 (Utah 1993). We have formulated the test for insurance contract clarity this way:

"Would the meaning [of the language of the insurance contract] be plain to a person of ordinary intelligence and understanding, viewing the matter fairly and reasonably, in accordance with the usual and natural meaning of the words, and in the light of existing circumstances, including the purpose of the policy[?]"

LDS Hosp. v. Capitol Life Ins. Co., 765 P.2d 857, 858 (Utah 1988) (quoting Auto Lease Co. v. Cent. Mut. Ins. Co., 7 Utah 2d 336, 339, 325 P.2d 264, 266 (Utah 1958)).

This is especially true when the summary/signature page specifically recited that the policy consisted of “descriptions, definitions, exclusions, and conditions” but then omitted any reference to endorsements to the policy. Instead, the summary/signature page recited that in “case of any conflicts, **your policy language will control the resolution of coverage questions.**” [emphasis added] Of course, this can only mean conflicts between the policy and anything else.² Here, the anything else was the step down endorsement.

Having created an ambiguity which a lay person could reasonably resolve (and in fact, most probably would resolve) in favor of the limits of liability for Part A. stated on the declarations page and the limits of liability for Part B. stated for Part A. or Part C. on the declarations page, the public policy of this state requires resolution of that ambiguity in favor of the insured. How can the step down endorsement at issue here be “fully set forth in the policy”, when the summary/signature page, the cover page and the declarations pages all state that endorsements are documents which are separate from the policy?

By its own adhesive boilerplate terms, Liberty Mutual has contracted to nullify the endorsements which conflict with its policy. *See* Utah Code Ann. § 31A-21-106(1) where the legislature prohibited incorporation into an insurance policy of any agreement or provision that is not fully set forth in the policy; the rationale being that an insured

²Except of course representations from the agent. The summary page specifically informs the insured lay person that they must rely on their agents representations as to the policies terms and conditions, thus attempting to sidestep the requirements of Utah Code Ann. 31A-21-105 that statements and representations as to policy coverage must be specifically stated in the policy.

should not be bound by policy provisions which he does not have full and opportunity to examine and understand at the time the policy is delivered to him.

Liberty Mutual might argue that the insureds in this case had full opportunity to examine and understand the conflicting endorsements because they were attached to the policy and that is all that § 106(1) requires. But that is not all that is required. It also requires that the policy accurately reflect the terms of the incorporated agreement, provision, or attached document. Here, Liberty Mutual has by contract stipulated with the insureds that any endorsements which conflicts with the coverage stated in Part A. of the policy, does not accurately state the coverage in the policy. In effect, with the language in the summary/signature page, Liberty Mutual has contracted to nullify the family exclusion clause in the step down endorsement attached to the Shores' policy.

Did Liberty Mutual have reason to know that a lay reader reviewing the summary/signature page could reasonably conclude that they must rely on their insurance agent's representations as to policy coverage? Did Liberty Mutual have reason to know that there was a Utah statute which explicitly dealt with that question?³

If a plain reading of the language in the first paragraph in the summary/signature page is adopted, the inevitable answer is yes.

Did Liberty Mutual have reason to know of the appellate decisions in this state which require that any ambiguity in the policy be construed in favor of coverage? Did Liberty Mutual have reason to know that a lay reader could reasonably construe the statement in the summary/signature page so that in any conflicts as to coverage, the policy

³See Utah Code Ann. §31A-21-105(1)(a)

would trump any conflicting language elsewhere?

If one adopts a plain reading of the statement on the cover page of the policy **“Please read your policy and each endorsement carefully”** and of the statement in endorsement 01 to the policy (the declarations page), that the endorsements were attached to the policy (thus unequivocally stating that the policy and the endorsements were separate documents) the answer to each of these questions is a resounding yes. Then, on the very last page of the policy, which is the summary/signature page, it again defines policy by excluding endorsements. And in the next sentence it declares that conflicts as to coverage between that policy and the endorsements are to be controlled by coverage declared in the policy.

With the above in mind, under the test stated by §237(3) of the Restatement, Liberty Mutual had reason to know, and know, and know again that in manifesting their assent to the policy the Shores believed or assumed that this writing did not contain a particular term stepping down the liability coverage in Part A. of the policy. Accordingly, that term is not part of the agreement.

Front and back, back and front, Liberty Mutual leads – and in fact, compels – the lay reader to conclude that the coverage declared in Part A of the policy will control over that stated in the step down endorsement. In aggravation, Liberty Mutual uses terms of art such as single limit and split limit without defining those terms. It speaks of amendatory endorsements which broaden coverage and general revisions which both broaden and restrict. Having created a multitude of ambiguities which directly confuse the lay reader as to liability coverage, Liberty Mutual now seeks to enforce the policy to

the very letter.

Of such ambiguities the Versaw court at ¶ 9 stated:

This test is supplemented by our observation that ambiguities typically appear in two forms:

"An ambiguity in a contract may arise (1) because of vague or ambiguous language in a particular provision or (2) because two or more contract provisions, when read together, give rise to different or inconsistent meanings, even though each provision is clear when read alone.' Sandt, 854 P.2d at 523. Both types of ambiguity infect the terms of Farmers's E-Z Reader Car Policy relating to the coverage for loss of consortium."

In Cullum v. Farmers Insurance Exchange, 857 P.2d 922 (Utah 1993) the supreme court refused to incorporate by reference a step down clause limiting coverage for an insured. There the clause was in the policy itself, not in any attached document. *See Cullum* at 925 where the court condemns the policies incorporation of "coverage limits from an outside source without fully setting them forth in the contract." If Liberty Mutual wished to incorporate the step down endorsement in its policy, it merely needed to amend a few key phrases in its policy and place on the last page of the policy, in large bold type, a recitation that the endorsements referenced in the policy declarations and attached to the policy were part of the policy.

Cullum cites Farmers Insurance Exchange v. Call, 712 P.2d 231 (Utah 1985) for the rule that a policy must disclose in writing the existence of an exclusion. Obviously, where that exclusion is stated in an attachment to the policy, the policy must make clear that the attachment is part of the policy. As the above analysis from a lay person's perspective makes clear, Liberty Mutual never made that disclosure and instead

affirmatively represented by its own policy terms that those attachments, at least as to conflicting coverage, were not part of the policy. Because of this, the holding in Cullum has full application to this case:

“In light of the plain language of section 31A-21-106, the important nature of the omitted material, and the ease with which the insurer could have set forth the actual limits of coverage, we hold that the limitation provision in this policy violates section 31A-21-06 and is unenforceable.”

That the holding in Cullum also controls in cases of ambiguity in disclosure of a policy term is confirmed by Versaw at ¶ 24 :

Although we construe insurance contracts using the same interpretive tools we use to review contracts generally, we have frequently declared that because insurance policies are adhesion contracts, they are to be " 'construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of insurance.' " Sandt, 854 P.2d at 521 (quoting Richards v. Standard Accident Ins. Co., 58 Utah 622, 200 P. 1017, 1020 (1921)). In Sandt, we summarized our jurisprudence on adhesion contracts, specifically insurance contracts, recognizing our long-standing view that because insurance contracts are typically drafted by insurance company attorneys, are not negotiated by the insured, and are offered on a take-it-or-leave-it basis, " 'this jurisdiction, like many others, has declared in favor of a liberal construction in favor of the insured to accomplish the purpose for which the insurance was taken out and for which the premium was paid.' " Id. at 522 (quoting Browning v. Equitable Life Assur. Soc'y, 94 Utah 532, 562, 72 P.2d 1060, 1073 (1937) (Larson, J., concurring)).

*6 [7] ¶ 25 We have also stated that ambiguous or uncertain language in an insurance contract that is fairly susceptible to different interpretations should be construed in favor of coverage [I]f an insurance contract has inconsistent provisions, one which can be construed against coverage and one which can be construed in favor of coverage, the contract should be construed in favor of coverage. Id. at 522-23. The reason for doing so is clear: "Because insurance policies are intended for sale to the public, the language of an insurance contract must be interpreted and construed as an ordinary purchaser of insurance would understand it." Id. at 523.

As to Part B. of the policy, the medical payments coverage, the above analysis discloses a plain reading of the policy by a lay person would require him to conclude that

the Personal Injury Protection endorsement recites supplemental coverage, which because of the stipulation in the summary/signature page that in “case of any conflicts, **your policy language will control the resolution of coverage questions**” [emphasis added], this renders moot any conflicting coverage in the Personal Injury Protection endorsement.

But Liberty Mutual seeks to impose a standard for interpretation of its policy which requires sufficient skill, cunning, subtlety, complexity, casuistry and sophistication to make even a hearse horse snicker. In other words, it wants the policy read with the same art by which it was devised. The appellate courts of this state require a plain reading at the level of a lay reader of ordinary intelligence. If a lay reading is applied to this policy, then at the least the Shore’s have coverage under Part A or Part B of the policy, unamended by the step down endorsement.

Parol Evidence Is Relevant To The Shores’ claims

The specific language on the summary/signature page of the policy and the ambiguities in the policy and its attachments bring into issue §235 of the Restatement, Second, Contracts which reads:

- (1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
- (2) Whether there is an integrated agreement is to be determined by the court as a question of preliminary to determination of a question of interpretation or application of the parol evidence rule.
- (3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be an integrated agreement, it is taken as an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

When read in light of Liberty Mutual policy’s own explicit language identifying on three different occasions that the endorsements are documents separate from the policy and

given the express language in the summary/signature page that favors coverage in any resolution of conflicts between the policy and endorsements, it is evident that the Liberty Mutual policy step down endorsement was not integrated into the policy.

Fact issues arising from statements made or not made by agents for Liberty Mutual are then properly discoverable. And of course in determining whether the policy and its endorsements present an integrated agreement, parol evidence is always admissible. Union Bank v. Swenson, 707 P.2d 663, 664 (Utah 1985). Furthermore, the numerous ambiguities in the Liberty Mutual policy invokes an independent ground for the consideration of parol evidence. Fitzgerald v. Corbett, 793 P.2d 356, 360 (Utah 1990).

On the above authority, the district court in denying all discovery to the Shores and in imposing summary judgment when disputed issues of material fact remained entirely unresolved, erred.

CONCLUSION AND RELIEF SOUGHT

Unior Shores' Bad-Faith Counterclaim against Liberty Mutual Should be Allowed to go Forward

Bill Shores' bad-faith counterclaim was dismissed by the trial court. Where that bad-faith counterclaim was based on the first party contractual relationship of Bill Shores to Liberty Mutual and where the policy affirmatively declares that the coverage in the policy must trump conflicting endorsements, Mr. Shores is entitled to full discovery on the issue of bad faith.

Liberty Mutual's insistence that step down endorsement negates any claim of bad faith by Mr. Shores, is rebutted by the express terms of its own policy. Without the

benefit of the step down endorsement or the Personal Injury Protection limitations on medical payments, conduct such as Liberty Mutual followed in this case constitutes unfair claims settlement practice.

It is requested that the trial court's dismissal of Burdene Shores' bad-faith counterclaim be reversed, the bad-faith counterclaim be reinstated and allowed to proceed to discovery and as appropriate, to trial.

The Summary Judgment for Liberty Mutual and Dismissal of the Shores' Counterclaims Should be Reversed and the Case Allowed to Go to Trial

For the reasons recited above, it is requested that the Liberty Mutual step down endorsement be found invalid and unenforceable against the Shores because of the terms in Liberty Mutual's own policy negating any conflict between the coverage stated in Part A. or Part B. of the policy and any endorsement to either of those parts.

If the Liberty Mutual step down endorsement is generally found to be valid, it is requested that the case be allowed to proceed to trial on the factual issues surrounding the representations which induced the Shores to purchase the insurance policy, to determine whether the step down endorsement was integrated into the policy.

In that case, it is requested that the Shores also be allowed to move forward on their counterclaims for declaratory relief against Liberty Mutual.

The Shores should be allowed appropriate Discovery before Dispositive Rulings by the Court

The trial court improperly allowed Liberty Mutual to stall discovery in this case; and, improperly refused to allow further discovery before ruling on Liberty Mutual's

motion for summary judgment and dismissal of the Shores' declaratory judgment claims.

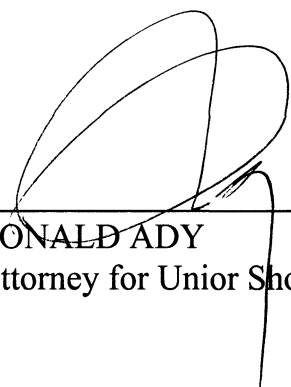
The summary judgment and dismissal should be reversed and remanded for further discovery before ruling on a fact-dependant motion which Liberty Mutual might present.

Additionally, the Shores should be allowed to complete discovery to determine if other theories need to be advanced in support of their counterclaims including reformation of contract, misrepresentation and fraud.

Bill Shores is entitled to attorney's fees on this appeal

Our appellate courts have repeatedly held that claims by insureds for breach of the implied covenant of good faith and fair dealing constitute a narrow exception to the American Rule. Pugh v. North American Warranty Services, Inc., 2000 Ut App 121, ¶14. Bill Shores in the action below has plead such a breach by Liberty Mutual and has claimed for attorney fees. In the result, if Mr. Shores prevails on this appeal he is entitled to his attorney fees and he requests that the court make an award of reasonable attorney fees to him.

RESPECTFULLY SUBMITTED this 22nd day of August, 2005.



RONALD ADY
Attorney for Unior Shores

ADDENDUM:

A. Answer and Counterclaim of Unior Shores date June 9, 2004.

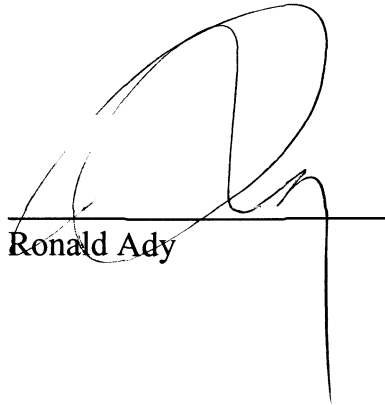
B. Documents Contained in Appellant Burdene Shores Addendum:

1. Order and Final Judgment of Judge Pullan dated January 21, 2005	6
2. Liberty Mutual Insurance Policy in the form delivered to the Shores dated January 16, 2003	16
3. Amended Complaint by Liberty Mutual dated March 12, 2004	61
4. Affidavit of Burdene Shores in Opposition to Liberty Mutual's Motion for Summary Judgment dated December 2, 2004	84

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing “Brief of The Appellant Unior Shores” was mailed by the United States Postal Service on the 22nd day of August, 2005 to the following:

Mitchel T. Rice
Joseph E. Minnock
Morgan, Minnock, Rice & James, L.C.
136 S Main St, 8th Flr
Salt Lake City, Utah 84111
Attorneys for Liberty Mutual Insurance Company

A handwritten signature in black ink, appearing to read "Ronald Ady", is written over a horizontal line. A vertical line extends downwards from the end of the signature.

RONALD ADY #3694
10 W. 100 S., Ste. 425
Salt Lake City, Utah 84101
(801) 539-1900

Attorney for Unior Shores

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

LIBERTY MUTUAL INSURANCE
COMPANY,

Plaintiff,

v.

BURDENE SHORES and UNIOR SHORES

Defendants.

UNIOR SHORES

Counterclaim Plaintiff,

v.

LIBERTY MUTUAL INSURANCE
COMPANY and LIBERTY MUTUAL FIRE
INSURANCE COMPANY,

Counterclaim Defendants.

ANSWER & COUNTERCLAIM

Civil No. 040400497
Judge Lynn W. Davis

Defendant Unior Shores through his counsel Ronald Ady, answers the complaint of Liberty Mutual Insurance Company as follows:

ANSWER

First Defense

Plaintiff fails to state a claim upon which relief can be granted.

Second Defense

1. The allegations of paragraphs 2, 3, 4, 5, 6, 7, 10 are admitted.

2. Mr. Shores denies that the insurance policy in question properly includes the policy provision referred to in paragraph 8 of Plaintiff's complaint. As to the verbatim terms of the policy Plaintiff asserts is the policy that was properly issued to Mr. Shores, Mr. Shores is without knowledge or information sufficient to form a belief as to the truth of said allegations and therefore denies the same.

3. Mr. Shores denies that endorsement to the insurance policy in question referred to in paragraph 9 of Plaintiff's complaint, was ever brought to his attention or was ever properly included in his policy with Plaintiff. As to the verbatim language and typeface of that endorsement, Mr. Shores is without knowledge or information sufficient to form a belief as to the truth of said allegations and therefore denies the same.

4. With respect to the allegations of paragraph 1, 3 and 11, Mr. Shores is without knowledge or information sufficient to form a belief as to the truth of said allegations and therefore denies the same.

5. The allegations in paragraph 13 of Plaintiff's complaint are denied.

AFFIRMATIVE DEFENSES

Factual Background

1. The Accident. On or about September 9, 2003, Mr. Shores was driving his motor vehicle insured by the policy complained of by Plaintiff in this action and was involved in an accident with another motor vehicle. Burdene Shores, a passenger in Mr. Shores's vehicle, received serious and permanently debilitating injuries in that accident.

2. Burdene Shores has claimed that Unior Shores was primarily responsible for that accident

and that she has incurred medical expenses and damages above \$100,000.00 in that accident.

3. The Policy. In January 2003 Liberty Mutual Insurance Company (Liberty Mutual) or Liberty Mutual Fire Insurance Company (Liberty Mutual) issued to Mr. Shores and his wife Burdene Shores the Liberty Guard Auto Policy, No. A02-268-209010-103 7 (referred to in this Complaint as “the policy”). The policy period was January 12, 2003 to January 12, 2004. At all times relevant to this civil action, Mr. Shores and his wife Burdene were insureds under that policy.

4. The policy provided in part that Liberty Mutual would pay on Mr. Shores behalf all sums that Mr. Shores became legally obligated to pay as damages because of personal injury or property damage arising out of ownership or operation of a motor vehicle. The policy was delivered to Mr. Shores on or after January 16, 2003. The policy generally limited Liberty Mutual’s liability under the policy to \$100,000 per person and \$300,000 per accident. At all times relevant to Mr. Shores claims in this action Liberty Mutual affirmatively represented to Mr. Shores that the liability limits and coverage provided by the policy would be at least those of the Met Life policy the Liberty Mutual policy replaced.

5. Other than the liability limits in the policy and the classes of coverage provided, Mr. Shores had no opportunity to negotiate the terms of the policy with Liberty Mutual. The policy was a pre-printed form the terms of which Liberty Mutual would not negotiate with consumers like Mr. Shores. Mr. Shores relied upon the specific advice and representations of Liberty Mutual as to the content, coverage and exclusions provided by that policy.

6. In particular, Liberty Mutual made representations as to the liability coverage of the policy in comparison to the former automobile policy Mr. Shores had subscribed to through Liberty Mutual and it was upon the specific representation of Liberty Mutual that the policy provided the same coverage as the Met Life policy, that Mr. Shores agreed to subscribe to the policy with Liberty

Mutual.

7. Mr. Shores reliance on Liberty Mutual's representations as to coverage provided under the policy was made necessary by the abstruse drafting and arcane construction of the policy, which included general insuring clauses limited by carefully drafted and lengthy definitions of specific terms, exclusions to the general insuring clauses and exceptions to the exclusions. This arcane constructions and the lack of plain English drafting in the policy made it problematic for an unsophisticated lay person of average intelligence, education and experience to understand the terms of the policy.

8. In particular, the limitation on coverage relied upon by Liberty Mutual in its action for declaratory judgment is located on page 22 of the policy, is not readily referable to the other liability coverage provisions of the policy and in fact requires very careful reading and above average comprehension skills to properly understand. Furthermore, the limitation on page 22 of the policy is not stated on page 2 of the policy declarations. The general liability limit stated on the declarations page is \$100,000.00 per person and \$300,000.00 per accident.

9. Prima facie, the policy in form and content is drafted so that the unsophisticated reader of average intelligence, education and experience is left with the impression of the policy providing broad and general liability coverage, while making the limitations in question obscure or indiscernible to such readers. Because of this, not only was the policy a contract of adhesion but it also failed to comply with the express requirements of Utah Code Ann. §31A-21-308(1), which imposes a special duty on Liberty Mutual to disclose the limitations of the at issue in this case by using plain English drafting.

10. Liberty Mutual breached that duty by not making the required disclosure of those limitations on page 22 to Mr. Shores, which breach constituted constructive fraud by Liberty Mutual thus

depriving Mr. Shores of the \$100,000 in policy coverage for Burden Shores claims to which he was entitled.

11. Further and in the alternative, at all times relevant to Mr. Shores's claims in this civil action, Liberty Mutual knew or should have known of these readily apparent defects in the policy's form stated above.

I. Fraud

1. By reason of the matters plead above, at all times relevant to Mr. Shores's claims and defenses in this pleading, until January 2003, Met Life was the insurer that underwrote insurance coverage on Mr. Shores's motor vehicle. Under the terms of that coverage Mr. Shores had liability coverage limits of \$100,000.00 per person.

2. On or about January 12, 2003 and Liberty Mutual substituted its insurance policy coverage on Mr. Shores's motor vehicle for that of Met Life.

3. On information and belief, at the time Liberty Mutual substituted its insurance coverage on Mr. Shores's automobile for that of Met Life, Liberty Mutual knew or should have known that the liability coverage stated in Liberty Mutual's policy issued to Mr. Shores provided substantially less liability coverage to Mr. Shores on the coverage which is the subject matter of Liberty Mutual's complaint in this action, than the coverage provided under the policy from Met Life.

4. At no time prior to the injuries to Burdene Shores which are at issue in this action did Liberty Mutual disclose to Mr. Shores that there had been a reduction in coverage by Liberty Mutual in relation to that previously provided to Mr. Shores by Met Life.

5. At all times relevant to Liberty Mutual's claims against Mr. Shores in this action, Liberty Mutual had an affirmative duty to disclose this reduced coverage to Mr. Shores.

6. By reason of Liberty Mutuals failure to disclose that reduced coverage to Mr. Shores, it

has constructively defrauded Mr. Shores of the coverage for which Mr. Shores contracted with Liberty Mutual.

II. Mutual Mistake

Further and in the alternative, by reason of the matters plead above, Liberty Mutual and Mr. Shores were mutually mistaken as to the liability coverage terms contained in the policy, and more particularly, those terms complained of by Liberty Mutual in this action and Mr. Shores is entitled to reformation of the policy to reflect the terms contracted for which the parties contracted.

III. Negligent Misrepresentation

Further and in the alternative, by reason of the matters plead above, Liberty Mutual negligently misrepresented the policy coverage provided to Mr. Shores.

IV. Estoppel

Further and in the alternative, by reason of the matters plead above, Liberty Mutual is estopped from denying that it is obligated to indemnify Mr. Shores for Burdene Shores claims up to \$100,000.00.

V. Waiver

Further and in the alternative, by reason of the matters plead above, the representations of Liberty Mutual to Mr. Shores have resulted in the waiver by Liberty Mutual of its right to assert the reduced policy coverage claimed by it in this action.

VI. Failure of Consideration

At no time did Mr. Shores pay or agree to pay premiums for the reduced coverage asserted by Liberty Mutual in this action, but at all times Mr. Shores has paid premiums for the full coverage asserted in paragraph 4 in the factual background stated above. In the result, Liberty Mutual has

failed to provide any consideration to Mr. Shores for the reduced coverage claimed by Liberty Mutual in this action.

VII. Illegality -- unauthorized form

Further and in the alternative, the policy endorsement asserted by Liberty Mutual seeks to impose a household exclusion contrary to public policy of this state and so is not an authorized form authorized pursuant to Utah Code Ann. §31A-21-201, rendering the policy exclusion asserted by Liberty Mutual illegal.

VIII. Illegality -- unfair claims settlement practices

Further and in the alternative, Liberty Mutual in asserting the policy endorsement relied upon by it in this action seeks to engage in claim settlement practices prohibited by Utah Code Ann. §31A-26-301 and 303 and the regulations promulgated pursuant to those statutes, thus rendering Liberty Mutual's claims illegal.

IX. Illegality -- breach of the implied covenant of good faith and fair dealing

Further and in the alternative, , by reason of the matters plead above, in asserting the policy endorsement relied upon by Liberty Mutual in this action, it seeks to breach its implied covenant of good faith and fair dealing with Mr. Shores or to breach its statutory duty to defend Mr. Shores, pursuant to Utah Code Ann. §31A-22-203, in good faith in the claims made by Burdene Shore against Mr. Shores, thus rendering Liberty Mutual's claim for declaratory judgment illegal.

X. Illegality -- statutory coverage

Further and in the alternative, Utah Code Ann. §31A-22-303(1)(a)(iii) explicitly requires that Liberty Mutual provide liability coverage to Mr. Shores in claims made against him that are the same as the coverage provided to Burdene Shores, and subsection (B) to that statutory coverage requirement specifically prohibits reduction of coverage by Liberty Mutual because Mr. Shores may

be at fault in causing an accident, there being no limitation in the statutory language on the parties claiming against Mr. Shores because of such “an accident”. By reason of these express statutory prohibitions against reduced coverage, Liberty Mutual’s claims against Mr. Shores in this action are rendered illegal.

XI. Illegality -- discrimination

Further and in the alternative, Utah Code Ann. §31A-23-302(3)(a) prohibits Liberty Mutual from discriminating between policyholders by imposing different terms of coverage on policyholders subject to third party liability claims, where those different terms of coverage are based on classifications unrelated to the nature and degree of risk covered or expense borne by an insurer under that coverage. On information and belief, at all times related to Liberty Mutual’s claims in this action, it incurred no additional risk and bore no additional expense in providing the same liability coverage to insureds claimed against by family members as that provided to insureds for liability claims made by third parties unrelated to them. Accordingly, Liberty Mutual’s claims in this action are violative of this section of the Utah Code and so illegal.

XII. Illegality -- unfair and deceptive practice

Further and in the alternative, Liberty Mutual, by reason of the matters plead above, through the representations of Liberty Mutual to Mr. Shores as to the coverage in dispute in this action, has engaged in unfair or deceptive acts of the kind prohibited by Utah Code Ann. §13-11-4(1) and (2)(a)(b)(d)(e)(f)(j)(q) or (r).

XIII. Illegality -- clear statement of loss limitation

Further and in the alternative, Utah Code Ann. §31A-21-308(1) requires that limitations on the loss borne by Liberty Mutual must be stated in the policy with clear language. Furthermore, the different limitations for each risk must be clearly stated. Liberty Mutual in the language used to

describe the limitation on coverage asserted by it in this action has failed to comply with this requirement. In particular, and without limiting the generality of the foregoing defense, the language employed by Liberty Mutual has made it practically impossible for an unsophisticated lay person of average education and experience to reasonably reconcile or reasonably determine whether Liberty Mutual's policy language is consistent with the requirements of Utah Code Ann. §31A-22-303(1)(a)(iii) or Utah Code Ann. §31A-23-302(3)(a) and (8).

XIV. Laches

Further and in the alternative, Liberty Mutual knew or should have known through its agent, Liberty Mutual, that Mr. Shores had applied for and was relying upon Liberty Mutual issuing a policy of insurance in conformance with the coverage provided by Mr. Shores's prior policy obtained through Liberty Mutual. Despite that imputed knowledge, Liberty Mutual failed to take timely steps or any steps at all to advise Mr. Shores that the policy issued by Liberty Mutual did not conform to that relied upon by Mr. Shores. By reason of that untimely delay, it would be inequitable to enforce the policy limitations complained of by Liberty Mutual against Mr. Shores.

COUNTERCLAIM

Mr. Shores for cause of action against Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company, alleges as follows:

Parties

1. Mr. Shores is an individual.
2. Mr. Shores Liberty Mutual Fire Insurance Company (Liberty Mutual) is a corporation engaged in the business of insurance.
3. Mr. Shores Liberty Mutual Insurance Company (Liberty Mutual) is a corporation engaged

in the business of insurance.

Jurisdiction and Venue

4. Counterclaim Plaintiff Unior Shores is a citizen of the State of Utah and reside in the County of Utah and this court has jurisdiction of this counterclaim under Utah Code Ann. §78-33-1. Venue for this counterclaim properly lies in Utah County.
5. Liberty Mutual is a corporation incorporated under the laws of other than Utah and has its principal place of business in a State other than the State of Utah. Its principal office within this state is in the County of Salt Lake.
6. Mr. Shores incorporates by reference in this counterclaim the facts plead above in his Affirmative Defenses.

First Cause of Action
(Bad Faith)

As a cause of action against defendant Liberty Mutual Insurance Co., Mr. Shores further allege as follows:

7. Mr. Shores incorporate in this paragraph the allegations set forth in paragraphs through 1 through 6 above as if they were set forth in full in this paragraph.
8. In responding to Burdene Shores's settlement offer defendant Liberty Mutual in bad faith failed to give as much consideration to Mr. Shores's interests in settling Burdene Shores's claims against Mr. Shores as it gave to its own interest in contesting those claims, in that:
 - a. Liberty Mutual failed to investigate the case against Mr. Shores honestly and competently and to determine the likely outcome of Burdene Shores's claims and the fair settlement value of her claim.
 - b. Liberty Mutual failed to inform Mr. Shores of defendant Liberty Mutuals evaluation

of Burdene Shores's case against him. By failing to keep Mr. Shores informed, Liberty Mutual deprived Mr. Shores of the opportunity to take steps to protect his interests.

e. Liberty Mutual failed to accept Burdene Shores's settlement offer, despite the fact that, given Mr. Shores's exposure to liability and Burdene Shores's damages, which exceed \$100,000.00, an insurer in Liberty Mutual's position with policy limits exceeding the amount of Burdene Shores's claim would have accepted her policy limits settlement offer to protect its own interests.

9. As a proximate result of defendant Liberty Mutual's bad faith, Mr. Shores has been forced to engage in needless litigation and the accompanying stress, worry and continuing focus on the cause of Burdene Shores's injuries, on the financial stress accompanying the care of those injuries and on the costs of future care of those injuries.

10. Liberty Mutual's Oppression, Constructive Fraud, and Malice. In doing the acts described in this Complaint, Liberty Mutual, knowing that they would cause financial injury to Mr. Shores, rejected Burdene Shores's settlement offer and in doing so subjected Mr. Shores to unjust hardship in conscious disregard of his rights to an expeditious and fair resolution of Burdene Shores's claims against him, and made misrepresentations to Mr. Shores and concealed material facts from Mr. Shores with the intention of depriving him of the insurance protection to which he was entitled. Defendant Liberty Mutual officers and managing agents knew of Liberty Mutual's misconduct and accepted the benefits of that misconduct, doing nothing to rectify that misconduct, and thereby ratified that wrongdoing.

11. On Mr. Shores' first cause of action Mr. Shores prays for damages against defendant Liberty Mutual:

A. For a declaration that Liberty Mutual must indemnify Mr. Shores on Burdene Shores's claims against Mr. Shores up to \$100,000.00;

- B. For reformation of the policy to the policy limits agreed to by the parties of \$100,000.00.
- C.. For punitive damages in favor of Mr. Shores in the amount of \$750,000.00;
- D. For attorneys' fees and costs in favor of Unior Shores, according to proof,
- E. For such further relief as the Court may deem just.

Second Cause of Action
(Unfair Claim Settlement Practices)

As a cause of action against Liberty Mutual, Mr. Shores further allege as follows:

- 12. Mr. Shores incorporate in this paragraph the allegations set forth in paragraphs 1 through 10 as if they were set forth in full in this paragraph.
- 13. Liberty Mutual is engaged in the business of insurance in the State of Utah, and the policy was issued and delivered to Mr. Shores in the State of Utah.
- 14. Liberty Mutual committed the acts referred to above knowingly and as part of a general business practice of:
 - a. knowingly misrepresenting the contents of insurance policies;
failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
 - b. failing to adopt and implement reasonable standards for the prompt investigation of claims;
 - c. refusing to pay claims without first conducting a reasonable investigation based upon all available information;
 - d. not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.
- 15. These acts constitute violations of Utah Code Ann. §31A26-303 and the regulations

promulgated pursuant to it. Although this section does not provide a private cause of action to Mr. Shores for its breach, it does provide a standard by which the legality of Liberty Mutual's claim settlement practices can and should be assessed in relation to Mr. Shores claims for common law cause of action for unfair claims settlement practices sounding in tort or contract.

16. As a result of Liberty Mutual's violations, Mr. Shores suffered harm as alleged in paragraph 10.

On Mr. Shores's second cause of action Mr. Shores pray for damages against Liberty Mutual as follows:

- A. For a declaration that Liberty Mutual must indemnify Mr. Shores on Burdene Shores claims against Mr. Shores up to \$100,000.00;
- B. For reformation of the policy to the policy limits agreed to by the parties of \$100,000.00.
- C.. For punitive damages in favor of Mr. Shores in the amount of \$750,000.00;
- D. For attorneys' fees and costs in favor of Union Shores, according to proof,
- E. For such further relief as the Court may deem just.

DATED June 9, 2004.

By:

RONALD ADY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing "Answer and Counterclaim was mailed by first class mail, postage prepaid, on June 10, 2004 to the following:

Mitchel T. Rice
Joseph E. Minnock
Morgan, Minnock, Rice & James, L.C.
136 S Main St, 8th Flr
Salt Lake City, Ut, 84111
